

# The Ethics of Integrity and the Law in Global Governance

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## I. BRINGING PHILOSOPHY DOWN TO EARTH?

This symposium has been about “bringing philosophy down to earth.” In some sense, environmental ethics, especially a global biocentric and holistic ethic, is by its very nature grounded in the Earth.<sup>1</sup> The ethics of integrity, based on the need to acknowledge ecological reality, traces biological consequences and defines required behavior in light of its compatibility with the structure and function of the Earth’s systems.<sup>2</sup> In showing what an Earth philosophy can and should be, it will be useful to show what it cannot be and why.

Environmental ethics must be based on theory and arguments informed by science. The multiple ecological crises resulting from climate change serve as a clear example of what happens when powerful forces block application of science and ethics to policy.<sup>3</sup> Ecological rights and environmental rights must be firmly entrenched in law, particularly in international covenants.<sup>4</sup> In addition, these rights must be supported by foundational arguments which must be established before moving to applications in specific instances.<sup>5</sup>

Some argue that it is important, even necessary, to avoid theory, as all that is needed to achieve consensus is the establishment of a dialogue among different parties.<sup>6</sup> Consensus, however, is based on the acknowledgment of common, basic interests among all parties to a specific issue and cannot be invoked among geographically and ethnically disparate peoples.<sup>7</sup> In fact, consensus-based positions, seeking to ground public policy on preferences, are not morally acceptable, as even with consensus, serious problems remain.

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<sup>1</sup> See LAURA WESTRA, *AN ENVIRONMENTAL PROPOSAL FOR ETHICS: THE PRINCIPLE OF INTEGRITY* (1994) [hereinafter WESTRA, *PROPOSAL FOR INTEGRITY*]; see also LAURA WESTRA, *LIVING IN INTEGRITY: A GLOBAL ETHIC TO RESTORE A FRAGMENTED EARTH* (1998) [hereinafter WESTRA, *LIVING IN INTEGRITY*].

<sup>2</sup> Laura Westra et al., *Ecological Integrity and the Aims of the Global Ecological Integrity Project*, in *ECOLOGICAL INTEGRITY: INTEGRATING ENVIRONMENT, CONSERVATION AND HEALTH* 19-41 (Laura Westra et al. eds., 2000).

<sup>3</sup> See DONALD BROWN, *AMERICAN HEAT* (2002).

<sup>4</sup> Prudence Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?* 10 *GEO. INT’L ENVTL. L. REV.* 309 (1998); Steven Rockefeller, *Foreword*, in *JUST ECOLOGICAL INTEGRITY* xi, xi-xiv (2002).

<sup>5</sup> See ALAN GEWIRTH, *HUMAN RIGHTS* (1982).

<sup>6</sup> Bryan Norton, *Economists’ Preferences and the Preferences of Economists*, 3 *ENVTL. VALUES* 311, 311-32 (1994).

<sup>7</sup> Westra et al., *supra* note 2.

First is the problem of the minority stakeholder.<sup>8</sup> Second is the problem of “culturally relative” place-based values inappropriate for confronting global problems. Stakeholder/citizen values are problematic even when presented in contingent valuation studies to evaluate environmental policy.<sup>9</sup> The third problem arises from the presence of manipulated or hidden information.<sup>10</sup> And fourth, there is a fundamental problem with consensus similar to what accountants call the “expectation gap.”<sup>11</sup>

Underlying the problems with consensus are three shortcomings of the contingent valuation method (CVM) used to evaluate consensus. Before turning to the consensus issues, it is important to address the basic problems with CVM. First, there are market power problems that occur in all modern democracies. These problems arguably doom CVM from the outset. Second, there are specific challenges faced by CVM practitioners working in the political context. Third, there are problems which cannot be addressed from within the theoretical framework of CVM. If we accept these problems as significant, we effectively demolish CVM as a practical tool, and I have discussed both the problems of democracy in its present instantiations, and those of contingent valuation in detail elsewhere.<sup>12</sup>

CVM studies are often presented as determinant of a defensible environmental public policy. These studies are based on the expressed preferences of citizens in a specific locale and their willingness to pay to avoid environmental hazards or to protect natural environments.<sup>13</sup> Aside from the deliberate deception in cases like Enron, the expectation gap is a fundamental problem in public accountancy practice, where financial statements prepared for large corporations may or may not represent the accurate information that the public has a right to expect.<sup>14</sup>

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<sup>8</sup> See *FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE* (Laura Westra & Peter S. Wenz eds., 2001); see also WESTRA, *LIVING IN INTEGRITY*, *supra* note 1.

<sup>9</sup> K.S. SHRADER-FRECHETTE, *RISK AND RATIONALITY: PHILOSOPHICAL FOUNDATIONS FOR POPULIST REFORMS* (Univ. of Cal. Press 2000) (1991).

<sup>10</sup> See DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* (1995).

<sup>11</sup> Laura Westra, *The Disvalue of Contingent Valuation and the Accounting Expectation Gap*, in *ENVIRONMENTAL VALUES* 153, 153-71 (2000).

<sup>12</sup> Michael Prior, *Economic Valuation and Environmental Values*, 4 *ENVTL. VALUES* 423, 423-42 (1998); see also Laura Westra, *supra* note 11.

<sup>13</sup> *Id.* at 154 n.6.

<sup>14</sup> *Id.* at 165-69.

*A. Underlying Contingent Valuation Difficulties*

Is it possible that the problems imputed to CVM are simply endemic to democratic decision-making as practiced in affluent Northern and Western countries?<sup>15</sup> While it is true that politics plays an important role in limiting the impact of environmental ethics, it is also true that problems such as the lack of readily available information become more acute within the context of CVM.<sup>16</sup> In other words, because CVM views preferences as determinant, problems with lack of access to information are exacerbated.<sup>17</sup> These kinds of difficulties are not necessarily unique to CVM but are magnified through its application.

Second, it is important to consider problems faced by CVM theorists. Examples include the need for a global perspective and the importance of the size and location of the sampled population.<sup>18</sup> It is both short-sighted and unscientific to assume that an intrusive siting of unsafe facilities or even the opening of a road will have an effect that can be credibly limited to one area, to one community. If this is true, then those outside the immediate area or community have a stake in the decision to be made.<sup>19</sup> For an example of the potential global impact of a series of such local decisions being billed as "limited to specific communities," consider the crises faced by North American fisheries, especially those in Canada, and the impacts of these decisions on numerous countries. Many "local" decisions were made that collectively contributed to the collapse of one fishery stock after another.<sup>20</sup> Local decisions had global consequences.

The third problem to consider is how the reality of global consequences takes us beyond the theoretical limitations of CVM. Take the familiar example of the Bhopal tragedy after the siting of the Union Carbide facility in India.<sup>21</sup> The local citizens were told that Union

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<sup>15</sup> See WESTRA, *LIVING IN INTEGRITY*, *supra* note 1.

<sup>16</sup> See, e.g., CHARLES JONES, *GLOBAL JUSTICE, DEFENDING COSMOPOLITANISM* (1999); see THOMAS W. POGGE, *GLOBAL JUSTICE* (2001); JAMES N. ROSENAU, *GOVERNANCE WITHOUT GOVERNMENT* 1-29 (J.N. Rosenau & E.O. Czempiel eds., 1992).

<sup>17</sup> See CARL F. CRANOR, *REGULATING TOXIC SUBSTANCES* (1993); Christian Bay, *Civil Disobedience: Prerequisite for Democracy in Mass Society*, in *CIVIL DISOBEDIENCE AND VIOLENCE* 73, 73-92 (Jeffrie G. Murphy ed., 1971); Robert Bullard, *Environmental Decision Making*, in *FACES OF ENVIRONMENTAL RACISM* 3-28 (Laura Westra & Bill E. Lawson eds., 2001).

<sup>18</sup> Westra, *supra* note 11.

<sup>19</sup> *Id.*

<sup>20</sup> WESTRA, *LIVING IN INTEGRITY*, *supra* note 1.

<sup>21</sup> See UPENDRA BAXI & PAUL THOMAS, *INDIAN LAW INST., MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE* (1986).

Carbide was manufacturing medicine for plants rather than the toxic chemicals they actually produced. In addition, the factory's machinery was not adequately maintained and normal safety precautions were not taken. Union Carbide did not follow the safety standards it would have applied in its home country and made no effort to protect workers or their families, who lived near the factory. The eventual disastrous explosion killed thousands and has become the basis for numerous business ethics case studies.<sup>22</sup>

Looking at the disaster in the context of the present topic, several questions can be raised. Were the local citizens aware of the hazard in their midst? The answer is clearly no. Had they been questioned about the desirability of such a siting, would they have rejected it? The answer once again is probably not. The question that must then be answered is: what was the moral approach to the situation in Bhopal? Possible answers include: first, more information about the hazards of the corporation's activities, on which the community might have based more informed decisions; and second, removing the desperate economic pressures that effectively force many poverty stricken communities to "choose" whatever will provide them with economic survival.<sup>23</sup> Offering these populations a hazardous, risky option as the only option other than starvation is immoral. It is wrong for the corporation to make such an "offer." It may also be wrong for the impoverished to "accept." The offeror, however, clearly bears the greater guilt.<sup>24</sup>

On the topic of immoral corporate activities, Kristin Shrader-Frechette discusses the "isolationist strategy" often employed by multinational corporations leery (perhaps because forbidden by domestic law) of exposing people in their own countries to risks to which they willingly expose people in developing countries.<sup>25</sup> As Shrader-Frechette remarks, "a bloody loaf of bread is sometimes better than no loaf at all, a dangerous job preferable to no job at all, and food riddled with banned pesticides better than no food at all."<sup>26</sup> The isolationist position thus presupposes that "any cost is allowable as long as the countervailing benefits are greater."<sup>27</sup>

One might ask whether there is any value in criticizing CVM when the critique glosses over large, unanswered questions that cannot be

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<sup>22</sup> See MANUEL VELASQUEZ, *BUSINESS ETHICS: CONCEPTS AND CASES* (1993).

<sup>23</sup> SHRADER-FRECHETTE, *supra* note 9.

<sup>24</sup> POGGE, *supra* note 16.

<sup>25</sup> SHRADER-FRECHETTE, *supra* note 9.

<sup>26</sup> *Id.* at 149.

<sup>27</sup> *Id.* at 149-51.

answered from within the theoretical base of CVM. The reason that there is value in this critique is that the method of CVM lends a spurious air of respectability and legitimacy to practices that are deeply morally flawed. So long as the systems that support Union Carbide remain institutionalized and no serious questions are asked about the operation of all "risky business,"<sup>28</sup> it is superficial and dangerous to use a method that lends these practices a glossy coat of legitimacy. This Article does not attempt to deal with all the grave, institutionalized underlying problems in democratic decision making. It only proposes an examination of CVM with the specific purpose of showing why the mantle of respectability the method assumes masks deeper problems that need to be addressed. Let us now return to two of the specific problems with consensus raised by contingent valuation methodology.

### *B. Problems With Consensus*

#### *1. The Minority Stakeholder Problem*

The first specific problem with consensus is the one I termed the problem of minority stakeholders. Even when majorities take time to determine the preferences of minorities in the community, they are usually committed only to hearing minority opinions. The minority viewpoint will not be adopted unless it happens to parallel that of the majority. Even if we limit our focus to concerns about human life and health risks, minority stakeholders tend to be the most adversely affected by environmental hazards. For this reason, "[g]rassroots environmental justice groups and their networks must become full partners, not silent or junior partners, in planning the implementation of the new executive order [of environmental justice]."<sup>29</sup>

It is minorities who live in "brownfields," areas used for environmentally unsafe operations for years. Even now these areas are often considered more appropriate than other areas for such uses, whatever the possible health costs to the minority inhabitants. "Locally unwanted land use" sites (LULUs), chosen by majorities and imposed upon minorities, are commonplace throughout North America,<sup>30</sup> and are

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<sup>28</sup> See ELAINE DRAPER, *RISKY BUSINESS: GENETIC TESTING AND EXCLUSIONARY PRACTICES IN THE HAZARDOUS WORKPLACE* (1991).

<sup>29</sup> Bullard, *supra* note 17 at 7.

<sup>30</sup> See *FACES OF ENVIRONMENTAL RACISM* (Laura Westra & Bill E. Lawson eds., 2001).

a fact of life in developing countries.<sup>31</sup> For a global example of this externalizing process, consider the trade in toxic wastes that thrives between affluent Northern and Western countries and impoverished Southern and Eastern countries.<sup>32</sup> Similarly, there is substantial evidence of "unequal protection" and the prevalence of environmental racism. Consider the "layers of poison in Altgeld Gardens," an entirely African-American community in Chicago too polluted to be easily reclaimed, or the overwhelming air pollution problems in the Los Angeles air basin, where "71 percent of African Americans and 50 percent of Latinos live in areas with the most polluted air."<sup>33</sup> In all of these cases, we see first hand the results of majoritarian community decisions about environmental risks without serious consideration of minority stakeholders.

## 2. The Problem of Culturally Relative Values

This second problem with consensus arises from the challenges inherent in basing risk assessments on the preferences of any one community when the effects of hazards are potentially global. This is the major tenet of the "ethics of integrity."<sup>34</sup> Within the framework of this ethics, the only sound basis for assessing environmental hazards is to examine their impact on natural life-support systems. The difficulty here does not hinge on the composition of the majority and minority stakeholders within a community but on the presence of global stakeholders beyond the community who represent a majority that is neither seen nor heard. Local preferences and local valuations will tend to reflect the culture and the location wherein they arise. However, risk assessment based on cultural relativism, that is, risk understood as a "social construct," is generally considered a flawed approach in the extensive literature on the topic. As Kristin Shrader-Frechette writes, "even though risk evaluation is not wholly objective, neither is it merely evaluative nor only a construct. Constructs don't kill people; faulty reactors, improperly stored toxics and poor risk evaluations do."<sup>35</sup>

The culturally relative preferences problem is theoretical, given the indefensibility of ethical relativism as a moral theory, and also practical

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<sup>31</sup> Segun Gbadegesin, *Multinational Corporations, Developed Nations, and Environmental Racism: Toxic Waste, Oil Explorations and Eco-Catastrophe*, in *FACES OF ENVIRONMENTAL RACISM* 187, 187-202 (Laura Westra & Bill E. Lawson eds., 2001).

<sup>32</sup> *Id.*; see SHRADER-FRECHETTE, *supra* note 9; see also CARL F. CRANOR, *REGULATING TOXIC SUBSTANCES: A PHILOSOPHY OF SCIENCE AND THE LAW* (1993).

<sup>33</sup> Bullard, *supra* note 17, at 7.

<sup>34</sup> See WESTRA, *LIVING IN INTEGRITY*, *supra* note 1.

<sup>35</sup> SHRADER-FRECHETTE, *supra* note 9, at 30.

and scientific. There is ultimately no environmental hazard that can be contained at a location. Climate conditions, non point-source pollution, the vagaries of weather, difficulties preventing leaching, geography, compound effects, land-use cycles, and other factors conspire to render all hazards at least potentially global. For example, "risky business" practices<sup>36</sup> and the emergence of new diseases and health threats, especially in combination with climate change, demonstrate the inappropriateness of place and community based preferences for public decision making.<sup>37</sup>

There are three separate issues within this problem of "culturally relative" and place-based values: first, the inappropriate presumption of cultural relativism; second, the conflict between local interests and global needs; and third, the lack of a non-anthropocentric, life-based perspective. The question is no longer just one of "majority rule," as outlined in the discussion of the previous problem. The missing universal, global perspective is essential.<sup>38</sup> In some cases, local perspectives and needs should prevail, especially in support of developing countries' traditional practices.<sup>39</sup> An example of a local argument that ought to prevail is that in support of the diet choices of Inuit people. Although the choices of the Inuit — to adopt a vegetarian diet, to eat "lower" on the food chain — are morally superior on ecological grounds as well as for reasons of fairness and global justice, this argument cannot apply to areas where these choices are not available. The argument is not that a global perspective must prevail in all cases but that global interests, the interests in and of life-support systems and non-human nature, must be considered. These perspectives cannot be captured through CVM for the reasons cited above.

Health problems, including disease and increased mortality, may be causally related to hazardous products and practices developed far away under completely unknown circumstances. For instance, the Bhopal tragedy in India was the result of management decisions made in North America about the manufacture and sale of pesticides.<sup>40</sup> The citizens of Bhopal had no information about or access to the decision-making

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<sup>36</sup> DRAPER, *supra* note 28.

<sup>37</sup> See Anthony J. McMichael, *The Health of Persons, Populations and Planets: Epidemiology Comes Full Circle*, 6 EPIDEMIOLOGY 633 (1995); David Pimentel et al., *Ecology of Increasing Disease*, 48 BIOSCIENCE 817, 817-26 (1998); see also WESTRA, *LIVING IN INTEGRITY*, *supra* note 1.

<sup>38</sup> Westra et al., *supra* note 2.

<sup>39</sup> See VENDANA SHIVA, *STAYING ALIVE* (1989).

<sup>40</sup> BAXI & THOMAS, *supra* note 21.



process. There were no public debates among scientists and ethicists from which people might have formed their own opinions. This is not an isolated occurrence. Most hazardous products and activities are never scientifically evaluated for effects from global use or other global consequences. Residents of more affluent countries who live near hazardous operations are at least more likely to derive some economic benefit from the situation. In contrast, most people in poor countries without appropriate environmental regulations enjoy minimal, if any, benefits and are forced to carry a much heavier burden.

In conclusion, the local/global problem and the minority/majority problem cannot be effectively addressed in the context of preference-based environmental decision making. These difficulties are substantially magnified when nonhuman nature is introduced into the argument, as anthropocentrism is not the only approach when environmental risks are at stake. The ecosystem approach includes natural systems with all their biotic and abiotic components,<sup>41</sup> not only because of the intrinsic value of these components and of the natural processes they engender in their own support but also for the life-support provided by "nature's services" to all living things, including humans.<sup>42</sup> Hence, majority decisions in one location may cause morbidity and death elsewhere.

## II. FROM ENVIRONMENTAL ETHICS TO LEGAL INSTRUMENTS

The aim of this Article is to show why dialogue among interested stakeholders is insufficient to protect the environment and human rights. Here I discuss international legal approaches to these problems. I then turn to the theoretical basis I propose for establishing an ecologically sound environmental ethic.

From a legal point of view, the apparent legitimacy of preference-based public policy decisions does not suffice when the consequences of these decisions are transnational. This is evident in cases such as the *Trail Smelter Arbitration*<sup>43</sup> or the *Gabcikovo-Nagymaros Project*.<sup>44</sup> *Trail Smelter*, a classic arbitration between Canada and the United States over trans-boundary pollution, clearly established that trans-boundary harm

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<sup>41</sup> WESTRA, PROPOSAL FOR ETHICS, *supra* note 1.

<sup>42</sup> Gretchen C. Daily, *Introduction: What are Ecosystem Services?*, in NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 3, 3-4 (Gretchen C. Daily ed., 1997); see WESTRA, LIVING IN INTEGRITY, *supra* note 1.

<sup>43</sup> *Trail Smelter Arbitration* (U.S. v. Can.) 3 R.I.A.A. 195 (1941).

<sup>44</sup> *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 92 (Sept. 25).

is impermissible and has been cited in almost all environmental decisions and arbitrations since. In 1997, *Gabcikovo-Nagymaros* assessed the need for serious consideration of the ecological impacts of building a dam on the Danube River despite an agreement to the project dated twenty years earlier before the question of sustainability could be raised. In addition, although states are the primary subjects of international law, individuals and communities may increasingly seek redress for harms originating from the activities of states or state-supported activities.

Internationally, activities that may constitute an attack on the life and health of citizens are not left exclusively to the jurisdiction of domestic law. The supranational human rights court of the European Community (EC)<sup>45</sup> has supported the extension of the "right to life"<sup>46</sup> concept in the environmental context as the "right to biological or physical integrity."<sup>47</sup> In this context, even nationally supported industries that enjoy majority support because of their positive economic impacts are not immune from prosecution if they cause harm to local communities, even if those communities are in the minority. Although international regulatory regimes are not guaranteed to implement environmental measures to protect public health,<sup>48</sup> they are potentially able to do so. In addition, the ecosystem approach is accepted and is in fact *de rigueur* in international environmental law.<sup>49</sup> Even the biocentric approach is gaining ground internationally. Consider the recent United Nations Environmental Protection (UNEP) funded "Portal" project, an effort to provide ecological and scientific information to Supreme Court justices around the world engaged in the reform of legal regimes impacting the environment. As Justice Arthur Chaskalson, Chief Justice of South Africa, writes: "Our declaration and proposed program of work are, I believe, a crucial development in the quest to deliver development that respects people and that respects the planet for current and future generations and for all living things."<sup>50</sup> The Portal project paves the way

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<sup>45</sup> J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2403-83 (1991).

<sup>46</sup> COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS ART. 2 (1950).

<sup>47</sup> *Guerra v. Italy*, 26 Eur. Ct. H.R. 357 (1998); *Lopez-Ostra v. Spain*, 20 Eur. Ct. H.R. 277 (1995).

<sup>48</sup> Martti Koskeniemi, *Breach of Treaty or Noncompliance? Reflections on the Enforcement of the Montreal Protocol*, Y.B. INT'L ENVTL. L. 123, 123-28 (1992).

<sup>49</sup> Jutta Brunnée, *The Responsibility of State for Environmental Harm in a Multinational Context: Problems and Trends*, 34 LES CAHIERS DE DROIT 827 (1993); Prudence Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309 (1998).

<sup>50</sup> Justice Arthur Chaskalson, Address at the Summit for the Johannesburg Principles on the Role of Law and Sustainable Development (Aug. 27, 2002).

for the recognition of the connection between ecological awareness, public health, and the protection of human rights.

If human rights are at issue, then breaches of environmental regulations ought to be viewed through the lens of criminal prosecution.<sup>51</sup> Covenants that protect human life can be cited in support of this argument, as can instruments based on *jus cogens* norms, such as the prohibition of attacks against the human person,<sup>52</sup> the INTERNATIONAL COVENANT AGAINST GENOCIDE,<sup>53</sup> the U.N. CHARTER (especially Article 2, prohibiting aggression)<sup>54</sup> and the U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS (particularly Article 6, on the protection of life).<sup>55</sup>

At first sight, the vagueness of a right to a "healthy" or "ecologically balanced" environment appears potentially fatal to implementation, even under the best of circumstances.<sup>56</sup> Yet Alexander Kiss argues that this difficulty is to be expected in the realm of human rights, "where concepts such as 'national security' and 'morality' are to be given an exact interpretation."<sup>57</sup> Nevertheless, once we see the connection between ecological degradation and the breaching of human rights,<sup>58</sup> a biocentric position like the ethics of integrity can be shown to be already present in public policy and to offer a better path for future global governance.

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<sup>51</sup> See LAURA WESTRA, *ECOVIOLENCE AND THE LAW: SUPRANATIONAL NORMATIVE FOUNDATIONS OF ECOCRIME* (forthcoming 2004).

<sup>52</sup> See *Definition of Aggression*, GA Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

<sup>53</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260 A (III), U.N. GAOR, 78 U.N.T.S. 277, U.N. Doc. A/810 (1951); see also William A. Schabas, *GENOCIDE IN INTERNATIONAL LAW* (2003).

<sup>54</sup> U.N. CHARTER art. 2.

<sup>55</sup> *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966).

<sup>56</sup> Alexander Kiss, *The Implications of Global Change for the International Legal System*, in *ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW* 315, 315-39 (1992).

<sup>57</sup> *Id.*

<sup>58</sup> See COLIN L. SOSKOLNE & ROBERTO BERTOLLINI, WORLD HEALTH ORGANIZATION, A DISCUSSION DOCUMENT, *ECOLOGICAL INTEGRITY AND SUSTAINABLE DEVELOPMENT: CORNERSTONES OF PUBLIC HEALTH* (European Centre for Environment and Health 1999), available at <http://www.who.dk/document/gch/ecorep5.pdf> (last visited Sept. 20, 2003).

## III. INTRINSIC VALUE AND ECOLOGICAL INTEGRITY IN THE LAW

Prudence Taylor writes:

It is not difficult to conceive of humanity as being morally responsible to protect the integrity of the whole ecosystem, and for that responsibility to be translated into such mechanisms as standard-setting in a manner which is cognizant of ecological thresholds.<sup>59</sup>

I have concentrated almost entirely on human life and health to support the argument that breaches of environmental regulations, because of their impacts on basic human rights, should be met with both economic and criminal penalties. Eco-crimes are, for the most part, perpetrated by corporate/industrial enterprises with the support of national governments and international trade organizations.<sup>60</sup> Economic advantage and power represent the foundation and the goal of eco-crimes.

There is, however, a parallel movement; one that recognizes the intrinsic value of natural systems in philosophy<sup>61</sup> and the law.<sup>62</sup> For example, a number of international legal instruments reflect emerging global ecological concerns. These instruments incorporate a respect for the intrinsic value of nature. As Taylor argues, international law has already moved to create "new environmental human rights."<sup>63</sup>

This point is confirmed by the UNEP funded "Portal" project discussed above. Justice Chaskalson described the creation of a new environmental human right as one of the most important results of the Johannesburg meeting. Taylor's point is similarly confirmed by the 2000 Draft International Covenant on Environment and Development, which incorporates the mandates and the letter of the Earth Charter,<sup>64</sup> including

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<sup>59</sup> Taylor, *supra* note 49, at 382-83.

<sup>60</sup> Martti Koskenniemi, *Breach of Treaty or Noncompliance? Reflections on the Enforcement of the Montreal Protocol*, Y.B. INT'L ENVTL. L. 123, 123-28 (1992).

<sup>61</sup> ALDO LEOPOLD, *A SAND COUNTY ALMANAC* (1966); J. Baird Callicott, *The Foundations of the Land Ethic*, in ENVIRONMENTAL ETHICS 126-35 (Wadsworth Publishing House 1993) (2000); Bill Devall & George Sessions, *Deep Ecology*, in ENVIRONMENTAL ETHICS 157-61 (Wadsworth Publishing House 1993) (2000); Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); see also WESTRA, *LIVING IN INTEGRITY*, *supra* note 1.

<sup>62</sup> RICHARD O. BROOKS ET AL., *LAW AND ECOLOGY: THE RISE OF THE ECO-SYSTEM REGIME* (2002).

<sup>63</sup> Taylor, *supra* note 49.

<sup>64</sup> Rockefeller, *supra* note 4.

articles on ecological integrity and the intrinsic value of nature.<sup>65</sup>

Taylor traces the history of the development of human rights instruments from civil and political rights to economic, social, and cultural rights through to the "third generation of human rights" that she terms "solidarity rights."<sup>66</sup> These rights, set out in Articles 2 through 21 of the UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948),<sup>67</sup> include the right to "life, liberty and security of the person; freedom from slavery or involuntary servitude; freedom from torture." Taylor suggests that the core concept here is that of liberty from state abuses.<sup>68</sup>

In contrast, I have argued that these "freedom from" rights are implicitly based on the rights Henry Shue terms "basic" rights, because without physical security and subsistence, without the protection of life and health, all other rights are meaningless.<sup>69</sup> Richard Falk argues that human rights 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 sustainability."<sup>70</sup>

In this era of economic and cultural globalization, we confront a more profound normative vacuum: the dominating logic of the market in a world of greatly uneven social, economic, and political conditions without any built in, reliable means to ensure that global economic growth does not at some point cause decisive ecological damage. Although the position advanced here is present in the law, economic power blocs paper over the differences between the basic rights of people and the property rights of purely legal entities. The result is that various courts weigh these incommensurable values as though they were equal.

The "right" to economic prosperity is simply not comparable to the "right" to life and survival. This is where applying the principled approach of *jus cogens* norms, and of cosmopolitanism in general, can be

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<sup>65</sup> IUCN, THE WORLD CONSERVATION UNION & INTERNATIONAL COUNCIL OF ENVIRONMENTAL LAW, DRAFT INTERNATIONAL COVENANT ON ENVIRONMENT AND DEVELOPMENT (2000).

<sup>66</sup> Taylor, *supra* note 49, at 318.

<sup>67</sup> U.N. *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. OHCHR, at 71, U.N. Doc A/810 (1948).

<sup>68</sup> Taylor, *supra* note 49, at 318.

<sup>69</sup> See HENRY SHUE, *BASIC RIGHTS* (1996).

<sup>70</sup> Edith Brown-Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495, 558 (1984), quoting RICHARD FALK, *HUMAN RIGHTS AND STATE SOVEREIGNTY* (1981).

helpful. The latter is exemplified in the supranational governance of the EC.<sup>71</sup> This normative approach is complementary to Taylor's quest for "ecological limits" to property rights and can be viewed as a mandatory first step to curtail and contain "emergent risks"<sup>72</sup> and perhaps to mitigate attacks on life and health that are part of the present status quo. The implicit presence of "basic rights" binds together all rights, "creating an interdependent, 'mutually self-supporting whole.'"<sup>73</sup>

The EC recognizes the importance of environmental rights. As the OECD states, "fundamental human rights should include a right to a decent environment."<sup>74</sup> Further, the United Nations Economic Commission for Europe (UNECE) "affirmed the universal right to an environment adequate for general health and well-being, as well as the responsibility to protect and conserve the environment for present and future generations."<sup>75</sup>

An additional connection arises from a consideration of "ecological integrity," defined in 2000 by the "Global Ecological Integrity Project."<sup>76</sup> The protection of basic human rights through the recognition of our need for ecological integrity, as Holmes Rolston acknowledges,<sup>77</sup> is a step in the emerging awareness of humanity as an integral part of the biosphere.<sup>78</sup> Any "ecological right" can be understood as mandating respect for all parts of the biosphere, as does any right directly or indirectly applicable to non-human entities, be they trees,<sup>79</sup> large carnivores<sup>80</sup> or earthworms.<sup>81</sup> In other words, if we protect individual species we are not only protecting aggregates of natural entities but also the ecosystem where they exist and its natural processes. It is impossible to separate the former from the latter. Earthworms, for instance, are not

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<sup>71</sup> Weiler, *supra* note 45.

<sup>72</sup> See RICHARD P. HISKES, *DEMOCRACY, RISK AND COMMUNITY: TECHNOLOGICAL HAZARDS AND THE EVOLUTION OF LIBERALISM* (1998).

<sup>73</sup> Taylor, *supra* note 49, at 319; see also SCOTT DAVIDSON, *HUMAN RIGHTS* 41 (1993).

<sup>74</sup> Organisation for Economic Co-operation and Development, *Responsibility and Liability of States in Relation to Transfrontier Pollution*, 13 ENVTL. POL'Y & L. 122 (1984).

<sup>75</sup> Taylor, *supra* note 49, at 348.

<sup>76</sup> Westra et al., *supra* note 2.

<sup>77</sup> Holmes Rolston, *Rights and Responsibilities on the Home Planet*, 18 YALE J. INT'L L. 251, 251-52 (1993).

<sup>78</sup> WESTRA, *LIVING IN INTEGRITY*, *supra* note 1, at 123; Taylor, *supra* note 49.

<sup>79</sup> Stone, *supra* note 60.

<sup>80</sup> See Reed Noss, *The Wildlands Project: Land Conservation Strategy*, 1992 WILD EARTH J. 10 (1992).

<sup>81</sup> Orie L. Loucks, *Pattern of Forest Integrity in the Eastern United States and Canada: Measuring Loss and Recovery*, in *ECOLOGICAL INTEGRITY: INTEGRATING ENVIRONMENT, CONSERVATION AND HEALTH* 177 (2000).

charismatic megafauna but by ensuring their survival, we also ensure ours. That is the reality.

It would be difficult, perhaps impossible, to convict those whose negligence killed the proverbial canary in the mine. But I argue that criminal penalties can and should be demanded for the death of the miner. Without abandoning our understanding of the reasons for our stance, we need to move toward the twin goals of deterrence and restraint, as is done for assaults, rapes, and other violent crimes. Laws to restrain unbridled property rights might be a first goal but we cannot limit our efforts to action within the realm of tort law. Economic harms are transferable and often not compensable. As law professor Richard Brooks and others argue, in United States' law there is a growing recognition of the scientific support for interdependence:

In the 1990s we have witnessed the culmination of the relations between ecology and environmental law. Not only has conservation biology as a discipline and biodiversity as a concept become an important part of national forest and endangered species management, but major court cases reviewing biodiversity determinations have been decided.<sup>82</sup>

Law and ecology are increasingly joined in both domestic common law and international law. In addition, Earth System Science increasingly provides a "multidisciplinary and interdisciplinary science framework for understanding global scale problems," including the functioning of the land, oceans, and atmosphere.<sup>83</sup> The ecosystem approach and science have contributed to what A.A. Cancado Trindade terms "the globalization of human rights protection and of environmental protection."<sup>84</sup>

Additional support for this approach can be found in the Third Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law,<sup>85</sup> so that "when pollution is caused by substances that are highly dangerous to human life and health, there is no need to prove a significant impact or injury."<sup>86</sup> Without immediate

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<sup>82</sup> Brooks, *supra* note 62, at 373.

<sup>83</sup> *Id.* at 345.

<sup>84</sup> Cancado Trindade, *The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Change*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 244, 244-312 (1992).

<sup>85</sup> International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, U.N. International Law Commission, 34th Sess., U.N. Doc. A/51/49 (1982).

<sup>86</sup> Francisco Orrego Vicuna, *State Responsibility, Liability and Remedial Measures Under*

evidence of harm, awareness of environmentally hazardous activities is essential to the defense of public health. Present approaches, with these significant and growing exceptions, are insufficient for the protection of public health as the emphasis on state sovereignty is often counter-productive.<sup>87</sup>

The effort to harmonize the competing interests prevalent in international law instruments is in direct conflict with the reality of the violent harms to life that result from such a conciliatory attitude, hence the possible analogy to sexual attacks and other crimes where no "harmonization of interests" is possible or allowed. The right to health, proceeding from the right to life — or the "right to living," as Cancado Trindade labels it<sup>88</sup> — is clearly the focus of *erga omnes* obligations. Such obligations proscribe all attacks against others and are particularly desirable because of their preventive character.<sup>89</sup> Some propose the expansion of genocide to include "cultural genocide" ("ethnocide") as well as "ecocide" in cases of irreparable environmental alteration that threatens the existence of entire populations. Others argue that "ecocide" is a different kind of crime against humanity and is thus distinct from genocide.<sup>90</sup>

#### IV. CONCLUSION: INTEGRITY AND GLOBAL GOVERNANCE

To rely on a radically biocentric ethic for public policy decisions is to recognize the biological implications of globalization. "Hegemonic globalization,"<sup>91</sup> following the decisions of the G7, the World Trade Organization, and other such bodies, is indeed "hegemonic" because it is dominated by powerful Western interests, primarily the United States. There are, however, increasing numbers worldwide who seek a non-hegemonic form of global governance: "anti-globalization" activists, members of the World Social Forum, and all who believe in an "alternative global governance in embryo."<sup>92</sup>

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*International Law: New Criteria for Environmental Protection*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 135 (1992).

<sup>87</sup> *Id.*; DAVID P. FIDLER, INTERNATIONAL LAW AND PUBLIC HEALTH (2001).

<sup>88</sup> Trindade, *supra* note 84, at 244-312.

<sup>89</sup> Brooks, *supra* note 62, at 261.

<sup>90</sup> *Id.*; Whitaker Report on Genocide, U.N. ESCOR, 38th Sess., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985); FALK, *supra* note 70.

<sup>91</sup> See Boaventura De Sousa Santos, Global Governance, paper presented at Sheffield University Law School for the International Global Governance and Democracy Conference (2003) (on file with author).

<sup>92</sup> *Id.*



Purely capitalistic forms of neo-liberal globalization exclude "all other kinds of knowledge"<sup>93</sup> and clash with human health concerns, biodiversity, multicultural conceptions of human rights, other cultural citizenships, and the rights of non-citizens (e.g., refugees). The "no global" or "anti-globalization" groups represent a "counter hegemonic utopia."<sup>94</sup> These groups may support many things: a return to neo-regionalism, the state as an important actor, or a renewed emphasis on human rights in "contact zones" where "cultures and uneven power meet and clash."<sup>95</sup> Most of these groups are opposed to neo-liberal capitalism. Their commitment to the cause predisposes them to give in on some parts of their agenda in the interest of forming alliances with other activists. The movement, however, has no single platform, no leader, and no unitary consensus. The stated goals of the various groups are mostly negative and tend to privilege rebellion and non-conformism over revolution. The cosmopolitan conception of law and human rights they embrace entails the very normative considerations and universalism they try to deny. Within this cosmopolitan ideal, a life-centered ethic fits well. It is clearly more than theoretical as it represents one of the major international goals of public policy.

A biocentric global ethic reaches across borders and ideologies. This ethic no longer represents a trivialized view. It has moved beyond the limits imposed by local dialogues all equally embedded in the neo-liberal status quo and seeks to reaffirm the indissoluble synthesis of humans and their habitat. Most of the ideals of this ethic and its concurrent movements are embedded in the language and the principles of the Earth Charter.<sup>96</sup> The 2000 International Draft Covenant on Environment and Development is committed to incorporating these principles. Likewise, some of the recent decisions of the European Court of Justice (e.g., *Guevara v. Italy*; *Lopez-Ostra v. Spain*) indicate that the EC *acquis communautaire* is embracing similar principles. With the increased power of the EC, the inception of the UNEP funded "Portal" project, the introduction of the Earth Charter into international law, and the growing presence of the anti-globalization movement, there is hope that an environmental ethic of respect for all life may yet prevail.

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<sup>93</sup> *Id.*

<sup>94</sup> BOAVENTURA DE SOUSA SANTOS, TOWARDS NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION & EMANCIPATION 182 (2001).

<sup>95</sup> De Sousa Santos, *supra* note 91.

<sup>96</sup> Steven Rockefeller, *Forward*, in JUST ECOLOGICAL INTEGRITY xi, at xi-xiv (2002).

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