BRIDGING THE ENVIRONMENT-HUMAN RIGHTS DIVIDE: MANIFESTING ECOLOGICAL RIGHTS

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ABSTRACT

This paper explores how the environment has been connected with human rights in an attempt to harvest greater environmental protection as a broader appeal to social insecurity and justice. The current scholarship suggests that the current interface between rights and environmental protection can be achieved by providing environmental protection through existing rights (e.g. procedural rights, right to life, right to health, etc.) or through a 'new right' to a quality environment. Yet, even if politically viable, given current global 'power relations' such a pathway is insufficient to address the fundamental practices that contribute to environmental degradation or the ideational perspectives that undergird such environmentally unsound practices. Even more, these rights are currently beyond the scope of direct application and remain subordinate to a vast array of mainstream rights (as 1st or 2nd generation rights), possibly further subverting environmental issues on the global agenda. After a short case study on Ogoniland that demonstrates the inherent limitations of an environmental human rights approach, a new conception of 'ecological rights' is proffered. This approach offers not only greater sensitivity to localized context (i.e. how individuals are 'situated' in local practices that contextually operate at the human-nature conjunction), but addresses fundamental conceptions and reconceptions of 'nature' in forming ideational perspectives that drive environmentally degrading practices. Specifically, an ecological rights framework integrates concern for individual rights within particular cultural and environmental contexts. I suggest that this conception offers greater potential to generate political mechanisms in addressing the multiplicity of crosscutting issues, both temporally and spatially, that environmental problems create, but that they can do so as a more robust complement to larger schemata of human security, ecological security, or sustainable development.

The environmental regime has frequently shifted agendas, frames, and political terrain searching for the connection that provides the most effective tools for political, social and legal action on environmental protection. More specifically, the environmental regime has embraced, even engendered, application through 'global environmental governance'—which expands coverage to include both a state-centric and a multi-centric world. The human rights regime has undergone a similar transformation in promoting individual rights beyond the traditional realm of international relations—one largely pursued through nonstate actors attempting to pressure, persuade, and shame state actors into appropriate action to acknowledge and protect these rights.

The *relative* success of the human rights regime at implementation and monitoring, combined with the inefficacy of international environmental regimes in achieving significant and enforceable protections[1], naturally prompts the question of linking environmental concerns with human rights[2]. As environmental protection has increasingly become framed as part of social equity and justice issues,[3] it suggests that potential pathways may exist for a rights-based framework to exist or coexist with emerging larger schema based on 'human security'[4], 'ecological security'[5] or 'sustainable development'. For example, linking environmental issues

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[1] Burger (2003), 373.

[2] Cranston, M. (1963), "What are Human Rights?" (Basic Books), quoted in Alston, P. (1986), "Conjuring up New Human Rights: A Proposal for Quality Control," AJIL 78:607, 615, n. 30: "A human right by definition is a universal moral right, something which all (people) everywhere at all times ought to have, something which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human."

[3] For a good example, *see* Keck, "Social Equity and Environmental Politics in Brazil," *Comparative Politics*, 27:4, 409-424.

[4] Contrary to traditional command and control approaches to security, 'human security' places people at the center, one that stresses interdependence and universality. See UNDP, Human Development Report 1994, New York: Oxford University Press, p. 22; see also more generally, Page and Redclift (2002), *Human Security and the Environment: International Comparisons*. Northampton, MA: Edward Elgar Publishers.

[5] Recently, there have been attempts to reconceptualize of security to include non-military threats, one that arguably could be expanded to include environmental problems. The problem is determining the primary point of reference for such security: nation-state, the individual, or the environment. Although beyond the scope of this paper, as a point of clarification, I would argue that the biotic community in context with the human activity must be part of 'security' in ensuring, protecting, and preserving both human and environmental interests. See Elliott (2004), pp. 201-222.

with development as sustainable development is a way to frame issues of poverty with environmental protection that affords the developing world an opportunity to have both stake and standing on these issues.[6] Similarly, human security attempts to provide a people-centered approach to securing the individual (and at times the collective) that could easily incorporate security of 'earth's life support systems'[7] offering a broader window into environmental degradation and human insecurity. It is within this context that this paper will explore how human rights have been connected with the environment in an attempt to harvest environmental protection in a broader appeal to social insecurity and justice.

In examining the human rights-environment interface, as Alan Boyle points out, there is already a natural affinity between environmental and human rights organizations, since "both aim to reduce the reserved domain of domestic jurisdiction protected under Article 2(7) of the UN Charter." At the domestic level, both groups focus on constraining both unaccountable government and private actor power, with a focus on political action at the international level. However, tensions manifest because "environmentalists may distrust the priority which human rights activists are likely to accord to the human being over other species and ecological processes…In contrast, some human rights activists have criticized the environmental movement for disregarding immediate human needs in the quest to protect biota…"[8] A fundamental question is then, "whether human rights and environmental protection are premised upon fundamentally different social values, such that efforts to implement both simultaneously will

[6] Increasingly, the environmental agenda, especially at the global level where tensions between the Global North and South have escalated, has evolved into one best captured by sustainable development. After the most recent global environmental summit at Johannesburg (2002), the definition for sustainable development was expanded to include environmental protection and economic development but social development as well.
[7] This linkage was proposed by the Commission on Global Governance (1995), *Our Global Neighborhood*. Oxford: Oxford University Press, p. 79.
[8] Anderson (1996), 10-11.

produce more conflict than improvement."[9] Human rights focus on the rights of individuals, while typically environmental claims are made on behalf of collective groups. This inherent conflict creates tension since environmental protection and enforcement embodies a positive right that necessitates to a large degree governmental support, rather than non-intervention.[10] However, as human rights have expanded into rights of groups or collective rights (e.g. indigenous groups), this tension has to some degree been mitigated.[11] Another potential limitation is that human rights are difficult to define, both in application and scope, and therefore the process through which they are generated and enforced can be slow and contentious, one that frequently results in acceptance of the lowest common denominator.

The literature suggests three orientations that have been generally proposed in comparing the spheres of human rights and the environment. First, it is suggested by some scholars that environmental issues are actually within human rights because the goal of environmental protection is ultimately to improve the quality of human life. Conversely, other scholars argue that human rights are included within the environmental sphere because humans are just one part of a complex global ecosystem, which should be preserved for its own sake.[12] A final orienting view, which is the best reflection of the current approaches, is that they represent two separate fields in which they have distinct but overlapping social values. Specifically, as described by Dinah Shelton, "these two fields share a core of common interests and objectives, although not obviously not all human rights violations are necessarily linked to environmental

[9] Shelton (1991), 104.
[10] Sax (1990), 94.
[11] Tracy (1994).
[12] Shelton (1991), 104.

degradation…[and vice versa]…and any attempt to force all issues into a human rights rubric may fundamentally distort the concept of human rights."[13]

Human rights are gaining more traction as a possible transition from universal rights upheld by nation-states to fundamental rights in a transnational world. At the same time, environmental problems have expanded far beyond the borders of states or even between states as transboundary pollution into truly global collective action problems—problems that tend to affect local communities rather than just individuals. Even more, there is a deepening problem where "a minority of prosperous countries overburden the global environment is now becoming a palpable reality as it leads to the degradation of other societies."[14] It is within the public transnational space of civil society, however, that both spheres conjoin and advance similar overriding concerns for the marginalized and the elementary needs of the disempowered. Indeed, states, governments of all forms and levels, corporations, institutions, agreements, investments, are all becoming more constrained by human rights in transnational space. It is here in transnational space that these two spheres overlap, where they may find sufficient common ground upon which to possibly move their respective agendas forward together.

However, despite the common ground and overlap between the spheres of environment and human rights, fundamental questions remain. For example, how can environmental protection effectively interface with individual rights? Why use human rights to further environmental protection, rather than more traditional interstate relations? What form will rights toward the environment take—mobilization of existing rights, reforming existing rights, or new 'environmental rights'?[15] And what is the source of these rights: legal, moral or natural rights?

[13] Shelton, (1991), 105.
[14] Sachs (2003), 34.
[15] 'Environmental rights' here are meant as traditional rights approach of granting rights and duties to the environment, and namely a newly generated right to a healthy or quality environment.

These questions are then heightened as a result of the increasingly complex supplement of sustainable development to the environmental agenda. So, additional questions arise whether this linkage is tenable with a sustainable development platform? Can a human rights-environment interface provide legal and political pathways for addressing the intensifying effects of environmental problems (e.g. global warming, biodiversity loss, water scarcity) and dealing with their myriad consequences? Finally, as the human rights regime focuses on the individual and their fundamental entitlements stemming from human dignity, and the environmental regime focuses on the degradation of nature (and its impact on human health), is there an unaccounted 'hidden' space where communities are disempowered in dealing with the unique environmental problems that face them in specific cultural contexts? Are potential solutions to specific environmental problems therefore culturally contingent and 'situated in place'?

In broadly addressing these questions, this paper seeks to provide an orientating perspective and broadly paint the landscape of human rights and environmental protection. The fundamental question to be explored here is how to address individual rights and interests within specific cultural and environmental contexts? Specifically, in addressing this question, this paper will explore the interconnection between the spheres of human rights and the environment, the myriad conceptions of those connections as 'environmental rights,' and their potential philosophical justifications in a call for a new approach based on 'ecological rights'. This paper will be structured in four parts: the first section will provide the history and topology of the human rights-environment interface; in the second, the paper will use current literature to examine how human rights and the environment connect; the third part will analyze the Ogoni crises as a case study for environmental human rights; and in the final section, based on the

limitations of an ‘environmental human rights’ approach, the paper will explore the advantages of a new framework based on ‘ecological rights’.

I. ENVIRONMENTAL HUMAN RIGHTS: HISTORY AND TOPOLOGY

In this section, I will first, briefly review the history connecting human rights and the environment, and then outline the basic propositions of how the environment and human rights can be linked, followed finally by a appraisal of the political actors involved in this connection and their level of commitment to it. The evolution of global institutions on global environmental problems can be described in stages that surrounds three landmark global meetings—the *UN Conference on the Human Environment* (Stockholm 1972), the *UN Conference on Environment and Development* (Earth Summit in Rio, 1992), and the *UN World Summit on Sustainable Development* (Johannesburg, 2002).

The 1972 *Stockholm Conference on the Human Environment* (hereinafter, the *Stockholm Conference*) emerged as a first attempt to *globally* address environmental problems. The Stockholm Conference marks the first attempt to connect environmental issues with human rights. Principle 1 of the *Declaration on the Human Environment* states: “man has the *fundamental right* to freedom, equality, and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being” [emphasis added].[16] However, in 1992 at the *Rio Conference on Environment and Development* there was a shift away from human rights emphasis. The Declaration merely asserted that “Human beings are at the center of concerns for

[16] Principle 1, Declaration on the Human Environment, *Report of the United Nations Conference on the Human Environment* (New York, 1973), UN Doc. A/CONF.48/14/Rev.1. See Sohn (1973), “The Stockholm Declaration on the Human Environment.” *Harvard International Law Journal*, 14:451-5.

sustainable development. They are entitled to a healthy and productive life in harmony with nature."[17]

Despite the failure to include a human rights focus in the *Rio Declaration*, there were leading up to Rio and beyond, continued references to a link between the environment and human rights. For example, the *Hague Convention* stated that "the right to life is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all States throughout the world."[18] The UN General Assembly even declared in 1990 that "all individuals are entitled to live in an environment adequate for their health and well-being." Following this declaration, the *UN Commission on Human Rights* adopted a resolution entitled "Human Rights and the Environment" in which the connection between human rights and environmental protection was affirmed. So, there have been influential declarations and comments made from the human rights side and environment side to justify a at least a limited connection between both spheres.

In addition, there continued to be supporting references from a wide variety of sources on environmental human rights. For example, such rights for the environment have been proposed in global and regional human rights treaties[19], declarations of international organizations[20], institutions[21], and by various scholars[22]. Even more, as Boyle notes "there has been a growing

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[17] Declaration on Environment and Development, Principle 1, *Report of the United Nations Conference on Environment and Development*, i (New York, 1992), UN Doc. A/CONF.151/26/Rev.1. For drafting history see Shelton (1993). "What Happened in Rio to Human Rights?" *Yearbook on International Environmental Law*, 3:82.
[18] *Hague Convention on the Environment*, Mar. 11, 1989, 28 I.L.M. 1308.
[19] 1961 *European Social Charter*, Article 11; 1966 *UN Covenant on Economic and Social Rights*, Article 12; 1981 *African Charter on Human Rights and Peoples' Rights*, Article 24; 1988 *Additional Protocol to the Inter American Convention on Human Rights*, Article 11; 1989 *Convention on the Rights of the Child*, Article 24(2)(c).
[20] *World Charter for Nature* (1982), Principle 23; 1989 *Hague Declaration on the Environment*; and UNGA Res. 45/94 (1990).
[21] See: *Yanomami Indians Case*, IACHR, in ECOSOC, Human Rights and the Environment, UN Doc. E/CN.4/Sub.2/1992/7; *Powell & Rayner v. UK*, ECHR, Ser. A. No. 172 (1990); *Port Hope Environmental Group, v. Canada,* Decision 67/1980, UN Human Rights Committee.

trend to give environmental protection constitutional status in many national legal systems either explicitly or implicitly or by judicial interpretation of other constitutional guarantees."[23] In the post-Rio era, this growing body of literature, organizations and institutions all promoting a linkage between human rights and the environment signal a return to the earlier conception of the environment as a human right articulated in Stockholm.

A good example is an influential report of the *Sub-Commission on the Prevention of Discrimination and Protection of Minorities* issued in 1994, concluding that there has been a "shift from environmental law to the right to a healthy and decent environment."[24] The report then argued that this right is already part of normative policy and international law, and thus is capable of implementation by human rights bodies. The final report included a recommendation for a Draft Declaration of "Principles on Environment and Human Rights," which became the first international instrument to comprehensively address the linkage between human rights and the environment. The Declaration preserves the right to a secure, healthy and ecologically sound environment, rights that enshrine the environmental dimension in human rights.

As Prue Taylor notes, all these documents demonstrate an attempt to link environmental concerns with existing international human rights, such as the right to life[25], the right to health[26],

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[22] See: Thorme (1991). "Establishing Environment as a Human Right." *Denver Journal of International Law and Policy*, 19:2, 301-342; Weber (1991). "Environmental Information and the European Convention on Human Rights." *Human Rights Law Journal* 12:177; Kiss and Shelton (1991). *International Environmental Law*, pp. 21-31.

[23] Boyle (1996), 44; *see also*, Hayward, Tim (2005) *Constitutional Environmental Rights*. Oxford, New York: Oxford University Press; Brandl and Busgert (1992). "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis." *Harvard Environmental Law Review* 16:1; see also, ECOSOC, *Human Rights and the Environment*, 1st and 2nd Reports, UN Doc. E/CN.4/Sub.2/1991/8.

[24] UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Preliminary Report, UN Doc. E/CN.4/Sub.2/1991/8, and the Final Report, UN Doc. E/CN.4/Sub.2/1994/9.

[25] *See Universal Declaration of Human Rights*, Article 3 ("Everyone has a right to life, liberty and security of person."); *see also* ICCPR, Art. 6 (1) ("Every human being has the inherent right to life. This shall be protected by law. No one shall be arbitrarily deprived of his life.").

[26] *See Universal Declaration*, Art. 25, para. 1 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...."); *see also* ICESCR, Art. 12, para. 1, 6 I.L.M. 360, 363. "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

and the right to an adequate standard of living[27]. Beyond the expression of environmental concern with preexisting rights, there have been proposals for the reformulation and expansion of civil and political rights in the context of environmental protection.[28] This *procedural* right to the environment would serve more as an intermediate position by using existing 'right to information' in the political decision-making process.[29] The third and most progressive proposal calls for a separate right to the environment, or more specifically, the right to a healthy or clean environment.

The final element in describing the landscape for linking the environment and human rights is the forms of agency and their sources. There are three forms of agents in the international system: institutions (Commissions, Courts, etc.); transnational networks (e.g. global civil society, social movements, global public policy networks); and states through intergovernmental relations.[30] Here, institutions have clearly been transformed into relatively autonomous agents who generate structural links between human rights and environment through international law, norms, and rules which can harden and embed into the international political system. Transnational actors, who often act with hybrid motives, seek to create an autonomous influence on the system while constraining state influence. These actors have increasingly used the human rights framework for environmental protection, although it remains nascent. Finally,

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Id. Art. 12, para. 2(b) of the ICESCR states that improvement of all aspects of environmental hygiene are steps towards realization of this right. *Id.* at 363.

[27] *See, e.g.*, ICESCR, Art. 11, para. 1 ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.").

[28] Taylor (1998), 342. *See* Kiss and Shelton, *International Environmental Law*, 21-31. Kiss and Shelton, *International Environmental Law 1994 Supplement*, 5-13; Schwartz (1993), 368-73; see more generally, Anderson and Boyle (1996).

[29] Shelton (1991), 105; Taylor (1998), 343.

[30] It should be noted that MNCs have a tremendous influence on the global system and significantly affect both human rights and the environment. No global governance structure is capable of being effective without addressing both MNCs and the global capitalist system.

states remain by far the most influential players in the linkage between human rights and the environment and continue to provide the basis for enforcement in both regimes.

Sovereignty, which grants states ultimate authority over internal affairs, continues to shape the choices and decisions made upon both human rights and the environment. State self-interest has also been combined with strong opposition by state governments in interstate affairs who fear that the "UN would use its policing forces against them (including economic sanctions) grounded on poor environmental records."[31] However, there has been increasing encroachment upon this international norm, where states are being "asked to curtail or alter their development and environmental policies to harmonize with those of their neighbors, and, in some instances, the entire international community."[32] This pressure on state sovereignty has opened the door to increased human rights acceptance, but compliance remains mixed. This mixed record of human rights compliance by states has limited its use as a framework for states and institutions in pursuing environment issues. Nevertheless, as *figure 1* demonstrates, in this mixed actor system, we find different actors with different levels of effectiveness and willingness to use the rights framework to address environmental concerns.

***Figure 1*: Actors in the Political System and linkage between HRs and Environment.**

Global Political Actors	Link: Human Rights and Environment
Institutions (Courts and Commissions)	Embedded notions linking human rights and environmental protection.
Transnational Networks	Increasingly using Rights framework for environmental protection, but still nascent.

[31] Taillant (2004), 4.
[32] Wapner (1998), 275; see generally Litfin (1998), *The Greening of State Sovereignty in World Politics*.

Inter-Governmental Relations/Diplomacy	Remain reluctant to make link, mainly because human rights themselves have been accepted by governments with mixed results.

II. THE LITERATURE: ENVIRONMENT AND HUMAN RIGHTS

This section will address the fundamental question for this paper which is *how* human rights and the environment are connected by reviewing the available literature, followed by an analysis section that addresses the advantages and limitations of each approach. Dinah Shelton suggested three possible forms where environmental protection can be linked to human rights, from which the literature since has followed: (1) mobilizing existing rights through greater transparency and access to decision-making to achieve environmental ends; (2) reinterpreting existing rights to include environmental concerns, which represent a 'greening' of existing human rights; and (3) create a new substantive human right to a clean environment.[33]

1. *Mobilizing Existing Rights: Environmental Protection through Procedural Rights*

The first form that manifests from the human rights-environment interface is mobilizing existing rights by ensuring basic procedural rights or "environmental due process". In other words, environmental protection and sustainable development require civic inclusion and participation rights, primarily secured through civil and political rights. These "rights to information and political participation are fundamental to the exercise of traditional human rights, because one's survival and well-being depend upon knowledge of environmental risks and the ability to minimize or avoid them."[34]

[33] Shelton (1991), 105; see also, Anderson (1996), 4.
[34] Schwartz (1993), 368; see also Boyle (1996), 60. See UDHR, articles 19, 21; 1966 ICCPR, articles 19, 25; 1969 *Inter American Convention on Human Rights*, Article 23; Distinguish with 1950 European Convention on Human Rights, Protocol 1, article 1, which provides only for free elections.

In essence, this procedural regime would require: (i) a right to prior knowledge of actions which may have a significant environmental impact, together with a corresponding state duty to inform; (ii) a right to participate in decision-making; and (iii) a right to recourse before administrative and judicial organs.[35] Thus this procedural guarantee can based all or in part on freedom of expression[36], right to information[37] or a right to participation[38], and a right of recourse[39].

Freedom of expression is important in the development and enforcement of environmental policy where individuals can express their perspectives and opinions on environmental issues. Second, a right to information includes the right to participate in decision making on environmental risks, in the formation and implementation of policy, and in developing environmental laws and regulations. Schwartz asserts that "states should be held to an affirmative duty to assess the environmental and public health risks associated with activities under their jurisdiction or control, and to inform those persons potentially affected."[40] Schwartz goes further and advocates expanding this right to include a 'right of access' to government-held information that would bear on health and safety of individuals or groups, and when a

[35] Shelton (1991), 117; Taylor (1998), 343.
[36] Guaranteed by UDHR and ICCPR. ICCPR, Art. 19 provides: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds…"
[37] ICCPR, Art. 25, provides that citizens have the right, without reasonable exceptions, "to take part in the conduct of public affairs, directly or through freely chosen representatives…"; European Court of Human Rights has expanded this entitlement to include the "right of the public to be properly informed," especially when public health and safety are concerned.
[38] *Rio Declaration*, Principle 10; *World Charter for Nature*, Principle 23 provides that: "all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."
[39] World Commission on Environment and Development, *Our Common Future* (Brundtland Report), Principle 6 provides for due process in administrative and judicial proceedings.
[40] Schwartz (1993), 368.

fundamental right is involved, the government "should take the initiative to disclose the relevant information."[41]

Third, the right of participation can be at its broadest "represented as the application of arguments for democratic governance as a human right to environmental matters."[42] From the environment side, we must look to environmental agreements to determine the degree to which participatory rights are conjoined with the environment. The *Rio Declaration*, Principle 10, although falling short of identifying a human right to the environment, does assert a comprehensive form of 'participatory rights'. It provides:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[43]

Alan Boyle indicates that what separates this principle from those articulated as participatory rights in the ICCPR and regional human rights conventions is that it is more specific and environmentally relevant, emphasizing both participation in decision making and access to 'justice'. He argues then that, "it is these features which justify the proposition that there is a role for human rights law in promoting procedures for protection of the environment, and a need for further development over and above those more general rights already protected in human rights

[41] Schwartz (1993), 370.

[42] Boyle (1996), 60. See Franck (1992). "The Emerging Right to Democratic Governance." 86 *AJIL* 46; Crawford (1993). *Democracy in International Law*. Cambridge: Cambridge University Press; Fox (1992). "The Right to Political Participation in International Law." 17 *Yale Journal of International Law* 539. Steiner (1988). "Political Participation as a Human Right." 1 *Harvard Human Rights Yearbook* 77; 1993 UN Conference on Human Rights, Vienna Declaration, paragraph 8.

[43] Elements of Principle 10 in the *Rio Declaration* have also been included and reflected in *World Charter for Nature,* 1991 ECE Convention on Environmental Impact Assessment, 1992 Biological Diversity Convention, 1993 Council of Europe Convention on Damage Resulting from Activities Dangerous to the Environment.

treaties."[44] As a result, there is little difference between participatory rights and environmental rights, and under this definition this right would significantly further environmental protection.

For these reasons, Boyle argues that procedural rights are the narrowest, but strongest, argument for a human right to the environment. He argues that this perspective merely asserts that "governments which operate with openness, accountability, and civic participation are more likely to promote environmental justice, to balance the needs of present and future generations in the protection of the environment, and to enforce existing environmental standards."[45]

Analysis: Advantages and Limitations of Procedural Rights to the Environment

A *first* **advantage** of the "procedural interpretation of environmental rights" is that it avoids problems of anthropocentricity (although human decision-making processes remain). This diminishment of anthropocentricity occurs to the extent that such rights can be exercised on behalf of the environment or of its non-human components, and not solely for human benefit, and it can also be employed for the benefit of future generations.[46] The *second* advantage is that it empowers individuals, primarily through recognized procedural rights of equal access and non-discrimination, to claim these rights over transboundary environmental disputes.[47] This promotes consistency of political and civil rights, and enables individuals in differing states to apply similar standards in resolving environmental disputes.

Finally, the *third* advantage is that procedural rights provide a more flexible and context-sensitive approach that endows individuals with procedural entry points into the environmental

[44] Boyle (1996), 61; see also Kiss and Shelton (2000). *International Environmental Law*, 2d. Ardsley, NY: Transnational Publishers.
[45] Boyle (1996), 60.
[46] Boyle (1996), 62. The problem of anthropocentricity will be discussed in more detail in the other rights-based approaches to the environment.
[47] Boyle (1996), 62.

debate and dialogue. This is particularly appropriate for the developing world by empowering marginalized groups, who in general suffer disproportionately the effects of environmental degradation—including women, the dispossessed, and communities dependent on natural resources for their survival, especially indigenous groups.

The question then becomes: procedural rights granted by whom? If it is merely by the state, particularly a state with little influence in the global hierarchy of the international system, then it is worth little to have such rights; however, if they are granted a viable political platform to voice and redress their concerns at the global level by states and supported by other international civil society actors (NGOs, Institutions, Courts/Commissions, etc.), then it becomes a significant step toward dealing with environmental degradation. It is only if "the people who make the decisions are the same as those who pay for and live by the consequences of the decisions," can procedural rights have a marked impact on the protecting the environment.[48]

This suggests the *first* **limitation**, which is to be effective various rights, duties and obligations would have to be applied to and by individuals outside the sovereign territory of an acting state.[49] More than likely, these assertions would be rejected on the grounds of national interest. A *second* disadvantage is that this right assumes all states have equal access to resources and information that concerns their citizens. Information between states would only be shared if it benefited the state providing the information—again national interest trumps. *Third*, as one commentator noted, given the urgency surrounding environmental problems, we may need to prioritize the development of substantive national, regional, and international environmental criteria before focusing on political and procedural rights.[50] *Fourth* and finally, if decisions made by a state's citizens result in deleterious consequences to the environment (e.g. climate change)

[48] Anderson (1996), 9.
[49] Shelton (1991), 119-20; Taylor (1998), 345.
[50] Chapman (1993), 223.

that harm either the biosphere itself or then have secondary consequences for citizens of another state, then procedural rights ensured by either state do little to address these collective action problems. Even more, those states with the most procedural rights (i.e. states based on democracies and liberal rights-based legal systems) are in fact the states most responsible for the vast majority of global environmental degradation (both in consumption of inputs as resources and outputs as emission gases). So, if there is a viable connection between democracy and development as proffered by many scholars, there is also a concomitant connection between democracy, development and environmental degradation where these states seem structurally predisposed to unfettered consumption and the polluting outputs of the production-consumption cycle. Procedural rights do little to address these problems.

2. *Reinterpreting Existing Rights: Environmental Protection through Other Rights*

The second form of linkage between human rights and environmental protection is to restructure existing rights to meet environmental ends. Thus the "full realization of a broad spectrum of first and second generation rights would constitute a society and a political order in which claims for EP are more likely to be respected."[51] The rights usually associated with this link with the environment are the right to life[52], the right to health[53], and the right to an adequate standard[54]. Since "degraded physical environments contribute directly to infringements of the human rights

[51] Boyle and Anderson (1996), 3.
[52] *See Universal Declaration*, Art. 3, provides: "Everyone has a right to life, liberty and security of person"; *see also* ICCPR, Art. 6 (1) provides that: "Every human being has the inherent right to life. This shall be protected by law. No one shall be arbitrarily deprived of his life."
[53] *See Universal Declaration*, Art. 25, para. 1, provides that: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...."; *see also* ICESCR, Art. 12, para. 1, 6 I.L.M. 360, 363, provides: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"; Art. 12, para. 2(b) of the ICESCR states that improvement of all aspects of environmental hygiene are steps towards realization of this right. *Id.* at 363.
[54] *See, e.g.*, ICESCR, Art. 11, para. 1, provides: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

to life, health, and livelihood, acts leading to environmental degradation may constitute an immediate violation of internationally recognized rights."[55]

From a moral and political perspective, the rights to life and health are critically affected by environmental degradation. According to estimates, about 40% of acute infections in the respiratory tract, 90% of cases of diarrhea, 50% of respiratory chronic disorders, and 90% of cases of malaria all could be prevented through simple changes in the environment.[56] Similarly, the lack of clean water, contaminated water and deficient sanitation account for more than 12 million deaths each year.[57] This illustrates the magnitude and intensity of environmental degradation on the exercise of human rights, and highlights the importance of recognizing their interdependency and indivisibility.

From a legal perspective, it is generally accepted that states have an affirmative duty to prevent situations that imperil life or health of citizens, which logically should be imputed to state activities that pose similar environmental risks.[58] However, the Inter-American Commission in the *Yanomami* case did not analyze these human rights violations with regard to particular events, leaving uncertainty about the scope of the rights and state obligations in the environmental context.[59] In addition, environmental law tends to revolve around a broad understanding of human needs, which breeds a more hierarchical approach prioritizing certain

[55] Boyle and Anderson (1996), 3.
[56] Brown, Flavin, and French, *State of the World* (2001), Worldwatch Institute.
[57] Brown, Flavin, & French (2001).
[58] Recent caselaw supports this position. In the *Yanomami* case, the Inter-American Commission on Human Rights determined that ecological destruction of *Yanomami* lands violated their right of life (and other rights) because the Brazilian government had allowed the exploitation of resources that resulted in the loss of land, influx of outsiders and disease, and ultimately the displacement of *Yanomami*.
[59] Recently, the Inuit have brought a similar case before the Inter-American Commission on Human Rights alleging that the United States, as the primary contributor to greenhouse gases that leads to global warming, is responsible for the degradation of Inuit habitat. This ruination of habitat, it is claimed, undermines the unique Inuit way of life and threatens their culture.

needs over others. Even in the caselaw the prioritization of environmental needs tends to be subverted for other needs, particularly economic needs.[60]

Analysis: Advantages and Limitations of Substantive Rights to the Environment

The *first* **advantage** of reshaping existing substantive rights for environmental ends is that they offer an opportunity to protect environmental goods themselves. That is, while procedural rights for the environment do little for directly protecting the environment itself, restructuring existing substantive rights will move in this direction. On some basic level, it redefines environmental degradation itself as a human rights violation. Indeed, "[a]dvocates of substantive environmental rights may not trust procedural rights alone for the simple reason that even if procedural or participatory rights are fully realized, and perfectly distributed through civil society, it is entirely possible that a participatory and accountable polity may opt for short-term affluence rather than long-term environmental protection."[61] A *second* advantage is that the rights are already in place, established *de minimus* as norms or soft law, which offers a pragmatic foothold forward in addressing immediate environmental problems that directly infringe on protected rights such as right of life and health. Even more, and *third* advantage, is that it allows for collective based claims, as *Yanomami* demonstrates that if a state interferes with the environment, it can give rise to an individual or *collective* rights-based claim.

The **disadvantages** to the approach revolve around pragmatic and structural limitations of the international system. *First*, as the *Powell* case (*supra*, fn. 55) demonstrates, environmental interests and rights of individuals are not likely to receive priority in the legal system over the

[60] *See, Powell & Rayner v. UK* (172 Eur. Ct. H.R. (ser. A) at 5 (1990)), where petitioners alleged noise pollution from Heathrow Airport interfered with their quality of life and enjoyment of property. The ECHR ruled that these rights must be balanced against the competing interests of the community as whole.
[61] Anderson (1996), 10.

economic interests of the community—in either developed or developing countries. *Second*, there has been negligible progress in practically implementing any of these new interpretations of existing rights,[62] and moreover, there is little reason for powerful states to agree or subject their autonomy and sovereignty to fully meet the demands—which could be significant—of these 'extended' forms of rights. *Third* and finally, although using established substantive rights offers a foothold forward, it is one that is contentious and narrowly construed. There is little support for enforcing the basic rights as they stand today, so extending these rights to environmental protection offers little practical redress for environmental violations and an insignificant structure for protecting the environment in general.

3. *New Right: Environmental Rights through a New Right of Environmental Quality*

A third view is an extreme extension of the second approach, where the right to a healthy environment becomes an inalienable right. Different perspectives have been promulgated in support of this right to a: 'decent environment,' 'healthy environment,' 'clean environment,' 'sustainable environment,' etc. This demonstrates the difficulty in not only delineating what form the right will take, but also definitional problems with precisely what such a right may entail.

In trying to understand the definition of such a right, the *Stockholm Declaration*, which initially generated a link between human rights and the environment, refers to "the fundamental right…to adequate conditions of life in an environment of a quality that permits a life of dignity and well-being."[63] This Article, it can be argued, includes some form of 'healthy' environment to ensure well-being. The *World Commission on Environment and Development* has proposed that, as a fundamental legal principle: "all human beings have the fundamental right to an

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[62] Taylor (1998), 342.

[63] Declaration on the Human Environment, Principle 1, *Report of the United Nations Conference on the Human Environment* (New York, 1973), UN Doc. A/CONF.48/14/Rev.1.

environment adequate to their health and well-being."[64] Probably the most comprehensive expression of this right is contained in the 1981 *African Charter* where Article 24 provides: "all peoples shall have the right to a general satisfactory environment favorable to their development." While the 1988 *Protocol to the American Convention on Human Rights* (i.e. San Salvador Protocol) actually provides in Article 11 entitled 'Right to a Healthy Environment': "1) Everyone shall have the right to live in a healthy environment and to have access to basic public services; 2) The States Parties shall promote the protection, preservation, and improvement of the environment."[65] This Article asserts not only a right to a healthy environment, one that impliedly incorporates an ecologically balanced environment that bears on both natural and cultural heritage, but it also specifies an affirmative state obligation to meet this right. The operative provision here requires both international cooperation and the adoption of domestic legislation for the achievement of rights, and although there is no legal right to petition for violations, the IACHR can make observations and recommendations on the status of these rights.[66]

The UN has not declared a specific right to a healthy environment, but it has made overtures in that direction. Specifically, the *Convention on the Right of the Child* expressly references environmental quality in Article 24 on the right to health, and in addressing education, it specifies the need for hygiene and environmental sanitation instruction. In addition, the OECD has stated that fundamental human rights should include a right to a 'decent environment'. More recently, the *Charter on Environmental Rights and Obligations* (drafted by the UN Economic Commission for Europe) affirmed a universal right to an environment adequate for general

[64] World Commission on Environment and Development (1987), *Our Common Future*, 348.
[65] American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, 1988, O.A.S.T.S. 69, OEA/ser. L.V/II.92, doc. 31 rev. 3 (1988).
[66] Taylor (1998), 346; see ACHR, Arts. 1, 2, 19 (6), 19 (7).

health and well-being, and the responsibility to protect and conserve the environment for present and future generations.[67] However, the most progressive appeal to this right has been made on behalf of indigenous cultures and peoples[68]; and in fact, the "the connection between human rights and environmental organizations is most evident in the protection of indigenous peoples and their traditional lands."[69]

This basis in discrimination has opened the door to a separate floor of access to environmental protection, where this right prohibits discrimination in access to environment and the state cannot interfere with environmental use (resources) or in the effects of environmental degradation. As mentioned earlier, the *UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities* studied the connection between human rights and the environment.[70] The Final Report[71] explicitly encouraged both a *substantive* rights to 'development, health and life', and *procedural* rights to public participation and access to justice. The Report includes a list of principles that include: (i) protection from environmental degradation; (ii) protection for the environment itself; (iii) while promoting the right to adequate healthy environment and access to clean resources that promote well-being.[72]

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[67] Shelton (1991), 125 (citing draft UNECE Charter on Environmental Rights and Obligations, adopted Oct. 29-31, 1990; Taylor (1998), 348.

[68] International Labor Organization (1989), *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 28 I.L.M. 1382, Art. 4(1).

[69] Tracy (1994); there is a growing body of literature on this subject and its connection to environmental protection and its implications for indigenous peoples. See also, Anaya (2004), *Indigenous Peoples in International Law.*

[70] UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Preliminary Report, UN Doc. E/CN.4/Sub.2/1991/8.

[71] UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Final Report, UN Doc. E/CN.4/Sub.2/1994/9 (the "Ksentini Report").

[72] Specifically, the Ksentini Report includes: a) freedom from pollution, environmental degradation and activities that adversely affect the environment, or threaten life, health, livelihood, well-being or sustainable development; b) protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems; c) the highest attainable standard of health; d) safe and healthy food, water and working environment; e) adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment; f) ecologically sound access to nature and the conservation and sustainable use of nature and natural resources; g) preservation of unique sites; and h) enjoyment of traditional life and subsistence for indigenous peoples.

These references to a right to a healthy environment suggest the emergence of such an entitlement as a 'generic right to the environment,' where the main beneficiary can be either an individual or collective group who possesses the right to enjoy the environment and a corresponding duty upon the state. This right is one enjoyed collectively, one that assumes solidarity with other human beings, where everyone has a right to enjoyment but also the duty to protect the environment.[73] Despite frequent calls and references to a new human right to a 'healthy environment', this is a contentious and uncertain area—and will continue to be, particularly since there is no implementation and enforcement mechanism to ensure such a right.

Analysis: Advantages and Limitations of a New Right to the Environment

The *first* and probably the strongest argument in favor of qualitative environmental rights is that other human rights are themselves dependent on adequate environmental quality, and cannot be realized without governmental action to protect the environment.[74] That is, the main argument is in the hierarchy of human rights (i.e. 'generation of rights'), the human right to a healthy environment becomes a necessary prelude to the realization of at least second generation rights (economic and social rights) with priority over non-rights based objectives. Further, it would "recognize the vital character of the environment as basic condition of life, indispensable to the promotion of human dignity and welfare, and to the fulfillment of other rights."[75] In this regard, Pathak, who seeks the broadest recognition of human rights in the environmental sphere, argues:

> …the protection and improvement of man's environment arise directly out of a vital need to protect human life to assure its quality and condition, to ensure the prerequisites indispensable to safeguarding human dignity and human worth and the development of the human personality, and to create an ethos promoting individual and collective welfare in all the dimensions of human existence.[76]

[73] Symonides (1992), 28.
[74] Boyle (1996), 63.
[75] Boyle (1996), 49.
[76] Pathak (1992), 209.

A *second* prominent argument for such a right is that any human rights claim is a universal entitlement, one that is—at least theoretically—immune to short-term, self-interested trade-offs.[77] The elevation of the environment into the human rights discourse therefore generates a moral claim that receives legitimacy within the international legal and political spheres. Finally, and the *third* advantage, is that this right represents a clear shift from the environment as a means of infringing other established rights to one where the environment itself has intrinsic value and its quality must be protected. The strength of the human right to the environment position is best summarized by Richard Falk's promotion of the right where it must include: "the rights of individuals and groups (including those of unborn generations) to be reasonably secure about their prospects of minimal physical well-being and survival [and] the duty of governments and peoples to uphold this right by working to achieve sustainable forms of national and ecological security."[78]

However, despite the moral, legal and political claims of such a right, the **limitations** are representative of the weaknesses intrinsic to human rights themselves. They often lack supervision or enforcement, sufficient definition, and are anthropocentric. *First*, the right to the environment remains vaguely defined, and as Crawford notes, "so far as claims such as the right to . . . the environment are concerned, the difficulty is that there is as yet no level of articulation of consequences of those rights, failing which they can only be said to have been accepted as

[77] Anderson (1996), 21.
[78] Falk, Richard A. (1981). *Human Rights and State Sovereignty*, *quoted in* Edith Brown Weiss (1984)."The Planetary Trust: Conservation and Intergenerational Equity," *Ecology Law Quarterly,* 11:495, 558. *See also* Schwartz (1993), 374; Nickel (1993), "The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification." *Yale Journal of International Law* 18:281.

pleasant-sounding formulae."[79] As a result, this imprecision has led many to consider the right largely aspirational, one that expresses national goals and intents rather than justiciable rights.[80]

A *second* limitation and related argument is that it is very difficult to arrive at a single precise formulation of a substantive right to a decent environment, because it will be culturally relative and the desired quality of the environment will ultimately be a value judgment.[81] Even more, environmental protection may be culturally and socio-economically contingent; that is, to adequately protect the environment and resources will be different for each culture or society dependent on varying cultural and economic priorities. Thus it is impossible to treat environmental rights as inalienable or non-derogable.

A *third* limitation is enforcement, for in this way, a right to "a decent environment has much in common with other claims, such as sustainable development or intergenerational equity, and suffers comparable problems of subjectivity, definition, and relativity which make it inherently problematic for any notion of universal human rights."[82] But it goes further since not only is there not an enforcement mechanism, but there is no mechanism for redress—as there often is for other rights—either procedurally or substantively.

A *fourth* and final argument against a right to the environment is that existing human rights norms and legal instruments already play a strong role in environmental protection, and that additional environmental rights proposals are redundant, if not counter-productive, and particularly so if the existing set of human rights cannot be realized first.[83] As a result, despite some powerful arguments for a right to the environment, it is possible that such a right is neither

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[79] Crawford, (1988), 172; *See also* Van Lier, Irene (1981), *Acid Rain and International Law*, 134-7; Brunee, Jutta (1988). *Acid Rain and Ozone Layer Depletion: International Law and Regulation*, 122-4.
[80] Schwartz (1993), 374; Taylor (1998), 351.
[81] Anderson (1996), 9.
[82] Boyle and Anderson (1996), 4.
[83] *See* e.g, J.G. Merrils, "Environmental Protection and Human Rights: Conceptual Aspect"; Robin Churchill, "Environmental Rights in Existing Human Rights Treaties" and Andrew Harding, "Practical Human Rights, NGOs and the Environment in Malaysia" in Boyle and Anderson (1996).

necessary nor desirable. Handl argues on this point that it is misconceived to assume that the cause of environmental protection is furthered by postulating a generic human right to the environment in any form.[84]

III. OGONIS: FINDING JUSTICE THROUGH ENVIRONMENT AS A HUMAN RIGHT?

The Ogoni Case

The Nigerian Delta is one of the most polluted places on the planet with contaminated water tables, leaking and/or ruptured oil pipelines, constant gas flares, pools of sulfur, acid rain, fouled aquatic life, and tainted soil. These environmental effects have had devastating economic and health consequences on the Delta region. For the Ogoni, who live in heart of this region and depend on farming and fishing for their livelihood, this has been crippling to their physical survival, altered their ways of life, and arguably, endangered their culture.

Even worse, Nigerian oil fields directly impact global commons areas by contributing more to the global warming than the rest of the oil fields in the world combined.[85] Shell Nigeria is one of the largest oil producers in the Royal Dutch/Shell Group[86] (hereinafter, Shell), and 80 % of the oil extraction in Nigeria is derived from the Niger Delta, the southeast region of Nigeria. Specifically, three *systematic* abuses have occurred from Shell's presence in Ogoniland: first, Shell has committed direct environmental abuse to the land of the Ogoni people and its surrounding area, which has then impacted the Ogoni economic well-being and health; second, Shell has been complicit with the Nigerian government in uniformly constraining and abusing the human rights of the Ogoni people; and finally, Shell has produced a grossly disproportionate

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[84] Handl (1992), 117.
[85] "Shell in Nigeria: What are the Issues?" http://www.essentialaction.org/shell/issues.html.
[86] The Royal Dutch/Shell Group is commonly known as Shell, and is a conglomerate of more than 1700 companies worldwide.

amount of greenhouse gases (through 'flaring') that contribute to global warming. As a result, the Ogoni serve as concrete case study for the intersection of human rights and the environment.

In regard to direct environmental abuse, Shell has engaged in natural resource exploitation that has consisted of: excessive natural gas flaring (95% is flared in Ogoniland compared with 0.6% in the US)[87]; oil spills, where although Shell drills oil in 28 countries, 40 percent of its oil spills worldwide have occurred in the Niger Delta,[88] including more than 3,000 spills between 1976 and 1991[89] (this spillage totaled more than four times that of the Exxon Valdez tragedy[90]); and ubiquitous pipelines and refineries that literally blanket precious Ogoni farmland. As a result, the Nigerian Environmental Study Action Team observed a dramatic increase in "discomfort and misery" due to the lack of arid land, depleted fish stocks, pungent fumes, excess heat, combustible gases, and oil residue that pervades entire region.[91] The cumulative effect of Shell's oil business in the area has yielded a dramatic increase in human illnesses, ruined farmland, soil degradation, aquatic ruination, drinking water contamination, and air pollution.

Consequently, not only have Shell's activities brought ecological destruction and ruination of the Ogoni habitat, but in doing so, Shell has interfered with the Ogoni fundamental human rights, arguably including their right of self-determination (i.e. one cannot be self-determining or autonomous when the means for development are severely restricted).[92] In exacerbation of this result, Shell has not compensated the Ogonis for the environmental injustice,

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[87] Carbon Dioxide and Methane release from this flaring is a major contributor to global warming.
[88] Crayford (1996), 183.
[89] Ellis (1994).
[90] Watts (1994).
[91] NEST, Nigeria's Threatened Environment.
[92] Art. 1.1, *Int'l Covenant on Civil and Political Rights* (1966), which states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This is arguable since traditionally international law has only prioritized nation-states holding rights of self-determination, while ethnic or cultural groups typically fail to acquire sufficient standing to hold such a right.

nor have they received royalties for the wealth derived from their land.[93] The Ogonis stand largely without procedural recourse (except through the US alien tort statute), no substantive guarantees for environmental protection from infringing on their right to life, health, adequate living, or 'right to a healthy environment'.

These environmental injustices highlight the second major effect of Shell's influence in the Niger Delta, for its complicit partnership with the Nigerian government has undermined Ogoni human rights and security rights in particular. Oil exports have since become vital to the Nigerian economy; revenue from oil exports has brought in approximately $30 billion since 1958, and in recent years, it has accounted for approximately 95 percent of Nigeria's export income. However, the Ogonis received little to no wealth generated by the oil export by Shell and others. This governmental reliance on multi-national oil companies has created a deleterious partnership that has served to maximize oil company profits and governmental control over the country at the direct expense of Ogoni fundamental rights and environmental protection that is the lifeblood for Ogoni survival.

It became evident early in the conflict that the Ogoni people were distinctly aware of their human rights, and they began to feel that they were being cheated out of their birthright by foreign oil companies.[94] In addition to the environmental concerns and destruction of habitat, the lack of paved roads, plumbing, electricity, schools, and hospitals all motivated the founding of Movement for the Survival of Ogoni People (MOSOP) in 1990. This group galvanized the community and brought together the repressed Ogonis and supplied them with a sense of purpose

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[93] Unfortunately, this is a legal problem. Under Nigerian law, all land belongs to the State, so all royalties are paid to the State, and yet citizens receive little benefit from the government, and consequently, they must bear the profound injustices economically and environmentally. This highlights the argument for granting ethnic and cultural groups standing for rights of self-determination—that is, when the government fails to adequate ensure their individual rights.

[94] Article in the Weekly Mail and Guardian, 12 July 1996, cited in Hattingh, 17.

and empowerment. Armed with this community support, the group's leader, Ken Saro-Wiwa, quickly published the Ogoni Bill of Rights, which demanded rights not only to environmental protection and "a fair proportion" of local resources, but also the right to religious freedom, the development of Ogoni culture, and above all, the political autonomy of the Ogoni people as "a separate and distinct ethnic nationality" within Nigeria. The MOSOP-led protests eventually prompted a harsh rebuke from the Nigerian military regime that has sought to protect Shell, and its oil export, from any resistance. In 1990, the police killed 80 people, destroyed houses and vital crops[95]; in two separate incidents in 1993, an estimated 2000 Ogonis were killed (including women and children). In 1995, Ken Saro-Wiwa and eight others (the Ogoni 9) were arrested and tried on unfounded grounds, and sentenced to death. Within ten days, the sentences were carried out in Port Harcourt amidst international outcry and media campaigns.[96] For many, these executions were seen as "the mindless culmination of one of the most serious clashes in the history of environmental struggle on the continent of Africa ever recorded."[97] Twenty other Ogonis (the Ogoni 20) were also taken into custody at that time, awaiting trial by the same tribunal; yet, in late 1998, they were released (on bail). International condemnation followed[98], but the Nigerian government steadfastly continued to find that the Ogoni claims were illegitimate.

Since the public hangings, the evidence against Shell includes payments for these military missions that resulted in Ogoni fatalities during their peaceful protests in 1990 and 1993.[99] Further, the Nigerian government has admitted to purchasing weapons for the police who

[95] Ellis (1994).
[96] Report of Human Rights Watch, Africa, 27 September 1996.
[97] Hattingh (1997), 3.
[98] In fact, a lawsuit by Saro-Wiwa's successors has been filed in New York, and has passed early tests for US jurisdiction—including a major decision on this point by the Supreme Court.
[99] Ellis (1994).

guarded Shell's facilities, including funding a "permanent security force" to occupy Ogoniland under which the Ogonis have lived under constant surveillance and threats of violence. In fact, in a classified memo, Shell leaders describe the necessity for "psychological tactics of displacement/wasting" in stating that, "Shell operations are still impossible unless ruthless military operations are undertaken."[100] In short, both the Nigerian government and Shell Oil were complicit in the pattern of human rights abuse in Ogoniland and the environmental destruction to the Niger Delta region, which has clearly undermined the free development of the Ogoni people.

Interconnection of Human Rights and Environment: Ogoniland

The Ogoni case demonstrates the interconnection of environmental degradation with human rights. To deal with the environmental abuse without addressing the pure human abuse would be unjust; conversely, to address the human rights violations without the environmental abuse and degradation caused by Shell, would also be an illusory form of justice. More poignantly, it would be an ineffective remedy if the environment was not addressed as concomitant form of restitution with human rights. They go hand in hand and must be engaged directly and connectedly; thus, on some basic level it makes sense to address these issues as part of the same sphere, or at least build upon their overlap. However, that said, procedural rights, substantive rights, or even a new environmental human right, do not provide support for interconnectedness of these issues. In addition, they also tend to give way to a 'prioritization' of rights—where certain human rights take priority over each other, as well as the inherent tendency to elevate human rights over those of nature and the environment.

[100] Robinson (1996).

For example, procedural rights, particularly access to information, would be helpful to building a case against Shell and the Nigerian government, but does little to address their grievance directly. Similarly, substantive rights would use fundamental rights such as 'right to life' to legally and politically engage pathways to remedies. Beyond the limitations of human rights alone to address these atrocities, substantive tie-ins with human rights does little to address the environmental problems that created the problems in the first place. In addition, it does little to address Shell's indifference to the externalities it creates and to the global commons areas (e.g. flaring that leads to global warming). The final approach, to develop a separate right to a quality environment would offer broader coverage including that of the environment itself, although it would suffer from many of the limitations discussed. Specifically, they all remain anthropocentric, prioritizing those rights that directly impact human health, which although important, fail to address the practices that lead to environmental degradation. In addition, they do not address the ideational perspective that supports these practices; at most, a right to a quality environment would provide only a deterrent effect to environmental abuse (one however would remain subject to cost-benefit protocols by MNCs).

This type of prioritization is severely problematic for, in the future, these type claims would at best provide deterrence, which would then simply become another variable in a cost/benefit analysis for similarly situated MNCs. So, even if the basic rights of the Ogonis were recognized for redress, it would pave the way for 'paying off' human abuse through monetary compensation without addressing the underlying environmental conditions that precipitated human abuse. Fundamentally, this is a problem with all human rights approaches as currently constituted—for how do you redress environmental disasters, loss of habitat or way of life, loss

of culture and situatedness of place, or degraded biosphere that contribute directly to degrading the ecosystem in which groups of people live communally?

Thus should these rights evolve into hard law, the legal system would more than likely, barring finding a substitute habitat, simply demand that the offending party financially recompense aggrieved parties. How does this protect either human rights or the environment? If these norms hardened and are routinely enforced, maybe it could be argued that it is a form of redistributive justice, but it does so at the expense of a society's habitat, culture, etc. This represents a significant problem for both human rights and environment (and more broadly hard law and transitional justice), one that requires a *proactive* force to prevent these problems from occurring or de minimus limit their impact on particular communities. Otherwise, ironically through human rights regime itself, we risk treating entire groups of human lives as merely "cost of doing business."

By way of example, as the effects of global warming deepen, the number of these cases (e.g. Ogonis, Inuits, Yanomamis, small island nations, etc.) will swell significantly in the coming decades. Problem one is how to compensate victims of aggregate environmental effects? A linkage between human rights and the environment could be an effective instrument for redress, primarily through compensation and relocation, but with the aforementioned caveats. Problem two, however, is what happens with environmental refugees created from these environmental 'disasters'? Their rights are based solely on their individuality, not as situated in place or in a cultural context, precluding legal redress that accounts for loss of culture, way of life, and the particulars of habitat. Even more, such a link does nothing for problem three, how to prevent or at least take proactive measures to curb this type of abuse. Finally, problem four is that the ideational orientation that fuels degrading environmental practices must be effectively addressed

in a way that shifts values. Clearly, assuming problem one can be addressed through human rights-environment interface (which to date, it has not), a new governance structure is necessary to account for problems two, three and four—all of which will become prevalent in the next few decades.

IV. A COMMON BRIDGE: 'ECOLOGICAL RIGHTS'

Human rights were prescriptive measures taken to ensure those rights inherent to individuals, which "belong to all people, at all times, in all situations, and in all societies."[101] The human rights regime was built as an answer to the state and its claims of sovereignty, where the individual was considered to have such basic and fundamental rights that despite the implied social contract with the state they were inalienable. Thus the human rights regime has in part, along with other nonstate actors, manifested as an autonomous force that breaks down state sovereignty for individual rights. At the same time, however, we are seeing an increase in environmental collective action problems that neither the state nor the individual can address effectively—in fact, these problems are virtually intractable from their typically self-interested perspectives. In addition, as the Ogoni case study demonstrates, private actors such as MNCs as well as other state actors (e.g. governments and government officials) are complicit in what is tantamount to creating environmental disasters that precipitate human rights abuse—and, as we are beginning to see, often destroying entire communities.

So, as the human rights regime is reconstructing structures, identities and the actors in the emerging global system toward inalienable individual rights, there is an equally strong pull to reconstruct the emerging order to recognize the environmental problems created by aggregation of human behavior—either by the state, private global actors, or even particular cultures. This

[101] Winston (2000), 2.

demonstrates the limitations of both the state and individual based order as presented in traditional human rights. This suggests a mutually constitutive effect of linking human rights and environment whereby they both realize their limitations and restructure by transforming into more efficacious approaches that recognize individual rights within their particular context enshrined at the global level. In fact, there is already some evidence in International Environmental Law that supports such a connection embodied within a more eco-centric approach.[102]

This eco-centric orientation in IEL could be broaden to support an 'ecological rights' approach, one based on exploring and ultimately preserving the fundamental relationship between humanity and nature within a given context (e.g. cultural, societal, community). Specifically, ecological rights would recognize that individual rights are subject to limitations where "individual freedoms are exercised in an ecological context, in addition to a social context."[103] As a result, there needs to be a concurrent reconstruction of *responsibilities* to nature, and to see human beings as part of an interconnected ecosystem; that is, when you destroy nature, you destroy humanity, and likewise, when you destroy human life, you destroy nature.

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[102] *World Charter for Nature* (1982), which was the first international legal document to introduce eco-centrism, referring to "mankind as part of nature…to civilization rooted in nature… [and] every form of life is unique, warranting respect regardless of its worth to man…"; see specifically, General Assembly Resolution on a World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, U.N. Doc. A/RES/37/7 (1982); See also, *Convention on Biological Diversity*, June 5, 1992, arts. 7-10 and annex 1, 31 I.L.M. 818, where in the Preamble, it states: "Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational, and aesthetic values of biological diversity and its components…"; and the draft IUCN World Conservation Union, *International Covenant on Environment and Development* (3rd ed., 2004) which states, in addition to similar language as the World Charter for Nature, that as a fundamental principle (Article 2), "nature as a whole warrants respect; every form of life is unique and is to be safeguarded independent of its value to humanity." Other international agreements that embrace an eco-centric orientation are: *Convention for the Conservation of Antarctic Living Resources* (1980); *ASEAN Agreement on the Conservation of Nature and Natural Resources* (1985); *Protocol to the Antarctic Treaty on Environmental Protection* (1991); *Berne Convention on the Conservation of European Wildlife and Natural Habitats*; and the *CITIES Convention*; see generally, Birnie and Boyle (1995), 194.
[103] Taylor (1998), 309.

Figure 2: **Orientation to the Type of Rights and Environmental Protection**.

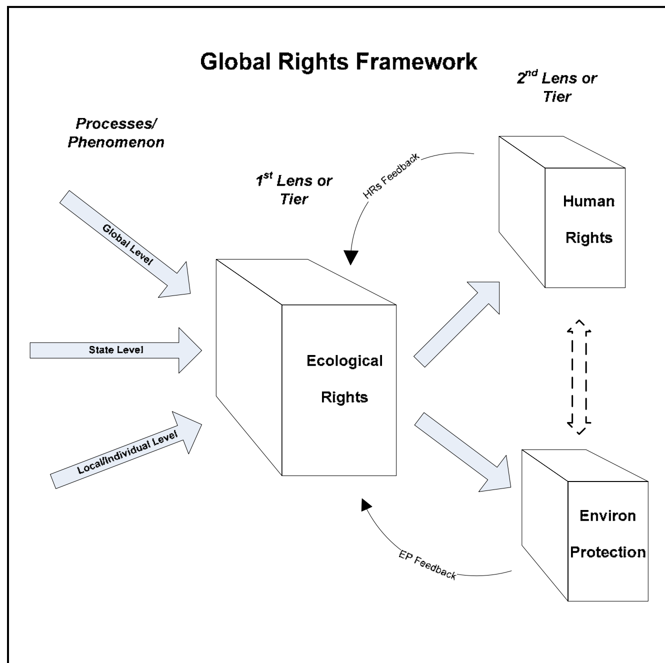
Forms of Rights toward Environment	Source	UN Document	Means of Right	Basis of Right	Orientation	Examples
Mobilizing Existing Rights—"environmental due process"	Due Process	ICCPR	Procedural	Individual based	Anthropocentric	Rt to information; Rt of participation; Rt to jud redress
Reinterpreting existing rights—"greening" of rights	Pre-existing Human Right	ICESR	Substantive	Individual & Group based	Anthropocentric (with indirect concern for EP)	Right to Life/ Health; Rt to Property; Rt to subsistence
Environmental Rights	'Dignity' of being human	Stockholm Declaration; African Charter; Indigenous Peoples	Procedural & Substantive	Collective based	Anthropocentric in application, biocentric in theory	Right to Healthy Environment
Ecological Rights	Natural Rights	World Charter for Nature; Biological Diversity Convention	Procedural & Substantive	Ecosystem based	Ecocentric	Right of nature; Rt of future generations

This is not to say that human rights and environmental protection do not possess intrinsic value and that their current regimes would become insignificant. On the contrary, these regimes would continue to operate according to current mandates and processes. However, the inherent weakness in both regimes is holding power-brokers and decision-makers accountable (e.g. states, MNCs, institutions, etc.) in the global legal and political system. Likewise, neither regime possesses the ability to reshape and directly influence how human beings orient themselves to the environment. For example, individuals will continue to see the environment as a separate sphere from human beings (and their social, economic, and cultural processes). This separation facilitates the exploitation of nature and its resources, while permitting unmitigated polluting outputs. While this is not a complete explanation for environmental abuse, this ideational process does reinforce practices that result in environmental degradation.

So, to merely suggest that the environment could simply be linked with human rights, as a third-tiered right, provides little practical insight or the necessary political and legal tools to address human conditions within an environmental context. The difference here would be that ecological rights would provide the initial lens through which problems and issues surrounding human-nature interactions would be observed, analyzed and judged (see *figure 3* below). It provides two primary functions: one, it seeks to alter the perspective or orientation through which human beings analyze environmental problems by deepening the contextual sphere in which those problems take place. Second, it provides a bridge between the two fields that allows for reconstituting problems in a more significant light, one that might be more akin to 'ecological security'[104]. For example, as with the Ogonis (or the Inuits, whose way of life is threatened by permafrost loss, or the Tuvaluvans, who are being forced to abandoned their islands as a result of sea level rise), we cannot address or redress the human rights' component of these abuses without connecting them with the environmental degradation that accompanies the human abuse, and further, who was ultimately responsible for these environmentally abusive practices. Moreover, any redress from environmental degradation that imperils human life must account for the historical and cultural context in which individuals or collective groups are situated, so that reparations correspond precisely with what is threatened and/or lost.

[104] 'Ecological security' (as an expansion of human security) would again encompass a deepened contextuality in the human-nature interface, one that would require understanding security in terms of humans in a particular environmental circumstances.

Figure 3: Global Rights Framework



The crucial task for this paper then is to further "explore the philosophical foundations of human rights and reconcile them with ecological principles."[105] This section reviews this possibility in developing ecological rights based on the philosophical foundations of human rights, where the aim would be to link the intrinsic values of humans with the intrinsic values of other species and the environment. The argument is broken into six component parts that address the fundamental philosophical and legal limitations of the current human rights-environment interface, while proposing the advantages of the ecological rights approach.

1. Anthropocentrism

The anthropocentric nature of human rights and the cultural relativity in engaging environmental problems create fundamental limitations in the application in a rights-based approach to the environment. However, to move away from the anthropocentricity intrinsic to human rights to an

[105] Taylor (1998), 396.

ecocentric[106] perspective requires nature to be provided with some form of (legal and political) standing.[107] Although various means have been proposed (e.g. 'biotic rights', moral 'responsibilities', etc.), what remains constant is an attempt to give meaningful recognition to the intrinsic value of nature.[108] Bosselmann suggests that ecological rights move beyond the anthropocentricity of human rights by focusing on intrinsic values and interests of the ecosystems in the natural world, in addition to the human-community focus of the current human rights agenda.[109] An ecological rights approach could therefore be supported philosophically by natural rights that accentuate the interests of 'life' and 'liberty', from which such fundamental pursuits are dependent upon humans in their particular ecological context.[110]

Ironically, it is this anthropocentric orientation that facilitates and perpetuates the vagaries of capitalistic system with little resistance. As a result, the human-centered approach that is promoted as the protectorate of the marginalized, actually further entrenches not only the state-based system (in which states further their own interests based on power differential), but more importantly, the capitalistic ideology that steers this orientation (i.e. production-consumption cycle) causing environmental degradation and further subverting the very rights of

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[106] Ecocentric theory defines the value of nonhumans intrinsically as possessing value independent of human judgment. My argument on this formulation is two fold: one, nature is in many ways a human construction, derived through perceptions of value and judgment; but two, I maintain that nature has intrinsic value independent of human conditioning; hence, I am arguing for moral expansion of the community to include the natural world (other species) as requiring equal respect.
[107] This issue emanates from Christopher Stone's article, "Should Trees Have Standing?" Stone (1972), "Should Trees Have Standing—Toward Legal Rights for Natural Objects." *Southern California Law Review*, 45:450. *See also* Stone (1985). "Should Trees Have Standing Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective." *Southern California Law Review* 59:1. *See also* Stone (1987), *Earth and Other Ethics: The Case for Moral Pluralism*. New York: Harper and Row.
[108] Taylor (1998), 373-4; this position is probably best captured by the basic tenets of 'deep ecology'; see Devall and Sessions (1985), *Deep Ecology*, Salt Lake City: Gibbs Smith Publishers.
[109] Bosselmann (2001).
[110] Although beyond the scope of this article, I am suggesting here a natural rights foundation for ecological rights, one derived from natural law and the right to 'life' and 'liberty', from which such fundamental pursuits are dependent upon humans in their particular ecological context. The difference, for example, from Lockean approaches would be that instead of grounding this in private property (which leads to commodification of land and nature), these pursuits would be grounded in an ecological context; that is, recognizing the intrinsic value of humans in their particular habitat or ecosystem.

the marginalized the human rights regime attempts to protect.[111] In part, it is a structural impediment to realizing these intrinsic values in being human, and human rights for all its significance simply attempts to work from within this system. As a result, it is restricted as purely a reactionary force to these structural forces.

It is precisely for this reason that human rights commentators, like Ignatieff, argue that we should avoid foundational arguments because a "universal regime of human rights protection ought to be compatible with moral pluralism,"[112] are ill founded. Simply, they perpetuate the very problems they are attempting to ameliorate, and without a restructured foundation, they will continue to do so. If, for example, we accept Ignatieff's position in consideration of the natural world, one may value a tree for its intrinsic value, another for its instrumental value, and still another may not assign value at all. Simply, without a common foundational position, it is difficult to justify protecting the tree. In the current system, that tree often possesses instrumental value as an objectified commodity, and as such it becomes acceptable to remove or destroy regardless of the potential degradation to the soil or the individual who depends on the tree. I argue therefore that we must plow a course forward with a philosophical justification that underpins the pragmatic system of rights-based application founded upon an eco-centric approach that gives the tree standing.

[111] Here, it is important to recognize the influence of ecofeminism, where the "politics of knowledge" plays a critical role in power relations, one entrenched in both the state and capitalist systems. Thus both women and nature are oppressed by these pervasive forces. This has recently been extended to include oppression based on race and class, so the movement is best captured as working against interconnected oppressions of gender, race, class and nature. See, Merchant (1983), *The Death of Nature*, HarperSanFrancisco, where she argues that ecology and feminism have similar linkages: i) all parts of a system have equal value, ii) Earth is a habitat for living organisms, iii) process is primary, and iv) reciprocity and cooperation; see also, Mies and Shiva (1993), *Ecofeminism*, London: Zed Books; Plumwood (1994), *Feminism and the Mastery of Nature*, New York: Routledge; Sturgeon (1997), *Ecofeminist Natures*, New York: Routledge; Warren (2000), *Ecofeminist Philosophy*, New York: Rowman and Littlefield Publishers; and Eaton, ed. (2003), *Ecofeminism and Globalization*, New York: Rowman and Littlefield Publishers.

[112] Ignatieff (2001), xix.

The counterargument might be that this weakens human rights by diminishing their standing and their conceptual focus. However, the conceptual reorientation is to have human rights—retaining their anthropocentric basis—as part of a broader platform of ecological rights. That is, if the ecosystem indeed has intrinsic value, such that protection is necessary, then this aspect must be recognized within the governance and legal systems. This is no easy task, for it suggests a deeper structural transformation, one paralleled in the ecofeminist, postmodernist, deep ecologist, and neo-marxist literatures.

Human beings as residents within an ecosystem would garner the same fundamental rights demanded by the human rights regime, but would do so within a broader platform that allows for expression of these rights particularized toward collective ecosystems. Admittedly, as the only conscious entities within the system (as far as we know), there is an unavoidable anthro-orientation in assigning value to the ecosystem. The problem might then be a 'prioritization of rights'—when say, life of animals vs. humans, wildlife habitat vs. human habitat—however, although inevitable, it is this fragmentary thinking is precisely what creates many of the environmental collective action problems in the first place. As it stands now, the environment, nature, earth are all deprioritized in a system in which they are integral to the sustainability of system. Thus to displace the role of the environment or nature from the political, social and economic calculus through 'prioritization' inherently engenders unsustainable practices and behavior. This is not to say that 'prioritization' is not a problem, it is (one best resolved through dialogue) and will remain so until there is a fundamental shift in perspective to realize the vital interconnections of nature, development, equality (class, gender, and race) that are magnified in a globalization process that diminishes the local and cultural.

In addition, many scholars want to view the lineage of rights (from procedural to substantive to environmental rights) as a linear progression, one that at each step requires more cooperation, resources, monitoring, and enforcement. Basic procedural and substantive rights are now barely justiciable and enforced in the current system; thus to move to an 'ecological rights' approach would seem, by many, far beyond the current capacity and capabilities of today's system. However, the conceptualization of ecological rights is not necessarily a linear climb, but a parallel shift—one I argue is already facilitated by the common undergirding of both spheres, which is to protect the marginalized or vulnerable. This *raison d'etat* for both spheres not only overlaps but is identical whether talking about human beings or the natural world. An ecocentric perspective then facilitates using this common ground as mutually constitutive spheres that then can be applied in a context-driven way. So, where in the beginning of the paper scholars like Shelton argued that human rights are either embodied within the sphere of greater environmental protection, or conversely that the environment is part of the greater cause of protecting human life, I find that they are mutually constitutive.

2. Moral Legitimacy

Barbara Johnston asserts three reasons for human and environmental abuse. One, people live in the wrong place (e.g. close to resources); two, people are in the way of 'progress' and national or corporate interests supersede those of the individual, community or nature; and three, it is socially, culturally and often legally acceptable to protect the health of some over others.[113] The process of legitimizing this abuse—making immoral actions socially palatable and legally defensible—involves physical and cultural mechanisms to create, manifest and widen the

[113] Johnston (1995), 112-3.

distance between decision-makers and the marginalized who usually bear disproportionately the consequences.[114]

The ecological rights approach seeks to provide nature with standing, and thereby place humanity in 'relationship' with earth's ecosystem. This naturally would alter humanity's orientation both to nature and to each other. I see two significant consequences: first, the change in orientation from human-centered orientation then shifts the emphasis away from infinite unfettered human progress and redefines it. The new definition of progress then is based on 'balance' between humanity and the environment, one that encourages development with sustainability within a rights framework. Thus where nature was merely seen as a commodity to be exploited (following Enlightenment notions of 'progress'), a pattern which ironically paralleled the exploitation of other human beings, it now must be balanced with human needs to generate sustainable pathways in localized setting.

Second, by recognizing nature's intrinsic value, we are naturally recognizing the intrinsic value of *place* (i.e. where someone lives), the land beneath their feet, the air they breathe, and the water they drink. It is not only that the individual should have clean drinking water (i.e. as a right of life or health), but that the water should be clean for the ecosystem's sake, from which humanity benefits. This is a critical shift in perspective and approach. At some basic level then there would be universal protection for nature[115], regardless of circumstance; however, what form that protection would take would be primarily context-driven—i.e. allowing for moral pluralism and cultural interpretation. In other words, ecological rights would provide nature some basic form of standing that serves as a common platform, but which would in defining the

[114] Johnston (1995), 114; see also, Rosenau, *Distant Proximities* (2003), where spheres of authority have expanded from globalizing forces, often leaving individuals dispossessed of rights and power.
[115] To what degree and depth this universal protection took place is debatable. From a temporal perspective, it is enough here to acknowledge this as a first step toward building a common platform of natural protection.

parameters of protection allow for different interpretations of nature inspired by moral pluralism. The question then becomes a problematic and inevitable tension between use and protection (i.e. when can you cut the tree down to use as a resource)?

In addressing this question, the ecological rights perspective fits snugly with the tenets of sustainable development and could be realized in many ways—two of which I propose here: one, would require sustainable practices to be enlisted through 'reciprocity', such as replacing the tree, finding a substitute, or contributing to the ecosystem in a comparable manner. This would require restructuring MNCs, for example, to not only account for environmental externalities and incorporate them into accounting practices, but to actively engage in reciprocity to nature.[116] The objective here is not necessarily to have a full reciprocity toward nature (which at this stage is unattainable), but to provide nature with some form of basic representation in the political, social and economic systems, one that helps move the sustainability agenda forward.

A second and concomitant idea is, based on Thomas Pogge's idea[117], to tax the natural resource base as a form of respecting nature's moral standing—payable to the GEF (Global Environmental Facility). As the Ogoni case study demonstrates, often MNCs extract natural resources in both common areas (e.g. oceans) and in other countries, which are usually poverty-stricken and often controlled by strict totalitarian governments. Even more, the polluting externalities are displaced from their source, falling largely on the communities (e.g. polluted oceans and land, toxic fish, ruination of agriculture and soil, etc.) that directly impact livelihoods, culture, and way of life. This leaves communities like the Ogonis, who are already

[116] In cases of extraction of non-renewable fossil fuels, a MNC or government would have to put a certain amount toward non-renewable research and development. Initially, it's unfeasible to require a full cost accounting for nature through direct reciprocity; as such, indirect means will have to be at fore.
[117] Pogge, Thomas (2002). *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms.* Cambridge: Polity Press. Although placing a form of monetary value on nature is philosophically problematic, at least in the short run, the pervasiveness of global capitalism requires some mechanisms within the system itself for distributive justice purposes. Ideally, a combination of ideas one and two would be mandatory.

marginalized by the global economic structure, in a powerless if not helpless situation. By taxing the resource itself, Shell is forced into fuller cost-accounting for environmental degradation, and supplies a source of GEF funding (which is drastically underfunded). In addition, through nature reciprocity, Shell would have a legal (and moral) obligation to full restitution to both the Ogoni (via human rights) and natural environment (via ecological rights). This would condense the divide between marginalized and power-holders (i.e. elites), and by its very nature, decentralize the basis of capital itself, and therefore the authority structure to which it is attached.[118] Simply, the main driver of global production and development is no longer capital but sustainability.

3. Social Construction of Nature: Legal Standing for 'situatedness in place'

Processes of political, economic, and cultural globalization always interact with informal local practices. These processes of globalization when intermixed with the norm of sustainable development can be viewed as historically constructed and political contested through interactions among local cultural, ecological, political and economic processes, yielding different results. Sheila Jasanoff argues that we gain 'explanatory power' by interpreting nature (or natural orders) and social order as produced together; that is, any historical period and its cultural and political formations can only be examined through this lens of co-production.[119] Thus she explains that co-production (of natural and social order) represents "the ways in which we know and represent the world (both nature and society) are inseparable from the ways in which we choose to live in it."[120] That is, culture and nature are mutually constitutive and are a constant force of reshaping the perception and reality of the other. Specifically, culture can shape or

[118] This is not to offer 'ecological rights' as a panacea, it is not; the governance structure needs to be addressed concurrently in myriad ways to provide for enforceability; and alas, is the topic for a forthcoming paper.
[119] Jasanoff (2004), 2.
[120] Ibid.

‘frame’ perceptions of nature as pressures from cultural norms, identities, discourses, social practices—that is what is social—which often influences how nature is perceived. Conversely, nature—in its myriad forms—can equally place pressures on shaping the social and political agenda as a resource, natural obstacle, or aesthetics.

Culture (particularly Western culture) has developed around liberal economics, individual rights, and science/technology. ‘Knowledge’ is simultaneously derived from and informs these areas considered fundamental to Western society. It is driven by a paradigm that accentuates humanity as competitive individuals driven by the most efficient ways of producing goods and services, all of which is heightened through the medium of globalization. As a result, in this paradigmatic view, nature is a hostile force, one to be suppressed, harnessed and used as a means toward these ends. Nature has therefore become objectified—an object in which human beings, enshrouded in their cultural perceptions, justify its exploitation. In this context, humanity and nature inevitably seem bound as dichotomous forces, which engender deleterious consequences for both.

Ecological rights would not only recognize nature with intrinsic value and a human being with intrinsic value, but that the unique connection in particularized context possesses intrinsic value. Further, ecological rights would view culture and nature as inseparable, and in fact, they are co-evolving spheres that mutually constitute the other. However, ecological rights would also be context-driven tailored to the micro-particularities of the locality in which they are applied. As such, they would not be subjected to the critiques of human rights as a Western imposed paradigm that does not fit harmoniously with all societies and cultures.

This raises a second issue, one centered on power relations. <u>All</u> knowledge, including the ‘hardest’ scientific facts, originates in some sense as local or situated where needs are created in

a particularized circumstance. Specifically, it is this 'situatedness' in place that gives knowledge its force in decision making—whether scientific or otherwise. Yet globalized knowledge is superseding, and often displacing, localized knowledge in reshaping perceptions of 'nature'. Indeed, the "reassertion of local knowledge claims and local identities," today frequently finds itself under assault by the "simplifying and universalizing forces of global science, technology and capital."[121] This has disastrous consequences, because those who control globalized knowledge can often dictate the framing of 'nature' and thus its greatly inform its social construction and manipulate individual environmental values—and to some degree social values more generally.

It is within this power structure that traditional human rights reside, and although it offers an empowering pathway to resist this power, the discourse and the techniques of power that inform it, are not created or asserted in neutral space. It is this dimension of unequal power relations, and the paradigm in which it resides, that ecological rights would undercut. First, ecological rights attempt provide a common language that speaks directly to the sustainable development agenda in a localized setting and offers empowering bridges to global governance structure. Second, ecological rights would seek to protect not just the rights of individuals but the 'situatedness in place' from which local environmental knowledge is created, culture manifests, and identity fashioned. In this context, for example, ecological rights would also ensure both water conservation and biodiversity toward maintaining healthy ecosystem. Like the Ogonis, and for many indigenous cultures, this is imperative for their cultures and traditions, which are non-transferable to other landscapes and environments.

4. Addressing World and Moral Imperialism

[121] Martello and Jasanoff (2004), 4.

Ignatieff argues that human rights is increasingly seen as "the language of a moral imperialism just as ruthless and just as self-deceived as the colonial hubris of yesteryear."[122] As the Ogoni crises demonstrate, the developing world usually receives the brunt of human rights abuse and the effects of environmental degradation, often with concomitant loss of local resources. It is easy to see Ignatieff's point when the human rights framework is one "thrust down" upon collectivities and societies—even if to protect those groups. This is particularly evident as Ignatieff points out, international human rights have perpetuated the growth of nationalism, where it has endorsed the core claim of collective self-determination.[123] If procedural rights, substantive rights, or even a new right to the environment are implemented, the rights' framework remains subjected to Ignatieff's point of moral imperialism and reinforcement of the state-based system predicated on collective self-determination. This point is heightened for developing countries where they have different cultural dispositions, economic priorities, and societal sensitivities. In the case of the Ogonis, although these rights would provide a justiciable path to redress, and provide an important voice in the emerging global order, nonetheless it would come under the guise of moral imperialism.

I would argue that an ecological rights approach alleviates Ignatieff's concern for moral imperialism for three reasons: *one*, it gives those in the developing world both a stake and standing in the process—today they only have a stake; *two*, it coincides with the integrated view of many cultures throughout the world where nature and humanity are already integrated, and in fact, cannot be viewed as distinct spheres; and *three*, those most susceptible to environmental abuse (such as those in the Global South) caused either by aggregate effects (e.g. global warming) or by outside agents (e.g. MNCs), are also groups that are the ones that possess

[122] Ignatieff (2002), 20.
[123] Ignatieff (2002), 14-5.

localized knowledge on sustainable development and environmental protection. In fact, many of these groups or communities are "now seen as having been more successful than modern societies in enabling sustainable development over long time periods."[124]

By contrast, 'ecological rights' would offer a common perspective, beyond the common language that human rights instills, one that the ecosystem—of which humanity is part—is to be protected as a whole. By giving nature standing, it provides a legal and moral stake to the land, water, and air locally occupied, and abiding by this principle forces the MNCs, states (particularly the powerful), and institutions to prioritize the mutual interconnection of nature and individuals with equal force. It also provides legal and moral standing for place, that is, particular cultures and ways of life within their ecological context.

5. Human Agency

For Ignatieff, the purpose of human rights is to protect *human agency*, and therefore to protect human agents against abuse and oppression. So, for Ignatieff the core is protecting *negative* freedoms, which provides the ability of individuals to resist an unjust state.[125] This potential resistance is what gives the international human rights movement its potential appeal outside the West. The problem with Ignatieff's position is that it requires a 'victimizing lens' where everyone is viewed as a potential victim, and human rights must step in to prevent this marginalization or oppression. He argues that human rights then embody a "systematic agenda of negative liberty, a tool kit against oppression."[126] This is a Western or elite perspective; although well intentioned, if viewed from one who is being marginalized, it seems that it perpetuates the undercurrent of entitlement as a victim. That is, it is one story to redress injustice caused by

[124] Falk (2000), 138.
[125] Ignatieff (2001), 57.
[126] Ignatieff (2001), 57.

marginalization, and quite a different one, to view the marginalized as victims in systematically attempting to ameliorate underlying oppression. Simply, it is an attempt to empower through the lens of victimization, not through a lens of equality or inherent fairness.

Ecological rights challenge these philosophical focal points of a human rights-based approach by altering this perception of human agency in three significant ways. *First*, in an eco-centric approach, human agency shifts as a result of a different philosophical foundation. It shifts from conceptualizing the rights-based approach that seeks to protect the victim which then gives rise to a corresponding duty, to one of conceptualizing *responsibilities* that necessitate human agency (based on equality within an ecosystem) that then gives rise to corresponding rights. In an ecologically-based framework the focus is on the *responsibilities* toward nature, which give rise to an inherent right of nature. That is, as human rights are often conceptualized as rights inherent because of the innate dignity of the human being, nature cannot be similarly grounded. As a result, the philosophical foundation for such a right is derived from the 'conscious' basis inherent to being human, and therefore, one's moral responsibility to nature as a part of the ecosystem. This philosophical foundation then gives rise to a legal right of nature. Rights then become the natural outcome of the approach based on equality, rather than the starting point. Beyond altering human rights, this approach may even prompt states to orient toward greater commitment to environmental problems.

Second, the rights approach based on anthropocentrism focuses on 'entitlements' (derived from the right). This focal point, I would argue, tends to again undermine the basis for the rights because the corresponding duty or obligation is seen as a hardship for another's benefit. By altering the focus to a responsibility-first approach for all, it changes the incentive structure—although admittedly, the effect is slight and perhaps in perspective only. Therefore, if nature has

standing, an equal partner in a relationship with humanity, it becomes a force against state sovereignty, which today frequently operates as a sanctuary from global accountability. As a result, rights then flow naturally—without having to be subjects of moral imperialism—while combating the detrimental effects of sovereignty.

Third, most citizens look to their national law or policy with little regard for global policies or consequences. An eco-centric basis for rights would shift this perspective on two levels: one, it would force sovereign states to adjust their domestic policies to reflect nature's intrinsic value, at least to some degree; and two, by gaining currency as an inherent right, people will shift their perspective toward more global (and ironically more local) concerns away from state authority, thereby reinforcing accountability in their localized circumstance.

Simply, nature "must be brought back directly into the locality's everyday life from its current denaturalized conditions in more subjective aesthetic and ethical forms."[127] Ecological rights direct not only the global productive forces to recognize and heed respect to the environment, but it focuses individuals and communities on their own responsibilities to nature and the environmental context of place in which they are located. This vests human beings in its place, its communal context, which is critical to building sustainable communities; otherwise, it becomes too easy to relocate and/or for power-holders (e.g. MNCs, States, institutions) to suggest relocation as a form of redress. In the Ogoni case, where can they be relocated? Will this relocation offer the same way of life, the same cultural context, the same traditions and interactions? In many ways, who they are, their identity and sense of distinctness—from which dignity is derived, is Ogoniland. Ideally, on some level, with ecological rights human agency is preserved through a self-regulating process that focuses on responsibilities to nature both within communities at the local level and by global level structures.

[127] Luke (1997), 201.

6. Moral Induction

Morton Winston argues that human rights are recognized through "reflection on historical experiences of oppression…[and] that this reflection allows us to understand the particular oppressive practices and acts…"[128] This form of moral induction is particularly relevant in light of environmental problems, for it is because of the reflection on the gravity of these problems that we now seek solutions—and possibly through a rights framework. This approach also reveals the flows of repression through the economic, political and social structures at all levels of global society. Winston goes on to assert that just as techniques of repression can form a system of oppression, so too different human rights are responses to particular techniques of repression and function as parts of a system of ethical and legal norms.[129] Human rights therefore are interdependent to some degree, because otherwise, oppressors could simply find other means or techniques of repression.

However, Winston, like most human rights scholars, asserts that human rights come into existence as moral rights, that is, as ethical claims that a "certain personal good be always and everywhere protected by society, but they can and often do evolve into legal rights which are recognized within international or domestic national law."[130] Rather, I argue that human rights come into existence through the discharge of responsibilities, and the responsibilities come into existence from moral obligations. Naturally, the moral rights theoretically always existed, but the question is how to *realize* those rights, and they are only realized when a concomitant duty or obligation is discharged. Therefore, it becomes necessary to recognize the inherent value of

[128] Winston (2000), 5.
[129] Winston (2000), 6.
[130] Winston (2000), 2.

responsibilities as the basis for ecological rights, which then should evolve into legal rights from which rights can then be realized.

The question then becomes how to get reluctant parties to comply—and human rights scholars would argue that it is through recognizing 'rights' via monitoring and compliance mechanisms. I would argue, however, that it is not through the acknowledgement of rights, but through recognizing victimization and coercive mechanisms that the human rights regime currently operates. Granted, the 'ecological rights' approach would be hindered by the same cooperation problems and largely to the same degree, yet the difference would be in its appeal to justice and responsibility (not victimization and entitlement) and in its fundamental attack on the global coercive order.

Two fundamental problems exist from this current global coercive order: one, the state sovereignty system does not align with ecological problems which are connected to the global ecosystem, which problematizes the allocation of political authority and control;[131] and two, the economic structure of global capitalism inculcates many of these power differentials into societies, cultures and individuals further emasculating their rights. As Winston suggests, moral induction allows us to properly frame the flows of oppression that emanate from these two structural problems that currently plague the international system and its members. Two key differences manifest from this morally-induced frame that suggest the viability of ecological rights. *First*, with ecological rights, nature's rights essentially become the responsibilities of the powerful to maintain, which shifts the economic structure and offers an open doorway for the marginalized and oppressed to then *realize* their individual rights in politically and socially significant ways. *Second*, the pool of justiciable claims may be enlarged simply by expanding those who would have standing. If responsibility is the focus, anyone burdened significantly by

[131] Wapner (1998), 277.

the malfeasance has a justiciable claim—as opposed to only the one holding a right.[132] Even more, it makes cases of nonfeasance potentially justiciable for the failure to act or protect—a case much more difficult to make from a rights perspective.

V. CONCLUSION

The recognition of human rights and environmental protection are emerging spheres in global governance, and more importantly, they are materializing as fundamental conditions for a nascent world society. For now, in both areas the "power of ethical imagination in civil society thus runs ahead of the political condition of world society."[133] It has been argued here that by bridging this gap between ideal and reality through ecological rights, both spheres can find common ground and utilize the optimal elements in both. The purpose of human rights is to ensure that people have an elementary capacity for action in the face of power. Like traditional human rights, the goal of ecological rights is to establish ethical and legal norms which will offer greater access to justice based on fairness, equality and dignity for all species. However, the fundamental difference is that an ecological rights approach offers not only individual empowerment, but it also assists in restructuring a global coercive order, while protecting the environment through sustainable practices—one that may enhance and contribute to broader concerns over security.

Human rights (such as human dignity, liberty, property, and development) need to respond to the fact that the individual not only operates in a social environment, but also in a

[132] This raises the obvious question as to who speaks for nature. In addition to the individual, group or community affected as a collective right tied to the environment, nature could be represented by a form of representation approved by the legal source provided with jurisdiction.
[133] Sachs (2003), 36.

natural environment. Just as the individual must respect the intrinsic value of fellow human beings, the individual must also respect the intrinsic value of other fellow beings as part of an interconnected ecosystem. The basis for ecological rights therefore attempts to entwine society and humans in a unity of existence that stresses the harmony of the individual with social praxis, particularly the connection between humanity and nature, one bound by ethical considerations that empowers local communities. Such an agenda fits with ongoing and evolving notions of human and ecological security, providing a bridge between global and local, natural and social processes.

As Taylor notes the "problem is not human rights, but how to change human behavior."[134] For many in environmentalism today, sustainability and justice must begin in local communities. The reason is simple, for as Aaron Sachs observed, "if more projects emphasized the full, well-informed involvement of local peoples, governments could no longer treat them—or their environments—as expendable. And if there were no expendable people or ecosystems, development would have to be sustainable."[135] Thus by re-linking human beings in relation to the land and providing a rights within an ecological context—including that of place—a more comprehensive approach to environmental justice and sustainability can be achieved. It empowers localities as a collective because their individual rights are intimately connected with their sense of place, their identity, and a healthy ecosystem upon which they depend.

The problem with environmental rights (procedural or substantive) that would set out minimal environmental standards for humans (e.g. for a healthy water supply or landuse) advocated by many commentators, is that they subordinate environment while failing: i) to address the ideational structure and reorient the human relationship with nature; ii) to empower

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[134] Taylor (1998), 397.
[135] Sachs (1997), 8.

the local community—where sustainability must begin; iii) to restructure the obligations of power brokers in the global political system (states, MNCs, and institutions); iv) to provide local enforcement or a 'voice of protest' without national or global intervention; and v) to privilege ecological context. They become just another right in a long line of rights, that have increasingly become prioritized (based on economic concerns)—and as third generation rights, they would largely be ignored even if promulgated.

As we attempt to develop sustainable communities, ecological rights would provide a foothold forward in securing individuals and communities, and if accepted, they would enshrine normative behavior into legal processes and adjudicated forms of justice. At a minimum, ecological rights forge new political and legal pathways toward raising ecological awareness, offer a potential bridge between the Global North and South, while conceptually challenging both the material and ideational forces wielded in the current global governance system. Initially, of course, these rights would be difficult to enforce, but as the sustainable development paradigm continues to be embraced, ecological rights would assist in reorienting human vision toward their ecological surroundings and context. The overall goal for ecological rights becomes one based on, "not the solution itself that is necessarily radical but the shift in perspective with which we begin, from the old view of nature as something to be controlled to a stance of engagement."[136] It attempts to become the genesis of the extension of ethics to what Aldo Leopold refers to as the third element in human evolution—that is, to see the land as a privilege as well as obligation.

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[136] McDonough and Braungart (2002), 84.

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