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SYMPOSIUM ON UN RECOGNITION OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT

THE RIGHT TO A HEALTHY ENVIRONMENT AS A CATALYST FOR THE CODIFICATION OF THE CRIME OF ECOCIDE

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This essay explores some of the reasons why the recognition by the UN General Assembly of the human right to a healthy environment could catalyze the codification of ecocide as a crime under international law. It argues that even though the two concepts fall within distinct areas of international law, their potential for a synergistic interaction derives from the right's rhetorical and normative aspects. The right's rhetorical dimension refers to the communicative value derived from phrasing calls for responsive action in the language of rights, while the right's normative dimension alludes to its legal or juridical character.

The concept of ecocide emerged during the Vietnam War to describe the deliberate use of chemical warfare to destroy the environment. Over a period of forty years following its emergence, UN bodies have on different occasions considered the possibility of recognizing ecocide either as a method of genocide or as a standalone international crime under the Rome Statute of the International Criminal Court.[1] However, on none of those occasions has the idea been brought to fruition. The push for codification of ecocide as an amendment to the Rome Statute received renewed attention in 2021, when an Independent Expert Panel proposed a definition of the crime 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."[2]

Efforts to develop the law of ecocide have been paralleled by calls to recognize the right to a healthy environment as a human right under international law. Albeit in the form of soft law, the recognition by the UN General Assembly of the human right to a clean, healthy, and sustainable environment introduces an international legal norm that may be helpful to efforts to codify ecocide in a legal instrument with global reach. This evolution signifies the international community's continuing desire for effective regulatory solutions in international environmental governance. While the pursuit of the codification of the crime of ecocide denotes a continued interest in using criminal law as a means of environmental regulation, the adoption of the right to a healthy environment indicates that the human rights approach holds appeal as a mode of environmental regulation. Importantly, these recent developments present an opportunity to question what interlinkages exist between the two modes of environmental regulation and whether such interlinkages (if they can be identified) are positive or not.

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[1] Polly Higgins, Damien Short & Nigel South, *Protecting the Planet: A Proposal for a Law of Ecocide*, 59 Crime L. & Social Change 251, 256–62 (2013).

[2] International Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text (June, 2021).

From a broader perspective, this question may be situated within the discourse that explores the controversies, tensions, and paradoxes between international criminal law and international human rights law.[3] Opinions on this issue are divided, mainly informed by the argument that international human rights law is a double-edged sword. On the one hand, human rights law plays a protective role by safeguarding the fundamental rights of accused persons through all the stages of the criminal justice process.[4] On the other hand, the use of criminal law as an instrument for protecting human rights risks enhancing the coercive power of the state because it increases the circumstances in which the state is allowed to resort to the most intrusive form of regulation.[5]

Despite the ongoing controversy, this essay advances the argument that proponents of codifying ecocide can leverage the recognition of the right to a healthy environment to support the argument that ecocide can serve as one of the means for implementing this right, specifically through the criminalization of severe violations.

The Effect of the Right to a Healthy Environment on Efforts to Codify the Crime of Ecocide

The phrase "human rights rhetoric" is often used in a pejorative sense to refer to the seemingly intractable gap between the promises embodied by human rights law and their realization in practice.[6] Notwithstanding this uncharitable description, scholars have identified several uses for human rights rhetoric. Andreas von Arnauld and Jens Theilen identify five functions of human rights rhetoric that inform the potential usefulness of the right to a healthy environment as a language for supporting efforts to codify ecocide. According to these authors, human rights rhetoric can play appellative, contestation, connecting, triggering, and juris-generative roles. The appellative role refers to the function that human rights rhetoric plays in raising public consciousness about an issue. The appellative role is closely connected to the contestation function, which refers to the use of human rights language to bring about change by critiquing present injustices. In its connecting function, human rights language can provide familiar and powerful metaphors to connect advocates at the local, regional, and global levels around a particular issue. Furthermore, human rights language can trigger relevant institutions at all these levels to respond to violations. Finally, human rights rhetoric provides the language to support discursive practices of communities at the grassroots level to give meaning to human rights law beyond formal lawmaking processes and institutions of the state.

The right to a healthy environment could play similar functions as those outlined above in driving the codification of the crime of ecocide. First, in terms of its potential appellative function, the right to a healthy environment can be invoked to draw attention to certain incidences of environmental damage that are serious enough to be described as ecocide. Already, communities, activists, and jurists around the world are increasingly invoking ecocide as a trope to communicate that certain kinds of environmental damage and their deleterious effects on individual and collective wellbeing are sufficiently serious to qualify as cases of ecocide. For example, the term "ecocide" has been invoked to draw attention to the escalating destruction of the Amazonian Forest in Brazil.[7] Similarly, activists have invoked the term ecocide to rally against the planned East African Crude Oil Pipeline, a 1,443 kilometer-long heated pipeline to transport oil from Uganda to Tanzania. In describing the project as "future

[3] Françoise Tulkens, *The Paradoxical Relationship Between Criminal Law and Human Rights*, 9 J. Int'l Crim. Just. 577 (2011).

[4] Mattia Pinto, *Awakening the Leviathan Through Human Rights Law: How Human Rights Bodies Trigger the Application of Criminal Law*, 34 Utrecht J. Int'l & Eur. L. 161 (2018).

[5] *Id.* at 165–67.

[6] Andreas von Arnauld & Jens T. Theilen, *Rhetoric of Rights*, *in* The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric 34 (Andreas von Arnauld, Kerstin von der Decken & Mart Susi eds., 2018).

[7] *See, e.g.*, Malayna Raftopoulos & Joanna Morley, *Ecocide in the Amazon: The Contested Politics of Environmental Rights in Brazil*, 24 Int'l J. Hum. Rts. 1616 (2020).

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ecocide," advocates underline that the destructive impacts of the extraction and transportation of oil on human and ecosystems are almost always predictable.[8]

Second, the right to a healthy environment can be deployed as a language of critique to expose the gap between existing laws and the ideal implied by the notion of a clean, healthy, and sustainable environment. For instance, the recognition and enforcement of a right to a healthy environment at the international level is put forward as a possible solution to the limitations that hinder current international environmental law from addressing serious problems such as biodiversity loss, climate change, and pollution.[9] Third, using the language of the right to a healthy environment can offer a universally recognized lexicon that is familiar to activists across local, national, and regional levels, who can invoke it to justify calls to codify ecocide. Invoking the right to a healthy environment against ecocide could have the same galvanizing effect as was witnessed with the invocation of the language of civil and political rights as a rallying cry against atrocities such as apartheid, colonialism, and denial of universal suffrage. Fourth, in legal systems where the right to a healthy environment can be invoked to support claims for judicial remedies, litigants could strategically frame incidences of environmental damage that violate the right as cases of ecocide. This type of juris-generative practice is likely to occur in legal systems where both the crime of ecocide and the right to a healthy environment are legally recognized. The recognition of the right to a healthy environment by the UN General Assembly and in many national constitutions, coupled with the increasing calls to codify ecocide both as a crime under national and international law, provides robust legal tools to tackle incidences of grave environmental damage.

The Right to a Healthy Environment and the Obligation to Develop Responsive International Environmental Laws

The right to a healthy environment implies that states have an obligation to develop and maintain progressive environmental laws—that is, laws that promote and fulfill the objective of the right.[10] This raises a question as to whether there is a distinct objective that environmental laws inspired by the right to a healthy environment should serve. Stated differently, does the right to a healthy environment have, to borrow a term from John Tasioulas, a distinct "formative aim" that sets it apart from other environmental rights?[11] Tasioulas defines a formative aim as the unique individuating aspect of specific human rights norms, which is determined, "not simply by reference to the profile of interests they serve . . . but by reference to the subject matter of the obligations associated with them."[12] Following Tasioulas's notion of a formative aim, it can be argued that the overriding objective individuating the right to a healthy environment is to protect human well-being from harmful consequences of environmental damage. An important qualification is that the notion of human well-being implied by the right is a holistic one that conceives of humans as environmentally embedded beings whose relationship with nature is one of profound interdependence and co-shared vulnerability.[13]

A further question may be raised whether current international environmental law contains norms that can fulfill the objective embodied by the right to healthy environment identified above. One major limitation of

[8] Stop Ecocide International, *The East African Crude Oil Pipeline: Future Ecocide?* (May 23, 2022).

[9] Louis J. Kotzé & Duncan French, *A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for Lex Anthropocenae?*, 18 INT'L ENVTL. AGMTS.: POL., L. & ECON. 811 (2018).

[10] United Nations Office of the High Commissioner for Human Rights, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles, Framework Principle 11, UN Doc. A/HRC/37/59 (Jan. 24, 2018).

[11] John Tasioulas, *Saving Human Rights from Human Rights Law*, 52 VAND. J. TRANSNAT'L L. 1167 (2019).

[12] *Id.* at 1183–84.

[13] *See, e.g.*, Angela P. Harris, *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY, CLIMATE & ENV'T 98 (2015).

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international environmental law is that it contains very few concrete and absolute prohibitions against environmental harm. The lack of such prohibitions limits the ability of international environmental law to confront the most challenging contemporary environmental challenges, including pollution, climate change, and biodiversity loss.[14] Moreover, international environmental law has also been criticized for its complicity in the occurrence and worsening of environmental damage and its attendant harmful consequences to humans and nature by giving legal expression to certain predatory paradigms, including anthropocentric sustainable development, colonialism, neocolonialism, private property rights, state sovereignty, and neoliberal corporate exploitation.[15] Adding to these challenges, international environmental law has so far resisted norms that may allow it to transcend the restrictions imposed by such paradigms through, for instance, recognizing concepts such as rights of nature.[16]

Can the crime of ecocide provide a solution to the limitations that characterize international environmental law and thereby help to fulfill the objective of the right to a healthy environment? Notwithstanding its description as a potential fifth crime in the Rome Statute, the proposed crime of ecocide would fit appropriately within the purview of international environmental law, because it is a type of law conceived as a necessary response to tackling incidences of serious environmental damage. The characterization of ecocide as environmental law reflects Fisher's definition of environmental law as all the laws that are relevant to tackling environmental problems.[17]

No single legal concept can serve as a panacea for all the shortcomings afflicting international environmental law. Nonetheless, certain attributes of the proposed crime of ecocide could potentially strengthen environmental law as a means of protecting the right to a healthy environment. First, the crime of ecocide could offer a legal avenue through which violations of the right to a healthy environment may be criminalized, prosecuted, and punished. The obligation to criminalize, prosecute, and punish human rights violations is rooted in the well-known principle *ubi jus, ibi remedium*, which means that where law establishes a right, there should be a corresponding remedy for its breach. Now that the right to a healthy environment has become part of international soft law, it is imperative that legal remedies be put in place to give meaning to the right. To achieve this goal, states are required to develop or recognize responsive and workable causes of action, provide procedural guarantees to parties to a dispute, and empower courts to provide a wide range of reliefs. In reference to this expansive idea of a remedy, ecocide could be considered as a potential cause of action within criminal law that would be instrumental to penalizing violations of the right to a healthy environment and provide effective remedies to victims of harm in cases where the consequences of environmental damage are serious enough to warrant global opprobrium. On this logic, states' failure to put criminal sanctions in place to punish perpetrators of serious environmental damage would constitute a violation of the right. Jurisprudence emanating from regional judicial bodies affirms this position. In *Oneryildiz v. Turkey,* for example, the European Court of Human Rights found Turkey to have violated the right to life for having failed to effectively prosecute the officials responsible in a case involving the explosion of a refuse tip.[18] Outside the environmental context, the Inter-American Court of Human Rights in *Velásquez Rodríguez v. Honduras* recognized that the right to freedom implies a duty on the state to investigate and punish conduct that constitutes the denial of freedom.[19]

A natural corollary of the notion of remedies is accountability. Accountability means that actors who violate the law should answer for their misconduct. By providing a means for holding perpetrators accountable for serious

[14] Louis J. Kotzé, *International Environmental Law's Lack of Normative Ambition: An Opportunity for the Global Pact for the Environment?*, 16 J. Eur. Envtl. & Planning L. 213, 219–23 (2019).

[15] *Id.* at 214–15.

[16] *Id.*

[17] Elizabeth Fisher, Environmental Law: A Very Short Introduction 3 (2017).

[18] Oneryildiz v. Turkey, App. No. 48939/99, Judgment, paras. 111–18 (Eur. Ct. Hum. Rts. June 18, 2002).

[19] Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C), No. 4, para. 34 (July 29, 1988).

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environmental damage, the crime of ecocide could fill an accountability gap for environmental damage in international law. This is a critical goal for international law because accountability gaps contribute to the worsening of environmental challenges of the day, such as climate change and pollution. When actors are aware that violations of the law are unlikely to be met with sanctions, impunity thrives and the legal system in question loses credibility. Some commentators argue that the lack of a legal basis to hold corporate actors directly responsible for international wrongs is a major lacuna in international law's ability to foster accountability. Some proponents argue that the crime of ecocide should be formulated in a such a way as to allow direct accountability for corporate perpetrators of serious environmental damage.[20] This proposal is controversial in part because the Rome Statute applies only to natural persons. Nonetheless, if the crime of ecocide is formulated as a means of direct corporate accountability it could position international law to pursue the objective of the right to a healthy environment, considering that corporate actors have been implicated in some of the worst cases of environmental damage while escaping proper regulation under international law.

In addition to the possibility of holding corporate actors directly accountable, the proposed crime of ecocide contemplates a broad temporal scope that would allow the crime to be applied to punish environmental damage during war as well as peacetime.[21] Finally, since the proposed crime of ecocide seeks to penalize both humanitarian and ecological damage,[22] it would offer a means of accountability that is informed by the need for holistic protection of human well-being, according to which the well-being of humans and nature are inextricably linked.

Conclusion

Efforts to codify the crime of ecocide as an international law crime have so far been unsuccessful. This essay argues that the right to a healthy environment, which was recognized by the UN General Assembly in 2022, could catalyze codification of the crime. As a human right, the right to a healthy environment offers a universally recognized language that can be marshalled by activists, litigants, and jurists to convince relevant actors to codify ecocide as a crime. Moreover, codifying the crime of ecocide offers a promising pathway through which states may fulfill the positive obligation embodied by the right to develop responsive environmental laws.

[20] Rosemary Mwanza, *Enhancing Accountability for Environmental Damage Under International Law: Ecocide as a Legal Fulfilment of Ecological Integrity*, 19 MELB. J. INT'L L. 586 (2018).

[21] *Id.* at 604.

[22] *Id.* at 607.

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