

SUSTAINABLE DEVELOPMENT LAW & POLICY



EXPLORING HOW TODAY'S DEVELOPMENT AFFECTS FUTURE GENERATIONS AROUND THE GLOBE

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EDITORS' NOTE

Environmental justice and environmental equity represent two ideas that, while seemingly straightforward and complementary, tend to foster controversy both in the environmental community and in the public at large. The latter term has been described as a movement to equally distribute environmental risks between and among populations, while the former is seen as a movement to eliminate those risks entirely, but with special attention to those populations most affected. At the heart of both is the idea that people should be treated fairly with respect to the application and impact of environmental policy and practice, regardless of a community's race, gender, class or income. In the United States and abroad, a growing number of states and organizations are striving to achieve environmental justice for affected citizens, but how they define and implement "justice" and "equity" with regard to environmental risks and benefits varies widely. In this latest issue of Sustainable Development Law & Policy we highlight some of the most pressing domestic and international concerns and struggles of the environmental justice movement.

Three of our articles address the domestic implications of environmental justice concerns. Mike Ewall's article, *Legal Tools for Environmental Equity vs. Environmental Justice*, focuses on the quest within the judicial system for remedies of environmental injustices against minorities and disadvantaged communities. He examines various claims brought under Title VI of the Civil Rights Act, suggesting policy changes that could rectify much of the disparate impact of environmental actions. In *On Diversity and Public Policymaking*, Professor Simms examines the internal composition and structure of U.S. environmental agencies and sees an opportunity to advance environmental justice aims by integrating disparate and underrepresented voices into the ranks of decision-makers. Professor Alice Kaswan also focuses on domestic issues in her article, *Seven Principles for Equitable Adaptation*, urging policymakers to incorporate equity considerations and socioeconomic factors in addressing the potential damage from climate change. She posits that long-range land use planning, culturally sensitive communications and services, participatory processes, and reducing underlying environmental stresses top the list of priorities that could prepare the most vulnerable populations for a changing climate.


Moving to an international scope, in her article, *The Growth of Environmental Justice and Environmental Protection in International Law*, E.A. Pheby addresses threats to the indigenous peoples of the Arctic. She criticizes the application of international law, while highlighting the tension between states' rights to natural resources and the rights of indigenous groups to health, safety and self-determination. In *Free Prior*


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Informed Consent, Tendai Zvogbo addresses the concept of free prior informed consent and how it can be used by communities to benefit from foreign direct investment. She posits that by employing this principle, both indigenous communities and multinational corporations can benefit by facilitating economic growth while protecting the environment. In *A Legal Standard for Post-Colonial Land Reform*, Amelia Peterson gives us a comprehensive legal framework for how to equitably and feasibly accomplish land redistribution. She draws upon international human rights law to fill a conceptual gap in the legal justifications for such policies, and demonstrates that human rights can be protected within land redistribution programs. Finally, Hdeel Abdelhady proposes a sustainable and innovative way to enhance food security for vulnerable populations by harnessing a time-tested Islamic financing mechanism in *Islamic Finance as a Mechanism for Bolstering Food Security in the Middle East*.

We would like to offer our sincerest thanks to all of our passionate and talented authors. It is our hope that their articles not only contribute to the academic study of environmental justice and equity, but that the ideas presented herein create a positive impact in communities disproportionately suffering under the environmental burdens of our society.


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ABOUT SDLP

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LEGAL TOOLS FOR ENVIRONMENTAL EQUITY VS. ENVIRONMENTAL JUSTICE¹

Mike Ewall, Esq.*

In 1982, when Benjamin Chavis coined the term “environmental racism” to describe the targeting of a black community in Warren County, North Carolina for a toxic waste dump, it brought together two powerful movements – the civil rights and environmental movements – into a growing force that would eventually reach the White House and the United States Supreme Court.² No one would have guessed at the time that within a five day span around Earth Day 2001, the legal side of the movement against environmental racism would see its brightest, and then darkest, days.

Since the early 1980s, numerous studies have looked at the correlation between environmental hazards and the race and class demographics of the communities where these hazards are located.³ The vast majority have shown a trend toward low-income communities and especially communities of color being unfairly burdened with excessive pollution from a variety of polluting industries and chemical exposures.⁴ These studies affirmed the understanding of an environmental racism trend. While many are quick to conclude that communities of color are targeted solely because of their generally low-income socioeconomic status, most of the studies have demonstrated that race is more of a factor than class.⁵ In other words, if one were to compare a middle-class community of color to a low-income white community, and look at which community is more likely to have a hazardous waste facility sited there, the middle-class community of color would have a greater chance of being targeted for such a facility. In fact, in some cases, race is a more significant indicator of pollution burdens than income, poverty, childhood poverty, education, job classification, or home ownership.⁶ Demographic studies showing disparate distribution of polluting industrial facilities have been key aspects of many environmental racism lawsuits. Such studies of discriminatory effects are necessary since intentional discrimination is very hard to prove, except in the rare cases where inappropriate industry siting reports are leaked.⁷

The growing movement against environmental racism came together in October 1991 for the First National People of Color Environmental Leadership Summit held in Washington, D.C. Participants drafted and adopted the seventeen Principles of Environmental Justice.⁸ The Principles set forth a bold vision of what would be necessary to address environmental racism.⁹

Initially, the controversy in Warren County, North Carolina resulted in the General Accounting Office studying the locations of hazardous waste landfills in the southeastern United States.¹⁰ The 1983 study found that three of the four existing hazardous waste landfills were in African-American communities, when

African-Americans constituted only twenty percent of the region’s population.¹¹

In 1990, the Congressional Black Caucus met with the U.S. Environmental Protection Agency (“EPA”), accompanied by academics and activists, to discuss the disparate environmental risks in low-income and minority communities.¹² The EPA created the Environmental Equity Workgroup in July 1990 in response to the presentation of findings by social scientists that “racial minority and low-income populations bear a higher environmental risk burden than the general population” and that the EPA’s inspections failed to adequately protect low-income communities of color.¹³ Analysis shows that the agency takes longer to get around to cleaning up toxic waste sites in communities of color and that penalties under hazardous waste laws were five times higher in white communities than in communities of color and forty-six percent higher for other programs relating to air, water, and waste.¹⁴

“EQUITY” – DERAILING THE ENVIRONMENTAL JUSTICE MOVEMENT

In June 1992, the Environmental Equity Workgroup produced a report that supported the findings that recommended the formation of an EPA office to address these disparities.¹⁵ In November 1992, one year after the Principles of Environmental Justice were written, the EPA formed an Office of Environmental Equity.¹⁶ In response to public criticism, the EPA changed the name of the office to the Office of Environmental Justice in 1994.¹⁷

The “equity” versus “justice” framing is more than mere semantics. It represents the fundamental difference between the concepts of “poison people equally” and “stop poisoning people, period!” There is not a single mention in the movement-defined Principles of Environmental Justice of the notion that the goal is to simply redistribute environmental harms so that white communities have their “fair share” of pollution.¹⁸ Even if this “equity” vision were possible, the environmental justice movement has put forth a much deeper analysis, based on phasing out

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inappropriate technologies that ought not exist in any community. However, the EPA, and numerous state environmental agencies bunted and co-opted the bolder “justice” agenda by setting up offices and working groups around environmental “equity.”¹⁹

When the EPA and a number of state environmental agencies cleaned up the titles of their programs, renaming them “environmental justice,” they retained their “equity” agenda. Today, governmental bodies and others who have followed their lead universally define environmental justice as some version of “fair treatment and meaningful involvement.” The EPA defines environmental justice as:

the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people should bear a disproportionate share of the

agency habit of holding a public hearing and ignoring/dismissing the comments before issuing pollution permits. The fourth part of the “meaningful involvement” definition – that “decision makers seek out and facilitate the involvement of those potentially affected” – is sometimes made real when exceptional agency staff go the extra mile to ensure that the public knows about a meeting or hearing. However, it is still far too frequent that the outreach is so inadequate, or the meeting logistics made so inconvenient, that no one from the impacted community even shows up at these “environmental justice” meetings.²¹

GAINING GROUND

The same year that the EPA changed the Office’s name to “Environmental Justice,” President Clinton, on February 11th, 1994, signed Executive Order 12898, titled “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.”²² The Executive Order requires each federal agency to develop an agency-wide environmental justice

The “equity” versus “justice” framing is more than mere semantics. It represents the fundamental difference between the concepts of “poison people equally” and “stop poisoning people, period!”

negative environmental consequences resulting from industrial, governmental and commercial operations or policies. Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public’s contribution can influence the regulatory agency’s decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.²⁰

Without any real legislative teeth to back up these “equity posing as justice” policies, environmental agencies have no tools to even try to redistribute environmental harms. Rather, they use these policies to try to look responsive to environmental justice concerns when trotting them out at government-sponsored “environmental justice” conferences, public meetings and hearings on pending pollution permits, and other forums.

As long as there is no blatant intentional racism to be found, the “fair treatment” hurdle is deemed cleared, as the agencies have no authority to act on the distributional equity of harms concept in their “fair treatment” definition. The “meaningful involvement” hurdle still looks, on the ground, like the usual

strategy, sets up an interagency working group that reports to the President, requires certain agency studies, and sets forth a public participation plan.²³

While White House-level recognition of environmental justice was a shot in the arm of the movement, the Order explicitly states that it does not go beyond current law and creates no new rights or remedies, procedural or otherwise.²⁴ Nonetheless, the Executive Order was helpful in a groundbreaking case before the Nuclear Regulatory Commission (“NRC”) in 1997 – *In Matter of Louisiana Energy Services, L.P.*²⁵ – perhaps the only case where an agency denied a permit to a polluting industry because of racially discriminatory impacts in the siting process. Louisiana Energy Services (“LES”) sought to build a uranium enrichment facility between the tiny towns of Forest Grove and Center Springs in rural Northern Louisiana’s Claiborne Parish.²⁶ A grassroots community group, Citizens Against Nuclear Trash (“CANT”), challenged the proposal’s permits in the administrative process before the Atomic Safety and Licensing Board (“ASLB”) of the NRC.²⁷ Founded by freed slaves after the Civil War, the two towns (with a combined population of about 250) were about 97% African-American.²⁸ Their inhabitants lived in grinding poverty, with no stores, schools, medical clinics,

or businesses in the towns, and no running water in many of the homes.²⁹ Over 69% of the black population of Claiborne Parish earned less than \$15,000 annually, 50% earned less than \$10,000, and 30% earned less than \$5,000.³⁰ Over 31% of the black population in Claiborne Parish had no motor vehicles, over 10% lacked complete plumbing in their houses, and 58% lacked a high school education.³¹ One would be hard-pressed to find a more underprivileged community to target for such a facility.

To find a site for their uranium enrichment facility, LES hired a company, Fluor Daniel, Inc., with extensive experience in industrial facility site selection.³² In their siting process, they had initially narrowed a list of potential sites to seventy-eight, where the average percentage of black population within a one-mile radius of each of the sites across sixteen parishes was 28.35%.³³ Since the black population in Louisiana was about 32.5%, this was pretty fair to start.³⁴ However, once the list of potential sites was cut to thirty-seven, the average black population rose to 36.78%.³⁵ It rose again to 64.74% once the list of sites was narrowed to six.³⁶ At the end of the process, they managed to pick the one site with the highest percent black population of all seventy-eight examined sites (97.1%).³⁷

LES admitted to doing an “eyeball” assessment of potential sites.³⁸ They admitted to eliminating sites from consideration because they were close to “sensitive receptors” like hospitals, schools, and nursing homes (thus eliminating communities privileged enough to have such amenities) or because the site is near a “very nice lake” with “nice homes, vacation and fishing, hunting.”³⁹ The ASLB found this evidence to be “more than sufficient to raise a reasonable inference that racial considerations played some part in the site selection process.”⁴⁰ In a powerfully worded decision, the ASLB stated, in part:

Racial discrimination in the facility site selection process cannot be uncovered with only a cursory review of the description of that process appearing in an applicant’s environmental report. If it were so easily detected, racial discrimination would not be such a persistent and enduring problem in American society. Racial discrimination is rarely, if ever, admitted. Instead, it is often rationalized under some other seemingly racially neutral guise, making it difficult to ferret out. Moreover, direct evidence of racial discrimination is seldom found. Therefore, under the circumstances presented by this licensing action, if the President’s nondiscrimination directive is to have any meaning a much more thorough investigation must be conducted by the Staff to determine whether racial discrimination played a role in the [enrichment facility] site selection process.

... [T]he Staff must conduct an objective, thorough, and professional investigation that looks beneath the surface of the description of the site selection process in the Environmental Report. In other words, the Staff must lift some rocks and look under them.⁴¹

The decision acknowledged that the obligations under the Executive Order were new to the agency and that agency staff’s primary responsibilities have historically been to evaluate technical concerns, not to apply the social science skills needed to investigate whether racial discrimination played a part in a facility siting decision – skills that are far from the experience and expertise of NRC staff.⁴² The ASLB’s decision concluded with a determination that a staff investigation of the siting process, to determine whether racial discrimination played a role in that process, was essential to ensure compliance with the Executive Order, and that the Final Environmental Impact Statement was insufficient in other ways and needed to be revised.⁴³

Such a strong decision was a welcome surprise, especially coming from an agency whose very existence is financially tied⁴⁴ to the survival of the notoriously racist nuclear industry, whose uranium mining and nuclear waste disposal burdens fall almost exclusively on black, Hispanic, and Native American communities.⁴⁵ Though the victory over LES in Louisiana held,⁴⁶ the legal precedent was undermined on appeal.

On appeal to the NRC Commissioners, the Commission reversed the ASLB’s requirement of an inquiry into racial discrimination in siting, but affirmed its disparate impact ruling.⁴⁷ In reversing the requirement of inquiry into racial discrimination, the Commission held that no “nondiscrimination directive” exists in Executive Order 12898 and that the National Environmental Policy Act (the law requiring Environmental Impact Statements on certain federal projects) is not “a tool for addressing problems of racial discrimination.”⁴⁸

TITLE VI AS A TOOL FOR ENVIRONMENTAL JUSTICE

As the LES case was playing out, the nation’s first attempt to address environmental racism using Title VI of the Civil Rights Act of 1964 was moving toward the U.S. Supreme Court, fresh from an amazing victory in the Third Circuit.

The mostly African-American City of Chester, Pennsylvania is home to the nation’s largest trash incinerator, a sewage treatment plant that burns the county’s sewage sludge, a paper mill that burns waste coal, numerous chemical plants and toxic waste sites, and formerly hosted the nation’s largest medical waste autoclave. It is surrounded on either side by oil refineries and coal, oil and gas-fired power plants.⁴⁹

In 1996, Chester Residents Concerned for Quality Living (“CRCQL” – pronounced “circle”) sued the Pennsylvania Department of Environmental Protection (“PADEP”) for issuing a permit to Soil Remediation Systems (“SRS”), a company planning to build a facility to clean petroleum contaminated soil by burning off the contaminants.⁵⁰ This “soil burner” facility would have been sandwiched between the trash and sewage sludge incinerators.

Suit was brought in the Eastern District of Pennsylvania under both sections 601 and 602 of the Title VI of the Civil Rights Act of 1964.⁵¹ Section 601, codified as 42 U.S.C. § 2000d, provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any program or activity receiving Federal financial assistance.⁵² Section 602, codified as 42 U.S.C. § 2000d-1, authorizes and directs agencies, such as the EPA, which provide financial assistance to state agencies like PADEP “to effectuate the provisions of § 2000d of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute”⁵³

The complaint alleged that PADEP’s grant of the permit violated: 1) § 601 of Title VI of the Civil Rights Act of 1964; 2) EPA’s civil rights regulations promulgated pursuant to § 602 of Title VI; and 3) PADEP’s “assurance pursuant to the regulations that it would not violate the regulations.”⁵⁴ The District Court quickly did away with the first cause of action, citing Supreme Court precedent that § 601 applies only to intentional discrimination and that CRCQL failed to allege that PADEP intentionally discriminated when granting the pollution permit to SRS.⁵⁵ The District Court dismissed the second and third claims on the basis that, while there is a private right of action under § 601, there is no such right under § 602.⁵⁶

In *Chester Residents Concerned for Quality Living v. Seif*,⁵⁷ the Chester residents appealed the ruling to the Third Circuit Court of Appeals, focusing only on the second cause of action: the core § 602 claim.⁵⁸ Establishing important precedent, the Third Circuit reversed the District Court’s ruling.⁵⁹ The Third Circuit panel found that the District Court misread the U.S. Supreme Court’s fractured ruling in *Guardians Ass’n v. Civil Service Commission of New York City*,⁶⁰ falsely assuming that it stood for the notion that there is private right of action under § 602.⁶¹

Instead, the Third Circuit recognized that the Supreme Court had since recognized that *Guardians* affirmed 1) that a private right of action exists under § 601 of Title VI, requiring plaintiffs to prove discriminatory *intent*; and 2) that agencies may validly promulgate discriminatory *effect* regulations under § 602.⁶² The ruling did not, however, decide the issue of whether there is a private right of action to enforce regulations promulgated under § 602.⁶³ The Third Circuit stitched together two sets of opinions in *Guardians* to infer that a five-justice majority would support a private right of action under § 602.⁶⁴ A dissent by Justice Stevens (joined by Justices Brennan and Blackmun) concluded with a statement that the plaintiffs “only had to show that the respondents’ actions were producing discriminatory effects in order to prove a violation of [the regulations].”⁶⁵ Justices White, writing for the court, and Marshall, dissenting, both found it acceptable for a plaintiff to bring a discriminatory *effect* case under § 601, so the Third Circuit inferred that they would find the same acceptable under § 602.⁶⁶ This five Justice-majority inference wasn’t enough for the Third Circuit to hold that *Guardians* is dispositive on the Chester case, since the Supreme Court had not spoken directly to the issue.⁶⁷

With nothing dispositive in Supreme Court precedent, the Third Circuit looked at its own precedent.⁶⁸ In doing so, it found that the District Court misread Third Circuit precedent in concluding that no private right of action exists under § 602 when, in fact, that case spoke only to whether a plaintiff must

exhaust administrative remedies under § 602 before bringing a suit directly under § 601.⁶⁹ With no precedent on the specific question, the Third Circuit applied its own three-prong test for determining when it is appropriate to imply private rights of action to enforce regulations and found that there *is* a private right of action under § 602.⁷⁰

PADEP appealed to the U.S. Supreme Court.⁷¹ By the time the case reached the highest court, PADEP had revoked the permit for SRS, the permittee whose permit challenge formed the basis of the case.⁷² Both sides, fearing unfavorable precedent, asked the Supreme Court to declare the case moot, but PADEP also asked the Supreme Court to vacate the Third Circuit decision, which – over the protest of CRCQL – the Supreme Court did.⁷³ In a one-sentence decision, the case was vacated as moot with instructions to dismiss.⁷⁴ After all this effort, Chester residents had one less polluter to contend with, but impacted communities around the country were left again with no federal court precedent allowing a private right of action under Title VI for allegations of discriminatory effects against federally funded permitting agencies. Until Camden.

STARTING OVER

Some of the same Philadelphia attorneys involved in *Chester* found opportunity to start over, setting precedent in the same Circuit, across the river in Camden, New Jersey – a community with a very similar story to that of *Chester*. In 2001, (*Camden I*)⁷⁵ was filed under similar theories as used in *Chester*.⁷⁶

Like Chester, South Camden’s Waterfront South neighborhood is surrounded by toxic industrial threats.⁷⁷ The South Camden lawsuit was over a permit granted by NJDEP to Saint Lawrence Cement (“SLC”) for a facility that would grind blast furnace slag, exposing the community to fine particulate matter laden with toxic metals.⁷⁸

In a lengthy, well-documented, and carefully thought-out opinion, the District Court sided with the South Camden residents, concluding that:

(1) The NJDEP’s failure to consider any evidence beyond SLC’s compliance with technical emissions standards, and specifically its failure to consider the totality of the circumstances surrounding the operation of SLC’s proposed facility, violates the EPA’s regulations promulgated to implement Title VI of the Civil Rights Act of 1964; and (2) Plaintiffs have established a *prima facie* case of disparate impact discrimination based on race and national origin in violation of the EPA’s regulations promulgated pursuant to § 602 of the Civil Rights Act of 1964.⁷⁹

As in *Chester*, the plaintiffs included a § 601 claim of intentional discrimination, but didn’t back it up, focusing instead on their § 602 disparate impact discrimination claim.⁸⁰ After the Supreme Court vacated the Third Circuit’s decision in *Chester*, the Circuit revisited the issue of whether there is an implied private right of action under § 602 of Title VI, finding in *Powell v. Ridge*⁸¹ that such a right exists.⁸²

That matter being settled law in the Circuit, the court moved on to rule on whether mere compliance with existing environmental laws and regulations is sufficient to meet the requirements of Title VI.⁸³ In other words, even if a corporate polluter would release pollution in amounts deemed acceptable, and permitted under environmental regulations, could that polluter still be found to be contributing to a violation of a community's civil rights under Title VI? This question strikes at the heart of what environmental justice activists have complained about for years. Environmental permitting agencies routinely give out pollution permits that are calculated to allow only a certain number of people to die of cancer. This permitting regime is widely criticized for not accounting for vulnerable populations (children, the elderly, fetuses, those with compromised immune systems) and for looking at only one chemical exposure at a time. The existing permitting regime does not factor in the increased chance of illness when one's community is surrounded by dozens of pollution sources, each exposing the community to a wide array of pollutants that can even interact with one another to magnify their health impacts.⁸⁴ Industry and government officials pretend that an industrial facility that stays within its permit limits means that the facility is "safe" and thus not harming health. This is far from the truth.

As the District Court framed the issue in *Camden I*: "This case presents the novel question of whether a recipient of EPA funding has an obligation under Title VI to consider racially discriminatory disparate impacts when determining whether to issue a permit, in addition to compliance with applicable environmental standards."⁸⁵ The court found that an agency *does* have such an obligation.⁸⁶ To reach this conclusion, the court looked at the fact that permitting agencies do not look at the cumulative effects of permitting multiple polluters in a single community.⁸⁷ Since environmental laws and regulations are not yet up to this task, the court held that it is appropriate for this to be considered as part of a Title VI analysis in the permitting process.⁸⁸

The District Court also looked closely at the issue of particulate matter (soot), since the EPA was in the process of adopting stricter regulations on fine particulate matter, known as PM-2.5.⁸⁹ Regulations in effect at the time only covered PM-10 (larger soot particles), but a substantial body of science showing major health impacts from the smaller PM-2.5 pollution caused the EPA to propose more stringent regulations.⁹⁰ At the time of the case, these PM-2.5 regulations were not in effect and NJDEP had no legal obligation to consider this sort of pollution in environmental permitting. However, the body of science showing harm existed and was enough to prod the EPA into regulatory action. The District Court held it relevant to consider the issue within the context of a Title VI disparate impact analysis.⁹¹

Environmental laws and regulations often take several decades to catch up to what science tells us about the threat of pollutants on health. This is largely due to the need for a "scientific consensus" to line up enough dead bodies before regulatory and political action against a pollutant is even possible, as well as the reality of corporate campaign contributions, lobbying, and

lawsuits intended to block or delay implementation of new regulations. *Camden I*'s novel "totality of the circumstances"⁹² use of Title VI to shortcut the glacial environmental regulatory process and apply modern science to community health burdens is a huge benefit to impacted minority communities, but a dramatic threat to the economic interests of corporate polluters.

On April 19, 2001, three days before Earth Day, the United States District Court for the District of New Jersey granted a preliminary injunction to the South Camden plaintiffs.⁹³ The court vacated SLC's air pollution permits and enjoined the cement company from operating its proposed facility.⁹⁴ The court when on to stipulate operations could not commence until the NJDEP performed an appropriate adverse disparate impact analysis in compliance with Title VI to the satisfaction of the District Court.⁹⁵ The Earth Week celebration lasted five days.

THE COURTS CLOSE THE DOOR ON ENVIRONMENTAL JUSTICE

On, April 24, 2001, two days after Earth Day, this victory came crashing down as the U.S. Supreme Court ruled on *Alexander v. Sandoval*.⁹⁶ The case had nothing to do with environmental matters, but did involve § 602.⁹⁷ The high court ruled that there is no private right of action under § 602, effectively shutting down any litigation over racially disparate impacts caused by federally-funded agencies, unless one can prove intent.⁹⁸ The 5-4 majority opinion, written by Justice Scalia, focused on the idea that courts may no longer find that there is a private right of action to enforce federal law unless Congress intends such a right.⁹⁹

When Title VI was enacted in 1964, the Court was in the habit of creating private rights of action and providing remedies as they found necessary to effectuate congressional purpose.¹⁰⁰ This practice was abandoned in 1975 when the Supreme Court created a test in *Cort v. Ash*,¹⁰¹ setting forth four factors to determine whether Congress intended for a private right of action to exist under a statute:

- (1) whether the plaintiff is one of the class for whose benefit the statute was enacted;
- (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;
- (3) whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiffs; and
- (4) whether the cause of action is one traditionally relegated to state law.¹⁰²

The *Sandoval* majority ignored most of the *Cort v. Ash* factors, focusing narrowly on part of the second factor where the Court stated: "We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."¹⁰³ The majority pointed to *Touche Ross & Co. v. Redington* to back up their opinion that, "like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."¹⁰⁵ While the *Sandoval* majority failed to point this out, *Touche Ross* backs up their abuse of the *Cort v. Ash* factors

by stating that the “Court did not decide that each of these factors is entitled to equal weight.”¹⁰⁶

The *Sandoval* majority concluded its *Cort v. Ash* analysis by holding that the “rights-creating” language in § 601 (“no person ... shall ... be subjected to discrimination”) is not present in § 602 because § 602 “limits agencies to ‘effectuating’ rights already created by § 601,” and that “the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI’s protection.”¹⁰⁷ Yet, as Justice Stevens pointed out in a dissenting opinion, it makes sense that there is no “rights-creating” language in § 602 since “it is perfectly obvious that the regulations authorized by § 602 must be designed to protect precisely the same people protected by § 601.”¹⁰⁸

In his dissent, Justice Stevens first pointed out that the question of a private right of action under § 602 should not even be before the Supreme Court, since not a single Court of Appeals has ruled that there is no such right.¹⁰⁹ He listed eleven cases in ten Federal Circuits where federal courts, all on the same page, supported a private right of action under § 602; a twelfth case suggested that the question was still open.¹¹⁰

Second, Justice Stevens argued that the majority misinterpreted *Guardians*. He pointed out, as the Third Circuit did in *Chester*, that there were five justices supporting the notion that “private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities.”¹¹¹

Third, Justice Stevens argued that a proper analysis under *Cort v. Ash* supports the notion that there is an implied private right of action under § 602.¹¹² Clearly, there is no doubt that the plaintiff in a discriminatory impact case is one of the class for whose benefit the statute was enacted, and it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiffs. Justice Stevens documented that there was legislative intent – among proponents and opponents of the Civil Rights Act of 1964 – that Title VI included a private right of action for discriminatory impacts.¹¹³ The Supreme Court’s decision in *Cannon v. University of Chicago*¹¹⁴ found that Congress intended a private right of action to enforce both Title IX of the Education Amendments of 1972 (a gender discrimination statute modeled on Title VI, and expected to be construed the same way) and Title VI.¹¹⁵ Justice Stevens pointed out that the analysis of *Cort* in *Cannon* “was equally applicable to intentional discrimination and disparate impact claims” and that *Cannon* was, in fact, a disparate impact case.¹¹⁶

Fourth, Justice Stevens argued that § 601 is not limited to intentional discrimination, in contradiction to the majority which claimed such a limitation was “beyond dispute”.¹¹⁷ He dissected the Court’s decisions in *Guardians* and *Regents University of California v. Bakke*¹¹⁸ and found that *Bakke* did not rule directly on the matter and that *Guardians* mistakenly assumed that *Bakke* did.¹¹⁹

Most significant to the resolution of the Camden case is Justice Stevens’ argument that there is still private right of action reaching § 602 under 42 U.S.C. § 1983.¹²⁰ Section 1983 of the Civil Rights Act of 1871 imposes liability on anyone who, under

color of state law, deprives a person “of any rights, privileges, or immunities secured by the Constitution and laws.”¹²¹ It is almost comical in that, for all the wrangling a private right of action under § 602, plaintiffs can still bring the same legal challenge by simply invoking § 1983 to enforce rights created by regulation, causing Justice Stevens to describe *Sandoval* as “something of a sport.”¹²²

The sporting continued in *Camden I* on April 24th, 2001. *Sandoval* had been decided that morning. That afternoon, the District Court asked the parties in *Camden I* to brief the following two questions: (1) whether the claim could be brought as an intentional discrimination claim under § 601 and (2) whether the § 602 claim could be maintained by invoking 42 U.S.C. § 1983, as Justice Stevens suggested.¹²³ Perhaps for the first time in any federal court, the *Camden I* case raised the question of “whether the same disparate impact regulations which can no longer be enforced through a private right of action brought directly under § 602 of Title VI, can be enforced pursuant to 42 U.S.C. § 1983.”¹²⁴ The District Court upheld its April 19 decision and injunction, finding that the disparate impact discrimination claim can be brought under § 1983.¹²⁵

As before, the victory was short-lived. The courtroom door shut to civil rights plaintiffs in *Sandoval* was to be one in a series of doors slamming shut, closing out opportunities for justice in the courts. On appeal in the Third Circuit addressed the question of whether a regulation can create a right enforceable through § 1983, in the absence of clear rights-creating language in the statute.¹²⁶ Justice Stevens had argued in his *Sandoval* dissent that the courts should apply *Chevron* deference in such situations, allowing agencies to create rights in regulations when interpreting broadly-worded statutes, unless the regulations are an unreasonable interpretation of the statute.¹²⁷ The Third Circuit did not agree. They held that an administrative regulation could not create a right enforceable under § 1983 unless the right can be implied from the statute authorizing the regulation.¹²⁸ Using the Supreme Court’s *Blessing v. Freestone* test¹²⁹ to see if the right can be implied from the regulation adopted under § 602 and enforced with 42 U.S.C. § 1983, they ruled that it could not.¹³⁰

The “we won’t find any rights you can enforce unless Congress clearly spelled them out for you” trend was made harder the following year, with a 2002 U.S. Supreme Court ruling in *Gonzaga Univ. v. Doe*.¹³¹ *Gonzaga* made the *Blessing* test even harder to meet, requiring that Congress intend to create a federal right, not merely intend the statute to benefit the plaintiff.¹³² *Gonzaga* boldly states: “We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”¹³³

THE FOX NOW GUARDS THE HENHOUSE

With this nail in the coffin of environmental justice litigation, the courts have basically said: If you can’t prove the federally-funded agency’s discrimination is intentional, all you can do is to complain to the agency itself and ask them to hold themselves accountable. Asking the fox to guard the henhouse has been as fruitful as one might imagine.¹³⁴ About 250 Title VI complaints

were filed with the EPA's Office of Civil Rights from 1993 to 2011, the vast majority of which were dismissed or rejected.¹³⁵

The EPA's first decision on a Title VI complaint was in 1998, ruling on a complaint against Michigan's environmental agency for permitting Select Steel to build a new steel mill in their predominantly African-American neighborhood of Flint, Michigan.¹³⁶ In their decision, the EPA found no discrimination.¹³⁷ The EPA assumed that the proposed steel mill would be in compliance with environmental laws, and held that complying with environmental laws means that there would be no "adverse effect" on the community.¹³⁸ The EPA further held "[i]f there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA's implementing regulations."¹³⁹

The EPA's position in their *Select Steel* decision is that there can be no violation of Title VI of the Civil Rights Act because there is no violation of environmental laws.¹⁴⁰ This contradicts the Department of Justice's interpretation that civil rights laws are independent and that compliance is evaluated in light of anti-discrimination requirements.¹⁴¹ It also contradicts common sense, since environmental laws are designed to allow certain levels of pollution – usually without factoring in other nearby sources of pollution – and allowable pollution levels are often based on what is technically and economically possible for an industry to achieve, not on what levels are healthy for the community. The inevitable "adverse" effects on health can surely have a discriminatory effect, even if pollution levels are within permitted limits, as the District Court in *Camden* recognized.¹⁴²

Even when you win, you lose. In August 2011, the EPA finally issued an investigative report on a 1999 Title VI complaint filed over disparate impacts of methyl bromide pesticide spraying near grade schools predominantly serving Latino children in California.¹⁴³ In the only case where the EPA ever found a violation of Title VI,¹⁴⁴ it failed to provide a meaningful remedy.¹⁴⁵ After 12 years of delays, the EPA secretly negotiated a settlement with the California Department of Pesticide Regulation, without involving the plaintiffs, and settled for additional monitoring of methyl bromide near schools, and "outreach" by the Department of Pesticide Regulation.¹⁴⁶ The plaintiffs, and all future school children won no real relief from this decision. The EPA is supposed to withhold federal funding when it finds Title VI violations.¹⁴⁷ Settling in secret for crumbs when it finds its first violation is not promising.

The Obama White House and EPA Administrator, Lisa Jackson, while claiming to take environmental justice and civil rights seriously, have permitted this awful decision under their watch.¹⁴⁸ EPA's latest decision, in August 2012, confirms that EPA – even under presumably favorable political leadership – is not a place to find justice. The Center for Race, Poverty and the Environment had to sue the EPA to finally get the agency to decide on a case filed eighteen years earlier, in 1994.¹⁴⁹ Only when the court imposed a deadline on the EPA, did the EPA finally act on complaint – by dismissing it.¹⁵⁰ The complaint alleged discrimination with regard to the fact that all three of California's hazardous waste landfills are in low-income Latino

communities.¹⁵¹ The EPA absolved the federally-funded state agency that permitted the facilities because they were not actually involved in siting the facilities.¹⁵² Such an interpretation is quite dangerous, since state permitting agencies rarely pick the sites, but do decide whether to grant permits for where corporations seek to build polluting facilities. Stunningly, the EPA also found that the three hazardous waste landfills did not harm public health despite unexplained birth defect clusters and high infant mortality rates.¹⁵³ In coming to this conclusion, the EPA failed to evaluate the impact of diesel trucks coming to the facilities, even though the agency had awarded a California group, Greenaction, a grant to work with one of these communities specifically on diesel pollution issues.¹⁵⁴

Such twelve to eighteen year delays are not uncommon. The EPA is required to accept for investigation or deny a Title VI complaint within 20 days, and within 180 days of accepting one, must issue preliminary findings from its investigation.¹⁵⁵ However, many complaints have languished fifteen years or more without any agency response.¹⁵⁶ In 2003, the U.S. Commission on Civil Rights found that the EPA lacked an effective system for investigating the growing backlog of complaints.¹⁵⁷ In 2009, the Ninth Circuit Court of Appeals ruled against the EPA in the first case related to the backlog of Title VI complaints, noting a "consistent pattern of delay by the EPA" and that the delays in that case "appear, sadly and unfortunately, typical of those who appeal to [the EPA] to remedy civil rights violations."¹⁵⁸ In 2011, a Deloitte Consulting LLP report on the EPA's Office of Civil Rights showed that their backlog problems continue.¹⁵⁹

"ENVIRONMENTAL JUSTICE" LEGISLATION

After several years of frustration with courts refusing to hear environmental racism claims on the merits and the EPA failing to respond to Title VI complaints, some environmental justice activists have sought to legislatively "fix" *Sandoval*. In 2006, Senator Menendez (D-NJ) introduced S. 4009, the Environmental Justice Enforcement Act of 2006.¹⁶⁰ In 2008, on the seventh anniversary of the *Sandoval* ruling, Senator Menendez reintroduced the bill as S. 2918, and Congresswoman Solis (D-CA) introduced the same, as H.R. 5896.¹⁶¹ The legislation has not been reintroduced in either the 111th or 112th Congress (2009-2012).

The Environmental Justice Enforcement Act essentially overturns key findings in *Sandoval* and a whole string of cases preceding it by creating a clear statutory right to sue for disparate impacts under § 601.¹⁶² Section 601 would be amended so that a recipient of federal funds accused of discriminatory impact may only escape liability if they can "demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner."¹⁶³ A plaintiff may also prove discrimination by demonstrating that a less discriminatory alternative policy or practice exists, and that the recipient of federal funds refuses to adopt such alternative policy or practice.¹⁶⁴ The legislation also clearly spells out rights to recovery.¹⁶⁵ Plaintiffs bringing claims based on disparate impact may recover equitable relief, attorney's fees (including

expert fees), and costs.¹⁶⁶ Those bringing claims of intentional discrimination may also recover compensatory and punitive damages, though punitive damages are not available against governmental bodies.¹⁶⁷

While framed as an environmental justice bill, the Environmental Justice Enforcement Act is not limited to environmental claims. It would reopen doors to private disparate impact claims of any sort that are “on the basis of race, color or national origin.”¹⁶⁸ Perhaps if the rest of the civil rights movement were aware of this, or if the Obama Administration’s actions were as serious about combating discrimination as his words, the legislation would have been reintroduced and made more of a priority.

While passage of the Environmental Justice Enforcement Act would be a huge victory for civil rights, its impact on achieving environmental justice would be fairly small in the big picture. It is hard for most community groups to bring Title VI cases without free legal help, which the groups in *Chester* and *Camden* had. The number of communities that can bring claims is also limited, since such cases are only likely to succeed where there are blatant racial disparities,

comparable to *Chester* and *Camden*. Many other “environmental justice” communities don’t share such stark demographic disparities, and some are likely to be seen as arguable, such as where major polluting facilities are planned in poor, rural white areas adjacent to prisons housing mostly racial minorities, as is the case in a community near Gilberton, Pennsylvania.¹⁶⁹ Since Title VI provides no protection for class discrimination, many impoverished and heavily impacted communities, like those suffering in West Virginia’s mountaintop removal mining regions, are left without legal protection. Some have argued that the future direction of environmental justice law needs to include protections for victims of economic discrimination.¹⁷⁰

Even with a private right of action on race and class discrimination, the legal tool lends itself to a one facility at a time, one community at a time, solution. With the systematic onslaught of pollution and unnecessary industries, it would be more appropriate for the environmental justice movement to be pushing for broader policy-level changes, not unlike the Environmental Justice Enforcement Act’s “prove discrimination by demonstrating that a less discriminatory alternative policy or practice exists” idea – but one where people could sue if the government permits a company to operate a technology where a less polluting alternative technology or practice exists. Currently, under the National Environmental Policy Act,¹⁷¹ certain federally

funded or sponsored projects must do an Environmental Impact Statement that is supposed to include an analysis of alternatives, but there is no requirement that the project proponents actually adopt any of the better alternatives they write up in the impact statement.¹⁷²

Until we see the day when these broader policies are politically possible, we must take advantage of every opportunity to protect every community from environmental harm – especially those that are made easy targets because of actual or perceived political powerlessness. A renewed Title VI would be a weak tool toward “justice.” A wave of lawsuits would, at best, start to redistribute environmental harms, with some polluting projects turning their sights

on communities with a larger white population. Any distributional equity would mostly pertain to locating new polluters, as such litigation isn’t likely to dislodge and relocate existing industries.

When corporate polluters are chased out of a community, most give up after targeting one or two other communities. Some are more persistent. In 1998, a company named PhilPower Corporation sought to build a wood waste incinerator in

*Since Title VI provides
no protection for class
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left without legal protection.*

Delaware.¹⁷³ They targeted one community after another – ultimately targeting six communities.¹⁷⁴ Most were communities of color, but when they tried to set foot in a suburban white community, that was enough to get state legislation moving that ultimately banned incinerators statewide in 2000.¹⁷⁵

This is an ideal example of where equity can be a step toward justice. However, more typical examples from other, more famous, environmental justice battles didn’t turn out so well. In the LES example, the company tried three more times, twice in whiter communities in Tennessee, where they were defeated both times, and ultimately landed in a low-income, forty-five percent Hispanic community in New Mexico.¹⁷⁶ While this is more “equitable” than the company’s initial target, it is still environmental racism and it will still do grave harm to the environment and the people who live in the region. Another notorious example, well-known in the environmental justice movement, is that of Shintech – a Japanese company that sought to build a PVC plastics factory in Convent, Louisiana, in a region known as “cancer alley” due to the high concentration of petroleum refineries, chemical, and plastic production facilities.¹⁷⁷ While the battle against Shintech stopped them from locating in Convent, they ultimately got a facility built – albeit smaller – in a largely white community in another county in the region.¹⁷⁸

ENVIRONMENTAL EQUITY IS IMPOSSIBLE

Given unequal routes of exposure to toxic pollutants, even those released in white communities disproportionately impact people of color. Some racial minorities consume more fish and thus suffer higher exposure to toxic mercury, dioxins and PCBs.¹⁷⁹ Dioxins and PCBs travel quite far, accumulating at the Earth's poles. Indigenous people living in the Arctic Circle subsist necessarily on a diet heavy in animal fat, where these toxins accumulate at high doses, with one of the largest sources having been a trash incinerator in an environmental justice community in Harrisburg, Pennsylvania. In both cases, the racially disparate exposures would occur even if every smokestack were in a nearby affluent white community, as the pollutants (and fish) travel before the uneven exposures are felt.

Water fluoridation is another example where toxic exposure is inherently unequal. While urban communities are most often fluoridated, disproportionately exposing people of

some risk (such as recycling facilities, where the siting should be made more equitable and the impacts should be insulated from residential land uses).

Given this, it does not make sense to pose legislative solutions in terms of environmental justice. Most “environmental justice” policies have actually been “equity” policies weakly designed to redistribute harms. Such policies usually just focus on increased “public involvement,” but some aim to establish protocols that discourage agency permitting of new polluting facilities in designated “environmental justice” communities.

While it's good to discourage the concentration of new polluters where existing polluters are already concentrated – mainly low-income communities and communities of color – it hardly goes far enough. There is still the matter of existing polluters, and no one has seriously proposed uprooting industries in order to relocate some in wealthy, white suburbs. Clearly, that would

If there were economic resources (and political will) to relocate polluting industries, then those funds would be better put into replacing the polluting technology with non-pollution alternatives.

color to the hazardous chemicals used, the chemicals – even within the same community – impact people of color more than whites. Fluoride helps the body absorb lead, which affects the brain in ways that diminish IQ and contribute to learning disabilities, violent behavior and increased likelihood of cocaine addiction. The fluoride-induced increase in lead exposure is most pronounced in blacks, and also affects Hispanics more than whites.¹⁸⁰

CONCLUSION

The “environmental equity” goal of redistributing harms is not only impossible, but is largely undesirable. For the worst environmentally harmful industries, such as nuclear reactors, combustion-based power plants, incinerators, and the like there are alternatives that are generally cheaper, zero-emission, and which produce far more jobs. For these types of harmful industries, it's proper to say “Not in Anyone's Backyard.” Such a position fits with the Principles of Environmental Justice.

The equity concept only belongs to bringing fairness in the distribution of socially beneficial things (such as access to parks and public transit, or availability of fresh produce in urban “food deserts” – each of which have been tackled as environmental justice issues), and in socially necessary facilities that carry

prove politically impossible, and any such effort, even if legal, would be economically ridiculous and politically divisive. If there were economic resources (and political will) to relocate polluting industries, then those funds would be better put into replacing the polluting technology with non-pollution alternatives. It is more strategic to help more privileged communities understand how they are also affected by pollution, and to use that awareness to create a solidarity to work toward broader solutions.

Policies designed to redistribute beneficial things (parks, groceries, access to public transit, health care, schools...) are good and can be honestly framed as equity policies. A law designed to ensure equitable enforcement of environmental laws would be most helpful, and would also fairly fall in the “equity” realm.

Policies that are truly about environmental justice are unlikely to be framed in such terms, as they would look like laws that help everyone by transitioning from various polluting practices to clean ones. Examples include laws replacing toxic chemicals with safe alternatives, banning incineration, or removing dirty energy subsidies. Such laws would most help the communities of color who suffer the disproportionate impacts, but the laws themselves would not need to be framed in terms

of environmental justice or with any race-based language. This is just as well, and advisable, considering the misguided “color-blind” approach that courts have taken with such issues as affirmative action.

As we sharpen legal tools to achieve environmental justice for all, we must not sell short and settle for equity of harms disguised as justice. As Martin Luther King, Jr. knew, injustice anywhere is a threat to justice everywhere.¹⁸¹



Endnotes: LEGAL TOOLS FOR ENVIRONMENTAL EQUITY VS. ENVIRONMENTAL JUSTICE

¹ For the full-length version of this article, see www.ejnet.org/ej/ejlaw.pdf

² *Environmental Justice- History*, AVOICE, <http://www.avoiceline.org/environmental/history.html> (last visited Nov. 20, 2012).

³ See generally Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All These Years*, 38 ENVTL. L. 371, 373-77 (2008) (tracing the history of environmental justice from the 1987 United Church of Christ study, *Toxic Wastes and Race in the United States*, through this new study in 2007); ROBERT D. BULLARD ET AL., *TOXIC WASTES AND RACE AT TWENTY: 1987-2007* (2007), available at <http://www.ejnet.org/ej/twart.pdf>; Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 790 n.1 (1999) (compiling a list of studies dating to 1983). Additional studies available at: <http://www.ejnet.org/ej/>.

⁴ See Mank, *supra* note 3, at 792 (concluding in the review of many studies that “there is credible evidence that minority groups experience significant discrimination in some areas of the country”).

⁵ See Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 334-40 (1995) (examining studies on siting of waste sites and citing many that conclude that race is a more significant indicator of siting than socioeconomic factors).

⁶ See ENVIRONMENTAL STUDIES CAPSTONE, SWARTHMORE COLLEGE, *MAPPING ENVIRONMENTAL JUSTICE IN DELAWARE COUNTY* 20 fig.5, 21 fig.6, 22 fig.7, 23 fig.8, 24 fig.9 (2006), available at <http://www.ejnet.org/chester/delco-swat.pdf> (displaying data on geographic distribution of race, education, unemployment, and age with respect to air and water pollution); *Distribution of Environmental Burdens in Delaware County*, SCORECARD http://www.scorecard.org/community/ejsunmary.tcl?fips_county_code=42045#dist (last visited Jan. 17, 2013) (comparing distribution of environmental burdens by race, income, poverty, childhood poverty, education, job classification, and home ownership and showing that the ratio of burden is higher based upon race than any other indicator).

⁷ J. STEPHEN POWELL, CERRELL ASSOC., *POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING, STUDY FOR THE CALIFORNIA WASTE MANAGEMENT BOARD* 1, 4-6 (1984), <http://www.ejnet.org/ej/cerrell.pdf> (failing to specifically mention racial criteria, but this study, aimed to help the state site 43 trash incinerators, spelled out numerous other criteria for communities “more” or “less” likely to resist siting of “major facilities” like trash incinerators; of the three that were ultimately built, all were in low-income Hispanic communities). In another example, Epley Associates, hired in North Carolina to help site a nuclear waste dump, did a window-survey of communities and suggested that specific communities be considered or not based on race and class factors. See Environmental Research Foundation, *Nuclear Industry Discovers Solution to Waste Problem: Bribery and Deception*, RACHEL.ORG (Nov. 26, 1991), <http://www.rachel.org/?q=en/node/4191>; see also Michael Heiman, *Waste Management and Risk Assessment: Environmental Discrimination through Regulation*, 17 URBAN GEOGRAPHY 400 (1996).

⁸ FIRST NAT’L PEOPLE OF COLOR ENVTL. LEADERSHIP SUMMIT, *THE PRINCIPLES OF ENVIRONMENTAL JUSTICE* (1991), <http://www.ejnet.org/ej/principles.pdf> [Hereinafter *PRINCIPLES OF ENVIRONMENTAL JUSTICE*].

⁹ *Id.* (setting an agenda that stood for human rights, democratic community decision-making, education, women’s and workers’ rights, and health care, while standing against imperialism, militarism, corporate abuses, and toxic and nuclear production).

¹⁰ U.S. GEN. ACCOUNTING OFFICE, *GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983), <http://www.gao.gov/products/RCED-83-168> (last visited Jan 17, 2013).

¹¹ *Id.* at 1.

¹² *Environmental Justice – History*, *supra* note 2.

¹³ *Environmental Justice – Basic Information*, ENVTL. PROT. AGENCY, <http://www.epa.gov/environmentaljustice/basics/ejbackground.html> (last visited Jan. 17, 2013).

¹⁴ Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT’L L.J., Sept. 21, 1992, at S2, <http://www.ejnet.org/ej/nlj.pdf> (last visited Jan. 17, 2013).

¹⁵ *Environmental Justice – Frequently Asked Questions*, ENVTL. PROT. AGENCY, <http://web.archive.org/web/20100408215551/http://www.epa.gov/compliance/ej/resources/faqs/index.html> (last visited Nov. 20, 2012).

¹⁶ *Id.*

¹⁷ *Environmental Justice – History*, *supra* note 2; Heiman, *supra* note 7, at 418, n. 13.

¹⁸ *PRINCIPLES OF ENVIRONMENTAL JUSTICE*, *supra* note 8.

¹⁹ See *Environmental Justice – Basic Information*, *supra* note 13 (conflating the terms justice and equity).

²⁰ *Id.* (emphasis added).

²¹ At three “environmental justice” meetings held in Pennsylvania, that this author is personally familiar with, two of them (in Philadelphia and Harrisburg) involved such poor community outreach that no one in the community showed up to speak, and in Erie, Pennsylvania, where the world’s largest tire incinerator was proposed next to housing projects in the city, the “environmental justice” meeting was held—not at the high school within walking distance, where the polluter held its initial meeting—but at a suburban school five miles away, where no one in the nearby community of color managed to attend.

²² Exec. Order No. 12898, 3 C.F.R. 859 (1994), *reprinted as amended in* 42 U.S.C. § 4321 (2011), <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>.

²³ *Id.* §§ 1-102, 1-103, 3-301, 5.

²⁴ *Id.* § 6-609.

²⁵ 45 N.R.C. 367 (1997).

²⁶ *Id.* at 371.

²⁷ *Id.* at 370.

²⁸ *Id.* at 371.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 376-78.

³³ *Id.* at 392.

³⁴ *Louisiana*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/bkml/table/1.0/en/DEC/00_SF1/DP1/0400000US22 (last visited January 15, 2013).

³⁵ 45 N.R.C. at 371.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 395.

³⁹ *Id.* at 387-88.

⁴⁰ *Id.* at 391.

⁴¹ *Id.*

⁴² *Id.* at 391-92.

⁴³ *Id.* at 412.

⁴⁴ Approximately 90% of the Nuclear Regulatory Commission’s funding is legally mandated to come from fees assessed to nuclear facility operators, creating the incentive for Commission staff to keep the industry open if they are to keep their jobs. See *License Fees*, NRC.GOV, <http://www.nrc.gov/about-nrc/regulatory/licensing/fees.html> (last visited Mar 14, 2013).

⁴⁵ See, e.g., *Radioactive Racism: The History of Targeting Native American Communities with High-Level Atomic Waste Dumps*, PUB. CITIZEN, <http://www.citizen.org/documents/radioactiveracism.pdf> (last visited Nov.20, 2012) (documenting incidents which indicate that Native Americans have “disproportionately borne the brunt of the impacts from the nuclear fuel chain over the past 60 years”).

ON DIVERSITY AND PUBLIC POLICYMAKING:

AN ENVIRONMENTAL JUSTICE PERSPECTIVE

by Patrice Lumumba Simms*

INTRODUCTION

Over the course of the Twentieth Century, the environmental movement and the resulting adoption and implementation of increasingly protective environmental laws have literally changed America's social, political, and physical landscape.¹ However, the character of our policymaking institutions – how they both perceive and fulfill their responsibilities – profoundly affects the nature of the benefits they produce for society. In this regard, it would be a mistake to assume that the personalities, family histories, ethnic and linguistic backgrounds, genders, moral values, sexual orientations, social environments, spiritual or religious traditions, life experiences, and cultural perspectives of the decision-makers themselves do not affect the character of these institutions and therefore the nature and quality of their work.

As many have observed, the environmental movement and the institutions responsible for environmental policymaking have been historically and overwhelmingly the province of the white middle class.² While some have argued that diversity is a “fad” – or worse, a disingenuous aesthetic adornment³ – a wealth of research suggests otherwise.⁴ Indeed, in this author's view, the chronic lack of diversity among environmental policymakers has defined the evolutionary path of the institutions that have sprung to life in the United States over the past century. And the ongoing homogeneity of the environmental policy leadership continues to stand as a significant barrier to the important objectives of current environmental justice efforts.

To be sure, the concerns about diversity among environmental policymakers are far from the only challenge facing the environmental justice community.⁵ It is, however, a critical structural failing that will inhibit both the rate of progress and ultimately the ability to achieve environmental justice goals.

Accordingly, achieving real diversity within the ranks of environmental policy decision-makers, especially at the federal and state level, is absolutely essential to true-up the structural failure that stands in the way of genuine progress toward environmental justice. Part I of this article will briefly describe the history and objectives of the environmental justice movement. Part II will examine the “classic approach” to assessing and addressing environmental concerns and discuss a few of the subtle but inherent and invidious biases that historically have gone unrecognized by classic environmental policymakers. Part III will describe how a more diverse body of decision-makers, who more vividly conceptualize environmental issues at a multidimensional level, can lead to better decisions. Part IV will briefly describe the trajectory of Environmental Protection Agency

(“EPA”) efforts to address diversity and environmental justice. Finally, Part V concludes with a call to accelerate the pace of workforce diversification, to explicitly confront the persistent structural biases of U.S. environmental policy, and to actively pursue forward-looking intentional multidimensionality.

SOME PREFATORY OBSERVATIONS

It is important to clarify two points at the outset of this analysis. First, references to diversity in this article do not relate merely to race. While race is an especially important aspect of diversity in the context of environmental protection – due largely to its historical relationship to environmental burden⁶ – it is by no means the only one. As the introduction above suggests, a host of other aspects of diversity are also important and should be integral to any efforts to diversify the ranks of environmental public policymakers. Because the goal of this article is to illuminate the connection between leadership diversity and environmental justice, however, much of the discussion herein focuses on racial, ethnic, and economic diversity. Second, it should be clear that “low-income” and “non-white” are not synonymous.⁷ Indeed, there are relatively wealthy black communities that have very much fallen victim to neglect or worse,⁸ and there are many poor white communities that suffer under the yoke of disproportionate environmental burdens.⁹ Moreover, my references to “non-white” communities are by no means a euphemistic allusion to communities of people of African descent alone. It is true that members of the African Diaspora in the United States have suffered an especially brutal and repressive brand of injustice.¹⁰ However, across the U.S., Spanish speaking communities, Asian American communities, and Native American communities (to name a few) have each experienced their own species of social injustice, elements of which clearly resonate as environmental justice issues.¹¹

I. ENVIRONMENTAL JUSTICE – A SEARCH FOR RESPECT

As many have observed, the civil rights and environmental movements have strong genealogical ties and, at least to some degree, share a common foundation based on principles of human rights and social justice.¹² As Professor Richard J.

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Lazarus has noted, the roots of environmental justice, civil rights, and traditional environmentalism intertwine (at least in principle) as far back as the late nineteenth century.¹³ In the 1960s, the environmental movement adopted many of the organizing strategies, mobilization techniques, and legal tools of the civil rights movement.¹⁴ The modern core of the classic environmental movement, however, made a shift into the mainstream in a way that the civil rights movement did not, and in doing so has in a sense lost sight of its own ancestry.¹⁵ As a result, the idea that environmental protection must acknowledge and account for its social justice implications has only very recently begun to reliably take root as a core value in the minds of contemporary environmentalists and environmental policymakers.¹⁶

At its core, the environmental justice movement, in its many manifestations, is bound together by a set of principles that emerge from a shared experience of abuse and isolation. As described by Professor Tseming Yang:

Many of the complaints of environmental justice activists can be traced to three deficiencies of the environmental regulatory system: 1) the failure of regulations to provide adequate substantive environmental protections for minorities and the poor, 2) inequality and disproportionality in the distribution of the burdens and benefits of regulations, and 3) the inability of minority groups and the poor to participate actively and effectively in environmental decision-making processes.¹⁷

These grievances range from inadequate water quality standards that leave subsistence fishers under-protected because they consume much higher levels of contaminated fish than the official standards presume, to insufficient protections for farm-workers against toxic pesticides, to the disproportionate concentration of hazardous waste facilities and toxic air emission sources in poor and minority communities.¹⁸ Additionally, environmental justice advocates have long protested the marginalization of poor and minority communities in the decision-making process and the relative inattention of environmental enforcement officials to violations that primarily affect these communities.¹⁹

In the end, the appeal of environmental justice advocates is merely that every community, including poor communities and communities of color, should be valued, respected, and extended the full consideration of environmental policy and the full protection of environmental laws.²⁰

II. CLASSIC ENVIRONMENTALISM – BENEFITS AND BIAS

Most people recognize that environmental protection encompasses an enormous range of federal, state, and local policy decision-making.²¹ It includes, among other things, the creation and enforcement of explicit legal restrictions (such as limits on pollution discharges),²² affirmative procedural obligations (such as pre-decisional environmental analysis),²³ and checks on commercial behavior (such as the mandatory tracking of hazardous materials as they travel through commerce).²⁴ In addition, environmental policymaking frequently involves the targeted protection or enhancement of certain natural resources

and environmental values (such as the creation and management of parks and wildlife areas and the protection of species and habitat).²⁵ Even more broadly, classic environmental considerations typically also include decisions regarding zoning, land use, public infrastructure and the provision of certain services (like storm water management).²⁶

This classic understanding of environmental protection can largely be reduced to three broad categories of policy interest:²⁷

1. **Pollution Amelioration** – This category of protection seeks reductions in ambient concentrations of, and human exposure to, environmental pollutants. This is usually accomplished through the targeted reduction of pollutant releases, such as air pollution emissions and water pollution discharges.²⁸
2. **Hazard and Risk Management** – This category includes efforts to manage materials (including both products and wastes), which might be toxic or otherwise hazardous to human health or the environment. These environmental policy objectives are most often accomplished through concentration and isolation of hazardous constituents (e.g., in the case of hazardous wastes), or restrictions on commercial manufacture and/or use (e.g., in the case of pesticides).²⁹
3. **Resource Protection and Conservation** – This category encompasses efforts to prevent over utilization of natural resources (such as forests, minerals and species) and to preserve natural resources for their aesthetic, economic, recreational, and ecosystem values.

One common response of classic environmental thinking to the generalized concerns of the environmental justice community is that environmental protection functions as a “rising tide that lifts all boats.”³⁰ This notion is deceptively alluring – if the air is cleaner, it is cleaner for everyone; if hazards are better managed, all of society benefits. The argument can be made even more pointedly. For example, in the pollution amelioration context, if EPA adopts air emissions standards for a particular category of stationary sources, and poor and minority communities are most likely to be located in close proximity to such sources, not only should these communities benefit from adoption and implementation of the standards, but they will arguably benefit more than anyone else. By this view, environmental protection is an instrument that already, to a large degree, accomplishes objectives that inure to the benefit of disadvantaged communities.

As comforting as it might be to stop the inquiry there, the inadequacy of this level of examination becomes evident when one views the issue from a community’s perspective. To be sure, the reduction of hazardous air pollutants (“HAPs”) from a particular source category *will* generate benefits, and will generate perhaps the greatest absolute benefits for populations adjacent to such sources.³¹ Understandably however, the questions that communities ask are more direct and more practical: “Will the selected level of control ensure that my family will not suffer harmful effects? Is my community as healthy to live in as any other community?”³² The reality is that EPA and other environmental policymakers typically do not approach programmatic

decision-making with an eye toward ensuring comprehensive protection of every community.³³

Consider again the clean air example above. The Clean Air Act (“CAA”) gives EPA a tremendous degree of discretion in implementing its responsibilities under the CAA’s HAP provisions.³⁴ The agency, approaching its task through the lens of classic environmental problem solving, has adopted some rather narrow views regarding how and to what extent it will evaluate risk when setting standards. For example, with regard to cancer risk, the agency has consistently taken the position that it need not reduce risk to a level at or below one in one million,³⁵ even though the CAA uses that threshold as an explicit trigger for listing source categories and obligating the agency to promulgate standards.³⁶ Rather, EPA has utilized something of a sliding scale, whereby, depending on a host of factors, “acceptable” cancer risks might range as high as one in ten thousand.³⁷ Additionally, despite decades of regulatory experience, EPA has yet to establish a reliable means of assessing cumulative risk from multiple sources.³⁸ Thus, for communities that are surrounded by a variety of pollution sources, whether EPA’s rules will provide protection from the combined emissions of all sources is something of mystery, and not one that the agency meaningfully attempts to solve in most instances.³⁹ This mystery deepens when a multitude of sources emit a cocktail of different HAPs, which might interact in synergistic ways to enhance toxicity.⁴⁰ In addition, many overburdened communities are also exposed to toxins through other routes such as contaminated drinking water, lead paint, and mercury-contaminated fish.⁴¹ Finally, poor people and people of color are more likely to be subject to significant occupational exposures, which further enhance individual risk.⁴²

As a result, while such pollution amelioration standards may serve to reduce risks for communities of color and poor communities, they do not necessarily ensure the protection of a healthy environment for these communities, and they often do not answer the questions asked by our hypothetical community member. In the end, these communities are frequently left in a substantially worse position than wealthier and non-minority communities (which may have almost no remaining risk after regulation). Moreover, it is conceivable that, at least in some situations, overburdened communities might be left even *less* protected in a *relative* sense after implementation of environmental laws. That is, implementation of environmental laws might improve conditions for everyone, but improve conditions more substantially in wealthier communities (perhaps eliminating risks altogether for them), effectively magnifying environmental disparities.⁴³

Hazardous waste management and disposal practices also have a long history of generating disproportionate impacts in poor communities and communities of color.⁴⁴ Again, the classic environmental view provides a compelling justification for our approach to hazardous waste regulation. Following hazardous wastes through the stream of commerce, imposing specific treatment and disposal standards, and ensuring targeted long-term management provides immense benefits to society as a whole.⁴⁵ Highly toxic wastes from commercial and industrial activities,

small businesses, agriculture, the military, academic institutions, and a host of other sources (including household hazardous wastes) are prevented from entering the general environment due to the operation of these important regulatory devices. Nonetheless, as these substances are funneled toward managed disposal, they necessarily become geographically concentrated.⁴⁶ The observations of the environmental justice movement are that when this geographic concentration occurs, it is likely to occur disproportionately in minority or low-income communities.⁴⁷

As a result, with respect to both pollution amelioration and hazard and risk management, there is a tendency toward a “concentration bias” that preferentially benefits white and well-to-do communities, while disproportionately allowing higher pollution concentrations to persist in low-income communities and communities of color.⁴⁸

Finally, once again, with respect to resource protection and conservation, the benefits here also tend to favor communities with means. To be sure, there are reasons for these efforts that are incredibly important, and which serve broad social, economic, and public health and welfare interests.⁴⁹ The immediate benefits that relate to tangible quality of life improvements however, largely inure to the benefit of the middle class and even then predominantly to whites.⁵⁰ One prominent explanation for this phenomenon as it relates to recreational resource use is the marginalization of non-white communities, which results in a “lack of access to recreational sites and economic barriers to participation.”⁵¹ Additionally, even where economics do not stand as a barrier, non-whites may be less likely to utilize recreational resources because of past discrimination that engenders “feelings that people of their ethnic or racial group are unwelcome” or raises “fear of physical harm.”⁵² This is hardly surprising in light of the fact that many recreational resources were expressly or implicitly segregated for most of the Twentieth Century – preventing the development and transmission of cultural traditions that would promote greater use.⁵³

Historically, however, relatively little attention has been paid by classic environmental policymakers to acquiring, enhancing, and maintaining natural resources in or near urban cores, where it would provide the most benefit to poor and non-white communities.⁵⁴ This kind of “benefits allocation bias” reflects an historic tendency, with respect to resource protection and conservation, for the prioritization of public expenditures on environmental resources that favor policy-based objectives benefiting relatively privileged communities while systematically undervaluing the needs of already marginalized communities.

In light of the historic homogeneity of environmental policymakers, it should come as no surprise that “concentration bias” and “benefits allocation bias” have gone (until recently) largely unnoticed, or at least uncorrected.⁵⁵ Arguably, it is unrealistic to expect decision-makers, shaped and hardened within a system that is implicitly biased toward the classic environmental model, to stumble upon an appropriate approach to multidimensional decision-making. Indeed, these problems have persisted largely unabated despite the adoption of statutes like the National Environmental Policy Act (“NEPA”),⁵⁶ and the issuance of an

Executive Order specifically addressing environmental justice (E.O. 12898)⁵⁷ – instruments which on their face appear to provide at least the starting point for a more robust and inclusive decision-making framework.⁵⁸

Regardless of the standards to which we hold our policymakers, as environmental justice advocates have long and persuasively argued,⁵⁹ it is *clearly unjust* for the communities who benefit least from our collective environmental compromise to carry the lion's share of the adverse health burden. It is incumbent on the environmental policymaking apparatus to fix its own house; to nurture a capacity to listen to communities and identify and adopt appropriate solutions to environmental justice problems.

While the environmental justice community rightly continues to clamor for action, ultimately it may not be more voices on the outside calling for better decision-making that is necessary, but a more diverse group of decision-makers on the inside that is required.

III. LEVERAGING DIVERSITY: MAKING ENVIRONMENTAL POLICY WORK FOR EVERYONE

At its most basic level, the greatest challenge of environmental justice implementation is ensuring that lawmakers, policymakers, and implementing officials recognize the legitimacy of the concerns voiced by affected communities and make the appropriate inquiries before committing internal institutional resources toward a particular objective. Those inquiries must be made, however, at the *beginning* of the decision-making process, not after a preferred course of action has already been selected. The problem with a relatively homogeneous body of decision-makers is that their range of vision is restricted by their own experience. As a result, “[o]rganizational routines or standard operating procedures are developed ... and public officials become increasingly resistant to change over time, especially if there is little turnover within the initial cadre of administrators.”⁶⁰ In this way, policy approaches, once adopted, tend to ossify, thus preventing innovation.

Ultimately, despite some initial optimism in the wake of E.O. 12898 and the Council on Environmental Quality's Environmental Justice NEPA Guidance,⁶¹ the environmental justice community has been profoundly disappointed by policy decision-making at the federal level.⁶² In part, this is a product of the fact that once an institutional policy tradition has been formulated it often proves very resistant to change, even in the face of valid observations from external sources.⁶³ This has meant that even with improved procedural access to the decision-making process, environmental justice advocates and community-based organizations frequently find that policy decision-makers (who have already effectively blessed another institutional approach) are unreceptive to their requests and recommendations.

As a practical matter, to effectively counteract institutionalized “concentration bias” and “resource allocation bias,” policymakers must adopt a truly multidimensional decision-making approach – that is, they must effectively view each decision not only from the perspective of the institution's existing policy

traditions, from the vantage point of economic stakeholders, or from the vantage point of classic environmentalism, but also from the perspective of families, communities, workers, educators, civic leaders, and other affected persons. Moreover, they must deploy this multidimensionality from the very *beginning* of the decision-making process, not merely in response to formal comments submitted after a proposed course of action has already been fully formulated.⁶⁴

The following are examples of the types of questions that must inform environmental policy decision-making from the very earliest stages of the process:

- Does the decision-making involve the concentration of hazardous pollutants or the control of ambient concentrations of pollutants or pollutant discharges?
- Have potentially affected communities been included in the initial process of defining the problem and identifying potential solutions?
- Where will the benefits of the action be felt most acutely?
- Does the action fully account for cumulative risk, multiple routes of exposures, and potential synergistic effects?
- Will the action eliminate risks, harms, or impacts for every community?
- Are any remaining risks or impacts likely to be borne by communities that are already overburdened?
- Do potentially affected communities fully understand the nature and degree of all remaining risks?
- What concerns are most acute for potentially affected communities?
- Are any remaining impacts acceptable to the potentially affected communities?
- If the action will create or allocate resources benefits, does it preferentially benefit certain communities?
- Are there comparable benefits available to other communities?
- Are comparable benefits being pursued or enhanced for underserved communities?
- Can access to benefits by underserved communities be enhanced in the decision-making process?

Undoubtedly, a conceptual framework can serve as a valuable methodological aide in the decision-making processes. However, as the failure of NEPA as an effective environmental justice tool demonstrates, ultimately the decision-makers matter. As Justice O'Connor acknowledged in *Wygant v. Jackson Board of Education*, “[t]he exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in that particular community, but also creates mistrust, alienation, and all too often hostility toward the entire process of government.”⁶⁵ While Justice O'Connor's statement was made in the context of “[d]iscrimination by government,”⁶⁶ it matters little if the exclusion of people of color (and others) is the result of overt discrimination or not; the effect is the same. And, certainly these observations have been borne out time and again in the environmental justice context.⁶⁷

Diversity-related barriers to advancing environmental justice principles cannot be overcome merely by recruiting a

more diverse body of decision-makers (although that is where it must necessarily begin). Rather, environmental policymaking institutions must manifest a commitment to multidimensional decision-making by cultivating, retaining and promoting not just a diverse workforce but also a diverse collection of perspectives.⁶⁸ When it comes to improving the ethical responsiveness of decision-making, valuing differences in *perspective* as a vital institutional asset is just as important as valuing physical or cultural differences such as race, religion, gender, sexual orientation, or disability. To truly benefit from a diverse workforce, and to successfully cultivate a meaningfully diverse leadership, it is necessary to *specifically encourage* the articulation of different perspectives; to pull different viewpoints out from the shadows.⁶⁹

Indeed, many professionals of color and other visible minorities feel overtly or implicitly compelled to hide their viewpoints in a professional environment, and mask any obviously atypical perspectives behind a façade of conformity, often due to an unspoken (but typically not expressly repudiated) expectation of bias against unconventional viewpoints.⁷⁰ In this sense, if diverse perspectives are not actively and openly encouraged, institutional assimilation as a survival mechanism can undermine the benefit of whatever diversity has been achieved. Thus, leveraging the benefits of diversity is not just a challenge of recruitment, retention, and promotion; it is also explicitly a challenge of inclusive management, which must actively pursue intentional multidimensionality.⁷¹

The idea of pursuing a broader set of perspectives among environmental policymakers has a pedigree reaching at least as far back as the early 1990s.⁷² As Richard Lazarus explained:

The need for ‘better understanding’ should not, however, be confined to formal empirical investigation. It must also include efforts aimed at increasing awareness among both the general public and policymakers about the potential for, and impact of, distributional inequities. As described by one minority environmentalist, who warned against addressing the problem by simply including more minority representation, ‘[t]here is a need for diversity *not only in the makeup of the organizations, but also in how these [environmental] issues are looked at.* . . . For environmental groups to consider issues like wetlands, global warming, and wilderness protection as being the only environmental issues flies in the face of reality.’⁷³

In essence, in order to more meaningfully appreciate and consider issues that have immediacy to communities outside the core of classic environmentalism, including for example people of color, poor communities, immigrant communities, language minorities, and Tribes, policymakers must be able to meaningfully engage in a robust internal dialogue on such issues. By necessity, this requires a range of perspectives that can facilitate thinking (and talking) outside the box of classic environmentalism and that can shake off the constraints of longstanding institutional policy traditions.⁷⁴

A NOTE ON AFFIRMATIVE ACTION

While the intent of this article is not to argue for so called “affirmative action” measures in the hiring practices of entities with environmental responsibilities, it would be a disservice not to at least mention this critical point. After all, the legality of race-conscious decision-making is once again before the Supreme Court.⁷⁵ When considered in light of cases like *Bakke* and *Grutter*, which held (among other things) that diversity may constitute a compelling interest that can justify narrowly tailored race-conscious decision-making in university admissions,⁷⁶ there seems good reason to question why such diversity would not also constitute a compelling interest in the context of certain government hiring. These prior cases relied on the proposition that a diverse classroom enhances the educational experience by creating an environment in which a more “robust exchange of ideas” can occur.⁷⁷ It seems incongruous that the government’s interest would somehow be *less* compelling when the benefits of that more robust dialogue (and of overcoming racial stereotypes) involve manifestly higher stakes – i.e., the formulation of official policy that will directly and profoundly affect the health and well-being of communities.⁷⁸ Full exploration of this question, however, is beyond the scope of this article.⁷⁹

IV. FEDERAL DIVERSITY AND ENVIRONMENTAL JUSTICE EFFORTS: FITS AND STARTS

By and large, environmental policymaking agencies have professed an appreciation for diversity since at least the early 1990s. In 1992, after convening a task force to examine diversity issues, EPA adopted a strategy document to address workforce diversity within the agency.⁸⁰ Perhaps not coincidentally, EPA’s 1992 Diversity Strategy document was released the same year as its report entitled “Environmental Equity: Reducing Risk for All Communities.”⁸¹ This was among the agency’s first efforts to directly confront the issue of environmental justice. Additionally, the agency pursued more concrete action; in 1992 creating the Office of Environmental Justice (“OEJ”) and in 1993 commissioning the National Environmental Justice Advisory Council (“NEJAC”) – an advisory body created under the authority of the Federal Advisory Committee Act (“FACA”).⁸² In 1995, pursuant to the 1994 Executive Order on Environmental Justice (E.O. 12898), the agency adopted an environmental justice strategy document (as did other federal agencies), and began to participate as a member of the Interagency Working Group (“IWG”) on Environmental Justice.⁸³

During the period of the mid- to late-1990s, federal efforts to address environmental justice concerns, while clearly in their infancy, appeared genuine. Communication with communities improved, at least marginally, and under pressure from environmental justice advocates, the EPA began to explore legal mechanisms to accomplish environmental justice goals.⁸⁴ This progress came to an abrupt halt at the end of 2000, with the election of President George W. Bush and the transition to an administration that had chilly relations, at best, with the communities representing environmental justice interests. By the end of the Bush administration, despite an ongoing commitment among

OEJ staff, much of the early momentum on environmental justice had been lost; and despite almost two decades of implementation, realization of EPA's "bold plan" to increase agency diversity remained elusive, especially among the ranks of senior decision-makers.⁸⁵

It is noteworthy, however, that in the few short years of Barack Obama's Presidential administration and Lisa Jackson's tenure as Administrator of the U.S. EPA (the first African Americans to hold these respective positions), a conspicuous new effort to engage traditionally marginalized communities of all stripes in environmental justice policy discussions and renewed efforts toward greater diversity among the ranks of government policymakers has emerged. This has been reflected in initiatives such as the Partnership for Sustainable Communities, the development of EPA's Plan EJ 2014, the reinvigoration of the Interagency Working Group on Environmental Justice, the convening of regular Environmental Justice Community Outreach Teleconferences, and the commissioning of several reports evaluating and proposing reforms to EPA's Office of Civil Rights.⁸⁶ Among other things, the renewed focus on diversity has included the issuance of a 2011 Executive Order on federal workforce diversity.⁸⁷

Indeed, one of Administrator Jackson's specific priorities for EPA includes the following:

Expanding the Conversation on Environmentalism and Working for Environmental Justice: We have begun a new era of outreach and protection for communities historically underrepresented in EPA decision-making. We are building strong working relationships with tribes, communities of color, economically distressed cities and towns, young people and others, but this is just a start. We must include environmental justice principles in all of our decisions. *This is an area that calls for innovation and bold thinking, and I am challenging all of our employees to bring vision and creativity to our programs.*⁸⁸

This statement echoes at least one of the themes of this article – the significance of the connection between the *policymakers* (EPA's "employees") and the policies being pursued. Ultimately, to succeed in efforts to bring about an era in which environmental protection leaves no community behind, EPA and other environmental policymaking institutions must be deliberate in their efforts to draw upon the full diversity of perspectives and experiences of what must become an increasingly diverse workforce. Top-down efforts, without corresponding changes in institutional composition and a deliberate embrace of multidimensional decision-making approaches, are bound to produce results that are limited in both duration and efficacy. Success will require nothing short of a willingness to fundamentally rethink the model of classic environmentalism that has heretofore provided the blueprint for existing institutional structures.

V. CONCLUSION: TIME TO GET IT RIGHT

At EPA and around the country, in both government agencies and environmental nonprofits, as the old guard—those heroic stalwarts of classic environmentalism—continues to retire, we have a moment of opportunity. While extending to them our deepest gratitude for their vision and commitment, we must chart an important new course. We must reunite the estranged descendants of the environmental and civil rights movements and reaffirm environmentalism as a peoples' struggle.

Armed with a healthy variety of perspectives that have been encouraged rather than squashed, institutional leadership will be better able to genuinely and effectively address the challenges of environmental justice. The validation of principles of community self-determination and the elimination of significant environmental health disparities may well be the legacy of the next generation of environmental policy leadership. Getting there, however, will require that we re-conceptualize, to some extent, the structure and function of our policymaking institutions. This will take a transformation from within (and of course continuing vigorous advocacy from without) and will depend, at least in part, upon an enduring commitment to real diversity and a deliberate embrace of multidimensional approaches to decision-making.



Endnotes: ON DIVERSITY AND PUBLIC POLICYMAKING: AN ENVIRONMENTAL JUSTICE PERSPECTIVE

¹ This is true to the extent that "environmentalism in the United States appears to have achieved a steady state, with law and social norms mutually reinforcing each other to maintain ... a relatively stable commitment to environmental protection." Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 88 (2001).

² See Dorceta E. Taylor, *Diversity and the Environment: Myth-Making and the Status of Minorities in the Field*, 15 RES. IN SOC. PROBS. & PUB. POL'Y 89, 89-139 (2008) (discussing the evolution of research on diversity and the environment); KATHLYN GAY, POLLUTION AND THE POWERLESS: THE ENVIRONMENTAL JUSTICE MOVEMENT 18 (1994); Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 517

(1992) (noting how environmental inequity originates in the indifference of traditionally white environmental groups to issues of race and equity); Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 278 n.30 (1993) (noting historical examples where traditionally white environmental groups failed to hire people of color and pursue environmental protection in urban areas); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 819-20 (1993) (noting the lack of representation of minority groups relating to environmental protection issues).

³ See *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., dissenting).

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ON FERTILE GROUND:

THE ENVIRONMENTAL AND REPRODUCTIVE JUSTICE MOVEMENTS AS A UNIFIED FORCE FOR REFORMING TOXIC CHEMICAL REGULATION

By Angie McCarthy*

The Environmental Justice (“EJ”) and Reproductive Justice (“RJ”) movements share important common ground: They aim to improve socioeconomic conditions for those living in poverty, increase involvement of traditionally marginalized communities in policy decisions affecting them, and recognize the right of women to have healthy pregnancies and of parents to raise healthy children.¹ The time is ripe for the EJ and RJ movements to collaborate² and harness their joint potential to effect policy reform and ensure that vulnerable women are not exposed to toxic chemicals that harm their reproductive health.

In the United States, the Toxic Substance Control Act is the primary law ensuring use of safe chemicals,³ but a lack of Congressional attention since 1976 has made it almost impossible for the EPA to require testing or regulation of chemicals based on their adverse health effects.⁴ This inaction’s effect is highlighted in studies that show that people who live and work in the most polluted environments in the United States are people of color and the poor.⁵ Further, because women of color are more likely than other Americans to be low-wage workers, they are “disproportionately exposed to . . . hazardous chemicals [in the workplace], including agricultural pesticides, home cleaning products, industrial cleaning products, and chemicals used in hair and nail salons.”⁶

Despite the clear links between toxic chemical exposure and harm to reproductive health, reproductive rights organizations have traditionally ignored the EJ movement.⁷ Today, the RJ movement’s expansion from a rights-based framework to a broader justice-based framework provides RJ advocates a new opportunity to join with EJ advocates. The new RJ framework encompasses “the right to parent [children] in safe and healthy environment[s] . . . [and] is based on the human right to make personal decisions about one’s life, and [government and society’s obligation] to ensure that . . . conditions are suitable for implementing one’s decisions.”⁸ Similarly, the EJ movement

calls for “the fair treatment and meaningful involvement of all people . . . with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁹

The movements’ shared policy objectives and commitment to community-based intervention creates the perfect atmosphere for movement building and joint advocacy. To date there have been several successful collaborations, including efforts to: “regulate, disclose and eliminate toxic ingredients in consumer products,”¹⁰ “expand chemical reform campaigns to include workplace exposure,”¹¹ and integrate gender justice into climate change policy analysis.¹² For example, an EJ/RJ collaboration in California yielded a successful education campaign on the harmful impact of toxic chemicals used in nail salons on Asian women’s reproductive health, which in turn led to legislative victories.¹³

By building on this momentum, EJ and RJ advocates have the opportunity to come together to pass strong legislation reforming outdated toxic chemicals regulations. Currently, two such bills are pending before Congress: The Toxic Chemicals Safety Act of 2010¹⁴ and The Safe Chemicals Act of 2011.¹⁵ Both bills aim to improve reproductive health by requiring that all chemicals meet a safety standard that will protect vulnerable populations, including pregnant women and workers.¹⁶ They also include provisions to reduce disproportionate toxic chemical exposure faced by people of color, low-income individuals, and indigenous communities.¹⁷ RJ and EJ movements should recognize this legislation’s contribution to their shared goals and join in support of its passage. Doing so will move our government and society a necessary step closer to recognizing the universal right of “every woman to bear and raise healthy children and live in healthy communities.”¹⁸



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Endnotes: On Fertile Ground: The Environmental and Reproductive Justice Movements as a Unified Force for Reforming Toxic Chemical Regulation

¹ *If You Really Care About Environmental Justice, You Should Care About Reproductive Justice!*, LAW STUDENTS FOR REPRODUCTIVE JUSTICE 1 (2012), http://www.nwlc.org/sites/default/files/pdfs/enviromental_justice_reproductive_justice_factsheet_10-9-12.pdf.

² *Executive Summary: Gender, Organizing, and Movement Building at the Intersection of Environmental Justice and Reproductive Justice*, MOVEMENT

STRATEGY CENTER 4 (2000), http://movementbuilding.movementstrategy.org/media/docs/9946_FertileGround_ExecSum.pdf.

³ 15 U.S.C. § 2601 (1976).

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A LEGAL STANDARD FOR POST-COLONIAL LAND REFORM

by Amelia Chizwala Peterson*

[T]he increase of lands, and the right employing of them, is the great art of government: and that prince, who shall be so wise and godlike, as by established laws of liberty to secure protection and encouragement to the honest industry of mankind, against oppression of power and narrowness of party, will quickly be too hard for his neighbor...

—John Locke¹

We live in a world of globalizing processes that impose particular limitations on any one State's capacity to do as it pleases under the cloak of sovereign independence, particularly in economic and human rights matters.

—Ben Chigara²

INTRODUCTION

The violent land redistribution program of a small sub-Saharan country made international headlines twelve years ago before quickly bowing off the world stage.³ Thousands of violently displaced Zimbabwean farmers were forced to settle into new lives in neighboring African countries, either as refugee immigrants or as hopeful exiles holding on to a desire that they would one day resume their livelihood as farmers in their home country.⁴ The agrarian economy they once supported had crashed and hundreds of thousands of workers were displaced.⁵ Today, a grave, unaddressed question lingers in the psyche of our ordered society—what happens to property rights in the context of post-colonial land redistribution?

Post-colonial land reform is a necessity,⁶ but its design and implementation invoke questions about the bounds of government authority to reshape the idea of the individual right to property, an issue traditionally left to domestic governance under the principles of sovereignty.⁷ Over the last decade, scholars scathingly condemned Zimbabwe's fast track land reform, citing violations of human rights and property law.⁸ Yet, property rights in the context of post-colonial land redistribution have never been fully articulated,⁹ and no comprehensive standard has been offered to appraise post-colonial governments' land reform policies, which are constrained by international norms.¹⁰

This article identifies a conceptual gap in the traditional (both classical and customary) justifications for property rights in the context of correcting colonially established land imbalances, and proposes a legal standard based on five core elements extracted from human rights law and universally accepted international norms concerning property. To be legal under international norms, a land reform policy must: (1) stem from

a legitimate public purpose; (2) be in accordance with law; (3) be proportional to the public purpose; (4) guarantee a non-discriminatory right to own land; and (5) compensate incumbent landowners where elements of the formula are violated.¹¹ The land reform formula proposed here is grounded in first generation civil and political human rights, making it a practical standard for any country to adopt, regardless of its level of economic and institutional development.

Land rights are not directly protected as human rights, although they are occasionally mentioned by human rights instruments.¹² The bulk of human rights law establishes no other criteria in order for a claimant to qualify as an intended beneficiary of the law; protection of rights attaches simply by virtue of the claimant being human.¹³ However, while many intuitively believe that both those who have enjoyed access to property rights in land and those who have been marginalized and prevented by law from enjoying those rights should have *some* protected property rights under the new regime, the nature of the right—particularly the property rights of the group that benefitted from exclusionary property laws—seems difficult, if not uncomfortable, to articulate.

Part I of this article introduces modern post-colonial land reform and the idea of property as it relates to land reform by tracing both classical and customary theories of property. The Zimbabwe land reform platform, commenced in the late 1990s, presents a relatively recent example of policy-driven land redistribution.¹⁴ Part II examines international law concerning property and land rights to demonstrate that land reform *is* captured by the body of human rights law which addresses procedural rights—first-generation, or civil and political (“CP”) rights. Part III presents the confluence of CP rights principles, provisions on property in human rights, and judicial interpretations of the idea of property, which together establish the legal standard proposed here—the outer bounds of the power of sovereigns to reform property rights in land post-colonization.

Articulating the legal bounds of land redistribution is more critical today than it ever was.¹⁵ The legal standard proposed here is aimed at: (1) protecting the universal idea of property; (2) advancing the right and capacity of post-colonial governments to develop land as a natural resource; and: (3) providing a clear skeletal framework for legally and morally justifiable land

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reform for those regions of the world contemplating wide-scale land transfer programs.

I. THEORETICAL FOUNDATIONS FOR POST-COLONIAL LAND REFORM

Agrarian nations with a history of colonization are on the verge of imploding under the weight of unaddressed or poorly addressed needs for land reform.¹⁶ Land acquisition and redistribution have received little attention from international scholars, and yet they arguably pose the most direct threat to development for post-colonial States. In 2004, Ben Chigara framed the Southern Africa Development Cooperation (“SADC”) land conflict as an issue which threatens social, political and economic disintegration of some SADC member States and destabilization of the region as a whole.¹⁷ This need for careful resolution of post-colonial land issues is not unique to sub-Saharan Africa.¹⁸ Latin America and Asia are also grappling with land reform issues.¹⁹ The justifications for land reform are primarily social, economic and political and include, *inter alia*: the need to right historical wrongs; the need to rationalize distortions in land relations, particularly in regards to tenure and distribution; the need to resolve internal conflicts arising from inefficiencies within the existing tenure relations; and the desire to “modernize” indigenous tenure as a means of stimulating agrarian development.²⁰

The re-appropriation of land and the idea of property rights could not be more adverse to each other. Regardless of its necessity, land redistribution stands in opposition to ideas rooted in classical theories of property and customary law, which, to varying degrees, conceptualize property as an individual or common right to own, hold or use land to the exclusion of all others.²¹ Neither classical theories nor customary rights approaches to property anticipate the modern need to legitimately dispossess a land-wealthy few and transfer land to previously marginalized groups.

A variety of philosophical traditions guide scholars and judges in choosing a normative approach to what the rules of property law are and should be.²² *Justice, liberty, or rights-based* approaches focus on the obligation to pursue fairness when selecting the applicable law in a given case.²³ The justice approach arises from the notion that law should protect individual rights.²⁴ This approach to property focuses on individual autonomy, human dignity, human flourishing, distributive fairness, social justice, human needs and other related norms.²⁵ Rights-based approaches to property propose that someone has an obligation to protect or preserve the property right.²⁶ These approaches can be easily used to support a land redistribution program that simply orders total restitution, such as full dispossession of land-holders whose estates can be traced to colonial conquest. In this context of land reapportionment, who has the obligation to protect the right? Should the government pay for the land on behalf of the dispossessed, as was the case with the first major phase of land redistribution in Zimbabwe?²⁷ Or does that obligation fall on another—perhaps the public at large?

A second approach to property is the *utilitarian* or *consequentialist* approach, which creates rules of property based

not on their inherent goodness or fairness, but on the societal consequences they produce.²⁸ The goal of this strand of property theory is to promote the general welfare, maximize wealth, or increase social utility and efficiency.²⁹ If the economic snapshot of Zimbabwe in the colonial 1970s is compared with the 2000s after the fast-track land reform program, the utilitarian theories produce the perverse result of suggesting that land should not have been redistributed at all.³⁰ This theory would vest in the commercial farmer of European descent full rights to the land simply by virtue of the farmer being in the best position to put the land to beneficial use. However, establishing a property right to land for the beneficiaries of colonization simply because they had the wealth, capital and financial resources to engage in large-scale commercial farming is to place the notion of property on shifting soil. How does one account for the fact that colonial law, such as the Land Tenure Act in Zimbabwe,³¹ excluded the indigenous from owning land, even if one had the wealth and knowledge to contribute to the agricultural output on a large scale?³² The utilitarian theory of property therefore fails to support a sensible legal standard without raising some insurmountable equity questions.

A few traditional theories of property law take a more direct approach to the idea of property by creating justificatory norms to ground the definition and allocation of property rights. Those most relevant to the theoretical foundations of land reform are: (1) *first possession* as a source of property rights—including conquest; (2) *labor* (desert); (3) *personality and human flourishing*; (4) *efficiency*; (5) *justified expectations*; and (6) *distributive justice*.³³ The possession theory of the source protects possessors from claims by anyone but the title holder, and in some cases even the title holder will not be able to dispossess a possessor.³⁴ Commonly held norms that justify the possession theory include protection of rights and efficiency maximization.³⁵

Although these are attractive norms, possession in the context of post-colonial land distribution is highly problematic.³⁶ Land in Zimbabwe was obtained by a combination of coerced agreements, force and/or conquest.³⁷ Land allocation during colonial rule did not allow black Africans to make land claims. The Land Apportionment Act of 1931 strengthened the white settlers’ expropriation of land owned by indigenous people.³⁸ Under a system that designated land in terms of who lived on and farmed it, the legislation allocated approximately 51% of land to about 3,000 white farmers, confining 1.2 million indigenous Africans to Native Reserves that constituted 30% of the country’s poorest agricultural land.³⁹ Indigenous Africans could not own land classified as “white” in the apartheid system established by this and subsequent laws, and those who already owned or lived on designated lands were evicted *en masse* and relocated to Native Reserves.⁴⁰ As evidenced by Zimbabwe’s experience, the distributive implications of the possession theory make it an insufficient theory on which to base the new allocation of land rights under a post-colonial redistribution program.

The property theory that comes closest to providing a sound theoretical foundation for property rights in the context of land redistribution is John Locke’s *labor* theory of property.

In his Second Treatise of Government, Locke posited: “As much land as man tills, plants, improves, cultivates, and can use the product of, so much is his *property*. He by his labor does, as it were, inclose [sic] it from the common.”⁴¹ Locke declared that “[w]hatsoever then [a person] removes out of the state that nature has provided and left it in, he has mixed his *labor* with, and joined to it something that is his own, and thereby makes it his property.”⁴² This “mixing” of one’s labor with land creates Locke’s idea of property. Locke’s labor theory went on to explicitly constrain property rights by requiring that the person claiming property—by virtue of his labor “mixed” in with the land—not take so much of the land that others would be prohibited from equally utilizing with the land.⁴³ The conditions in post-colonial Africa, with its historical legal barriers to land access, meant that indigenous Africans did not have access to land of the same quality as settlers.⁴⁴ Therefore, the natural rights theory provides a theoretical starting point for post-colonial land reform because it rejects the absoluteness of the other classical theories and refuses to allocate property rights on the basis of who has the better guns. To Locke, the post-colonial commercial farmers’ agrarian efforts, while establishing property rights in the land, are valid only to the extent that their exercise does not deny other individuals the opportunity to create for themselves the same type of property rights.⁴⁵

While they are useful in framing the conceptual gap in property rights theory as applied to post-colonial land redistribution, classical theories of property are further confounded by the historical dominance of the customary ideas of property in Africa, Asia and Latin America. Under the customs and traditions of many countries that have undergone or are currently engaged in land redistribution, the idea of property, especially where applied to land, was largely communitarian.⁴⁶ Land was owned by the entire community, with the existence of merely temporary claims.⁴⁷ This system of communitarian holding patterns established the “law” prior to colonization.⁴⁸ Customary patterns of land tenure stand in stark contrast to the settlers’ idea of specifically identified, titled and exclusive land rights.

Customary land tenure still influences holding patterns today. For example, to many indigenous populations of Latin America, the territory is considered to be a communal possession of a distinct people or ethno-linguistic group.⁴⁹ Customary norms stipulate that the territory is to be shared for the benefit of the community and prohibit alienation of the whole or any portion of it (no matter how small) to any individual, family, community or other association.⁵⁰ Unlike the civil codes of many Latin American countries, which dictate that land ownership rights derive exclusively from the social function of rural property, when put to agricultural use, indigenous customary laws view exclusive rights of possession flowing from use, occupancy, practical and spiritual knowledge, and the religious and spiritual ties to the land.⁵¹ In many indigenous societies, traditional territorial possession and rights to share in and benefit from a homeland are derived from an intimate collective and individual knowledge of the totality of a particular territory or a specific part of that territory.⁵²

Although the model is extreme, Zimbabwe’s fast-track land reform program provides a recent canvas to articulate a legal standard. Basic principles of fairness suggest that those who possessed and maintained their commercial farming estates through a land-grab executed by their ancestors have no right in the property just as a thief has no property interest in the chattel of another by simply converting it. Natural notions of corrective justice and restitution support the full return of land into the hands of the historically disenfranchised group, regardless of the moral or economic judgments we may make about economic viability of such an undertaking. Under traditional ideas of property, we are left in a world of land reform triage—insufficient principles on which to base the otherwise indispensable need for land redistribution and little guidance on how to implement this invaluable undertaking while upholding the idea of property. This theoretical gap is unsustainable given the urgencies faced by post-colonial governments to resolve critical issues of land distribution. It demands that our post-modern legal order creatively structure an adaptive legal standard for land reform.

Although international law is traditionally viewed as governing the relationship between sovereigns, and largely abstains from domestic issues such as individual property rights,⁵³ an exploration of international law reveals a robust body of legal and moral norms fit for articulating such a standard. These legal and moral norms suggest that, in a land redistribution program, stripping land rights from any group, even when that group benefitted from a system weighted in its favor, conflicts with universal principles found in human rights law and in general principles of international law.⁵⁴

II. LAND REFORM & RIGHTS UNDER INTERNATIONAL LAW

Article 17 of the Universal Declaration of Human Rights (“UDHR”) explicitly protects the right to property. It states:

- (1) Everyone has the right to own property alone as well as in association with others.
- (2) No one shall be arbitrarily deprived of his property.⁵⁵

It has been posited that the UDHR’s human right to own property is not a right to specific pieces of property but a general right to hold *adequate* property.⁵⁶ Land is fundamental to the attainment or protection of a variety of other basic human rights, such as the right to life.⁵⁷ Therefore, although no international right to land is explicitly guaranteed in the international legal framework, there is an emerging international norm recognizing that a post-colonial government’s sovereign right to redistribute land violates an international moral code of property rights when it fails to recognize the five elements articulated herein.⁵⁸

THE (NON-EXISTENT) HUMAN RIGHT TO LAND

The documents forming the pillars of human rights law all frame the concept of human rights in terms of human dignity⁵⁹ and acknowledge the human personality (as opposed to the rights of groups, or “peoples.”)⁶⁰ Without this focus on individual rights, personhood unravels at the hands of domestic law and unbridled exercises of state sovereignty. Human rights principles operate to take unfettered power over individuals out

of the hands of States. Today, human rights concepts have crystallized into law, creating binding obligations on governments despite the backdrop of Westphalia and ideas of sovereignty.⁶¹

Yet, human rights law represents ideals over which conflicting groups will continue to struggle.⁶² On one hand, human rights activists and scholars push for a definition of human rights based on a broad and inclusive conception of what it means to be “human” and stress a wide range of moral claims to which humans are entitled.⁶³ On the other hand, states, groups, and individuals who are resistant to a progressive human rights agenda commonly define humanity in more narrow and limited ways.⁶⁴ Legal distinctions are made between fundamental human rights and other rights, with fundamental rights being perceived as elementary or supra-positive in that their validity is not dependent on their acceptance by the subjects of law.⁶⁵ These fundamental rights are seen as the foundation of the international community.⁶⁶ Consequently, the right to own a piece of land is not classified as a fundamental human right. However, the international norms protecting human dignity underscore the existence of a legal standard for the preservation of property rights under post-colonial land reform. At the heart of these norms is procedural due process.

PROCEDURE UNDER CIVIL & POLITICAL RIGHTS & NORMS

The International Convention on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) embody the so-called first generation and second generation human rights, respectively.⁶⁷ A brief overview of the evolutionary classes of human rights reveals that first generation, or civil and political (“CP”), rights require governments adopting a policy of post-colonial land redistribution to extend broad procedural protections to the group whose land is indentified for annexation.

The ICCPR governs the protection of the human interest in bodily integrity, self-determination and human dignity.⁶⁸ The enumerated rights under the ICCPR each stem from the idea of due process of law.⁶⁹ Due process is perceived as playing a significant role in fulfilling the universal need for human dignity. Access to enumerated protection and procedure can be afforded all human beings with less intrusion on the sovereignty of states than a substantive obligation would impose.⁷⁰ Therefore, like the Universal Declaration of Human Rights, the ICCPR presumes the universal applicability of the norms it articulates.⁷¹ The body of CP rights envisages a system in which individuals are accorded specific minimal procedural protections in the determination of their legal entitlements.⁷² It does not provide access to substantive entitlements. However, when those entitlements are re-ordered by government, the CP norms trigger the state’s duty to align the procedural mechanism employed to universal principles articulated in the spirit and letter of the ICCPR. Several of these CP rights are framed in absolute terms in the Covenant,⁷³ which arises out of the fundamental nature of the protected rights. For example, Article 25 creates an obligation for states to provide every citizen the right and the opportunity, “without any of the distinctions mentioned in article 2 and

without unreasonable restrictions to take part in the conduct of public affairs, *inter alia*.”⁷⁴

The ICESCR embodies second generation economic, social, and cultural rights that scholars have characterized as “programmatic and promotional.”⁷⁵ According to Anton and Shelton, despite the fact that within the U.N. there is an almost universal acceptance of the theoretical “indivisible and interdependent” nature of the two sets of human rights, the reality is that economic, social, and cultural (“ESC”) rights are largely ignored.⁷⁶ The ESC body of international human rights differs in substance from CP rights and meets greater opposition from individual states because of its deeper interface with issues that, even in a world governed by the Universal Declaration of Human Rights, are traditionally seen as domestic prerogatives. For a flavor of the types of rights guaranteed under the ICESCR, see articles 6,⁷⁷ 7,⁷⁸ 8,⁷⁹ 9,⁸⁰ 10,⁸¹ 11,⁸² 12,⁸³ 13,⁸⁴ and 14.⁸⁵

Specific rights to land as property have been left out of all major treaties. This is not surprising, given that land is such a central aspect of sovereignty that it is even part of the definition of the nation-state.⁸⁶ Land law is generally an issue over which states exercise full territorial sovereignty.⁸⁷ Nevertheless, the ICCPR and the ICESCR impose procedural and substantive minima, which states may not ignore in recognition of their obligations under international law. Specifically the ICCPR guarantees everyone, including holders of land seized under a land redistribution policy, the *right to an effective remedy* (even against state actors) the *right to a judicial remedy*, and the *right of the individual to retain enough property for an adequate standard of living*.⁸⁸ Derogation from ICCPR obligations is permitted under very narrow circumstances characterized by public emergency.⁸⁹

Despite the fact that primary human rights instruments avoid directly addressing property rights, other sources of international law take the subject head-on, but only for the protection of narrowly defined groups. These international instruments are instructive in identifying the elements of a legal standard for land reform because they are an example of instances where international law reaches beyond the sovereign barrier to domestic land issues. Explicit rights to land have been developed in two areas of international human rights law: the rights of indigenous peoples and the rights of women.⁹⁰ These instruments suggest a growing willingness of sovereign states to cede absolute control of at least some issues of property law and policy, and also point to the universal importance of both *access* and *tenure*.

EXPLICITLY RECOGNIZED LAND RIGHTS

The International Labor Organization Convention 169 on Indigenous and Tribal Peoples (“Convention 169”) is the only legally binding international instrument related to the rights of indigenous peoples.⁹¹ Convention 169 establishes the right of indigenous peoples to “exercise control, to the extent possible, over their own economic, social and cultural development” in a number of areas.⁹² It includes specific sections on land and requires parties to identify lands traditionally occupied by indigenous peoples and guarantees ownership and protection of

rights thereon.⁹³ In essence, “measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.”⁹⁴ Convention 169 also requires the provision of legal procedures to resolve land claims, establishes rights over natural resources, and protects against forced removal.⁹⁵

A second explicit articulation of land rights was generated under the UN framework and garners much wider support than Convention 169, but it is not a legally binding instrument.⁹⁶ The UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) states that “indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁹⁷ Indigenous people have a right to own and develop resources on their land, a “right to redress . . . for the lands, territories and resources which they have traditionally owned or otherwise occupied or used and which have been confiscated, taken, occupied, used or damaged.”⁹⁸ The Declaration confirms similar principles to those contained in Convention 169. Both the Convention and the Declaration emphasize consultation, participation and free, prior, and informed consent where government policy affects lands occupied by indigenous peoples.⁹⁹

Implicit in both Convention 168 and UNDRIP is the underlying notion that human rights law limits the type of policies a government may use to redefine land rights. The narrow application of these articulations exposes the fact that the power imbalance between government and individuals (or groups) has historically disadvantaged the poor and displaced people with deep historical connections to the geographic location from which they are expelled. Modern examples of government altering the idea of property through land reform call for the same body of law to prevent excessive, dehumanizing land reform policies. While it can be agreed that land rights are not in themselves human rights as they lack the inalienability of self-determination or the fundamental nature of bodily integrity, human rights norms provide the core elements of a new property right under post-colonial land reform.

THE IDEA OF PROPERTY IN HUMAN RIGHTS JURISPRUDENCE

On May 27, 2002, the African Commission on Human Rights and Peoples’ Rights (“African Commission”) became the first human rights adjudicatory organ to find the existence of a sweeping “human right to a healthy environment.”¹⁰⁰ By broadly interpreting Article 24 of the African Charter on Human and Peoples’ Rights (“African Charter”) in *SERAC v. Nigeria*, the Commission seemed to herald a new era in the liberalization of human rights.¹⁰¹ It has been described as a sweeping decision affirming the duties of African states to ensure respect for economic, social and cultural rights.¹⁰² At the time that *SERAC v. Nigeria* was decided, there was much optimism that the decision offered a “blueprint for merging environmental protection, economic development, and guarantee of human rights.”¹⁰³ But most importantly, the African Commission’s *SERAC* decision suggested a liberal interpretation of the rights protected under

the African Charter, opening the door to the possibility of clothing other rights under the charter with broad protection under regional and international law. Article 14 of the same Charter directly protects a human right to property, except under very specific circumstances.¹⁰⁴

The African Commission on Human Rights has spoken consistently in two cases invoking land interests in the context of human rights, but not in the context of land redistribution.¹⁰⁵ *Endorois v. Kenya* is of paramount importance in understanding how the severity of the conflict between human rights and public policies alter property rights in land. In that case, the African Commission ruled on a complaint filed by the Center for Minority Rights Development and others, on behalf of the Endorois community, an indigenous community of 60,000 people living in the Lake Bogoria area.¹⁰⁶ The complaint alleged that the Government of Kenya violated the African Charter, the Constitution of Kenya, and international law by forcibly removing the Endorois from their ancestral lands without prior consultation and without adequate or effective compensation.¹⁰⁷ The plaintiffs alleged that the displacement disrupted their community’s pastoral enterprise, interfering with their primary economic livelihood and preventing them from practicing their religion and culture.¹⁰⁸ They sought a declaration by the African Commission that the Republic of Kenya violated Articles 8, 14, 17, 21, and 22 of the African Charter.¹⁰⁹ The plaintiffs demanded (1) restitution of their land, with legal title and clear demarcation, and (2) compensation to the community for all the losses suffered through the loss of property, development and natural resources, as well as the loss of freedom to practice their religion and culture.¹¹⁰

The Kenyan government argued that the land on which the Endorois lived was designated as “Trust Land.”¹¹¹ Further, under the Kenyan Constitution, Trust Lands could be alienated or set apart as government land for government or private purposes, extinguishing any interests previously vested in any tribe, group, family or individual under African customary law.¹¹² The African Commission relied on its own jurisprudence and on international case law to resolve the conflict,¹¹³ condemning the conduct of the government, and finding that restricting the Endorois from free access to their territory fell below internationally recognized norms.¹¹⁴

The African Commission pointed to Articles 26 and 27 of the UN Declaration on Indigenous Peoples to stress that indigenous peoples have a recognized claim of ownership, not just access, to ancestral lands under international law, even in the absence of official title deeds.¹¹⁵ The Commission held that the traditional possession of land by indigenous people has the equivalent effect as that of a state-granted, full property title and entitles them to demand official registration of property title.¹¹⁶

But the Commission did not base its decision solely on international laws pertaining to indigenous rights. Of specific import to the broader notion of property rights in the context of land reform is the Commission’s reliance on Articles 14 and 21 of the Charter.¹¹⁷ Article 14 provides:

The individual *right to property* shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.¹¹⁸

Article 21 provides:

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.¹¹⁹

The Commission clarified that it is not the encroachment *itself* that creates a violation of Article 14 of the African Charter.¹²⁰ The right to property under Article 14 imposes an obligation on States to respect as well as to protect the right to property.¹²¹ The Commission applied a two prong test extracted from the language of the provision. Under Article 14, an encroachment can only be conducted: (1) in the interest of public need or in the general interest of the community, *and* (2) in accordance with appropriate laws.¹²² The test laid out in Article 14 is conjunctive, such that public need alone cannot define the policy.

The Commission declared that domestic law did not by itself prescribe the right to property.¹²³ Accordingly, the Commission scrutinized the actions of the Kenyan government in light of standards and principles of international law. Relying on the *Saramaka*¹²⁴ case—a recent landmark ruling by the Inter-American Court for Human Rights regarding the right of tribal and indigenous people in the Americas to control the exploitation of natural resources in their territories—the African Commission explained that the provision “in accordance with the provisions of appropriate law” under the African right to property required inquiry into: (1) effective participation; (2) compensation; and (3) prior environmental and social impact assessment.¹²⁵ Finding that the Kenyan government had failed to sufficiently accord any of the three elements to the Endorois expropriation, the Commission held that the Kenyan government was in violation of the Endorois’ right to property.¹²⁶

The Commission also elaborated on the notion of “public interest,” stating that this part of the test is met with a much higher threshold in the case of encroachment of indigenous land as opposed to individual private property.¹²⁷ The Commission found support for its position in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights, which states that “instances of forced eviction are *prima facie* incompatible with the requirements of the ICESCR Covenant and can only be justified in the most exceptional circumstances, and in accordance with relevant principles of international law.”¹²⁸ The clarity of the encroachment rule now positions us to extract from the corpus of international and regional human rights law those elements of the notion of property that must permeate any post-colonial land redistribution policy.

III. CORE ELEMENTS OF THE LAND REFORM FORMULA

Five legal principles can be extracted from the preceding discussion, which together form the minimum standards under

international law for post-colonial land redistribution. These elements are universal principles linking the right to land (as property) to broader principles of international law. Under this legal standard, post-colonial land reform: (1) is based on the existence and articulation of a legitimate public emergency; (2) is authorized and carried out in accordance with both domestic and international law; (3) exercises proportionality in its implementation; (4) provides a non-discriminatory right to own land under the new system; and (5) pays compensation at independently determined market value whenever any of the other elements are breached. The following section explores these elements in depth.

EXISTENCE AND ARTICULATION OF PUBLIC EMERGENCY CREATING LEGITIMACY

An indispensable component of the land reform formula is that government proceeds on the basis of a legitimate public need for land reform. Because land reform through expropriation is an extreme measure confronting many civil and political rights, a land reform program can only be legal under international law if conditions in the post-colonial states qualify as a public emergency which “threatens the life of the nation.”¹²⁹

The land imbalance in Zimbabwe was stark enough to set aside debates on the necessity of land reform. Landlessness, especially where it is an insurmountable economic barrier in the absence of reform policy, can be considered a public emergency.¹³⁰ Therefore, when executed to avert urgent economic and social crises, land reform is designed to empower previously land-less people by giving them access to land, a primary natural resource and the hallmark of agrarian economies. Under this standard, governments have an obligation to articulate a legitimate public interest before any program of redistribution is implemented. Public need must threaten the economic or social well-being of the State before this condition is satisfied.

THE “IN ACCORDANCE WITH THE LAW” TEST

A land reform program which adheres to principles of international law is designed and implemented with respect for the rule of law.¹³¹ In *Endorois v. Kenya*, the African Commission emphasized the conjunctive nature of the inquiry into whether the human right to property had been violated.¹³² The African Commission explained that under this analysis, the dispossession of land must satisfy both domestic and international law.¹³³

That the African right to property in *Endorois* was supported by the ruling of the Inter-American Court of Human Rights in *Saramaka* bolsters the universal reach of the notion that land expropriation must be designed and implemented in accordance with international norms concerning effective participation, compensation, and prior environmental and social impact assessment.¹³⁴ In the absence of these formal mechanisms, the substance of rule of law is lost. In essence, land reform may be governed entirely by domestic laws as long as that law embodies the three core elements that human rights precedent agrees enshrine lawful expropriation.¹³⁵

PROPORTIONALITY & THE LEAST RESTRICTIVE POLICY

Both African and European jurisprudence restrict the range of permissible state conduct that interferes with the right to property. In addition to the requirements that government have a legitimate public purpose and that the expropriation be carried out in accordance with appropriate domestic and international law, *Endorois* held that limitations placed by government on the human right to property must be reviewed under the principle of proportionality.¹³⁶ Under this requirement, limitations on rights to property must be proportionate to a legitimate need, and should be the least restrictive measures possible.¹³⁷ Expanding the discussion from indigenous peoples, the Commission cited its decision in *Constitutional Rights Project Case 1999*: “the justification of limitations must be strictly proportionate with, and absolutely necessary for, the advantages which follow.”¹³⁸ The rule of proportionality declares that “a limitation may not erode a right such that the right itself becomes illusory,” and further, that eviction violates the very essence of the right.¹³⁹ Putting these principles together, land reform policy may not include systematic eviction and must allow incumbent landholders to retain that portion of land that supports a family and allows them to be self-sufficient.

Further, the international norm of proportionality in the human rights context has been defined by the European Court of Human Rights to require that any condition or restriction imposed upon a right [under the European Convention on Human Rights] be “proportionate to the legitimate aim pursued.”¹⁴⁰ Although proportionality is most commonly identified under international law in the context of the use of force, proportionality is also a central theme of international law concerning civil and political rights.¹⁴¹ The derogation clause illustrates this principle by restricting State actions that depart from protecting CP rights only to the “extent strictly required by the exigencies of the situation.”¹⁴² Under no set of hypothetical scenarios can physical violence and force be deemed a legally permissible platform for land expropriation, and where the appropriate laws and procedures are followed, resistance to expropriation should be treated through the justice system, where the appropriate civil and political rights would be protected.

ERADICATION OF DISCRIMINATORY PROPERTY RIGHT ALLOCATIONS

Citizens of the post-colonial country, barring other non-discriminatory impediments, should be given equal opportunity to own land under the new system. Conceptual loopholes in existing human rights law expose those subject to land annexation to discriminatory treatment. Yet a land reform policy that excludes certain groups from obtaining title to land or enjoying the same types of property rights available to the direct beneficiaries of the reform simply perpetuates systems of disenfranchisement and violates the anti-discrimination principles of the ICCPR, the ICESCR, and other treaties which collectively form a clear universal norm against discrimination.¹⁴³

The victory of the *Endorois* under the African regional human rights system is a reinforcement of the focus of land rights

on the poor to the exclusion of the rich. Yet, human rights are not just for the poor, nor for the rich—their goal is the preservation of all human dignity.¹⁴⁴ We misconstrue the idea of human rights when we sentimentalize the land rights of ‘the poor’ or the disenfranchised in parts of the world like Lake Bogoria in Kenya, while recoiling from the idea of preserving property rights for people who benefitted from colonization.¹⁴⁵

COMPENSATION WHERE ELEMENTS ARE BREACHED

The notion of compensation for injury is well established under international law, but ideas about its role in land redistribution are less convergent.¹⁴⁶ Having determined that the *Endorois* owned the land and thus had a protected ownership right under international and African human rights law and under general principles of international law, the Commission proceeded to determine the remedy. Article 14 provides that in the case of dispossession the victims have the right to the lawful recovery of their property as well as adequate compensation.¹⁴⁷ The Commission held that *Endorois* who had been forced off the land were entitled to either restitution or to obtain other lands of equal extent and quality.¹⁴⁸

From a practical standpoint, land redistribution is unlikely to be attainable on the scale required for land reform if it demands compensation at market value for all land acquired for redistribution. But there is also a legal dimension: the ICCPR derogation clause suggests that such compensation is not mandated under international law.¹⁴⁹ Under civil and political rights principles, if a public need for land reform rises to the level of threatening the life of a nation, the notion of compensation at market value does not stand in the way of a State’s power, indeed its *obligation*, to address land pressure. Instead, compensation should be viewed as a penalty government must pay to incumbent landowners if its land reform policy breaches any of the preceding four procedural and substantive elements.

CONCLUSION

Land reform has become too critical an issue to ignore in post-colonial countries, and the power of governments to alter property rights consistent with international law is a critical question of our day. This article proposes a legal standard for post-colonial land reform, one rooted in human rights law and framed in the language of norms that go beyond the racial and socio-economic tension accompanying current post-colonial land reform efforts.

The legal standard for land reform proposed here demonstrates that human rights *can* co-exist with the recognition of the need for land redistribution to correct the land ownership imbalances that remain an unresolved, simmering issue of contention. The land right is not synonymous with the basic human right, because the need for land lacks the characteristic universality of fundamental human rights. Rather, the land right that *is* protected under international law, within the complicated framework of post-colonial land redistribution, is the right of the incumbent to retain enough land for his subsistence and that of his family. This is the substantive portion of the notion of property in the land reform context. Further, for annexation and redistribution to be

lawful under international law, the policy must: (1) be based on the existence and articulation of a legitimate public emergency; (2) be authorized and carried out in accordance with both domestic and international law; (3) exercise proportionality in its implementation; (4) provide a non-discriminatory right to own land under the new system; and (5) pay compensation at an independently determined market value where the other elements are breached.

Classical theories and customary practices defining the concept of property are ill-suited to the modern-day need to justify and implement land redistribution. The clash between the dominant theories upon which property law is founded and

the transfer of land by government from the land-wealthy to the landless requires a new, comprehensive way of looking at property—one that is founded on universal principles that apply to individuals and groups regardless of their race or status. In a world where many post-colonial governments are grappling with serious issues of land pressure, the absence of definitive international law on land reform is untenable. This proposed legal standard for land reform defends a substantive and procedural minimum that post-colonial governments, in their rightful assertions of sovereignty, should incorporate in formulating much-needed land redistribution.



Endnotes: A Legal Standard for Post-Colonial Land Reform

¹ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 26 (C.B. Macpherson, ed. 1980) (1889).

² BEN CHIGARA, LAND REFORM POLICY: THE CHALLENGE OF HUMAN RIGHTS LAW 123 (2004).

³ For a detailed historical background of the Zimbabwean land conflict, see Simon Pazvakavambwa & Vincent Hungwe, *Land Distribution in Zimbabwe*, in AGRICULTURAL LAND REDISTRIBUTION: TOWARD GREATER CONSENSUS 138, 138 (Hans P. Binswanger-Mkhize, et al. eds., 2009).

⁴ *Id.*

⁵ *Id.*

⁶ In its broadest sense, land reform entails a wide spectrum of options including land claims, acquisition and distribution of land, access to land for certain purposes, land use planning, infrastructure development, farming and commercial support, resettlement programs, security of tenure and training. See Bertus DeVilliers, *Land Reform: Issues and Challenges A Comparative Overview of Experiences in Zimbabwe, Namibia, South Africa and Australia*, KONRAD ADENAUER FOUNDATION (2003). This article borrows the definition of “land reform” that broadly includes reforms that increase the ability of the rural poor and other socially excluded groups to gain access and secure rights to land. See Roy L. Prosterman & Tim Hanstad, *Land Reform in the Twenty-First Century: New Challenges, New Responses*, 24 SEATTLE J. FOR SOC. JUST. 763 (2006). See, e.g., Olivier De Schutter, *Access to Land and the Right to Food*, Report of the Special Rapporteur on the Right to Food presented at the 65th General Assembly of the United Nations, U.N. Doc. A/65/281 (21 October 2010) (drawing on lessons learned from decades of agrarian reform and emphasizing the importance of land redistribution for the realization of the human right to food, but cautioning against development models that lead to evictions, disruptive shifts in land rights and increased land concentration).

⁷ See *infra* notes 8, 49, 69 (and accompanying text).

⁸ See, e.g., Caitlin Shay, Comment, *Fast Track to Collapse: How Zimbabwe's Fast Track Land Reform Violates International Human Rights Protections to Property, Due Process & Compensation*, 27 AM. U. INT'L L. REV. 133 (2012) (arguing that Amendments 16A and 16B to the Zimbabwean constitution fall short of the basic human rights standards articulated in the Universal Declaration of Human Rights and Banjul Charter and that Zimbabwe is in violation of its obligations to a Southern African Development Community Tribunal's decision by refusing to register the Tribunal's judgment that Amendments 16A and 16B are arbitrary, do not provide due process, and do not provide compensation to owners).

⁹ See *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and Peoples' Rights, Comm. No. 276 (2003) [hereinafter *Endorois*] (addressing the right to property (land) when government dispossessed an indigenous group in order to free ancestral lands for economic and tourist development).

¹⁰ See generally, Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resources Allocation: Sovereignty, Human Rights, and People-Based Development*, 45 VAND. J. TRANSNAT'L L. 785 (2012) (describing the evolution of international law and its infiltration into what has been deemed a

sacred prerogative of states—sovereignty of their natural resources—and thereby, ultimate decision-making authority regarding the course of development).

¹¹ *Id.*

¹² Some examples include the right to food or the autonomy of indigenous peoples. See De Schutter, *supra* note 6, at 2 (concluding that access to land and security of tenure are essential for the enjoyment of the right to food, and exploring how States and the international community could better respect, protect and fulfill the right to food by giving increased recognition to land as a human right).

¹³ The Convention for the Elimination of Discrimination against Women (“CEDAW”) is one notable exception in which gender defines the protected class. See Convention for the Elimination of Discrimination against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

¹⁴ The Zimbabwean method morphed from market driven sales of land to the government and indigenous farmers in the 1980s, into a rapid, violent phase marked by the “gazetting” and reacquiring of land held by white commercial farmers; acquired land was redistributed to indigenous people.

¹⁵ See, e.g., Butjwana Seokoma, *Land Redistribution: A Case for Land Reform in South Africa*, NGO PULSE (Feb. 10, 2010), <http://www.ngopulse.org/article/land-redistribution-case-land-reform-south-africa> (arguing that South Africa should speed up the redistribution of land to the black majority and that there is a need for the government to review the current laws that govern how land should be redistributed).

¹⁶ See, e.g., De Schutter, *supra* note 6, at 5 (describing long-term trends of rural population growth and the loss or severe degradation of arable land in Asia, Eastern and Southern Africa).

¹⁷ The Southern Africa Development Cooperation (“SADC”) is a regional agreement among 14 sub-Saharan States, each one a former colony of Portugal, Belgium, the United Kingdom, and/or Germany. See CHIGARA, *supra* note 2, at xvi (proposing several lenses through which to best conceptualize and approach land reform, including human rights law and arguing that the strategies adopted to resolve the apparent problem of inequitable land distribution in the predominantly agrarian economies of SADC States, the outcomes that they obtain, and the reaction of stakeholders will impact political stability).

¹⁸ De Schutter, *supra* note 6, at 5.

¹⁹ *Id.*

²⁰ See *id.* at 16 (recognizing that his proposed *humwe* principle—grounded in social justice principles—alone is not adequate to resolve the land issues in sub-Saharan Africa and that market efficiency supporting (1) the development of a sustainable supply of agricultural products and creation of domestic and international markets for the same, and (2) the restoration and preservation of the capacity to feed their populations and to supply external markets with food and food products); Margaret Rugadya, *Land Reform: The Ugandan Experience*, RISD (1999), available at <http://www.mokoro.co.uk/other-resources/east-africa/uganda> (explaining how and why land reform has taken center stage on the agendas of East, Central and Southern African countries in the last few decades); see also Prosterman & Hanstad, *supra* note 6, at 764 (stating that in countries where the landless are a large part of the agricultural population, their families form a deep concentration of poverty and human suffering, as well as an impediment to the process of economic development and, in many settings, a potential threat to political stability).

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ISLAMIC FINANCE AS A MECHANISM FOR BOLSTERING FOOD SECURITY IN THE MIDDLE EAST:

FOOD SECURITY *Waqf*

by Hdeel Abdelhady, Esq.*

INTRODUCTION

This article proposes the establishment of a multilateral food security *waqf*, a type of Islamic trust or endowment, as a vehicle of investment in the future food security of the Middle East. Sections II through IV briefly discuss global food insecurity, Middle East food insecurity, and the need for a regional food security strategy for the Middle East. Sections V through VIII discuss contemporary Islamic Finance generally, the essential objectives of *Shari'ah*, historical *waqf* practice, Islamic perspectives on agriculture, and the proposed food security *waqf*. This article focuses on the rationale and objectives of *waqf*-based and other agricultural investment frameworks that are currently under development by the author, for application by governments, institutions, and private entities. The structures under development combine the *waqf* (as a foundational framework to allocate funding and other assets) with Islamic financing structures, Islamic and conventional asset management approaches, *Shari'ah* and civil law-based legal frameworks, and effective governance and operational models to achieve measurable impact, in a manner that equitably and rationally distributes rights and responsibilities among parties across the food supply chain, from government consumers to small farmers.

While this article focuses on the use of the *waqf* structure to advance food security, its premises and objectives have broader application. As discussed below, the *waqf* structure has been used successfully in the past to promote public objectives, such as education, aid to the poor, healthcare, public access to water, and food aid. While the use of the *waqf* has declined in modern times, its history suggests strongly that the structure was and can again be a powerful vehicle through which resources are organized and allocated to advance development objectives.

I. GLOBAL FOOD INSECURITY: A SNAPSHOT

Food insecurity is a global threat.¹ The nature of food and the means of its production make food insecurity a uniquely complex problem, with social, political, economic, and ethical dimensions. Serious efforts to promote food security and sustainability must respond to the complexities of the challenge.

According to the Food and Agricultural Organization of the United Nations ("FAO"), "in order to feed a population of more than 9 billion [the projected world population in 2050] and free the world from hunger, global food production must nearly double by 2050."² Competition for food and for the means of food production is increasing, without commensurate rises in

supply.³ Owing to population growth, increased food purchasing power and demand in emerging economies, climate change, land degradation, price volatility, and other factors, the global food supply-demand imbalance is expected to widen.⁴ The world's governments have taken note. Acting independently and multilaterally, they have devoted resources to assess the food insecurity threat, and have taken steps to mitigate the risk.⁵ As yet, however, no comprehensive solutions are on the horizon.

II. FOOD INSECURITY IN THE MIDDLE EAST

The Middle East is particularly susceptible to food insecurity.⁶ While the region does not face any foreseeable near-term threat of famine or widespread malnutrition,⁷ the Middle East presently lacks the means to produce adequate food supplies due to water scarcity, insufficient arable land, and man-made hurdles.⁸ These hurdles include land and crop misallocations, under-utilization of food production means, inadequate investment in agriculture, poor stock management, sub-optimal distribution networks, and other factors.⁹

According to the World Bank, as of 2008, the Middle East imported fifty percent of its food.¹⁰ "High food prices and international market volatility mean domestic agriculture has taken on strategic importance in all the food producing countries in the region.¹¹ Non-food producing countries, such as member states of the Gulf Cooperation Council ("GCC"), are looking at ways of securing land in third party countries to produce part of their food needs."¹²

By 2030, the combined Muslim population in the Middle East is expected to grow to 439,453,000.¹³ Today, the Muslim population is estimated at 321,869,000.¹⁴ This projection, a 36.5% net increase in population in less than twenty years, is staggering. The consequences of such population growth for food security in the Middle East will be profound.

At the country level, Middle Eastern countries have attempted to address food insecurity risks through food subsidies, export bans, price ceilings, and other policy measures, as well as by acquiring rights to farmland overseas.¹⁵ For instance, food exporting countries like Egypt, Yemen, and Djibouti

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impose *ad hoc* export restrictions in response to global price rises.¹⁶ The governments of the Middle East, as in the cases of Egypt, Morocco, Tunisia, Djibouti, and Yemen, employ government subsidies as a primary means of facilitating domestic food affordability.¹⁷

Arab countries, and particularly GCC states, which lack the arable land and water resources necessary to produce food sustainably, also pursued other avenues such as acquisition of long-term agricultural land rights overseas.¹⁸ Between 2006 and 2009, Arab governments, government-owned companies, and private entities (primarily in the GCC states) were particularly active in acquiring agricultural land overseas.¹⁹ According to one compilation, forty-nine agricultural land deals and land-related investments were initiated or concluded between 2006 and 2009.²⁰ Of those, twenty-one (45%) involved Arab countries (most by governments with limited private companies) as investors.²¹ The countries involved in these transactions were Saudi Arabia (five), the United Arab Emirates (four), Qatar (three), Bahrain (three), Kuwait (two), Libya (two), Jordan (one), and Egypt (one).²² The majority of these investments were made in Africa and Asia, and eleven of the twenty-one were made in majority Muslim countries.²³ This data is illustrative, and reflects only a fraction of overseas agricultural land investments that are understood to have been made by Arab and non-Arab countries and private parties in recent years.²⁴

While the logic of these land acquisitions is clear, their sustainability is not. Acquisitions of overseas land and land-use rights by Arab countries and other parties have not been without controversy.²⁵ These transactions are very likely to pose significant legal and political risks, an expectation that is borne out by the inhospitable reception they have received both inside and outside their host countries.²⁶ They have been characterized as “land grabs”—modern scrambles for resources reminiscent of nineteenth-century colonization.²⁷ The terms of these land acquisitions and their details are often, if not always, undisclosed.²⁸ This opacity has fueled suspicion that the deals are opportunistic usurpations of scarce resources by relatively wealthy countries at the expense of relatively poor countries and their small farmers.²⁹ The lack of transparency and controversy surrounding agricultural land acquisitions raises questions not only about their nature, but about their long-term viability as a means of securing food supplies.

As a practical matter, the acquisition of agricultural land to produce food exclusively for the benefit of acquirer countries is legally and politically risky. It is not difficult to envision scenarios in which yields generated on overseas land would be wholly or partially expropriated, subjected to export bans, or otherwise intercepted, particularly in events of local or global food shortage and political or social unrest. Think tanks and other organizations have called for the regulation of overseas investments in agricultural lands.³⁰ For example, the International Food Policy Research Institute has suggested that investors should refrain from exporting crop yields in the case of food shortage in a host country.³¹ Such concerns, and the political and legal risks associated with overseas land acquisitions, will likely increase over

time, as global competition for food increases, exacerbated by demographic and environmental strains.³²

The governments and companies that invest in agricultural lands overseas can, and likely have, put into place agreements to achieve optimal commercial and legal conditions. But under extraordinary circumstances, these agreements will be insufficient to overcome the very real risks stemming from political and social tensions that surround food, agricultural land, and the reality or perception of exploitation associated with overseas agricultural land investments. In worst-case scenarios, Arab governments and other investors in overseas agricultural land might find themselves with recourse only to international tribunals and money damages, and without access to the very crop yields for which they bargained.³³ Money damages would hardly be compensatory in such cases, as these investments are not made for profit, but for specific performance—*i.e.*, the enforcement by host governments of investors’ rights to produce on agricultural lands and repatriate agricultural yields.

More immediately, overseas land acquisitions by some Arab countries are detrimentally impacting the food (and water) security of other Arab countries. For example, Arab countries including Saudi Arabia, Qatar, Kuwait, and the United Arab Emirates, are believed to have acquired agricultural land or land use rights in the Sudan (prior to the establishment of South Sudan as an independent nation).³⁴ These acquisitions (and those by non-Arab countries and private parties) in the Sudan and other Nile Basin countries directly threaten Egypt’s “ability to put bread on the table because all of Egypt’s grain is either imported or produced with water from the Nile River, which flows north through Ethiopia and Sudan before reaching Egypt.”³⁵ In addition to being flawed in a practical sense, these Nile River-related land (and water) acquisitions present risks and interesting legal questions, such as whether state parties to an agreement for the use of a common and vital resource like the Nile River may contract out access to the resource to third parties for profit, to the detriment of other state parties to the same agreement. Indeed, such scenarios should prompt examinations of the nature and limits of relevant legal concepts, such as sovereignty over natural resources, particularly where a third-party state benefits from a shared natural resource at the expense of one or more states with direct and assertable rights of access.

As an important matter of national policy (if not national security), Arab governments must pursue food security solutions that are economically, politically, socially, and ethically sustainable. Measures taken by Arab countries thus far fail to address food insecurity comprehensively or at its root. At the regional level, Arab governments have yet to take coordinated steps to combat food insecurity. This likely is a symptom of a more general reality, which is that Arab countries, for a variety of reasons, trade more with countries outside, rather than within, their region.

III. THE CASE FOR A REGIONAL FOOD SECURITY STRATEGY

“There is no way around the reality that MENA [Middle East and North Africa] countries will need to buy a significant- and increasing- share of their food on international markets... the key is to manage this exposure in new and innovative ways to reduce the potential for food prices shocks without going bankrupt in the process.”

—WORLD BANK, APRIL 2009³⁶

The quoted statement describes key challenges of food insecurity in the Middle East. However, the gravity of the long-term food insecurity threat to the region requires much more than management of exposure to international markets. As the global food supply-demand imbalance widens over time, the difficulties and risks associated with food security will intensify in the Middle East unless effective coordinated action is taken now.

The political, social, cultural, and historical ties that bind Middle Eastern countries favor the pursuit of a regional food security strategy, as do the geographic, demographic, and economic differences between them. As recent political uprisings have shown, major events in even one Arab country have the potential, if not the likelihood, to produce similar or follow-on events in others.³⁷ The consequences of food insecurity, if it intensifies in the region or any of its major countries, will have regional impact: whether in the form of economic migration, spillover social and political unrest, or the need for food and other aid from neighboring states.³⁸

Bolstering regional food production and supply in a coordinated fashion also would serve as a defensive measure, to the extent that Middle Eastern countries limit the need to compete for food in the global marketplace. Beyond politics and market exposure, the Middle East, for the sake of its development, has a fundamental interest in creating conditions in which its inhabitants live in an environment conducive to progress in all spheres.³⁹ Other than the related issue of access to water, no single issue is more essential to the creation and long-term maintenance of such conditions than is food security.

The GCC states, while comparatively cash rich, desperately lack the arable land, water resources, human resources, and depth of agricultural experience necessary to produce food sustainably and at appreciable levels.⁴⁰ By comparison, the relatively cash poor countries of the region, including Egypt, the Sudan, Algeria, Morocco, and the countries of the Levant, individually and together possess the agricultural land, climate conditions, human resources, and agricultural experience to produce food in appreciable quantities, and in any case at higher than present output levels.⁴¹ But this latter group of countries has yet to realize its agricultural production potential for a number of reasons.⁴²

As a region, the Middle East has not explored its potential to sustainably bolster food security by marshaling its combined monetary, natural, and human resources for the long-term benefit

of its inhabitants. It is in the region's best interest to identify and pursue strategies to bolster food security, through increased regional production and other means, in ways that are not only economically, legally, and environmentally sustainable, but also are politically, socially, and ethically sound. The food security *waqf* proposed in this article would serve as a vehicle through which the region's collective resources can be allocated and deployed to advance sustainable regional food security.

IV. ISLAMIC ECONOMICS AND FINANCE

The principles and objectives of *Shari'ah*, which favor real economic activity, profit and loss sharing (rather than risk remoteness), and the creation and multiplication of wealth, its productive use, and its allocation for the common good, are uniquely suited to food security and development generally.⁴³ As used today, Islamic modes of finance and investment have proven effective and attractive in the commercial realm.⁴⁴ Yet in contemporary practice, Islamic Finance has not been used meaningfully and consistently for development finance and social investment. As an industry and discipline, Islamic Finance has an interest in expanding its scope and impact, substantively and geographically.

Islamic Finance is a burgeoning financial services segment that is expected to continue to grow in volume and expand geographically.⁴⁵ Current accepted estimates indicate that the size of the Islamic Finance industry is \$1.4 trillion, with the potential to reach \$4 trillion within five years, assuming continued growth at current rates.⁴⁶ Regardless of its exact size or value (however measured), it is widely accepted that the industry has grown tremendously in the past thirty years, and that demand will support its continued rapid growth.⁴⁷

Arab jurisdictions, such as Bahrain, Dubai, and Qatar, have invested significantly to position themselves as centers of Islamic Finance.⁴⁸ Saudi Arabia, which offers relatively vast domestic retail and commercial opportunities, through private efforts and more recently with government support, is in the early stages of building its Islamic Finance industry.⁴⁹ Egypt, the most populous Arab country, has only recently taken steps to promote Islamic Finance, even though the first Islamic bank was established in Egypt nearly forty years ago.⁵⁰ Outside of the Middle East, non-majority Muslim jurisdictions, most notably London and Hong Kong, have invested political, economic, and regulatory capital to position themselves as global Islamic Finance hubs.⁵¹

Notwithstanding the impressive growth and burgeoning popularity of Islamic Finance, common perceptions of its essence are limited, due in no small part to the fact that Islamic Finance is often framed in the one-dimensional, negative terms of what it prohibits—*e.g.*, *riba* (a broad concept often described as interest)—and not in terms of what it permits and encourages, which broadly is the creation and multiplication of wealth, its productive use, and its allocation and distribution for the public interest.

The Islamic Finance industry, its stakeholders and proponents (including governments) have an interest in demonstrating the potential real economy impact of Islamic Finance. The

development and social finance spheres, the objectives of which are compatible with *Shari'ah* objectives, provide a platform for such a demonstration.⁵² Further, governments that have invested in Islamic Finance have an interest in its promotion beyond their borders and the commercial spaces that contemporary Islamic Finance has thus far occupied. The association of Islamic investment and financial mechanisms with endeavors of global significance, such as food security and development generally, would provide a platform for the expansion of Islamic Finance from a niche financial services segment to a discipline having wide applicability and potential impact beyond the commercial realm.

V. PROMOTING ETHICALLY SUSTAINABLE FOOD SECURITY INVESTMENT: *MAQĀSID AL-SHARI'AH*

The need for enhanced ethics in the pursuit of food security investment is clear. Ethics, as much as monetary, land, and human resources, will be essential to the long-term success of food security strategies, particularly those that span multiple countries.⁵³ The infusion of and adherence to *maqāsid al-Shari'ah*, or the goals and objectives of Islamic Law, in the pursuit of food security is one effective way to fill the ethics deficit, particularly in the Middle East.⁵⁴ A brief look at the core objectives of *Shari'ah* demonstrates this.

Leading classical scholars of *Fiqh* (*fuqaha*) and *uṣūl al-Fiqh* (*uṣūliyyīn*) delineated five “essential” objectives advanced by Islamic Law that are accorded the highest weight among the objectives of Islamic Law (*maqāsid al-Shari'ah*).⁵⁵ In order of importance, the five essentials are the preservation of: (1) the religion of Islam; (2) human life; (3) progeny; (4) the faculty of reason; and, (5) material wealth.⁵⁶ According to modern scholars, these five “essential” objectives of Islamic law were established by Imam al Ghazali of the *Shafi'ite* School, and later adopted by classical scholars of the Malki and Hanafi Schools of Islamic law.⁵⁷

In contextualizing the five “essentials” of *maqāsid al-Shari'ah*, classical scholar Izz al-Din ibn Abd al-Salam’s commentary is helpful. He is reported to have written that “all legal rulings in the areas of jurisprudence are contained within” the following Qur’anic verse: “Behold, God enjoins justice and the doing of good, and generosity towards [one’s] fellow-men, and He forbids all that is shameful and that runs counter to reason, as well as envy; [and] He exhorts you [repeatedly] so that you might bear [all this] in mind.” (QUR’AN 16:90).⁵⁸ The point, essentially, is that in Islam, as enjoined by the Qur’an and illustrated by the *Hadith* and *Shari'ah* interpretations, service of humankind, consistently with Islamic law, is an act of worship.⁵⁹ In other words, it is fundamentally Islamic—an act of “preserving the religion”—to utilize and protect worldly resources, including human life, progeny, the faculty of reason, and wealth.⁶⁰ Classical scholar Sayf al-Din al-Amidi, in his defense of giving the highest priority to the preservation of religion, offered this formulation:

[w]hatever is intended to preserve the root of religion should be given priority over all else, since [the Islamic] religion’s aim and ultimate outcome is the attainment

of eternal happiness in the presence of the Lord of the worlds. All other objectives, including the preservation of human life, the faculty of reason, material wealth and anything else, are in the service of this overriding interest. As God Almighty declares, ‘I have not created the invisible beings and men to any end other than that they may [know and] worship Me.’ (Qur’an 51:56).⁶¹

Classical scholar Ibn Abd al-Salam explained that Islamic law provides an equally potent summation of *maqāsid al-Shari'ah* and that Islamic legal rulings have one central purpose, which is to promote human well-being. Specifically, he stated:

All divine commands and prohibitions are founded upon the [pursuit of] benefit for human beings both in this world and in the next. God Himself has no need of anyone’s worship. He is not benefited by the obedience of the obedient, nor is he harmed by the disobedience of the disobedient.⁶²

In other words, the promotion of human well-being is not only encouraged, but required. This includes the creation, protection, and deployment of wealth in the service of individuals, families, and society at large. Intrinsically, the objectives of *Shari'ah*, and therefore *Shari'ah*-compliant finance, are compatible with the objectives of development finance and social investment, which, in principle, advance the well-being of mankind. “In the Islamic system there is no such thing as a [charitable] dedication ‘solely to the worship of God.’”⁶³ It is appropriate then that Islamic Finance, which is *Shari'ah*-based, be employed to advance the public interest.⁶⁴

VI. FOOD SECURITY *Waqf*

This article proposes the establishment of a multilateral food security *waqf* as a mechanism for investment in the future food security of the Middle East.⁶⁵ As envisioned, the food security *waqf* would serve as a vehicle for allocating and organizing capital and other resources for investment in agriculture and the financing of essential activities such as research, technological innovation and transfer, agricultural production capacity building, and income-generation. Importantly, the food security *waqf* envisioned would directly or indirectly facilitate much needed access to finance, including by small farmers, small and medium enterprises, and other parties across the food supply chain.

The *waqf* structure (rather than a conventional conduit, such as a fund or corporation) is proposed primarily to mitigate the political and legal risks (real and perceived) that tend to deter investment in the region, particularly on a multilateral basis and for regional benefit.⁶⁶ *Waqf* assets, relative to assets associated with conventional investment vehicles, have enjoyed relative freedom from governmental interference, due both to the general respect accorded to *awqaf* and the relative vigilance of the public and *waqf* custodians against undue interference.⁶⁷

Therefore, for the purposes of diminishing legal and political risk in the context of multilateral Middle East investment, the *waqf* structure (properly crafted and with strong legal frameworks to diminish the likelihood of government

interference) provides an attractive alternative to conventional investment modalities. Further, the *waqf* structure is proven as an effective and administratively convenient mode of investment and finance, particularly for large-scale projects. As discussed below, *awqaf* have been used successfully (by Muslims and non-Muslims) to promote the public interest and facilitate investment throughout culturally and geographically diverse countries. The potential of the *waqf* as a modern development and investment tool is borne out by history and should neither be overlooked nor underestimated.

AGRICULTURE: ISLAMIC PERSPECTIVE AND EARLY PRACTICE

The promotion of food security is compatible with *Shari'ah* objectives and the distribution of agricultural resources in early Muslim communities. Reverence for agricultural endeavor and ethical practices in agricultural production and distribution are well-documented, and a few examples from *Hadith* are sufficient to briefly make the point.⁶⁸

According to a narration of Anas bin Malik, the Prophet Mohammed said: "There is none amongst the Muslims who plants a tree or sows seeds, and then a bird, or a person or an animal eats from it, but is regarded as a charitable gift from him."⁶⁹ The Prophet Mohammed was equitable in contracting for food and the means of food production.⁷⁰ Various *ahadith* indicate also that while the Prophet was believed to have preferred the giving of land outright⁷¹, he approved share-cropping provided that such arrangements were not speculative and yields were divided equitably.⁷²

As narrated by Abdullah bin Omar: the Prophet concluded a contract with the people of Khaibar to utilize the land on the condition that half the products of fruits or vegetation would be their share."⁷³ The Prophet is also said to have prohibited speculative sharecropping arrangements, such as agreements giving parties rights to yields from specific tracts of agricultural land or specific produce from sharecropped land. Rather, the Prophet required that parties agree to apportion the total agricultural produce, whether in percentages or by other measures.⁷⁴ This approach, which diminished speculation and more equitably distributed risk and reward, is consistent with the principles of Islamic Finance, which requires risk-sharing and the avoidance of *gharar* (undue speculation).⁷⁵

These *ahadith* illustrate two important Islamic principles: first, the productive cultivation of land is encouraged and rewarded⁷⁶; and second, the equitable use and distribution of agricultural products and the means of their production are consistent with the teachings of Islam.

BASIC ELEMENTS OF WAQF AND CONSEQUENCES OF ESTABLISHMENT⁷⁷

The *waqf* is a kind of trust or endowment through which assets are allocated and preserved for a designated period of time or in perpetuity for specified beneficiaries for charitable, social welfare, development, or intra-family wealth distribution purposes.⁷⁸ Stated more succinctly, *waqf* is the "[bequeathing] of property and dedicating the fruit."⁷⁹ Analogous to the *waqf* in non-Islamic law is the Anglo-American common law trust,

which is considered by some to be "among the most important creations of the [common] law of equity... [and has] for hundreds of years...played a vital role in organizing transactions of both a personal and a commercial character."⁸⁰

The essential legal requirements for the establishment of a valid *waqf* are straightforward and well-established. The donor of assets (*waqif*) must have legal and mental capacity.⁸¹ The *waqif* must have the right to legally transfer the assets and the nature of the assets must not be repugnant to *Shari'ah*.⁸² The pledge to transfer *waqf* assets must be outright, without condition or contingency.⁸³ The permissible purposes for which the *waqf* is established (e.g., charitable or interfamily wealth transfer) must be clearly stated.⁸⁴ The primary beneficiaries of the *waqf* (which may include the *waqif*) must be identified.⁸⁵ A *waqf nazir* (trustee or administrator) must be designated.⁸⁶ And the terms of the *waqf*, according to the majority of scholars, must be in writing.⁸⁷

Upon a valid declaration of *waqf* (i.e., an informed statement, freely made, of intention to commit certain assets to *waqf*), the declaration, and therefore the *waqf* established by it, becomes irrevocable.⁸⁸ After establishment, a *waqf* enjoys independent legal personality under Islamic law and may, *inter alia*, enter into transactions, acquire assets, and engage in other activities permitted under *Shari'ah* and other applicable law.⁸⁹

HISTORICAL USES OF WAQF

The efficacy and legal legitimacy of the *waqf* structure are well-established. *Awqaf* have been used as vehicles for charity, the promotion of social welfare, the provision of public utilities, the building of rural and urban infrastructure, the provision of education, the building and maintenance of mosques, the provision of community medical services, and to advance other projects of public value.⁹⁰ *Waqf* capital has also been a source of commercial credit.⁹¹

An early example of *waqf* is the endowment of the Ruma Well as a public utility.⁹² It is reported that, upon arriving in Madina, the Prophet realized that the Ruma Well was one of the few sources of potable water for the city. "He asked: '[w]ho will purchase...[the Ruma Well] [and] equally share the water drawn therefrom with his fellow Muslims.'"⁹³ The Ruma Well was purchased and bequeathed as *waqf* property, to provide drinking water for the people of Madina.⁹⁴ The Prophet is said to have advised Omar Ibn al-Khattab, a companion of the Prophet at the time and later his second successor (the second of the four Rightly Guided Caliphs), to bequeath land in Khaibar as *waqf*, which he did.⁹⁵ Consistent with the Prophet's practice, the Companions continued to establish *waqf* in the public interest. "Since the Prophet instructed his Companions about bequest and its benefits, they never stopped attending to it and putting their money and property into it, so much so that. . . [a]ny of the Prophet's Companions who could afford it made endowments."⁹⁶

Conterminously with the spread of Islam, *waqf* practice expanded in scope, size and impact⁹⁷ through the Ottoman period, with the volume and quality of activity diminishing after that point and through the present time.⁹⁸ At times, *awqaf* were

used so pervasively that they “contributed towards shaping the economic, religious, political and social landscape of urban areas in the Islamic world.”⁹⁹ Thousands of *awqaf* were in operation in the Fatimid period (909-1171).¹⁰⁰ And in the lifetime of the Ottoman Empire, *awqaf* had grown to a “staggering size, amounting to about one third of the Islamic Ottoman Empire and a substantial part of Muslim lands elsewhere.”¹⁰¹

Waqf practice was dynamic. As the needs of society and Islamic jurisdictions changed and evolved, so did *waqf* practice. “[T]he extent of endowment usages along with their legal framework and practices . . . varied significantly throughout the centuries in response to the fluctuating needs of society, taking on different and distinct forms around the Islamic world, often assimilating local customs which frequently preceded the advent of Islam or were contemporaneous with it.”¹⁰² This is borne out by historical practice, where *awqaf* assets and purposes included revenue-generating, mixed asset *awqaf*,¹⁰³ revenue-generating agricultural land,¹⁰⁴ the funding of large-scale commercial property developments over large areas of land for mosque construction,¹⁰⁵ and the bequest of real properties sited in multiple jurisdictions for the benefit of a single beneficiary in another jurisdiction.¹⁰⁶ Other historical examples of *waqf* practice include provisioning for asset substitution (*istibdal*) to ensure the continuation and flexibility of *awqaf*,¹⁰⁷ the joint establishment of *waqf* by spouses for themselves and their children, the establishment of *awqaf* by guilds to support guild members’ families,¹⁰⁸ and the establishment of multi-party *awqaf* to support Islam’s holiest places of worship and its most significant institutions, such as the Two Holy Mosques, Al-Aqsa Mosque, and Al-Azhar.¹⁰⁹ “*Awqaf* cover the Islamic world, from monuments such as the Indian Taj Mahal to the Bosnian Mostar bridge . . . from the Shishli Children’s Hospital in Istanbul to the Zubida’s Waterway in Mecca.”¹¹⁰ The successful use of *awqaf*, across jurisdictions, for diverse purposes, and with various assets, speaks to the flexibility, stability, and appeal of the *waqf* structure.

This brief recitation of some of the historical uses and the dynamism of the *waqf* structure illustrates its significance in the development of Islamic jurisdictions. The *waqf* was so successful in some jurisdictions that British colonial administrations “exerted huge efforts in the nineteenth and first half of the twentieth century . . . to bring these assets under state control.”¹¹¹ In hindsight, this attempt at appropriation showed how highly valued these structures had become, and it reinforces the efficacy of the public *waqf* as a successful vehicle of investment and asset management for diverse purposes.

VII. ADAPTATION OF *Waqf* FOR FOOD SECURITY INVESTMENT: LEGAL FRAMEWORKS AND REMOVAL OF PUBLIC ADMINISTRATION

As discussed, the *waqf* structure has been used successfully to promote the public interest. Regional food security is a matter of public interest of the highest order in the Middle East and elsewhere. The causes of food insecurity are various and numerous, but the challenges are not insurmountable. With


proper investment, resource allocation, and management, many of these causes can be addressed, including poor agricultural practices;¹¹² water pollution and misuse;¹¹³ lack of effective land use planning;¹¹⁴ inaccessibility of finance for small farmers;¹¹⁵ and insufficient public investment in research, development, and technological innovation.¹¹⁶ The *waqf* structure is one avenue through which these challenges can be met, for example, through the allocation of land for specific agricultural purposes, the appropriation of capital and other resources for research, development, and technological innovation (including innovations for sustainable cultivation of dry lands), the education and training of parties across the food supply chain (such as stock managers and small farmers), building and improving infrastructure to facilitate efficient delivery and storage of food and agricultural staples, and the provision of finance to small farmers based on profit and loss sharing through the Islamic financing modalities.¹¹⁷

To accommodate multilateralism and regional food security objectives, and to further the political stability objectives for which the *waqf* structure has specifically been proposed herein, any *waqf*-based structure should be adapted to suit the participating parties and the scale of objectives agreed by them. The *waqf* asset composition and operating framework should incorporate modern asset classes and best operating practices, as well as *Shari’ah* and civil law based frameworks that mitigate legal risk and deter government or other interference. Importantly, the *waqf* structure contemplated requires freedom from direct administration or management by any general *awqaf* authority, in order to promote effective *waqf* management and mitigate the real or perceived political and legal risk associated with direct government participation. The *waqf*-based structures under development, for example, provide for the appointment of a *waqf nazir* or *waqf nuzzar* (an individual, group, or entity) to administer the *waqf* and maximize *waqf* assets, subject to customized and clearly defined performance benchmarks and governance standards.¹¹⁸ This approach not only would diminish legal and political risk, but would provide the flexibility needed to appoint parties with the expertise necessary to effectively, efficiently, and profitably administer the *waqf*, without undue interference. With these and other modifications, the objectives of mitigating political and legal risks would be served, clearing the way for the pursuit of regional food security, innovatively and effectively.

VIII. CONCLUSION

The utilization of the *waqf* structure to bolster food security is legally, administratively, and politically compelling. The legal rights and responsibilities attendant to *awqaf* are clear—from the requirements of establishment, to the relinquishment of legal title to *waqf* assets, to the role and duties of the *waqf nazir*, to the purposes of the *waqf* and the identity of its beneficiaries. Because the framework and mechanics of *awqaf* are established and have, more often than not, been respected, the administrative costs of *awqaf*, compared to other structures, are relatively low as a general matter.¹¹⁹

The religious origins of the *waqf* and its treatment historically make it a comparatively safe vehicle for the investment of assets, particularly in the context of multi-party agricultural investment with significant sovereign involvement. Compared to other legal structures (e.g., the corporation, partnership, etc.), the *waqf* is less susceptible to political or other interference that might frustrate the *waqf* purpose or diminish the value of *waqf* assets through misappropriation or mismanagement.

Middle Eastern countries, institutions, and private parties would serve the food security needs of their region, as well as Islamic Finance, by adopting a *waqf*-based strategy for regional food security. The *waqf* structure is a proven and established structure in the Middle East, and is well-suited to garner the political will, monetary resources, and cooperation necessary to effectively advance food security on a multilateral basis at the regional level. 

Endnotes: Islamic Finance as a Mechanism for Bolstering Food Security in the Middle East: Food Security *Waqf*

¹ See Claire Schaffnit-Chatterjee, *The Global Food Equation: Food Security in an Environment of Increasing Scarcity* 4, DEUTSCHE BANK RESEARCH, September 21, 2009.

² *Id.* at 13.

³ *See id.* at 22, 26.

⁴ *See id.* at 11-13.

⁵ U.N. FOOD AND AGRICULTURE ORGANIZATION, THE STATE OF FOOD INSECURITY IN THE WORLD: ADDRESSING FOOD INSECURITY IN PROTRACTED CRISES, 27 (2010).

⁶ In this article, the Middle East includes the countries that are geographically situated in the Middle East and North Africa and are member states of the League of Arab States. *See* Schaffnit-Chatterjee, *supra* note 1, at 13, 14.

⁷ Notably, however, that the region's malnutrition rates are strikingly high relative to its income levels. *See, e.g.,* Ruslan Yemstov, *The Global Food Crisis: Global Perspectives and Impact on MENA, Fiscal and Poverty Impact*, WORLD BANK GROUP; Clemens Brisinger et al., *Economics of the Arab Awakening: From Revolution to Transformation and Food Security*, International Food Policy Research Institute (IFPRI) Policy Brief 18, May 2011 at 2.

⁸ Clemens Brisinger et al., *supra* note 7, at 3.

⁹ *See* Yemstov, *supra* note 7, at 5.

¹⁰ WORLD BANK GROUP, AGRICULTURE & RURAL DEVELOPMENT IN MENA 1 (Sept. 2008).

¹¹ *Id.* at 1.

¹² *Id.* at 2.

¹³ PEW RESEARCH CENTER FORUM ON RELIGION AND PUBLIC LIFE, THE FUTURE OF THE GLOBAL MUSLIM POPULATION 14 (Jan. 2011).

¹⁴ *Id.* at 14. The projection and current figures count only the Muslim populations of Middle Eastern states because Muslims are overwhelming majorities in the countries surveyed. The food security *waqf* proposed would not be limited to Muslim beneficiaries, but would serve food security needs of involved states and their inhabitants and other designated beneficiaries, if any. It should be noted that *awqaf*, their administrators, and beneficiaries, have and may involve non-Muslims. For example, "[a] *waqf* supported many churches and synagogues and these were equally admissible in the Muslim courts of law." SIRAJ SAIT & HILARY LIM, LAND LAW & ISLAM: PROPERTY & HUMAN RIGHTS IN THE MUSLIM WORLD 156-57 (2006).

¹⁵ U.N. FOOD AND AGRICULTURE ORGANIZATION, COUNTRY RESPONSES TO THE FOOD SECURITY CRISIS: NATURE AND PRELIMINARY IMPLICATIONS OF THE POLICIES PURSUED 27-28 (2009).

¹⁶ *See* Yemstov, *supra* note 7, at 10, 13 (Showing price fluctuations and responses).

¹⁷ Yemstov, *supra* note 7, at 13.

¹⁸ Saudi Arabia embarked on an ambitious government-mandated and subsidized effort to achieve self-sufficiency in key food staples and succeeded, but at a high cost to government coffers and the country's scarce water resources. According to the Saudi Arabian government, the Kingdom built its first grain silos in 1978, and in 1984, became wheat self-sufficient. *See Agricultural Achievements*, ROYAL EMBASSY OF SAUDI ARABIA, WASHINGTON, D.C., available at http://www.saudiembassy.net/about/country-information/agriculture_water/Agricultural_Achievements.aspx (last visited Dec. 19, 2012). Saudi Arabia spent between SR60 billion to 70 billion to subsidize wheat production over the "long term" and significantly depleted water resources in the process. Recognizing the prohibitively high cost of domestic wheat production, the government announced that Saudi Arabia will phase out wheat production by 2016. *See Saudis to Phase Out Wheat Production*, FINANCIAL TIMES, April 11, 2008, available at <http://www.ft.com/intl/cms/s/0/a686f2b0-0753-11dd-b41e-0000779fd2ac.html#axzz2BUJ3AgpW>.

¹⁹ Alexandra Spieldoch & Sophia Murphy, *Agricultural Land Acquisitions: Implications for Food Security and Poverty Alleviation*, in LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 39, 42 (Michael Kugelman & Susan L. Levenstien eds., 2009).

²⁰ *See* Joachim von Braun & Ruth Meinzen-Dick, *Land Grabbing by Foreign Investors in Developing Countries: Risks and Opportunities*, IFPRI Pol'y Brief No. 13, Apr. 2009, at 5.

²¹ *Id.*

²² *Id.*

²³ The Sudan (seven), Egypt (one), Turkey (one), Mali (one), and Pakistan (one). *Id.*

²⁴ For example, Qatar is known to have invested in farmland in Australia. *See, e.g.,* Cameron Houston & Royce Millar, *Qatar Land Grab Angers Bush*, THE AGE, (June 19, 2011), available at <http://www.theage.com.au/victoria/qatar-land-grab-angers-bush-20110618-1g99l.html>

²⁵ Numerous reports scrutinizing "land grabs" have been critical of the practice. And land acquisitions have been received with hostility in various jurisdictions. For example, the acquisition by Qatar of farmland in Australia has sparked controversy. *See id.* In Madagascar, a proposed land acquisition by South Korea triggered political unrest, leading to the eventual ouster of Madagascar's president and the cancellation of the transaction by his successor. Sebastian Berger, *Madagascar's New Leader Cancels Korean Land Deal*, THE TELEGRAPH, Mar. 18, 2009, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/madagascar/5012961/Madagascars-new-leader-cancels-Korean-land-deal.html>.

²⁶ *See, e.g.,* Houston & Millar, *supra* note 24.

²⁷ *See* Michael Kugelman, *Introduction and Acknowledgements*, in LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 1, 3 (Michael Kugelman & Susan L. Levenstien eds., 2009).

²⁸ *See* Houston & Millar, *supra* note 24 (Deal described as "secretive").

²⁹ Kugelman, *supra* note 27, at 16-18.

³⁰ *See* Kugelman, *supra* note 27, at 18.

³¹ Schaffnit-Chatterjee, *supra* note 1, at 15.

³² *See* Schaffnit-Chatterjee, *supra* note 2, at 13.

³³ Indeed, it is understood that in most cases, agreements for the outright purchase or long-term lease of agricultural land overseas are made with host nation governments without participation or input from farmers or other segments of local populations that are dislocated or adversely impacted in other ways. *See, e.g.,* U.N. FOOD AND AGRICULTURE ORGANIZATION, FROM LAND GRAB TO WIN-WIN SEIZING THE OPPORTUNITIES OF INTERNATIONAL INVESTMENTS IN AGRICULTURE, ECONOMIC AND SOCIAL PERSPECTIVES POLICY BRIEF 2 (June 2009).

³⁴ *See, e.g.,* von Braun & Meinzen-Dick, *supra* note 20.

³⁵ Lester R. Brown, *When the Nile Runs Dry*, N.Y. TIMES, June 1, 2011, § A, at 29 (explaining that "[t]he Nile Waters Agreement, which Egypt and Sudan signed in 1959, gave Egypt seventy-five percent of the river's flow, Sudan twenty-five percent and none to Ethiopia. This situation is changing abruptly as wealthy foreign governments and international agribusinesses create land acquisition deals to for large swaths of arable land along the Upper Nile. Consequently, Egypt must deal with several governments and commercial interests that were not party to the 1959 agreement. However, Egypt too has acquired agricultural land and/or land-use rights in the Sudan. As for the Sudan, there is no publicly available evidence to suggest that the state or Sudanese farmers have realized appreciable net monetary, know-how, or other gains from foreign acquisitions or use of Sudanese land. The adverse consequences to some Arab countries illustrate the need for a coordinated regional food security strategy").

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EDIBLE COMMUNITIES: INSTITUTIONALIZING THE LAWN-TO-GARDEN MOVEMENT TO PROMOTE FOOD INDEPENDENCE FOR LOW-INCOME FAMILIES

by Chelsea Tu*

The concept of building local food systems for low-income communities has gained impressive momentum as part of the U.S. sustainability movement.¹ Local food systems help reduce environmental impacts from production to plate, increase availability and access to cheaper fresh fruits and vegetables in underserved communities, lower rates of obesity and diet-related diseases, and eliminate food deserts.² Notable existing local food initiatives serving low-income individuals include building grocery stores and community gardens in food deserts,³ and promoting the use of Supplemental Nutrition Assistance Program (SNAP) benefits to purchase fresh produce⁴ as well as seeds and food-bearing plants.⁵ The local food movement arose in response to overarching political support for large-scale commercial agriculture at the federal and state levels, which still dominates the national food system.⁶ Beyond this, particular challenges for institutionalizing innovative food initiatives for low-income residents include a lack of sustained funding, zoning restrictions, insufficient training and institutional support, as well as locating and converting productive land in urban and suburban areas.⁷ Thus, despite the positive impact of local food systems, 14.9 % of U.S. households were still food insecure in 2011.⁸ Establishing lawn-to-garden programs for low-income individuals can solve land availability and conversion issues while achieving all of the health and environmental benefits local food initiatives bring.

The lawn-to-garden concept is not novel. During World War II more than twenty million “victory gardens” were planted on residential lawns and community plots across the country,⁹ yielding an estimated nine to ten million tons of fruits and vegetables.¹⁰ However, these gardens disappeared when improved and cheaper technologies led to a shift in federal food policy that encouraged large-scale commercial farming.¹¹ The lawn reverted back to its decorative role,¹² and the lawn-to-garden concept was all but abandoned until 2009 when Michelle Obama converted the White House South Lawn to a 1,110-square-foot vegetable garden.¹³

The case for converting lawns to gardens is simple: edible gardens will help alleviate the energy and health crises.¹⁴ Lawn-to-garden initiatives make use of productive agricultural space in residential yards and reduce input of fossil fuels and toxic products to maintain green carpets.¹⁵ This makes sense in low-income communities where many residents may not have sufficient income or time to maintain manicured lawns. The lawn-to-garden model also reduces reliance on processed foods that travel thousands of miles to consumers while increasing access to locally grown fresh foods.¹⁶ In effect, edible communities will better connect people, food, and the environment.¹⁷

Lawn-to-garden initiatives could be customized according to the size of available land, the number of participants, and the type of operation that participants desire. Similar to community garden projects and school farms,¹⁸ low-income single-unit homes and multi-unit affordable housing complexes could convert available lawn space to gardens where participating residents could grow what they wish or delegate gardening responsibilities in order to operate as a cooperative.¹⁹

Low-income individuals could also farm on someone else’s yard.²⁰ Low-income individuals could become “agripreneurs” and sell their produce directly to neighbors, farmer’s markets, and other outlets.²¹

The creation and institutionalization of lawns-to-gardens must overcome legal, pecuniary, institutional support, and cultural hurdles. Most urban and suburban municipal zoning laws limit commercial agricultural areas to certain parts of town.²² Residential zones typically do not allow for commercial gardens.²³ However, some municipalities, such as Seattle, have adjusted their zoning laws to promote growing and selling fresh produce in residential areas.²⁴ Another promising method for institutionalizing edible communities is incorporating them into municipal sustainability plans.²⁵

Like any farm, a successful lawn-to-garden may require sustained funding to retain full-time staff and to purchase seed, fertilizer, and equipment. This is especially relevant in the low-income context as economically disadvantaged individuals are unlikely to have sufficient time and money to maintain lawn-converted gardens. However, an increasing number of private investors,²⁶ local programs, and federal programs²⁷ provide local food project funding targeting underserved communities. There is also no paucity of knowledgeable gardeners themselves, as evidenced by AmeriCorps’ recent launch of the Food Corps program where over one thousand applicants competed for fifty openings in 2011.²⁸ The number of agripreneurs is also rising, notably in marginalized populations of Latinos and veterans.²⁹ Once participants convert lawns to gardens and establish local marketing outlets, this community of gardens has the potential to generate both food and income,³⁰ allowing underserved communities to be both food-secure and food-independent.

Perhaps the biggest challenge to institutionalizing lawn-to-garden initiatives is Americans’ longstanding belief that lawns promote the attractiveness and marketability of their property.³¹ Additionally, low-income residents may perceive gardening as a luxury and not a means of sustenance.³² These “perception gaps” can be overcome with grassroots support from programs like Food Corps, as well as education and media campaigns modeled on the success of the local foods revolution.³³ The objective should be to educate the public about the functional beauty of gardens and the potential avenues for entrepreneurship they create.

In addition to increasing the number of backyard gardens that many Americans have, we should look to expand gardens to front yard and courtyard gardens. Providing low-income communities easy access to fresh produce by converting lawns to gardens will connect urbanites and suburbanites to their food, improve environmental and human health, and increase community pride.³⁴ Lawns-to-gardens will give us the opportunity to show off the fruits of our labor, enjoy them ourselves, give them to our neighbors, and even sell them for profit. Lawn-to-garden initiatives can be a part of the local food system revolution that seeks to create food independent, healthy communities for millions of Americans.



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FREE, PRIOR, AND INFORMED CONSENT:

IMPLICATIONS FOR TRANSNATIONAL ENTERPRISES

by Tendai Zvobgo*

INTRODUCTION

Inward foreign direct investment by multinational enterprises has been instrumental for the development of extractive industries and manufacturing exports in developing countries.¹ In some instances, however, large-scale industrial and economic development has occurred without regard for the rights of indigenous peoples' and their ownership and usage of land.² During the past two decades, the protection of indigenous peoples' has increased under international law as a result of the free, prior, and informed consent principle ("FPIC").³ This paper examines the scope of FPIC as an aspect of environmental justice and a tool for poverty alleviation. It also explains some of the difficulties encountered by transnational enterprises when they attempt to utilize FPIC and the benefits that accrue to indigenous communities and transnational enterprises when the principle is properly applied.

FREE, PRIOR, AND INFORMED CONSENT IN INTERNATIONAL LAW

FPIC empowers indigenous communities by providing them access to environmental justice. The concept of "environmental justice" mandates that all people, regardless of their race, origin or income, have the ability to "enjoy equally high levels of environmental protection."⁴ At the core of FPIC, is the right to self-determination as enshrined in Article 1 of the International Covenant on Civil and Political Rights.⁵ FPIC enables indigenous peoples to "assert that their territories should be recognized by government and that their free, prior, and informed consent is necessary before development activities can take place on their territories."⁶ FPIC is also significant in the development context because, as noted by Amartya Sen, development is related to freedom and freedom is undermined when people are restricted from exercising their civil and political rights.⁷ Therefore, FPIC gives the most vulnerable members of society a platform from which they can express their rights.

The most significant instruments that recognize FPIC are the International Labor Convention 169 of 1989 and the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") passed in 2007. The former is a binding treaty and has been ratified by 23 countries, most of which are in South America.⁸ Although most states are not parties to the Convention, it is still important as a "persuasive authority for the global community regarding FPIC."⁹ The UNDRIP, on the

other hand, is not a treaty and therefore not binding authority. One hundred and forty three countries voted in favor of the UNDRIP while eleven abstained. The United States, New Zealand, Canada and Australia voted against it.¹⁰ These four countries later abandoned their initial position and endorsed the UNDRIP.¹¹

Although international law does not impose an obligation on transnational enterprises to respect FPIC, states will still be affected by the principle's

evolution within international law.¹² The language utilized in the International Labor Convention and UNDRIP makes it apparent that states bear the primary responsibility for respecting FPIC.¹³ Article 32, section 2 of The United Nations Declaration on the Rights of Indigenous Peoples explicitly refers to the notion of free, prior, and informed consent and the process that states should undertake in order to obtain it.¹⁴ As a result, national and regional legal systems have begun to adopt the FPIC principle as a guideline when making decisions that would impact the development of indigenous populations.¹⁵ At times, this has culminated in the modification or denial of concessions that states had offered multinational companies.¹⁶ Furthermore, international institutions, such as the Inter-American Development Bank and

large-scale industrial and economic development has occurred without regard for the rights of indigenous peoples' and their ownership and usage of land

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the Roundtable on Sustainable Palm Oil (“RSPO”), have adopted the principle of FPIC.¹⁷ The World Bank modified its safeguard policies in 2006 to include free, prior, and informed consultation as a requirement for its supported projects.¹⁸

THE SOCIAL LICENSE

FPIC requires that consent must be freely given and that the decision must be made after indigenous peoples have been educated about the project.¹⁹ Therefore, a neutral agent should obtain FPIC before a transnational enterprise may proceed with a development project and any agreement reached between the indigenous peoples and the agent must not be influenced by coercion.²⁰ Furthermore, it is imperative during the negotiation process that indigenous groups are made aware of their rights over their ancestral lands, the risks associated with the project, and the relationship between their rights and their access to natural resources, which the community may be dependent upon for sustenance.²¹

However, the process of obtaining FPIC may contain complicated obstacles, making the procurement of FPIC an arduous task for transnational enterprises.²² For example, the process of identifying the indigenous population that may be greatly impacted by a development project could prove to be laborious and time consuming and, even after the group is identified, the negotiation process may be riddled with difficulties.²³ The challenges encountered during the negotiation process can stem from cultural beliefs that indigenous peoples maintain about their territory. These beliefs may influence their perception of foreseeable consequences. For example, the experience of indigenous inhabitants may hinder them from comprehending that a river can run dry or that an industry’s activities could result in the annihilation of a river, particularly if the rivers on their land have always flowed generously for generations.²⁴ Therefore, it may be impossible to attain FPIC in contexts in which indigenous groups have never seen an example of a proposed project or lack awareness of the potential consequences.

One proposed solution to this problem has been to utilize videos to enable the group to envision what is proposed. However, videos may also be insufficient, as they may not capture the scale of the project adequately.²⁵ Even if the group has seen a road, it cannot be concluded that they understand the scale and the implications of a proposed highway.²⁶ Under such circumstances, it may be necessary to provide transportation for the indigenous group so that they can be taken to an area where a similar project has been executed.²⁷ They should also be granted

an opportunity to converse with the inhabitants within that area, so that they can receive information about their personal experiences concerning the completed project.²⁸

Considering the obstacles that transnational enterprises must contend with, it is essential to contemplate the benefits that accrue when enterprises practice FPIC with fidelity. Businesses are motivated by profits after all, whereas FPIC is most concerned with empowering and protecting the poor and vulnerable from exploitation.²⁹ The application of the FPIC principle by transnational enterprises has beneficial ramifications for the companies—the states, and indigenous populations.

In 2001, the Business and Industry Advisory Board to the Organisation for Economic Co-operation and Development stated that “companies cannot be required to resolve all the world’s problems . . . they have neither the mandate nor the

organization to do so.”³⁰

While there is some truth to this statement, transnational enterprises and corporations are expected to respect human rights.³¹ The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights was approved unanimously by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003.³² When read together with the interpretive guide of the sub-commission, these norms constitute an authoritative

FPIC requires that consent must be freely given and that the decision must be made after indigenous peoples have been educated about the project.

guide regarding corporate social responsibility.³³ In fact, they represent the first set of “comprehensive human rights norms specifically aimed at and applying to transnational enterprises and other business entities.”³⁴ The preamble of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights stipulates that, although states are primarily responsible for respecting, protecting, and fulfilling human rights, “transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.”³⁵ Therefore, transnational corporations and enterprises participating in extractive industries must be sensitive to human rights issues, particularly when dealing with indigenous peoples and local communities.³⁶

The responsibilities of transnational enterprises to respect human rights should not merely be regarded as an altruistic obstacle to be overcome when establishing business operations in another state. Rather, transnational enterprises’ adherence to the FPIC principle benefits companies through the social license to operate within or in proximity to indigenous communities.

The value of a social license must not be understated; its absence can result in human and fiscal loss to the enterprise as well as reputational damage.³⁷

The Niger Delta in Nigeria is a consummate example of mayhem in the absence of a social license. Political repression, marginalization, land dispossession, and degradation of the environment have incited a number of indigenous peoples of the Niger Delta to join militant groups and to attack the workers of oil companies.³⁸ In 2006, one of the groups, known as the Movement for the Emancipation of the Nigeria Delta (“MEND”), gained international notoriety when it claimed responsibility for the kidnapping of four foreign oil workers.³⁹ MEND members have even occasionally kidnapped the family members of oil workers.⁴⁰ The group claims its actions constitute an attempt to obtain rights for local communities to participate in the oil industry.⁴¹ The militants insist that they represent marginalized communities that have been “alienated from the wealth of their lands.”⁴² In addition, the Council on Foreign Relations has noted that since 2006, MEND’s “attacks on oil pipelines and kidnappings have reduced oil output in the Niger Delta by roughly one third.”⁴³ Nigeria is the fifth largest oil supplier to the United States and, understandably, the U.S. government has expressed concern about MEND’s capacity to unsettle global oil supply.⁴⁴

Though MEND has garnered international attention recently, protests in the Niger Delta are hardly a new occurrence. Demonstrations commenced in the 1990s, initiated by members of the Ogoni ethnic group, who were indigenous inhabitants of the delta.⁴⁵ The Ogoni people were vexed by the environmental degradation of the delta as a result of oil operations and the lack of economic development in their communities.⁴⁶ The Movement for the Survival of the Ogoni People (“MOSOP”) was the first militant group in the delta to gain international attention.⁴⁷ Led by Ken Saro-Wiwa, they campaigned in a non-violent manner against the operations of Royal Dutch/Shell that contributed to the deterioration of their environment whilst their community derived no monetary benefit.⁴⁸

The efforts of MOSOP led Shell to cease operations in Ogoni in 1993.⁴⁹ However, allegations abounded that the Nigerian government, backed with monetary support from Shell, utilized deadly force against the Ogoni people throughout the 1990s.⁵⁰ Furthermore, Saro Wiwa and eight other MOSOP members were executed in 1995 by Nigeria’s military regime.⁵¹ The relatives of the executed MOSOP members filed a lawsuit against Shell in 1996, suing Shell for their wrongful deaths. After over a decade of litigation and reputational damage, Shell agreed to pay \$15.5 million to the families of the victims in 2009.⁵² When the African Commission on Human Rights delivered its judgment concerning the Ogoni case in 2002, it highlighted the importance of FPIC.⁵³ The Commission noted that throughout its dealings with oil consortiums, the Nigerian government failed to involve the people of Ogoni in matters that were critical to their region, Ogoniland.⁵⁴ Additionally, the Nigerian government had infringed upon the right of the Ogoni people to freely dispose of their natural wealth and resources by issuing oil concessions on Ogoni lands without consulting them.⁵⁵

The conflict within the Niger Delta demonstrates that when states do not esteem human rights and allocate rights to companies which operate in those indigenous territories, companies can share the burden of quelling the resulting social unrest. In addition, this political and social climate may serve to undermine the investments made by an enterprise in a particular territory.⁵⁶

Adherence to FPIC, particularly in countries that voted for the UN Declaration on Indigenous Peoples, lowers legal and reputational risks in the long term for transnational enterprises.⁵⁷ In fact, analysts have found the long term benefits derived from the utilization of FPIC—such as the social license—outweigh the obstacles oil and gas companies may encounter when seeking public approval.⁵⁸

FREE, PRIOR, AND INFORMED CONSENT AND PROPERTY RIGHTS

Article 1 of the Indigenous and Tribal Peoples Convention, 1989, expresses the concept of indigenous and tribal peoples. According to the convention, the former constitutes:

“[P]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”⁵⁹

Available data reveals that approximately three quarters (900 million) of the world’s poorest populations (1.2 billion) inhabit rural areas; about one third of those living in rural areas are indigenous peoples, inhabiting at least 70 countries.⁶⁰ In most cases, the level of poverty in indigenous communities is exceptionally high.⁶¹ To illustrate, 86.6 percent of the indigenous peoples in Guatemala and 80.6 percent of indigenous peoples in Mexico are impoverished.⁶² Therefore, this relationship suggests that assisting indigenous peoples in overcoming poverty will also significantly reduce the number of the world’s rural poor.⁶³

The material vulnerability of indigenous peoples can be attributed to their tendency to inhabit areas where property rights are ill defined.⁶⁴ Indigenously owned territories often offer sources of power generation, water, minerals and resources that may not be available elsewhere within the state.⁶⁵ Their territories may also present investment opportunities in ecotourism and lumbering.⁶⁶ When these resources are exploited in a manner that degrades the environment of the territories they rely on for sustenance their vulnerability is heightened.⁶⁷

The FPIC principle provides indigenous peoples with a measure of protection from imposed development and environmental degradation. However, the protection and material empowerment of indigenous peoples is dependent upon government and corporations’ adherence to FPIC, the attainment of collective land ownership, the characterization by participatory mapping of territorial boundaries, and the legal demarcation of land.⁶⁸ In particular, the lack of legal ownership often causes

indigenous communities to lose control over their ancestral territories because it permits governments to utilize those lands for development projects and to grant the property rights to foreign companies. The Endorois indigenous community in Kenya⁶⁹ is an example of the former while the Saramaka, a tribal community in Suriname, provides a point of reference concerning the latter point.⁷⁰

The Endorois community occupied their territory for over 300 years while the Saramaka have exercised control over their territory since the 17th century.⁷¹ Notwithstanding, neither community petitioned their respective governments for formal recognition of the groups' land ownership until they lost control of their properties and their way of life was disrupted, prompting legal recourse. However, when transnational enterprises adhere to FPIC, they have the potential to catalyze the attainment of formal property rights by indigenous peoples and this could potentially strengthen property rights within the state.

The term "property rights" has been defined in a number of ways.⁷² A definition proffered by Armen, Alchian and Harold Demsetz in 1972 will suffice for the purpose of this discussion. Their definition is comprised of three components the right to control, to derive income from, and to transfer the resources located on one's property.⁷³ It is difficult for indigenous communities to strive to attain these rights because in most instances the exact parameters of their territories are not known.⁷⁴ Government maps "often do not reflect the precise traditional land usage of indigenous peoples."⁷⁵ Therefore, before embarking on the exploration stage, prudent enterprises that intend to adhere to FPIC should retain the services of a social geographer or other professionals that have intimate knowledge of land use by indigenous groups.⁷⁶ This will enable the transnational enterprise to determine the precise indigenous group it ought to consult.


The efforts of enterprises to determine property boundaries could produce the evidence indigenous groups need to legally claim and subsequently establish property rights.⁷⁷ For example, Western Mining Corp Ltd. in the Philippines utilized the services of archeological and ethnographic teams for the purpose of

ascertaining the land that belonged to indigenous peoples.⁷⁸ The corporation's determinations assisted the indigenous populace when they sought title to their land because the results provided clarity regarding the area's parameters.⁷⁹ Additionally, the benefits for the enterprises of undertaking this process are twofold; not only do adherents earn the trust of the community, but they also create a legally unambiguous climate of operation for the duration of their tenure in that state.⁸⁰

CONCLUSION

Amartya Sen argued, "[t]he regions of the world are more interlinked now than at any other time in history."⁸¹ As a result, land development is not solely influenced by governments, but also by transnational enterprises, as they are among the significant drivers of globalization.⁸² However, at the heart of the concept of free, prior, and informed consent is the idea of self-determination. The principle has far reaching implications in the context of environmental justice while also enabling indigenous communities to attain property rights and to overcome economic marginalization and poverty.

The application of FPIC is beneficial for states, transnational enterprises, and indigenous peoples. Shell's involvement in the Niger Delta exemplifies the burdens and consequences incurred when corporations fail to adhere to the FPIC. Transnational enterprises employing FPIC will be protected from the ire of indigenous peoples constantly exposed to the dichotomy of mineral wealth, environmental degradation and human poverty. Further, by acquiring a social license, transnational enterprises preserve their reputation and avoid their entanglement in human rights abuses.

When properly applied, the FPIC principle plays a role in reducing the effects emanating from forced relocation, such as poverty and economic marginalization, and provides vital support to the fight for environmental justice. The increasing prominence of FPIC and the examples herein highlight the wealth of factors that impact human development, such as local governance, environmental protection, justice, trade, and human rights while also illustrating the principle's importance as an essential mechanism in a highly globalized world. 

Endnotes: Free, Prior, and Informed Consent: Implications for Transnational Enterprises

¹ See Kathryn Gordon, OECD, *Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuses* 3 (May 2002), <http://www.oecd.org/dataoecd/46/31/2757771.pdf>; see also IAN GOLDIN & KENNETH REINERT, *GLOBALIZATION FOR DEVELOPMENT* 59 (2006).

² Helen Tugendhat & Valerie Couillard, *Forest Peoples Programme*; Jeremy Gilbert & Cathal Doyle, MIDDLESEX UNIV. BUS. SCH., *Business, Human Rights and Indigenous Peoples: The Right to Free, Prior, and Informed Consent* 1 (2010), <http://www.forestpeoples.org/sites/fpp/files/publication/2010/10/ukgovt-fpicsubmissionmay09eng.pdf>.

³ Robert Goodland, *Free Prior Informed Consent and the World Bank Group*, SUSTAINABLE DEV. L. & POL'Y, Summer 2004, at 66, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1381&context=sdlp>.

⁴ *Environmental Justice*, THE CAL. ENERGY COMM'N, http://www.energy.ca.gov/public_adviser/environmental_justice_faq.html.

⁵ Tugendhat & Valerie Couillard, *supra* note 2, at 2; Article 1 International Covenant on Civil and Political Rights 1976 <http://www2.ohchr.org/english/law/ceschr.htm>.

⁶ Patrick Anderson, *Free Prior Informed Consent in REDD* 71 (Feb 2011) http://www.recoftc.org/site/uploads/content/pdf/FPICinREDDManual_127.pdf.

⁷ AMARTYA SEN, *DEVELOPMENT AND FREEDOM* 4 (1999).

⁸ Convention No. 169 <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169>.

⁹ AMY K. LEHR & GARE A. SMITH, *IMPLEMENTING A CORPORATE FREE, PRIOR AND INFORMED CONSENT POLICY: BENEFITS AND CHALLENGES* 11 (Foley Hoag 2010).

SEVEN PRINCIPLES FOR EQUITABLE ADAPTATION¹

Prof. Alice Kaswan*

As Professors Robert Bullard and Beverly Wright have stated, “[c]limate change looms as *the* global environmental justice issue of the twenty-first century,” posing critical challenges “for communities that are already overburdened with air pollution, poverty, and environmentally related illnesses.”² Around the world, sea level rise, more extreme storms, heat waves, wildfires, changing weather patterns, and the spread of disease appear inevitable.³ Reducing greenhouse gas (GHG) emissions is necessary but not sufficient to address the potential damage.⁴ Global, national, and subnational adaptation measures to reduce climate harm are essential.⁵ To avoid substantial disparities in the impacts of climate change, equity considerations should play a vital role in emerging United States adaptation initiatives.⁶ Focusing on domestic law, this article briefly describes climate change impacts and the role of socioeconomic factors in determining their magnitude. It then provides seven principles for achieving equitable adaptation.

CLIMATE CHANGE IMPACTS

Among the most dramatic impacts of climate change will be the increasing incidence of disasters.⁷ Climate scientists anticipate that flooding will become more common and severe as sea levels rise and hurricanes become more intense, generating more destructive storm surges – the consequences of which were all too evident after Hurricane Sandy’s inundation of New York and New Jersey in Fall 2012.⁸ Throughout the nation, precipitation events are likely to become more extreme⁹ and, in some parts of the country, overall precipitation levels are already increasing dramatically.¹⁰ Scientists predict increasing wildfires in the western states,¹¹ predictions borne out by recent record-breaking fires.¹² Risks from flooding and fire include not only the direct harm from rising waters or flames, but contamination risks from inundated or incinerated industrial and hazardous waste facilities,¹³ the need to dispose of tons of debris,¹⁴ and the long-term housing and economic impacts that endure for years after major disasters.¹⁵ Adaptation measures must address adequate disaster preparedness, response, recovery, and mitigation measures to reduce long-term risks.

Increasing disaster risks could also render certain parts of the country uninhabitable. Migration away from low-lying coastal areas and floodplains may ultimately be necessary.¹⁶ Certain tribal communities in coastal Alaska, like the Village of Kivalina, already face the need to relocate.¹⁷ Additional climate impacts, like unsustainably high temperatures, droughts or saltwater intrusion that depletes essential water supplies, could likewise require large-scale population shifts.¹⁸ Adaptation measures must address local decision-making processes that govern decisions about when to protect an area from harm (through, for example, coastal armoring, levees, or the enhance-

ment of natural buffers), when to adjust (through, for example, building standards to increase resilience), and when to retreat (through, for example, conservation easements or public purchase of at-risk property).

Scientists have also found that climate change will lead to numerous public health threats. Climate scientists predict that by 2100, average temperatures in the United States will increase by four to eleven degrees and heat waves that historically occurred once every twenty years will occur every other year.¹⁹ Heat waves are among the most lethal of

disasters, causing as many or more deaths than other types of disasters.²⁰ Moreover, higher temperatures trigger higher pollution levels, increasing the negative public health consequences of high heat.²¹ Warmer temperatures in the United States are also predicted to lead to the spread of disease and allergens.²²

Climate change will have pervasive economic impacts as well. For example, 80,000 businesses and almost 400,000

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jobs were reportedly lost from Hurricanes Katrina and Rita.²³ Changes in resource availability, like water supplies, could increase the cost of water and, given the importance of irrigation to agriculture, increase the cost of food.²⁴ Warmer temperatures may increase demand for air conditioning, potentially increasing electricity costs.²⁵ Climate mitigation efforts, however well-meaning, could also increase energy costs, by either placing a price on carbon through a market-based control mechanism or by encouraging the use of more expensive renewable energy sources.²⁶ More broadly, adaptation measures themselves are likely to be extremely costly. Fortifying or moving key infrastructure, like roads, airports, and sewage treatment plants, will cost billions.²⁷ Relocating communities or buying out property owners to protect them from harm would cost billions more.²⁸ Disaster response and reconstruction costs multiple billions of dollars.²⁹ Indirectly, addressing climate impacts and financing adaptation measures could drain government resources from other functions, like education and the social safety net, unless alternative financing sources are developed.³⁰

CLIMATE CHANGE IMPACTS AND EQUITY

The consequences of climate change will be experienced unevenly. In the United States, poor and marginalized communities without sufficient financial and social resources will face significant adaptation challenges.³¹ To quote Professor Robert Verchick: “Catastrophe is bad for everyone. But it is especially bad for the weak and disenfranchised.”³²

While it is critical to determine risk exposure – to assess the likelihood that a community will encounter a given climate impact – a community’s ultimate vulnerability cannot be determined without also assessing its sensitivity and its capacity to cope.³³ Depending upon the type of climate impact at issue, sensitivity is determined by such features as the quality of the housing stock, underlying health conditions, land elevation, and proximity to other hazards. The capacity to cope is a function of such factors as a community’s financial and social resources, access to health care, and geographic mobility.

Both physical and social factors thus determine climate impacts.³⁴ Social scientists evaluate social factors in terms of social vulnerability, defined as “the characteristics of a person or group in terms of their capacity to anticipate, cope with, resist, and recover from the impact of a natural hazard.”³⁵ Substantial evidence demonstrates that social vulnerability is greater for the poor, the elderly, racial minorities, people with underlying health conditions or disabilities, the socially isolated and politically marginalized, immigrants, and communities that are dependent upon vulnerable natural resources.³⁶

To avoid these disparities, climate change adaptation policies must grapple with underlying socioeconomic inequities. Decreasing social vulnerability requires adaptation measures that both reduce the underlying sensitivity to harm and enhance impacted communities’ resilience to harm after it has occurred. As in the environmental justice context, pursuing climate justice involves improving substantive outcomes for disadvantaged communities, developing inclusive and empowering participatory mechanisms, and addressing the deeper social and institutional forces that create and perpetuate systemic disparities,³⁷ themes addressed by the seven principles articulated below.

Improving equity is valuable not only on its own terms, but because of the adverse societal consequences of failing to address equity. Widespread homelessness, unemployment, and illness disrupt the social fabric of a community and could create far-reaching instability. The already-frayed social safety net may be unable to cope with the scale of disruption that could occur. Considered comprehensively, it is more prudent to develop adaptation plans that avoid harm than it is to attempt to repair the harm after the fact — or suffer the consequences of irreparable devastation.³⁸

SEVEN PRINCIPLES FOR EQUITABLE ADAPTATION

Given the key role of socioeconomic factors in determining the magnitude of climate impacts,

an integrated ecological, social, and economic approach to adaptation planning, like that suggested by Rob Verchick and by Manuel Pastor and his co-authors in the disaster planning context, is essential to equitable adaptation efforts.³⁹ Although successful adaptation will require attention to a wide range of important principles,⁴⁰ this article articulates a subset of that array, focusing on those principles with the greatest impact on equity.

The principles are intended to guide adaptation planning in any of the contexts in which it emerges. The principles are applicable to action taken by local, state, or national entities. They could inform new adaptation legislation, or they could be integrated into adaptation efforts by institutions, like disaster management agencies, housing agencies, public health organizations, and local governments as they act under existing authorities.

1. GOVERNMENT HAS AN IMPORTANT ROLE TO PLAY

A threshold question is whether government action is necessary or whether people can (and should) take care of themselves. There is little dispute over the importance of governmental measures to protect key infrastructure, like highways and energy systems. Where individual or private business welfare is at stake, however, some might argue that as long as the government

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provides accurate and accessible information about current and future climate impacts, the private market will generate the optimal response. As citizens perceive growing threats, they will respond, and their responses will reflect their individual (and differing) risk tolerances. For example, they will or will not move away from floodplains, seashores, or disease-prone areas, buy hazard insurance, trim fire-prone vegetation in their yards, and purchase air conditioning. Under this view, if citizens end up in harm's way, then they are responsible for their own choices.⁴¹

Relying on individual initiative is, however, unlikely to lead to sufficient adaptation. Individuals could discount what appear to be inchoate, distant, and remote threats. As a consequence, they could fail to make sufficient investments to prepare for uncertain risks. Moreover, certain adaptation choices, like retreat, require difficult emotional decisions that could lead to collectively irrational results, as community residents prefer denial to leaving their homes and communities and losing all the social capital that resides in existing community structures.

Relying on the market is particularly detrimental to low-income marginalized communities. As Manuel Pastor and his co-authors have observed, relying on "market forces" to adequately prepare for disasters and other climate change impacts will fail to provide an adequate adaptation response because reliance on private action fails to protect those without the knowledge or means to act, systematically disadvantaging poor and isolated communities.⁴² Even assuming adequate knowledge, poor residents do not have the resources to respond to that knowledge by preparing, insuring, or moving.⁴³ When serious disasters occur, the government has historically provided some compensation, but that compensation cannot make up for underlying inequities.⁴⁴

Moreover, relying on market forces to depopulate at-risk areas would exacerbate, not reduce, risks to low-income and of-color citizens who could be powerfully attracted to newly affordable housing – housing that has become affordable and available because it is at risk.⁴⁵ Where citizens do not have adequate resources and face limited housing mobility due to lingering discrimination, individual responses to climate change risk do not reflect free and unconstrained "choices."

Given the likelihood that market forces will fail to adequately protect people from harm, and fail in ways that exacerbate risks for more vulnerable populations, comprehensive government adaptation initiatives are warranted. The remainder of this section addresses key themes to guide the incorporation of equity considerations in adaptation policy.

2. DESIGN SUBSTANTIVE ADAPTATION MEASURES THAT ADDRESS VULNERABILITY

Adaptation policies that attempt to treat everyone the same, regardless of underlying demographic characteristics, will result in substantial inequality given underlying differences. To achieve equitable adaptation, adaptation policies must explicitly address the demographics of affected populations and target interventions to address the needs of the most vulnerable.⁴⁶ Although such measures cannot eliminate all inequity – they cannot

prevent the inexorable loss of Native American Alaskan coastal communities, for example – they could in many instances reduce harm and lessen disparities. Relevant characteristics include income, race, age, status as renters versus owners, and type of employment. Immigrant status is also relevant to adaptation policy, and is addressed explicitly below in connection with communication measures.

Disparities in income create many of the most significant disparities in vulnerability to climate change impacts. Income disparities also have a racial dimension: Although many whites live in poverty, communities of color are disproportionately poor.⁴⁷ Climate impacts that disproportionately impact the poor will therefore affect a larger percentage of people of color. Adaptation policies that target resources toward low-income communities could thus ameliorate both income and racial disparities.

For example, given poor families' lack of resources to prepare for disasters,⁴⁸ funding hazard preparation measures for low-income households or assisting with housing retrofits to provide cooling could improve outcomes for disadvantaged communities.⁴⁹ Moreover, poor residents are less likely to have adequate transportation to flee disasters,⁵⁰ face greater challenges in finding affordable and safe shelter if evacuation is necessary,⁵¹ and are less likely to have air conditioning or other means for keeping cool in heat waves.⁵² As Hurricane Katrina made abundantly clear, adaptation plans must provide timely transportation options,⁵³ provide for adequate and safe public shelters, and provide cooling centers in heat waves so that poor residents do not remain in place – and at risk – because of inadequate transportation or fear of public facilities.

In the disaster recovery context, to avoid homelessness and widespread suffering, low-income residents will require various forms of assistance, including adequate housing vouchers and relocation assistance where rebuilding is infeasible. If rebuilding requirements, like flood-proofing codes, add significant costs to re-building, then government support for such measure may be needed to ensure that low-income households are not priced out of rebuilding.⁵⁴ Given the challenges in siting and building low-income and public housing, a strong governmental role, and financial support, is likely to be necessary to ensure that adequate low-income options are available.

Long-range land use planning to address shifts in habitability will have important equity implications and should avoid criteria that adversely impact low-income communities. For example, if planners in an area subject to flooding risks were to choose what areas to protect based solely upon land value, that criterion would systematically undermine poor communities, communities that often have less power in local land use debates.⁵⁵ Land use decisions about protection, retreat, and new development should be guided by substantive criteria that recognize a range of community values, including but not limited to land value. In addition, decisions about how to facilitate retreat, and how to compensate for the loss of property, should recognize that low-income residents do not have the resources to start fresh

elsewhere and face significant risks of homelessness or deepening poverty if relocation assistance is not provided.

Such long-range land use planning must also address potential impacts on areas that are likely to experience in-migration, as the population shifts from areas at risk to areas that face fewer risks and remain more habitable.⁵⁶ Adequate affordable housing in the nation's more habitable regions will be essential to avoid serious housing shortages and potential increases in homelessness.

Income is not the only demographic feature requiring sustained attention in the development of adaptation measures. Elderly and disabled residents face substantially greater risks in disasters because they are less likely to have adequate independent transportation, fare worse in shelters without adequate medical services, and are likely to suffer greater psychological distress from a disaster's profound disruptions.⁵⁷ They are also more vulnerable to public health threats, like heat and disease.⁵⁸ As a consequence, special accommodations for transportation, shelter, and medical needs are necessary for elderly and disabled residents to avoid serious consequences from disasters and the range of public health threats that climate change could cause.⁵⁹

Renters also require particularized attention. Renters are less able to prepare for disasters or heat waves because landlords control investments in home strengthening, air conditioning, or other mechanisms to reduce vulnerability to disasters or heat waves.⁶⁰ Local governments could adopt building codes that require or incentivize landlords to strengthen structures and install air conditioning. Moreover, in hot climates, building codes could require building designs that minimize summer heat and incorporate energy-efficient cooling mechanisms. Given evidence that past disaster recovery programs have provided more resources for homeowners than for displaced renters,⁶¹ adaptation planners should ensure that recovery programs provide adequate options for renters, including vouchers and housing alternatives.⁶² In developing post-disaster rebuilding plans, relevant officials should include sufficient replacement rental and public housing, housing that has historically been replaced at a lower rate than other forms of housing.⁶³

Lastly, given variations in risk exposure by occupation, adaptation planning should address the unique needs of certain workers. Outdoor workers, like agricultural, construction, and sanitation workers, face greater risks from high heat and pollution levels.⁶⁴ Those risks could be reduced by adjustments to the workday and by occupational safety guidelines that address adequate hydration, cessation of work when ambient temperatures exceed a certain level, and other measures to protect vulnerable workers.

3. PROVIDE CULTURALLY-SENSITIVE COMMUNICATIONS AND SERVICES

Communication is key to effective adaptation. Given the diversity of populations, community and demographic-specific strategies are necessary.⁶⁵ Public education can help communities prepare for disasters and inform them about how to address public health risks from heat waves, allergens, or new diseases.

Early warning systems are also essential to prepare for weather-related disasters, including potential flooding and heat waves.⁶⁶ Effective disaster response requires providing those affected with information about evacuation and shelter options. After a disaster occurs, effective recovery depends upon widespread access to information about available recovery resources.

Experience in the disaster context demonstrates that linguistic and cultural isolation will exacerbate climate impacts for immigrant communities unless proactive steps are taken to develop community-specific communication mechanisms.⁶⁷ In addition to identifying language needs, adaptation planners need to identify culturally appropriate modes of communication including, potentially, newspapers, radio, television, e-mail, social media, or door-to-door outreach.⁶⁸ Given undocumented immigrants' justifiable fear of deportation or historically rooted distrust of government,⁶⁹ government agencies should provide assurances that they will not deport.⁷⁰ In addition, agencies could partner with nongovernmental community organizations that could facilitate community outreach, provide information, and help organize vulnerable or impacted communities.⁷¹ The same issues arise in the context of providing services, like shelters or cooling centers, and in the context of distributing resources, like disaster relief.

Effective communications strategies are likely to vary for non-immigrant as well as immigrant communities, and require location-specific assessments.⁷² Some neighborhoods may have strained relationships with local police departments or other officials.⁷³ Certain populations could also require different communication methods. For example, personal, door-to-door warning and assistance may be necessary to adequately prepare elderly and disabled residents.⁷⁴

4. DEVELOP PARTICIPATORY PROCESSES

Decisionmakers cannot develop substantively appropriate adaptation and communication strategies without the right participatory processes. Given the importance of community-specific information, adaptation planning processes require bottom-up participatory mechanisms.⁷⁵ Such participatory processes are important not only to obtain critical information, but to provide marginalized communities with a voice in difficult political decisions.⁷⁶ Consistent with principles of environmental justice, adaptation planning could provide a vehicle for community empowerment and self-determination.⁷⁷

Adaptation planners should engage with community leaders to obtain site-specific information about relative disaster or heat preparedness and to identify appropriate modes of – and institutions for – communicating information about preparedness, warnings, and recovery.⁷⁸ Community-based information about available resources is also essential, including transportation and shelter options in the event of natural disasters or heat waves.⁷⁹

The political dimension to participatory processes is as important as the informational dimension. Many adaptation-related decisions will be politically controversial. For example, planners must determine who benefits from disaster recovery resources. What resources for homeowners? What resources for

renters? If new housing will be built, what income levels will it serve? With what neighborhood structures? In the long-term, communities facing flood and fire risks will have to make fateful decisions about what areas to protect and what areas to abandon.

To be effective, participatory opportunities need to occur early in the process and address local power dynamics. Timing is critical to the ability to shape decision making; an obligatory public hearing on an already-complete planning document does not constitute real public participation. An extended process of place-based community hearings and forums is more likely to generate meaningful participation.⁸⁰ Moreover, given power disparities and the political marginalization of some communities, carefully crafted and targeted outreach will be necessary to draw in all communities. While good participatory mechanisms cannot erase endemic power imbalances, they at least provide transparent forums that give historically less powerful constituencies a seat at the table.

5. REDUCE UNDERLYING NON-CLIMATE ENVIRONMENTAL STRESSES

In some instances, climate change does not create new risks; it exacerbates existing risks. For example, it could increase risks from flooded sewage treatment plants, industry, or waste sites.⁸¹ As Prof. Robin Craig has observed, a key adaptation principle is to “Eliminate or Reduce Non-climate Stresses and Otherwise Promote Resilience.”⁸² By improving the baseline, climate impacts will be less extreme. Because environmental justice research has demonstrated that many existing environmental problems, like hazardous waste storage and disposal sites, air pollution, and other environmental risks are disproportionately located in of-color and low-income communities,⁸³ reducing non-climate environmental stressors will have indirect equity benefits.

For example, improving inadequate storm water management, an existing non-climate problem, could mitigate the contamination that could arise from climate-caused increases in extreme precipitation.⁸⁴ In their compliance and enforcement initiatives, EPA or applicable state agencies could include vulnerability to disasters as a key factor in prioritizing their review of industrial and municipal storm water management plans and assessing compliance with industrial waste storage requirements. Similarly, the federal superfund program and its state equivalents could consider flood or fire risks in prioritizing cleanup efforts and in selecting remedies that take potential future disasters into account.⁸⁵ Moreover, aggressive efforts to reduce air pollution now will reduce the adverse consequences of future heat-induced air pollution increases.⁸⁶

Following this principle would not only mitigate climate impacts; it would provide significant co-benefits by reducing existing non-climate stresses. Given extensive co-benefits, such initiatives are often considered “no” or “low” regrets policies that are justified whether or not climate change occurs.⁸⁷

6. MITIGATE MITIGATION: ADDRESSING ADAPTATION/ MITIGATION TRADEOFFS

Although climate adaptation (addressing the impacts of climate change) and climate mitigation (reducing GHG emissions to lessen climate change) often involve different regulatory strategies, there are significant interactions between adaptation and mitigation measures. Policymakers need to consider the interplay between mitigation and adaptation.

In some instances, mitigation measures could be “maladaptive” by creating adaptation challenges, some of which raise equity concerns.⁸⁸ For example, a key strategy for reducing GHG emissions is encouraging smart growth to reduce transportation emissions from sprawl.⁸⁹ That smart growth could, however, increase urban heat. Scientists have documented that dense urban environments increase urban temperatures by several degrees over less-dense surrounding areas, a phenomena known as the “urban heat island effect.”⁹⁰ Moreover, although having denser cities might reduce overall air pollution emissions by reducing the driving associated with sprawl, increased urban density could increase localized air pollution levels.⁹¹ Finally, because many existing urban areas are in coastal areas and along rivers that face high disaster risks,⁹² intensifying growth would often, as Prof. Lisa Grow Sun has suggested, constitute “smart growth in dumb places.”⁹³ Where smart growth is justified, land use measures should prevent development in the riskiest areas and provide green spaces to minimize urban heat.⁹⁴ Transportation infrastructure should facilitate evacuation and be resilient to damage from potential disasters.⁹⁵

Certain mitigation measures could also generate equity concerns if they increase energy costs, which could occur through greater reliance on more expensive renewable energy or from imposing a price on carbon through a market-based mechanism like cap-and-trade or a carbon tax.⁹⁶ Measures to alleviate such impacts, like financing energy efficiency or public transportation, would ameliorate the potential adverse economic consequences of climate mitigation policies.

In other instances, adaptation measures could compromise mitigation. For example, while policymakers should develop cooling strategies to protect people from heat waves, policies that simply require or finance the installation of air conditioning would undermine mitigation by increasing energy demand.⁹⁷ In addition to, or instead of air conditioning, policymakers should consider building standards that lead to cooler buildings,⁹⁸ urban designs that reduce the heat island effect, cooling centers, and demand-response systems that allow residents or utilities to reduce air conditioning use in unoccupied buildings.

7. A COMPREHENSIVE AGENDA

While these suggestions for incorporating equity considerations into adaptation planning are important, it is also clear that they address symptoms, not causes. Underlying socioeconomic vulnerabilities create the disparities in the capacity to recover and reconstruct from disasters, inequities in the capacity to relocate to avoid harm, and differences in the public health consequences

of increasing heat, pollution, and disease. We are confronting more than a “disaster planning” or “adaptation planning” issue.

A larger socioeconomic agenda is critical to achieving equitable adaptation. The IPCC has stated that “[a] prerequisite for sustainability in the context of climate change is addressing the underlying causes of vulnerability, including the structural inequalities that create and sustain poverty and constrain access to resources.”⁹⁹ The IPCC states further that “[a]ddressing social welfare, quality of life, infrastructure, and livelihoods ... in the short term ... facilitates adaptation to climate extremes in the longer term.”¹⁰⁰

Successful adaptation will require addressing such pervasive issues as poverty, affordable housing, the provision of healthcare, and the political voice of currently marginalized communities.¹⁰¹ Building social infrastructure has always been

a laudable goal. Impending climate impacts provide yet another reason to mend social ills, or risk systemic disruptions that could make disasters like Hurricane Katrina and its aftermath the norm rather than the exception.

CONCLUSION

While global climate change is an “environmental” problem, the scope and scale of its impacts is strongly determined by underlying socioeconomic variables. As climate impacts emerge, they have the potential to exacerbate existing inequalities and cause severe hardships for the nation’s most vulnerable populations – hardships that are not only intrinsically of concern, but also destabilizing to the larger community. These seven principles provide policymakers with guideposts for achieving equitable adaptation.



Endnotes: Seven Principles for Equitable Adaptation

¹ This essay is adapted from a longer article entitled “Domestic Climate Change Adaptation and Equity,” 42 ENVTL. L. REP. 11125 (2012).

² ROBERT D. BULLARD & BEVERLY WRIGHT, *THE WRONG COMPLEXION FOR PROTECTION: HOW THE GOVERNMENT RESPONSE TO DISASTER ENDANGERS AFRICAN AMERICAN COMMUNITIES* 51 (2012).

³ See generally CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (M.L. Parry et al., eds., 2007), available at: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf>.

⁴ Public attention is understandably focused on climate mitigation – on policies to reduce greenhouse gas emissions – but mitigation measures cannot undo the consequences of already-accumulated atmospheric greenhouse gases (GHGs). See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, *supra* note 3, at 19, 20 [hereinafter IPCC, *Summary for Policymakers*], available at: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf>; UNITED STATES GLOBAL CHANGE RESEARCH PROGRAM, *GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES* 11 (2009) [hereinafter USGCRP REPORT], available at: <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf>.

⁵ The Intergovernmental Panel on Climate Change defines adaptation as: “the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.” See CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, *supra* note 3, at 6. On balance, scientists predict that the negative consequences will outweigh the beneficial impacts. See IPCC, *Summary for Policymakers*, *supra* note 4, at 17.

⁶ Cf. ROBERT R. M. VERCHICK, *FACING CATASTROPHE: ENVIRONMENTAL ACTION FOR A POST-KATRINA WORLD* 105-70 (2010) (proposing “Be Fair” as a central principal of disaster law); Jim Chen, *Law among the Ruins*, in *LAW AND RECOVERY FROM DISASTER: HURRICANE KATRINA* 1, 3 (Robin Malloy, ed., 2009) (arguing that the quest for equality should be a central component of disaster law); Victor B. Flatt, *Adapting Laws for a Changing World: A Systemic Approach to Climate Change Adaptation*, 64 FLORIDA L. REV. 269, 289-91 (2012) (discussing the important role of distributional justice in adaptation); J.B. Ruhl & James Salzman, *Climate Change Meets the Law of the Horse*, 62 DUKE L.J. 975 (2013) (suggesting equity as one of three overarching policy goals for adaptation efforts); Robert R.M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENVTL. L. & POL’Y FORUM 23 (2012).

⁷ See NAT’L RESEARCH COUNCIL, *ADAPTING TO THE IMPACTS OF CLIMATE CHANGE* 1 (2010), available at: http://www.nap.edu/catalog.php?record_id=12783.

⁸ Sea levels have already increased over the last century and, notwithstanding uncertainty about the magnitude, climatologists predict further increases of three to four feet by 2100. See USGCRP REPORT, *supra* note 4, at 149 (describing past increase of up to two feet) and 150 (predicting future increase) and 149 (predicting more destructive storm surges). While no single weather event can

be attributed to climate change, Hurricane Sandy provided a wake-up call to many about climate change and the risks of rising sea levels and more intense storm surges. Thomas Kaplan, *Most New Yorkers Think Climate Change Caused Hurricane, Poll Finds*, THE NEW YORK TIMES (Dec. 3, 2012).

⁹ See IPCC, *MANAGING THE RISKS OF EXTREME EVENTS AND DISASTERS TO ADVANCE CLIMATE CHANGE ADAPTATION* 13 (2012) [hereinafter IPCC, *MANAGING THE RISKS*], available at <http://www.ipcc-wg2.gov/SREX/>.

¹⁰ Between 1958 and 2007, heavy storms increased by 67 percent in the Northeast and by 31 percent in the Midwest. USGCRP REPORT, *supra* note 4, at 32.

¹¹ *Id.* at 82 (describing fourfold increase in western wildfires over the last several decades).

¹² See, e.g., Pete Spotts, *Monster Wildfire in Arizona: A Glimpse of What Climate Change Could Bring*, CHRISTIAN SCIENCE MONITOR, June 9, 2011, <http://www.csmonitor.com/Environment/2011/0609/Monster-wildfire-in-Arizona-A-glimpse-of-what-climate-change-could-bring>; Darryl Fears, *Colorado’s Table Was Set for Monster Fires*, THE WASHINGTON POST, Jul. 1, 2012, http://www.washingtonpost.com/national/health-science/colorados-table-was-set-for-monster-fire/2012/07/01/gJQAVa6cGW_story.html.

¹³ VERCHICK, *supra* note 5, at 133; Robin Kundis Craig, *A Public Health Perspective on Sea-Level Rise: Starting Points for Climate Change Adaptation*, XV WIDENER L. REV. 521, 536-37 (2010); MANUEL PASTOR ET AL., *IN THE WAKE OF THE STORM: ENVIRONMENT, DISASTER, AND RACE AFTER KATRINA* 30 (2006).

¹⁴ See LINDA LUTHER, CONG. RESEARCH SERV., RL33477, *DISASTER DEBRIS REMOVAL AFTER HURRICANE KATRINA: STATUS AND ASSOCIATED ISSUES* (updated 2008) (describing post-Katrina debris removal challenges).

¹⁵ See, e.g., PASTOR, *supra* note 13, at 25-27 (describing the long-term challenges in recovering from disasters, particularly for poor and minority communities).

¹⁶ See, e.g., NAT’L RESEARCH COUNCIL, *supra* note 7, at 75.

¹⁷ See Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 207 (2010).

¹⁸ See, e.g., Robin Kundis Craig, “Stationarity is Dead” – *Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9, 55 (2010) (noting the possibility of significant migration from arid western areas to wetter regions, and from coastal areas inland).

¹⁹ USGCRP REPORT, *supra* note 4, at 29, 34 (describing predicted increase in average temperatures; describing predicted increase in heat waves).

²⁰ USGCRP REPORT, *supra* note 4, at 90 (reporting that: “[h]eat is already the leading cause of weather-related deaths in the United States”). A severe 2003 European heat wave reportedly caused 70,000 excess deaths. See NAT’L RESEARCH COUNCIL, *supra* note 7.

²¹ U.S. ENVIRONMENTAL PROTECTION AGENCY (“EPA”), *OUR NATION’S AIR: STATUS AND TRENDS THROUGH 2010* 11 (2012). Higher temperatures increase the rate at which ozone, a significant air pollutant, is formed from its precursor compounds, nitrogen oxides and volatile organic compounds. See also USGCRP REPORT, *supra* note 4, at 92-94.

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DANGEROUS SEPARATION: AN ECOSYSTEM AND WAY OF LIFE IN THE WEST BANK AT THE BRINK OF DESTRUCTION

by Elana Katz-Mink*

Residents of the Palestinian village of Battir practice an ancient agricultural technique dating back to the Roman Period a few miles from Jerusalem, Bethlehem, and the Green Line.¹ Agricultural terraces, which were developed to take advantage of natural mountain springs, cover 2,000 hectares around the village where residents cultivate produce for their livelihoods and sustenance.² Over the centuries, the terraces have increased the land's fertility, preserving the area's agricultural heritage and environmental integrity.³

Israel is currently planning to build the separation wall on the edge of Battir, separating farmers from their fields.⁴ If the wall is constructed, residents face the specter of abandoning their way of life and severely restricting their movement, while at the same time the hydrology and ecology of the area will become severely imperiled.⁵ In early December, the Israeli Supreme Court (ISC) issued an interim decision ordering the Israeli Defense Ministry (IDM) to submit plans for an alternate route for the wall within ninety days, indicating that the Court is not willing to let Israeli's security interests override consideration of environmental impacts and the rights of Battir's residents.⁶

Construction of the separation wall began in 2003 to address Israeli security.⁷ Israel legitimized construction of the wall through a series of decisions beginning with *Beit Sourik Village Council v. The Government of Israel*.⁸ In *Beit Sourik*, the ISC ordered portions of the wall rerouted due to minimal Israeli security gains as compared to the disproportionate impact on Palestinian rights and interests.⁹ Despite this order, the court held that the construction of the wall was legally authorized based on its interpretation of belligerent occupation laws that supported Israel's efforts to secure Jewish-Israeli rights against Palestinian terror attacks.¹⁰ The International Court of Justice (ICJ) then issued an advisory opinion contradicting the ISC, holding that construction was contrary to international law because: (1) Israeli settlements were a breach of international law; (2) the wall was a 'fait accompli' future border;¹¹ and (3) construction impeded Palestinians' basic rights to work, health, education, and adequate standards of living.¹² The ICJ determined that Israel had to cease present and dismantle past construction, and make reparations for construction-related damages.¹³ Israel rejected the ICJ's opinion and has ruled in contravention on numerous occasions, clinging to the *Beit Sourik precedent*.¹⁴

In 2007, Battir brought suit against IDM to change the wall's proposed route to protect agricultural areas.¹⁵ IDM argued that the wall was necessary for security, but that a gate would allow Battir residents to access their fields.¹⁶ Battir then filed a claim with the ISC, but suspended it early this year as the Finance Ministry considered their request to reroute the wall around the agricultural lands.¹⁷ The Finance Ministry advisory commission has not yet ruled,¹⁸ but construction plans were halted by the ISC, which ordered the state to quickly respond to the appeal.¹⁹

While many attempts to stop or reroute construction of the wall have failed, two nearby villages have succeeded in stopping construction of other portions.²⁰ The Palestinian village of Bilin won its challenge before

the ISC in 2007.²¹ In Bilin, residents, along with Israelis (Arabs and Jews from Mevasseret) and other activists, held weekly demonstrations that drew considerable global media attention.²² There, the ISC determined that the wall was not being built for security reasons.²³ The court accepted an alternate route for the wall and ordered the dismantling of what had been built.²⁴ In a similar case, the Palestinian village of Wadi Fuqin won its legal battle on environmental grounds.²⁵ There, the neighboring Israeli community understood that the wall would deprive Wadi Fuqin of its agricultural livelihood and threaten security by breeding hostility between Palestinians and Israelis.²⁶ In response, 300 Israeli residents from neighboring Tzur Hadassah signed a petition against construction.²⁷ Using evidence that the wall would cause hydrological and ecological destruction to the area, together with the petition, Wadi Fuqin succeeded in its appeal to the ISC and successfully stopped construction.²⁸

In continuing its legal battle, Battir has several options. Arguments based on human rights and the effectiveness of the wall have not proven persuasive to the ISC.²⁹ Both the Wadi Fuqin and Beit Sourik outcomes demonstrate that support of Jewish-Israeli neighbors can help secure a positive outcome. Unfortunately, Battir does not have such a clear ally nearby, though residents could seek support from residents of Aminadav.³⁰ Nonetheless, Battir has an environmental avenue open following publication of a paper by the Israel Nature and Parks Authority (INPA) condemning construction of the wall in Battir and finding significant threats to hydrology and ecology in the area.³¹ Further, INPA emphasized the wall's potential destructiveness to the area's unique agricultural practices and livelihoods.³² Based on INPA's findings, Battir's best hope for legal success rests on evidence that the wall will threaten Israeli water and ecological security. In a water-starved region, this legal basis may prove extremely persuasive as Israel is forced to confront how its actions affect one of its biggest security concerns: access to fresh water.³³

The ISC's interim decision ordering IDM to produce a plan for an alternate route is a temporary win for the residents of Battir. The decision includes a requirement for IDM to consider the environmental impact on the area in its alternate route plan.³⁴ UNESCO's expedited consideration of Battir's application to be a World Heritage Site—recognizing the rarity of Battir's agricultural terraces—bolstered its case in the ISC.³⁵ This month's decision suggests that the ISC is no longer willing to blindly give more weight to IDM's invocation of national security over environmental and justice issues. No matter the final outcome, it is increasingly clear that construction of the wall will bring environmental degradation, hydrological destruction, and further insecurity to both sides. The ISC's order for study of ecological implications of construction³⁶ indicates that the strength of environmental objections to the wall's construction is growing despite the absence of historically important Jewish-Israeli participation.



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THE GROWTH OF ENVIRONMENTAL JUSTICE AND ENVIRONMENTAL PROTECTION IN INTERNATIONAL LAW:

IN THE CONTEXT OF REGULATION OF THE ARCTIC'S OFFSHORE OIL INDUSTRY

by E.A. Barry-Pheby*

INTRODUCTION

The Arctic Ocean is surrounded by five coastal states (four of which are heavily industrialised).¹ With its short food chain, and low temperatures, the Arctic Ocean is highly vulnerable to pollution.² This marine environment is central to Arctic indigenous peoples' existence: providing food, warmth, livelihood and cultural integrity.⁴ Yet the offshore hydrocarbon industry is increasingly exploiting the Arctic Ocean: many activities are in deeper, and formerly unexplored, territories.⁵ Relevant international law is not keeping pace, leaving this delicate marine environment, and its indigenous coastal populations increasingly vulnerable to oil pollution.⁶

There is greater inclusion of international environmental law principles and concepts in relevant international law yet environmental protection is still severely curtailed by weak application of the precautionary principle, little progression in the creation of marine protected areas ("MPA's"), inadequate protection of identified species at risk from oil pollution, and a sustainable development model weighted heavily towards economic development. Similarly, there has been a substantial growth of international law affording greater rights to indigenous peoples and ground-breaking involvement of indigenous peoples in the law-making process. Yet constraints are imposed by the failure of key states to ratify relevant international law and from limitations of the Arctic Council's soft law. Examples of environmental injustice are found in inadequate public participation for environmental impact assessments identified as tokenistic, ineffective or untimely, and in distributive inequalities of the sustainable development of Arctic coastal states. The tension between state sovereignty and international law has caused an impasse, which needs to be circumvented to sufficiently support environmental protection and environmental justice in regulation of the Arctic's offshore oil industry.

ENVIRONMENTAL PROTECTION

The Arctic faces ongoing degradation from global warming, ozone depletion, radioactive waste, pollution from persistent organic pollutants, pollution from heavy metals, and oil

development.⁷ Oil pollution from the offshore industry has the potential to damage marine animals, change migratory patterns, destroy flora and halt indigenous peoples subsistence lifestyles.⁸

The Arctic marine environment is rendered particularly vulnerable to oil pollution due to the severe limitations that climatological, oceanographic and ecological factors impose on oil biodegradation.⁹ Furthermore, industry clean-up methods are rendered difficult, some postulate impossible, due to the Ocean's remoteness, semi-permanent ice cover¹⁰ and climatological extremes.¹¹ Oil spills in the Arctic marine environment could

remain unweathered, and toxic, for decades.¹²

With some reticence, the offshore industry primarily drills only during summer seasons.¹³ During the summer season the climate may be problematic, with "gale force winds, week-long storms, and heavy fog restricting visibility."¹⁴ While the increasing melting of the Arctic summer ice is announced with growing hysteria,¹⁵ icebergs, ice packs and increased 'wave and storm action' could present new problems.¹⁶

Unfortunately, the heavily anticipated Arctic Council's binding agreement on oil pollution preparedness and response may fail to address the salient needs of the Arctic environment. In February 2013 Greenpeace leaked the draft agreement and heavily criticised the limitations of this piece of draft legislation, describing it as "incredibly vague" and "inadequate."¹⁷

Numerous academics acknowledge problems with the primarily soft international law regulating the Arctic.¹⁸ The problems identified relate to: a) the nature of international law (and the systemic failures of this particular soft law);¹⁹ b) procedural failures and weaknesses including inadequate implementation procedures, evaluation, outcome targets, follow-up procedures and integration of science into practice and policy;²⁰ c) a lack

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of integration of recognized and accepted environmental principles and approaches such as ecosystem-based management (“EBM”), biodiversity, creation of Marine Protected Areas (“MPA”s), sustainable development, the precautionary principle and the polluter pays principle;²¹ and d) a range of other faults including lack of funding, many years without an Arctic Council permanent secretariat, geopolitical tensions, a resistance by coastal states to develop international law and a lack of real integration of indigenous and other local people’s opinions.²²

Soft law can provide more detail, and be quicker and less cumbersome to create (as it does not demand domestic ratification), than hard law.²³ Furthermore, it often supports enhanced stakeholder involvement.²⁴ It is also acknowledged that soft law has the potential to better address politically sensitive issues, allowing for the retention of sovereignty while resulting in the integration of the essence of soft law into domestic legislation.²⁵ Fitzmaurice identifies that soft law can play a “fundamental” role in environmental protection.²⁶

The inclusion of international environmental law principles and concepts provides, *prima facie*, a legal foundation for ecological, cultural and scientific perspectives; promotes discourse; and potentially raises environmental protection standards.²⁷ Therefore, the next part will analyze the growth of environmental protection in relevant international law by examining the inclusion of international environmental law principles/concepts.²⁸

THE PRECAUTIONARY PRINCIPLE

The precautionary principle is increasingly included in international instruments relevant to the Arctic marine environment, including: the Convention of Biological Diversity,²⁹ Agenda 21,³⁰ the Rio Declaration,³¹ the Convention for the Protection of the Marine Environment of the North-East Atlantic (the “OSPAR Convention”),³² the Environmental Impact Assessment (“EIA”) Guidelines³³ and the Offshore Oil and Gas Guidelines.³⁴ The precautionary principle provides an essential mechanism for considering environmental protection in the face of scientific uncertainty, or more accurately the inability of scientific modelling to predict, with any certainty, the risk of deleterious effects.³⁵ The precautionary principle is particularly relevant given the identified vulnerability of the Arctic marine environment³⁶ and the dispute amongst environmentalists, scientists and politicians regarding the risk of oil spills, the ‘response gap,’³⁷ the effect of oil waste products on the marine environment, and effective clean-up methods in sea-ice clean-up.³⁸

The precautionary principle is one of four principles on which the Arctic Offshore Oil and Gas Guidelines are based, and the guidelines require states to ‘widely apply’ it.³⁹ Yet the Offshore Oil and Gas Guidelines lack evaluation of their implementation, monitoring and follow-up procedures. This has weakened their capability to set and maintain higher standards.⁴⁰ While enforcement of soft law⁴¹ is problematic, evaluation, monitoring and follow-up mechanisms are more readily carried out, although these mechanisms are insufficient in Arctic soft law, perhaps partially due to state resistance and funding problems.⁴²

The Environmental Impact Assessment (“EIA”) Guidelines identify the need for a precautionary approach in keeping with the Rio Declaration’s definition.⁴³ The EIA Guidelines, less direct than the Offshore Oil and Gas Guidelines, state only that a precautionary approach is “encouraged” when conducting an EIA.⁴⁴ These Guidelines have seemingly had limited influence on practice through a lack of awareness of their existence and a lack of follow-up procedures.⁴⁵

The language of the binding OSPAR Convention⁴⁶ is stronger, and its effect is *prima facie* more substantial, driven by the OSPAR Commission (“OSPARCOM”). OSPAR directs Contracting Parties to apply the precautionary principle when there are “reasonable grounds for concern”⁴⁷ with regards to inputs that could cause damage to humans or marine flora and fauna.⁴⁸ OSPARCOM also “collect(s) and review(s)” data to assess the effects of development on relevant marine environments.⁴⁹ This data gathering is key to the success of the OSPAR and OSPARCOM and reportedly lowers oil pollution levels and raises standards of the state parties.⁵⁰ A main limitation of OSPAR in relation to the Arctic Ocean is that only two of the Contracting Parties are Arctic coastal states (Denmark⁵¹ and Norway) – therefore the OSPAR Convention only covers 8% of the surface area of the Arctic Ocean.⁵² Theoretically the OSPAR boundaries could be widened,⁵³ but as the Convention was developed to support a set maritime area,⁵⁴ this has not happened.

The Convention on Biological Diversity (“CBD”) has been an instrumental framework convention which other international law has followed.⁵⁵ The CBD preamble directs⁵⁶ parties to adopt a precautionary approach, and this is reiterated by Decision II/10 advocating a “precautionary approach” in the marine environment.⁵⁷ As a framework Convention, it has been successful, but it does not have the substantive detail required to address the salient issues of Arctic offshore development.

The inclusion of the precautionary approach into international hard and soft law regulating the Arctic is positive, yet its effect is limited. OSPAR only covers a small proportion of the Arctic Ocean, the framework Convention CBD lacks substantive detail and only contains this approach within its preamble, and the EIA and Arctic Offshore Oil and Gas Guidelines have weak monitoring and follow-up procedures and are soft law. The result being that protection of the Arctic Ocean is curtailed: with a large response gap⁵⁸ and questionable clean-up methods little supported in the weak interpretation/application of the precautionary principle.

BIOLOGICAL DIVERSITY

Marine ecosystems are intricate, and interdependent, so damage to part of the food chain can have a catastrophic effect on the whole ecosystem.⁵⁹ In the Arctic Ocean, plankton is a key part of the food chain for birds, fish and marine mammals.⁶⁰ The Arctic Ocean, with restricted biodiversity and species with increased longevity is in particular need of conservation of its biological diversity.⁶¹

MPAs are identified as an effective way of supporting biological diversity yet despite this there are so few MPAs in

the Arctic.⁶² Aiding biological diversity does not automatically preclude all offshore development, and MPAs can be designated to restrict or prevent certain activities in vulnerable areas.⁶³ Such action can support recovery of the wider marine environment.⁶⁴ The International Union for Conservation of Nature (“IUCN”) identifies that an “imperfect” MPA, that only limits certain activities, is preferable to no MPA.⁶⁵

The Convention on Biological Diversity⁶⁶ seeks to conserve biodiversity and to support the sustainable development of environmental resources. One hundred and ninety-three states are parties to the Convention, and it is ratified by all the Arctic coastal states except the U.S.A. Article 8 directs parties to consider the creation of protected areas, and in 2004 the Conference of Parties identified the need for MPAs as a key way of supporting biological diversity.⁶⁷ The CBD as a framework Convention does not provide substantive detail and its requirements are “broad and vague, or carefully qualified.”⁶⁸

The Arctic Council Working Group, Conservation of Arctic Flora and Fauna (“CAFF”),⁶⁹ provides for some monitoring and assessment of the Arctic environment and aims to promote biological diversity. In 1998, CAFF set up the Circumpolar Protected Areas Network (“CPAN”) to support the growth of protected areas.⁷⁰ Unfortunately CPAN became dormant due to inner-wrangling and state differences regarding MPAs.⁷¹

Another way to support biodiversity is to protect specific species that are in decline. There are seventeen varieties of cetaceans in the Arctic Ocean including the narwhal, bowheaded and beluga whales. Bowheaded whales are an endangered species and an oil spill within their territory could have a disastrous effect on the species.⁷² The Exxon Valdez oil spill caused mortalities and a continuing decline in whale numbers.⁷³ Polar bears, classified as marine mammals, spend most of their life on Arctic ice floes, or swimming.⁷⁴ They have a number of features which make them particularly vulnerable to oil pollution. Firstly, contamination is magnified along each step of the food chain. If a polar bear eats contaminated prey, it also consumes toxic levels of hydrocarbons. The ingestion of these hydrocarbons can lead to a multiplicity of health problems, and ultimately death.⁷⁵ Secondly, polar bears are a non-migratory species⁷⁶ and they hibernate to cope with food scarcity. When they wake from hibernation, if prey is not readily available, as happens in cases of large-scale oil pollution, they will not get the nutrients they need to survive.⁷⁷ Thirdly, if oil penetrates the fur of polar bears it compromises its insulation, leaving the bear at a heightened risk of hypothermia and death.⁷⁸

In 1946, following an increase in commercial whaling, the International Convention for the Regulation of Whaling was established. The Convention’s purpose was to conserve whales, specifically by regulating the whaling industry.⁷⁹ In response to declining polar bear numbers due to harvesting, the International Agreement for the Conservation of Polar Bears was created. Article II of the Agreement requires contracting parties to “protect the ecosystems of which polar bears are a part,”⁸⁰ paying “special attention” to polar bear habitats.⁸¹ However, it does not preclude exploration.⁸² Whilst both the International Convention

for the Regulation of Whaling and The International Agreement for the Conservation of Polar Bears successfully addressed the concerns of whaling and harvesting,⁸³ the newer threat posed by offshore oil development has not been addressed.

SUSTAINABLE DEVELOPMENT

There has been increased interest in Arctic offshore hydrocarbon activities with high bidding for leases that previously did not receive bids due to their remote and potentially hazardous locations.⁸⁴ The Arctic offshore oil industry is experiencing rapid growth to meet the demands of world hydrocarbon needs, domestic energy security and desired economic growth.⁸⁵ The rate of growth of the Arctic offshore oil industry is predicted to rise. The United States Geological Society estimates that ninety-billion barrels of Arctic oil remain untapped.⁸⁶

Sustainable development,⁸⁷ identified as a somewhat fluid concept,⁸⁸ has a classic definition in the Brundtland report: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁸⁹ Sustainable development, conceived at global conferences and forums, has been extensively incorporated into relevant international legislation.⁹⁰

The Arctic Council, from its inception as the Arctic Environmental Protection Strategy (“AEPS”), identified sustainable development in the Arctic as a key objective.⁹¹ To focus further on sustainable development, the AEPS created the Sustainable Development Program, which later evolved into the more formal Sustainable Development Working Group (“SDWG”).⁹² Discord amongst Arctic states over the definitions and boundaries of sustainable development led to substantial delays in devising a programme for the SDWG.⁹³ Consequently the SDWG’s focus is somewhat ‘disparate’ and has circumvented focusing on several controversial issues.⁹⁴

Since 1998 under the auspice of the SDWG a number of reports have been produced, more recently including the Best Practices in Ecosystems-Based Ocean Management report, the Arctic Energy report and as part of the International Polar Year an energy summit was held (with consequential report), in which the Arctic’s offshore oil industry was part of a wider discussion of many energy sources.⁹⁵ Following changes in the Arctic Council chair in 2006 to Norway⁹⁶ there was clearly a shift towards further consideration of the impact of the offshore oil industry, however this has had limitations: the SDWG’s Arctic Energy report notes that it is “not intended as a comprehensive assessment of Arctic energy resources, nor of the impacts of Arctic energy development on the natural and human environments in the circumpolar environment” and is instead a strategic report.⁹⁷

The EIA Guidelines identify that sustainable development is the cornerstone principle of the Arctic Council.⁹⁸ They also identify that the key to sustainable development is the inclusion of “traditional knowledge.”⁹⁹ The Arctic Offshore Oil and Gas Guidelines (created by Protection of the Arctic Marine Environment or “PAME”) identify that offshore oil and gas activities in the Arctic should be predicated on the principle of

sustainable development.¹⁰⁰ The Guidelines direct governments to be “mindful of their commitment to sustainable development” focusing on eight key issues, including: biological diversity, transboundary pollution, and “broad public participation in decision making.”¹⁰¹ Public participation in EIAs has been criticised for being tokenistic, ineffective or untimely.¹⁰²

The OSPAR Convention identifies in its preamble “that concerted action at national, regional and global levels is essential to prevent and eliminate marine pollution and to achieve sustainable management of the maritime area.”¹⁰³ OSPAR also refers to the need for programs and plans to implement sustainability. OSPARCOM identifies “that sustainable development through the application of the Ecosystem Approach” is a key principle for the North-East Atlantic Environment Strategy and requires that “[t]he Contracting parties [ensure][the] involve[ment] of relevant stakeholders in the development of their national approaches to sustainable uses of the seas.”¹⁰⁴

The more advanced implementation, monitoring and follow-up procedures of OSPAR better support sustainable development. The OSPAR bound countries of Norway and Greenland (via Denmark) could help to coerce the other Arctic states to consider better integration of sustainable development into practice, perhaps via OSPARCOM. The inner-wrangling, inefficiencies and procedural problems experienced by SDWG, and the lack of follow-up procedures of the EIA and Offshore Oil and Gas Guidelines, could be better addressed. They are not *de facto* a problem of all soft law, but rather are problems associated with the Arctic’s international law.¹⁰⁵

ENVIRONMENTAL PROTECTION—CONCLUSION

The Arctic Council and working groups have instigated many meetings, reports and legislation, which increasingly considers environmental protection via implementation of international environmental law concepts and principles. Yet, the Arctic Council and its working groups have limited funds, lack enforcement mechanisms, are somewhat thwarted by procedural and structural problems and are restrained by States’ desire to maintain their sovereign rights to freely exploit natural resources.¹⁰⁶

The environmental protection provided by inclusion of these international environmental law principles/concepts with regards to the offshore oil industry in the Arctic appears insufficient: the precautionary principle is applied in a diluted form, there are still so few MPAs in the Arctic Ocean, species specific legislation remains narrow despite new and potential risks from the offshore oil industry, and sustainable development favours state economic growth providing insufficient consideration to distributive justice.

ENVIRONMENTAL JUSTICE AND HUMAN RIGHTS

The indigenous, Arctic coastal population maintains a largely symbiotic relationship with the marine environment: some still leading subsistence lifestyles and many others heavily relying on the marine environment for food, warmth and cultural identity.¹⁰⁷ Pollution by the offshore oil industry that damages the marine environment would fundamentally interfere with indigenous peoples’ lives.¹⁰⁸

The environmental justice movement has arisen in response to racial and social inequalities that have caused ‘disproportionate environmental burdens.’¹⁰⁹ Arctic indigenous peoples have been described as victims of ‘eco-crime’.¹¹⁰ Dorrough states that ‘indigenous peoples have been and continue to be victims of subjugation, domination and exploitation’.¹¹¹ Environmental justice is a multi-dimensional concept identified as incorporating many elements of: distributive,¹¹² procedural,¹¹³ recognitive,¹¹⁴ productive¹¹⁵ and ecological justice.¹¹⁶

INTERNATIONAL LAW

International law increasingly addresses Arctic indigenous peoples’ human rights in an environmental context in: the Indigenous and Tribal Peoples Convention,¹¹⁷ the UN Declaration on the Rights of Indigenous Peoples¹¹⁸ the Convention on Biological Diversity, soft law created by the Arctic Council, the inclusion of indigenous peoples in the United Nations Permanent Forum on Indigenous Issues (“UNPFII”), the creation of the Inter-American Commission on Human Rights, and the inclusion of six groups of indigenous peoples as permanent participants in the Arctic Council.¹¹⁹

The ILO Convention 169¹²⁰ is a legally binding piece of international legislation setting out minimum standards for indigenous rights. It accords distributive and procedural elements of environmental justice to indigenous peoples via: recognition of cultural diversity,¹²¹ “ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population,”¹²² and by providing consultation and decision-making rights.¹²³ Furthermore, indigenous peoples were involved in the creation of this legally binding piece of international law.¹²⁴

Only two of the five Arctic coastal states (Denmark and Norway)¹²⁵ are parties to this Convention. Although, Henriksen speculates that “the other Arctic countries cannot ignore the comprehensive set of international minimum standards on indigenous rights.”¹²⁶ Unfortunately by failing to ratify this Convention it is presumably what they intend to do.

The United Nations Declaration on the Rights of Indigenous Peoples is a rights-based piece of international legislation that proliferates environmental justice. Article 18 states indigenous peoples’ “right to participate in decision making in matters which would affect their rights,” and Article 32 directs that “(s) tates shall consult and cooperate with the indigenous peoples concerned through their own representative institutions . . . to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with development, utilization or exploitation of mineral, water or other resources.”¹²⁷ Both Articles 18 and 32 clearly centralize indigenous peoples’ right to the procedural facet of environmental justice with regard to any offshore oil development.

The Declaration took decades of deliberations with battling over the minutiae of detail, yet minor alterations could have substantially weakened its effect. For example, with regards

to the issue of “free, prior and informed consent” some states wished to substitute “obtain” with “seek.”¹²⁸ The strength of the Declaration is greatly attributed to the participatory role of indigenous peoples in its creation.¹²⁹ This Declaration is seen as a crucial step in paving the way to the creation of a binding Convention on indigenous rights.¹³⁰

Other international law also provides Arctic indigenous peoples with rights in corollary with their territories and environment, including: the non-binding United Nations Conference on Environment and Development (UNCED) Agenda 21,¹³¹ the Rio Declaration on Environment and Development,¹³² and the binding Convention on Biological Diversity.¹³³ In contrast, indigenous people were not included in the Ilulissat Declaration discussions. Furthermore, the United Nations Convention on the Law of the Sea (UNCLOS)¹³⁴ incorporates a traditional view of sovereignty and fails to mention indigenous people’s rights, which Rebecca Bratspies sees as “striking a jarring note of discord with recent developments in international law.”¹³⁵

Other notable inclusions of indigenous people in international law and policy making include: The creation in 2000 of the United Nations Permanent Forum on Indigenous Issues (“UNPFII”),¹³⁶ The Inter-American Commission on Human Rights, which is relevant to two of the Arctic coastal states, the USA and Canada, and the role of indigenous peoples as permanent participants in the Arctic Council.

The Arctic Council is the main forum for inter-governmental political discussion of Arctic environmental issues and the driving force behind the creation of many reports and much international soft law.¹³⁷ Although the presence of the permanent participants can be influential the decisions are made with the consensus of Arctic Council members states only.¹³⁸ The fundamental doctrine of state sovereignty persists.

There has been huge growth of indigenous peoples’ rights in international law via UNDRIP, ILO169, CBD, the soft law of the Arctic Council and the inclusion of indigenous peoples in international forums. Yet, there are limitations on Arctic indigenous peoples’ rights. First, after decades of debate, only Norway and Denmark¹³⁹ are parties to ILO169, and Russia is not a party to UNDRIP (which is not a binding instrument). Second, the Arctic Council’s Permanent Participants do not have voting rights. Third, the vulnerable position of the permanent participants can be seen by the Russian government’s immediate decision to suspend the work of the Russian Association of Indigenous Peoples of the North (RAIPON) in November 2012.¹⁴⁰ RAIPON can no longer officially participate in Arctic Council work. Finally, the soft law that the Arctic Council creates faces substantial criticism for its poor compliance rates, lack of implementation and insufficient monitoring standards.¹⁴¹

The exclusion of indigenous peoples from the Ilulissat Declaration’s discussions suggests both reluctance by the five coastal states to identify indigenous peoples as on an equal footing, and their intention not to accede state sovereign rights to restraints imposed by international law. There is clearly a gap between rhetoric and reality and a reluctance to go beyond this impasse.

ENVIRONMENTAL IMPACT ASSESSMENTS (“EIA”s) AND ENVIRONMENTAL JUSTICE

EIAs are a key way of allowing analysis, consultation, research¹⁴² and public participation. Public participation is, *prima facie*, able to fulfil a critical part of according environmental justice to indigenous peoples by providing procedural rights.¹⁴³ EIAs are defined by the Espoo Convention as a “national procedure for evaluating the likely impact of a proposed activity on the environment.”¹⁴⁴ The CBD Guidelines, Arctic Offshore Oil and Gas Guidelines and EIA Guidelines all include broad boundaries of what the EIA process should involve: including impact on “human-health” and the importance of incorporating traditional (and other local) knowledge.¹⁴⁵

International legislation regulating the Arctic has embraced the EIA concept. The Espoo Convention (addressing trans-boundary EIAs for offshore hydrocarbon activities)¹⁴⁶ has forty-five Contracting Parties, of which only Canada, Denmark and Norway are Arctic coastal states.¹⁴⁷ The EIA Guidelines and the Offshore Oil and Gas Guidelines provide Arctic-specific guidance: identifying features of the Arctic’s cryosphere and eco-system that demand consideration.¹⁴⁸ The Offshore Oil and Gas Guidelines attempt more stringent regulation of transboundary impacts than the standards set by the Espoo Convention.¹⁴⁹ UNCLOS requires states to conduct an assessment for hydrocarbon activities although as a framework the Convention does not provide substantive detail.¹⁵⁰

The Espoo Convention requires adherence to public participation procedures although it does not elaborate on the form that this participation should take, or the stage at which it should be instigated.¹⁵¹ Koivurova states that the lack of detail regarding the form and timing of public participation makes this Convention “considerably weakened.”¹⁵² The Espoo Convention’s¹⁵³ strong institutional arrangements provide a forum for effective follow-up procedures, prescribing that there should be regular reviews for implementation;¹⁵⁴ the last such meeting was in Geneva in June 2011.¹⁵⁵ The Espoo Convention is praised for setting detailed procedural standards and for creating what “seems to have become a global standard for how to conduct TEA.”¹⁵⁶ Yet it is criticized for not having harmonized standards of EIAs across contracting states in practice and therefore potentially causing problems of reciprocity.¹⁵⁷ As only three of the five coastal states are parties to this Convention, its ability to harmonize legislation governing the Arctic Ocean is limited.¹⁵⁸

PAME’s Offshore Oil and Gas Guidelines identify the importance of “full and meaningful” public participation,¹⁵⁹ but do not provide substantive detail on this issue. The EIA Guidelines, although more detailed, identify the importance of incorporation of traditional knowledge into the EIA process from initial exploration stages and throughout the exploitation process.¹⁶⁰ However, they are often criticized for lacking implementation, having poor follow-up evaluation procedures,¹⁶¹ and a study identified that key parties were not even aware of the existence of these Guidelines.¹⁶²

In practice there are examples of Arctic public participation falling far short of standards international legislation aspires

to achieve. In the United States, the villagers of Kaktouik (the nearest community to prospective development in the US sector of the Beaufort Sea) felt that their views were sought so late in the process that they did not actually influence or alter practice and that it was a tokenistic process.¹⁶³ These villagers wished to raise technical concerns but instead Shell provided public relation employees to answer these technical concerns.¹⁶⁴ Similarly Canadian Inuits have criticised public participation in the region as insufficient and untimely.¹⁶⁵ Steiner also commented that “the general public is asked to review and comment on an overwhelming stream of technically complex documents, but is outmatched by well-paid industry advocates.”¹⁶⁶ The offshore industry presents a different picture – one where they seek “consent” rather than mere consultation and where they, in response to indigenous people’s requests, stopped operations for a two-week period “to enable locals to carry out their subsistence hunting during the whaling season.”¹⁶⁷

The indigenous peoples of the Arctic are not of only one opinion with regards to offshore activities but they are united in supporting the need for continued, and ongoing, involvement of indigenous peoples in the international debates, and at a local level, their involvement in each and every planned development.¹⁶⁸ Examples of inadequate involvement in decision-making and insufficient information provisions are examples of environmental injustice.

ENVIRONMENTAL PROTECTION AND ENVIRONMENTAL JUSTICE – CONFLICTING CONCEPTS?

The environmental movement in the Arctic has historically alienated the indigenous population.¹⁶⁹ In the 1970s and 80s, Greenpeace launched a campaign against seal hunting that Greenland’s indigenous peoples found offensive, inaccurate and damaging.¹⁷⁰ There were later objections to Greenpeace’s attack on indigenous peoples whaling.¹⁷¹ While Arctic indigenous peoples are described as victims of “eco-crime(s),” environmentalists are perceived as having done little to pursue this injustice.¹⁷² In turn, Indigenous peoples often appear keen to maintain their distance from the environmental movement.¹⁷³

To consider whether environmental protection and environmental justice mutually drive up standards or conflict, this paper focuses on sustainable development and EIAs. Sustainable development, in balancing economic growth with environmental protection, is potentially at odds with environmental justice.¹⁷⁴ The indigenous coastal communities risk environmental costs yet share little of the economic benefits.¹⁷⁵ Often large proportions of high paid offshore oil industry jobs do not go to local people¹⁷⁶ but instead to skilled, experienced workers outsourced from other areas.¹⁷⁷ Also, complex revenue systems for offshore

industries can mean minimal local benefits; for example, in Alaska beyond six miles offshore the revenues gained go entirely to the federal government with no share going to the state of Alaska.¹⁷⁸ The Deepwater Horizon and Exxon Valdez disasters illustrate the level of damage that oil pollution can cause to local fishing and tourism industries, sustainable lifestyles and the environment.¹⁷⁹ Despite a \$2.5 billion clean-up operation, less than 10% of the spilled Exxon Valdez oil was recovered from the water and shore.¹⁸⁰ Twenty years later, the damage to organisms and their marine environment is still apparent.¹⁸¹ Immediate sizeable effects from the Exxon Valdez spill were obvious, with estimated mortalities of 2,800-5,000 sea otters, 250,000-700,000 seabirds, 300 harbour seals, 250 bald eagles, 22 killer whales and billions of herring and salmon eggs.¹⁸²

Indigenous peoples state that both the offshore industry and central governments do not adequately consider their lack of economic benefits, or the potentially devastating risks they face: This is at odds with the distributive element of environmental justice.¹⁸³ Sustainable development is identified as an “unabashedly anthropocentric concept,”¹⁸⁴ yet this does not provide the full picture, for it can conceivably fail to duly consider certain groups of people. It is not however automatically a concept that excludes distributive elements; it has only been deconstructed and interpreted in this way in the Arctic region.¹⁸⁵ The concept of sustainable development demands consideration of future generations and can therefore be viewed as potentially distributive, and not at odds with environmental justice. Careful reframing of sustainable development in the Arctic context is needed to allow due consideration of indigenous peoples and to provide environmental justice.

The second issue is whether EIAs potentially cause conflict between environmental justice and environmental protection. If the EIAs of offshore oil projects provide sufficient procedural mechanisms for indigenous peoples’ involvement and decision-making, they could be seen as complying with principles of environmental justice. Given that environmental protection does not *ipso facto* demand restriction on all development, it is not necessarily at odds with environmental justice.¹⁸⁶ EIAs can potentially drive up standards of environmental protection and comply with the procedural requirements of environmental justice.

CONCLUSION

There has been substantial growth in international law according rights to indigenous peoples, illustrating that indigenous peoples are no longer “passive observers to fundamental decisions being made about [their] homeland.”¹⁸⁷ Yet they are now somewhat locked into the rhetoric of international politics

and law-making. Increasingly there has been inclusion of key international environmental law principles and concepts into relevant international law. Yet the ability of the inclusion of these principles and concepts to drive up standards of environmental protection has been limited. There is a deadlock created by the tension between state sovereign rights to utilise natural resources, environmental protection, and the rights of indigenous peoples.

The five coastal states, undeterred by the soft law created and unfettered by international hard law they have not ratified,¹⁸⁸

delineate themselves with traditional ideas of sovereign rights in order to utilise natural resources unabated. The exponential growth in recognition of indigenous rights regarding their environments and the growing recognition of environmental protection in international law certainly provides a beacon of hope for the future, but at the present the offshore oil industry continues to grow far beyond the capacity of international law.



Endnotes: The Growth of Environmental Justice and Environmental Protection in International Law: In the Context of Regulation of the Arctic's Offshore Oil Industry

¹ Tavis Potts, *The Management of Living Marine Resources in the Polar Region* (2010); M.H. NORDQUIST ET AL., CHANGES IN THE ARCTIC ENVIRONMENT AND THE LAW OF THE SEA 4, 404 (listing the USA, Canada, Norway and Russia as the four heavily industrialised coastal states (coastal industries include fishing, mineral extraction and the hydrocarbon industry), the fifth coastal state is Greenland); Intl. Arctic Sci. Comm., *An Introduction to the Arctic Climate Impact Assessment* (Feb 2010); N. E. Flanders & R.V. Brown, *Justifying Public Decisions in Arctic Oil and Gas Development: American and Russian Approaches*, 51 Arctic 264 (September 1998).

² Timo Koivurova, *The Importance of International Environment Law in the Arctic*, The Arctic Centre (November 2011), www.arcticcentre.org/?Dep-ID=5484 [hereinafter Koivurova, *Environment Law*]; Timo Koivurova, *Governance of protected areas in the Arctic*, 5 Utrecht Law Rev. 44 (2009) [hereinafter Koivurova, *Governance*]; WWF, *Oil Spill Response Challenges in Arctic Waters* (October 2011); *An Introduction to the Arctic Climate Impact Assessment*, *supra* note 1.

³ In keeping with the preferred plural usage of indigenous peoples found throughout relevant international law, this paper adopts the same pluralisation. Definitions of indigenous peoples are disputed but for the purposes of this paper the definition of indigenous peoples is taken from the working definition used by the United Nations Permanent Forum on Indigenous Issues. See UN Permanent Forum on Indigenous Issues, *Who Are Indigenous Peoples?* www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf [hereinafter *Who Are Indigenous Peoples*].

⁴ See ASLAUG MIKKELSEN & OLUF LANGHELLE, ARCTIC OIL AND GAS – SUSTAINABILITY AT RISK, (2011) (A large part of indigenous Arctic diets consist of marine mammals. Some indigenous peoples maintain totally subsistence lifestyles); see also D. Cavanagh, *Marine Mammals and the Inuit*, Journal of the Vancouver Aquarium 10 (1987); J. HOLDER & M. LEE, ENVIRONMENTAL PROTECTION LAW AND POLICY (Cambridge Univ. Press 2010).

⁵ WWF, *Oil Spill Response Challenges in Arctic Waters*, *supra* note 2, at 6 (listing the newly explored offshore Arctic areas which includes: West Greenland, the Russian Barents Sea, the Canadian Beaufort Sea territory and in the USA Chukchi Sea territory, some involving deep-water drilling.)

⁶ See generally ALLEN MILNE, OIL, ICE AND CLIMATE CHANGE: THE BEAUFORT SEA AND THE SEARCH FOR OIL (R.J. Childerhose ed., 1977) (noting that The Arctic Ocean is particularly vulnerable to the effects of oil pollution due to its short food chain and environmental factors limiting biodegradation); see also G.P. GLASBY, ANTARCTIC SECTOR OF THE PACIFIC, 312-3 (Elsevier Science Publishing Co. 1990).

⁷ Sarah R. Hamilton, *Toxic Contamination of the Arctic: Thinking Globally and Acting Locally to Protect Arctic Ecosystems and People*, 15 Colo. J. Int'l Envtl L. & Pol'y 71, 71 (2004); LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF INDIGENOUS PEOPLES 208 (Routledge 2012).

⁸ Mary Simon, *Canadian Inuit*, 66 INT'L J. 879 (2010-11); Rebecca M. Bratspies, *Human Rights and Arctic Resources*, 15 Sw. J. Int'l L. 250, 260 (2008-9).

⁹ R. Rayfuse, *Protecting Marine Biodiversity in Polar Areas Beyond National Jurisdiction* 17(1) REICEL, 4 (2008) (highlighting that furthermore freezing water can trap oil and prevent waves from dispersing and allowing evaporation).

¹⁰ See PAME, *The Arctic Ocean Review – Phase 1 Report*, at 10 (2009-11) (noting the Arctic Ocean has previously been in the main a frozen ocean with seasonal and perennial sea ice, although this is altering due to global warming); Peter Wadhams, *Arctic Ice Cover, Ice Thickness and Tipping Points* AMBRIO 9 (23/24) and NSIDC nsidc.org, accessed 30 January 2012.

¹¹ See generally PAME, *supra* note 10; TIMO KOIVUROVA, OFFSHORE HYDROCARBON: CURRENT POLICY CONTEXT IN THE MARINE ENVIRONMENT (Arctic Transform 2010) [Hereinafter, Koivurova, *Maine Environment*] (noting the period of time in which the climatology/cryosphere make clean-up operations impossible is called a 'response gap'. There is much debate amongst scientists, environmentalists and the oil industry as to how large the 'response gap' is and how adequately it is addressed).

¹² Arctic Environmental Protection Strategy, *Report on Recent Lingering Oil Studies* at 3.2 (June 1991); see also The Exxon Valdez Oil Spill Trustee Council, *Long Term Effects of Initial Exposure to Oil* (2010), available at www.evostc.state.ak.us/recovery/longTerm.cfm.

¹³ See Offshore Technology 26-7 (October 2012) (Statoil carry out one of the few all year offshore Arctic drilling activities in the Norwegian Barents Sea area). See The House of Commons (Environmental Audit Committee), *Protecting the Arctic*, at 5 (September 2012) (explaining that Shell did not wish to adhere to the summer only drilling requirement and challenged the decision for summer only drilling in offshore Alaska).

¹⁴ Environment Group, *Offshore exploration in the Arctic*, www.pewtrusts.org/news_room_detail.aspx?id=58806.

¹⁵ Wadhams, *supra* note 10; cf. National Snow and Ice Data Center, (October 2012) available at <http://nsidc.org/arcticseaicenews> (melting sea ice could be viewed as advantageous to industries such as oil, fishing and shipping, and to states to wish to exploit this Ocean). But cf. M Bravo & G. Rees, *Cryo-Politics: Environmental Security and the future of Arctic Navigation*, 13 Brown J. World Aff. 205 (2006-7) (supporting the argument that the full complexity of the measurements is not accounted for and that the large mass of an entire ocean is being labeled with what is not a consistent trend for the many seas and waters it includes).

¹⁶ See generally *Arctic Changes*, Postnote, Number 334 (Parliamentary Office of Science and Technology, London, UK) June 2009, at 4.

¹⁷ See Greenpeace Press Release, 'Leaked Arctic Council oil spill response agreement 'vague and inadequate'', February 4 2013 at <www.greenpeace.org/international/en/press/releases/Leaked-Arctic-Council-oil-spill-response-agreement-vague-and-inadequate—Greenpeace/?accept=aa29a15f9873f37b520e73bc7551178f>

¹⁸ See Koivurova, *Marine Environment*, *supra* note 11, at 37; see generally T. Koivurova, E.J. Molenaar & D.L. Vanderzwaag, *Canada, the EU, and Arctic Ocean Governance: A Tangled and Shifting Seascape and Future Directions*, 18 J Transnat'l L. & Pol'y 247 (2008-9) [hereinafter Koivurova, *Shifting Seascape*].

¹⁹ L.A. Fayette, *Ocean Governance in the Arctic* 23 INT'L J. MARINE & COASTAL L. 531 (2008), 559; Koivurova & Molenaar, *International Governance and Regulation of the Marine Arctic*, WWF (2009) available at <http://www.wwf.se/source.php/1223579/International%20Governance%20and%20Regulation%20of%20the%20Marine%20Arctic.pdf>.

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⁴⁶ See *Louisiana Energy Services: Uranium and Environmental Racism*, EJNET.ORG, <http://www.ejnet.org/ej/les.html> (last visited Nov. 15, 2012) (relating that while Louisiana Energy Services was indeed defeated in their efforts to build in northern Louisiana, and was subsequently kicked out of two communities they targeted in Tennessee, they ultimately managed to build their uranium enrichment facility in Eunice, New Mexico, in a community with a Hispanic population nearly triple the national average and a poverty rate 45% above the national average).

⁴⁷ In the Matter of Louisiana Energy Services, L.P., 47 N.R.C. 77, 101, 106-07 (1998).

⁴⁸ *Id.* at 100-102.

⁴⁹ Mike Ewall, *Environmental Injustice in Delaware County, PA*, ACTIONPA.ORG (Feb. 2008), <http://www.ejnet.org/chester/delco-ej.pdf> (listing waste facilities within Delaware County, PA).

⁵⁰ *Chester Residents Concerned for Quality Living v. Seif (Chester I)*, 944 F. Supp. 413, 415 (E.D. Pa. 1996).

⁵¹ *Id.* at 414, 417.

⁵² 42 U.S.C. § 2000d (2000).

⁵³ 42 U.S.C. § 2000d-1 (2000).

⁵⁴ *Chester Residents Concerned for Quality Living v. Seif (Chester II)*, 132 F.3d 925, 927-28 (3d Cir. 1997).

⁵⁵ *Chester I*, 944 F. Supp. at 417 (“We thus find that by alleging only discriminatory effect rather than discriminatory intent, plaintiffs failed in their complaint to allege a violation of Title VI.” (emphasis in original)).

⁵⁶ *Id.* at 417-18.

⁵⁷ 132 F.3d 925 (3d Cir. 1997).

⁵⁸ *Id.* at 928.

⁵⁹ *Id.* at 937.

⁶⁰ 463 U.S. 582, 103 S. Ct. 3221, 77 L.Ed.2d 866 (1983).

⁶¹ *Chester II*, 132 F.3d at 929.

⁶² *Id.* (citing *Alexander v. Choate*, 469 U.S. 287, 292-94, 105 S. Ct. 712, 716 (1985)).

⁶³ *Id.*

⁶⁴ *Id.* at 930.

⁶⁵ *Id.* (quoting *Guardians* 463 U.S. at 645, 103 S. Ct. at 3255) (Stevens, J., dissenting)).

⁶⁶ *Id.* (citing *Guardians*, 463 U.S. at 584, 589-93, 103 S. Ct. at 3223, 3226-28 (opinion of White, J.); 463 U.S. at 615, 103 S. Ct. at 3239-40 (Marshall, J., dissenting)).

⁶⁷ *Id.* at 930-31.

⁶⁸ *Id.* at 932.

⁶⁹ *Id.* (discussing *Chowdhury v. Reading Hosp. and Med. Ctr.*, 677 F.2d 317 (3d Cir. 1982)).

⁷⁰ *Id.* at 933 (explaining three prong test looks at: “(1) whether the agency rule is properly within the scope of the enabling statute; (2) whether the statute under which the rule was promulgated properly permits the implication of a private right of action; and (3) whether implying a private right of action will further the purpose of the enabling statute.” (quoting *Polaroid Corp. v. Disney*, 862 F.2d 987, 994 (3d Cir. 1988) (internal quotations and citation omitted)).

⁷¹ *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915, 118 S. Ct. 2296 (1998) (granting writ of certiorari).

⁷² See generally Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice?* 27 B.C. ENVTL. AFF. L. REV. 631, 675-80 (2000) (detailing the dynamics surrounding the CRCQL Supreme Court appeal).

⁷³ *Id.*

⁷⁴ *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974, 119 S. Ct. 22, 22-23 (1998) (“The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit with instructions to dismiss.”).

⁷⁵ 145 F. Supp. 2d 446 (D.N.J. 2001).

⁷⁶ *Id.* at 473-474.

⁷⁷ *Id.* at 459-60.

⁷⁸ *Id.* at 450.

⁷⁹ *Id.* at 451-52.

⁸⁰ *Id.* at 472 (noting that the Plaintiffs spent particular attention on briefing the claim of disparate impact in violation of § 602).

⁸¹ 189 F.3d 387 (3d Cir. 1999).

⁸² *Id.* at 399.

⁸³ *Camden I*, 145 F. Supp. 2d at 474.

⁸⁴ See generally *Risk Assessments vs. Alternative Assessments*, EJNET.ORG, <http://www.ejnet.org/ej/riskassessment.html> (last visited Nov.20, 2012) (explaining flaws in risk assessment and advocating for a more involved process).

⁸⁵ *Camden I*, 145 F. Supp. 2d at 474.

⁸⁶ *Id.*

⁸⁷ *Id.* at 488-90.

⁸⁸ *Id.* at 490.

⁸⁹ *Id.* at 461-66.

⁹⁰ *PM_{2.5} NAAQS Implementation*, ENVTL. PROT. AGENCY, http://www.epa.gov/ttnnaaq/pm/pm25_index.html (last updated July 14, 2008).

⁹¹ *Camden I*, 145 F. Supp. 2d at 497-98 (noting the EPA’s own admission that their regulations regarding particulate matter were “inadequate to protect the public health”).

⁹² *Id.* at 499.

⁹³ *Id.* at 452.

⁹⁴ *Id.*

⁹⁵ *Id.* at 503-05.

⁹⁶ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁹⁷ *Id.* at 279.

⁹⁸ *Id.* at 293.

⁹⁹ *Id.* at 286-87.

¹⁰⁰ *Id.* at 287 (“That understanding is captured by the Court’s statement in *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), that ‘it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose’ expressed by a statute.”).

¹⁰¹ 422 U.S. 66, 95 S. Ct. 2080 (1975).

¹⁰² *Id.* at 78.

¹⁰³ *Sandoval*, 532 U.S. at 288.

¹⁰⁴ *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

¹⁰⁵ *Sandoval*, 532 U.S. at 286 (citing *Touche Ross* 442 U.S. at 578).

¹⁰⁶ *Touche Ross*, 442 U.S. at 575.

¹⁰⁷ *Sandoval*, 532 U.S. at 288-89.

¹⁰⁸ *Id.* at 316 (Stevens, J., dissenting).

¹⁰⁹ *Id.* at 295, 317.

¹¹⁰ *Id.* at 295 n.1.

¹¹¹ *Id.* at 299.

¹¹² *Id.* at 311.

¹¹³ *Id.* at 302 n.9.

¹¹⁴ *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

¹¹⁵ *Id.* at 702-03.

¹¹⁶ *Sandoval*, 532 U.S. at 298 (Stevens, J., dissenting).

¹¹⁷ *Id.* at 303; *id.* at 280 (Scalia, J.).

¹¹⁸ *Regents Univ. Cal. V. Bakke*, 438 U.S. 265 (1978).

¹¹⁹ *Sandoval*, 532 U.S. at 307-08 (Stevens, J., dissenting).

¹²⁰ *Id.* at 299-301.

¹²¹ 42 U.S.C. § 1983; *Blessing v. Freestone*, 520 U.S. 329, 340 (1997).

¹²² *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting).

¹²³ *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot. (Camden II)*, 145 F. Supp. 2d 505, 509 (D.N.J. 2001).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot. (Camden III)*, 274 F.3d 771, 781 (3d Cir. 2001).

¹²⁷ *Sandoval*, 532 U.S. at 309 (Stevens, J., dissenting).

¹²⁸ *Camden III*, 274 F.3d at 774.

¹²⁹ *Blessing v. Freestone*, 520 U.S. 329, 338, 117 S.Ct. 1353, 1358 (1997). The *Blessing* test to determine whether a federal statute creates an individual right enforceable through § 1983 looks at the following: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the plaintiff must demonstrate that the right protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory terms.

¹³⁰ *Camden III*, 274 F.3d at 791.

¹³¹ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

- ¹³² *Id.* at 283; *see also* Derek Black, *Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C.L. REV. 356, 366-67 (2002) (“The Gonzaga Court stated that it was not changing the Blessing test, but Gonzaga stressed that Congress must intend to create a federal right, not merely intend the statute to benefit the plaintiff.”).
- ¹³³ *Gonzaga*, 536 U.S. at 283.
- ¹³⁴ *See* CENTER FOR RACE, POVERTY & THE ENVIRONMENT, ET. AL., *THE EPA DENIES CIVIL RIGHTS PROTECTION FOR COMMUNITIES OF COLOR* (2011), <http://www.ejnet.org/ej/tvifactsheet.pdf> (arguing that the EPA’s Select Steel decision and California Department of Pesticide settlement have eroded civil rights protection and demanding their rescission and increased oversight).
- ¹³⁵ *Title VI Complaints Listing*, EJNET.ORG, <http://www.ejnet.org/ej/2011-07-15complaints.pdf> (last visited Nov. 24, 2012).
- ¹³⁶ ANN E. GOODE, ENVTL. PROT. AGENCY, *SELECT STEEL DECISION MEMORANDUM & REPORT* 10 (1998), http://www.epa.gov/ocr/docs/ssdec_ir.pdf.
- ¹³⁷ *Id.* at 37-38.
- ¹³⁸ *Id.* at 2.
- ¹³⁹ *Id.* at 3.
- ¹⁴⁰ *Id.* at 2.
- ¹⁴¹ *See* Brief Amicus Curiae of the United States at 13, 19, *Save Our Summers v. Washington Department of Ecology*, 132 F. Supp. 2d 896 (E.D. Wash. 1999) (No. CS-99-269-RHWQ), *available at* <http://www.cforjustice.org/wp-content/uploads/2009/03/amicus.pdf>. Endnote 143: insert “*available at*” before URL (urging the court to consider the purposes and structure of both environmental laws and civil rights laws to find an approach which would reconcile any tension or conflict between the two and that, because the two different types of statutes can be harmonized, there is no need to consider which is controlling, and they may be separately applied).
- ¹⁴² *Camden I*, 145 F. Supp. 2d at 498-99.
- ¹⁴³ OFFICE OF CIVIL RIGHTS, ENVTL. PROT. AGENCY, *INVESTIGATIVE REPORT FOR TITLE VI ADMINISTRATIVE COMPLAINT FILE NO. 16R-99-R9* (2011), <http://www.epa.gov/ocr/TitleVIcases/ir-082511.pdf>.
- ¹⁴⁴ *Id.* at 37 (determining that the plaintiffs had made a *prima facie* showing of adverse impact).
- ¹⁴⁵ *Compare id.* at 37-38 (stating that the EPA agreed to increased monitoring of air concentration levels and community outreach and education efforts), *with* Complaint at 40-41, *Angelita C. v. Cal. Dep’t of Pesticide Regulation*, No. 16R-99-R9 (Office of Civil Rights, Env’tl. Prot. Agency) (1999), <http://www.ejnet.org/ej/angelitac-complaint.pdf> (asking the EPA to ban methyl bromide, or in the very least to enforce much larger buffer zones).
- ¹⁴⁶ OFFICE OF CIVIL RIGHTS, *supra* note 143, at 37-38.
- ¹⁴⁷ Press Release, Center on Race, Poverty, & the Environment, *EPA Fails to Enforce Civil Rights Act* (Aug. 25, 2011), <http://www.ejnet.org/ej/angelitac-crpe-pr.pdf> (quoting Brent Newell, General Counsel).
- ¹⁴⁸ *See* EPA roundly criticized over draft supplement to Civil Rights plan, INSIDE EPA.COM (July 20, 2012), <http://www.enviro-lawyer.com/EPA%20Roundly%20Criticized.pdf> (quoting a neighborhood association as saying that “[d]espite Rosemere’s lawsuit and the subsequent national debate of the failures of the [EPA Office of Civil Rights (OCR)], and despite [Lisa Jackson’s] continued promises for EPA to increase efficiency in that office to make environmental justice a national priority, the OCR continues to fail in its intake and investigation guidelines in regard to Title VI complaints.”).
- ¹⁴⁹ *See* Padrias Hacia Una Vida Mejor v. Jackson, No. 1:11CV01094 AWI DLB, 2012 WL 1795823, at *3 (May 16, 2012), <http://www.epa.gov/ocr/TitleVIcases/decisions/#padres> (“On June 30, 2011, Plaintiffs filed this lawsuit. Plaintiffs allege that EPA has violated, and continues to violate, 40 C.F.R. § 7.115(c)(1) because it failed to issue preliminary findings and recommendations for voluntary compliance in response to Plaintiffs’ Title VI complaint within 180 days of EPA’s initiation of investigation.”).
- ¹⁵⁰ RAFAEL DELEON, ENVTL. PROT. AGENCY, *DISMISSAL AND CLOSURE OF TITLE VI COMPLAINT* (Aug. 20, 2012), http://www.epa.gov/ocr/TitleVIcases/decisions/padres/Padres_complaint_01-95-R9_decision-ltr_DTSC_20120830.pdf.
- ¹⁵¹ *Id.* at 1.
- ¹⁵² *Id.*
- ¹⁵³ *Id.* at 4-7.
- ¹⁵⁴ Eiji Yamashita, *EPA awards grant to environmental group: Greenaction Campaign to Conduct Outreach on Impact of Diesel Emissions*, HANFORD SENTINEL, Dec. 10, 2011, http://www.hanfordsentinel.com/news/local/epa-awards-grant-to-environmental-group/article_856323fa-22d5-11e1-894b-001871e3ce6c.html.
- ¹⁵⁵ 40 C.F.R. §§ 7.120(d), 7.115(c).
- ¹⁵⁶ *EPA Fails to Enforce Civil Rights Act*, *supra* note 147 (reporting that dozens of complaints have languished at the EPA).
- ¹⁵⁷ U.S. COMMISSION ON CIVIL RIGHTS, *NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE* 55-62 (2003), <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.
- ¹⁵⁸ *Rosemere Neighborhood Assoc. v. U.S. Env’tl. Prot. Agency*, 581 F.3d 1169, 1175 (9th Cir. 2009), <http://www.ca9.uscourts.gov/datastore/opinions/2009/09/17/08-35045.pdf>.
- ¹⁵⁹ DELOITTE CONSULTING LLP, *EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS – FINAL REPORT* 19 (2011), http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf (concluding that the backlog was “directly attributable to OCR’s difficulty in securing the time of resources in the program and regional offices that have required technical and regulatory expertise to execute the highly analytical investigation plan”).
- ¹⁶⁰ S. 4009, 109th Cong. (2006).
- ¹⁶¹ S. 2918, 110th Cong. (2008); H.R. 5896, 110th Cong. (2008).
- ¹⁶² S. 2918 § 1; H.R. 5896 § 1.
- ¹⁶³ S. 2918 § 3; H.R. 5896 § 3.
- ¹⁶⁴ *Id.*
- ¹⁶⁵ S. 2918 § 5; H.R. 5896 § 5 (providing the right to recovery on (1) “claims based on proof of intentional discrimination” and (2) “claims based on the disparate impact standard of proof”).
- ¹⁶⁶ *Id.*
- ¹⁶⁷ *Id.*
- ¹⁶⁸ S. 2918 § 3; H.R. 5896 § 3.
- ¹⁶⁹ *See generally* SCHUYLKILL TAXPAYERS OPPOSED TO POLLUTION, <http://www.ultradirtyfuels.com> (last visited Nov. 27, 2012) (providing a brief history of “coal-to-oil” refineries in Schuylkill County and their impact on residents). In response to comments by the author, the Department of Energy, in their Environmental Impact Statement, recognized the prison population as an environmental justice community, but pretended that they would not be impacted by the coal-to-oil refinery proposed adjacent to them because the pollution would be within legal limits, along the flawed lines of the aforementioned *Select Steel* decision. DEP’T OF ENERGY, *FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE GLIBERTON COAL-TO-CLEAN FUELS AND POWER PROJECT xxxi-xxxii* (2007), http://www.netl.doe.gov/technologies/coalpower/cctc/EIS/gilberton_pdf/0%20WMP/0%20FEIS/0%20Front%20Matter.pdf.
- ¹⁷⁰ *E.g.*, Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 246-248 (2005).
- ¹⁷¹ Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4231 et seq.).
- ¹⁷² 42 U.S.C. §§ 4332(C)(iii), (D)(iv), (E) (2011).
- ¹⁷³ *See generally* *Philpower Incinerator Saga*, GREEN DEL., <http://greendel.org/versionone/incinerator/ppstory.html> (last updated June 18, 2000) (providing history on the “Philpower Incinerator Saga”).
- ¹⁷⁴ *Philpower Corporation*, ENERGY JUSTICE NETWORK, <http://www.energyjustice.net/map/displayfacility-69734.htm> (last visited Nov. 25, 2012).
- ¹⁷⁵ Del. S.B. 280, 140th Gen. Assemb. (2000) (codified at Del. Code. Ann. tit. 7, §§ 6002-03).
- ¹⁷⁶ *See supra* note 46 and accompanying text.
- ¹⁷⁷ *See generally* *Environmental Justice Case Study: Shintech PVC Plant in Convent, Louisiana*, UNI. OF MICH., <http://www.umich.edu/~snre492/shin.html> (last visited Nov. 25, 2012) (providing a case study of the Shintech proposal).
- ¹⁷⁸ *Id.*
- ¹⁷⁹ TOXICOLOGY EXCELLENCE FOR RISK ASSESSMENT and ENVIRONMENTAL PROTECTION AGENCY, *COMPARATIVE DIETARY RISKS: BALANCING THE RISKS AND BENEFITS OF FISH CONSUMPTION* (1999), *available at* <http://www.tera.org/Publications/CDR%20Front%20Matter.pdf>.
- ¹⁸⁰ ROGER D. MASTERS, *The Social Implications of Evolutionary Psychology: Linking Brain Biochemistry, Toxins, and Violent Crime*, in *EVOLUTIONARY PSYCHOLOGY AND VIOLENCE: A PRIMER FOR POLICYMAKERS AND PUBLIC POLICY ADVOCATES* (Richard W. Bloom and Nancy K Dess, Eds., 2003).
- ¹⁸¹ Letter from Martin Luther King, Jr., *Letter From Birmingham Jail* (April 16, 1963), *available at* <http://abacus.bates.edu/admin/offices/dos/mlk/letter.html>.

- ⁴ See *Grutter*, 539 U.S. at 330 (2003) (citing studies regarding educational benefits of diversity); Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2804-05 (2012) (discussing studies showing that racial and cultural diversity “has a positive impact on accuracy, flexibility, group creativity, thoughtfulness, and information sharing”); Seletha R. Butler, *All On Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 73-80, (2012) (discussing benefits of board diversity).
- ⁵ See, e.g., Coglianese, *supra* note 1, at 110-11 (noting public support of environmentalism as current issue for environmental justice groups).
- ⁶ See Collin, *supra* note 2, at 513, 518.
- ⁷ American Fact Finder, *American Community Survey Selected Population Tables (2006-10)*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_SF4_DP03&prodType=table (last visited Oct. 25, 2012) (noting that in 2010 10.6% of black families had a household income of \$100,000 or more, and more than 21% of white households earned less than \$25,000 per year).
- ⁸ See Rick Jervis, *Six years after Katrina, pockets of New Orleans languishing*, USA TODAY (Aug. 25, 2011), <http://usatoday30.usatoday.com/news/nation/story/2011-08-25/Six-years-after-Katrina-pockets-of-New-Orleans-languishing/50141660/1> (discussing the plight of New Orleans East, a predominantly middle and upper middle class African American community six years after hurricane Katrina).
- ⁹ See Sam Evans, *Voices From the Desecrated Places: A Journey to End Mountaintop Removal Mining*, 34 HARV. ENVTL. L. REV. 521 (2010) (discussing the impact of mountaintop mining on impoverished white communities in Appalachia).
- ¹⁰ State sanctioned racism; open and notorious acts of murder, humiliation and degradation; physical segregation; economic isolation; civic neglect; and political disenfranchisement. See, e.g., Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1043 (2010) (discussing “evolution of thinking about criminal justice and racial justice over the last one hundred years”); See generally JOHN STRAUSBAUGH, BLACK LIKE YOU: BLACKFACE, WHITEFACE, INSULT & IMITATION IN AMERICAN POPULAR CULTURE (Aug 16, 2007) (exploring race relations in American popular culture and how blackface performance came to be denounced as purely racist mockery); MICHAEL HARRINGTON, THE OTHER AMERICA, (Simon and Shuster, 1962) (exploring depth of poverty crisis and analyzing why “invisible” citizens as the elderly, children, and minorities are not given adequate opportunities).
- ¹¹ See, e.g., Bethany Li, *‘We Are Already Back’: The Post-Katrina Struggle for Survival and Community Control in New Orleans East’s Vietnamese Community of Versailles*, 18 ASIAN AMER. L.J. 25 (2011) (discussing a Vietnamese community’s struggle for survival after Hurricane Katrina); Joan D. Flocks, *The Environmental and Social Injustice of Farmworker Pesticide Exposure*, 19 GEO. J. ON POVERTY L. AND POL’Y 255 (2012) (discussing hazards to migrant farmworkers from pesticide exposure); Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 LAW & INEQ. 267 (1994) (discussing impacts of radioactive wastes on Tribal communities).
- ¹² See Michael Gelobter, et al., *The Soul of Environmentalism: Rediscovering Transformational Politics in the Twenty-First Century*, GRIST.ORG (2008), available at http://archive.fieldmuseum.org/research_collections/ccuc/ccuc_sites/newallies/pdf/Soul_of_Environmentalism.pdf.
- ¹³ See Richard J. Lazarus, *Highways and Bi-ways for Environmental Justice*, 31 CUMB. L. REV. 569, 576 (2001) (noting early sanitation and public health movements with a focus on urban environmental concerns).
- ¹⁴ *Id.* at 572; See Gelobter, *supra* note 12, at 4 (referring to the environmental movement as the “Elvis of Sixties activism”).
- ¹⁵ Gelobter, *supra* note 12, at 5-8.
- ¹⁶ See Collin, *supra* note 2, at 538.
- ¹⁷ Tseming Yang, *Environmental Regulation, Tort Law and Environmental Justice: What Could Have Been*, 41 WASHBURN L.J. 607, 610 (2002).
- ¹⁸ *Id.* at 611.
- ¹⁹ See *id.* at 612, 621 (noting the exclusion of minority groups and the poor from environmental decision-making and the weakness of environmental enforcement provisions). In addition to this array of more traditional environmental concerns, environmental justice advocates also demand recognition and consideration of other factors that can profoundly affect the health and wellbeing of communities, such as economic isolation, access to health care, quality of housing and education, and access to healthy food choices.
- ²⁰ See Collins, *supra* note 2, at 545.
- ²¹ *Agriculture: Sustainability*, U.S. EPA, <http://www.epa.gov/agriculture/tsus.html> (last visited Oct. 28, 2012).
- ²² These types of restrictions are at the heart of laws like the federal Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7641, and Clean Water Act (“CWA”), 33 U.S.C. §§ 1252-1387, among others, and state law equivalents.
- ²³ See e.g., The National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-70.
- ²⁴ See Solid Waste Disposal Act, 42 U.S.C. §§ 6921-39 (hazardous waste provisions).
- ²⁵ See e.g., Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-87; Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. §§ 1600-87; Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-44.
- ²⁶ See generally *Learn the Issues*, U.S. EPA, <http://www.epa.gov/gateway/learn/> (last visited Oct. 28, 2012).
- ²⁷ While these categories overlap to some degree, the categories themselves serve as useful methodical reference points. Additionally, there are categories not included here, such as statutes that serve a primarily informational function, such as NEPA, 42 U.S.C. §§ 4321-70, or the Emergency Planning and Community Right-to-Know Act (“EPCRA”), 42 U.S.C. § 11046.
- ²⁸ The Clean Air Act and Clean Water Act largely reflect this approach to environmental protection. See 42 U.S.C. § 7401(a)(3), 33 U.S.C. § 1252(a) While such standards are usually tied in various ways to adverse health impacts, the stringency of emission controls are typically not directly linked to a demonstration of hazard or risk.
- ²⁹ See 42 U.S.C. § 7412(k)(2)(A).
- ³⁰ An adage famously used by J.F.K in support of free trade. President John F. Kennedy Address at the Paulskirche in Frankfurt, Germany, 24 (June 25, 1963), available at <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-045-023.aspx>.
- ³¹ See *Technology Transfer Network Air Toxics Web Site: About Air Toxics*, U.S. EPA, <http://www.epa.gov/ttn/atw/allabout.html> (last visited Oct. 25, 2012).
- ³² Indeed, the problem of disproportionate impacts can be summed up thusly: “Are members of some communities asked to shoulder more than their share of the public health burden associated with the maintenance of our industrialized way of life?” To the extent that the answer is “yes”, any justification that merely accepts such disparities as the natural consequence of relative powerlessness (economic, political, and societal) is morally repugnant.
- ³³ See Yang, *supra* note 17, at 607, 610-12.
- ³⁴ See 42 U.S.C. § 7412(d) (instructing the agency to consider cost, non-air quality impacts, and energy requirements when setting “achievable” standards for HAPs); 42 U.S.C. § 7412(f)(2) (instructing EPA to set “residual risk” standards 8 years after initial HAP emission controls are adopted “if promulgation of such standards is required in order to provide an ample margin of safety to protect public health.”). See generally, Mark W. Ciaravella, Comment, *Regulation of Hazardous Air Pollutants Under Section 112 of The Clean Air Act Amendments of 1990*, 15 ENERGY L.J. 485 (1994).
- ³⁵ See, e.g., *Natural Resources Defense Council v. EPA*, 529 F.3d 1077 (D.C. Cir. 2008) (EPA successfully arguing that HAP standards need not protect the public from cancer risks of greater than one in one million).
- ³⁶ 42 U.S.C. §§ 7412(c)(9), 7412(f)(2).
- ³⁷ In the agency’s words: “EPA strives to provide maximum feasible protection against risks to health from HAP[s] by: (1) Protecting the greatest number of persons possible to an individual lifetime cancer risk level of no higher than approximately 1 in 1 million and (2) limiting to no more than 1 in 10,000 the estimated cancer risk to the hypothetical maximum exposed individual.” National Emission Standards for Hazardous Air Pollutants from Secondary Lead Smelting, 60 Fed. Reg. 32,587, 32,591 (June 23, 1995) (to be codified at 40 C.F.R. pts. 9, 63).
- ³⁸ See, e.g., National Emissions Standards for Hazardous Air Pollutants: Secondary Aluminum Production, 77 Fed. Reg. 8,576, 8,593 (February 14, 2012) (to be codified at 40 C.F.R. pt. 63) (requesting comment on “whether and how best to estimate and evaluate total HAP exposure”).
- ³⁹ See *id.* at 8,595.
- ⁴⁰ See National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry, 75 Fed. Reg. 5,4970, 54,986 (September 9, 2010) (explaining that EPA’s metrics for assessing health risks “do not reflect any potential cumulative or synergistic effects of an individual’s exposure to multiple HAPs or to a combination of HAPs and criteria pollutants”).

⁴¹ See Yang, *supra* note 17, at 610-11.

⁴² See generally George Friedman-Jimenez, M.D., *Achieving Environmental Justice: The Role of Occupational Health*, 21 FORDHAM URB. L.J. 605 (1994).

⁴³ This article does not address the question of “geographic implementation bias” whereby environmental protection policies, law enforcement, or other environmental benefits are simply targeted geographically more vigorously at wealthy communities and/or white communities as compared with poor and/or non-white communities. See generally *id.*

⁴⁴ See Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice”*, 47 AM. U. L. REV. 221, 231-32 (1997) (discussing the history of “studies suggesting that minority and low-income communities currently endure undesirable land uses to a greater extent than other communities”).

⁴⁵ See the Resource Conservation and Recovery Act (“RCRA”) 42 U.S.C. §§ 6921-39 (regulating hazardous management and disposal).

⁴⁶ See Kaswan, *supra* note 44, at 269 (explaining that the United States has only a few hazardous waste disposal facilities, which studies show are disproportionately located near low-income or minority populations).

⁴⁷ See Kaswan *supra* note 44, at 232-33 (citing two studies from the 1980s that found correlations between communities’ racial and economic demographics and their proximity to hazardous waste sites).

⁴⁸ See Kaswan *supra* note 44, at 232-33 (“Studies have shown a correlation between race and exposure to air pollution, between race and lead poisoning, between race and pesticides, and between race and exposure to occupational hazards.”); Lazarus, *supra* note 2, at 801-806 (observing that minorities are also more likely to be employed in areas of work that expose them to greater environmental risks, such as pesticide-heavy farming and the steel industry).

⁴⁹ For example, the preservation of wild places is a critically important societal goal for many reasons, not the least of which are habitat protection, ecosystem services, and inter-generational equity. See generally Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495-582 (1984); Will R. Turner et al., *Global Conservation of Biodiversity and Ecosystem Services*, 57 BIOSCIENCE 868, 868 (2007).

⁵⁰ See John Schelhas, *Race, Ethnicity, and Natural Resources in the United States: A Review*, 42 NAT. RESOURCES J. 723, 739, 750-54 (2002) (discussing, among other things, discrimination in the conservation movement and the under-participation of minorities in outdoor recreation).

⁵¹ *Id.* at 751 (explaining the marginality hypothesis).

⁵² *Id.*

⁵³ See *id.* at 739 (citing the example of the Southern California Chapter of the Sierra Club, which in the 1950s explicitly excluded minorities from its meetings).

⁵⁴ See Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and The Future of the American City*, 2011 BYU L. REV. 2157, 2162-66 (2011) (discussing this history and also observing that recently, “mainstream environmentalists and environmental law scholars are engaged in a full-blown love affair with cities”).

⁵⁵ From the perspective of human psychological norms, this should not come as a particular surprise. People disproportionately value their own set of interest and concerns and tend to prioritize based on their own experiences. See generally David M. Messick & Max Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 SLOAN MGMT. REV. 9 (1996).

⁵⁶ 42 U.S.C. § 4331 (2006) (declaring “it is the continuing policy of the Federal Government” to take the measures necessary “to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans”).

⁵⁷ Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994) [hereinafter “E.O. 12898”] (ordering, among other things, each federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States”).

⁵⁸ In fact, in 1997, the Council on Environmental Quality (“CEQ”) issued the document “Environmental Justice: Guidance Under the National Environmental Policy Act,” which contemplates some meaningful procedural steps to ensure robust consideration of community concerns during NEPA review. It also provides that “agencies that promulgate or revise regulations, policies, and guidances under NEPA or under any other statutory scheme should consult with CEQ and EPA to ensure that the principles and approaches presented in this guidance are fully incorporated into any new or revised regulations, policies, and guidances.” COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE

UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 19 (1997), available at <http://ceq.hss.doe.gov/nepa/regs/ej/justice.pdf> (emphasis added).

⁵⁹ See e.g. Kaswan, *supra* note 44, at 238 (“If the government’s remediation decisions are influenced by the demographics of the communities adjoining contaminated areas, the decisionmaking process could be considered unjust.”)

⁶⁰ Charles Davis, *Approaches to the Regulation of Hazardous Wastes*, 18 ENVTL. L. 505, 529 (1988). Notably, Robert Percival has observed with respect to the CAA and NEPA, that “both were founded on the conviction that action-forcing legislation was necessary to overcome agency resistance to change.” Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 129 (1991). Moreover, in discussing the “tradeoff between politics and expertise as a basis for decision-making” current Justice Kagan observed that one inherent limitation of agency officials is their “insulation from the public, lack of capacity for leadership, and significant resistance to change.” In her view, these attributes “pose significant risks to agency policymaking.” Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245-2352-53 (2001).

⁶¹ See Kaswan, *supra* note 44, at 251-52 (“Environmental justice advocates expect that Executive Order 12,898’s two-pronged approach – requiring (1) the compilation and consideration of demographic information, and (2) the improvement of public participation mechanisms – will result in fairer decisionmaking”).

⁶² See Yang, *supra* note 17, at 607 (noting that “[o]ne of the most severe criticisms has been the claim that environmental laws were not merely doing too little for the poor and people of color but that they were in fact the cause of some of the racism and injustice”).

⁶³ See generally RONALD N. JOHNSON & GARY D. LIBECAP, *THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY* 177 (1994).

⁶⁴ See generally Messick & Bazerman, *supra* note 55, at 37 (discussing “concentration bias” and “benefits allocation bias”).

⁶⁵ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 290 (1986) (J. O’Connor concurring in part and concurring in judgment), quoting S. Rep. No. 92-415, p. 10 (1971) (accompanying the amendments extending coverage of Title VII to the States).

⁶⁶ *Id.*

⁶⁷ Nearly the same observation was made during hearings before the House Legislation and National Security Subcommittee of the Committee on Government Operations. *Environmental Protection Agency Cabinet Elevation—Environmental Equity Issues: Hearing before the Legis. & Nat’l Sec. Subcomm. of the Comm. on Gov’t Operations*, 103rd Cong. 63 (1993) (statement by Richard Moore, coordinator for the Southwest Network for Environmental and Economic Justice), available at http://www26.us.archive.org/stream/environmentalpro00unit/environmentalpro00unit_djvu.txt (“To establish credibility in EPA programs, the Agency must reverse its historical resistance to cultural diversity and integration in the workforce. Congress and EPA should put employees of color in substantive decision-making positions and heed input.”).

⁶⁸ This commentary is not meant to suggest that the perspectives of the American white upper middle class are homogenous. They manifestly are not. However, the range of experiences and perspectives among a broader community of people will necessarily be more expansive.

⁶⁹ See Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715, 726-27 (2011) (arguing that “a diversity of viewpoints can only benefit a company if those viewpoints can be expressed”).

⁷⁰ See Rebecca K. Lee, *Core Diversity*, 19 TEMP. POL. & CIV. RTS. L. REV. 477, 488-91 (2010) (explaining that “[d]espite its objectives, surface diversity reinforces asymmetric relationships of power present in broader society and recreated within organizations. The problem with surface diversity speaks to the problem of assimilation ... [and] the phenomenon of ‘covering.’” Lee defines “covering” as “deemphasizing aspects of one’s identity that deviate from the assimilation ideal”); George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1, 27 (1999) (discussing “the costs to Latinos and other minority groups in attempting to assimilate”).

⁷¹ See Lee, *supra* note 70, at 493-94 (encouraging businesses to adopt the “core diversity” model for achieving inclusive management, which “seeks to apply people’s differences to concretely improve the organization’s practices at its core”). Another aspect of addressing this problem has been the pursuit of a “critical mass” of diverse participants. See Grutter, 539 U.S. 318-19 (asserting that with regard to race, the goal is to achieve “a number that encourages under-represented minorit[ies] ... to participate” without “feel[ing] isolated or like spokespersons for their race”).

⁷² See generally Lazarus, *supra* note 2.

⁷³ Lazarus, *supra* note 2, at 827 (emphasis added).

⁷⁴ Criticism in this regard can be levied equally at government policymakers and at mainstream environmental organizations. This latter group, which has been largely responsible for defining the nature and scope of the environmental debate over the past several decades, is firmly rooted in the classic environmental mindset and has its own set of institutional traditions that have proven amazingly resistant to change.

⁷⁵ *Fisher v. Univ. of Tex.*, 132 S.Ct 1536 (2012) (granting cert again in the context of university admission policies).

⁷⁶ See *Grutter*, 539 U.S. at 328 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

⁷⁷ See *Bakke*, 438 U.S. at 313 (1978); *Grutter*, 539 U.S. at 324.

⁷⁸ Of course the Court has effectively cabined its grant of leave for race-conscious decision-making by relying on the special solicitude afforded universities in the name of “academic freedom.” *Bakke*, 438 U.S. at 319; *Grutter*, 539 U.S. at 324, 329. However the rationale for encouraging diversity in certain public policymaking is implicit in Powell’s rationale in *Bakke*: the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this nation of many peoples.” *Bakke*, 438 U.S. at 313. If such diversity of thought is important in education, should it be considered any less critical to our nation’s future within the institutions that make and implement important public policy?

⁷⁹ Notably, indicators of “sameness” – sometimes described in terms of whether a person is a “good fit” – often emerge as a “factor” in hiring decisions with the effect preventing diversity (with respect to race, gender, disability, or otherwise) and furthering the creep toward institutional homogeneity. See DAVID M. BLANCHARD, REPRESENTING EMPLOYEES IN DISCRIMINATION CASES 4 (2012) (“Millions of Americans have lost their jobs because they were not a ‘good fit’ or because the company wanted to move in a ‘different direction.’”). In such instances ultimately the burden is on the applicant to prove that the employer’s stated reason is a “pretext.” *Id.* at 1.

⁸⁰ See CULTURAL DIVERSITY CHALLENGES FOR EPA: A STRATEGY FOR BOLD ACTION, ENVTL. PROT. AGENCY 3, 13 (1992) (“1992 Diversity Strategy”) (recognizing that “organizations benefit from a broad range of perspectives” which can stimulate “creative thinking, problem solving [and] innovation”).

⁸¹ U.S. EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992), available at http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/reducing_risk_com_vol1.pdf.

⁸² *Environmental Justice: Basic Information*, U.S. EPA, <http://www.epa.gov/compliance/ej/basics/ejbackground.html> (last updated May 24, 2012); 58 Fed. Reg. 59,723, 59,723 (Nov. 10, 1993) (EPA Notice of Establishment of the National Environmental Justice Advisory Council and Request for Suggestions of Candidates for Membership).

⁸³ The IWG was also a creature of E.O. 12898. See E.O. 12898, *supra* note 57, at § 1-102 (describing the EJ IWG’s composition and duties, which includes providing guidance to federal agencies “on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations”). See also *Federal Interagency Working Group on Environmental Justice*, U.S. EPA, <http://www.epa.gov/>

compliance/ej/interagency/index.html (last updated Sept. 13, 2012) (stating that the role of the Environmental Justice Interagency Working Group is “to guide, support and enhance federal environmental justice and community-based activities”).

⁸⁴ See Memorandum from Gary Guzy, U.S. EPA General Counsel, regarding EPA Statutory and Regulatory Authorities under which Environmental Justice Issues may be Addressed in Permitting (Dec. 1, 2000), available at http://www.epa.gov/environmentaljustice/resources/policy/ej_permitting_authorities_memo_120100.pdf (reporting that the Environmental Appeals Board (EAB) directly addressed the environmental justice issues in RCRA hazardous waste permits in a 1995 report and found that “‘when the Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process.’”).

⁸⁵ Even today, more than 82% of the 2,400 employees comprising the EPA’s senior career staff (grade GS 15) are white (non-Hispanic). See Letter from James H. Johnson, Jr., Chair, National Advisory Council for Environmental Policy and Technology, to Lisa P. Jackson, Administrator, U.S. EPA (Dec. 22, 2011), available at http://www.epa.gov/ocempage/nacept/reports/pdf/2011_1222_nacept_diversity_letter.pdf. One could say this group exhibits all the diversity of Mercy College in Des Moines, Iowa, or St. Olaf College in Northfield, Minnesota. *Mercy College Quick Facts*, MERCY COLLEGE OF HEALTH SCIENCES, <http://www.mchs.edu/quick-facts.cfm> (last visited Nov. 1, 2012); *St. Olaf College 2012 Profile*, ST. OLAF COLLEGE 1, available at <http://www.stolaf.edu/about/StOlafProfile.pdf>. That said, whites made up about 90% of GS 15 employees in 1994 (70% of whom were males). See U.S. EPA, FY 1994 AFFIRMATIVE EMPLOYMENT PROGRAM ACCOMPLISHMENT REPORT AND FY 1995 PLAN UPDATE: STRATEGIC PLAN FOR DIVERSITY 77 (1995), available at <http://www.epa.gov/nscepf/index.html>.

⁸⁶ See generally *Environmental Justice*, U.S. EPA, <http://www.epa.gov/environmentaljustice/index.html> (last updated Oct. 15, 2012) (asserting the EPA’s commitment to promoting environmental justice, which the EPA defines as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies”); and *Strengthening and Revitalizing the EPA’s Civil Rights and Diversity Programs*, U.S. EPA, <http://www.epa.gov/epahome/ocr-statement.htm> (last updated April 24, 2012). While EPA has by no means solved all of its longstanding issues (especially as they relate to the enforcement of Title VI of the Civil Rights Act of 1964), the efforts within the administration have been significant and seemingly genuine.

⁸⁷ Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 18, 2011) (establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce, and *inter alia*, acknowledging that “[a] commitment to equal opportunity, diversity, and inclusion is critical for the Federal Government as an employer,” that the federal government has a “special obligation to lead by example,” and that the government “must create a culture that encourages collaboration, flexibility, and fairness to enable individuals to participate to their full potential”).

⁸⁸ Memorandum from Lisa P. Jackson, Administrator, U.S. EPA, to All EPA Employees regarding Seven Priorities for EPA Action, available at <http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/> (emphasis added).

Endnotes: ON FERTILE GROUND: THE ENVIRONMENTAL AND REPRODUCTIVE JUSTICE MOVEMENTS AS A UNIFIED FORCE FOR REFORMING TOXIC CHEMICAL REGULATION *continued from page 20*

⁴ *Reproductive Health Analysis of the Toxic Chemicals Safety Act (H.R. 5820)*, REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT 1 (2010) http://www.poder-texas.org/files/TSCA_Reform_Bill.pdf.

⁵ Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NATIONAL RESOURCE DEFENSE COUNCIL (2006), <http://www.nrdc.org/ej/history/hej.asp>, (last visited Oct. 26, 2012) (citing *TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES*, COMM’N FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST (1986), <http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf>. This study was updated twenty years later with similar findings. See *TOXIC WASTES AND RACE AT TWENTY 1987-2007: GRASSROOTS STRUGGLES TO DISMANTLE ENVIRONMENTAL RACISM IN THE UNITED STATES*, UNITED CHURCH OF CHRIST

JUSTICE AND WITNESS MINISTRIES (2007), <http://www.ejrc.cau.edu/2007%20UCC%20Executive%20Summary.pdf>.

⁶ LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *SUPRA* note 2 at 1.

⁷ Chinue Turner Richardson, *Environmental Justice Campaigns Provide Fertile Ground for Joint Efforts With Reproductive Rights Advocates*, 9 GUTTMACHER POL. REV. 14, 17 (2006), available at <http://www.guttmacher.org/pubs/gpr/09/1/gpr090114.pdf>.

⁸ *Why is Reproductive Justice Important to Women of Color?*, SISTER SONG, http://www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=81 (last visited Oct. 28, 2012).

⁹ See *Environmental Justice*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/environmentaljustice/> (last visited Oct. 28, 2012); see also 17 PRINCIPLES OF

ENVIRONMENTAL JUSTICE, ENERGY JUSTICE NETWORK (1996), <http://www.ejnet.org/ej/principles.html> (last visited Oct. 28, 2012).

¹⁰ Kristen Zimmerman & Vera Miao, *Fertile Ground: Women Organizing at the Intersection of Environmental Justice and Reproductive Justice*, MOVEMENT STRATEGY CTR. 6 (2009), available at <http://funderservices.movementstrategy.org/a/wp-content/uploads/FertileGround.pdf>.

¹¹ *Id.*

¹² MOVEMENT STRATEGY CENTER *SUPRA* NOTE 2, at 8.

¹³ Karen Hu et al., *Removing the Topcoat: Understanding Federal Oversight of Nail Salons*, THE NATIONAL ASIAN PAC. AM. WOMEN'S FORUM 4 (2011), <http://nailsalonalliance.org/storage/Removing%20the%20Topcoat%20May2011.pdf>.

¹⁴ Toxic Chemicals Safety Act of 2010, H.R. Res. 5820, 111th Cong. (2010).

¹⁵ Safe Chemicals Act of 2011, S. Res. 84, 112th Cong. (2011).

¹⁶ REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT, *SUPRA* NOTE 4 AT 1.

¹⁷ *Id.*

¹⁸ *Integrate Strategies to Improve Environmental and Reproductive Justice*, NAT'L INST. FOR REPRODUCTIVE HEALTH 2 (2009), available at <http://www.urbaninitiative.org/SiteContent/Static/Docs/AgendaCh9Environment.pdf>.

Endnotes: A LEGAL STANDARD FOR POST-COLONIAL LAND REFORM *continued from page 28*

²¹ See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (declaring that the right to exclude is "universally held to be a fundamental element of the property right"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (emphasizing the importance of the right to exclude, calling it "one of the most treasured strands in the owner's bundle of property rights").

²² JOSEPH W. SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (5th ed. 2010).

²³ *Id.*

²⁴ See *id.* (explaining that rights language justifies property regimes or rules because they are right, i.e. they describe ways in which people ought to behave towards each other).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *People First – Zimbabwe's Land Reform Programme 2*, Ministry of Lands, Agriculture and Rural Settlement in conjunction with the Department of Information and Publicity, Office of the President and Cabinet, (2001) (describing three consecutive land reform programs and one joint government/ large-scale commercial white-farmer program implemented by the government to address the clear imbalance in land ownership between black and white Zimbabweans at independence).

²⁸ *Id.* at 14.

²⁹ *Id.*

³⁰ In the 1980s, Zimbabwe thrived on a strong agricultural sector. Exports of crops such as tobacco ranked high on the world market. Today, Zimbabwe is primarily an importer of commodities, including many food products. See Pazvakavambwa & Hungwe, *supra* note 5, at 137.

³¹ Land Tenure Act (Zimbabwe 1969).

³² See Pazvakavambwa & Hungwe, *supra* note 5, at 139.

³³ See Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 88 (1985) ("[t]he common law gives preference to those who convince the world that they have caught the fish and hold it fast . . . one has, by 'possession,' separated for oneself property from the great commons of unowned things.").

³⁴ See Singer, *supra* note 22, at 17 (describing the historical "finders keepers" concept as a simple and workable rule to allocate ownership of unpossessed or abandoned objects).

³⁵ *Id.*

³⁶ See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988) (explaining that the fact that one grabs something is not a strong enough reason for others to recognize his rights to control it unless those others have similar opportunity to obtain property); see also, Singer, *supra* note 22, at 17.

³⁷ The series of clashes through which the indigenous Africans were driven from their lands includes the First Chimurenga, or First War of Independence, in which the Shona and Ndebele uprising in opposition to displacement was violently quelled in 1897 by the Pioneer Column, a group of settlers sent to the region by the British South African Company in search of gold and diamonds. See Pazvakavambwa & Hungwe, *supra* note 5, at 138.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ LOCKE, *supra* note 1, at 21.

⁴² *Id.* at 19.

⁴³ *Id.*

⁴⁴ For an excellent summary of the agrarian profile of Zimbabwe leading up to the year 2000, see Thomas W. Mitchell, *The Land Crisis in Zimbabwe: Getting Beyond the Myopic Focus Upon Black and White*, 11 IND. INT'L & COMP. L. REV. 588 (2001); see also, United Nations Development Program (UNDP), Interim Mission Report, *Zimbabwean Land Reform and Resettlement: Assessment and Suggested Framework for the Future* 3, Jan. 2002 available at <http://www.eisa.org.za/PDF/zimlandreform.pdf>.

Colonial legislation created land classification and barred blacks from ownership of land in "velds" where the soil and weather conditions best promoted agriculture on a large-scale. The Land Apportionment Act of 1965, authorized the colonial government to move indigenous populations to marginal lands in the predominantly dry agricultural zones. Human Rights Watch, *Fast Track Land Reform in Zimbabwe*, A1401 (8 March 2002), available at <http://www.unhcr.org/refworld/docid/3c8c82df4.html>. As a result, as Zimbabwe celebrated independence from Great Britain in 1980, about 4,500 large-scale commercial farmers, consisting of less than one per cent of the population, occupied 45 per cent of the agricultural land. *Id.* This grossly disproportionate land-ownership profile can be traced back to the Land Apportionment Act of 1931, a law passed by the colonial government which created a land apartheid scheme, with land being designated black or white, as well as by the type of activity the land would be used for. Under this legislation alone, 51 percent of land was allocated to about 3,000 white farmers, and 1.2 million indigenous Zimbabweans were confined to Native Reserves (later renamed "communal lands") consisting of 30 percent of Zimbabwean land. See Pazvakavambwa & Hungwe, *supra* note 5, at 138-139.

⁴⁵ LOCKE, *supra* note 1, at 21.

⁴⁶ See Rugadya, *supra* note 20, at 3 (explaining that, in the context of Ugandan land reform, prior to the colonization era none of the communities in Uganda recognized individual ownership of land and that individual rights of possession and use of land existed but were subject to sanction by the holder's family, clan, or community).

⁴⁷ For example, one planted seed in the ground to trigger a communally recognized right to access the land until harvest time. Local leaders divided the land among members of the community according to each man's ability and willingness to put the land to productive use. Grazing was carried out in common, often intermingling livestock and rotating them across the entire expanse of land in a collective effort to ensure adequate access to pasture for all. See Thomas Griffiths, *Indigenous People, Land Tenure and Land Policy in Latin America*, FOOD & AGRICULTURAL ORGANIZATION 47 (2004).

⁴⁸ While no one held title to land under customary law, the colonial system and its titling model introduced a system of individual land ownership in line with the Jeremy Bentham's theory of property as a justified expectation. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 111-113 (C.K. Ogden ed. 1931) (stating that property is nothing but a basis of expectation of deriving certain advantages from a thing which we possess; this expectation, can only be the work of law).

⁴⁹ See Griffiths, *supra* note 47, at 51.

⁵⁰ *Id.* (citing P. Garcia, TERRITORIOS INDIGENAS: TOCANDO A LAS PUERTAS DEL DERECHO, REVISTA DE INDAS, LXI (223)).

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Miranda, *supra* note 10 (and accompanying text).

⁵⁴ See *infra* Parts II and III (drawing on international law to outline a legal standard for land reform policy).

⁵⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 17.

⁵⁶ See Poul Wisborg, *Are Land Rights Human Rights? Online debate on Human Rights Day* (Dec. 10 2011, available at <http://landportal.info/content/are-land-rights-human-rights-online-debate-human-rights-day-10th-december-2011>) (identifying the protection of land rights as governing the idea and the institutions of property); see also, Universal Declaration of Human Rights, *supra* note 55.

⁵⁷ Elizabeth Wickeri and Anil Kalhan, *Land Rights Issues in International Law*, INSTITUTE FOR BUSINESS AND HUMAN RIGHTS, available at <http://www.ihrb.org>.

org/pdf/Land_Rights_Issues_in_International_HRL.pdf; see also, De Schutter, *supra* note 6 (and accompanying text).

⁵⁸ See *infra* Part III (outlining the legal standard for land reform that best captures the norms established by universal agreements with near global consensus, as well as the jurisprudence of regional human rights courts).

⁵⁹ See DEBRA L. DELAET, *THE GLOBAL STRUGGLE FOR HUMAN RIGHTS: UNIVERSAL PRINCIPLES IN WORLD POLITICS* 14 (2006) (tracking the notion of dignity back to the political documents that first articulated fundamental human rights, the U.S. Declaration of Independence, which claimed “all Men . . . are endowed by their Creator with certain inalienable rights” and the French Declaration of the Rights of Man and Citizens, which claimed that certain “natural, inalienable, and sacred rights of man” are enjoyed “under the auspices of the Supreme Being” and finding that both were shaped by religious overtones and justified human rights under a basis for a universal notion of morality); see also, American Declaration of the Rights and Duties of Man, OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1948), at preamble, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev. 1 at 17 (stating that “the essential rights of man are not derived from the fact that he is a national of a certain State, but are based upon attributes of his *human personality*”).

⁶⁰ See CHIGARA, *supra* note 2, at 206 (stating that “there is nothing more universal than human dignity” and describing the related “humanity” as the common denominator among people of all races and faiths).

⁶¹ Sovereignty is an overarching and constantly lurking principle of international law. The Treaty of Westphalia in 1648 created a world of independent, individual States each governing a fixed territory, having jurisdiction over the people and things within its boundary, and providing the basic infrastructure for the benefit of its citizens. Since the 1400s, geopolitics have shifted the effects of sovereignty, but its core idea of self-determination remains undisturbed and is the basis of the rules governing international relations. See Treaty of Westphalia, Oct. 24, 1648, available at http://avalon.law.yale.edu/17th_century/westphal.asp.

⁶² DELAET, *supra* note 59, at 14.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ THEO VAN BOVEN, *Distinguishing Criteria of Human Rights*, in *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS*, VOL. 1, (Kare et al., eds., 43rd ed. 1982).

⁶⁶ *Id.* (contending the existence of very fundamental human rights, described, for example in international humanitarian law as that part of human rights law which does not permit any derogation even in time of armed conflict).

⁶⁷ See International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR] (Out of 196 countries in the world, 167 are party to the ICCPR, including Zimbabwe (ratification 1991)); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [hereinafter ICESCR].

⁶⁸ These first generation rights are negative “freedoms *from*” rather than more positive “rights *to*.” See ICESCR, *supra* note 57, at 317-318; ICCPR, *supra* note 67, Preamble (recognizing that all humans have “equal and inalienable rights” and articulating that the rights conferred by the ICCPR “derive from the inherent dignity of the human person”). See also, Prudence Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?* 10 GEO. INT’L ENVTL. L. REV. 317, 317-18 (1998) (explaining that these civil and political rights derived from seventeenth and eighteenth century reformism and the political philosophy of liberal individualism and economic laissez-faire); ROBERT H. KAPP, *SOME PRELIMINARY VIEWS ON THE RELATIONSHIP BETWEEN CIVIL AND POLITICAL RIGHTS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE CONTEXT OF DEVELOPMENT AND ON THE RIGHT TO DEVELOPMENT* 3 (1978) (Mimeo, The International Commission of Jurists, Geneva) (stating that “Civil and political rights are rooted in traditional Western source[s] . . . have been associated with the eighteenth century and the French and American Revolutions” and “can be traced back to the Magna Carta of 1215 and the thoughts of traditional Western philosophers”).

⁶⁹ ICCPR, *supra* note 67, art. 6-27.

⁷⁰ *Id.*

⁷¹ HENRY J. STEINER, PHILIP ASTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 152 (2007).

⁷² *Id.*

⁷³ See, e.g., ICCPR, *supra* note 67, art. 8(1) (“[n]o one shall be held in slavery”).

⁷⁴ Article 2 identifies, not to the exclusion of other possibilities, the following distinctions: race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See *id.*, art. 2(1), 25.

⁷⁵ See IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 539 (2003) (suggesting that the attainment of the standards set by the Economic, Social, and Cultural Covenant involves effort over time); see also, General Comment No. 3 of the Committee on Economic, Social, & Cultural Rights, U.N. Doc. HRI/GEN/1/Rev.6 (May 12, 2003) (stating that while the ICESCR provides for progressive realization and acknowledges the constraints due to the limits of available resources, it imposes various obligations that which are of immediate effect); The Committee specifically points to the following State obligations under the covenant: the “undertaking to guarantee” that relevant rights “will be exercised without discrimination” and the article 2(1) undertaking “to take steps,” which itself is not qualified or limited by other considerations. *Id.*

⁷⁶ MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 8 (1998) (attributing this perceptual inferiority of economic, social and cultural (“ESC”) rights on two assertions: (1) that human rights come from a natural law pedigree rooted in the concern for individual autonomy and freedom, interests already protected by CP rights and not promoted by ESC rights, and (2) that ESC rights “lack the essential characteristics of universality and absoluteness which are the hallmarks of human rights” such that this category of rights only debilitates, muddies and obscures the true essence of human rights).

⁷⁷ The right to work.

⁷⁸ The right of everyone to the enjoyment of just and favorable conditions of work.

⁷⁹ The right to form trade unions and to strike.

⁸⁰ The right of everyone to social security.

⁸¹ Family-type rights (right to marry, assistance to families, paid maternity leave).

⁸² The right of everyone to an “adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

⁸³ The “fundamental right of everyone to be free from hunger.”

⁸⁴ The right to the “enjoyment of the highest attainable standard of physical and mental health.”

⁸⁵ The right to education.

⁸⁶ See MALCOLM NATHAN SHAW, *INTERNATIONAL LAW* 178 (2003) (stating that Article 1 of the Montevideo Convention on Rights and Duties of States, 1933 lays down the most widely accepted formulation of the criteria of statehood in international law). It notes that the state as an international person should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. See also, *PERSPECTIVES ON INTERNATIONAL LAW* 20 (Nandasiri Jasentuliyana ed. 1995) (stating that the traditional definitions provided for in the Montevideo Convention remain generally accepted as applied to states).

⁸⁷ See JOHN W. BRUCE ET AL., *LAND LAW REFORM: ACHIEVING DEVELOPMENT POLICY OBJECTIVES*, *THE WORLD BANK* 15 (2006) (stating that property rights in land are, under international law, largely the business of nation states and that a state has the right to establish its own property system so long as it is not repugnant to international law).

⁸⁸ See ICCPR, *supra* note 67, art. 2.3(a)-(b) and ICESCR, *supra* note 72, art. 11 (protecting the right to “an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”).

⁸⁹ See ICCPR, *supra* note 67, art. 4 (“In time of public emergency which threatens the life of the nation and the existence” States Parties “may take measures derogating from their obligations . . . provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.”); VAN BOVEN, *supra* note 65 (and accompanying text); *infra* note 113 (and accompanying text).

⁹⁰ Land rights have been more fully developed in the sphere of indigenous rights. Women’s rights are recognized by several international documents, primarily the Universal Declaration of Human Rights (Articles 17 and 25); International Covenant on Civil and Political Rights (Article 17); International Covenant on Economic, Social and Cultural Rights (Article 11); CEDAW (Articles 13-16).

⁹¹ International Labour Organization, Convention 169, Indigenous and Tribal Peoples Convention, opened for signature Jun. 27, 1989, available at <http://www.ilo.org/dyn/normlex/>

en/?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314 [hereinafter Convention 169]. To date, Convention 169 has only been ratified by 20 States, most of them in Latin America.

⁹² *Id.* art. 1.

⁹³ *See id.* art. 14.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Despite their lack of legal force, the species of agreements termed Declarations under the UN framework create an important source of international law that scholars have classified as “soft law.” Soft law, as the term suggests, is not legally enforceable but is important for its potential to develop into international norms and generate consensus around binding agreements.

⁹⁷ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 26(1) (Sept. 13, 2007), 46 I.L.M. 1013 (2007). A Declaration is adopted by the UN General Assembly but is not legally binding on state parties. It is the main component of “soft law,” a nonetheless important source of international law for its potential to morph into legally binding agreements.

⁹⁸ *See id.* art. 26(2), 28.

⁹⁹ *See id.* art. 10, 28, 29, 32; Convention 169, *supra* note 91, art. 6 (requiring governments to consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly).

¹⁰⁰ *See* Decision Regarding Communication 155/96 (*Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*). Case No. ACHPR/COMM/A044/1, available at <http://www.umn.edu/humanrts/africa/comcases/allcases.html> [hereinafter SERAC v. Nigeria] (holding that the Nigerian government had violated several provisions of the African Charter, a human rights treaty to which most African states are party).

¹⁰¹ African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 [hereinafter Banjul Charter]. The African Charter on Human and Peoples’ Rights is the regional human rights treaty for Africa. Article 24 provides: “All peoples shall have the right to a general satisfactory environment favorable to their development.” *Id.* art. 24. *See* SERAC v. Nigeria, *supra* note 100.

¹⁰² *See* Bernard Oxman and Dinah Shelton, *International Decision*, 96 AM. J. INT’L L. 941 (Oct. 2002).

¹⁰³ *Id.* at 942.

¹⁰⁴ Banjul Charter, *supra* note 101, art. 14 (“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”).

¹⁰⁵ *See generally* SERAC v. Nigeria, *supra* note 100; Endorois, *supra* note 9.

¹⁰⁶ *See* Endorois, *supra* note 9 ¶ 60.

¹⁰⁷ *Id.* ¶ 1-2.

¹⁰⁸ *Id.* ¶ 2. (noting that the Endorois’ argued that they have always been the *bona fide* owners of the land around Lake Bogoria, contending that as a pastoralist community, their concept of “ownership” has not been one of paper, but one where the Endorois land belongs to the entire community as a whole and nothing that the Kenyan government argued against giving the Endorois title to their ancestral lands, preferring instead to give them “access” to ceremonial sites for their religious practices).

¹⁰⁹ Article 8 of the African Charter guarantees the right to practice religion. Banjul Charter, *supra* note 101, art. 8 (guaranteeing the right to practice religion), art. 14 (guaranteeing the right to property), art. 17(2) (guaranteeing the right to “freely take part in the cultural life” of one’s community), art. 21 (protecting the right to free disposition of natural resources, stating that “All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.”).

¹¹⁰ Endorois, *supra* note 9, ¶ 22.

¹¹¹ *Id.* ¶ 175.

¹¹² *Id.* ¶ 175-176.

¹¹³ *Id.* ¶ 186 (looking to *Malawi African Association and Others v. Mauritania* to guide its analysis).

¹¹⁴ *Id.* ¶ 206.

¹¹⁵ *Id.* ¶ 207, (citing *The Mayagna (Sumo) Awas Tingni v. Nicaragua*, IACtHR (2001), ¶¶ 140(b) and 151) (stating that possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property).

¹¹⁶ *Id.* ¶ 209 (holding that those Endorois who were forced to leave against their will did not lose title to those lands by virtue of leaving, unless those lands were transferred to innocent third parties).

¹¹⁷ *Id.* ¶ 191, 267.

¹¹⁸ *See infra* note 127 (and accompanying text) (explaining the distinction between individual and “peoples” rights under the Banjul Charter). Banjul Charter, *supra* note 101, art. 14.

¹¹⁹ Even though the traditional international trajectory of human rights law has focused on the individual, the African Charter is divided into two broad categories of rights: individual human rights, and rights that can be claimed collectively, or “peoples’ rights.” Articles 20, 21, 22, 23, and 14 provide that peoples retain the rights collectively. *See* SERAC v. Nigeria, *supra* note 100, ¶ 40 (“the importance of community and collective identity in African culture is recognized throughout the African Charter”); Banjul Charter, *supra* note 101, art. 21.

¹²⁰ Endorois, *supra* note 9, ¶ 211.

¹²¹ *Id.* ¶ 191.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Case of the Saramaka People v. Suriname, IACtHR, Judgment of August 12, 2008 (upholding the right of the Saramaka people to refuse access to logging operations on their native lands).

¹²⁵ *Id.* ¶ 211.

¹²⁶ *Id.* ¶ 215.

¹²⁷ *Id.* ¶ 212 (“the [public interest] test is more stringent when applied to ancestral land rights of indigenous peoples”); *see also*, Nazila Ghanea and Alexandra Xanthaki *Indigenous Peoples’ Right to Land and Natural Resources* in MINORITIES, PEOPLES AND SELF-DETERMINATION (Erica-Irene Daes ed., 2005) (“Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state”).

¹²⁸ *Id.* ¶ 200. *See also* Committee on Economic, Social and Cultural Rights, General Comment 4, *The Right to Adequate Housing* (Sixth Session, 1991) ¶ 18, U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

¹²⁹ *See* ICCPR, *supra* note 67, art. 4 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant.”).

¹³⁰ *See supra* notes 16-17 (and accompanying text) (describing the salient purposes of land reform in modern-day post-colonial nations to reduce poverty and decrease economic disparities).

¹³¹ *See* CHIGARA, *supra* note 2, at 213 (2004) (arguing that land reform policies that ignore the requirement of the principle of the rule of law cannot be regarded as legitimate and efficient strategies for the resolution of the issue of inequitable land distribution in the SADC).

¹³² Endorois, *supra* note 9, ¶ 219 (stating that the Kenyan government bore the burden of demonstrating that the removal satisfied both international and Kenyan law).

¹³³ *Id.*

¹³⁴ *See* Endorois, *supra* note 9; Saramaka, *supra* note 124. The compensation requirement is the only one of the three that is probably directly applicable only in the case of expropriation of land from indigenous peoples. In the case of land redistribution to transfer land concentrated in a relatively few hands to previously disenfranchised groups, the right to compensation under this land reform standard is only triggered where the expropriation is not carried out consistently with (1) a legitimate public purpose; (2) in accordance with domestic and applicable international norms; (3) proportionality; and (4) non-discriminatory design. *See infra* Part IV. E.

¹³⁵ *See id.* (explaining the more nuanced right to compensation under the land reform standard proposed here, unlike the right to compensation derived from the human right to property by both the Inter-American Court and the African Commission in *Saramaka* and *Endorois* respectively).

¹³⁶ *See* Endorois v. Kenya, *supra* note 9, ¶ 213.

¹³⁷ Endorois, *supra* note 9, ¶ 214 (finding that in pursuit of creating a Game Reserve, the Republic of Kenya had unlawfully evicted the Endorois, an act disproportionate to any public need served by the Game Reserve.)

¹³⁸ *Id.* ¶ 213, citing *The Constitutional Rights Project Case 1999*, African Commission on Human and Peoples’ Rights, Comm. Nos. 140/94, 141/94, 145/95 ¶ 42 (1999).

¹³⁹ *Id.* ¶ 215.

¹⁴⁰ *Handyside v. U.K.* (No. 5493/72), Eur. Ct. H.R., ¶ 49 (1976).

¹⁴¹ See, e.g., Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, U.N. Doc.A/32/144, Annex I, reprinted in 16 I.L.M. 1391 (1978).

¹⁴² See ICCPR, Van Boven, *supra* note 89 (and accompanying text).

¹⁴³ ICCPR, *supra* note 67, art. 4, 24, and 26. See, e.g. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁴⁴ See *supra* note 54 (and accompanying text) (explaining the root of the human rights concept back to founding texts which unanimously uphold the idea of protecting human dignity and preserving personhood).

¹⁴⁵ According to Human Rights Watch, the Lake Bogoria region over which the *Endorois v. Kenya* judicial battle centered is considered to have great tourism potential due to its hot springs and abundant wildlife, including one of Africa's largest populations of flamingos. *Kenya: Landmark Ruling on*

Indigenous Rights, HUMAN RIGHTS WATCH (Feb. 4, 2010), <http://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights>.

¹⁴⁶ See American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, art. 63(1) ("[I]f the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.").

¹⁴⁷ Banjul Charter, *supra* note 101, art. 21.

¹⁴⁸ This is equivalent to the notion of specific performance, as it would require the Kenyan government to bring the Endorois back onto their land, with full legal title to it. *Endorois*, *supra* note 9, ¶ 209.

¹⁴⁹ See ICCPR, Van Boven, *supra* note 89 (and accompanying text).

Endnotes: ISLAMIC FINANCE AS A MECHANISM FOR BOLSTERING FOOD SECURITY IN THE MIDDLE EAST: FOOD SECURITY WAQF continued from page 35

³⁶ THE WORLD BANK, FOOD SECURITY IN THE MIDDLE EAST AND NORTH AFRICA, INTERVIEW WITH JULIAN LAMPIETTI, LEAD RURAL DEVELOPMENT SECTOR, April 2009, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/0,,contentMDK:22148641~pagePK:146736~piPK:146830~theSitePK:256299,00.html>.

³⁷ See Brisinger et al., *supra* note 7, at 1.

³⁸ Unmanageable (or ill managed) rises in food prices in countries like Egypt have long been a key cause of public disaffection. In the case of Egypt, progressively decreasing food purchasing power—a stark reminder to any consumer of economic hardship—contributed to the uprisings of January 2011. The adverse impacts of rising food prices and the reliance on government subsidies for basic food staples by the poor in Egypt was illustrated most tragically in 2008, when at least 11 people died while standing in line for government-subsidized bread. The level of frustration with government subsidies and food prices was powerfully described by an Egyptian man who said of the subsidized bread system (and unemployment) in Egypt: "This is a rotten system . . . I come here every day. I have no work, so this is my job. Waiting for bread." Cynthia Johnson, *In Egypt, Long Queues for Bread That's Almost Free*, REUTERS, (Apr. 6, 2008), available at <http://www.reuters.com/article/2008/04/06/us-agflation-subsidies-idUSL0404033220080406>.

³⁹ GCC member states, which rely heavily on expatriate labor, have a clear interest in ensuring food affordability and balance of overall cost-of-living among expatriate residents, who, with the exception of Saudi Arabia, Oman, Bahrain, significantly outnumber, or in the case of Kuwait, are nearly equal in number to, native residents. Michael Strum & Nikolaus Siegfried, *Regional Monetary Integration in the Member States of the Gulf Cooperation Council*, EUROPEAN CENTRAL BANK OCCASIONAL PAPER SERIES No. 31, June 2005, at 20.

⁴⁰ Von Braun & Meinzen-Dick, *supra* note 20.

⁴¹ See Spieldoch & Murphy, *supra* note 19, at 42.

⁴² For example, in Egypt and Morocco, farmers account for 60% of the poor, but earn only 40% of their income through farming. Yemstov, *supra* note 7.

⁴³ For an introductory discussion of Islamic Finance and the economic principles and objectives of *Shari'ah*, see Muhammad Ayub, UNDERSTANDING ISLAMIC FINANCE 21 (2007).

⁴⁴ See, e.g., Camilla Hall, *Islamic banking: Impressive Growth Underscores Success*, FINANCIAL TIMES, (March 27, 2012), available at <http://www.ft.com/cms/s/0/09a99422-7291-11e1-9be9-00144feab49a.html#axzz2JlJKEfCH>.

⁴⁵ See Salman Syed Ali & Ausaf Ahmad, *An Overview*, in ISLAMIC BANKING AND FINANCE: FUNDAMENTALS AND CONTEMPORARY ISSUES, 1, 2 (Salman Syed Ali & Ausaf Ahmad eds., 2007).

⁴⁶ KUWAIT FINANCE HOUSE, About KFH, Growth of Islamic Finance <http://www.kfh.com/en/about/index.aspx> (last visited February 4, 2013).

⁴⁷ See Ali & Ahmad, *supra* note 45, at 2-3.

⁴⁸ See GOLDEN OPPORTUNITY: THE SHARIA-COMPLIANT FINANCE INDUSTRY IS POISED FOR A SEA CHANGE, OXFORD BUSINESS GROUP, (2011) available at www.oxfordbusinessgroup.com/news/golden-opportunity-sharia-compliant-finance-industry-poised-sea-change.

⁴⁹ Robert B Gray, *Islamic Finance: Is the Time Ripe for a Private Sector Trade Association?*, THE WORLD FINANCIAL REVIEW (2012), available at www.worldfinancialreview.com/?p=238.

⁵⁰ Mit Ghamr Savings Bank, established in Egypt in 1963, was the first twentieth century Islamic financial institution. Notably, the Islamic Development Bank was born of an Egyptian study presented to the Organisation of the Islamic Conference (OIC). See, e.g., NAZIHI N. AYUBI, POLITICAL ISLAM: RELIGION AND POLITICS IN THE ARAB WORLD 136-37 (Routledge 1991).

⁵¹ See, e.g. Massoud Hayoun, *Who's Afraid of Islamic Finance?*, THE ATLANTIC, Mar. 30, 2012, available at www.theatlantic.com/business/archive/2012/03/whos-afraid-of-islamic-finance/255265/.

⁵² This is not to say, and should not be construed to suggest, that Islamic economic principles prohibit or discourage profit-making. Indeed, lawful (e.g., non-usurious, transparent) trade and investment for profit are encouraged by Islam. See, e.g., Abu Umar Faruq Ahmad & M. Kabir Hassan, *The Time Value Concept of Money in Islamic Finance*, 23 THE AMERICAN JOURNAL OF ISLAMIC SOCIAL SCIENCES 66, 67-68 (2011). The Prophet Mohammed, who was himself a businessman, is reported to have said: "There is no harm in riches for the one who has piety." Abdul-Azeem Badawi, *infra* note 74, at 456.

⁵³ See, e.g., U.N. FOOD AND AGRICULTURE ORGANIZATION, *supra* note 15, at 27-28 (Pointing out the drawbacks of conventional economic thought in solving the food crisis). The *waqf*-based and other frameworks under development by the author address the ethics deficit in various ways, including with positive and negative incentives, such as: (1) including farmers as financial stakeholders in agricultural investment structures; (2) enhancing investment value (by favorable regulation, transactional incentives, or other means) for investors who commit to supporting auxiliary benefits for impacted communities (e.g., infrastructure development, etc.); (3) incorporating mechanisms to directly and indirectly raise transaction costs to investors and host governments where investments displace or disenfranchise local farmers or other parties without compensation; and, (4) where feasible, encouraging relevant entities (e.g., development banks) to incorporate into development assistance eligibility and terms criteria, factors that discourage host governments from conducting transactions that displace or undermine the land interests of local populations, or are inconsistent with key agricultural investment principles, such as The Principles for Responsible Agricultural Investment (PRAI) developed jointly by the UNCTAD, FAO, IFAD and the World Bank.

⁵⁴ See generally Ahmad Al-Raysuni, IMAM AL-SHATIBI'S THEORY OF THE HIGHER OBJECTIVES AND INTENTS OF ISLAMIC LAW 421 (Nancy Roberts trans., The International Institute of Islamic Thought 2005) (defining *maqāṣid al-Shari'ah*).

⁵⁵ In this article, the terms "Islamic Law" and "*Shari'ah*" are used interchangeably. And the following definitions are used herein: *Fiqh* is the "study and application of Islamic legal rulings as based upon detailed evidence; the corpus of practical legal rulings in Islam"; *Faqīh* (pl. *fuqahā*) is "a scholar of Islamic jurisprudence who concerns himself with the details of Islamic legal rulings and their legal bases"; *Maqāṣid* or *Maqāṣid al-Shari'ah* is the "higher objectives of Islamic law in general"; *uṣūl al-Fiqh* is "the principles or fundamentals of Islamic jurisprudence"; and, *Uṣūl* (pl. *uṣūliyyīn*) is a "scholar who devotes himself to the study of the principles of Islamic Jurisprudence (*uṣūl al-Fiqh*). See *id.* at 421-25.

⁵⁶ *Id.* at 22-25.

⁵⁷ *Id.* at 22-23. According to some sources, there was some disagreement amongst influential classical scholars as to the ordering of the third and fourth categories of "essentials", specifically whether the preservation of the faculty

of reason should trump the preservation of progeny. *Id.* at 26. It should be noted further that with respect to the preservation of “progeny”, Hanafi school thinkers used the often referred to the preservation of “family lineage” or *nasab*, rather than “progeny”—but the terms appear to have been used interchangeably. *Id.*

⁵⁸ *Id.* at 31 (discussing commentaries on a book written by Izz al-Din ibn Abd al-Salam and attributing to him the statement that all Islamic legal rulings are “contained within” the quoted Qur’anic verse (*aya*)). A reference, such as the foregoing, to specific Qur’anic text (*i.e.*, QUR’AN 16:90) corresponds with a numbered chapter (*sura*) and verse(s) (within chapters) of the Qur’an.

⁵⁹ *Id.* (discussing service of mankind as a component of preserving the religion).

⁶⁰ *Id.*

⁶¹ *Id.* at 23 (discussing the contribution of *uṣṭlḥ* Sayf al-Din al-Amidi to the development and refinement of the five “essentials” of *Maqāṣid*).

⁶² *Id.* at 32.

⁶³ LAW OF WAQF IN ISLAM 78 (Tauqir Mohammad Khan et al. eds., Pentagon Press 2007) (discussing the religious significance of a charitable or waqf contribution as an act of religious worship *because* such a contribution constitutes a service to humankind. “A dedication ‘solely to the worship of God’ is . . . [not a meaningful] phrase in Islam . . . Everything which is dedicated to God is in reality for the good of mankind; and everything which is dedicated for the good of human beings, individually or collectively, . . . [is] for the service of God.” Al-Raysuni, *supra* note 54, at 32.

⁶⁴ In this article, the *waqf* structure is considered an instrument of Islamic Finance. Islamic Financial Institutions are required to contribute a portion of their profits to *zakat* (charity). Beyond that, profits obtained by Islamic Finance Institutions in violation of *Shari’ah* (*e.g.*, through interest) are also donated to charity. Public *awqaf* are among the parties eligible to receive *zakat*, and in a coordinated environment, a food security or other *waqf* could benefit from the *zakat* contributions of Islamic Financial Institutions, companies, individuals, and other parties.

⁶⁵ As noted below, the *waqf* is a kind of trust or endowment through which assets are allocated and preserved for a designated period of time or in perpetuity in the service of specified beneficiaries for charitable, social welfare, development, or intra-family wealth distribution purposes. The author has developed tailored *waqf*-based and equity-based financing and investment frameworks designed to advance food security and other public objectives. The use of other, commercial and capital markets, Islamic finance forms for agriculture investment and food security will be discussed in a separate writing.

⁶⁶ A high ranking Arab diplomat in Washington, D.C. recently reminded me of the deterrent power of political and legal risk associated with sovereign and private agriculture and food security investment across borders in the Middle East. In no uncertain terms, the official described the skepticism with which some Arab governments and officials view agriculture and food security cooperation among Arab governments. The official informed me that agriculture and food security investment in non-Middle East jurisdictions (such as in Asia), while financially and geographically less advantageous, is viewed as a politically and legally stable alternative to Middle East investment risk, which the official believed had intensified in the wake of the “Arab Spring.”

⁶⁷ It is important to note that while instances of government interference with *waqf* assets are relatively infrequent (when compared with interference with purely commercial vehicles), the administration of *awqaf* by government is widely practiced; and in some cases, the administration of private *awqaf* have been overtaken by government authorities, often after decades or more since initial *waqf* establishment. The supplanting of private administration with government administration has more often occurred in connection with public or general-purpose *awqaf* (*e.g.*, general purpose *waqf* for the poor), usually through the transfer of *waqf* administration from originally designated trustees to the state, through its ministries or departments of *awqaf*. But in the case of *awqaf* (as opposed to non-*waqf* structures), *awqaf* properties and purposes typically are preserved—only the administration of the *waqf* is nationalized or rendered a government function. In the case of nationalization of commercial or other assets held, for example, by a corporation, the assets themselves are appropriated.

⁶⁸ The Arabic term *Hadith* (*pl. ahadith*) refers in this context to the collective authenticated accounts of the deeds and utterances of the Prophet Mohammed. The deeds and utterances of the Prophet, collectively, are *Sunnah*.

⁶⁹ Dr. Muhammad Muhsin Khan, *Summarized Sahih Al-Bukhari* (Arabic-English) 505 (1st ed. 1996).

⁷⁰ *Id.*

⁷¹ *Id.* at 508.

⁷² *Id.* at 507.

⁷³ *Id.*

⁷⁴ Abdul-Azeem Badawi, THE CONCISE PRESENTATION OF THE FIQH OF THE SUNNAH AND THE NOBLE BOOK 476-78 (Jamaal al-Din M. Zarabozo trans., International Islamic Publishing House 2007).

⁷⁵ See generally *Gharar – Explained*, ISLAMICBANKER.COM, <http://www.islamicbanker.com/educationarticles/gharar> (last visited Jan. 11, 2012) (discussing the various definitions of *Gharar*, including uncertainty, risk, hazard and deceit).

⁷⁶ Badawi, *supra* note 74, at 478-79 (The Prophet Mohammed encouraged the cultivation of “dead lands”, where the land was not being cultivated and the previous owner was unknown. On this subject the Prophet is reported to have stated: “Whoever cultivates the land that does not belong to anyone has the *most* right to it.” (emphasis added). The preference for the productive use of land, rather than its waste, is well established in Islamic law and custom, and underpins the doctrine of *ihya’ al mawat* (literally, “revival of the dead”, referring to land). This encouragement of land cultivation and its association with preferential rights seems compatible with common law legal doctrines like adverse possession, which also encourages the development of land and property).

⁷⁷ THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC, 1278-80, 81 (JM Cowan, ed., Spoken Language Services, Inc. (1994) (1961). (The Arabic term *waqf* means to stop or to halt, and in the case of the Islamic endowment, the term *waqf* (*pl. awqaf*) refers to sequestration of assets for charitable purposes by donation, bequest, grant, or the establishment of a religious endowment. *Waqif* (*pl. waqifah*) is the donor or grantor of *waqf* assets (or the *waqf* corpus) and is analogous to the donor or grantor of a trust. A *waqf* is administered by a *waqf nazir* (one or more natural or juridical persons (*pl. nuzzar*)). The term *waqf* is interchangeable with the term “*habs*”, which means to actively hold (as in hold in custody), apprehend, block, or confine. In the case of property or other assets, *habs* means to “tie up [or] invest inalienably”, “to devote entirely to” or to “tie up in inalienably” particularly for “a pious purpose.” The writing in which the *waqf* terms are set forth is typically referred to as a *waqifiyya*.)

⁷⁸ *E.g.*, *Summarized Sahih Al-Bukhari*, *supra* note 69, at 51-52. (There is debate as to whether it is permissible to fix the lifetime of a *waqf*. Historically, *awqaf* have been perpetual (unless extinguished by circumstances, such as the demise of the *waqf* assets) and many scholars and commentators contend that *waqf* must be perpetual, as a matter of *Shari’ah*. Some scholars have stated that it is permissible to establish a temporary *waqf*, but only in the case of familial (*ahli*) *waqf*. Others, particularly in the Maliki School, believe it is permissible to fix the duration of *waqf*, if the duration is specified by the *waqif* in a valid *waqf* establishment declaration.)

⁷⁹ Ahmad Al-Raysuni, *Islamic Waqf Endowment Scope and Implications*, (2012), available at www.isesco.org.ma [hereinafter “AL-RAYSUNI ON WAQF”] (quoting the definition of *waqf* by Hanbali scholar Muwaffiq Addin bin Qudama). This source is not paginated and therefore page references to this source are not provided herein.

⁸⁰ Henry Hansmann and Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434, 435 (1998).

⁸¹ Dr. Eisa Al-Enizy, *The Environmental Protection in the Islamic Waqf* 14 (Selected Works, Sept. 2009).

⁸² Al-Raysuni on *Waqf*, *supra* note 79 (Some scholars and commentators have suggested that only immovable assets (real estate, buildings) are *waqf*-eligible, due to their long life and fixed nature. But it appears that a consensus, if not a majority, of scholars and commentators are of the view that immovable assets are *waqf*-eligible. As explained by one contemporary scholar, “[T]he most comprehensive analysis in this matter is that of Ibn Qudama. . . [who] states [that] ‘in sum, what is permissible for *waqf* endowment is what can be sold and benefited from while it is a capital asset remains linked with its stock such as real estate, animals, arms, furniture and the like. This means what cannot be benefited from while it is a capital asset remains such as dinars, dirhams, food and drink, candles and the like, cannot be *waqf* endowed for most canonists and scholars.”); LAW OF WAQF IN ISLAM, *supra* note 63, at 3. (A broader and more clearly policy-driven formulation of this view is: “[E]very kind of property, immovable as well as moveable, every object in fact which is capable of being possessed or being reduced to possession actually or constructively, equally with interest in trade, commerce, or investments—is a fit and lawful subject of *Waqf*.”).

⁸³ LAW OF WAQF IN ISLAM, *supra* note 63, at 3.

⁸⁴ LAW OF WAQF IN ISLAM, *supra* note 63, at 3.

⁸⁵ Where the *waqf* declaration does not designate successor beneficiaries, the *waqf* proceeds will be distributed to appropriate beneficiaries, such as the poor or other classes of beneficiaries consistent with the purposes of the *waqf*.

⁸⁶ THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC, *supra* note 77, at 1288 (The *waqf nazir* is also referred to as a *mutawalli*, an Arabic term derived from the root “*waliya*”, which among other meanings, includes to “manage, run, administer” and to “be entrusted.”); SIRAJ SAIT & HILARY LIM, *supra* note 16, at 155 (Vis-à-vis the *waqf*, its assets, and its beneficiaries, the *waqf nazir* is a fiduciary and is required to administer a *waqf*, maintain its assets, serve its beneficiaries, and discharge her duties in accordance with the *waqf* terms, *Shari’ah*, and other applicable law. Researchers of *awqaf* have described cases in which, for example, a *waqf nazir* was sued by “respectable citizens, invariably headed by *ulama* [religious scholars]”, for failure to administer a *waqf* in accordance with its terms, *Shari’ah*, other law, or Islamic principles generally. Specific allegations in such instances, include “failure to provide food measuring up to the traditional standard in the kitchen”, in a case from Turkey, and from the records of twentieth century *Shari’ah* courts in Jerusalem, “neglect, mismanagement, and embezzlement, sometimes leading to the dismissal of the *mutawalli*.”) (discussing Gerber, H., *The Public Sphere and Civil Society*, in THE PUBLIC SPHERE IN MUSLIM SOCIETIES (M. Hoexter, S.N. Eisenstadt and N. Levtzion eds., Albany: State University of New York Press 2002) and Reiter, Y. *The Administration and Supervision of Waqf Properties in Twentieth Century Jerusalem*, in LE WAQF DANS LE MONDE MUSULMAN CONTEMPORAIN (XIXE-XXE SIÈCLES) (F. Bilici ed., Istanbul: Institut Francais d’Etudes Anatoliennes 1994)).

⁸⁷ SIRAJ SAIT & HILARY LIM, *supra* note 14, at 151 (quoting Benthall, J., *Organized Charity in the Arab-Islamic World: A View from the NGO’s*, at 153, in H. Donnan (ed.) *Interpreting Islam*, London: Sage). The verbal declaration of *waqf* terms is acceptable according to some scholars and in some jurisdictions, so long as the declaration is made by a person having the requisite legal and mental capacity. For example, it has been reported that in Oman, “almost all *waqf* property is held on trust by word of mouth tradition...and this tradition continues even in the modern state, though gradually the legal status of *waqf* property is being formalized.”).

⁸⁸ E.g., LAW OF WAQF IN ISLAM, *supra* note 63, at 50.

⁸⁹ See, e.g., SIRAJ SAIT & HILARY LIM, *supra* note 14, at 168-69; See also Ahmed Hamad, *The New Waqf (Islamic Trust) Law in the Emirate of Sharjah Law Update*, (Al Tamimi & Co. June 2011) (The Emirate of Sharjah, United Arab Emirates, recently passed a law that confirms the independent legal status of *awqaf* and expressly permits *awqaf* to hold moveable assets and sue and be sued); News Release, Ernst & Young, Islamic Endowments to Accelerate Growth of Islamic Finance (Dec. 19, 2010). (Laws such as that adopted by the Emirate of Sharjah appear to recognize not only the modern potential of *awqaf* as vehicles for the transfer and management of assets for familial and public purposes, but also the growing interest in *awqaf* among asset managers and other financial services providers. In 2010, Ernst & Young estimated the value of the global “*Waqf* sector” at \$105 billion, with an estimated \$35 billion of that total comprised of cash *waqf* and the remainder in the form of real estate. The firm’s Head of Islamic Financial Services stated: “The opportunity cost in terms of foregone [*waqf*] wealth is staggering. The Cash *Waqf* sector would potentially generate an incremental \$2-3 billion annually, simply by aligning with professional investment managers.”).

⁹⁰ SIRAJ SAIT & HILARY LIM, *supra* note 14, at 155 (citing Yediyildiz, B., *Maessese-Toplum Minisebetleri Cercevesinde XVIII, Asir Turk Tomplumu ve Vakif Mu essesesi*, Vaka, flar Dergisi at 15 (1982)) (This article is concerned with the social and developmental objectives of *waqf*. Therefore, the family (*ahli*) *waqf* will not be discussed herein. According to a study of eighteenth century Ottoman *awqaf* records, no more than seven percent of *awqaf* were family only *waqf*. Without more information about this study, such as the extent to which *waqf* instruments were written, recorded, accurate, the specific time period(s) covered by the records, the representativeness of the records of broader *waqf* practice, etc., it is difficult to know whether, and to what extent, this data reflects *waqf* practice more broadly.); SIRAJ SAIT & HILARY LIM, *supra* note 14, at 150. (Context might explain why, in the eighteenth century Ottoman Empire, public *awqaf* might have so significantly outnumbered family *awqaf*. Ottoman rulers’ viewed the role of government, according to one source, as primarily to provide security, defense, and tax collection. This, perhaps, left a void in public services and social welfare that may have been filled partially by *awqaf* (which Ottoman rulers also actively established)).

⁹¹ See, e.g., Randi Deguilhem, *The Waqf in the City*, THE CITY IN THE ISLAMIC WORLD 926 (Salma K. Jayussi et. al. eds., Brill 2008) (describing the lending of *waqf*-owned funds for profit); Al-Raysuni on *Waqf*, *supra* note 79; See also SIRAJ SAIT & HILARY LIM, *supra* note 14, at 154 (explaining that cash *waqf* “were an important source of credit, with the endowed capital lent to borrowers [for profit].” And profit earned was used for “charitable purposes, after any deductions for expenses incurred by the . . . [*waqf*] nazir and any taxes. Money earned through provision of credit that was not distributed according to the terms of the *waqf* in any particular year was added to the endowed capital.” According to a survey, “about 10 per cent of the total eighteenth-century population of Bursa [in modern Turkey], which averaged about 60,000 inhabitants during that period, borrowed from cash *awqaf*.”)

⁹² Al-Raysuni on *Waqf*, *supra* note 79.

⁹³ Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁴ Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁵ Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁶ Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁷ See, e.g. Deguilhem, *supra* note 91, at 930; Al-Raysuni on *Waqf*, *supra* note 79.

⁹⁸ See Deguilhem, *supra* note 91, at 930.

⁹⁹ *Id.* at 928.

¹⁰⁰ *Id.*

¹⁰¹ SIRAJ SAIT & HILARY LIM, *supra* note 14, at 147.

¹⁰² Deguilhem, *supra* note 91, at 930. See also Al-Raysuni, *supra* note 54.

¹⁰³ Deguilhem, *supra* note 91, at 932 (discussing a mid-17th century *waqf* established in Aleppo by its governor Ipsir pasha, which consisted of various types of revenue-generating commercial properties, the earnings from which were used to fund Islamic religious sites).

¹⁰⁴ Deguilhem, *supra* note 91, at 933-34 (discussing the endowment of agricultural land in Central Asia and in Iran, where the endowment of agricultural land is “traditional” and also discussing the endowment of agricultural land in India).

¹⁰⁵ Deguilhem, *supra* note 91, at 934-35 (discussing the construction in Aleppo of commercial buildings over five hectares of land with the rent proceeds going to *waqf* to fund the construction of the architecturally formidable al-Khusrawiyya mosque).

¹⁰⁶ Deguilhem, *supra* note 91, at 935 (discussing “the intertwined nature and large networks of *waqf* assets dispersed over large areas”).

¹⁰⁷ Deguilhem, *supra* note 91, at 939.

¹⁰⁸ Deguilhem, *supra* note 91, at 940-41 (discussing the establishment of *waqf* by a husband and wife for the benefit of themselves and their children and the establishment of “guild *waqf*” in the Ottoman empire for the benefit of needy guild members and their family members).

¹⁰⁹ *Id.* at 942 (discussing various examples including, most notably, various *awqaf* established for the benefit of the Two Holy Mosques, al-Aqsa Mosque, Al-Azhar, and the Great Umayyad Mosque).

¹¹⁰ SIRAJ SAIT & HILARY LIM, *supra* note 14, at 147. “Even a lighthouse on the Romanian coast was established under the *waqf* system.” *Id.* at 150 (quoting Kuran, T., *The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, *Law and Society Review*, 35, 4, 2001).

¹¹¹ Deguilhem, *supra* note 91, at 934.

¹¹² Schaffnit-Chatterjee, *supra* note 1, at 9.

¹¹³ Schaffnit-Chatterjee, *supra* note 1, at 10, 16.

¹¹⁴ Schaffnit-Chatterjee, *supra* note 1, at 15.

¹¹⁵ Schaffnit-Chatterjee, *supra* note 1, at 28-30.

¹¹⁶ Schaffnit-Chatterjee, *supra* note 1, at 18-21.

¹¹⁷ That said, the historical treatment and usage of the *waqf* structure has not been without flaws. In contemporary practice, *waqf* assets under state administration have suffered from mismanagement or interference. These realities should be acknowledged and addressed when the *waqf* structure is employed, particularly for public purposes. On balance, however, the benefits of *waqf* practice over time (which remain today) outweigh the burdens of *waqf* misuse.

¹¹⁸ Dr. Eissa Zaki, *A Summary of Waqf Regulations*, 11 (Kuwait Pub. Found., 2006).

¹¹⁹ See, e.g., Hansmann and Mattei, *supra* note 80, at 446-66 (discussing the relatively low transaction costs associated with the trust structure – the same is true of the common law trust).

- ¹ Steve Martinez et al., *Local Food Systems: Concepts, Impacts, and Issues*, U.S. DEP'T OF AGRIC. (USDA) 2, 39-41 (2010), http://www.ers.usda.gov/media/122868/err97_1_.pdf (highlighting the 2009 launch of the USDA's "Know your Farmer, Know Your Food" initiative that includes funding and various programs that connect consumers with local producers); see also *The People's Garden Grant Program*, USDA.GOV, http://www.usda.gov/wps/portal/usda/usdahome?navid=GARDEN_RT5&parentnav=PEOPLES_GARDEN&navtype=RT (summarizing various federally-funded local garden initiatives targeting low income groups) (last visited Nov. 13, 2012).
- ² See, e.g., Megan Galey and A. Bryan Endres, *Locating the Boundaries of Sustainable Agriculture*, 17 NEXUS: CHAP. J. L. & POL'Y 3, 10-11 (2012); but see *Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences*, U.S. DEP'T OF AGRIC., 57 (2009) (stating that a review of relevant empirical literature shows that "[i]ncreased access to healthy foods alone, without decreased consumption of all other foods, will likely have little impact on obesity among subpopulations of concern."). The 2008 Farm Bill defined the term "food desert" as "area in the United States with limited access to affordable and nutritious food, particularly such an area composed of predominantly lower income neighborhoods and communities." Food, Conservation, and Energy Act, Pub. L. No. 110-234 § 7527, 122 Stat. 923, 1277 (2008).
- ³ See, e.g. *The People's Garden Grant Program*, *supra* note 1; Clare Trapasso, *Bringing Farmers' Markets and CSAs into Low-Income Neighborhoods*, CITYSPOONFUL.COM (May 11, 2011), <http://www.cityspoonful.com/csas/>; see also *Community Food Projects Competitive Grants Program*, NAT'L INST. OF FOOD & AGRIC., <http://www.csrees.usda.gov/fo/fundview.cfm?fnum=1080> (last updated Oct. 24, 2012); 2011 Health Food Financing Initiatives Grantee List, U.S. DEPT. OF HEALTH & HUMAN SERV., <http://www.acf.hhs.gov/programs/ocs/resource/2011-ced-hffi-grantees> (last visited Nov. 19, 2012).
- ⁴ See *NYC Expands Health Bucks Program to Make Produce More Affordable*, MIKEBLOOMBERG.COM (July 2, 2012), <http://www.mikebloomberg.com/index.cfm?objectid=48D7CFEF-C29C-7CA2-F65154EBA1C1C971>.
- ⁵ See generally Daniel Bowman Simon, *Food Stamps Grow Urban Gardens*, 5 CITIES AND ENV'T VOL. 1, 1 (2012); See also *Snap Gardens History*, SNAP-GARDENS.ORG, <http://www.snapgardens.org/> (last visited Nov. 12, 2012).
- ⁶ Robert Hoppe & David Banker, *Structure and Finances of U.S. Farms*, U.S. DEPT. OF AGRIC. iv (2010), http://www.ers.usda.gov/media/184479/eib66_1_.pdf (noting that "[l]arge-scale farms made up only 12 % of U.S. farms in 2007 but accounted for 84 % of the value of U.S. production."); see also John Antle, *Agriculture and the Food System: Adaptation to Climate Change*, RES. FOR THE FUTURE 2-3 (2009), <http://www.rff.org/rff/documents/rff-rpt-adaptation-antle.pdf>.
- ⁷ Nina Mukherji & Alfonso Morales, *Zoning for Urban Agriculture*, AMER. PLANNING ASS'N, 3 Practice Urban Agric. 1, 7 (2010), <http://www.planning.org/zoningpractice/2010/pdf/mar.pdf>.
- ⁸ Alisha Coleman-Jensen et al., *Household Food Security in the United States in 2011*, U.S. DEPT. OF AGRIC. 4 (Sept. 2012), <http://www.ers.usda.gov/media/884525/err141.pdf> (defining "food security as "all household members ha[ve] at all times to enough food for an active, healthy life.").
- ⁹ JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 13:16 I (3d ed. 2012).
- ¹⁰ A figure that equals the commercial production of fresh vegetables at that time. *Id.*
- ¹¹ MARTINEZ ET AL., *supra* note 1; see also Anne B. W. Effland, *U.S. Farm Policy: The First 200 Years*, ECON. RES. SERV./U.S. DEPT. OF AGRIC. 24-25 (Mar. 2000), http://www.ucema.edu.ar/udm/CAPITULO_1/POLITICA_EE.UU./US_Farm_Policy_the_First_200_Years.pdf.
- ¹² Michael Pollan, *Why Mow? The Case Against Lawns*, N.Y. TIMES MAGAZINE (May 28, 1989), <http://michaelpollan.com/articles-archive/why-mow-the-case-against-lawns/> (hereinafter *Why Mow?*).
- ¹³ Jane Black, *Vegetable Garden Will Be Installed on White House Grounds*, WASHINGTONPOST.COM (Mar. 20, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/19/AR2009031902886.html>.
- ¹⁴ Michael Pollan, *Wendell Berry's Wisdom*, THE NATION (Sept. 2, 2009), <http://michaelpollan.com/articles-archive/the-nation-magazine-wendell-berrys-wisdom/>.
- ¹⁵ Since lawn-to-garden initiatives operate on a concept very similar to community gardens, they arguably also bring very similar benefits. See Kathryn A. Peters, *Creating a Sustainable Urban Agriculture Revolution*, 25 J. ENVTL. L. & LITIG. 203, 221-230 (2010), <http://www.law.uoregon.edu/org/jell/docs/251/peters.pdf> (explaining the benefits of community gardens).
- ¹⁶ Mukherji & Morales, *supra* note 7, at 6.
- ¹⁷ Heather A. Okvat & Alex J. Zautra, *Comty. Gardening: A Parsimonious Path to Individual, Cmty. and Envt'l Resilience*, 47 AM. J. COMTY. PSYCHOLOGY 374, 378-381 (2011).
- ¹⁸ See, e.g., *Fifty-two Schools Win "Farm-to-School" Grants to Plant On-site Fruit and Vegetable Gardens*, SOUTH CAROLINA STATE DEPT. EDUCATION (May 31, 2011), <http://ed.sc.gov/agency/news/?nid=1759>.
- ¹⁹ Laurel Kallenbach, *Cultivating Community: Community-Supported Agriculture*, MOTHEREARTHLIVING.COM (Apr. 2009), <http://www.motherearthliving.com/vegetable-gardening/cultivating-community-supported-agriculture.aspx>.
- ²⁰ For instance, West Virginia Sustainable Agriculture Entrepreneurs (WV SAGE) recently began in 2012 on a one-eight acre donated apartment complex backyard in West Charleston, one of the poorest neighborhoods in the city and will be teaching farming and marketing skills to twenty individuals from West Charleston who were selected based on low-income, minority, or single-parent status. Phone Interview with Cullen Naumoff, Vision 2030 Project Manager, CHARLESTON AREA ALLIANCE (Dec. 8, 2012).
- ²¹ Mukherji & Morales, *supra* note 7, at 6.
- ²² JUERGENSMEYER & ROBERTS, *supra* note 9, at 1.
- ²³ *Id.*
- ²⁴ Seattle's 2010 zoning amendments allow produce to be grown and sold either on-site or off-site in commercial zones. Additionally, the new code also allows urban farms and community gardens in all zones (with limitations in industrial zones), and residents can sell food grown on their properties. See *Seattle City Council Approves Urban Farm and Community Garden Legislation Improving Access to Locally Grown Food*, SEATTLE CITY COUNCIL (Aug. 16, 2010), <http://www.seattle.gov/council/newsdetail.asp?ID=10996&Dept=28>; see generally Mukherji & Morales, *supra* note 7, for examples of other municipal codes that have expanded zoning allowance for urban agriculture.
- ²⁵ For instance, edible communities could be incorporated into the Sustainable DC initiative, which is underway as of the writing of this article and includes a food desert reduction program. See *Sustainable DC: Food Working Group*, DC.GOV, <http://sustainable.dc.gov/page/food-working-group-background-documents> (last visited Dec. 10, 2012).
- ²⁶ See Kirk Johnson, *Small Farmers Creating a New Business Model as Agriculture Goes Local*, N.Y. TIMES (July 1, 2012), http://www.nytimes.com/2012/07/02/us/small-scale-farmers-creating-a-new-profit-model.html?_r=0; see also Slow Money, SLOWMONEY.ORG (last visited Nov. 29, 2012).
- ²⁷ Low-income residents could, for instance, participate in USDA's local food initiatives and the SNAP Gardens program that provide monetary and gardening support to establish and maintain viable gardens. See *The People's Garden Grant Program*, *supra* note 1; see also other local and federal urban agriculture finance and education programs, *supra* notes 2 and 3.
- ²⁸ Michael Pollan, *How Change is Going to Come in the Food System*, THE NATION (Sept. 11, 2011), <http://michaelpollan.com/articles-archive/how-change-is-going-to-come-in-the-food-system/> (hereinafter *How Change is Going to Come in the Food System*).
- ²⁹ Kirk Johnson, *Small Farmers Creating a New Business Model as Agriculture Goes Local*, N.Y. TIMES (July 1st, 2012), http://www.nytimes.com/2012/07/02/us/small-scale-farmers-creating-a-new-profit-model.html?_r=1&.
- ³⁰ See Kallenbach, *supra* note 19.
- ³¹ Pollan, *Why Mow?*, *supra* note 12.
- ³² Phone Interview with Elise Golan, Director, SUSTAINABLE DEV. PROGRAM, OFFICE OF THE CHIEF ECONOMIST, U.S. DEP'T OF AGRIC. (Nov. 29, 2012).
- ³³ See Pollan, *How Change is Going to Come in the Food System*, *supra* note 28; See also Simon, *supra* note 5.
- ³⁴ Peters, *supra* note 15, at 227; see also Heather A. Okvat & Alex J. Zautra, *supra* note 17.

- ¹⁰ United Nations Declaration on the Rights of Indigenous Peoples voting record <http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295>.
- ¹¹ United Nations Declaration on the Rights of Indigenous Peoples Adopted by the General Assembly 13 September 2007. <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.
- ¹² LEHR & SMITH, *supra* note 9, at 14.
- ¹³ United Nations Declaration on the Rights of Indigenous Peoples, article 32 sec. 2 http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.
- ¹⁴ *Id.*
- ¹⁵ LEHR & SMITH, *supra* note 9, at 16.
- ¹⁶ *Id.*
- ¹⁷ *Id.*
- ¹⁸ *Id.* at 15.
- ¹⁹ Goodland, *supra* note 3, at 67.
- ²⁰ *Id.*
- ²¹ *Id.*
- ²² Lehr & Smith, *supra* note 9, at 7.
- ²³ *Id.*
- ²⁴ Goodland, *supra* note 3, at 67.
- ²⁵ *Id.*
- ²⁶ *Id.*
- ²⁷ *Id.* at 68.
- ²⁸ *Id.*
- ²⁹ *Id.* at 72.
- ³⁰ DIR. FOR FIN., FISCAL, & ENTER. AFFAIRS, OECD, *Multinational Enterprise in Situations of Violent Conflict and Widespread Human Rights Abuses 4* (May 2002), <http://www.oecd.org/dataoecd/46/31/2757771.pdf>.
- ³¹ See Preamble, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), <http://www1.umn.edu/humanrts/links/norms-Aug2003.html>.
- ³² Carolin Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, GER. L.J. Vol. 4, 10 1065(2003), http://www.germanlawjournal.com/pdfs/Vol04No10/PDF_Vol_04_No_10_1065-1080_European_Hillemanns.pdf.
- ³³ *Id.*
- ³⁴ *Id.*
- ³⁵ See Preamble, *supra* note 31.
- ³⁶ Hillemanns, *supra* note 32, at 1075.
- ³⁷ LEHR & SMITH, *supra* note 9, at 21.
- ³⁸ Elias Courson, NORDISKA AFRIKAINSTUTET, *Movement for the Emancipation of the Niger Delta (MEND) 7* (2009), nai.diva-portal.org/smash/get/diva2:280470/FULLTEXT01.
- ³⁹ Stephanie Hanson, COUNCIL ON FOREIGN RELATIONS *MEND: The Niger Delta's Umbrella Group*, (March 22, 2007), <http://www.cfr.org/nigeria/mend-niger-deltas-umbrella-militant-group/p12920>.
- ⁴⁰ Courson, *supra* note 38, at 7.
- ⁴¹ *Id.* at 8.
- ⁴² *Id.*
- ⁴³ Hanson, *supra* note 39.
- ⁴⁴ *Id.*
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*

- ⁴⁷ *Id.*
- ⁴⁸ Ed Pilkington, *Shell Pays Out \$15.5 Million over Saro-Wiwa Killing*, THE UK GUARDIAN (June 8, 2009), <http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa>.
- ⁴⁹ Hanson, *supra* note 39.
- ⁵⁰ *Id.*
- ⁵¹ *Id.*
- ⁵² Ed Pilkington, *supra* note 48.
- ⁵³ Antoanella-Iulia Motoc & Tebtebba Found, *Legal Commentary on the Concept of Free, Prior Informed Consent*, SUB-COMM. ON THE PROMOTION AND PROT. OF HUMAN RIGHTS 6 (July 2005), www2.ohchr.org/english/issues/indigenous/docs/wgip23/WP1.doc.
- ⁵⁴ *Id.* at 6.
- ⁵⁵ *Id.*
- ⁵⁶ LEHR & SMITH, *supra* note 9.
- ⁵⁷ *Id.* at 6-7.
- ⁵⁸ *Id.* at 7.
- ⁵⁹ International Labour Organization, Indigenous and Tribal Peoples Convention No. 169, art. 1(b), June 27, 1989, 28 I.L.M. 1382, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314.
- ⁶⁰ *Indigenous Peoples and Sustainable Development*, Int'l Fund for Agric. Dev. 5 (Feb. 2003), <http://www.ifad.org/gbdocs/gc/26/e/ip.pdf>.
- ⁶¹ *Id.* at 5.
- ⁶² *Id.* at 5.
- ⁶³ *Id.* at 5.
- ⁶⁴ Jennifer Tobin, *Political Investments and Property Rights in Developing Countries*, YALE UNIVERSITY AND BROOKINGS INSTITUTION 2 (Oct. 3, 2005), http://www.people.fas.harvard.edu/~ces/conferences/cpeworkshop/tobin_CPE.pdf.
- ⁶⁵ *Indigenous Peoples and Sustainable Development*, *supra* note 61.
- ⁶⁶ *Id.* at 15.
- ⁶⁷ *Id.*
- ⁶⁸ *Id.* at 8.
- ⁶⁹ *Ctr. for Minority Rights Dev. ex rel. Endorois Welfare Council v. Kenya*, A.C.H.P.R. 276/2003 (2009), available at http://www.hrw.org/sites/default/files/related_material/2010_africa_comm_ission_ruling_0.pdf.
- ⁷⁰ Fergus MacKay, *Suriname: Chinese Logging Companies and Tribal Rights*, FOREST PEOPLES PROGRAMME (Sept. 2002), <http://www.wtm.org.uy/bulletin/62/Suriname.html>.
- ⁷¹ *Id.* at 76.
- ⁷² Tobin, *supra* note 64, at 3.
- ⁷³ *Id.*
- ⁷⁴ LEHR & SMITH, *supra* note 9, at 22.
- ⁷⁵ *Id.*
- ⁷⁶ *Id.*
- ⁷⁷ *Id.* at 21.
- ⁷⁸ *Id.*
- ⁷⁹ *Id.*
- ⁸⁰ *Id.* at 71.
- ⁸¹ SEN, *supra* note 7, at 3.
- ⁸² John M. Kline & Ludger Odenthal, *The Social Responsibility of Transnational Corporations*, U.N. CONFERENCE ON TRADE AND DEV. 44 (1999), available at <http://www.unctad.org/en/docs/poiteit21.en.pdf>.

- ²² JONATHAN SAMET, PUBLIC HEALTH: ADAPTING TO CLIMATE CHANGE 4-5 (Resources for the Future, 2010), available at <http://www.rff.org/RFF/Documents/RFF-IB-10-06.pdf>.
- ²³ Robert K. Whelan & Denise Strong, *Rebuilding Lives Post-Katrina: Choices and Challenges in New Orleans' Economic Development*, in RACE, PLACE, AND ENVIRONMENTAL JUSTICE AFTER HURRICANE KATRINA: STRUGGLES TO RECLAIM, REBUILD, AND REVITALIZE NEW ORLEANS AND THE GULF COAST 183, 183 (Robert D. Bullard & Beverly Wright, eds., 2009) [hereinafter RACE, PLACE, AND ENVIRONMENTAL JUSTICE]. In the month following Hurricane Sandy, the New York area lost approximately 30,000 jobs due to the storm. See Patrick McGeehan, *Nearly 30,000 Jobs Lost Because of Hurricane Sandy*, THE NEW YORK TIMES (Dec. 20, 2012).

- ²⁴ See Seth B. Shonkoff et al., *The Climate Gap: Environmental Health and Equity Implications of Climate Change and Mitigation Policies in California – a Review of the Literature*, 109 CLIMATIC CHANGE S485, S491 (2011).
- ²⁵ See USGCRP REPORT, *supra* note 4, at 54-55 (explaining that warmer temperatures are projected to lead to a slight net increase in energy use because increases in air conditioning are likely to outpace decreases in energy use for heating).
- ²⁶ See, e.g., NAT'L RESEARCH COUNCIL, *supra* note 7, at 49 (describing increasing energy costs resulting from increasing focus on expensive renewable energy sources).
- ²⁷ See *id.* (assessing the cost of providing protection from three feet of sea level rise at roughly \$100 billion).

²⁸ For example, relocating a single 400-person Alaskan tribal village, the Village of Kivalina, is projected to cost from 95 to 400 million dollars. *See* Abate, *supra* note 17, at 207.

²⁹ *See* M. L. PARRY, ET AL., ASSESSING THE COSTS OF ADAPTATION TO CLIMATE CHANGE: A REVIEW OF THE UNFCCC AND OTHER RECENT ESTIMATES 31 (2009). Hurricane Katrina reportedly caused 146 billion dollars in damage. *See Hurricane Sandy's Rising Costs*, NEW YORK TIMES A32 (Nov. 28, 2012). After Hurricane Sandy, New York estimates \$42 billion in damage, while New Jersey estimates almost \$30 billion. *Id.*

³⁰ *See generally*, MATTHIAS RUTH ET AL., THE US ECONOMIC IMPACTS OF CLIMATE CHANGE AND THE COSTS OF INACTION (2007), available at: <http://www.cier.umd.edu/documents/US%20Economic%20Impacts%20of%20Climate%20Change%20and%20the%20Costs%20of%20Inaction.pdf>. Climate mitigation efforts, like a cap-and-trade program or carbon tax, could conceivably generate revenue that would finance climate adaptation efforts. *See* RACHEL MORELLO-FROSCH ET AL., THE CLIMATE GAP: INEQUALITIES IN HOW CLIMATE CHANGE HURTS AMERICANS & HOW TO CLOSE THE GAP 19 (2010), available at: http://dornsife.usc.edu/perc/documents/ClimateGapReport_full_report_web.pdf.

³¹ These challenges are described in more detail in the longer version of this article. *See* Alice Kaswan, *Domestic Climate Change Adaptation and Equity*, 42 ENVIRONMENTAL LAW REPORTER 11125 (2012). Equity concerns are even more dramatic internationally. Many poor developing countries, like small-island states, Bangladesh, and African nations, are simultaneously the least responsible for, but the most at risk from, global climate change. *See, e.g.*, IPCC, *Summary for Policymakers*, *supra* note 4, at 12 (describing high risks from sea level rise for low-lying African and Asian deltas and for small island states). The importance of international adaptation and equity concerns does not, however, erase the significance of addressing equity in U.S. adaptation measures.

³² *See* VERCHICK, *supra* note 6, at 106.

³³ *See* NAT'L RESEARCH COUNCIL, *supra* note 7, at 29; Chen, *supra* note 6, at 3-5.

³⁴ *See* IPCC, *MANAGING THE RISKS*, *supra* note 9, at 7, 10; USGCRP REPORT, *supra* note 4, at 100-101; Verchick, *supra* note 6, at 38-41 (observing that the degree of hazard a community faces is "a combination of a community's physical vulnerability and its social vulnerability") (emphasis in original). *See generally* PASTOR ET AL., *supra* note 13, at 2 (observing that environmental equity focuses on both cumulative exposure and social vulnerability).

³⁵ *See* DANIEL A. FARBER ET AL., *DISASTER LAW AND POLICY* 217 (2d ed. 2010) (quoting PIERS BLAIKIE ET AL., *AT RISK: NATURAL HAZARDS, PEOPLE'S VULNERABILITY AND DISASTERS* 9 (1994)).

³⁶ *See* U.S. CLIMATE CHANGE SCIENCE PROGRAM, *ANALYSES OF THE EFFECTS OF GLOBAL CHANGE ON HUMAN HEALTH AND WELFARE AND HUMAN SYSTEMS* 64 (2008) (listing socioeconomic factors affecting vulnerability), available at: <http://www.climatechange.gov/Library/sap/sap4-6/final-report/>; *id.* at 64 (noting greater impacts on those with lower socioeconomic status); *id.* at 123 (listing factors affecting vulnerability to disasters); VERCHICK, *supra* note 6, at 106; BULLARD & WRIGHT, *supra* note 2, at 52-54 (describing disparities in climate impacts for disadvantaged populations). Large-scale aggregate analyses have isolated the important role of social vulnerability as a determinant of disaster impacts. A study of 832 floods in 74 Texas counties found a statistically significant correlation between social vulnerability, as measured by racial minority or low-income status, and flood deaths or injuries. Sammy Zahran et al., *Social Vulnerability and the Natural and Built Environment: A Model of Flood Casualties in Texas*, 32 *DISASTERS* 552-553, 555 (2008).

³⁷ *See* Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy*, 38 ENVTL. L. REP. 10,287, 10,289 (2008) (describing the environmental justice movement's distributive, participatory, and social justice goals and their influence on the movement for climate justice); *see generally* LUKE W. COLE & SHEILA FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* (2001) (describing the environmental justice movement's focus on distributional outcomes, participatory processes, and institutional structures).

³⁸ *See* M. L. PARRY ET AL., *supra* note 29, at 102-113; RUTH ET AL., *supra* note 30. In addition to economic considerations, avoiding harm has important social, cultural, and psychological benefits.

³⁹ PASTOR ET AL., *supra* note 13, at 30-31; VERCHICK, *supra* note 6, at 165.

⁴⁰ *See, e.g.*, VERCHICK, *supra* note 6; Craig, *supra* note 18.

⁴¹ *See* James K. Boyce, *Let Them Eat Risk? Wealth, Rights and Disaster Vulnerability*, 24 *DISASTERS* 254, 257 (2000) (stating that "the wealth-based approach holds that ... those individuals who are willing (and, perforce, able) to pay more, deserve to get more [disaster vulnerability reduction]").

⁴² *See* PASTOR ET AL., *supra* note 13, at 7 (arguing that a market-based approach to disaster preparedness "is a recipe for targeting those with the least

power in the social calculus"); VERCHICK, *supra* note 6, at 149; *See* Debra Lyn Bassett, *Place, Disasters, and Disability*, in *LAW AND RECOVERY FROM DISASTER*, *supra* note 6, at 51, 68.

⁴³ *See* Debra Lyn Bassett, *The Overlooked Significance of Place in Law and Policy: Lessons from Hurricane Katrina*, in *RACE, PLACE, AND ENVIRONMENT*, *supra* note 23, at 49, 57; Boyce, *supra* note 41, at 257 (observing that relying on individual willingness-to-pay for disaster reduction would distribute reductions in a manner "strongly correlated with wealth").

⁴⁴ *See generally* PASTOR ET AL., *supra* note 13, at 25-27 (describing how reconstruction programs have not been sufficient to fully address the needs of low-income disaster victims). For example, in post-Katrina New Orleans, the Mayor proposed that the city should decide where to invest in new infrastructure and support rebuilding by evaluating where rebuilding was already occurring. That approach would privilege areas where residents had sufficient resources to rebuild and disadvantage areas where residents did not have sufficient resources. John R. Logan, *Unnatural Disaster: Social Impacts and Policy Choices After Katrina*, in *RACE, PLACE, AND ENVIRONMENTAL JUSTICE*, *supra* note 23, at 249, 257.

⁴⁵ *See* PASTOR ET AL., *supra* note 13, at 11 (observing, in the environmental justice context, that "lower-income residents may be willing to trade off health risks for cheaper housing").

⁴⁶ *See* HEATHER COOLEY ET AL., *SOCIAL VULNERABILITY TO CLIMATE CHANGE IN CALIFORNIA* 1 (2012); NAT'L RESEARCH COUNCIL, *supra* note 7, at 55; MORELLO-FROSCH ET AL., *supra* note 30, at 22. The California Energy Commission commissioned a study that not only identified 19 discrete physical and social vulnerability factors, but evaluated their cumulative impact by creating an overarching climate vulnerability index to score different areas of the state, and then indicated where high social vulnerability "intersects with the most severe projected climate change impacts." COOLEY, *supra* at ii.

⁴⁷ Statistical Abstract of the United States, *Table 711, People Below Poverty Level and Below 125 % of Poverty Level by Race and Hispanic Origin: 1980-2009*, available at <http://www.census.gov/compendia/statab/2012/tables/12s0711.pdf> (indicating that, as of 2009, African-Americans and Hispanics were twice as likely as whites to be below the poverty level: over 25 percent, in comparison with the white population's 12.3 percent poverty rate).

⁴⁸ *See, e.g.*, PASTOR ET AL., *supra* note 13, at 19-21; CALIFORNIA CLIMATE CHANGE CENTER, *THE IMPACTS OF SEA-LEVEL RISE ON THE CALIFORNIA COAST* 46 (2009) [hereinafter *THE IMPACTS OF SEA-LEVEL RISE*], available at: <http://www.energy.ca.gov/2009publications/CEC-500-2009-024/CEC-500-2009-024-F.PDF> (describing income- and race-based disparities in disaster preparation).

⁴⁹ The Federal Emergency Management Agency has several programs that provide some resources for hazard mitigation both pre- and post-disaster, resources that could be targeted toward the most vulnerable populations. *See* FEMA, *HAZARD MITIGATION GRANT PROGRAM*, <http://www.fema.gov/hazard-mitigation-grant-program> (describing). *See also* USGCRP REPORT, *supra* note 4, at 91 (describing Philadelphia's "Cool Home Program," which provides low-income elderly residents with roof retrofits to cool their homes and save energy).

⁵⁰ *See* Robert D. Bullard, Glenn S. Johnson, and Angel O. Torres, *Transportation Matters: Stranded on the Side of the Road Before and After Disasters Strike*, in *RACE, PLACE, AND ENVIRONMENTAL JUSTICE*, *supra* note 23, at 63, 66-67 (noting racial disparities in automobile ownership). In Hurricane Katrina, 55 percent of those who failed to evacuate did not own cars. *See* *THE IMPACTS OF SEA-LEVEL RISE*, *supra* note 48, at 49.

⁵¹ *See* PASTOR ET AL., *supra* note 13, at 23 (describing disaster studies indicating that poor and minority populations are more likely to resort to tent cities and mass shelters); Scott Gold, *Trapped in the Superdome: Refuge Becomes a Hellhole*, SEATTLE TIMES (Sept. 1, 2005) (describing horrific shelter conditions, conditions that could deter residents from evacuating).

⁵² *See* Shonkoff, *supra* note 24, at \$488 (observing that low-income and of-color residents are less likely to have air conditioning); COOLEY ET AL., *supra* note 46, at 6 (citing study that poor people are less likely to use air conditioning, even if they have it, due to financial concerns).

⁵³ *See* Bullard et al., *supra* note 23, at 70. Recent data suggests that, despite some recent improvements, many states and local governments have not adequately addressed evacuation needs for carless and special-needs populations. *See* Bullard et al., *supra* note 23, at 69, 76, and 77-78 (describing studies).

⁵⁴ *See* BULLARD & WRIGHT, *supra* note 2, at 75, 98 (noting that green building "that fails to address issues of affordability, access, and equity may open the floodgates for permanent displacement of low-income and minority homeowners and business owners").

⁵⁵ *See* PASTOR ET AL., *supra* note 13, at 11.

⁵⁶ *See* Craig, *supra* note 18, at 55 (discussing possibility of mass migrations in response to climate impacts).

- ⁵⁷ See Bassett, *supra* note 42, at 64-65.
- ⁵⁸ See COOLEY ET AL., *supra* note 46, at 5 (noting the role of age in vulnerability to heat). In the 2003 European heat wave, many of the deaths were among the elderly. See "Over 11,000" Dead in French Heat, *BBC News*, Aug. 29, 2003, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/3190585.stm>.
- ⁵⁹ See Bassett, *supra* note 42 and 43; Janet E. Lord, Michael E. Waterstone, & Michael Ashely Stein, *Natural Disasters and Persons with Disabilities*, in *LAW AND RECOVERY FROM DISASTER*, *supra* note 6, at 71.
- ⁶⁰ See THE IMPACTS OF SEA-LEVEL RISE, *supra* note 48, at 48.
- ⁶¹ See PASTOR ET AL., *supra* note 13, at 24; THE IMPACTS OF SEA-LEVEL RISE, *supra* note 48, at 50.
- ⁶² Although property owners, unlike renters, have lost an asset, renters nonetheless encounter severe post-disaster conditions. Post-disaster, the demand for rental housing skyrockets, leading to significant increases in rents and serious shortages of affordable rentals. See PASTOR ET AL., *supra* note 13, at 24; see also Lisa K. Bates & Rebekah A. Green, *Housing Recovery in the Ninth Ward: Disparities in Policy, Process, and Prospects*, in *RACE, PLACE, AND ENVIRONMENTAL JUSTICE*, *supra* note 23, at 229, 231 (describing renters post-Katrina challenges).
- ⁶³ See, e.g., VERCHICK, *supra* note 5, at 138-39 (describing insufficient development of rental housing in post-Katrina New Orleans); Robbie Whelan, *A Texas-Size Housing Fight*, *THE WALL STREET JOURNAL*, Aug. 3, 2012, at A3 (describing local resistance to re-building affordable public housing in Galveston, Texas).
- ⁶⁴ See Shonkoff, *supra* note 24, at S489-90; COOLEY ET AL., *supra* note 46, at 6.
- ⁶⁵ See, e.g., NAT'L RESEARCH COUNCIL, *supra* note 7, at 70, 71 (observing importance of "early warning systems" and "public outreach" to adapting to extreme events and disease risks from contaminated water and disease outbreaks) and 71. See also Sari Kovats & Shakoor Hajat, *Heat Stress and Public Health: A Critical Review*, 29 ANN. REV. PUB. HEALTH 41, 49 (2008) (observing importance of health education to reducing impacts from heat waves).
- ⁶⁶ See NAT'L RESEARCH COUNCIL, *supra* note 7, at 70.
- ⁶⁷ See TED WANG & LUNA YASUI, *INTEGRATING IMMIGRANT FAMILIES IN EMERGENCY RESPONSE, RELIEF AND REBUILDING EFFORTS 1-3* (2008), available at <http://www.aecf.org/~media/PublicationFiles/IR3622H122.pdf>.
- ⁶⁸ See *id.* at 9-11.
- ⁶⁹ See PASTOR, *supra* note 13, at 25. As states begin to enact laws requiring police officers to check and report on immigration status, a practice upheld by the Supreme Court in *Arizona v. United States*, 132 S.Ct. 2492, 183 L.Ed.2d 351 (2012), immigrants are likely to become increasingly reluctant, rather than more willing, to interface with government officials. See 'Copycat Immigration Laws,' *THE WASHINGTON POST*, Sept. 29, 2011, http://www.washingtonpost.com/politics/copycat-immigration-laws/2011/09/29/gIQA993Y7K_graphic.html.
- ⁷⁰ See WANG & YASUI, *supra* note 67, at 4.
- ⁷¹ See *id.* at 1 and 6-7 (describing important role that community organizations could play in enhancing emergency response for "limited-English proficient (LEP) residents and immigrants").
- ⁷² See Bates & Green, *supra* note 62, at 243 (observing that post-Katrina recovery would have better served African-American neighborhoods if community-based organizations had been involved in planning and outreach early in the recovery process); BULLARD & WRIGHT, *supra* note 2, at 215-16 (describing the importance of cultural awareness in disaster communications and detailing several techniques for developing effective communication).
- ⁷³ As the Department of Health and Human Services has recognized, as a result of experiences of racial discrimination, "racial and ethnic minority groups may distrust offers of outside assistance . . . even following a disaster . . . They may be unfamiliar with the social and cultural mechanisms of receiving assistance and remain outside the network of aid." DEP'T OF HEALTH AND HUMAN SERVICES, *supra* note 56; BULLARD & WRIGHT, *supra* note 2, at 216-17 (discussing studies showing blacks' mistrust of white relief agencies).
- ⁷⁴ Recognizing the importance of personal outreach, Philadelphia instituted a "buddy system" run by block captains to check on elderly residents during heat waves. See USGCRP REPORT, *supra* note 4, at 91.
- ⁷⁵ See THE IMPACTS OF SEA-LEVEL RISE, *supra* note 48, at 89; PASTOR, ET AL., *supra* note 13, at 35; MORELLO-FROSCH ET AL., *supra* note 30, at 24.
- ⁷⁶ See Verchick, *supra* note 6, at 61-62, 67 (identifying the fundamental importance of democratic participation in mechanisms to reduce vulnerability).
- ⁷⁷ See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L. QUARTERLY* 619 (1992) (describing the environmental justice movement's community empowerment goals); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775 (1998).
- ⁷⁸ See PASTOR ET AL., *supra* note 13, at 21; WANG & YASUI, *supra* note 67, at 7.
- ⁷⁹ See WANG & YASUI, *supra* note 67, at 5.
- ⁸⁰ See Foster, *supra* note 77, at 834-36.
- ⁸¹ See Craig, *supra* note 13, at 536-37 (discussing contamination from inundated sewage treatment facilities); see also PASTOR ET AL., *supra* note 13, at 30; VERCHICK, *supra* note 5, at 133 (discussing risks of inundated industries, landfills, or hazardous waste sites).
- ⁸² Craig, *supra* note 18, at 43-45 (articulating climate change adaptation principle #2: "Eliminate or Reduce Non-climate Stresses and Otherwise Promote Resilience," and sub-principle: "Decontaminate Land, Water, and Air, and Reduce New Pollution as Much as Possible").
- ⁸³ See, e.g., COLE & FOSTER, *supra* note 37, at 167-83 (Appendix: "An Annotated Bibliography of Studies and Articles that Document and Describe the Disproportionate Impact of Environmental Hazards by Race and Income"); see also VERCHICK, *supra* note 6, at 167-70 (suggesting that policymakers should prioritize addressing existing hazards, like landfills and contaminated sites, in at-risk areas).
- ⁸⁴ See EPA, OFFICE OF WATER, NATIONAL WATER PROGRAM STRATEGY: RESPONSE TO CLIMATE CHANGE 45-47 (2008), available at <http://water.epa.gov/scitech/climatechange/upload/2008-National-Water-Program-Strategy-Response-to-Climate-Change.pdf> (discussing need to manage storm water and infrastructure to reduce contamination).
- ⁸⁵ See Craig, *supra* note 13, at 538 (suggested expedited cleanup of contaminated sites in coastal areas). Disaster considerations could also significantly impact the choice of remedy, reducing the desirability of "institutional controls," like land use restrictions, that leave contamination in place and at risk of flooding.
- ⁸⁶ See USGCRP REPORT, *supra* note 4, at 92-94 (describing how increasing temperatures could worsen air quality).
- ⁸⁷ See NAT'L RESEARCH COUNCIL, *supra* note 7, at 71. The IPCC has noted that many initiatives to address projected increases in extreme events have multiple co-benefits that render them "low regrets" policies. IPCC, *MANAGING THE RISKS*, *supra* note 9, at 16, 17.
- ⁸⁸ This Essay addresses mitigation measures that create equity issues, a subset of the larger issue of maladaptation. Non-equity related maladaptive mitigation measures, like thermal solar power plants that consume large volumes of water in areas expecting future shortages, are important but beyond the scope of this Essay.
- ⁸⁹ See Alice Kaswan, *Climate Change, Consumption, and Cities*, *FORDHAM URB. L.J.* 253, 280-81 (2009).
- ⁹⁰ See BRIAN STONE, JR., *THE CITY AND THE COMING CLIMATE: CLIMATE CHANGE IN THE PLACES WE LIVE* 75-76 (2012).
- ⁹¹ See USGCRP REPORT, *supra* note 4, at 92 (noting that poor air quality is an especially serious concern in cities); EPA, *supra* note 21, at 19 (noting that toxic air pollution levels are higher in urban areas).
- ⁹² See Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, 2011-6 *BYU L. REV.* 2157, 2168-69.
- ⁹³ See *id.* Increased development is inconsistent with a sustainable long-term land use strategy in many of these high-risk areas. *Id.* at 2160-61. See also *id.* at 2166-68 (describing disaster risks associated with increasing density in urban areas).
- ⁹⁴ See NAT'L RESEARCH COUNCIL, *supra* note 7, at 70 (noting that, in the long term, reducing health risks could require "urban design to minimize the urban heat island effect through greater use of trees and green spaces").
- ⁹⁵ See Sun, *supra* note 92, at 2199-200 (describing urban design patterns that facilitate long-term strategic retreat if it proves necessary).
- ⁹⁶ See NAT'L RESEARCH COUNCIL, *supra* note 7, at 49 (regarding potential increases in energy costs from a switch to renewable energy).
- ⁹⁷ See USGCRP REPORT, *supra* note 4, at 54-55; ENVIRONMENTAL HEALTH PERSPECTIVES & THE NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, *A HUMAN HEALTH PERSPECTIVE ON CLIMATE CHANGE: A REPORT OUTLINING THE RESEARCH NEEDS ON THE HUMAN HEALTH EFFECTS OF CLIMATE CHANGE* 30-31 (2010), available at: http://www.cdc.gov/climateandhealth/pubs/HHCC_Final_508.pdf.
- ⁹⁸ See NAT'L RESEARCH COUNCIL, *supra* note 7, at 50.
- ⁹⁹ IPCC REPORT, *MANAGING THE RISKS*, *supra* note 9, at 20.
- ¹⁰⁰ IPCC REPORT, *MANAGING THE RISKS*, *supra* note 9, at 11.
- ¹⁰¹ See Susan L. Cutter, *The Geography of Social Vulnerability: Race, Class, and Catastrophe*, in *Understanding Katrina: Perspectives from the Social Sciences*, Jun. 11, 2006, available at <http://forums.ssrc.org/understandingkatrina/the-geography-of-social-vulnerability-race-class-and-catastrophe/> (stating that "[s]ocial vulnerability involves the basic provision of health care, the livability of places, overall indicators of quality of life, and accessibility to lifelines (goods, services, emergency response personnel), capital, and political representation").

Endnotes: DANGEROUS SEPARATION: AN ECOSYSTEM AND WAY OF LIFE IN THE WEST BANK AT THE BRINK OF DESTRUCTION *continued from page 47*

- ¹ The Green Line marks the boundary between Israel and Palestine, the pre-1967 border, drawn in the 1949 Armistice Agreement. IAN S. LUSTICK, THE FETISH OF JERUSALEM, in ISRAEL IN COMPARATIVE PERSPECTIVE: CHALLENGING THE CONVENTIONAL WISDOM, 152 (MICHAEL N. BARNETT ed., SUNY Press, 1996).
- ² The terraces are so unique that they were awarded the 2011 Melina Mercouri International Prize for the Safeguarding and Management of Cultural Landscapes. *Israel's Separation Barrier Threatens Ancient Palestinian Farming Practice*, N.Y. DAILY NEWS, May 11, 2012, http://articles.nydailynews.com/2012-05-11/news/31672583_1_separation-barrier-west-bank-battir; Cross-Border "Priority Initiatives" of the Good Water Neighbors Project, Friends of the Earth Middle East, 7 (Sept. 2012), available at http://foeme.org/uploads/13470236580~%5E%5E~Community_Based_Problem_Solving_on_Water_Issues_2012.pdf.
- ³ Friends of the Earth Middle East, *supra* note 2, at 7.
- ⁴ Zafrir Rinat, *Ministry of Defense: Minimal Damage, A First: A Government Ministry Against the Separation Wall*, HAARETZ, Sept. 13, 2012, available at <http://www.haaretz.co.il/news/politics/1.1823483>.
- ⁵ The destruction and abandonment of terrace agriculture in other areas has caused natural springs to dry up, while other springs have become polluted by agricultural runoff and sewage. DU'ACH RASHUT HA TEVA VE HANIM LSHNAT 2010 [ISRAEL NATURE AND PARKS AUTHORITY REPORT] <http://www.parks.org.il/publicparticipation/publichearing/publishing/images/%20%20%20%20%202010.pdf>.
- ⁶ Nir Chason, *The Israeli Supreme Court Ordered the State to Reexamine the Construction of the Separation Wall in the Village of Battir*, HAARETZ, Dec. 13, 2012, available at <http://www.haaretz.co.il/news/politics/1.1885682>.
- ⁷ See Yisha Blank, *Legalizing the Barrier: The Legality and Materiality of the Israel/Palestine Separation Barrier*, 46 TEX. INT'L L.J. 309, 310 (2010-11); See also, Susan Akram & Michael Lynk, *The Wall and the Law: A Tale of Two Judgments*, 24 NETH. Q. H.R. 61, 85 (2006) ("In June 2002, when the Israeli Government announced its formal decision to build an integrated system of walls, trenches, barriers and fences throughout the West Bank, it stated that the Wall was initiated solely as a response to the series of Palestinian suicide bombings that had killed approximately 450 Israelis since the start of the second Intifada in September 2000.");
- ⁸ Blank, *supra* note 7, at 317. ("[T]he barrier is erected on the basis of authorized government decisions, administrative regulations, and military orders... done in a highly legalized fashion according to legal chains of authorizations... some of the actions taken with regard to the barrier were in violation of Israeli administrative and constitutional law...[y]et, the state of Israel behaved as if it were bound by law. Every action was done in accordance with administrative procedures, under explicit authorization, and often received the approval of the Israel courts which reviewed them."); HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel 58(5) PD 807 [2004] (Isr.), available at <http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/09d47365bd007706c12575c20046ec2a?OpenDocument>.
- ⁹ Beit Sourik Village Council v. Israel, *supra* note 8.
- ¹⁰ The court found that the laws of belligerent occupation in the 1907 Hague Regulations and 1949 Fourth Geneva Convention applied in this case, and in Israel's interpretation supported Israel's effort to secure the rights of the Jewish-Israeli population against Palestinian terror attacks. See Beit Sourik Village Council v. Israel, *supra* note 8 (basing the opinion on the laws of belligerent occupation and Jewish Israeli security); See also, Hague Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, arts. 23(g) and 46, 18 Oct. 1907 (stating the laws of belligerent occupation).
- ¹¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 28 (July 9), available at <http://www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6&c>.
- ¹² *Id.*
- ¹³ These decisions were reached by a 14-1 majority within the court. *Id.*
- ¹⁴ Notably in *Mara'abeh v. The Prime Minister of Israel* where the court rejected the ICJ advisory opinion. See Blank, *supra* note 7, at 330.
- ¹⁵ N.Y. DAILY NEWS, *supra* note 2, 2.
- ¹⁶ Zafrir Rinat, *Separation Fence Threatens to Destroy Farming, Ecosystem Around Jerusalem: According to the Nature and Parks Authority, Establishment*

- of the Wall Will Change Not Only the Landscape, But Also the Special Pace of Life of Traditional Farmers*, HAARETZ, Oct. 18, 2012, available at <http://www.haaretz.com/news/features/separation-fence-threatens-to-destroy-farming-ecosystem-around-jerusalem.premium-1.470656>
- ¹⁷ N.Y. DAILY NEWS, *supra* note 2 at 2 (allowing for the lands to remain with Battir residents).
- ¹⁸ *Id.*
- ¹⁹ *Id.*; Nir Chason, Atirah Neged Geder HaHefradah SheMeskenet et HaTara-sot BeBattir [Appeal Against the Separation Wall, Which Endangers the Terraces in Battir], HAARETZ, October 23, 2012, <http://www.haaretz.co.il/news/politics/1.1848525>
- ²⁰ A recent example of failure is in the village of Walajah, close to Battir.
- ²¹ Isabel Kershner, *With a Bit of Land Restored, Villagers End Campaign*, N.Y. TIMES, June 24, 2011, <http://www.nytimes.com/2011/06/25/world/middleeast/25palestinians.html>; Friends of Freedom and Justice-Bilin (last visited Dec. 18, 2012).
- ²² *Id.* at 3.
- ²³ *Id.*
- ²⁴ *Id.*
- ²⁵ Zafrir Rinat, *Construction Plans Clog Palestinian Village's Water Supply: A Blueprint to Expand Both Betar Illit and the Separation Fence Encroaches on Wadi Fuqin*, HAARETZ, Jan. 16, 2006, <http://www.haaretz.com/print-edition/features/construction-plans-clog-palestinian-village-s-water-supply-1.62345>; USAID, BREAKING THE CYCLE OF DESPAIR: IN THE HORN OF AFRICA, 2 GLOBAL WATERS 5, 21 (Oct. 2011), available at http://issuu.com/sixhalfdozen/docs/gw_redesign_22_issuu.
- ²⁶ GWN Communities: Wadi Fuqin and Tzur Hadassah Join to Oppose Separation Barrier, EcoPeace—Friends of the Earth Middle East (Mar. 8, 2010), <http://foeme.wordpress.com/2010/03/08/wf-th-separation-wall-meeting/>.
- ²⁷ Scott Wilson, *Bonded in Resistance to the Barrier*, WASHINGTON POST, June 8, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/07/AR2007060702588.html>; Julien Katchinoff, *Green Objections to the Green Line: A Struggle For a Shared Environment in the Middle East*, NEW SECURITY BEAT, March 4, 2010, <http://www.newsecuritybeat.org/2010/03/green-objections-to-the-green-line-a-struggle-for-a-shared-environment-in-the-middle-east/>.
- ²⁸ Sue Fishkoff, *Palestinian Village and Israeli Town Build Rare Partnership Across Line*, JTA, April 16, 2010, <http://www.jta.org/news/article/2010/04/19/1011655/palestinian-village-and-israeli-town-build-rare-partnership-across-line>.
- ²⁹ See generally, Blank, *supra* note 7; Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?* 18 EUR. J. INT'L L. (2007). (giving examples of cases *Mara'abeh v. Prime Minister of Israel*, *Ma'arab v. The IDF Commander in Judea and Samaria*, *Hass v. Commander of the IDF Forces in the West Bank*).
- ³⁰ Aminadav, 2 km away, is Battir's best option for a neighboring Israeli participant. Har Gilo, which is very close by is a settlement and is unlikely to aid Battir in its struggle.
- ³¹ Zev HaCohen, Michshol Kav Hatefer—Keta Battir-Machsom Ha Lamed Heh: Emdat Rashut Hateva VeHaGanim [The Seamline Obstacle—the segment of Battir to the Lamed Heh Checkpoint: The Position of Israel Nature and Parks Authority], 12 (Aug. 2012), available at http://www.k-etzion.co.il/_Uploads/735ratag.pdf (suggesting that the wall will adversely affect plant growth and animal migration).
- ³² Zafrir Rinat, *supra* note 4.
- ³³ Water is imperative for human survival and in the water scarce environment of Israel and Palestine, there is intense competition for water resources. Israel's determination of water resources as a national security issue rightly prioritizes the necessity of water for its citizens, agriculture, and economy. See Peter H. Gleick, *Water and Conflict: Fresh Water Resources and International Security*, 18 INT'L SEC. 79, 79 (1993) (discussing the competition for scarce water resources leading to viewing water as a national security matter).
- ³⁴ Nir Chason, *supra* note 6.
- ³⁵ Nir Chason, *Representative of The Israel Nature and Parks Authority to the Israeli Supreme Court: The Separation Wall in Battir Harms Nature*, HAARETZ, Dec. 12, 2012, available at <http://www.haaretz.co.il/news/politics/1.1884670>
- ³⁶ Nir Chason, *supra* note 6.

- ²⁰ Nordquist et al., *supra* note 1; Koivurova & Molenaar, *supra* note 18.
- ²¹ See J.L. Pagnan, *Arctic Marine Protection* 53(4) *Arctic* 469 (December 2000); see also F. Cava, D. Monsma & O.R. Young, *Workshop on Arctic Governance: Drawing Lessons from the Antarctic Experience* (2009).
- ²² A permanent secretariat is currently being set up and will begin work by May 2013—Nuuk Declaration—On the Occasion of the Seventh Ministerial Meeting of the Arctic Council, 12 May 2011. D. Rothwell, *The Arctic in International Affairs: Time for a New Regime?*, 15 *BROWN J. WORLD AFF.* 241 (2008-9).
- ²³ H. Hillgenberg, *A Fresh Look at Soft Law*, 10 *EJIL* 499 (1999). See also A. Boyle, *Soft Law in International Law Making* in M.D. Evans, *International Law*, 140-156 (Oxford University Press 2006).
- ²⁴ The Rio Declaration and Agenda 21 identify this wide inclusion as an important feature of international environmental law.
- ²⁵ K. KABBOT & D. SNIDAL, *HARD AND SOFT LAW IN INTERNATIONAL GOVERNANCE* (MIT Press 2000); SALE & E. POTAPOV, *SCRAMBLE FOR THE ARCTIC*, 141 (Francis Lincoln Publishers 2010).
- ²⁶ M. Fitzmaurice, *RECUEIL DES COURS* 132 (Hague Academy of International Law 2001).
- ²⁷ See generally A. Boyle, *INTERNATIONAL LAW AND THE ENVIRONMENT* (Clarendon Press 1992); see also Bell & McGillivray, *ENVIRONMENTAL LAW*, 52-54 (Oxford University Press 2008).
- ²⁸ This article utilizes three of these international environmental law principles/concepts as an example, other relevant ones include: the polluter pays principle, the principle of prevention and the concept of ecobased management.
- ²⁹ The Convention on Biological Diversity 1992, <http://www.cbd.int/convention/>, last accessed Feb. 9, 2013.
- ³⁰ United Nations Agenda 21 1992, available at http://www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml.
- ³¹ Rio Declaration on Environment and Development 1992, Principle 15, available at <http://www.unep.org/Documents/Multilingual/Default.asp?documentid=78&articleid=1163>.
- ³² Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention) 1992 [hereinafter OSPAR].
- ³³ *Environmental Impact Assessment Guidelines*, 9 (Finnish Ministry of the Environment 1997) available at <http://ceq.hss.doe.gov/nepa/eiaguide.pdf>.
- ³⁴ *Arctic Offshore Oil and Gas Guidelines* 2009, PAME, 6 available at <http://www.pame.is/images/stories/FrontPage/Arctic-Guidelines-2009-13th-Mar2009.pdf>.
- ³⁵ T. O'RIORDAN ET AL., *REINTERPRETING THE PRECAUTIONARY PRINCIPLE* (Cameron & May 2002); K. BASTMEIJER, *THE ANTARCTIC ENVIRONMENTAL PROTOCOL AND ITS DOMESTIC LEGAL IMPLEMENTATION*, (Kluwer Law International 2003); R. Cooney, *The Precautionary Principle in Biodiversity Conservation and Natural Resource Management*, IUCN Policy & Global Change Series No. 2 (2004).
- ³⁶ See *supra* notes 7-15.
- ³⁷ See Koivurova, *Maine Environment*, *supra* note 11 (explaining that a response gap is the time when climatological or cryosphere extremes preclude, or severely restrict, the ability to carry out a response to any oil spillages).
- ³⁸ Greenpeace, *Arctic Oil: A Very Crude Idea*, available at <http://www.greenpeace.org/international/en/news/Blogs/makingwaves/arctic-oil-a-very-crude-idea/blog/12544/> (2010) (advocating that in adherence to a strictly precautionary approach offshore oil activities in the Arctic should have far greater control or entirely cease); see also Friends of the Earth, *Act for the Arctic*, (May 2011), available at http://www.foe.co.uk/news/act_for_arctic_30746.html.
- ³⁹ The Arctic Offshore Oil and Gas Guidelines 2009, Paragraph 1.3. (adopting the definition of the precautionary principle found in the Rio Declaration on Environment and Development, Principle 15).
- ⁴⁰ T. Koivurova in N. Craik, *THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS SUBSTANCE*, 107 (Cambridge University Press 2008); see generally NATALIA LOUKACHEVA, *POLAR LAW* (National Council of Ministers 2010) [hereinafter *POLAR LAW*].
- ⁴¹ Cava et al., *supra* note 21; D. VIDAS, *PROTECTING THE POLAR MARINE ENVIRONMENT: LAW AND POLICY FOR POLLUTION PREVENTION* 111 (Cambridge University Press, 2000).
- ⁴² Rothwell, *supra* note 22; C. de Roo et al., (Arctic Transform), *Environmental Governance in the Marine Arctic* (2008).
- ⁴³ Environmental Impact Assessment Guidelines 1997, *supra* note 33.
- ⁴⁴ *Id.* at 5.1.
- ⁴⁵ Koivurova in Craik, *supra* note 40, at 107; LOUKACHEVA, *supra* note 40, at 39.
- ⁴⁶ See generally OSPAR, *supra* note 32.
- ⁴⁷ OSPAR, *supra* note 32, Article 2(2)(a).9
- ⁴⁸ OSPAR, *supra* note 32, Article 2(2)(a).
- ⁴⁹ OSPAR, *supra* note 32, Annex V.
- ⁵⁰ Koivurova & Molenaar, *supra* note 18; E. Hey, *The International Regime for the Protection of the North Sea: From Functional Approaches to a More Integrated Approach*, 17 *Int'l J. Marine & Coastal L.* 325 (2002). See also Fayette, *supra* note 18, at 557-8; De Roo et al., *supra* note 41, at 26.
- ⁵¹ Greenland is party to OSPAR via Denmark's ratification.
- ⁵² OSPAR Commission, *Quality Status Report, Geography, Hydrography and Climate* (2000).
- ⁵³ OSPAR, *supra* note 32, Articles 25, 27(2).
- ⁵⁴ OSPAR, *supra* note 32, Article 1(a) (defining the Maritime Area).
- ⁵⁵ OSPAR, *supra* note 32, Annex V, Article 2 (providing the example of OSPAR, which specifically refers to CBD).
- ⁵⁶ Although this is non-binding as it's within the preamble the contents should be interpreted in keeping with this approach.
- ⁵⁷ Conservation and Sustainable Use of Marine and Coastal Biological Diversity, COP 2, Decision II/10, Part xi, available at <http://www.cbd.int/decision/cop/?id=7083>.
- ⁵⁸ See *supra* notes 37-38 (environmentalists, scientists and the offshore industry debate whether or not in application of the precautionary principle offshore drilling should cease).
- ⁵⁹ R. SONI, *CONTROL OF MARINE POLLUTION IN INTERNATIONAL LAW* 39 (Juta & Co.1985).
- ⁶⁰ B. STONEHOUSE, *ANIMALS OF THE ARCTIC* 52-54 (Ward Lock Ltd. 1971); PAME, *supra* note 10.
- ⁶¹ *An Introduction to the Arctic Climate Impact Assessment*, *supra* note 1.
- ⁶² Identified by the CBD Conference of the Parties (2004).
- ⁶³ B. Lausche, *Guidelines for protected areas legislation*, IUCN (June 2011) (highlighting that areas with hydrothermal vents or polar bear habitats are considered vulnerable areas). S. GUBBAY, *MARINE PROTECTED AREAS – PRINCIPLES AND TECHNIQUES FOR MANAGEMENT* (Chapman & Hall, 1995).
- ⁶⁴ Conservation of Arctic Flora and Fauna, CPAN (Feb 2012), www.caff.is/about_cpan [hereinafter CAFF]; UNEP, *National and Regional Networks of Marine Protected Areas: A Review of Progress* (2008).
- ⁶⁵ Lausche, *supra* note 63.
- ⁶⁶ The Convention on Biological Diversity 1992, <http://www.cbd.int/convention/>, last accessed Feb. 9, 2013.
- ⁶⁷ *Id.*
- ⁶⁸ ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 338 (Cambridge University Press 2005).
- ⁶⁹ CAFF is one of the Arctic Council's six working groups.
- ⁷⁰ CAFF, CPAN, *supra* note 64.
- ⁷¹ CAFF, CPAN, *supra* note 64; UNEP, *National and Regional Networks of Marine Protected Areas: A Review of Progress* (2008).
- ⁷² A. Hidayarad, *ENDANGERED WILDLIFE AND PLANTS OF THE WORLD* 1636 (Marshall Cavendish Corporation 2001). See also Greenpeace, *Black on White: The Threat of Arctic Oil to Whales* (July 2011).
- ⁷³ S.D. Rice, *Persistence, Toxicity and long-term environmental impact of the Exxon Valdez Oil Spill*, 7 *U. St. Thomas L.J.* 55, 57 (2009-10); see The Exxon Valdez Oil Spill Trustee Council (Rodgers et al.), *supra* note 12 (the estimated ranges are large as there is debate over how many species actually died as carcasses sink uncounted but this is the general range, with over 35,000 seabird and 1,000 sea otters carcasses actually retrieved).
- ⁷⁴ STONEHOUSE, *supra* note 60.
- ⁷⁵ Koivurova and K. Hossain, *Offshore Hydrocarbon: Current Policy Context in the Marine Arctic*, *Arctic Transform*, 18/19; W.N. ROM, *ENVIRONMENTAL POLICY AND PUBLIC HEALTH: AIR POLLUTION, GLOBAL CLIMATE CHANGE* (John Wiley & Sons Inc. 2012).
- ⁷⁶ The Wilderness Society, *Broken Promises, The Reality of Oil Development in America's Arctic*, 10 and 2 (September 2009).
- ⁷⁷ Hamilton, *supra* note 7.
- ⁷⁸ Alaska Center for Climate Assessment Policy, *Arctic Marine Shipping Assessment*, 2; WWF, *Polar Bears at Risk* (2002), available at <http://www.oilspillcommission.gov/sites/default/files/documents/Updated%20Arctic%20Working%20Paper.pdf>.
- ⁷⁹ Greenpeace, *Black on White: The Threat of Arctic Oil to Whales* (July 2011); Koivurova, *supra* note 9, at 55. The International Agreement for the Conservation of Polar Bears 1973,

⁸⁰ Art. II, Nov. 15, 1973, 27 U.S.T. 3918, 13 ILM 13(1974), available at <http://sedac.ciesin.org/entri/texts/polar.bears.1973.html>.

⁸¹ *Id.* at Art.II.

⁸² Matt Irwin, Note, *Polar Bears, Oil and the Chukchi Sea: The Federal Government Sells Mineral Rights in Polar Bear Habitat*, 8 SUSTAINABLE DEV. L. & POL'Y 40, 40 (2008) (noting that in the U.S. sector of the Chukchi Sea, oil exploration has been allowed within polar bear habitats. There was an ominous delay in considering the status of polar bears with regards to the US endangered Species Act meaning the US MMS Department could auction off these licenses with relatively few encumbrances. This area is home to 10% of the polar bear population). See also LOUKACHEVA, *supra* note 40.

⁸³ De Roo et al., *supra* note 42 at 20-22; WWF, POLAR BEARS AT RISK (2002), available at <http://www.oilspillcommission.gov/sites/default/files/documents/Updated%20Arctic%20Working%20Paper.pdf>.

⁸⁴ Thurston, *Offshore Oil and Gas Activities in the Arctic* (PAME October 2003); National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *The Challenges of Oil Spill Response in the Arctic* (Staff Working Paper Number 5, January 11 2011). <http://www.oilspillcommission.gov/sites/default/files/documents/Updated%20Arctic%20Working%20Paper.pdf>.

⁸⁵ K. Casper, *Oil & Gas Development in the Arctic: Softening of Ice Demands Hardening of International Law* 49 Nat. Resources J. 825, 839 (2009); Fayette, *supra* note 19 at 543; Smith, WWF, *Environmental Impacts of Offshore Oil and Gas Development in the Arctic* (2003).

⁸⁶ United States Geographical Soc'y, *Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle* (2008), available at <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>. (noting that 84% of this is predicted to be offshore oil, within states Exclusive Economic Zones (EEZs). This figure although reduced from the prior USGS pronouncement, has led to scientific queries about the level of accuracy).

⁸⁷ Experts generally accept that sustainable development is now an established principle of environmental law. Although some academics dispute this—for purposes of this article, sustainable development is an accepted opinion. Unfortunately there is no scope for a further discussion in this paper. See generally R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* (1988); DIRE TLADI, *SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW* (PULP 2007).

⁸⁸ M. Jacobs, *Sustainable Development as a Contested Concept in Fairness AND FUTURITY: ESSAYS ON ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE*, 218 (Oxford University Press 1999).

⁸⁹ *Our Common Future: Report of the World Commission on Environment and Development, Towards Sustainable Development* (The Brundtland Report)—Chapter 2 U.N. A/42/427 (1987), available at <http://www.un-documents.net/wced-ocf.htm>.

⁹⁰ See UN Environment Program ("UNEP"), *Nairobi Declaration on the State of the Worldwide Environment from the UN Conference on the Human Environment in Stockholm* (1972), UNEP/GC.10/ INF.S of May 19, 1982 UNEP Regional Seas Programme, IUCN World Conservation Congress (resulting in many of recommendations and resolutions including many on sustainable development). See also United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 13-14, 1992, *Rio Declaration on Environment and Development*, A/CONF. 151/26 (Vol. 1), Principle 22 (Aug. 12, 1992); UN World Summit on Sustainable Development (Earth Summit), Johannesburg, S. Afr. (Aug. 26-Sept. 4, 2002); OSPAR, *supra* note 31.

⁹¹ MIKKELSEN, *supra* note 4 at 5; Preamble, Guidelines for Environmental Impact Assessment (EIA) in the Arctic, Preamble (2007).

⁹² *Arctic Council*, U.S. DEPARTMENT OF STATE, available at <http://www.state.gov/e/oes/ocns/opa/arc/ac/index.htm>, last accessed Jan.15, 2013.

⁹³ L. Nowlan, IUCN Environmental Law Programme, *Arctic Legal Regime for Environmental Protection*, 12 (2001); Timo Koivurova & David L Vanderzwaag, *The Arctic Council at 10 Years: Retrospective and Prospects* 40 UBCL Rev. 121, 150 (2007); see also MIKKELSEN, *supra* note 4 at 30.

⁹⁴ Focusing on issues such as sustainable reindeer husbandry and telemedicine. MIKKELSEN, *supra* note 4; David Vanderzwaag, *The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering while the Arctic Marine Environment Totters*, 30 DENV. J. INT'L L. & POL'Y 131, 152-4 (2001-2); Paula Kaankaanpää and Oran R Young, *The Effectiveness of the Arctic Council*, Polar Research 31, 17176 (2012) (noting that until 2006 there was little focus on the offshore oil industry). For a full list of projects/activities relating to SDWG see: www.sdwg.org/content.php?doc=86.

⁹⁵ International Polar Year Project, *Arctic Energy Summit – The Arctic as an Emerging Energy Province* (February 2010) (including coal, gas and many renewables and rural energy sources).

⁹⁶ See Koivurova & Vanderzwaag, *supra* note 93 at 160 (discussing the altering visions that the change in chair has upon the Arctic Council. See also www.sdwg.org/content.php?doc=75 for details of the Best Practices in Ecosystem-based Ocean Management report.

⁹⁷ Sustainable Development Working Group, *Report on Arctic Energy* (2006).

⁹⁸ Guidelines for EIA, *supra* note 33, at Preamble (1997).

⁹⁹ Guidelines for EIA, *supra* note 33, at Preamble, Part 1 (Pages 6,7, 8 and 9), Table 1, Part 4, Part 7, Part 8, Part 9 and Part 10.

¹⁰⁰ Arctic Council, *Arctic Offshore Oil and Gas Guidelines*, ¶ 1.3 (2009), http://www.pame.is/images/PAME_NEW/Oil%20and%20Gas/Arctic-Guidelines-2009-13th-Mar2009.pdf.

¹⁰¹ Arctic Offshore Oil and Gas Guidelines, *supra* note 34.

¹⁰² See text relating to notes 135-161 regarding public participation in EIAs.

¹⁰³ OSPAR Convention 1992, Preamble, Sept. 22, 1992. Positive examples of OSPAR's regulation of the offshore industry include: OSPARCOM Decision 2000/3 prohibited oil-based muds and allowed discharge of synthetic fluids only in 'exceptional circumstances' and subsequent OSPARCOM monitoring and reporting requirements. OSPAR Recommendation 2001/1 regulates the management of produced water discharge and again provides for monitoring and follow-up procedures.

¹⁰⁴ OSPAR Commission, *The North-East Atlantic Environment Strategy – OSPAR Agreement* (2010-3).

¹⁰⁵ See text relating to notes 18-22.

¹⁰⁶ Casper, *supra* note 85, at 839; Koivurova, Molenaar, & Vanderzwaag, *supra* note 17 at 260. Huebert, in NORDQUIST ET AL., *supra* note 1; SALE & POTAPOV, *supra* note 25, at 141-2.

¹⁰⁷ STONEHOUSE, *supra* note 60 at 55; Snyder, *International Legal Regimes to Manage Indigenous Rights & Arctic Dispute from Climate Change*, 22 COLO. J. INT'L ENVTL L. & POL'Y, 6 (2011) (providing a detailed discussion of use of different flora fauna and cultural importance of marine environment in which he acknowledges that most Arctic indigenous people live by and rely on the coast); S.J. Dresser, *Safeguarding the Arctic from Accidental Oil Pollution* 16 SW. J. INT'L LAW 507, 512 (2010) (utilizing a large number of marine mammals: fish, whales, seals, polar bears and walrus).

¹⁰⁸ See *supra* note 8 and see section on sustainable development.

¹⁰⁹ JOHN BYRNE, LEIGH GLOVER & CECILIA MARTINEZ, ENVIRONMENTAL JUSTICE: DISCOURSES IN INTERNATIONAL POLITICAL ECONOMY, 3 (2002); BRYANT, ENVIRONMENTAL JUSTICE ISSUES, POLITICS AND SOLUTIONS 6-7 (1995).

¹¹⁰ WESTRA, *supra* note 7, at 208-9; S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2004).

¹¹¹ Dalee Sambo Dorrough, *Inuit of Alaska: Current Issues in POLAR LAW*, *supra*, note 40 at 200.

¹¹² O.W. Pedersen, *Environmental Principles and Environmental Justice*, 12 ENVTL. L. REV. 26, 27-8 (2010); RONALD SANDLER, ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT 88-9 (2007) (acknowledging that distributive justice was recognized by Aristotle as key part of justice).

¹¹³ Pedersen, *supra* note 112; SANDLER, *supra* note 112; BYRNE, GLOVER & MARTINEZ, *supra* note 109.

¹¹⁴ Pedersen, *supra* note 112; SANDLER, *supra* note 112; BRYANT, *supra* note 109.

¹¹⁵ Pedersen, *supra* note 112; BYRNE, GLOVER & MARTINEZ, *supra* note 109.

¹¹⁶ Pedersen, *supra* note 112 at 28; NICHOLAS LOW & BRENDAN GLEESON, JUSTICE, SOCIETY AND NATURE – AN EXPLORATION OF POLITICAL ECOLOGY (1998).

¹¹⁷ Int'l Labor Org. ("ILO"), *The Indigenous and Tribal Peoples Convention*, ILO169 (June 27, 1989), available at <http://www.unhcr.org/refworld/pdfid/3ddb6d514.pdf>

¹¹⁸ United Nations Declaration on the Rights of Indigenous Peoples 2007 A/ RES/61/295(Sept. 13, 2007). Despite initial opposition Canada and USA in 2010 showed their support for UNDRIP. Leaving Russia as the sole Arctic state opposing UNDRIP.

¹¹⁹ The Arctic Council, *Member States*, <http://www.arctic-council.org/index.php/en/about-us/members>.

¹²⁰ Indigenous and Tribal Peoples Convention, *supra* note 117.

¹²¹ *Id.* at Preamble.

¹²² *Id.* at Art. 2(2)(a).

¹²³ *Id.* at Art.6 and 15(2).

¹²⁴ Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203, 236 (2010-11).

¹²⁵ Greenland and the Faroe Isles are also parties to this Convention via Denmark.

¹²⁶ John B. Henriksen, *Oil & Gas Operations in Indigenous Peoples Lands And Territories In The Arctic: A Human Perspective*, 4 Galdú Cala – Journal of Indigenous Peoples Rights 24, 30 (2005).

- ¹²⁷ United Nations Declaration on the Rights of Indigenous Peoples, *supra* 117 at Art. 32(2).
- ¹²⁸ Erica-Irene A. Daes, *The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples in Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* 87-8 (IWGA, Copenhagen 2009).
- ¹²⁹ Aponte Miranda, *supra* note 124.
- ¹³⁰ Snyder, *supra* note 107, at 15; Dorrough in POLAR LAW, *supra* note 40; Bratspies, *supra* note 8, at 276-7.
- ¹³¹ United Nations Conference on Environmental and Development (UNCED, June 3-14, 1992) *Agenda 21*, Chapter 26 (June 14, 1992).
- ¹³² *Id.*
- ¹³³ United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.
- ¹³⁴ United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 1833 U.N.T.S. 3.
- ¹³⁵ Bratspies, *supra* note 8, at 269.
- ¹³⁶ *Id.*
- ¹³⁷ Koivurova, *Shifting Seascape* *supra* note 18; *see also* Koivurova & Molenaar, *supra* note 19.
- ¹³⁸ MIKKELSEN & LANGHELLE, *supra* note 4.
- ¹³⁹ Denmark's 1996 ratification of ILO169, and 2007 voting in favor of the UN Declaration on Rights of Indigenous Peoples applies to Greenland and the Faroe Isles.
- ¹⁴⁰ See RAIPON's submission to the Human Rights Council Universal Periodic Review Mechanism, 9 October 2012 at <<http://www.raipon.info/en/component/content/article/8-news/91-ngo-submission-to-the-human-rights-council-universal-periodic-review-mechanism>>; <http://www.nunatsiaqonline.ca/stories/article/65674-russian-indigenous_org_calls_for_arctic_council_support_to_fight_shut->
- ¹⁴¹ See text relating to notes 18-26 for a discussion of the criticisms of the soft law created by the Arctic Council.
- ¹⁴² IUCN and E&P Forum, *Oil And Gas Exploration And Production In Arctic And Subarctic Onshore Regions: Guidelines For Environmental Protection* (1993); Koivurova, *supra* note 40; PHILIPPE SANDS & JACQUELINE PEEL, INTERNATIONAL ENVIRONMENTAL LAW 141-3 (Cambridge University Press, 2012).
- ¹⁴³ See Pedersen, *supra* note 112; WESTRA, *supra* note 7.
- ¹⁴⁴ UN Convention on Environmental Impact Assessment in a Transboundary Context ("the Espoo Convention") art. 1 (vi), Feb. 25, 1991.
- ¹⁴⁵ The Espoo Convention, *supra* note 144, at art. 1 (viii).
- ¹⁴⁶ Along with other activities, the Espoo Convention, *supra* note 143, at Appendix I (15).
- ¹⁴⁷ See United Nations Treaty Collection (April 2012) http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en (noting in 1997, Denmark declared that the ESPOO Convention applies to Greenland and the Faroe Islands. In 1998 Canada made a reservation for all proposed activities that fall outside the remit of the Canadian federal jurisdiction. This reservation has been objected to by a number of States (including Norway for its lack of clarity with regards to applicability)).
- ¹⁴⁸ Arctic Offshore Oil and Gas Guidelines ¶ 2 and 3.1 (2007); 1 Arctic Offshore Oil and Gas Guidelines *supra* note 34; Linda Nowlan, IUCN Environmental Law Programme, *Arctic Legal Regime for Environmental Protection* (2001); Koivurova, *supra* note 40, at 107.
- ¹⁴⁹ Nowlan, *supra* note 148; Koivurova, *supra* note 41, at 107.
- ¹⁵⁰ United Nations Convention on the Law of the Sea, *supra* note 134.
- ¹⁵¹ The Espoo Convention, *supra* note 144 at art. 5 and 2(6).
- ¹⁵² Koivurova, *The Transnational Eia Procedure Of The Espoo Convention in The FINNISH YEARBOOK OF INTERNATIONAL LAW* 173-4 (Brill 1997).
- ¹⁵³ The ESPOO Convention is a Convention adopted by the United Nations Economic Commission for Europe (UNECE) and has 45 parties to the Convention (*see* www.treaties.un.org).
- ¹⁵⁴ The Espoo Convention, *supra* note 144 at art. 11.
- ¹⁵⁵ United Nations Economic Commission for Europe, http://www.unece.org/env/eia/meetings/mop_5, last viewed Jan. 13, 2013.
- ¹⁵⁶ BASTMEIJER, *supra* note 35 at 347-389; SANDS, *supra* note 142 at 589-591.
- ¹⁵⁷ KOIVUROVA, *supra* note 40 at 184.
- ¹⁵⁸ A further restriction on its effectiveness is in the reservation made by Canada, *see* note 140.
- ¹⁵⁹ The Arctic Offshore Oil and Gas Guidelines ¶¶ 1.3 and 2.4 (2009).
- ¹⁶⁰ Guidelines for (EIA), ¶ 7, 15, 17 and 24-36 (1997) (stating that "one of the most important features in Arctic assessment is the early and full involvement of indigenous people and other local communities").
- ¹⁶¹ Koivurova in CRAIK, *supra* note 40, at 107; Koivurova, Molenaar & Vanderzwaag, *supra* note 18, at 157-8.
- ¹⁶² LOUKACHEVA, *supra* note 40.
- ¹⁶³ MIKKELSEN & LANGHELLE, *supra* note 4, at 166.
- ¹⁶⁴ *Id.* at 163-4.
- ¹⁶⁵ Louie Porta and Nicholas Banks, *Becoming Arctic Ready: Policy Recommendations For Reforming Canada's Approach To Licensing And Regulating Offshore Oil And Gas In The Arctic* at 15-16 (Sept. 2012).
- ¹⁶⁶ Environmental Audit Comm., *Protecting The Arctic*, H.C. 7/24, at 7 note 376. (September 2012).
- ¹⁶⁷ *Id.* at note 165.
- ¹⁶⁸ Dorrough, in POLAR LAW, *supra* note 40.
- ¹⁶⁹ CONTESTED ARCTIC: INDIGENOUS PEOPLES, INDUSTRIAL STATES AND THE CIRCUMPOLAR ENVIRONMENT 15 (Eric Smith & Joan Mccarter Eds. 1997) [hereinafter CONTESTED ARCTIC]; MILTON M.R. FREEMAN et al., INUIT, WHALING AND SUSTAINABILITY (Altamira Press 1998)
- ¹⁷⁰ CONTESTED ARCTIC, *supra* note 167; FREEMAN, *supra* note 169.
- ¹⁷¹ CONTESTED ARCTIC, *supra* note 167; FREEMAN, *supra* note 169.
- ¹⁷² WESTRA, *supra* note 4; ANAYA, *supra* note 109.
- ¹⁷³ Chief Joe Linklater, *The Arctic and Energy: Exploration and Exploitation Issues; Indigenous Peoples; Industry*, 30 CAN-U.S. L.J. 301, 304 (2004).
- ¹⁷⁴ See MIKKELSEN & LANGHELLE, *supra* note 4; *see also* Pedersen, *supra* note 112; M JACOBS in ANDREW DOBSON, JUSTICE AND THE ENVIRONMENT: CONCEPTIONS OF ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE (Oxford Univ. Press 2004); D. PEARCE AND E.B. BARBIER, *Blueprint for a Sustainable Economy* in HOLDER & LEE, *supra* note 4 (discussing the breadth of meanings. Early inclusion of the concept is found in the Brundtland Report, *supra* note 89).
- ¹⁷⁵ MIKKELSEN & LANGHELLE, *supra* note 4; *see also* Shell in the Arctic (October 2012) www.shell.com/home/content/future_energy/meeting_demand/arctic/.
- ¹⁷⁶ See MIKKELSEN & LANGHELLE, *supra* note 4 (noting that in many Arctic coastal areas there are high levels of socio-economic deprivation and unemployment, and low education levels).
- ¹⁷⁷ *Id.* at 323-5.
- ¹⁷⁸ *Id.* at 147 (The revenue system is very different with near shore or onshore sites); Nicholas E. Flanders and Rex V. Brown, *Justifying Public Decisions in Arctic Oil and Gas Development: American and Russian Approaches* ARCTIC Vol. 51, No. 3, 262, 264 (Sept. 1998).
- ¹⁷⁹ Julie Porter, *Regional Economic Resilience and the Deepwater Horizon Oil Spill: The case of New Orleans Tourism on Fishing Clusters* (November 2011), available at www.cieo.ualg.pt/discussionpapers/8/article5.pdf; Hugo Pinto, et al., *Spatial and organization Dynamics – Discussion Papers Number 8*, 72 (CIEO Nov. 2011), available at www.cieo.ualg.pt/discussionpapers/discussionpapers8.pdf (scientists, environmentalists and politicians debate the level of risk offshore oil development poses on accidental spills with many stating that both the level of pollution and the ability to clean-up are severely curtailed by conditions in the Arctic Ocean). *See also* text relating to notes 35-37.
- ¹⁸⁰ S.D. Rice, *Persistence, Toxicity and long-term environmental impact of the Exxon Valdez Oil Spill*, 7 U. ST. THOMAS L.J. 55, 56 (2009-10).
- ¹⁸¹ Fayette, *supra* note 19, at 548.
- ¹⁸² Rice, *supra* note 180, at 57. (The Exxon Valdez Oil Spill Trustee Council *Questions and Answers*, <http://www.evostc.state.ak.us/facts/qanda.cfm> (accessed 6 February 2012) – The estimated ranges are rather large as there is disagreement as to how many species actually died as carcasses sink uncounted but this is the general range, with over 35,000 seabird and 1,000 sea otters carcasses actually retrieved).
- ¹⁸³ See James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples – Extracting Industries Operating Within or Near Indigenous Territories*, A/ HRC/18/35 (July 11, 2011); Pedersen, *supra* note 111; DOBSON, *supra* note 172.
- ¹⁸⁴ HOLDER & LEE, *supra* note 4 at 217.
- ¹⁸⁵ H.J. STEINER, P. ALSTON & R. GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT (Oxford Univ. Press 2000) (quoting Mary Robinson, UN High Commission Human Rights stated "we now recognise that respect for human rights is at the core of sustainable development" and acknowledged that the poor and rich unbalance can be redressed").
- ¹⁸⁶ See MIKKELSEN & LANGHELLE, *supra* note 4 (developments that are carried out in a way that is compatible with international environmental law principles and concepts could not automatically be viewed as contrary to environmental protection); Roel Slootweg et. al., *Biodiversity in Environmental Assessment: Enhancing Ecosystem Services for Human Well-being* 2010.
- ¹⁸⁷ Simon, *supra* note 8.
- ¹⁸⁸ For example, UNCLOS with regards to the USA, ILO169 with regards to Canada, Russia and USA, CBD with regards to the USA, USA and Russia with regards to the Espoo Convention and OSPAR with regards to Canada, Russia and the USA.

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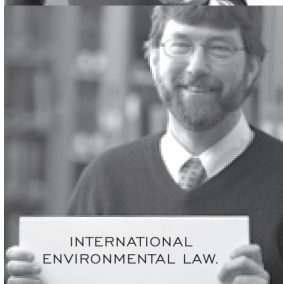
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