

# SEEING LIKE A STATE: LAND LAW AND HUMAN MOBILITY AFTER NATURAL DISASTERS

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*This Article applies a critical perspective to under-explored issues of land law, human mobility, and state sovereignty in natural disaster contexts. Most postcolonial states maintain positivist myths of sovereign control over land, notwithstanding the persistent reality of informal settlements. Yet, state-centric constructions of land law and planning increase disaster risk for the billion or more landholders classified as informal or illegal in the Global South. Where international instruments such as the Sendai Framework for Disaster Risk Reduction 2015-2030 recommend risk reduction through land use planning and prohibitions on high risk settlements, national governments may assert a capacity to control human relationships with land, notwithstanding long-term failures to prevent informal settlements in hazardous areas. As a result, those who lack rights derived from or through sovereign grant—or who live in areas designated as non-residential land—are subject to labels of illegality, and are vulnerable to exclusion from shelter assistance, in purported fulfilment of disaster risk reduction commitments. Our case study considers the re-population of prohibited hazard zones after super-Typhoon Haiyan in the Philippines.*

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## I. INTRODUCTION

International frameworks for disaster management encourage states to incorporate risk reduction into land use planning.<sup>1</sup> While the language is apolitical, the recommendation may entrench inequality and vulnerability as risk reduction filters through state disaster plans and programs. The neutral language masks the politics of risk reduction—the significance of the state as a translator of international standards.<sup>2</sup> The role

1. See, e.g., World Conference on Disaster Risk Reduction, *Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters*, ¶ 19(iii), U.N. Doc. A/CONF.206/6 (Jan. 18–22, 2005) [hereinafter *Hyogo Framework*]; Third U.N. World Conference, *Sendai Framework for Disaster Risk Reduction 2015-2030*, ¶¶ 30(f)–(g), U.N. Doc. UNISDR/GE/2015 (Mar. 18, 2015) [hereinafter *Sendai Framework*].

2. This proposition applies broader critical perspectives on international law to land law and disaster risk reduction. See, e.g., CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 48, 185–87 (G. L. Ulmen trans., 2003) (describing land appropriation as a constitutive act of international law); Anthony Carty, *Critical*

of the state as a translator of international standards is most apparent in the fields of land law and land use planning. Where risk reduction involves planned relocation and prohibitions on high-risk settlements, the state may assert a capacity to control human mobility and prevent re-population of prohibited areas. Yet, for many disaster-vulnerable states, there is no capacity to control human mobility, and informal settlements persist in hazardous areas without reference to legal prohibitions or land use plans.<sup>3</sup> This global phenomenon of informal settlements creates disproportionate vulnerability to landholders classified as illegal for breaching land use law, and who are thus excluded from shelter assistance notwithstanding the long-term nature of their settlements.

The ideation of states as sovereign entities continues to shape the governance of land in an age of climate change and enhanced disaster risks. While contemporary governance studies highlight the “hollowing out” of states through delegation of functions to non-state actors,<sup>4</sup> the legal regulation of land

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*International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66, 67–69 (1991) (critiquing pseudo-impartial notions of universal legal order); Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 7 (1990) (noting that the ideology of liberal legalism as applied to public international law hides the fact that social conflicts must be solved through political means). For a more recent study that critiques the technocratic language of international legal instruments as a semantic mechanism to generate legitimacy and obscure distributional impacts, see Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EUR. J. INT'L L. 395, 405–08 (2009).

3. For an overview of settlement informality in the Global South, see generally UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME (UN-HABITAT), *THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS (2003)* [hereinafter UN-HABITAT, *THE CHALLENGE OF SLUMS*]; UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME (UN-HABITAT), *STATE OF THE WORLD'S CITIES 2012/2013: PROSPERITY OF CITIES (2012)* [hereinafter UN-HABITAT, *STATE OF THE WORLD'S CITIES*]. For a discussion of the relationship between settlement informality and disaster vulnerability, see UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME (UN-HABITAT), *LAND AND NATURAL DISASTERS: GUIDANCE FOR PRACTITIONERS 1*, 82–86 (2010) [hereinafter UN-HABITAT, *LAND AND NATURAL DISASTERS*]. For examples of long-term settlement informality and disaster vulnerability from the Philippines, see *infra* Part II.F.

4. See, e.g., JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD 6* (1992) (describing the increasing importance of non-state actors in relation to issues such as economic investment, technological change, international security and

and human mobility retains legacy links with principles of sovereign authority over territory.<sup>5</sup> These principles establish contemporary legal baselines that land ownership derives through sovereign grant or recognition; that “waste land” or land without an owner belongs to the state; and that the state determines the borders of permitted settlements.<sup>6</sup> The law encourages government actors to “see like a state” and to conceptualize human relationships with land according to state-centric constructs.<sup>7</sup> As a result, those who lack rights derived from or through sovereign grant—or who live in areas designated as non-residential land—are subject to labels of illegality, even if they are long-term residents with their own perceptions of property-like entitlements to land.<sup>8</sup>

Most postcolonial states maintain positivist myths of sovereign control over land, notwithstanding the persistent reality of widespread informal settlements.<sup>9</sup> The narrative of sover-

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armed conflict); Karen Slawner, *The Decline of Sovereignty?*, in PERSPECTIVES ON THIRD-WORLD SOVEREIGNTY 139, 148 (Mark E. Denham & Mark Owen Lombardi eds., 1996) (analyzing the decline of sovereignty in the Global South as a result of globalization); Neil Walker, *Out of Place and Out of Time: Law's Fading Co-ordinates*, 14 EDINBURGH L. REV. 13, 17, 36–38, 42–43 (2010) (analyzing the nature of law in a post-Westphalian world). For further discussion, see *infra* Part IV.E.

5. See also *infra* Part II.A (discussing the influence of colonial land law and contemporary title registration schemes on positivist conceptions of property as a product of sovereignty).

6. The Westphalian concept of territorial sovereignty is a contingent historical product of European colonization that has cast overly positivist shadows on conceptualizations of property. See *infra* Parts I.A, I.B.

7. This proposition links positivist principles of land law to the state-centric perspectives identified by James Scott. See JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 11–52 (1998) [hereinafter SCOTT, SEEING LIKE A STATE].

8. For a theoretical discussion, see Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 999–1006 (2006).

9. By sovereign control we refer to territorial concepts derived from Westphalian principles—that a state has exclusive authority over an area of jurisdiction subject to acts of delegation and the obligations of public international law. See, e.g., G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, art. 2(1) (Dec. 12, 1974) (providing an illustration of the principle of permanent sovereignty over natural resources); Helmut Steinberger, *Sovereignty*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 500, 507 (Rudolf Bernhardt ed., 1987) (describing the development of sovereignty as a principle of exclusive territorial jurisdiction); Clifford Geertz, *What Is a State If It Is Not a Sovereign? Reflections on Politics in Complicated Places*,

eign control develops heuristic power through iterative acts of performance and naturalization by government actors.<sup>10</sup> Even where constituency demands create pro-poor laws, such as homesteading legislation or protection against eviction, the skeletal principle of sovereign authority over property remains the baseline framing device for those who apply the law.<sup>11</sup> That is, government actors who make determinations of illegality or informality evince a basic understanding of freehold property as derived from or through sovereign grant. The fact that those denied legal proprietary rights engage in studied ignorance of the state, and develop their own perceptions of quasi-proprietary entitlements,<sup>12</sup> creates circumstances of epistemic fracture but does not displace the state's core episteme of sovereign control over territory.<sup>13</sup> Indeed, perhaps counter-

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45 CURRENT ANTHROPOLOGY 577, 579, 580, 583 (2004) (arguing that Eurocentric notions of sovereignty are not operative in much of the postcolonial world due to contests over state authority and the existence of multiple normative orders that pre-date the state). For a discussion of the "mythic unity" intrinsic to the conceptualization of sovereignty even as the state lacks exclusive authority over territory, see Stephan Feuchtwang, Comment, 45 CURRENT ANTHROPOLOGY 587, 587 (2005).

10. Ethnographers argue that imperatives to perform sovereignty arise from its character as an institutionalized projection of power. See Thomas Blom Hansen & Finn Stepputat, *Sovereignty Revisited*, 35 ANN. REV. ANTHROPOLOGY 295, 297 (2006). Michel Foucault, for example, describes the recursive practices and technologies of state formation at micro-scales of interaction, involving the repetition of procedures, symbols and examinations that project the coherence of "the state" as a projection of power. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 141–56 (Alan Sheridan trans., First American ed. 1978) (1977) (describing techniques of spatial enclosure as a form of social discipline) [hereinafter FOUCAULT, *DISCIPLINE AND PUNISH*].

11. See *infra* Part II.A (discussing the influence of colonial land law and contemporary title registration schemes on positivist conceptions of property as a product of sovereignty).

12. See, e.g., UN-HABITAT, *THE CHALLENGE OF SLUMS*, *supra* note 3, at 222 (estimating that around seventy-five percent of unregistered landholders in Phnom Penh regard themselves as owners of the land). For a further discussion, see Alain Durand-Lasserve, *Informal Settlements and the MDGs: Global Policy Debates on Property Ownership and Security of Tenure*, GLOBAL URBAN DEV., Mar. 2006, at 1, 1.

13. For an overview with case studies from Kenya, Cambodia, and Timor Leste, see Daniel Fitzpatrick, *Fragmented Property Systems*, 38 U. PA. J. INT'L L. 137, 191–92 (2016). See also JAMES C. SCOTT, *THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA* 40–41, 53–58, 103–105 (2010) (providing analogous discussion of non-state spaces in up-

intuitively, the persistence of informal settlements may reinforce self-validating needs to construct and perform the spatialized authority of the state.

Of particular significance in circumstances of enhanced disaster threats is the fact that state-centric constructions of land law and planning increase risks for landholders classified as informal or illegal.<sup>14</sup> There are a billion or more people living in informal or illegal settlements in the global South.<sup>15</sup> Many live in areas disproportionately prone to storms and other forms of natural hazard.<sup>16</sup> After a disaster, informal, undocumented, or illegal landholders are vulnerable to exclusion from shelter or relocation assistance because they lack rights or documentation, or they have returned to re-build in prohibited areas.<sup>17</sup> For state actors, the delineation of permitted settlements through law reduces the risk of future disas-

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land sodden cultivation zones characterized by strategies to avoid governance by the state).

14. For country-specific case studies of informal settlements and disaster vulnerability, see Herbert Hambati, *Weathering the Storm: Disaster Risk and Vulnerability Assessment of Informal Settlements in Mwanza City, Tanzania*, 70 INT. J. ENVTL. STUD. 919, 925-34 (2013) (demonstrating how multiple factors interact in non-linear ways to increase disaster vulnerability); see also INFORMAL SETTLEMENTS, ENVIRONMENTAL DEGRADATION, AND DISASTER VULNERABILITY: THE TURKEY CASE STUDY (Ronald Parker et al. eds., 1995).

15. See UN-HABITAT, STATE OF THE WORLD'S CITIES, *supra* note 3, at 151 (setting out an estimate of 862,000 people living in urban informal settlements); see also ROY L. PROSTERMAN ET AL., ONE BILLION RISING: LAW, LAND AND THE ALLEVIATION OF GLOBAL POVERTY 2 (Roy L. Prosterman et al. eds., 2009) (estimating that more than a billion people live without formal security of land tenure in rural areas of the world).

16. See, e.g., Brent Doberstein & Heather Stager, *Towards Guidelines for Post-Disaster Vulnerability Reduction in Informal Settlements*, 37 DISASTERS 1, 28 (2013) (describing correlations between informal settlements and hazard-prone locations).

17. See UN-HABITAT, LAND AND NATURAL DISASTERS, *supra* note 3, at 82-83 (describing the vulnerability of landless households to exclusion from post-disaster shelter or recovery programs); see, e.g., Ruth Jackson, Daniel Fitzpatrick & Prabin Man Singh, *Building Back Right: Ensuring Equality in Land Rights and Reconstruction in Nepal*, OXFAM ET AL. 6-8, 13-14 (Apr. 21, 2016), <https://policy-practice.oxfam.org.uk/publications/building-back-right-ensuring-equality-in-land-rights-and-reconstruction-in-nepal-606028> (setting out linkages between landlessness and disaster vulnerability in Nepal); Daniel Fitzpatrick, *Access to Housing for Renters and Squatters in Tsunami-Affected Aceh, Indonesia* 11-18 (Nat'l Univ. Sing. Asia Research Inst. Aceh Working Paper No. 2, 2007), [http://atdr.unsyiah.ac.id:8080/jspui/bitstream/123456789/9710/1/20071101\\_Access\\_Housing\\_Renters\\_Squatters\\_Tsunami\\_Affected\\_Aceh](http://atdr.unsyiah.ac.id:8080/jspui/bitstream/123456789/9710/1/20071101_Access_Housing_Renters_Squatters_Tsunami_Affected_Aceh).

ters. Yet, in many disaster-prone areas, positivist visions of land use planning are not consistent with the enduring reality of human settlement. Vicious cycles of risk thus emerge when government and non-government actors erroneously assume state capacity to control human mobility and apply labels of informality or illegality to people with little alternative than to live in hazard-prone settlements.

This Article considers the centrality of state sovereignty to conceptual frames for land policy and risk reduction in disaster contexts. Our case study is Typhoon Haiyan, which hit the central Philippines in 2013 as one of the strongest storm ever to make landfall.<sup>18</sup> The Philippine government framed the disaster as a climate change event and applied risk reduction concepts derived from the Hyogo Framework on Climate Change Adaptation 2005-2015. To reduce the risk of future super-typhoons, the recovery plan proposed coastal “no-build zones” and relocation of over 200,000 households from coastal areas.<sup>19</sup> Most of those affected lived close to the sea in urban informal settlements.<sup>20</sup> Others were fisherfolk living on land classified as public foreshore land.<sup>21</sup> Large numbers were unable to access transitional shelter and did not receive timely relocation assistance, leading many to return to original lands, notwithstanding their classification as no-build zones.<sup>22</sup> Their housing is vulnerable to future typhoons, as they were denied shelter assistance because of their unauthorized return. In the

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pdf (describing obstacles to housing for renters and “squatters” in tsunami-affected Indonesia).

18. See *infra* Part III.A (describing size and impacts of Typhoon Haiyan).

19. See *infra* Part III.B (describing relocation planning after the disaster).

20. See *infra* Part III.A.

21. *Id.*

22. For further study of relocation failures after Typhoon Haiyan, see Angela Sherwood et al., *Resolving Post-Disaster Displacement: Insights from the Philippines after Typhoon Haiyan (Yolanda)*, BROOKINGS & INT’L ORG. MIGRATION 53–55 (2015), <https://www.brookings.edu/wp-content/uploads/2016/06/Resolving-PostDisaster-DisplacementInsights-from-the-Philippines-after-Typhoon-Haiyan-June-2015.pdf> (identifying obstacles to effective relocation in Haiyan-affected areas); Alice R. Thomas, *Resettlement in the Wake of Typhoon Haiyan in the Philippines: A Strategy to Mitigate Risk or a Risky Strategy?*, BROOKINGS-LSE: PROJECT ON INTERNAL DISPLACEMENT 6–19 (June 2015), <https://www.brookings.edu/wp-content/uploads/2016/06/Brookings-Planned-Relocations-Case-Study-Alice-Thomas-Philippines-case-study-June-2015.pdf> (describing the confusion and delay affecting government plans for relocation of people from “no-build” zones).

event, the technocratic aims of no-build zones have not produced desired effects—there is little or no reduction in disaster risk through land use planning, while there is continued exclusion of vulnerable households from access to safe or adequate shelter.

The Article contributes to literature on law and climate change through a critical focus on under-explored issues of land, human mobility, and state sovereignty. Part II considers land law and informal settlements. In the latter stages of European colonization, colonial law favored positivist links between property and sovereignty as part of constructions of territorial authority. The linking of property and sovereignty encouraged state-centric heuristics—ways of seeing land and property through the lens of sovereign authority.<sup>23</sup> European colonization spread sovereign-centric ways of seeing land and property to most jurisdictions of the Global South. Yet, many postcolonial jurisdictions have not been able to impose positivist rules of property and zoning on their citizens. Very large numbers reside in informal settlements and pursue informal methods of land administration because they are unable to comply with law and land use planning for reasons of poverty, government dysfunction, and communicative separation from the state.<sup>24</sup> These people are vulnerable to natural disasters not only because of hazard-prone settlements, but because they lack lawful entitlements to land and shelter in the eyes of the state. Part II illustrates this vulnerability through an account of land law and settlement informality in the Philippines.

Part III considers human mobility and the state. The state may refuse to “see” human mobility responses to natural disasters that contradict sovereign-centered principles of land law and land use planning. The reflexive response—that settlements are illegal—substitutes for case-by-case assessment of acts of self-settlement. After Typhoon Haiyan, for example, the assumption of the capacity to control human mobility formed the basis for the Philippines government’s relocation plans.<sup>25</sup> Re-population of hazardous zones was not anticipated, and the

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23. See *infra* Part II.A.

24. See *infra* Part II.B.

25. See *infra* Part III.B (analyzing the assumption of government capacity implicit in post-Haiyan relocation planning).



response to policy failure was not re-assessment but further assertion of the imagined authority of the state. We argue that this way of seeing land—the heuristic of sovereign state authority—created a cognitive resistance to the possibility of failure and a belief that the best response to failure was applications of labels of illegality, which served to deny shelter assistance to disaster-vulnerable groups. Part III concludes that the state is a problematic translator of international disaster risk reduction standards embodied in the Hyogo Framework for Adaptation Action 2005-2015,<sup>26</sup> and its successor instrument.<sup>27</sup> State actors have a natural tendency to apply epistemic filters—based on assumptions of state capacity—which distort the meaning of international references to land use planning as a disaster risk reduction measure.<sup>28</sup>

Part IV considers non-state actors who adopted state-centric perspectives on land and human mobility after Typhoon Haiyan. We identify the humanitarian principle of neutrality (for UN agencies), and climate change frames for disasters (for international NGOs), as central to the deference displayed by non-state actors to government relocation planning. While non-state actors in this case study also referred to human rights law, including the Guiding Principles on Internal Displacement,<sup>29</sup> we note that emerging international human rights principles on planned relocation highlight procedural safeguards, such as consultation and participation. We further argue that a focus on procedural safeguards for relocation directs attention to policy implementation—that is, what needs to happen for rights-compliant relocation—rather than the likelihood of policy failure and the consequent effects on substantive rights to adequate housing. Part IV concludes with comments on the emerging architecture of transnational disaster governance, including the extension of principles of deference to state sovereignty to new circumstances of climate change adaptation and disaster risk reduction. The central argument is that international legal standards such as the Hyogo

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26. *Hyogo Framework*, *supra* note 1.

27. *Sendai Framework*, *supra* note 1.

28. See *infra* Part III.E (considering the phenomenon of “seeing like a state” in relation to disaster risk reduction).

29. U.N. Comm’n on Human Rights, *Guiding Principles on Internal Displacement*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles*]; see also *infra* Part IV.B.

Framework for Adaptation Action 2005-2015—and its successor Sendai Framework for Disaster Risk Reduction 2015-2030—continue to defer to states as units of territorial authority because Westphalian constructions of state sovereignty are intrinsic to the international legal order.

## II. PERFORMING THE STATE: LINKING PROPERTY AND SOVEREIGNTY

Early international law scholarship described the concept of state sovereignty by analogy to Roman law principles of ownership. Just as a private law owner had exclusive control over an owned thing (*res*), so too sovereignty gave rise to exclusive control or jurisdiction over a defined territory.<sup>30</sup> Most commentators, however, did not suggest that sovereign acquisition *ipso facto* vested exclusive proprietary rights in the sovereign.<sup>31</sup> While some early German jurists argued sovereignty (*imperium*) also implied ownership (*dominium*),<sup>32</sup> other jurists identified circumstances of conquest, cession, or purchase as implying the prior existence of private property rights under the

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30. For a discussion, see Lauren Benton & Benjamin Straumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 *LAW & HIST. REV.* 1, 15 (2010); see also EMER DE Vattel, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY*, 213–14, 309, 312 (Béla Kaposy & Richard Whatmore eds., 2008) (1758) (explaining that sovereigns acquire domain over territory which confers property-like powers to exclude unauthorized encroachments on land); Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 *EUR. J. INT'L. L.* 25, 34, 41, 43 (2005) (describing references to Roman law to support patrimonial conceptions of the state in the early law of nations).

31. See Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L. REV.* 8, 8–9 (1927) (noting that “[t]he distinction between property and sovereignty is generally identified with the Roman discrimination between *dominium*, the rule over things by the individual, and *imperium*, the rule over all individuals by the prince”). For a critical survey of the argument that sovereignty operates as a form of private property over territory, see Jeremy Waldron, *Exclusion: Property Analogies in the Immigration Debate*, 18 *THEORETICAL INQUIRIES L.* 469, 478–81 (2017).

32. D.P. O’CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 22–25 (1967) (overview of early international law theories concerning the relationship between *imperium* and *dominium*).

former sovereign.<sup>33</sup> Hence, for example, Vitoria wrote in 1539 that the acquisition of Spanish sovereignty over its American territories allowed the Spanish to obtain ownership of *res nullius* but did not override, by automatic implication of sovereignty, the private property rights of subjects of the former sovereign(s).<sup>34</sup> This formulation finds contemporary expression in the international law doctrine of acquired title, which obliges states to respect property rights issued under a former sovereign upon a transfer of sovereignty.<sup>35</sup>

There is an irony that, as international law distinguished *dominium* from *imperium* in terms of matters such as state succession, municipal law increasingly sought to link *imperium* and *dominium* in the context of European colonization, particularly as from the late nineteenth century.<sup>36</sup> In the early period of

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33. See, e.g., HUGO GROTIUS, 2 DE JURE BELLI AC PACIS LIBRI TRES [ON THE LAW OF WAR AND PEACE] 40 (James Brown Scott ed., Francis W. Kelsey trans., Clarendon Press 1925) (1625) (describing the right to acquire property as preceding the development of sovereign law); CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM [LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD] 50–51 (Joseph H. Drake trans., Clarendon Press 1934) (1749) (“[T]he ownership of the estates always remain distinct from the sovereignty, nor does the sovereignty affect the ownership in any way.”).

34. See Benton & Straumann, *supra* note 30, at 21–22 (citing Francisco de Vitoria, *On the American Indians*, in POLITICAL WRITINGS 239 (Anthony Pagden & Jeremy Lawrance eds. & trans., 1991) (1539)); see also Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321, 324 (1996) (setting out Vitoria’s conclusion that the indigenous inhabitants of the Indies possessed ownership rights prior to sovereign acquisition by the Spanish); Benjamin L. Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. UNIV. INT’L L. REV. 263, 265 (1997) (“[P]roperty rights are fundamentally independent of state sovereignty and, hence, changes in (or even the complete absence of) sovereignty or government do not affect them.”). For the canonical formulation in U.S. Supreme Court jurisprudence, see *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (“[C]ession of territory is never understood to be a cession of the property belonging to its inhabitants.”).

35. For the classic exposition in the Permanent Court of International Justice, see *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, 1923 P.C.I.J. (ser. B) No. 6, at 36 (Sept. 10).

36. Although we focus on colonial contexts, the common law always displayed a tendency to conflate sovereignty with property as a result of the prerogative powers of the Crown and the feudal doctrine that radical title to land vests in the Crown. See O’CONNELL, *supra* note 32, at 22 (“Anglo-Ameri-

European colonization, constructions of sovereignty often took the form of control over people rather than territory, both as a result of the provenance of sovereign acquisition and the practicalities of territorial control.<sup>37</sup> European colonial law moved towards positivist formulations of property and sovereignty in the late nineteenth century when municipal legislation,<sup>38</sup> and in the case of British colonization, doctrines of radical Crown title<sup>39</sup> provided the legal basis for administrators to link freehold property in land with acts of sovereign grant or recognition.<sup>40</sup> Positivist requirements that freehold property

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can thinking, which is still dominated by the feudal conception of eminent domain . . . resists the disengagement of *imperium* and *dominium*.”).

37. See Lauren Benton & Richard J. Ross, *Empires and Legal Pluralism: Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World*, in *LEGAL PLURALISM AND EMPIRES 1500–1850*, 1, 8 (Lauren Benton & Richard J. Ross eds., 2013) (describing Papal Bulls and the evangelizing provenance of Spanish and Portuguese colonization); see also Martti Koskenniemi, *Sovereignty, Property and Empire: Early Modern English Contexts*, 18 *THEORETICAL INQUIRIES* L. 355, 371–78 (2017) (describing the issue by the Crown of patents and charters to establish settlements in North America between 1578 and 1732).

38. Once sovereignty is acquired, municipal legislation which evinces a clear intention to affect or override acquired rights will be applied by municipal courts, even if that legislation were in breach of international law. See L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 501, 522 (Hersch Lauterpacht ed., 6th ed. 1947); see also O’CONNELL, *supra* note 32, at 237 (1967) (noting that the property rights of nationals of a successor state are protected only to the extent that the Constitution guarantees private property rights).

39. The common law, with its well-known rules of possession, including the doctrine of lost Crown Grant, nevertheless retains the core principle that estates in land derive mediately or immediately of the Crown. See 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*50–51. In circumstances of colonization, so-called “native” rights to land were not classified as estates held of the Crown at the time of sovereign acquisition. Subject to the possibility of *ex post* sovereign recognition, “native” rights to land were classified as a permissive occupancy, or a personal right of usufruct, terminable at the will of the Crown, and alienable to the Crown only. See, e.g., *Johnson v. M’Intosh*, 21 U.S. (8 Wheat) 543 (1823); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 279, 281 (1955); *St. Catherine’s Milling & Lumber Co. v. R.*, [1888] 13 S.C.R. 577 (Can.); *Tijani v. Sec’y of S. Nigeria* [1921] 2 NLR 24 (Nigeria).

40. Space does not permit a full exposition. For Francophone territories of sub-Saharan Africa, colonial legislation set out principles that “vacant land without a master” vested in the state. Colonial administrators interpreted the principle to require proof of ownership in accordance with the evidential requirements of the Civil Code. For a discussion, see Jean-Philippe Platteau, *LAND REFORM AND STRUCTURAL ADJUSTMENT IN SUB-SAHARAN AFRICA: CONTROVERSIES AND GUIDELINES* 232–42 (1992). In the Netherlands East Indies,

derive from or through sovereign grant or recognition supported European attempts to extend control over land as colonial policy shifted from protection of trade to economic production.<sup>41</sup> At the risk of over-simplification, European colonization then played a critical role in the spread of positivist postulates of land law to most parts of the Global South. For example, common elements of land law now include baseline principles that land without an owner belongs to the state; land ownership derives from or through state grant; the state prescribes the means of proof of rights to land; and *numerus clausus* doctrines limit the proprietary rights that an owner may create through contract or custom.<sup>42</sup> The spread of Torrens-like title registration law through the Global South further reduces the proprietary significance of acts such as possession, particularly where public land and registered private titles are exempted from claims based on adverse possession or acquisitive prescription.<sup>43</sup>

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the *Agrarische Besluit* [Agrarian Decree] 1870 provided that all lands to which no title (*eigendom*) can be proven shall be considered the property of state (art. 1). Colonial administrators interpreted “*eigendom*” land to mean land solely subject to Civil Code rights of ownership. See Daniel Fitzpatrick, *Private Law and Public Power: Tangled Threads in Indonesian Land Regulation*, in *INDONESIAN TRANSITIONS* 75, 78–82 (Henk Schulte Nordholt & Ireen Hoogenboom eds., 2006). In some common law jurisdictions, the vesting of “waste lands” in the Crown included lands not subject to a grant of title from the Crown. For example, in the Australian colonies, *Sale of Waste Land Act 1842* (Imp) s 23 (Austl.) defined the “waste lands of the Crown” to include land not already granted in fee simple, or for an estate of freehold, or for a term of years. For a detailed exposition in relation to the Spanish Philippines, see *infra* Part II.C.

41. See e.g., PATRICK MCAUSLAN, *BRINGING THE LAW BACK IN: ESSAYS IN LAND, LAW, AND DEVELOPMENT* 59–83 (2003) (describing the stages of application of European land laws to Commonwealth Africa).

42. See also Fitzpatrick, *Fragmented Property Systems*, *supra* note 13, at 176–90 (including case studies from Kenya and Cambodia).

43. For example, in Cambodia the 2001 Land Law applies title-by-registration principles and excludes Civil Code provisions on prescription from land within the public or private domain of the state. See Land Law, arts. 16, 30, 32, 38, No. 197/C (2001) (Cambodia). Even in England and Wales, the Land Registration Act 2002 guarantees indefeasibility of title to a registered proprietor subject to certain limited exceptions. Land Registration Act 2002, c. 9, §§ 29(1)–(2), 132(1) (U.K.). Title arises from registration rather than presumptions derived from the fact of possession. *Id.* § 58(1). Similarly, among the states of Australia—the home of the Torrens system—not only are adverse possessors required to apply for registered proprietorship, but

The linking of property and sovereignty in the latter part of European colonization created a spatialized construct—an elemental narrative of control over territory.<sup>44</sup> The spatialized nature of territorial sovereignty demanded acts of performance, legitimation, and habituation in order to maintain the mythology of exclusive or ultimate control.<sup>45</sup> There are epistemic needs to act like a state, as part of constructions of the state, even as the application of sovereign authority is negotiated against the reality of territorial control. Colonial actors asserted, ignored, and withheld claims of sovereign title to land in response to a range of factors, not only the strength and nature of non-European resistance, but also the jurisdictional claims of churches, empires, and trading corporations.<sup>46</sup> Yet, state actors must still perform like a state, to construct sovereign authority over territory, through iteration of elemental links between sovereignty and property.<sup>47</sup> Self-validating needs

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some states prohibit adverse possession claims on Crown land altogether. See Fiona Burns, *Adverse Possession and Title-By-Registration Systems in Australia and England*, 35 MELB. U. L. REV. 773, 777–805 (2011).

44. See John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 REV. INT'L POLIT. ECON. 53, 76–77 (1994) (describing the reification of state territorial spaces as fixed units of secure sovereign space); Richard T. Ford, *Law's Territory: A History of Jurisdiction*, 97 MICH. L. REV. 843, 843, 873 (1999) (noting the relationship between concepts of territorial sovereignty and the extension or acquisition of European dominions); see also James Ferguson & Akhil Gupta, *Spatializing States: Toward an Ethnography of Neoliberal Governmentality*, 29 AM. ETHNOLOGIST 981, 981–82 (2002) (noting that the state presents itself as “above,” “encompassing” local society as part of expression of sovereignty); Megan Wachspress, *Rethinking Sovereignty with Reference to History and Anthropology*, 5 INT'L J. L. CONTEXT 315, 319 (2009) (discussing the use of sovereignty as a justification for territorial acquisition in colonial contexts).

45. Nicholas Blomley provides a series of case studies of the performativity of property from the perspective of studies in critical geography. See, e.g., Nicholas Blomley, *Disentangling Property, Making Space*, in PERFORMATIVITY, POLITICS, AND THE PRODUCTION OF SOCIAL SPACE 133, 147 (Michael R. Glass & Reuben Rose-Redwood eds., 2014); Nicholas Blomley, *Performing Property, Making the World*, 27 CAN. J.L. JURIS. 23, 34–38 (2013) (describing the performative dimensions of property while also distinguishing performativity as an analytical concept from simple constructivist accounts of the ideology of property). For a canonical study of narrative as integral to property, see Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 37–58 (1990).

46. Benton & Ross, *supra* note 37, at 8.

47. Colonial contexts provided laboratories for modern forms of government—based on surveillance, control, large-scale bureaucracies and “ra-

to perform, construct, and imagine the state, in the face of challenges to territorial control, arise from the constitutive nature of sovereignty and control over territory.<sup>48</sup> We suggest that these constitutive processes create state-centric heuristics—ways of seeing land and property—even as entitlements are negotiated at the edges of the state.

#### A. *Land and the Lens of the State*

James Scott coined the phrase, “seeing like a state” to critique high modernism—the application of scientific principles to attempts at re-ordering the social and natural world.<sup>49</sup> The critique includes sedentarization projects that sought to reduce the mobility of people, as part of the “rational” re-ordering of human settlements, such as in the cases of forced villagization in Tanzania and Soviet collectivization of agriculture.<sup>50</sup> Such processes of social re-ordering require mechanisms to make social information “legible” to the state, through devices that include maps, cadastral surveys, and land registers.<sup>51</sup> The heart of Scott’s critique is excessive confidence in the capacity of the state to re-order society, the damage caused by coercive application of re-ordering programs, and the loss of local knowledge and adaptive capacity arising from the legibility processes of the state.<sup>52</sup> We assert a related cri-

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tional” re-ordering of settlements—that were then reflected in European national environments. See generally STEPHEN LEGG, SPACES OF COLONIALISM: DELHI’S URBAN GOVERNMENTALITIES (2007); David Scott, *Colonial Governmentality*, 43 SOC. TEXT 191 (1995).

48. See SCHMITT, *supra* note 2, at 45–47 (identifying legal techniques for the appropriation of land as the fundamental constitutive act of territorial sovereignty and the application of sovereign law). For case studies from Indonesia and Thailand, see Nancy Peluso, *Rubber Erasures, Rubber Producing Rights: Making Racialised Territories in West Kalimantan, Indonesia*, in THE POLITICS OF POSSESSION: PROPERTY, AUTHORITY AND ACCESS TO NATURAL RESOURCES 46, 48–49 (Thomas Sikor & Christian Lund eds., 2009); Peter Vandergeest & Nancy Peluso, *Territorialization and State Power in Thailand*, 24 THEORY & SOC’Y 385, 391–417 (1995).

49. See SCOTT, SEEING LIKE A STATE, *supra* note 7, at 87–102.

50. *Id.* at 193–261.

51. *Id.* at 262–306. Foucault provides a similar description of partitioning techniques as a technique of social control in relation to monasteries, military formations and camps, hospitals, asylums, schools, and factories. See, FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 10, at 143.

52. See SCOTT, SEEING LIKE A STATE, *supra* note 7, at 3–6. For applications of Scott’s thesis to a remarkable range of comparative contexts, see Karl Ap-

tique: that taken-for-granted assumptions of the capacity of states to control relationships with land cause damage when they hinder recognition of heterogeneous local land relationships that are adaptive to circumstances such as natural disasters.<sup>53</sup>

The primary concern of this Article is sovereign-centered perspectives on entitlements to land rather than the actuality of negotiating entitlements among heterogeneous actors of the state. To see like a state is not necessarily to assume a monolithic state.<sup>54</sup> Not all government actors assert sovereign-cen-

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puhn, *Inventing Nature: Forests, Forestry, and State Power in Renaissance Venice*, 72 J. MOD. HIST. 861, 861–89 (2000); Christopher J. Coyne & Adam Pellillo, *The Art of Seeing Like a State: State Building in Afghanistan, the DR Congo, and Beyond*, 25 REV. AUSTRIAN ECON. 35, 35–52 (2012); Carl J. Griffin, *More-Than-Human Histories and the Failure of Grand State Schemes: Sylviculture in the New Forest, England*, 17 CULTURAL GEOGRAPHIES 451, 451–72 (2010); Randolph Head, *Knowing Like a State: The Transformation of Political Knowledge in Swiss Archives, 1450–1770*, 75 J. MOD. HIST. 745, 745–82 (2003); Jason Mosley & Elizabeth E. Watson, *Frontier Transformations: Development Visions, Spaces and Processes in Northern Kenya and Southern Ethiopia*, 10 J. E. AFR. STUD. 452, 452–75 (2016); Cyrus Schayegh, “Seeing Like a State”: *An Essay on the Historiography of Modern Iran*, 42 INT’L J. MIDDLE EAST STUD. 37, 37–61 (2010); David Shearer, *Elements Near and Alien: Passportization, Policing, and Identity in the Stalinist State, 1932–1952*, 76 J. MOD. HIST. 835, 835–81 (2004).

53. We are not aware of any other work linking Scott’s “seeing like a state” thesis to land law and natural disasters. Some readers may see resonances of Hayekian perspectives in our skepticism relating to the state and its capacity to formulate optimal *ex ante* rules for the control of human mobility after natural disasters. See Kevin A. Carson, *Legibility and Control: Themes in the Work of James C. Scott* 6 (Center for a Stateless Soc’y Paper No. 12, 2011), <https://c4ss.org/wp-content/uploads/2011/05/James-Scott.pdf> (noting similarities between Hayek’s account of the “knowledge problem” of state market regulation and Scott’s distinction between knowledge embedded in local experience [*metis*] and knowledge derived through generalized deductions from fundamental principles [*techne*]). While we accept analogies with Hayekian approaches, our focus is not so much the “knowledge problem” of state regulation but the nature, provenance, and dissemination of state-centric interpretive frames relating to land.

54. We make this point in response to Tania Li’s critique of Scott’s “seeing like a state” thesis. See Tania Murray Li, *Beyond “the State” and Failed Schemes*, 107 AM. ANTHROPOLOGIST 383, 383–84 (2005) (critiquing the “spatial optic that posits an up there, all-seeing state operating as a preformed repository of power, spread progressively outward to nonstate spaces beyond its reach.”). A related critique of Scott’s thesis is put by Nicholas Blomley: that “seeing like a state” does not *ipso facto* involve simplification of proprietary complexity. While the legibility devices of the state often involve characterizations of simplification, the purported simplification of property rights



tric visions of land in the everyday negotiation of state authority. For example, colonial administrators qualified claims of sovereign title to land as a result of limits on the legal provenance of colonization and the coercive capacity of colonial regimes.<sup>55</sup> Even today, postcolonial state actors engage in situational negotiation of proprietary claims, at the margins of the state, through co-option and hybridization of non-state sources of entitlement.<sup>56</sup> In terms of urban planning, modernist perspectives on human settlements, of the kind critiqued by Scott, may also intermingle with pre-modern ways of regulating urban behavior through notions such as offensiveness.<sup>57</sup> Nevertheless, for all this, European colonization disseminated a positivist way of seeing property—a sovereign-centric perspective that embedded through the accretion of time a conceptual baseline for bureaucratic interpretation and negotiation of re-

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through state-centric devices also involves a re-entanglement of property relations in processes of measurement, commodification, and law. See Nicholas Blomley, *Simplification is Complicated: Property, Nature, and the Rivers of Law*, 40 ENVTL. & PLAN. A: ECON. & SPACE 1825, 1827 (2008). Our response, as with Li's critique, is that "seeing like a state" perspectives properly focus on interpretive frames derived from narratives of simplification, as part of mythic constructions of the state, not whether claims of simplification hold up as a matter of process or ontological fact. We therefore distinguish interpretation from actuality, in a way we feel Scott also intended.

55. See Benton & Ross, *supra* note 37, at 8. For discussion of the legal recognition of customary law as a technique of colonial control, see Anthony N. Allott, *The Judicial Ascertainment of Customary Law in British Africa*, 20 MOD. L. REV. 244, 244 (1957); Sally Engle Merry, *Law and Colonialism*, 25 L. & SOC'Y REV. 889, 893 (1991) (reviewing MARTIN CHANOCK, *LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* (1985)).

56. There are a large number of ethnographic studies of the negotiability of property in postcolonial environments. For an overview that theorizes negotiability in terms of constitutive interactions between property and public authority, see generally Christian Lund, *Negotiating Property Institutions: On the Symbiosis of Property and Authority in Africa*, in *NEGOTIATING PROPERTY IN AFRICA* 11, 13–15 (Kristine Juul & Christian Lund eds., 2002).

57. Mariana Valverde, *Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance*, 45 L. & SOC. REV. 277, 277–79 (2011). Valverde further argues that the hybridity of "seeing like a city" does not involve the hegemony/resistance paradigm implicit in Scott's work, but a dialectical process where new and old methods of land use planning oscillate and interact in unpredictable ways. *Id.* at 280–81. Our thesis does not require a resolution of the debate as we focus on modernist land use planning techniques, in the form of "no-dwelling" zones, and not the nature of resistance by informal settlers or whether state-settler interactions were pluralist, negotiated or dialectical in nature.

relationships with land. This argument does not require “the state” to always behave like a state, but rather focuses on the nature, provenance, and dissemination of state-centric frames for the interpretation of land.

Our argument extends Scott’s analysis by drawing on principles of social constructivism to explain sovereign-centered perspectives on land and property.<sup>58</sup> Studies in social constructivism highlight the collective nature of social meaning.<sup>59</sup> The more people communicate similar interpretations of their environment, the more likely their interpretation assumes taken-for-granted characteristics.<sup>60</sup> Collective narratives may thus generate or reinforce the heuristics of individual cognition.<sup>61</sup> For example, the heuristic of “seeing like a state,” as a cognitive mechanism to interpret complex relationships with land, is generated or reinforced by participation in the self-

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58. A number of disciplinary perspectives have adopted constructivist (or interpretivist) arguments that reality is not an autonomous phenomenon identified through objective enquiry, and that shared understandings of reality are constructed through discourse and narrative. For canonical texts, see PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 50–108 (1967); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 3–32 (1973). There are considerable variations within constructivist theory that are not the subject of this Article. Our focus is constructions of meaning through the ideational power of narratives of state sovereignty. See Marc Williams, *Rethinking Sovereignty*, in *GLOBALIZATION: THEORY AND PRACTICE* 109, 111, 114 (Eleonore Kofman & Gillian Youngs eds., 1996) (distinguishing the mythology and reality of sovereignty and noting the manipulation of sovereignty myths by postcolonial elites).

59. For an influential early exposition, see BERGER & LUCKMANN, *supra* note 58, at 19–44 (describing social constructions of knowledge in everyday life); see also Michel Callon & Bruno Latour, *Unscrewing the Big Leviathan: How Actors Macro-Structure Reality and How Sociologists Help Them to Do So*, in *ADVANCES IN SOCIAL THEORY AND METHODOLOGY: TOWARD AN INTEGRATION OF MICRO- AND MACRO-SOCIOLOGIES* 277, 277–81 (Karin Knorr Cetina & Aaron V. Cicourel eds., 1981); Thomas Schwandt, *Constructivist, Interpretivist Approaches to Human Inquiry*, in *HANDBOOK OF QUALITATIVE RESEARCH* 118, 118 (Norman K. Denzin & Yvonna S. Lincoln eds., 1994).

60. See BERGER & LUCKMANN, *supra* note 58, at 43–48.

61. For leading psychological studies of the role of narratives in human cognition, see JEROME S. BRUNER, *ACTS OF MEANING* 35–40 (1990) (describing narrative and the making of meaning); MICHELE L. CROSSLEY, *INTRODUCING NARRATIVE PSYCHOLOGY: SELF, TRAUMA, AND THE CONSTRUCTION OF MEANING* 45–64 (2000) (describing narrative and the construction of self).

defining narratives of the state.<sup>62</sup> The heuristic is naturalized through constructions of identity, the signaling of reputation, the development of pro-group preferences, and the enforcement of norms within the state.<sup>63</sup> While government actors may still choose not to see like a state, there are self-reinforcing dimensions of heuristics as a result of the naturalization of individual ways of thinking through constitutive interactions with dominant narratives of a group.

Constructivist insights help to explain the cognitive blindness of land policy in the case of Typhoon Haiyan. John Ruggie argues that the core knowledge (i.e., episteme) that defines and binds a community also acts to delimit the proper interpretation of reality.<sup>64</sup> The episteme establishes the general conditions for knowledge—the narrative parameters that interpret reality at any given point in time or space.<sup>65</sup> To dilute or complicate the episteme is to undermine the self-perpetuating nature of the interpretive group. As a result, state actors may maintain mythologies of sovereign control over land, notwithstanding the persistence of informal settlements, in order not to undermine the elemental basis of the state. To put this point another way: state-centric heuristics for interpreting land may be so persistent, in the face of the divergent reality of human settlements, because of a constitutive relationship between the self-validating needs of the state and the production of shared meaning within the state. The point is significant because the assumption that the Philippine government had the capacity to control human relationships with land after Typhoon Haiyan may not have been a simple result of policy overreach, but a product of deep-seated imperatives to see like a state, as part of elemental constructions of the state.

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62. The canonical study is BENEDICT R. ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983) (describing the constructed nature of nations and states).

63. BERGER & LUCKMANN, *supra* note 58, at 149–65 (describing the role of socialization in the internalization of reality).

64. John Gerard Ruggie, *International Responses to Technology: Concepts and Trends*, 29 *INT'L ORG.* 557, 569–70 (1975); *see also* John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 *INT'L ORG.* 855, 868 (1998).

65. *See generally* MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* 400–07 (A.M. Sheridan Smith, Routledge Classics 2002) (1969) (identifying dominant epistemes for different stages of human history).

## B. *The Politics of Land and the State*

The idealized state has the administrative capacity to access information relating to land for the purposes of standardization and the technical capacity to record standardized land information for monitoring and upkeep purposes. These processes seek to render the local legible in order to meet the informational needs of a modern bureaucratic state.<sup>66</sup> Legibility techniques include land use maps, cadastral surveys, and registers of land titles or deeds.<sup>67</sup> Economic theories of property further reify the administrative capacity of states through baseline preferences for property standardization to reduce the information costs of identifying permitted and proscribed uses of resources.<sup>68</sup> By definition, the legal standardization of property requires administrative devices to render proprietary information relating to land legible to the state. As a result, baseline economic preferences for the standardization of property also encourage a belief that the answer to persistent non-standardized property is further or better constructions of the state. Thus, for example, common policy responses to persistent property informality involve capacity-building or technical assistance for government land administration agencies, rather than *a priori* skepticism as to the baseline ability of some states to provide, record, or recognize property rights for the poor.

The ideation of states has profound consequences for equity and exclusion where the mythology of sovereign control over land fails to match the reality of human relationships with land. Utilitarian preferences for standardized property infor-

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66. See generally MITCHELL DEAN, *GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY* 98–112 (1999) (identifying a range of circumstances where ‘modern’ government perspectives have been imposed on local populations).

67. See Ford, *supra* note 44, at 873–74 (noting the essential role of modern cartographic techniques in the emergence of concepts of territorial jurisdiction; cartography acted as a means to transform spatial meaning rather than as a mere neutral reflection of physical facts).

68. Thomas Merrill and Henry Smith are the leading U.S. proponents of information costs theories of property. See, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *YALE L.J.* 357, 359 (2001) (“[P]roperty imposes an informational burden on large numbers of people . . . . As a consequence, property is required to come in standardized packages that the layperson can understand at low cost.”).

mation assume a property system capable of replacing rather than overlaying heterogeneous local relationships with land. There are inevitable informality effects where a state is not willing or able to provide the land administration services required to replace local heterogeneity with standardized legal products. Those who are disengaged from the state, or cannot afford to comply with law, may adhere to localized land administration mechanisms notwithstanding official classifications of illegality or informality. These local administration mechanisms are well-documented and include coordination devices based on occupation and use, consent from informal powerholders, or even *de facto* recognition by local government officials.<sup>69</sup> While some landholders transition to law for rational cost/benefit reasons,<sup>70</sup> others affected by poverty are likely to be excluded from formal land administration systems because of the costs of registering titles and transfers or connecting to utilities and services. As outlined in the following discussion of the Philippines, these exclusionary impacts on the poor are exacerbated where the state applies cost recovery principles to program such as the titling of land, the development of serviced land, or the upgrading of tenure in informal settlements.

Conventional land administration devices such as land use maps, cadastral surveys, and title registers are not solely or simply technical exercises in the pursuit of aggregate social benefits.<sup>71</sup> The utilitarian framing of land policy has the potential to mask disproportionate impacts on poorer sections of society. Laws that restrict places of residence punish the home-

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69. See Fitzpatrick, *Fragmented Property Systems*, *supra* note 13, at 167–85 (describing a variety of coordination mechanisms for informal property systems).

70. See generally Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (arguing that when individuals need to coordinate, law works to make one equilibrium “focal” and thereby creates expectations that others will play the strategy associated with that equilibrium).

71. For an analysis of cadastral techniques as mechanisms of frontier violence, see generally Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid*, 93 ANNALS ASS’N AM. GEOGRAPHERS 121 (2003). For a related analysis of the distributional politics of urban land planning, see NICHOLAS K. BLOMLEY, *UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY* 29–32, 113 (2004).

less.<sup>72</sup> Laws that require the registration of titles or transactions disproportionately affect the poor.<sup>73</sup> Laws that require parol evidence of proprietary rights affect the undocumented.<sup>74</sup> Laws that prohibit settlements in unsafe areas punish those unable to afford alternative places of residence. Even laws that upgrade land tenure for informal settlers may force poor households to leave newly formal settlements as a result of the costs of formalization. In all these respects, and particularly in weak or contested state contexts, conventional land laws have a propensity to exacerbate conditions of poverty, inequality and—as we shall argue—vulnerability to recurrent natural disasters.

The following overview of the Philippines describes the conceptual linking of property and sovereignty through colonial law and the contemporary exclusion of poor landholders from formalized housing and land administration. The discussion traces sovereign-centric perspectives of government actors to key principles of Spanish and American land law in the Philippines. In summary, these principles include propositions that freehold property rights require original grant or recognition by the sovereign; that property transfers require registration to have *in rem* effect; and that adverse possession or prescription principles are abrogated by title registration requirements. The discussion then turns to state-centric perspectives on land and their relationship with settlement informality in the Philippines. The examples evidence a divergence of state-centric frames for land from popular understandings of property in many parts of the Philippines, particularly as illustrated by *latifundia* arrangements in agrarian areas,<sup>75</sup> failures of laws mandating land title registration, and the growth of informal

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72. See Nicholas Blomley, *Begging to Differ: Panhandling, Public Space, and Municipal Property*, in PROPERTY ON TRIAL: CANADIAN CASES IN CONTEXT 393, 393 (Eric Tucker et al. eds., 2012) (describing the differential effects of residence laws); Nicholas Blomley, *What Sort of Legal Space is a City?*, in URBAN INTERSTICES: THE AESTHETICS AND POLITICS OF THE IN-BETWEEN 1, 1–3 (Andrea Mubi Brighenti ed., 2013) (describing the scale and differential impacts of urban lawmaking).

73. Fitzpatrick, *Fragmented Property Systems*, *supra* note 13, at 152–53.

74. *Id.* at 154–56.

75. *Latifundia* are extensive, privately owned, landed estates, historically staffed by compelled or very low wage labor. In the Spanish empire, they were also referred to as *haciendas*. In the Philippines today there remain a number of large estates worked by sharecroppers or day laborers.

urban settlements. The divergence of state-centric frames from proprietary reality in the Philippines illustrates the “stickiness” of mythologies of sovereign control over land.

### C. *Property and Sovereignty in the Spanish Philippines*

The story of conceptual links between property and sovereignty in the Philippines most appropriately begins in 1681, when the *Recopilación de Leyes de las Indias* vested all land “held without proper and true deed of grant” in the Spanish Crown.<sup>76</sup> This rule—later known as the “Regalian Doctrine”—provided that land was “free and unencumbered” for disposal by the Crown, save for land reserved for public and common use, and after “distributing to the natives what may be necessary for tillage and pasturage.”<sup>77</sup> After the United States claimed sovereignty over the Philippines in 1898, the Supreme Court stated the effect of the Regalian doctrine in the following terms:

While the State has always recognized the right of the occupant to deed if he proves a possession for a sufficient length of time, yet it has always insisted that he must make that proof before the proper administrative officers, and obtain from them his deed, and until he did that the State remained the absolute owner.<sup>78</sup>

Book Four of the *Recopilación de Leyes de las Indias* locates the Regalian doctrine within a set of provisions governing the planning of Spanish settlements. The settlement plans include provisions for location of native populations, thereby providing an early example of sovereign-centric links between human mobility and land use planning.<sup>79</sup> The relocation of

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76. Novísima Recopilación de Leyes de las Indias lib. IV, tit. XII, ley XIV (1680) (Spain), discussed in *Cruz v. Sec’y of the Env’t & Nat. Res.*, G.R. No. 135385 (S.C., Dec. 6, 2000) (Phil.). *La Recopilación de Leyes de las Indias* is a compilation of legislation intended to be applied in the Western Indies, including the New Spain, promulgated in Spain in 1880 by royal decree of Carlos II. See Jorge A. Vargas, *MEXICO AND THE LAW OF THE SEA* 20 (2011).

77. *Cruz v. Sec’y of the Env’t & Nat. Res.*, G.R. No. 135385 (S.C., Dec. 6, 2000) (Phil.) (discussing Novísima Recopilación de Leyes de las Indias lib. IV, tit. XII, ley XIV (1680) (Spain)).

78. *Valenton v. Murciano*, 3 PHIL. REP. 537, 537 (S.C., Mar. 30, 1904).

79. These provisions are outlined in Novísima Recopilación de Leyes de las Indias lib. IV (1680) (Spain). See *supra* note 77.

people into civilian towns (i.e., *pueblos*) in the Philippines ostensibly took place for the purpose of religious instruction, as part of the *reducciones* policy.<sup>80</sup> The relocation of people led to re-classification of their vacated traditional land as Crown or Royal Estate land (i.e., *realangas*).<sup>81</sup> Once part of a *pueblo*, indigenous households received usufructuary rights to residential and farming land.<sup>82</sup> Outside the *pueblo*, however, the classification of vacated lands as *realangas* provided the basis for Crown grants to establish new civilian or military settlements.

The Regalian doctrine acted as a framing device—an ambit claim of sovereign control over land—rather than a conclusive statement of Spanish land law. During the eighteenth century in particular, there were a number of laws, decrees, and practices that purported to recognize native interests in land.<sup>83</sup> Corpuz cites, for example, a 1713 Royal Cedula requiring colonial authorities to protect native rights to land “inherited from their ancestors.”<sup>84</sup> In 1784, the Governor General of the Philippines identified three types of private property in the archipelago, distinguishing property obtained through inheritance, legitimate purchase, and “title of ownership from the royal

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80. See RENATO CONSTANTINO, *A HISTORY OF THE PHILIPPINES: FROM THE SPANISH COLONIZATION TO THE SECOND WORLD WAR* 58–59 (1975) (discussing the motivations for the *reducciones* policy).

81. *Cruz v. Sec’y of the Env’t & Nat. Res.*, G.R. No. 135385 (S.C., Dec. 6, 2000) (Phil.) (citing 2 ONOFRE DIZON CORPUZ, *THE ROOTS OF THE FILIPINO NATION* 277 (1989) (“All lands lost in the process of *pueblo* reorganization . . . were now declared to be crown lands.”)).

82. *Novísima Recopilación de Leyes de las Indias* lib. IV, tit. XII, ley XIV (1680) (Spain); *ORDENANZAS DE BUEN GOBIERNO*, ORD. 11 OF 1758 (Spain), *reiterated in* *ORDENANZAS DE BUEN GOBIERNO*, ORD. 53 OF 1768 (Spain) (“The territory of native reductions and villages is declared communal, and at the time of the erection of any village, lands must be apportioned to the Indians . . . . No land-tax or rent is to be paid for such land, it being the royal will . . . that the Indians have lands allotted to them for planting and working. . . .”). For further discussion of local landholdings in the *pueblos*, see ONOFRE DIZON CORPUZ, *I THE ROOTS OF THE FILIPINO NATION* 274–304 (1989) (discussing the process of *pueblo* organization, paying particular attention of the transformation of property rights held by relocated Filipinos). A similar discussion is available in CONSTANTINO, *supra* note 80, at 53–72.

83. Owen J. Lynch, *Land Rights and Land Usurpation: The Spanish Era (1565-1898)*, 63 *PHIL. L.J.* 82, 93 (1988) (outlining series of legal responses as reports of abuses of Filipino rights to land reached Madrid).

84. See CORPUZ, *supra* note 82, at 291.



Audiencia.”<sup>85</sup> The category of “legitimate purchase” recognized the acquisition of rights “through native chiefs [i.e., *caciques*] who were cultivating them at the time when the Catholic faith was established in the Philippines, and when they rendered fidelity, obedience, and vassalage to the august Spanish monarchs.”<sup>86</sup>

#### D. *Agricultural Land and the Emergence of Inequality*

The legal recognition of “legitimate purchase” of Filipino land had particular significance as it facilitated widespread accumulation of lands by conquistadores, wealthy Filipinos, and the Catholic Church itself. Church lands, known as friar estates, also expanded through conquest, encroachment, forfeiture for unpaid debts, and outright land grabbing.<sup>87</sup> By the end of the eighteenth century, Catholic friars owned more than 185,000 hectares of land—about one fifteenth of all land under cultivation across the archipelago.<sup>88</sup> The holdings were concentrated in Luzon.<sup>89</sup> Initially, local farmers worked friar land as sharecroppers.<sup>90</sup> As the estates expanded, the preferred method of management took the form of leases to wealthy families, who entered various forms of sharecropping agreements with resident cultivators.<sup>91</sup>

In 1902, under the new U.S. administration, the Taft Commission negotiated the purchase of 166,000 hectares of

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85. José Basco y Vargas, *Decree of 1784*, in 52 THE PHILIPPINE ISLANDS: 1493-1898, 291, 291–301, 295–96 (Emma Helen Blair & James Alexander Robertson eds. & trans., 1911).

86. *Id.*

87. See KATHLEEN M. NADEAU, THE HISTORY OF THE PHILIPPINES 36 (2008) (“At first, the friars developed large tracts of agricultural land that supplied rice for local consumption and urban centres . . . . The friar estates spread out to encompass more common lands and family plots, which sometimes caused peasant uprisings . . .”).

88. CONSTANTINO, *supra* note 80, at 72.

89. See *id.* at 64–68 (documenting the concentration of property held by the friars in the Spanish colonial Philippines).

90. NADEAU, *supra* note 87, at 36 (“Farming was done by sharecroppers, who the friars were able to recruit by releasing them from tribute-labor demands by the state.”).

91. SOLEDAD BORRAMEO-BUHLER, *The Inquilinos of Cavite and Filipino Class Structure in the Late Nineteenth Century*, 7 ASIAN STUD. 41, 45 (1973) (discussing the rise in subleases and sharecropping assignments).

friar land from the Holy See.<sup>92</sup> The land was then offered for sale at prices set to recoup the purchase price and interest.<sup>93</sup> This application of cost recovery principles generated prices far beyond the capacity of the resident farmers, and the bulk of the estates went to wealthy families.<sup>94</sup> One commentator concludes that, as a result, friar lands “fell like ripe mangoes into the hands of the likes of [former] President [Corey] Aquino’s immediate ancestors.”<sup>95</sup> In the Visayas, where Typhoon Haiyan caused the most damage, the opening of Iloilo port to foreign trade in 1855 also drove the consolidation of small sugar farms into large plantation estates.<sup>96</sup> As in Luzon, the plantation estates took on *latifundia* characteristics and were concentrated in the hands of local elites.<sup>97</sup> Families that accrued large estates under colonial administration continue to exercise disproportionate influence over political processes in the independent Philippines.<sup>98</sup> The entrenchment of elite

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92. LOURDES SAULO-ADRIANO, A GENERAL ASSESSMENT OF THE COMPREHENSIVE AGRARIAN REFORM PROGRAM 3 (1991) (“Taft finally succeeded when the Pope agreed to sell 166,000 ha of the friars’ landholdings for the amount of \$7 million.”).

93. Jennifer C. Franco & Saturnino M. Boiras Jr., *Struggles Over Land Resources in the Philippines*, 19 PEACE REV. 67, 68–69 (2007) (noting that the government purchased the lands with money borrowed at commercial interest rates, and resold the land to recover all costs).

94. LESLIE E. BAUZON, PHILIPPINE AGRARIAN REFORM 1880-1965: THE REVOLUTION THAT NEVER WAS 15 (1975) (documenting the failure of the United States administration to distribute friar land to small landholders, claiming that “in the end . . . what happened was merely a transfer of titles of ownership from the friars to the Filipino and American landlords.”).

95. Benedict Anderson, *Cacique Democracy in the Philippines: Origins and Dreams*, 1 NEW LEFT REV. 3, 6 (1988).

96. See Alfred W. McCoy, *A Queen Dies Slowly: The Rise and Decline of Iloilo City*, in PHILIPPINE SOCIAL HISTORY: GLOBAL TRADE AND LOCAL TRANSFORMATIONS 297, 302 (Alfred W. McCoy & Ed. C. de Jesus eds., 1982) (“Contemporary historians have been nearly unanimous in their assessments that the year 1855, the year Iloilo was opened to foreign commerce, marks the start of a new era in Philippine economic history.”).

97. See generally JOHN A. LARKIN, SUGAR AND THE ORIGINS OF MODERN PHILIPPINE SOCIETY (2001) (detailing on the role of the sugar industry in Philippine history, including the industry’s impact on land relations in the Visayas); see also FILOMENO V. AGUILAR, JR., CLASH OF SPIRITS: THE HISTORY OF POWER AND SUGAR PLANTER HEGEMONY ON A VISAYAN ISLAND 9–10 (1998) (detailing the same).

98. See Anderson, *supra* note 95, at 10–12 (illustrating the historical relationship between land acquisition under the U.S. regime and contemporary political power). Anderson uses “cacique democracy” to refer to a system of

landholder control over government processes was thus shaped and mediated by the extension of colonial techniques of government to land formerly held under indigenous arrangements.

The Philippines remains marked by high degrees of inequality of agricultural land ownership. In 1952, an authoritative study estimated that forty-six percent of all farms were tenanted.<sup>99</sup> In 1955, a further study identified 221 landowners with more than 1000 hectares of land each.<sup>100</sup> Around 14,000 individuals owned approximately forty-two percent of all farmed land.<sup>101</sup> The Philippine government has attempted an agrarian land reform program—the Comprehensive Agrarian Reform Program (CARP) and its successors. The Comprehensive Agrarian Reform Law of 1988 creates a procedure for compulsory acquisition of agricultural land for re-distribution to tenant farmers and farm workers.<sup>102</sup> Beneficiaries receive ownership of the land subject to a lien to secure payment for the land and restrictions on sale or transfer of the land for a period of ten years.<sup>103</sup> Yet, over many years of operation, CARP and its successors have re-distributed disproportionately small amounts of land, relative to the cost and duration of the program, due to government dysfunction and resistance from

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democracy where political leadership is concentrated in the hands of a national oligarchy that had been able to consolidate power across Spanish, United States, and Filipino administrations. *See also* Paul D. Hutchcroft & Joel Rocamora, *Strong Demands and Weak Institutions: The Origins and Evolution of the Democratic Deficit in the Philippines*, 3 J. E. ASIAN STUD. 259, 260–61 (2003) (illustrating the historical trajectory of contemporary political elites from the time of the early United States regime).

99. GENEROSO F. RIVERA & ROBERT T. McMILLAN, *THE RURAL PHILIPPINES: A COOPERATIVE PROJECT OF THE PHILIPPINE COUNCIL FOR UNITED STATES AID AND THE UNITED STATES MUTUAL SECURITY AGENCY* 42–43 (1952).

100. ARTURO P. SORONGON, *A SPECIAL STUDY OF LANDED ESTATES IN THE PHILIPPINES: ANALYSIS AND FINDINGS* 2, 6–7 (1955).

101. *Id.*

102. An Act Instituting a Comprehensive Agrarian Reform Program to Promote Social Justice and Industrialization, Providing the Mechanism for Its Implementation, and for Other Purposes, Rep. Act No. 6657, §§ 3(c), 4 (June 10, 1988), <http://www.officialgazette.gov.ph/1988/06/10/republic-act-no-6657> (Phil.).

103. CARP applies to land devoted to agricultural activity, including public domain land suitable for agriculture, but not to land classified as mineral, forest, residential, commercial, or industrial. *Id.* at § 3.

large landowning elites.<sup>104</sup> In this sense, the construction of state capacity to respond to majority demands for landholding inequality, through programs of land reform, has met the reality of state dysfunction and resistance from influential landowner interest groups.

#### E. *The Failure of Mandatory Title Registration*

During the 1880s—in common with other European colonies—concerns with the economic productivity of Spanish colonies, combined with extensions of colonial control, led to reification of the Regalian doctrine as the interpretive basis for land law and administration in the Philippines.<sup>105</sup> Legislative reforms requiring registration of land titles and transactions reinforced the conceptualization of property as a legal product derived from or through state grant or recognition. The Spanish administration set out a system of mandatory registration of ownership titles under the 1893 Mortgage Law<sup>106</sup> and the 1894 Maura Law.<sup>107</sup> The U.S. administration further mandated title registration under the Land Registration Act 1902.<sup>108</sup> While these laws consolidated the idea of sovereign state control, their implementation was not sufficient to replace local practices and preferences relating to land. The laws thus formed part of constructions of the state but did not reflect the reality of property-like relationships with land.

The Land Registration Act sets out a number of Torrens title registration principles: for example, that good faith pur-

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104. See ARSENIO M. BALISACAN ET AL., COMPREHENSIVE AGRARIAN REFORM PROGRAM IMPACT ASSESSMENT: STUDY ON THE IMPACT OF CARP ON POVERTY REDUCTION AND PROSPECTS FOR LONG-TERM GROWTH, FINAL REPORT 33 (2007) (describing the CARP program as “plagued with difficulties and problems”); see also Jennifer C. Franco, *Making Land Rights Accessible: Social Movements and Political-Legal Innovation in the Rural Philippines*, 44 J. DEV. STUD. 991, 1014 (2008) (discussing the challenges of the Agrarian Reform program).

105. See Benton & Ross, *supra* note 37, at 11 (noting transition from the pluralism that characterized earlier colonial endeavors).

106. Ley hipotecaria para las provincias de ultramar [Mortgage Law for the Overseas Provinces] (R.D. 1893) (Spain).

107. Royal Decree of February 13, 1894 (R.D. 1894) (Spain).

108. An Act to Provide for the Adjudication and Registration of Titles of Land in the Philippine Islands, Act No. 496 (Nov. 6, 1902) (Phil.) [hereinafter *Land Registration Act*], <http://lmb.gov.ph/index.php/93-resources/v-laws-and-policies/166-acts-2017>.

chasers of registered interests are not bound by unregistered interests;<sup>109</sup> that rights based on prescription or adverse possession do not derogate from title to registered land;<sup>110</sup> and that conveyances have proprietary effect from the time of registration only.<sup>111</sup> These provisions appear to cement state control over the acquisition and transfer of proprietary rights. Yet, even here, the law provided a construction of state authority rather than a reflection of proprietary reality. Very large numbers of landholders in the Philippines did not (and do not) comply with mandatory title registration requirements for proprietary transfers. To take one example: by 1911, only 9,000 of an identified 2,250,000 parcels of land had been registered under the Land Registration Act 1902.<sup>112</sup>

Even today, the Department of Environment and Natural Resources (DENR) estimates that only sixty-nine percent of land available for titling in the Philippines is titled.<sup>113</sup> Registration rates apply only to land classified as alienable and disposable, which covers around forty-seven percent of the land-mass.<sup>114</sup> The other fifty-three percent is classified as forests, mining, or national park land, and includes many millions of long-term residents classified as illegal or informal landholders.<sup>115</sup> The interpretive principle of state control over proprietary acquisition and transfer is also undermined by widespread failures to register transactions over titled land, notwithstanding legal rules requiring registration to grant proprietary effect

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109. *Id.* § 39.

110. *Id.* § 46. Some Torrens system jurisdictions (outside the Philippines) allow for registration of rights based on adverse possession. See Fiona Burns, *supra* note 43, at 777–805.

111. Valid conveyances have *inter partes* effects prior to the act of registration. Land Registration Act, *supra* note 108, § 50.

112. See CORPUZ, *supra* note 82, at 528.

113. PHIL. DEP'T OF ENV'T AND NAT. RES., COMPENDIUM OF BASIC ENR STATISTICS FOR OPERATIONS AND MANAGEMENT 88 (2d ed. 2008) [hereinafter DENR].

114. Tony Burns, *Land Administration Reform: Indicators of Success and Future Challenges* 29 (World Bank Agric. & Rural Dev. Discussion Paper 37, 2006), <http://siteresources.worldbank.org/EXTARD/Resources/ARDDiscussionPaper37.pdf>.

115. Emelyne V. Talabis, *Land Titling in the Philippines: Addressing Challenges Through a Reform-Oriented Framework* 3 (Mar. 24, 2017) (unpublished manuscript) (paper presented at the 2017 World Bank Conference on Land and Poverty).

to conveyances.<sup>116</sup> One 2013 survey reported that only fifteen percent of title-holders intended to register conveyances with the Department of Environment and Natural Resources.<sup>117</sup> Where there is registration, there is evidence of widespread loss, theft, damage, and illegal alteration of land records.<sup>118</sup> Yet, the Philippines persists with Torrens land title law and World Bank-assisted systematic land titling programs, notwithstanding their long-term failure to reflect or control human relationships with land.

#### F. *The Spread of Informal Urban Settlements*

Since independence, the Philippines has experienced rapid rates of population growth and rural-urban migration. Between 1948 and 2010, the population increased from 19.2 to 92.34 million people.<sup>119</sup> In the mid-1970s, some 36 percent of the population lived in urban areas.<sup>120</sup> By 2010, 66.4 percent of the population was urban,<sup>121</sup> with Manila and the National Capital Region growing from 5.9 million residents in 1980 to 11.9 million residents by 2010.<sup>122</sup> While assessments vary as to

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116. *Land Registration Act*, *supra* note 108, §§ 39, 50.

117. FLORADEMA C. ELEAZAR ET AL., IMPROVING LAND SECTOR GOVERNANCE IN THE PHILIPPINES: SYNTHESIS REPORT IMPLEMENTATION OF LAND GOVERNANCE ASSESSMENT 106 (2013).

118. *See* Burns, *supra* note 114, at 29. For further discussion of the state of the Philippines land administration, see ELEAZAR ET AL., *supra* note 117, at 92 (providing a comprehensive analysis of land administration issues in the Philippines); CARLOS ISLES & BERLIN BERBA, PHILIPPINES-AUSTRALIA LAND ADMINISTRATION AND MANAGEMENT (LAMP) PROJECT 8 (2002) (describing a “number of significant issues” in land administration in the Philippines, including that land descriptions in certificates of title are “prone to error”); GILBERTO M. LLANTO & MARIFE M. BALLESTEROS, LAND ISSUES IN POVERTY REDUCTION STRATEGIES AND THE DEVELOPMENT AGENDA: PHILIPPINES 7–10 (2003) (documenting shortcomings in land administration infrastructure and capacity).

119. *The 2010 Census of Population and Housing Reveals the Philippine Population at 92.34 Million*, PHIL. STAT. AUTHORITY (Apr. 4, 2010), <https://www.psa.gov.ph/content/2010-census-population-and-housing-reveals-philippine-population-9234-million>.

120. AGNES R. QUISUMBING & SCOTT McNIVEN, MIGRATION AND THE RURAL-URBAN CONTINUUM: EVIDENCE FROM THE RURAL PHILIPPINES 1 (2005).

121. Nat’l Statistics Office, *Philippines—Census of Population and Housing Reports 2010*, 2–3 PHIL. STAT. AUTHORITY (Feb. 24, 2016), <http://web0.psa.gov.ph/psada/index.php/catalog/64>.

122. *Id.*

the number of people living in urban informal settlements, a 2003 UN-Habitat study provided an estimate of 2.54 million unauthorized residents of vacant private and government-owned land in Metro Manila alone.<sup>123</sup> The UN-Habitat study reports findings from an Asia Development Bank-supported survey that, on average, informal settlements in Metro Manila had been in place for nineteen years—with some more than forty years old; that three-quarters of their inhabitants had been in residence for more than five years; and that most residents perceived themselves as legal citizens awaiting government housing assistance even as they acknowledge the illegality of “squatting” itself.<sup>124</sup>

Although evictions occur in the context of infrastructure or building projects, most informal settlements in the Philippines are long-term if not multi-generational in nature. From 1987 to 1997, “squatting” was criminalized under the authoritarian regime of President Marcos.<sup>125</sup> Since 1997, there have been laws and programs to protect informal settlers from eviction. For example, the Urban Development Housing Act (UHDA) requires thirty days’ notice of eviction, and “adequate consultation” both with families to be resettled and communities in locations of resettlement.<sup>126</sup> At the same time, the UDHA excludes “professional squatters” and members of “squatting syndicates” from subsidized housing programs,<sup>127</sup> and provides for the identification, eviction, and punishment

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123. See UN-HABITAT, *THE CHALLENGE OF SLUMS*, *supra* note 3, at 215–16. Other estimates vary. Cf. Jeanette E. Cruz, *Estimating Informal Settlers in the Philippines 1* (Oct. 5, 2010) (unpublished manuscript) (paper presented at 11th National Convention on Statistics in Manila, Philippines) (estimating that over 550,000 households had informal tenure arrangements), <http://www.creba.ph/images/Housing%20Library/Estimating%20Informal%20Settlers%20in%20the%20Philippines%20by%20Director%20Jeanette%20E.%20Cruz,%20Housing%20and%20Urban%20Development%20Coordinating%20Counci.pdf>.

124. See UN-HABITAT, *THE CHALLENGE OF SLUMS*, *supra* note 3, at 256.

125. *Penalizing Squatting and Other Similar Acts*, Pres. Decree No. 772, § 1 (Aug. 20, 1975) (Phil.), [https://www.lawphil.net/statutes/presdecs/pd1975/pd\\_772\\_1975.html](https://www.lawphil.net/statutes/presdecs/pd1975/pd_772_1975.html).

126. *An Act to Provide for a Comprehensive and Continuing Urban Development and Housing Program, Establish the Mechanism for Its Implementation, and For Other Purposes*, Rep. Act No. 7279, § 28 (Mar. 24, 1992) (Phil.) [hereinafter UHDA], <http://www.officialgazette.gov.ph/1992/03/24/republic-act-no-7279>.

127. *Id.* § 16(d).

of professional squatters, and the demolition of their houses.<sup>128</sup> Importantly, professional squatters are defined to include people who have received housing units from the government, and have sold, leased, or transferred the unit “to settle illegally in the same place or another urban area.”<sup>129</sup>

There is evidence that poor households sell, lease, or transfer housing units provided by the government because of the costs of taxes, utilities, and services. As a result, the government is not able to prevent out-migration of the poor from subsidized housing and in-migration of wealthier households. The Community Mortgage Program (CMP) provides an illustration. The CMP has provided subsidized loans for over 190,000 households to form associations and buy land for settlement.<sup>130</sup> Most land is purchased *in situ* and thus avoids the public costs of developing new areas of serviced land. However, the program requires beneficiaries to re-pay their loan in installments and authorizes the housing association to commence eviction proceedings after three months’ arrears of payment.<sup>131</sup> A UN-HABITAT study notes examples of wealthier residents evicting poorer residents for default in payments.<sup>132</sup> Further, there is evidence of “illegal substitutions,” where middle-class households purchase housing in desirable urban locations from CMP beneficiaries notwithstanding legal restrictions on the sale or lease of their lot.<sup>133</sup> If these beneficiaries thereafter live in the same or another informal urban settlement, they fall into the legal category of “professional squatters” and are excluded from future housing assistance.<sup>134</sup>

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128. *Id.* § 27.

129. *Id.* § 3(m).

130. UN-HABITAT, COMMUNITY-BASED HOUSING FINANCE INITIATIVES: THE CASE OF COMMUNITY MORTGAGE PROGRAMME IN THE PHILIPPINES 26 (2009) [hereinafter UN-HABITAT, COMMUNITY-BASED HOUSING].

131. UHDA, *supra* note 126, § 32(c).

132. See UN-HABITAT, COMMUNITY-BASED HOUSING, *supra* note 130, at 1, 55.

133. See Erhard Berner, *Poverty Alleviation and the Eviction of the Poorest: Towards Urban Land Reform in the Philippines*, 24 INT’L J. URB. & REGIONAL RES. 554, 563 (2000) (“[W]hile the marginal segments of the population are expelled by their neighbors and forced to move on to find shelter in other squatter settlements, the former slums become middle-class areas.”).

134. See, e.g., *De Castro Homesite Inc. v. Leachon*, G.R. No. 124856, 453 S.C.R.A. 1 (Mar. 10, 2005) (Phil.) (“Article I, Section 3 of Rep. Act No. 7279 defines ‘professional squatters’ as individuals or groups who occupy lands without the express consent of the landowner and who have sufficient in-



### G. *Property and Path Dependence*

There is a line of literature that explains the emergence of widespread landholding informality, such as in the Philippines, by reference to factor endowments and the initial design of institutions. Endowments such as climate, soil, disease, and the cost of labor, lead to production systems that shape political incentives for the design of property law. A standard illustration is Latin America and the Caribbean, where the climate and the quality of soil suited crops such as sugar, coffee, and tobacco with scale economies in plantation production.<sup>135</sup> High population densities, or access to the slave trade, provided access to cheap labor. Colonial administrations lacked incentives to allow landownership for the majority, or to protect them from state predation or expropriation, because of the extractive nature of colonial activity.<sup>136</sup> Vicious cycles of inequality and informality emerged as minoritarian property arrangements delivered privileged rents to interest groups with the political capacity to lock in predatory state control over land and restrict opportunities for secure smallholder land ownership.

These institutional accounts provide a means to analyze the incentives of property law design.<sup>137</sup> But, they do not provide an explanation for heuristics—the global spread of sover-

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come for legitimate housing. The term shall also apply to persons who have previously been awarded homelots or housing units by the Government but who sold, leased, transferred the same to settle illegally in the same place or in another urban area, and *non-bona fide* occupants and intruders of lands reserved for socialized housing.”).

135. See Daron Acemoglu et al., *Institutions as a Fundamental Cause of Long-Run Growth*, in 1 HANDBOOK OF ECONOMIC GROWTH 368, 400 (2005); see also Lee J. Alston et al., *The Development of Property Rights on Frontiers: Endowments, Norms and Politics*, 72 J. ECON. HIST. 741, 754–65 (2012) (providing further illustrations from their survey of settlement frontiers in Eastern Australia, the Great Plains of the United States, and Brazil).

136. See KENNETH L. SOKOLOFF & STANLEY L. ENGERMAN, *Factor Endowments, Institutions, and Differential Paths of Growth Among New World Economies: A View from Economic Historians of the United States*, reprinted in HOW LATIN AMERICA FELL BEHIND 260 (Stephen H. Haber ed., 1997) (focusing on initial factor endowments, particularly relating to the supply of labor, as generative of persistent inequality of political institutions).

137. See Acemoglu et al., *supra* note 135, at 427 (“[E]conomic institutions that enforce property rights or protect against state predation may not be in the interest of a ruler who wants to appropriate assets.”).

eign-centric interpretive frames for land. Legal doctrines of territorial sovereignty linked with positivist formulations of land law from the latter stages of the nineteenth century to frame a dominant conception of “native” property. The primary drivers were not only colonial processes of economic exploitation, but also the resolution of inter-jurisdictional conflicts among churches, trading corporations, military institutions, and colonial administrations.<sup>138</sup> Even after decolonization, positivist principles of European land law remain embedded in conceptualizations of territorial sovereignty, particularly in terms of rules that freehold property in land derives from or through the sovereign, and that land without an owner or recognized occupier vests in the sovereign. For government actors, these state-centric principles create a natural frame for applying labels of illegality and informality even in circumstances where territorial sovereignty itself is contested—where large numbers of people do not comply with the law for reasons of poverty, government dysfunction, and communicative separation from the state. Our argument, therefore, is that state-centric frames for interpreting relationships with land are widespread as a result of conceptual links between sovereignty and property derived from European colonization; and that these links are revealed with particular force in countries where historical factors, such as endowments, have interacted with social, economic, and demographic trends to produce widespread non-compliance with law.

What is clear is that positivist constructions of land law and territorial sovereignty have played a central role in the

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138. See Lauren Benton, *Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State*, 41 *COMP. STUD. SOC'Y & HIST.* 563, 364–65 (1999) (arguing that territorialized sovereignty was not a product of the imposition of municipal European legal order alone, but an outgrowth of efforts to mediate inter-jurisdictional conflicts arising from colonization); see also Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *HARV. INT'L L.J.* 1, 4–6 (1999) (describing the way in which the colonial process—and in particular the subjugation of non-European peoples—shaped positivist notions of sovereign territorial states as constitutive units of international legal order); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 *Q. L. REV.* 99, 102–05 (1997) (arguing that classical conceptions of sovereignty that emerged in the nineteenth century continue to influence contemporary formulations of global legal order).

perpetuation of property and informality in many parts of the postcolonial world.<sup>139</sup> The conceptual linking of property and sovereignty is not ineluctable, ahistorical, or intrinsic to the ontological notion of property or, for that matter, territorial sovereignty.<sup>140</sup> European doctrines of territorial sovereignty formed through processes of colonial subjugation and exploitation.<sup>141</sup> Their application to land law has acted—in combination with contemporary title registration requirements—to deny property rights to vast numbers of people who reside on land claimed by the state or left vacant by private landholders for speculative purposes. Yet, territorial sovereignty remains a dominant interpretive frame for human relationships with land. Moreover, as we shall see, Westphalian conceptions of territorial state sovereignty remain a constitutive element of global legal order,<sup>142</sup> including in relation to the emerging international law of disaster risk reduction. The perverse result is that state-centric heuristics derived from exploitative colonial processes now apply to the reduction of disaster risk through land use references in international instruments, even though “seeing like a state” is a central cause of vulnerability to disasters.

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139. See THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 184 (2d ed. 2008) (criticizing *inter alia* Westphalian concepts of sovereignty as a key cause of extreme global property); see also UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 26–27, 153 (2008) (describing the role of international law in appropriation and theft of resources from the developing world).

140. Sovereignty itself does not necessarily demand denial of property rights formed outside the domain of sovereign grant. For a discussion, see MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, 11 (2001).

141. See James Thuo Gathii, *International Law and Eurocentricity*, 9 *EUR. J. INT’L L.* 184, 187 (1998).

142. See A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 *REV. INT’L STUD.* 133, 134–36 (2001) (describing classical positivist conceptions of states as constituent subjects of international law); Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 *MICH. J. INT’L L.* 1113, 1120–26 (1995) (describing distorting impacts of concepts of territorial sovereignty on processes of decolonization in Africa); Vasuki Nesiiah, *Placing International Law: White Spaces on a Map*, 16 *LEIDEN J. INT’L L.* 1, 6 (2003) (criticizing foundational notions of sovereign states as constituent elements of international law with reference to rights of self-determination).

### III. ASSUMING A STATE: NO-DWELLING ZONES AND PLANNED RELOCATION

The Philippines illustrates our assertion of a relationship between conventional land law and disaster vulnerability. As with settlement informality, the assertion is not that conventional land law necessarily produces or causes disaster vulnerability. Rather, conventional land law, and its elemental linking of sovereignty and property, engenders state-centric conceptual frames that enhance disaster risk when government officials attempt to apply legal constructs—such as no-build zones—in landholding circumstances that are resistant to the bright-line formulations of law.<sup>143</sup> This mismatch of conceptual framing and reality has a powerful effect on disaster risk when large numbers of people—*in situ* or displaced—are unable to access shelter or resettlement because they cannot establish legal rights to land in “safe” areas.<sup>144</sup> As in the case of Typhoon Haiyan, informal or illegal landholders are then likely to return and reclaim property-like entitlements in high-risk areas regardless of their legal classification as public lands or no-dwelling zones.

#### A. Typhoon Haiyan and Informal Settlements

On 8 November 2013 Typhoon Haiyan—locally known as Yolanda—hit the Central Philippines. The typhoon was one of the strongest ever recorded, with winds of over 275 kilometers per hour and a storm surge up to four meters in height.<sup>145</sup>

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143. It is important to note that the enhancement of disaster risk through law is distinct from the internal resilience of affected communities themselves. For a case study from the Philippines, see Muhibuddin Usamah et al., *Can the Vulnerable Be Resilient? Co-Existence of Vulnerability and Disaster Resilience: Informal Settlements in the Philippines*, 10 INT'L J. DISASTER RISK REDUCTION 178 (2014). See also Anuradha Mukherji, *Resilience at the Margins: Informal Housing Recovery in Bachhau, India, After the 2001 Gujarat Quake*, INT'L J. HOUSING POL'Y ONLINE, Aug. 30, 2016, at 273–84, <https://doi.org/10.1080/14616718.2016.1219648> (describing resilience of informal community reconstruction in India).

144. See also Véronique M. Morin et al., *Vulnerability to Typhoon Hazards in the Coastal Informal Settlements of Metro Manila, the Philippines*, 40 DISASTERS 693, 693 (2016) (setting out survey of informal settlements in Metro Manila and concluding that denial of access to formal administrative systems exacerbates vulnerability to disasters).

145. SHALINI JAGNARINE-AZAN, TACLOBAN-PHILIPPINES TYPHOON HAIYAN (YOLANDA): DAMAGE ASSESSMENT REPORT, 15–16 (2014), <https://>

The storm struck 171 municipalities and cities in central parts of the archipelago.<sup>146</sup> The ensuing disaster displaced more than four million people, with half a million houses totally destroyed and an additional 600,000 damaged.<sup>147</sup> In December 2013, a United Nations needs assessment noted that forty-nine percent of people living in evacuation centers were in the poorest quartile of the population.<sup>148</sup> As of March 2014, 20,924 families remained in evacuation centers and an even greater number—some 869,971 families, or four million individuals—lived with host families or had sought other housing alternatives.<sup>149</sup>

Typhoon-affected regions were among the poorest in the country. The poverty rates of the worst hit area, Region VIII—covering the provinces of Biliran, Leyte, Southern Leyte, and Western and Eastern Samar—were increasing even prior to the typhoon. Between 2006 and 2009, the region experienced the largest rise in poverty rates among farmers, migrants, the unemployed, and individuals residing in urban areas.<sup>150</sup> The overall poverty rate in the region increased from 41.5 percent in 2006 to 45.2 percent to 2012—compared to declining rates

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[www.istructe.org/downloads/resources-centre/technical-topic-area/eefit/non-eefit-reports/tacloban-typhoon-yolanda-report-8-nov-2013.pdf](http://www.istructe.org/downloads/resources-centre/technical-topic-area/eefit/non-eefit-reports/tacloban-typhoon-yolanda-report-8-nov-2013.pdf).

146. OFFICE OF PRESIDENTIAL ASSISTANT FOR REHAB. & RECOVERY, YOLANDA COMPREHENSIVE REHABILITATION AND RECOVERY PLAN 1, 7 (2014), <http://yolanda.neda.gov.ph/wp-content/uploads/2015/11/Yolanda-CRRP.pdf>.

147. Press Release, Nat'l Disaster Risk Reduction & Mgmt. Council, Updates Re the Effects of Typhoon "YOLANDA" (HAIYAN) (Apr. 17, 2014), [http://www.ndrrmc.gov.ph/attachments/article/1329/Update\\_on\\_Effects\\_Typhoon\\_YOLANDA\\_\(Haiyan\)\\_17APR2014.pdf](http://www.ndrrmc.gov.ph/attachments/article/1329/Update_on_Effects_Typhoon_YOLANDA_(Haiyan)_17APR2014.pdf); cf. Humanitarian Country Team, *Philippines: Typhoon Haiyan Action Plan*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES [UNHCR] 1 (Nov. 2013), <http://www.unhcr.org/528228cf9.pdf> (indicating that 673,042 people were displaced by the typhoon).

148. *Multi-Cluster Needs Assessment (Final Report): Philippines: Typhoon Haiyan*, WORLD FOOD PROGRAMME 8 (Dec. 2013), <http://www.wfp.org/content/philippines-typhoon-haiyan-multi-cluster-needs-assessment-december-2013>.

149. *SitRep No. 106 Effects of Typhoon "YOLANDA" (HAIYAN)*, NAT'L DISASTER RISK REDUCTION & MGMT. COUNCIL 1 (Mar. 6, 2014), [http://ndrrmc.gov.ph/attachments/article/1329/SitRep\\_No\\_106\\_Effects\\_of\\_Typhoon\\_Yolanda\\_HAIYAN\\_as\\_of\\_06MAR2014\\_0600H.pdf](http://ndrrmc.gov.ph/attachments/article/1329/SitRep_No_106_Effects_of_Typhoon_Yolanda_HAIYAN_as_of_06MAR2014_0600H.pdf).

150. *Farmers, Fishermen and Children Consistently Posted the Highest Poverty Incidence Among Basic Sectors—PSA*, PHIL. STAT. AUTHORITY, tbls. 5, 6, 7, 11 (Apr. 11, 2017), <https://psa.gov.ph/content/farmers-fishermen-and-children-consistently-posted-highest-poverty-incidence-among-basic>.

of 26.6 percent in 2006 and 25.2 percent in 2012 for the Philippines generally.<sup>151</sup> Region VIII also experienced a rise in the poverty rates of women, from 33.7 percent in 2006 to 37.4 percent in 2012—compared to declines from 21 percent in 2006 to 19.7 percent in 2012 for the Philippines generally.<sup>152</sup>

The typhoon had a disproportionate impact on informal, undocumented, and illegal landholders. These groups included fisherfolk and farmers in rural areas, and informal settlers in both rural and urban communities. Even before Typhoon Haiyan struck, there were large numbers of informal, undocumented, or illegal landholders in the Philippines. According to the 2007 Census, there were 62,187 tenant-households and 11,462 informal settler households out of a total of 804,991 households in Region VIII alone.<sup>153</sup> A further 251,480 households lived rent-free on land with the consent of the landowner.<sup>154</sup> Most tenant households lacked formal documentation of their rights to land.<sup>155</sup> In total, therefore, thirty-two percent of the population of Region VIII in 2007 fell into the category of “landless.”

There are correlations between tenure status and poverty across the Philippines, including in areas affected by Typhoon Haiyan. Across Region VIII generally, the proportion of farmers classified as poor increased from 37.3 percent in 2003 to 46.7 percent in 2009—compared to declining from 37.2 percent in 2006 to 36.7 percent in 2009 for the Philippines generally.<sup>156</sup> In Eastern Samar it was estimated that 55.4 percent of the population lived in poverty.<sup>157</sup> There are approximately 16,300 coconut farmers in the province, over fifty percent of

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151. *Per Capita Poverty Threshold, Poverty Incidence and Magnitude of Poor Population, by Region and Province (2006, 2009, 2012 and 2015)*, PHIL. STAT. AUTHORITY (Apr. 11, 2017), <http://openstat.psa.gov.ph/dataset/poverty/re-source/674f1c33-295d-4ef9-8581-9ecf498c5766#{}>.

152. *Id.*

153. *Population and Housing Census 2007: Table 7. Households by Tenure Status and Region*, PHIL. STAT. AUTHORITY (2007), [https://psa.gov.ph/sites/default/files/attachments/Philippines\\_Table%25207.pdf](https://psa.gov.ph/sites/default/files/attachments/Philippines_Table%25207.pdf).

154. *Id.*

155. Interviews by Caroline Compton with Department of Agrarian Reform officials in Region VIII, including in Tacloban (Feb. 19, 2014), Palo (Feb. 18, 2014), and Quinapundon (Feb. 21, 2014).

156. PHIL. STAT. AUTHORITY, *supra* note 150.

157. POVERTY, HUMAN DEV. AND GENDER STATISTICS DIV., NAT'L STATISTICAL COORDINATION BD., 2012 FULL YEAR OFFICIAL POVERTY STATISTICS x, tbl.

whom lack secure rights to land.<sup>158</sup> Historically, tenant farmers on coconut plantations lack secure rights to land because of embedded *latifundia* arrangements. In Eastern Samar, only two percent of land covered by the most recent iteration of agrarian reform—the Comprehensive Agrarian Reform Program Extension with Reforms (CARPER)—had been distributed to agrarian reform beneficiaries by the time of the typhoon.<sup>159</sup>

The relationship between poverty and tenure status applies to fisherfolk as well as farmers. Most fishing settlements are situated on land classified as public foreshore land and are subject to the threat of eviction. According to a survey prepared by the Philippines Partnership for the Development of Human Resources in Rural Areas, eighty-seven percent of coastal respondents identified fisherfolk in their communities who were informal settlers, and 69.6 percent identified fisherfolk who were at risk of eviction.<sup>160</sup> In Region VIII, twenty-nine percent of fisherfolk were classified as poor in 2006, rising rapidly to 45.7 percent in 2009—compared to thirty-five percent in 2006 and 41.4 percent in 2009 for fisherfolk in the Philippines generally.<sup>161</sup> As will be seen, no build zone proposals after the typhoon disaster had a disproportionate impact on these poverty-affected groups because of their residence on public foreshore land and their reliance on proximity to the sea for their livelihoods.

Further interviews provide evidence that undocumented, informal, or illegal landholders prior to the disaster were disproportionately vulnerable to forced evictions after the disaster. For example, in Guiuan, Eastern Samar, officials from the Department of Agrarian Reform stated that the typhoon pro-

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5(2013), [https://psa.gov.ph/sites/default/files/Report%20on%20the%202012%20Full%20Year%20Poverty%20Statistics\\_0\\_0.pdf](https://psa.gov.ph/sites/default/files/Report%20on%20the%202012%20Full%20Year%20Poverty%20Statistics_0_0.pdf).

158. *Information Bulletin: Philippines Rebuilding Coconut Production After Typhoon Yolanda*, FOOD SEC. CLUSTER (Dec. 9, 2013), [http://fscluster.org/sites/default/files/documents/PHL\\_Rebuilding\\_Coconut\\_Production\\_After\\_Typhoon\\_Yolanda\\_04122013\\_0.pdf](http://fscluster.org/sites/default/files/documents/PHL_Rebuilding_Coconut_Production_After_Typhoon_Yolanda_04122013_0.pdf).

159. *Id.* The largest portion of undistributed land is used for coconut farming (thirty percent or 262,524 hectares). There are similar figures for rural areas of Leyte.

160. Letter from NGOs for Fisheries Reform to Jeffrey Ferrer, Comm. Chairperson, Special Comm. on Land Use, House of Representatives (Feb. 9, 2011) (on file with author).

161. PHIL. STAT. AUTHORITY, *supra* note 150, tbl. 8.

vided further opportunities to evict farmers to allow for redevelopment for tourism.<sup>162</sup> Most farmers lacked lease documentation to identify their rights, compounding the asymmetrical power relations between landlord and tenants. One of the bases for evictions from agricultural tenancies was an argument that there are legal obligations on tenants to cultivate the land. With the destruction of up to forty-four million coconut trees in affected areas,<sup>163</sup> there was a powerful economic incentive for landowners to evict coconut farmers on the basis of lack of cultivation, as it takes eight years for a coconut tree to become productive.<sup>164</sup>

Even for those claiming ownership or tenancy rights, there were problems with documentary evidence of rights before Typhoon Haiyan. Large numbers of landholders do not have documents of title to land in the Philippines.<sup>165</sup> Field interviews suggest that the number of Haiyan-affected landowners with land title documents appears to have been relatively few by comparison with groups without land title documents. For example, in Barangay 7, Quinapundon, Eastern Samar, informants described a range of land rights, including purchase, inheritance, and processes of borrowing land. While some residents had land tax documents, not one had formal certificates of ownership.<sup>166</sup> The Mayor of Quinapundon described a common situation where land documentation, such as tax receipts, remained in the names of the parents of current occupants.<sup>167</sup> The Mayor indicated that one reason for the lack of

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162. Interview by Caroline Compton, Leonida Odrón & Pio Macawili with Dep't of Agrarian Reform Officers, in Guiuan, Eastern Samar, Phil. (Feb. 20, 2014).

163. UNOCHA, *TYPHOON HAIYAN (YOLANDA) KEY MESSAGES 1* (2014), [https://reliefweb.int/sites/reliefweb.int/files/resources/Key\\_Messages%20Haiyan%20no11%20-%202002052014%20-%20EXTERNAL.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Key_Messages%20Haiyan%20no11%20-%202002052014%20-%20EXTERNAL.pdf).

164. *Id.*

165. See DENR, *supra* note 113, at 88.

166. Interview by Caroline Compton with a group of Quinapondan tenant farmers, in Barangay 7, Quinapundon, Eastern Samar, Phil. (Feb. 21, 2014).

167. Interview by Caroline Compton with Nedito A. Campo, Mayor of Quinapondan, in Quinapondan, Eastern Samar, Phil. (Feb. 21, 2014). The Local Government Unit did not wish to distribute formal title documents for fear of community and social unrest, and because the costs of having land remapped were prohibitive.



formal land title documents was a result of errors in the cadastral maps of the local government area.<sup>168</sup>

In sum: there is substantial evidence that the typhoon disaster disproportionately affected informal, undocumented, or illegal landholders. The causes are complex and at times indirect. One mechanism was correlations between tenure status and poverty. The poor are more likely to be displaced, to have their housing destroyed or damaged in disaster situations, and to be subject to threats of eviction. Another mechanism is the interrelationship between tenure status and location. Informal, undocumented, or illegal landholders are more likely than documented landholders to live in hazard-prone areas—either as fisherfolk or in urban informal settlements.<sup>169</sup> They were also more likely to be affected by coastal no-build zone proposals after the disaster. A final source of correlation is investment in housing. In comparative terms, informal landholders are less likely to have the resources or the tenurial incentive to invest in the structural quality of housing.<sup>170</sup> These findings are consistent with evidence of disproportionate impacts of disasters on informal, undocumented, or illegal landholders in other parts of the world.<sup>171</sup>

#### B. *The RAY Plan: From Risk Reduction to No-Dwelling Zones*

Soon after the disaster, the national government called for strict enforcement of forty-meter “no build zones,” along shore and water lines in disaster-affected areas.<sup>172</sup> The initial public justification for the easements was the Water Code,

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168. *Id.*

169. For a further study of informal settlements and disaster vulnerability in the Philippines, see Janet Dilling et al., *Informal Settlers, Government Officials, and Disaster Vulnerability: Experience from the Philippines*, 4 J. SAFETY CRISIS MGMT 24, 24–35 (2014).

170. See Emma Porio & Christine Crisol, *Property Rights, Security of Tenure and the Urban Poor in Metro Manila*, 28 HABITAT INT’L 203, 215–16 (2004) (finding that tenure security increases investment in safe housing).

171. See, e.g., David Mitchell, *Reducing Vulnerability to Natural Disasters in the Asia Pacific Through Improved Land Administration and Management* (Apr. 2010) (paper presented at FIG Congress 2010), [https://www.fig.net/resources/monthly\\_articles/2010/october\\_2010/october\\_2010\\_mitchell.pdf](https://www.fig.net/resources/monthly_articles/2010/october_2010/october_2010_mitchell.pdf) (deriving conclusions from case studies of Indonesia, Bangladesh, India, and the Philippines).

172. There was no official declaration of government policy; President Aquino instructed those responsible for the recovery to implement forty-

which provides for public easements along the shores of seas, lakes, and rivers.<sup>173</sup> The Water Code states, “No person shall be allowed to stay in this zone longer than . . . is necessary for recreation, navigation, flotage, fishing or salvage or to build structures of any kind.”<sup>174</sup> The declaration of the no build zones was primarily justified as necessary for safety, particularly in circumstances of climate change and prospects of future super typhoons.<sup>175</sup>

The government’s initial cost estimates for the recovery plan—the Reconstruction Assistance on Yolanda: Build-Back-Better plan (the RAY plan)—was published in December 2013,<sup>176</sup> with a more detailed version of the plan being published in August 2014.<sup>177</sup> The RAY plan proposes resettlement of 205,128 households on the basis of a forty-meter no-build zone, and envisages resettlement as a medium-term activity, with expenditure needs identified until 2017.<sup>178</sup> The process has a number of complex and interlocking steps, including hazard mapping, beneficiary identification, land acquisition, settlement planning, environmental assessments, service delivery, and house and infrastructure construction. Each step requires or assumes a high degree of government capacity and coordination. For example, the Resettlement Cluster has a membership of fifteen government agencies and departments. It is required to cooperate with Local Government Units

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meter easements. (“[I]nitially, a blanket 40 meter zone from the shoreline was announced . . .”).

173. A Decree Instituting a Water Code, Thereby Revising and Consolidating the Laws Governing the Ownership, Appropriation, Utilization, Exploitation, Development, Conservation and Protection of Water Resources, Presidential Decree No. 1067, art. 51 (Dec. 31, 1976) (Phil.).

174. Notably, the Code provides only for easements of three meters in urban areas, twenty meters in agricultural areas and forty meters in forest areas. *Id.* The government proposed a uniform forty-meter zone for all disaster-affected areas. Evolving Picture of Displacement, *supra* note 172, at 162.

175. T. J. Burgonio, *Gov’t Declares Coastlines No-Build Zones*, INQUIRER (Nov. 25, 2013), <http://newsinfo.inquirer.net/534035/govt-declares-coastlines-no-build-zones> (quoting Herminio Coloma, Jr., Communications Secretary, on transfer of residents to safe areas).

176. NAT’L ECON. & DEV. AUTH., RECONSTRUCTION ASSISTANCE ON YOLANDA: BUILD BACK BETTER (Dec. 16, 2013) [hereinafter BUILD BACK BETTER].

177. OFFICE OF PRESIDENTIAL ASSISTANT FOR REHAB. & RECOVERY, *supra* note 146, at 1.

178. *Id.* at 49.

(LGUs), which are responsible for acquisition of land and selection of beneficiaries for resettlement.<sup>179</sup>

In March 2014, the Office of the Presidential Assistant for Recovery and Rehabilitation (OPARR) criticized the uniformity of a forty-meter zone, recommending a revised approach to align with technical identification of hazardous areas.<sup>180</sup> International agencies such as Oxfam International also recommended aligning no-build zones with hazard-identification and comprehensive land use planning.<sup>181</sup> Subsequently, OPARR tasked local government units with delineating “high,” “medium,” and “low” hazard areas, with technical assistance from a range of agencies: the Departments of Environment and Natural Resources, Mines and Geosciences Bureau, Science and Technology, and Interior and Local Government.<sup>182</sup> OPARR required the classification of high hazard areas as no-dwelling zones pursuant to the Disaster Risk Reduction and Management Act, which requires local government units to delineate danger areas in which they are able to restrict particular types of building.<sup>183</sup>

The RAY plan frames medium-term measures, including relocation, in terms of climate proofing and building back bet-

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179. *Id.* at 31.

180. PARR: “No Build Zone” Policy Not Recommended in Yolanda-Affected Areas, OFFICIAL GAZETTE (Mar. 14, 2014), <http://www.officialgazette.gov.ph/2014/03/14/parr-no-build-zone-policy-not-recommended-in-yolanda-affected-areas> (describing remarks by Office of Presidential Assistant for Rehabilitation & Recovery).

181. *See, e.g.*, CAROLINE BAUDOT, OXFAM INT’L, THE RIGHT MOVE? ENSURING DURABLE RELOCATION AFTER TYPHOON HAIYAN 3 (2014) (report identifies the need for aligning hazard and no-residence areas).

182. Memorandum Circular No. 2014-01 from Joint DENR-DILG-DNP-DPWH-DORT on Adoption of Hazard Zone Classification in Areas Affected by Typhoon Yolanda (Haiyan) and Providing Guidelines for Activities Therein (Nov. 5, 2014), <http://pcij.org/wp-content/uploads/2015/01/Joint-DENR-DILG-DND-DPWH-DOST-Adoption-of-Hazard-Zone-Classification.pdf>.

183. BUILD BACK BETTER, *supra* note 176, at 21 (“Typhoon Yolanda, as any disaster event, offers lessons that need to be factored into the country’s DRRM policies, systems, and capacities if the country is to build resilience to such extreme events, which are becoming more frequent. Demarcating safe locations and hazard zones is pivotal in the recovery and reconstruction to ensure that communities, along with the economic assets and infrastructure.”). The reference to DRRM policies is a reference to implementation of the Disaster Risk Reduction and Management Act, RA 10121 (2009).

ter.<sup>184</sup> The approach builds on widespread climate change frames for the disaster. For example, Yeb Sano, the leader of the Philippines Delegation to the Nineteenth United Nations Climate Change Conference in Warsaw, stated to the conference just three days after Haiyan made landfall, that the Philippines refused “to accept that running away from storms, evacuating our families, suffering the devastation and misery, counting our dead, become a way of life.”<sup>185</sup> President Aquino told CNN that recovery required measures “to withstand the ravages of . . . climate change,” and that these measures “must make our country more resilient [to] all of these natural disasters.”<sup>186</sup>

The climate change frame had broad appeal and, needless to say, is founded on extensive peer-reviewed science. At the time, the incorporation of risk reduction into recovery planning was not subject to significant opposition or critique. Yet, the implications were profound as the narrative of risk reduction overlaid humanitarian processes of emergency relief. Relocation was no longer a matter of disaster preparedness, but an element to be integrated into the sequencing of disaster recovery. The heuristic of state control over human mobility, so easily applied to national disaster planning, met complex post-disaster challenges of coordination and enforcement. In the post-disaster context, there was no reasonable prospect that relocation could provide timely shelter solutions for the displaced, and that prohibitions on return could be enforced in circumstances of denial of shelter assistance. Yet, government officials persisted in the belief that risk reduction through relocation was transferable from national disaster planning to emergency disaster relief. There were no changes of plans as the prohibited danger zones were re-populated.

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184. See BUILD BACK BETTER, *supra* note 176, at 9 (“In the medium term, reconstruction will focus on structural and non-structural measures for climate proofing, building-back-better, enhancing resilience of water supply, and upgrading sanitation.”).

185. Linh Do, *Philippines COP19 Opening Intervention: Full Transcript*, VERB (Nov. 12, 2013), <http://theverb.org/philippines-cop19-opening-intervention-full-transcript>; see also Yeb Sano, *An Emotional, Powerful Speech on Climate Change*, YOUTUBE (Nov. 11, 2013), <https://www.youtube.com/watch?v=7SS-XLIZkM3E>.

186. Christiane Amanpour, *Transcript: Typhoon Haiyan Aftermath; A Glimmer of Progress in Iran; Imagine a World*, CNN (Nov. 12, 2013), <http://edition.cnn.com/TRANSCRIPTS/1311/12/ampr.01.html>.

Government actors simply applied labels of illegality to those who returned to prohibited areas, without acknowledging the inevitability of delays to relocation, or the practical or legal obstacles to mass evictions. We conclude that there is more to the policy failures of relocation after Typhoon Haiyan than simple poor-quality decision-making; and that the heuristic of sovereign state authority had sufficient attractive force as to create a form of cognitive blindness to the likelihood of re-population of hazardous zones.

### C. *No-Dwelling Zones in Tacloban City*

Tacloban City, the capital of Region VIII, illustrates the failures of relocation policy after Typhoon Haiyan. The eye of the typhoon passed close to the city, with wind gusts estimated at 275 kilometers per hour and a storm surge up to nine meters in the worst-affected areas.<sup>187</sup> 28,734 houses were totally damaged, of which ninety percent were along the shoreline, and a further 17,643 houses were partially damaged.<sup>188</sup> In the wake of the storm, the Tacloban City legislature passed an ordinance establishing a no-build zone within forty meters of waterways and the sea.<sup>189</sup> Signposts were erected, and some areas outside the forty-meter zones were fenced with barbed wire.<sup>190</sup> The primary proposed relocation site is in Tacloban North, some fourteen kilometers to the north of the city.<sup>191</sup> The Tacloban North relocation site has a projected completion date of 2018, and is slated to house 15,000 households.<sup>192</sup>

The city government allowed emergency assistance, including tarpaulins and tents, in the no-build zones until May 2014. Thereafter, the government prohibited assistance of any

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187. SHALINI JAGNARINE-AZAN, *supra* note 145, at 15-16.

188. Presentation by City of Tacloban, Proposed Tacloban Recovery and Rehabilitation Plan 7 (Mar. 2014), [http://www.logcluster.org/sites/default/files/trrp\\_updated\\_mar\\_21\\_public\\_forum.pdf](http://www.logcluster.org/sites/default/files/trrp_updated_mar_21_public_forum.pdf).

189. CITY OF TACLOBAN, PHIL., ORDINANCE NO. 2013-12-15A, AN ORDINANCE PROVIDING FOR A 40-METER NO BUILD ZONE FOR RESIDENTIAL HOUSING WITHIN THE TERRITORIAL JURISDICTION OF THE CITY OF TACLOBAN (2013).

190. Discussions between Caroline Compton and residents of the 40-meter zones in Tacloban City (May 2016).

191. Presentation by City of Tacloban, *supra* note 188, at 7.

192. Interview by Caroline Compton & Janice Canta with the Planning Officer of the Tacloban City Planning & Dev. Office, in Municipal Offices, Tacloban, Phil. (June 3, 2016).

kind.<sup>193</sup> Subsequently, the national government prohibited Emergency Shelter Assistance (ESA) payments to households in designated unsafe areas.<sup>194</sup> At the same time, government agencies also failed to ensure sufficient transitional housing for displaced persons subject to prohibitions on return to hazardous areas. For example, 100 days after the typhoon, only 1,455 households had been able to move into short-term bunkhouse accommodation.<sup>195</sup>

The inevitable result was a process of return to hazardous areas.

By July 2016, a mere 700 families had relocated to Tacloban North.<sup>196</sup> By December 2016, after President Duterte expressed a desire for a faster process, around 3,800 households had moved to the relocation site.<sup>197</sup> However, some relocated households have now returned to informal city settlements *inter alia* because of limited access to services, including the provision of piped water.<sup>198</sup> The water issue highlights the challenges of coordinating recovery in post-disaster contexts. The national government funds “restoration” works as part of recovery from Haiyan, but does not fund work classified as a “new development.”<sup>199</sup> The city government cannot

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193. See Minutes of Shelter Cluster Meeting at Tacloban City Hall, SHELTER CLUSTER PHIL. 2 (June 3, 2014), <https://www.sheltercluster.org/sites/default/files/docs/140603%20Tacloban%20City%20Shelter%20Cluster%20Minutes.pdf> (“City of Tacloban communicated their decision that no temporary shelter assistance should be provided in high risk areas.”).

194. Interview by Caroline Compton & Anonymous with Emergency Shelter Assistance Focal Staff, Mun. Soc. Welfare & Dev. Office, in Tacloban, Phil. (May 31, 2016).

195. Paterno Esmaguel II, *Bunkhouses Help Less Than 1% of Haiyan’s Homeless*, RAPPLER (Feb. 18, 2014), <http://www.rappler.com/move-ph/issues/disasters/typhoon-yolanda/50899-yolanda-haiyan-bunkhouses-homeless-turnover>.

196. Interview by Caroline Compton & Ted Jopsom with Community Affairs Officer, City Hous. Dev. Office, in Tacloban, Phil. (June 9, 2016).

197. TACLOBAN City Housing & Community Development Office, *Schedule of Activities/Transfer of Families to Tacloban North*, FACEBOOK (Nov. 16, 2016), <https://www.facebook.com/chcdo/photos/pcb.1870504419847263/1870504329847272/>.

198. Interviews by Caroline Compton with humanitarian workers, local government officials, and activists.

199. Gerald Paragas et al., *Tacloban After Haiyan: Working Together Towards Recovery*, IIED HUM. SETTLEMENTS GROUP 27 (2016) (“[T]he national govern-

afford to extend piped water to Tacloban North,<sup>200</sup> and so water is trucked in for purchase by the residents.<sup>201</sup> Unsurprisingly, the cost of accessing water provides a push factor for people to return to informal settlements.

The costs of formal housing in Tacloban North are a further incentive for people to return or remain in informal settlements. Local governments are responsible for cost recovery aspects of relocation projects,<sup>202</sup> and can recover expenditure from beneficiaries on house construction, land acquisition and development, and associated charges.<sup>203</sup> Under current arrangements, households relocated to Tacloban City North receive usufruct rights, which are free of charge for five years, after which households are liable for monthly charges for twenty-five years, beginning at 200 pesos per month in the first year, increasing by fifty pesos per month each year until the fifteenth year, and plateauing at 670 pesos per month for years sixteen to twenty-five.<sup>204</sup> Connection to the electricity grid involves a one-off payment of 1,800 pesos per household, in addition to consumption costs.<sup>205</sup> To put these expenses in context, the national poverty threshold in 2015 was 9,064 pesos per month for a family of five.<sup>206</sup> Combined with the costs of

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ment refused to fund items such as new water lines to resettlement areas as this was deemed to be a ‘new’ project.”).

200. TACLOBAN CITY, CITY GOVERNMENT OF TACLOBAN CONSOLIDATED STATEMENT OF CASHFLOWS FOR YEAR ENDED 31 DECEMBER 2016 (2017) (revealing the financial weakness of the Tacloban City government).

201. Consuelo B. Alarcon, *Tacloban Mayor Grateful to PRRD for Yolanda Rehab Efforts*, PHIL. INFO. AGENCY (Nov. 14, 2017), <http://pia.gov.ph/news/articles/1001811> (“[T]he city has already procured six water tankers delivering 130 tons of water to the resettlement sites daily.”).

202. See Memorandum Circular No. 2427 from Nat’l Hous. Auth. on Revised Guidelines for the Implementation of Resettlement Assistance Program for Local Government Units (Apr. 26, 2012) (on file with author) (explaining the allocation of responsibilities for joint projects).

203. See HOUSING AND URBAN DEVELOPMENT COORDINATING COUNCIL, LGU’S GUIDEBOOK FOR LOCAL HOUSING PROJECT / PROGRAM 23 (2010).

204. Interview by Caroline Compton & Paul Mendiola with Nat’l Hous. Auth. Region VIII Staffer, Nat’l Hous. Auth. Region VIII Office, in Tacloban, Phil. (July 21, 2016).

205. Interviews by Caroline Compton with households slated for relocation, in Tacloban City, Phil. (July 4–8, 2018).

206. *Poverty Incidence Among Filipinos Registered at 21.6% in 2015*, PHIL. STAT. AUTHORITY (Oct. 27, 2016), <https://psa.gov.ph/content/poverty-incident-among-filipinos-registered-216-2015-psa>.

travelling for livelihoods, even the head of the City Social Welfare and Development Office admitted that “if there is permanent relocation they will still go back.”<sup>207</sup>

The prohibited hazard zones in Tacloban City have been re-populated by informal settlers. The “new” informal settlements are extensive and are catalogued in a number of Filipino blogs and websites.<sup>208</sup> The public and private entities that own land in coastal zones are unlikely to engage in mass evictions for reasons of cost and popular resistance. All these circumstances of re-population were quite foreseeable after the disaster. Why, then, did the city government persist with relocation planning in the post-disaster environment? The reasons include incentives to attempt urban re-development, which generates revenue as well as votes from sections of the urban population. There was also scope for rent-seeking as a result of deep-seated links between political and commercial elites in the Philippines.<sup>209</sup> Above all, we suggest, there were beliefs that the government could solve the “problem” of informality, and that relocation was a viable instrument to achieve desired ends. In other words, state-centric perspectives on land that developed from Philippine colonial history extended—without evidence of appropriate analysis or insight—to contemporary circumstances of hazard and human mobility.

#### D. *Relocation After Disasters: Policy Failures and Cognitive Blindness*

What is striking is that relocation plans in Tacloban City developed not only in a historical context of state policy failures in relation to human mobility, but also persisted in a post-disaster environment characterized by sequencing challenges for the coordination of shelter, land, and relocation policy. In

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207. Interview by Caroline Compton & Gloria Fabrigas with Officer in Charge, Tacloban City Soc. Welfare & Dev. Office, Municipal Offices, in Tacloban, Phil. (June 13, 2016).

208. See, e.g., Isumat News Team, “No Build Zone” Daw!, ISUMAT (Apr. 1, 2015), <http://isumat.com/no-build-zone-daw/>; Fritzie Rodriguez, *Why They Say Yes to No-Build Zones*, RAPPLER (Nov. 8, 2014), <http://www.rappler.com/move-ph/74390-no-build-zones-families>.

209. See EVA-LOTTA E. HEDMAN & JOHN T. SIDEL, PHILIPPINE POLITICS AND SOCIETY IN THE TWENTIETH CENTURY: COLONIAL LEGACIES, POST-COLONIAL TRAJECTORIES 3 (2000) (documenting the embedded relationship between political power and economic advantage in the Philippines).



2010, a UN-Habitat study on land issues after natural disasters stated:

Humanitarians and planners should exercise humility in their desire to “build back better.” While disasters present opportunities to improve livelihoods and the spatial character of settlements, the chaotic environment of the post-disaster context argues for an enabling approach that builds on affected people’s own response strategies. People’s response strategies in developing countries are likely to be dictated more by social and economic considerations . . . than by safety considerations.<sup>210</sup>

These issues are well known. Even in New Orleans after Hurricane Katrina, there were considerable delays to house reconstruction as a result of disputes over land use planning, particularly in relation to proposals to limit housing in low-lying areas.<sup>211</sup> In countries such as the Philippines—with a history of settlement informality and inter-governmental dysfunction—the prohibition on returning to designated danger zones, and the planned relocation of over 200,000 households, was never going to succeed, particularly in light of the severity of the disaster.

The myopia of post-disaster relocation proposals must involve more than poor judgement on the part of officials. The assumption of capacity to control human mobility formed the basis for government policy, notwithstanding the history of informal settlements in Tacloban City. The assumption of rapid resettlement site preparation formed the basis for shelter policy, notwithstanding the lessons available from other post-disaster environments. Foreseeable processes of return were labeled illegal, and resulted in exclusion from shelter assistance, notwithstanding the inevitability of long-term settlements for those who returned. Tacloban City officials imagined a state that was capable of solving disaster risks through the reloca-

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210. UN-HABITAT, LAND AND NATURAL DISASTERS, *supra* note 3, at 112.

211. See ROBERT B. OLSHANSKY & LAURIE JOHNSON, CLEAR AS MUD: PLANNING FOR THE REBUILDING OF NEW ORLEANS 39–82 (2010) (describing complex interactions of city, state and federal planning processes for New Orleans); Marla Nelson et al., *Planning, Plans, and People: Professional Expertise, Local Knowledge, and Governmental Action in Post-Hurricane Katrina New Orleans*, 9 CITYSCAPE 23, 29–34 (2000) (describing four different planning processes for post-Katrina New Orleans).

tion of informal settlements. Their response to failure was not to re-evaluate policy but to continue to assert the imagined authority of the state over relationships with land. We conclude that the way of seeing land—the heuristic of sovereign state authority—created a cognitive resistance to the likelihood of policy failure, and a stubborn belief that the best responses to failure were further assertions of the authority of the state.

#### E. *State Mythologies and Human Mobility*

The Tacloban City case is consistent with Scott's critique of state-centered ways of interpreting human relationships with land. The state may refuse to "see" human mobility responses to natural disasters because they contradict the standard operating procedures of the state. The form and function of settlements in no-dwelling zones emerged from social orders outside the purview of the state. The settlements thus required prohibition, not because of contextual calculations of their costs and benefits, but because their presence was a challenge to the putative authority of the state. As a result, the policy response failed to account either for the benefits of adaptive self-settlement for people who have few alternative options or for the costs of withholding shelter assistance for people with inevitable locational exposure to natural hazards. In short, as with Scott's critique of villagization in Tanzania and collectivization in the Soviet Union,<sup>212</sup> adaptive local processes are subject to restriction in the name of "rational" interpretive frames without contextual assessment of either their merits or the costs of failed attempts at enforcement.

These circumstances constitute a form of herd behavior where reflexive application of state-centered perspectives substitutes for case-by-case judgements of self-settlement after displacement.<sup>213</sup> There is a reflex response—that settlements are illegal—which hinders assessment of the merits of self-settlement. Counterintuitively, the prohibition of settlements for breach of land use zones may be undesirable notwithstanding breaches of law because of the costs of enforcement, the likeli-

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212. SCOTT, *SEEING LIKE A STATE*, *supra* note 7, at 193–261.

213. See Michelle Baddeley, *Herdling, Social Influence and Economic Decision-Making: Socio-Psychological and Neuroscientific Analyses*, 365 *PHIL. TRANSACTIONS OF THE ROYAL SOC'Y B: BIOLOGICAL SCI.* 281, 285–88 (2010) (describing circumstances where herd behavior substitutes for informed rational choice).

hood of re-population, and the limited availability of alternative settlement options for the poor. In certain state contexts, the legal recognition of settlements on vacant land owned by others may even be desirable notwithstanding circumstances of hazard simply because the costs of removal are too high for the state to bear. All we suggest, therefore, is a heuristic-free assessment of the costs and benefits of self-settlement after disasters. That assessment should not only take into account the legitimate expectations of *de jure* owners and the economic benefits of stable property rights, but also the costs of eviction and the social costs of persistent settlement informality and exposure to disaster risks.

There remains an under-explored question: *why* do government actors continue to see like a state notwithstanding persistent evidence of policy failure? We do not wish to discount the effects of job performance and bureaucratic hierarchy. Government officials have private incentives to follow state policy in order to achieve performance targets and avoid employment sanctions. So much is consistent with new institutionalist analysis: the pursuit of private incentives may produce sub-optimal results where incentive structures are misaligned with welfare-maximizing outcomes.<sup>214</sup> What we contribute is an emphasis on state-centric heuristics and their constitutive relationship with narratives of sovereign state authority. We draw on behavioral science propositions that heuristics provide explanations for policy error beyond simple rule-based analysis of individual incentives.<sup>215</sup> This argument breaks new ground by linking state-centric heuristics—as elucidated by James Scott’s work—to conceptualizations of territorial sovereignty in order to explore circumstances of policy failure such as Typhoon Haiyan. The argument explains the cognitive blindness of state-centric perspectives on land and human mo-

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214. For an overview of the voluminous literature on private incentives and institutional design, see Lee J. Alston, *New Institutional Economics*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* (Steven N. Durlauf & Lawrence E. Blume eds., living ed.), [https://link.springer.com/referenceworkentry/10.1057/978-1-349-95121-5\\_2468-1](https://link.springer.com/referenceworkentry/10.1057/978-1-349-95121-5_2468-1).

215. For canonical early studies of heuristics as explanations for deviations from rational utility theory, see *generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 *ECONOMETRICA* 263 (1979); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect & the Coase Theorem*, 98 *J. POL. ECON.* 1325 (1990).

bility, notwithstanding the persistence of informal settlements, by reference to imperatives to perform the sovereign narratives of the state.

The following section extends the analysis to the filtering of international risk reduction principles through the self-validating narratives of the state. The Philippines National Disaster Risk Reduction Plan requires relocation of local populations from hazardous areas purportedly to “meet commitments” under the Hyogo Framework for Action 2005-2015 (the Hyogo Framework).<sup>216</sup> Yet, the Hyogo Framework refers to land use planning only, and does not identify relocation as a risk reduction action. We argue that Hyogo Framework references to land use planning transformed into relocation as a result of the interpretive frames of key government actors, who assumed state capacity to control human mobility, and constructed the state as capable of risk reduction action. While planned relocation proposals are also products of constituency pressures and self-interested political ends, disaster policy actors within the Philippine government adopted state-centric perspectives by projecting a capacity both to respond to enhanced disaster risks and to “solve” the problem of informal settlements.

F. *National Disaster Planning: From Risk Reduction to Relocation*

The Philippine government had only attempted limited relocation after previous typhoons.<sup>217</sup> What was different about Typhoon Haiyan? The emergence of risk reduction frames was central to prohibitions on return and proposals for relocation. The Hyogo Framework encourages incorporation of disaster risk assessments into urban planning and management of disaster-prone human settlements. Subsequently, the 2010 Philippines Disaster Risk Reduction and Management Act provides that the state shall mainstream disaster risk reduction into land use and urban planning.<sup>218</sup> To implement the

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216. REPUBLIC OF THE PHIL., NATIONAL DISASTER RISK REDUCTION AND MANAGEMENT PLAN 2011-2028, 5 (2011), [http://www.ndrrmc.gov.ph/attachments/article/41/NDRRM\\_Plan\\_2011-2028.pdf](http://www.ndrrmc.gov.ph/attachments/article/41/NDRRM_Plan_2011-2028.pdf).

217. Evolving Picture of Displacement, *supra* note 172, at 13–14 (explaining the Philippine government’s relocation attempt following Tropical Storm Washi).

218. An Act Strengthening the Philippine Disaster Risk Reduction and Management System, Providing for the National Disaster Risk Reduction

Act, the National Disaster Risk Reduction and Management Plan sets out a priority project of hazard and risk mapping, and identifies relocation as a response for high-risk areas. Outcome 22 is stated as incorporating disaster risk reduction into human settlements.<sup>219</sup> The outputs for Outcome 22 include safe relocation sites within timeframes of a year.<sup>220</sup> This is a medium-term objective that the plan identifies as necessary to meet the commitments of the Philippines under the Hyogo Framework.<sup>221</sup>

The Hyogo Framework does not identify relocation as a risk reduction and urban planning measure. It even links informal settlements and housing in high-risk areas to imperatives for urban poverty reduction and slum-upgrading programs.<sup>222</sup> Yet, the Philippines Disaster Risk Reduction and Management Act purports to implement the Hyogo Framework, while defining disaster prevention to include “land-use regulations that do not permit any settlement in high-risk zones.”<sup>223</sup> As noted, the National Disaster Risk Reduction and Management Plan then sets out relocation from high-risk areas as necessary to “meet commitments under the . . . Hyogo Framework.”<sup>224</sup> The National Disaster Risk Reduction and Management Plan provided the policy framework for the RAY plan after Typhoon Haiyan, which—as noted previously—pro-

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and Management Framework and Institutionalizing the National Disaster Risk Reduction and Management Plan, Appropriating Funds Therefor and for Other Purposes, Rep. Act No. 10121, § 2(g) (May 27, 2010) (Phil.), <http://www.officialgazette.gov.ph/2010/05/27/republic-act-no-10121>.

219. NATIONAL DISASTER RISK REDUCTION AND MANAGEMENT PLAN 2011-2028, *supra* note 216, at 33.

220. *Id.*

221. *Id.* at 5.

222. *Hyogo Framework*, *supra* note 1, ¶ 19(iii).

223. An Act Strengthening the Philippine Disaster Risk Reduction and Management System, Providing for the National Disaster Risk Reduction and Management Framework and Institutionalizing the National Disaster Risk Reduction and Management Plan, Appropriating Funds Therefor and for Other Purposes, Rep. Act No. 10121, § 3(k) (May 27, 2010) (Phil.), <http://www.officialgazette.gov.ph/2010/05/27/republic-act-no-10121>.

224. NATIONAL DISASTER RISK REDUCTION AND MANAGEMENT PLAN 2011-2028, *supra* note 216, at annexure A (describing progress on implementation of the Hyogo Framework in the Philippines).

posed relocation of over 200,000 households from designated hazardous areas.<sup>225</sup>

The Philippines illustrates the problematic role of the state as a translator of priority actions under the Hyogo Framework, and its successor Sendai Framework for Disaster Risk Reduction 2015-2030. The technocratic language of the Hyogo Framework masks the politics of land policy and human mobility. Some government actors will use land use planning, under the guise of disaster risk reduction, for self-serving ends based on commercial development of valuable coastal land.<sup>226</sup> Other government actors will assert a capacity to reduce risk through land planning in order to project the sovereign authority and legitimacy of the state. For example, in the case of Typhoon Haiyan, as we have seen, Tacloban City officials maintained mythologies of sovereign control over land notwithstanding an inability to control acts of self-settlement, with results that enhanced rather than reduced disaster risks. The depoliticized presentation of land use planning in the Hyogo Framework may thus induce a distancing from context, not only as regards the historical capacity of a state to control human mobility, but also as to the socio-political causes of settlements in hazardous areas. We consider the implications for international disaster risk reduction standards in Part IV.E.

#### IV. DEFERRING TO A STATE: RELOCATION AND NON-STATE ACTORS

Part II considered the conceptual linking of property, territory, and state sovereignty. Part III considered the coupling of risk reduction with planned relocation, as international standards filter through self-validating processes of the state. There remains a puzzle of non-state actors after Typhoon Haiyan. What, for example, was the logic of humanitarian action that also viewed planned relocation as a risk reduction

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225. OFFICE OF PRESIDENTIAL ASSISTANT FOR REHAB. & RECOVERY, *supra* note 146, at 49–51.

226. See, e.g., Erik Cohen, *Tourism and Land Grab in the Aftermath of the Indian Ocean Tsunami*, 11 SCANDINAVIAN J. HOSP. & TOURISM 224, 229–35 (2011); Patrick Connolly, *Complications of Land Reform in Postsunami Sri Lanka*, CHAZEN WEB J. INT'L BUS. 1, 1–2 (2007), <https://www8.gsb.columbia.edu/researcharchive/articles/2525> (describing exemptions granted to commercial interests in the post-tsunami buffer zone of Sri Lanka).

measure and accepted government requests not to provide shelter assistance in hazardous areas? Some non-state actors deferred to state responsibility for disaster recovery, rather than pursue alternative paths of opposition to state proposals. What, then, are the drivers of state-centric perspectives for actors outside the state?

This Part considers the responses of non-state actors to government plans for relocation after Typhoon Haiyan. First, we consider the U.N. Office for the Coordination of Humanitarian Affairs (UNOCHA) as the lead agency for the Strategic Response Plan, which guided the response of international actors after the disaster.<sup>227</sup> The UNOCHA response plan contemplated support for implementation of government relocation proposals subject to compliance with human rights safeguards.<sup>228</sup> Second, we consider Oxfam International, which along with other international NGOs (INGOs) complied with government requests not to provide shelter assistance in hazardous areas.<sup>229</sup> The framing of Typhoon Haiyan as a climate change event provided a dominant narrative which defined the basis of Oxfam's work on disaster relief.<sup>230</sup> The cases of UNOCHA and Oxfam illustrate the way in which non-state actors may adopt and maintain state-centric heuristics as a result of self-defining narratives of action—that is, UNOCHA actors adopted state-centric interpretive frames as part of narratives of humanitarian neutrality; Oxfam staff adopted state-centric frames as a result of a narrative focus on climate change adaptation.

This Part concludes with a discussion of transnational disaster governance. The focus of this paper is the Sendai Framework, which maintains Hyogo Framework references to land use planning, while adding a new possibility of planned relocation.<sup>231</sup> The references to zoning and relocation are presented in technical, universalized, and acontextual terms. There is no acknowledgement of disproportionate impacts on informal settlements. There are causal assumptions concerning land use law and risk reduction, irrespective of the capacity of indi-

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227. *See infra* Part IV.A.

228. *Id.*

229. *See infra* Part IV.D.

230. *Id.*

231. *See infra* Part IV.E.

vidual states. We conclude that the emerging transnationality of disaster governance should not obscure the epistemic significance of the state as the primary bearer of legal responsibility for risk reduction and as a translator of international standards on land use planning.

#### A. *UNOCHA and the Strategic Recovery Plan*

UNOCHA prepared the Typhoon Haiyan Strategic Response Plan (SRP) in order to “complement the government’s RAY [plan], and fill gaps as identified by government and inter-agency assessments.”<sup>232</sup> The plan is a product of UNOCHA’s coordination system role in international disaster relief, and adopts the cluster system approach of international humanitarian action. The U.N. humanitarian cluster system developed from disaster response reviews that highlighted lack of coordination as an obstacle to recovery after disasters.<sup>233</sup> Coordination challenges not only include government/international actor interactions, but also transitions from emergency relief to sustainable development. The cluster system thus includes an Early Recovery Cluster that focuses on relief-development transitions, and advocates recovery processes that “build back better.”<sup>234</sup>

The SRP adopts framing references to climate change. It notes a scientific consensus that rising sea surface temperatures will increase the frequency and severity of typhoons.<sup>235</sup> It

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232. See Philippines Humanitarian Country Team, *Typhoon Haiyan (Yolanda) Strategic Response Plan*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES [UNHCR] 2 (2013) [hereinafter Philippines Humanitarian Country Team, STRATEGIC RESPONSE PLAN], <https://reliefweb.int/sites/reliefweb.int/files/resources/Strategic%20Response%20Plan%20-%20Philippines%2010-Dec-2013.pdf>.

233. See Constanza Adinolfi et al., *Humanitarian Response Review*, UNITED NATIONS EMERGENCY RELIEF COORDINATOR & UNDER-SECRETARY-GENERAL FOR HUMANITARIAN AFFAIRS 8 (2005), [https://www.unicef.org/emerg/files/ocha\\_hrr.pdf](https://www.unicef.org/emerg/files/ocha_hrr.pdf).

234. See generally Inter-Agency Standing Committee Working Group on Early Recovery, *Guidance Note on Early Recovery*, UNITED NATIONS DEV. PROGRAMME (Apr. 1, 2008), <http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/guidance-note-on-early-recovery-cwger-april-2008.html> (setting out the role and functions of the Early Recovery cluster).

235. Philippines Humanitarian Country Team, STRATEGIC RESPONSE PLAN, *supra* note 232, at 13.



highlights “critical needs” for strengthened disaster risk reduction at national and local levels, including in relation to spatial planning, zoning, and hazard mapping.<sup>236</sup> The plan then notes proposals to resettle a substantial number of people from geo-hazard zones, and states that advocacy, monitoring, and technical and policy assistance are required to ensure that resettlement complies with the U.N. Guiding Principles on Internal Displacement (the Guiding Principles).<sup>237</sup> Consistent with the Guiding Principles, the SRP states that any movement of people affected by the disaster must be voluntary, free, informed and dignified.<sup>238</sup> There are further references to resettlement as a last resort, and the rapid identification of viable and safe resettlement sites.<sup>239</sup>

The SRP does not directly question the government’s determination that public safety required permanent prohibitions on return to hazardous areas after Typhoon Haiyan. The SRP advocates procedural rights to consultation, participation and information for affected persons, and substantive rights to safety and suitability in sites for resettlement.<sup>240</sup> The SRP Protection Cluster objectives include supporting “*implementation of government policies in relation to displacement/resettlement in line with the Guiding Principles on Internal Displacement and other international standards.*”<sup>241</sup> The SRP does not contemplate the likelihood that the no-build zone proposal would fail from the outset as a result of the state’s lack of capacity to control human mobility with respect to land. That is, UNOCHA did not plan, soon after the disaster, for the likely re-population of no-dwelling zones by informal settlers irrespective of government proposals. Even the references to human rights assumed policy implementation, and hence a capable state, rather than the possibility of policy failure and the re-population of no-dwelling zones.

We do not discount practical imperatives for UNOCHA to coordinate with national governments. But, why did UNOCHA

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236. *Id.*

237. *Id.* at 15.

238. *See id.* at 16.

239. *See id.*

240. *Id.* at 20–21 (setting out requirements to identify vulnerable individuals in groups requiring relocation, and to site relocation settlements near livelihoods, social services, and infrastructure).

241. *Id.* at 66 (emphasis added).

propose to support implementation of resettlement proposals notwithstanding the history of settlement informality and the likelihood of re-population of no-dwelling zones in the Philippines? The SRP Protection Cluster objectives display similar indications of cognitive blindness to the likelihood of relocation policy failure as afflicted the drafters of the RAY Plan and the no-build zone ordinance in Tacloban City. We suggest that UNOCHA's unconscious assumption of baseline state capacity stems from conscious acts of deferral to the state. The SRP objectives symbolically defer to the primary role of the state, and thereby construct U.N. humanitarian action as apolitical. The SRP illustrates the instantiation of self-defining U.N. narratives of neutrality through performative acts of deference to state sovereignty. We conclude there is a constitutive relationship between the performance of humanitarian neutrality and the adoption of state-centric frames for interpreting relocation proposals. The process involves interpretive resonances as assumptions of the capacity of states also help to construct states as foundational elements of global legal order.

### B. *Human Rights and Humanitarian Action*

UNOCHA did not simply or solely adopt state-centric perspectives on relocation after Typhoon Haiyan. There were references to compliance with human rights safeguards, such as the Guiding Principles on Internal Displacement and other international standards.<sup>242</sup> Yet, human rights provided an ancillary rather than dominant narrative for the disaster, particularly in terms of the interpretive framing of relocation and prohibitions on return after displacement. We argue that there was no link between post-disaster heuristics and human rights narratives as human rights were not foundational or definitional of the U.N. intervention. While a number of individuals adopted human rights frames and were skeptical of relocation proposals from the outset, the formal framing of agencies such as UNOCHA drew on narratives of neutrality and risk reduction rather than critical rights-based analysis of relocation in a dysfunctional state context. In these circumstances, the references to human rights in the SRP appear more as legiti-

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242. See *id.* at 15, 64, 66 (setting out training programs for state actors on the U.N. Guiding Principles).

mizing devices, to avoid potential criticism, rather than core interpretive frames for the determination of action.

For U.N. actors, the key framing resolution is General Assembly Resolution 46/182 of 1991, which identifies the guiding principles for humanitarian action as humanity, neutrality, impartiality, and respect for the sovereignty, territorial integrity, and national unity of states.<sup>243</sup> International cooperation is of great importance where an emergency is beyond the response capacity of a country. However, the international response must strengthen national response capacity, supplement national efforts, and comply with national law.<sup>244</sup> The primary framing focus is state implementation and the supplementation of national efforts. As a result, human rights perspectives overlay rather than replace foundational humanitarian narratives of respect for state sovereignty.<sup>245</sup> It is a short step for interpretive frames to focus on procedural safeguards that assume a capable state—if necessary after capacity-strengthening efforts—rather than human rights contraventions flowing from an incapable state. In other words, while human rights law aims to constrain the state, assumptions of a capable state misdirect the focus of human rights perspectives away from the adequate housing requirements of informal settlers.

The SRP includes references to the Guiding Principles on Internal Displacement.<sup>246</sup> Yet, the Guiding Principles do not refer to the possibility of permanent prohibitions on return to unsafe areas in order to safeguard against future disasters. Principle 6(2)(d) allows for “evacuation” where required for the health and safety of those affected.<sup>247</sup> Principle 28 simply refers to voluntary choice of options to return or resettle in

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243. G.A. Res. 46/182, ¶ 2–3, Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations (Dec. 19, 1991).

244. *Id.* ¶ 3–5.

245. See TONY EVANS, *THE POLITICS OF HUMAN RIGHTS: A GLOBAL PERSPECTIVE* 55–76 (2d ed. 2005); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* 189–93 (2003) (describing the implicit positivism of international human rights law).

246. See Philippines Humanitarian Country Team, *STRATEGIC RESPONSE PLAN*, *supra* note 232, at 15, 64, 66; see *Guiding Principles*, *supra* note 29.

247. *Guiding Principles*, *supra* note 29, princ. 6(2)(d); see Jane McAdam & Elizabeth Ferris, *Planned Relocations in the Context of Climate Change: Unpacking the Legal and Conceptual Issues*, 4 *CAMBRIDGE J. INT’L COMP. L.* 137, 149, 158

another part of the country.<sup>248</sup> The Inter-Agency Standing Committee (IASC) Framework on Durable Solutions for Internally Displaced Persons, which purports to operationalize the Guiding Principles, provides for “exceptional situations” where permanent prohibitions on return are justified on safety grounds:

IDP [Internally Displaced Persons] return . . . may be prohibited where IDPs would still face serious risks to their life or health despite the best efforts of the authorities to protect them. Recurrent disasters, for instance, may make an area uninhabitable or seriously unsafe, even if all necessary and reasonable disaster risk reduction measures were to be adopted.<sup>249</sup>

The IASC Framework sets out a number of rights-based requirements other than public safety for permanent prohibitions of return, including consultation, information, participation, access to legal remedies, and basis in law.<sup>250</sup> These requirements are notable for their focus on procedural safeguards—what needs to happen to protect human rights in circumstances of prohibitions on return.

The application of human rights as procedural safeguards for the implementation of state policy constructs the state as capable of action. The assumption is the capacity to implement policy: that the state can enforce prohibitions on return. The imagined objective is a physical state of exclusion, creating an area of safety from disaster risks. Where, however, the reality is re-population by informal settlements, the key human rights issues are not procedural safeguards, such as consultation, participation, and informed choice, but substantive rights to safe and adequate housing. In other words, the IASC filters human rights perspectives through assumptions of state capacity and misdirects attention from likely policy failure to as-

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(2015) (noting that evacuations are temporary and are distinguishable from the permanence of planned relocation).

248. *Guiding Principles*, *supra* note 29, princ. 28.

249. BROOKINGS INST. & INTER-AGENCY STANDING COMM., IASC FRAMEWORK ON DURABLE SOLUTIONS FOR INTERNALLY DISPLACED PERSONS 19 (2010), [https://www.brookings.edu/wp-content/uploads/2016/06/04\\_durable\\_solutions.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/04_durable_solutions.pdf).

250. *See id.* at 19–20 (providing detailed description of procedural requirements relating to relocation).

sumed implementation.<sup>251</sup> We are skeptical of procedural safeguards in dysfunctional state contexts. No amount of information, consultation, participation, and equality of treatment washes clean the structural causes of settlement informality or is sufficient to serve the purpose of protecting high-risk groups, in circumstances where states are not capable of controlling human mobility with respect to land.

### C. *Humanitarian Action and Shelter Programming*

One would expect that activist INGOs, at the least, might have opposed government plans for relocation and prohibitions on return. By definition, INGOs are not the government and should adopt interpretive frames separate from the state. Yet, while many INGO staff members identified the human rights risks of relocation, very few organizations stated, from the outset, that large-scale relocation and prohibitions on return were misguided policies in the context of coordinating disaster recovery and meeting urgent shelter needs. These concerns were lost in a context of widespread framing of recovery in terms of risk reduction and “building back better.” While there was some discussion among INGOs of the inevitable re-population of no-build areas,<sup>252</sup> these concerns did not find expression in overt opposition to implementation of government policy. The climate change framing of the disaster discouraged critical interpretive perspectives on relocation

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251. For related arguments that the privileging of sovereignty in global legal order has had a distorting effect on the application of international human rights law, see Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1, 5 (1999); David Kennedy, *The International Human Rights Movement: Part of the Problem?* 3 *EUR. HUM. RTS. L. REV.* 245, 261 (2001). See also Richard Ashby Wilson, *Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 342, 343, 357–60 (Mark Goodale & Sally Engle Merry eds., 2007) (describing how categorizations of human rights as law affect the discursive dimensions of human rights).

252. During fieldwork in January and February 2014 in Tacloban City and neighboring Palo, Caroline Compton spoke with a number of humanitarian staff and Shelter Cluster representatives who were skeptical of the relocation scheme and the idea that land could be kept unpopulated.

proposals that took into account the likelihood of policy failure.<sup>253</sup>

Climate change narratives were central for INGOs that deferred to government requests not to assist returnees in hazardous areas.<sup>254</sup> Well-known INGOs added their voice to climate change and risk reduction perspectives on the disaster. For example, Oxfam declared Haiyan a “warning for the world.”<sup>255</sup> As noted previously, Oxfam advocated aligning the no-build zone proposal with hazard-identification and comprehensive land use planning soon after the disaster.<sup>256</sup> The approach built on long-standing advocacy by Oxfam Philippines for a national land use policy:

If Typhoon Haiyan can move the National Land Use Act (NLUA) from a proposed bill into law, it will do a lot to frontload risk reduction in development planning. NLUA prioritizes life and safety, and thus states that extremely hazardous and high risk zones must be cleared from all forms of human-made constructions.<sup>257</sup>

The Haiyan case illustrates circumstances of epistemic alignment where INGOs interpret post-disaster policy through risk

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253. This argument provides a climate change-related perspective to earlier critical studies of NGOs as unwitting agents of neo-liberal development agendas. *See, e.g.*, NGOIZATION: COMPLICITY, CONTRADICTIONS AND PROSPECTS (Aziz Choudry & Dip Kapoor eds., 2013) (compiling a set of studies of NGOs and development).

254. *See* Caroline Compton, *An Unheeded Present and the Impossible Future: The Temporality and Logic of Emergency, Humanitarianism and Climate Adaptation After Typhoon Haiyan*, 50 CRITICAL ASIAN STUD. 136, 136–54, (2018) (describing the centrality of climate change accounts to the humanitarian response in Tacloban City).

255. Shaheen Chughtai, *Typhoon Haiyan: The Response So Far and Vital Lessons for the Philippines Recovery*, OXFAM INT’L 12 (Dec. 7, 2013), <https://www.oxfam.org/sites/www.oxfam.org/files/bn-typhoon-haiyan-philippines-response-071213-en.pdf>.

256. *See* BAUDOT, *supra* note 181, at 3–4, 14–16 (setting out recommendations for a “scientific process” to determine safe and unsafe zones prior to relocation).

257. Lan Mercado, *Typhoon Haiyan: Rebuilding a Just and Resilient Society*, OXFAM INT’L, <https://blogs.oxfam.org/en/blogs/13-12-11-one-month-after-typhoon-haiyan-rebuilding-just-resilient-society> (last visited Apr. 11, 2017).

reduction perspectives shared by national governments.<sup>258</sup> INGOs, such as Oxfam, are members of an epistemic community that has developed around climate change and risk reduction policy. Their role now extends beyond critique and advocacy to partnerships for policy formulation and implementation.<sup>259</sup> Without discounting the importance of climate adaptation measures, we urge enhanced awareness of the state-centric frames that may flow from associating climate adaptation and risk reduction with land use planning and planned relocation. Collective narratives of climate change adaptation, disaster risk reduction, and “building back better” lend themselves to frames of reference that interpret relocation policies as technical state-driven measures rather than politicized instruments with considerable potential for social exclusion. Yet, as the following example illustrates, to advocate the removal of settlements from high-risk zones is to assume a state capable of implementing land use planning and to create the possibility of complicity in failed government attempts at relocation.

In 2014, Oxfam was responsible for providing transitional shelter to a small settlement in Barangay 88, Tacloban City, known as Costa Brava.<sup>260</sup> Their partner organization was a local NGO, Green Mindanao, which undertook survey work in the Costa Brava settlement between June to September 2014.<sup>261</sup> Oxfam staff reported that their work with the community then “came to an end because the city government wouldn’t allow it.”<sup>262</sup> Although the land is coastal, the settlement itself is located more than forty meters from the sea. Nevertheless, city government staff informed Oxfam that the land was hazardous, irrespective of the distance of the residences from the shore, and foreshadowed inclusion of the area in the local Comprehensive Land Use Plan as a no-dwelling

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258. *See generally* DAVID HUME & MICHAEL EDWARDS, *NGOs, STATES AND DONORS: TOO CLOSE FOR COMFORT?* (1997) (related critiques of a state-donor nexus that undermines critical framing for NGOs).

259. Clair Gough & Simon Shackley, *The Respectable Politics of Climate Change: The Epistemic Communities and NGOs*, 77 *INT’L AFF.* 329, 331, 336–39 (2001).

260. Interview by Caroline Compton, Jesus F. Dizon II & Anonymous with Project Team Leader & Shelter Team Leader, Oxfam Phil., in Tacloban, Phil. (June 6, 2016).

261. *Id.*

262. *Id.*

zone.<sup>263</sup>The Managing Director of Oxfam stated that, at the time, there was an expectation the government would provide relocation assistance relatively quickly to the people of Costa Brava.<sup>264</sup> This did not happen, and so the effect of withdrawal by Oxfam and Green Mindanao was to leave the people living in tents and shacks, vulnerable to future typhoons. At present, mass relocation to Tacloban North still has not taken place and is not likely to in the foreseeable future.

#### D. *INGOS and the Interpretive Framing of Informal Settlements*

Oxfam was in a difficult position in Tacloban City, as it had advocated for the creation of hazard-specific coastal buffer zones after the disaster.<sup>265</sup> Oxfam's advocacy success with the revised no-dwelling zone plan limited its capacity to oppose local government classifications of hazardous zones. As with other INGOs, it was necessary to obtain permission to work in the disaster zone. There were concerns over visa denials for international staff.<sup>266</sup> One INGO had reported threats of being "kicked out" of the country after accusations of working in a "no build" zone after Tropical Storm Washi.<sup>267</sup> There were even legalistic opinions that "if we assist in building in an unsafe zone identified by city government it would make us accountable if something happened."<sup>268</sup> Most strikingly, one informant stated, "[Most residents] are informal settlers, and I think the government doesn't want them back."<sup>269</sup> The label of informality aligned with local government perspectives on the Costa Brava settlement. The settlement was labelled as informal as a result of slated inclusion in the no-dwelling zone, even though the landholders held usufruct rights from the owner of the land.

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263. *Id.*

264. Interview by Caroline Compton & Justin Morgan with Country Manager, Oxfam Phil., in Makati, Phil. (July 25, 2016).

265. See BAUDOT, *supra* note 181.

266. Interview by Caroline Compton & Joseph Curry with Country Manager, Catholic Relief Serv., in Manila, Phil. (May 19, 2016); Interview by Caroline Compton & Josh Kyller with Emergency Coordinator, Catholic Relief Serv., in Cebu, Phil. (Nov. 6, 2015).

267. Interview by Compton & Curry, *supra* note 266; Interview by Compton & Kyller, *supra* note 266.

268. Interview by Compton, Dizon II, & Anonymous, *supra* note 260.

269. *Id.*



Other humanitarian interviewees justified prohibitions on return in terms of informality and compliance with law. There were reports of pressure from donors to ensure legal compliance and avoid perceptions of encouraging informality.<sup>270</sup> For example, one donor staff member noted they were not supporting rebuilding in danger areas because they did not “want to encourage informal settlers.”<sup>271</sup> Other informants repeated the local government’s formulation that support for no-dwelling zone inhabitants would “send mixed messages” about intended relocation.<sup>272</sup> One donor advised, “[S]o long as there is a legal requirement, you have to comply . . . unless there is a serious human rights violation.”<sup>273</sup> In an interesting twist, Swiss Solidarity—which funded a successful Caritas project on Bantayan Island—described the law-abiding preferences of Swiss citizens as an important reason for recipient organizations to comply with local laws.<sup>274</sup> For donors in particular, it thus seems that the *perception* of legality was critical to legitimizing projects for external audiences.

INGOs working in Tacloban, such as Oxfam, were less concerned with the detail of the law or negotiation of entitlements than with perceptions of compliance with law and government policy. The INGOs responded to sovereign imaginings of state law and policy rather than fine-grained analysis of land law in action. To do otherwise was to undercut climate change and risk reduction frames for the disaster, and risk accusations of political activity and contravention of principles of neutrality. The effect was to construct the Philippine state as a coherent entity with sovereign authority over land and human mobility, even though the reality of the Philippine state is quite different and involves dysfunctional competition among units and agencies of government, and multiple examples of

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270. Interview by Caroline Compton & Jose Alegro Asuncion (Joli) Torrella with Urban Poor Assoc. Transitional Hous. Project Manager, Urban Poor Assoc. Offices, Tacloban, Phil. (Apr. 24, 2016).

271. Interview by Caroline Compton & Mai G. Alagcan with Senior Program Officer, Disaster Risk Reduction and Humanitarian Team, Australian Dept. of Foreign Affairs & Trade, in Makati, Phil. (May 19, 2016).

272. Interview by Compton & Canta, *supra* note 192.

273. Interview by Caroline Compton & Anonymous (on a monitoring visit) with Catholic Int’l Dev. Charity staff, in Santa Fe, Cebu, Phil. (Nov. 25, 2015).

274. Interview by Caroline Compton & Marina Marinov with Swiss Solidarity Technical Expert, in Geneva, Switz. (July 4, 2016).

overlapping, inconsistent, and unimplemented laws relating to land.<sup>275</sup> These circumstances reinforce our hypothesis that state-centric perspectives are heuristics—convenient cognitive shortcuts that are resistant to fine-grained forms of empirical, legal, social, or historical enquiry.

#### E. *Planned Relocation and Transnational Disaster Governance*

We conclude that the emerging transnationality of disaster governance should not obscure the enduring epistemic significance of the state. There is a line of scholarship on transnational disaster governance that identifies the potential for loss of voice and accountability from transfers of functions to non-state actors.<sup>276</sup> We highlight a counterintuitive alternative—that even weak states are politicized translators and transformers of international standards.<sup>277</sup> The relationship between sovereignty and transnationality is not necessarily a zero-sum game. International law imagines states as units of territorial authority in order to construct the constituent elements of global legal order.<sup>278</sup> The process may involve interlocking projections of state capacity, where international actors imagine the territorial authority of states, and government actors co-opt international instruments to support performative constructions of the capacity of their state. As a result, transnational elements of disaster governance may exacerbate inequality where international standards filter through the self-validating programs and processes of a state.

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275. ELEAZAR ET AL., *supra* note 117, at 92.

276. See, e.g., Samantha Jones et al., *Governance Struggles and Policy Processes in Disaster Risk Reduction: A Case Study from Nepal*, 57 GEOFORUM 78, 79–80 (2014).

277. For a related argument put in more abstract terms, see Costas Douzinas, *Speaking Law: On Bare Theological and Cosmopolitan Sovereignty*, in INTERNATIONAL LAW AND ITS OTHERS 35, 52 (Anne Orford ed. 2006) (disputing the notion that sovereignty has lost its power in the face of universalizing processes of international law).

278. See Guy Fiti Sinclair, *State Formation, Liberal Reform and the Growth of International Organizations*, 26 EUR. J. INT'L . 445, 448 (2015) (“[International organization] growth is intimately bound up with the creation of states, the construction of state powers and the very constitution of modern statehood.”); Liisa Malkki, *Citizens of Humanity: Internationalism and the Imagined Community of Nations*, 3 DIASPORA 41, 62 (1994) (“[I]magine the political community of a nation . . . always necessitates the imagining of an international community.”).

The role of land in disasters illustrates the enduring significance of the idea of the state. To take a contemporary example: the Sendai Framework—the successor to the Hyogo Framework—includes land use planning as a priority “build back better” action for disaster recovery.<sup>279</sup> The aim is to use opportunities during the recovery phase to reduce disaster risk in the medium and long term.<sup>280</sup> As with the Hyogo Framework, the Sendai Framework further supports land use actions prior to disasters, including mainstreaming disaster risk assessments into land use policy and developing guidance for disaster preparedness, “such as on land-use planning.”<sup>281</sup> However, unlike the Hyogo Framework, the Sendai Framework sets out a further priority action: to “formulate public policies, where applicable, aimed at addressing the issues of . . . relocation, where possible, of human settlements in disaster risk zones, subject to national law and legal systems.”<sup>282</sup> This reference to planned relocation forms part of emerging international legal scholarship on removal of people from hazardous areas as a potential disaster risk reduction measure.<sup>283</sup>

Both the Hyogo Framework and the Sendai Framework identify states as bearers of primary responsibility to prevent and reduce disaster risk.<sup>284</sup> The Sendai Framework situates the role of local communities within the enabling, guiding, and coordinating role of governments.<sup>285</sup> Non-state actors “play an important role as enablers and provid[e] support to States, in

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279. *Sendai Framework*, *supra* note 1, ¶ 33(j).

280. *Id.* at 10 (identifying building back better as a goal for disaster recovery).

281. *Id.* ¶¶ 30(f)–(g).

282. *Id.* ¶ 27(k).

283. *See, e.g.*, SANJULA WEERASINGHE ET AL., PLANNED RELOCATIONS, DISASTERS AND CLIMATE CHANGE: CONSOLIDATING GOOD PRACTICES AND PREPARING FOR THE FUTURE 16 (2014), <http://reliefweb.int/sites/reliefweb.int/files/resources/54082cc69.pdf> (“Lessons from planned relocation implemented as a disaster risk management strategy indicate that it provides opportunities to save lives and assets . . . if articulated into a comprehensive risk management strategy and planned and implemented properly.”); *see also* THE NANSEN INITIATIVE ON DISASTER-INDUCED CROSS-BORDER DISPLACEMENT, 1 AGENDA FOR THE PROTECTION OF CROSS-BORDER DISPLACEMENT IN THE CONTEXT OF DISASTERS AND CLIMATE CHANGE 28 (2015), <http://www.nanseninitiative.org/global-consultations>.

284. *See Hyogo Framework*, *supra* note 1, ¶ 13(b); *Sendai Framework*, *supra* note 1, ¶ 19(a).

285. *See Sendai Framework*, *supra* note 1, ¶ 19(f).

accordance with national policies, laws and regulations.”<sup>286</sup> Yet, as argued above, locating the state as the lead Westphalian actor in disaster risk reduction constructs the state as capable of action. The assumption is the state’s capacity to implement policy: for example, that the state can enforce, either directly or with international support, permanent prohibitions on settlements in hazardous zones. However, the reality for some states is a lack of capacity to control human mobility. In these circumstances, the implicit Sendai Framework assumption of a causal relationship between land use planning and disaster risk reduction is misplaced because of chronic state incapacity to enforce land use zones or provide affordable land and housing for poverty-affected citizens.

The Sendai Framework presents land use policy as a depoliticized, acontextual instrument of disaster risk reduction. The priority actions in relation to land use planning are universalized. There are no distinctions based on the historical capacity of individual states to implement land use zones. The only reference to context is the acknowledgement that “developing countries . . . as well as middle-income countries facing specific challenges, need special attention and support to augment domestic resources.”<sup>287</sup> Yet, even this contextual acknowledgement serves as a basis for capacity-building responses and complementary international action rather than baseline skepticism as to whether successful land use planning and relocation is even possible in certain disaster-vulnerable contexts. We are skeptical of the universalized approaches to land use planning and risk reduction evident in the Hyogo Framework and the Sendai Framework. The Typhoon Haiyan case suggests the need for a fine-grained, flexible approach based on contextual inquiry into the capacity of states. Is the state in question capable of implementing and enforcing land use zones? What is the likelihood of re-population of disaster risk zones notwithstanding efforts at relocation? The process requires empirical induction—the development of international standards from case studies rather than the deductive “first principles” reasoning evident in the Sendai Framework.

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286. *Id.* ¶ 35.

287. *Id.* ¶ 8.

## V. CONCLUSION

The conceptual linking of property and sovereignty through positivist law has ill-served vast numbers of people who cannot afford serviced land and are now vulnerable to enhanced threats of natural disasters. In a world affected by climate change, there is a need for renewed consideration of the contingent historical circumstances that link property and sovereignty, and the role of law and the state in the reproduction of global informal settlements. This Article has argued that informal settlements are constructions of law as well as products of poverty and migration. Law and the state are primary sources of disaster risk for informal settlements. As a result, international instruments that present land use planning as a risk reduction measure contribute to the creation of risk where state actors pursue planned relocation from hazardous areas as part of the performance of sovereignty, even though the state lacks capacity to control human mobility with respect to land. The depoliticized terminology of land use planning and risk reduction obscures the socio-political dimensions of relocation—the fact that those prohibited from return are disproportionately likely not to receive shelter assistance, afford resettlement, or access formal housing markets. The implication is that self-validating constructions of state sovereignty form part of the problem of disaster risk, particularly for poor households with little choice but to live in hazard-prone informal settlements. Recognizing the relationship between positivist land law, and the perpetuation of informality and inequality, is essential for transnational policy efforts to reduce the risk of future natural disasters.

