A Human Right to Commons- and Rights-based Ecological Governance:
the key to a healthy and clean environment?

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1. Introduction

How can we construct a right to a healthy and clean environment that is enforceable in today's complex international legal order? What legal construct would be visionary and ambitious enough to meet the urgent need for environmental justice and protection and at the same time be enforceable in court rather than fall into the category of 'soft law"?

In this paper, I will argue that the introduction of a **human right to commons- and rights-based ecological governance** as proposed by professor Burns Weston and David Bollier could provide the answer to the big challenge of safeguarding a healthy and clean environment for current and future generations.
What are commons? Commons are resources that are governed by a community (composed of so-called "commoners") according to a set of social protocols. The commons relevant for this paper are ecological commons, such as forests, pastures, common lands, drinking water, lakes, seas, oceans and the planetary atmosphere.

I will argue that introducing procedural environmental rights to establish, maintain, participate in-, be informed about and seek redress for ecological commons is a practical way to construct an enforceable right to a healthy and clean environment. It's enforceable, because procedural environmental rights raise few of the problems of interpretation and adjudication common to substantial or "autonomous" environmental rights (such as the right to a clean and healthy environment itself). It's practical, because it falls back on the social practice of commoning prevalent throughout human history; a practice moreover that is taking off on a massive scale the last couple of decades.

Before I get to the details of Weston and Bollier's proposal for a human right to commons- and rights-based ecological governance in paragraph 5, I will first take a short look at the environmental challenges we are facing today (paragraph 2), the current state of affairs of the right to a clean and healthy environment around the world (paragraph 3) and the emerging necessity of an "expansive" human right to the environment that is resilient and enforceable (paragraph 4).

2. Earth under Threat

On 30 January 2014, the Intergovernmental Panel on Climate Change (IPCC) published its full report *Climate Change 2013: the Physical Science Base.* It concluded that the warming of the climate system is unequivocal, the human influence on the climate system is clear and that limiting climate change will require substantial and sustained reductions of greenhouse gas emissions.1 This most recent scientific evidence for anthropogenic climate change, coming from the world's leading experts in this field, places an urgent call upon political leaders to take responsibility and immediate action.
But climate change is not the only factor threatening the health of the Earth. Massive damage and destruction of ecosystems - "Ecocide", as Polly Higgins calls it2 - are the externalized 'costs' produced by governments and multinational corporations in their search for fossil fuels, scarce resources and profit. The Deepwater Horizon Oil-spill, the Niger Delta Oil-spill and the illegal burning of the Tripa peat forest in Borneo are examples of Ecocides happening around the planet.3 If politicians and CEO's continue with this kind of 'business-as-usual', they might be conducting a dangerous and irreversible experiment with the only Earth humans have.

But the awareness of the need to change "business-as-usual" is growing and States and big corporations are taking steps towards more sustainable policies and business models.
It is unrealistic however to think that the enormous environmental challenges we are facing can be successfully met without effective legal action. In the words of Weston and Bollier:

"*Free market economics (in both its classical and neoliberal guises) has given rise to a legal apparatus and political system that elevates territorial sovereignty and material accumulation over shared stewardship of the natural environment.4 (...) The monetary system has trouble representing notions of value that are subtle, qualitative, long-term, and complicated - precisely the attributes of natural systems. It has trouble taking account of qualitatively different types of value on their own terms, most notably the carrying capacity of natural systems and their inherent usage limits.[5] (...) In the pantheon of economics and public policy, then, nonmarket value tends to recede into the shadows. Realms such as ecosystems, community and culture are essentially 'res nullius' (ownerless property, FW) from the value orientation of markets because they are not encased in property rights and traded in the market.6"*

Because at this moment there is still a lack of binding legal principles and procedures designed to prevent environmental harm before the fact, to deal with nature in a holistic way or to encourage creative environmental stewardship, economic and market considerations usually triumph over the environment in legal decisions that have to balance short-term economic benefits with vaguely understood or scientifically uncertain long-term consequences.7 In the absence of a justiciable right to environment, other constitutionally protected rights, such as property rights, are often given automatic priority

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1 View the report here: http://www.ipcc.ch/report/ar5/wg1/#.UvtFG87WU-U.
2 Higgins, P., *Eradicating Ecocide: Exposing the corporate and political practices destroying the planet and proposing the laws needed to eradicate ecocide,* London: Shepheard-Walwyn 2010, p. 62-63.
3 For a more comprehensive list of Ecocides, visit http://www.endecocide.eu/examples-of-ecocide/?lang=en
4 Weston, B.H. and Bollier, D., *Green Governance. Ecological Survival, Human Rights and the Law of the Commons*, Cambridge: Cambridge University Press 2013, p. xix.
5 Ibidem, p. 9.
6 Ibidem, p 11.
7 Ibidem, p. 27.

instead of being balanced against environmental and future concerns, such as conservation of habitats or clean air, water and soil.[8]

To change (unsustainable) business-as-usual and to start recalibrating the laws of humans with the laws of nature[9], we will need to develop and codify a human right to a healthy and clean environment for current and future generations that is enforceable and resilient.

3. Human right to a safe and healthy environment: current state of affairs

Ever since the 1972 Stockholm United Nations Conference on the Human Environment, thousands of international environmental soft law instruments have been developed and dozens of international, regional and national court decisions have been issued that refer to a human right to the environment. More than 75 constitutions in the world explicitly recognize a 'right to environment' for individuals, groups, or communities. 60 Constitutions affirm that individuals have a 'duty' to protect the environment, of which 27 constitutions explicitly recognize this duty as related to a 'right to environment'. Additionally, 22 constitutions recognize rights or duties of environmental protection towards future generations of which 10 constitutions explicitly link such rights or duties to a constitutional 'right to environment.[10]

The human right to environment is today officially recognized juridically in three ways:[11]

1) as an **entitlement derived from other recognized rights**, centring primarily on the substantive rights to life, health and respect for private and family life, but embracing occasionally other rights as well - e.g., habitat, property, livelihood, culture, dignity, equality or non-discrimination and sleep;
2) as an **entitlement autonomous to itself,** dependent on no more than its own recognition;
3) as a cluster of procedural entitlements commonly referred to as '**procedural environmental rights**' (e.g., the right to environmental information, decisional participation and administrative and judicial recourse).[12]

A juridically recognized right to environment may be said to exist officially in Africa, Asia, Europe, and Latin America based on regional treaty or national constitutional authority (or both), in the following shapes:

- in *Africa* (i.e., sub Saharan Africa), in its autonomous form through a regional treaty

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8 Van de Venis, J., *Ombudsperson Future Generations in the Netherlands Legal Background Paper,* presented at the "Global Conference on Implementing Intergenerational Equity", organized by the United Nations Environmental Program (UNEP) on 4 & 5 July 2013 in Geneva, Swiss, p. 26.

9 Weston, B. H. and Bach, T., *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights and Intergenerational Justice*, The University of Iowa, Vermont Law School, 2009 http://www.vermontlaw.edu/Documents/CLI%20Policy%20Paper/CLI_Policy_Paper.pdf

10 NJCM stakeholder input for the 2011 OHCHR study '*Human Rights and Environment*', ANNEX II, List of constitutional provisions on environmental rights and duties (integral part of the 'stakeholder input' submitted earlier by the NJCM to the OHCHR, on 30 June 2011,available from: http://www.njcm.nl/site/english/english_reports), download via <www.RightToEnvironment.org> under "News".

11 For a short overview of the explicit and implicit recognition of the human right to a healthy environment, see
Boyd, D. R., "The Implicit Constitutional Right to Live in a Healthy Environment", in: *Review of European Community & International Environmental Law*, 20 (2) 2011, pp. 171-179.

12 Weston, B.H. and Bollier, D. 2013, p. 33-34.

backed by a treaty commission decision (invoking also the derivative rights to life and health), and in its derivative form13 (mainly the right to life) as pronounced in a few national judicial decisions interpreting constitutional mandates;14
- in *Asia* (i.e., South Asia, mainly India), in both its autonomous and derivative forms, via the enforcement by national courts largely of express constitutional authority though to a degree of growing extraterritorial influence sufficient to suggest the emergence of at least a regional “general principle” voicing the right to environment;15
- in *Europe* in three ways:
(1) in its derivative form, mainly via the European Court of Human Rights' interpretative application of the 1950 European Convention on Human Rights and Fundamental Freedoms16, (2) in its autonomous form, principally in Eastern Europe according to national constitutional mandates, and (3) in procedural terms throughout Europe and extending into Central Asia by virtue of the Aarhus Convention and national constitutional and statutory law;17
- in *Latin America*, as in Africa, in its autonomous form courtesy of a regional treaty backed by treaty commission decisions so far limited to the rights of indigenous peoples, except for one recent such decision that implicitly recognizes an autonomous right to environment for all.18

A large part of national and regional support for the right to environment thus comes from the world's developing countries in Latin America, sub-Saharan Africa and South Asia (especially India) and Eastern European countries formerly belonging to the Soviet Union and Soviet bloc. The wish to erect a protective shield against ecologically exploitative business enterprise as experienced in the past (not least at the hands of foreign corporations, e.g. in Ecuador's Oriente, India's Bhopal and Nigeria's Ogoniland) seems to be an important rationale for the legal support of the right to environment in developing countries.19 The demonstratively embrace of 'environmental democracy' in Eastern European constitutions on the other hand could be (partly) motivated by their wish to enhance their prospective membership of the European Union.20

On the global plane, no binding treaty provides for a human right to environment explicitly in either its autonomous or derivative form; two treaties recognize its autonomous existence during peacetime and three treaties during wartime, but only implicitly and largely in passing.21 Until now only one global-level court decision (Gabcikovo-Nagymaros

13 Meaning, the right to environment is derived from other human rights, such as the right to life or the right to family life and privacy.
14 Weston, B.H. and Bollier, D. 2013, p. 38.
15 Ibidem
16 The jurisprudence of the European Court of Human Rights can be summarized as follows: Party States to the ECHR have the obligation to take (preventative) measures in the case of (the threat of) a violation of the right to life (article 2 ECHR) and the right to family life and privacy (article 8 ECHR) due to environmental pollution.
Lopez Ostra v. Spain, Guerra v. Italy and Bacila v. Italy.
17 Weston, B.H. and Bollier, D. 2013, p. 38.
18 Case of the Saramaka People v. Suriname, Inter-American Court of Human Rights, Ser. C, No. 172 (Nov. 28, 2007).
19 Weston, B.H. and Bollier, D. 2013, p. 37
20 Ibidem, p. 38
21 For peacetime expression, see: Convention on the Elimination of All Forms of Discrimination against Women art. 14(2)(h) and the Convention on the Rights of the Child. Wartime art. 1. For wartime expressions: the Geneva Conventions Relative to the Treatment of Prisoners of War (art. 26 and 46), Relative to the Protection of Civilian Persons in Time of War (art. 89 and 127) and art. 55 of the First Additional Protocol to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts.
Weston, B.H. and Bollier, D. 2013, p. 34

Project; Hungary v. Slovakia)22 affirms the right to environment explicitly, but in its derivative form (via the rights to life and to health), as do also a few treaty-body rulings, but only implicitly.23.

Otherwise, the recognition and reach of the human right to environment is left largely to a series of progressive resolutions, declarations, charters and other instruments affirming the right in its autonomous form; all or most are technically nonbinding or at best disputed in their juridical quality or significance.24 The human right to a clean and healthy environment is therefore part of our legal and moral inheritance, but it is severely limited in its juridical recognition and jurisdictional reach.25 The sum total of the legal and "quasi legal" instruments affirming this right on the global plane cannot be said to reflect general customary international law at present.26

Also, on the regional and national planes - with the exception perhaps of the Aarhus Convention relative to procedural environmental rights and the occasional national court case invoking international legal authority to define or support a derivative or autonomous right to environment - few law making and law enforcing processes sympathetic to the right to environment have demonstrated **juridical resilience** beyond their regional or national frontiers or even within these frontiers.27 To take the much praised *Minors Oposa v. Factorian*-decision of the Philippine Supreme Court as an example: In this decision, the Supreme Court held that minors, their parents and the Phillipine Environmental Network had standing to sue against the logging of Philippine virgin forests for their own generation and for successive generations based on the concept of intergenerational responsibility and the right to a balanced and healthful ecology28. However, the Supreme Court did not cancel the disputed timber license agreement, nor did the decision lead to a flood of environmental litigation or to a discernible improvement in the Philippine environment.

A further fundamental problem with current national, regional and international environmental law decision-making is the tendency to rely on outmoded jurisprudence developed in a preindustrial era when environmental harm did not for the most part cross national borders. A consequential assumption and legacy of this jurisprudence is that both the economic benefits and the environmental costs of a State's policies remain within that State's territory. Deferring to juridical-political notions of State sovereignty, jurists in the field of environmental law tend to limit themselves to procedural rights issues that appear less likely to offend national jurisdictional sensibilities.29

Courts also feel challenged by the vagueness of what "the environment" actually entails and how a meaningful conception of the environment can be incorporated into the practice of (constitutional) adjudication.30 As Philipine Justice Feliciano famously said in his concurrence in *Minors Oposa vs. Factorian*: "It is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to 'a balanced and

22 1997 I.C.J. 7 (February 5).
23 Weston, B.H. and Bollier, D. 2013, p. 34.
24 Weston, B.H. and Bollier, D. 2013, p. 34.
25 Weston, B.H. and Bollier, D. 2013, p. 29.
26 Ibidem, p. 39.
27 Ibidem
28 Available at http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html
29 Weston, B.H. and Bollier, D. 2013, p. 42.
30 Daly, E., "Constitutional Protection for Environmental Rights: The Benefits of Environmental Process" in: *International Journal of Peace Studies*, Volume 17, Number 2, Winter 2012, pp. 71-80.

healthful ecology'. The list of partiuclar claims which can be subsumed under this rubric appears to be entirely open-ended."31
Courts are even less likely to take the lead in recognizing *intergenerational* ecological rights (the right to environment for future generations, represented 'by proxy' by a member of the current generation) because of the difficulty to establish legal standing (locus standi: a personal stake is required in the outcome of a case to bring suit).32 And even when this hurdle is taken, courts are prone to invoke the 'political question doctrine'33 (courts only have jurisdiction to decide upon a legal question, not a political one), leaving it to the administrative and legislative branches to untangle the legal and political complexities involved.34 In the case of the *Oposa*-decision, both these hurdles were tackled, but the decision did not result in an order to stop logging or in a sustainable improvement of the Philippinian environment as said above.

This current state of affairs makes it difficult to proclaim an existing customary practice or general principle that validates a global right to environment.35
After all, it is the accepted authentication and application of durably *enforceable* norms over time that makes them socially as *well as jurisprudentially significant.36* The world's policy and decision making elites (with the exclusion of much of the developing world) simply have not yet accepted or recognized the right to environment, or the combined "soft" and hard" law authority on which it is said to stand, sufficiently to count as law universally.[37] The same control or applicative threshold we apply not only to customary international law in theory, but to all law in practice - **the "bite" or "compliance pull" of sanction** has yet to be officially crossed for a human right to environment.

31 Minors Oposa v. Factoran Jr., G.R. No. 10183, 224 S.C.R.A. 792 (July 30, 1993) (Phil.), reprinted in 33 I.L.M. 173, 176 (1994) (Feliciano, J., concurring).
32 Weston, B.H. and Bollier, D. 2013, p. 69.
33 The political question doctrine pertains to American Constitutional Law. In The Netherlands, we have a similar principle: "de rechter mag niet op de stoel van de wetgever zitten " and "de rechter moet de beleidsvrijheid van de bestuurlijke macht respecteren" (courts should not enter the territory of political and administrative decision-making). It will be interesting to see if the Dutch Supreme Court (Hoge Raad) will be willing to decide on the merits of the Urgenda Climate case - a tort case against the Dutch State for failing climate policy, - or if it will dismiss the case on grounds of legal standing or the political question doctrine. For more information about this case see: http://www.utrechtjournal.org/article/view/ujiel.ci/7

34 Weston, B.H. and Bollier, D. 2013, p. 71 and 72.
35 Weston, B.H. and Bollier, D. 2013, p. 39.
36 Ibidem.
37 Ibidem, p. 41

4. Emerging harms, emerging rights: why we need an enforceable human right to a clean and healthy environment

Increasingly, international human rights and environmental law scholars and practitioners are calling for the adoption of an “expansive” right to environment as a means to enhance environmental protection.38 They do so out of concern over current scientific forecasts, but also out of dissatisfaction with the “traditional” international legal process which is not up to the ecological challenges now facing the planet.39

In our highly decentralized and essentially voluntarist international legal order, the bottom-line commercial imperatives of the contemporary global economy does not invite widespread, much less universal, legal recognition and enforcement of a human right to a clean and healthy environment.[40] In fact, our formal national and international legal orders are structurally organized more to contribute than to prevent the deterioration of the natural world. We are heirs to a scientific and religious anthropocentrism born of the Scientific Revolution of the 16th and 17th century (Copernicus, Descartes, Newton) and the Reformation, which encouraged 'civilized' humans to see themselves as separate from nature and, indeed, as its masters/beneficiaries rather than its servants/stewards[41]. Our models of economic development have presumed infinite and free natural resources and our current laws, created to advance the operational needs of industrial society, reflect these foundational beliefs. As long as this anthropocentric worldview prevails - as long as we continue to insist that humans are outside nature and that nature has no limits - it's unlikely that the mainstream economic and political paradigm will take an (intergenerational) right to the environment seriously[42]

However, a new environmental law ethics is emerging. Bold, creative attempts are made to stretch the boundaries of existing legal thought and action to stop our planet's environmental decline and transform the law itself. Increasing numbers are arguing for establishing rights for future generations so that they might enjoy approximately the same earthly bounties we enjoy today. In the Netherlands, lawyer Jan van de Venis proposes to introduce an Ombudsperson for Future Generations who would promote and safeguard the rights and interests of future generations. This Ombudsperson for Future Generations would provide the government and parliament with advice on any legislation or policy that

38 Ibidem, p. 40.
39 Ibidem.
40 Ibidem, p. 48.
41 Ibidem, p. 49.
42 Ibidem.

might affect future generations. Moreover, based on citizens' complaints or on his or her own research, he or she would be able to investigate possible infringements of the right to a clean and healthy environment.43 Ecuador and Bolivia are recognizing the rights of Nature herself in their legislation44 (though the Ecuadorian government is abandoning these legal commitments in its recent decisions to stimulate and welcome new oil- and mining industry.)45 In the Western world, initiatives are sprouting to give Nature rights as well, and the "Wild Law-movement" is taking root.46 As mentioned before, lawyer Polly Higgins is campaigning to make Ecocide - massive damage and destruction of ecosystems - a crime under the Statute of Rome.47 Prohibiting Ecocide in Europe is the goal of the European citizens' petition End Ecocide in Europe as well.48

Positive law must adjust to this new environmental ethic and codify the growing demands for (intergenerational) ecological equity49 if its wants to do justice to the environmental challenges and the changing moral landscape of the 21st century. Positive law has to adequately respond to 'emerging' environmental risks (risks that arise from our modern, fossil fuel-based lifestyle and economy) that didn't exist during the 'seed time' of the fundamental rights theory in the 17th century (Hobbes, Locke). Human rights emerge in response to a historic need for them because emerging societal, economical or political phenomena infringe on human liberty, safety and well being. **In that sense, rights are the**

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43 Van de Venis, J. 2013. Van de Venis describes similar initiatives worldwide to protect the interests and rights of future generations in this working paper, downloadable via this link: http://www.worldconnectors.nl/en/themes/ombudsman-voor-toekomstige-generaties/

44 Higgins, P. 2010, p. 153-156. The Ecuadorian Constitution dedicates chapter 7 of Title II to the Rights of Nature:
http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html
Bolivia submitted a Declaration of Mother Earth Rights to the United Nations in 2010, initiated the establishment by the UN General Assembly of the International Mother Earth Day (22 April) and adopted the *Ley de Derechos de La Madre Tierra* (Law of Mother Earth) in December 2010. For the Spanish text of this Law of Mother Earth, visit
http://www.ftierra.org/index.php?option=com_content&view=article&id=4288:rair&catid=152:cc&Itemid=210

45 The Ecuadorian government is currently promoting large-scale oil and mining operations that put at risk some three million hectares of its remaining Amazon rainforests while engaging in a crack down on activists and organizations who are defending the rights of Mother Earth.
http://amazonwatch.org/news/2014/0121-first-international-tribunal-on-rights-of-nature

46 The term 'wild law' was first coined by South African professor Cormac Cullinan, to refer to human laws that are consistent with laws of nature. A wild law is a law made by people to regulate human behaviour that privileges maintaining the integrity and functioning of the whole Earth community in the long term, over the interests of any species (including humans) at a particular time. Wild laws seek to balance the rights and responsibilities of humans against those of other members of the community of beings within the natural environment that constitutes Earth (e.g. plants,, animals, rivers and ecosystems) in order to safeguard the rights of all the members of the Earth community.
Wild laws may be distinguished from laws based on the understanding that Earth is a conglomeration of objects which human beings are entitled to exploit for their exclusive benefit (e.g. most property laws). The development of wild laws is motivated partially by the belief that it is desirable, and essential to the survival of many species (including humans), for us to change our relationship with the natural world from one of exploitation to a more 'democratic' participation in a community of other beings. This requires laws that firstly, recognise that other members of the Earth community have rights, and secondly, restrain humans from unjustifiably infringing those rights (as is done within the human community). See: Cullinan, C., *Wild Law: A Manifesto for Earth Justice* (2011), White River Junction: Chelsea Green Publishing.

47 Higgins, P., *Eradicating Ecocide: Exposing the corporate and political practices destroying the planet and proposing the laws needed to eradicate ecocide,* London: Shepheard-Walwyn 2010 and www.eradicatingecocide.com.

48 http://www.endecocide.eu. This initiative, run by a group of young volunteers, is collecting signatures of European citizens for a petition to ban Ecocide in Europe. In September 2014, this petition will be presented to the European Parliament.

49 J.C. Tremmel; Establishing intergenerational justice in national constitutions', in: J.C. Tremmel (ed.), *Handbook of Intergenerational Justice*, Edward Elgar Publishing 2006, p. 107.

legal response to harms. Out of our modern industrial society with its technological innovations and enormous appetite for resources, environmental risks emerge at the collective level and also a new kind of emergent harm, for which we need a new type of rights to protect us.50

Whereas rights theorists in the 17th century projected that the first step toward political liberty was away from nature - to leave the Hobbesian 'state of nature' - human rights theorists today increasingly understand that although rights are rooted in society, they are greatly affected by our natural needs and our interactions with nature. The degradation of our natural environment threatens the enjoyment of our 'traditional' human rights, because without a liveable environment, there is no possibility for any exercise of legal rights at all.

Human rights are the products of human identity and that identity itself is forged in ever changing relationships with others, with institutions and institutionalized power, and with nature. Human rights grow and evolve as the human relationships from which they emerge change the ways in which we relate to each other, our politics, and our natural world.51

As the IPCC describes in its report *Climate Change 2013*, the relationships with our natural environment has been most recently and consciously in flux. Global warming and large scale environmental destruction have made it abundantly clear that the destructive impact on the environment by humans is an *emergent* one. It's the product of uncounted individual and corporate decisions and choices on one hand, and public policies and political omissions on the other. As individuals in the 21st century, we no longer need rights only to protect ourselves from our neighbor's smoking or from the corporation down the street whose action is fouling the water. We now also need rights against the effects of all the unseen, unnamed, perhaps no longer living fellow citizens who collectively made choices, took actions, perhaps even made policies that seemed harmless or even wise then, but that threaten us now. These rights emerge now in the face of the emergent environmental threats. Further, they attach themselves to us not as isolated individuals, but as citizens interrelated in a complex web of responsibility and liberty that includes our ancestors, as well as future persons, whose actions or welfare will be hugely affected by our decisions while we are alive. Both ourselves and those who succeed us have rights and obligations (born out of the accountability of one generation to the next) defined by this new relationship to nature.52

Protecting ourselves against emerging environmental harms by recognizing the emergent need for an enforceable and resilient human right to a safe and healthy environment and codifying this right on the national and international level is the new legal "frontier" of our times. Creating a resilient and enforceable human right to the environment could break through walls of political and dogmatic resistance to protecting and honoring the environment, because human rights are well-rooted in our cultural and legal traditions, have authoritative language, persuasive power and moral conviction. Because of these properties, human rights are uniquely suited to assist in gathering the collective will necessary to preserve the planet.[53]

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50 Hiskes, R.P*., The Human Right to a Green Future. Environmental Rights and Intergenerational Justice,* Cambridge: Cambridge University Press 2009, p. 145 - 147

51 Ibidem.

52 Hiskes, Richard P., *"*The Right to a Green Future: Human Rights, Environmentalism and Intergenerational Justice*", in: Human Rights Quarterly,* Volume 27, Number 4, November 2005, pp. 1346-1364.

53 Hiskes, R.P. 2009 p. 145-147 and Weston, B.H. and Bollier, D. 2013, p. 87-99.

Professor Weston and David Bollier have constructed a resilient and - in theory - enforceable environmental human right with their proposal for **a human right to commons- and rights-based ecological governance.** The human right to commons- and rights-based ecological governance is an emergent right, a creative and visionary response to the emerging harms of global warming and environmental destruction (Ecocide). In the next paragraph I will investigate the contents and reach of this new human right and its proposed implementation.

5. Human Right to Commons- and rights-based ecological governance

So what are the commons and why could a human right to commons- and rights-based ecological governance be the enforceable and resilient human right we are looking for?

5.1 Commons

A commons is a governance system for using and protecting all the creations of nature and society that we inherit jointly and freely and hold in trust for future generations.54 A commons typically consists of non-State resources controlled and managed by a defined community of commoners, directly or by delegation of authority. These community-governed resources are known as "Common Pool Resources". We talk about "commons" when these Common Pool Resources are governed by a community according to a set of social protocols. In short: **a common = a resource + a community + a set of social protocols**.55 Sometimes these social protocols are written down in a so-called "commons governance covenant" (an agreement between commoners that sets out the principles of governance for the common in question).

Commons operate in a quasi-sovereign manner, largely escaping the centralized mandates of the State and the structures of market exchange while mobilizing decentralized participation on the ground. A commons enacts new forms of (self-) governance without becoming government. A commons also put limits on market activity and mediates the tensions that normally exist between conventional politics and society, and between Nature and the (political) community. Where appropriate or needed, the State may act as a trustee for a commons or formally facilitate specific commons, much as the State chartering of corporations facilitates market activity.56

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54 Weston, B.H. and Bollier, D. 2013, p. 124.

55 Bollier, D., *Think Like a Commoner: A Short Introduction to the Life of the Commons*, Gabriola Island: New Society Publishers 2014, p. 15.

56 Jan Jonkers wonders how the State can facilitate civic commons in his book *Werken aan de Weconomy*: "Het besef groeit dat doorbraken in de transitie naar een duurzame samenleving zullen vragen om veel iniatieven 'van onderop' en de benutting van energie aan de basis van de samenleving. Op dat gebied gebeurt recentelijk veel, getuige de vele lokale initiatieven op het gebied van energieproductie, delen van resources, enz. Netwerken van zichzelf organiserende burgers vormen zich momenteel in snel tempo. Dit stelt bestaande instituties (zoals de rijksoverheid) voor een opgave: hoe geef je inhoud en betekenis aan een rol die tot doel heeft de condities voor het onstaan van lokale beweging te optimaliseren?" Jonkers, J., *Werken aan de Weconomy. Duurzaamheid cooperatief organiseren*, Deventer: Kluwer 2013,

Commons governance can take many forms. There are *subsistence commons*, such as forests, fisheries, wild game, pastures, irrigation and drinking water; *social and civic commons* such as public schools and libraries, parks, community festivals and civic associations; *digital commons* on the Internet such as free and open-source software, wikis like Wikipedia and works under the Creative Commons license and *global commons*, such as the planetary atmosphere, oceans, the polar regions, biodiversity, outer space and the human genome.

Commons historically developed as a set of social practices and, as societies became more organized, into formal law as well. It has flourished in human societies with and without the support of larger systems of power. Commoning - the social practices by which commoners manage their shared resources - has been a pervasive and durable governance system for assuring equitable access to- and use of Nature.57
Abundant evidence of commoning can be found throughout human history. The instinct to establish commons may in fact be a deeply rooted aspect of humanity. A growing body of scientific evidence suggests that social trust and cooperation may be an evolutionary force hard-wired into the human species.58 These studies suggest that human beings are neurologically hard-wired to be empathetic and cooperative59; cooperation is an inborn human capacity that enhances our long-term struggle to survive. This for sure is a more hopeful, socially constructive storyline for political theory and economics than that of the Hobbsean savage that has prevailed for centuries (*Homo Homini Lupus*).60

Water provides the earliest clear example of communal resource use and management, perhaps because water is indispensable to life. Most societies have developed systems for sharing water used for navigation, fishing, irrigation and drinking.
Land is another example of a communal resource. Cooperation, collective action and "commoning" were key factors in the development of prehistoric agriculture.61

The Ancient Romans were the first society in recorded history to have made explicit laws regarding distinct categories of property, including common property. **The first legal recognition of the commons can be found in the *Res communes*** - a category of law enshrined by Emperor Justinian in 535:

"*By the law of nature these things are common to mankind - the air, running water, the sea and consequently the shores of the sea.... Also all rivers and ports are public, so that the right of fishing in a port and in rivers is common to all. And by the law of nations, the use of the shore is also public, and in the same manner, the sea itself. The right of fishing in the sea from the shore belongs to all men.*"62

This codification can be seen as an early expression of what in American law is known as the "public trust doctrine". The Roman Empire acted as a trustee for the public interest and for the "things held in common".

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p. 63.
57 Weston, B.H. and Bollier, D. 2013, p. 131
58 Bowles, S. and Gintis, H., *A Cooperative Species: Human Reciprocity and Its Evolution*, New Jersey: Princeton University Press 2011.
59 If this is true, then the idea of homo economicus - the autonomous, selfish, rational individual - which modern-day economists and political theorists presume to be a universal norm, has less basis in fact or history than usually thought.
60 Weston, B.H. and Bollier, D. 2013, p. 133
61 Ibidem
62 The Institutes of Justinian: http://classes.maxwell.syr.edu/His381/InstitutesofJustinian.htm#Book%20II.

However, already in the Roman days there was a tension between the Empire's assertion of power to act as a trustee for the public interest versus the inherent rights of the people to manage *res communes* as self-organized commons.63 For example, when the Roman Empire claimed rights to manage water through a centralized, formal body-of-water law, a unitary legal regime displaced the plural systems of customary water rights that had prevailed in conquered territories. Although the centralization of Roman law in theory made water management more rational, uniform, and fair, it also gave political elites special opportunities to assert their own privileged access to water and to dispossess less favored parties in the provinces.64

This tension between dominant systems of power and commons continued after the fall of the Roman Empire and the beginning of the Dark Ages. Kings and feudal lords throughout Europe started claiming the right of access to 'public resources' previously protected as *res communes* under Roman law. In thirteenth-century England, following the Norman Conquest, a series of monarchs claimed increasingly large patches of forest for their own recreation and profit at the expense of barons and commoners (an early example of *enclosure*). These royal encroachments on commons had a devastating impact on medieval English life since the commoners were depended on forests to meet their basic need for food, firewood and building materials.65

A long series of armed conflicts between the barons and commoners and King John and his son King Henry III culminated in the signing of the Magna Carta in 1215 and the Charter of the Forest in 1217. **The Charter of the Forest stipulated and protected certain rights of commoners**, such as rights of grazing for their cattle, fishing in streams, cutting of turf to burn for heat and forest wood for one's house.66 These 13th-century English battles to reclaim and preserve commons have cast a long shadow. The English Commons as a source of inalienable rights influenced the American Declaration of Independence ("We the People": the commoners against the monarch and State) and the American Bill of Rights. When Congress debated the Thirteenth, Fourteenth and Fifteenth Amendments to the US Constution, it often invoked the Magna Carta as shorthand for 'common rights' that are sufficiently fundamental to warrant constitutional protection.67

5.2 Legal recognition of the Commons

Legal recognition of the ecological commons and the commoners' right to environment has come in many guises over the centuries. Some examples of commons-based legal regimes are:

- *Common Land.* Commoners around the world have relied on shared lands for subsistence throughout history and today. There has been a long history of prehistoric agriculture, and today more than 1.6 million people actively use the world's forests (which compromise approximately 30 percent of the global land mass), often as commons. Another one billion people rely on dry lands (which constitute some 40 percent of the

63 Weston, B.H. and Bollier, D. 2013, p. 136
64 Weston, B.H. and Bollier, D. 2013, p. 136-137
65 Weston, B.H. and Bollier, D. 2013, p. 137
66 The Forest Charter remained the law governing the English commons for almost 800 years until it was superseded by the Wild Creatures and Forest Laws Act in 1971. Weston, B.H. and Bollier, D. 2013, p. 138.
67 Weston, B.H. and Bollier, D. 2013, p. 139.

global land mass) for their subsistence.68 In the contemporary world, other commons-based subsistence uses of fisheries, irrigation systems, oceans and lakes are widespread. But because so many commons are based on traditional usage, and are unrecognized by formal property rights, these lands tend to be highly vulnerable to corporate and State enclosure.69

- *Wildlife*. Wildlife has enjoyed a unique status outside of private property at least since the Roman Empire.
- *Endangered Species.* Endangered Species are protected internationally in the Convention on International Trade in Endangered Species of Fauna and Flora;
- *Wilderness Conservation* Even in ancient Persia, there were forestry conservation laws in effect as early as 1700 B.C. Pharoah Akhenaten established Nature reserves in Egypt in 1370 B.C. In our time, nearly 100 countries around the world protect and conserve national parks.70
- *Oceans and Seas*: Hugo Grotius argued in his famous treatise *Mare Liberum* (1609) that the seas must be free for navigation and fishing because the law of Nature prohibits ownership of things that appear "to have been created by nature for commons things".71 In the age of European colonialism marked by conquest and enclosure, common access to the high seas was protected by international law, and remains so in the United Nations Convention on the Law of the Sea, which recognizes freedom on the high seas as well as the exclusive rights enjoyed by coastal States in waters immediately offshore.
- *Space*. The 1967 Outer Space Treaty declares outer space, the moon and other celestial bodies to be the 'province of all mankind' and 'not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."72
- *Antartica.* Antartica is managed as a cooperative regime of research scientists since the entry into force of the 1959 Antartica Treaty in 1961. Antartica is one of the rare global commons that has been highly stable because it met many important principles of a successful commons: a well-defined user community, clearly delineated and well-recognized boundaries, and moral and political legitimacy for decisions that have constituted the Antartica commons regime.73

After the Second World War, the commons were largely dismissed as an historical curiosity. Biologist Garrett Hardin's influential essay *The Tragedy of the Commons*, published in the journal Science in 1968, further contributed to the dismissal of the commons.74 He predicted the inevitable collapse of any shared resource because commoners would have no incentive to hold back and over-exploit and ruin the commons out of self-interest.

However, in 1990 the late Nobel laureate Elinor Ostrom rebutted Hardin and rescued the commons as a governance paradigm of considerable merit in her book *Governing the Commons*.75 She described sustainable commons that have flourished for hundreds of years, whose success can be traced to their social authority and administrative capacities to allocate access and user rights to finite resources, their responsible rules for stewardship and effective punishments for rule-breakers.

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68 Ibidem, p. 140
69 Ibidem
70 See the list List of National Parks from the IUCN: http://en.wikipedia.org/wiki/List_of_national_parks

71 Weston, B.H. and Bollier, D. 2013, p. 142
72 Ibidem, p. 143
73 Ibidem
74 Hardin, G., *The Tragedy of the Commons*, 162 Science 1243 (1968)
75 Ostrom, E., *Governing the Commons. The Evolution of Institutions for Collective Action,* Cambridge: Cambridge University Press 1990.

Ostrom identified the following seven basic design principles of successful commons:

1. The common-pool resource has clearly-defined boundaries.
2. There is congruence between the resource environment and its governance structure or rules.
3. Decisions are made through collective-choice arrangements that allow most resource appropriators (commoners) to participate.
4. Rules are enforced through effective monitoring by monitors who are part of- or accountable to the appropriators.
5. Violations are punished with graduated sanctions.
6. Conflicts and issues are addressed with low-cost and easy-to-access conflict resolution mechanisms.
7. Higher-level authorities recognize the right of the resource appropriators to self-govern.
8. In the case of larger common-pool resources: rules are organized and enforced through multiple layers of nested enterprises.

Olstrom's book had a far-reaching effect on American legal thought and sparked a new academic interest in the commons.

In the late 1990s and early 2000s a diverse global movement of commoners began to emerge in response to enclosures, environmental degradation and of the excesses of neoliberal capitalism. Five categories of contemporary commons are particularly noteworthy: subsistence commons (such as Vandana Shiva's *Navdanya-movement*76, the "*acequia*" irrigation systems of New Mexico and the worldwide Permaculture movement), Indigenous People's Commons (e.g. *The Pachamama Alliance*77), Internet Commons (think of open-source software such as *GNU Linux, Wikipedia* and *Creative Commons*), Social and Civic Commons (*Slow Food movement*78, *Time Banking movement*79, *Repair Cafe*80) and Businesses embedded in Commons (*Farmer's markets*, community-supported agriculture: *CSA*, *Bitcoin*81, *crowdfunding* and *crowdsourcing*).

76 http://www.navdanya.org/

77 http://www.pachamama.org
78 http://www.slowfood.com
79 http://www.timebanking.org
80 http://www.repaircafe.org/
81 https://www.bitcoin.org/en/

5.3 Introducing a Human Right to Commons- and rights-based ecological governance

Weston and Bollier propose the introduction of a **universal human right to commons- and rights-based ecological governance**. Such a right would be resilient, because it is rooted in a rich legal tradition dating back to the Roman Empire, the Magna Carta and the Charter of the Forrest. The right would be embedded in a widespread social practice that has developed in the course of human history and is recently going through a resurgence as described in the preceding paragraph. This human right would also be easier to enforce than a substantive environmental right because of its procedural nature: to determine whether there has been a violation of a procedural environmental right, a court needs (only) to decide that the case at hand is in some manner environmental, and then needs to determine if the mandated procedures have been followed. The discretion involved in these determinations is minimal and, by nature, strictly judicial. It raises few of the broad ranging and policy-based considerations that come up when a court has to adjudicate an substantive environmental right.82

Weston and Bollier have drafted an ***"Universal Covenant Affirming a Human Right to Commons- and Rights-based Governance of Earth's Natural Wealth and Resources"*** (see the Appendix of this paper for the integral text).

How would a human right to commons-and rights-based ecological governance look like according to this draft Universal Covenant?

Every natural person would have the right to ecological governance in which a community of natural persons (commoners), directly or by delegation, manages and controls natural wealth and resources as a means of inclusively and equitably meeting the basic human needs of its members and its future generations. Such a human right to commons and rights-based ecological governance would include the right to establish, maintain, be informed about, participate in- and seek redress for commons governance.

82 Daly, E., "Constitutional Protection for Environmental Rights: The Benefits of Environmental Process" in: *International Journal of Peace Studies*, Volume 17, Number 2, Winter 2012, pp. 71-80.

More specifically, natural persons would have the right to:

1) **Establish and maintain commons to protect their vital ecosystem resources**
the right to establish and maintain commons, if possible with financial, technical and infrastructural help from the State.

2) **Ecological Participation**:
a) the right to participate directly in decisions affecting their common assets and commons governance covenant;
b) in the absence of a practical opportunity for direct participation, the right to adequate representation of their interests in the stewardship of common assets;
c) the right to consistent and meaningful access to any representative ecological decision-makers as well as effective mechanisms of communication and accountability;
d) the right to timely and accessible public hearings before decisions are made that may significantly affect their common assets and commons governance covenant, and
e) the right to recourse, for themselves or as surrogates for future generations* from competent internal decision-making institutions within the commons or processes for redress of violations of their rights to ecological information and participation.

3*)* **Ecological Information:** the right to be informed, which includes
a) the right to prior notice of proposed State or private market decisions and policies that may significantly affect their common assets or governance covenant;
b) the right to clear and complete information on the ecological impact of activities that may significantly affect their common assets or governance covenant;
c) the right to effective access to legislative, administrative, judicial, or other proceedings during which decisions that may have significant ecological impact upon the common assets are under discussion;

4) Human Right protection and the safeguarding of Nature's rights

Human rights (applicable to both present and future generations)** and nature's rights (applicable to all species present and future) are essential to the success of commons- and rights-based ecological governance.
a. To this end, commons- and rights-based ecological governance shall embody the values of human dignity as expressed in the 1948 Universal Declaration of Human Rights and such human rights treaties evolved from it that have been designated "core international human rights instruments" by the Office of the United Nations High Commissioner for Human Rights83.
b. To the same end, commons- and rights-based ecological governance shall embody the values expressed in the Universal Declaration of the Rights of Mother Earth adopted by the World People's Conference on Climate Change and the Rights of Mother Earth in 2008 and submitted by the Plurinational State of Bolivia to the United Nations for consideration in 2010.**84**

5) Local Governance and the Subsidiarity Principle
Commons- and rights-based ecological governance shall be based on the principle of local control and subsidiarity to the maximum extent feasible. Commons-and rights-based

83 See http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx for these ten core international human rights instruments.
84 See http://pwccc.wordpress.com/programa/.

ecological governance should aspire to the lowest level of policy- and decision-making possible, with conscientious and generous support from institutions of greater scale and authority.

6) Precautionary principle
To protect common assets, commons- and rights-based ecological governance systems shall conscientiously adhere to a precautionary approach when threats of damage to ecological resources are serious or potentially irreversible. Lack of full scientific certainty shall not be used as justification for postponing cost-effective measures to prevent environmental degradation.

6) Conflict and Dispute Resolution
Conflicts and disputes within commons- and rights-based ecological governance systems shall be settled through self-organized dispute resolution systems to the maximum extent feasible, using techniques and procedures that favor dialogue, mutual respect, and restorative outcomes among the disagreeing parties.

5.4 The State & The Commons

In Weston's and Bollier's proposal, the State has a duty to support commons- and rights-based governance. The State has to facilitate and safeguard commons- and rights-based governance of Earth's wealth and resources as part of its mission to protect, conserve, and restore the integrity, health and sustainability of ecosystems. Next to signing, implementing and enforcing the principles and obligations of their proposed Universal Covenant, the **State would have to assist commoners in fulfilling their rights to ecological information**,through:

1) the compilation, maintenance, and regular updating by all public authorities of environmental information relevant to the functioning of the commons.
2) the assessment of the ecological impact of any activity that may significantly impact large-scale common-pool resources and prompt publication thereof on the Internet, with opportunities for public dialogue, and
3) the facilitation of crowdsourcing of knowledge, information, and new initiatives to assist State activities designed to support the commons Sector.

Furthermore, the State has to assist the public by **guaranteeing its rights to participation in ecological decision- and policy-making and to justice in environmental matters**, ensuring, among others, that individuals exercising their rights, including their rights to petition government, are not penalized, persecuted, or otherwise harassed or disadvantaged for raising and expressing their ecological concerns.85

When ecological or economic conditions or practical considerations (i.e. the size of the common-pool resources) require so, the State may:
a. **serve as a trustee** of common-pool resources belonging to commoners if the commoners so authorize or if protection of a given resource so requires it; and

85 The need for such protection of 'Environmental Human Rights Defenders' was one of the outcomes of the UN Environmental Human Rights Defenders Summit held in Geneva on 12-13 March 2014.

b. **charter or otherwise authorize** responsible parties to manage common-pool resources as ecological commons when such stewardship can be shown to serve the public interest.
In these cases, the State has to create transparent and accountable ecological management systems under State law that are compatible with commons- and rights-based ecological governance principles, rights, and duties.

The State has an affirmative duty to **prevent enclosures** of ecological commons and common-pool resources. To this end, it shall **formally recognize such commons and resources by State law** to the maximum possible.

The State also has an affirmative duty also to **ensure that private property owners (both individuals and businesses) shall exercise maximum caution not to externalize environmental risks, damage, or costs onto ecological commons,** or otherwise act in ways that are incompatible with the principles, rights, and duties of commons- and rights-based ecological governance. To this end, market players are obliged to provide clear, current, transparent and timely environmental information to State officials upon their request.

The State shall furthermore conscientiously adhere to:
a. a **precautionary approach** to prevent human activities from causing species extinction, the destruction of ecosystems, or the disruption of ecological cycles onto ecological commons in particular and the wider environment in general
b. the principle that the polluter, not the general public or the commoner, remedies any harm that may occur despite best efforts ("**polluter pays**").

5.5 United Nations & The Commons

The United Nations and its system of organizations should support commons- and rights-based ecological governance with technical aid, financial assistance and infrastructural support.
More specifically, Weston and Bollier propose to institutionalize commons- and rights-based ecological governance in three ways.

1) The UN should support the human right to commons- and rights-based ecological governance by, on the basis of Article 22 of the Charter of the UN86, establishing a **Judicial Organ** empowered to refer cases to the **International Court of Justice** for **compulsory advisory opinions87** on all matters connected to the human right to commons- and right-based ecological governance. Any state that would want to pursue a legal complaint against another state with regards to this human right could petition this independent Judicial Organ, which could refer the case to the ICJ for an advisory opinion.

2) The UN should also establish a permanent "*Ecological Governance Oversight Panel*" charged with the responsibility to help safeguard the human right to commons- and rights-based ecological governance for present and future generations. This Panel should have

86 Art. 22 UN Charter: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions".

87 According to Article 65 of the Statute of the International Court of Justice, the Court is empowered "to give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." Article 96 of the United Nations Charter provides that in addition to the General Assembly and the Security Council other organs of the United Nations and specialized agencies, may request advisory opinions of the Court on any legal question so long as they arise within the scope of their activities and they are authorized to make such requests by the General Assembly.

legal standing before the Human Rights Council and all other relevant United Nations bodies, both treaty and non-treaty, on all matters pertinent to this right as embodied in the Draft Universal Covenant.

3) The Security Council or the General Assembly should recognize the sky, the oceans and/or the atmosphere as global commons and create a *Sky Trust, Ocean Trust and/or global Earth Atmospheric Trust* for its governance and protection.

Commons- and rights-based ecological governance should furthermore become an integral part of the **Sustainable Development Goals** (SDGs) which are currently being developed by the Open Working Group to be submitted to the 68th session of the General Assembly later this year.88

5.6 Enforceability of the human right to commons- and rights-based ecological governance.

Imagine that the ***"Universal Covenant Affirming a Human Right to Commons- and Rights-based Governance of Earth's Natural Wealth and Resources"*** would be signed and ratified by a significant number of States.
What remedies would a citizen of a signatory State to the Universal Covenant have when his/her right to commons- and rights-based ecological governance would be violated?

1) The right to commons- and rights-based ecological governance is constructed as consisting of several procedural environmental rights:
- the right to establish commons, maintain commons and have access to them;
- the right of participation in commons;
- the right to information regarding the commons;
- the right of recourse/redress when his/her rights of ecological information, access and participation are violated (the right of effective remedy);
- the right to local governance and the subsidiarity principle (ecological governance should be handled by the least centralized authority capable of addressing the matter effectively).

These procedural environmental rights would be legally binding (self-executing; not requiring domestic legislation to be effective within the legal order of the signatory state) and enforceable in a court of the signatory state. That court would be spared the difficult questions of interpretation that pertain to substantive environmental rights and avoid entanglement with the political question doctrine. It would 'only' have to establish that common-pool/ecological resources are involved and investigate if the mandated procedure has been respected. So a citizen of a signatory state to the Universal Covenant could enforce his or her human right to commons- and right-based ecological governance directly in a domestic court.

88 Jan van de Venis endorsed commons-and rights-based ecological governance during his presentation at the intersessional meeting between stakeholders and the Open Working Group on SDGs on 22 November 2013:
http://www.worldconnectors.nl/jan-venis-spreekt-tijdens-vn-open-session-sustainable-development-goals/

2) Under the proposal of Weston and Bollier, an individual complaint mechanism could be introduced that gives the citizen the right to complain to the Ecological Governance Oversight Panel when his or her human right to commons-and rights based ecological governance is violated and domestic adjudication has not remedied the violation. This Ecological Governance Oversight Panel would then investigate the alleged violation and issue a morally and politically binding report, much like the reports of the Human Rights Committee of the International Covenant on Civil and Political Rights or the recommendations of the Aarhus Convention Compliance Committee in response to communications from the public.

3) Member-states could take it upon themselves to petition the Judicial Organ to ask the ICJ for an advisory opinion in case of (gross) violations of the human right to commons-and rights-based ecological governance in another member-state, for example as a result of enclosures or Ecocide.

4) Violations of the human right to commons-and rights-based ecological governance would fall under the auspices of the proposed Ombudsperson for Future Generations in the Netherlands (and equivalent agencies in other countries), since the human right is established as a right for current AND future generations89 (see * and ** on page 15).

5) If the human right to commons-and rights-based ecological governance is violated because the ecological resources in question are damaged on a massive scale or destroyed by State or market actors, this would constitute the crime of "Ecocide" as proposed by Polly Higgins. Acknowledging a human right to commons-and rights-based ecological governance could help the political and legal process of prohibiting Ecocide, because it in essence protects the same values (ecological resources should be protected and humans should have access to them).

6) Similarly, establishing a human right to commons- and rights-based ecological governance would make it easier to win a "climate" tort-case against the State such as the NGO Urgenda is currently pursuing in the Netherlands. According to Urgenda, failure of the State to take effective action to combat climate change is unlawful because it means the State forsakes its duty of care towards its citizens and because climate change (threatens to) violate human rights.90 It would be easy to show that damage or destruction of ecological resources due to climate change violates the human right to establish, maintain and/or participate in commons- and rights-based ecological governance: if the ecological resources are destroyed or damaged, the enjoyment of this human right is affected by definition.

Finally, a human right to commons-and rights-based ecological governance could help further the acknowledgment of the rights of Mother Earth:

- the Universal Covenant would embody the values expressed in the Universal Declaration of the Rights of Mother Earth, promoting their acceptance in the international legal order;
- the procedural right to judicial recourse in matters of ecological governance could be constructed in such a way, that commoners could not only act as surrogates for future

89 See note 43.

90 For more information on the Urgenda Climate Case, read "*The Liability of European States for Climate Change*" written by Roger Cox, the lawyer representing Urgenda: http://www.utrechtjournal.org/article/view/ujiel.ci/74

generations, but as representatives of Mother Earth as well. If the ecological/common pool resources are damaged, destroyed or enclosed, commoners can stand up on behalf of these resources and seek redress. Although the damage and destruction of ecological resources would probably automatically mean an infringement of the commoner's own human right, the introduction of a 'common' right to represent Mother Earth would help us to move away from a purely anthropocentric system towards a more holistic/"ecocentric" system of respecting and defending ecological resources as championed by the Wild Law-movement.

6. Conclusion

In this paper I have explored how a human right to a clean and healthy environment could be best enforced in our complex international legal order. After a short examination of the worrisome level of environmental degradation in today's world and the "status quo" of the codification and enforcement of the human right to a clean and healthy environment around the globe, I came to the conclusion that at present the human right to a clean and healthy environment does not have the judicial 'resilience' nor compliance pull that is needed to call it customary international law or a general principle of international law. There is no legally binding international treaty for the human right to a healthy and clean environment and most of the successful cases of environmental litigation derived the human right to a clean and healthy environment from other human rights (such as the right to life, privacy and family life).

At the same time, the need for effective protection of the environment for the sake of humans, future generations and the Earth herself is becoming increasingly urgent. Environmental degradation and climate change are 'emerging' harms that require the emergence of a new kind of robust environmental human right.

And indeed, an 'old' new governance structure for ecological resources is emerging : the commons. The commons have been present throughout human history as a governance system for ecological resources organized, regulated and executed by the commoners themselves. It's a dynamic governance system that leverages cooperation, bottom-up energies and local knowledge in service to the preservation and sustainable allocation of Earth's natural resources. The distributed, flexible system of commons governance can more closely track the dynamic, complex realities of natural ecosystems than top-down

bureaucratic systems typically do. Top down systems are more rigid and unable to adapt to the evolving circumstances of an ecosystem. They also tend to marginalize or override local knowledge and participation and bolder the interests of political elites who dominate the governance process. Commons governance on the contrary uses the creativity, energy and knowledge of the locals,channeling them into a supportive structure for synergy and innovation.

Giving legal recognition and protection to the commons through the introduction of an universal right to commons-and right-based ecological governance could be an excellent strategy. The human right to commons-and right-based ecological governance would be enforceable in court because of its procedural nature. It would be rooted in a well-established social practice that is currently going through a resurgence all over the world. It has a rich legal tradition dating back to Roman times, yet is visionary and futuristic enough to accommodate emerging environmental harms and the legal responses needed to counter those harms. It would not only protect living commoners, but future generations and the rights of Earth herself as well. Because of its flexible and organic nature, the right to commons-and rights-based ecological governance could be tailor-cut to work for local commons and global commons such as the sky, the oceans or the atmosphere alike. The principles of subsidiarity and precaution would guide commons governance, market players would be held accountable for externalizing costs onto ecological commons and State/market enclosures of commons would be forbidden. Finally, the State could play many roles as facilitator, partner, trustee and enforcer of commons governance, which (given the unaltered importance of national sovereignty in our world today) would be a key factor for the acceptance and successful implementation of a universal human right to commons-and right-based ecological governance.

APPENDIX

Universal Covenant Affirming a Human Right to Commons- and Rights-based Governance of Earth's Natural Wealth and Resources

Article I. Commons- and Rights-based Ecological Governance

All natural persons have a human right to commons- and rights-based ecological governance (green governance).

1. Commons- and rights-based ecological governance is a system for using and protecting all the creations of nature and related societal institutions that we inherit jointly and freely, hold in trust for future generations, and manage democratically in keeping with human rights principles grounded in respect for nature as well as human beings, including the right of all people to participate in the governance of wealth and resources important to their basic needs and culture.

2. Typically, commons- and rights-based ecological governance consists of non-State management and control of natural wealth and resources by a defined community of natural persons (commoners), directly or by delegation, as a means of inclusively and equitably meeting basic human needs. It generally operates independently of State control, and it need not be State-sanctioned to be effective or functional.

3. Where appropriate or needed, the State may act as a guardian or trustee for commons- and rights-based ecological governance or formally facilitate its principles and practices by

establishing commons-like State institutions to manage publicly owned natural wealth and resources.

Article II. Principles of Internal Governance

1. The natural environment is the common heritage of all humankind, belonging to all natural persons present and future, and shall be respected as such by all commons- and rights-based governance systems.

2. Commons- and rights-based governance systems shall at all times responsibly account for the fragile and complex interdependence of living ecosystems, social and cultural norms, the aesthetic value of the environment, the interests of future generations, and the ultimate dependence of humankind on our Earth for health and survival.

3. Social cooperation, trust, and reciprocity are essential to the success of commons- and rights-based ecological governance.

a. To these ends the self-determined constitutive and operational rules of green governance systems must be conducive to ensuring that

1) reliable information is available about the immediate and long-term costs and benefits of actions as measured in both quantitative and qualitative terms;

2) individual commoners understand that their shared resources are important for their own interests and long-term security, and therefore are motivated to act as trustworthy, reciprocal and openly communicative commoners in the shared management of ecological resources;

3) informal as well as formal monitoring of resource use and sanctioning of rulesviolators are feasible and considered appropriate; and

4) the culture, leadership and historical continuity of a commons enable it to adapt and learn in addressing ecological management challenges over time.

b. To these ends also the self-determined constitutive and operational rules of green governance systems shall guarantee to all involved individuals and groups:

1) the right to be informed, which includes

a) the right to prior notice of proposed decisions and policies that may significantly affect their common assets, governance covenant, community ethos, and cultural identity;

b) the right to clear and complete information on the ecological impact of activities that may significantly affect their common assets, governance covenant, community ethos, and cultural identity;

c) the right to effective access to legislative, administrative, judicial, or other proceedings during which decisions that may have significant ecological impact upon the common assets are under discussion; and

2) the right to participation, which includes

a) when practical, the right to participate directly in decisions affecting their common assets, governance covenant, community ethos, and cultural identity;

b) in the absence of a practical opportunity for direct participation, the right to adequate representation of their interests in the stewardship of common assets;

c) the right to consistent and meaningful access to any representative ecological decision-makers as well as effective mechanisms of communication and accountability;

d) the right to timely and accessible public hearings before decisions are made that may significantly affect their common assets, governance covenant, community ethos, and cultural identity; and

3) the right to recourse, for themselves or as surrogates for future generations, from competent internal decision-making institutions or processes for redress of violations of their rights to ecological information and participation.

4. Human rights (applicable to both present and future generations) and nature's rights (applicable to all species present and future) are likewise essential to the success of commons- and rights-based ecological governance, including the human right to commons and rights-based ecological governance recognized in this Universal Covenant.

a. To this end, commons- and rights-based ecological governance shall embody the values of human dignity as expressed in the 1948 Universal Declaration of Human Rights and such human rights treaties evolved from it that have been designated "core international human rights instruments" by the Office of the United Nations High Commissioner for Human Rights.

b. To the same end, commons- and rights-based ecological governance shall embody the values expressed in the Universal Declaration of the Rights of Mother Earth adopted by the World People's Conference on Climate Change and the Rights of Mother Earth in 2008 and submitted by the Plurinational State of Bolivia to the United Nations for consideration in 2010.

5. Commons- and rights-based ecological governance shall be based on the principle of local control and subsidiarity to the maximum extent feasible. Green governance by default should aspire to the lowest level of policy- and decision-making possible, with conscientious and generous support from institutions of greater scale and authority.

6. To protect common assets, commons- and rights-based ecological governance systems shall conscientiously adhere to a precautionary approach when threats of damage to ecological resources are serious or potentially irreversible. Lack of full scientific certainty shall not be used as justification for postponing cost-effective measures to prevent environmental degradation.

c. If and when the application of human rights and nature's rights differ or conflict, such disagreement shall be resolved in a way that best promotes the integrity, balance, and health of Earth for the benefit of present and future generations and other beings.

7. Commoners shall have collective control over the surplus value they create through the collective management of their shared wealth and resources. To this end, commons- and rights-based ecological governance shall not be cash-driven or market-mediated except with the explicit consent of commoners and clear rules for personal use and resource alienability.

The freedom of commoners to limit or ban the monetization of their shared assets shall not be compromised.

8. Property rights granted by commons- and rights-based governance systems for use of natural wealth and resources to individuals or groups (public, private or commons-based) are not absolute; they must conform to the principles and practices of commons- and rightsbased ecological governance as recognized and reaffirmed in this Universal Covenant.

9. Conflicts and disputes within commons- and rights-based ecological governance systems shall be settled through self-organized dispute resolution systems to the maximum extent feasible, using techniques and procedures that favor dialogue, mutual respect, and restorative

outcomes among the disagreeing parties.

Article III. Principles and Policies to Guide State Support of Commons- and Rights-based Ecological Governance

1. Earth belongs to everyone, and its services and infrastructure are necessary for the wellbeing and survival of all humans and other species. The State shall therefore facilitate and safeguard commons- and rights-based governance of Earth's wealth and resources as part of its mission to protect, conserve, and restore (where necessary) the integrity, health, and sustainability of the vital ecological balances, cycles, and processes that nourish communities and enhance all life on Earth. In these critical respects, the State shall strive to work as a generous partner, not a selfish overlord, of green governance systems.

2. In furtherance of foregoing Article III (1), the State and its agents at all levels shall:

a. recognize and promote the full implementation and enforcement of the principles, rights, and obligations proclaimed or reaffirmed in this Universal Covenant, including the human right to commons-and right-based ecological governance recognized herein;

b. without financial burden, assist commoners in fulfilling their rights to current, timely, and clear ecological information, including but not limited to:

1) the compilation, maintenance, and regular updating by all public authorities of environmental information relevant to their functions,

2) the assessment of the ecological impact of any activity that may significantly impact the environment, especially large-scale common-pool resources and prompt publication thereof on the Internet, with opportunities for public dialogue, and

3) the facilitation of crowdsourcing of knowledge, information, and new initiatives to assist State activities designed to support the Commons Sector.

c. further and similarly assist the public by guaranteeing its rights to participation in ecological decision- and policy-making and to justice in environmental matters, ensuring, inter alia, that individuals exercising their rights, including their rights to petition government, are not penalized, persecuted, or otherwise harassed or disadvantaged for raising and expressing their ecological concerns;

d. fully and actively support the right of all individuals and groups, sanctioned by national and international law and reaffirmed in this Universal Covenant, to protect, conserve, and restore (where necessary) their vital ecosystems via commons governance in national, subnational, and transnational settings;

e. in exercise of its partnership with commons- and rights-based ecological governance, collaborate with established and new green governance systems in the invention, recommendation, and initiation of new policy structures (normative, institutional, and procedural) that could work effectively to manage large-scale national, transboundary and global common-pool resources; and

f. cooperate fully with other States, appropriate intergovernmental organizations (including the United Nations and its system of organizations), and civil society in respect of vital ecological matters largely beyond the limits of the State's territorial jurisdiction, in particular in respect of large-scale transboundary and global common-pool resources, and the invention, recommendation, and initiation of effective new policy structures for the management of them.

3. In keeping with foregoing Articles I(4) and III(1), when ecological or economic conditions require, the State may:

a. serve as a trustee of common-pool resources belonging to commoners if the commoners so authorize or if protection of a given resource so requires it; and

b. charter or otherwise authorize responsible parties to manage common-pool resources as ecological commons when such stewardship can be shown to serve the public interest;

c. provided, however, that in each of the foregoing instances the State, its agents, and its surrogates shall create transparent and accountable ecological management systems

under State law that are compatible with commons- and rights-based ecological governance principles, rights, and duties, and that beneficiary interests are well served with effective accountability systems. Commoners' rights shall not be alienated or diminished except for the purpose of protecting the commoners' shared resources for future generations.

4. The State has an affirmative duty to prevent enclosures of ecological commons and common-pool resources. To this end, it shall formally recognize such commons and resources by State law to the maximum possible.

5. The State has an affirmative duty also to ensure that private property owners—individuals and commercial interests alike—shall exercise maximum caution not to externalize environmental risks, damage, or costs onto the environment in general or ecological commons in particular, or otherwise act in ways that are incompatible with the principles, rights, and duties of commons- and rights-based ecological governance. To this end, the State shall, among other environmentally protective policies, conscientiously adhere to:

a. a precautionary approach to prevent human activities from causing species extinction, the destruction of ecosystems, or the disruption of ecological cycles onto ecological commons in particular and the wider environment in general—the lack of full scientific certainty never to be used as justification for postponing cost-effective measures to prevent environmental degradation, especially when such degradation is serious or potentially irreversible; and

b. the principle that the polluter, not the general public or the commoner, remedies any harm that may occur despite best efforts—the remedy, however, shall not to be considered the equivalent of the ecological loss if it be in the form of financial compensation exclusively and therefore shall not to be considered exhaustive of remedial responsibility, which shall include, but not be limited to, restoration of the integrity and health of the damaged resource to the maximum extent possible; ecosystems and their elements are not fungible.

6 The State has an affirmative duty to eliminate nuclear, chemical, and biological weapons, all of which are antithetical to a clean and healthy environment, including common-pool ecological resources (managed or unmanaged).

Article IV. Duties of Market Actors towards Commons- and Rights-based Ecological Governance

1. Market actors, comprised of both natural and juridical persons, shall honor and respect the existence and expansion of commons- and rights-based ecological governance and, to the extent possible, support the human right to commons-and right-based ecological governance recognized in this Universal Covenant. To this end, they shall:

a. act in accordance with the principles, rights, and duties recognized in this Universal Covenant, including the full realization of the human right to commons- and right-based ecological governance recognized in this Universal Covenant;

b. recognize and promote the full implementation of the aforementioned principles, rights, and duties to the maximum of their capabilities;

c. cooperate fully with State officials in their efforts to facilitate commons- and rightsbased ecological governance systems, in particular by providing, when requested, clear, current, transparent and timely environmental information to State and Commons officials alike; facilitating active commoner participation in ecological governance; and helping to ensure commoner access to justice in environmental matters, when needed.

2. Market actors shall conscientiously establish and apply effective norms to protect, conserve, and restore (where necessary) the natural resources with which they become involved, including the shared resources of ecological commons. In this regard, they shall assess fully and transparently any proposed activity of their own that might impact

adversely the environment in general and common-pool ecological resources in particular. If ecological harm results nonetheless, the market actor, not the general public or commoners, shall remedy the harm. The remedy, however, shall not to be considered the equivalent of the ecological loss if it be in the form of financial compensation exclusively, and therefore shall not be considered exhaustive of the market actor's responsibility, which shall include, but
not be limited to, restoration of the integrity and health of the damaged resource to the maximum extent possible; ecosystems and their elements are not fungible.
3. Market actors shall cooperate fully with ecological commons systems, State officials, intergovernmental organizations, and civil society in the management of vital ecological resources, both within and beyond the limits of their domiciles (in the case of natural persons) or executive and operational headquarters (in the case of juridical persons), in particular in respect of large-scale transboundary and global common-pool resources. Market actors shall be invited to help invent, recommend, and initiate effective new policy structures for Market activity that are consistent with commons- and rights-based ecological management.
4. At no time shall private actors seek to undermine or otherwise compromise commons- and rights-based ecological governance systems. They shall undertake, instead, to partner with green governance systems, not to compete with or undermine them, in the preservation, conservation, and, where necessary, restoration of vital ecological resources, including vital common-pool ecological resources.
5. Market actors shall at all times cooperate with the State in fulfillment of its affirmative duty to eliminate nuclear, chemical, and biological weapons, as well as other toxic substances antithetical to a clean and healthy environment, including common-pool resources whether managed or unmanaged.

Article V. (Duties of United Nations and Other Intergovernmental Organizations)
1. The United Nations and its system of organizations shall contribute to the extent of their capacities to the creation, support, and proliferation of commons- and rights-based ecological governance through the mobilization of financial cooperation, technical assistance, and other methods and means of promoting such governance.
a. To this end, the Member States of the United Nations and the intergovernmental organizations that have agreed to achieve eight Millennium Development Goals (MDGs) by 2015, including "ensuring environmental sustainability," shall strive both before and, if possible, after 2015, to make the creation, support, and proliferation of commons-and rights-base ecological governance an integral part of the MDG policy frame.
b. The United Nations and its system of organizations shall contribute also to the full realization of the human right to commons- and rights-based ecological governance recognized and defined in this Universal Covenant. In this regard,
1) the General Assembly shall formally recognize this right to green governance, and, in accordance with Article 22 of the Charter of the United Nations, shall establish and actively support a subsidiary organ empowered to refer cases to the International Court of Justice for compulsory advisory opinions on all matters pertinent to said right; and
2) the United Nations shall use its good offices to establish a permanent Ecological Governance Oversight Panel (or equivalent) charged with responsibility to help safeguard the human right to commons- and rights-based ecological governance for present and future generations. The Panel shall have legal standing before the Human Rights Council and all other relevant United Nations bodies, both treaty and non-treaty, on all matters pertinent to this right.

2. All other appropriate intergovernmental organizations—including but not limited to such global institutions as the International Monetary Fund (IMF), the World Bank, and the World Trade Organization (WTO); and such regional systems as the African Union (AU), the Association of Southeast Asian Nations (ASEAN), the European Union (EU), and the Organization of American States (OAS)—shall

a. at all times cooperate with the United Nations and its system of organizations in their efforts to promote and protect both commons- and rights-based ecological governance and the full realization of the universal right of all natural persons to it as set forth in this Universal Covenant; and

b. to the extent of their financial, technical, and other capacities take initiatives of their own to promote and protect both green governance and the full realization of the universal right of all natural persons to it as set forth in this Universal Covenant.