Introduction

Environmental health addresses the physical, chemical and biological factors external to a person and all the related behaviours. [1] It comprises those aspects of human health and disease that are determined by environmental risks, encompassing also the assessment and control of environmental factors that have the potential to adversely affect human health. [2]

The global dimension of environmental health impacts is impressive. The report issued by the World Health Organization in 2016 on *Preventing Disease through Healthy Environments: A Global Assessment of the Burden of Disease from Environmental Risks* [3] states that 23% of global deaths and 26% of deaths among children under age 5 – that is to say an estimated 12.6 million deaths every year – are due to preventable environmental risk factors such as air, water and soil pollution, chemical exposures, climate change, and ultraviolet radiation. It is estimated that these environmental hazards contribute to 101 diseases and injuries out of the 133 diseases or disease groups listed in the Global Health Observatory. [4] In particular, 8.2 million environmental-related deaths are due to non-communicable diseases, including stroke, heart disease, cancers and chronic respiratory diseases, which are the top five causes of deaths. Children under 5 and older adults between 50 and 75 are most affected by the detrimental effects of environmental degradation, while low- and middle-income countries bear the greatest share of environmental disease. The report argues that environmental health interventions can make a valuable and sustainable contribution towards reducing the global disease burden, improving the well-being of people worldwide and achieving all Sustainable Development Goals, many of which are closely interlinked with the environmental and social determinants of health. [5]

The protection of public health from environmental harm is clearly a major concern in international environmental law. [6] The importance of safeguarding human

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[1] Annette Prüss-Ustün, Jennyfer Wolf, Carlos Corvalán, Robert Bos, Maria P Neira, *Preventing Disease through Healthy Environments: A Global Assessment of the Burden of Disease from Environmental Risks* (WHO 2016) 3.

[2] WHO Europe, European Charter on Health and the Environment, 1989; see also Environment and Health. The European Charter and Commentary, 1990, 18.

[3] Prüss-Ustün and others (n 1).

[4] ibid at 11.

[5] ibid at 95.

[6] See Makane Moïse Mbengue and Susanna Waltman, 'Health and International Environmental Law' in Gian Luca Burci and Brigit Toebes (eds), *Research Handbook on Global Health Law* (Edward

health in the context of environmental protection is evidenced by several multilateral environmental agreements (MEAs), whose stated aim is the dual protection of both health and the environment. They include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, [7] the Rotterdam Convention on Hazardous Chemicals and Pesticides, [8] the Stockholm Convention on Persistent Organic Pollutants, [9] and the Minamata Convention on Mercury. [10] These treaties establish an international regime for the control of cross-border movements and international trade in toxic and bio-accumulative products and substances, creating an integrated system of protection of human health from the damages caused by exposure to such harmful agents.

Air pollution is a major threat to public health owing to the severe respiratory (lung diseases and cancer) and cardiovascular diseases caused by air pollutants (both outdoor and indoor). Its death toll is estimated in 7 million deaths every year. The impact of air pollution on human health is currently at the top of the WHO agenda and was discussed in the first global conference on air pollution, climate change and human health, organised by the WHO in collaboration with the United Nations Environmental Programme (UNEP), the World Meteorological Organization and the Secretariat of the Framework Convention on Climate Change. [11] In this field, there are several important agreements combating air pollution and protecting health, first and foremost the Convention on Long-Range Transboundary Air Pollution and its eight protocols, negotiated by the United Nations Economic Commission for Europe. [12] These treaties aim to improve air quality at the local, national and regional levels, gradually reducing and preventing air pollution through the identification of specific measures aimed to cut noxious emissions.

In the field of water pollution and waterborne diseases due to unsafe or contaminated drinking, bathing and washing water, the UNECE Protocol on Water and Health is of special significance. [13] The Protocol deals with the management of water

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Elgar Publishing 2018) 197; see also Stefania Negri, *Salute pubblica, sicurezza e diritti umani nel diritto internazionale* (Giappichelli 2018) 177-179; ILA, Committee on Global Health Law, Sydney Conference Report 2018, Section IV, paras 31-43 (by Stefania Negri).

[7] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 22 March 1989, in force as of 5 May 1992, ratified by 186 States and the European Union.

[8] Rotterdam Convention on Hazardous Chemicals and Pesticides (PIC Convention), Rotterdam, 10 September 1998, in force as of 24 February 2004, ratified by 160 States and the European Union.

[9] Stockholm Convention on Persistent Organic Pollutants (POP Convention), Stockholm 22 May 2001, in force as of 17 May 2004, ratified by 182 States and the European Union.

[10] Minamata Convention on Mercury, Kumamoto, 10 October 2013, in force as of 16 August 2017, ratified by 111 States and the European Convention.

[11] See at <www.who.int/airpollution/events/conference/en/>.

[12] Convention on Long-Range Transboundary Air Pollution, Geneva, 13 November 1979, in force as of 16 March 1983, ratified by 50 States and the European Union.

[13] UNECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of

resources and access to drinking water and its aim is to protect human health, prevent the spread of infectious diseases and diseases associated with water through better management of water resources and the protection of aquatic ecosystems.

The conservation and sustainable use of biodiversity and health are also inextricably linked, as the Convention on Biological Diversity [14] and its Protocols exemplify. The preamble to the Convention recognises the importance of biodiversity to meet the health needs of the growing world population, while article 8 requires the Parties to take measures to regulate, manage and control the risks to human health posed by the use and release of leaving modified organisms resulting from biotechnology. The same concern for potential adverse health effects of modern biotechnologies is equally echoed in the preamble and several provisions of the Cartagena Protocol on Biosafety, which impose on the Parties the obligation to adopt necessary and appropriate preventive and risk assessment measures. [15] Also relevant is the Nagoya Protocol on Access to Genetic Resources. [16] The preamble to the Protocol explicitly acknowledges the importance of genetic resources for public health as well as the importance of ensuring access to human pathogens for public health preparedness and response purposes; it provides regulatory instruments to promote an effective and equitable international access to pathogens and the sharing of related benefits (including through the development of specific international instruments), the assessment of the existence of emergencies that threaten human health and the promotion of international collaboration. [17]

Last but not least, the impact of climate change on global health is considered the greatest challenge of the 21st century, threatening access to clean air, safe drinking water, nutritious food supply and safe shelter. It is currently the object of scientific investigation aimed at clarifying its negative effects, also in terms of increased spread of new pathogens that lead to the multiplication of infectious diseases. [18] According

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Transboundary Watercourses and International Lakes, London, 17 June 1999, in force as of 4 August 2005, ratified by 26 States.

[14] Convention on Biological Diversity, Nairobi, 5 June 1992, in force as of 29 December 1993, ratified by 195 States and the European Union.

[15] Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force as of 11 September 2003, ratified by 170 States and the European Union.

[16] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, 29 October 2010, in force as of 12 October 2014, ratified by 118 States and the European Union.

[17] In a recent study by the WHO Secretariat, the implications of the application of the Protocol for the sharing of influenza and non-influenza pathogens are explored and it is concluded that the Protocol can play an important role also in support of the *Pandemic Influenza Preparedness Framework* and the *Global Influence Surveillance and Response System*: see WHO, *Implementation of the Nagoya Protocol and Pathogen Sharing: Public Health Implications*, Study by the Secretariat, 18 November 2016 <www.who.int/influenza/pip/2016-review/NagoyaStudyAdvanceCopy_full.pdf>; see also *Review of the Pandemic Influenza Preparedness Framework*, Report by the Director-General, EB140/16, 29 December 2016, Annex: Report of the 2016 PIP Framework Review Group.

[18] See WHO, COP24 Special Report: Health and Climate Change, 2018 <www.who.int/global

to the WHO, a highly conservative estimate of 250.000 additional deaths each year is projected between 2030 and 2050. In this respect, the first relevant global treaty is the Vienna Convention for the Protection of the Ozone Layer, [19] which acknowledges the risks posed to human health by modifications of the ozone layer and sets the general obligation to protect both health and the environment against the adverse effects of such modifications as resulting from human activities. The United Nations Framework Convention on Climate Change [20] requires the Parties to commit to minimise the adverse effects of climate change on public health and on the quality of the environment, while the preamble to the Paris Agreement clearly emphasises the relationship between climate change and the right to health. [21]

Moving to the regional context and focusing on the European Union as a key global player in the protection of health and the environment, it is well known that EU law provides a rich legal framework that includes a wealth of legislative acts relevant to environmental health issues of both European and global concern. [22]

Apart from the abundant legislation put in place pursuant to articles 168 and 191 of the Treaty on the Functioning of the European Union, [23] which has resulted in overall reduced air, water and soil pollution, [24] several EU acts have been adopted in order to implement the provisions of the MEAs to which the Union has adhered. Suffice it to mention that in execution of the Basel, Rotterdam, Stockholm and Minamata Conventions the EU adopted the directives on waste disposal and e-waste, [25]

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change/publications/COP24-report-health-climate-change/en/>; Health, environment and climate change, Draft WHO global strategy on health, environment and climate change: the transformation needed to improve lives and well-being sustainably through healthy environments, Report by the Director-General, A72/15, 18 April 2019.

[19] Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force as of 22 September 1998, ratified by 197 States and the European Union. The Preamble to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (equally recognises 'that world-wide emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment'.

[20] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force as of 21 March 1994, ratified by 196 States and the European Union.

[21] Paris Agreement, Paris, 12 December 2015, in force as of 4 November 2016, ratified by 185 States and the European Union.

[22] See William Onzivu, 'European Environmental Health Law' in André den Exter (ed), *European Health Law* (Maklu 2017) 77.

[23] Article 168, para 1, of the TFEU provides that 'Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health', while article 191, para 1, states that 'Union policy on the environment shall contribute to the pursuit of the following objectives: - preserving, protecting and improving the quality of the environment; - protecting human health (…)'.

[24] See at <https://ec.europa.eu/environment/index_en.htm>.

[25] Especially relevant is the Framework Directive on Waste Disposal, Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives; Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE).

the REACH, [26] PIC [27] and POP Regulations [28] and the new Mercury Regulation. [29] Echoing the dual purpose characterising the corresponding international conventions, the declared objective of these acts 'is to ensure a high level of protection of human health and the environment' in Europe.

One last consideration concerns the fact that environmental health is a dynamic and evolving field. In fact, while there is strong scientific evidence of the negative impact on the global burden of disease of well-defined hazards such as air, water and soil pollution, chemical exposure and ultraviolet radiation, not all environmental risk factors can be grasped with full detail, especially emerging threats posed by climate change, loss of biodiversity and the effects of biotechnologies, electromagnetic fields and antimicrobial resistance. [30]

In consideration of such complexities, and consistent with the "One Health approach", the present book aims to offer a broad and systematic overview of the interactions between public health and environmental protection and the legal responses provided by international and EU law to prevent the health hazards associated with massive pollution, degradation of ecosystems and climate change.

This book gathers the scientific results of the research project "New frontiers in environmental health" developed within the framework of the activities of the *Jean Monnet Chair in European Health, Environmental and Food Safety Law* (2016-2019), co-funded by the Erasmus+ programme of the European Union. It builds on the expertise of a large international network of academics collaborating with the "Observatory on Human Rights: Bioethics, Health, Environment", which is based at the Law School of the University of Salerno. Leading experts in the field and younger

[26] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

[27] Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals (RECAST); Commission Delegated Regulation (EU) 2019/330 of 11 December 2018 amending Annexes I and V to Regulation (EU) No 649/2012 of the European Parliament and of the Council concerning the export and import of hazardous chemicals.

[28] Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC; Commission Regulation (EU) No 757/2010 of 24 August 2010 amending Regulation (EC) No 850/2004 of the European Parliament and of the Council on persistent organic pollutants as regards Annexes I and III; Commission Regulation (EU) No 756/2010 of 24 August 2010 amending Regulation (EC) No 850/2004 of the European Parliament and of the Council on persistent organic pollutants as regards Annexes IV and V.

[29] Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury and repealing Regulation (EC) No 1102/2008.

[30] See, eg, Antimicrobial resistance from environmental pollution among biggest emerging health threats, says UN Environment <www.unenvironment.org/news-and-stories/press-release/antimicrobial-resistance-environmental-pollution-among-biggest>, 5 December 2017.

researchers discuss both traditional and new or emerging environmental health challenges from multiple legal perspectives, integrating human rights, ethics, investments, trade, energy, food safety and emergencies. I am extremely grateful to all of them for their excellent contribution to the book and for their confidence in this project.

Salerno, May 2019

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Part I

Environmental Health at the Intersection of Ethical, Human and Economic Values

Chapter 1

[Human] Values and Ethics in Environmental Health Discourse and Decision-Making: The Complex Stakeholder Controversy and the Possibility of "Win-Win" Outcomes

Anja Matwijkiw [*] *and Bronik Matwijkiw* [**]

1. *Introduction: Shareholder and Non-Shareholder Stakeholders*

Descriptively, real-world facts about the link between the mode of production and its effects on the environment speak their own clear language. In 2018, *Deutsche Welle* reported that:

> Plastic now pollutes our entire Planet.
> Governments are trying to tackle the environmental catastrophe… and this is hurting some businesses.
> It is all proving that the move away from waste is going to be a struggle.
> The move will save a lot of money in the long run, but big business is only interested in profits. Shareholders focus on the short-term.
> And… we are forever encouraged to consume. [1]

Making money is the centerpiece of corporate responsibility, according to Milton Friedman. Thus, the (value) clash between environmental concerns and the business-as-usual view goes to the very core of the controversy and conflict that this chapter

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Disclaimer: All views expressed in this chapter are the sole responsibility of the authors.

[1] Ben Fajzullin, 'Made in Germany – Away from Waste' *Deutsche Welle* (25 December 2018) <www.dw.com/en/made-in-germany-away-from-waste/av-46862971>.

addresses, as will be explicated in the following paragraphs and sections. At the same time, the complexity of the stakeholder divide is such as to give rise to a number of crucial mergers, meaning that critical questions about the depth and relevancy of their differences may be inescapable.

Stakeholder doctrine or theory has a very recent origin in that R. Edward Freeman's *Strategic Management: A Stakeholder Approach* (1984) is commonly construed as the alternative to Friedman and similar *laissez-faire* capitalists who support a Privatize-Deregulate-Decentralize program. Referring explicitly to Freeman as "the father of stakeholder theory", Norman E. Bowie contrasts Freeman's approach to business management with so-called "stockholder theory".[2] Like Freeman's stakeholder theory, this concerns the parties, be they individuals or groups, which deserve recognition and consideration for the specific objective of managing the business. However, unlike the broad criteria that theorists like Freeman adopt and endorse, the relevant defenders of traditional business interests take a "narrow" view by virtue of ascribing primacy to investors, ie stockholders or shareholders as stakeholders.[3] Therefore, the responsibilities of managers consist first and foremost in acting as *their* agents. In the event that there are no monetary or market interests at stake, the profit *versus* humanity tension comes to define the relationship between shareholders and those (non-shareholders) who *cannot be counted* as stakeholders on narrow terms. Broad stakeholder theory opposes this, in part, because the implied exclusivity makes it impossible to account for the modern business environment as an empirical phenomenon.[4] Thus, managers must and, *mutatis mutandis*, should be broad or holistic in their approach and outlook, in effect, to avoid being left behind. Realistically and pragmatically, they should consider *anybody who can affect or is affected* by the activity or policy of the business, firm, corporation or organization as stakeholders.[5] Besides real-world necessity and effectiveness as regards the goal of doing and staying in business successfully, a broad approach and outlook also secures an idealist component, though; and this commits managers to manage the business on the basis of values, including values that derive from singular and substantive morality (cf ethics). Unlike the narrow stakeholder version's declared respect for ethical customs and the deconstruction of value objectivity that results from an analysis of the Privatize-Deregulate-Decentralize program, broad stakeholder theorists do *not* reduce all (market) preferences to wants, nor do they accept the consequences of such a *meta*-strategy, inter alia, the idea that important values like freedom are linked with subjectivist and/or relativist philosophies that, in turn, explain why that particular individ-

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[2] Norman E Bowie, 'Foreword' in Abe J Zakhem and others (eds) *Stakeholder Theory. Essential Readings in Ethical Leadership and Management* (Prometheus Books 2008) 9, 12.

[3] ibid 9. Note that the primacy is predicated on risk-taking. See generally Milton Friedman, *Capitalism and Freedom* (40th, University of Chicago Press 2002) (1962).

[4] R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman 1984) 38.

[5] ibid 25, 46.

ual or that particular group are owed rights that match liberal or libertarian perceptions – whereas yet other rights (allegedly) fall outside the domain of valid claims. The main point is that the broad line of reasoning has a universal and humanistic foundation for freedom and liberty (although the objects of the rights permit second-order diversity or variation); and reapplies this across the value-spectrum. Furthermore, broad stakeholder theorists are skeptical about the (narrow) private/public contrast as a phenomenon that imputes an inevitable value clash, *as if* the interests of the government or, even more broadly, the community are bound to pull in the opposite direction of *our* good; with stakes in autonomy (as opposed to hegemony), self-determination (as opposed to Big Government) and non-interference (as opposed to third-party control) and, on the other and broad side of the divide, welfare (as opposed to (in)human vulnerability through unmet basic human needs), solidarity (as opposed to strict individualism and/or group egoism), and cooperation (as opposed to competition over scarce resources).

In the case of both versions of stakeholder theory, however, a certain "missing link" can be observed.[6] More precisely, to make the leap from business management to international law, stakeholder theory has to be supplemented with additional premises to make transferrable frameworks possible, even if these do not provide exhaustive accounts of the realm. Since neither narrow nor broad stakeholder theory was originally designed to accommodate general jurisprudence, it is hardly surprising that such a (re)constructivist effort can only be stretched so far. That said, attempts to formulate a "stakeholder jurisprudence" have to contain answers to *at least some* of the key questions with which legal experts access their discipline's interpretative platform.[7] The list includes inquiries into philosophical topics like: (1) "What is international law?" thereby inquiring about international law's nature and origin and, *ipso facto*, its sources of norm-creation and, as an aspect of this, the difference (if any) between legislation and adjudication;[8] (2) "Wherein lies international law's purpose?" thereby inquiring about necessary and immanent properties; (3) "Are moral principles condi-

[6] Anja Matwijkiw and Bronik Matwijkiw, 'The Missing Link in Stakeholder Theory: A Philosophical Framework' (2014) 28 International Journal of Applied Philosophy 125.

[7] For the authors' formulation of stakeholder jurisprudence, see Anja Matwijkiw and Bronik Matwijkiw, 'From Business Management to Human Rights: The Adoption of Stakeholder Theory' (2010) XIII Journal of The Indiana Academy of the Social Sciences 46; Anja Matwijkiw and Bronik Matwijkiw, 'Stakeholder Theory and Justice Issues: The Leap from Business Management to Contemporary International Law' (2010) 10 International Criminal Law Review 143; Anja Matwijkiw and Bronik Matwijkiw, 'Stakeholder Theory and the Logic of Value Concepts: Challenges for Contemporary International Law' (2011) 7 International Studies Journal 19; Anja Matwijkiw and Bronik Matwijkiw, 'A Stakeholder Approach to International Human Rights: Could the Trend Become a Tragedy?' (2013) 84 Revue Internationale de Droit Pénal 405; Anja Matwijkiw and Bronik Matwijkiw, 'February 14, 2014: The Three-Year Anniversary. Bahrain and the Precarious Diplomacy of Responsibility-Ascriptions: Values and Philosophical Aspects of Interpretation' (2015) 14 Global Community YILJ 63.

[8] Answers like "International law is not really law" are possible. Such skepticism can be found in legal positivism.

tions for the legal validity of the system of international norms?" thereby inquiring about that same system's legitimacy and/or authority in a manner that may or may not debunk the distinction between conceptual and normatively-substantive questions;[9] (4) "What is the relationship between international law and national law?" thereby inquring about international law's status, in addition to its (possible) distinctiveness or unique character; (5) "What are the limits for state sovereignty?" thereby inquiring about the constituent elements of international jurisdiction, something which, in turn, gives rise to questions about; (6) the scope of responsibility-ascriptions and accountability-securing strategies in the event of norm-violation (tribunals, courts, etc) and – in the cases where the accused are found guilty of crimes – questions about the consequences that attach or should attach, namely; (7) "What are the offenders' debts and just deserts?" thereby inquiring about the victim-satisfaction that is owed under international law, together with the legal/moral need for punishment (cf retribution), or alternatively; (8) the provision of non-punitive measures that secure future peace and security as goals, inter alia, deterrence, rehabilitation of offenders, and social reconciliation, thereby also inquiring about the stakes of the community and, furthermore; (9) the rationale for generalized consideration, an aspect which may not only draw on law and morality, but also on democracy, thereby extending the inquiry to questions about; (10) global(-ization) imperatives for the regulation of the behavior of states, such as "Does participartory politics constitute a requirement at the national and international level?"[10]

Yet other questions are possible. However, the list is more than enough to show that while the method and subject-matter of legal doctrine differ, there is nevertheless room for a number of stakeholder relevant observations and reflections, if not overlaps, as regards the kind of insights that theorists provide. Certainly, the United Nations (UN) converted to the stakeholder-terminology two decades ago, and at a point in time where the organization also highlighted a dual rule of law concept – as an anti-dote to both political tyranny and structural violence (cf economic inequities). The latter type of violations or deprivations may even be listed as "root-causes" of serious wrongdoing and antitheses to democracy.[11] Furthermore, ideas about "higher values and principles" have found their way into the UN's perception of fairness and conse-

[9] This entails a response to the separation thesis for law and (normatively-)substantive morality or ethics. Traditionally, exponents of legal positivism endorse the separation whereas advocates of natural law doctrine oppose it.

[10] It is possible to promote the strategy of inclusiveness and cooperation at home and, at the same time, ascertain and/or accept that certain states act as a "directorate" of the international community, eg, 'formed by the permanent members of the Security Council (or some of them)…' This step is inconsistent with the "integrated approach", a legal doctrine which relies on cooperation outside of the United Nations (Chapter VII) Charter system. See Giuliana Ziccardi Capaldo, 'The Law of the Global Community: An Integrated System to Enforce "Public" International Law' (2001) 1 Global Community YILJ 71, 85-86, 119; Terry Macdonald, *Global Stakeholder Democracy: Power and Representation Beyond Liberal States* (OUP 2008).

[11] Kofi Annan, Report of the Secretary-General to the Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 3-4, UN Doc. 5/2004/616 (Aug. 3, 2004).

quently *broadened* this, from a formal and procedural matter in rule-application to a (substantive) "fair laws" requirement.[12] While raising the bar with the use of ethics, the UN has also inserted political ideology. With performance as an integral aspect of legitimacy, it holds that the rule of law, democracy, and "all human rights and fundamental freedoms for all" reinforce each other – without any exeptions made, inter alia, for gender "empowerment", "employment" or the "right to development", which entails inclusive economic growth and the eradication of poverty.[13] The UN's Global Compact also distils the essence of stakeholder direction-posts like "sustainability" (cf principle 7 (businesses should support a precautionary approach to environmental challenges), principle 8 (businesses should undertake initiatives to promote greater environmental responsibility), and principle 9 (businesses should encourage the development and diffusion of environmentally friendly technologies).[14] Important interests in health are wedged between such broad notions of corporate *social* responsibility and the fear of ecocide.

In the light of this, concepts like "abuse and exploitation" and, moreover, "terrorism" cannot but assume connotations that go beyond the set of values that otherwise still appears to constitute the rights-paradigm, *viz.*, "life, liberty, physical integrity and security" defined as stakes in (narrow) freedom and survival (through non-interference).[15] Although some trends in legal doctrine graviate towards liberal *cum* narrow outlooks, interpretations of international criminal law (ICL) as a branch of public international law (PIL) do not warrant an uncritical repetition of H.L.A. Hart's duty-fixation in national (criminal) law, especially because *jus cogens* crimes qualify as instances of basic human rights violations.[16] Hence, proscriptions from

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[12] M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 16; UNGA, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, para 2, A/RES/67/1 (Nov. 30, 2012) [hereinafter 2012 Rule of Law Declaration].

[13] 2012 Rule of Law Declaration (n 12) paras 7-8, 16.

[14] The Ten Principles of the Global Compact are derived from respectively the *Universal Declaration of Human Rights*, the *International Labour Organization's Declaration on Fundamental Principles and Rights at Work*, the *Rio Declaration on Environment and Development*, and the *United Nations Convention Against Corruption*. See UN, Global Compact <www.unglobalcompact.org/what-is-gc/mission/principles>; Jeremy L Caradonna, S*ustainability: A History* (OUP 2014) 89-112 (for 'Eco-Warriors: The Environmental Movement and the Growth of Ecological Wisdom' – which captures the broad and critical messages to narrow capitalism from the 1960s to the 1970s).

[15] 2012 Rule of Law Declaration (n 12), paras 17, 26; M Cherif Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* (Brill 1994) XXVI.

[16] American Legal Process Theory (ALPT) is one example of a general jurisprudence trend that aims to halt boldness as far as rights are concerned by precluding economic/social claims from recognition. See Anja Matwijkiw and Bronik Matwijkiw, 'The Unapologetic Integration of Ethics: Stakeholder Realignments in the light of Global Law and Shared Governance Doctrine. – Distilling the Essence of Giuliana Ziccardi Capaldo's Jurisprudential Paradigm-Shift' (2016) 15 Global Community YILJ 885, 900-901; Anja Matwijkiw, 'A Philosophical Perspective on Rights, Accountability and Post-Conflict Justice. – Setting up the Premises' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Brill 2002) 155-199.

"core international crimes" (cf genocide, crimes against humanity (CAH – which include apartheid), war crimes, and crime of aggression) give rise to rights on account of their nature and/or harmful consequences in the event of breaches.[17] Furthermore, instead of *aut dedere aut judicare*, the relevant peremptory norms and corresponding non-derogable *obligatio erga omnes* may be paired with non-traditional measures and strategies for post-conflict justice management, eg, context-specific memorialization and vetting. Obviously, the narrow stakeholder version's subjectivism and/or relativism are suitable for this application, although the broad theory can integrate such non-universal philosophies while also placing limits on their mandate and scope.

The unregulated autonomy parameter follows in the wake of the separation thesis between business and government. However, this thesis also entails spill-over effects for law and substantive morality. This is to say that the minimal state arguments that narrow stakeholder theorists advance (ideo)logically imply that the law functions as a non-paternalist instrument, whereas the broad doctrine requires, *per* Louis Henkin's terminology, "public welfare" measures of positive protection for those who are unable to provide for their own basic needs.[18] An analogous concept of justice, at least if construed broadly, results in a model of economic/social performance that covers both the national and international levels. To the extent that stakeholder theorists' may and may not also draw on the interest-incommensurability thesis, the belief that stakes S come with a cancellation effect on stakes S' cannot be ignored. As it happens, the narrow version invokes the thesis, whereas the broad alternative rejects it. Narrowly therefore, economic/social rights are *at the cost of* civil/political rights, which is tantamount to a Nationalize-Regulate-Centralize outcome. Broadly, civil/political rights mix negative *and* positive features for their protection, thereby practically invalidating any conclusions about necessary choices between different types of values. Furthermore, if values are put on a formula for rights and corresponding duties, stakeholder theorists may and may not proceed in accordance with the so-called logical correlativity thesis.[19] Consequently, stakeholder theorists may and may not

[17] The International Criminal Court (ICC), as established under the Rome Statute, accommodates complementarity, universal jurisdiction and cooperation in connection with core international crimes while reaching the compromise whereby 'the ICC wields no primary jurisdiction over national courts. Instead, States are vested with the primary responsibility, or right, to prosecute such crimes. The ICC can only assume jurisdiction if national systems are "unwilling or genuinely unable to carry out the investigation or prosecution"'. See Sascha DD Bachmann and Eda N Nwibo, 'Pull and Push – Implementing the Complementarity Principle of the Rome Statute of the ICC Within the African Union: Opportunities and Challenges' (2018) 43 *Brooklyn Journal of International Law* 457, 463; Rome Statute of the ICC, 17 July 1998, 2187 UNTS 3-9, 13-16, corrected by *procès-verbaux* of 16 January 2002 (entered into force on 1 July 2002), arts 6-8, 17, 19; M Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 Virginia Journal of International Law 81, 156 (for universal jurisdiction as an "unsettled question").

[18] Louis Henkin and others, *Human Rights* (Foundation Publishers 1999) 285.

[19] A critical review of each thesis' application is provided in Matwijkiw and Matwijkiw, *A Stakeholder Approach to International Human Rights* (n 7); Joel Feinberg, *Social Philosophy* (Prentice Hall 1973) 61 (for logical correlativity).

agree that values *cum* rights depend upon duties for their existence *in the first instance*. If so, rights *per se* have no (separate) conceptual and normative pull, which causes a comparative and serious devaluation of course that is difficult, if not impossible, to square with the UN's strategy of accentuating "human rights" and, futhermore, of presupposing interdependency across the entire spectrum of values.

Notwithstanding, the following tentative conclusion stands: that talk about stakeholder jurisprudence is narrowly/broadly meaningful in the context of PIL on condition that this realm exhibits features that connect with a particular outlook and approach to values. Although the main test is about rights, stakeholder theorists and practitioners may also be identified through references and applications of ideas and beliefs that, *per* M. Cherif Bassiouni's terminology, are not "value-neutral".[20] While the two main versions of stakeholder theory are different in many respects, they also share a number of significant similarities – some of which constitute foundational premises. Eg, both narrow and broad versions entail a commitment (i) to the values that underpin the free market system, and (ii) to the belief that the distinction between the economic and political domains is not a static dichotomy. Admittedly, the pro-Friedmanian framework aims to emancipate interests in freedom of association, private property (rights) and profit-maximization outcomes (cf business-as-usual) from the agenda of those in power. If corporate social responsibility in terms of realizing the common good were to be decreed by political controllers, the implied no-choice position of utilitarianism would count as an inappropriate economic freedom-deprivation. However, if the (*per* Friedman's outlook) "impersonal" market forces are left intact, a responsibility to obey the law-that-is, to avoid fraud and deception and to non-interference with preferences in general would secure the voluntarism that the narrow ideal (of the minimal state) is premised on and which, if only over time, is more likely than not *to generate* political and civil freedoms *cum* rights as safeguards against totalitarianism.[21] While the concept of the law-that-is undoubtedly paves a path towards legal positivism and, *ipso facto*, a Westphalian notion of international law and international relations that revolves around sovereignty and state-centricity, the narrowness of the liberty that is valued entails, of course, credentials-checking that can substantiate that same narrowness. Apart from its deference to capitalist desires, the narrow stakeholder theory is *not* willing to negotiate economic/social rights that transcend (the narrow subclass of) market freedoms. The framework that best matches this (exclusivist) perception can be found in Hart's Classical Choice Theory of Rights.

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[20] M Cherif Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights' (2001) 1 Global Community YILJ 22.

[21] Friedman (n 3) 7, 20, 119.

2. *Rights* Stricto Sensu*: Meta-Freedom to (Ab)use One's Power to Eliminate Values*

Narrow stakeholder theorists home in on rights the object and indeed objective of which is to secure freedom and autonomy as (higher) values on behalf of individuals as national citizens. Therefore, Hart's Classical Choice Theory of Claim-Rights is well-suited for the purpose of conceptualization. According to the theory in question, the holder of a claim-right, *viz*., a right *stricto sensu*, is a "small-scale sovereign" who has (i) a bilateral liberty to waive the primary duty or leave it in existence as he chooses (cf discretionary powers) and, if the primary duty is breached, (ii) enforce the secondary duty, eg, by suing for compensation (cf remedial powers) just as the right-holder may (iii) choose to waive the secondary duty.[22] Thus, the implied credentials-checking is such as to make it hold that rights are consequences. In order for A to have a claim-right, there must – as a logically necessary condition – exist at least one other person or party, B, who has a duty toward A (cf logical correlativity thesis). This is the order of the relevant values. Furthermore, the right-holders present themselves as the parties who, by definition, must be in control of the correlative duties. Therefore, in the event of scarcity, there would be no rights that correspond to duties to render aid and assistance. As it happens, there would be no real economic/social rights in *any set of circumstances* because, as explained by Joel Feinberg, the availability of resources here and now at time T may change in tomorrow's world. It is the lack of a guarantee of fulfilment that disqualifies economic/social claims as candidates for status as rights *stricto sensu*.[23] As a premise, it holds that economics determine ethics. The premise in question can be subsumed under economic realism as a position. Theoretically, the premise is sometimes generalized to the Ought Implies Can Principle, thereby making it evident that "money matters" reasoning constitutes a trump. Both advocates of classical liberalism and neo-liberalism, that is, libertarianism apply it in credentials-checking.

For the purpose of self-identification, Friedman sees himself as a defender of classical liberalism.[24] However, Friedman's position can (more correctly) be classified as libertarianism for the following reasons. First, to violate the rights of stockholders or shareholders for generalized consideration is inexcusable. Second, even if rights translate into a compatriot version of the concentric-circle conception (because relativism and legal positivism together imply nationalism), the government has no jurisdiction over the assets that belong to individual citizens. A redistribution of resources is wrong.[25] Consequently, the issue of freedom *versus* welfare boils down to a distinc-

[22] HLA Hart, 'Bentham on Legal Rights' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1973) 192.

[23] Feinberg (n 19) 84-97.

[24] Friedman (n 3) 5-6.

[25] ibid 107.

tion between justice (= a capitalist free society) and injustice (= a socialist welfare state). The premise that permeates the implied liberal democracy *versus* economic "democracy" argument, namely the idea that it is not possible to have both freedom and welfare (cf interest-incommensurability thesis) cannot but have an unhappy outcome. This is to say that there is no choice in the matter after all. And the conclusion stands. Alan Gewirth, one of the most ardent defenders of a double-aspect notion of agency, presents arguments to demonstrate that the individual is bound to contradict himself if he were to reason that there are no rights to freedom *and* well-being, and yet well-being loses out on comparison. Unlike freedom, well-being is a value that requires resources. In spite of his support of welfare liberalism, Gewirth views freedom as a negative concept because it imposes negative duties of non-interference. On the other hand, well-being is a positive right that entails positive duties to do or to deliver something, eg, assistance to those in need. [26]

Transferring strict individualism to states and international relations, the (collective) right to development would have to be dismissed or denied by analysts, especially because of the economic harm and imbalance in the current distribution of autonomy/sovereignty it (the "right") necessarily causes and inflicts. Furthermore, developed nations would no longer be able to rely on the Principle of Mutual Benefit (cf voluntary cooperation) under international law, but instead unfair laws would undermine the *status quo* by demanding that national governments act on the basis of (alleged) "socially desirable goals", such as the eradication of poverty, or preventable diseases, or pollution, or all of these as a package-solution. [27] However deserving on the basis of merit, winners would be made to sacrifice for the sake of realizing goals/values that *they* say compel *us* to make certain decisions about *our* successful way – to *their* advantage. Replacing free competition with market corrections is not consistent with capitalism's individual freedom under individual responsibility prescription – a minimal state arrangement that also helps to protect against uniformity and promote liberal plurality and diversity. What is more, dominion and imperialist conquest are not precluded by the narrow outlook. Unlike the broad goal of social viability, narrow stakeholder theory is geared towards a type of continued survival that does *not* presuppose interdependency. If anything, this enhances the risk of zero-sum game outcomes in connection with the Principle of Mutual Benefit. There is no reason to seek a negotiated compromise. Instead, there is a strong incentive to "leave them to their own devices" while we pursue our own rational self-interest. As it happens, there is no alternative. The pursuit of rational self-interest is a market force. A short-term gain is preferable to a "bad deal", ie, a policy of social equalization where the 2nd sentence of thermodynamics may come to apply in economics and politics, meaning that generosity and solidarity will not even the playing field (but instead

[26] Alan Gewirth, *Reason and Morality* (University of Chicago Press 1978) 340.

[27] For the "normative dimension" of corporate social responsibility (doctrine), see Andrew Crane and others, *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 201.

universalize the "status" as non-winners). Capitalism does not attempt to negate the class society. It is through *its* dynamics that wealth is created. In turn, this is why (narrow) risk-taking and innovation cannot and indeed should not be stigmatized as *a priori* suspect in comparison to considerations having to do with vulnerability and sustainability. Eg, if climate change poses environmental health issues at the national and international levels, it may be the new technology of private business entrepreneurs that "saves the world", and *not* OSHA regulations (cf United States measures) or signatures on the Paris Agreement (cf international measure) or, for that matter, all the concerned members of the (national and international) civil society who may criticize business for its "greed" and "immoral profit". [28] Even utilitarian thinkers like Peter Singer advocate effective altruism as a business strategy. [29]

In all circumstances, considerations having to do with environmental health issues revolve around the notion of harm which, in turn, introduces a variable in the stakeholder equation. [30] Ideas about "global warming" expresses a perspective.

3. *Fairness through Broadness: Rights- and Stakeholder-Inclusion*

Besides market freedoms, the narrow rights-typology is limited to civil/political rights and, even more narrowly for fundamental or basic rights, to life, liberty and security *on condition* that the arrangement is the outcome of negotiation in accordance with preferences. The role of the minimal state is to 'protect our freedom both from the enemies outside our gates and from our fellow-citizens … [and to] preserve law and order', [31] but paradoxically enough it may be doomed to failure through its lack of protective measures in situations where autonomy is exercised in ways that adversely affect liberty, physical integrity and security, thereby *discounting* the values to the extent that no-rights outcomes are unavoidable. Self-regarding decisions that backfire on the premises of liberalism by virtue of ending that particular individual's status as an end in himself (in practice) are too extremist to match the dignity and respect constellation in international (human rights) law. Counterproductive exercise of freedom goes to the core of the profit *versus* humanity tension, with examples like slavery-related practices, human, sex and organ trafficking, and transplant tourism. [32]

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[28] The anti-business perspective relies on "normative and ethical" egalitarianism whereby the state should (re)distribute resources in accordance with (basic) needs. For Friedman, it is not possible to be 'both an egalitarian, in this sense, and a liberal'. See Friedman (n 3) 161, 195.

[29] Peter Singer, *The Most Good You Can Do: How Effective Altruism Is Changing Ideas about Living Ethically* (Yale University Press 2016).

[30] Friedman (n 3) 3 ('… what one man regards as good, another may regard as harm'), 12 (for Friedman's embryonic notion of a marketplace of ideas).

[31] ibid 2.

[32] Anja Matwijkiw and Bronik Matwijkiw, 'Biolaw Stakes, Activist Jurisprudence, and (Presumed)

The main point is that free will and consent have to be disqualified as criteria for credentials-checking concerning the most basic stakes.[33] Regarding other-regarding violations like environmental crimes (cf ecocide), the individual responsibility clause has also been challenged in the context of an analysis of CAH, partly in an attempt to establish basic and broader rights to life and health.[34] For example, Stefania Negri argues that the current obstacles for recognizing environmental crimes in terms of CAH can and indeed should be overcome. Empirically, the relevant crimes take place during times of peace as well as times of war and conflict. Furthermore, ecocide 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.[35] Unfortunately, the Rome Statute currently makes the progressive step of analogous norm-recognition impossible because the elements of CAH, *expressis verbis*, include *mens rea*. Therefore, impunity as opposed to accountability is secured on behalf of states and corporations. Another obstruction consists in the fact that environmental destruction currently can only be subsumed under "war crimes" (cf Article 8 (b VI). To make ecocide applicable in times of peace requires, therefore, CAH status.

The question is, of course, how much of an advantage, if any, the broad stakeholder version accomplishes once a(n alternative) framework for rights has been added? Since Freeman's critical reaction against Friedman is *not* driven by ideologically antagonistic sentiments, the broad version does not entail any political-economic revolution for '[i]t is decidedly not a form of socialism'.[36] That granted, the broad responsibility to balance the different interests of the different stakeholders resonates with advocates of "*hyper*norms" which function as global limits on capitalism and which render it impermissible to let corporate (state or other) activities trump the important rights of others *unless* these others participate in the decision-making.[37] Besides the Principle of Corporate Rights (PCR) that incorporates central aspects of Immanuel Kant's philosophy, ethics also accommodates consequentialism. Under the Principle of Corporate Effects (PCE), the corporation and its managers should be held accountable for the effects of their actions on others whose stakes are reciprocal, thereby arriving at a balanced judgment on the basis of interdependence. Cutting across the Respect Principle (from Kant) and the Harm Principle, PCR and PCE summarize the implicit social contract. Additional norms that are ascribed status as

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Limits for Protected Interests' in Anja Matwijkiw (ed) (special issue entitled) Paving the BioLaw Path in International Criminal Law (2017) 17 International Criminal Law Review 1070.

[33] Stefania Negri, *New Frontiers of International Justice: Crimes against the Environment and Public Health*, keynote speech at the Conference *International Justice: A Work in Progress*, Indiana University Northwest, 8 November 2018 (for the irrelevancy of the victim's consent under current international law).

[34] ibid.

[35] ibid.

[36] R Edward Freeman and others, *Stakeholder Theory. The State of the Art* (CUP 2010) 230.

[37] ibid.

ideals are: the (P1) Principle of Corporate Legitimacy and the (P2) Stakeholder Fiduciary Principle. Like the PCR and the PCE, the contents of these do not diverge from the requirements of Kantianism and consequentialism, which are pitted together as working rules although they derive from two different traditions in general ethics. Notwithstanding, P1 and P2 give rise to tension. On the basis of the premise that the purpose of the firm, business, organization (or state) is to be a vehicle for the coordination of interests, the conclusion under P1 is that stakeholders have inalienable rights, thereby making the implicit social contract consistent with natural law theory as a position within general jurisprudence. However, the same conclusion is counteracted by (a) a rights-reduction of participation to simply "being heard", and (b) a corresponding duty-reduction toward claimants – from safeguarding the long-term stakes of each group – to "paying attention" to those stakes. Accepting the reality of conflict under P2, fiduciary is construed as *prima facie* and, subsequently, management should act in the long-term interests of the corporation "when the interests of the group outweigh the interests of the individual parties to the collective contract". [38] In this way, P2 may require the survival of the corporation at the expense of the stakes of individual claimants, however deserving. It follows that the vulnerability factor from Friedman's radical market approach reappears in Freeman's idealism. Voluntary cooperation may be inseparable from unfairness. In other words, it may be false that it is, borrowing Freeman's own wording, "through the firm" that stakeholders make themselves better off. [39] At worst, Kantianism is sacrificed in favour of libertarianism or consequentialism as an instance of utilitarianism. In either case, justice has not been done. It makes no difference, if the principles are applied to the relationship between governments and their citizens. However, the broad version's potential relapse to libertarianism poses a greater transfer challenge than utilitarianism, which is already embedded in rights-restricting clauses, albeit the position cannot actually extinguish values *per se*. [40]

While humanistic in nature, the broad idea of natural law imputes no absolutism whereby any (business, legal, etc) (norm-)reality that discords with higher *cum* moral values or principles ceases to be in force descriptively as well as prescriptively. Rather, the moderate natural law argument is that discourse, decision-making and practices must and, *mutandis mutandis*, should be grounded in "good reason", in "multi-fiduciary" considerations that go beyond profit, thereby *benefitting non-shareholder* stakeholder interests while complying with the (corporate) responsibility to shareholders. [41] The natural environment, *qua* a nonhuman entity, so some stakeholder theorists maintain, should also be recognized as a stakeholder constituency, in part,

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[38] William Evan and R Edward Freeman, 'A Stakeholder Theory of the Modern Corporation: Kantian Capitalism' in Tom Beauchamp and Norman E Bowie (eds), *Ethical Theory and Business* (Prentice Hall 1988) 100.

[39] ibid 103.

[40] Matwijkiw and Matwijkiw, *A Stakeholder A pproach to International Human Rights* (n 7) 420-421.

[41] Freeman and others, *Stakeholder Theory. The State of the Art* (n 36) 198, 203.

because it lacks the political-economic voice to express its interests, but also on account of its inherent moral worth. [42] A win-win situation accommodates the natural environment – for its own sake. [43] The community, which is inserted into the broad stakeholder equation together with the government and, in principle, any other party whose welfare is substantially affected, is equally defined by "intrinsically superior" stakes – that therefore warrant consideration and recognition. [44] Nature *versus* humanity strategies and outcomes are as pragmatically defeatist as they are ethically absurd. Thus, interdependency, *mutual* sustainability, and *mutual* responsiveness to needs positively reinforce each other, thereby also validating claims about subsistence (in addition to survival through non-interference) as a matter of (broad) rights that are anchored in ethics as the First Pillar of law. Given that the serious and negative effects of climate change encompass threats to the health of the planet and the human species, inter alia, in terms of accessibility to drinking water, food scarcity and increased prices of the essentials for subsistence, broad stakeholder theory's conceptual flexibility seems crucial. [45] Certainly, outlooks that void social/economic rights with economic realism entail such blatant contradictions of international law that they have to be classified, at best, as inaccurate and outdated responses and, at worst, as reflections of aversions to humanity-centricity, shared community values and collective enforcement strategies for human rights, as defended by modern supporters of global constitutionalism and governance.

After this, the credentials for rights cannot but invoke minimal decency in the context of universalism. More precisely, it seems that the best framework is provided by the Modern Interest Theory of Rights. On Neil MacCormick's premises, the concept of a benefit is a necessary condition. The claim to treatment T constitutes a right *if and only if* the object of the right in question advances important interests of the stakeholder constituency, C, on the supposition that T is normally a good for each and every member of C. Eg, judged by the general norm for humanity, fulfillment of basic needs secures wellbeing and welfare in terms of a benefit and, therefore, economic/social human rights clearly and unambiguously qualify as candidates for recognition. However, the concept of a benefit is not sufficient. The object of the right must also promote the good of the intended beneficiary as an end in himself. Therefore, rights-recognition incorporates respect. *Only if* the interest in welfare is promoted for the right reason, is it correct that "X's claim-right to T has been established". [46] On behalf of basic stakes in

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[42] ibid 208-209.

[43] Broadly, biolaw stakes 'extend the interpretation of the human organism and its vital processes and capabilities to aspects that concern the fundamental conditions for humanity and the natural environment within which "our own kind" exists, such as consciousness-formation that avoids alienation, inter-species associations and, even more broadly, love, creativity, and the (search for) meaning with human life'. See Matwijkiw and Matwijkiw, *Biolaw Stakes* (n 32) 1074.

[44] ibid 1079.

[45] See generally Paul R Epstein and Dan Ferber, *Changing Planet, Changing Health* (University of California Press 2011).

[46] Neil MacCormick, *Legal Right and Social Democracy. Essays in Legal and Political Philosophy* (Clar-

civil/political right, it can be argued that this is the element that prevents Self as well as others from "selling out"; from degrading humanity.

Obviously, a traditional interpretation of respect could still connect respect with the possession of rationality, thereby automatically disqualifying various human stakeholders from the form of credentials-checking that otherwise relies on a principle from ethics while at the same time presupposing that the law's rationale for rights-conferment is adequately captured. However, while it is correct that various basic or fundamental rights cannot be separated from the liberal idea of autonomy and freedom as interests, the broader notion of stakeholder beneficence may pick up other rights on behalf of the nonhuman constituency, inter alia, because of their equal status as sentient beings capable of suffering or on the ground of nonhuman integrity, meaning that concentric-circle arguments in stakeholder theory come to include the natural environment as deserving of (rights-) recognition and protection. If anything, shared stakes in vulnerability, interdependency and sustainability serve to substantiate consideration that draws on biodiversity, ultimately giving rise to public and global policies that negate speciesism and similar types of ideological discrimination and non-inclusion in theory and practice.

The Modern Interest Theory of Rights does not explain how and why basic needs function as co-founders of fundamental economic/social human rights. For this purpose, stakeholder theory has to resort to the informal logic of extensionality. According to this, the following holds. If X is a basic need, then X is something which the need-holder, Y, cannot be or do without, without at the same time, suffering serious harm. Furthermore, it holds that (if X is a basic need, then) X is something which Y, or anybody else for that matter, is unable to change by changing the way he thinks or feels about X.[47] It is not possible to un-need X just through adopting the belief that, eg, "X is a myth". Paradigms include nutritious food, clean water, and unpolluted air. Other examples, which qualify as needs that are just as basic, belong to the class of what might be called developmental needs. For example, most human beings are born with the capacity to develop into rational and autonomous agents – which is what is generally taken to be part of the concept of the adult – and, consequently, children and adolescents have a need to receive the things that facilitate the process that places them within the norm, such as nurture, training and education. In order to be consistent, the narrow version of stakeholder theory has to at least accept these preconditions for rationality and autonomy in terms of needs (*as opposed to* wants) rather than allow inequality (of liberal core values) prior to open competition.

In practice, such a narrow/broad compromise may imply environmental interests to the extent that these affect the relevant developmental stakes. For example, approximately 1.2 million children in the United States are affected by lead poisoning, although many states do not even test "at-risk" stakeholders, inter alia, African Amer-

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endon Press 1982) 154-166.

[47] David Wiggins, *Needs, Values, Truth. Essays in the Philosophy of Value* (Clarendon Press 1998) 9-10.

ican children in poor(er) neighbourhoods, in spite of the facts that (i) exposure to the toxin is preventable, and (ii) the neurological damage results in serious learning disabilities and corresponding deficits.[48] If environmental health considerations require agents to balance reality and morality in a way that includes redistributive measures, narrow stakeholder theorists withhold their informed agreement; whereas exponents of the broad alternative take the step of anchoring these directly in economic/social rights. That said, they realize that recent trends in general jurisprudence include conservative legal doctrines. One example is American Legal Process Theory (ALPT).[49] If pushed, broad stakeholder arguments will combat its ideological influence as an instance of propaganda.

From the point of view of logic, all needs contrast with wants – as well as desires and preferences – on the basis of considerations having to do with their status (cf the systematic aspect) as opposed to their origin (cf the genetic aspect). Unlike needs, wants – as well as desires and preferences – come and go in accordance with the beliefs, opinions or feelings of particular individuals. It follows that if I want X, then (i) I have to have a conception of X, and (ii) there has to be circumstances in which I would try to secure X – as a goal, as something I favour and therefore prefer (which is also why X is the object of my conscious pursuit). This entails that subjectivism applies to the relevant category. As groups are also in a position to determine what "we want", relativism too has a pull. Even if the way of a group makes it correct to state, for example, that "An American family typically needs one car per household (but we really want three because that's a status symbol)" the relevant social/cultural needs – just like the relative wants – do not describe irrevocable necessities. Thus, a need-oriented environmental consciousness and conscience on behalf of the Planet, its population and its health, may guide the response to the effects of bad choices, in particular an uncritical commitment to capitalist consumerism.

Strategically, the use of basic needs as demarcation criteria for wants may translate into freedom from the "welfare diseases" that describe many modern liberal and capitalist societies. They may also provide an anti-dote to self-destruction, as in "We want hybrid cars instead of conventional cars because we need to pollute less"). Objectively, if basic and less basic needs compete, the interest in fulfilment of basic needs should be promoted as a First Priority (Principle).

In the light of the above account, basic needs are co-founders of human rights in that the Harm Principle links these facts (cf reality) with fundamental norms (cf substantive morality). Because the argument is not directly from needs (from what "is") to rights (to what "ought" to be), there is no risk of committing the naturalistic fallacy. At the same time, it is true to say that harm functions as a bridge-concept. The

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[48] Vanessa Sacks and Susan Balding, 'The United States Can and Should Eliminate Childhood Lead Exposure', *Child Trends* (2 February 2018) <www.childtrends.org/publications/united-states-can-eliminate-childhood-lead-exposure>.

[49] See (n 16).

same is true of other principles that enable the human stakeholder constituency to remain in the image of the species, inter alia, the Principle of Consideration whereby equal consideration of needs and interests is prescribed, and the Fair Opportunity Principle that bans discrimination against other stakeholders on the basis of characteristics that they have either little or no control over, meaning that they do not have subjectivist or relativist free choices to un-acquire the characteristics without difficult and/or costly intervention. [50]

Friedman's misconception that all needs reduce to a subclass of wants ethically calls for a reform of the narrow premise that the 'market makes no judgement'. [51] To separate the free market ideology from the broad logic of value concepts obstructs the singular notion of ethics. Furthermore, to activate the full potential of the Modern Interest Theory of Rights, it can be argued that the more fundamental rights are, the more the implied needs or interests deserve protection, if necessary, by imposing self-regarding immunities (so the victim can no longer give his voluntary consent). For the same reason, the strategy necessitates a revision of the PCR (whereby it is impermissible to let capitalism trump the important rights of others *unless* these others participate in the decision), meaning that the exercise of autonomy should be constrained by the values that are at stake in rights.

On the premises of the broad theory, rights are not analytically tied to free choices and powers. More generally, it not only refutes the logical correlativity thesis but also the thesis that rights, for their existence, depend on the practical possibility of their fulfilment. The narrow stakeholder theory proceeds *as if* there is a synthesis between the two views, more precisely, *as if* the logical correlativity thesis commits theorists to economic realism. In turn, the alleged synthesis constitutes the basis for the distinction between civil/political rights and economic/social rights in terms of negative and positive rights. Realists and liberals alike either preclude economic/social rights or make these secondary *because* they are positive whereas civil/political rights are real or primary *because* they are negative. Logically, however, this is untenable. It does not make sense to argue that duties are prior to rights. If anything, rights are (good) reasons for duties as consequences. Whether it is practically possible to fulfil duties in the real world is something that depends on the circumstances, but this consideration is *post facto*. It cannot affect rights-recognition. To push the point, the logical correlativity thesis is "logical" only for realists and liberals.

Equipped with the Modern Interest Theory of Rights, broad stakeholder theorists are able to proceed in an unapologetic manner whenever they are confronted with critics who, in effect, are trying to re-start the Cold War in the area of human rights with references to (the myth of freedom *versus* welfare) interest-incommensurability. This does not mean that ideology and politics are superfluous. What it does mean,

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[50] Matwijkiw and Matwijkiw, *Stakeholder Theory and Justice Issues* (n 7) 156 (for stakeholder jurisprudence principles).

[51] ibid 150.

however, is that ideological and political discourse does not make rights come and go in accordance with preferences. Rather, these have to be tested against the law to secure norm-descriptive adequacy.

At both the national and international levels, broad stakeholder theory is better suited to the task of accounting for developments that stem from considerations having to do with ethics. Certainly, in stark contradistinction to Friedman, Freeman welcomes the "recently" legal constraints on the ability of managers to maximize the interests of stockholders at the expense of other claimants on the firm.[52] When the national law created rights for these, in the 1960s and 1970s, it responded to distributive justice problems on behalf of vulnerable stakeholders, just as it contributed to the discontinuation of the classical management strategy of internalizing benefits and externalizing costs by making provisions for government regulation (*cf.* the Civil Rights Act (1964), the Clean Water Act (1972), and other measures). Concerning human rights, their existence does not depend on correlative duties in international law, albeit true that both capitalism and socialism may be accommodated *de jure* – under that individual state's right to self-determination.[53] Instead, a notion of programmatic duties guides the accountability response for protection, thereby making it possible to continue to interpret rights as normative stimuli for decisions, policies and practices that otherwise would make no sense in circumstances where rights *per se* are deconstructed beforehand. If economic realists and (neo-)liberals were introduced to "green rights" as a consequence of global climate change, they would totally dismiss these *unless* the law already made provisions for them. The tactic of denying climate change may and may not be added but – regardless of this – the line of argument would be *against* using the law as an instrument for pro-environmental activism.[54] The point is that their *allegedly* value-neutral approach conserves the current state of affairs.

4. *Conclusion: Towards a Comprehensive Justice Project*

> There are many things to be said about values which are neither 'just opinion', nor dry empirical studies of 'what someone's values happen to be' or studies of 'opinions held'. By paying attention to the logic of value concepts, theorists can develop better descriptions and yield more effective prescriptions for managers. Ultimately, the 'stakeholder issue' must be resolved in the arena of 'distributive justice'. The sledding is rough, but the questions cannot be avoided.[55]

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[52] Evan and Freeman (n 38) 98.

[53] Henkin and others (n 18) 283.

[54] Matwijkiw and Matwijkiw, *Biolaw Stakes* (n 32) 1073; John Foster, *After Sustainability: Denial, Hope, Retrieval* (Routledge 2015) 23-45 (for climate change deniers).

[55] Freeman (n 4) 248-249.

Undoubtedly, the narrow *cum* Hartian framework works for (neo-)liberal values that do not require self-regarding immunities for their protection. Those that do, namely basic and reciprocal stakes, can only be rescued by the broad framework, which makes no attempt to downplay or deny the values that the law wills. If anything, foundational principles for *hyper*norms function to fill gaps that may result from broad analysis of law in general and international law in particular.

Contemporary rule of law accusations of "state-sanctioned terrorism" would, however, be blatantly denied by liberals outside the domain of life, liberty and security as traditionally interpreted. That said, policies and strategies of systemic economic/social violence would suffice as counter-proof. Furthermore, given that injustice in terms of inequity is (impersonally) inflicted by the superstructure, the (narrow stakeholder) Principle of Individual Responsibility is inadequate. Broadly, the Principle of Corporate and/or State Responsibility also must or, *mutatis mutandis*, should be made to matter. In addition, collective enforcement strategies constitute best practices on account of their contribution to the pillars of, *per* Giuliana Ziccardi Capaldo, verticality (cf global democracy) and integrity (cf global norm-harmonization) as well as effectiveness (cf pragmatism) of value-protection. Cutting across the narrow/broad divide, important interests in civil/political and economic/social human rights are equally *real* and therefore selective tolerance for violations should not be allowed, especially not in an international community that 'is no longer a community of states but of mankind as a whole (common humanity)'. [56] As pointed out by exponents of respectively the integrative approach and stakeholder jurisprudence, interests/stakes in the environment belong to the class of public *cum* global stakes. [57] As a stakeholder in its own right, the natural environment does not yet have a legal counterpart, but the detrimental effects on *homo sapiens* create an analogy to the building block argument in failed state theory. Hence, if the natural environment suffers, members of the human family are adversely affected. In actual fact, the post-World War II rationale for norm-recognition and -protection, as provided by the International Military Tribunal at Nuremberg (IMT), relied on both other-regarding interests/effects and humanity, thereby mixing the teleological and deontological aspects that also characterize broad stakeholder theory's working rules. [58]

Without the kind of concessions and subsequent reform that Negri suggests in an era that is optimally and, some critics would argue, unfairly challenged by a non-specialized regime (cf courts with limited or no jurisdiction), further setbacks to the basic and reciprocal stakes that form integral parts of environmental crimes can be expected. If legally subsumed under CAH in the manner Negri's proposal entails, the current law-ethics separation can be overcome, together with the myth of value-incommensurability. The positivization of environmental crimes would

[56] Matwijkiw and Matwijkiw, *The Unapologetic Integration of Ethics* (n 16) 887, n. 7.

[57] ibid 901.

[58] ibid 888.

then copy the indirect and derivative procedure that the IMT used when it recognized CAH *in connection with* the commission of war crimes; and the Principle of Justice would be applicable by extension, although with decades of delay. Historically, critical voices concerning phenomena like (widespread and long-term and severe) environmental degradation (of the groundwater supplies, of fertile territories), transboundary pollution (of the atmosphere, the seas and the land), destruction of ecosystems, modifications of weather and climate (cf global warming) began in the 1960s and assumed the narrow/broad discourse format in the context of business management strategy, with the ecocide/war crimes constellation emerging in the 1970s and prevailing until the new millennium where it was referred to as 'the 5th missing crime against peace'.[59] Thus, the emphasis was on the use of military means (with nuclear arms as the main threat) which prejudiced the health or survival of the population rather than the direct link between ecocide and the effects of this on real-world resources and economic factors (cf accessibility to drinking water, food scarcity and increased prices of the necessities for subsistence) as well as human health. Unless the full (legal/doctrinal) force of *jus cogens* norms in reasoning is brought to bear on environmental crimes, thereby making the distinctions between respectively peace and war time and intent and no intent irrelevant, the multi-dimensional stakeholder spectrum of values that ultimately explains why the criteria for rights have to be broadened to include, inter alia, '[e]arth protection and climate justice' and 'cultural loss' will miss its mark.[60] Interestingly enough, the policy paper on ecocide that the Office of the Prosecutor of the ICC issued in 2016 explicitly mentions 'the *social, economic* and environmental damage' to signal the importance of negative effects on the category of economic/social rights, including 'exploitation of natural resources' and 'land grabbing'.[61]

Paving the path towards norm-recognition and -protection is fraught with obstacles, as demonstrated by 2018 headlines like 'UN climate talks deadlocked on final day'.[62] Although the relevant conference in Katowice, Poland, also generated a more optimistic headline, namely 'Nations finally agree to Paris climate treaty rules', critical comments and observations were ample – ranging from failure to cut emissions in accordance with need, developing countries relegated to second-class stakeholders,

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[59] Negri (n 33).

[60] ibid. Since the mandate of the ICC is limited to prosecution of heads of state and other instances of superior *cum* individual responsibility, the ICC does not provide the best fit with *jus cogens* standards and corresponding *obligatio erga omnes*. As argued by M. Cherif Bassiouni, these norms (doctrinally) extend beyond the current legal constraints *qua* their very status. Thus, Article 25 of the Rome Statute is in need of reform. See Anja Matwijkiw and Bronik Matwijkiw, 'A Modern Perspective on International Criminal Law: Accountability as a *Meta*-Right' in Leila N Sadat and Michael P Scharf (eds), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Martinus Nijhoff Publishers 2008) 45.

[61] Negri (n 33) (Authors' emphasis).

[62] Deutsche Welle, 'UN climate talks deadlocked on final day', *DW News* (14 December 2018) <www.dw.com/en/un-climate-talks-deadlocked-on-final-day/av-46748534>.

and an irresponsible divide between vulnerable *cum* impoverished nations and rich *cum* immoral blockers of progress.[63]

While unhappy facts only exist for economic realists and their followers, the various messages undoubtedly come with "back to square one" implications in the sense that the *status quo* preference of capitalism appears to prevent broad measures and strategies. The environment is just a natural resource (to be exploited); a pre-capitalist "value" with which no relationship exists for the same reason. A neutrality-indifference "response" seems inescapable and, *ipso facto*, a narrow zero-sum game fate. As a non-stakeholder (on the relevant capitalist premises), the environment falls outside of ethics – with no claim to any particular kind of treatment. If the sole source of interest-stimulus – the marketplace supply-and-demand – is activated, a "good reason" *for them* to protect biodiversity, ecosystems, etc, *against competition*, emerges. In turn, this explains why ecocide denial is strictly a feature of capitalism as an ideology and why legal projects that aim to synthesize law, science and ethics in order to maximize objectivity pertaining to the needs that underpin standards are likely to be brushed aside as (unfair) accountability traps for developed countries like the United States.[64] 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 yet more criminal stakes in life, health, physical integrity and security, the more protest and resistance can be expected, especially if such dynamic developments were to occur in the context of the ICC and if the implied public *cum* global interests ended the Westphalian opportunity to stand outside the global community. The *uti universi* strategies that modern exponents of globalization defend for measures to secure dignity, decency and respect on the basis of humanity force all states to comply as a matter of principle.[65] But, whereas they themselves reason that the implied decentralization of state responses owes to the very meaning of "*jus cogens*" (cf compelling law), antagonists will probably counter-argue that 'force *consists in* subordinating the individual state to the (will, interests, values, etc) of the community'. Once again, therefore, politics and ideology will be at the forefront of the debate (eg, with references to the superpower status of the United States); and the *realpolitik* advantage that the developed nations currently enjoy is more likely than not going to be preserved in future policy-making decisions that strengthen exceptionalism, nationalism, and other state-centric strategies. Narrow stakeholder theory is not about "good reason" in terms of "right reason", as defended

[63] 'Nations finally agree to Paris climate treaty rules', *SBS News* (16 December 2018) <www.sbs.com.au/news/nations-finally-agree-to-paris-climate-treaty-rules-after-all-night-deadlock>.

[64] Since the ALPT selectively negates the separation thesis, the problem of using ethics as an assessment tool of the law is introduced. See Matwijkiw and Matwijkiw, 'The Unapologetic Integration of Ethics' (n 16) 893-894.

[65] ibid 900; James Nickel and Daniel Magraw, 'Philosophical Issues in International Environmental Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (2010) 463 (for 'IEL norms… rely heavily on voluntary compliance').

by Bassiouni.[66] It is a conservation-strategy – for power. Thus, only broad stakeholder theorists and practitioners would agree that "We have a problem" when the Rockefeller Foundation–Lancet Commission on Planetary Health states that:

> The continuing degradation of natural systems threatens to reverse the health gains seen over the last century … We have mortgaged the health of future generations to realize economic and development gains in the present.[67]

In one important sense (having to do with sustainability), this goes to the very core of the narrow *versus* broad dispute. If admitted, the wheels of capitalism may stop. – And then what? The ethical considerations of broad business management *cum* stakeholder strategy are not radical. As the authors of this chapter have previously pointed out, the stakeholder issue concerning justice is not fully resolved by adding a framework that can tackle the larger community problems, such as "social justice" and defending 'the rights of the oppressed'.[68] Furthermore, the framework may be recalled.[69] If so, stakeholder jurisprudence has to, in one sense at least, turn the tables by responding to all justice deficits, practical as well as doctrinal ones, with need-oriented ethics, as indeed recommended as a UN policy in 2010.[70]

If this step is not taken, there cannot be any "win-win" outcomes in environmental health discourse and decision-making. While broad stakeholder theory avoids the anthropocentrism of its narrow counterpart (that precludes non-human stakeholders), its own account of [human] values and ethics comes with a so-called "fit" clause, meaning that considerations may be separated from idealism.[71] If so, Friedman's jus-

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[66] Matwijkiw and Matwijkiw, A Modern Perspective on International Criminal Law (n 60) 37, 76-77.

[67] 'Safeguarding human health in the Anthropocene epoch: report of The Rockefeller Foundation–Lancet Commission on planetary health', *The Lancet* (16 July 2015) <www.thelancet.com/commissions/planetary-health>.

[68] Historically, '… the critics, intellectuals, and protestors of the 1960s and 1970s who raised awareness about environmental problems, advocated for social justice, and defended the rights of the oppressed'. See Caradonna (n 14) 89-90; see note 55 (here assuming that basic and reciprocal rights and their distribution are aspects of "social justice" and "the rights of the oppressed").

[69] According to James Stieb, '… some advocates have moved a bit too quickly and without proper definition or argument. They have exceeded Freeman's intentions which are more libertarian and free-market than is often thought'. See James A Stieb, 'Assessing Freeman's Stakeholder Theory' (2009) 87 Journal of Business Ethics 401.

[70] *Meta*-ethically, this type of ethics would abridge positive duties to assist and negative duties not to harm. See Thomas Pogge, '"Assisting" the Global Poor' in Thomas Pogge and Keith Horton (eds), *Global Ethics: Seminal Essays* (Paragon House Publishers 2008) 531; Paul Farmer and others, *Reimagining Global Health: An Introduction* (University of California Press 2013) 245-287 (for utilitarianism, liberal constitutionalism, and the capabilities approach as normatively-substantive discourse frameworks for values and global health); Anja Matwijkiw, 'Justice versus Revenge: The Philosophical Underpinnings of the Chicago Principles on Post-Conflict Justice' in M Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice* (Intersentia 2010) 240-241 (for need-oriented ethics recommendations).

[71] Freeman (n 4) 83, 101.

tification of capitalism may remain intact: 'It [the market organization of economic activity] gives people what they want instead of what a particular group thinks they ought to want'.[72] Therefore, the contrast between environmental health stakes and capitalism is ethically sharp and significant, at least in one important sense. Furthermore, if freed from the (original) context of business management, broad stakeholder theory can make a complete and qualitative leap from the strategic *cum* instrumental approach (to values, interests, stakes, needs, etc) to a prescriptive project of redistribution that is guided and informed by the environmental health stakes themselves. It may still be true that the capitalism *versus* socialism choice misses "the mark".[73] Be that as it may, fair laws and a philosophical guarantee of objectivity can properly achieve better outcomes in the future than any *ideology for the sake of ideology* dispute. Certainly, if pollution and other cases of environmental destruction are subsumed under Friedman's idea of neighbourhood effects, the intervention that is required automatically has the additional and negative effect of limiting individual freedom.[74] Worse still perhaps, the disadvantage of tilting the private/public stakes against liberal capitalism is too great "now that government has become so overgrown" to justify (further) public/governmental measures.[75] If nothing can be done to recognize and protect basic and reciprocal environmental health stakes because "the basic rules" for a particular outlook are given comparatively more weight, then ethics is the only solution – for only ethics can tilt the weight-scales to benefit deserving stakeholders for their own sake.[76]

[72] Friedman (n 3) 75.

[73] Freeman (n 4) 8.

[74] Friedman (n 3) 30, 85.

[75] ibid 32, 77.

[76] ibid 27.