BUSINESS-AS-USUAL BARRIERS FOR THE CRIME OF ECOCIDE: A MULTIDISCIPLINARY MAZE

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Abstract

Ecocide as a possible new crime and, *eo ipso*, candidate for international norm-recognition is gathering momentum in the contemporary era among observers and commentators. In legal and evolutionary terms, however, such support for the idea of accommodating and adopting ecocide as a core international crime is no guarantee of success. It is up to the Member States to the Rome Statute for the International Criminal Court to decide for or against. This reality which links law and politics, together with other types of conventional facts and theorizing have influenced the debate and dispute. With the use of examples from the responses and perspectives of legal professionals and scholars, the two authors of this article capture the multidisciplinary maze that ecocide and legal doctrine form part of. By emphasizing the role of philosophy, critical aspects pertaining to human rights and other key areas of importance are accentuated. Unfortunately, the multidisciplinary maze may be a vicious circle, without much potential for progressive transformation.

Key Words:

Business, Barriers, Crime, Ecocide, Multidisciplinary

I. Introduction

In international criminal law (ICL), the majority of contemporary complaints is about the lack of effective norm-protection.[1] In the post-World War II era,

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Acknowledgements:

Both authors wish to warmly thank Vice-Dean for International and Interinstitutional Cooperation and Quality Management prof. dr. sc. Iris Goldner Lang for approving their research partnership with the Chair of Criminal Law at the Faculty of Law, University of Zagreb, Croatia.

positions in legal doctrine have even tailored their framework to respond to the need for increased enforcement, e.g., the Integrative Approach.[2] Admittedly, norm-protection encompasses formal provisions for norms and, with these, questions about future norm-recognition may ensue. To make things more complicated, the distinction between norm-protection and norm-recognition is sometimes blurred, especially in connection with discussions of possible new crimes and corresponding fundamental human rights. Apart from enforcement as a topic that falls under international criminal justice (ICJ), norm-protection includes (human rights) fulfilment. If and when serious crimes are committed, human rights are violated; and this wrongdoing is tantamount to a loss or deprivation of the objects of those same rights. Norm-protection through fulfilment gives rise to the question of resources, and some theorists believe that human rights differ in that regard. They may have no general theory of rights to substantiate the claim. It may be advanced in an indirect manner or in the form of scattered remarks about rights. Nevertheless, it is typically embedded in one or more of the premises for the legal doctrine that theorists espouse.[3]

Legal doctrine may be a case of "deep theory," of reasoning and argumentation that tackle foundational issues having to do with the law.[4] However, in the debate and dispute about ecocide, legal doctrine may also assume the character of a conventional response by default, e.g., by being a primarily pragmatic answer to the problem or challenge of possible new crimes, rather than a quest for answers to the theoretical study of, *inter alia*, "What law is."

Ecocide as a candidate for norm-recognition, so it appears, has gained support among a variety of legal professionals and scholars. This article seeks to cover a small selection of responses perspectives in the relevant regard. To facilitate an

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[1] To explain this "seminal" problem, Bassiouni states:
Foremost is the adamant refusal of nation-states to surrender or share their power with an international organization in certain areas determined for various reasons by each nation-state to be of vital self-interest.
See I INTERNATIONAL CRIMINAL LAW xii (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

[2] *See generally* GIULIANA ZICCARDI CAPALDO, THE PILLARS OF GLOBAL LAW (2008).

[3] Note the lack of a general rights theory makes a reconstructive approach to the interpretation of rights necessary. For an examination of the way in which the "waters part" as regards so-called negative and positive rights for doctrinal outlooks that otherwise share the premise that there are (basic) human rights that correspond with or to *jus cogens* norms, *see* Anja Matwijkiw & Bronik Matwijkiw, *The Emerging Ethics Evolution: The Evasive Connection Between Environmental Crimes, Philosophical Considerations of Public International Law, and the International Criminal Court's 20th Anniversary, forthcoming in* 22 GLOBAL COMMUNITY YILJ (2023). For an account of the philosophical and critical tools for analysis, *see* Anja Matwijkiw, *The Dangers of the Obvious but Often Disregarded Details in the International Criminal Law Demarcation Debate: Norm-Integration and the Triple-Thesis 'Argument,'* 20 INT'L CRIM. L. REV 759 (2020) [hereinafter *The Dangers of the Obvious but Often Disregarded Details in the International Criminal Law Demarcation Debate]*.

[4] In the case of Bassiouni, pragmatism and idealism are mixed in his general jurisprudence, just as the deep theory perspective is on accountability as a *meta*-right. *See* Anja Matwijkiw & Bronik Matwijkiw, *A Modern Perspective on International Criminal Law: Accountability as a Meta-Rights, in* THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI 50, 57, 68 (Leila N. Sadat & Michael P. Scharf eds., 2008) [hereinafter *A Modern Perspective on International Criminal Law*].

understanding of the role of philosophy, the authors first engage in a "warming up" exercise concerning legal doctrine (section II). This exercise functions as a general backdrop for the kind of new crimes and human rights comparison they pursue in several of the subsequent sections (III-V). In section VI, a selection of critical observations and insights give rise to more conceptual and normative discussion of ecocide. Finally, the conclusion – in section VII – shows that ecocide viewed as a multidisciplinary maze may only carry the "promise" of a vicious circle.

II. Between Progress and Paralysis – What Does Philosophy Have to Do with Anything?

Philosophers tend to be attracted to controversial topics. At the same time, they couple their attraction with an analytical approach to central concepts, a comparison of competing theories within the relevant field, and thought experiments to detail the implications of the various scenarios, however hypothetical in nature. If philosophers are more practically oriented (cf. applied philosophy), they tend to gravitate towards a carefully divided account of the descriptive and the evaluative aspects – to reassure their audience that any contribution to assessment (cf. evaluative) is *not* conflated or confused with fact-finding. Their rebellion against any naïve expectation of the so-called detached philosopher may and may not result in critically engaged statements or, if certain beliefs are strongly held, opinionated responses to the topics. Such an outcome does not necessarily create doubts about the distinction itself. Facts and values are different. That is the concession. Values may be captured descriptively, though. If so, they are recorded and relayed as facts, as in "In place P, freedom is considered to be the supreme value." Furthermore, contemporary philosophers share a respect for clarity, together with the criteria that underpin a particular strategy for classifying concepts as (clearly) belonging in one category as opposed to another. This can be extended to best practices, if the way of ordering and systematizing their thoughts incorporate ideas about "What should be" (cf. ideals) and not just "What is" (cf. facts). To create a whole philosophical system, which covers all or most of the branches within the discipline, is not *en vogue* anymore.[5] However, a multidisciplinary interest is, especially if the topics appear to depend upon a (non-philosophical) expertise to provide informative and well-founded propositions.

And philosophers are not alone when it comes to multidisciplinary inquiries and exercises. There are studies and discoveries that simply cannot be made unless they are methodologically predicated on certain synergies, on different areas that intersect or cross-fertilize each other. Philosophy of law is one example. If executed

[5] One of the last thinkers to develop philosophy as an all-embracing system is Georg Wilhelm Friedrich Hegel (1770–1831). *See* HOWARD P. KAINZ, G.W.F. HEGEL: THE PHILOSOPHICAL SYSTEM (1996).

by a theorist with a background in law, s/he must consider the abstract and speculative *cum* philosophical components of the framework. If one or more parts of the law is scrutinized by a philosopher, the need to somehow "anchor idea(l)s" in legal reality must be met. Those who are trained and gainfully employed in law are often preoccupied with legal facts, whereas philosophers are at risk of pushing the envelope when they work on idea(l)s, *as if* there is a special truth-value in an intellectual innovation. The transition from preferences to preconceptions gives practitioners and scholars alike pause for thought. Both extremes are warning lessons, just as sweeping generalizations are the first item on the philosopher's "List of Things to Avoid."

But, what if philosophers encounter legal professionals and scholars who work on legal doctrine or argue along the premises of a particular legal doctrine without necessarily paying attention to this? As the label "legal doctrine" suggests, the implied interpretative activities are directed at the law, but the comprehension and conceptualization that ensue may be driven by facts or by beliefs, or both. Sometimes doctrine is narrowed to a notion of a well-established rule or principle, a precedent, which is then perceived as "the law." In turn, this explanation invokes the work of the courts (cf. judicial opinions as rules). In all circumstances, observers and commentators of contemporary contributions to legal doctrine complain about "the decline of doctrinal method"[6] or, alternatively, that positions in legal doctrine do not "effectively come to grips with the descriptive meaning of legal doctrine.[7] The latter sets the stage for empirical testing, with a view to determining if positions can be said to fail or succeed.

Philosophically, this can be construed as a doctrinal program declaration. As such, it is one that American legal realists would embrace, because they proceed on the basis of the assumptions that i) the natural sciences constitute the paradigm for law, ii) that law is a prognostic tool for the way that judges will rule (cf. judicial decisions), and that iii) a contextual link between law and society emerges through the social beliefs *cum* values judges consider in their decisions. The stronger the emphasis on law-making as opposed to rule-following, the sharper the distinction between legal formalists and realists becomes, albeit also true that realists vary in their outlooks.[8] Other positions come with a method that accentuates written law as a source. Sometimes this is paired with a naturalistic assumption about the behavior of judges. E.g., Scandinavian legal realism is a position that assumes that judges

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[6] Jan M. Smits, *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research, in* RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE 207-228 (Rob van Geste *et al* eds., 2017).

[7] Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?* 100(1) NW. U. L. REV. 517 (2006), https://heinonline.org/HOL/LandingPage?handle=hein.journals/illlr100&div=32&id=&page=.

[8] Oliver Wendell Holmes Jr., *The Path of the Law*, 10(8) HARVARD LAW REVIEW 457, 467-468 (1897) (cf. judges are importing social beliefs into their decisions). For the view that law *is indeterminate* until judicial decisions or rulings have been made, *see* JEROME FRANK, LAW AND THE MODERN MIND (1930).

"feel bound" by the prevailing judicial ideology, thereby capturing a conservative feature that is tailored to prognostic models, however erroneous in and of themselves.[9] The possibility of predictions is a myth.[10] The underpinning obsession with objectivity is repeated in legal positivism. Like Scandinavian legal realism, advocates of legal positivism reject the tenets of natural law theory, especially if the distinction between law and morality (cf. the so-called separation thesis) is replaced by an emphasis on moral absolutes as direction-posts or value measurements for positive law.[11] Morality reduces to subjectivity or emotional statements without cognitive meaning. Rational discussion is reserved for the law defined as the body of legally positive norms. Admittedly, doctrinal compromises exist in the form of, *inter alia*, moderate legal positivism.[12] Natural law theory does not have to entail epistemological and ontological views that commit its defenders to some form of metaphysics pertaining to the law. E.g., M. Cherif Bassiouni's concept of "right reason" revolves around the "humanistic values" that rules, principles, and standards in international criminal law (ICL) *should or ought* ideally express, but this position does not cancel the legal validity of the existing arrangement (which includes the administration of justice) simply because it is morally illegitimate.[13] However, it does put pressure on stakeholders who may facilitate change through legal reform. This may even come about in a procedurally imperfect way that is controversial, and still count as a step in the direct direction.

According to Bassiouni's analysis, the "modern human rights era" was commenced with a "questionable" satisfaction of the principle of legality on account of the 1945 Nuremberg Charter (cf. London Agreement) and the 1945-1946 International Military Tribunal at Nuremberg (IMT), which is nevertheless "a worthy legacy" that reflects "our moral-ethical values and intellectual commitment."[14] In particular, the judges established "crimes against humanity"

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[9] ALF ROSS, ON LAW AND JUSTICE 14, 40, 68, 105 (2004) (1959).

[10] For a critical trilogy on predictions in law, *see* Bronik Matwijkiw, *Opgøret om Forudsigelsen* [*The Prediction Controversy*], 5 TIDSSKRIFT FOR RETTSVITENSKAP [J. JUR.] 874 (1998) (Nor.)); *Den Umulige Forudsigelse* [*The Impossible Prediction*], 1-2 J. JUR. 103 (1997) (Nor.); *Den Fuldstændige Selv-Forudsigelse* [*The Complete Self-Prediction*], 3 J. JUR. 389 (1997) (Nor.)).

[11] ROSS, ON LAW AND JUSTICE, *supra* note 9, at 227-296. Note that the separation thesis – together with the logical correlativity thesis for rights and the incompatibility thesis for values make up the triple thesis, *see generally* Matwijkiw, *The Dangers of the Obvious but Often Disregarded Details in the International Criminal Law Demarcation Debate, supra* note 3.

[12] For one example, *see* H.L.A. HART, THE CONCEPT OF LAW (1961).

[13] The expression "right reason" is a placeholder for idealism *cum* natural law theory in Bassiouni's Mixed Theory, which also includes pragmatism *cum* legal positivism. *See* Matwijkiw & Matwijkiw, *A Modern Perspective on International Criminal Law, supra* note 4, at 19; The Grotius Centre for International Legal Studies, "Professor M. Cherif Bassiouni on the Future of International Criminal Justice" (interview), Sept. 2015, https://www.facebook.com/GrotiusCentreLeidenUniversity/videos/10155918105168938/.

[14] Note that it is Bassiouni's "law of humanity" that corresponds to Cicero's view that "true law is right reason in agreement with nature." *See* M. Cherif Bassiouni, Richard A. Falk & Yasuaki Onuma, *Nuremberg: Forty Years After*, 80 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 59, 62, 65 (1986); M. Cherif Bassiouni, *The Chicago Principles on*

(CAH) as an international crime under ICL (*cf.* positive norm-recognition) in a derivative argument whereby it was made to hold that "the maximum *nullum crimen sine lege* is not a limitation of sovereignty [but is in general a principle of justice]."[15] Apparently, legally-technical considerations could not compete with the need for change. In the wake of the Nazi regime's mass atrocities, what constitute materials of substantive morality for philosophers codetermined international law for the purpose of facilitating progress (cf. the "Never Again" motto).

Post-IMT events show that the concept of core international crimes and the basic human rights that are at stake in violations of *jus cogens* or peremptory norms have evolved in ways that do not impose a strict and rigid law *versus* morality separation. In fact, examples to the contrary exist. E.g., Responsibility to Protect (R2P) doctrine is a moral standard. According to some theorists, R2P is also emerging under customary international law (CIL). In the opinion of others, R2P should not be "recomputed" in the ethics-law calculation.[16] In other words, it should not be pushed as a potential CIL norm, but instead remain "an international ethical norm."[17] Yet other scholars argue that R2P would benefit from a narrow approach to crimes, one that avoids "broader" human rights for the same reason.[18]

The narrow approach is a response to the fact that the different components of R2P are gathered from many sources of international law, something that makes the linkages (appear to be) weak as opposed to well-grounded and firmly established in a singular sense.[19] Be that as it may, the rationale entirely ignores the contribution of the original landmark document on R2P, the 2001 report by the International

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Post-Conflict Justice, at 5 (2007), https://law.depaul.edu/academics/centers-institutes-initiatives/international-human-rights-law-institute/projects/Documents/chicago_principles.pdf; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes,* 59/4 L. & CONTEMP. PROBS. 63 (1996) [hereinafter *International Crimes*]; Matwijkiw & Matwijkiw, *A Modern Perspective on International Criminal Law, supra* note 4, at 31.

[15] Anja Matwijkiw, *The No Impunity Policy in International Criminal Law: Justice versus Revenge*, 9(1) INT'L CRIM. L. REV 1 (2009); Memorandum of the Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, at 43, 70-72, U.N. Doc. A/CN. (3 Mar. 1949); Charter of the International Tribunal at Nuremberg, United Nations Treaty Series, vol. 82, 279 (1945).

[16] Ramesh Thakur, *Review Article: The Responsibility to Protect at 15*, 92(2) INTERNATIONAL AFFAIRS 415, 422 (2016) [hereinafter *Review Article]*.

[17] Pinar Gözen Ercan, *R2P: From Slogan to an International Ethical Norm*, 11(43) INT'L REL. (ULUSLARARASI İLIŞKILER in Turkish) 35 (2014).

[18] This outlook coincides with the conventional position, as made evident in this citation.

It is gratifying to note that the 'World Summit' version of R2P only refers to four grave international crimes—genocide, crimes against humanity, war crimes and ethnic cleansing—rather than the other broader categories suggested by the Canadian Commission such as 'large-scale killing' or 'overwhelming natural or environmental catastrophes'. This limitation will not only ensure that R2P is applied only in cases of mass atrocities but will make certain that the concept of R2P develops through close linkages with legal developments.

See S.R. Subraminian, *UN Security Council and Human Rights: An Inquiry into the Legal Foundations of the Responsibility to Protect in International Law*, 37(1) UTRECHT J. INT'L & EUR. L. 20, 32, (2022); UN GA, 2005 World Summit Outcome, A/RES/60/1 (24 Oct. 2005).

[19] *Id*.

Commission on Intervention and State Sovereignty (ICISS).[20] In this report, the concept of mass atrocities covers "(mass) starvation" and "overwhelming inequalities of power and resources."[21] Other examples are "large-scale killing" or "overwhelming natural or environmental catastrophes."[22] The term "ecocide" is not used, but the kind of crisis and conflict that may ensure from it can nevertheless be subsumed under the ICISS' notion of "man-made" catastrophes and threats that put populations at risk.[23]

Whether assessed alone in the rear mirror or compared with post-2005 R2P developments in the context of the United Nations (UN), the 2001 ICISS report was and still is progressive. Until the UN's "all human rights" approach is accepted or at least resolved in a manner that does not dogmatically *preclude* a doctrinal abridgement, critical discourse about crimes and human rights must be continued.[24]

If so, the disappearance of (allegedly) controversial human rights is an area that warrants attention. Concerning norm-recognition, ethics is not typically perceived as an evolutionary driver that is inescapable. Ecocide is no exception. Admittedly, ethics may be presupposed as a value system that helps to support a stance on crimes and corresponding human rights, but it is (typically) not articulated, let alone ascribed sufficient significance to give rise to a need for elaborate accounts.[25] Instead, law's dependency on politics seems to play a primary role. As it happens, legal professionals and scholars may both criticize politicians *cum* policymakers for prioritizing state interests over the best interest of the collective, *realpolitik* in other words, and, at the same time, worry that *without compromise*, without an incremental step-by-step strategy, no progress would be possible. In the following sections, the authors will illustrate this kind of concern. The non-emphasis on ethics immediately introduces a disadvantage for philosophy as a discipline. Be that as it may, the analytical tools of philosophers may still be used to unlock the weaknesses of

[20] International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect (report of Dec. 2001) [hereinafter 2001 Report].

[21] *Id*., at 7 (1.32), 17 (2.29), 33 (4.20), 69 (8.1), 71 (8.13). Note that *per* Johan Galtung's terminology, "structural violence" captures the socioeconomic inequity and inequality. *See* Johan Galtung, *Violence, Peace and, Peace Research*, 6(3) J. PEACE RES. 167 (1969).

[22] ICISS, 2001 Report, *supra* note 20, at XI, 33 (4.20).

[23] *Id*., at XI, 19.

[24] *E.g.,* Report of the UN Secretary-General to the GA, *Implementing the Responsibility to Protect,* U.N. Doc. A/63/677, Jan. 12, 2009) (prepared by Ban Ki-moon). For the "all human rights" approach as one that mixes international human rights norms, democracy and sustainable development, *see* UN GA, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, paras. 5-7, A/RES/67/1 (Nov. 30, 2012) [hereinafter 2012 Rule of Law Declaration].

[25] If ethics is discussed in the context of law and ecocide, the participation is often limited to "international lawyers and scholars." *E.g., see* Stop Ecocide International, Ecocide: A Discussion of Law and Ethics, 20 January 2022, https://www.stopecocide.earth/events/ecocide-a-discussion-of-law-and-ethics; For an example of multidisciplinary approach that draws on stakeholder theory and ethics, *see* Anja Matwijkiw & Bronik Matwijkiw, *[Human] Values and Ethics in Environmental Health Discourse and Decision-Making: The Complex Stakeholder Controversy and the Possibility of 'Win-Win' Outcomes, in* ENVIRONMENTAL HEALTH IN INTERNATIONAL AND EU LAW: CURRENT CHALLENGES AND LEGAL RESPONSES 3-25 (Stefania Negri ed., 2019) [hereinafter *[Human] Values and Ethics in Environmental Health Discourse and Decision-Making].*

"arguments" that go straight to business-as-usual responses to possible new crimes. Because the tactic is an instance of leaping over deep-theory reasoning, it introduces a kind of paralysis. There are, of course, various ways in which theorists do this. E.g., they may not embark on a debate about which premises to adopt because they proceed on the tacit assumption that this is superfluous. For the same reason, the question of which premises *should* be advanced for the sake of promoting the cause itself becomes too far-fetched. This does not mean that values do not manifest themselves, though. As already alluded to, legal doctrine is also a matter of perception and perspective. In the case of ecocide and legal doctrine, it may be tempting to gravitate towards an outlook that relies on science. However, this preference will not necessarily subtract from controversy. Currently, talk about "fake science" permeates the environmental studies, thereby discrediting the (alleged) facts *cum* data that supposedly make a scientific hypothesis or theory falsifiable.[26] To the extent that the "fake science" accusations are politically motivated, they do not have any pull in rational discussion, but that observation misses their intended effect.

So, what does philosophy have to do with things? The previous account demonstrates the prominent but also precarious role of philosophy as a general anti-dote to taking too much for granted in law and in theorizing about the law. Philosophy comes with a commitment to rigorous scholarship and method, but it is first and foremost critical reflection that is the hallmark of the discipline. The closer the link between legal doctrine and philosophy of law, the more the resulting positions, views and outlooks become infused with the main ingredient from critical reflection: questions. If pragmatism reduces law to an instrument for politics, the position called critical legal studies (CLS) sees this outcome as an unavoidable implication of what law is.[27] It is important, of course, to be aware of the difference between such ideology-oriented pragmatism and the critically-informed usage of pragmatism as a reference to the measures that are effective for a closer approximation to justice (cf. idealism). In Bassiouni's words, if "the substance of law is not bound by higher values and principles, law too easily becomes an instrument for the pursuit of totalitarian power at the expense of the best interest of the collectivity."[28]

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[26] If environmental science is defined as a purely objective discipline (without any normative component), the view belongs to a pre-modern perception. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959).

[27] CLS, which is philosophically indebted to, *inter alia*, Karl Marx and Michel Foucault, includes theorists like Roberto Mangabeira Unger, Robert W. Gordon, and Duncan Kennedy. Among the outgrowths of CLS, critical race theory (CRT), feminist legal theory, and postmodernism can be mentioned.

[28] Note the implication, *viz*., that justice and humanist(ic) values are legal imperatives. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 16 (2011). For the broadening of the UN's concept of justice – from a (formal *cum*) procedural to a (moral *cum*) substantive requirement, *see* UN GA, 2012 Rule of Law Declaration, *supra* note 24, at para. 2. For specific values, *e.g*., justice, the inherent value of human life and democracy, and, furthermore, for a general requirement of balancing reality (economic, legal, political, *etc*.) and morality (justice), *see* Bassiouni, *The Chicago Principles on Post-Conflict Justice*, *supra* note 14, at vi, 5, 7-8, 11, 24, 55, 59.

For the remainder of this article, the authors will concentrate on two examples that involve the voices of legal professionals and scholars. In the course of providing an account of these (sections III-V), an emphasis is placed on the implication/s for human rights. As one of the most prominent figures in ICL and ICJ, Bassiouni is included in the analysis and assessment, together with a speaker from the 20th anniversary for the International Criminal Court (ICC), namely Phoebe N. Okowa. Despite the generational difference between the two voices, environmental destruction is a topic that they both address.

III. A Derivative Argument Dilemma Anno 2022: New Crimes and Old Human Rights

When the permanent successor to the IMT, *viz*., the ICC celebrated its 20th anniversary in 2022, a conference was held to mark the special occasion. As one of the contributors, Okowa delivered a speech entitled "Prospects of Adding New Crimes in the ICC's Jurisdiction."[29] In this, she expressed the belief that ecocide was the most credible candidate for the purpose in question. She also went on to praise the 2021 proposal of the Independent Expert Panel (IEP) for the Legal Definition of Ecocide, as established by the Stop Ecocide Foundation.[30]

According to the IEP, ecocide can be defined in terms of "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[31] Okowa's praise of the proposed definition focused on one particular fact: that it repeated the standard elements of core international crimes.[32] She did not discuss the legalese, nor did she address the topic of R2P and the instrumental value of the ICC.[33] Finally, she did not attempt to respond to philosophical assumptions

[29] Phoebe N. Okowa, *Prospects of Adding New Crimes in the ICC's Jurisdiction*, ICC, 1 July 2022 (speech for *International Criminal Court at 20: Reflections on the Past, Present and the Future*), https://www.icc-cpi.int/icc-20a-cpi; For the "non-anthropocentric approach" to the definition, *see* Haroon Siddique, *Legal experts worldwide draw up 'historic' definition of ecocide*, THE GUARDIAN, June 22, 2021, https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide.

[30] The Panel consisted of twelve international lawyers from different areas of expertise and specialization, but no ethicists or experts from other disciplines outside of law. According to one of the members, namely Christine Voight, Stop Ecocide fights to promote the crime of ecocide "to be elevated" at the international level. *See* The Stop Ecocide Foundation, https://www.stopecocide.earth/; Jack & Mae Nathanson Centre on Transnational Human Rights, *Understanding the Legalities of Ecocide*, Nov. 18, 2021, https://www.youtube.com/watch?v=xNzTmR5GvNM.

[31] IEP, Legal Definition of Ecocide, https://www.stopecocide.earth/legal-definition.

Note that the disjunctive "widespread *or* long-term" is not a business-as-usual strategy in that it deviates from (the conjunctive usage in) Article 8(2)(b) of the Rome Statute.

Note also that domestic or national law was explored for the purpose of defining international unlawfulness. Ecocide appears in some national jurisdictions, but the experts seem to have perceived this area as nothing more than "pieces."

[32] M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50(2) VA. J. INT'L L. (2010) 269, 280, 287, 317.

[33] According to Thakur, "[a]trocity prevention remains challenging and requires using early warning information and analyses and a range of legal instruments and regimes, including the International Criminal Court." *See* Thakur, *Review Article*, *supra* note 16, at 420. For a discussion of the multidisciplinary aspects of ecocide and the legalities of

on behalf of the ICC, such as Bassiouni's idea that the ICC is engaged in fundamental human rights promotion because the crimes are committed "against all of humanity."[34] It does not follow from this that Okowa disagreed with Bassiouni. All that follows is that her main objective did not consist in questions about human rights implications, at least not in a direct fashion. Rather, she expressed her concern about history and politics in connection with an assessment of the crime of ecocide's transitional potential, from credible candidate for norm-recognition to law (cf. new crime). For this purpose, Okowa reminded the audience that ecocide had been considered as an atrocity crime in the final drafting stages of the 1998 Rome Statute. However, politics had blocked the endeavor to include it.[35] Now, twenty years after, one of the learning lessons apparently consisted in the choice of a (more) prudent tactic. Otherwise, ecocide might be consigned to "the graveyard" once again.[36]

Fortunately, there was a solution in her opinion. To opt for a "narrow subject-matter… to maximize political support."[37] If the crime of ecocide was *not* (too) progressively defined, the likelihood of a successful outcome increased proportionally, so the line of reasoning was. But, even with a narrow agenda, Okowa still believed that "political pushback" had to be expected, first and foremost in the form of post-colonial obstruction in the wake of the global south-north tension.[38] Therefore, the implied blame game about inequities and resources and the appropriate distribution of responsibility would take center stage. By extension, the international community would have to make do with some measure of (political) success and (legal) progress rather than a total setback, a back to square one scenario – with no adoption and accommodation.

In the light of this, observers and commentators may connect the dots in the following way. Concerning serious environmental destruction, the current legal framework fails to provide sufficient protection. But, in terms of new norm-recognition, a narrow expansion approach to ecocide is required at the same time on account of *their* predictable resentment. In particular, the risk of asking too much of countries with a colonial past that continues to leave them behind could steer the ecocide debate and dispute away from the need for legal reform, in effect, turn it into a political fight over ethics and economics. The more weight observers and commentators attach to an analysis of the legacy of Western colonialism and imperialism, the less likely a shared commitment to global values becomes, simply

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the crimes in question, *see* Jack & Mae Nathanson Centre on Transnational Human Rights, *Understanding the Legalities of Ecocide*, *supra* note 30.

[34] M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS L. REV. 203, 232 (2006).

[35] This is the aspiration of Stop Ecocide Foundation that commissioned the Independent Expert Panel for the Legal Definition of Ecocide. *See* Stop Ecocide International, https://www.stopecocide.earth/who-we-are-.

[36] *Id*.

[37] Okowa, *Prospects of Adding New Crimes in the ICC's Jurisdiction*, *supra* note 29.

[38] *Id*.

because the post-colonial discourse may quickly approximate "postcolonialism" as an ideology. This calls for justice by critically challenging the relationship between the developed and developing countries, *inter alia*, on the basis of a comparison of *our* poverty and *their* wealth. That said, the global south-north tension may still defeat the crime-typological expansion effort, however, limited or minimalist in scope; thereby also rendering the underlying ecocide compromise superfluous beforehand.

Here it is noteworthy that the ICC has already secured a certain codification success in the relevant regard. More precisely, Article 8(2)(b)(iv) of the Rome Statute provides that a war crime within the context of an international armed conflict and "within the established framework of international law" may have been committed in the event that an accused "[i]ntentionally launch[es] an attack in the knowledge that such attack will cause […] widespread, long-term and severe damage to the environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."

From the perspective of legal doctrine, it is possible to avoid a derivative argument for ecocide, if the ICC went ahead and adopted an alternative type of proposal. Currently, damage to the environment can only be subsumed under "war crimes" (*cf*. Articles 5, 8(1), 8(2)(a)(iv)). To make it applicable in times of peace requires crimes against humanity (CAH) status. As pointed out by Stefania Negri, this concession is important because serious crimes like ecocide *take place* during times of peace as well as times of war and conflict. Furthermore, widespread, etc. environmental damage during times of peace is often "a crime without intent as it occurs as a byproduct of industrial and other activity" just as it is "associated with" the activity of states.[39] Doctrinally, the step of making the distinctions between respectively peace and war time and intent and no intent irrelevant places the focus on the values that, in turn, help to explain why the affected human rights have to be broadened to accommodate, *inter alia*, "[e]arth protection and climate justice" and "cultural loss."[40] The policy paper on case selection and prioritization that the Office of the Prosecutor of the ICC issued in 2016 happens to mention "the social, economic and environmental damage" to signal the centrality of a non-separation and with *a specific view to* the consideration to prosecute Rome Statute crimes "that are committed by means of, or that result in the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.[41] In and of itself, the 2016 policy paper is proof of insider activism, of an endeavor to steer

[39] Matwijkiw & Matwijkiw, *[Human] Values and Ethics in Environmental Health Discourse and Decision-Making, supra* note 25, at 13.
[40] In the opinion of Negri. *See id*, at 21.
[41] ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritization, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

the ICC towards the challenges and problems that characterize the contemporary era. The contribution came four years before the IEP's 2021 proposal, thereby also demonstrating that the legal evolution is a gradual one (and not a Kuhn-like paradigm-shift) *in spite of the urgency* that some theorists appeal to for a description of serious environmental destruction and its effects.[42]

Prior to any amendment to the Rome Statute, legal professionals and scholars still have time to discuss the jurisdiction, the *chapeau* elements, and the human rights implications of the crime of ecocide.[43] The fact that the "responsibility to prosecute" is stressed in the context of the ICC may arguably deflect from R2P's most effective justice pull in the era of globalization: an "all human rights" approach to core international crimes.[44] Then again, a policy that is consistent with the assumption that the ICC has the tools to tackle environmental criminality may (eventually come to) mean that the implied pro-ecocide reaction will pave the path for future and broader developments. It will be legal doctrine, though, that determines the general direction of the interpretation, just as the R2P effort will be clarified accordingly. Obviously, if *jus cogens* or peremptory norms compel *increased human rights enjoyment*, the distinction between human rights promotion and R2P prevention must be viewed as artificial and obsolete.[45]

In the context of serious environmental crimes, future threats *broadly* include nationalism together with mass starvation and mass displacement from climate migration[46] – and all of these are almost bound to raise several of the same questions as those from the post-colonial debate and dispute. The answers may rely on post-ecocide and, for that matter, post-R2P parameters and methodologies. Only the future will tell.

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[42] Intergovernmental Panel on Climate Change (IPCC), Climate change: a threat to human wellbeing and health of the planet, 28 February 2022, https://www.ipcc.ch/2022/02/28/pr-wgii-ar6/; UN Environment Programme, 2022: Emergency mode for the environment, 6 January 2022, https://www.unep.org/news-and-stories/story/2022-emergency-mode-environment; UN High Commissioner for Refugees, Climate change and disaster replacement, 2021, https://www.unhcr.org/en-us/climate-change-and-disasters.html; Amnesty International, Climate Change: Stop Coal!, 2021, https://www.amnesty.org/en/what-we-do/climate-change/; Kate Mackintosh, *How Long Until the Planet's Destruction is an International Crime?*, BLOOMBERG LAW, 18 March 2022, https://news.bloomberglaw.com/us-law-week/how-long-until-the-planets-destruction-is-an-international-crime.

[43] Cf. the debate about whether ecocide applies in peace time and, with intent, criminalizes mass damage and destruction of ecosystems (and therefore is expanded beyond a human cum "civilian population"), or – *mens rea* is kept so as to include ecocide in the ICC's catalogue of core international crimes only if perpetrators of "unlawful or wanton acts *committed with knowledge* that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts." *See* Katie Surma, *The International Criminal Court Turns 20 in Turbulent Times. Should 'Ecocide' Be Added to Its List of Crimes?* INSIDE CLIMATE NEWS, July 10, 2022, https://insideclimatenews.org/news/10072022/international-criminal-court-20-years-ecocide/.

[44] James Pattison, *Mapping the Responsibilities to Protect: A Typology of International Duties*, 7(2) *GR2P* 190, 191 (2015).

[45] JAMES PATTISON, HUMANITARIAN INTERVENTION & THE RESPONSIBILITY TO PROTECT 71-73, (2010).

[46] Note that environmental concerns that intersect with nationalism may and may not evolve from civil nationalism to ethnic nationalism. *See* Boudewijn de Bruin. *Against Nationalism: Climate Change, Human Rights, and International Law*, DANISH YEARBOOK OF PHILOSOPHY 1 (2022), https://doi.org/10.1163/24689300-20221060.

Predictions are not possible regardless of Okowa's cautiously optimistic belief that the 2022 ecocide stalemate could be ended if states negotiate along the lines of the IEP's 2021 proposal. Even if this were to occur, it (the IEP's 2001 proposal) signals that the solution bypasses those broad but basic needs that inform the ethics of ecocide (cf. economic and social human rights). Philosophers have contributed to the conceptual and normative work on needs, especially in the context of humanistic ethics.[47] In fact, need-based ethics recommendations for the UN date back to a global study from 2010.[48] Opinions are the common territory of ethics and law – something that is too often overlooked by human rights attorneys and other legal professionals. Admittedly, opinions may not be well-founded in the sense that they are not adequately supported by facts. However, ethics cannot be automatically dismissed just because facts do not necessarily derive from the preexisting standard of relevancy for a particular case (-law domain). Unlike law, ethics is geared towards experimentation, innovation, and idealistic change; and as long as the negotiated settlements constitute significant improvements that benefit the best interest of the collective, law yields to ethics, and *not* the other way around.[49] Left with intellectual weapons like expressions of disapproval, indignation and anger, ethics may not seem well-equipped for tasks like legal reform. However, if there is social pressure, say, because members of civil society step up, because engaged global citizens proceed as activist-type stakeholders, governments may have to pay attention to voices of discontent and protest. After all, reasonable trust in rulers, people in positions of power, is performance-based in modern rule of law philosophy.[50] The point is that policymakers and legislators can and indeed should be held accountable for a state of affairs that is in breach of the part of the social contract that uses basic socioeconomic needs as the cutoff line between solidarity and intolerable

[47] Anja Matwijkiw, *Human Needs, Rights, and Corresponding Duties*, Ph.D. dissertation (1997); *Rights for the Sake of the Individual as an End in Himself,* 3-4 TIDDSKRIFT FOR RETTSVITENSKAP [J. JUR.] 738 (2000) (Nor.). For needs and stakeholder theory, *see* Anja Matwijkiw & Bronik Matwijkiw, *Stakeholder Theory and Justice Issues: The Leap from Business Management to Contemporary International Law*, 10/2 INT'L CRIM. L. REV. 143 (2010) [hereinafter *Stakeholder Theory and Justice Issues*]. These examples of work on needs are directly applicable to the debate and dispute about ecocide and its narrow v. broad implications. Interestingly enough, researchers from the University of Copenhagen issued a 2022 call for consideration of needs in connection with ecocide. *See* The Nordic Committee on Bioethics, https://www.youtube.com/watch?v=ZmhBOvjghyc. Apart from the fact that such work has already been done, its premises can be extended to other members of other species and/or talk about ecosystems.

[48] Anja Matwijkiw, *Justice versus Revenge: The Philosophical Underpinnings of the Chicago Principles on Post-Conflict Justice, in* THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE VOLS. I-II, 173, 239-241 (for ethics recommendations) (M. Cherif Bassiouni ed., 2010). Note that the world study was considered "a milestone in the field of international criminal justice (ICJ)" and "an outstanding world survey." *See* Giuliana Ziccardi Capaldo, 10(II) GLOBAL COMMUNITY YILJ 929, 931 n.21 (2010).

[49] This has also been pointed out by Hart.

[50] Anja Matwijkiw & Bronik Matwijkiw, *From the Rhetoric of States to Strategic Effectiveness in the Globalization Effort: M. Cherif Bassiouni's Statement at the Historic High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, 12(II) GLOBAL COMMUNITY YILJ 1001 (2013).

abandonment of the citizenry at all levels of the law, at least in the opinion of theorists like Louis Henkin.[51]

Okowa's scholarship is generally concerned with the legal challenges that environmental harm presents for traditional or conventional methods of accountability in international law.[52] Her interest revolves around state responsibility, an area that was emphasized in the 1970s where ecocide first emerged as a term and began to enter into proposals for an international convention.[53] While the diplomatic attitude that leads Okowa to favor a narrow approach to minimize political controversy reflects an aspiration *to get something done*, the implied modesty *cum* compromise may still be an instance of asking too much, as will be made evident in the next sections.

IV. Humanistic Values and Legal Doctrine

Bassiouni is one of the "distinguished publicists" whose writings can be considered among the legal sources.[54] Be that as it may, his work on *jus cogens* norms and the basic human rights that arguably correspond to these does not produce a dual-aspect notion that creates a fit for a broad outlook. Bassiouni is pro-experimental and innovative within the area of post-conflict justice management, but equally traditional in his legal doctrine for ICL and the humanistic values he otherwise explicitly treats as a moral compass for evolutionary progress.[55] The fact that ecocide affects non-human organisms too reveals an in-built restriction. The speciesism that traditionally has informed the human rights movement is also a premise in Bassiouni's moderate version of natural law theory. Furthermore, Bassiouni's holistic approach to accountability-securing modalities in the aftermath of conflict paradoxically underscores his unreadiness to transcend a narrow conceptualization of basic human rights in ICL *per se*.

There is tension between the pro-experimental and traditional, the alternative and the business-as-usual responses to justice, in effect, between restorative justice and retributive justice. In post-conflict terms, the former allows victims to integrate negative and positive aspects of values like life, freedom, and security, e.g., survival

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[51] LOUIS HENKIN ET AL, HUMAN RIGHTS 285 (1999).

[52] PHOEBE N. OKOWA, STATE RESPONSIBILITY FOR TRANSBOUNDARY AIR POLLUTION (2000); ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT (Phoebe N. Okowa & Jonas Ebbesson eds., 2009).
In the case of air pollution, Okowa makes a distinction between pollution from industrial and nuclear operations.

[53] The Ecocide Project, https://sas-space.sas.ac.uk/4686/1/Ecocide is the missing 5th Crime Against Peace.pdf. For Richard Falk's Proposed International Convention on the Crime of Ecocide, *see* Richard A. Falk, *Environmental Warfare and Ecocide—Facts, Appraisal and Proposals*, 9(1) REVUE BELGE DE DROIT INTERNATIONAL (1973) (Belg.)

[54] Leila N. Sadat & Michael P. Scharf, *Foreword: Taking Aim at the Sky, in* THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI v (Leila N. Sadat & Michael P. Scharf eds., 2008); Bassiouni, *International Crimes, supra* note 14, at, 71, 74.

[55] The Grotius Centre for International Legal Studies, "Professor M. Cherif Bassiouni on the Future of International Criminal Justice," *supra* note 13.

and subsistence. Victim-centered demands may also establish preferences to have socioeconomic needs met in terms of fundamental human rights. In Bassiouni's own words, "[r]elying solely on formal legal action generally fails to fully address victims' needs."[56] Seven principles for a mixed theory of post-conflict justice that goes far beyond the *aut dedere, aut judicare* strategy are presented:[57]

> prosecutions; truth-telling and investigations of past violations; victims' rights, remedies and reparations; vetting, sanctions and administrative measures; memorialization, education and the preservation of historical memory; traditional, indigenous and religious approaches to justice and healing; and, institutional reform and effective governance.[58]

This is philosophically unproblematic, especially since the overarching project is an attempt to put pragmatism in the service of idealism, that which is owed (justice, truth and redress) *should* be effectively protected and delivered. It is the fact that social and economic human rights do *not* make it to Bassiouni's list of basic human rights which is odd.

Once again, there is a tension in Bassiouni's scholarship. On the one hand, ICL, international human rights law (IHRL) and international humanitarian law (IHL) merge in ICJ – and merge *through* fundamental *cum* basic human rights, thereby also giving rise to a singular concept of public international law (PIL).[59] The legal technicalities of demarcating the three branches of PIL is essentially put in brackets within the area of post-conflict justice. On the other hand, it is not the synthesis but what turns out to be a subtle separation of basic *v.* non-basic rights that is significant. However open-minded and flexible Bassiouni wants to be, there is no escape from the conclusion that it (the separation) demonstrates a liberal bias.

On scrutiny, the bias begins to manifest itself in the sliding scale for Bassiouni's self-declared "firm belief in moral and legal rights," with a strict and legal response that equates retributive justice with a no-impunity policy for genocide, war crimes and crimes against humanity at the very top of the hierarchy and followed by lower types of accountability which match lower stakes in restorative justice and rights.[60]

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[56] Bassiouni, *The Chicago Principles on Post-Conflict Justice*, *supra* note 14, at 3.

[57] *See generally* M. Cherif Bassiouni, AUT DEDERE AUT JUDICARE:THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).

[58] Bassiouni, *The Chicago Principles on Post-Conflict Justice, supra* note 14, at 3.

[59] Matwijkiw, *The Dangers of the Obvious but Often Disregarded Details in the International Criminal Law Demarcation Debate, supra* note 3, at 766-767.

[60] In the case of Bassiouni and that which he treats as the *jus cogens* paradigm, namely genocide, crimes against humanity and war crimes, it holds that:

> [T]he enforcement of their proscriptions consists of two duties, namely, the duty to prosecute or extradite and the duty of states to cooperate with other states in the investigation, prosecution, and adjudication of those charged with such crimes, and the punishment of those who are convicted of such crimes.

Note that Bassiouni also takes the step of optimizing retributive justice in his legal doctrine:

There are certain crimes with certain corresponding duties that are categorically binding by virtue of the very nature of the crimes and corresponding human rights at stake. Since "fundamental human rights" also provide a moral and legal incentive to respect the preferences of victims, this could be construed as a signal of ambivalence pertaining to the basicness of other rights. On scrutiny, however, an analogy is bound to misfire.

On Bassiouni's list of basic human rights, we find "[l]ife, liberty personal safety, and physical integrity."[61] If psychological integrity is added and if physical and psychological integrity is referred to in terms of "personal security," that too will reflect Bassiouni's own view about individual rights that count as basic human rights.[62] As rights, life, freedom, safety/security and integrity correspond to *jus cogens* norms which, in turn, are coupled with "consequences," namely, non-derogable obligations *erga omnes* (meaning that the obligations "flow to all").[63] From this, it immediately follows that Bassiouni does *not* presuppose the truth of the logical correlativity thesis.[64]

Philosophically, the step of relegating obligations to the domain where means for rights-protection are considered has the effect of introducing a non-conventional component. As an influential figure in general jurisprudence, Wesley N. Hohfeld's

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> In practice, *jus cogens* norms are intended to secure accountability through (1) prosecution/punishment or extradition, (2) non-applicability of statues of limitations, (3) non-applicability of immunities up to and including heads of states, (4) non-applicability of the defense of "obeying orders", (5) universal application of (1) to (4) whether in times of peace or war or states of emergency, and (6) universal jurisdiction over perpetrators of *jus cogens* crimes, so as to secure prosecution/punishment or extradition, etc. Thus, jurisdiction is applicable irrespective of where the crimes were committed, by whom they were committed (including heads of states), against whatever category of victims, and irrespective of the context of their occurrence (whether they occurred in times of peace, etc.), circumstances (e.g., whether they were the result of "obeying orders"), and legal characterization (e.g., whether they were made part of treaty law).

See M. Cherif Bassiouni, *Searching for Peace and Achieving Accountability*, 59/4 LAW AND CONTEMPORARY PROBLEMS 9 (1996); Bassiouni, *International Cries, supra* note 14; M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, *in* POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2002); M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39-64 (Stephen Macedo ed., 2004).

[61] M. CHERIF BASSIOUNI, THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS xxvi (1994).

[62] M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980); M. Cherif Basisouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 46/1-2 REVUE INTERNATIONALE DE DROIT PÉNAL 405 (1974).

[63] Bassiouni, *International Crimes, supra* note 14, at, 65.

[64] Correspondence in terms of logical correlativity implies that duties are analytically necessary concepts to establish rights, as in "Duties first, and then rights." More precisely, it is made to hold that in order for A to have claim-rights, there must, as a condition, exist another person or party, B, that is a duty-holder. In terms of general rights theory, it is noteworthy that the logical correlativity thesis cuts across the two main traditions, namely Choice or Will Theory (e.g., H.L.A. Hart) and the Benefit or Interest Theory (e.g., Jeremy Bentham).

work on claim-rights as rights *stricto sensu* has served as a standard classification that has prompted the majority of post-Hohfeldian theorists to assume that there cannot be any rights unless there are duty-holders in place. More precisely, the logical correlativity thesis, as presented by Hohfeld, makes duties analytically prior to and necessary for rights. By reversing the order in the relationship between rights and duties, Bassiouni's position is theoretically consistent with a different kind of credentials-checking of rights. Be that as it may, his consequentialist interpretation of duties does *not* secure a progressive perception. In the final analysis, other human rights than civil/political rights are subjected to realist criteria, thereby introducing "You get as much justice as can be afforded" arguments. Unlike higher-level rights, economic/social human rights are not ones that result in duties because the prior rights *compel* other people or parties to provide the objects of the rights. The explanation cannot be found in Hart's distinction between relative and absolute duties because relative duties are, by definition (of claim-rights), ones that entail discretionary powers or controlling choices. These features do not apply to economic/social human rights. Instead, their lower ranking is tied to a notion of fulfillable duties which, in turn, is tied to the availability of resources.

Therefore, when experts talk about *jus cogens* or peremptory norms with the paradigm being proscriptions of genocide, crimes against humanity, and war crimes[65] as implying violations of basic human rights, they must and, *mutatis mutandis*, *should* limit the nature and scope of those rights – for they cannot include so-called positive or affirmative rights, *however basic* from the point of view of humanity *per se*.[66] Another way of putting the same point is to say the following: economic/social human rights are, at best, candidates for claim-rights that "*jus cogens* norms cannot mandate,"[67] thereby establishing a philosophical link between

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[65] The Vienna Convention on the Law of Treaties (VCLT) has two provisions on *jus cogens cum* peremptory norms: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law" and "If a new peremptory norm of general international law emerges, any exiting treaty which is in conflict with that norm becomes void and terminates." *See* UN, VCLT, Treaty Series, 1155, I-18232, arts. 53 and 64 (23 May 1969).
Note that the International Law Commission's (ILC) 2017 terminological shift from *jus cogens* to peremptory norms included the "Draft Conclusion 3" on the "no derogation" from the relevant norms defined as fundamental values:

> Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

See ILC, *Peremptory Norms of General International Law (Jus Cogens)*, 2017, https://legal.un.org/ilc/summaries/1_14.shtml.
Note also that a conventional interpretation of human rights in terms of negative and positive rights supports a preclusion of economic and social human rights because the premises for these are considered to be inconsistent or incompatible with no derogation.

[66] The absurdity of this is an instance of dogmatism. All human rights entail positive and negative duties.

[67] Mary Ellen O'Connell, *Jus Cogens: International Law's Higher Ethical Norms*, *in* THE ROLE OF ETHICS IN INTERNATIONAL LAW 97 (Donald E. Childress III ed., 2012) [hereinafter *Jus Cogens*].
Note that a 2020 lecture component for an International Law Course at the Faculty of Law & Political Sciences, Allameh Tabataba'i University, Tehran, namely, Anja Matwijkiw, *American Legal Process Theory (ALPT) and Limits to (the ICC's) Litigation: Appropriateness, Jus Cogens Norms and Basic (Human) Rights* addressed the challenges

Bassiouni's position and American Legal Process Theory. As it happens, this is a legal doctrine that is as conservative in its stance on rights as outlooks promoted by theorists like Maurice Cranston, who took the step of stripping economic/social rights of any status as "real" rights.[68]

The more the discourse about environmental crimes in terms of *jus cogens* norms and corresponding *obligatio erga omnes* is oriented towards the goal of interpreting basic rights to include broader criminal stakes in life, health, integrity/security/safety, the more problematic equal recognition of economic/social human rights becomes, especially if such dynamic developments were to occur in the context of the ICC. The ICC's typology of crimes is the outcome of the historical coherence thesis, according to which the ICC relied on the IMT.[69] If the ICC is going to continue to conform to this, crimes against the environment *should no*t be included in the first instance. Positive rights implications and interpretations merely add to the controversy. In Bassiouni's case, the split between freedom and welfare accords with the interest-incompatibility thesis, but the rights division is more of a spillover effect from the historical coherence thesis than an ideologically constructed line of reasoning. Bassiouni's ambivalence gets in the way of such a conclusion for his legal doctrine. If anything, his liberal bias is inherited – as a kind of byproduct – from the historical coherence thesis. Given the IMT's consideration of the Principle of Justice, the "right is might" maxim was negated, and, with this, law and morality were integrated (rather than separated) to the extent that CAH were established. Unlike a value merger at the level of rights-protection (cf. restorative justice), new crime-recognition resists this.

V. Modesty Aside: The Preference Is Shared

Undoubtedly, Bassiouni would share Okowa's enthusiasm of ecocide as "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts." This is not a guess about Bassiouni's posthumous response (he passed in 2017). Instead, it is a well-founded statement that can be directly confirmed by Bassiouni's scholarly writings.

As it happens, Bassiouni himself proposes "the dumping of nuclear and hazardous waste" and "the use of biological substances by individuals and armed groups," more precisely, ecocide *narrowly construed.* This candidate for *jus cogens*

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that conventional and conservative outlooks pose for progress. The lecture was for the "Mondays on the ICC" Series, and it was co-sponsored by The Hague Center for International Law and Investment (HCILI) & Iranian Association of International Criminal Law (IAICL).

[68] Maurice Cranston, *Are There Any Human Rights?* 112(4) Daedalus 1 (1983); Maurice Cranston, *Human Rights: Real and Supposed*, in POLITICAL THEORY AND THE RIGHTS OF MAN 43 (D. D. Raphael ed.,1967).

[69] Mohammed Saif-Alden Wattad, *The Rome Statute & Captain Planet: What Lies between 'Crime against Humanity' and the 'Natural Environment'?* 19/2 FORDHAM ENVIRONMENTAL LAW REVUE 265, 273 (2009).

crime inclusion is formulated as a community-oriented peace/security stake, in accordance with a "fifth crime against peace."[70] Hence, too idealistic proposals remain separated from progressive projects to give *due consideration* to conventional factors (*cf*. the historical coherence thesis). By balancing legal reality and morality in this manner, expectations for change resemble a piecemeal reform strategy.

It is equally conventional to assume that violations of economic/social human rights violations are beyond the scope of ICL, and although both case-law studies and modern legal doctrines like Stakeholder Jurisprudence or the Integrative Approach have pointed to an interconnectivity, the belief in ICL (as opposed to ICJ in the form of restorative justice) as a one-dimensional value phenomenon continues.[71] The 2016 policy paper may help to shake this belief, but the long-term direction of the ICC is still *in flux* and, consequently, it is premature to even speculate about the narrowness or broadness of its future crime typology.

While well-suited for an aspirational agenda of effective enforcement of norms (*cf*. pragmatism), Bassiouni's outlook offers no interdisciplinary tools to tackle the discrepancy between accountability and impunity that the law *cannot resolve* and which owes to the fact that law, politics and ethics are *not* in sync. Prosecution/punishment and/or extradition measures fail to accomplish their goal. The enormous justice deficits Bassiouni himself points to again and again are the results of political *cum* unethical and amoral strategies like selective [ICJ] enforcement, double standards and exceptionalism for the benefit of the powerful and wealthy states, and "manipulating the bureaucracies and financial resources of international institutions," thereby making it difficult for ICJ fora to function fairly and effectively.[72] The moral necessity of *jus cogens* accountability is defeated by the very practice his theory is designed to combat, *realpolitik*. Regarding norm-recognition and legal doctrine, Bassiouni's own outlook accentuates the need for specialized conventions to achieve consistency for the core international crimes that matches his concept of basic human rights, that is, genocide, war crimes, and CAH.[73] Unlike the two first-mentioned categories, CAH continue to leave a gap between values and norms. To this day, Bassiouni's call for a specialized convention has not

[70] Apart from environmental crimes as candidates for *jus cogens* crime inclusion, Bassiouni mentions cyberterrorism, which (ideally-)prescriptively belongs "in an expanded *ratione materiae* of a more progressive definition of CAH." *See* BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION, *supra* note 28, at 590.

[71] CAPALDO THE PILLARS OF GLOBAL LAW, *supra* note 2; Matwijkiw & Matwijkiw, *Stakeholder Theory and Justice Issues*, *supra* note 47.

[72] M. Cherif Bassiouni, *Challenges Facing a Rule-of-Law Oriented World Order*, 8(1) SANTA CLARA J. INT'L L 1, 7-9, (2010); Bassiouni, *Perspectives on International Criminal Justice, supra* note 32, at 283.

[73] Bassiouni, *Perspectives on International Criminal Justice*, *supra* note 32, at 280.
Note that besides genocide, CAH and war crimes, the Rome Statute mentions "the crime of aggression" and "apartheid." *See* Rome Statute of the International Criminal Court (ICC), 2187 U.N.T.S. 90, arts. 7 and 8,17 July 1998.

been heeded, although a major pro-codification push and pressure on the UN is also a part of the 2022 effort to abridge legal expectations and legal reality. However, this is no guarantee of more successful enforcement, and again for the same reason: *realpolitik*.[74] The clash between facts and values brings Bassiouni back to square one: "the practice of states" has *not* been to "conform to the scholarly writings" like the ones Bassiouni espouses but instead it (the practice of states) "evidences that, more often than not, impunity has been allowed for *jus cogens* crimes."[75] It may be that Bassiouni's unarticulated concern comes down to a case of prioritization in circumstances where not even core international crimes construed conventionally can gain the required support; but this is merely an explanation and not an acceptable excuse for lowering the bar for new crime recognition, in part, to avoid alienating states.

VI. Further Reflections and Remarks

If the real problem is *realpolitik*, as Bassiouni suggests, it is not references to the debate and dispute about the nature and scope of crimes and corresponding affirmative or positive human rights that matter. Rather, it is Westphalian stakes in national sovereignty, preferences for domestic control (over wealth, territory, population, etc.) and jurisdiction, and other power-conservation measures that make it possible for heads of state and other high-level officials to evade the globalization trend and, more concretely, render a kind of post-internationalist resistance against perceived norm-impositions that aim for a global legal order and shared democratic governance, including co-determination and co-management of enforcement strategies under the principle of the right to react *uti universi*.[76]

The global constitutionalism that underpins the quest for innovative ways of enhancing effectiveness for norm-protection entails a broad philosophy for the human rights that can be subsumed under public interests and, therefore, constitute the common values that subordinate the individual state, however strong or dominant, to the will of the international community that is "no longer a community of states but of mankind as a whole (common humanity)."[77] By virtue of being informed by this, the principle of respect for *jus cogens* cannot but result in a dual-aspect (freedom and welfare) expansion of the human rights norms that are at stake.

If adopted, ecocide as a new crime category would be ethically aligned with global rights notions *if and only if* the needs at stake pass the test of objectivity whereby needs can be differentiated from wants and are immune to belief-based

[74] BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 62, at 174.
[75] *Id*.
[76] This is espoused by Ziccardi Capaldo in her Integrative Approach.
[77] ZICCARDI CAPALDO THE PILLARS OF GLOBAL LAW, *supra* note 2, at 9; Giuliana Ziccardi Capaldo, *The Law of the Global Community: An Integrated System to Enforce "Public" International Law*, 1 GLOBAL COMMUNITY YILJ 71 (2001).

manipulation. The environmental destruction involved in ecocide affects victims holistically, and the whole human rights vocabulary may have to be reexamined to capture, communicate and express the deprivation, the loss and the harm for all stakeholders. ICL has a meta-duty to undertake this task. Since modern ethicists have the necessary expertise, the analytical tools should be provided by them, together with the tools for general rights theory.[78] Legal positivism may have discredited morality, just as contemporary types of natural law theory may treat needs as suspicious by (erroneously) associating them with "subjective" and "person-centric" approaches.[79] Nevertheless positions in contemporary legal doctrine, such as Stakeholder Jurisprudence, accommodate needs as the key to an interpretation of basic economic and social human rights as real rights with both negative and positive features, by analogy to civil and political human rights.[80]

As alluded to in previous sections, facts about resources do *not* enter into the norm-recognition equation for human rights, including economic and social human rights. Such considerations are extra-systematic, here borrowing a term from Alf Ross.[81] International law, on the other hand, is clear on the topic. Rights-recognition takes places in isolation from any ideas or assumptions about the requirements for fulfillment. It is treaty law for the relevant area that confirms this.[82]

Together with the free marketplace, conservative theorists may reduce the global south-north tension to a class society myth. This kind of political rhetoric is not helpful in a world where everything is at stake with global warming, climate change and its effects on ecosystems and biodiversity, together with landscape transformations through floods, droughts, and other extreme weather events and the impact of these on migration issues. In terms of basicness, survival and subsistence are at stake when human beings flee conditions that turn them into destitute persons. Interestingly enough, there seems to be a link between a non-empathetic reception and a country's economic development to the extent that "Western societies, which

[78] Apart from the tools with which to disprove the triple thesis "argument" that draws on the separation thesis for law and morality, the logical correlativity thesis for rights and the incompatibility thesis for values (supra note 11), the tools for correction can be found in the logic of extensionality (cf. analysis of needs).

[79] O'Connell, *Jus Cogens*, *supra* note 67, at 93-94.

[80] Anja Matwijkiw & Bronik Matwijkiw, *Stakeholder Jurisprudence: The New Way in Human Rights*, *in* PROCEEDINGS OF THE 25TH IVR WORLD CONGRESS OF PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY (Department of Law, Goethe Universität ed., Frankfurt, Germany, 2012, http://publikationen.ub.uni-frankfurt.de/frontdoor/index/index/year/2013/.
docId/24872 (co-authored) (Department of Law, Goethe Universität ed., Frankfurt, Germany, 2012).

[81] In his analysis of natural law theory applications of the concept of justice, these are perceived to be extra-systematic by virtue of transcending the system of legally-positive norms. *See* ROSS, ON LAW AND JUSTICE, *supra* note 9, at 29, 268.

[82] Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant[…]
See UN GA, International Covenant on Economic, Social and Cultural Rights (ICESCR), U.N. Doc. A/6316 Dec. 16, 1966, 993 U.N.T.S. 3, at art. 2.1 (*entered into force* Jan. 3, 1976).

are economically among the world's most advanced, have been more resistant […] to refugees fleeing wars, repressive regimes, economic exploitation, and poverty" – a link that is paired with neonationalist and relativist resistance against global human rights norms.[83] In countries like Denmark, even refugees who are in need of humanitarians protection conditions cannot expect solidarity, especially if they come from non-European countries. In particular, policies and laws to reduce the number and cost of Muslims from the Middle East and Africa have been adopted by "value warriors" *cum* politicians who strive to conserve the Danish majority culture, as well as establish a claim on behalf of ethnic Danes to use the available resources on *our own* kind.[84] As a Member State of the European Union (EU), Denmark's illiberal state rebranding has occurred with the help of legal opt-outs in the area of justice and home affairs.

> Over the past 15 years, Denmark has been the object of international attention and criticism due to its increasingly restrictive immigration policies limiting immigrants and refugees' access to the country and its social benefits.[85]

The point is that so-called climate migrants can only expect to be treated even more harshly. In the context of the global south-north tension that Okowa draws attention to, the problem is likely to be exacerbated.

Currently, environmental destruction appears to affect the global south more than the global north, although the global north is responsible for a greater share of, *inter alia*, CO2 and greenhouse gas (GHG) emissions.[86] A larger global north contribution to the destruction should translate into a larger debt to the global south, meaning that the developed nations are ethically obligated to shoulder the main burden in terms of the costs for securing climate justice by responding to the need to mitigate and adapt to the changes (cf. effects in the wake of climate change, etc.). This is how the developing nations argue that the asymmetry is best remedied especially since the equity concerns extend to the additional losses from the global economy's transition to greener energy, such as the developing nations' missed opportunity to go through the stages that the developed nations did, such as extracting and capitalizing on fossil fuels.[87]

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[83] M. Cherif Bassiouni, *Human Rights and International Criminal Justice in the Twenty-First Century*, *in* GLOBALIZATION AND ITS IMPACT ON THE FUTURE OF HUMAN RIGHTS AND INTERNATIONAL CRIMINAL JUSTICE 56-57 (M. Cherif Bassiouni ed., 2015).

[84] LAW, CULTURAL STUDIES AND THE "*BURQA* BAN" TREND: AN INTERDISCIPLINARY HANDBOOK 354 (Anja Matwijkiw & Anna Oriolo eds., 2021).

[85] JEAN-MICHEL LAFLEUR & DANIELE VINTILA, I MIGRATION AND SOCIAL PROTECTION IN EUROPE AND BEYOND: COMPARING ACCESS TO WELFARE ENTITLEMENTS 125 (2020).

[86] Sinan Ülgen, *How Deep Is the North South Divide on Climate Negotiations?,* Carnegie Europe 1, 6 October 2021, https://carnegieeurope.eu/2021/10/06/how-deep-is-north-south-divide-on-climate-negotiations-pub-85493.

[87] *Id*.

If ecocide as a new crime is *not* defined in a broad manner, thereby integrating socioeconomic aspects, its fit will be lesser in terms of the "humanistic values" Bassiouni views as the moral compass for the future evolution of ICL while at the same time adhering to conventional and conservative standards for his own assessment of future norm expansion. Undoubtedly, *realpoliticians* will favor ecocide as a narrowly construed crime, especially if an individual state is not willing to draw the consequences of concessions to asymmetry and inequity as international parallels to structural and systemic injustice at the domestic level, e.g., racism in the USA.[88] While it is intellectually intriguing to observe that among the one hundred and eighty-eight (188) recommendations the UN made for Denmark in 2022[89] – for the purpose of improving its human rights record – there was also a recommendation to discontinue the practice of referring to Muslim and ethnically non-Danish areas in derogatory and exclusionary terms, e.g., "non-Western" and "ghettos," it is first and foremost a reminder of the fact that differences still matter, that the problem of the Other is not resolved in the post-World War II era, and that ecocide is not a value-neutral challenge.[90]

In legal doctrine, it would be too naïve to deny the link between law and politics. Positions like Judith Shklar's legalism illustrates this.[91] She presupposed a notion of law (that should ideally serve) as an instrument for liberal law-making efforts. However, if the link is so firm as to preclude the possibility of *speaking truth to power*, law becomes, at best, a tool for the *status quo* and, at worst, an instrument for arbitrariness at the expense of the best interest of the collectivity.[92] A liberal democracy protects individual rights and vulnerable minorities too and, therefore, the ethical bottom line is provided by such minimal measures. In the era of globalization and talk about common values that transcend national boundaries, the approach to norm-expansion should conform to the emerging modern subbranch of the Principle of Justice that the IMT used to balance ethics and international law,

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[88] JOE A. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION (2006).

[89] UN, Universal Periodic Review –Denmark, 3rd Cycle, 38th Session (6 May 2021), https://www.ohchr.org/en/hr-bodies/upr/dk-index.

[90] M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS AND CONTENTS 178 (3d. ed 2008).

[91] *See generally* JUDITH N. SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS (1964).

[92] In terms of philosophy of law, this makes CLS relevant. According to CLS, the law is an instrument with which to reproduce the *status quo*, thereby establishing or codifying society's biases against marginalized stakeholder groups. The premises of CLS presupposes a non-separation of law and politics. Consequently, judicial decision-making is a version of political discourse.

More pointedly, these writers argue that the belief in legal neutrality legitimates an unrepresentative political process, thereby benefiting the powerful to the detriment of the weaker. Accordingly, CLS writers consider the belief in legal neutrality to be ideological. Also, CLS writers consider judicial decision making itself (as opposed to beliefs about legal decision making) to be ideological in the sense that the outcomes of legal decision making are informed and influenced by conservative ideology.

See Stefan Sciaraffa*, Critical Legal Studies: A Marxist Rejoinder*, 5(2) LEGAL THEORY 201 (1999). DOI: 10.1017/S13523252999052040; supra note 27.

namely climate equity.[93] Apparently, this is the politics Okowa fears will consign ecocide to the graveyard because the discourse is bound to take a broad direction. Without it, ecocide will be partially muted beforehand, though. The price of justice is controversy. It seems that international lawyers and scholars have to prepare for a fight – *provided* they wish to be associated with the climate justice movement. This is very much about ethics, as also made evident by the UNESCO Declaration of Ethical Principles in relation to Climate Change.[94] It may still be true that states will only accept a narrow definition on account of economics, to avoid a redistribution. There is only one comment possible for this. Such a manifestation of *realpolitik* should not be permitted to obstruct the process of tackling the most pressing issue in the modern era: environmental destruction and its effects on human and "non-anthropocentric" stakes and stakeholders, harm to the environment (defined comprehensively as "the earth and its different spheres") *per se*.[95] Subject to a few exceptions (e.g., the conjunctive usage of "widespread or long-term" and pure environmental harm), the definition was kept conventional and narrow as a consequence of the IEP's choice. Ecocide would "stand a chance" for adoption if innovations were minimal, so the belief was.[96]

The IEP's definition of ecocide (from 22 June 2021) "for the purpose of the Rome Statute," i.e., as a proposal for an amendment of this, was expressly proposed as "a fifth international crime complementing the four existing international crimes."[97] The intention of the IEP was to launch the proposal as a suggestion, a useful tool and a consideration for the Member States of the Rome Statute. The IEP wanted to propose "something that was realistic… and not utopian" and at the same time an instance of "pushing the envelope" from the perspective of norm-recognition.[98] The IEP aimed to *not* "alienate [Member] States" and for the same reason the IEP deliberately worked with "familiar concepts."[99] The IEP also avoided

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[93] CATHARINE TITI, THE FUNCTION OF EQUITY IN INTERNATIONAL LAW (2021).

[94] UNESCO, 39th session of UNUESCO's General Conference in Paris, Declaration of Ethical Principles in relation to Climate Change (13 November 2017). For examples of scholarly work on the intersection of law, politics, ethics and economics, *see* Aurélie Méjean *et al, Catastrophic climate change, population ethics and intergenerational equity*, CLIMATE CHANGE 873 (2020); JUSTICE AND EQUITY IN CLIMATE CHANGE EDUCATION: EXPLORING SOCIAL AND ETHICAL DIMENSIONS OF CLIMATE EDUCATION (Elizabeth M. Walsh ed., (2022); ETHICS, EQUITY AND INTERNATIONAL NEGOTIATIONS ON CLIMATE CHANGE (Luiz Pingueilli-Rosa and Mohan Munasinghe eds., 2022); Damilola S. Olawuyi, *Advancing Climate Justice in International Law: An Evaluation of the United Nations Human Rights-Based Approach*, 11(1) FLORIDA A & M FLORIDA LAW REVIEW 103 (2015).

[95] Jack & Mae Nathanson Centre on Transnational Human Rights, *Understanding the Legalities of Ecocide*, *supra* note 30; Haroon Siddique, *Legal experts worldwide draw up 'historic' definition of ecocide*, THE GUARDIAN, June 22, 2021, https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definition-of-ecocide.

[96] Jack & Mae Nathanson Centre on Transnational Human Rights, *Understanding the Legalities of Ecocide*, *supra* note 30.

[97] *Id*.

[98] *Id.*

[99] *Id.*

a catalogue of illegal actions, in part, because many crimes happen legally (in compliance with international law[100]) and, furthermore, because a "general and abstract" crime (definition) was evolutionary and dynamic, open to change over time, *inter alia*, from developments in international customary law (ICL).

Thus, the definition was an attempt to propose something that was *not* detrimental to the political process that involved negotiation. This amicable approach, which avoided any shock effects from a leap from purely lawful to criminalized *cum* illegal behavior and acts, is likely to invite criticisms from experts and scholars who point to the lack of international prohibitions despite the fact that environmental destruction is global and often irreversible (affecting future generations) and that every individual in the world is a small-small impact contributor to pollution.[101] The ICC may be a forum that can help to remedy some of the structural injustice in the global south-north tension by prosecuting the worst-case perpetrators from the north, in effect, members of the elite.

But this is where the rub is…if Member States set the rules, if negotiated settlements have to be acceptable to Member States by virtue of not adversely affecting their sovereignty, the outcome is more likely than not to be(come) a reflection of the wealthy and politically powerful, the elite.

Ecocide as a crime that meets the hallmark of international crimes may be more of a political tool (than a legal tool) in the hands of the civil society, as also suggested by Gus van Harten.[102]

If we looked at what states have done in international law, they have prioritized *creating obstacles to state action* to address probably the greatest environmental challenge of humanity.[103]

If so, there is an additional tension, of course, to accommodate in the ecocide equation. Stronger still, it is *unrealistic* to expect Member States to accept ecocide

[100] Behavior or acts that are legal (in compliance with international law) can be included (in the definition of ecocide – so as to constitute acts of ecocide) based on a proportionality test, meaning if the damage is clearly excessive in relation to the economic and social benefits that are anticipated, thereby disregarding (while being aware) the disproportionality of the environmental damage in relation to the relevant benefits (cf. "wanton"). The lack of clarity that follows from this arrangement may create fear for businesses that may argue "we don't know what is and is not legal, and that is unfair on us."

[101] This introduces the problem of which individuals to identify for prosecution at the ICC. Note that other types of criticisms encompass the view that behavior or acts that amount to high-level impact should be criminalized. One argument against this is that it would be bad policy, because the consequences may increase the problem it was supposed to solve. This suggests that ecocide should mix high impact *and* wrongfulness, especially as correlated with fraud and deception. Cooperate responsibility, which was also discussed in the draft to the Rome Statute, is not considered by the ICC (which is therefore being relegated to civil law, under due diligence). As for state responsibility, the ICC's mandate is limited to prosecution of individuals as members of groups.

[102] Jack & Mae Nathanson Centre on Transnational Human Rights, *Understanding the Legalities of Ecocide, supra* note 30.

[103] Gus van Harten proposes international investment law as an alternative route. *See id*.

as a crime. It is the opposite way around of what the IEP assumed. The stalemate is not going to end. Paralysis is guaranteed, and not progress.

Legally, only if heads of state and other high-ranking officials are going to be held accountable for the design of structures themselves, could norm-recognition of ecocide make a major dent in the accumulative harm picture. Such a strategy could be aligned with pillar I from the notion of R2P that relies on sovereignty defined as (state) responsibility to protect, namely prevention.[104] With irreversible harm at stake, this makes the sense from the viewpoint of pragmatism (cf. effective strategies to protect "all human rights"). Alternatively, measures like codification could be made to yield – owing to the urgency and importance of combatting and preventing further environmental destruction – to ethics alone (cf. idealism). If this approach was taken, the future direction of ecocide could still be derivatively informed by CIL developments *provided* R2P is freed from doctrinal constraints that narrow the crime typology and corresponding human rights and instead is expected to conform to the original 2001 landmark document by the ICISS. Why not stop *further setbacks* to the multistakeholder and multifaceted stakes in ecocide? Why not think of new ways of compelling all states (and not just Member States) to do the right thing? How can it be that legalese and, from an uncritical perspective of law as an instrument, political correctness are even items on the ecocide agenda *knowing full well* about the game strategies that are pursued? Why is the emphasis not on the Big Questions, such as global environmental justice and the way this is delayed or, worse still, undermined?

VII. Conclusion

Martti Koskenniemi's statement about international law as something that "exists as a promise of justice" is cited by Jutta Brunnéer who notes that "the [positivist] separation of law and politics is seen as crucial to international's law ability to mediate the diverse interests and values in international society," thereby implicitly categorizing Okowa among theorists who follow positivism as an "overly optimistic" position about "the extent to which rules enshrined through formal 'sources' reflet genuinely shared international norms."[105] Transferred to ICL and future CIL developments, the implications are clear: the outcome is political (too).

This is consistent with the view that the best defense against *realpolitik* at the international level, against the domination of world society by powerful states, is validity (of rules) as measured by the consent of sovereign states. If they also play the game of prioritizing the so-called national interest as a smokescreen for their own agenda as an elite (domestic *realpolitik*), then the vicious ecocide circle of compromise can continue *in*

[104] ICISS, 2001 Report, *supra* note 20, at 69 (8.2), 74 (8.24).

[105] Jutta Brunnéer, *Climate change, global environmental justice and international environmental law*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 316, 322 (Jonas Ebbesson & Phoebe Okowa eds., 2009).

principium ad infinitum. The business-as-usual barriers to progress (politics) do not have to take ethics into consideration unless civil society decides otherwise by beginning to think outside the box, in search of entirely new ways of responding. In an attempt to overcome the part of the paralysis that stems from conventional legal factors, human rights studies may be initiated for the purpose of determining "the decline of doctrinal method" through the common lack of general rights theory in the work of legal professionals and scholars.[106]

Meanwhile, convenient, i.e., not-so-controversial delaying practices that almost offer themselves on a silver platter include the discussion of the very term "ecocide," according to some observers and commentators.[107] Furthermore, there are no quantifiable measures or standards in the IEP's 2001 proposal for a definition and, therefore, states may come to spend time on the discussion of what the concrete threshold should be (unless this is left to precedents). – The multidisciplinary maze described in the previous sections does not have an easy way out.

Historically, it is thought-provoking that the Stop Ecocide Foundation's norm-recognition effort (cf. IEP's proposal for a definition of ecocide as a new crime) is taking place simultaneously with the Crimes Against Humanity Initiative's (CAHI) most recent push for a codification of CAH under the auspices of the UN.[108] CAHI began its work in 2008, and the specialized convention remains a work in progress.[109] If ecocide is going to repeat the incremental step-by-step strategy from the CAH process, all stakeholders may be faced with a zero-sum outcome – no winners, only losers. Setting aside the impossibility of the detached philosopher, it is ironic that talk about compromise and incremental change through reform continues in the face of the doomsday-like threats posed by ecocide and its effects.[110] Admittedly, the strategies are intended as reasonable or, *per* Okowa, realistic measures; but if there is no good will to take state action (cf. obstructionist responses), the waiting game is absurd. In 2010, Polly Higgins presented a definition of ecocide to the UN Law Commission, and Pope Frances referred to this in his 2019 call to criminalize ecocide.[111] The work on proposals for a definition, so it seems, is just another part of the maze. Ethics is the one exit route that has not been tried yet. At the peril of adding to the irony, justice has in fact worked as a vehicle for progress in the past.

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[106] Supra note 6.

[107] One example is John N. Davis, who views the term (ecocide) as a poor metaphor. *See* Jack & Mae Nathanson Centre on Transnational Human Rights, *Understanding the Legalities of Ecocide, supra* note 30.

[108] Crimes Against Humanity Initiative, Washington University in St. Louis, https://sites.wustl.edu/crimesagainsthumanity/ (2022).

[109] FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed., 2011). *See also* BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL: EVOLUTION AND CONTEMPORARY APPLICATION, *supra* note 28.

[110] WARREN M. HERN, HOMO ECOPHAGUS: A DEEP DIAGNOSIS TO SAVE THE EARTH (2022).

[111] Polly Higgins (1968-2019), Stop Ecocide International, 2022, https://www.stopecocide.earth/polly-higgins.