

Scientific

THE INTERNATIONAL CRIME THAT COULD HAVE BEEN BUT NEVER WAS: AN ENGLISH SCHOOL PERSPECTIVE ON THE ECOCIDE LAW

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ABSTRACT

This paper applies English School theory to explain the failure of efforts to establish ecocide as the fifth core international crime in the Rome Statute. It argues that while there is an emerging norm of environmental responsibility in international politics, the way this norm has been codified into laws has been influenced by two, arguably 'stronger' norms: the market and human rights. These two institutions of the international society have constrained the emergence of the norm of environmental responsibility. This has resulted in the establishment of utilitarian and anthropocentric environmental laws, rather than 'ecocentric' laws, as advocated by environmental lawyer Polly Higgins.

Keywords: Ecocide; Environmental law; International Law; International Crimes.

Introduction

'None of our existing laws set out a proper duty of care for the earth. We have a Universal Declaration of Human Rights, but the same does not exist for the earth. The earth has rights too, I reasoned, such as the right not to be polluted and the right to life.'¹

The global nature of environmental degradation has received a lot of attention amongst lawyers, politicians, civil society groups and academics. While there is consensus on the fact that action must be taken internationally to alleviate the consequences of environmental degradation, there is less consensus on the measures required. Although the environmental regime has grown in the past three to four decades, damage to the environment produced by humans does not seem to be

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¹ P. Higgins, *Earth is our Business: Changing the Rules of the Game*. London: Shephard-Walwyn Publishers, 2012, p. 5.

decreasing. For example, ‘The Economics of Ecosystems and Biodiversity’ (TEEB) report found that in 2008, the top 3000 corporations in the world have caused 2.2 trillion dollars’ worth of damage and destruction to the environment.² By comparison, only seven nation’s GDP exceed that number. In 2009 alone, the cost of environmental damage and destruction reached four trillion dollars, almost double to that of previous years. Moreover, one of the largest cases of ecocide in 2010 was the oil spill in the Gulf of Mexico, which endangered the lives of many species such as the bottlenose dolphins found in those waters.³ For many environmentalists, the TEEB report’s findings are an indication of the weakness of the current environmental regime. They are thus demanding more international commitment and unified action to save the environment.

At last November’s 15th Assembly of States Parties session, which sets the direction for the upcoming year for the International Criminal Court (ICC), environmental lawyer Polly Higgins and the island state of Vanuatu hosted a side event that presented Higgins’ proposal to include crimes against the environment – ecocide – in the Rome Statute, the founding document of the ICC, as a fifth crime against peace. The delegate from Vanuatu explained how small island states are suffering enormously under the consequences of climate change – resulting in an increase of natural disasters – and do not have the capacity to manage this threat on their own. He called for more concrete international action, to stop the widespread destruction of the environment and assist those that are most vulnerable to climate change.⁴

International law, as the law between states, has evolved enormously in the last decades. Just 30 years ago, the establishment of the ICC would have been unthinkable. However, since then we have seen the emergence of many other courts, such as the European Court of Human Rights and the African Court on Human and Peoples’ Rights. If states have been able to agree on the establishment of courts prosecuting human rights violations, including violations committed by state leaders, why is it that similar mechanisms do not exist to prosecute ‘environmental rights’ violations? And why is it necessary to establish a law which holds perpetrators of environmental crimes accountable? These are the questions this article will explore.

It will draw on the English School (ES) theory to explain the co-constitutional relationship between politics and international law and establish that a certain degree of consensus on the norm of environmental responsibility has to first be agreed upon before it can be codified into an ecocide law. As Hedley Bull has argued, international law is created by states to facilitate their cooperation, based on shared values and interests that already exist.⁵ Applying this theory explains why the ecocide law has so far failed to achieve legal status, even though the idea has

² P. Kumar, (Ed.). *The Economics of Ecosystems and Biodiversity: Ecological and Economic Foundations*. Routledge, 2011.

³ A. Burke, S. Dalby, S. Fishel, D. Levine, & A. Mitchell. ‘A Manifesto for the End of IR’. *Millennium - Journal of International Studies* 2016-44(3), pp. 499-523.

⁴ Coalition for the International Criminal Court: *ASP 15 Day Six - Can the ICC act on climate justice?* At: <http://www.coalitionfortheicc.org/news/20161122/asp-15-day-six-can-icc-act-climate-justice> (accessed on 01.07.17)

⁵ H. Bull. *The Anarchical Society: A Study of Order in World Politics*. New York: Columbia University Press 1977

been around since the 1970s and the law came very close to being incorporated into the Rome Statute. Unlike other International Relations theories, such as Realism, the ES sees international politics as a cooperative society based on shared institutions such as sovereignty, human rights and the market. Although many ES theorists are already talking about environmental stewardship as an emerging institution, the laws and regulations we have in place today reflect a very specific understanding of environmental stewardship, one which does not sufficiently protect the environment. This article will argue that instead of an evolving consensus on a 'responsibility of care', based on a belief of the intrinsic value of nature - as forwarded by Higgins – the current emerging institution of environmental responsibility in international society is based on a view of nature that is inherently utilitarian and anthropocentric. Therefore, 'ecocentric' proposals like the ecocide law are not receiving the international attention they warrant.

The article will first discuss the concept and origins of the ecocide law before presenting the key aspects of the ES theory. It will then attempt to explain why existing environmental laws do not sufficiently protect the environment, by analysing how the institution of environmental responsibility clashes with two other institutions: the market and human rights. This analysis will follow the model of Falkner, who discussed how environmental responsibility is influenced and compromised by three institutions: sovereignty, international law and the market.⁶ Since the relationship between environmental responsibility and human rights has not yet been problematized by ES scholars, it will receive more attention.

I. The Concept of Ecocide

Higgins defines ecocide as follows:

'Ecocide is the extensive damage to, destruction of or loss of ecosystems of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.'⁷

Higgins proposes to include ecocide into the Rome Statute as the fifth international crime against peace.⁸ This campaign is in line with many other ambitious projects that demand more action to save the environment, such as the proposal to create an International Environmental Court.⁹ They have in common a belief about the *intrinsic value of nature* and the need to protect the earth's 'right to life'.¹⁰ This is not a new idea; a law prohibiting ecocide was seriously considered for inclusion in the Rome Statute in the 1990s. However, the ecocide proposal, like many other

⁶ R. Falkner, 'Global environmentalism and the greening of international society', *International Affairs* 2012-88(3), pp. 503–522.

⁷ P. Higgins, 'Seeding Intrinsic Values: How a Law of Ecocide will Shift our Consciousness', *Cadmus*, 2012b-1(5), pp. 9–10.

⁸ The ICC has jurisdiction over four core crimes: genocide, crimes against humanity, war crimes and crime of aggression.

⁹ Higgins 2012, *supra* note 1.

¹⁰ *Idem*, p. 7.

ambitious environmental projects, has not yet received substantial international attention.

Ecocide in the widest sense describes the destruction of the natural environment.¹¹ The term emerged after World War II and, in particular, after the Vietnam War.¹² In this context, Arthur Galston, the scientist whose research led to the invention of Agent Orange, played an influential role in calling for a new international agreement to ban ecocide.¹³ At the opening speech of the 1972 UN Stockholm Conference on the Human Environment, the then prime minister of Sweden, Olaf Palme, spoke explicitly of the Vietnam War as an ‘ecocide’.¹⁴ While the conference did not include the term ecocide in any of its official documents, it did establish the UN’s Environmental Program (UNEP), which later became the leading global environmental authority.

Following the Stockholm Conference, there was much academic discussion on what exactly constitutes ecocide, whether it applies to intentional or unintentional environmental destruction and whether it should be outlawed only in wartime or also in peace time.¹⁵ Fried, a member of the Lawyer’s Committee on Nuclear Policy, believed ecocide to include ‘various measures of devastation and destruction which [...] aim at damaging or destroying the ecology of geographic areas to the detriment of human life, animal life and planet life.’¹⁶ Others have argued however, that ecocide often occurs simply as a consequence of business rather than as a result of determined and intended destruction.¹⁷ Falk, who published a Draft Ecocide Convention in 1973, states that ‘man has consciously and unconsciously inflicted irreparable damage on the environment in times of war and peace.’¹⁸

During the 1970s, the idea of expanding the 1948 Convention on Genocide led to an inquiry by the UN as to how the Convention could be improved.¹⁹ This included the possibility of criminalising ecocide alongside genocide. The International Law Commission (ILC) considered the inclusion of an environmental crime within the Draft Code of Crimes against Peace and Security of Mankind (hereafter ‘the Code’), which later became the Rome Statute – the founding document of the ICC. The ILC has the mandate to promote the progressive development of international law and its codification.²⁰ It included in Article 26 of the Code that, ‘an individual who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [...]’.²¹ The

¹¹ S. Mehta & P. Merz, Ecocide, a new crime against peace? *Environmental Law Review* 2015-17(1), pp. 3–7.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ A. Gauger, Rabatel-Fernel, L. Kulbicki, D. Short & P. Higgins, *The Ecocide Project: Ecocide is the missing 5th Crime Against Peace*. London: Human Rights Consortium 2012.

¹⁵ *Ibid.*

¹⁶ Fried 1973 cited in Gauger et al., 2012, *supra* note 14, p. 6.

¹⁷ A. H. Westing, ‘Arms Control and the Environment: Proscription of Ecocide’, *Science and Public Affairs*, 1974-30(1), pp. 24–27.

¹⁸ R. Falk, ‘Environmental Warfare and Ecocide. In M. Thee’ (Ed.), *Bulletin of Peace Proposals*. Oslo: Universitetsforlaget 1973, p. 80.

¹⁹ Mehta & Merz 2015, *supra* note 11.

²⁰ Gauger et al. 2012, *supra* note 14.

²¹ *Idem*, p. 9.

inclusion of the word ‘wilfully’ gave rise to criticism since it presupposes a clear intent.²²

In the end however, Article 26 was removed from the Code altogether. The final version adopted by the ILC only mentioned the intentional creation of ‘widespread, long-term and severe damage to the natural environment’ within a war context under Article 8.²³ Thus, Article 8 is the only provision in international law to hold a perpetrator responsible for environmental damage.²⁴ However, this article limits the crime to wartime situations and to intentional damage, and its threshold is considered to be too high. Tomuschat, a long-term member of the ILC from 1985-1996, for instance argued that the final Article ‘now has been emasculated to such an extent that its conditions of applicability will almost never be met even after humankind would have gone through disasters of the most atrocious kind as a consequence of conscious action by persons [...]’.²⁵

Environmental cases under Article 8 have not yet been heard at the court. In 2016, the Office of the Prosecutor published a policy paper announcing that it would prioritise, amongst others, crimes that result from the destruction of the environment and land grabbing: ‘The office [of the prosecutor] will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.’²⁶ This does not change or expand Article 8; the issues raised above regarding the war time context and the intent question remain the same. However, it does represent a shift in the Prosecutor’s focus area and it remains to be seen how this shift will be translated into action.

I.1 Why an Ecocide Law is Needed

In 2010, Polly Higgins revived the idea of a law prohibiting ecocide. In light of the deteriorating state of the environment and incidents of ecocide like the oil spill in the Gulf of Mexico, Higgins criticised that laws governing climate negotiations are based on property laws rather than trusteeship laws.²⁷ The former revolve around ownership and silent rights (silent rights that corporations have garnered, such as the right to destroy, the right to pollute et cetera). The duties regarding these laws are limited and the enforcement through fines is weak. Moreover, these laws are laid out in a way that benefits first and foremost corporations and businesses. She argues:

²² *Ibid.*

²³ Mehta & Merz 2015, *supra* note 11.

²⁴ P. Higgins, ‘Ecocide: the fifth crime against peace?’ Lecture held at Symposium on Ecocide. University College London, 2011.

²⁵ C. Tomuschat, ‘Crimes Against the Environment’, *Environmental Policy and Law*, 1996-26(6), p. 243

²⁶ The Guardian, 15.09.2016, <https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>

²⁷ Higgins 2011, *supra* note 24.

‘Many of our existing laws are premised on permit allocation and limitations, not prohibition – these are laws that have proven themselves to be unfit for purpose. Permits to pollute protect the polluter, not the earth. Fines levied after the event, when caught exceeding acceptable levels of destruction, can be sidestepped, litigated or paid-off. No amount of voluntary codes, environmental impact reports or energy efficiency targets will change matters until the concept of the ‘environment as property’, with ownership and thereby accrual of superior rights by the owner, is overturned.’²⁸

As an alternative, Higgins advocates the development of environmental laws in the framework of trusteeship laws. In contrast to property laws, these emphasise guardianship and rights for all (such as the right to peace), and would impose duties of care and legal obligations concerning the environment. She argues that enforcement should be through criminal sanctions, and that the wider community, of mankind and other species, would stand to benefit from such laws.²⁹

In her proposed definition for ecocide, Higgins refers to the peaceful enjoyment of the earth by *all* inhabitants of a given territory. She emphasises that this refers not only to human but also non-human inhabitants.³⁰ This law addresses environmental destruction in a way that implies that nature is worth saving, due to its intrinsic value and not only for human well-being. Moreover, she argues, that a law of ecocide will ‘shift our consciousness’ and that the implementation of the crime of ecocide will stop the flow of destruction at the source and create a ‘pre-emptive duty’ on governments and corporations:

‘The Law of Ecocide imposes a superior obligation and a pre-emptive legal duty upon individuals who are in a position of superior responsibility within corporations, banks and governments to prohibit profit, investment and policy which causes or supports ecocide.’³¹

As Birnie has already pointed out: ‘There are serious difficulties with the application of state responsibility in the field of environmental law [...] None of the conventions relating to environmental protection [...] do more than state that principles of liability should be developed.’³² According to Higgins, making ecocide a fifth crime against peace will create provisions which impose a legal duty of care to place human and non-human life first.³³ This presupposes a constructivist type of relationship between international law and state behaviour. It assumes, along the lines of Sikkink’s thoughts on norm cascades, that international law can effectively lead to the emergence of a ‘responsibility of care’ for the environment; that behaviour will follow, once the law has been implemented.³⁴ However, in

²⁸ Higgins 2012, *supra* note 1, p. 6.

²⁹ *Ibid.*

³⁰ Higgins 2012, *supra* note 7.

³¹ Higgins 2012, *supra* note 7, p. 4.

³² P. Birnie, ‘International Environmental Law: Its Adequacy for Present and Future Needs’, In A. Hurrell & B. Kingsbury (Eds.), *The International Politics of the Environment*. Oxford: Clarendon Press 1992, pp. 666-7.

³³ Higgins 2012, *supra* note 7.

³⁴ K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*. New York: W.W. Norton & Company, 2012.

International Relations, ES thinkers such as Hedley Bull argue that the relationship between international law and politics is co-constitutional rather than linear.

II. The English School Theory

ES theorists argue that the international system is a social system, an international society, that is commonly understood to be about the ‘institutionalisation of shared interest and identity amongst states, and puts the creation and maintenance of shared norms, rules and institutions at the centre of IR theory.’³⁵ Following a Grotian tradition, it seeks to integrate the co-operative aspect of international relations into the realist idea of the anarchical and conflictual international system.³⁶

II.1 Institutions of the International Society

Institutions are a central element of ES theorising, as the international society is made up of different patterns and layers of institutions. While regime theory focuses on intentionally created issue-specific regimes, the ES focuses on institutional phenomena below that level.³⁷ Similar to constructivism, it views institutions and the states that make up international society as mutually constitutive. It is this particular ES understanding of institutions that distinguishes it from the mainstream rationalist and neoliberal institutionalist study of international regimes.³⁸

Buzan distinguishes between two types of institutions; ‘primary’ institutions and ‘secondary’ institutions. The former are described as ‘durable, routinised practices that have evolved over time’.³⁹ According to Buzan, primary institutions define both the rightful, legitimate membership of, and the rightful, legitimate conduct within international society. Within the context of modern European history, primary institutions include sovereignty, balance of power, territoriality, international law, war, diplomacy, nationalism, human equality, development, and the market.⁴⁰ These practices are institutionalised in secondary institutions, which mainly describe international organisations like the UN.

While they are defined as durable, primary institutions typically do undergo historical change. Holsti for example, has shown how new institutions can arise (like trade) and some old ones can decline or completely drop out of use (like colonialism).⁴¹ Others have become more elaborate and complicated, like international law and diplomacy, or have adapted to changes, like sovereignty.

³⁵ B. Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation*. Cambridge: Cambridge University Press 2004, xvii.

³⁶ R. Murray, (Ed.) *System, Society and the World: Exploring the English School of International Relations*. E-International Relations Publishing, 2015-Ed.2

³⁷ Falkner 2012, *supra* note 6.

³⁸ Buzan 2004, *supra* note 36.

³⁹ *Idem.*, p. 181.

⁴⁰ *Idem.*

⁴¹ K. J. Holsti, *Taming the Sovereigns: Institutional Change in International Politics*. Cambridge: Cambridge University Press 2004.

Institutions are a key element for assessing change in international politics.⁴² As Buzan has pointed out, the idea of primary institutions ‘implies that one deep practice essentially generates or shapes all of the others.’⁴³ Moreover, as Wendt and Duvell have argued, more fundamental institutions condition the establishment of ‘lower’ or less fundamental ones, as they enable the latter.⁴⁴ Primary and secondary institutions relate closely to each other, with the latter typically having their roots in the former. Therefore, a law of ecocide or any environmental instrument for that matter, would need to have some normative grounding in primary institutions.

Institutions, ideas and norms of international society do not necessarily have to complement each other but can also collide. Jackson points out that the international society is characterised by an ‘ethic pluralism’, consisting of ‘diverging norms which figure in the choices of statesmen and stateswomen.’⁴⁵ For Jackson, the basic goal of ES scholars should be to identify competing norms and understand choices of state leaders. He emphasises that ‘international society is a changing, indeed an evolving, normative sphere and not a static or strictly limiting one; in other words, it is a historical and sociological concept.’⁴⁶

It is in this understanding of a society made up of institutions in which lies the value of the ES in explaining the failure and emergence of institutions such as laws and courts. Other IR theories, such as realists, whose explanation of inaction in the face of environmental degradation is based on the belief that it is not in state’s interest to take joint action to protect the global environment, ahead of more fundamental security and economic objectives, fail to explain why states cooperate in ways that do not directly benefit their interests – like in the creation of institutions such as the ICC and the advancement of the human rights regime in general.⁴⁷ Since certain international crimes have already been outlawed, realism does not give a convincing account for the reason why ecocide in particular has not been outlawed. Moreover, while the ES agrees with regime theorists that the international society is more than a ‘self-interested epiphenomenon of great power foreign policies’ regime theory fails to adequately address the historical embeddedness of norms and institutions.⁴⁸ By contrast, the ES’ historical approach and its distinction between evolved (primary) and designed (secondary) institutions allows it to explore the shared cultural aspects that precede rational cooperation and identify the fundamental practices that shape or constrain the evolution of more specific institutions.⁴⁹ ES theory is therefore

⁴² Falkner 2012, *supra* note 6.

⁴³ Buzan 2004, *supra* note 36, p. 180.

⁴⁴ C. Reus-Smit, ‘The Normative Structure of International Society’. In F. O. Hampson & J. Reppy (Eds.), *Earthly Goods: Environmental Change and Social Justice*. Ithaca: Cornell University Press 1996, p. 108.

⁴⁵ R. Jackson, ‘Can International Society be Green?’ In F. Rick (Ed.), *International Society after the Cold War: Anarchy and Order Reconsidered*. Basingstoke: Macmillan Press 1996, p. 172.

⁴⁶ *Idem*, p. 173.

⁴⁷ R. Eckersley, *The Green State: Rethinking Democracy and Sovereignty*. Cambridge: MIT Press 2004, p. 20.

⁴⁸ B. Buzan, *An Introduction to the English School of International Relations*. Cambridge: Polity Press 2014, p. 32.

⁴⁹ *Idem*, p. 31.

better suited for analysing long-term changes in the normative structure of international society.⁵⁰

II.2 The English School and Environmental Stewardship

Environmentalism has thus far received little attention amongst ES scholars.⁵¹ Bull touches on the topic of environmentalism but dismisses it as a force for changing established primary institutions of the international society, such as the market or sovereignty.⁵² However, more recently, some scholars have referred to ‘environmental stewardship’ as an emerging primary institution of international society.⁵³

According to Falkner, states have come to accept a responsibility for environmental protection beyond their national territory.⁵⁴ Reus-Smit also argues that the normative framework in which states define and pursue their interest, is changing. However, he remains sceptical about the extent to which environmental values have infused the international constitutional order.⁵⁵ Assessing the role of power, interests and different conceptions of justice, Hurrell discusses the weak global environmental regime, arguing that the ecological challenge has questioned ‘both the practical viability and the moral acceptability of state-based pluralist international order.’⁵⁶

Within the ES, Falkner’s study on the emergence of the norm of environmental stewardship is arguably the most thorough one.⁵⁷ He has traced the historical emergence of the norm and the ‘greening’ of international society, identifying the modern environmental movement in the 1960s and 1970s as the historical starting point. It turned environmentalism into a ‘transnational movement that challenged core norms and practices of international society’.⁵⁸ The 1972 Stockholm Declaration, in which the doctrine of state responsibility for the environment is defined, is considered to be an indicator of this change. Falkner also highlights the 1992 UN Conference on Environment and Development (UNCED) as equally pivotal, where a ‘broad North-South and East-West consensus had emerged on the need to anchor environmental responsibility in international society, despite continuing difference over how to balance the environment with development’.⁵⁹ He argues that the Rio Declaration, which resulted from the UNCED, can be

⁵⁰ Falkner 2012, *supra* note 6.

⁵¹ M. Paterson, ‘Global Environmental Governance’. In A. Bellamy (Ed.), *International Society and its Critics*. Oxford: Oxford University Press 2005.

⁵² Bull 1977, *supra* note 5.

⁵³ See Falkner 2012, *supra* note 6, Buzan 2004, *supra* note 36, Jackson 1996, *supra* note 46.

⁵⁴ Falkner 2012, *supra* note 6.

⁵⁵ Reus-Smit 1996, *supra* note 45.

⁵⁶ A. Hurrell, *On Global Order. Power, Values, and the Constitution of International Society*. Oxford: Oxford University Press 2007, p. 222.

⁵⁷ Falkner 2012 *supra* note 6.

⁵⁸ *Idem*, p. 512.

⁵⁹ *Idem*, p. 513

considered a ‘universally accepted constitutional text for the emerging primary institution’.⁶⁰

He does concede however that environmental responsibility is only an emerging primary institution and that it competes and clashes with other, established primary institutions like sovereignty, international law and the market. Despite these institutional clashes, Falkner optimistically concludes that these institutions are in the process of being ‘greened’ and transformed.

In some ways this paper expands on Falkner’s thoughts, in others it contests it. It argues with him that certain primary institutions seem to clash with environmental responsibility while remaining more sceptical regarding their overall compatibility. As such, we do not agree with Falkner’s analysis on the relationship between the market and environmental responsibility. While we acknowledge that the institution of the market is ‘greening’, illustrated by concepts like sustainability, this process can be described as an ‘accommodation’ of environmental responsibility in the most limited sense, with market interests clearly still dominating.

Jackson points to the extraordinary expansion of environmental awareness, from an object of science to ‘an authentic subject of human responsibility (including legal accountability)’.⁶¹ He also recognises that this norm can clash and has to be weighed against other norms:

‘The despoliation or destruction of the environment is now recognized to be not only dysfunctional or unwise but also wrong. It must therefore be justified. That, of course, involves balancing environmental values with other values, such as economic development, human rights or national sovereignty’.⁶²

He argues that environmental norms should be seen as not isolated from, but running alongside, other norms ‘which compete with each other as claims on decisions and policies of state-leaders and other international actors’.⁶³ Interestingly, he argues that environmental stewardship is a new form of state responsibility next to the three existing ones: national, international and humanitarian. This thought was briefly questioned and debated by Buzan, who suggests that environmental responsibility might be a derivative norm of human rights.⁶⁴ I will expand on this debate in the discussion on the relationship between environmental responsibility and human rights.

While the ES acknowledges that the setting of general standards in law can have a long-term effect on state behaviour, the assumption is that laws presuppose a pre-existing intent or common interest in the international society to act in the way the laws indicate.⁶⁵ According to ES thinking about the co-constitution of institutions and states, there needs to be a certain degree of consensus on a norm of

⁶⁰ *Ibid.*

⁶¹ Jackson 1996, *supra* note 46, p. 174.

⁶² *Ibid.*

⁶³ *Idem*, p. 184.

⁶⁴ Buzan 2014, *supra* note 47

⁶⁵ A. James, ‘Law and Order in International Society’. In A. James (ed.) *The Bases of International Order: Essays in Honour of C. A. W. Manning*. London: Oxford University Press 1973.

environmental responsibility or stewardship in place, which has infused the behaviour and identities of states, as well as the fundamental institutions of international society, before states agree to an international law that reinforces their environmental responsibility. The following analysis will attempt to answer the questions: What values and ideas dominate the current environmental discourse and constrain it in a way that impedes the evolution of an enforceable ecocide law? To what extent are states responsible for protecting the environment? It will argue that the emergence of the norm of environmental responsibility has been constrained by two other norms/institutions of international society: the market and human rights.

III. Environmental Stewardship and the Market

The market is considered a primary institution of international society.⁶⁶ Buzan argues that the idea of modernity evolved in North America, Northwest Europe and Japan in the 19th century and continued to spread to the rest of the world in the 20th century.⁶⁷ Liberalist ideas about individual rights and free markets, which formed an important part of the modernist package, spread with it. According to Falkner, the US introduced and established market liberalism into the post-1945 economic order and ‘successive waves of globalization and economic liberalization, especially after the end of the Cold War, have further entrenched the position of the market as a primary institution in international society’.⁶⁸

Modern states and societies have a deep rooted commitment to capitalism, which, in many ways, is in tension with environmental ideas, especially because states are actively promoting the accumulation of resources.⁶⁹ According to Eckersley, the exploitation of natural resources and the environment for the purposes of national economic development, along with the defence of state territory for national security, ‘have been widely understood as the overriding imperatives of all states and constitutive of the state’s very form’.⁷⁰

Neorealist explanations for environmental degradation within state territories emphasise that it is not in the interest of states to take concerted action in order to protect the environment, ahead of more essential security and economic goals.⁷¹ However, contrary to neorealist assumptions, there has been an accommodation between environmentalism and economic growth. The emergence of a discourse of sustainable growth is one area where the ‘greening’ of the market seems to have taken place.⁷²

This sustainable growth concept has however been criticised by scholars who argue that capitalism cannot be sustainable, given its very nature. For example, in his Marxist critique on ‘the second contradiction of capitalism’, James O’Connor argues, that capitalism cannot become ecologically sustainable; it can only expand,

⁶⁶ Falkner 2012, *supra* note 6.

⁶⁷ Buzan 2014, *supra* note 47, p. 135.

⁶⁸ Falkner, 2012, *supra* note 6, p. 519.

⁶⁹ *Ibid.*

⁷⁰ Eckersley 2004, *supra* note 48, p. 19.

⁷¹ *Idem.*

⁷² Falkner 2012, *supra* note 6.

not stand still. The industrial and expansionist logic of capitalism was identified as a root cause of the global ecological crisis by the modern environmental movements of the 1960s and 1970s.⁷³

Moreover, Eckersley argues that the role of policy-makers is to ‘rationalize the conditions of production by improving the productivity of labour, protecting and regulating access to nature, or producing capitalist infrastructure’.⁷⁴ Reus-Smit supports this argument, noting that the state itself has become ‘one of the most important agents of natural exploitation’, referring to the role of the state in providing commercial infrastructure, which has led to major transformations of nature.⁷⁵ He argues that the moral purpose of the state is defined in economic terms, grounding this understanding in Locke’s argument that the state’s fundamental role is to be the guarantor of property. Therefore, he states that the ‘modern economic state has been directly implicated’ in the ecological revolution, referring to the transformations that took place in the late 18th century.⁷⁶

The convergence of the two transformations is the origins of the moral purpose of the state: The rise of industrial capitalism and the start of a new social ideology centred on the interests and rights of the individual.⁷⁷ These transformations led to a new ideal of the human agent, new ideas about the relationship between the human and nature, and to new understanding of the role of the state. One of the original justifications for the modern state was its role in protecting the property rights of those who transform nature through their industry: ‘It has been generally accepted that nature has little or no value until it is mixed with human labour and thus transformed into productive personal property, which it is the state’s responsibility to protect’.⁷⁸⁷⁹

That Locke’s property-oriented philosophy has wider ramification is exemplified by the justification of colonialism: the natural bounty of the Americas and Africa lying fallow because indigenous people did not have the industry and means to transform them into productive property. As such, it was commonly argued throughout the 19th century that Europeans were not only entitled to, but also had the duty to protect the property rights of those explorers, pioneers and merchants, who ‘released nature from its unproductive slumber’.⁸⁰ Reus-Smit further convincingly illustrates how this understanding of the moral purpose of the state is currently framing international environmental negotiations through institutions that empower some actors and marginalise others:

‘It was in terms of these standards that international society gradually expanded, and when it finally globalized with the post-1945 wave of decolonization, the ideal of dynamic economic, scientific and technological state remained the standard achievement, becoming

⁷³ Eckersley 2004, *supra* note 48.

⁷⁴ *Idem*, p. 57.

⁷⁵ Reus-Smit 1996, *supra* note 45, p. 111.

⁷⁶ *Idem*, p. 109

⁷⁷ *Ibid.*

⁷⁸ *Idem*, p. 111.

⁷⁹ J. Locke, *Locke: Two treatises of government student edition*. Cambridge University Press, 1988

⁸⁰ Reus-Smit 1996, *supra* note 45

embedded in the characters of key institutions like the World Bank, IMF, the OECD and GATT'.⁸¹

Eckersley further expands on this thought, arguing that these modernist standards, which were used during colonial times to distinguish 'civilised' and 'uncivilised' countries, and are embedded in the constitutional structure of current international institutions and organisations, link to debates of 'communicative' environmental justice.⁸² She criticises the limited possibilities of developing countries, some of whom do not share this utilitarian view of nature (like Ecuador or Bolivia), to participate in global climate negotiations and actively shape measures to stop environmental degradation. From an ES perspective, this participation issue in institution formation is important in order to explore the degree of consensus about a norm or institution in international society. As Habermas has pointed out, valid social norms have to satisfy 'the principles of universalization', meaning that all affected parties have to agree to accept the consequences of a norm, and its 'general observance' can be anticipated and is in everyone's interest.⁸³

This utilitarian perspective on nature stands in contrast to the idea of an intrinsic value of nature, as brought forward by Higgins. In her proposal on the need for a law of ecocide, Higgins notes: 'Currently, our world is predominantly driven by laws that put profit first' and asks: 'So, how do we shift to a new way of being that prioritises intrinsic values? How do we shift away from valuing something for its price-tag to valuing something for its own sake, regardless of whether or not it has a pecuniary value?'⁸⁴ These questions also play an essential role in the discussion that will now follow on the relationship between human rights and environmental stewardship.

IV. Environment Stewardship and Human Rights

The relationship between environmental stewardship and human rights has not been explored yet. Therefore, the following discussion represents an attempt to fill a gap in ES literature. Two aspects of this relationship will be highlighted: Firstly, the inherent anthropocentrism of the current environmental regime is in contrast to the ecocentrism of Higgins' definition of ecocide. Secondly, the emerging institution of environmental stewardship can be a challenge for developing countries that have to balance competing responsibilities in light of the humanitarian implications of development. These arguments will be supported by primary sources, more specifically declarations and constitutions from the field of environmental law.

IV.2.1 Anthropocentric vs. Ecocentric Environmentalism

⁸¹ *Idem*, p. 113.

⁸² Eckersley 2004, *supra* note 48.

⁸³ J. Habermas, *Moral Consciousness and Communicative Action*. Cambridge: MIT Press 1991, p. 65.

⁸⁴ Higgins 2012, *supra* note 7, p. 9.

The norm and institution of human rights emerged as a primary institution of the international society after the atrocities committed in World War II. Since then, the human rights regime has grown considerably in importance, giving rise to concepts like the R2P and international legal institutions like the ICC. At first sight, human rights and environmentalism may not seem to stand in opposition to one another. As many scholars have argued, the framing of environmental protection as a fundamental condition for ensuring human rights has enabled environmental concerns to move to the top of the global agenda. However, this framing has also prevented the evolution of the norm of environmentalism into conceptions of responsibility similar to those that are in place for human rights (like R2P) or a 'responsibility of care' as proposed by Higgins. The inherent anthropocentrism of the international environmental regime and the duties and responsibilities attached to it, limit the potential of the emergence of this norm.

Jackson explicitly distinguishes environmental stewardship from human rights cosmopolitanism, attributing it a different logic of 'custodial responsibility for the planet'. He argues:

'The environment is not only a self-regarding value but also an other-regarding value, and at that point Realism fails to understand it. The other-regarding aspect of the environment makes it a far better candidate for theorizing in terms of international society. However, as indicated, "the other" in the case of the environment is not only other individuals or other states who share a dependency on the natural habitat but also other animals, species, and forms of life; environmental responsibility thus spreads well beyond the human family. This gives applied environmental ethics its character of stewardship or trusteeship'.⁸⁵

This idea fits into the debate about whether the referent object of environmental security is the environment itself, as Jackson argues, or the ability of the environment to sustain desired and existing levels of *human* civilisation. Buzan questions whether Jackson's idea of the intrinsic value of the environment is accurate, or whether the environment is rather 'a means to the sustainability of human life and civilisation'.⁸⁶ If the latter is the case, then, according to Buzan, Jackson's separate logic is 'questionable'. He goes on to argue that the 'life and civilisation logic would open a link between environmental stewardship and human rights, in which the right to a liveable environment is constructed as a human right'.⁸⁷ From this view, he concludes, 'the emergence of environmental stewardship as an institution of international society might be more a *derivative of human rights* than an entirely new social concept' (emphasis added).⁸⁸

Neither Buzan nor Jackson expand further on these ideas. This paper aims to continue this debate, arguing that while Jackson's logic to separate between the referent objects is useful in determining the evolution and limits of the norm of environmental stewardship, his assumption of the referent object being the environment and not solely human beings, can be described as 'solidarist idealism'.

⁸⁵ Jackson 1996, *supra* note 46, p 189

⁸⁶ Buzan 2014, *supra* note 47, p. 162

⁸⁷ *Ibid.*

⁸⁸ *Idem*, p. 162-163.

Similar to the proposal for a law of ecocide, it imbues nature with intrinsic value, worth saving not just for the wellbeing of humans but also of other species. In reality however, current environmental laws are mostly anthropocentric, limiting the scope of state responsibility to protecting the environment only to the extent needed to protect humans.

Most important domestic and international environmental laws can be accused of having an anthropocentric framing.⁸⁹ Since 1968 an increasing number of international declarations and statements have recognised the fundamental connection between environmental protection and respect for human rights. For example, in 1968, a UN General Assembly resolution noted the relationship between the quality of the human environment and the enjoyment of basic rights.⁹⁰ The first major international environmental declaration, the Stockholm Declaration, further fortified this logic:

‘(b)oth aspects of man’s environment, the natural and the man-made, are essential to his wellbeing and to the enjoyment of basic rights – even the right to life itself’ and ‘(m)an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing [...]’

Moreover, the Rio Declaration (1992) is a manifest of anthropocentric environmentalism. It states in Principle One: ‘Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature’. More recently, in 2012 the UN Human Rights Council decided to establish a mandate on human rights and the environment with Resolution 19/10, which ‘will, among other tasks, study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promote best practices relating to the use of human rights in environmental policymaking’.⁹¹ Moreover, on 12 December 2015, the Parties to the UN Framework Convention on Climate Change adopted the Paris Agreement, one of the most important climate agreements since the UNCED. The climate negotiators included a strong reference to HR in the agreement. After acknowledging that climate change is a common concern of humankind, the preamble states:

‘Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.’⁹²

Framing environmental protection in terms of human rights has been useful to draw attention to environmental destruction and bring about international action to solve

⁸⁹ K. Bosselmann, ‘Human Rights and the Environment: Redefining Fundamental Principles?’ In B. Gleeson & N. Low (Eds.), *Governance for the Environment: Global Problems, Ethics and Democracy*, London: Palgrave 2001, pp. 118–134.

⁹⁰ *Ibid.*

⁹¹ See website of the United Nations Human Rights Office of the High Commissioner

⁹² Preamble of the Rio Declaration on Environment and Development, 1992.

this problem. In this sense, the institution of human rights, which emerged more than 20 years before the start of the environmental movement, reinforced the emergence of the institution of environmental responsibility.

However, for many academics, this connection is not unproblematic. It can be argued, that one of the reasons the proposal for a law of ecocide was never implemented is this anthropocentric framing of environmental protection. Higgins' proposal states that 'law that is premised on health and well-being of human *and non-human life* is our bridge to a new way of being' [emphasis added].⁹³ In this context, she emphasises the intrinsic value of nature and the need to recognise the rights of *all* species living on earth. However, human rights can in some aspects limit or even contradict environmental claims. Bosselmann illustrates this problem:

'The biosphere (environment) is presently taken for granted and has no legal quality. Human rights are historically and systematically created to protect citizens against the state, in other words to protect humans from each other; they contain no provision to stop humans from exploiting non-humans and fundamentally changing the conditions of life. As long as human rights are not impinged on we are free to destroy the environment and all life around us.'⁹⁴

A discussion on the relationship between humanity and nature, as well as the moral worth of nature, is relevant for understanding the limitations inherent in current international law and the failure of the law of ecocide. As Taylor has pointed out, international environmental protection currently solely serves human interests.⁹⁵ This utilitarian perspective on nature is commonly said to derive from economic imperatives but can also be applied to human rights. However, this does not mean environmental protection should not serve to advance and protect human rights. The value in combining these two is recognised. The way this anthropocentric framing of environmental stewardship constrains the emergence of this institution needs to be highlighted however, to explain the failure of the ecocide law and other ambitious ecocentric environmental projects.

Moreover, according to Birnie and Boyle, environmental human rights 'create a hierarchy, according to which humanity is given a position of superiority and importance above and separate from other members of the natural community'.⁹⁶ In a mapping report to the Human Rights Council for example, Special Rapporteur Knox stresses that states have the obligation 'to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights' but makes clear that this obligation does not require states 'to prohibit all activities that may cause any environmental degradation'.⁹⁷ Rather, 'states have discretion to strike a balance between environmental protection and legitimate societal interests'.⁹⁸ An anthropocentric framing of environmental

⁹³ Higgins 2012, *supra* note 7, p. 9.

⁹⁴ K. Bosselmann, *The Principle of Sustainability*. Burlington: Ashgate, 2008, p. 112

⁹⁵ P. E. Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' *Georgetown Environmental Law Review*, 10(2): 1998, pp. 309–397.

⁹⁶ P. Birnie & A. Boyle, *International Law and the Environment*. Oxford: Clarendon Press 1992, p.193

⁹⁷ J. Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 2013, p. 12.

⁹⁸ *ibid*

protection leads to the objectives and standards applied being human-centred and the state of the environment is therefore determined only by the needs of humanity, not the needs of other species.⁹⁹

Furthermore, Taylor argues that anthropocentric approaches to environmental protection perpetuate the values and attitudes that are at the root of environmental degradation. Since human life, health and standard of living are the aims of this protection, the environment is only protected as a consequence of and to the extent necessary to protect humans.¹⁰⁰ All other needs, interests and values of nature are therefore subjugated to humanity. This way, environmental degradation is not a satisfactory cause for complaint but must be linked to human well-being. Although some argue, that humans, their interests and duties are not separable from environmental protection¹⁰¹ it becomes clear that the uniqueness of humanity's right to the environment needs to be de-emphasised, and the link between humans, nature and all other species re-imagined.¹⁰²

For many scholars the key for such a reformulation are more ecocentric environmental obligations that limit individual freedoms and human entitlement to resources.¹⁰³ They acknowledge the intrinsic, instead of the functional value of the environment, while concurrently trying to preserve ecological integrity.¹⁰⁴ Higgins' ecocide definition meets these criteria. Kotzé explains:

‘At the heart of the ecocentric ethic lies the realization that the future of life on Earth depends squarely on safeguarding ecological integrity, which would, among others, require a deliberate effort to shift the parochial orthodox human focus that human rights have held since Modernity, to a more inclusive ecological one which does not only include responsibility for the self, but also for all other non-human entities.’¹⁰⁵

In practice however, most national and international environmental principles are formulated in human rights terms. According to Knox, 90 national constitutions include a right to a healthy environment as a human right and in many other countries, national courts have interpreted other rights, like the right to life and health, as incorporating environmental protection.¹⁰⁶ South Africa's environmental right for example provides that ‘everyone has the right to an environment that is not harmful to their health or well-being’.¹⁰⁷

There are a few exceptions to this anthropocentric formulation, most notably in South American countries. Ecuador and Bolivia's constitutions include a more

⁹⁹ Birnie & Boyle 1992, *supra* note 96.

¹⁰⁰ Taylor 1998, *supra* note 95, p. 352.

¹⁰¹ D. Shelton, ‘Human Rights, Environmental Rights, and the Right to Environment’. *Stanford Journal of International Law*, 1991-28(1), 103–138.

¹⁰² Taylor 1998, *supra* note 95, p. 353.

¹⁰³ L. J. Kotzé, ‘Human rights and the environment in the Anthropocene.’ *The Anthropocene Review*, 2014-1(3), 252–275.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Idem*, p. 12.

¹⁰⁶ J. Knox, ‘Human Rights and the Environment: The Relationship Becomes Clearer’. Lecture held at Wake Forest University School of Law, 2014.

¹⁰⁷ Section 24, Constitution of the Republic of South Africa, 1996.

ecocentric right of the environment, a ‘right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution’.¹⁰⁸ This rights-formulation is ‘the first of its kind at the constitutional level and it is exemplary of one of the possible (but likely unpopular, due to its limitations on growth) manifestations that an ecocentric right might take’.¹⁰⁹

Similarly, many indigenous cultures view the relationship between the natural environment and humans profoundly different from those advanced by Western industrialised cultures.¹¹⁰ These indigenous cultures have however been unsuccessful in influencing the underlying norms of emerging global environmental accords since ‘the ideals of the modern state so dominate the negotiating agendas of the developing countries in which many indigenous people reside’ (ibid.). Supporting this argument, Kotzé states that neoliberal hegemony is profoundly embedded in the world’s regulatory regimes ‘with the majority of legal orders structurally committed to furthering neoliberal anthropocentric objectives, assumptions and closures which continue to threaten the living order’.¹¹¹

Referring to human rights framings of environmental protection, Higgins emphasises:

‘Climate change cases are failing at the court door for being argued on Human Rights breaches. For the crime of ecocide however, the damage is to the environment and all who live there (or who are impacted by the ecocide). Human damage can be and often is secondary (it arises out of the primary damage – for instance the polluted waters can give rise to illness). Thus the *actus reus* (the physical element – the doing of the act) of the crime is the establishment of damage to the *territory*, not specifically the doing damage directly to the people’.¹¹²

IV.2 Human Rights and Environmental Stewardship: Competing Rights

In addition to a need for more ecocentric and enforceable laws and rights of nature, certain human rights themselves require a re-interpretation and reformation to ‘allow for a new ethical relationship between humanity and nature’.¹¹³ This applies to human rights that can be invoked to justify environmental damage like property and development rights. States that emphasise a libertarian and individualist ideology may discard ecological limitations to civil and political rights, like the property right, on the grounds that the unrestricted enjoyment of such rights are ‘essential to personal freedom’.¹¹⁴ As already established in the discussion on the institution of the market, the role of the state is to protect property, not limit its use beyond what is needed and justified in the interest of society as a whole.¹¹⁵

¹⁰⁸ Article 71 of the Constitution of Ecuador.

¹⁰⁹ Kotzé 2014, *supra* note 103, p. 10.

¹¹⁰ Reus-Smit 1996, *supra* note 45, p. 115.

¹¹¹ Kotzé 2014, *supra* note 103, p. 12.

¹¹² Higgins 2012, *supra* note 1, p. 12-13.

¹¹³ Taylor 1998, *supra* note 93, p. 314.

¹¹⁴ *Ibid.*

¹¹⁵ *Idem*, p. 321.

Bosselmann however argues: ‘In light of the fact that no species can survive without respecting its ecological conditions, an anthropocentric perception of human freedom [as expressed by human rights in this instance] appears as an absurdity. It is the saw to cut the branch we are sitting on’¹¹⁶

Many developing countries argue that environmental limitations are a luxury that must wait until a higher level of development has been reached and poverty has been reduced.¹¹⁷ The rights to development and economic self-determination were advanced as a basic human rights by the newly independent former colonies.¹¹⁸ The development right is anchored in the 1986 UN Declaration on the Right to Develop, which refers to it as an ‘inalienable human right’ (Article 1(1)). Article 2(3) imposes a right and a duty on states to ‘formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals’.

Economic self-determination connects to the idea that states can use their natural resources as they see fit, a right that was argued to be essential by some developing countries for advancing the welfare of their people.¹¹⁹ A number of international documents explicitly refer to these rights. For example, the International Covenant on Economic, Social and Cultural Rights declares: ‘all peoples have the rights of self-determination’ and ‘(a)ll peoples may, for their own ends, freely dispose of their natural wealth and resources [...]’.¹²⁰

Many environmentalists are worried about the measures that developing countries are taking in the name of development. Their biggest concern is the consumption of resources. In the 1970s, the ‘third world environmental crisis’ was added to the ‘third world development and poverty crisis’.¹²¹ Kotzé argues that

‘Ecological concerns should carry equal weight despite (or perhaps as a counter measure to) the fact that some of the most prominent international environmental soft law instruments, among others, worryingly state that ‘[H]uman beings are at the centre of concerns for sustainable development’ (Rio Declaration on Environment and Development, 1992, Principle 1)’.¹²²

To this criticism, many developing countries respond that they have a responsibility to fulfil the humanitarian needs of their population first, a goal that can arguably best reached through development. As Vincent has noted, the most basic right is the right not to starve, arguing that Western individualistic political rights have to be subordinated to this basic right.¹²³ While Vincent was referring to human rights, the same argument can be applied to the prioritisation of development over environmental protection. In his discussion on environmental justice, Henry Shue

¹¹⁶ Bosselmann 2008, *supra* note 94, p. 63.

¹¹⁷ Taylor 1998, *supra* note 93.

¹¹⁸ Reus-Smit 1996, *supra* note 45.

¹¹⁹ *Ibid.*

¹²⁰ International Covenant on Economic, Social and Cultural Rights 1966, Article 1.

¹²¹ W. M. Adams, *Green Development: Environment and Sustainability in the Third World*, London: Routledge, 1990-2, p. 12.

¹²² Kotzé 2014, *supra* note 103, p. 12.

¹²³ R. J. Vincent, *Human Rights and International Relations*. Cambridge: Cambridge University Press 1986.

supports this argument.¹²⁴ According to him, what constitutes rights distribution of environmental obligations, depends on the moral priority of certain individual rights. Poor countries should not be expected to sacrifice their economic development for environmental protection because according to him, the right to economic development is morally superior. He builds on this argument in 'Basic Rights' where he draws a hierarchy of HR, based on a hierarchy of human needs.¹²⁵ For Shue, economic development is directly linked to the survival of the world's poorest people. It consequently has moral priority over the 'luxury interests' of the wealthy.¹²⁶

It is thus false and overly simplified to conceive development as a purely material concern and of environmentalism as a moral issue. As Eckersley argues, from the perspective of developing countries, 'the right to develop was defended in no less moralistic terms than the case for environmental protection advanced by environmental NGOs'.¹²⁷ Moreover, as Eckersley and Reus-Smit have pointed out, developing countries have a general suspicion towards the 'imposition' of environmental standards and conditionality by Western States, as they perceive it as a form of neo-imperialism.¹²⁸ Developing countries are thus more likely to insist on their sovereign rights to non-interference.

A way to combine development and the concerns of environmentalists is the concept of sustainable development which became popular in the 1990s, following the UNCED.¹²⁹ This concept is vaguely defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.¹³⁰ Kotzé argues however that human rights in the environmental context are often misleadingly used in the sustainable development paradigm 'to advance socio-economic development, at the cost of ecological concerns'.¹³¹

For example, the South African environmental right affords people a right

'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that ... secure ecologically sustainable development and use of natural resources while promoting *justifiable* economic and social development' (emphasis added).¹³²

This environmental right acknowledges the need for development that is ecologically sustainable, only then to weaken this obligation to include the 'justifiability criteria'. Ecological sustainability should thus only be ensured to the extent that ecological concerns do not constrain justifiable socio-economic

¹²⁴ H. Shue, 'Environmental Change and the Varieties of Justice', In F. O. Hampson & J. Reppy (Eds.), *Earthly Goods: Environmental Change and Social Justice*. Ithaca: Cornell University Press, 1996.

¹²⁵ H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. Princeton: Princeton University Press 1980.

¹²⁶ Shue 1996, *supra* note 124.

¹²⁷ Eckersley 2004, *supra* note 48, p. 223.

¹²⁸ *Idem*, Reus-Smit 1996, *supra* note 45.

¹²⁹ Adams 1990, *supra* note 121.

¹³⁰ Brundtland Report 1987, p. 43.

¹³¹ Kotzé 2014, *supra* note 103, p. 8.

¹³² Section 24, Constitution of the Republic of South Africa, 1996.

development.¹³³ This is a cause for concern, since, according to Kotzé, due to this ‘weak form of sustainability, the environmental right could be used to advance socio-economic developmental interests while ecological interests remain at the periphery of concern’.¹³⁴ He concludes that ‘sustainable development has been used as the ethical justification for the legal creation of deeply embedded anthropocentric human demands on dwindling resources’.¹³⁵

Conclusion

Some ES scholars have celebrated the emergence of environmental stewardship as a primary institution. Yet, states have so far failed to implement collective and *enforceable* environmental measures. This paper has argued that the ideas underlying a law prohibiting ecocide - which demands a protection of the environment beyond human and utilitarian needs - compete with the primary institutions of the market and human rights. The specific shape the emerging institution of environmental stewardship has taken is imbued with anthropocentric values and ideas, which limits the extent to which this institution can truly be influential. Due to the co-constitution of primary and secondary institutions, and primary institutions and state behaviour, a certain degree of consensus on this norm is needed in international society. This is also true for a law against ecocide, which could most likely result from a more ecocentric conception of the primary institution of environmental responsibility.

While the increasing involvement of states in the current environmental regime would indicate that this norm is already in place, a more thorough analysis of the institution of environmental responsibility has shown that it has evolved in a way that was dominated by certain ideas and world views, while marginalising other views. The ecocentric ideas outlined in Higgins’ ecocide proposal clash significantly with the utilitarian and pecuniary values the market endows nature with. As argued, the state’s role as the ‘guarantor of property’ meant that the state was directly implicated in the current ecological crisis. Moreover, libertarian modernist ideologies about the relationship between humans and nature are deeply embedded in the global environmental and regulatory regimes. Therefore, the ‘consensus’ on this institution of ‘environmental responsibility’ is also dominated by these world-views.

Furthermore, the clashes between human rights and environmentalism can be divided into two aspects: firstly, the anthropocentric framing of environmental law contradicts the ecocentric objectives of Higgins’ ideas. Framing environmental laws as human rights risks limiting the scope of environmental responsibility only to the extent needed to ensure human well-being. Secondly, competing rights, such as property and development rights, are often prioritised over environmental protection. Kotzé therefore criticises the liberal concept of human rights that is anchored in modernity and that ‘pits humans as masters of nature and entitled recipients against a defenceless environment.’¹³⁶

¹³³ Kotzé 2014, *supra* note 103, p. 12.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Kotzé 2014, *supra* note 103, p. 12.

This analysis has shown that it can be useful to apply International Relations theories, in particular the English School theory, to explain the existence, and failures, of certain aspects of international law. While international law has made great progress in the area of human rights, similar protective measures do not exist for the environment. A critical analysis of the norms underlying the international society served to show that this is not because states do not take their environmental responsibility seriously, but rather because of the way this norm of environmental responsibility has evolved.