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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*, RISK (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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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 [\[www.eisa.org.za/PDF/zimlandreform.pdf\]\(http://www.eisa.org.za/PDF/zimlandreform.pdf\). Colonial legislation created land classification and barred blacks from ownership of land in “veldts” 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.](http://</p></div><div data-bbox=)

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.ihbr.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./VII.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 Env’tl. 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 BROWNLIE, *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 Ghanaea 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) ("[If] 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 WORD 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#axzz2JjKEfCH>.

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 KFHH, Growth of Islamic Finance <http://www.kfhh.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, *Uṣūlī* (pl. *uṣūllīyyīn*) 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