

DAVID AND GOLIATH: GIVING THE INDIGENOUS
PEOPLE OF THE NIGER DELTA A SMOOTH
PEBBLE—ENVIRONMENTAL LAW, HUMAN
RIGHTS AND RE-DEFINING THE VALUE OF LIFE

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I.	Introduction.....	494
II.	Background on Nigeria.....	496
III.	Actions of Transnational Oil Companies in Nigeria and the Environmental and Agricultural Impact	498
IV.	Does the Violation of International Environmental Law Give Rise to Human Rights Violations?.....	502
	A. The Importance of Placing Violations of Environmental Law within the Human Rights Framework.	502
	B. The Connection Between Human Rights and the Environment.....	505
	C. Is There a Right to a Healthy Environment Under International Law?.....	508
	D. Defining When a Deliberate Environmental Degradation Is a Violation of Human Rights.....	512
V.	Examining Transnational Companies Participation in Human Rights Abuses	513
VI.	Present Avenues of Accountability Under International Environmental Law and International Human Rights Law	518
	A. International Environmental Law.....	518

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	B. International Human Rights Law	520
VII.	Proposals for Holding Transnational Companies	
	Accountable For Their Abuses.....	522
	A. Criminal Sanctions	522
	B. Global Standards for Transnational Companies.....	522
	C. Application of Theories of Common Law Aiding	
	and Abetting to Human Rights Violations.....	523
VIII.	Conclusion	524

I. INTRODUCTION

Imagine that you are a citizen of the United States of America and your family makes a living by farming. Farming is not only the manner through which the economy of your town and county is fueled; it is the means by which most make a living. Imagine that the majority of people in your town are subsistence farmers. Subsistence farming has been the way of life for the people in your town for hundreds of years. It is also part of your cultural heritage. Because of the forestation and the plentiful rivers in your region, the people in your town depend on fishing as well. This way of life and method of subsistence is replicated in the other towns of your state and even in a few other states.

Imagine that about fifty years ago, petroleum deposits were discovered beneath the land the people in your country farm and live upon. In order to lead the nation toward economic and technological development, foreign transnational companies began to extract this oil. However, these companies have failed to utilize safety measures and technology that they use in their own home countries or in other developed countries. Instead, these companies have polluted the land and water, making farming and fishing nearly impossible. In fact, you must import drinking water. As a result, your region and other regions with similar experiences, have the highest rates of poverty in the nation. Your nation is one of the world's leading producers of oil and is very active in the Oil Producing and Exporting Countries ("OPEC"). Your nation receives billions of dollars every year from oil exports, little of which is used to protect and preserve your environment.

Tired of your economic situation and unable to feed your family, you and others in your county have protested the abuse of your land. But little has been done about your plight, and your rights under international law to live and undertake development measures are not protected. Your protests have led to the government killing, maiming, and raping the people in your county in order to pro-

protect the rights of the transnational companies to extract oil from your land at your expense. This is your life. This is your experience. This is your reality.

Most would find this scenario appalling but this is the reality of the people of the Niger Delta in Nigeria. The plight of the people of the Niger Delta is occasionally publicized in the world media, and their cause championed by human rights and environmental organizations. The sad truth, however, is that the rights we would consider fundamental in America, and in most of the international community, are not being protected in Nigeria for the people of the Niger Delta.

It is a sobering thought when you realize that “fifty of the world’s hundred greatest powers” are multinational companies.¹ Many oil companies fit into the category of multinational or transnational companies. Today oil is the “most important energy resource in the world.”² However, a degradation of the environment is associated with oil extraction and use.³ Advocates excusing oil pollution argue that oil pollution is a “necessary price for cultural modernization and advancements in state infrastructure.”⁴ Regardless of whether one believes the platitudes offered by many oil companies — that their presence encourages democracy in underdeveloped nations — or not, the decisions of multinational companies around the globe affect “a greater number of countries and populations every day.”⁵ In short, the actions of multinational or transnational corporations directly affect the lives of individuals worldwide. Around the world transnational companies (“TNCs”) make huge profits by extracting resources in underdeveloped or developing countries.⁶ Many activists and organizations have worked, and continue to work, to hold some of these companies accountable for the destruction they cause to the environment and their participation in egregious human rights violations and sometimes war crimes.⁷

1. Roland-Pierre Paringaux, *Business, Oil and Human Rights: Should Corporations Care?* LE MONDE DIPLOMATIQUE, Dec. 2000 (Malcolm Greenwood trans.), available at <http://www.monediplo.com/2000/12/08oil> (last visited Apr. 11, 2002).

2. Ambrose O. O. Ekpu, *Environmental Impact of Oil on Water: A Comparative Overview of the Law and Policy in the United States and Nigeria*, 24 DENV. J. INT’L L. & POL’Y 55, 55 (1995).

3. *Id.*

4. *Id.*

5. Paringaux, *supra* note 1, available at <http://www.monediplo.com/2000/12/08oil>

6. *See id.*, available at <http://www.monediplo.com/2000/12/08oil>

7. *See id.*, available at <http://www.monediplo.com/2000/12/08oil>

This note will specifically discuss the actions of mining companies in the Niger Delta region of Nigeria where petroleum is extracted. The effects of oil pollution in Nigeria have been described as “monumental.”⁸ The following broad questions will be addressed: (1) Does the gross violation of environmental law give rise to violations of international human rights? That is if you destroy the ability of a people to participate in agriculture, or other normal means of subsistence, have you violated their human rights?; (2) Can, and should, a transnational company be held accountable for its actions under international human rights law?; and (3) How do you hold transnational companies liable for their participation in human rights abuses and violations of international environmental law?

Part III of this note will discuss how TNCs have conducted their business in the Niger Delta region of Nigeria. Part IV of this note will raise and address the question of whether or not a violation of international environmental law gives rise to a human rights violation. In answering this question, various views will be presented. In Part V of this note, I will briefly discuss the participation of TNCs in direct human rights violations, e.g. the rape, killing, and maiming of persons that protest the actions of these companies. In Part VI, the avenues for accountability under international environmental law and international human rights law will be laid out. Part VII will then discuss proposals for holding TNCs responsible for their abuses of the environment and indigenous people. These proposals include criminal sanctions incorporated into present environmental and human rights laws, including common law theories of aiding and abetting to the international criminal system, and creating global standards that all extractive industries must comply with.

II. BACKGROUND ON NIGERIA

Nigeria is the world’s sixth largest exporter of crude oil⁹ and the Niger Delta region is home to Nigeria’s oil resources. Oil was first discovered in Nigeria in 1958 and today the country receives about ninety percent of its foreign exchange from oil extracted in the nation.¹⁰ In 1996, for instance, oil accounted for

8. Ekpu, *supra* note 2, at 56.

9. See *Shell Tightens Its Grip on Nigeria*, BBC NEWS, Sept. 4, 2001, at http://news.bbc.co.uk/1/hi/english/business/newsid_1525000/1525037.stm (last visited Nov. 14, 2001) [hereinafter *Shell Tightens*].

10. See Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT’L L.

over seventy-five percent of Nigeria's national revenue and over ninety-five percent of the state's export earnings.¹¹ Oil is both Nigeria's blessing and curse; although it is the nation's main source of revenue, it is also the root of much suffering for the people of the Niger Delta.¹² Additionally, although oil is the main source of revenue for Nigeria, the Niger Delta remains very poor and underdeveloped.¹³

Over the last forty-one years, petroleum extracting TNCs have "pervaded the Niger Delta . . . their noxious products and wastes now polluting virtually all corners of the region."¹⁴ Prior to oil extraction, the people of the Niger Delta lived by "farming the formerly arable lands" and "fishing the formerly rich waters" of their region.¹⁵ Nigeria is a very diverse nation with over 250 ethnic groups.¹⁶ Within the Niger Delta alone, there are many different ethnic groups including the Ogoni¹⁷ and the Ijaw.¹⁸ The Ogoni will be mentioned frequently throughout this note because they have led the protests against oil production in the Delta for the past decade.¹⁹

The discussion of the actions of oil companies in Nigeria will focus on Shell. Shell is not the only oil company doing business in Nigeria, but it is the dominant player in Nigeria's exploration and extraction of oil.²⁰ Shell's presence

927, 958-59 (1998).

11. See Joshua P. Eaton, Note, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 265 (1997).

12. See *Oil: Nigeria's Blessing and Curse*, BBC NEWS, June 8, 2000, at http://news.bbc.co.uk/hi/english/world/africa/newsid_782000/782925.stm (last visited Nov. 14, 2001).

13. See *id.*, at http://news.bbc.co.uk/hi/english/world/africa/newsid_782000/782925.stm

14. Eaton, *supra* note 11, at 264-65.

15. *Id.*

16. See *id.*

17. See *id.*

18. See Barnaby Phillips, *Niger Delta Town 'Destroyed and Deserted'*, BBC NEWS, Nov. 30, 1999, at http://news.bbc.co.uk/hi/english/world/africa/newsid_543000/543544.stm (last visited Nov. 14, 2001).

19. See *Update on Human Rights Violations in the Niger Delta*, Human Rights Watch, available at <http://www.hrw.org/background/africa/nigeriabkg1214.htm> (last modified Dec. 14, 2000).

20. See *Shell Tightens*, *supra* note 9, at http://news.bbc.co.uk/hi/english/business/newsid_1525000/1525037.stm

in Nigeria continues to be controversial.²¹ Shell has been accused of exploiting the natural resources yet not “providing a fair return for the country.”²² The relationship between Shell and the people in the Niger Delta may yet see some improvement because as recently as July 2001, Shell stated its desire to make peace with the Ogoni people of Nigeria.²³

The demands of the people living in the Niger Delta seem very simple: “They want to control their resources. They want jobs. They want training. They want to be part of the world, really. They are not even part of Nigeria.”²⁴ Presumptively, the people of the Niger Delta desire to see a change in the abject poverty they live in. Their communities have no electricity, no roads—only foot paths—and are “severely neglected in every respect,” school roofs are collapsed and premises are covered by weeds and tall grass.²⁵

III. ACTIONS OF TRANSNATIONAL OIL COMPANIES IN NIGERIA AND THE ENVIRONMENTAL AND AGRICULTURAL IMPACT

The last half of the twentieth century saw an expansion in the number of multinational companies.²⁶ Free trade advocates consistently argue that TNCs in underdeveloped nations serve to increase prosperity and development in the domestic states within which they operate.²⁷ While this may or may not be true, many TNCs blatantly engage in human rights abuses,²⁸ as well as environmentally destructive practices.²⁹

21. See *id.*, at http://news.bbc.co.uk/hi/english/business/newsid_1525000/1525037.stm

22. *Id.*, at http://news.bbc.co.uk/hi/english/business/newsid_1525000/1525037.stm

23. See Chris Simpson, *Shell Overtures to Ogonis*, BBC NEWS, July 25, 2001, at http://news.bbc.co.uk/hi/english/world/africa/newsid_1457000/1457001.stm (last visited Nov. 14, 2001).

24. Hilary Andersson, *World: Africa Fighting the Oil Firms*, BBC NEWS, Nov. 6, 1998, at http://news.bbc.co.uk/hi/english/world/africa/newsid_209000/209441.stm (last visited Nov. 14, 2001) (quoting Mofia Akobo, a campaigner for the rights of the people of the Niger Delta).

25. *Id.*, at http://news.bbc.co.uk/hi/english/world/africa/newsid_209000/209441.stm. The town Akassa profiled in this article is representative of towns and villages in the Delta. *Id.*, at http://news.bbc.co.uk/hi/english/world/africa/newsid_209000/209441.stm

26. See Eaton, *supra* note 11, at 262.

27. See, e.g., *id.* at 262-63.

28. See generally Gregory G.A. Tzeuschler, Note, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359 (1999) (analyzing the participation of TNCs in the violation of human rights and war crimes). Shell and Chevron are notable for their use of “security providers” in committing human

The extraction of oil, and related activities, in the Niger Delta has destroyed the environment, water, air, and land of the people in that area.³⁰ As a result, the water and land has become so polluted that “fishing, forestry, and agriculture are no longer possible in large areas.”³¹ The frequent oil pollution incidents have led to oil layers on many water surfaces, causing the death of the organisms in the water which are unable to obtain aeration.³² In addition, fish ingest the oil and become unpalatable, or worse yet, poisonous.³³ This sad scenario is even more alarming when one considers the fact that fishing is a major source of subsistence for the people of the Niger Delta region.³⁴ In essence, a people’s cultural and natural way of life is rapidly being destroyed.

Over the years, numerous problems have arisen and still remain for the people of the oil-producing regions in Nigeria due to the practices of the TNCs in the region. These problems include footpaths blocked by petroleum pipelines, polluted wells, continual noise, delay in necessary repairs to damages, and flooding and disruption of fresh water supplies due to canals created through farmlands.³⁵ The pipelines are poorly maintained and leak frequently causing “polluted water, fountains of emulsified oil pouring into villagers’ fields, pools of sulfur, blow-outs, [and] air pollution.”³⁶ Catastrophic effects to the people’s habitat and lifestyle have followed in areas of the Niger Delta where oil pollution in

rights violations in Nigeria. See also *Human Rights Principles for Oil and Mining Companies Welcome*, Human Rights Watch, at <http://www.hrw.org/press/2000/12/oil1221.htm> (last visited Apr. 20, 2002). Both companies were involved in a recent process where voluntary guiding principles on security and human rights issues in extractive industries were issued by the governments of the United States and United Kingdom. *Id.*, at <http://www.hrw.org/press/2000/12/oil1221.htm>. These principles were formulated as a result of discussions between the United States Department of State, the United Kingdom Foreign and Commonwealth Office, and various human rights organizations, unions, businesses and transnational extractive companies. *Id.*, at <http://www.hrw.org/press/2000/12/oil1221.htm>

29. See generally Eaton, *supra* note 11 (describing in detail the environmental destruction caused by Shell Petroleum Development Company of Nigeria).

30. See *id.* at 266.

31. *Id.* at 266-67.

32. See *id.* at 267.

33. See *id.*

34. See *id.*

35. See *id.*

36. See *id.* (quoting John Vidal, *Born of Oil, Buried in Oil*, *GUARDIAN*, Jan. 4, 1995, at T2).

water is most serious.³⁷ Most of the villages have no clean drinking water due to the oil pollution.³⁸ In fact, despite the fact that the people of the Niger Delta are surrounded by water, the expensive task of importing clean drinking water from great distances is undertaken in order for there to be clean drinking water.³⁹

Transnational companies have been accused of *allowing* petroleum and its products to contaminate and pollute the environment in Nigeria.⁴⁰ There is solid basis for this accusation. Petroleum is transported to refineries where it is processed.⁴¹ An extensive network of oil pipelines from wells to refineries transports the oil throughout the nation.⁴² TNCs responsible for extraction and transportation, however, have failed to properly maintain the transportation pipelines, resulting in regular large oil spills.⁴³ As an illustration of this lack of care on the part of TNCs, the oil spills caused by Shell in Nigeria constituted forty percent of Shell's spills *worldwide* between the years of 1982-1992.⁴⁴

Oil pollution is not limited to spills from poorly maintained pipelines. "Blow-outs," which are uncontrolled releases of oil from wells, also contribute to the oil pollution problem.⁴⁵ Again, a lack of care in pollution prevention and poor maintenance of oil wells are responsible for "blow-outs" and the resulting pollution.⁴⁶ It is bad enough that the oil companies fail to exercise the care that would prevent pollution, but the pollution problems are "exacerbated by the failure of foreign oil companies to clean up their spills."⁴⁷

The rampant lack of care on the part of TNCs is also evident from the pollution coming from the refineries.⁴⁸ Solid and liquid toxic wastes contaminate water as they exit refineries through drainpipes which lead directly into the environment.⁴⁹ These toxic wastes are sometimes dumped directly into or nearby the

37. *See id.* (quoting NIGERIAN ENVTL. STUDY/ACTION TEAM, NIGERIA'S THREATENED ENVIRONMENT: A NATIONAL PROFILE 87 (1991)).

38. *See id.*

39. *See id.*

40. *See, e.g., id.* at 268 (discussing TNC practices which result in petroleum products entering the environment).

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *Id.* at 269.

48. *See id.*

49. *See id.*

water.⁵⁰ These wastes are released into the air, water, and land raw or only partially treated.⁵¹ The refineries utilize ineffective antipollution measures and devices.⁵² The waste treatment can be described as nothing less than inadequate.

Another pollution source found in the Niger Delta is gas flaring. Human rights activists and environmental publicists have documented that the constant gas flaring has led to the creation of acid rain and release of greenhouse gases into the atmosphere.⁵³ According to many activists and residents of the Niger Delta, acid rain has substantially destroyed the plant life and wildlife in the region.⁵⁴ The people of the Niger Delta have noticed a change in their habitat, but also report that they suffer from respiratory diseases and are partially deaf from the constant noise from the gas flares.⁵⁵ This is in addition to the disproportionate increase in incidents of cancer and other organic diseases linked to the water pollution.⁵⁶

In addition to the fact that Shell does not use the same operating standards that it uses in developed nations, Shell has also been resistant to other suggestions that would safeguard the habitat of the Nigeria people. For instance, in 1997, Pensions Investments Research Consultants ("PIRC") announced that the environmental report issued by Shell was inadequate.⁵⁷ PIRC then issued a resolution asking that Shell accept independent environmental audits.⁵⁸ According to PIRC, independent environmental audits are accepted in the oil industry as best practice.⁵⁹ For example, British Petroleum, another oil giant, has an environmental audit conducted by Ernst and Young annually.⁶⁰ Shell declined to adopt this

50. *See id.*

51. *See id.*

52. *See generally id.* (discussing the negative environmental and health consequences tied to the TNCs' use of their refineries).

53. *See Nigeria: The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria*, HUM. RTS. WATCH REP., July 1995, at <http://www.hrw.org/reports/1995/Nigeria.htm> [hereinafter *Nigeria: The Ogoni Crisis*]; *see also* Eaton, *supra* note 11, at 269.

54. *See Eaton, supra* note 11, at 269.

55. *See id.*

56. *Id.* at 267 (quoting Oladele Osibinjo, *Industrial Pollution Management in Nigeria*, in ENVIRONMENTAL CONSCIOUSNESS FOR NIGERIAN NATIONAL DEVELOPMENT 95, 97 (E.O.A. Aina & N.O. Adepipe eds., 1992) (a publication of FEPA, discussed in Part III, B.2.a.i.)).

57. *See Environmental Auditing: Shareholder Advisory Group Calls on Shell to Obtain Independent Environmental Audits*, Int'l Env'tl. Daily (BNA), at D3 (May 15, 1997) [hereinafter *Environmental Auditing*].

58. *See id.*

59. *See id.*

60. *See id.*

recommendation and announced that each of its businesses would decide whether or not to audit.⁶¹ Following this announcement, eleven percent of Shell's shareholders "vot[ed] for an overhaul of the oil company's [position] on environmental issues" and voted to support the PIRC resolution.⁶² Shell Nigeria reportedly will be adopting the suggested PIRC policy.⁶³

IV. DOES THE VIOLATION OF INTERNATIONAL ENVIRONMENTAL LAW GIVE RISE TO HUMAN RIGHTS VIOLATIONS?

A. *The Importance of Placing Violations of Environmental Law Within the Human Rights Framework*

"International environmental law comprises those substantive, procedural and institutional rules of international law which have as their primary objective the protection of the environment."⁶⁴ Environmental laws often raise human rights implications. Numerous global and regional human rights instruments,⁶⁵ as well as national constitutions⁶⁶ of nation states, have recognized the right to a

61. *See id.*

62. *United Kingdom: Environmentalists Claim Partial Victory as Group of Shell Shareholders Back PIRC*, Int'l Env'tl. Daily (BNA) at D7 (May 23, 1997) [hereinafter *United Kingdom: Environmentalists*].

63. *See id.*

64. PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* I at 17 (1995).

65. *See, e.g.*, International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, Part III, art. 12 (entered into force Jan. 3, 1976); *United Nations: Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, Supp. No. 49, at 165, U.N. Doc. A/Res/44/736 (1989), reprinted in 28 I.L.M. 1448, art. 24 (adopted Nov. 20, 1989); European Social Charter, 529 U.N.T.S. 89, art. 11 (entered into force Feb. 26, 1965); African Charter on Human and Peoples Rights, O.A.U. Doc. CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 58, art. 24 (1982).

66. *See* Dinah Shelton, *Human Rights, Environmental Rights and the Right to Environment*, 28 STAN. J. INT'L L. 103, 104 (1991) (discussing Brazilian and Namibian constitutions); *see, e.g.*, Constituição Federal (Federal Constitution of Brazil), available at <http://www.Georgetown.edu/pdba/Constitutions/Brazil/brtitle8.html> (last visited Apr. 24, 2002); NAMIB. CONST. chap. III, available at http://www.uni-wuerzburg.de/law/wa00000_.html (last visited Oct. 17, 2002); THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE CZECH REPUBLIC art. 35; INTERNATIONAL HELSINKI FEDERATION FOR HUMAN RIGHTS, ANNUAL REPORT CZECH REPUBLIC (1997), available at <http://www.ihf-hr.org/ar97cze.htm> (last visited Apr. 20,

healthy environment or the right to health. Scholars in the field have posed the question of whether the right to a healthy environment is a human right.⁶⁷ The question is an important one because if the right to a healthy environment is a human right, then it is fundamental and universal.⁶⁸ As a universal right, a human right applies equally to all persons.⁶⁹ Further, if the right to a healthy environment is a human right, and is universal, then it should not bend to economic factors or geographic locations.⁷⁰

Under traditional international law, nation states are the subjects and the individual citizens of the state are the objects of the law.⁷¹ This is referred to as state centered law, as opposed to individual rights centered law. Under state centered law, the aggrieved individual does not enjoy direct benefits of the law but only receives benefits indirectly through the state.⁷² International human rights law is changing that landscape, and the trend is a gradual recognition that individuals are objects *and* subjects of human rights law and can have direct protections and benefits.⁷³ The end result is that persons can bring their grievances before international tribunals when their governments are unwilling to do so on their behalf, or when their governments are the violators of the law.⁷⁴ This movement from state centered law to individual rights centered law provides individuals with more protection and power by placing states in the position of

2002) (describing the right to a healthy environment provided for in the Czech Republic).

67. See, e.g., John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283 (2000) (proposing a legal basis upon which the right to a healthy environment is a human right under emerging international customary law); Eaton, *supra* note 11, at 272 (discussing the potential for international human rights laws relative to the environment); James T. McClymonds, Note, *The Human Right to a Healthy Environment: An International Legal Perspective*, 37 N.Y.L. SCH. L. REV. 583, 596 (1992) (exploring the extent to which a right to a healthy environment has been recognized in international law); Iveta Hodkova, *Is There a Right to a Healthy Environment in the International Legal Order?*, 7 CONN. J. INT'L L. 65 (1991) (examining international regional legal documents relating to environmental protections); Shelton, *supra* note 66 (discussing United Nations meetings to promote and protect human rights).

68. See Lee, *supra* note 67, at 287.

69. See *id.* at 287-88.

70. See *id.* at 288.

71. See McClymonds, *supra* note 67, at 592.

72. See *id.* (stating that when individuals are seen as mere objects, they only enjoy benefits indirectly and lack direct access to transnational tribunals).

73. See *id.* at 593.

74. See *id.*

providing appropriate remedies and reparations or facing the condemnation of the international community.⁷⁵

Considering the above-discussed trend that human rights law has taken, the benefit to individuals, like those native to the Niger Delta, becomes readily apparent. The right to a healthy environment is not exclusive to the nation but trickles down to the individuals. If the government of the Federal Republic of Nigeria chooses not to protect the environment of the people of the Niger Delta and their rights to development and dignity, and participates in violations against them, then the international community can sanction Nigeria. Further, and most importantly, individuals can theoretically bring a claim before an international tribunal, free from coercion or intimidation, and can receive redress for the wrongs done. Finally, the Nigeria government cannot be insulated by claiming to do what is best for the nation while disregarding the rights, and allowing the abuse of the rights of the people of the Niger Delta.

Under the rubric of international human rights law, the Universal Declaration of Human Rights and other international covenants aim to achieve freedom, justice, and peace in the world.⁷⁶ “The means of achieving this goal begin with legal recognition of the equal and inalienable rights of all members of the human family and of the inherent dignity possessed by each individual.”⁷⁷ It is debatable as to whether environmental law seeks to protect and enhance the well being of persons or whether the broader goal is to protect nature, thereby subordinating human well-being.⁷⁸ But if the right to a healthy environment is placed within human rights law, it will gain specific recognition.⁷⁹ More importantly, placing the right to a healthy environment within the human rights framework insulates the right from the ordinary political processes.⁸⁰ Compare, for instance,

75. *See id.*

76. *See* Shelton, *supra* note 66, at 106 (quoting *PRIVACY AND HUMAN RIGHTS* (Arthur H. Robertson ed., 1968)).

77. *Id.* at 106-107.

78. *See id.* at 107. Some commentators argue that although the goal of environmental law is to protect the environment, the ultimate goal is preservation or protection of mankind. Others argue that an emphasis on preservation of mankind will allow for over-exploitation of the environment and environmental degradation when the needs of humans must be met. For a more complete discussion of these divergent views, see also *id.* at 107-11.

79. *See id.* at 107.

80. *See id.* (stating “[t]his absolute limitation on domestic political decisions is potentially an important consequence of elaborating a right to environment, particularly given the high short-term costs involved in many environmental protection measures and the resulting political disfavor.”).

some of the recognized human rights with environmental laws. The right to life, or the right to be free from torture or cruel and degrading punishment, is not subject to political legislation or manipulation.⁸¹ These rights may be not abrogated.⁸² It is upon these considerations that I argue that it is imperative to find the violation of environmental law implicates human rights considerations.⁸³

There are also practical benefits to protecting environmental values through human rights recognitions. Environmental law and the crises that have led to its creation are of a global nature.⁸⁴ As such, the participation of member states of the international community is required for effective enforcement.⁸⁵ Transboundary pollution, for instance, cannot be contained within the boundaries of one nation state.⁸⁶ Further, environmental problems like deforestation, although internal in nature, do affect other states.⁸⁷ The placement of environmental obligations within the human rights framework “would impose the moral and legal obligations on nation-states to cooperate in addressing these problems, not only among themselves, but also internally.”⁸⁸

B. *The Connection Between Human Rights and the Environment*

The period after the creation of the United Nations saw a recognition, albeit limited, of the connection between environmental protection and economic development.⁸⁹ To argue that the right to a healthy environment is a human right I assert that there exists a linkage between the environment and human rights.⁹⁰ This link is recognized in the Stockholm Declaration on the Human Environ-

81. *See generally id.* at 106 (using the once accepted practice of slavery to illustrate the now recognized human right to live and be free from cruelty, manipulation, and degradation).

82. *See id.* at 107.

83. There are other commentators that disagree that the right to environment or other environmental rights and laws be placed within the human rights framework. *See, e.g., id.* at 133-38.

84. *See* McClymonds, *supra* note 66, at 592.

85. *See id.*

86. *See id.*

87. *See id.*

88. *Id.*

89. *See* SANDS, *supra* note 64, at 30 (describing said recognition as a feature of the second phase in the development of international environmental law).

90. John Lee discusses his view that many theorists fail to acknowledge the implicit assumption that a linkage must exist between human rights and the environment in order to address the concept of the right to a healthy environment. *See* Lee, *supra* note 67, at 285.

ment.⁹¹ Within this Declaration states exhort the principle that, “[m]an 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; and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁹² The rights to freedom and equality are fundamental human rights guaranteed by international law instruments since the adoption of the Universal Declaration of Human Rights.⁹³

Necessarily, a healthy environment, or lack thereof, affects the right to life,⁹⁴ and the right to development.⁹⁵ It seems clear that a degraded environment affects health and, therefore, life. In a recent case heard by the International Court of Justice, the court found a duty to protect the environment.⁹⁶ One of the opining Justices stated that environmental protection is a vital part of the human rights doctrine.⁹⁷

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments. While, therefore, all peoples have the right to initiate development projects and enjoy their bene-

91. See generally United Nations Conference on the Human Environment: Final Documents, U.N. Doc. A/Conf. 48/14 and Corr./Report of the United Nations Conference on the Human Environment, reprinted in 11 I.L.M. 1416 (adopted on June 16, 1972).

92. *Id.*

93. See Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 91-92 (Sept. 27).

94. See, e.g., U.N. CHARTER PREAMBLE; *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, at 135-36, U.N. Doc A/810 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 6 (1976); *American Declaration of Rights and Duties of Man*, O.A.S. Res. XXX, ch. 1, art. 1 (1948), available at <http://www1.umn.edu/humanrts/oasinstr/zoas2dec.htm> (last visited Apr. 22, 2002); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, sec. 1, art. 2 (entered into force Sept. 3, 1953); American Convention on Human Rights, Nov. 22, 1969, art. 4, 9 I.L.M. 673 (1970).

95. See, e.g., U.N. CHARTER, ch. IX, art. 55; African Charter on Human and People's Rights, June 27, 1981, art. 22, 21 I.L.M. 58, 62, (1982).

96. See Gabcikovo-Nagymaros Project, 1997 I.C.J. at 41.

97. See *id.* at 91-92 (separate opinion of Vice President Weeramatry).

fits, there is likewise a duty to ensure that those projects do not significantly damage the environment.⁹⁸

The merit of the Justice's statement cannot be overemphasized considering that environmental destruction leads to cycles of poverty, which deny people the ability to develop, sometimes the right to live, and often deny people a life of dignity.⁹⁹

The right to development and life, however, are not the only recognized human rights that are affected by whether persons have a healthy environment. The environment and how it is treated directly affects the right to suitable working conditions,¹⁰⁰ the right to an adequate standard of living,¹⁰¹ the right to health,¹⁰² and the right to privacy.¹⁰³ "Even claims for respect, including the right to individual dignity and worth, freedom from discrimination, and the right to equality and equal protection of the laws, are abused."¹⁰⁴

Publicists question whether environmental protection is a precondition or prerequisite for guaranteeing fundamental human rights, or whether environmen-

98. *Id.* (quoting of Vice President Weeramathy).

99. *See* McClymonds, *supra* note 67, at 587.

100. *See* Shelton, *supra* note 66, at 112 (citing Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Protocol of San Salvador, Nov. 14, 1988, art. 7, 28 I.L.M. 156, 163 (1989); African Charter on Human and Peoples' Rights, art. 15, 21 I.L.M. 58, 61 (1982); Universal Declaration of Human Rights, art. 25, G.A. Res. 217, U.N. GAOR, 3rd. Sess., pt. I, at 71, U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, art. 7, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966)).

101. *See id.* (citing Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Protocol of San Salvador, Nov. 14, 1988, art. 7, 28 I.L.M. 156, 163 (1989); Universal Declaration of Human Rights, art. 25, G.A. Res. 217, U.N. GAOR, 3rd. Sess., pt. I, at 71, U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, art. 7, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966)).

102. *See id.* (citing African Charter on Human and Peoples' Rights, art. 16, 21 I.L.M. 58, 61 (1982); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966)).

103. *See id.* (citing American Convention on Human Rights, art. 11, 9 I.L.M. 99, 105 (1969); International Covenant on Civil and Political Rights, art. 17 G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); Universal Declaration of Human Rights, art. 12, G.A. Res. 217, U.N. GAOR, 3rd Sess., pt. I., at 71, U.N. Doc. A/810 (1948); European Convention on Human Rights, art. 8, Europ. T.S. No. 5 (1950)); McClymonds, *supra* note 67, at 586-88.

104. McClymonds, *supra* note 67, at 587.

tal protection is just an integral part of enjoying fundamental human rights.¹⁰⁵ If environmental protection is deemed merely a precondition for fundamental human rights, then governments are left with the flexibility to remove these human rights from the realm of “guaranteed.” That is, the fundamental rights will never be enjoyed until these preconditions are met.¹⁰⁶

I am cognizant and appreciative of the argument that placing the focus of environmental law on human rights reduces “non human aspects of the ecosystem to consideration of their short-term economic value to humanity,” and that nature has intrinsic value of its own.¹⁰⁷ However, considering that the human race is dependent upon the environment for survival, it is impossible to really separate the need for environmental protection from the interests of human beings.¹⁰⁸

C. *Is There a Right to a Healthy Environment Under International Law?*

The problem is that even if environmental laws overlap with human rights laws, or are subsumed within human rights laws, the question remains: Is there a right to a healthy environment under international law? International law has a variety of sources.¹⁰⁹ The World Court (International Court of Justice (“ICJ”)) recognizes the principal sources relied upon to determine state obligations and rights under international law.¹¹⁰ The Court considers treaties (international conventions), international customary law, general principles of law, the judicial decisions of nation states, and the teachings of leading publicists of the various states.¹¹¹ Certainly, the use of treaties is the most organized and formal method of creating obligations and rights in the international community.¹¹² States are only bound to what they agree to and therefore, nations are generally not bound to treaties to which they are not parties.¹¹³

105. See Shelton, *supra* note 66, at 112-16 (discussing the merits and failings of both views).

106. See *id.* at 112-13.

107. *Id.* at 108-109.

108. See *id.* at 109.

109. See McClymonds, *supra* note 67, at 593.

110. See *id.*, citing Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060 (1945).

111. See Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945).

112. See McClymonds, *supra* note 67, at 594.

113. See *id.*

On the other end of the spectrum, customary international law is the least deliberative or organized form of creating international law.¹¹⁴ Customary international law is definable as the practices or customs of states, undertaken based on a sense of legal obligation.¹¹⁵ Therefore, customary law comprises of state practice or custom and *opinio juris* – the sense that the actions undertaken are law.¹¹⁶

The presence of customary law, or the comprising norms, can be tested through an analysis of how extensive and convincing the practice is.¹¹⁷ More weight is usually given to the practice of directly affected states.¹¹⁸ In this case, because of the global nature of environmental concerns, all states are affected. In ascertaining custom, consideration is given to duration, uniformity, and generality.¹¹⁹ Furthermore, the Court generally has not placed great emphasis on duration as a factor.¹²⁰ This is especially true with the advent of technology and non-governmental organizations, which have made “the requisite *opinio juris* become clear over shorter periods of time.”¹²¹

As to the uniformity requirement, complete uniformity is not required, however there must be substantial uniformity.¹²²

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.¹²³

Generality complements uniformity.¹²⁴ Although the universality requirement is not absolute, it must be determined whether or not there is value to

114. *See id.*

115. *See id.*

116. *See* IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 7 (5th ed. 1998).

117. *See id.*

118. R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 5 (1988).

119. *See* BROWNLIE, *supra* note 116, at 5-6 (5th ed. 1998).

120. *See id.* at 5.

121. McClymonds, *supra* note 67, at 595.

122. *See* Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18). The Court has previously stated that a practice does not need to be in absolute conformity to qualify as customary law. *See* Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).

123. Concerning Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. at 98.

124. *See* BROWNLIE, *supra* note 116, at 6.

the dissent from non-practicing states.¹²⁵ State practice can be ascertained from State legislation and court decisions and statements by official government representatives among other things.¹²⁶

As stated above, *opinio juris* refers to the recognition that the custom or practice is the law.¹²⁷ The Court in a case between Nicaragua and the United States stated that nations must act in a manner such that their behavior evidences the belief that the practice is obligatory under the law.¹²⁸ The subjective element of *opinio juris* is determined by evaluating the statements of states or by inference from state practice.¹²⁹ Although some commentators argue against the wisdom of doing so, *opinio juris* can be inferred from the language and existence of non-binding United Nations General Assembly resolutions.¹³⁰

Once a treaty is accepted by a significant number of states, it can become customary law or convey emerging customary international law.¹³¹ Even the Vienna Convention on the law of treaties allows for a treaty to become international customary law binding upon non-parties to the treaty.¹³² A treaty can be evidence of state practice and *opinio juris* in the absence of explicit customary international law.¹³³ In fact, the Court has looked to treaties several times in settling cases where practice and *opinio juris* could not be easily determined.¹³⁴ In determining whether a treaty is customary international law, the Court examines the number of states that were parties to a treaty.¹³⁵

After establishing the bases upon which states may be bound under international law, suffice it to say that the right to a healthy environment is not rec-

125. *See id.*

126. *See* Concerning Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. at 98.

127. *See* BROWNIE, *supra* note 116, at 7.

128. *See id.* at 9.

129. *See* McClymonds, *supra* note 67, at 595.

130. *See* Concerning Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. at 98.; THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 86-87 (1989).

131. *See* Gary L. Scott & Craig L. Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV. J. INT'L L. & POL'Y 71, 72 (1996); *North Sea Continental Shelf* (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 43-44 (Feb. 20).

132. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 694 (entered into force Jan. 27, 1980).

133. *See* Scott & Carr, *supra* note 131, at 82.

134. *See id.*

135. *See id.* at 85-86.

ognized in any multilateral convention that would bind nations of the world.¹³⁶ The right to a healthy environment has also not achieved acceptance in international customary law even though the right is arguably emerging as customary law.¹³⁷

The Stockholm Declaration remains the strongest international expression of what may be the right to a healthy environment.¹³⁸ One may argue that the Stockholm Declaration of the United Nations Conference on the Human Environment is a statement of customary law,¹³⁹ just as some treaties are evidence of customary international law.¹⁴⁰ It is doubtful that the Stockholm Declaration has attained the level of customary international law for various reasons. First, the Declaration, although having achieved generality through overwhelming state support, does not have uniformity due to the numerous reservations.¹⁴¹ Moreover, the Stockholm Declaration does not expressly list the right to a healthy environment but rather lists the right to “freedom, equality and adequate conditions of life.”¹⁴² Although states on regional levels have made other efforts to include an express right to a healthy environment in subsequent treaties and declarations,¹⁴³ it appears the international community is presently unwilling to grant the “right to a healthy environment unless it is couched in terms of other rights or entitlements.”¹⁴⁴ Hence, one cannot conclusively claim that the right to a healthy environment exists under international customary law.

136. See Lee, *supra* note 67, at 305.

137. See *id.*; see also McClymonds, *supra* note 67, at 596 (stating “[t]he fundamental right to a healthy environment, however, has not been expressly adopted by the international community”).

138. See McClymonds, *supra* note 67, at 596.; See generally Report of the United Nations Conference on the Human Environment: Principle 1, June 16, 1972, U.N. Doc. A/Conf. 48/14, reprinted in 11 I.L.M. 1416, 1417 (1972) [hereinafter Stockholm Declaration].

139. See *id.*

140. See Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 694.

141. See McClymonds, *supra* note 67, at 597.

142. Stockholm Declaration, *supra* note 138, at 1417.

143. See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Protocol of San Salvador 1989, art. 11, 28 I.L.M. 161, 165 [hereinafter Protocol of San Salvador]; African Charter on Human and Peoples’ Rights, June 1981, art. 24, 21 I.L.M. 58, 63 (1982). For a discussion of treaties outlining some form of the right to an environment see Shelton, *supra* note 66, at 125-29.

144. McClymonds, *supra* note 67, at 598. For further discussion on the Rio Declaration as an example of an attempt to include the right to a healthy environment, see *id.* at 597-98.

Interestingly enough, the right to a healthy environment has probably achieved regional acceptance in the African continent.¹⁴⁵ In addition, due to the fact that many states have included the right to environment in their constitutions,¹⁴⁶ general principles of law recognizing the right to a healthy environment may have emerged or be emerging. Unfortunately, the people of the Niger Delta cannot seek redress through the African Charter because it does not have an enforcement provision.¹⁴⁷

D. *Defining When a Deliberate Environmental Degradation Is a Violation of Human Rights*

Strong arguments exist to assert the lack of a right to a healthy environment as discussed in section III.C. Even if this right exists, it has not been firmly established and recognized as a human right. The present international law principles provide a basis for arguing that certain environmental violations are violations of human rights law, even if enforcement is not feasible. Not every violation of an environmental law will amount to a violation of human rights because the rules are not sufficient and no standard exists from which to base a judgment.¹⁴⁸

John Lee proposes that an environmental violation becomes significant enough to become a human rights violation when “as a result of a specific course of state action, a degraded environment occurs with either serious health consequences for a specific group of people or a disruption of a people’s way of life.”¹⁴⁹ In arriving at this definition, Lee accepts the view that a human rights violation does not occur just because the environmental conditions in a poor nation are comparatively appalling by western standards.¹⁵⁰ In so doing, he recognizes that cultural and/or economic factors have an effect on whether a right to a healthy environment may have a positive impact on the overall environment of a

145. See Lee, *supra* note 67, at 305. The African Charter on Human and Peoples’ Rights is arguably evidence of regional, customary international law on the right to a healthy environment. See African Charter on Human and Peoples’ Rights, June 1981, 21 I.L.M. 58, 59 (1982).

146. See Lee, *supra* note 67, at 289.

147. See African Charter on Human and Peoples Rights, *supra* note 145.

148. See Lee, *supra* note 67, at 287-88.

149. *Id.* at 285.

150. See *id.*

people.¹⁵¹ This definition, therefore, is workable and acceptable for now and I will make my arguments using this definition.

The situation in Nigeria differs from an overall unhealthy environment “in that [the Nigerian] government [and] [] or another actor, such as [the oil companies], have undertaken a specific course of action that has had a serious effect on the environment of a localized group of individuals.”¹⁵² In Nigeria the rampant and continuous pollution by TNCs has led to a devastation of the homeland of the indigenous people of the Niger Delta.¹⁵³ This devastation of the habitat, and the negative socio-economic impact,¹⁵⁴ has led to social unrest in the communities where oil is extracted.¹⁵⁵ The actions of the TNCs in Nigeria have led to a disruption of a people’s way of life serious health consequences for the people of the Niger Delta, and poverty, among other things. As such, these actions by the TNCs in Nigeria amount to human rights violations.

V. EXAMINING TRANSNATIONAL COMPANIES PARTICIPATION IN HUMAN RIGHTS ABUSES

Transnational companies have also “aided and abetted” in the killing of activists, abuse of the people in the region to prevent opposition, and other forms of human rights abuses. According to human rights groups, TNCs may, by turning a blind eye, allow human rights abuses to go unchecked.¹⁵⁶ Most oil companies deny any knowledge of the abuses undertaken by security forces on their behalf.¹⁵⁷

Transnational companies have a legitimate concern for security of their personnel and property because of the conflicts in the nations where they operate. Oil companies in Nigeria have endured theft from pipelines and violence directed at them from individuals in the communities where they operate.¹⁵⁸ The repeated theft of crude oil from facilities has led to huge losses and continues to take

151. *See id.* at 285-86.

152. *Id.* at 286.

153. *See Eaton, supra* note 11, at 268.

154. *See id.* (citing John Vidal, *Born of Oil, Buried in Oil*, *GUARDIAN*, Jan. 4, 1995, at T2).

155. *See, e.g., id.* at 269-70 (providing examples of social unrest in Ogoniland).

156. Paringaux, *supra* note 1, available at <http://www.monediplo.com/2000/12/08oil>

157. *See id.*, available at <http://www.monediplo.com/2000/12/08oil>

158. *See Oil: Nigeria’s Blessing and Curse, supra* note 12, at http://news.bbc.co.uk/hi/english/world/africa/newsid_782000/782925.stm

place.¹⁵⁹ Local youths have repeatedly sabotaged oil plants even during the present democratic government.¹⁶⁰ For example, in November 1998, youths in the Niger Delta took over fifteen flow stations after declaring a people's war on the oil companies.¹⁶¹ The oil companies' staff are kidnapped by gangs in the Delta, sometimes to bring attention to local demands and other times for high ransoms.¹⁶² On September 29, 2001, the British Broadcasting Corporation ("BBC") reported that Shell claimed it had been deprived of 40,000 barrels per day of production because one of its flow stations had been severely damaged by armed youth.¹⁶³ Shell is actually suing two villages for damages to equipment and seeking twenty-five million dollars in damages and more than eight hundred thousand dollars per day lost in production since the attacks in September 2001.¹⁶⁴ And although the criminal activity directed toward oil company staff and property ought to be punished, TNCs must ensure that the protection they seek does not result in abuses that are egregious and inconsistent with the present human rights regime.¹⁶⁵

The most prominent of the Niger Delta communities is the Ogoni people. The world's attention was drawn to their plight and that of other communities in the Niger Delta region when a human rights and environmental activist, Ken Saro-Wiwa, was executed by the Nigeria military government for his opposition to the practices of TNCs in his homeland.¹⁶⁶ This crisis can be traced to a protest by

159. See *Update on Human Rights in the Niger Delta*, *supra* note 19, available at <http://www.hrw.org/background/africa/nigeriabkg1214.htm>

160. See *Oil: Nigeria's Blessing and Curse*, *supra* note 12, at http://news.bbc.co.uk/hi/english/world/africa/newsid_782000/782925.stm; *Nigeriaian Shell Facility Destroyed*, BBC NEWS, Sept. 29, 2001, at http://news.bbc.co.uk/hi/english/business/newsid_1570000/1570037.stm (last visited Apr. 9, 2002).

161. See Andersson, *supra* note 24, at http://news.bbc.co.uk/hi/english/world/africa/newsid_209000/209441.stm

162. See *Update on Human Rights Violations in the Niger Delta*, *supra* note 19, available at <http://www.hrw.org/background/africa/nigeriabkg1214.htm>

163. See *Nigerian Shell Facility Destroyed*, *supra* note 160, at http://news.bbc.co.uk/hi/english/business/newsid_1570000/1570037.stm

164. See *id.*, at http://news.bbc.co.uk/hi/english/business/newsid_1570000/1570037.stm; Sola Odunfa, *Shell Sues Nigerian Villages*, BBC, Oct. 22, 2001, at <http://www.globalpolicy.org/security/natres/oil/nigeria/2001/1022shell.htm> (last visited Apr. 13, 2002).

165. See Paringaux, *supra* note 1, available at <http://www.mondediplo.com/2000/12/08oil>

166. See *id.*, available at <http://www.mondediplo.com/2000/12/08oil>; Eaton, *supra* note 11, at 270-71.

three hundred thousand Ogoni, led by Ken Saro-Wiwa, who gathered to protest the degradation of their environment on January 4, 1993.¹⁶⁷ The Movement for the Survival of the Ogoni People (“MOSOP”), an activist group created by Ken Saro-Wiwa in 1990, organized the demonstrations.¹⁶⁸ The Ogoni protestors demanded that Shell utilize better oil pollution prevention methods, conduct environmental and social impact studies regarding effects of the pollution, and pay the Ogoni royalties for the oil taken from their land.¹⁶⁹ Protests continued, some of which were violent, leading Shell to suspend its operations in Ogoniland in mid-1993 while continuing to operate in other parts of the nation.¹⁷⁰ When Shell suspended its operations in Ogoni land in 1993, it said its staff was intimidated and attacked.¹⁷¹

In response to the Ogoni protests, Shell called on the Nigerian military dictatorship for assistance.¹⁷² The military government responded to Shell’s distress call with extrajudicial executions, rapes, looting, beatings, shooting, and arrests and detentions completely lacking in due process protections.¹⁷³ Similar military operations were conducted throughout the region to dispel protests by indigenous people.¹⁷⁴ In May 1994, a mob murdered four Ogoni leaders.¹⁷⁵ The government, in its zeal to silence the Ogoni people, arrested Ken Saro-Wiwa and eight other activists and prosecuted them for the murder of the four pro-government Ogoni leaders.¹⁷⁶ This trial was watched in horror by the internation-

167. See Eaton, *supra* note 11, at 269.

168. See *Update on Human Rights Violations in the Niger Delta*, *supra* note 19, available at <http://www.hrw.org/backgrounder/africa/nigeriabkg1214.htm>

169. See Eaton, *supra* note 11, at 269.

170. See *id.* at 269-70; see also Paringaux, *supra* note 1, available at <http://www.monediplo.com/2000/12/08oil>

171. See Phillips, *supra* note 18, http://news.bbc.co.uk/hi/english/world/africa/newsid_543000/543544.stm

172. See Eaton, *supra* note 11, at 270.

173. See *id.* (quoting 7 HUMAN RIGHTS WATCH/AFRICA, NIGERIA: THE Ogoni CRISIS: A CASE-STUDY OF MILITARY REPRESSION IN SOUTHEASTERN NIGERIA 2 (1995)). “To get [production] started again, General Sani Abacha’s government unleashed a murderous repression.” Paringaux, *supra* note 1, available at <http://www.monediplo.com/2000/12/08oil>

174. See Eaton, *supra* note 11, at 270 (citing 7 HUMAN RIGHTS WATCH/AFRICA, NIGERIA: THE Ogoni CRISIS: A CASE-STUDY OF MILITARY REPRESSION IN SOUTHEASTERN NIGERIA 2 (1995)).

175. See *id.*

176. See *id.* (citing *Ogoni Leaders’ Murder Trial Puts Nigeria in the Dock*, AGENCE FRANCE PRESSE, Jan. 15, 1995).

al community.¹⁷⁷ It was condemned widely but inevitably led to the conviction and the execution of the nine activists *two* days after the convictions.¹⁷⁸

The condemnation by the international community to this horrendous action was resounding. Nations like the United States and Great Britain removed their ambassadors from Nigeria, the World Bank cancelled a one hundred million dollar loan to Nigeria intended for natural gas liquefaction,¹⁷⁹ and Nigeria was suspended from the Commonwealth of Nations.¹⁸⁰ Although Shell had called on the military dictatorship to help it deal with the protests of the Ogoni people, Shell refused to use its influence to save the lives of the activists condemned to death.¹⁸¹ Shell claimed that as a commercial entity, it was not entitled to intervene in the “legal processes of a sovereign state.”¹⁸² Needless to say, activists accused Shell of condoning human rights violations and the execution of Ken Saro-Wiwa by the military government of Sani Abatcha.¹⁸³ Today, MOSOP still holds Shell partially responsible for the execution of Ken Saro-Wiwa and remains Shell’s strongest critic in the Niger Delta.¹⁸⁴

On December 11, 1998, the Ijaw youths in the Niger Delta adopted the “Kaiama Declaration.”¹⁸⁵ The Declaration required that all oil companies withdraw from Ijaw territory by January 1, 1999.¹⁸⁶ The Declaration also stated that any oil company utilizing the Nigeria security forces would be deemed an “enemy of the Nigeria people.”¹⁸⁷ This opposition by community groups like the Ijaw

177. *Id.*

178. *See id.* at 270-71 (citing Howard W. French, *Nigeria Executes Critics of Regime; Nations Protest*, N.Y. TIMES, Nov. 11, 1995, at 1).

179. *See id.* at 271. (citing Howard W. French, *Nigeria Executes Critics of Regime; Nations Protest*, N.Y. TIMES, Nov. 11, 1995, at 1).

180. *See id.* (citing *Commonwealth Suspends Nigeria over Executions*, N.Y. TIMES, Nov. 12, 1995, at 18).

181. *See id.* (quoting Paul Lewis, *Rights Groups Say Shell Oil Shares Blame*, N.Y. TIMES, Nov. 11, 1995, at 6).

182. *Id.* (quoting Paul Lewis, *Rights Groups Say Shell Oil Shares Blame*, N.Y. TIMES, Nov. 11, 1995, at 6).

183. *See* Simpson, *supra* note 23, at http://news.bbc.co.uk/hi/english/world/africa/newsid_1457000/1457001.stm

184. *See id.*, at http://news.bbc.co.uk/hi/english/world/africa/newsid_1457000/1457001.stm

185. *See* Press Release, Human Rights Watch, State of Emergency Declared in the Niger Delta (Dec. 31, 1998), available at <http://www.org/hrw/press98/dec/niger1231.htm> (last visited Nov. 14, 2001).

186. *See id.*, available at <http://www.org/hrw/press98/dec/niger1231.htm>

189. *Id.*, available at <http://www.org/hrw/press98/dec/niger1231.htm>

Youth has led to continued repression and abuses by the Nigeria Security forces on behalf of the oil companies.¹⁸⁸

One would have hoped that with the advent of a democratically elected president the abuses against those who protested the misuse of their land would end in the Delta. The introduction of civilian rule in Nigeria since 1999 has seen a change in the location and type of abuses by the government, even though there has not been an eradication of human rights violations in the Delta.¹⁸⁹ The President's government has also participated in the atrocities against those in the Niger Delta.¹⁹⁰ When twelve policemen were murdered in the Niger Delta during November 1999, the government accused the youths there of the crime and sent in the army.¹⁹¹ The town of Odi was sealed off and the Nigerian army moved in and destroyed the town leaving it virtually deserted.¹⁹² The troops demolished every building in the town except "the bank, the Anglican church and the health clinic."¹⁹³ It is estimated that as many as two thousand people were killed during this incident.¹⁹⁴

This was not an isolated incident. The Nigerian government continued to deploy indiscriminate lethal force in response to protests against oil production in the Niger Delta.¹⁹⁵ Security forces deployed in Ogoni land by the government

188. See *id.* (stating that the shooting of demonstrators was "part of a pattern of abuses against those protesting the activities of the oil companies" in the Niger Delta), available at <http://www.org/hrw/press98/dec/niger1231.htm>.

189. See *Update on Human Rights Violations in the Niger Delta*, *supra* note 19, available at <http://www.hrw.org/backgroundunder/africa/nigeriabkg1214.htm>; see also, *Oil: Nigeria's Blessing and Curse*, *supra* note 12 (stating that "[t]he advent of democracy has done little to ease tension in the [Niger] Delta), at http://news.bbc.co.uk/hi/english/world/africa/newsid_782000/782925.stm.

190. *Update on Human Rights Violations in the Niger Delta*, *supra* note 19, available at <http://www.hrw.org/backgroundunder/africa/nigeriabkg1214.htm> (commenting on how the president threatened to declare a state of emergency in a letter to the governor if the governor did not apprehend those responsible for the murders).

191. See Phillips, *supra* note 18, at http://news.bbc.co.uk/hi/english/world/africa/newsid_543000/543544.stm; *Oil: Nigeria's Blessing and Curse*, *supra* note 12, at http://news.bbc.co.uk/hi/english/world/africa/newsid_782000/782925.stm

192. See Phillips, *supra* note 18, at http://news.bbc.co.uk/hi/english/world/africa/newsid_543000/543544.stm

193. *Update on Human Rights Violations in the Niger Delta*, *supra* note 19, available at <http://www.hrw.org/backgroundunder/africa/nigeriabkg1214.htm>

194. See *id.*, available at <http://www.hrw.org/backgroundunder/africa/nigeriabkg1214.htm>

195. See *id.*, available at <http://www.hrw.org/backgroundunder/africa/nigeriabkg1214.htm>

continued to “carry out summary executions, assaults and other abuses on an ongoing basis” against those who still oppose the practices of the TNCs.¹⁹⁶

VI. PRESENT AVENUES OF ACCOUNTABILITY UNDER INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL ENVIRONMENTAL LAW

Numerous mechanisms exist for individuals and communities to seek and obtain redress through the Nigerian judicial system.¹⁹⁷ However, I do not discuss these mechanisms in this note because they have failed to protect the rights and needs of the people of the Niger Delta and hence, I look to international law.

A. *International Environmental Law*

The two main instruments governing international environmental law are the Stockholm Declaration and the Rio Declaration. As previously discussed, the Stockholm Declaration does not create a legally enforceable right to a healthy environment.¹⁹⁸ In fact, the 1992 Rio Declaration and the 1972 Stockholm Declaration “were not intended to create rights and obligations.”¹⁹⁹ Both Declarations are not binding treaties and have arguably not attained the power of customary law.²⁰⁰ In addition, neither Declaration provides an enforcement mechanism for individuals in the Niger Delta to utilize in seeking redress. Finally, both Declarations enunciate steps that states must take with respect to their responsibility toward other states.²⁰¹

Even if the Rio Declaration were customary law, its provisions may not help the people of the Niger Delta. The Rio Declaration has a more human cen-

196. *Id.*, available at <http://www.hrw.org/background/africa/nigeriabkg1214.htm> (detailing more incidents where the government has used security forces or the military to harass and abuse people in communities that oppose oil companies).

197. For a discussion on Nigerian domestic law concerning oil pollution, see Ekpu, *supra* note 2, at 79-94.

198. See generally Stockholm Declaration, *supra* note 138, at 1417.

199. SANDS, *supra* note 64, at 105.

200. See Stockholm Declaration, *supra* note 138; United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 14, 1992, UNCED Doc. A/CONF. 151/Rev. 1, reprinted in 31 I.L.M. 874 (1992). See discussion in Part IV.C.

201. See Stockholm Declaration, *supra* note 138, at 1418.

tered focus than the Stockholm Declaration, but it falls short of recognizing a right to a healthy environment.²⁰² A careful reading of the Rio Declaration could mean that each nation state has the right to follow its own environmental policies.²⁰³ This provision allows the Nigerian government too much flexibility in maintaining what should be global rights. The underdeveloped nations in the international community fought for Principle 3, which states the right to development must be fulfilled in order to meet the environmental needs of the present and the future.²⁰⁴ Nations like Nigeria can then treat development as a precondition for protecting the environment. More specifically, the country can continue to allow unacceptable exploration and exploitative practices in its quest to generate revenue and become a developing nation. Finally, Principle 7 of the Rio Declaration recognizes an approach where countries have differentiated responsibility such as allowing developed nations to utilize different standards and priorities.²⁰⁵ Again, this provision allows the Nigeria government too much flexibility.

On May 13, 1995, the International Convention on Oil Pollution Preparedness, Response, and Cooperation ("OPRC") went into effect.²⁰⁶ Nigeria is one of the twenty-one nations that accepted the OPRC convention.²⁰⁷ The treaty implores signatory nations to develop and maintain the "capability to deal with oil pollution emergencies."²⁰⁸ The convention was adopted in a conference convened by the International Maritime Organization, which defines polluting oil as petroleum in any form.²⁰⁹ Pursuant to the OPRC, Nigeria must enact a system to

202. See United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 14, 1992, UNCED Doc. A/CONF. 151/Rev. 1, *reprinted in* 31 I.L.M. 874. See SANDS, *supra* note 64, at 50 for a more complete discussion on the shift in focus from the Stockholm Declaration to the Rio Declaration.

203. See United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, Principle 2, June 14, 1992, UNCED Doc. A/CONF. 151/Rev. 1, *reprinted in* 31 I.L.M. 874, 876 (1992).

204. See SANDS, *supra* note 64, at 17.

205. See United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, Principle 7, UNCED Doc. A/CONF. 151/Rev. 1, June 13, 1992 *reprinted in* 31 I.L.M. 874, 877 (1992).

206. See *Oil Spills: International Treaty on Oil Pollution Response, Preparedness Comes into Effect*, Int'l Env't Daily (BNA), at 6/2/95IEDd5 (June 2, 1995).

207. See *id.*

208. *Id.*

209. See *id.*

efficiently deal with oil pollution incidents.²¹⁰ However, this treaty appears to deal with maritime pollution as opposed to inland pollution.

B. *International Human Rights Law*

Section IV.B. already articulates how the environment is related to numerous human rights that are already recognized. Therefore, the people of the Niger Delta ought to be able to assert these human rights for their protection. It would appear at first glance that the most likely avenue of redress for the people of the Niger Delta would be the African Charter on Human and Peoples' rights. The Charter places emphasis on peoples' rights and not individual rights, which is characteristic of traditional African law.²¹¹ This emphasis does not subordinate individual rights but rather emphasizes that the individual rights are satisfied through the attainment of people's rights.²¹² "[H]uman and solidarity rights are understood as complementary categories."²¹³ However, although the Charter is progressive in granting the right to a "satisfactory environment," it lacks effective enforcement mechanisms.²¹⁴ Finally, the Charter fails to enact any legal obligations upon the member parties.²¹⁵

The next step would be to look at other International Instruments that were signed by Nigeria guaranteeing human rights which are directly affected by environmental degradation such as the right to life, right to development, right to adequate standards of living, and the right to dignity in life. In Europe, for example, individuals have successfully used human rights law to enforce environmental protections.²¹⁶ After the African Charter on Human and People's Rights,

210. *See id.*

211. *See* Iveta Hodkova, *Is There a Right to a Healthy Environment in the International Legal Order?* 7 CONN. J. INT'L L. 65, 75-76 (1991).

212. *See id.*

213. *Id.* at 76.

214. *See id.* (pointing out that the Charter lacks obligations which correlate with the right to a satisfactory environment).

215. *See id.*; *see generally* African Charter, *supra* note 143, at 59 (illustrating that a duty on member parties to enforce the right to a satisfactory environment has not been imposed).

216. *See, e.g.,* López Ostra v. Spain (1994), *available at* <http://hudoc.echr.coe.int> (under Access Hudoc link) (successfully challenging the leather industry in the claimant's home town on, among other grounds, an infringement upon the claimant's liberty and right to freely choose where the claimant wants to live); Guerra and Others v. Italy (1998), *available at* <http://hudoc.echr.coe.int> (under Access Hudoc link) (determining citizens have a right to be free from exposure to severe environmental pollution).

the instruments that provide the above listed rights are the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

The International Covenant on Civil and Political Rights provides for the creation of a Human Rights Committee.²¹⁷ However, this enforcement scheme, outlined in articles 41 to 47 refers to states bringing actions against other states.²¹⁸ The Optional Protocol to the International Covenant on Civil and Political Rights, on the other hand, provides a mechanism wherein individual victims of human rights violations can communicate their issues and concerns to the Human Rights Committee.²¹⁹ Further, the Optional Protocol to the International Covenant on Civil and Political Rights recognizes the competence of the Committee to consider complaints from individual citizens from state parties to the treaty.²²⁰ Individuals must exhaust all domestic remedies before the committee may hear their complaints.²²¹ Unfortunately, Nigeria is not a party to the Optional Protocol even though it is a party to the International Covenant on Civil and Political Rights. The International Covenant on Economic, Social and Cultural Rights, which Nigeria is also a party to, has no enforcement scheme or committee that individuals can seek redress from. In sum, the people of the Niger Delta presently have no viable avenue for holding their government and the TNCs extracting oil in the Delta accountable.

217. See International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *reprinted in* 6 I.L.M. 368 (entered into force Mar. 23, 1976).

218. See International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *reprinted in* 6 I.L.M. 368, 378-81 (entered into force Mar. 23, 1976). See also DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 509 (1994) (providing a detailed history of the origins of the ICCPR)..

219. See MCGOLDRICK, *supra* note 218, at 9-10.

220. See Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *reprinted in* 6 I.L.M. 383 (entered into force Mar. 23, 1976) [hereinafter *Optional Protocol*]. See also MCGOLDRICK, *supra* note 218, at 525.

221. See *Optional Protocol*, *supra* note 220. See also MCGOLDRICK, *supra* note 218, at 525.

VII. PROPOSALS FOR HOLDING TRANSNATIONAL COMPANIES ACCOUNTABLE FOR THEIR ABUSES.

A. *Criminal Sanctions*

Typically when an individual sues for damages, the amount of damages is based on what can be proven as lost. Shell is suing two Nigerian villages for eight hundred thousand dollars per day in lost production.²²² Arguably then, Shell makes at least eight hundred thousand dollars a day in profits that it is presently losing from one of its oil stations in the Delta.²²³ Once environmental protections are placed within a human rights framework, criminal sanctions should be added to the environmental law remedial scheme. TNCs should be made to clean up their pollution and pay sanctions when they pollute the environment and create conditions that are incompatible with a dignified life. The sanctions should be proportionate to the amount of profits that the corporation derives from its extraction of minerals or natural resources. The belief is that TNCs engage in environmentally destructive processes to maximize profit margins. We can end that with an effective monetary sanction remedial scheme.

B. *Global Operating Standards for All TNCs*

Many multinational corporations that exploit natural resources in the developing world consistently fail to abide by international environmental law, or utilize safeguards used by the same companies in western nations.²²⁴ It is documented that TNCs use “less expensive and sloppy production methods with obvious deleterious effects *solely to maximize profits*” when a strict and effective regulatory scheme is absent.²²⁵ These companies have caused “immeasurable environmental damage in developing countries.”²²⁶ Oil exploration and produc-

222. See Odufa, *supra* note 164, at <http://www.globalpolicy.org/security/natres/oil/nigeria/2001/1022shell.htm>.

223. See *id.*, at <http://www.globalpolicy.org/security/natres/oil/nigeria/2001/1022shell.htm>

224. For instance, in 1997, Pensions Investment Research Consultants (“PIRC”) chastised Shell for its practices in Nigeria “as a clear case of the company using lower operating standards in a developing country.” *Environmental Auditing*, *supra* note 57, at D3.

225. Ekpu, *supra* note 2, at 58 (emphasis added).

226. *Oil Report Criticizes Environment Record of Major Oil Firms in Developing Na-*

tion is a global industry with the same group of TNCs dominating the industry.²²⁷ As noted before, companies like Shell fail to use the same standards in underdeveloped nations like Nigeria that they use elsewhere. This is unacceptable. Oil companies should be expected to utilize the same methods and technology globally and, thereby, attain uniform protection from pollution.²²⁸ It is clear that if TNCs use safer operating standards elsewhere, then these companies have the technology required to minimize the deleterious impact of oil exploration.²²⁹ Hence, there is no valid reason for not requiring these same TNCs to utilize the same standards globally. Maximizing profits is not a valid reason for destroying a people's way of life, diminishing their sources and access to subsistence, or for creating environmental conditions that lead to serious health consequences.

C. *Application of Theories of Common Law Aiding and Abetting to Human Rights Violations*

Under the common law, an individual can be culpable for a crime, even though that person did not carry out all elements of the crime.²³⁰ Anyone who aids, encourages or commands an action can be held responsible for that action as an accomplice.²³¹ As such, the government of Nigeria, as the party responsible for the killing and maiming of the people, is responsible for committing human rights abuses against her people. The introduction of accomplice liability into international human rights and criminal law will extend culpability to TNCs in certain situations.

Although this note discusses the role of oil companies in the Niger Delta, the Nigerian government's responsibility for the environmental destruction and abuse of the people of the Niger Delta remains. A more effective human rights regime must be created to hold nations accountable for atrocities such as those committed by the Nigerian military. However, because this note focuses on corporate responsibility, TNCs should not get away with having governments do

tions, [Nov. 1999] Int'l Env't Daily (BNA), at D3.

227. See Ekpu, *supra* note 2, at 57.

228. See *id.*

229. See *id.* at 57-58.

230. See, e.g., 1 AM. JUR. 2D *Abduction and Kidnapping* § 7 (1994); 5 AM. JUR. 2D *Arson and Related Offenses* § 22 (1995); 6 AM. JUR. 2D *Assault and Battery* § 12 (1999).

231. See, e.g., 1 AM. JUR. 2D *Abduction and Kidnapping* § 7 (1994); 5 AM. JUR. 2D *Arson and Related Offenses* § 22 (1995); 6 AM. JUR. 2D *Assault and Battery* § 12 (1999).

much of their dirty work. The TNCs in Nigeria look to the government for the provision of security forces and aid when indigenous people protest their actions. When the security forces hired by the TNCs commit atrocities, the TNCs should be held directly liable as primaries. However, the atrocities are not always committed by security forces hired by the TNCs. In situations where the TNCs encourage or ask for military repression to solve their problems, they should be held as accomplices to the criminal acts and human rights abuses that take place on their behalf. The effectiveness of such a solution is dependent on a remedial scheme that not only condemns violations but is effective.

VIII. CONCLUSION

All my proposed solutions are based on the same premises — human life is invaluable and all people are equal and have the same rights in our global community. If the value of a human life in the Western world is the same as one in Nigeria, then it is incumbent upon the international community to hold TNCs to the same standards worldwide. If human life is invaluable then governments should not degrade that life without due process for any reason.

The present state of international law allows transnational companies to act recklessly with impunity. In order to attain the goals of the New World Order, the international community must move away from state-centered international law and embrace individual rights-centered international law more completely. The emphasis should be on the individual and not the nation. At least with individual rights centered environmental law, individuals can seek redress for the wrongs done to them, when their own governments stand unwilling.

The fact that the culprit is a company as opposed to a nation-state should not change the consequences of the illegal action. The introduction of criminal liability for actions taken by TNCs would make it clear that companies can no longer justify their illegal actions by their profit margins. The rights protected by the Declaration of Human Rights have no meaning if they are not enforced against all culprits — states, companies and private individuals alike.

Working from the premise that human life is invaluable will also shift international environmental law from allowing countries to have flexibility in standards and priorities when human lives are affected. The gross violations of environmental rights are a violation of society's human rights when human beings are caused to live in abject poverty in degraded conditions. Nations should not be allowed to get away with allowing such circumstances to exist.

A right without a remedy is merely a suggestion. If the people of the Niger Delta, and all other indigenous people in the world, indeed have the basic human rights that the international community claims they have, then we, as an international community must ensure that effective remedies exist. The international community must ensure that the rights guaranteed in international instruments are not merely a suggestion.