

Call for papers: A Greener International Law: International Legal Responses to the Global Environmental Crisis

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In his 2020 address on the state of the planet, UN Secretary-General Antonio Guterres conveyed a powerful message when he stated that “humanity is waging war on nature” which is “suicidal”.¹ It has indeed become increasingly clear that we are on the verge of reaching the planet’s boundaries. Industrialisation, the growth of the world population and changing consumption patterns all impact on nature’s capacity to regenerate, with global warming, extreme weather, pollution, species depletion, the destruction of ecosystems and the spread of infectious diseases as major threats to our survival. The Covid-19 pandemic has clearly shown us the repercussions of human encroachment on nature. Zoonotic diseases are furthermore expected to become more prevalent in the future as a result of the loss of buffer zones between animals and humans due to land conversion (deforestation) and wildlife consumption.² These challenges require a (re)calibration of the existing norms for the protection of the environment and more generally an inquiry into international law’s response to the global environmental crisis. This explains the call of this volume for a greener international law, defined as the need to adapt and/or reinterpret international law to provide a more adequate response to the environmental problems that the international community is currently facing.³

International environmental law is the principal body of international law providing protection to the environment and is therefore directly relevant for addressing the global environmental crisis. The 1972 Stockholm Conference on the Human Environment is generally regarded as marking the birth of international environmental law as a distinct field of international law. Alarmed by the effects of “the continuing and accelerating impairment of the quality of the human environment” on human health and well-being and recognizing that these problems could only be addressed through enhanced international cooperation,⁴ the UN General Assembly decided in 1968 to convene a conference on the protection of the environment. This Conference on the Human Environment, convened in Stockholm in 1972, as well as its successor on Environment and Development, convened 20 years later in Rio de Janeiro, constituted important catalysts for regulatory developments in the field of international environmental law. Nonetheless, with approximately 200 multilateral environmental agreements in place today, it cannot be said that states have delivered on what they promised. A lack of institutional oversight and enforcement mechanisms as well as open-ended and soft obligations are often-heard criticisms with respect to international environmental law.⁵ Another point of criticism concerns its predominantly anthropocentric

¹ See ‘Secretary-General’s address at Columbia University: “The State of the Planet”’, 2 December 2020, available at <https://www.un.org/sg/en/content/sg/speeches/2020-12-02/address-columbia-university-the-state-of-the-planet>.

² United Nations Environment Programme and International Livestock Research Institute (2020), ‘Preventing the Next Pandemic: Zoonotic diseases and how to break the chain of transmission’.

³ The title of this volume of the Netherlands Yearbook of International Law goes back to the title of a book edited by Philippe Sands, *Greening International Law* (Routledge 1993).

⁴ UN General Assembly Resolution 2398 (XXIII): Problems of the human environment, 3 December 1986, preamble.

⁵ See for a nuanced approach in relation to the Paris Agreement, Daniel Bodansky, ‘The Legal Character of the Paris Agreement’, *RECIEL* 25(2) (2016), 142-150.

focus.⁶ Lastly, the sectoral approach to environmental protection that ensues from the wide variety of international environmental agreements with overlapping mandates is considered to hamper effective protection of the environment. Several recent initiatives seek to address these deficiencies. Most notably, the project for a Global Pact for the Environment, initiated by a network of legal experts and embraced by the UN General Assembly, seeks to establish a more unified approach to addressing environmental problems.⁷ Another important development concerns the increasing recognition, mostly in domestic legal systems, of rights for the environment itself.⁸

Norms that benefit protection of the environment can be found in other fields of international law that do not directly address environmental concerns as well. Human rights instruments, even though their objective is to provide protection to human beings, are increasingly used as mechanisms to mobilize States to protect the environment against degradation or pollution and to ensure that natural resources are used sustainably.⁹ Substantive rights such as the right to a healthy environment, the right to life, health and an adequate standard of living have been interpreted by human rights treaty monitoring bodies, including courts, as requiring States to take measures to protect the environment.¹⁰ Furthermore, procedural rights such as the right of access to information and public participation, as conceptualized in both international environmental law and human rights law, are important tools to empower individuals and collectivities to influence environmental decision-making.¹¹

Other relevant developments stem from the field of international criminal law. While the Rome Statute only expressly criminalizes environmental destruction when committed as part of a military attack in situations of international armed conflict, the ICC's prosecutorial office stated in its 2016 Policy Paper on Case Selection and Prioritisation to give particular consideration to crimes involving the destruction of the environment, the illegal exploitation of natural resources, or the illegal dispossession of land,¹² including

⁶ See e.g. Louis Kotzé and Duncan French, 'The Anthropocentric Ontology of International Environmental Law and the Sustainable Development Goals: Towards an Ecocentric Rule of Law in the Anthropocene', *Global Journal of Comparative Law* 7(1) (2018), 5-36.

⁷ See UN General Assembly Resolution A/72/L.51 'Towards a Global Pact for the Environment', 7 May 2018; and Report of the Secretary-General, Gaps in international environmental law and environment-related instruments: towards a global pact for the environment, UN Doc. A/73/419, 30 November 2018.

⁸ For a recent overview, see Jan Darpö, 'Can Nature get it Right: A Study on Rights of Nature in the European Context', March 2021, requested by the JURI committee of the European Parliament.

⁹ See Alan Boyle, 'Human Rights and the Environment' in Ben Boer (ed.) *Environmental Law Dimensions of Human Rights* (2015), 203. See also the UN Framework Principles on Human Rights and the Environment, developed by Special Rapporteur John Knox under the auspices of the Human Rights Council. UNHRC, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John Knox, UN Doc A/HRC/37/59 (2018).

¹⁰ E. Grant, 'International Human Rights Courts and Environmental Human Rights: Re-imagining Adjudicative Paradigms', *Journal of Human Rights and the Environment* 6(2) (2015); Ginevra Le Moli, 'The Human Rights Committee, Environmental Protection and the Right to Life', *International & Comparative Law Quarterly* 69(3) (2020), 735.

¹¹ See e.g. Jonas Ebbesson, 'Principle 10', in Jorge Viñuales, *The Rio Declaration on Environment and Development: A Commentary* (2015), 287. The body of case law from human rights bodies in relation to access to environmental information and public participation in decision-making regarding the environment is growing steadily. See e.g. *Guerra and Others v. Italy*, Application No. 14967/89, European Court of Human Rights, 1998 in relation to access to environmental information.

¹² International Criminal Court, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15 September 2016, para. 41, available through https://www.icc-cpi.int/itemsdocuments/20160915_otppolicy_case-selection_eng.pdf.

in non-international armed conflicts and in situations that do not qualify as armed conflict. Nevertheless, there has not been a single environmental case since the publication of this policy paper. This raises questions as to how the ICC as a mechanism and domestic criminal courts through positive complementarity can be used more effectively for the purpose of addressing environmental crimes. Permeating these debates is the call for the introduction of a separate criminal provision to address environmental destruction or 'ecocide'. While the inclusion of such a crime in the Draft Code of Crimes Against the Peace and Security of Mankind (which became the Rome Statute) was expressly considered by the ILC in the 1980s,¹³ this idea was ultimately abandoned. Currently, the call for an environmental crime is gaining new momentum. A panel of prominent experts has drawn up a definition for a crime of ecocide which is to be proposed to the parties of the Rome Statute as a basis for discussion on an amendment of the Rome Statute.¹⁴ This development opens novel prospects for enhancing the relevance of the Rome Statute machinery in addressing serious environmental harm. At the same time, more critical reflection on the appropriateness of (international) criminal law to resolve long term and systemic environmental damage (such as caused by greenhouse emissions, climate change and ocean pollution) is needed.¹⁵

Furthermore and as demonstrated by the inclusion of an environmental war crime in the Rome Statute, military activities can have devastating effects on the environment. Classical examples include the United States' aerial spraying campaign in Vietnam in the 1960s, causing massive deforestation, and Iraq's campaign to light oil wells upon its retreat from Kuwait in 1990, causing severe air and marine pollution. International humanitarian law contains important gaps when it comes to the prevention of conflict-related environmental harm, especially in relation to non-international armed conflicts. Two important initiatives have been undertaken in recent years to address these problems. First, the International Law Commission has prepared a set of 28 draft principles that seek to clarify and develop States' obligations for the protection of the environment in relation to armed conflicts, which have been adopted in first reading in 2019.¹⁶ Second, the International Committee of the Red Cross has issued Guidelines on the Protection of the Natural Environment in Armed Conflict in 2020,¹⁷ which build on its earlier guidelines for military manuals adopted in 1994. These initiatives provide a good starting-point for assessing the current state of the law, while inviting further reflections on its development. Likewise, reflection is needed on the connection between the environment and collective security. While the ILC draft principles and the ICRC guidelines notably deal with the effects of armed conflict on the environment, the environment itself can also constitute a cause for or driver of armed conflict. Environmental degradation and natural resource scarcity, exacerbated by climate change, increasingly define the global security landscape.¹⁸ The drying of Lake Chad constitutes a relevant example, where environmental degradation and the proliferation of terrorism go hand in hand. The UN Security Council and other security (related)

¹³ Second report on the draft code of offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/377 and Corr.1, para. 79.

¹⁴ Independent Expert Panel for the Legal Definition of Ecocide, Commentary And Core Text, June 2021, available at <https://www.stopecocide.earth/>.

¹⁵ See e.g. Geoff Gilbert, 'International Criminal Law Is not a Panacea - Why Proposed Climate Change 'Crimes' Are Just Another Passenger on an Overcrowded Bandwagon', *International Criminal Law Review* Vol. 14 (3) (2014), p. 551 - 587.

¹⁶ Report of the International Law Commission to the Seventy-First Session, UN Doc A/74/10, 20 August 2019.

¹⁷ ICRC, Guidelines on the Protection of the Natural Environment in Armed Conflict (2020), <https://www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating>.

¹⁸ Institute for Economics & Peace, Global Peace Index 2020: Measuring Peace in a Complex World (2020), https://visionofhumanity.org/wp-content/uploads/2020/10/GPI_2020_web.pdf.

organizations are trying to grapple with this new reality and how to respond to it.¹⁹ Reflection on this theme is very much needed, while it is also important to address the more fundamental question of what it means to frame environmental problems as security threats.

Major challenges further lie in greening the economy. According to Principle 4 of the Rio Declaration, sustainable development requires that “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”.²⁰ This raises questions as to the extent to which environmental protection is currently integrated in international legal frameworks regulating economic activities and what should be done to enhance integration. Whereas the relationship between trade and investment on the one hand and environmental protection on the other could be described as antagonistic in the early days, today there seems to be increasing recognition of the need to address the environmental harmful effects of economic activities. Most modern investment treaties include environmental clauses and investment tribunals are proving to be more willing to take into consideration environmental concerns.²¹ Likewise, the World Trade Organization has come a long way since the infamous Tuna decision in the early 1990s, but there are still many challenges ahead.²² The important topic of labelling as well as the rules on subsidies for green energy are relevant examples. The stalled negotiations on an Environmental Goods Agreement are also a matter of concern. Furthermore, it has been acknowledged that the integration of environmental considerations in economic policies does not only contribute to preserving the environment but also mitigates threats to the (global) economy from environmental risks. Exemplary in this regard is the debate on the greening of the financial system and the inclusion of environmental considerations in macroeconomic policy. In the context of a review of its monetary policy strategy the European Central Bank has recently decided on an action plan with a concrete roadmap aimed at including climate change considerations in its monetary policy.²³ This has been mainly explained through the potential for the “undesirable accumulation of climate-related financial risks” that can be linked to the negative effects of climate change and the carbon transition on “the value and the risk profile of the assets held on the Eurosystem’s balance sheet”, but also with the effects on price stability of “the transition to a more sustainable economy”.²⁴

The greening of international law also takes shape through developments at the regional level throughout different parts of the world as well as through regional integration, such as within the European Union. With regard to the latter, the European Union’s Green Deal “aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use.”²⁵

¹⁹ See e.g. Security Council Report, The UN Security Council and Climate Change, Research Report, June 2021; NATO Climate Change and Security Action Plan, 14 June 2021, https://www.nato.int/cps/en/natohq/official_texts_185174.htm.

²⁰ Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 13 June 1992, 31 I.L.M. 874 (1992).

²¹ See e.g. Kate Miles (ed.), *Research Handbook on Environment and Investment Law* (Elgar 2018).

²² See e.g. Geert Van Calster and Denise Prévost (eds.), *Research Handbook on Environment, Health and the WTO* (Elgar 2014).

²³ European Central Bank, ECB presents action plan to include climate change considerations in its monetary policy strategy, Press Release of 8 July 2021, available at < https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210708_1~f104919225.en.html >.

²⁴ Ibid.

²⁵ Communication from the Commission to the European Parliament, the European Council, the Council, the European economic and Social Committee, and the Committee of the Regions, ‘The European Green Deal,

As such, it is considered as “an integral part” of the strategy of the European Commission “to implement the United Nations’ 2030 Agenda and the sustainable development goals.”²⁶ Internally the EU has announced a European climate pact which inter alia includes the ambitious plan to mainstream sustainability in *all* EU policies, including pursuing green finance and investment and greening the national budgets of the EU member states. Externally, the EU strives to be a global leader, engaging in what it refers to as “green deal diplomacy” and by setting “a credible example”.²⁷ One of the pertinent questions that arises in this context is with what aim Europe pursues environment protection at the global level and to what extent this is fueled by the desire to protect its own economic interests (the EU internal market), for example in the context of its Common Commercial and Foreign Direct Investment Policy.

Special consideration should be given to the impact of human activities on our global commons, including the high sea, outer space, the atmosphere and the climate system. Shipping, offshore oil drilling and seabed mining all pose considerable risks to the marine environment. This can be exemplified by the MV Wakashio oil spill that occurred off the coast of Mauritius in 2020, causing irreparable damage to one of the largest Ramsar wetlands worldwide. Other dangers threatening the marine environment stem from land-based pollution, especially from microplastics, and over-fishing, while a new convention is currently being considered to enhance protection of marine biodiversity of areas beyond national jurisdiction.²⁸ Outer space also increasingly experiences the effects of human activities. Over 60 years of space activities, including the launching of satellites and other objects underpinning modern life on earth, has generated a significant amount of waste in outer space, prompting questions about the contribution of international law to prevention of and liability for space debris.²⁹ The protection of the atmosphere (including the ozone layer) and the climate system also pose considerable challenges. While the Montreal Protocol on the Protection of the Ozone Layer has been heralded as a success story, progress on combating air pollution and global warming is considerably slower. Most notably, the 2015 Paris Agreement on Climate Change has been considered progress by some and a step back by others.³⁰ Major challenges lie in operationalizing the Paris Agreement in light of its dependence on States’ implementation of ambitious climate plans.

The developments and challenges set out in this *Call for Papers* require closer examination. Several questions can be raised that are relevant for understanding and developing international legal responses to the global environmental crisis:

- 1) What does ‘greening’ mean within particular fields of international law?
- 2) What developments can be identified, what drives these developments, and who are the principal actors (including – if any – the role of private actors)?
- 3) How has the greening phenomenon been conceptualized in various fields of international/transnational/regional law?
- 4) What are (inherent) limitations to the greening of international/transnational/regional law?

COM(2019) 640 final. See e.g. Alicja Sikora, ‘European Green Deal – legal and financial challenges of the climate change’, *ERA Forum* 21, 681–697 (2021).

²⁶ Ibid.

²⁷ Ibid.

²⁸ Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UN Doc. A/72/249, 24 December 2017. See more generally e.g. Rosemary Rayfuse (ed.), *Research Handbook on International Marine Environmental Law* (Elgar 2017)

²⁹ See e.g. Peter Stubbe, *State Accountability for Space Debris: A Legal Study of Responsibility for Polluting the Space Environment and Liability for Damage Caused by Space Debris* (Brill Nijhoff Leiden 2018).

³⁰ See e.g. Daniel Bodansky, ‘The Paris Climate Change Agreement: A New Hope?’, *The American Journal of International Law* Vol. 110(2) (2016), p. 288-319.

- 5) What further changes are necessary in order to address the global environmental crisis and what is the role of enforcement mechanisms therein?

The Netherlands Yearbook of International Law invites contributions on the theme of “Legal Responses to the Global Environmental Crisis” for Volume 52. We are interested in:

- i) conceptual papers about what it means to translate environmental concerns into other legal vocabularies, such as human rights, peace and security, international criminal law, and economic and trade law. More specifically, we are interested in the question of what gets lost in the translation;
- ii) papers considering approaches to the greening phenomenon (focusing on underlying concepts such as ecocentrism; (environmental) law & economics of greening, drivers of the greening phenomenon; principal actors),
- iii) papers that describe and evaluate how the greening phenomenon takes shape in specific areas of international/transnational/regional law, including considerations about the appropriateness of using these areas to address environmental concerns;
- iv) papers that address opportunities and constraints related to the greening phenomenon in international law.

Authors are invited to submit an abstract (max. 500 words) on one of the listed themes and a short C.V. (including affiliations and principal publications) to Daniëlla Dam-de Jong (d.a.dam@law.leidenuniv.nl) and Fabian Amttenbrink (amtenbrink@law.eur.nl) with the subject line “NYIL Vol. 52”. The deadline for submitting abstracts is **1 December 2021**. The editors will inform selected authors by 24 December 2021. The deadline for submitting full contributions is **29 April 2022**.