Of Means and Ends: Poverty Alleviation and Environmental Protection

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Mexico City, November 11, 2008

It was with surprise and a certain apprehension that I received your invitation to give the Distinguished Lectures to the Academy at this year's Congress in Mexico. I am humbled by the honor of speaking to you and more than anything I am aware of the considerable challenge of presenting remarks to a room full of so much scholarship, dedication and experience. I am also, though, pleased to speak at a meeting that is taking up one of the greatest ethical and legal problems facing the world today. Thank you very much for this opportunity.

I hope to bring together many of the elements addressed in the superb papers that have been submitted. Because the scope of the topic is immense I would like to start by putting it in a personal context.

I. A Tale of Two Cities

A quonset hut is a formerly popular type of low cost housing, especially for military families during and immediately after World War II. I spent some of my early years living in one and mention it only to emphasize how far it was from there to living in the Oakland hills of California with a panoramic view of the San Francisco Bay and the Golden Gate Bridge. I remember joking to friends when I bought the property that "come the revolution, this house will burn." Well, the revolution came and it did burn. The revolution was not a social or political one, but a devastating ecological one. In October 1991, the periodic shift we Californians experience in wind direction, known as a Santa Ana, appeared. The normal coastal breeze disappeared and the winds blew in

from the desert, coinciding with an unusually hot and dry spell. The winds also were much stronger than normal and they picked up embers from a site high in the hills, fanning them into a conflagration known as the "Oakland Firestorm" that destroyed nearly 4000 homes and killed 28 people in the space of a day. I lost my house and everything in it. For the next two years I was, technically, an internally-displaced person due to a natural disaster, like millions of others around the world. My initial place of refuge was the Claremont Resort Hotel, which offered to house fire victims temporarily. I was officially entered in their records and on my receipt as "Dinah Shelton, Distressed Person." Despite this, I rejoiced that my children and dog were safe. Also easing the situation, my insurance company had an agent there within 24 hours, check in hand to cover initial expenses. The insurance policy ultimately paid all the costs of rebuilding and refurnishing my destroyed home; it also covered my rental of a comparable house until the project was completed. In the meantime, local, state and federal officials provided assistance to all those burned out. Shops gave discounts and other communities reached out. The neighborhood rebuilt itself completely within a couple of years. Only the elderly among my neighbors did not return, because the stress of the fire took their lives within months. That was the hills of Oakland.

In New Orleans, the Lower Ninth Ward is not elevated; it is in what we call the flatlands and like most such areas, its residents are poor and over 98 percent of them are African-American. When Hurricane Katrina threatened in 2005, most of those living in the wealthier parts of the city had the means to leave before the storm made landfall. Those in the Ninth Ward did not. Of the nearly 2000 people killed during Katrina, 70 percent of them were black and poor; most of them came from the Ninth Ward. Those who could escape their houses had no resort hotel to go to; they were herded into a football arena, the Super Dome, where thousands of them were kept with little food or

water, and where the sanitation facilities were overwhelmed after the first day. The aftermath further exacerbated the disproportionate impact of Katrina on the poor, as the latter were wholly underserved by the government and private relief agencies, creating a second disaster. The residents of the Ninth Ward had no insurance to cover immediate expenses or long-term rebuilding, because they could not afford it; they had no place to go. The federal government eventually provided some temporary housing, in mobile homes later found to be contaminated with toxic chemicals, contamination known to the manufacturer and the government at the time they made the mobile homes available. Eventually some of the residents of the Ninth Ward were relocated as far away as Texas and Colorado, never to return to their former homes. Today, the community has not been rebuilt; much of it looks the same as it did shortly after the hurricane. New Orleans as a whole is whiter, older and richer. The same year Katrina hit, there were 27 active hurricanes in the Caribbean, including Stan, which killed 1600 mainly indigenous people in the central highlands of Guatemala.

Desmond Tutu has accurately described the global version of this tale of two cities as "adaptation apartheid."[1] Adaptation in some wealthy countries means the ski areas are buying artificial snow machines; along the coasts, residents are beginning to construct luxurious floating homes. In poor countries, the women and children in coastal areas are being taught to float and to swim. Why is this? Can anything be done to avoid adaptation apartheid becoming a permanent human condition? More broadly, can environmental protection and poverty alleviation become equally and mutually-reinforcing priorities? The title of this lecture raises the question of means and ends in looking at the linkages between poverty alleviation and environmental protection. I want to suggest that in addressing both issues, the aim must be to ensure that neither

[1] United Nations Development Programme, *Human Development Report* (2007), p. 13.

environmental protection nor poverty alleviation is viewed simply as instrumental to achieving the other goal. While it is clear that conditions of poverty contribute to environmental degradation, poverty must be addressed not for that reason alone, but because every human being has an equal right to a life of dignity, with an adequate standard of living, health and well-being. Alleviating poverty is not about charity, but justice and rights, for which there must be an effective legal framework empowering those in need. Similarly, while recognizing that a healthier environment can help improve the lives of the poor, environmental protection is its own goal, nature has intrinsic value and the global resource base and ecological services should be conserved for this reason alone. Putting the two goals together is not only possible, it is essential and leads directly to the concept of environmental justice.

II. A Snapshot of Links between Poverty and the Environment

The World Bank recently raised its benchmark for extreme poverty from $1 a day to $1.25, but still announced on August 27, 2008 that more people are living in that condition than ever before.[2] Over 1.4 billion people – a quarter of the developing world – are living on less than this amount in the 20 poorest countries, where human development indicators declined significantly over the past decade.[3] Globally, one in five girls of primary school age is not in school; more than 55 million girls receive no formal schooling whatsoever; in the least developed countries, women are 30 percent less likely to be literate than men.[4] More than one billion persons lack access to safe drinking water. Four million infants die in their first month of life and another nearly 7 million die before they are five. An estimated 60 percent of these deaths are

[2] "World Bank Finds That Adjustment Places More in Steep Poverty," *New York Times*, Aug. 27, 2008, p. A7.
[3] Id.
[4] Office of the High Commissioner for Human Rights, *Claiming the Millennium Development Goals: A Human Rights Approach* (2008) at 25. HR/PUB/08/3, sales no. E.08.XIV.6.

preventable.[5] Even in rich countries, like the U.S., mortality rates from respiratory illnesses due to pollution are higher among minorities, who make up the ranks of the poor, than they are among whites.

Even without facing natural disasters like Hurricane Katrina, people living in poverty bear a disproportional amount of environmental harm, from air and water pollution to deforestation and crashing fisheries. In urban centers, wealthy families are largely able to isolate themselves from pollution and contamination due to their ability to choose the location of their homes. Poor people, especially the old and young, are less able to escape exposure to pollutants, with disastrous effects on their health. NIMBY is a principle that only works easily for the wealthy and powerful.

The result is that "[a] fifth of the disease burden in developing countries can be linked to environmental risk factors."[6] A direct causality has been established between malaria and deteriorating ecosystems, where in particular the disease flares up in ecological systems altered by irrigation projects, dams, construction sites, standing water and poorly drained areas. It is estimated, for example, that the deforestation and consequent immigration of people into the Brazilian interior increased malaria prevalence in the region by 500 per cent.[7] The same trend has been observed between ecological damage and other vector-borne diseases across a range of developing countries.[8] The burden of these diseases falls especially hard on the poor who often lack the resources to seek medical treatment.

Anthropogenic climate change also has and will continue to have its most devastating impacts on poor and minority communities. According to the IPPC, by 2020, water stresses will lead to shortages for 2 billion people, while rising sea levels

[5] Id. at 27.
[6] Id. at 37.
[7] Smith A.T.P., *The Wealth of Nations* (MIT Press, Cambridge, MA, 2002).
[8] Platt, A.E., *Infecting Ourselves: How Environmental and Social Disruptions Trigger Disease,* Worldwatch Paper 129 (World Watch Institute, Washington, DC, 1996).

risk producing 330 million displaced persons.[9] Between 75 and 250 million people in Africa are projected to be exposed to an increase of water stress due to climate change. The expected negative impacts in Asia include the irreversible melting of Himalayan glaciers, creating increased flooding in glacier-fed rivers from the meltwater, then decreased water resources as the glaciers disappear. Asian coastal areas, especially the big cities in the seven large deltas from India's Ganges to China's Yangtze, will be at greatly increased risk of flooding, with an associated increase in death to due to disease. Crop yields in parts of Asia may drop by 30 per cent.

In Latin America, water supplies are predicted to be "significantly affected" by changes in rainfall patterns and the disappearance of Andean glaciers. Parts of the Amazon rainforest are likely to turn into semi-arid savannah. The most severe impacts of climate change in some parts of the world will be heat extremes. Experience from such events, like that of the 1996 Chicago heat wave, has taught that the disproportionate impact will be felt by poor minority communities.[10] Heat related deaths among non-whites were double those of whites during one heat wave in St. Louis. Climate change also may increase the cost of food and energy and further hurting the poor.

Climate change is already having devastating impact on the lives and well-being of the Inuit, and the inland pastoral nomads of Kenya, whose lands and herds have been decimated by persistent drought. The impacts being felt were documented by Arctic villages in the amicus brief they filed in the U.S. Supreme Court case *Massachusetts v.*

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[9] IPCC (Intergovernmental Panel on Climate Change), *Climate Change 2001: Impacts, Adaptation, an*d *Vulnerability* (A Report of Working Group II of the IPCC, Geneva, 2001).

[10] Julie Sze, 'Race and Power: An Introduction to Environmental Justice Energy Activism,' in *Power, Justice, and the Environment: A Critical Appraisal of the Environmental Justice Movement* 101, 114 n. 4 (David Naguib Pellow & Robert J. Brulle eds., 2005).

EPA.[11] The very existence of the inhabitants of the Arctic is threatened by climate-related disruptions of soils, water, vegetation, and wildlife. These are subsistence communities dependent on the ecosystem. Now, Arctic communities are hunting at their peril as the ice thins and changes. There is no practicable alternative food supply and even if alternative sources existed, the loss of traditional foods and the means of acquiring them, brings with it a loss of culture and religion. Arctic storms are growing more fierce and frequent; one village lost 15 meters of land overnight in a storm. Afterwards, the residents voted to leave the community they have inhabited for the past 4000 years. The April 2007 IPCC report on climate change impacts, adaptation and vulnerability confirmed what the Inuit already know, that "the poorest of the poor in the world – and this includes poor people in prosperous societies – are going to be the worst hit."[12]

They already are. The Red Cross estimates that 1998 was the first year in which the number of refugees from environmental disasters exceeded those displaced as a result of war.[13] Between 2000 and 2004, some 262 million people were affected by climate disasters and 98 percent of them were in the developing world.[14] In OECD countries, 1 in 1500 persons was affected; in developing countries it was one in 19 – 79 times more. The impacts are especially felt by the most vulnerable: children born during a drought are 50 - 79 percent more likely to be malnourished.[15] Women born during a flood are nearly 20 percent less likely to attend primary school.

The links between poverty and environmental conditions become more obvious when one considers that poverty is not merely about income or wealth, but encompasses

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[11] Brief of Amici Curiae Alaska Inter-Tribal Council et al in Support of Petitioners, *Mass. v. EPA*, 127 S.Ct. 1438 (No. 05-1120.

[12] *Climate Change 2007: Impacts, Adaptation and Vulnerability* (IPCC 2007, M.L. Parry et al. eds., 2007).

[13] International Committee of the Red Cross, *Annual Report* (Geneva, 1999).

[14] UNDP supra n. 1, p. 8.

[15] Id. p. 9.

the various elements that contribute to well-being, and the capability of an individual or group to access or achieve them.[16] These elements are very closely linked with ecosystem services such as sufficient clean water for drinking and bathing. Those who are not poor can buy clean water or the equipment to filter and purify water if it is contaminated. The poor have limited resources to pursue these options and usually have to depend on natural and/or public water supply systems.

For the poor, then, development is about human choice and freedom, the self-determination to decide on a future that is not constrained by sickness, hunger, illiteracy, or oppression. It is allowing each person to lead the life that he or she values. The World Bank's *Voices of the Poor* found that the poor themselves define poverty as disempowerment and exclusion.[17] They seek respect for their rights guaranteed in the Universal Declaration of Human Rights. The emphasis thus has to be on empowering the poor, seeing them as rights-bearing agents of change rather than victims requiring aid. How can this be done?

III. Addressing the Challenge: The Millennium Development Goals (MDGs)

One effort being made to alleviate poverty and factors that contribute to it is through the Millennium Development Goals (MDGs), which emerged from long discussions about poverty, development and the environment. The eight MDGs[18] are intended to be discrete, time-bound and measurable poverty reduction goals. There are problems with the MDGs, however. Notably, they view environmental protection as an instrument of poverty alleviation, rather than as a goal in and of itself. They thus fail to

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16 The *World Development Report 2000/01* defined poverty as "the pronounced deprivation of well-being" (World Bank 2001).

17 Id.

18 The eight goals are: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability; develop a global partnership for development.

give sufficient attention to this fundamental value, although it is clear that unless there is success in arresting and reversing the erosion of natural resources, the Millennium Development Goals will not success in the goal of halving extreme poverty.[19] More than halfway through the MDG commitment period, some countries have not met any of the goals and the present economic crisis means some countries are sliding backwards.

Another reason, I would suggest, for the lack of implementation is that the MDGs lack a focus on accountability, public participation, access to information, and transboundary obligations in the field of economic, social and cultural rights. They are weak on empowerment, being state-centric and top-down in their approach. For the Goals to be met, the focus must shift from charity to the poor towards an emphasis on justice and rights. Poverty is a human rights issue because the poor are deprived of basic social goods, such as health, freedom from violence and intimidation, cultural and spiritual guarantees, and the ability to participate in the political process. Human rights law provides support to development practices that help realize poverty alleviation through empowering the vulnerable and marginalized in society. Human rights law also offers accountability mechanisms, because it introduces a normative basis of obligation corresponding to the rights bearers and their rights.

IV. Achieving the MDGs: the Meaning and Relevance of Environmental Justice

The ethical foundation of any society, from which rights emerge, can be measured partly on the basis of how it treats its most vulnerable members. In this respect it is fundamentally unjust that an unequal burden is falling on those who have not been primarily responsible for environmental harm, including climate change. Some 2.6 billion people, the poorest on earth, are being forced to adapt to climate

[19] World Bank, DFID, EU and UNDP, *Linking Poverty Reduction and Environmental Management: Policy Challenges and Opportunities*, (The World Bank, Washington DC, 2002).

change which they did not create and over which they have no control, in countries where they have little or no political voice.

These facts raise issues of international and domestic environmental justice. But what is international justice? In a fable of Aesop, several blind men touch an elephant. Each one comes to a different conclusion about the type of animal it is. One feels the trunk and decides that the elephant is long and thin like a serpent. Another touches the leg and concludes that it is thick and round like a tree. The third strokes the side of the elephant and determines that it is related to the rhinoceros.

Like Aesop's elephant, the term "international justice" had been described in many, often contradictory ways. Some authors hold that the term signifies a fundamental source or rationale providing the moral underpinnings from which law emerges. Other writers posit that international justice is not a source of law, but the ultimate goal or outcome to be achieved by legal norms. Justice has also been presented as an alternative to law, with a meaning akin to fairness or equity. Narrower usages center on (1) legal institutions and procedures for accountability and dispute settlement and (2) the substantive content of norms regulating the use of power over persons and resources. To some extent, the different invocations of environmental justice correspond to classic distinctions between procedural, reparative and distributive justice. Consolidating the meanings in reference to the environment, international (and domestic) justice can be said to describe a system of norms, institutions and procedures aimed at maximizing the well-being of present and future inhabitants of the planet. The primary modalities for achieving this goal include allocation and management of scarce resources, restraints on the exercise of power, and enforcement of the rule of law, aiming to achieve inter-generational, intra-generational and inter-species equity. Efforts to achieve this ideal world are undertaken in the context of existing nation states, but the

objective is not state-centric.[20] Principles of justice can be found in morality, equity and law.

Morality.

For centuries, international legal scholars have equated international justice with principles of natural law, the moral foundation of law.[21] National courts similarly saw positive law as derived from and conforming to "larger considerations of the public good, of commercial liberality, and of international justice…".[22] In the first decades of the twentieth century, writers expressed a conviction that all positive law emerges from and is inferior to international morality or natural law precepts of justice.[23]

The view of international justice as a set of moral values which precedes, is superior to, and fills in gaps in the law, is reflected in the Martens Clause: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from *the laws of humanity, and the dictates of the public conscience*."[24] In the aftermath of World War II, the existence of a superstructure or international public order within which law functions, a matter previously implicit among states with a common history and traditions, needed to be made explicit.[25] The

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[20] Robert Keohane goes further, arguing that the evolution of a system of global justice requires the system's transformation from one based on states to one based on the primacy of world government and global citizenship. R. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 249 (1984).

[21] See e.g., 4 William Blackstone, *Commentaries* at 66-67; Robert Philimore, *Commentaries upon International Law*: Vol. 1 (2nd ed, Butterworths, 1871) 20 et seq.

[22] *The Henry Eubank,* 11 F. Cas. 1166, 1170 (D. Mass. 1833 (No. 6376); see also *The Blackwall*, 77 U.S. (10 Wall.) 1, 14, 2002 AMC 1808, 1815 (1869).

[23] For a historical discussion of the view that natural law is anterior and superior to positive law, see John P. Humphrey, *On the Foundations of International Law*, 39 AJIL 231 (1945).

[24] Convention (No. IV) Respecting the Laws and Customs of War on Land, with annex of Regulations (The Hague, Oct. 18, 1907), 36 Stat. 2277, T.S. No. 539, Pmbl (emphasis added).

[25] See Helen Silving, *In re Eichmann: A Dilemma of Law and Morality*, 55 AJIL 307 (1961).

increasingly accepted concept of jus cogens or "universal law" is one result.

International justice as morality has been invoked (*contra legem*) as justification for humanitarian intervention. The concept of illegal but justified intervention has led some to argue for a right of "ecological intervention" in cases of environmental emergency.[26] Environmental treaties call for contingency planning, notification by the state that is the source of the harm to those states potentially affected and cooperation in case of emergency,[27] but no conventional or customary law gives states a right to intervene on the territory of another state to prevent or mitigate environmental harm. Those who favor ecological intervention thus justify it on the basis of higher humanitarian values and point to the Chernobyl incident as one where intervention would have been justified.

Equity

International justice may also mean equity, in the sense of fairness. Equity can play this role by making necessary exceptions to an otherwise uniformly applied law, in order to provide individualized justice (equity *contra legem*), by filling gaps when the law fails to regulate a problem or situations (equity *praetor legem)* or the law itself may call for equity as the basis for allocating rights and duties (equity *infra legem*).[28]

Affording individualized justice (equity *contra legem*) allows for exceptional adjustments or correctives to fulfill the underlying and overarching purpose for which a law is adopted. In international environmental law, some developing countries have argued for exemptions from legal norms or preferential treatment on the basis that

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[26] See Alexandra Knight, "Can the Security Council Protect Our Earth," 80 *N.Y.U. L. Rev*. 1549 (2005); David Keane, "The Environmental Causes and Consequences of Migration: A Search for the Meaning of Environmental Refugees," 16 *Geo. Int'l Envtl L. Rev*. 209 (2004); Sanford Gaines, Sustainable Development and National Security, 30 *Wm. & Mary Envt'l & Pol'y Rev*. 321 (2006)(citing President Clinton's support for the U.S. use of humanitarian intervention in this context).

[27] See, e.g. UNCLOS, art. 199, (10 Dec. 1982); Nordic Mutual Emergency Assistance Agreement in Connection with Radiation Accidents (Oct 17, 1963), 525 U.N.T.S. 75; and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, Sept. 26, 1986), 25 I.L.M. 1377 (1986).

[28] For other meanings see Oscar Schachter, *International Law in Theory and Practice* 55-56 (1991).

international legal rules impose upon them a disproportionate environmental burden due to the export of pollution from wealthier countries, while they are unable to share in the benefits derived from activities producing the pollution. Trade preferences that accord differential and more favorable treatment to developing countries, as an exception to Article I of GATT, also reflect equitable adjustments to the law. In dispute settlement, Article 38(2) of the Statute of the International Court of Justice (ICJ) provides for equity to be applied as individualized justice (*contra legem*) if the parties so agree, but this option has never been utilized.

Equity also may provide a basis for decision in the absence of law or when it is necessary to fill in gaps in existing norms, such as when new issues emerge that give rise to disputes. International tribunals have applied equity in this way, but usually on the basis that the equitable principle being invoked is a general principle of law. Thus, for example, in the case of *Diversion of the Waters of the Meuse*, where the PCIJ held that it was inequitable for the applicant state to complain of a harmful act which the applicant itself had committed in the past.[29]

Finally, equity is most often chosen as the rule of decision when different circumstances among subjects of the law necessitate differential treatment in order to achieve a just result.[30] Equity has been utilized this way in international environmental law, as discussed further in the next section, in an effort to fairly allocate and regulate scarce resources to ensure that the benefits of environmental resources, the costs associated with protecting them, and any degradation that occurs (that is, all the benefits and burdens) are fairly shared by all members of society.

Law

[29] PCIJ: Ser. A/B 70, p. 25.
[30] M. Akehurst, "Equity and General Principles of Law," 25 *Int'l & Comp. L. Q.* 801 (1976).

In a third meaning, international justice can refer to adherence to the rule of law generally, i.e., accepting that "there is an international society within which every state accepts that the same basic principles of international norms are applicable to every other state and that they are all equal before the law and the international legal system. They can neither modify the rules by their own will nor ignore them. ... The concept of international justice denotes the existence of a common point of view between states for the maintenance of international peace and solving of international conflicts from different aspects of the law."[31] Adherence to the rule of law includes application of norms of equity *infra legem*.

Imposing equal obligations on subjects of law that are unequal in relevant ways is likely to exacerbate inequalities or imposes unfair burdens on those least able to bear the burdens. Legal systems, including the international legal system, therefore often seek to base the distribution of societal goods and burdens according to the principle of distributive justice, seeking substantive equality by treating like alike and unlike differently. Specific legal norms seen to promote international justice generally fall within one of three categories: norms addressing the consequences of wrongful actions (state responsibility and liability); norms of humane treatment (human rights and humanitarian law); and norms allocating scarce resources.

Equity *infra legem* probably plays its major part in determining the distribution of rights and responsibilities in conditions of scarcity and inequality. This first requires law adopted through fair procedures: decision-making based on relevant criteria with the participation of those affected, aiming to produce outcomes that treat all affected groups fairly. An example is the reliance on watercourse agreements negotiated among riparian states on the basis of equitable utilization of the shared waters.

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[31] F. Malekian, "Emasculating the Philosophy of International Criminal Justice in the Iraqi Special Tribunal," 38 *Cornell Int'l L. J.* 638, 678 (2005)

International justice in the sense of distributive justice represents an ethical imperative based on the notion of moral reciprocity, in which all human beings are treated as equals. Relations that have existed between rich and poor countries and rich and poor individuals can be viewed as unjust in their failure to promote equality and to narrow the gap between the haves and have-nots. Moral reciprocity therefore demands redistribution as a matter of justice. In trade relations, inequalities between developed and developing countries could alone be seen to require redistributive justice, but corrective justice may be a more appropriate model, to the extent that developing countries have been disadvantaged as a result of past injustices. Corrective justice "put[s] into balance something that has come out of balance because of an injustice."

International law has attempted to allocate both shared resources and environmental burdens to achieve distributive justice. This equitable approach may call for accommodating pervasive inequalities of economic development or lack of capacity to tackle a given problem, by imposing differential obligations or providing preferential treatment. These unequal relationships seek to foster true equality, largely through favoring the least developed or most affected states.

Distributive justice as the basis for allocating limited resources plays a role in the rules governing the common heritage of mankind. Once resources have been identified as part of the patrimony of all humanity, because they fall outside the sovereignty of any state or group of states, it becomes essential to articulate principles for sharing the management and benefits from such resources and the rules to govern their use. Such rules may promote exploitation, as with deep seabed mineral resources, or may reject extractive operations in favor of conservation, as in Antarctica. The issue of fairness in the allocation of benefits has been a major issue in debates regarding the

resources of the deep seabed, while much of the discussion about Antarctica has concerned procedural fairness and participation in decision-making.

Concern about the equitable distribution of the burdens of environmental protection has led to the creation of a series of financial mechanisms, exemptions, provisions for the transfer of technology, and flexibility in the time required for compliance with international obligations. Capacity building through the provision of financial resources and the transfer of technology is widely included in global multilateral environmental agreements and often becomes a condition for compliance by developing countries. Explicitly stating that economic and social development and poverty eradication are the first and overriding priorities of developing country parties, the Convention on Biological Diversity (CBD) and the UN Framework Convention on Climate Change (UNFCCC) make the provision of financial resources and the transfer of technology from developed country parties a condition for the implementation of treaty obligations by developing country parties. Other conventions, such as the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, express a concern for the special needs and circumstances of developing countries, particularly the least developed, in combating environmental degradation.

Equitable utilization is a widely accepted principle applied in apportioning other shared resources, such as watercourses, fish stocks, and the continental shelf. It finds expression in Article 2 of the 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses, which calls on the parties to take all appropriate measures to ensure that international watercourses are used in a reasonable and equitable way. The status of equitable utilization as a fundamental and just norm in the field of shared natural resources was affirmed by the ICJ in the *Case Concerning the*

Gabčíkovo-Nagymaros Project (Hungary/. Slovakia).[32] In the *Fisheries Jurisdiction Cases (UK v. Iceland; FRG v. Iceland*), the ICJ stressed the obligation of reasonable use and good faith negotiations aimed at an equitable result, taking into account the needs of conservation and the interests of all exploiters of the resource.[33]

Equitable utilization, as an application of the principle of distributive justice, attempts to make a 'reasonable' allocation or reach a fair result in distribution of a scarce resource, based on what are deemed to be relevant factors, such as need, prior use or entitlement, and other interests. On a substantive level, each party is held to have an equal right to use the resource, but since one party's use can impact the beneficial uses of others and not all uses can be satisfied, some limitations are necessary. The Watercourses Convention states that equitable and reasonable uses are to be 'consistent with adequate protection of the watercourse' (Article 5). The phrase suggests that uses that would substantially harm the watercourse could be inherently inequitable and indicates how positive rules may restrict the scope and application of equitable principles.

Notions of entitlement stemming from prior uses, strict equality, proportional use based on population, and priority accorded to certain uses all have been asserted at one time or another as a basis for determining what is an equitable allocation. In some instances, the parties agree in advance on certain divisions or priorities. The 1909 Boundary Waters Treaty between the United States and Canada relies upon equality of use for the generation of power (each country being entitled to use half of the waters along the boundary) and equitable sharing of water for irrigation. In contrast, the 1959 Nile Agreement between the Sudan and Egypt for Full Utilization of Nile Waters

[32] *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/ Slovakia)*, Judgment of 25 September 1997, [1997] I.C.J. 7.
[33] *Fisheries Jurisdiction Cases (United Kingdom v. Iceland; Federal Republic of Germany v.Iceland),* Judgments of 25 July 1974, [1974] I.C.J. 3; and [1974] I.C.J. 175.

confirmed the 'established rights' of each party, without identifying them, while additional amounts were allocated on other equitable bases. While the Nile agreement seems to view established rights as guaranteed by law, most other instruments take the better view and include prior entitlements as one factor in determining equitable allocation.

The idea of equitable utilization in the past had as a corollary that no use had inherent priority over any other. Today, there appears to be a move towards recognizing that some resource uses do have priority over others. In the use of freshwaters, for example, emphasis is being placed on the satisfaction of basic human needs—that is, the provision of safe drinking water and sanitation. The Watercourses Convention, Article 10, provides that in the event of a conflict between the uses of an international watercourse, special regard is to be given to the requirements of vital human needs, while the UN Committee on Economic, Social and Cultural Rights, in its General Comment 12 on the Right to Water, insists that priority be given to safe drinking water and sanitation, with a guaranteed minimum amount to be provided to every person. Thus, substantive human rights considerations take precedence over other factors in allocation.

Another application of distributive and corrective justice in legal norms is found in the principle of common but differentiated responsibilities.[34] Article 5(5) of the amended Montréal Protocol on Substances that Deplete the Ozone Layer (Montréal Protocol), for example, provides that developing countries' capacity to fulfill the obligations and implement the control measures specified in the Montréal Protocol will depend upon the effective implementation by developed nations of financial cooperation and transfer of technology as set out in the Protocol. Similarly statements

[34] Mark A. Drumbl, "Poverty, Wealth, and Obligation in International Environmental Law," 76 *Tulane L. Rev*. 843 (2002).

are contained in Article 4(7) of the United Nations Framework Convention on Climate Change (FCCC) and article 20(4) of the Convention on Biological Diversity (CBD).

Corrective justice supports the demand that developed nations pay for any reductions or modifications the developing world has to make in the process of industrialization, because developed-world industrialization has unfairly circumscribed the ability of the developing world to pass off the negative externalities of development on the environment. The global community finds itself at the tipping point because of the conduct of the developed world. It is precisely because of this conduct that the marginal environmental costs of developing-nation industrialization today are high. It is deemed unfair to allocate each state or each person an equal share of total permissible pollution in the present, given the past high levels of pollution by some countries and persons.

Corrective justice thus has a place in substantiating the notion that developing nations and the poor today are entitled to the resources and technology from developed nations such that developed nations should have to internalize the environmental costs of ongoing and future developing-nation industrialization. In international law, this corrective justice model brushes against theories of formal equality, but justice in the present cannot ignore elements from the past.

Equality in law and rights is nonetheless important. The modern recognition of "the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world" requires basing international law, public policy, and justice on "normative individualism," (i.e., that "all human beings are born free and equal in dignity and rights.") Also, in international economic law, values and policies should be legitimized through individual consent, equal rights, and democratic procedures rather than only through

utilitarian philosophies of maximizing individual and social "utilities" on the basis of money and abstract notions of "welfare" and "economic efficiency." In this view, "justice" remains a never-ending regulatory task and "cannot be related to any one value, be it equality or any other, but only to the complex value system of a man, a community, or mankind."[35]

As the human rights paradigm of international justice develops, it is increasingly moving from an exclusive focus on the conduct of state agents to concern with the actions of legal and natural persons in the private sector. The U.N. Secretary-General's Global Compact, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises, and the U.N. Sub-Commissions Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (2003) all reflect a growing trend of seeing human rights as comprehensively concerned with matters of international justice.

V. Conclusion: Just Process and/or Just Results

If international justice requires like cases to be treated alike while those that are not alike are handled in accordance with the differences, it becomes necessary to determine which similarities and differences are relevant in which situation. To take an example from within national legal systems, income differences are generally accepted as a proper basis for allocating tax burdens but not for voting in national elections. Thus, while the general value of equity or fairness is largely accepted in the context of scarcity and inequality, debate centers on the appropriate principle on which to determine equitable allocation—whether decisions should be based on need, capacity,

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[35] See Ernst-Ulrich Petersmann, "Theories of Justice, Human Rights, and the Constitution of International Markets," 37 *Loy. L.A. L. Rev.* 407, 412 (2003) ("[C]ontrary to the suggestion by John Rawls to base international justice on equal freedoms of peoples, human rights offer a more appropriate constitutional basis for national as well as international justice."). as Petersmann puts it, "[t]he universal recognition of human rights requires basing 'international justice '--contrary to the views of John Rawls--not only on freedom and equality of peoples, but also on equal human rights and multi-level constitutionalism." Petersmann, at 458.

prior entitlement, 'just deserts,' the greatest good for the greatest number, or strict equality of treatment. The various factors may point towards allocation in one direction or in many different directions. In addition, a single factor, such as need, may be asserted by more than one actor or group of actors. These latter problems have complicated international negotiations, for example, over access to, and equitable benefit sharing of, the use of genetic resources. Some possible alternatives are the following:

Formal equality (for example, per capita distribution) is one method of allocating resources and burdens. As noted earlier, rules are generally deemed just if they apply to all without discrimination. Yet equal treatment may yield extreme outcomes when pre-existing economic or other inequalities exist in society. At the international level, when allocations are based on formal equality, moreover, the issue of whether the appropriate apportioning unit is the state or the individual arise, as in determining permissible emission levels. Requiring all states to implement environmental agreements in identical fashion would make many developing countries, or groups in those countries, worse off, at least in the short term. From the perspective of equity towards the most vulnerable or least well off, environmental protection should not result in further deterioration of their well-being. In order to address this problem, non-equal or differential obligations can and are being imposed as equitable means to foster substantive equality in the long term.

Notions of *entitlement* uphold the existing distribution of goods if they were justly acquired according to the rules in force at the time of acquisition. Entitlement protection is contained in some environmental laws and agreements that 'grandfather' existing activities by exempting them from retrofitting to meet more exacting and newly enacted standards or allowing emissions to continue at pre-existing levels. Some

international environmental agreements, such as the 1987 Sulphur Protocol to the Convention on Long-Range Transboundary Air Pollution, require equal reductions in pollution from historic baseline levels. This system rewards those who already have the goods and may not result in what is considered to be a fair distribution. An entitlement approach also may serve to deny essential goods to others.

Different *capacities* may be the decisive factor chosen to achieve distributive justice, as expressed in environmental agreements that require the Organisation for Economic Cooperation and Development (OECD) or other groupings of countries to finance poorer countries or transfer technology because they have the ability to do so. One problem that can arise is making the relevant determinations of ability to pay. States may argue that various factors make if fair for them to be grouped with the poorer countries. The Kyoto Protocol classifies Saudi Arabia and Singapore as 'developing,' while Bulgaria is classified as developed. Without objective criteria to determine the groupings, along with the flexibility to move states from one group to another, the problem will largely be a political one. Some treaties avoid this problem by incorporating notions of capacity generally, requiring each state party to take measures 'in accordance with its particular conditions and capabilities' or 'as far as possible and as appropriate.'[36]

Inequalities in the ability to access the benefits of natural resources and address environmental impacts are evident. While the reality of environmental interdependence imposes a need for inter-state cooperation, states are impacted differently by specific environmental conditions, have greater or lesser interest in or impact on a particular problem, and may lack the human or financial capacity to take actions deemed prudent or necessary by the international community. It is clear that the expenditures necessary

[36] Articles 6–11 of the Convention on Biological Diversity.

to prevent or abate environmental hazards can be high in the short term. This factor often provokes in developing countries rational fears that participation in international environmental treaties may decelerate or limit industrial development. As a result of these types of considerations, the Food and Agricultural Organization's Code of Conduct for Responsible Fisheries[37] recognizes that the capacity of developing countries to implement the recommendations of the code have to be taken into account because existing inequality with regard to resources and capacities influences the ability of such states to take action on specific environmental problems.

Equitable allocation based on different *needs* is recognized in the Rio Declaration and reappears, for example, in the UNFCCC. In implementing the convention, the parties are to be guided by 'the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the convention.'[38] The question of what would be 'disproportionate' is left open. Article 4(8) adds that all parties are to consider what actions, including funding, insurance, and transfer of technology, may be necessary to meet the specific needs of specially affected states. Determining need, like determining capacity, may require the development of objective criteria and the assessment of the situation over time of each state party.

Different *historical responsibility* — that is, past and present contribution to environmental harm— is certainly one of the most relevant factors in allocating burdens. The 1991 Beijing Declaration on Environment and Development[39] stated the view of the developing world that 'the developed countries bear responsibility for the

[37] FAO Conference, Rome, Oct. 31, 1995, ISBN 92-5-103834-1.
[38] Article 3.2 of the UN Framework Convention on Climate Change.
[39] Peoples' Republic of China, Beijing Ministerial Declaration on Environment and Development, June 19, 1991.

degradation of the global environment. Ever since the Industrial Revolution, the developed countries have over-exploited the world's natural resources through unsustainable patterns of production and consumption, causing damage to the global environment, to the detriment of the developing countries.' Fairness and a morally coherent response suggest that these states, which attained their current developed status through imposing non-internalized costs on the environment, take the major abatement actions, rather than demanding that everyone equally mitigate the externalities, including those not responsible for initially creating the problem. Equity, in this sense, is justified as a means of corrective justice, requiring remedial conduct to correct past wrongs.

Whichever approach is followed, a growing recognition of the interdependence of states and of problems that are insoluble through unilateral action, has led to acceptance of the principle of solidarity or partnership. Interdependence underscores the search for a just global society, which is a quest as old as human civilization. To many, a just society involves ensuring that the natural components of the environment continue to sustain life in all of its diversity and that the natural benefits that humans enjoy are fairly shared among all those present and to come. The moral dimension of equity is such that it is often deemed synonymous with justice.

Justice in international environmental law thus means a rational sharing of the burdens and costs of environmental protection, discharged through the procedural and substantive adjustment of rights and duties. Justice in the sense of fairness also means warning states of imminent peril and cooperating to resolve problems that will impact the ecological processes or resources on which future well-being depends. While certain stated principles of environmental law seem to aim for such international justice, there has been an evident strong resistance to aiding the "have-nots" on the part of some

of those who "have," within and across states. To the extent progress has been made in fairly allocating benefits and burdens in international environmental law, it may be considered the result of ecological interdependence and issue-linkages. Developed countries increasingly recognize that they *must* have the cooperation of developing states if the global environment is to be restored and maintained; they cannot do it on their own. Benefit and burden-sharing then becomes the just price demanded by the developing world for its cooperation.

Justice and equity are important and, with their emphasis on fairness, are more attractive to many than economic efficiency or open conflict as a means of deciding how to allocate and sustain limited commons resources. Without a cooperative and just solution to the issue of allocation, competitive utilization of the resource may continue until the resource is depleted. Equitable or differentiated obligations may induce participation in action among the competing states as well as among states that may not have any direct interest in a specific environmental issue.

Equity also may be justified on the basis of self-interest. Environmental protection is in everyone's interest, and the adjustment of legal obligations to achieve better protection is self-interested. An allocation of burdens that takes into account the more vulnerable position of developing states may benefit all through inducing their cooperation to improve global environmental conditions. Moreover, Scott Barrett's work has indicated that agreements perceived to be fair are not only likely to induce greater participation but are more likely to be self-enforcing and thus successful over the long term.[40]

In sum, international justice is not only a matter of morality and equity but may also foster more effective action on issues of common concern and more effective

[40] S. Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (London: Oxford University Press, 2003).

implementation of legal norms. Equity, as reflecting notions of fairness and legitimacy, may produce more or better compliance with environmental agreements. In practice, therefore, equitable differentiation has become the price to be paid to ensure universal participation in environmental agreements concerned with global problems. Yet, it should not be forgotten, as Thomas Franck has noted, that '[t]he law promotes distributive justice not merely to secure greater compliance, but primarily because most people think it is *right* to act justly.'[41]

[41] T. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), at 8.