

# *Fordham International Law Journal*

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*Volume 38, Issue 5*

2015

*Article 4*

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## Environmental Justice Reimagined Through Human Security and Post-Modern Ecological Feminism: A Neglected Perspective on Climate Change

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# Environmental Justice Reimagined Through Human Security and Post-Modern Ecological Feminism: A Neglected Perspective on Climate Change

Linda A. Malone

## Abstract

The modern feminist and environmental movements were given birth in the same decade, and both reached a critical developmental stage in the 1980s. The full extent of their relevance to each other was briefly explored in the 1990s in very limited legal literature, consisting primarily of three articles that began to explore the concept of ecological feminism, or “ecofeminism.” Since the mid-1990s, however, ecofeminism has largely been left to examination and study by sociologists with virtually no contribution from legal academics or environmental professionals. The point of this study is to demonstrate that it would be a missed opportunity not to revisit the concept of ecofeminism with today’s world structure and the pressing problems of international environmental degradation. Specifically, this article will focus on the problem of climate change and the valuable insights that a post-modern ecofeminist perspective on international environmental law could bring. This article will propose that post-modern feminism move beyond earlier ecofeminist perspectives, with their self-limiting focus on enhancing participation of women in international governance and the disproportionate impacts of environmental problems on women, to a broader perspective on the underlying causes of international environmental problems drawing from twenty-first century concepts of environmental justice, deconstructed and reimagined state sovereignty, population control, food security, and energy security.

**KEYWORDS:** Environmental Justice, Climate Change, Feminism, Gender, Ecofeminism, Marshall Islands

ARTICLE

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*INTRODUCTION*

The modern feminist and environmental movements were given birth in the same decade, and both reached a critical developmental

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\* Marshall-Wythe Foundation Professor of Law, William and Mary Law School, Visiting Fellow, Columbia Law School Sabin Center for Climate Change Law. In the formative stages of this project, I benefitted from the input I received as a panelist at the 2014 annual meeting of the World Conservation Union Academy of Environmental Law. Invaluable research assistance was provided by Shaina Taylor, Melanie Lazor, Nathan Michaux, Michael Wyatt, Nicholas Medved, Karl Spiker, Paul Ertel, and Seth Perlitz, with the support of Felicia Burton and Derek Mathis. Finally, in the past I benefitted from the insights and experience of many of the participants in the conference, as well as individual discussions with Professor Michael Gerrard and Professor John Dernbach on this and other climate change topics. I also wish to express my appreciation for the questions and comments received on this article from the audience at Widener Law School's Distinguished Environmental Lecture Series.

stage in the 1980s.<sup>1</sup> The full extent of their relevance to each other was briefly explored in the 1990s in very limited legal literature, consisting primarily of three articles that began to explore the concept of ecological feminism, or “ecofeminism.”<sup>2</sup> Since the mid-1990s, however, ecofeminism has largely been left to examination and study by sociologists with virtually no contribution from legal academics or environmental professionals.<sup>3</sup> The point of this study is to demonstrate that it would be a missed opportunity not to revisit the concept of ecofeminism with today’s world structure and the pressing problems of international environmental degradation. Specifically, this article will focus on the problem of climate change and the valuable insights that a post-modern ecofeminist perspective on international environmental law could bring.<sup>4</sup> This article will propose that post-modern feminism move beyond earlier ecofeminist perspectives, with their self-limiting focus on enhancing participation of women in international governance and the disproportionate impacts of environmental problems on women, to a broader perspective on the underlying causes of international environmental problems drawing from twenty-first century concepts of environmental justice, deconstructed and reimagined state sovereignty, population control, food security, and energy security.

As global perspectives on population, food, energy, and inequities in environmental law have themselves evolved to deal with new political realities and resource scarcities, so should the construct of ecofeminism. Post-modern ecofeminism inevitably calls for fundamental reimagining and rethinking of the role that women play in environmental preservation on a global basis, and on a national and local basis as well. In so doing, the author proposes that all of these

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1. See generally Anne E. Simon, *Whose Move? Breaking the Stalemate in Feminist and Environmental Activism*, 2 *UCLA WOMEN’S L.J.* 145 (1992); Christopher C. Joyner & George E. Little, *It’s Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 *B.U. INT’L L.J.* 223 (1996).

2. See *infra* notes 26-32, 36-47 and accompanying text (discussing the law review articles *Whose Move? Breaking the Stalemate in Feminist and Environmental Activism* by Anne E. Simon, *In a Greener Voice: Feminist Theory & Environmental Justice* by Robert R.M. Verchick, and *It’s Not Nice to Fool Mother Nature!* by Christopher C. Joyner & George E. Little).

3. See, e.g., *infra* notes 49-50 and accompanying text (noting the scarcity of legal literature on ecofeminism).

4. For the purposes of this article, “post-modern” is used in the broadest sense of skepticism toward established norms and institutions, and assumptions of bias or ideology in power structures.

emerging concerns of the world community for food, population control, energy, and equity require a re-focused ecofeminism that embraces and incorporates not only women, but also all the most disadvantaged stakeholders as absolutely indispensable to resolving those problems.

Both the feminist movement and the environmental movement of the twentieth century suffered from splintering of perspectives on the goals to be achieved, inevitability reflecting a greater maturity and recognition of complexity natural to any movement, but which nevertheless impeded both movements in reaching any kind of consensus.<sup>5</sup> More generally, public international law has itself been splintered into sub-issues of greater specificity and specialization – as in many areas of the law – that have worked to undermine any type of synthesis or coalition of competing interests.<sup>6</sup> Feminism in the 1980s reached its crises as a result of the different views of feminism on issues of pornography and sexual identity, which threatened to destroy any momentum that the movement as a whole had presented.<sup>7</sup> Similarly, in the 1980s, questions about developing economies, the concept of sustainable development, and the extent to which it compromised or qualified environmental preservation, threw the international environmental movement into a tailspin.<sup>8</sup> Environmental justice, the “grass roots” movement to address decision-making that disadvantaged already-disadvantaged groups, suffered as well during this period from an apparent lack of enforceability.<sup>9</sup>

As these movements struggled for credibility and consensus, the new globalization and so-called new world order after the collapse of the Soviet Union led to a questioning of the traditional notion of national security.<sup>10</sup> The sanctity of State sovereignty was reevaluated as states began to separate, crumble, and fail or be unwilling to fulfill the most fundamental duties owed to their respective populations. At the same time, food and energy security became a crucial determinant

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5. See *infra* note 23 and accompanying text (mentioning infighting among advocates).

6. See *infra* notes 23-24 and accompanying text (discussing the lack of interdisciplinary study on environmental feminism from a legal perspective prior to 1997).

7. See *infra* note 44 and accompanying text (on the effects of infighting within the feminist movement).

8. See *infra* notes 30-33 and accompanying text (questioning the view that environmental preservation constituted oppression to women).

9. See *infra* notes 38-42 and accompanying text (discussing environmental justice).

10. See *infra* note 85 and accompanying text (on the impact of current trends in the changing view of national security to environmental feminism).

of the future of growing populations in areas least able to adapt to environmental change and provide the food and energy necessary for the population. The result has been a redefinition of the Westphalian notion of State sovereignty, conditioning the concept of State sovereignty on fulfillment of the State's obligation to protect and provide for its own people.<sup>11</sup> This shift in focus from State rights to State responsibility in turn expanded the concept of national security to encompass human security, ensuring civil society a stable and safe basis for its continuance.<sup>12</sup>

Part I of this article will give a history of the legal and other academic interdisciplinary literature on ecofeminism.<sup>13</sup> There is a little-noticed convergence in all of these disciplines on greater enfranchisement of the disadvantaged, including specifically women and children.<sup>14</sup> This convergence also encompasses the growing sensitivity to an obligation of developed countries to help sustain and even compensate developing countries for the environmental degradation they suffer due to the excessive exploitation of common resources by the developed countries. Ecofeminism and its central notion of an "ethic of care" is a necessary foundation for ensuring that such obligations are imposed.

Part II of the article will focus specifically on recent developments in gender balance and climate change in negotiations and remedies.<sup>15</sup> In addition, Part II will then focus on how the so-called bottom-up approach to addressing climate change incorporates women as the most essential providers of food and the most essential gatherers of energy throughout the globe. Their role is minimized, but critically important and more important than the more powerful and visible positions of power.<sup>16</sup> The September 2014 conference on Climate Change in New York symbolizes the new intensity and

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11. See *infra* notes 80-81 and accompanying text (on the recognition of States' "responsibility to protect").

12. See *infra* note 83 and accompanying text (as to how interpretations of international law have expanded to allow responses to humanitarian crises).

13. See, e.g., *infra* notes 49-53 and accompanying text (highlighting the scarcity of legal literature, despite writings by sociologists on various issues).

14. See *infra* notes 52-56 and accompanying text (analyzing the effects of climate change on women as compared to men).

15. See *infra* notes 75-87 and accompanying text (discussing the role of women in addressing climate change).

16. See, e.g., Elizabeth Spahn, *Feeling Grounded: A Gendered View of Population Control*, 27 *ENVTL. L.* 1295, 1316 (1997).

recognition that climate change is an immediate problem in which civil society is more pro-active than traditional power structures.<sup>17</sup>

Part III will focus on the evolving concepts of State sovereignty and specifically the emerging or emerged norm of the responsibility to protect.<sup>18</sup> This Part will also demonstrate that the responsibility to protect cannot be limited to situations of military conflict.<sup>19</sup> It must be extended to environmental disasters, which inevitably lead to military conflict and instability.<sup>20</sup> As part of this section, a closer examination will be made of both the role of the responsibility to protect on what traditionally would be considered to be national security issues, as well as how the interrelatedness of civil society security and military security have rendered meaningless the traditional division between the two.<sup>21</sup>

Part IV will utilize the climate change quandary of the disappearing island State, and the example of the Marshall Islands in particular, to illustrate how ecofeminist analytical methods may bring more imaginative approaches to climate change crises than “hard” international environmental law can.<sup>22</sup> This article serves as an introduction to a series addressing the overlooked or insufficiently examined aspects of climate change from a legal perspective. The academic literature on climate change has grown exponentially in direct relationship to the continuing failures of the global community to come to grips with the impacts of climate change and implement a comprehensive framework for improvement. The question posed is why the proliferation of academic analysis of the legal dimensions has not been effective, perhaps even had little or no impact, in bringing about necessary changes. There are, of course, socio-political factors responsible, but that is the case with any environmental problem or crisis. Why has climate change law and legal theory, as voluminous as it is now, accomplished so little in creating meaningful momentum

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17. See *infra* notes 77-78 and accompanying text (describing the International Women’s Earth and Climate Summit).

18. See *infra* notes 80-81 and accompanying text (analyzing the development and international acknowledgement of the R2P).

19. See *infra* notes 82-87 and accompanying text (positing that environmental crises present as great a danger as the more traditionally recognized dangers already included in the R2P).

20. See *infra* notes 82-87 and accompanying text.

21. See *infra* notes 82-87 and accompanying text.

22. See *infra* Part IV (presenting a case study of environmental dilemmas of the Marshall Islands).

and innovation in addressing the causes of climate change, its mitigation, and adaptation to its effects?

The first step in this exploration is determining what aspects of climate change in the legal literature, despite its volume, seem under-represented or neglected in relation to their importance in finding a solution. This article suggests just a few of many possibilities. The challenge is then to determine any common cause for this failure of analysis. This project posits that the causes are failures endemic, not just to the approaches to climate change law or even international environmental law, but to a persistent lack of pragmatism and sense of communal responsibility in international legal theory and policy. Ultimately, if the academic literature is to have any influence in the necessity for a solution, the very nature of academic scholarship and theory must be re-evaluated and re-formulated against this backdrop.

#### I. *THE OVERLOOKED VALUE OF ECOLOGICAL FEMINISM AS A LEGAL PERSPECTIVE*

To an extent, feminism and the environmental movement have been victims of their own early successes. Both movements began to suffer from infighting among their advocates over what the priorities should be, and academics' abstract notions regarding how particular problems should be posed as opposed to how they should be addressed.<sup>23</sup> In the introduction to her 1997 book *Ecofeminism: Women, Culture, Nature*, Karen J. Warren, Ph.D. notes the following:

During the past ten years, several journals, anthologies and single-authored books have been published on ecological feminism, or "ecofeminism." Ecological feminism is the position that there are important connections between how one treats

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23. See, e.g., *ECOFEMINISM: WOMEN, CULTURE, NATURE* (Karren J. Warren ed., 1997) (highlighting that there is no multidisciplinary perspective on topics in ecofeminist scholarship); see also Marilyn Waring, *Gender and International Law: Women and the Right to Develop*, 12 *AUST. YBIL* 177 (1988-1989) (criticizing perceived shortcomings in international law from a feminist perspective); Alice Kaswan, *Professor Commentary: Defining the Movement: Parallels Between Feminism and Environmentalism*, 9 *CARDOZO WOMEN'S L.J.* 455 (2003) (highlighting the shortcomings of both the feminist and environmental movements with regards to traditionally disadvantaged communities); Dianne Otto, *Challenging the "New World Order": International Law, Global Democracy and the Possibilities for Women*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 371 (Fall 1993) (arguing the "new world order" of global liberal democracy marginalizes and controls women); Hilary Charlesworth & Christine M. Chinkin, *The Gender of Jus Cogens*, 15.1 *HUM. RTS. Q.* 63 (Feb. 1993) (arguing bias in favor of men undermines the application of jus cogens in international law).



women, people of color, and the underclass on one hand and how one treats the nonhuman natural environment on the other. Of these various publications, none has provided a multidisciplinary perspective on topics in ecofeminist scholarship. What this volume does is just that: it provides a critical examination of ecofeminism from a variety of cross-cultural and multidisciplinary perspectives. As such, it is an important addition to the literature on ecofeminism.<sup>24</sup>

Significantly, the book consists of three parts; the first part focuses on clerical data, the second on interdisciplinary perspectives, and the third on philosophical perspectives. Conspicuously missing from this list are legal perspectives on ecofeminism.<sup>25</sup>

With only a few exceptions, it would fall to academics outside of the legal literature to address ecofeminism as a valuable perspective on environmental problems. The first notable exception was an article written by Anne E. Simon in the *UCLA Women's Law Journal*, entitled *Whose Move? Breaking the Stalemate in Feminist and Environmental Activism*.<sup>26</sup> Significantly, Ms. Simon was at the time an administrative law judge from the Massachusetts Department of Environmental Protection, and the essay was part of her presentation on a panel at a conference entitled "Justice and Gender: A New Look at Women and the Law – A Conference on Feminist Jurisprudence," sponsored by the University of Maine School of Law, on October 19, 1991.<sup>27</sup> The conference was dedicated to the memory of Mary Joe Frug, a professor of law at the New England School of Law in Boston, who was supposed to be on the panel before she was murdered in April 1991.<sup>28</sup> Professor Frug was a forerunner of post-modern feminist theory and a renowned post-modern feminist legal scholar before she was murdered by an unknown assailant.<sup>29</sup> Simon's essay questions the view of many feminists that environmental preservation is yet another form of oppression against women because so many global problems of environmental degradation are related to

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24. Karen J. Warren, *Introduction* to *ECOFEMINISM: WOMEN, CULTURE, NATURE* xi (Karen J. Warren ed., 1997).

25. *See id.*

26. *See* Anne E. Simon, *Whose Move? Breaking the Stalemate in Feminist and Environmental Activism*, 2 *UCLA WOMEN'S L.J.* 145, 149 (1992).

27. *See id.* at 145.

28. *See id.*

29. *See id.*; Amanda C. Pustilnik, *Three Years Later, Frug Probe Remains Open*, *The Harvard Crimson* (April 21, 1994), <http://www.thecrimson.com/article/1994/4/21/three-years-later-frug-probe-remains>.

global population, with women seen as “population polluters.”<sup>30</sup> As a result, various forms of coercion to lower birth rates have been imposed, usually directed toward poor women, according to Simon.<sup>31</sup> She warns that whatever position feminists take on the relationship between women and nature, all must acknowledge that outright rejection of this relationship is not helpful to women struggling all over the world nor to the necessary preservation of the ecological balance.<sup>32</sup> Simon asserts that feminists must “reevaluate the view that caring about nature will contribute to women’s oppression” if they want “to continue to move forward both to end the oppression of women and to keep the planet alive and healthy for all its inhabitants.”<sup>33</sup>

In 1999, an entire book by feminist scholars, activists, and members of the community on women, population, and the environment would be dedicated to debunking the perspective that women are population polluters.<sup>34</sup> Its essays challenge the claims that global and environmental degradation, widespread poverty and famine are predominantly the result of population growth and that population growth in turn is primarily attributable to women, in particular poor and minority women.<sup>35</sup> In doing so, they point out that the structural causes of environmental degradation – including, among other factors, colonialism, trade imbalances, militarism, corporate pollution, consumerism, and economic inequities.<sup>36</sup>

The other two significant contributions to the legal academic literature on ecofeminism are written by men, both in 1996.<sup>37</sup> In the

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30. *See id.* at 161-63; *see generally* DANGEROUS INTERSECTIONS: FEMINIST PERSPECTIVES ON POPULATION, ENVIRONMENT, AND DEVELOPMENT (Jael Silliman & Ynestra King eds., 1999); Geetanjali Misra et al., *Poor Reproductive Health and Environmental Degradation: Outcomes of Women’s Low Status in India*, 6 COLORADO J. OF INT’L ENVTL. L. AND POL’Y 273 (1995); Elizabeth Spahn, *Feeling Grounded: A Gendered View of Population Control*, 27 ENVTL. L. 1295 (1997) (discussing environmentalism’s relation to issues of population and reproductive health).

31. *See* Simon, *supra* note 27, at 161-63.

32. *See* Simon, *supra* note 27, at 164.

33. *See id.*

34. DANGEROUS INTERSECTIONS: FEMINIST PERSPECTIVES ON POPULATION, ENVIRONMENT, AND DEVELOPMENT (Jael Silliman & Ynestra King eds., 1999).

35. *See generally id.*

36. *See generally id.*

37. *See* Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN’S L.J. 23 (1996); *see also* Christopher C. Joyner & George E. Little, *It’s Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 B.U. INT’L L.J. 223 (1996).

first of these, *In a Greener Voice: Feminist Theory & Environmental Justice*, Professor Robert R.M. Verchick notes that he is not presuming to speak for feminist environmental justice activists or for women, but is, in the words of Mari Matsuda “a theoretical co-conspirator.”<sup>38</sup> As he confirms in a footnote, aside from Anne Simon’s essay, to his knowledge no law review article had explored environmental justice within the context of feminist theory at that time.<sup>39</sup> He notes that some social scientists had begun examining environmental justice themes in the context of feminism.<sup>40</sup> Verchick’s article is essentially directed at identifying the impact of women in the environmental justice movement and how it affects that movement in various ways.<sup>41</sup> He specifically notes that, unlike environmentalists in the first or second “waves,” these activists are acting out of a sense of “necessity to protect their own lives and personal relationships. And, significantly, the networks they are developing are led and populated mainly by women.”<sup>42</sup>

In other words, he sees the disparate impact of environmental degradation on women as leading to their greater involvement in the environmental justice movement and in formulating a broader sense of environmental justice to encompass not only the poor, but the otherwise disadvantaged.<sup>43</sup> In *It is Not Nice to Fool Mother Nature!*

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38. See Verchick, *supra* note 37, at 27.

39. *Id.* at 26 n. 10.

40. *Id.* (citing Barbara Epstein, *Ecofeminism and Grass-roots Environmentalism in the United States*, in TOXIC STRUGGLES: THE THEORY & PRACTICE OF ENVIRONMENTAL JUSTICE 144 (Richard Hofrichter ed., 1993); Cynthia Hamilton, *Concerned Citizens of Central Los Angeles*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR 207 (Robert D. Bullard ed., 1994); Celene Krauss, *Women of Color on the Front Line*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR 256 (Robert D. Bullard ed., 1994); Lin Nelson, *The Place of Women in Polluted Places*, in REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM 173 (Irene Diamond & Gloria Feman Orenstein eds., 1990)).

41. See *supra* note 40 and accompanying text.

42. Verchick, *supra* note 37, at 23.

43. See generally CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE (2008); INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE (Rosemary Rayfuse & Shirley V. Scott eds., 2012); THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012); Deepa Badrinarayana, *Three Climate Crises*, 44 CASE W. RES. J. INT’L L. 435 (2011); David B. Hunter, *Human Rights Implications for Climate Change Negotiations*, 11 OR. REV. INT’L L. 331 (2009); John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT’L L. 163 (2009); Diana M. Liverman, *Vulnerability to Global Environmental Change*, UNDERSTANDING GLOBAL ENVIRONMENTAL CHANGE: THE CONTRIBUTIONS OF RISK ANALYSIS AND MANAGEMENT 27 (R.E. Kasperson et al., eds. 1990); Hari M. Osofsky, *Climate Change and Crises of International Law: Possibilities for Geographic Reimaging*,

*The Mystique of Feminist International Environmental Law*, the authors take to the relatively recent emergence of feminist perspective on international law generally, and evaluate its implications or applications to international and environmental law specifically.<sup>44</sup> In his criticism of feminist scholarship, Professor Teson points out the tension between liberal and radical feminism, which he says “coexist in uneasy tension,” thus making use of the in-fighting within feminist thought to devalue feminist perspectives to international law generally.<sup>45</sup> The article by Joyner and Little notes that there are four chief assumptions in the feminist critique of global and environmental law, of which they say the fourth is the most significant.<sup>46</sup> That approach is “that concern for the global environment falls more aptly under the female ‘ethic of care’ grounds for moral reasoning than that of the male process guided by an ‘ethic of rights’.”<sup>47</sup> As a result, the authors suggest, women are more inclined to respect the human relationship to the environment, as opposed to men who see it as an object to be dominated and controlled.<sup>48</sup> The almost prophetic part of the article deals with how both assumptions of the feminist approach to international and environmental law suggest criticisms of certain fundamental concepts of international law; specifically, the “persistent primacy of state sovereignty, the espoused right to a healthy environment, and the gendered connotations implicit in the critical economic concept of sustainable development.”<sup>49</sup> This insight into some of the critical implications of the feminist approach to international and environmental law are even more insightful today in the sense that we are seeing an erosion of the primacy of state sovereignty and virulent debate over the right to a healthy environment, and its compatibility with the concept of sustainable development. The authors’ suggestion that ecofeminism has

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44 CASE W. RES. J. INT’L L. 423 (2011); Sheridan Bartlett, *Climate Change and Urban Children: Impacts and Implications for Adaptation in Low- and Middle-Income Countries*, ENVIRONMENT AND URBANIZATION, Sep. 26, 2008, at 501; Justin Gillis, *U.N. Panel Issues Its Starkest Warning Yet on Global Warming*, N.Y. TIMES, Nov. 3, 2014, at A6; Joane Nagel et al., WORKSHOP ON SOCIOLOGICAL PERSPECTIVES ON GLOBAL CLIMATE CHANGE (2010) (discussing the dangers of climate change and its connection to human rights issues).

44. See generally Joyner & Little, *supra* note 37.

45. See *id.* at 227 n.19 (quoting Fernando R. Teson, *Feminism and International Law: A Reply*, 33 VA. J. INT’L L. 647, 648 (1993)) (internal quotation marks omitted).

46. See *id.* at 248-49.

47. *Id.* at 248.

48. Joyner & Little, *supra* note 37, at 248-49.

49. *Id.* at 250.

something important to add in addressing each of these three aspects is even more convincing today, as they have risen to the forefront of the environmental agenda.

## II. RECENT DEVELOPMENTS IN GENDER AND CLIMATE CHANGE

This history of the legal literature is most striking for the scarcity of the literature on ecofeminism, a scarcity that has yet to be remedied. As global consciousness was raised about climate change in the mid-1990s, a new security issue was injected into the political dialogue: the question of food security.<sup>50</sup> As a result of the interrelationship between climate change and food, articles discussing food security were written primarily by sociologists and geographers on the interrelationship between climate change and social vulnerability in general.<sup>51</sup> In such articles, the impact upon women was noted, but more generally in the context of socially vulnerable groups, and particularly the poor being less well equipped to deal with the impacts of climate change in access to food.<sup>52</sup> Meanwhile, many of the articles, mostly written by women, were still fighting the battle against women being depicted as “population polluters.”<sup>53</sup> These articles typically offered a gendered perspective on sustainable development being maintained in the face of population control without unduly oppressing women populations, particularly poor women.<sup>54</sup> Typically, the gender mentioned in the relationship to vulnerability to climate disruption focuses on women and how, with their lower incomes and lack of rights to land and other resources,

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50. See, e.g., T.E. Downing, *Climate Change and Vulnerable Places: Global Food Security and Country Studies in Zimbabwe, Kenya, Senegal and Chile*, Research Paper, ENV'T CHANGE UNIT, OXFORD (1992), available at <http://www.ciesin.org/docs/004-042/004-042.html>; see also Hans G. Bohle et al., *Climate Change and Social Vulnerability: Toward a Sociology and Geography of Food Insecurity*, 4 GLOBAL ENVTL. CHANGE 37, 37 (1994).

51. See sources cited *supra* note 50.

52. Bohle, *supra* note 50, at 44-45.

53. See generally Spahn, *supra* note 16 (asserting that women are controlled in order to slow population growth and better impact the environment); see also Cynthia Kennedy, *Cairo, Beijing, and the Global Environmental Crisis: The Continuing International Dialogue on Population Stabilization and Sustainable Development*, 8 GEO. INT'L ENVTL. L. REV. 451 (1996); Geetanjali Misra et al., *Poor Reproductive Health and Environmental Degradation: Outcomes of Women's Low Status in India*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 273 (1995); Katherine Spengler, *Expansion of Third World Women's Empowerment: The Emergence of Sustainable Development and the Evolution of International Economic Strategy*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 303 (2001).

54. See generally Spahn, *supra* note 16.

women could be more affected by drought and natural disasters.<sup>55</sup> Changes in environmental resources affect women more than men because women have the traditional responsibilities for energy, water collection, and farming.<sup>56</sup> Commentators often have to walk a fine line between the all-too-familiar depiction of woman as victims, and a more accurate representation of women as having critical roles in the sustainability of families in civil society, and thus being of critical importance in any solutions to the global climate change dilemma. With the explosion of feminist academic literature on climate disruption in the late 1990s and early 2000s, gender-related and gender-focused analysis came into its own. As one author wrote in 2004, gender was a “latecomer” to climate change and needed a head start.<sup>57</sup> In this article, Professor Denton was following up on a 2002 article she had written to demonstrate that women are critical to the success of any concept of sustainable development and that women had been ineffectively incorporated – if incorporated at all – into the debates on climate change and sustainable development due to decision-making processes and male-dominant social standards.<sup>58</sup> As a political scientist, Professor Denton would go on to become one of

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55. See Spahn, *supra* note 16, at 1316 (relating stories told by women from Bangladesh of how girls and women are fed after men and boys because “economic survival of the family depends on males”); Misra et al., *supra* note 53, at 287 (explaining that the methyl isocyanate leak in Bhopal, India “was felt most acutely by women and children, the most vulnerable members of the society”). See generally GENDER, DEVELOPMENT, AND CLIMATE CHANGE (Rachel Masika ed., 2002); Irene Dankelman, *Climate Change: Learning from Gender Analysis and Women’s Experiences of Organizing for Sustainable Development*, 10 GENDER AND DEV. 21 (2002); Justina Demetriades & Emily Esplen, *The Gender Dimensions of Poverty and Climate Change Adaptation*, 39 IDS BULLETIN 24 (2008); Fatma Denton, *Climate Change Vulnerability, Impacts, and Adaptation: Why Does Gender Matter?*, 10 GENDER AND DEV. 10 (2002) [hereinafter *Climate Change Vulnerability*]; Fatma Denton, *Gender and Climate Change: Giving the “Latecomer” a Head Start*, 35 IDS BULLETIN 42 (2004) [hereinafter *Gender and Climate Change*]; Trish Glazebrook, *Women and Climate Change: A Case-Study from Northeast Ghana*, 26 HYPATIA 762 (2011); Ashbindu Singh et al., Consultation: Impact of Climate Change on Women and Gender Relations (Nov. 12, 2009); Deborah Zabarenko, *Women Face Tougher Impact from Climate Change*, REUTERS, May 7, 2008, <http://www.reuters.com/assets/print?aid=USN0633990420080507>; *COP 18 Adopts a Decision Promoting Gender Balance in Climate Change Negotiations*, UN WOMEN (2012), <http://www.unwomen.org/en/news/stories/2012/12/cop-18-adopts-a-decision-promoting-gender-balance-in-climate-change-negotiations> (discussing the intersection between climate change and gender issues); Terry Cannon, *Gender and Climate Hazards in Bangladesh*, 10 GENDER AND DEVELOPMENT 45 (July 2002) (asserting that climate change will likely affect women more than men).

56. See Spahn, *supra* note 16, at 1316.

57. *Gender and Climate Change*, *supra* note 55, *passim* (2004).

58. See *id.* at 43; *Climate Change Vulnerability*, *supra* note 55, at 17-19.

the lead authors for the Intergovernmental Panel on Climate Change.<sup>59</sup> Her 2004 article gave three reasons why gender was the so-called “latecomer” to climate change.<sup>60</sup> First she argued, was that discussions on climate change quickly devolved into debates between the north and south, as well as developed and developing countries, to the exclusion of other stakeholders.<sup>61</sup> Second, the initial and continuing emphasis on market considerations and establishment of carbon markets excluded consideration, in practice, of poverty and social justice and, by association, gender was left to be considered with broader human security and social issues not considered to be of such high priority.<sup>62</sup> Third, the strong focus on physical aspects of climate change often ignored that those physical changes would have primarily a social and economic impact, again, on the most vulnerable members of the population.<sup>63</sup> This exclusion of gender in the debate ignored that it was, in fact, women throughout the world who had primary responsibility, particularly in the most vulnerable areas, for agriculture, water, and energy provision.<sup>64</sup>

Women with experience in organizing for the sustainable development process began to argue for the incorporation of women organizationally into the climate change debate, as well as into policy-making.<sup>65</sup> At the same time, feminist scholars were critiquing the concept of sustainable development as having fundamentally failed, from an ecofeminist perspective, to sufficiently address the marginalization of the poor and women in developing countries.<sup>66</sup> From this ecofeminist perspective, the concept of sustainable development continued based on essentially male-centered or androcentric views,<sup>67</sup> of human beings as separate and above nature,

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59. RICHARD J. T. KLEIN, SALEEMUL HUQ, FATIMA DENTON, THOMAS E. DOWNING, RICHARD G. RICHELIS, JOHN B. ROBINSON, FERENC L. TOTH, 2007: INTER-RELATIONSHIPS BETWEEN ADAPTATION AND MITIGATION: CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY: CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Martin Parry et al. eds., 2007), available at [https://www.ipcc.ch/publications\\_and\\_data/ar4/wg2/en/ch18.html](https://www.ipcc.ch/publications_and_data/ar4/wg2/en/ch18.html).

60. *Id.* at 43-44.

61. *See id.* at 43.

62. *See id.*

63. *See id.* at 43-44.

64. *See id.* at 44-46.

65. Annie Rochette, *Stop the Rape of the World: An Ecofeminist Critique of Sustainable Development*, 51 U.N.B. L.J. 145, 168 (2002).

66. *See, e.g., id.* at 152.

67. *See id.* at 157-58, 167; *see also* Nancy Perkins Spyke, *The Land Use -Environmental Law Distinction: A Geo-Feminist Critique*, 13 DUKE ENVTL. L. & POL'Y F. 55 (Fall 2002);

fundamentally at odds with the ecofeminism perspective.<sup>68</sup> This view is perhaps best and most forcibly expressed in the article “*Stop the Rape of the World: an Ecofeminist Critique of Sustainable Development*” by Annie Rochette.<sup>69</sup>

In 2002, Oxfam collected a series of articles on gender development and climate change, which contributed essential perspectives on the role and inevitable linkage between climate change, development, and gender.<sup>70</sup> In 2009, sociological perspectives on global climate change came to the forefront of all the academic literature.<sup>71</sup> A 2010 workshop held by the National Science Foundation centered on sociological perspectives on global climate change.<sup>72</sup> In November 2009, a consultation on the impact of climate change on women and gender relations was sponsored by the United Nations Environment Program and United Nations Foundation.<sup>73</sup> Also in 2010, the World Bank joined the discourse with its publication “*Social Dimensions of Climate Change: Equity and Vulnerability in a Warming World*.”<sup>74</sup> Time Magazine and the legal journals were the latecomers, publishing little to nothing on the question of gender and climate change with a few isolated exceptions, and nothing on the broader context of gender implications for revitalizing ecofeminism, other than the 2002 article by Annie Rochette.<sup>75</sup>

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Ruth L. Gana, *Which “Self”?* *Race and Gender in the Right to Self-Determination as a Prerequisite to the Right to Development*, 14 WIS. INT’L L.J. 133 (Fall 1995); Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT’L L. 255 (Summer 1996); Maria Zardo, *Gender Equality and Indigenous Peoples’ Right to Self-Determination and Culture*, 28 AM. U. INT’L L. REV. 1053 (2013).

68. Rochette, *supra* note 65, at 167.

69. *See generally id.*

70. *See generally* GENDER, DEVELOPMENT, AND CLIMATE CHANGE (Rachel Masika ed., Oxfam 2002).

71. *See generally* Joane Nagel et al., *Workshop on Sociological Perspectives on Global Climate Change*, NAT’L SCIENCE FOUND. (2009), available at [http://www.res.ku.edu/~crgc/NSFWorkshop/Readings/NSF\\_WkspReport\\_09.pdf](http://www.res.ku.edu/~crgc/NSFWorkshop/Readings/NSF_WkspReport_09.pdf).

72. *See generally* Joane Nagel et al., *Workshop on Sociological Perspectives on Global Climate Change*, NAT’L SCIENCE FOUND. & AMERICAN SOCIOLOGICAL ASSOC. (2010), available at [http://www.asanet.org/research/NSFClimateChangeWorkshop\\_120109.pdf](http://www.asanet.org/research/NSFClimateChangeWorkshop_120109.pdf).

73. *See generally* Consultation: Impact of Climate Change on Women and Gender Relations, UNEP & UNF (Nov. 12, 2009) (on file with author).

74. *See generally* SOCIAL DIMENSIONS OF CLIMATE CHANGE: EQUITY AND VULNERABILITY IN A WARMING WORLD, WORLD BANK (Robin Mearns & Andrew Norton eds., 2010).

75. *See* Rochette, *supra* note 65.



### III. REDEFINING THE STATE AND NATIONAL SECURITY

By 2010, the calls for, at a minimum, women's involvement in high-stakes climate change policy-making and discourse were having an effect. The eighteenth conference of the Parties to the United Nations Framework Convention on Climate Change held in Doha, Qatar adopted a decision promoting gender balance and improving the participation of women in the UNFCCC negotiations and bodies established pursuant to the Kyoto protocol.<sup>76</sup> The decision advanced gender equality by requiring a goal of gender balance, and in bodies established by the convention and the protocol, invited current and future chairs of such bodies to be guided by gender balance when setting up informal groups and consultations, and to provide for review and reporting mechanisms to track progress in meeting the goal of gender balance. It also positions the issue of gender and climate change as a standing agenda item.<sup>77</sup> Women had finally gotten their feet in the door on high-level decision-making under the UNFCCC. Within a year, the International Women's Earth and Climate Summit would be a high-profile media event. Held on September 20-23, 2013 in New York, it brought together 100 global women leaders including economists, scientists, businesswomen, indigenous leaders, faith leaders, and others to advance the women's climate action agenda.<sup>78</sup> It was not designed to be a one-time event, but rather the start of a long-term campaign and project to build climate-resilient communities and acknowledge the common, but differentiated responsibilities for solving climate change.<sup>79</sup> Law review articles finally began to appear, but usually with a regional focus on how women played a role in decision-making on sustainable development or climate change.<sup>80</sup>

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76. See *COP 18 Adopts a Decision Promoting Gender Balance in Climate Change Negotiations*, UN WOMEN, Dec. 11, 2012, <http://www.unwomen.org/en/news/stories/2012/12/cop-18-adopts-a-decision-promoting-gender-balance-in-climate-change-negotiations> (last visited Aug. 17, 15).

77. See *id.*

78. *IWECI Summit*, WOMEN'S EARTH & CLIMATE ACTION NETWORK, INT'L, <http://weicaninternational.org/summit> (last visited Aug. 17, 15).

79. See *id.*

80. See, e.g., Lori Noguchi & Shahla Ali, *Women, Decision Making and Sustainability: Exploring the Experience of the Badi Foundation in Rural China*, 22 HASTINGS WOMEN'S L.J. 295 (2011) (focusing on the empowerment of women in rural communities in China and its affect on sustainable development); see also Flynn Coleman, *Pan-African Strategies for Environmental Preservation: Why Women's Rights are the Missing Link*, 23 BERKELEY J. GENDER L. & JUST. 181 (2008) (focusing on rural women in Pan-African countries); Trish

On September 16, 2005, the United Nations General Assembly adopted by consensus a resolution recognizing the responsibility to protect (the “R2P”).<sup>81</sup> The core of the responsibility to protect as adopted by both the United Nations General Assembly and Security Council was first embodied in Paragraph 138 of the 2005 World Summit Outcome Declaration:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.<sup>82</sup>

On a more general normative level, in the author’s view, the refusal of the United Nations to recognize the R2P, as applicable to climate change humanitarian crises, is a blindness to environmental realities. In a January 2009, in a report on the R2P, the United Nations Secretary-General specifically excluded the norm from applying to climate change or the response to natural disasters.<sup>83</sup> The R2P is an innovative and necessary paradigm-shifting norm or “quasi-norm” of international law. Existing international law already can be interpreted to encompass some natural disasters, environmental destruction, and imminent environmental crises within the four atrocity crimes.<sup>84</sup> If, however, in order to preserve this advance in international law, it is necessary on a practical and diplomatic level to

Glazebrook, *Women and Climate Change: A Case-Study from Northeast Ghana*, 26 *HYPATIA* 762 (2011) (focusing on the effects of weather events on Ghanaian female subsistence farmers).

81. G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); *see also* S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (reaffirming provisions of paragraphs 138 and 139 of 2005 World Summit Outcome Document regarding R2P).

82. *See* G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

83. U.N. Secretary-General, *Integrated and Coordinated Implementation of and Follow-up to the Outcomes of the Major United Nations Conferences and Summits in the Economic, Social and Related Fields, Follow-up to the Outcome of the Millennium Summit: Implementing the Responsibility to Protect*, Rep. of the Secretary-General, ¶ 10, U.N. Doc. A/63/677 (Jan. 12, 2009).

84. Linda A. Malone, *Green Helmets: Eco-Intervention in the Twenty-First Century*, 103 *AM. SOC'Y INT'L L. PROC.* 19, 24 (2009). *See generally* Evan Fox-Decent, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* (Martin Loughlin et al. eds., 2011); Jürgen Friedrich, *INTERNATIONAL ENVIRONMENTAL “SOFT LAW”* (2013); Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 *U.C. DAVIS L. REV.* 741 (2012) (discussing the evolution and effectiveness of State power with regards to environmental and humanitarian issues).

pretend that its applicability to environmental disasters does not exist, then that approach is preferable to dissent and abandonment of a norm whose time has inevitably come. The unavoidable role of the United Nations Security Council in humanitarian missions must be seriously reevaluated in the context of adaptation to climate disruption. On April 17, 2007, the U.N. Security Council debated whether the potential for global warming to cause wars brought it within the Security Council's authority over international peace and security.<sup>85</sup>

In a somewhat parallel development, the concept of national security and international security began to focus more on the critical role that women had to play as participants in conflict and post-conflict situations. In December 2011, the White House issued the United States National Action Plan on Women, Peace, and Security, with not just protections for women during and after conflicts, but for women as participants in conflict resolution and conflict prevention efforts.<sup>86</sup> The Ford Foundation, among others, shortly afterwards contributed to the general discussion on women in conflicts and post-conflict situations in the context of climate change and women's empowerment.<sup>87</sup> In 2012, the National Academic of Sciences and the National Research Council produced a report on climate and social stress implications for security analysis.<sup>88</sup> In five years, there has been a striking convergence between the recognition of the role of women in climate change, policy, and conflict resolution; the role of women in international and national conflict and post-conflict situations; and recognition of the right to human security and R2P. The convergence of all of these theories, with a particular emphasis on gender balance and gender involvement, was supplemented by a new discussion about the interrelationship between climate change, human rights law,

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85. Press Release, Security Council, Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing Over 50 Speakers, U.N. Press Release SC/9000 (Apr. 17, 2007), *available at* <http://www.un.org/press/en/2007/sc9000.doc.htm>.

86. *See generally* Exec. Office of the Pres., UNITED STATES NATIONAL ACTION PLAN ON WOMEN, PEACE, AND SECURITY (December 2011), *available at* [http://www.whitehouse.gov/sites/default/files/email-files/US\\_National\\_Action\\_Plan\\_on\\_Women\\_Peace\\_and\\_Security.pdf](http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf).

87. *See generally* *Climate Justice and Women's Rights: A Guide to Supporting Grassroots Women's Action*, GLOBAL GREENGRANTS FUND, THE INTERNATIONAL NETWORK OF WOMEN'S FUNDS AND THE ALLIANCE OF FUNDS (2015) *available at* <http://www.womenandclimate.org/wp-content/uploads/2015/03/Climate-Justice-and-Womens-Rights-Guide1.pdf>.

88. Comm. on Assessing the Impacts of Climate Change on Soc. & Pol. Stresses, Nat'l Res. Council, *Climate and Social Stresses: Implications for Security Analysis* (John D. Steinbruner, et. al. eds., 2012).

and the potential for a human right to a safe and adequate environment. What remains is recognition of a concept of post-modern ecofeminism to bring all of these developments under one workable and sustainable umbrella framework.

#### IV. *AN ECOFEMINIST CASE STUDY OF THE ENVIRONMENTAL DILEMMAS OF THE MARSHALL ISLANDS*

United Nations officials, including the Secretary-General, have been quick to deny that R2P applies to environmental crises, including specifically climate change and its consequences. Nevertheless, the four specified crimes could encompass situations of abusive governments or non-state actors inflicting environmental damage. In the twenty-first century, the transformation of international law from national security to human security will inevitably (or more precisely necessarily) proceed. Examples of the illegitimacy of premising international legal norms on the Westphalian primacy of the sovereign State have reached a point at which the question is not whether the focus should shift from national sovereignty to human security, but rather how this normative shift should be formulated. Recognition of the R2P as a legal norm is a necessary, inevitable step in this progression.

The best (or, more accurately, most disturbing) example of such shortsightedness based on traditional Westphalian notions of the nation-state is the dilemma of the disappearing State. Island-States, often developing States or States highly dependent on tourism, find their very existence threatened. What could be a more compelling scenario for remediation than the end of an established State and its population? Even in observing the traditional concept of the primacy of the nation-state, is there no right to exist physically for such States? If the self-serving environmental excesses of a handful of nations lead to the destruction of other States, is there no responsibility to remediation or even amelioration to be found in the R2P? In this context, there has been analysis of legal liability, largely neglecting the indisputable demands of island-States to find legal avenues to preserve the existence of the State as well as its population over obtaining compensation of their destruction. The fundamental legal principle of making the injured party “whole” has no relevance when the injury is physical destruction of a State and its population.

Despite the immediacy of these problems for island-States, it was not until January of 2013 that the first book was published

considering the impact of climate change from the perspective of its most endangered victims and the host of legal issues never before addressed in such diverse areas, such as law of the sea, immigration, and the very definition of what constitutes a State. The book, *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*, explored this insufficiently addressed dilemma from the disappearing State perspective and was a compilation of papers presented in May of 2011 at the Center for Climate Change Law at the Columbia Law School, in conjunction with the Republic of the Marshall Islands.<sup>89</sup> The urgency and necessity for more critical thinking from the perspective of preservation, rather than compensation as the remedy for tortious harm, is intensified when it is demonstrated that many of these States will cease to exist in terms of habitability long before they disappear into the sea.

The Marshall Islands pose another example of how ecofeminism is a valuable framework for constructive consideration of environmental crises aside from climate change. On September 3, 2012, the Special Rapporteur on Toxic Wastes provided his report to the Human Rights Council on the continuing impacts of the United States nuclear testing in the islands from 1946 to 1958.<sup>90</sup> The Special Rapporteur specifically noted that the failure of years of remedial measures by the United States continued to be inadequate in large part due to an overall failure to assess the full direct and indirect effects of radiation on women. The health impacts on women and children, given the differing dietary habits of Marshallese men and women, and women's greater exposure to radiation due to their social chores in food and housing, was essentially overlooked:

The Special Rapporteur also received information suggesting that the full effects of radiation on the right to health of Marshallese women may have been, and continues to be, underestimated. For example, the practice of women bathing in contaminated water may have been overlooked as a possible means of exposure, and cultural differences may also have resulted in an inadequate accounting of adverse reproductive outcomes. Studies show that pregnant women are particularly susceptible to thyroid cancer,

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89. THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE (Michael B. Gerrard & Gregory E. Wannier eds., Cambridge Univ. Press 2013).

90. Special Rapporteur, Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes, Calin Georgescu, U.N. Doc. A/HRC/21/48/Add. 1 (Sept. 3, 2012).

with resultant negative effects on the health of the women and their infants.<sup>91</sup>

In addition, the cultural difference in dietary and eating habits, in which women and children ate the less desirable parts of fish such as bones and organ meat, led to their higher exposure to radioactive isotopes that accumulate there.<sup>92</sup> Women's role in preparing food, weaving fibers, building housing, collecting water, as well as in handicrafts, also resulted in a higher level of exposure.<sup>93</sup> The disproportion of such daily labor borne by women was not recognized, but neither was the primary source of their empowerment in Marshallese society, to their detriment. Marshall Islands culture features a matriarchal society, in that land is passed from mother to child.<sup>94</sup> The displacement of women from contaminated areas denied Marshallese women their "cultural and other rights and their role as custodians of land" and inheritance in their society.<sup>95</sup>

Although the report commends the United States for some US\$600 million in technical programs, the medical programs (for which sixty percent of the patients are women) are available only to people residing in the islands at the time of the testing, despite the obvious impact on children, women's reproduction, and intergenerational harm.<sup>96</sup> People "downwind" from the radiation in the islands are also excluded from medical coverage.<sup>97</sup> Almost incidentally from the serious, direct, physical harm to women and their reproductive functions, the report notes:

[T]he shame that [women] experienced during the relocation process, when they were subjected to examinations with Geiger counters while naked and hosed down with liquid in the presence of their male relatives, as well as enduring on-site analysis of their public hair by American male personnel. In this context, many women, in particular those from Rongelap Atoll, were stigmatized, which affected their prospects for marriage and motherhood.<sup>98</sup>

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91. *Id.* ¶ 27.

92. *See id.* ¶ 29.

93. *See id.*

94. *See id.* ¶ 33.

95. *See id.*

96. *Id.* ¶¶ 53-55.

97. *Id.* ¶ 56.

98. *Id.* ¶ 32.

The equity and moral problems with this scenario do not need elaboration. From a legal perspective, what went wrong? Quite simply, the tragedy exemplifies the inadequacy of “hard” international environmental law; the understandable, but very limited priorities of the very limited notion of ecofeminism in the twentieth century; and the need for its reformulation and its evident value going forward. Step-by-progressive-step, here is what went “wrong” in terms of a satisfactory, long-term solution.

The environmental crises we confront today did not suddenly arise yesterday. Even with something as extreme as nuclear testing in the oceans, hard law did not prohibit it in terms of treaty, custom, or general principles. Why? All of those hard sources of international law are determined by the generally accepted law of nation-states, which naturally prioritize their own interests, particularly national security. The relatively recent development of human rights after World War II does not change the focus on civil and political rights and the dismissal of economic, social, and cultural rights. Attempting to shoehorn into civil and political rights a human right to the environment (based on whatever standard), in confrontation with sustainable development, which prioritizes economic, social, and cultural rights (although, just as narrowly with a strong emphasis on economic rights of the State, not necessarily the population) only perpetuates in a slightly different form traditional international environmental law.

From 1946 to 1958, the United States engaged in nuclear testing in its “trusteeship” of the Marshall Islands. On the populated atoll most directly impacted (the Bikini), the population was displaced. Nothing the United States did, either in terms of displacement or even the testing, was illegal under “hard” international law, much less the yet to be recognized international environmental law. It took until 2012 for what I have characterized as twentieth century feminism to influence the outcome of this environmental and human degradation. The exclusion of Marshallese women from power in decision-making structures goes without saying. Whatever influence they may have asserted in this report, none of the ultimate decisions were theirs to make.

In sum, although the United States’ response may have been “generous” on one level, and certainly on a global level, women’s exposure was not meaningfully evaluated, even in the context of nuclear radiation, which so obviously affects women

disproportionately. Aside from the obvious direct effects, no consideration was given to how much more they were exposed due to their societal activities. In the one societal structure in which they had power, that being matriarchal land tenure, it was not figured into what should be provided. The Report serves as a primer to what is wrong in "hard" international environmental law in assessing what should be done without sufficient consideration of and participation by women in formulating solutions. Assessing what should be done without the benefit of going forward is more challenging.

The 1980's view of feminism, in any context, assumed feminists were of one voice. Even for feminist legal theorists, that was not the case. In my opinion, the difficulty is that women who have dedicated their lives, brains, and careers to some advancement of their ideals may be feminists' own worst enemies. Feminists agree on so much more than they disagree. More importantly, feminists are standing in their own way for obvious paths to follow.

Legal norms of State responsibility must be reevaluated from their very foundation if the legal framework as it stands would allow States to watch other States and their populations destroyed with no legal responsibility, even to ameliorate the effects of such destruction. The R2P is one possibility to advance a normative shift from liability to communal responsibility, but not the only one. Legal responsibility in this context is not a charitable responsibility, but rather a matter of global pragmatism that national security is unavoidably entangled with global security. The destruction of these low-lying island-States is not a "third world problem" that only becomes a "first world problem" in the loss of tourist destinations. International conflict over fishing, marine resource claims, and refugee populations, for example, threaten a new vacuum in the international legal order similar to that confronted after the events of September 11, 2001. The unwelcome but almost inevitable conclusion from this deficiency in the annals of climate change law is the continuing divide between developed countries and developing countries, with the normative controls formulated disproportionately by a small set of powerful States on the world stage, even if to their detriment in the long term.

##### V. *A PROPOSAL FOR POST-MODERN FEMINISM*

How might post-modern ecofeminism differ from the short-lived ecofeminism of the 1990s? The Joyner and Little article provides the most in-depth summary of the core principles of that decade's



ecofeminist theory. In doing so, three assumptions are described as “most fundamental to gendered perspectives on international law, namely: (1) the inherent bias of international law; (2) the rejection of objectivity in feminist legal theory; and (3) the distinction in moral reasoning between males and females.”<sup>99</sup> It is important to note that at this juncture, the authors are referring to the feminist perspective on international law generally.<sup>100</sup> The first assumption seems almost irrefutable. To date, women do not have an equal role or voice in government structures; and law-making, particularly on the international level, continues to be dominated by men and male-centric issues of power and maintenance of traditional norms and structures. In short, “women’s issues” such as domestic violence and socioeconomic equity are given less priority. The second assumption is rejection of the law as objective, impartial, or fair. To some extent, this is a permutation of the first assumption, again reflecting the realities of male-dominated institutions and governments. Exaltation of “the rule of law” perpetuates a biased system and elevates legal, civil, and political rights above economic, social, and cultural rights.

For purposes of formulating post-modern ecofeminism, it is the third assumption that is the most essential. It is also the assumption that may attract the most criticism from detractors of ecofeminism. Joyner and Little reference the landmark work of Carol Gilligan in *In a Different Voice*, which asserted that moral decision-making by girls differed from that of boys, specifically with boys employing an “ethic of rights” and girls utilizing an “ethic of care.”<sup>101</sup> The authors adeptly make the case that recognizing a male form of reasoning and a female form of reasoning does not denigrate either method of reasoning or either gender.<sup>102</sup> To elaborate on this point further, to say that ecofeminism shifts the emphasis to an “ethic of care” from the “ethic of rights” does not suggest discrimination against men as being “uncaring” any more than it suggests that women are uninterested in rights. The “ethic of care” is nothing more than a shorthand way of describing a reordering of priorities that puts at least as much emphasis on responsibilities, of States or individuals, as on rights. It is that focus, particularly on State responsibilities over sovereignty,

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99. Joyner & Little, *supra* note 37, at 232.

100. *See id.*

101. *See id.*, at 237-39 (referencing *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 25-51 (1982)).

102. *Id.*

that underlies many of the new directions in international law generally, such as the R2P and international environmental law specifically and common, but differentiated responsibility for environmental preservation.<sup>103</sup> Ultimately, the authors “deconstruct” international environmental law from the feminist perspective as questioning State primacy, distinguishing between the public and the private, and emphasizing “hard law” over “soft law.”<sup>104</sup>

What would post-modern ecofeminism add to this foundation from two decades ago? A possible manifesto might be as follows:

1. In its most embryonic form, ecofeminism requires expanded participation and cognizance of environmental concerns of women.
2. Similarly, ecofeminism demands recognition of the disproportionate impact of environmental degradation on women and children.
3. Post-modern ecofeminism would encompass the above requirements for all disadvantaged stakeholders, less-developed States, as well as individuals.
4. The State is not paramount; it retains its inviolability and sovereignty only so long as it earns that status by providing basic rights (economic, social, and cultural, as well as civil and political) and necessary resources to its population.
5. Universal, “objective” solutions to environmental problems are suspect. Ecofeminism is contextual and recognizes that even commonly shared environmental problems cannot be addressed with the same methods.

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103. *See* United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, Princ. 7, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) (“In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”); *see also* United Nations Framework Convention on Climate Change art. 3(1), Feb. 16, 2005, 1771 U.N.T.S. 107 (“The Parties should protect the climate system... on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”); *see also* Public Consultation on the Relationship between Human Rights Obligations and Environmental Protection, with a Focus on Climate Change (July 17, 2014) (questioning the fine line between applying obligations to the States to curb climate change and the effect of these policies on the enjoyment of human rights).

104. Joyner & Little, *supra* note 37, *passim*.

6. The public/private distinction in international law generally is a false assumption. Solutions to environmental problems cannot be solved at the State level without local involvement and support of individual behavior and initiatives to remedy environmental degradation.
7. In addition to State-centered modes of resolution and negotiation, regional and local governmental coalitions should be pursued, as well as modes and coalitions of non-governmental actors (for example, corporations and foundations).
8. National security has been absorbed into human security. The stability and safety of a State is only as strong as the stability and safety of its population, which is determined as much by an essential quality of life and not simply the preservation of physical existence.
9. The State's combative "finger-pointing" over human rights driven by whether a State values civil and political rights or economic, social, and cultural rights, is a false dichotomy. This "rights" debates only obscures and impedes assurance of all such rights in developed and developing States.
10. International environmental law should move from an ethic of rights to an ethic of care.

The last principle is the most significant. For example, the debate over whether sustainable development detracts from establishing a human right to an adequate environment is a debate over the ethics of rights, instead of the fundamental question of how a State advances its population's economy while providing a healthy physical environment for present and future generations. Evidently, this is a balancing act, and balancing standards are notoriously vague and indeterminate, but not from an ecofeminist perspective. International law generally has never been known for clarity, and yet in the situations that most require fluidity in international environmental law (environmental disasters, unforeseen dangers, unquantifiable risks), the rule of law, or more narrowly, the rule of "hard law" restricts the consideration of options.

The ultimate irony is that international law, in its recognition of customary international law, should be more receptive to changing norms and global perceptions. The ultimate post-modern ecofeminist

contribution might be erasing the distinction between “hard” and soft” law. “Soft law” may be customary international law in the making, or perhaps even made. As any student who has done a Jessup moot court knows, the cutting-edge issues they raise never turn on “hard law,” but on where the factual context and soft law lead.

In other words, there is, even in that arena, recognition of the ecofeminist perspective on contextual analysis and “soft law.”

### *CONCLUSION*

The first step in this exploration is determining what aspects of climate change in the legal literature, despite its volume, seem under-represented or neglected in relation to their importance in finding a solution. This article suggests just a few possibilities of many. The challenge is to determine a common cause for this failure of analysis. This project posits that the causes are failures endemic not just to the approaches to climate change law, or even international environmental law, but to a persistent lack of pragmatism and sense of communal responsibility in international legal theory and policy. Ultimately, if the academic literature is to have any influence in the necessity for a solution, the very nature of academic scholarship and theory must be reevaluated and reformulated against this backdrop.

That this minimally progressive legal norm sometimes seems recognized more in its breach than its acknowledgment is a political reality that should be familiar and answerable to every international lawyer who has ever had to address the question, “but is international law really law?” Civil and political human rights were more easily acknowledged and solidified as law, precisely because they required that governments refrain from engaging in unacceptable behavior. Economic, social, and cultural rights lagged in recognition and enforcement, precisely because they required affirmative (and, not incidentally, costly) governmental action, rather than mere restraint. The R2P is at its very essence an affirmative State obligation, not mere restraint. As such, it will be more difficult to achieve widespread recognition, acceptance, and implementation. That difficulty does not, however, negate its importance or necessity.

Returning again to the familiar paradigm of civil and political rights/economic, social, and cultural rights, and the most laudable implementation of the first set of rights, does not guarantee stability or peace in the absence of implementation of the second set of rights.

The converse, of course, is true: earnest efforts by states to afford the so-called “second generation” of rights does not assure personal security or national stability if implementation of civil and political rights is deficient. Acknowledging the political reality of today’s global community, however, demonstrates that far more progress has been made with the first generation of rights than the second, and the community has reached a point where lack of progress in ensuring economic, social, and cultural rights threatens the advances made in civil and political rights. Such is the nature of “terrorism,” a phrase without a generally acknowledged legal definition, but which is clearly traceable to an ability of dissidents to exploit frustration of disenfranchised individuals who may or may not feel that they have their civil and political rights, but are absolutely convinced they lack their economic, social, and cultural rights.

As diverse as these deficiencies appear, some common themes emerge. The law of international environmental protection continues to focus on remediation over prevention. When crises and damage do occur, there is more legal guidance in the context of compensation schemes than remediation. Legal norms more generally continue to suffer from exclusivity, rather than inclusion, both in terms of insufficient consideration of those primarily impacted and prioritizing solutions. The role of the nation-state in the global community is insufficiently formulated in terms of communal responsibility, as opposed to short-term self-interest. As a result, there is a need for recognition of the inextricability of every State’s interests from those of other States, strikingly so in the case of global environmental crises, in order to achieve a global pragmatism in international law and policy. Unfortunately, the academic literature both reflects and intensifies these failings, disproportionately posing theoretical and unachievable responses to climate change problems of a select audience and set of issues, which has little correlation or relevance to the primary stakeholders in seeking a solution in terms of impact and inability to respond. The core problem, ultimately, is the continuing reticence to recognize that the basic concepts of State sovereignty, and the very concept of what is a State, must be reformulated to accommodate current crises of whatever nature, with recognition of the dependence of national security on global security and the necessity of communal R2P. To paraphrase the axiom, we must acknowledge that no State is an island.

