# ENVIRONMENTAL PHILOSOPHY IN INTERNATIONAL LAW: A STUDY OF ENVIRONMENTAL PHILOSOPHICAL PERSPECTIVES IN DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

by

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**Abstract**

This thesis argues that the International Court of Justice (ICJ) is in a unique position to advance environmental norms but that it does not. Reasons for this situation are analysed and, ultimately, a biocentric natural law philosophy is presented to address the deficiencies of the Court's environmental protection. To construct this argument the thesis demonstrates that it is not unreasonable to assume that the Court's decision-making may embody a tacit philosophy. Notions of environmental duty and the traditions of thought they may be based upon are explored to understand this. Changing conceptions of the place of humans in the world and related notions of responsibility are shown to culminate in morally neutral utilitarianism, which removed all that had limited a ruinous environmental regard. Modern environmental philosophical perspectives must be characterised as movements to different extents, away from utilitarian thinking. ICJ case analysis is conducted against these perspectives, where it is found that the Court is inconsistent and hesitant to articulate the content and status of principles of international environmental law. In response, the thesis sketches a biocentric perspective based on natural law. To conclude the thesis considers what it would take for the ICJ to develop a biocentric legal doctrine.

*For Mathew*

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# INTRODUCTION

## i) Why this thesis is necessary

This thesis will analyse decisions of the International Court of Justice (ICJ) that concern environment related issues. It will question whether or not the ICJ has a coherent and systematic philosophical position towards the environment. To what extent do the Court's judgments already embody, or merely imply such a position? And if they do not, or if they indicate a highly fragmented rather than systematic concern with environmental ideas, what factors explain this?

It cannot be doubted that certain decisions of the ICJ have fundamental consequences for the natural environment. For example, the Court may reprimand states appearing before it for failing to provide adequate protections against environmental damage.[1] Doing so may establish behavioural standards for all states in the international community.[2] Does any coherent body of thinking, or any coherent system of values, underpin these decisions? Do they advance, or imply, a systematic commitment to perspectives of anthropocentricism, biocentrism, sustainable development or ecocentrism as a basis of interpreting or imposing legal duties? This thesis will outline and explore these contrasting positions, and analyse decisions of the Court against them.

Anthropocentrism regards humans alone as being of moral concern; the environment is something of instrumental value to humans. Biocentrism argues for the extension of moral

[1] "[T]he Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant." *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 [140] [hereinafter "*Gabčíkovo-Nagymaros Project*"].

[2] This controversial argument of ICJ decisions affecting states more widely than the applicant and respondent states before the Court is discussed below, text to n 20ff in ch 1.

concern to all individual life forms. The perspective of sustainable development seeks to resolve tensions that are understood to exist between ideas of how to protect the environment with notions of human development that may, for example, require the exploitation of natural resources. Ecocentrism argues for the extension of moral concern across species of life and for the protection of ecosystems and the environment on which life depends.[3]

The ICJ is one of many components in the international legal system. Many institutions in addition to the Court have competency in environmental matters and are tasked to improve the state of the natural environment or related protections. This thesis' focus on the ICJ forms part of its originality; it is the first work to analyse all the ICJ's current jurisprudence relating to the environment to question the potential for the Court to contribute to the establishment of stronger environmental protections. These avenues of inquiry have been overlooked in international environmental law scholarship, as is further discussed below.[4] Focus on the ICJ for the philosophical analysis of international law has two justifications: its transboundary outlook and its competence. Environmental issues have effects beyond state boundaries. Problems such as pollution of the atmosphere or climate change require internationally coordinated responses. The position of the ICJ in the United Nations legal system is unique; as an international court the ICJ reflects the global nature of many environmental problems. The Court occupies a central position for the resolution of environmental issues between states, which are often the causes of environmental problems.

The Court's jurisdiction is extensive. Many international environmental treaties and conventions contain referrals to the Court for the settlement of disputes that arise between

[3] Ch 3 examines these four perspectives and will offer justifications for the claims made here.
[4] See below text to fn 39.

party states.[5] Even where there are no such agreements states are entitled to request the Court's jurisdiction to resolve their disputes.[6] Accordingly the Court possesses a unique range of subjects of international law it can decide upon. This is important for environmental issues, as decisions relating to them may be contingent on other subjects of international law.[7] Specialised courts have been established for other subjects of international law, such as the International Criminal Court[8], but no such court exists for international environmental law.[9] The jurisdiction and competence of the ICJ distinguish it from other international-facing courts, such as those of the World Trade Organization (WTO), none of which have the breadth approaching that of the Court.[10]

Courts, in general, are a means of addressing "the regulatory gap" of inactive and ineffective executives and legislatures around the world.[11] For example, despite scientific consensus

[5] This arrangement is accounted for in the Statute of the International Court of Justice [hereinafter "the Statute"] annexed to the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi [hereinafter "the UN Charter"] art 36 (1). Examples of international environmental agreements to which referrals apply include the United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 14 (2)(a); the Convention on Biological Diversity (adopted 11-22 May 1992, entered into force 29 December 1993) 1760 UNTS 79 art 27 (3)(b).

[6] ibid art 36 (2). The *Gabčíkovo-Nagymaros Project* is an example of the voluntary recourse to the Court's jurisdiction. Both states agreed to have the ICJ decide their dispute that, among other matters, concerned environmental issues. *Gabčiíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Special Agreement) <http://www.icj-cij.org/docket/files/92/10835.pdf> accessed 30 October 2015.

[7] The concept of sustainable development provides a clear example of environmental issues being contingent on other subjects of international law such as trade or development. Trade or development as subjects of international law may also be contingent on international environment law. The concept of sustainable development is further discussed below, text to n 73ff in ch 3.

[8] Art 5 of the Statute of the International Criminal Court sets out that "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[9] International environmental courts have been suggested but not constituted. See generally, Ellen Hay, *Reflections on an International Environmental Court* (Martinus Nijhoff Publishers 2000); Cathrin Zengerling, *Greening International Jurisprudence* (Martinus Nijhoff Publishers 2013) ch 5.

[10] The Marrakesh Agreement Establishing the World Trade Organization 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154 art 2 confirms that the scope of the WTO is to "provide the common institutional framework for the conduct of trade relations."

[11] Jolene Lin, 'The First Successful Climate Negligence Case: A Comment on Urgenda Foundation v. The State of the Netherlands' (2015) University of Hong Kong Faculty of Law Research Paper 2015/21 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2626113> accessed 30 October 2015, 2. For an assessment

surrounding the urgent threat of climate change, states are yet to adopt and begin to comply with the reductions in carbon dioxide emissions required to mitigate the impacts of a changing environment.[12] The Hague District Court decision of 24 June 2015, *Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)*[13] is the first to succeed in an action against a government for failing to mitigate climate change. The judgment of the Dutch Court illustrates the potential for courts to contribute to environmental protection. It held, "It is an established fact that climate change is a global problem and therefore requires global accountability ... It compels all countries, including the Netherlands, to implement the reduction measures to the fullest extent … Emission reduction therefore concerns both a joint and individual responsibility of the signatories to the UN [United Nations] Climate Change Convention."[14]

The ICJ is not unaffected by this trend, with environmental issues increasingly demanding more of its attention. The Court's previous decisions show seven per cent of all of its cases have concerned environmental issues.[15] Yet the ICJ's importance in determining international environmental law is growing. Currently, three of the thirteen cases on the Court's docket

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of executive and legislative efficacy in environmental law generally see, Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP 2015).

[12] The Intergovernmental Panel on Climate Change find that, "Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems." IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Group I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (eds R K Pachauri and L A Meyer, IPCC 2014) 2. Note also the conclusion of climate scientists investigating ice melt and sea level rise who conclude, "that multi-meter sea level rise would become practically unavoidable. Social disruption and economic consequences of such large sea level rise could be devastating. It is not difficult to imagine that conflicts arising from forced migrations and economic collapse might make the planet ungovernable, threatening the fabric of civilization." James Hansen and others, 'Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modeling, and modern observations that 2°C global warming is highly dangerous' (2015) 15 Atmospheric Chemistry and Physics Discussions 20059, 20119.

[13] C/09/456689/HA ZA 13-1396 <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196> accessed 30 October 2015.

[14] ibid [4.79]

[15] As of September 2015, the Court has concluded a total of 121 contentious cases and has 15 pending. Of these ten relate to environmental issues. The Court has also offered twenty-six advisory opinions. Of these one encompasses environmental issues. Accordingly, environmental cases constitute 6.79% of its decisions.

relate to environmental issues.[16] These cases demonstrate the wide range of environmental issues the Court may have regard to, including protection of ecological diversity[17] and damage to wetlands and dependent wildlife.[18] Recently decided cases have concerned allegations of use of toxic aerial pesticides that damage the natural environment[19] and illegal programmes of whaling.[20]

In recognition of the increasing regard the Court has for environmental matters a few other writers have acknowledged the ICJ's contribution to international environmental law.[21] These, however, are exceptions and none of them conducts a complete appraisal of the Court's jurisprudence. Scholars more often discuss the Court in relation to the themes of environmental governance and public participation[22] or the role of justice and fairness in international law.[23] The scholarship has also approached the question of whether the Court should be seen as creating international law through its decisions or clarifying it.[24]

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[16] As of August 2014, there are 15 cases pending before the ICJ. Three of these expressly relate to environmental issues. These are (by most recent date of introduction to the Court): *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) (Application Instituting Proceedings) [2010] <http://www.icj-cij.org/docket/files/150/16279.pdf> accessed 30 October 2015 [hereinafter Certain Activities]; *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v Costa Rica*) (Application Instituting Proceedings) [2011] <http://www.icj-cij.org/docket/files/152/16917.pdf> accessed 30 October 2015 [hereinafter Construction of a Road]; *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Pending) ICJ Press Release 1998/31 <http://www.icj-cij.org/docket/index.php?pr=269&p1=3&p2=1&case=92&p3=6> accessed 30 October 2015.
[17] *Gabčíkovo-Nagymaros Project* (Judgment) (n 1) [35-37].
[18] *Construction of a Road* (n 16) 2 [4].
[19] *Aerial Herbicide Spraying* (*Ecuador v* Colombia) (Application Instituting Proceedings) [2008] <http://www.icj-cij.org/docket/files/138/14474.pdf> accessed 30 October 2015, 4 [2].
[20] *Whaling in the Antarctic* (*Australia v Japan: New Zealand intervening*) (Application Instituting Proceedings) [2010] <http://www.icj-cij.org/docket/files/148/15951.pdf> accessed 30 October 2015, 16-18 [36] and [38].
[21] Jorge E Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment' (2008) 32 Fordham International Law Journal 232; Robert Esposito, 'The ICJ and the Future of Transboundary Harm Disputes: A Preliminary Analysis of the Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia)' (2010) 2 Pace International Law Review Online Companion 1.
[22] Tim Stephens, *International Courts and Environmental Protection* (CUP 2009).
[23] For justice and fairness in international environmental law see, Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009).
[24] This argument is further discussed below, text to n 1ff in ch 1.

There has been much research into the extent to which decisions of national courts embody an implicit or consciously articulated environmental philosophy.[25] However, no similar research has been undertaken in regard to international law. Where scholars of international law have considered the extent to which ICJ's decisions represent a coherent body of jurisprudence, or an implicit moral viewpoint, they have ignored the area of international environmental law.[26]

Scholars in international environmental law, by contrast, have paid little or no attention to decisions of the ICJ as a coherent source of principle, or as embodying or implying a systematic philosophy of the environment. Instead, focus has centred on analysis of substantive international environmental legal principles and concepts.[27]

Despite this, the scholarship has advocated international environmental law to be "aligned with social values",[28] and the international institutions involved to be "attuned to environmental issues."[29] Yet little progress has been made in taking these recommendations further and questioning how these principles can be understood. Therefore the present investigation is unique in its drawing together of the analyses of whether the Court has a

[25] Ilona Cheyne, 'Law and Ethics in the Trade and Environment Debate: Tuna, Dolphins and Turtles' (2000) 12 *Journal of Environmental Law* 293; Christopher Stone, 'Do Morals Matter? The Influence of Ethics on Courts and Congress in Shaping US Environmental Policies' (2003) 27 Environs, Environmental Law and Policy Journal 13.

[26] Chetail analyses principles of international humanitarian law with reference to ICJ decisions. Vincent Chetail, 'The contribution of the International Court of Justice to international humanitarian law' (2003) 85 International Review of the Red Cross 235. Abu-Alhaj and Al Nuemat provide a general discussion of principles of the Court with reference to ICJ decisions. They do not consider whether such principles are coherent throughout the Court's jurisprudence. Ayman Abu-Alhaj and Ahmed Al-Nuemat, 'Legal and Moral Value to the Decisions and Advisory Opinions of the International Court of Justice' (2012) 27 European Journal of Social Sciences 149.

[27] These include the concepts of precaution, sustainable development, equity, environmental rights, public participation and legitimacy. Many of these issues will be addressed in this thesis, but for chapters on each of these see, Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008). Similarly, Fitzmaurice presents the precautionary principle, sustainable development, intergenerational equity and a human right to a clean environment as the dominant principles and concepts of international environmental law. Malgosia Fitzmaurice, *Contemporary Issues in International Environmental Law* (Edward Elgar 2009).

[28] Holly Doremus, 'Shaping the Future: The Dialectic of Law and Environmental Values' (2003) 37 University of California Davis Law Review 233, 235.

[29] Yvette Jackson, 'Evolutionary Spiral in the Development of Environmental Ethics' (2006) 3 Macquarie Journal of International and Comparative Environmental Law 119, 119.

coherent and systemised philosophical position in relation to the environment, and whether such a position normatively shapes its determinations.

Pluralists may look to challenge the approach of this thesis. They may suggest that it proposes a single, complete theory of 'the environmental good' which presumes "problems of [different accounts of] value were in principle soluble, and soluble with finality."[30] Contrary to such a 'monist' position to which all values may be reduced, for leading pluralist Berlin, human values are objective, values are plural, they conflict with one another and they are incommensurable.[31] So understood, in fact, the pluralist's variety of goods merely presents a different way of pursuing the basic goods that are presented in this thesis and explored through Finnis' catalogue: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion.[32] The basic goods, or combinations of the goods, accommodate the variety of values pluralists would say individuals hold, so long as they are reasonable. For example, values of compassion or equality that an individual could hold could be understood as recognition of the basic good of life.[33] Finnis maintains that the existence of objective goods cannot be denied and that they hold true for everyone: "Each is fundamental. None is more fundamental than any of the others, for each can reasonably be focused upon, and each, when focused upon, claims a priority of value. Hence there is no objective priority of value."[34] Indeed, though an individual may choose to focus upon one basic good at a given

[30] Isaiah Berlin, *Vico and Herder: Two Studies in the History of Ideas* (Vintage Books 1977) 207.
[31] Isaiah Berlin, *The Power of Ideas* (ed Henry Hardy, Chatto & Windus 2000) 12, and Isaiah Berlin, *Four Essays on Liberty* (OUP 1969) 169.
[32] Finnis' theory and other objective list theories of the good are discussed further below, see text to fn 3 in ch 5.
[33] According to Zakaras, Isaiah Berlin never provided an exhaustive list of objective values as there are numerous and new values could be discovered. But included are justice, compassion, courage, equality, honour, and liberty. Alex Zakaras, 'A Liberal Pluralism: Isaiah Berlin and John Stuart Mill' (2013) 75 The Review of Politics 69, 71.
[34] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 93.

point or throughout the course of their life, this is personal, that choice does nothing to rank the basic values or deny the others.[35]

The role of practical reasoning in determining which basic goods to prioritise is not disputed in Berlin's pluralist account in respect of values that may be held. Berlin acknowledges "a minimum of common moral ground" informed by "the general pattern of life in which we believe" and determinations "dictated by the forms of life of the society to which one belongs."[36] Similarities can be found between such explanations of how individuals would choose among the variety of values in the pluralist account and Finnis' nine requirements of practical reasonableness by which individuals participate in the basic goods.[37] Berlin writes that people "choose as they do, because their life and thought are determined by fundamental moral categories and concepts that are, at any rate over large stretches of time and space, a part of their being and thought and sense of identity; part of what makes them human."[38] Accordingly, the attempt of this thesis to ground notions of human duty to the natural environment in an overarching philosophy should not therefore be seen as moral monism. Overcoming the pluralist challenge, this thesis should be understood instead as an attempt to establish a basic good of a healthy environment as equally essential and universal as other goods, and in this regard as a reaction against Finnis who does not recognise it as such.

[35] ibid 93-4.
[36] Isaiah Berlin, *Liberty* (ed Henry Hardy, OUP 2002) 25, 47 and Isaiah Berlin, *The Crooked Timber of Humanity* (ed Henry Hardy, John Murray 1990) 18.
[37] The nine requirements of practical reasonableness are discussed in detail below, see text to fn 25 in ch 5.
[38] Berlin, *Liberty* (n 36) 217.

**ii) The limits of the current international environmental law scholarship**

The ICJ is seldom the topic of discussion in international environmental law scholarship. Most often, international environmental law scholarship focuses on the substantive work of the United Nations Environment Programme, or particular multilateral international agreements.[39] When the ICJ's role is considered, it is in terms of its traditional role of dispute settlement.[40] Within international environmental law present scholarship does not question whether the Court and its decisions display a coherent and systematic philosophical position towards the environment.

The Court and its decisions have until now been analysed in terms of the substantive obligations they place upon party states and how such obligations may develop international law. The Court's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[41] was of significance for Heverin because of the connections it made between environmental issues and humanitarian principles of necessity and proportionality.[42] The article sets out to "more fully develop the environmental and humanitarian implications" that resulted from the opinion.[43] Heverin notes that the Court undertook a "balancing" of the doctrines of respect for the environment and self-defence.[44] Yet how the Court balanced these doctrines is not

[39] Examples of international agreements relating to the environment include the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 (Kyoto Protocol) and the Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3. Both of these agreements have generated a considerable array of academic literature, both scientific and legal, more typical of international environmental law.
[40] The challenge to this traditional view of the Court is made below, text to n 27ff in ch 1.
[41] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 <http://www.icj-cij.org/docket/files/95/7495.pdf> accessed 30 October 2015 [hereinafter "*Nuclear Weapons* advisory opinion"].
[42] Timothy J Heverin, 'Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense' (1996-1997) 72 Notre Dame Law Review 1277, 1279.
[43] ibid 1280.
[44] ibid 1298.

pursued. What constitutes judge interpretation of environmental issues that might be expected in such "balancing" is absent.

Also concerning the *Nuclear Weapons* advisory opinion Houchins focuses on the implications of the Court on substantive principles of international environmental law.[45] Despite efforts to "understand the foundations for I.C.J. authority [and to] contemplate the cornerstones of international environmental law"[46] the investigation is restricted to the Court's procedural powers as per its constituting statute. Similarly, though the article identifies a need to explore these foundations beyond interpretation of its statute Houchins only mentions the Court's "judicial tool" of employing "equitable remedies"[47] in dispute resolution. The content of these principles of equity – and why they may be important – are subjects that are not taken up.

Scholarship on the more recent case of *Gabčíkovo-Nagymaros Project* shows a similar pattern. Taylor's analysis focuses on the decision, particularly its interpretation of sustainable development, as a substantive principle of international environmental law.[48] The extent to which the case establishes international obligations is of primary importance. The article does not delve deeper into the question of whether any systematic theory motivates or grounds the Court's decision, and does not explore rival views concerning the basis of environmental obligation.

[45] Deborah L Houchins, 'Extending the Application of the ICJ's July 8, 1996, Advisory Opinion to Environment-Altering Weapons in General: What Is the Role of International Environmental Law in Warfare?' (2002) 22 Journal of Land Resources and Environmental Law 463.
[46] ibid 464.
[47] ibid 470.
[48] Prue Taylor, 'The Case Concerning the Gabčíkovo-Nagymaros Project: A Message from The Hague on Sustainable Development' (1999) 3 New Zealand Journal of Environmental Law 109.

The same general trend is visible in Viñuales' history of the Court's contribution to the development of international environmental law.[49] Again, decisions of the Court are analysed without regard to philosophical underpinnings or general outlooks. Instead, Viñuales focuses on the Court's consistency in applying particular environmental principles. These include the obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states, as well as the environment of areas beyond national jurisdiction.[50] It is a history of decisions, not of ideas.

Likewise, Esposito's analysis of the *Case Concerning Aerial Herbicide Spraying*[51] focuses on whether the decision of the Court impacted the "corpus of international environmental law."[52] Yet what has an impact on this "corpus" is interpreted narrowly; the impact is interpreted only in so far as principles. The analysis questions whether this decision of the Court impacts in terms of clarifying international environmental law and whether it will change the obligations of states as understood on the basis of this "corpus". Impact is not understood as expressive of a coherent body of philosophical principle. Whether the decision of the Court will embody or imply a particular philosophical position towards the environmental claims that are at the centre of Ecuador's application is overlooked.

A notable exception is that of Cheyne. Her article considers the philosophical underpinnings of judicial decisions in a specific case that involved the issues of trade and protection of the environment.[53] This exception illustrates that inquiries into the values underpinning judicial

[49] Viñuales (n 21).
[50] Viñuales suggests the Court's statements regarding the principle of transboundary harm are the Court's most clear contributions to international environmental law. Viñuales (n 21).
[51] Espositio (n 21).
[52] ibid 52.
[53] Cheyne (n 25). United States–Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body (12 October 1998) WT/DS58/AB/R.

decisions expose the implicit perspectives and assumptions that drive and shape the development of legal doctrine. Although Cheyne's article principally concerns the fishing guidance of the US State Department this decision was affected by international WTO and GATT obligations.[54] Cheyne's judicial reasoning is conducted in the light of environmental philosophical perspectives that are used to demonstrate an implicit commitment to a strong anthropocentric position on exploitation of marine resources.[55]

This review demonstrates that the scholarship of international environmental law appears not to have undertaken analysis that questions the systematic philosophical underpinnings of ICJ decisions.

Elsewhere, writers have attempted to situate the ICJ's jurisprudence within a wider body of ideas, or regard decisions of the Court as being underpinned by broader philosophical perspectives. For example, Scobbie has questioned the reasoning behind determinations of judges in the Court's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[56] In his analysis Scobbie asserts a number of underlying, hidden factors as possibly having weight on the final decision of the Court.[57] These include the "lowest common denominator" character of judicial opinion formed from "a bargaining process between the judges."[58] He claims that in the opinion, "in some places,

[54] ibid 294.
[55] ibid 304.
[56] Iain Scobbie, 'Smoke, Mirrors and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall' (2004) 5 German Law Journal 1107. His article focuses on the case, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 136.
[57] ibid 1131.
[58] ibid 1111-12.

much rests on little more than assertion rather than on reasoned argument."[59] Why have such assessments not been undertaken in relation to international environmental law?

Three reasons may be given. The first reason is the relatively recent arrival of environmental law to the international community.[60] As a consequence there were, until recently, only a few ICJ cases that acknowledged environmental issues and this provided an insufficient number of cases to ascertain the systematicity of values underpinning decisions. This reason does not, however, present an obstacle to this thesis. Moreover, humanitarian justifications of intervention are a comparably recent development in international law and yet connections have been explored in this area of law between disputed substantive principles and the philosophical values that may underpin them.[61]

A second reason is the oblique status of much of international environmental law. Substantive principles of international environmental law may emerge through soft law treaty obligations. They may also develop through the customary international law process.[62] The ICJ has an important role in clarifying the rights and obligations of international law, a role that is understandably of interest to scholars.[63] Still, the clarification of principles by the Court is not something unique to international environmental law. It is not a factor that prevents the questioning of philosophical inquiry.

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[59] ibid 1113.
[60] This is a relative comparison. International environmental law is a recent subject if compared to other subjects of international law such as the use of force, the principles of which are enshrined in the UN Charter that dates back to 1945.
[61] For example, Fernando R Tesón, 'The liberal case for humanitarian intervention' and Allen Buchanan, 'Reforming the international law of humanitarian intervention' in J L Holzgrefe and Robert O Keohane (eds) *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (CUP 2003).
[62] Customary international law can be defined with reference to the UN Charter art 38(1)(b) and to the ICJ's decision in *North Sea Continental Shelf Cases* (*Federal Republic of Germany/Netherlands*) (Judgment) [1969] ICJ Rep 3 [37].
[63] Ch 1.1 argues that this clarifying role of the Court may also be understood as the Court developing international law.

A third reason for the limits to the present scholarship is that the environmental philosophical perspectives of anthropocentricism, biocentrism, sustainable development and ecocentrism elude specific definitions.[64] The analysis of whether, and the extent to which, the Court advances or implies a systematic commitment to environmental issues hinges on perspectives that are not clearly defined. However, certainty is not required for use of the philosophical positions as perspectives against which to analyse decisions of the Court. Analyses of other courts show the use of philosophical perspectives despite their indeterminacy. Consequently, none of these three reasons provide sufficient objection to the approach of this thesis. They also further underline the original contribution this thesis will make.

The absence of this kind of systematic, philosophical inquiry is in stark contrast to the position of municipal legal scholarship. At the domestic level, environmental legal scholarship has undertaken jurisprudential inquiry into this sort of deeper value in regard to various national courts. The following examples demonstrate the importance of inquiries into the deeper values and philosophical perspectives underpinning judicial decisions. There appear to be no reasons to exclude similar approaches from being systematically applied to decisions of the ICJ within the context of international law. The importance of such an inquiry would only be amplified by the ICJ's international and transboundary competence.

Stone questions whether "morals matter" in American courts and in Congress.[65] Following empirical study he finds little philosophical underpinning is advanced. No judge or senator refers to the "rights of nature" for example.[66] This does not mean that judges and senators do not have an "environment-favouring argument in mind", only that the values held are not

[64] Ch 3 presents a comprehensive account of the arguments and tensions that are found in philosophical perspectives of environmental issues.
[65] Stone (n 25).
[66] ibid 50.

expressed with reference to particular philosophers or environmental principles.[67] Instead, deeper values underpinning court decisions and Congress are implicit. Stone attempts to articulate these implicit values against environmental philosophical perspectives. His findings present an important criticism of the condition of the environment in America.[68]

Also focusing on decisions of national courts, both Lazarus[69] and Appel[70] demonstrate the importance of analysing whether deeper values can be ascertained. Appel conducts a review of the decisions of various North American courts. His aim is to present a better understanding of the contemporary view of wilderness management and court interpretations of "various biota, from tropical rainforest to tundra."[71] Appel finds that where the protection of wilderness is of issue American courts "do not act as they do in other areas of law."[72] The need for philosophical understanding of the various courts' approaches to environmental decisions is acknowledged though not pursued directly.[73]

Lazarus conducts a statistical inquiry into the voting habits of United States' Supreme Court judges in environmental cases. He finds apathy towards environmental law and at times scepticism and even hostility.[74] These judicial attitudes demonstrate the Court's system of value. Having undertaken such analysis it is certainly possible (though Lazarus does not) to make the further step of categorising the system of value against one of the philosophical perspectives of anthropocentrism, biocentrism, sustainable development and ecocentrism.

[67] ibid.
[68] Stone concludes, "the moral considerability of humans is uncontroversial. By contrast, the moral status of Nature, somehow conceived other than as a means to human welfare, remains problematic." ibid.
[69] Richard J Lazarus, 'Restoring What's Environmental About Environmental Law in the Supreme Court' (2000) 47 UCLA Law Review 703.
[70] Peter A Appel, 'Wilderness and the Courts' (2010) 29 Stanford Environmental Law Journal 62.
[71] ibid 129.
[72] ibid.
[73] ibid 93.
[74] Lazarus (n 69) 771.

Rather, important to Lazarus' project is the recommendations for changing the attitudes of judges following identification of the values of the Court.

Analysis of judicial reasoning and whether it embodies or implies a system of value has also been undertaken in relation to English law. An example is that of Soriano.[75] She argues that judicial regard for legal norms, precedents, legal doctrine and values, principles, rights and policies all contribute to the determinations courts make. These, Soriano asserts, "have to be considered in connection with moral and political theories."[76] Environmental philosophical perspectives offer theories of the sort and would be particularly of use for environment related court decisions. After her analysis, and finding the results deficient, Soriano asks the normative question of whether there has been the appropriate judicial account of such deeper values.[77]

Within international environmental law writers are beginning to acknowledge the importance of investigating deeper values. Flourney suggests, "a clearer sense of the values that dominate our laws and policies today may foster more serious thought about the values we want to protect and why."[78] So far however the existing scholarship does not address whether or to what extent (and in what form) such values are manifested or implemented institutionally.

Scholars have analysed values as normative aspirations and not as being present, if implicitly, within the law. Doremus views environmental values as an essential component of

[75] Leonor Moral Soriano, 'Environmental 'Wrongs' and Environmental Rights: Challenging the Legal Reasoning of English Judges' (2001) 13 Journal of Environmental Law 297.
[76] ibid 312.
[77] ibid.
[78] Alyson C Flourney, 'Building an Environmental Ethic from the Ground Up' (2003-2004) 27 Environs: Environmental Law and Policy Journal 53, 79.

environmental law.[79] To be effective law must be "aligned to societal values."[80] Yet focus here is in whether "law can either facilitate or inhibit the development and maintenance of environmental values." [81] Values are discussed as "underlying motivation for human behaviour"[82], the content of environmental values is not unpacked and they remain abstract. Flourney also takes an abstract approach arguing that environmental values should be reflected upon to "promote ethical development." [83] Unless environmental values are "grasped" environmental laws will not reflect the values people hold.[84] Jackson has also questioned this relationship, what she terms the "societal conscience", and whether it is attuned to environmental issues.[85] These articles only go so far as to question environmental values as providing reasons for environmental action or inaction.

**iii) Outline of thesis chapters**

This thesis seeks to remedy the deficiencies of the existing scholarship in international law. To do this chapter one argues that the ICJ can be understood as a developer of international environmental law. This is an important foundational argument for this thesis because if the Court can be understood as a developer it is then appropriate to question whether there is an implied or embodied philosophical position (systematic or otherwise) in the Court's decision-making that relates to the environment. As a developer of international law judges in the Court must exercise discretion in so far as international law is indeterminate. This discretion gives judges a crucial role in shaping the standards of behaviour of states.

[79] Doremus (n 28).
[80] ibid 235.
[81] ibid 241.
[82] ibid.
[83] Flourney (n 78) 64.
[84] ibid.
[85] Jackson (n 29) 119.

Chapter two questions whether genuine notions of environmental duties that may inform the Court's tacit philosophy are possible and what traditions of thought they may be based upon. Changing conceptions of the place of humans in the world are explored, as are related notions of responsibility that are evident in the traditions that anticipate modern environmental thinking. The chapter presents human attitudes towards the environment as culminating in the dominance of utilitarian thinking.

Chapter three analyses the four modern environmental philosophical perspectives of anthropocentrism, biocentrism, sustainable development and ecocentrism. It addresses the major arguments and particular tensions that exist within these accounts of the environment and the human relationship to it. They are presented as movements (to different degrees) away from the paradigmatic utilitarian conception of the human relationship with the world. The chapter provides a basis of understanding from which environmental attitudes, if found in the decisions of the ICJ, can be understood and the coherency of the philosophy that underpins the Court's decision-making.

Chapter four comprises the principal analysis of ICJ decisions. The typology of environmental philosophical perspectives is used as a basis against which case analysis can take place. Decisions of the Court that directly relate to the environment will be considered. Where it is reasonable to expect environmental principles to have affected Court decisions, other cases that do not concern international environmental law are also considered. The chapter will also argue that either the Court has a coherent environmental philosophy underpinning its decisions, a mix of philosophies or no coherent position.

Chapter five identifies a need for genuine duties towards the environment. This would respond to the deficiencies of the Court's decision-making approach in environmental cases identified from case analysis. The chapter sketches a biocentric natural law philosophy that would result in robust environmental decisions. The normative argument positioned understands human action as constrained by genuine human duties to nonhuman life. Natural law conceptions of the objective goods to which all humans participate will be shown to be unnecessarily restrictive and extendable to nonhuman animals, all individual life forms and to ecosystems, each to different degrees of reasonableness. The chapter defends this view against forms of instrumentalism that are not able to offer adequate environmental protection. The defence offered is a limited one, as the natural law cannot provide a basis for the more radical environmental philosophies of ecocentrism, deep ecology or Gaia theory.

Having established the possibility of a biocentric philosophy for individuals, chapter six undertakes to oppose this notion of duty to states. The chapter analyses how the biocentric natural law philosophy could be opposed to states through existing and emergent norms of international environmental law and considers what it would take for the ICJ to develop a biocentric legal doctrine, heeding judicial calls for a moral underpinning to principles of international environmental law.

## Chapter one

## THE INTERNATIONAL COURT OF JUSTICE AS A FORUM FOR ENVIRONMENTAL PHILOSOPHICAL INQUIRY IN INTERNATIONAL LAW

This chapter claims that the International Court of Justice (ICJ) does more than merely mechanically apply international law. A commonsensical reading of the Statute of the International Court of Justice[86] and the practice of the Court are used to argue the contrary view that the Court is a developer of international law. If the Court merely mechanically applies international law then decisions of the Court would accordingly be unable to embody or imply a philosophical position (systematic or otherwise) towards the environment, unless particular international rules were established that set out explicitly a philosophical position in relation to the environment. However, as will be established, the philosophical basis of the Court mechanically applying international law turns out to be untenable. The argument that follows demonstrates the importance of questioning whether decisions of the Court imply or embody a philosophical position (systematic or otherwise) in relation to the environment.

### 1.1 The International Court of Justice as a developer of law

The orthodox view is that states create international law.[87] The International Court of Justice (ICJ), which is the principal judicial organ of the United Nations, then applies this law when it settles disputes. As a judicial institution the role of the ICJ is to resolve disputes between states. Articles 38 and 59 of the Statute of the ICJ in particular restrict the Court to this

[86] The Statute of the International Court of Justice [hereinafter "the Statute"] annexed to the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi [hereinafter "the UN Charter"].
[87] Here orthodoxy is taken to mean, "conforming with established or accepted standards." It is not intended to mean mainstream. *Collins Dictionary* (HarperCollins 2000) 394.

function. In this understanding the Court is not an institution that creates or develops international law.

To offer a contrary understanding the following approach will be taken. First, the orthodox understanding of the Court as an applier of international law will be presented. Its assumptions will be highlighted and their weaknesses criticised. Second, a contrary understanding of the Court will show that the Court is able to develop international law rather than merely mechanically apply rules. The practice of the Court and, notably, the writings of former Court judges support this view. Last, it will be argued that the orthodox understanding is a positivist one and that on further reflection even leading legal positivists do not support the image of the Court that the orthodoxy advances. This will further show that, in support of the contrary understanding, the Court is a developer of international law. To decide upon matters of international law that are indeterminate, judges in the Court must exercise discretion. This discretion gives judges a crucial role in shaping the standards of behaviour of states. Following this argument it will then be possible to analyse whether the Court develops international environmental law in a conscious and systematic manner or if its development is unconscious and unsystematic.

**a) The orthodox understanding of the Court as mechanically applying law**

Article 38 provides an appropriate starting point for determining what the orthodoxy regards as developing international law. The Article provides a list of the sources of international law. This is an uncontroversial claim despite the fact that the Article does not explicitly refer to its contents as constituting such a list. The ICJ has acknowledged Article 38 as authoritative in

this regard.[88] Article 38 provides that, in deciding disputes, the ICJ shall apply "international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; international custom, as evidence of a general practice as accepted law; the general principles of law recognised by civilized nations; and, judicial decisions and teachings of the most highly qualified publicists."[89] The final source is expressed as a "subsidiary means of determining the rules of law."[90] A hierarchy is apparent from the use of the term "subsidiary" in relation to Article 38(1)(d). Cassese uses the terms "primary" and "secondary" to distinguish between the sources.[91] International conventions, customs, and general principles of law recognised by civilised nations are primary sources. Judicial decisions are secondary sources. Whether Court determinations, as examples of "judicial decisions", are to be considered as developing law relates to questions that go to the heart of jurisprudential inquiry.

Typifying the orthodox position Thirlway regards the Article as a fixed list of the sources of international law.[92] This is a view often aligned to legal positivism. D'Amato describes Thirlway's restricted understanding of Article 38 as the "formal Anglo-American position", a position informed by the traditional jurisprudential outlook that presumes laws must be absolutely certain to qualify.[93] D'Amato's critique of Thirlway presents the orthodox understanding of international law as a set of rules arising through and created by members of the international community. He surmises the orthodox view as "(a) treaties are contracts between states, (b) there is a fixed number of "sources" of international law, and that new

[88] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986) ICJ Reps 14, 28 [56] [hereinafter "*Paramilitary Activities*"].
[89] The Statute art 38(1)(a-d).
[90] ibid art 38(1)(d).
[91] Antonio Cassese, *International Law* (2nd edn, OUP 2005) 183.
[92] Hugh Thirlway, *International Customary Law and Codification* (A W Sijthoff Publishers 1972).
[93] Anthony D'Amato, 'Review of International Customary Law and Codification by H. W. A. Thirlway' (1973) 67 The American Journal of International Law 357, 357.

"sources" can only be outgrowths of the old, and (c) rules of customary law are absolute – and custom is a sort of entity, not a process."[94] Although at times Court decisions may "come close" to developing international law, a positivist, 'formal' reading of the Statute prevents this.[95] Judicial decisions identify particular state obligations and state practice; they do not constitute formal sources of law. This understanding is supported by Brownlie who claims, "the Court applies the law and does not make it."[96] Verdross clarifies the orthodox position that "judicial practice and doctrine are not independent sources of international law; they are only subsidiary sources of law which serve to help understand doubtful provisions of law."[97]

The orthodox understanding of the Court as an applier of international law also relies on formal positivist interpretations of Article 36. The Article provides that the Court has jurisdiction in "cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."[98] Clear from this is the voluntary nature of the Court's dispute settlement mechanism; states engage the Court's jurisdiction. This voluntarism results from the general principle of cooperation upon which the UN was formed. It assumes the UN system of international law to operate foremost on the basis of state will. The orthodoxy assumes that voluntarism and cooperation confirm international law's authority as vested in state sovereignty. It follows from this assumption that only states are the creators and developers of international law and that the role of the ICJ is only to facilitate relationships between states and identify and interpret the rules states have posited. On this account the ICJ could never embody a philosophical position towards the environment, or any other discipline of international law.

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[94] ibid.
[95] ibid 189.
[96] Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 17.
[97] G I Tunkin, *Theory of International Law* (tr W Butler, George Allen & Unwin 1974) 182.
[98] The Statute art 36(1).

States voluntarily submit to international conventions and customs. It is state consent that distinguishes positive law from natural law. The phrase *pacta sunt servanda* exemplifies this; states are to keep to their agreements because they have voluntarily and expressly agreed to be bound by them. Similarly with customary international law, *consuetudo est servanda* demonstrates states' tacit consent to be obligated. In the positive law understanding, laws require a basis of voluntarism to be authoritative.

Arguments of the orthodox understanding, though, fail to appreciate the "pre-positive"[99] rules that form the inter-state will that principally validates international law.[100] State voluntarism and consent is based upon an expectation that other states will act in the same way. Vattell supposed that this underlying principle was based upon the Golden Rule of Sovereigns, that states would treat other states how they wanted to be treated.[101] Inter-state cooperation does not occur because a formal authority, such as the UN, expects it. Neither *pacta sunt servanda* or *consuetudo est servanda* are positive rules of international law. States adopted these principles prior to the development of posited international law. The UN Charter may provide a source from which the principle of cooperation (and others such as the territorial integrity and political independence of states[102] and their sovereign equality[103]) may derive their authority. Yet consideration of the Charter alone does not present a complete picture of how

[99] Alexander Orakhelashvili 'The Relevance of Theory and History – The Essence and Origins of International Law' in A Orakhelashvili (ed), *Research Handbook On The Theory And History Of International Law* (Edward Elgar 2011) 6.
[100] ibid 11.
[101] Emerich de Vattel, *The Law of Nations; or, the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (Sweet, Stevens and Maxwell 2008) 4.
[102] UN Charter art 2(4).
[103] ibid art 2(1).

international law is developed.[104] As such, a formal, positivist reading of the Statute provides an unsatisfactory explanation of the development of international law.

The orthodox understanding of Article 59 of the Statute also appears to restrict the scope of the Court in terms of its development of international law. The Article provides that, "The decision of the Court has no binding force except between the parties and in respect of that particular case." The wording of the Article is a clear acknowledgement of the limited power states wished to relinquish and that the Court is to be limited to resolving disputes. Article 59 may be understood to comprise two constraints on the Court. These (in the orthodox understanding) limit the Court to the role of applying international law. First, determinations are not to affect other states. The ICJ has, in certain cases, acknowledged this formal restriction. In *Monetary Gold Removed from Rome in 1943*[105] the Court regarded the Article as limiting their ability to decide on matters brought before them that impacted non-consenting states. In the more recent case of *Certain Phosphates Lands in Nauru*[106] the Court indicated that the restrictions of Article 59 did not preclude them from affecting the legal interests of "third states" so long as doing so did not form the "very subject matter of the decision that is applied for."[107] A broadening of the apparent restriction of Article 59 demonstrates that the ICJ can impose rules onto states and that the formal and positivist assumptions of the orthodoxy are unsatisfactory. However, the Court has realised its own limits. In *East Timor*[108] the Court found it did not have the jurisdiction to decide the case.[109]

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[104] Gerald Fitzmaurice has reasoned that no statute is able confer the authority to be authoritative. Any attempt to do so assumes the power being accounted for. Gerald Fitzmaurice, 'Foundations of the Authority of International Law' (1956) 19 Modern Law Review 1, 9.
[105] *Monetary Gold Removed from Rome in 1943* (*Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America*) (Judgment) [1954] ICJ Rep 19, 32.
[106] *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) (Judgment) [1992] ICJ Rep 4 [hereinafter "*Nauru*"].
[107] ibid [54].
[108] *East Timor* (*Portugal v Australia*) (Judgment) [1995] ICJ Rep 90.
[109] ibid [34].

Although the dispute was between Portugal and Australia, the Court's determination (either way) would necessarily involve a statement as to Indonesia's adherence to its international obligations.

Second, by implication of the first constraint that can be understood from Article 59, Court decisions are not to be based on previous judgements. Kelsen has argued that in expressly denying the binding force of Court decisions except for on the parties concerned, Article 59 excludes the Court's use of precedent.[110] Precedent would give the Court an "almost unlimited discretion."[111] Interpreted in this way the Article maintains the Court as a dispute settlement mechanism as opposed to municipal courts in common law systems where precedent would be used to establish a coherent, consistent and predictable body of law.

**b) A contrary understanding of the Court as developing law**

Challenging the orthodox view is important for this thesis. Contrary views to the orthodoxy challenge the formal and positivist interpretations of Articles 38 and 59. Contrary views support the argument that the Court is a developer of international law. The alternative approach of the role and function of the Court that is presented here is supported by the practice of the Court and the scholarship of former Court judges. The leading authority on this alternative understanding is Lauterpacht who was a judge in the ICJ between 1955 and 1960. To Lauterpacht international courts and tribunals "state what the law is. Their decisions are

[110] Hans Kelsen, *Principles of International Law* (Rinehart & Company 1952) 394.
[111] ibid 393.

evidence of the existing rule of law. That does not mean that they do not in fact constitute a source of international law."[112]

For Lauterpacht the ICJ, as the figurehead international court,[113] makes "a tangible contribution to the development and clarification of the rules and principles of international law."[114] He was clearly of the view that the Court acts beyond the formal provisions of the Statute. The Court does not heed the formal restrictions of Articles 38 and 59. This was not, in Lauterpacht's opinion, an affront to the Statute but rather the Court's interpretation of the drafters' intentions.[115] Lauterpacht infers these intentions from the *procès-verbaux* of the Advisory Committee of Jurists of 1920. Basing his views upon their comments he seeks to avoid claims that the Court is acting without mandate. The *procès-verbaux* clearly portrays what is now Article 38 as a "repository" of sources of international law that the Court is to use to decide disputes.[116] It is not an authoritative rule-based list, as the orthodox understanding would maintain. Lauterpacht's reading of the Jurists' intentions is that the Court is to apply other non-posited sources of law. The *procès-verbaux* envisaged the Court having recourse to the "maxims of law", and principles which "formed the bases of national law."[117] Specific examples would include "the principle of good faith, and the principle of *res judicata*."[118] The Court is to use such principles to address disputes of international law that could not be

[112] Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons Limited 1958) 20.
[113] ibid 11.
[114] ibid 5.
[115] Lauterpacht writes, "Institutions set up for the achievement of definite purposes grow to fulfil tasks not wholly identical with those which were in the minds of their authors at the time of their creation." ibid.
[116] Jörg Kammerhofer, 'Introduction' in League of Nations, *Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice: Procès-verbaux of the proceedings of the Committee June 16th-July 24th 1920 with Annexes* (Van Langenhuysen Brothers 2006) vi quoting Raghunandan Swarup Pathak.
[117] League of Nations, *Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice: Procès-verbaux of the proceedings of the Committee June 16th-July 24th 1920 with Annexes* (Van Langenhuysen Brothers 2006) 335.
[118] ibid.

resolved by treaty or custom alone.[119] This was "not to create law, but [to] assist in determining the rules which exist."[120] Not only does developing international law appear to be the express task of the Court but also this suggests it should be done with regard to principles besides those that constitute the posited sources of the Statute.[121]

Lauterpacht's view that international courts and tribunals should "develop" and "clarify" international law should be seen in the context of codification. He was writing just over a decade after the United Nations was established during which time comparatively little international law had been codified. Lauterpacht understood that the Court needed to recognise the implications its decision-making (as distinct from its decisions) would have on the international community. He believed that the Court's efficacy rested on states accepting its jurisdiction. To ensure this, the Court had to do more than apply international rules; it also had to assume a normative approach to decision-making so as to make international law clear and applicable to states. Since Lauterpacht's time of writing much international law has been codified. This is especially the case with international environmental law.[122] In response it

[119] The intention expressed by the Jurists was to avoid the possibility of a *non-liquet*. ibid 336.
[120] ibid.
[121] Distinct as the Jurists' views are, whether they do in fact represent the intentions of the drafters should remain somewhat open to debate. Firstly, *procès-verbaux* are summaries of what the Jurists said. As such the nuances of their arguments may be missed. Secondly, the draft advanced is not identical to the wording of the Permanent Court of International Justice Statute that has established the mandate of the Court, as it exists today. Thirdly, the intention of art 38 can only be understood in the context of the whole Statute. Kammerhofer is correct to note that the Jurists' portrayal of art 38 did not change much during its journey into becoming the Statute, but whether the intention of the Jurists entirely maps on to the subsequent drafters of the actual Statute is uncertain. Kammerhofer also considers the advantages of looking at the *procès-verbaux*. He notes that, at least compared to the *travaux préparatoires*, they are less prone to "diplomatic wrangling" and so even though they are a less accurate record the content of what it summarised is not politically "spoiled", Kammerhofer (n 31) vi. These caveats to relying on the intention of the Jurists aside, either way, intentions demonstrate the important task of showing that there is disagreement as to what art 38 conveys. It can be regarded as a closed and complete list of the rule-based sources of international law. Or, differently, it can provide instruction to the Court of what law it may consider and that in applying it, the Court should resort to its principles and values, the so-called "general principles".
[122] Mitchell has constructed a comprehensive list of environmental agreements. As of July 2013 there are 1599 bilateral environmental agreements, 1260 multilateral environmental agreements and 249 other forms of agreement. As a comparison to illustrate increasing codification, between 1960 and 1969 there were 59 international environment agreements. Between 1990 and 1999 there were 99. Ronald D Mitchell, 'Summary

may be argued that Lauterpacht's thesis is now less relevant and that the Court should not develop international law. However, such an argument does not suggest that the Court is necessarily no longer able to develop international law. Increased codification of international environmental law may have simply changed the sources of international law to which disputes tend to relate. That three environment related cases are pending in the ICJ[123] suggests that codification of international environmental law has not removed the need for dispute settlement. Indeed increased codification provides a larger body of rules from which disputes can arise. Court decision-making and developing of the law remains as important now as it was when Lauterpacht was himself an ICJ judge.

Higgins has pursued the view that international law is a normative system, that international law concerns more than rules and is also about process.[124] Distinguishing between the two, she writes, "international law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed 'rules'."[125] Comparisons with domestic systems of law have placed assumptions onto international law that fail to appreciate the distinctiveness of different legal systems. Rules that oblige a particular type of behaviour may play a part in international law, some conduct is expected of states and there may be consequences for not adhering to it. But if international law only consists of rules then with the absence of effective sanctions, the concept of state sovereignty will always have the potential to undermine international institutions, including the decisions of the ICJ. It is on this point where the views of Lauterpacht and Higgins can be understood to converge. They

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Counts and Graphs of Agreements by Year' (*International Environmental Agreements Database Project*, 20 February 2012) <http://iea.uoregon.edu/> accessed 30 October 2015.

[123] For details on pending cases see below, text to n 102ff.

[124] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994).

[125] Rosalyn Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 International and Comparative Law Quarterly 58, 58.

[125] Lauterpacht (n 27) 399.

see the Court not only finding or applying rules but making choices based on the "humanitarian, moral and social purposes" of the law.[126] As a normative system of law it is the shared purposes such as "advancing the common good,"[127] that maintain state behaviour as opposed to commands and sanctions. Rules may dictate these shared values but they are also advanced through authoritative decisions, such as those of the Court.[128] Lauterpacht understood the shared purposes to be the pursuit of maintaining and restoring peace and security, and advancing universal human rights.[129]

Despite the formal restrictions that have been shown to flow from Articles 38 and 59, Court practice in relation to customary international law provides an example of the contrary understanding of the Court. Article 38(1)(b) defines "international custom as evidence of a general principle accepted as law." In practice, the Court's approach to customary international law suggests the Court can develop the law. In the *North Sea Continental Shelf* cases the Court explained that both state practice and *opinio juris* are required to substantiate custom. State practice needs to be extensive and typical of the international community and be virtually uniform. This needs to then be followed by a belief by states that they are obliged to act in that particular way.[130] This can be understood (as the orthodox understanding sees it) as the ICJ maintaining its deference to states. Yet the precise threshold to establish sufficient state practice and *opinio juris* is disputed.[131] What is required to change customary international law is also contested. If contingent on state practice and the recognition by states

[126] Higgins (n 39) 5.
[127] ibid 1.
[128] Higgins clarifies authoritative decisions as "made by authorized persons or organs, in appropriate forums, within the framework of certain established practices and norms." Higgins (n 40) 58.
[129] Lauterpacht (n 27) 1.
[130] *North Sea Continental Shelf* (*Germany/Denmark*) (*Germany/Holland*) (Judgment) [1969] ICJ Rep 3.
[131] For example, Thirlway and D'Amato disagree as to whether customary international law should be regarded as an entity (either present or absent) or more as a process where is more receptive to change. Thirlway (n 7) and Anthony D'Amato, *International Law: Process and Prospect* (Transnational Publishers 1987).

that they are bound to it, the Court may be given jurisdiction by states to decide on the status of the custom. In so doing the Court assumes a developmental role in clarifying what is or what is not customary international law.[132] Through the confirmation of trends in state practice the Court can accelerate the development of customary international law.[133]

Without the Court taking this role, customary international law would remain a source of law as defined by state practice; the actions of states could always be justified on this basis. In *Paramilitary Activities* the Court sought to close this circular argument where a state's deviation was the exception that proves there was an obligation from which to deviate.[134] The practice of the Court demonstrates how it has "provided a vehicle" for the development of international law.[135] For example in the *Fisheries* case[136] the Court clarified the current state practice concerning territorial waters, demonstrating international custom before such rules had been articulated in the UN Convention on the Law of the Sea.[137] In another case the Court confirmed that Article 31 of the Vienna Convention on the Law of Treaties, which provides that a treaty must be interpreted in good faith, had become customary international law.[138] Similarly, in *Gabčíkovo-Nagymaros Project* the Court recognised as customary international

[132] G Fitzmaurice, 'Hersch Lauterpacht: The Scholar as Judge' (1961) 37 British Yearbook of International Law 1, 14.
[133] Martin Dixon, *International Law* (6th edn, OUP 2007) 28.
[134] *Paramilitary Activities* (Merits) (n 3) 98.
[135] Boyle and Chinkin give examples of where the Court has provided a vehicle for international law. These are transforming soft to hard law, expounding the relationship between treaty and customary international law, and giving credence to the work of the International Law Commission. Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 268-69.
[136] *Fisheries* (*United Kingdom v Norway*) (Judgment) [1951] ICJ Rep 116, 143.
[137] United Nations Convention on Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).
[138] *Territorial Dispute* (*Libyan Arab Jamahiriya v Chad*) (Judgment) [1994] ICJ Rep 6, 21 [41].

law Article 31 of the International Law Commission's Draft Articles on State Responsibility for International Wrongful Acts.[139]

Cassese provides an alternative argument in favour of the contrary understanding of the Court. He suggests that in practice the Court can be seen to use general principles to "fill possible gaps" in the primary sources of international law.[140] The Court may also use the general principles in reaching their decisions if more than one interpretation were in conformity with the law.[141] The Court's use of general principles to "fill gaps" suggests that the formal, positivist, orthodox account of the sources of international law is an incomplete picture. In the *Corfu Channel*[142] case the Court accepted "certain general and well-recognized principles" could be used if gaps in international law were found.[143] These principles include "elementary considerations of humanity", and "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[144] That the Court uses general principles is either tacitly acknowledged by states or ignored.[145] The Court's filling of the gaps in this way demonstrates it is not limited by the formal restrictions of the Statute.

In accordance with the above observations of the practice of the Court, Lauterpacht doubts whether the Statute's purpose was to prohibit the development of law by any institution other

[139] *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Judgment) [1997] ICJ Rep 7, 38 [47] [hereinafter "*Gabčíkovo-Nagymaros Project*"].
[140] The general principles Cassese discusses are distinct from art 38(1)(c)'s general principles of law recognised by civilised nations. Cassese (n 6) 189.
[141] ibid.
[142] *Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v Albania*) (Merits) [1949] ICJ Rep 4.
[143] ibid 22.
[144] ibid.
[145] For example in *Paramilitary Activities* the Court applied "the general principles of humanitarian law." *Paramilitary Activities* (Merits) (n 3) 219. One reason for this may be that the substantive principles used to fill the gaps are in large part drawn from Western states. As such the Court's use of them is not observed as extending its reach beyond the limitations of art 38, even though they are not formally provided for in the Statute.

than those given an express mandate.[146] His rationale for this is that the Court has an implicit role and responsibility to advance the shared purposes of the international community. Schwebel's reflections on Lauterpacht affirm this view. "Lauterpacht was intent on making international law much more than it was, especially in respect of the nascent law of human rights – to whose birth his contribution was so notable – and so the effectiveness of international adjudication."[147] The ICJ, along with other international courts and tribunals, are part of a plurality of decision makers.[148] Unlike in national systems, in international law there is no legislative body that assumes a constitutionally superior position. In recognition of this the Court (among other institutions) has stepped in to fill what would otherwise be a normative void. Lauterpacht was however careful to also point out that without a legislature that could overrule international courts judicial caution was all the more important[149]; even if the Court could develop international law without restriction it should not. One example of the accommodation of this balance is that states have to voluntarily accept the Court's

[146] His argument is that art 59 is directly stating what art 63 states indirectly, that if a state not a party to a decision of the Court uses its right to intervene then it too is bound by the Court's decision (art 59 states this in the negative). Lauterpacht (n 27) 8.
[147] Stephen M Schwebel, *Justice in International Law: Further Selected Writings* (CUP 2011) 324.
[148] Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 164.
[149] Lauterpacht provides, "Courts have to apply the law in force. It is not their function deliberately to change the law so as to make it conform with their own views of justice and expediency. This does not mean that they do not in fact shape or even alter the law. But they do it while guided at the same time by existing law; they do it while remember that stability and uncertainty are no less of the essence of the law than justice; they do it, in a word, with caution." Lauterpacht (n 27) 75; Echoing a similar balance Robert Jennings said of the Court, "interpretation does, and indeed should, have a creative element in adapting rules to new situations and needs, and therefore also in developing it even to an extent that might be regarded as changing it." Robert Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 International and Comparative Law Quarterly 1, 3.

jurisdiction.[150] To retain efficacy the Court must develop international law in a manner that is mediated by its regard for state sovereignty.[151]

The practice of the Court further suggests it does not consider itself to be constrained by Article 59. For example, in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*[152] the Court gave a wide interpretation to Article 59. It confirmed that, along with other sources of law, the case law of the Court was required for determinations.[153] Similarly, in *Nottebohm*[154] the Court stated "the same issue is now before the Court: it must be resolved by applying the same principles."[155] Although the Court is not obliged to follow its previous decisions, the Court appears inclined to consider the applicability of earlier judgments. Clarifying their referral to previous cases in *International Status of South West Africa*[156] the Court said "a decision binds not only the parties to a given case, but the Court itself."[157] On this point Dixon argues that ICJ decisions provide more than just examples or guidelines and that the Court regards its previous cases as authoritative.[158] In *Nauru* the Court expressly justified its reasoning with reference to its earlier decision in *Paramilitary Activities*.[159]

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[150] All states may have recourse to the Court for reasons detailed in art 36 of the Statute. Aside from these instances, only sixty-seven states recognise the compulsory jurisdiction of the Court. The limited compulsory jurisdiction of the Court demonstrate the careful balance that Lauterpacht identifies between developing international law to advance the aims of peace and human rights but also respecting state sovereignty.
[151] Besson has questioned whether the centrality of states as the principal international law makers remains the accurate observation. She identifies a move towards international institutions making international law's normativity more objective and universal. Besson (n 63) 165.
[152] *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* (Advisory Opinion) [1982] ICJ Rep 355.
[153] ibid [57].
[154] *Nottebohm* (*Liechtenstein v Guatemala*) (Second Phase) (Judgment) [1955] ICJ Rep 4.
[155] ibid 22.
[156] *International Status of South West Africa* (Advisory Opinion) [1966] ICJ Rep 128.
[157] ibid 240.
[158] Dixon (n 48) 25.
[159] *Nauru* (Judgment) (n 21) 260 [51].

The apparent restrictive wording of Article 59 presents an inaccurate view of the practice of the Court. The Court's informal use of precedent may have arisen to provide continuity when it transitioned from the Permanent Court of International Justice (PCIJ) in 1946. Although the ICJ is to be regarded as a distinct institution, its drafting process clarifies that the "1945 Statute will garner what has come down from the past."[160] The Court has interpreted the intentions of the drafters to include maintaining coherence, consistency and predictability.[161] It is commonplace for the Court to refer to previous decisions of both the ICJ and PCIJ.[162] The Court's acknowledgment of precedent goes against the orthodox understanding of Article 59. One possible explanation for this is that it is only the ICJ's reasoning that is binding and that the obligations on states does not extend beyond the parties before the Court. According to Judge Gros these two aspects of determinations are somewhat separable: "Although the force of *res judicata* does not extend to the reasoning of a judgment, it is the practice of the Court, as of arbitral tribunals, to stand by the reasoning set forth in previous decisions."[163] To avoid the Statute's constraints Lauterpacht also distinguished between the actual operative parts of the Court's decisions and their reasoning. Article 59 only prohibits the binding nature of previous ICJ decisions on states. This does not prevent the Court referring to its previous reasoning in such decisions. Lauterpacht explains this is necessary if the Court is to maintain its efficacy.[164]

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[160] United Nations Committee of Jurists, *Documents of the United Nations Conference on International Organizations Vol XIII* (United Nations Information Organization 1945) 384.
[161] This argument was made in *Paramilitary Activities* where the Court said, "the primary concern of those who drafted the Statute of the [ICJ] was to maintain the greatest possible continuity between it and its predecessor." *Paramilitary Activities* (Jurisdiction of the Court and Admissibility of the Application) [1984] ICJ Rep 407 [32].
[162] Mohamed Shahabuddeen, *Precedent in the World Court* (CUP 1997) 22.
[163] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (Second Phase) (Separate Opinion of Judge Gros) [1970] ICJ Rep 267, 267 [1].
[164] Lauterpacht writes "No legal rule or principle can bind the judge to a precedent which, in all the circumstances, he feels bound to disregard. In that case he will contrive to do what he considers to be justice through the elastic process of "distinguishing" and in other ways. But he is not free to disregard judicial precedent altogether." (n 27) 14.

The orthodox understanding of Article 59, that only states party to the Court are bound by its decisions, also neglects consideration of obligations *erga omnes.* "Obligations owed to all" is a doctrine introduced by the Court in *Barcelona Traction*. The Court reasoned: "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[165] The Court has been reluctant to promote such obligations because of the implications it has to the notion of *pacta sunt servanda*.[166] However, its existence confirms that the Court's practice overcomes what the orthodox understanding regards as the constraints of the Statute.

The foregoing discussion is obviously not dispositive of the issue of the Court's role as a developer of law. Theories of adjudication and of law are contentious and will remain so. But the discussion has shown that there is a fundamental difference of opinion within the present scholarship. This is a difference of opinion that cannot simply be dismissed by defenders of the orthodox view as obviously incorrect. On the contrary serious objections can be put to the orthodox understanding.

**c) Jurisprudential argument on the Court as a developer of international law**

The orthodox understanding has been shown to be a view aligned to legal positivism. This is a position that sees international law as a set of rules arising through and created by state practice. Yet even when the views of leading legal positivist HLA Hart, are turned to, there is an analysis of adjudication that directly undermines the orthodox understanding. In support of the argument of the Court as a developer of international law, Hart's analysis finds that there

[165] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) [1970] (Second Phase) (Judgment) ICJ Rep 3, 32 [33].
[166] *East Timor* (*Portugal v Australia*) (Judgment) [1995] ICJ Rep 90, 102 [29].

always comes a point at which legal rules, in the course of being applied, become indeterminate.[167] Laws and the interpretation of law are limited by the "open texture" of language.[168] For Hart, judicial interpretation is guided by an understanding of the purpose or purposes that are served by the rule. Hart illustrates this point with the example, "no vehicles are allowed in the park."[169] Were a court to decide a case concerning this rule, common sense would suggest the court would agree that cars should be excluded from entering the park. Suppose though that in a particular case there had been a fire in the park and in response a fire engine had entered to extinguish the fire. Though the rule would seem to exclude all vehicles, an exception to the rule was appropriate because the court could situate the exception in the context of the purpose of the rule.[170] The court may justify the exception on the basis that the purpose of the rule was to maintain safety in the park. It would be against common sense to suggest that fire engines should not be allowed to perform their duties simply because the fire had occurred in a park. Although an apparent violation of the wording of the rule, it would be in accordance with the purpose of the rule.

However, would a fire engine using the park as a shortcut still be within the purposes of the rule? Use of the shortcut may still be furthering the purpose of safety but this now applies more widely than the confines of the park. Different judges may find this too great an application of the rule. Others may find it to be an appropriate interpretation of the rule's

[167] H L A Hart, *The Concept of Law* (2nd edn, OUP 1994) 127-8. Fuller's case of the Speluncean explorers presents an example of the remarkable breadth of outcomes that judicial interpretation allows for. The case's fictional judges and their different statutory interpretations are an emphatic statement of law's indeterminancy and affirm the necessary role of judges in applying the law in such a decisive way as to develop it. Lon Fuller, 'The Case of the Speluncean Explorers' (1949) 62 Harvard Law Review 616.
[168] Hart (n 82) 126.
[169] ibid 125-27.
[170] Endicott has developed this aspect of indeterminancy. For Endicott vagueness is inescapable and also, importantly, an "essential feature of law". Judges must have recourse to linguistic and non-linguistic indeterminancies – which cannot be eliminated – because "life and legal systems are complicated" and they may need to reach decisions on cases not envisaged by legislative drafters. Timothy A O Endicott, *Vagueness in Law* (OUP 2000) 189-90.

purpose. What of cycling in the park? Cyclists may pose risks to the safety of other park users. Under the purposes of ensuring safety would the court interpret bicycles as constituting vehicles? Different judges in the court may have different ideas as to the purpose of the rule. In choosing the rule's purpose judges have "added their own line" to the rule.[171] A judge may favour the purpose of creating a safe space in which people can relax without the fear of traffic accidents. Another judge may think the purpose of the rule is to maintain the natural environment of the park, with the rule interpreted as excluding polluting vehicles. Both judges may allow for exceptions within their understandings of the purpose of the rules.

Judges may find multiple purposes for the rule. They may also have to decide on the order of the various purposes they find the rule to have. Would safety concerns be the primary purpose of the rule and environmental concerns secondary? Is this to be a predetermined hierarchy or would the hierarchy be dependent on the particulars of the decision at hand. Would judges refer to certain purposes because previous judges had highlighted these in earlier cases? Previously identified purposes may influence judges in future cases. Nevertheless, in every application of a rule discretion is required to ascertain whether the rule applies to the facts at hand.[172] As such it does not affect Hart's argument that the ICJ does not follow a system of precedent akin to those in municipal courts of common law systems. Hart acknowledges that the application of a rule is more than the "mechanical jurisprudence"[173] of judges declaring what the law is. On the contrary, where the language of the law possesses an indeterminate, open quality, Hart argues that the judge must exercise discretion. This discretion gives judges a crucial role in shaping the standards of behaviour the rule is to oblige.[174]

[171] Hart (n 82) 127.
[172] Hart phrased it, "the rule itself [cannot] step forward to claim its own instances." ibid 126.
[173] ibid 128.
[174] ibid 127.

In such cases where discretion is exercised Hart suggests that the basis for the decision cannot reside in the rule of recognition that provides that decision with authority. Instead authority is to be derived from the rule of adjudication.[175] This sets out that courts, among other bodies, can have the authority to apply rules. However, international law cannot be analysed in this way. Two points of contention may be raised here: First, it is uncertain as to whether Hart's analysis can extend to Article 38 of the Statute as providing sources of law sufficient for a rule of recognition. Second, the authority bestowed by the rule of adjudication to courts in municipal systems is not analogous to the authority given to the ICJ. These discrepancies have led Waldron to find Hart's contribution to international law "unhelpful" and "careless."[176] Nevertheless Hart's claim regarding the limits to judicial interpretation caused by the open texture of language cannot be dismissed. As has been shown his argument is principally about the nature of language and reasoning with rules. Accordingly, if the ICJ is accepted as an applier of international law then Hart's objections to mechanical jurisprudence hold equally true.

It should be noted that Hart's argument has been challenged and it remains controversial. Yet these challenges primarily relate to Hart's precise understanding of discretion and not the indeterminate and open texture of interpretation. The criticisms do not defend the orthodox understanding of the Court. Ronald Dworkin provides one obvious critique of Hart. Dworkin's counterargument has two parts: First, law should be understood as comprising more than rules; it also consists of principles.[177] Second, and by implication, judges may consult more than rules when deciding cases. As has been shown, Hart's understanding of

[175] ibid 97.
[176] Jeremy Waldron, 'Hart and the Principles of Legality' in Matthew Kramer and others (eds), *The Legacy of H.L.A. Hart* (OUP 2008) 67, 68–69.
[177] Ronald Dworkin, *Law's Empire* (Fontana 1986) 87-88.

discretion pushes the basis for legal decisions into the realm of moral or legal opinion because rules alone are indeterminate. Dworkin accounts for what Hart sees as the discretion of the judge by the use of other legal standards besides rules. Judges are bound by these other legal standards even if they do not constitute rules. Consequently, for Dworkin, other legal standards besides rules remove much of the indeterminacy in which Hart finds discretion. Dworkin only argues to extend discretion beyond rules to what he sees as law's other standards. Hart's claim regarding the interpretation of language and judicial reasoning stands.

Another critique is provided by Nigel Simmonds. His account rejects Hart's analysis of adjudication and in so doing takes up a position further from the orthodox understanding. Simmonds suggests that the application of rules and the development of rules are not separate processes. Despite this alternative conception, as was found with Dworkin's criticism, Hart's claim regarding the nature of language and legal reasoning still stands. Simmonds identifies "difficulties" in the accounts of both legal positivism and theories that "prescribe an appropriate *content* for the law, and not simply a particular *form*."[178] For Simmonds, the process of legal reasoning in court decisions indicates that these two dominant accounts of jurisprudence should not be contrasted.[179] His argument begins by recognising a "formal equality"[180] in court application of rules. Like cases are treated alike and other cases are distinguished on their differences.[181] Yet to determine whether cases are to be treated similarly or if they are to be distinguished on their differences requires an application of the rules. The problem Simmonds identifies is that the formal equality of courts adhering to rules

[178] Nigel E Simmonds, 'Between Positivism and Idealism' (1991) 50 Cambridge Law Journal 308, 309.
[179] ibid 309-10.
[180] ibid 310.
[181] Although the ICJ does not follow the doctrine of *stare decisis* strictly a similar use of precedent by the Court has been demonstrated. See above, text to n 67ff.

(or finding an exception) is an empty concept.[182] Without recognising that adherence to rules is "but an inchoate foreshadowing of a more substantive vision"[183] a court's application of rules is reliant on their interpretation (as to whether the rules apply or not). To resolve this Simmonds suggests a "shared understanding" exists in relation to what constitutes "sameness" or "difference" in the body of judicial reasoning that uses such distinctions or distinguishes on such a basis. The interpretative context of shared understandings is "resistant to articulation in rule-like form."[184] The underpinning of judicial reasoning and reflection does not necessarily form coherent and systematic positions in relation to the issues of the decision. [185] Yet court understanding of how a rule should be interpreted provides "background" to the rule. The rule and its background cannot be separated. Simmonds writes, "Given a set of shared understandings and assumptions, further detail in the statement may reduce ambiguity. But without such assumptions and understandings, the additional detail is just extra words on a page."[186]

The foregoing discussion has shown that the process of courts applying rules always involves the development of doctrine that grows up around the rules. Posited international law may generate grounds for ICJ decisions but a doctrine of Court reasoning and reflection is required for the rule to mean anything. With agreement found even among leading legal positivists it has been argued that the orthodox understanding of the ICJ as only an applier of international law is untenable. Having established the validity of taking such a position the project of the thesis will be to analyse the systematicity of the ICJ's development of international environmental law. Does the Court have a conscious or unconscious approach to the

[182] Simmonds (n 93) 311.
[183] ibid 311.
[184] ibid 313.
[185] This has important implications for the thesis. Ch 4's analysis of the ICJ's decisions discusses this point further, as it becomes an issue.
[186] Simmonds (n 93) 313.

development of international environment law? Do the decisions of the Court demonstrate a commitment to a specific set of values in relation to the environment? Is it possible, as Simmonds notes, that the Court's development may be only partially coherent with a systematic set of values containing internal contradictions?[187] Additionally, in analysing decisions of the ICJ this thesis will constitute further evidence of the norm-developing role the Court has been argued to possess.

### 1.2 Selection of ICJ cases and justification

Having justified that the Court can be argued to be a developer of international law the thesis can now discuss in which cases the Court has developed international environmental law. In the thesis a number of cases will be analysed to determine if there is a coherent and systematic philosophical underpinning in the decisions of the ICJ. There are certain cases that have come before the Court, and other decisions that are pending, that directly relate to the environment; these present obvious places from which to begin an analysis of Court philosophy.

There may also be other cases that do not directly relate to the environment but where it would be reasonable to expect environmental principles to affect Court decisions to some degree. Such cases present opportunities for the Court to make their environmental principles more explicit. The implications of the Court furthering environmental principles in cases that do not explicitly concern international environmental law may be demonstrative of the ICJ's set of underpinning environmental values. An example of such a decision is *Nauru*, which

[187] ibid 329.

concerned the extraction of phosphate.[188] The dispute before the Court was initiated on several grounds one of which was that Australia violated their international obligation "not to bring about changes in the condition of a territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory."[189] The term "environment" does not feature in documentation relating to this decision. Yet consideration of this decision should not be dismissed for this reason alone. Whether the Court regarded the "condition of a territory" to relate to international environmental law may be indicative of an environmental philosophical underpinning to its decisions.

This section will set out which specific cases of the Court are to be examined and how they are relevant. Ten decisions of the ICJ directly relate to environmental issues. Three of these decisions are pending before the Court. The explanations of the cases that follow demonstrate the diverse ecological and environmental contexts that the Court considers. The relatively low number of cases allows for only tentative conclusions regarding the merits of assessing any environmental philosophy the Court may be shown to have. Case analysis will also demonstrate whether the Court's systematicity is more evident in particular environmental issues over others. For example, do Court decisions suggest a more developed environmental philosophy in relation to the protections of rivers and oceans than endangered flora and fauna? Analysis of Court decisions is crucial in questioning why this may be the case.

[188] *Nauru* (Judgment) (n 21) 240.
[189] ibid 244.

The *Nuclear Test* cases[190] were the first of the ICJ to specifically refer to environmental issues. The cases concerned atmospheric nuclear testing conducted by France in the Pacific Ocean. In the first of the cases, Australia argued that there was a customary rule of international law that prohibited nuclear tests.[191] By testing, France had violated international law. France asserted that Principle 21 of the Stockholm Declaration confirmed this.[192] The dispute was settled before the Court decision was reached so the potential of this environment related argument was never realised. Nevertheless this part of Australia's application demonstrates the environmental grounds that states were disputing. Both the obligatory nature of customary international law and "soft law" agreements[193] that relate to the environment were to be considered.

In the second of the cases New Zealand also disputed the actions of France. Part of New Zealand's Application Instituting Proceedings related to environmental matters. They argued that the radioactive fallout from the nuclear testing had affected the "territory which is subject to fallout and also the living natural resources of the sea, especially fish and plankton. Migratory species of such living natural resources may carry both somatic and genetic effects

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[190] *Nuclear Tests (Australia v France)* [1974] ICJ Rep 457; *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457.
[191] *Nuclear Tests (Australia v France)* [1973] ICJ Pleadings Volume I, 163, 185-87.
[192] Principle 21 affirms that, "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." Australia asserted that Principle 21 was evidence that confirmed further that the "transboundary harm principle" had become part of customary international law. *Nuclear Tests (Australia v France)* [1973] ICJ Pleadings <http://www.icj-cij.org/docket/files/58/10725.pdf> accessed 30 October 2015, Annex 19, 43, 132. The transboundary harm principle states that, "Under the principles of international law, … no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Trail Smelter (USA v Canada)* (1941) 3 United Nations Reports on International Arbitral Awards 1905, 1965 [hereinafter "*Trail Smelter*"].
[193] A widely endorsed view of "soft law" is that of Sands. He observes that, "Soft law are rules that are not binding per se… but point to the likely future direction of formally binding obligations, by informally establishing acceptable norms of behaviour, and by 'codifying' or possibly reflecting rules of customary law." Philippe Sands, *Principles of International Environmental Law* (2nd edn, CUP 2003) 124.

beyond the range of fallout occurring in the vicinity of an explosion and can affect the protein-diet of other species, including man, in widely distributed areas."[194] Though France's detonations did not violate the territorial integrity of New Zealand, the applicants argued that damage resulting from the subsequent fallout was contrary to international law. Specifically, New Zealand argued the testing caused "contamination of the terrestrial, maritime and aerial environment." [195] In response to this argument the Court considered the principle of transboundary harm that had been established in the *Trail Smelter* arbitration.[196] In the *Nuclear Test* cases the Court had to question whether transboundary harm was now part of the corpus of customary international law. If it was the Court would then have to consider whether environmental degradation following nuclear fallout would constitute a violation of the transboundary harm principle.

The Court commented considerably on international environmental law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[197] The submission to the Court by the Solomon Islands and by Egypt both explicitly referred to environmental concerns.[198] The Court recognised "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the

[194] *Nuclear Tests (New Zealand v France)* [1974] ICJ Pleadings Volume II, 6 [17].
[195] ibid 8 [28].
[196] The now famous passage in *Trail Smelter* arbitration holds that, "Under the principles of international law, … no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Trail Smelter* (n 106) 1963.
[197] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 226 [hereinafter "*Nuclear Weapons* advisory opinion"].
[198] The Solomon Islands submitted to the Court their views that the protection of the environment is an issue applicable to the use of nuclear weapons. *Nuclear Weapons* advisory opinion (Written Comments of the Government of Solomon Islands) 1995 <http://www.icj-cij.org/docket/files/95/8724.pdf> accessed 30 October 2015 [19]; Egypt submitted that international agreements not to cause long-term and severe damage to the environment would include use of nuclear weapons. *Nuclear Weapons* advisory opinion (Written Comments of the Government of Egypt) 1995 <http://www.icj-cij.org/docket/files/95/8722.pdf> accessed 30 October 2015 [61]-[62].

environment."[199] Judge Weeramantry expressed dissatisfaction that the Court did not further strengthen international environmental protections. In his dissenting opinion he proposed that the Court could have taken the opportunity to further develop other principles of customary international law. These included: "the precautionary principle, the principle of trusteeship of earth resources, the principle that the burden of proving safety lies upon the author of the act complained of, and the 'polluter pays principle', placing on the author of environmental damage the burden of making adequate reparation to those affects."[200] Though these were only the views of one ICJ judge the comments demonstrates the expansion of environmental principles that the Court could consider.

Several of Judge Weeramantry's suggestions were argued as constituting customary international law in *Gabčíkovo-Nagymaros Project*.[201] The case concerned a hydroelectric dam built on the shared border between Hungary and Slovakia. Environmental issues were central to the case. The "water regime" had deteriorated to such a point that Hungary halted usage and development of the dam.[202] Hungary argued that an "ecological necessity" could justify their violation of the bilateral treaty they had with Slovakia.[203] The centrality of principles of international environmental law in this case gave the Court the mandate to establish the binding nature of several norms of environmental law.[204] The case remains

[199] *Nuclear Weapons* advisory opinion (n 112) 241-42 [29].
[200] *Nuclear Weapons* advisory opinion (Dissenting Opinion of Judge Weeramantry) 1996 <http://www.icj-cij.org/docket/files/95/7521.pdf> accessed 30 October 2015, 502-03.
[201] *Gabčíkovo-Nagymaros Project* (Judgment) (n 54).
[202] ibid 34 [37].
[203] *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Memorial of the Republic of Hungary (Volume 1)) 1994 <http://www.icj-cij.org/docket/files/92/10921.pdf> accessed 30 October 2015 [3.102].
[204] *Gabčíkovo-Nagymaros Project* (Judgment) (n 54) 67 [112].

pending before the Court; Slovakia reapplied to the Court on the basis that Hungary has not implemented the Court's Judgment of 1997.[205]

In 2006 the *Pulp Mills* case once again brought environmental matters before the Court.[206] Argentina was claiming that in constructing two pulp mills on the river that defined the border of the two states Uruguay had violated the terms of their bilateral treaty. Argentina also put forward the argument that the mills would have far reaching effects on the water quality of the area. In going ahead with the development Uruguay would derogate from their obligation "to preserve the aquatic environment and to prevent its pollution, by adopting appropriate measures, including recourse to best environmental practice and best available technology, in accordance with applicable international agreements…"[207] Several judges expressed a desire to progress environmental protections. In his separate opinion Judge Cançado Trindade commented that the *Pulp Mills* decision presented opportunity for the "progressive development of International Law in the present domain of the international protection of the environment."[208] He went on to suggest that the two states before the Court were perhaps expectant of such pronouncements as they themselves had invoked environmental principles in their respective arguments.[209]

In 2008 the Court was engaged by Ecuador in the *Aerial Herbicide Spraying* case.[210] Ecuador claimed that toxic herbicides sprayed by Colombia have seriously harmed people, crops,

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[205] *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Pending) ICJ Press Release 1998/28 <http://www.icj-cij.org/docket/index.php?pr=268&p1=3&p2=1&case=92&p3=6> accessed 30 October 2015.
[206] *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Application Instituting Proceedings) 2006 <http://www.icj-cij.org/docket/files/135/10779.pdf> accessed 30 October 2015.
[207] ibid [24(e)].
[208] *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Separate Opinion of Judge Cançado Trindade) 2006 <http://www.icj-cij.org/docket/files/135/15885.pdf> accessed 30 October 2015 [53].
[209] ibid.
[210] *Aerial Herbicide Spraying* (*Ecuador v Colombia*) (Application Instituting Proceedings) 2008 <http://www.icj-cij.org/docket/files/138/14474.pdf> accessed 30 October 2015.

animals and the natural environmental.[211] In so doing "Colombia have failed to meet their obligations of prevention and precaution."[212] This has "violated Ecuador's rights under customary and conventional international law."[213] Ecuador framed their arguments widely, which would have provided the Court with several opportunities within their judgment to clarify norms that relate to international environmental law. However, Ecuador and Colombia resolved the dispute outside of the Court and the case was removed from the Court's list.[214]

The *Whaling in the Antarctic*[215] case is the Court's most recent environment related decision. Australia's Application concerned whaling and that the "Japanese Whale Research Program under Special Permit in the Antarctic" (JARPA II) is in breach of Japan's international obligations. Australia understood Japan to have "obligations for the preservation of marine mammals and the marine environment."[216] In its decision the Court found that Japan's special permits to kill, take and treat whales were not in conformity with its obligations under the International Convention for the Regulation of Whaling.[217] The Court determined that Japan's JARPA II programme did not accord with its supposed research objectives of ecosystem monitoring and observance of multi-species competition.[218]

Currently before the Court is the *Certain Activities carried out by Nicaragua in the Border Area* case.[219] One of the grounds of the dispute relates to environmental consequences

[211] ibid [2].
[212] ibid [37].
[213] ibid.
[214] *Aerial Herbicide Spraying* (*Ecuador v Colombia*) (Removal from list: Order) General List No 138 [2013] ICJ Rep 1.
[215] *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Merits) [2014] ICJ Rep 1 [hereinafter "*Whaling in the Antarctic*"].
[216] *Whaling in the Antarctic (Australia v Japan)* [2010] (Application Instituting Proceedings) ICJ Rep 1, 4 [2].
[217] *Whaling in the Antarctic* (n 130) [247].
[218] ibid [153].
[219] *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) (Application Instituting Proceedings) [2010] ICJ Rep 1 [hereinafter "*Certain Activities*"].

resulting from the dredging and construction of a canal. In Costa Rica's Application they assert this will cause further damage to their territory, "including the wetlands and national wildlife protected areas located in the region."[220] In response Nicaragua defend their actions on environmental grounds.[221] The case presents an opportunity for the Court to debate interpretations of the international obligations of the states involved. Provisional measures were sought to secure an injunction against Nicaragua.[222] The Court decided that until the dispute is resolved neither party should enter the disputed area except designated environmental protection personnel.[223] This is again strongly suggestive of the centrality of environmental issues that this decision of the Court is likely to have.

Most recently Nicaragua has applied to the Court against the construction of a road and the dredging involved in its building. In the *Construction of a Road in Costa Rica along the San Juan River*[224] Nicaragua argue that Costa Rica's development threatens the "fragile ecosystem" of the San Juan River and "adjacent biosphere reserves."[225] A danger is posed to water quality, to aquatic life and to rare and diverse fauna and flora species.[226] The Court has joined this case with *Certain Activities.*[227] The Court is currently deliberating on this case.[228]

The overview of cases charts the progress of international environmental law. They demonstrate that the Court is often tasked with resolving disputed environment related issues.

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[220] ibid 6 [5].
[221] ibid 18 [72].
[222] *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) (Request for the Indication of Provisional Measures: Order) General List No 150 [2011] ICJ Rep 1.
[223] ibid 21 [86].
[224] *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v Costa Rica*) [2011] (Application Instituting Proceedings) ICJ Rep 1 [hereinafter "*Construction of a Road*"].
[225] ibid 2.
[226] ibid.
[227] ibid.
[228] *Certain Activities* and *Construction of a Road* (Pending) ICJ Press Release 2015/11 <http://www.icj-cij.org/docket/files/152/18626.pdf> accessed 30 October 2015.

The selection of cases spans over forty years and involves tens of different judges. The background to the cases and the environmental issues in dispute demonstrate the growing substantive content of environmental law. Other cases that do not directly concern international environmental law may also be suggestive of the Court's systematic philosophy in relation to the environment. The cases also show the increasing frequency to which disputes between states are argued on environmental grounds. With three environment related cases pending, the Court's role in resolving disputes and developing international environmental law is growing.

## Chapter two

## TRADITIONS SHAPING ENVIRONMENTAL PHILOSOPHY

An understanding of environmental philosophy is required in order to assess whether it is implied or embodied in the decisions of the International Court of Justice (ICJ). In addition this understanding is required to assess the coherency of the philosophy that underpins the Court's decision-making. Chapter 1 has demonstrated that it is not unreasonable to assume that the Court's judgments may embody a tacit philosophy in its decision-making. Building upon this, this chapter begins to question whether genuine notions of environmental duties that may inform the Court's tacit philosophy are possible and what they may be based upon.

Section 1 demonstrates changing conceptions of the place of humans in the world and related notions of responsibility that are evident in the traditions that anticipate modern environmental thinking. Human attitudes towards the environment were initially contextualised in cosmological visions of the world. These conceptions culminated in the dominance of utilitarian thinking. This established a permissive and morally neutral position that removed all that had limited a ruinous environmental regard, the assumptions of which remain pertinent in the present day. Section 2 assesses the paradigmatic utilitarian conception of the human relationship with the world and the adequacy of its resultant environmental protections.

The subsequent chapter continues to question notions of environmental duty and presents a typology of modern environmental philosophies from which to assess whether the ICJ expresses such values. Chapter 4 will use the typology to conduct this assessment.

## 2.1 Early traditions

It is necessary to start with Aristotle because his viewpoint is developed by Aquinas, and their respective understandings of the place of humans in the world and related notions of responsibility are reacted against by subsequent writers. Aristotle's cosmos is an ordered universe constituted by everything's intrinsic purpose.[1] Purpose is to be understood as "that for the sake of which"[2], which is both a thing's aim and its benefit to other things.[3] In his teleological conception humans occupy a particular and defined place.[4]

In Aristotle's conception human life is for the sake of eudaimonia, attaining to the good.[5] Attainment requires phronesis, practical wisdom.[6] For Aristotle, because humans have this intrinsic purpose they have a responsibility to lead virtuous lives, which is living to excellence.[7] Living well through the virtuous life is what brings about the possibility of being happy; happiness is not virtue in itself.[8]

This conception has implications that resonate forward into history; living in accordance with the virtuous life establishes a notion of responsibility in human action that has an

[1] "In everything the essence is identical with the cause of its being, and here, in the case of living things, their being is to live, and of their being and their living soul in them is the cause or source." Aristotle, *De Anima* (tr R D Hicks, CUP 1907) bk 2 [412b].
[2] Aristotle, *Physics* (tr Robin Waterfield, OUP 1996) bk 2 [194b].
[3] Monte Ransome Johnson, *Aristotle on Teleology* (Clarendon Press 2005) 91.
[4] Aristotle, *Physics* (n 2) bk 2 [194b]. Aristotle's understanding takes much from Plato who writes, "It is the duty of [humans] … to compel the best natures to attain the knowledge which we pronounced the greatest, and to win to the vision of the good." This duty imposes limits on human action. Plato makes this argument through the allegory of the cave where the duty to lead the virtuous life is made expressed through the metaphor of emerging from the cave. Plato, 'Republic' in Plato, *Plato in Twelve Volumes, Vol 5 and 6* (tr Paul Shorey, William Heinemann Ltd 1966) bk 4 [514a]-[520a] quotation at [519c].
[5] This inference may be made from his politically orientated texts, as the purpose of politics is to reach the best end. This is to be attained by "making the citizens to be of [good] character." Aristotle, *Nicomachean Ethics* (tr Roger Crisp, CUP 2000) bk 1 ch 9 [1099b].
[6] "Virtue is not merely the state in accordance with right reason, but that which involves it. And practical wisdom is right reason about such matters… [Humans] cannot be really good without practical wisdom, or practically wise without virtue of character." Aristotle, *Nicomachean Ethics* (n 5) bk 6 ch 13 [1144b].
[7] "The human good turns out to be activity of the soul in accordance with virtue, and if there are several virtues, in accordance with the best and most complete." ibid bk 1 ch 9 [1098a].
[8] ibid bk 1 ch 9 [1098b]-[1099a].

anthropocentric inheritance. In regarding humans as unique in the cosmos Aristotle positions humans hierarchically above other life that does not possess the distinguishing properties.[9] He emphasises humans as the natural beneficiaries of the good that can be found in nonhuman life: "…Plants exist for the sake of animals and the other animals for the good of [humans]… If therefore nature makes nothing without purpose or in vain, it follows that nature has made all the animals for the sake of men."[10] This statement exposes Aristotle's conception to the same criticism that befalls modern anthropocentric environmental philosophies of distorting valuations of nonhuman life by anthropomorphising human properties.[11] It may be argued that Aristotle uses such distinctions only as a metaphor for who ought to naturally rule and be ruled in the polis, since this is the focus of Aristotle's treatise. Regardless, making such an argument based on what he thought was an indisputable comparison establishes an idea of anthropocentrism in human thought that has a lasting impact on Western thinking.

Aristotle does not possess an explicit environmental philosophy but his cosmological conception allows one to be implied. In terms of modern environmental issues Aristotle's view might be taken to imply limits on the exploitation of the planet's resources. The exploitation of finite resources appears contrary to Aristotle's conception, as it would not involve the application of "practical wisdom", which is necessary to apply the virtuous character to human action.[12] The imposition of practical wisdom is constraining and far removed from notions of absolute freedom of action or inherent human superiority. Yet if the conception of responsibility that has been highlighted in Aristotle's writings is distorted by removing the context of teleological purpose of virtue and achieving excellence in human

[9] "Some animals possess all these parts of soul [nutritive, appetitive and intellect], some have certain of them only, others one only (this is what enables us to classify animals)." Aristotle, *De Anima* (n 1) bk 2 [413b]-[414a].
[10] Aristotle, 'Politics' in Aristotle, *Aristotle in 23 Volumes, Vol 21* (tr H Rackman, William Heinemann Ltd 1944) bk 1 [1256b].
[11] This criticism is explored in further detail below, text to n 3ff in ch 3.
[12] See n 6.

action, then happiness becomes the only motivator for human action. This conception would be devoid of any sense of responsibility imposed by the teleological order that would – in the context of modern environmental issues – limit exploitation of natural resources. In this interpretation the natural limits of practical wisdom establish, in the context of modern environmental issues, a significant and inescapable responsibility of stewardship, conservation and responsible use of natural resources. Just such shifts in thinking contributed to the rise of utilitarian thinking in the eighteenth and nineteenth centuries, as explained below.

The rise of Christian doctrine and the natural law theories that grew up around it made this transition towards utilitarianism more possible. In implicating different associations of the place of humans in the world Christian thought can be seen to transform the classical associations of the position of humans in the world as well as their related notions of responsibility. One interpretation of Christian doctrine demonstrates a strand of thinking that places further emphasis on the identified elements of Aristotle's writings regarding humans as more separate and less contingent on the rest of the cosmos.[13] That "God created man in the image of himself"[14], can be understood as distinguishing humans from the world due to their superiority that forms from their resemblance to God. As compared with the classical writers, more anthropocentric attitudes towards the rest of the world also contribute to such an

[13] The following excursus is limited to the creation story in Genesis. Recent and notable sources that have undertaken thorough Biblical exegesis in the environmental context include: Richard Bauckham, *The Bible and Ecology: Rediscovering the Community of Creation* (Baylor University Press 2010); Richard Bauckham, *Living with Other Creatures: Green Exegesis and Theology* (Baylor University Press 2010); David Edwards, *Ecology at the Heart of Faith* (Orbis Books 2006); Douglass John Hall, *Imaging God: Dominion as Stewardship* (Wipf & Stock 2004); John Hart, *What Are They Saying About Environmental Theology?* (Paulist Press 2004); David G Horrell, *Bible and the Environment: Towards a Critical Ecological Biblical Theology* (Equinox 2010); David G Horrell and others (eds), *Ecological Hermeneutics: Biblical, Historical and Theological Perspectives* (T & T Clark 2010); Hilary Marlow, *Biblical Prophets and Contemporary Environmental Ethics* (OUP 2009); Jay B McDaniel, *Of God and Pelicans: A Theology of Reverence for Life* (John Knox 1989); Sallie McFague, *A New Climate for Theology: God, the World, and Global Warming* (Fortress 2008).

[14] Genesis 1:27 (Bible, King James version) (all subsequent Biblical quotations follow the King James version).

interpretation. Only humans are instructed to "be fruitful, multiply, fill the earth and subdue it."[15] As subduing the earth is to subject it to human dominion, this interpretation implies an anthropocentric valuation of the world, that the earth is a means to human ends.

However, this interpretation must be set against a different understanding that emphasises a sense of responsibility. This notion of responsibility may be based upon recognition of the interdependency and interrelatedness between humans and the environment that is argued to exist because of the good that God has created, as set out in the Genesis account.[16] This implies that humans are not thought to be so distinguished from the rest of the world as they are dependent on the rest of creation. The writings of Saint Francis of Assisi support this interpretation. He finds both dependency on other animals and the natural environment itself[17], and interrelatedness: "Mother Earth, who sustains and governs us, and who produces varied fruits with colored flowers and herbs."[18] If strictly adhered to this ethical account has much in common with – in modern environmental terms – ecocentrism; all life and the interrelationship upon which life depends can be regarded as having intrinsic value.

In support of this interpretation that recognises a sense of responsibility in humans, God is said to place humans in the garden of Eden to "cultivate and take care of it."[19] This instruction implies a responsibility to conserve and carefully manage the earth. Humans are to be responsible stewards of the world; human behaviour is constrained as all human action takes place within God's order that has provided humans with fertile lands[20] and animals that fulfil

[15] Genesis 1:28.
[16] For example, having created "seed-bearing plants, and fruit trees bearing fruit with their seed inside… God saw that it was good." Genesis 1:11-12.
[17] Assisi writes of "Brother Wind" and "Sister Water" suggesting a strong connection to humans. ibid.
[18] St Francis of Assisi, 'The Canticle of Brother Sun' in Joseph DesJardins (ed), *Environmental Ethics: Concepts, Policy, Theory* (Mayfield Publishing Company 1999) 33.
[19] Genesis 2:15.
[20] "Making grass grow on thirsty ground." Job 38:27.

human needs.[21] The presumption that humans are able to maintain the order of the world through practices of cultivation and stewardship is an idea reflected in the modern environmental perspective of sustainable development. This perspective seeks to reconcile anthropocentric human values with a sense of responsibility to the rest of the world. The priorities of human development, including the exploitation of natural resources, is regarded as capable of being balanced with environmental priorities such as the prevention of pollution and maintaining biodiversity. In the Biblical account there is no doubt expressed as to whether humans can fulfil the responsibility of stewardship, God is presumed to have created a world that provides for all his creations.[22]

A sense of responsibility still displays some elements of an anthropocentric regard to the environment, suggesting these two interpretations of Christian doctrine are not mutually exclusive. To cultivate the earth is suggestive of an instruction to alter it and improve it, and as it is humans that are deciding what constitutes 'improvements' the results of such undertakings may incline towards human needs. This assumes that the needs of human and nonhuman life are in harmony and not in opposition. Nevertheless, this second interpretation seems to more accurately reflect Christian doctrine. Notions of responsibility imply a limit to human action that contextualises the former interpretation's more anthropocentric attitude. Though humans are told to subdue the earth, this seemingly limitless and anthropocentric injunction must be exercised in specific ways. Humans are instructed to "Be masters of the fish of the sea, the birds of heaven and all living animals on the earth."[23] Being a "master" implies an ethic of responsible management; to proficiently manage the fish, birds and all

[21] There are numerous examples of God's other animals provided for their human usefulness. These include the free ranging wild ass, Job 39:5; the stunted winged ostrich, Job 39:13; and, the strong horse, Job 39:19.
[22] This may be implied from the passage "I have given you every herb bearing seed, which is upon the face of all the earth, and every tree, in the which is the fruit of a tree yielding seed." This comment presumes the existence of all required for the survival of the human species so long as it is sustainably used. Genesis 1:29.
[23] Genesis 1:28.

living animals. This notion of responsibility establishes limits to human action, constrained by a duty to God and to the world.

At the centre of Christian political thinking in the West is the natural law with St Thomas Aquinas its most significant figure. The Biblical interpretations and the ethic of responsibility that Christian doctrine has been argued as emphasising form one element in a synthesis produced by Aquinas. Aquinas' synthesis situates these interpretations in the broad context of natural law. This development has important and lasting significance because natural law elaborates on the limited guidance that is offered by the Biblical texts. In this regard, Aquinas presents a more specific conception of the place of humans in the world and the responsibility they have.

Aquinas states, "the natural law is nothing else than a participation of eternal law in a rational creature."[24] Aquinas then provides a basic set of principles to participate in the eternal law and a method – practical reasoning – for living to those principles. His understanding of the practical reason delineates human action, how humans are to live and how they ought to relate to God's other creations. Similar to Aristotle's conception of teleological purpose, Aquinas regards the natural law as divine providence that informs humans of their responsibility, the "inclinations to their proper acts and ends."[25] Aquinas' conception implies a responsibility to lead virtuous lives, a conception that is similar to Aristotle's eudaimonism. In support of this idea Aquinas writes, "The light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the

[24] Thomas Aquinas, *Summa Theologiae* (tr Fathers of the English Dominican Province, Benziger Bros 1947) I-II q91 a2 (cited by Part (I, I-II, II-II, III) Question (q) and Article (a)).
[25] ibid.

Divine light."[26] As discussed in relation to Aristotle's writings, positioning a responsibility to achieve human flourishing and wellbeing so as to discharge the duty to oneself and to God, makes it possible – when this strand of thinking that urges responsibility is eroded – for human happiness to become the sole motivator for human action.

Two strands of thinking can be seen to emerge from the Christian doctrine and natural law theories that establish different conceptions of human responsibility to that implied from the writings of Aquinas. One strand can be understood as exploring ideas of human dominion against a background of duty.[27] In this strand notions of duty, informed by the natural law, are maintained. As was implied from Aquinas, human action is limited both because of the limited nature of the rights that are regarded as being bestowed onto humans and because of the sense of responsibility that the natural law imparts. A second strand of thinking emphasises as natural right the ideas of human wellbeing and flourishing, which expand notions of human entitlement.[28] Ideas of human wellbeing and flourishing are pursued without being bound by conceptions of duty. That there are no inherent moral limitations to human action ultimately leads to utilitarianism, a limitless and exploitative regard for natural resources and the environment.

The first strand of thinking portrays human action and natural right as restricted within a context of natural law that emphasises notions of responsibility and intrinsic limits to human action. The writings of Grotius present an account of human dominion and the idea of a

[26] ibid.
[27] Major sources representing this strand of thinking include: Hugo Grotius, *The Rights of War and Peace, Vols 1-3* (tr Jean Barbeyrac, ed Richard Tuck, Liberty Fund 2005); Hobbes, *Leviathan* (Clarendon Press 1909); Samuel von Pufendorf, *The Whole Duty of Man According to the Law of Nature* (tr Andrew Tooke, eds Ian Hunter and David Saunders, Liberty Fund 2003); John Locke, 'Two Treatises on Government' in John Locke, *The Works of John Locke Vol 5* (Thomas Tegg 1823).
[28] Major sources here include: David Hume, *Treatise on Human Nature* (Dover 2003); Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Kitchener 2000); John Stuart Mill, *Utilitarianism* (Kitchener 2001).

natural right to appropriate, both of which are limited by duty. Grotius understands natural law as grounded in human nature; "Human nature itself is the mother of natural law."[29] In his observation "Natural Right is the Rule and Dictate of Right Reason, shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature"[30], Grotius posits natural right as including both the "moral wrongness or the necessity of action"[31] because of its measure of appropriateness to rational nature and the "consequence of divine command or prohibition". [32] Grotius' conception allows for expanded notions of human dominion because it separates the rational action of human nature from the divine.[33]

Although presenting an expanded idea of the natural rights of humans, Grotius' account continues to posit intrinsic limitations. Because natural rights proceed "from principles internal to a human being"[34] they are limited by human nature. For Grotius, human nature relies upon society – being social, political or planning for the future requires society. In relation to the human relationship with the environment Grotius regards it as unjust for an individual to use a resource exhaustively because doing so may be detrimental to others who require the resource for their preservation.[35] If transposed to the present day this duty, if strictly adhered to, would preclude one person using resources to the point where they deprive others of them. Grotius' limitations were to be secured by the civil law. Being "patterned after nature's plan" Grotius understands the civil law to be an extension of right reason, which

[29] Grotius, *The Rights of War and Peace, Vol 3* (n 27) bk III Prolegomena, 1749.
[30] Grotius, *The Rights of War and Peace, Vol 1* (n 27) bk I ch 1 s X.I, 150-51.
[31] Terence Irwin, *The Development of Ethics: A Historical and Critical Study: Vol 2: From Suarez to Rousseau* (OUP 2008) 91.
[32] ibid.
[33] Grotius writes, "What I have just said would be relevant even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God, or that human affairs are of no concern to him." Grotius, *The Rights of War and Peace*, *Vol 3* (n 27) bk III Prolegomena, 1748.
[34] Irwin (n 31) 91.
[35] Grotius, *The Rights of War and Peace, Vol 2* (n 27) bk II ch 1 para III, 9.

establishes interpersonal restraint based upon the natural law that prevents disputes over claims of entitlement. The implication of Grotius's conception is that the civil law is restricted because it is informed by the natural law and so could not provide entitlements in addition or contrary to it.

A significant change in the basis by which the natural law established a sense of duty that limits human action can be seen in the different conceptions of Grotius and Hobbes. Whereas Grotius conceives of the civil law as constrained by the natural law, in so far as it could only be understood as just if in accordance with the natural law, by contrast, for Hobbes all notions of justice and right are determined by the civil law. This contrast can be seen in Hobbes' writings on the role of civil law: "These Rules of Propriety (or *Meum* and *Tuum*) and of *Good*, *Evil*, *Lawful*, and *Unlawful* in the actions of Subjects, are the Civill Laws."[36] Hobbes understands the state to be a necessary imposition that accommodates human life, life that is characterised by competition, diffidence, and glory[37] in which "there is nothing to which every man had not Right by Nature".[38] As set out above, Grotius' conception of right reason and its constraint on the civil law meant that any property claims would have inherent limitations to prevent exhaustive use of resources or waste to ensure others had sufficient resource for their preservation. By contrast, Hobbes' conception has no such limitations with the function of the state being to ensure peace only. Hobbes positions a notion of civic duty with individuals submitting their liberty – their "right of nature"[39] – to the absolute sovereignty of the state to prevent a return to each individual taking all he can and all he can

[36] Hobbes, *Leviathan* (n 27) pt II ch XVIII, 137.
[37] ibid pt I ch XIII, 96.
[38] ibid pt I ch XIV, 100.
[39] ibid pt I ch XIV, 99.

keep[40], a state of all-out war.[41] Though there remains a notion of duty that constrains human action, by Hobbes' account, the theistic conceptions of duty and notions of good and evil have been subsumed into the civil law.[42]

The writings of Hobbes illustrate conceptions of natural rights that initially appear unlimited in terms of the human action they allow; however, inherent limitations are stipulated. What can be implied from this is that a seemingly unlimited conception of human entitlement remains situated within a broader context of responsibility that the natural law provides. Hobbes makes this argument when he writes, "There be no Propriety, no Dominion, no *Mine* and *Thine* distinct; but onely that to be every mans, that he can get; and for so long, as he can keep it."[43] Hobbes finds the state of competition to occur since all humans are more or less equal in strength and intelligence.[44] In practice however, unlimited action is not permitted and the civil law circumscribes the content of the civil law and sets its limits; because of the desire for peace, prudence intervenes and moderates these unlimited claims of entitlement.[45] Though there remain inherent constraints on human action in the accounts of both Grotius and Hobbes, the implication of the latter's conception is that there is nothing offered that could impose moral limitations in relation to human use of natural resources and the environment.

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[40] The only way to limit each individual taking what he can and what he can keep is "to conferre all their power and strength upon one Man", which is for individual natural rights to be invested in the sovereign. ibid pt II ch XVII, 131.

[41] Hobbes writes, "For if a man in the state of nature, be in hostility with men, and thereby have lawful title to subdue or kill, according as his own conscience and discretion shall suggest unto him for his safety and benefit; much more may he do the same to beasts." Hobbes, *Elements of Law* (Kessinger Publishing 2004) pt 2 ch XXII para 9.

[42] Tom Sorell, 'Hobbes and the Morality Beyond Justice' (2001) 82 Pacific Philosophical Quarterly 227, 234.

[43] "There be no Propriety, no Dominion, no *Mine* and *Thine* distinct; but onely that to be every mans, that he can get; and for so long, as he can keep it. And thus much for the ill condition, which man by meer Nature is actually placed in; though with a possibility to come out of it, consisting partly in the Passions, partly in his Reason." Hobbes, *Leviathan* (n 27) pt I ch XIII, 98.

[44] "For as to the strength of body, the weakest has strength enough to kill the strongest." ibid pt I ch XIII, 94.

[45] "The Passions that encline men to Peace, are Feare of Death; Desire of such things as are necessary to commodious living; and a Hope by their Industry to obtain them." ibid pt I ch XVIII, 98.

Locke is another prominent writer whose work can be understood as constituting part of this first strand of thinking that regards natural rights as limited and contextualised within natural law notions of duty. Locke establishes a greater degree of human entitlement but this is encompassed within a greater notion of duty. For Locke, the fundamental law of nature is individual preservation.[46] His reasoning is based upon theocentric conceptions of God's grant of dominion to Adam, which he sees as extending to all humans, since otherwise they would go hungry and perish, and this could not be God's plan. In the same way that, for Locke, Adam's dominion is taken to imply human dominion, Adam's power is equally regarded as being bestowed on all humans. Making this argument, Locke writes that it is natural that humans "order their actions, and dispose of their possessions and persons as they see fit, within the bounds of the law of nature."[47]

Yet an expanded notion of natural rights brought with it an expanded duty that contextualised those rights and maintained limits to human action. Locke's labour theory suggests that an expanded sense of dominion also develops an obligation to improve what is being appropriated. The labour theory posits that what a person produces by working the earth is properly theirs and no longer belongs to the commons because the process of labour extends the natural rights of individuals onto property: "Nobody has any right to but himself. The labour of his body and the work of his hands, we may say, are properly his."[48] Though Grotius recognises the obligation to improve property, such as with enhancing agricultural practices and the feeding of cattle[49], this stems from the individual duty to preserve oneself. Locke's conception of duty can be contrasted with this. Improving that over which dominion

[46] Locke, 'Two Treatises on Government' (n 27) pt 1 ch IV para 42.
[47] ibid pt 2 ch II para 4.
[48] ibid pt 2 ch V para 26.
[49] Grotius, *The Rights of War and Peace*, *Vol 2* (n 27) bk II ch II s II, 20.

is claimed is focused towards the natural resources that are appropriated. That Locke's focus is on what can be derived from the planet can be substantiated by his comment, "The Earth and all that is therein is given to men for the support and comfort of their being."[50] In one interpretation this implies an anthropocentric regard for the environment in that natural resources are viewed to be of instrumental purpose. In support of this view Buckle writes, "Locke is able to give a full and almost free rein to self-interested behaviour."[51]

An alternative interpretation is to see this conception of human entitlement as operating within a framework of duty that continues to limit human action. The improvement that is derived from labour is qualified by a duty of management and of responsible cultivation of the earth for all to enjoy, including future generations. This interpretation may be gleaned from Locke who writes: "Neither Adam, nor Noah, had any private dominion, any property in the creatures, exclusive of his posterity."[52] That Locke again bases this duty on theocentric grounds supports the claim that the duty is based upon the natural law and that any human entitlement is contextualised by duty to God. Improvement for Locke is what is required to discharge the natural law duty to unlock the potential of the planet: "God sets [Adam] to work for his living, and seems rather to give him a spade into his hand to subdue the earth, than a sceptre to rule over its inhabitants."[53] Though this may generate benefits to humans it does not prohibit environmental goods, since Locke understands that without human improvement "nature and the earth furnished only the almost worthless materials as in themselves."[54] If interpreted in this way, Locke's labour theory imposes a duty that limits an overly exploitative environmental regard, as does Locke's statement that there ought to be "enough,

[50] Locke, 'Two Treatises on Government' (n 27) pt 2 ch V para 25.
[51] Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Clarendon Press 1991) 161.
[52] Locke, 'Two Treatises on Government' (n 27) pt 1 ch IV para 39.
[53] ibid pt 1 ch IV para 45.
[54] ibid pt 2 ch V para 43.

and as good left in common for others."[55] Locke's labour theory is significant in that it provides reassurances to anthropocentric thinking, that humans can bring about changes in agriculture, industry and technology that will improve the resources of the world.[56] Human improvement of the world is an idea that has been retained in modern environmental thinking where there is an expectation of human ingenuity being able to provide solutions.

The second strand of thinking mentioned earlier emphasises ideas of human wellbeing and flourishing as natural rights that gradually erode conceptions of limits on human exploitation of the environment, since they are not constrained by conceptions of responsibility or duty. It is in recognition of this strand of thinking that has led several writers to find Christianity contributing to humans "transcending nature"[57] and bestowing an exploitative environmental attitude. As will be discussed below such notions of entitlement ultimately culminate in utilitarianism, allowing for the exploitation of natural resources without limit.

As this chapter's historical account demonstrates, natural law contained ideas of property, liberty, rights and contractual obligations that were imbued with the legitimacy of natural law's eudaimonist account of morality. Hume's writings provide an impetus for (and evidence of) a decoupling of the deontological foundation from the content of the natural law that would pave the way for natural law's transition to utilitarianism. Discussing this decoupling Simmonds writes that the "*content* of natural law could be determined by human reason, but its *obligatory force* was the product of the divine will."[58] Hume sought to replace the

[55] ibid pt 2 ch V para 27.
[56] In the seventeenth century changes in agriculture, industry and technology were perceived to be solutions to any insufficiencies of resources. See generally Keith Thomas, *Man and the Natural World: Changing Attitudes in England 1500-1800* (Allen Lane 1983).
[57] Lynn White, 'The Historical Roots of Our Ecologic Crisis' (1967) 155 Science 1203, 1205.
[58] Nigel E Simmonds, *The Decline of Juridical Reason: Doctrine and theory in the legal order* (Manchester University Press 1984) 53.

deontological framework of the natural law with an empirical science of morality and law.[59] For Hume, human passions provide the ultimate basis of motivation in practically orientated thinking and action. If humans do not care about anything then morality and prudence would have no impact on their lives.[60] Hume writes, "Reason is, and ought only to be the slave of the passions."[61] If, as Hume suggests, obligatory force is not derived from divine will then the content that has been attributed to natural law is in a sense free to itself be regarded as providing the basis of morality.

The work of Grotius may have encouraged Hume in his undertaking; though Grotius does not advocate a secular account of morality he understands natural law to have a degree of validity "even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God, or that human affairs are of no concern to him."[62] It was reason that would, for Grotius, provide an alternate validity for, for example, ideas of property being understood as necessary in order for society to function.[63] Without the obligatory force of divine will, happiness and welfare – ideas that the content of the natural law had come to represent – could instead provide the basis of morality and so, in utilitarian terminology, become the only intrinsic goods. Decoupled from divine will natural law was able to "collapse into a general injunction to maximise welfare or happiness."[64] This was possible because of the similarities between the content of the natural law and the idea of maximising overall welfare – a core utilitarian notion. By defining the natural law as something necessary for the survival, peace and prosperity of humans and society, Grotius and his contemporaries introduced an

[59] Duncan Forbes, *Hume's Philosophical Politics* (CUP 1985) 68.
[60] Simmonds (n 58) 63.
[61] Hume (n 28) bk III pt III s III.
[62] See n 33.
[63] Hugo Grotius, *Commentary on the Law of Prize and Booty* (tr Gwladys L Williams, ed Martine Julia van Ittersum, Liberty Fund 2006) ch XII, 318.
[64] Simmonds (n 58) 58.

instrumental conception of natural law's body of injunctions that can be summarised in almost utilitarian terms; that above all the content of natural law was that "man should pursue his own happiness."[65] Placed in its historical context it is clear that utilitarianism does not abandon the notion of objective goods, they merely become represented by the singular notion of utility.

### 2.2 The tradition of Utilitarianism

Utilitarianism determines what is good from the utility that an action produces and not from actions themselves or an actor's character. There are various accounts of utilitarianism, including classical or hedonistic utilitarianism and preference-based utilitarianism and each will be considered in turn. In the classical account, for Bentham, utility is the "property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness."[66] By this account a particular course of action is good if it establishes more pleasure than pain among the majority of individuals affected by that action.[67] Since utilitarianism establishes human happiness as the single normative goal, humanity is separated completely from the rest of the world. All inherent moral responsibility is disregarded in utilitarian thinking; all limits to human action are removed. In utilitarian theory, no matter how environmentally ruinous human action is, it cannot be deemed intrinsically wrong.

[65] ibid 59 quoting William Blackstone.
[66] Bentham, (n 28) ch I para III, 14.
[67] Bentham writes that utility is the "principle which approves or disapproves of every action whatsoever according to the tendency it appears to have to augment or diminish the happiness of the party whose interest is in question." ibid ch I para II, 14.

This section mounts two criticisms to utilitarianism in terms of how as a moral theory it fails to provide sufficient reason to protect the environment.[68] The first criticism relates to the malleability of the notion of utility and its corresponding ambiguity. The second concerns an inherent problem that relates to the maximisation of utility in terms of what values utilitarianism must include and what it is forced to negate. The criticisms addressed below would be evaded in conceptions of the relationship between humans and the world where there are inherent limitations to human action.

The first of the two criticisms concerns the difficulties in reconciling values that may be determined as something constituting utility. Different accounts of utilitarianism portray this deficiency in different ways. The Benthamite hedonistic account of utilitarianism negates much that would constitute a purposeful life and counterarguments suggest that determining utility based solely upon the mental experience is insufficient in describing the good that ought to be attained. This account holds that the natural duty of individuals is to orientate their actions so as to maximise pleasure, since this alone increases utility. As a moral theory based on hedonistic experience the account is open to the criticism of Nozick's experience machine.[69] Nozick's thought experiment argues against pleasure being the only intrinsic good that is to be pursued, and that utility – if it is to constitute an obligatory moral force – must have a more inclusive understanding. To argue this Nozick imagines a machine that can feed experiences directly into the brains of individuals and produce all the pleasure each individual can conceive. Though this satisfies the Benthamite account of utility in terms of producing the maximum possible pleasure, lying in a machine and merely experiencing feelings (without performing the actions that produce them) is not a purposeful life. Even if, in an expanded

[68] These are criticisms that to different extents affect each of the different accounts considered.
[69] Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) 42-45.

notion of utility, other feelings besides happiness were to be taken into account, the experience machine would still be capable of artificially producing these. An experience machine that produces the pleasure humans may experience walking through forests or the love humans may feel towards their domesticated animals would still not accredit any inherent worth to the objects from which such feelings are derived.

Preference-based utilitarian accounts expand the notion of utility to include all preferences (all preferred actions as well the mental states discussed above).[70] The experience machine is now not able to artificially mimic all that provides utility. However, in expanding the category of what ought to be considered intrinsically valuable the notion of utility is now too inclusive and ambiguous. For example, the preference of an individual who benefits from dumping radioactive material in a river must be regarded as equally valid to a gardener's accomplishment in planting a seed. Both are valid preferences and so both must be counted and there can be no consideration of the different environmental impacts these two actions have.[71]

The criticisms of utility's indeterminacy – that it is inherently ambiguous as to the fundamental human values it denotes – are compounded by the scientific and moral complexity involved in estimating what should be done to protect the environment.[72]

[70] Hare, for example, argues that all "informed preferences" contribute towards wellbeing. Richard Hare, *Essays on Philosophical Method* (Macmillan 1971) 131.
[71] A related criticism of the preference account of utility that Kymlicka notes is that an individual's preferences may adapt to suit their position and transitory preferences may need to be weighed against "genuine" preferences. Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (2nd edn, OUP 2002) 16.
[72] Accounts of utilitarianism are unable to follow their own consequentialist basis in relation to the environment because the consequences of human action or inaction in relation to the environment elude comprehensive predictions. Determining environmental impacts involves highly complex calculations. For example, in relation to climate change the Fourth Assessment Report by the Intergovernmental Panel on Climate Change writes, "The scientific understanding of climate change, the complexity of the climate system and the multiple interactions that determine its behaviour impose limitations on our ability to understand fully the future course of

Determining how humans ought to act in relation to the environment regarding the unknown or unclear consequences of any particular action or inaction, illustrates utilitarianism's overemphasis on human experience. This contributes to the argument against the appropriateness of utilitarianism as a moral theory that can offer genuine environmental protection. Utilitarianism offers the view that the human realisation of pleasure or the satisfaction of a wider set of preferences (depending on which utilitarian account is followed) should determine environmental action or inaction. In classical accounts of utilitarianism calculations are required in order to ascertain the amount of pleasure or pain that would be produced by different environmental outcomes such as deforestation, soil erosion or climate change. If such environmental issues were to produce more human pain than pleasure then the cause of that pain should be remedied. Contemplating the widespread loss of glaciers and ice caps in this regard provides an example of the difficulty of this calculation.[73] How can this loss be calculated as something that increases or decreases the pleasure of humans or other sentient life? Classical utilitarianism's determinant of feeling pleasure or pain imposes a chain of cause and effect that must end at the point of affecting the human sensory experience, if it is to register as adding to or subtracting from utility calculations. The result of this approach is to produce a moral theory that validates an "out of sight, out of mind" value system. The experience of pleasure or pain is disconnected from the losses of glaciers and ice caps.[74]

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Earth's global climate." IPCC, *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2007) 21.

[73] The IPCC notes, "The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased." IPCC, 'Summary for Policymakers' in IPCC, *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2013) 4.

[74] As an additional example, the same disconnection is evident with climate change. For example, art 2 of the UN Framework Convention on Climate Change expresses its objective of preventing dangerous anthropogenic interference with the climate system by stabilising greenhouse gas emissions. This goal, environmentally sound though it may be, is far removed from individual experiences of pleasure or pain. United Nations Framework Convention on Climate Change (adopted 09 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 2.

Preference-based accounts of utilitarianism require even more complex calculations to ascertain the various mental states that may be fulfilled and regarded as producing utility. For this reason, preference utilitarianism also fails to provide robust environmental protections. Since preferences may include interests or desires to protect the environment as contributing to overall utility, the above argument used to criticise classical utilitarianism is not helpful. Instead, almost the opposite argument may be used; that calculating the sum satisfaction of preferences is unfeasible and illogical because the preferences may be incommensurable. The infeasibility of calculating preferences illustrates there is no scale against which to judge which pleasures are better than others, unless the scale is externally referenced against an objective criteria or set of preferences – which all utilitarian accounts must deny. This is a notable departure from conceptions of human reasoning being constrained within a context of natural limits and ideas of responsibility in action.[75]

This first criticism that utilitarian moral theories have an ambiguous and unworkable understanding of fundamental values can be supported using objective accounts of the good, such as those mentioned above of Aristotle, Aquinas and their intellectual descendants. The comparison suggests utilitarianism forces an oversimplification of the human experience, enveloping the multiplicity of appreciation in the sum of whether an individual's happiness or pleasure is increased. Unlike in utilitarian accounts of the good in objective explanations an individual's wellbeing is not discounted if it does not bring that individual pleasure or

[75] For example, Aristotle understands practical wisdom to determine virtuosity in human action. Aristotle understood this to create a context of natural limits. "Virtue is not merely the state in accordance with right reason, but that which involves it. And practical wisdom is right reason about such matters… [Humans] cannot be really good without practical wisdom, or practically wise without virtue of character." Aristotle, *Nicomachean Ethics* (n 5) bk 6 ch 13 [1144b].

happiness.[76] Whereas in utilitarian calculus aesthetic experiences, for example, are only of value if they increase overall satisfaction, in objective accounts all appreciation is as valuable as the rest so long as the individual regards it as contributing to their own wellbeing.[77] The utilitarian understanding is misconceived because it is not beauty only – to continue the above example – that corresponds to perceptions of happiness or pleasure in aesthetic experiencing. Dismissive of this claim, it is common to find beauty in the unconventional or in the ugly. For example, Lowry painted industrial, urbanised landscapes that might be considered by some to be ugly in terms of their craftsmanship or in terms of the subject matter they document. Those who experience Lowry's paintings may notice the artist's representation of the plight of factory workers and the commodification of the natural environment. However, though such paintings may lack the vivid colours of Van Gogh's sunflowers or the serenity of Monet's lilies the subject matter of Lowry's paintings is not precluded from being regarded as beautiful by those who experience them. The paintings may be beautifully simplistic or beautiful by way of the social undercurrent they highlight. It is for this reason that objective good theories suggest that seeking a "yet more basic" value such as the experience of pleasure or happiness simply "mislocates what is really worth while."[78]

Another illustration of the misconception of utilitarian accounts of the good is that individuals engage in "the emotionally dry, subjectively unsatisfying, 'not enjoyable' and 'does not appeal to me now'" but such experiences may be understood as accomplishments, or

[76] Adopting a hedonist utilitarian critique Crips questions why any experience should be considered to be of value for the experiencer if it is not giving them pleasure. Roger Crisp, 'Finnis on Well-being' in John Keown and Robert P George (eds), *Reason, Morality and Law: The Philosophy of John Finnis* (OUP 2013) 31.
[77] Objective accounts of the good are discussed below, text to n 3ff in ch 5.
[78] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 95. Examples of other objective good theories are discussed below, text to n 3 in ch 5.

intellectually meaningful even though they are not pleasurable.[79] For example Tolstoy may have accomplished a great novel in writing *War and Peace* even though he took no pleasure in the task.[80] If his accomplishment required his enjoyment – as utilitarianism must claim for it to be of value – then there is the potential anomaly where *War and Peace* cannot be regarded as an accomplishment *unless* the writing of it was enjoyed. Perhaps Tolstoy did not receive pleasure in writing *War and Peace* and only received pleasure from the money made from it. Regardless, Tolstoy's own sense of accomplishment need not impact on whether or not other individuals perceive it as such. Contrary to utilitarianism, objective accounts of the good are not determined by subjective interpretations of what constitute pleasurable experiences for that individual. Another individual's accomplishment may be making baked eggs for breakfast. What is important and what contributes to the account of human wellbeing is that both individuals are seeking to *do* something, to act.

Mill's hierarchy of pleasures can be understood as an attempt to introduce a means of distinguishing between the qualities (as well as quantities) of experiences. Although environmental protections can be derived from scales such as Mill's the scales are contingent on human valuations of the worth of nonhuman life and the environment. Intellect, feelings and moral sentiments are (for Mill) to be regarded as "higher" pleasures than the physical and sensual "lower" pleasures.[81] Mill writes, "It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied"[82] and that "we are justified in ascribing to the preferred enjoyment a superiority in quality, so far outweighing

[79] John Finnis, 'Reflections and Responses' in John Keown and Robert P George (eds), *Reason, Morality and Law: The Philosophy of John Finnis* (OUP 2013) 466.
[80] Crisp and Nozick have both used Tolstoy's War and Peace as an quintessential example of accomplished work. See Crisp, 'Finnis on Well-being' (n 76) 30 and Nozick (n 69) 241.
[81] Mill (n 28) 13.
[82] ibid 14.

quantity as to render it, in comparison, of small account."[83] Although this argument may appease the above criticisms that have been put to Bentham's utilitarian conception, Mill's argument is unsatisfactory because it implicitly and arbitrarily favours human experiences from the outset. Mill appears aware of this. He writes, "A being of higher faculties requires more to make him happy, is capable probably of more acute suffering, and certainly accessible to it at more points, than one of an inferior type."[84] Mill's argument exhibits "species solipsism" where because knowledge of nonhuman life is incomplete and is judged through a human ethical framework there is "excessive reluctance to consider any sort of evidence suggesting conscious thinking by animals"[85], and the prospect that animals may have differing scales of pleasure.

The consequence of such presumptions as those made by Mill is that the capacities of humans and their pleasures establish a speciesist *de facto* superiority of human over nonhuman life. As an example, consider the different uses a forest can provide to human and nonhuman life. Humans may use the forest as a setting for walks, turn trees into timber for the framing of works of art or pulp the trees for the printing of books. If these pleasures were transposed onto Mill's scale of higher and lower pleasures then they would sit at the higher end, implicitly bestowing them with an inherently greater worth. The human forestry uses would be superior to the nonhuman animal pursuits of using the forest for dwellings that provide for the physical pleasures of safety and rest. The higher pursuits of humans would have an even stronger position if compared to the plant and flower species that constitute the forest since they do not experience pleasure whatsoever. Of course, this is not necessarily the case; humans could regard forests as providing a qualitatively better utility through what they provide to

[83] ibid 11.
[84] ibid 12.
[85] Donald R Griffin, 'Animal Consciousness' (1985) 9 Neuroscience & Biobehavioral Reviews 615, 617.

nonhuman entities. Some humans may experience their greatest pleasures when securing the protection of forests in ways that ensure nonhuman life can use the forest as they please, in turn the practice of environmental awareness could be determined a higher pleasure. What this example illustrates is that Mill's scale of pleasures is wholly contingent on human values; the value of nonhuman life depends upon human estimations of their worth. Since the anthropocentric or sentientist character of utilitarianism positions humans as the foremost objects of moral concern[86] all nonhuman life and the environment are disadvantaged from the outset as a consequence.

The second of the two criticisms that can be put to utilitarian approaches to environmental protection concerns an inherent problem with the maximisation of utility. Utilitarianism is a deficient theory in terms of providing environmental protection because this is only possible if the majority of people support causes that offer environmental protection. If, as hedonist utilitarians claim, the only maximand is pleasure then the pleasure derived from the acts of a sadist must be understood as contributing to overall utility.[87] This is to be the case even if the pleasure of the sadist does not outweigh the pain of those being afflicted (and thus their actions deemed bad). Similarly, if utility is accepted as being increased by the satisfaction of preferences then because utility singularly comprises all forms of the good all preferences are equally valid. Accordingly, it is necessarily the case that the preferences of people to, for example, emit large quantities of carbon dioxide into the atmosphere must be regarded as contributing the same addition of utility as another group of people who have reduced their emissions. This does not leave utilitarianism unable to offer environmental protection

[86] Brian G Wolff, 'Environmental Studies and Utilitarian Ethics' (2008) 32 Environmental Studies 6, 8.
[87] John Finnis, *Natural Law and Natural Rights* (n 78) 112.

necessarily, but it does leave the prospect of the environment in the hands of the majority since it is their preferences that will determine the content of utility's notion of the good.

Even if consensus on utility was achieved, deciding how to maximise it poses another problem for utilitarianism because environmental issues are too far removed from the mental states they affect in humans that determine utility. For this reason Finnis claims that utilitarianism's project to maximise the good is vacuous.[88] In some instances what incommensurability points to is not an inability to measure things against one another, but that doing so may produce multiple outcomes. Nevertheless this presents a problem for utilitarianism, as the theory offers no objective scale against which to measure which possible good course of action ought to be followed. Placing environmental issues on a scale is a more difficult prospect because they (currently) elude comprehensive measuring. How can ocean acidification, human overpopulation, loss of biodiversity and pollution be weighed against one another? Simmonds suggests that arguments against incommensurability can be defeated if "ordinal" as opposed to "cardinal" judgements are used.[89] Precise calculations and measurements are not required, Simmonds argues, and it is sufficient to establish a ranking. Though this seems sensible for some issues such as "less pain is better than more pain", the complexity and uncertainty of environmental issues make them exceptions to such reasoning. The pejorative nature of words such as "pollution" do make it easy to claim that "less pollution is better than more pollution", but the complexity and uncertainty of the consequences of the effects of chemical compounds and particulate matter, make environmental issues exceptions to even ordinal computations of the good.

[88] Finnis writes, "In short, no determinate meaning can be found for the term 'good' that would allow any commensurating and calculus of good to be made in order to settle those basic questions of practical reason which we call 'moral' questions." ibid 115.
[89] Simmonds (n 58) 125.

The principle of the maximisation of utility also encounters the difficulty of calculating sum mental states or sum mental preferences for groups of individuals, whether this is a state populous, humanity in general or future generations of humans. Utilitarianism fails the environment in relation to transboundary pollution for example, where it permits benefits to a majority of one group of people despite these potentially causing suffering to another group in a different state.[90] Utilitarianism fails the environment when action or inaction is consequentially determined by the sum mental states or preferences of humanity. This is the case because utilitarianism logically obliges the "greatest good" to be determined by whatever constitutes the majority view of this greatest good. Evidence of this criticism is seen with the expectation that developing countries address global environmental problems despite not having contributed to environmental causes to the same extent as developed countries, either temporally or quantitatively. The principle of common but differentiated responsibility supports this argument and suggests there is a need to add a degree of fairness in order to address the deficiencies of the utilitarian model. In introducing common but differentiated responsibility, Principle 7 of the Rio Declaration states "developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development"[91], despite this not being necessarily the fulfilment of the developed states' preferences. Utilitarianism would also fail future generations in not valuing, and so not protecting, the sources of benefit, advantage, pleasure or happiness that could include the natural environment.

Proponents of utilitarianism may reply that such criticisms are unrealistic and that day-to-day humans do weigh up seemingly incommensurable qualities and quantities. Indeed there may

[90] Prasanta K Pattanaik, 'Limits of Utilitarianism' in Paul Annand, Prasanta K Pattanaik and Clemens Puppe (eds),
*Rational and Social Choice: An Overview of New Foundations and Appreciations* (OUP 2009) 326.
[91] Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development (14 June 1992) 31 ILM 874 (Rio Declaration) Principle 7.

be instances in which human pleasures or preferences align with the interests of the environment and environmental protections may accordingly result. However, to establish moral or prudential prescriptions from observations of human behaviour does not present an inviolable moral theory. Objective accounts of the good highlight the inadequacy of the utilitarian claims. They suggest that, contrary to utilitarianism, it is non-consequentialist considerations that allow for day-to-day decision-making. Whereas utilitarians hold that objective moral theories can be (in sum or in part) reduced to considerations of utility, to the contrary, objective accounts of the good accommodate consequentialism but must also accommodate other factors. Finnis discusses a situation where damage is unavoidable but there is a choice as to whether to stun or wound, wound or maim, maim or kill.[92] In objective accounts of the good human capacities of reasoning allow for speculative consideration of the consequences of different acts of damage. Consideration of the pain that would be avoided by pursuing the lesser forms of damage forms part of an individual's intellectual understanding and practical reasoning.[93] This is the case for all preferences, not just the preference of maximising pleasure or happiness and minimising pain. However, if consequences are the *only* consideration in deciding how to realise the good then inconsistencies result and, where environmental issues are concerned, nonhuman life and the environment are only protected in so far as such protections accord with delivering human pleasure or preferences.

Another example will further clarify the inherent problems of utilitarianism when it is applied to environmental issues. Some humans may gain utility (feeling pleasure or the satisfaction of a wider set of preferences) from the poaching of elephants. In utilitarian calculations the only reason why such action would be prohibited is if, as a consequence of such action, another –

[92] John Finnis, *Natural Law and Natural Rights* (n 78) 111.
[93] Finnis states, "One's actions should be judged by their effectiveness, by their fitness for their purpose, by their utility, their consequences…" ibid.

perhaps the local elephant conservationist – was deprived of a greater amount of utility. This example demonstrates that utilitarianism affords no value to nonhuman life directly and that the action of killing an elephant is not inherently wrong. For some (such as elephant poachers) this may be an acceptable and rational conclusion when it comes to elephants but the argument appears weaker when the elephant is substituted for a human. Why is this the case when the action is the same and is still that of killing another living organism?

If enough people were to gain utility from "poaching" an individual human then utilitarianism must endorse such an enterprise since it produces the greater overall utility. Williams argues against this unfortunate utilitarian logic in his example of Jim and the Indians.[94] Williams suggests that the utilitarian who is faced with the dilemma in which they must kill one Indian to ensure the survival of the remaining nineteen may indeed rationalise that doing so is the right thing to do. Not doing so would be to act contrary to the best overall utility and if he did not act Jim may feel a negative responsibility in having allowed all twenty people to be killed by their captors.[95] Yet if utilitarianism is to provide a comprehensive and coherent moral theory Jim must not only kill the individual but must have no moral qualms in doing so; utilitarianism cannot account for the moral disgust that Jim may feel when confronted with one choice, both outcomes of which may repulse him.[96]

This one-way relationship that utilitarianism obliges (that nonhuman life and the environment exist to maximise the good of sentient life) runs contrary to biological and ecological science. Insights into organisms, species interaction and the interdependence of organism communities

[94] Bernard Williams, 'A Critique of Utilitarianism' in J J C Smart and Bernard Williams (eds), *Utilitarianism: For and Against* (CUP 1973) 97-117.
[95] Williams criticises utilitarianism's negative responsibility because it is contrary to the idea that "each of us is specially responsible for what he does, rather than for what other people do." ibid 99.
[96] ibid 103-4.

and ecosystems indicate that humans (and indeed other life) require a particular environment in order to live and flourish. In support of this, Folke and Gunderson find, "People and societies are embedded in the biosphere, depending on the functioning and life support it provides, while shaping it globally."[97] Although humans require the resources of the planet this does not determine the resources to be exclusively for human instrumental use – this is merely how utilitarianism understands human interaction with the rest of the world. Despite Bentham's famous statement, "The question is not, Can they *reason*? Nor, Can they *talk*? But, Can they *suffer*?"[98], indicating that utilitarianism concerns the suffering of all sentient entities. This same utilitarianism perversely leaves all non-sentient entities and the environment on which all life depends only counting for their instrumental use.

Despite these persuasive criticisms utilitarianism continues to influence modern thinking and can even be shown to have become the default ethical model. This can be evidenced by the argument that even its critics acknowledge utilitarianism to be the paradigmatic ethical theory. Rawls, for example, emphasises his theory of justice as an alternative to utilitarianism. He argues that utilitarianism ignores the important issues of distributive justice and equality, because "utilitarianism does not take seriously the distinction between persons."[99] That his argument sets out to question the utilitarian account of justice and provide an alternative conception[100], suggests that utilitarianism has been accepted and is entrenched as the foundation of modern ethics. Other prominent figures of jurisprudential thinking demonstrate similar tendencies. Hart shares with Bentham a positivist theory of law, yet his work can be

[97] Carl Folke and Lance Gunderson, 'Reconnecting to the biosphere: a social-ecological renaissance' (2012) 17 Ecology and Society 55, 55.
[98] Bentham (n 28) ch XVII, para VI, 226, fn 2.
[99] John Rawls, *A Theory of Justice: Revised Edition* (Harvard University Press 1999) 24.
[100] ibid 20.

understood to be, at least in part, a response to the assumptions of utilitarianism.[101] Dworkin also accepts utilitarian (along with libertarian) thinking to be the orthodox political and moral ideas of modern times, before proceeding to challenge their conceptions.[102]

### 2.3 Conclusion

The discussed philosophical traditions present conceptions of the place of humans in the world and notions of responsibility. Cosmological arguments both of naturalness and creation gave way to human entitlements and natural rights. Though the natural law maintained a sense of responsibility to the world that limited human entitlement, these inherent limits were eliminated by the amoral insistence of utilitarianism; wherein human happiness is the only ethical criteria to inform the way humans ought to act. This is inadequate in terms of environmental protection as at best the environment is regarded as a vehicle for human satisfaction, and at worst, environmental concerns are altogether ignored.

As awareness of environmental issues increased throughout the twentieth century, modern environmental thinking can be seen to have developed in response to the intellectual situation in which utilitarianism has come to dominate. The next chapter considers the four modern environmental philosophical perspectives of anthropocentrism, biocentrism, sustainable development and ecocentrism.

[101] Part of Hart's theory in *The Concept of Law* is developed through "exposing the flaws in Austin's". Nigel E Simmonds, *Central Issues in Jurisprudence* (3rd edn, Sweet & Maxwell 2008) 146.
[102] Ronald Dworkin, *Law's Empire* (Fontana 1986) 73.

## Chapter three

## ENVIRONMENTAL PHILOSOPHICAL PERSPECTIVES

Environmental philosophies question how humans ought to regard or act towards the environment. Is the environment only to be protected for the benefit of humans? Does the current generation of humans owe obligations to future generations? What might these obligations be and why should they be promoted? Are the obligations not only legal but also moral? Might similar obligations also be owed to non-human species? Could moral concern be extended more widely to plants or ecosystems? Different environmental philosophical perspectives provide different answers to these, and other, questions.[1]

To substantiate these positions and to construct a typology that will aid the subsequent chapter's case analysis this chapter has two sections. Presented as movements away from utilitarianism section 1 sets out the modern environmental perspectives of anthropocentrism, biocentrism, sustainable development and ecocentrism. The tensions that exist within each accepted philosophy are assessed as well as their strengths and weaknesses in relation to one another. Section 2 presents Taylor's "biocentric outlook on nature"[2] as a remedy to modern paradigmatic utilitarian thinking. Taylor's conception presents a viable ethic that encourages genuine environmental duties to nonhuman life and the environment.

[1] The environmental philosophical perspectives of anthropocentrism, biocentrism, sustainable development and ecocentrism have been introduced in the thesis introduction. They are discussed in greater detail below.
[2] Paul W Taylor, *Respect for Nature: A Theory of Environmental Ethics* (Princeton University Press 1986).

### 3.1 Four major environmental perspectives

This section explores the four major perspectives of contemporary environmental philosophy: anthropocentrism, biocentrism, sustainable development and ecocentrism. The discussions of the perspectives that follow can be understood as responses to utilitarianism. To varying degrees these responses have sought to distance themselves from the assumptions of utilitarianism in order to establish stronger environmental protections.

The discussions are not intended as a contribution to the literature necessarily but serve to construct a typology. Of the hundreds of writers who have analysed the perspectives only a selection of the most influential and acute are presented, those whose accounts provide a sufficient basis to enable case analysis.

#### a) Anthropocentrism

The anthropocentric philosophical perspective regards the environment as instrumental to human ends; its central claim is that the environment is to be conserved or improved for the humans that inhabit it.[3] The value of humans is not regarded as derivative of their usefulness to anything else. Different instrumental values may generate or contribute to the generation of environmental protections. Aesthetic or cultural bonds between humans and the nonhuman world may exist. Also, there may be economic reasons for conserving the resources of the environment. This discussion will sketch these different categories of anthropocentric instrumental value. Separating human values into these categories is useful for the purposes of

[3] John Passmore, 'Philosophy and Ecology' (1999) 1 Proceedings of the Twentieth World Congress on Philosophy 141, 146.

explanation, however this should not discount the obvious, that such valuations may coexist and may influence one another.

Anthropocentrism regards aesthetic valuations of the environment as capable of motivating adequate environmental protections. In support of this claim, Callicott suggests such values motivate to a greater extent than ethical values in terms of what natural resources ought to be conserved.[4] For example, a large number of people in the vicinity of a forest may express their aesthetic valuations to be sufficient reason to establish protection of that forest. Certainly other values may affect how this forest is regarded and what subsequently happens to it, but these do not discount the normative force of aesthetic value itself. Even if this claim is accepted, it nevertheless presents a weakness in the anthropocentric perspective. The weakness relates to human preference with that which is regarded as beautiful being more likely to generate environmental redress than something regarded as ugly.

Aesthetic experience deserves further attention as there are both subjective and objective accounts. Subjective accounts may be understood as a form of artistic appreciation; the beautiful parts of the environment are those that generate human enjoyment or pleasure.[5] In relation to the natural environment subjective accounts of aesthetic value would be based on sensory experience and cultural preferences informing what is picturesque, beautiful and sublime.[6] For example, due to an individual's admiration for bees and other insects they may grow flowers in their garden, protecting them through suitable soil nutrition and irrigation practices. Such valuations may attract criticism of being obsessed with scenery, superficial,

[4] J Baird Callicott, 'Leopold's Land Aesthetic' in Allen Carson and Sheila Lintott (eds), *Nature, Aesthetics, and Environmentalism: From Beauty to Duty* (Columbia University Press 2007) 106.
[5] Yuriko Saito, 'The Aesthetics of Unscenic Nature' (1998) 56 The Journal of Aesthetics and Art Criticism 101, 103.
[6] Allen Carson, 'Aesthetic Appreciation of Nature and Environmentalism' in Anthony O'Hear (ed), *Philosophy and the Environment* (Royal Institute of Philosophy 2011) 139-40.

trivial and morally vacuous.[7] Nevertheless as statements of human preference based upon maximising pleasure they reflect the pursuit of utility, aligning anthropocentrism closely with utilitarianism. Environmental protections that result from such valuations would be contingent on the subjective admirer, which presents a weakness in terms of the environmental protection provided.

In contrast to subjective accounts, objective accounts of aesthetic value would hold that it is an object's qualities that make it beautiful and not the admiration of the object. For example, a redwood tree may be beautiful due to the abstracted representation of 'nature', 'wildness' or 'wilderness' etc. that is associated as intrinsic to that tree, and without such qualities it would not be possible to admire it genuinely.[8] Objective accounts of aesthetic value can lead to environmental protections that are not contingent on a subjective admirer. Authorities in the UK, for example, have powers to designate protections for places of natural scenic beauty, called Areas of Outstanding Natural Beauty (AONBs). As an example of the environmental protection that can result, AONBs create a presumption to refuse planning permission, instead prioritising "conserving or enhancing the natural beauty".[9] In terms of achieving stronger environmental protections objective accounts may be understood as preferable to subjective accounts in that they create obligations on everyone to attain to certain behavioural standards rather than such standards only being met by those who admire the object in question.

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[7] ibid 142.

[8] The two accounts of aesthetic experience are a matter of philosophical disagreement. For objective accounts of aesthetic value and discussion of both see Monroe C Beardsley, 'What Is An Aesthetic Quality' in Michael J Wreen and Donald M Callen (eds), *The Aesthetic Point of View: Selected Essays of Monroe C Beardsley* (Cornell University Press 1982); Alan H Goldman, 'Aesthetic Qualities and Aesthetic Value' (1990) The Journal of Philosophy 23; and, Frank Sibley and others, *Approach to Aesthetics: Collected Papers on Philosophical Aesthetics* (OUP 2001). Note that most in the natural law tradition would subscribe to the objective account as it accords with the view that there is a set of principles by which to participate in the eternal law and a method – practical reasoning – for living to those principles. So understood, it would not be possible to admire genuinely an artefact that was not beautiful. Natural law and the natural law tradition are discussed above, text to n 24 ch 2.

[9] Countryside and Rights of Way Act 2000, s 85(1).

Alternatively it can be argued that in aesthetic valuations it is the human experience that is valued and not the environment itself. If what is valued is actually the human sensory experience when a forest is seen or walked in, then artificial trees could replace forests of trees without changing aesthetic valuations. Tribe makes this argument finding that with an increasing ability to artificially satisfy the wants of sensory experience, human wants and needs are no longer dependent on natural objects.[10] Humans may discount other values in favour of aesthetic value; the suggestion of replacing forests with plastic trees demonstrates how aesthetic appreciation can overwhelm other environmental values.[11] The Eden Project in the United Kingdom, though it contains natural organisms, is an example of an artificial environment that is in part designed to replicate sensory experience of ecosystems not native to the country: "With the awe-inspiring domes and enormous trees towering above you, you'll follow the path deep into our vast indoor jungle and find surprises around every corner."[12]

The anthropocentric perspective implies other instrumental values as being capable of motivating human action so as to be in conformity with the ecological requirements of the environment, which is afforded instrumental value in innumerable ways from cultural interpretations and human experience. The anthropocentric perspective portrays the environment as a source that may be valued because, much like hospitals, schools or churches; it can be regarded as enhancing human life. The environment provides materials capable of healing, it can inform and influence human character and can be the source of

[10] Lawrence Tribe, 'Ways Not To Think About Plastic Trees: New Foundations for Environmental Law' (1973) 83 Yale Law Journal 1315, 1326.
[11] Rolston suggests aesthetic valuations ought to complement other values. "Appropriate aesthetic experience ought to be "up to" the forest, that is, adequate to its form, integrity, antiquity, value; but whether this happens is "up to" me." Holmes Rolston III, 'Aesthetic Experience in Forests' (1998) 56 Journal of Aesthetics and Art Criticism 157, 162.
[12] 'Rainforest Biome' (*Eden Project*) <http://www.edenproject.com/visit/whats-here/rainforest-biome> accessed 30 October 2015.

spiritual connection.[13] Muir, for example, can be seen to have had a spiritual relationship with the environment.[14] Feeling enraptured by the Hetch Hetchy Valley he campaigned to protect the area over competing plans to build a dam. That the Valley was the object of Muir's empathy remains an anthropocentric conception; had the Valley been preserved it would have been instrumental in maintaining Muir's satisfaction. This is not to say that environmental goods cannot be secured by human action, only that they would be an instrumental consequence.

The instrumental valuation of anthropocentrism reduces the environment to an object of human control or exploitation. This has the related effect of continuing the separation of humans from the environment. As the example of Muir's spiritual connection suggests, human values permeate all environmental perspectives; the conceptions of conservation, biology, ecology and sustainable development are themselves all goal orientated.[15] The Muir example also suggests that anthropocentrism does not emphasise the cultural relationships and spiritual encounters with environment as much as it does the pleasure derived from them. Again this corresponds to the utilitarian pursuit of utility and indicates close associations between anthropocentrism and utilitarianism. The implication of this is that anthropocentrism, as with utilitarianism, encourages an unlimited conception of how humans ought to act in relation to the environment.

The anthropocentric perspective tends towards conservation practices in which the environment is valued instrumentally and regarded as a physical resource base to be

[13] Holmes Rolston III, *Environment Ethics: Duties to and Values in The Natural World* (Temple University Press 1988) 25-26.
[14] Andrew J Joffman and Lloyd E Sandelands, 'Getting Right With Nature: Anthropocentrism, Ecocentrism and Theocentrism' (2005) 18 Organization and Environment 141, 143.
[15] Sahotra Sarkar, *Environment Philosophy: From Theory To Practice* (Wiley-Blackwell 2012) 3.

perpetually maintained for future generations of humans to draw utility from. [16] Conservation practices are associated with managing the natural resources of the environment for human use.[17] These practices are utilitarian in that they advocate maximising the utility to be derived from natural resources. Scientific and technological advancement encourages development and the exercise of control over the environment. In support of this understanding of conservation practices, Pinchot writes, "the first duty of the human race is to control the earth it lives upon." [18] Principles of conservation may include upholding the environment's regenerative capacity, using renewable resources, using plentiful minerals before less plentiful ones, and encouraging recycling.[19] Conservation practices and the exercise of human control over the environment may nevertheless produce environmental goods. As will be recalled, Locke's labour theory can be argued as implying that humans are uniquely positioned to unlock the potential of the planet.[20] Conservation practices reflect a similar ideal; through an understanding of the environment and its complex ecological systems humans may be able to improve the resources on offer and their productivity.[21]

The anthropocentric perspective includes optimistic views of changes to agriculture, industry and future technologies as aspiring to lessen the risk of dangers that threaten the environment. Valuing the environment instrumentally may generate environmental protections; yet doing so is far more likely to prioritise the immediate concerns of humans such as quality of life or the

[16] Mark Sagoff, 'Settling America or The Concept of Place in Environmental Ethics' (1992) 12 Journal of Energy, Natural Resources and Environmental Law 350, 405.
[17] ibid 403.
[18] Gifford Pinchot, *The Fight for Conservation* (Doubleday, Page & Company 1910) 45.
[19] Talbot Page, *Conservation and Economic Efficiency; An Approach to Materials Policy* (John Hopkins University 1977) 175.
[20] See above, text to n 47 in ch 2.
[21] Allan Schnaiberg, *The Environment: From Surplus to Scarcity* (OUP 1980) 11.

accumulation of wealth achieved through growth.[22] The ideal of growth has received much criticism both because it simply implies more of the same[23] and because there cannot be certainty that economics or technology will be able to solve environmental issues. Arguments in this regard suggest a need for philosophical solutions, perhaps to change the human relationship with and attitude towards the environment so as to not require solutions to environmental abuses in the first place. Hardin disputes the potential fix of both economics and technology.[24] He reasons that the economic system compels humans to increase their instrumental use of the environment without limit.[25] That this occurs in a world of finite resources means the only resolution is to address population levels. Despite such warnings the world population continues to grow. This suggests that the alterations to human patterns of instrumental use of the environment proposed by the anthropocentric perspective, are disregarded or perhaps that science and technology is expected to provide solutions. At the start of the twentieth century the global population was approximately one and a half billion.[26] The most recent global increase from six to seven billion people occurred in just fourteen years, between 1999 and 2013.[27] A Copernican understanding of these figures holds that the economic market and human ingenuity will be able to address environmental concerns and scarcities in resources[28] and that a greater population pool increase the chances of resolving environmental issues. The anthropocentric perspective has much in common with these views

[22] Suzanne Gagnon Thompson and Michelle Barton, 'Ecocentric and Anthropocentric Attitudes Towards the Environment' (1994) 14 Journal of Environmental Psychology 149, 150.
[23] Gray has called growth "the most vulgar ideal ever put before suffering humankind." John Gray, *Beyond the New Right: Markets, Governments and the Common Environment* (Routledge 1994) 127.
[24] Garret Hardin, 'The Tragedy Of The Commons' (1968) 162 Science 1243, 1243.
[25] ibid 244.
[26] 'The World at Six Billion' (*UN Population Division*, 19 September 2001) <http://www.un.org/esa/population/publications/sixbillion/sixbilpart1.pdf> accessed 30 October 2015, 3.
[27] 'From 6 Billion to 7 Billion: How population growth is changing and challenging our world' (*Population Institute*, September 2011) <https://www.populationinstitute.org/external/files/reports/from-6b-to-7b.pdf> accessed 30 October 2015, 1.
[28] Norman Myers and Julian Lincoln Simon (eds), *Scarcity or Abundance: A Debate on the Environment* (W W Norton & Co 1994) 65.

in that it emphasises scientific, technological and economic solutions for environmental issues. An alternative understanding is the Malthusian approach where the human population is expected to grow exponentially[29], which would dramatically increase the consumption of natural resources, inevitably leading to global famine.[30] Both anthropocentric and Malthusian accounts strongly suggest that population figures will contribute to ecological and environmental issues unless values regarding how the environment is to be used can be changed.

Other anthropocentric arguments suggest that a possible change in how the environment is regarded may be achieved by conferring rights on the environment.[31] As a possessor of rights, trees would in principle have value in themselves and would not be regarded as existing only for human use.[32] Legal rights for trees, for example, would contribute towards protecting the planet on which humans depend and it may change human consciousness for the better.[33] This argument implies that instrumental valuations of the environment and recognising the intrinsic value of the environment might be mutually reinforcing. This would strengthen the anthropocentric perspective, as it would accommodate greater environmental protections with the "personal growth and satisfaction" of humans.[34] Stone argues for the extension of the right to legal standing of trees by analogising the legal status of corporations as "persons" to the environment. For Stone, natural objects and the environment count jurally because legal

[29] Alex de Sherbinin and others, 'Population and Environment' (2007) 32 Annual Review of Environment and Resources 345, 348.
[30] Thomas Malthus, *An Essay on the Principle of Population* (OUP 1999) 61.
[31] Christopher D Stone 'Should Trees Have Standing? Towards Legal Rights For Natural Objects' in Joseph DesJardins (ed), *Environmental Ethics: Concepts, Policy, Theory* (Mayfield Publishing Company 1999) 203.
[32] The reality of differential treatment is acknowledged, for some trees to be cut down for certain purposes in certain instances. ibid 205.
[33] Stone writes, "… There are strong reasons for such a changed consciousness from the point of making us far better humans." ibid 210.
[34] ibid.

actions can be initiated at their behest, they can be injured, and they can be benefitted.[35] Though, obviously, natural objects cannot articulate their rights themselves they may be given guardians to represent and enforce their rights, in the same way corporations have representatives.[36] Children, slaves, women, racial minorities, fetuses, endangered species have been granted rights (albeit to different extents in different states), so why not extend this to natural objects? The important idea to distil from Stone's writing is the idea that as extensions of rights requires humans to be guardians of natural objects, this makes the natural objects once again dependent on human assertions of their worth. As previously noted, beautiful environments would stand more chance of securing human representation and possibly protection than ugly ones.

The associations between anthropocentrism and utilitarian thinking suggest the perspective represents only a weak movement away from an environmentally ruinous ethic towards a philosophical attitude that adequately protects nature and the environment. Anthropocentric understandings of intrinsic value support this argument. Callicott, for example, defines anthropocentrism as reserving intrinsic value for humans.[37] Recognising something's intrinsic value is to appraise its worth separately from the value it may have due to its instrumental usefulness. In common with one another, both anthropocentrism and utilitarianism suggest a special significance of humans and that humans are distinguished from the world because they have intrinsic value. The anthropocentric perspective presents accounts of humans

[35] ibid.
[36] ibid 206.
[37] J Baird Callicott, *Beyond the Land Ethic: More Essays in Environmental Philosophy* (State University of New York Press 1999) 14. However, most definitions of anthropocentrism tend to avoid firm affirmations of humans having intrinsic value, though it may be implied. For example, anthropocentrism is "the view that the earth and all its nonhuman contents exist or are available for man's benefit and to serve his interests." Bryan G Norton, *Why Preserve Natural Variety?* (Princeton University Press 1987) 136 quoting Routley and Routley.

possessing particular attributes – such as acting rationally, having interests or consciousness[38] – that qualify them as having intrinsic value. The intrinsic value of humans is implicit in utilitarianism. As discussed above, the normative goal of utilitarianism is maximising utility and the tradition has no conception of intrinsic value at all.[39] Nevertheless the theory imposes a value system in which utility can be maximised through increased benefit, advantage, pleasure, good or happiness. This imposition of a value system favours human conceptions of utility and presumes the species' intrinsic worth. To illustrate this, in the classical utilitarian account there is a value system in which pleasure is promoted. Within this, the human experience of pleasure or of pain is (conveniently) evaluated by humans to be more pronounced than in nonhuman animals, establishing a hierarchy in which human are prioritised.

The attributes that anthropocentrism uses to substantiate the intrinsic value of humans illustrates a weakness in addition to those which can be implied from its commonalities with utilitarianism. If human attributes are decisive in distinguishing human intrinsic value then the existence of such attributes in other animals, such as higher functioning mammals, ought to extend intrinsic value to nonhumans. Distinguishing on the basis of intrinsic value also poses problems in relation to humans. Humans who do not yet possess the required attributes (e.g. fetuses) may nevertheless be recognised as having intrinsic value. Furthermore, humans who no longer possess the attributes they once had are not regarded as having lost their intrinsic value. Arguments for anthropocentrism are contradictory; maintaining the threshold of the attributes that qualify something as having intrinsic value would exclude some humans, whilst lowering it would increase the number of qualifying nonhuman organisms.

[38] Gunnar Skirbekk, 'Discourse-Ethical Gradualism: Beyond Anthropocentrism and Biocentrism?' (1999) 1 Proceedings of the Twentieth World Congress on Philosophy 95, 98.
[39] See above, text to n 65ff in ch 2.

What this tension in the anthropocentric perspective demonstrates is that though the process of valuing is anthropogenic, the assertion that only humans are of moral value is just one (the anthropocentric) perspective, and furthermore, that there may be good reason to adopt different perspectives. Callicott distinguishes between anthropogenic and anthropocentric statements: "The *source* of all value is human consciousness, but it by no means follows that the *locus* of all value is consciousness itself or a mode of consciousness like reason, pleasure or knowledge."[40] Though it is true that value is anthropogenic and requires human subjectivity to "coagulate"[41] it, the anthropocentric perspective attributes this value in particular ways. Anthropocentric notions of both instrumental and intrinsic value, that remain broadly based in utilitarian thinking, strongly suggest the anthropocentric perspective is unable to provide satisfactory environmental protection. This is because anthropocentrism's central claim is the advancement of what is of instrumental use to human happiness, regardless of its environmental impact.

**b) Biocentrism**

Biocentrism can be understood as a response to the inadequate environmental protections of anthropocentrism. Seen in this light it presents a greater movement away from utilitarianism and towards a philosophy that adequately protects nature and the environment. Biocentrism does not consider human values to be a problem. Rather, where biocentrism finds fault with anthropocentrism is that it excludes the intrinsic value of nonhuman organisms. Though this may itself be insufficient from the point of view of ecocentrism, the biocentric perspective

[40] J Baird Callicott, *In Defense of the Land Ethic: Essays in Environmental Philosophy* (State University of New York Press 1989) 133.
[41] Holmes Rolston III, 'Value in Nature and the Nature of Value' in R Attfield and A Belsey (eds), *Philosophy and the Natural Environment* (CUP 1994) 14.

can be regarded as an important expansion of intrinsic value and moral considerability to nonhuman life. The central claim of biocentrism is the equality of species.[42] This discussion provides an overview of the perspective and the major tensions that exist within it: to what forms of life should moral concern be extended, what can justify this extension and, presuming these claims are established, how can competing claims of humans and animals be reconciled.

The biocentric perspective has different accounts of what qualifies an organism as having intrinsic value – this value is attributed depending on whether certain factual conditions are fulfilled. Different conceptions of how to attribute intrinsic value fragment biocentrism. This is a weakness of the perspective disallowing a united argument to be formed and no singular argument has the support of all adherents of biocentrism. It can also be understood to strengthen the perspective in terms of presenting it with several arguments as to why moral considerability ought to be extended beyond humans. Factual conditions are in large part informed by biology but they also contain an ethical statement in so far as the different biocentric accounts ascribe different value to particular biological attributes over others. For example, Taylor regards experiencing harm or benefit from something as requisite for intrinsic value.[43] Johnson's measure for intrinsic value, however, is that the life form must exhibit metabolic processes, a state of low entropy, organic unity and self-identity.[44] Different again, Varner's qualification is whether the entity has been formed from natural selection.[45] The factual condition that Agar reasons as necessary is simply that if something is alive then

[42] James Sterba, 'A Biocentrist Strikes Back' (1998) 20 Environmental Ethics 361, 363.
[43] Taylor, *Respect for Nature* (n 1) 68-71.
[44] Lawrence E Johnson, 'Towards the Moral Considerability of Species and Ecosystems' (1992) 14 Environmental Ethics 145, 147-57.
[45] Gary Varner, 'Biological Functions and Biological Interests' (1990) 27 Southern Journal of Philosophy 251, 260.

it ought to have moral significance.[46] Self-consciousness and reason are often posited as characteristics that distinguish human from nonhuman life. When used to distinguish which forms of life should have moral consideration such characteristics are not wholly empirical and are in part ethical decisions. Midgley regards extensions of equality to involve selection; "one must have picked on a certain area of unfair privilege which one wants, and can hope, to remedy."[47] By insisting on sentience as providing a set of attributes that ought to generate an equality of moral consideration, biocentrists seek to enlarge the group that is recognised to have moral importance. Although widened, the group still demarcates; there are still forms of life existing outside of the group that do not qualify.

The principle of equality of species advocated by the biocentric perspective is an effort to address speciesism. Whichever attributes are required for nonhuman animals to qualify as possessing intrinsic value, individual humans that do not possess these particular attributes are nevertheless not commonly considered to be without intrinsic value. Clark reasons that if there are principles by which "weak humans" are protected then by these same principles moral considerability must be extended to animals[48], or at least higher mammals that exhibit similar attributes. If such principles are not extended to nonhumans the result is speciesism, the discrimination of nonhumans. Debates in bioethics as to the different views on the moral consideration of fetuses demonstrate this difference. Fetuses do not exhibit the five traits suggested by Warren to constitute a "person". Fetuses do not possess consciousness, reasoning, self-motivated activity, the capacity to communicate, and self-awareness.[49] That they nevertheless are widely regarded as having intrinsic value is indicative of speciesism,

[46] Nicholas Agar, 'Biocentrism and the Concept of Life' (1997) 108 Ethics 147, 147.
[47] Mary Midgley, *Animals and Why They Matter: A journey around the species barrier* (Penguin Books 1983) 82.
[48] Stephen Clark, *The Moral Status of Animals* (OUP 1977) 34.
[49] Mary Anne Warren, 'On the Moral and Legal Status of Abortion' (1973) 57 The Monist 43,

suggesting there is no objective basis for nonhuman animals not to have moral considerability. Attempts have been made to avoid this issue by referring to the future potential of fetuses to grow into adults.[50] Though such an argument may accommodate fetuses it does not address adult humans who come to lose any of the traits that Warren posits, be it through disease or accident. Illustrative of speciesism, these humans are not said to have lost their intrinsic value.

The central claim of biocentrism to establish the equality of species can be understood as incorporating or removing the need for assessing the intrinsic value of nonhumans by establishing conceptions of the good that are shared between humans and other animals. This can be argued to be a weakness of the perspective in that such an approach merely avoids the issue of the intrinsic value of animals and does not resolve it. Substantiating equality of species neglects the possibility of (and merits in) there being different ideas of the good in different species. This argument can be made with reference to Finnis. He suggests there are several goods that humans may achieve: knowledge, friendship, play, aesthetic experience, spirituality and practical reasonableness.[51] If nonhuman animals are assessed by this standard they are certainly unable to achieve some of these goods. Yet, as explored in detail below, Finnis' model of human goods presents an understanding that can be applied more widely to nonhuman life.[52] The inability for animals to meet the standard imposed of human goods does not prevent there from being a separate standard of animal goods. In the same way Finnis' standard is based upon the nature humans have, animal nature could form the basis of a standard that is used to determine the good of animals. In principle this conception seemingly

[50] Robert Larmer, 'Abortion, Personhood, and the Potential for Consciousness' (1995) 12 Journal of Applied Philosophy 241.
[51] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) ch 3 and 4.
[52] See below, text to 80ff in ch 5.

resolves conflicting claims of moral consideration by suggesting a naturally occurring innate good of animals and not a statement of their value or lack of value to humans. Yet (also discussed below) weaknesses in this approach are exposed when differential treatment is required, both between and within species. This is because a human evaluation of different animal goods may introduce scales on which respective goods of different species could be judged that would implicitly lead to a ranking of different species.

Compared with anthropocentrism, the central biocentric claim of establishing equality of species presents an expanded conception of the qualifying attributes of intrinsic value. Yet the perspective still determines moral considerability on either human attributes or anthropomorphised accounts of the worth of animals. Intrinsic value is recognition of something's inherent worth and requires an unconditional statement; otherwise it is an arbitrary basis for speciesism. Part of the reason for this may be the individualistic nature of biocentrism, a stance it shares with anthropocentrism. Exploring this argument, some supporters of biocentrism have sought to establish nonhuman animals as possessors of rights. Feinberg questions whether human characteristics such as reason or a sense of understanding are required for something to be a possessor of rights.[53] The previous examples of fetuses and incapacitated adult humans suggest they are not, for these groups of humans may possess rights despite not being able to articulate their understanding of them. The difference may be that nonhuman animals have no "interests", whilst fetuses and incapacitated adults do but they themselves cannot express them.[54] The biocentric perspective does not agree with such an argument because that which constitutes interests in humans may also be observed in nonhuman animals. That biocentrism does not regard the different interests of different

[53] Joel Feinberg 'The Rights of Animals and Unborn Generations' in Joseph DesJardins (ed), *Environmental Ethics: Concepts, Policy, Theory* (Mayfield Publishing Company 1999) 183.
[54] H J McCloskey, 'Rights' (1965) 15 Philosophical Quarterly 121, 124.

animals as sufficient reason to deny them intrinsic value can be explained by distinguishing between the will and interest theories of rights. Although the will and interest theories of rights contain weaknesses when applied to animals they do not exclude the possibility of all animals having an equal intrinsic value. The problems with the theories instead relate to the human intervention of having to decide which animal interests should trump others. On the one hand, the will theory conceives of there being specific criteria required in rights holders, such as humans being over a certain age or of rational mind, that qualify them to waive or demand the enforcement of their rights.[55] This not only excludes nonhuman animals from possessing rights but also many humans. However, will theorists regard rights as merely one way to express moral consideration; the exclusion of some groups of humans or animals does not necessarily deny them intrinsic value, it may only exclude recourse to judicial systems on a rights basis. On the other hand, the interest theory positions rights as being based on the interests of the right holders.[56] Initially this interpretation appears attractive since it seemingly includes a greater number of desires and accordingly accommodates more animals under the banner protection of rights. However, since the animal interest to feed would be equal to any human interest more rights may need to be violable so as to provide an adequate means for differential treatment.

There is tension within the biocentric perspective in relation to which organisms ought to be protected. Biocentrism is largely undefined in this regard and ranges from an extension of moral considerability being limited to sentient animals, to the recognition of intrinsic value in all organisms. That there is a range illustrates a weakness in the perspective as it makes biocentrism not just influenced by, but contingent on anthropogenic valuation. This weakness

[55] Matthew H Kramer, 'Refining the Interest Theory of Rights' (2010) 55 American Journal of Jurisprudence 31, 32.
[56] ibid.

is explored by Watson who suggests that the process of changing human attitudes to bring about the claims of biocentrism is itself an assertion of human superiority and of the separate place of humans in the world.[57] The close association this implies between biocentrism and anthropocentrism leaves biocentrism exposed to the same criticisms that befall the anthropocentric perspective, perhaps the most significant of which is the pervasiveness of utilitarian thinking. Biocentrism's undefined range again turns on both empirical and ethical distinctions. For example, the European Union has recently introduced not only improved standards of care for farmed chickens but also a statement as to how human behaviour needs to change to accommodate such changed conditions. It is regarded as "important that persons attending to chickens have an understanding of the relevant animal welfare requirements."[58]

The most incremental extension of moral considerability within the biocentric perspective is to organisms that demonstrate sentient attributes like those of humans. The pervasiveness of utilitarian thinking is apparent in this conception of biocentrism. Human interests are conative and include hopes and desires, aims and tendencies and achieving growth. Higher mammals such as chimpanzees also demonstrate such interests that provide sufficient reason, according to this conception of biocentrism, to recognise their intrinsic value. For Singer, sentience is important because it indicates a capacity to experience pleasure and pain.[59] Singer follows the classical utilitarianism of Bentham who supposed, "The question is not, Can they *reason*? Nor, Can they *talk*? But, Can they *suffer*?"[60] The experience of pleasure and the avoidance of pain are important distinctions in utilitarianism for they are used to determine which actions

[57] Richard A Watson, 'A critique of Anti-Anthropocentric Biocentrism' (1983) 5 Environmental Ethics 245, 245.
[58] Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production [2007] OJ L182/19, 20 para 9.
[59] Peter Singer, *Animal Liberation: Towards an End to Man's Inhumanity to Animals* (Thorsons Publishers 1976) 9.
[60] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Kitchener 2000) ch XVII para VI, 226, fn 2.

produce the good and which do not; those that do are regarded as providing utility.[61] Such arguments have been employed in British domestic law. The Animal Welfare Act 2006 provides an example of particular animal protection based upon the attribute of sentience. Protection is only afforded to vertebrates as they are the only animals capable of experiencing pain or suffering, which suggests its utilitarian basis.[62] To ensure this, human control of animals entails a responsibility to alleviate their "pain, suffering, injury and disease."[63]

The attribute of being able to feel pleasure and pain can also been criticised for only widening the criteria of organisms that are due moral consideration and not abandoning it altogether.[64] It is also suggestive of anthropomorphising human sensibilities, positioning them as objective criteria. Certainly, as humans it is generally considered bad to feel pain, but this need not be a threshold to determine the worth of nonhuman organisms. Singer introduces the experiencing of pleasure and pain because he regards the membership of the human species to be an arbitrary basis upon which to recognise intrinsic value.[65] If membership were to be used as a criterion then the actual differences between individual humans would be sufficient to negate equality outright. On this Singer writes, "If the demand for equality were based on the actual equality of all human beings, we would have to stop demanding equality."[66]

The ability to experience pleasure or pain does not lead Singer to expect all humans and animals to be treated identically. Instead, what he suggests is recognition of the equal interests of all sentient organisms and for nonhuman animals to not be treated differently only because

[61] Singer, *Animal Liberation* (n 59) 5-6.
[62] Animal Welfare Act 2006 Explanatory Note 11.
[63] ibid s 9 (2) (e).
[64] Midgley (n 47) 82.
[65] "Membership of a species is no more relevant in these circumstances than membership of a race or sex." Peter Singer, *Practical Ethics* (2nd edn, CUP 1993) 76.
[66] Singer, *Animal Liberation* (n 59) 3.

they are not human. This approach regards all qualifying animals (humans included) as being principally equal to one another. Singer regards equality as a moral idea and it is only an ethical choice as to whether nonhuman animals would count for one and none for more than one.[67] Singer regards the state of equality between any two individuals (two males or a male and a female for example) or a group of individuals as unconnected to their "intelligence, moral capacity, physical strength or similar matters of fact."[68] Though there are notable differences between humans and nonhumans the differences are not prohibitive of equal moral considerability, though this is not to say the differences would not produce differential treatment.[69] Singer's idea of personhood illustrates how his biocentric conception attempts to accommodate differential treatment, this being a necessary feature if the perspective is to be widely adopted. Personhood is not limited to humans but rather describes the attributes of all sentient animals such as self-awareness.[70] In this understanding, very young humans are excluded but adult apes and monkeys are included.[71] Differences within the attributes that denote a sentient life can be implied. Singer suggests that awareness of death, an attribute particular to adult human persons, would be sufficient to prioritise human interests over other sentient animals.[72] He makes this argument by suggesting that a human infant is not able to conceptualise their continued existence. Yet this construction of a hierarchy of sentient attributes is a weakness in Singer's biocentrism, for it again makes the recognition of intrinsic value dependent on human perceptions of importance.

[67] ibid 5-6.
[68] ibid 5.
[69] ibid 2-3.
[70] Singer, *Practical Ethics* (n 65) 96-97.
[71] ibid 67-68.
[72] ibid 97-98.

Taylor, who views all organisms as "goal orientated centres of life", provides a more expansive account that finds intrinsic value in all organisms.[73] As all organisms are included, Taylor's conception is not immediately prone to the same criticisms that have been highlighted in the sentience-based accounts. His conception can be regarded as marking the boundary between biocentrism and ecocentrism, although Taylor does not recognise the intrinsic value of inorganic nature. Also demonstrative of the divide between perspectives, Taylor's conception still concerns individual organisms and not collections of organisms such as ecosystems. Taylor accepts that plants do not lead conative lives in the sense of acting with volition but they can be seen to grow deliberately, things do not matter *to* plants but things do matter *for* them.[74] Plants can be observed to grow towards the light and like animals plants can be understood to live with purpose. Taylor uses this argument to expand the extension of moral consideration beyond the sentient life conceptions of biocentrism. This argument suggests that whether the purpose of plants growing towards the light is an attributed value or not is an empirical question. Instead it depends on what will motivate humans to recognise the intrinsic value of nonhuman life.

Using Taylor's conception as an example, biocentrism could regard the individual cells that form plants or animals as having intrinsic value in that they too are goal orientated. Biocentrism, however, does not adopt this level of abstraction, despite the sciences being able to provide such evidence. The reason for this may be because the biocentric perspective is also informed by common sense and intuition. For example, an animal's complexity influences what humans recognise as having moral considerability.[75] Animal complexity may

[73] Taylor, *Respect for Nature* (n 1) 121.
[74] Rolston III, 'Value in Nature and the Nature of Value' (n 41) 18.
[75] Agar (n 46) 168.

be a reason why some humans prefer to only recognise the intrinsic value of higher mammals as such complexity is relatable to human composition.

**c) Sustainable development**

The concept of sustainable development, as it exists as a philosophical understanding of the human relationship to the environment is discussed here. There are two aspects of sustainable development that this section will focus on: sustainable development's integration of environmental and developmental values and the principles of intergenerational and intragenerational equity.

Sustainable development can be broadly defined as proposing a resolution between the requirements of protecting the environment and maintaining human development. The Brundtland Commission's Our Common Future report defines sustainable development as, "to ensure that [humanity] meets the needs of the present without compromising the ability of future generations to meet their own needs."[76] The Our Common Future report establishes seven imperatives that broadly determine the scope of sustainable development. The imperatives are "reviving growth, changing the quality of growth, meeting essential human needs, ensuring a sustainable level of population, conserving and enhancing the resource base, reorienting technology and managing risk, and merging environment and economics in decision making."[77] The concept's broad definition and its numerous imperatives position sustainable development as an ambiguous concept and as such it has a multitude of understandings.

[76] UNGA 'Report of the World Commission on Environment and Development: Our Common Future' (1987) Annex to UN Doc A/42/427 (Our Common Future) ch 2 para 1.
[77] ibid ch 2.

That sustainable development has remained undefined is both a strength and a weakness for the perspective. The concept's undefined nature can be demonstrated by the interrelation it has with numerous factors besides environmental and developmental priorities. Issues of poverty, resource depletion, global climate change and pollution inform the ambitions of sustainable development; the need to address major socio-economic trends in the world such as population growth, urbanisation and industrialisation, changes in land use, and global access.[78] There is ambiguity within the concept of sustainable development, which can be interpreted as a strength, and international law appears to have seized this. In support of this argument, sustainable development can be seen to inform much of the resulting international agreements of the Rio Conference.[79] Its principles have also influenced many international organisations including the World Bank and the World Trade Organisation.[80] Consensus also suggests the concept's political attractiveness. As the Brundtland Commission's imperatives suggest, sustainable development offers a realistic compromise by maintaining much of the current paradigmatic human relationship to the environment that is broadly anthropocentric and utilitarian, albeit with changes to how the environment is to be used and valued.

Yet malleability may come at the sacrifice of sustainable development having the substantive basis it requires to significantly alter current levels of human development and the resultant environmental problems. Compared with the other major environmental philosophical

[78] Michael Carley and Ian Christie, *Managing Sustainable Development* (2nd edn, Earthscan 2000) 4.
[79] Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development (14 June 1992) 31 ILM 874 (Rio Declaration). In addition to the influence of sustainable development in the Rio Declaration, consensus is also demonstrated in: Agenda 21, Report of the United Nations Conference on Environment and Development (14 June 1992) 31 ILM 874; The Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79; The Non-Legally Binding Authoritative Statement of Principles For A Global Consensus on the Management, Conservation and Sustainable Development of all types of Forests (14 August 1992) UN Doc A/CONF.151/26.
[80] UNGA 'Institutional arrangements to follow up the United Nations Conference on Environment and Development' Res 47/191 (1992) GOAR 47th Session Supp 49 para 32f; the Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, Preamble.

perspectives, sustainable development may be understood as only a "dialogue of values."[81] It provides a means of explaining, judging and prioritising to establish a middle ground between its focuses of the environment, development and social factors.[82] Sustainable development stands in stark contrast to the other three perspectives that can each be said to have specific arguments as to the intrinsic value and moral considerability of different organisms or the inorganic environment, albeit with their own strengths and weaknesses. Sustainable development would find it difficult to escape this criticism because any attempts to address these problems require further definition of the concept. This would detract from its spatial and temporal relativity. If the concept is to be understood as the integration of environmental, developmental and social values then it is wholly contingent on what those values are.

Sustainable development can be understood as a compromise between developmental and environmental priorities. Sustainable development strives to accommodate anthropocentric instrumental valuations of the environment with scientific understandings of how the environment can itself be benefitted. Though this may suggest an enlightened environmental regard the environmental protection policies that derive from the concept are routinely expressed as being to secure the interests of humans. Statements such as "To defend and improve the human environment for present and future generations has become an imperative goal for mankind"[83] imply notions of human dominion that closely associates sustainable development with anthropocentrism. As the Stockholm Declaration also demonstrates, prior

[81] Blake D Ratner, '"Sustainability" as a Dialogue of Values: Challenges to the Sociology of Development' (2004) 74 Sociological Inquiry 50, 50. Sneddon also regards sustainable development as a plurality of theories, values and perspectives. Chris Sneddon, Richard B Howarth and Richard B Norgaard, 'Sustainability in a post-Brundtland world' (2006) 57 Ecological Economics 253.
[82] Bryan G Norton, 'Sustainability: Descriptive or Performative?' in John Martin Gillroy and Joe Bowersox (eds), *The Moral Austerity of Environmental Decision Making: Sustainability, Democracy, and Normative Argument in Policy and Law* (Duke University Press 2002) 51.
[83] Stockholm Declaration of the United Nations Conference on the Human Environment (16 June 1972) 11 ILM 1461(Stockholm Declaration) para 6.

to the arrival of the concept there was widespread recognition in the international community that unrestrained economic growth and development could not be indefinitely sustained. This suggests notions of human dominion should change, but does not go so far as to suggest their abandonment. The Declaration recognised "Man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment."[84] Seen in this light sustainable development can be understood to principally involve the integration of environmental and developmental values, intergenerational equity, and common but differentiated responsibility.[85]

Whether the integration of environmental and development values can be achieved has divided the perspective of sustainable development. International agreements support the possibility of achieving integration and reiterate its importance. The Rio Declaration on Environment and Development suggests that equilibrium between human development and environmental requirements can be realised and ought to be. For example, Principle 1 states, "Human beings are at the centre of concerns for sustainable development. They are entitled to

[84] ibid para 3.

[85] Malgosia Fitzmaurice, *Contemporary Issues in International Environmental Law* (Edward Elgar 2009) 70. The literature more or less agrees. Magraw and Hawke identify four core elements that constitute sustainable development. These are intergenerational equity, intragenerational equity, the need to protect the environment, and the need to integrate economic, social and environmental policies. Daniel Magraw and Lisa Hawke, 'Sustainable Development' in Daniel Bodansky, Jutta Brunnée and Ellen Hay (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008) 613; Sands' list is similar, interpreting the need to protect the environment as "sustainable use" which is consistent with paradigmatic development goals. Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, CUP 2012) 207; The New Delhi Declaration has a more expansive list of seven elements. Additionally, common but differentiated responsibility features, as does the precautionary principle, public participation and good governance. Committee on Legal Aspects of Sustainable Development, 'New Delhi Declaration Of Principles Of International Law Relating to Sustainable Development (Resolution 2002/3)' in International Law Association Report of the Seventieth Conference (New Delhi 2002) (International Law Association, New Delhi 2002).

a healthy and productive life in harmony with nature."[86] Though the ambitions of sustainable development may have merit, they are expressed in purely aspirational terms. The concept can be understood as something that can be "promoted" as opposed to something that can be achieved.[87] Viewing sustainable development in this way understandably lends it considerable success in terms of the consensus it is able to accumulate, yet if it were judged in terms of its achievements its successes would be far fewer. Beckerman and Pasek's study finds no evidence of any environmental policy adhering to sustainable development beyond preambular statements.[88]

The surrounding literature reveals a degree of scepticism to achieving integration. The implication of this is that sustainable development's focus on integration between environmental and developmental values may eclipse substantive environmental and ecological issues. In support of this Pallemaerts suggests, "International environmental law runs the risk of being reduced to a mere appendage of international development law, and subordinated to economic rationality."[89] Banerjee arrives at a similar conclusion, finding sustainable development subsumes environmental values under paradigmatic economic priorities.[90] Such comments present strong reasons to doubt not just the prospect of integration but also the merits of sustainable development. Presuming harmonious integration can be achieved provides little incentive to adjust current development patterns or impose limits on how humans ought to act towards the environment. In support of this argument, in

[86] Rio Declaration Principle 1.
[87] Susan Baker, *Sustainable Development* (Routledge 2006) 1.
[88] Wilfred Beckerman and Joanna Pasek, *Justice, Posterity and the Environment* (OUP 2001) 71-72.
[89] Marc Pallemaerts, 'International Law and Sustainable Development: Any Progress in Johannesburg?' (2003) 12 Review of European Community & International Environmental Law 1, 9-10.
[90] The principal reason he gives are somewhat different, notably colonial resonance and the subsequent disempowerment of people in developing states. Subhabrata Bobby Banerjee, 'Who Sustains Whose Development? Sustainable Development and the Reinvention of Nature' (2003) 24 Organization Studies 143, 174.

their review of the Plan of Implementation of the World Summit on Sustainable Development[91], Galitzzi and Herklotz suggest that the environmental agenda is located within a context of promoting economic and social development.[92]

The concept of sustainable development has undergone changes since its inception that can provide justification for such sceptical views. The first definitions of sustainable development show the concept emphasised its environmental imperatives over those of development. This is a trend that has been subsequently inverted. The Our Common Future report suggests an urgent need for altering notions of development to resolve environmental issues; it calls for strategies of sustainable development to address the environment and other global problems.[93] These comments suggest the concept was proposed as a way to reconstruct the human relationship to the environment that would alleviate unsustainable practices. The concept appeared to respond to a growing environmental awareness. Patterns of economic growth and development were to be altered "to establish a condition of ecological and economic stability that is sustainable far into the future. The state of global equilibrium could be designed so that the basic material needs of each person on Earth are satisfied and each person has an equal opportunity to realize his individual human potential."[94]

The environmental emphasis of the concept seems to have peaked in the early 1990s. In the twenty-seven principles listed in the Rio Declaration sustainable development is explicitly

[91] 'Plan of Implementation of the World Summit on Sustainable Development' (*UN*, 4 September 2002) <http://ec.europa.eu/environment/archives/wssd/documents/wssd_impl_plan.pdf> accessed 30 October 2015.
[92] Paolo Galizzi and Alena Herklotz, 'Environment and Development: Friends or Foes in the 21st Century?' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook On International Environmental Law* (Edward Elgar 2011) 84.
[93] UNGA 'Process of preparation of the Environmental Perspective to the Year 2000 and Beyond 38/161' (1983) UN Doc A/RES/38/161 para 10.
[94] Donella H Meadows and others, *The Limits to Growth: A Report For the Club of Rome's Project on the Predicament of Mankind* (Universe Books 1972) 24.

mentioned in twelve Principles and can be easily inferred from several others.[95] Sustainable development demanded a "new global partnership" that would also bring about a "more efficient and equitable world economy."[96] Compared with these earlier understandings, more recent articulations of the concept indicate sustainable development now favours its development imperatives; as the sceptics warn, the environmental concerns of sustainable development have become subsumed by developmental priorities. In support of this argument the Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development discusses the "urgent need … for managing resources sustainably" [97] and for "sustained economic growth in the context of sustainable development."[98]

An alternative argument is the claim proponents of sustainable development make that integration may develop cultural and social changes in relation to how the environment is to be regarded and used. In doing so the concept may establish moral limitations to human action, which distances the perspective from anthropocentrism. Glenn and Gordon insist upon such cultural and social elements to sustainable development and suggest that without them the concept is only political rhetoric.[99] The perspective does appear to have adopted a wide ranging content that acknowledges diverse cultural and social values. To substantiate integration of environmental and developmental priorities sustainable development also displays concern for ecological holism, empowerment and community building, social justice

[95] Rio Declaration Principles 1, 4, 5, 7, 8, 9, 12, 20, 21, 22, 24, and 27 explicitly mention sustainable development.
[96] Agenda 21 para 2.1.
[97] Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development 1995, 19 April 1995, UN Doc A/CONF.166/9 para 25.
[98] ibid para 26.
[99] Jerome C Glenn and Theodore J Gordon, 'Executive Summary' (*Millennium Project*, 2007) <http://www.millennium-project.org/millennium/sof2007-exec-summ.pdf> accessed 30 October 2015, 5.

and equity, and sustainable production and reproduction – concerns that have been expressed as "political ecology".[100]

Although, as already discussed, an inclusionary approach garners consensus for the sustainable development perspective, the undefined nature of the concept allows the continuing addition of other concerns besides those that relate to the environment and development. This leaves the perspective exposed to criticism; by trying to address all the concerns of the planet its original focus of the environment and development may fade into obscurity. For example, Blewitt has criticised The Women's Environment and Development Organisation for ignoring wider social and gender impacts in its integration processes.[101] Similarly, Sen regards any drive for a sustainable life to necessarily include principles of equity, democracy, and human and civil rights.[102] Sustainable development has been labelled as redundant because it has become an expected in all political, social and economic law and policy. Worster regards sustainable development as having been deprived of its "real substance" in consequence of its broad remit of value.[103] Escobar finds the situation bleaker, he discusses how the expansion of values that are to be integrated within sustainable development and presents the concept as only existing as a modern day fairy tale that the world tells itself about its unfortunate condition.[104]

Sustainable development must also respond to the criticism that the harmonious integration it seeks between environmental and developmental issues is so unrealistic as to be impossible.

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[100] Keith Pezzoli 'Sustainable Development: A Transdisciplinary Overview of the Literature' (1997) 40 Journal of Environmental Planning and Management 549, 556.
[101] John Blewitt, *Understanding Sustainable Development* (Earthscan 2008) 17.
[102] Amartya Sen, *Development as Freedom* (Anchor Books 1999) 3.
[103] Donald Worster, 'The Shaky Ground of Sustainability' (1993) in Michael Redclift (ed) *Sustainability: Critical Concepts in the Social Sciences, Vol II: Sustainable Development* (Routledge 2005) 12.
[104] Arturo Escobar, 'Constructing nature: elements for a poststructural political ecology' in Richard Peet and Michael Watts (eds), *Liberation Ecologies: Environment, Development, Social Movements* (Routledge 1996) 53-55.

In part this criticism is a question of what sustainable development seeks to sustain. If development is taken to mean perpetual growth then sustainable development is an oxymoron which cannot occur in a world of finite resources. If development is taken to mean something analogous to the current patterns of resource consumption, then sustainable development has the unachievable task of reconciling the two incommensurable quantities of environment and development.[105] Both of these criticisms suggest the perspective to be conceptually flawed. Sustainable development is perhaps better understood as differentiating between notions of development: those that are good for the environment, which ought to be sustained, and those that are bad and should not. Instead of limitless maximisation of utility, sustainable development seeks to redefine the idea of development and impose limitations on human action. These are moral limitations that are reinforced by science and empirical data relating to the carrying capacity of the planet. Ecological and environmental requirements certainly stand more chance of being met if the needs of the present generation are mitigated by moral limitations, as a lower human impact on the environment may result. In support of this argument Daly compares the needs of the present generation to their extravagant wants.[106] If the need for access to fresh water is compared with the extravagant want of owning a car, sustainable development appears to be predominantly concerned with levels of "sufficiency". [107] When the concept is simplified to issues of sufficiency, sustainable development takes the form of an enlightened version of anthropocentrism; that the environment is to be protected to sustain human life.

[105] John Robinson, 'Squaring the circle? Some thoughts on the idea of sustainable development' (2004) 48 Ecological Economics 369, 382.
[106] Herman E Daly, 'Sustainable Development: From Concept and Theory to Operational Principles' (1990) 16 Population and Development Review 25, 35.
[107] ibid.

The other part of criticism of sustainable development relates to a more unwelcome observation – any emerging reductions of the human impact on the world may have come too late, the point of no return may have already passed. So understood, even the aspirations of sustainable development do not enforce sufficient limitations to address environmental damage and resource use. There is strong reason to support such an interpretation; worldwide resource and energy consumption remain as high as ever suggesting that achieving sustainable development is a delusional prospect.[108] If there is truth in these flaws in sustainable development then what is required are substantial levels of "de-growth". Latouche describes this as "a political slogan with theoretical implications."[109] Acknowledging the need for de-growth is to acknowledge the failure of the free market economy and other economic paradigms. This approach can be contrasted with other conceptions of sustainable development that seek to merely alter the current economic paradigm to make it more conducive to environmental needs.

The uncertainty and lack of knowledge in sustainable development provides a strong reason as to why there is not a greater call for de-growth or something of a similar nature. It suggests that ethical beliefs are required in addition to empirical beliefs to move towards de-growth.[110] In support of this argument, factors such as human population levels and consumption and pollution patterns continually influence one another adding complexity and removing certainty. Such factors affect the ability of science to recommend models of sustainable use

[108] "Consumption increased for all fuels, reaching record levels for every fuel type except nuclear power; production increased for all fuels except coal. … Global primary energy consumption increased by just 0.9% in 2014". 'Statistical Review of World Energy' (*BP*, June 2015) <https://www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2015/bp-statistical-review-of-world-energy-2015-full-report.pdf > accessed 30 October 2015, 2.

[109] Joan Martínez-Alier and others, 'Sustainable de-growth: Mapping the context, criticisms and future prospects of an emergent paradigm' (2010) 69 Ecological Economics 1741, 1742 quoting Serge Latouche.

[110] Paehlke uses the phrase, "part science and part value preference." Robert Paehlke, 'Sustainability, Sustainable Development, and Values' in John Martin Gillroy and Joe Bowersox (eds), *The Moral Austerity of Environmental Decision Making: Sustainability, Democracy, and Normative Argument in Policy and Law* (Duke University Press 2002) 212.

and may lead to inaction in terms of employing policies that aim to fulfil the ambitions of sustainable development. Furthermore, current certainty and knowledge may still be insufficient. The Our Common Future report states, "We need to develop new methods of thinking, to elaborate new moral and value criteria, and, no doubt, new patterns of behaviour."[111] The standards and knowledge of the environmental and ecological sciences do not provide a sufficient basis upon which to judge the successes of sustainable development. Science is unable to wholly fulfil its "desired role of arbiter."[112] Sustainable development requires a combination of moral values, ideology, individual self-interest and knowledge of what is thought to be best for the environment. This will inform how sustainable development is to interpret, process and justify its content.

An additional reason for inaction is the expectation that human ingenuity and technology will find solutions to ecological and environmental problems. The presumption of technological fixes to such problems can be implied from the expectation developed states have to transfer new and innovative technologies to developing states to aid environmental redress.[113] Assuming technological fixes in this manner implies human superiority and human mastery of the environment, both of which are suggestive of sustainable development's close association with anthropocentrism. The promise of technology illustrates how the perspective appears to advocate modifications to the paradigmatic exploitative human relationship to the environment, as opposed to advocating a fundamental change in human values. A reliance on technology providing solutions reiterates the overarching purpose of sustainable development as resolving environmental problems to deliver continued human prosperity.

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[111] Our Common Future (n 76) ch 1 para 45.
[112] Arnold Tukker, 'Sustainability: A Multi-Interpretable Notion', in Arnold Tukker and others (eds), *System Innovation for Sustainability: Perspectives on Radical Change to Sustainable Consumption and Production* (Greenleaf Publishing 2008) 26.
[113] Rio Declaration Principles 7 and 9.

Sustainable development incorporates the principle of intergenerational equity. The principle can be understood as seeking to constrain human action towards the environment. The principle places the interrelationship between environmental and developmental values in a temporal context. The needs of future generations create a responsibility of the present generation to provide them with an environment in the same or 'improved' condition to which they received it. The principle can be substantiated by the Our Common Future's statement of sustainable development "to ensure that [humanity] meets the needs of the present without compromising the ability of future generations to meet their own needs."[114] The prospective needs of future generations are presumed to be similar to the basic needs of the current generation. For this reason intergenerational equity is to ensure future generations have the same or better standards of unpolluted air, water, food, and shelter as enjoyed by the current generation.

Delivering intergenerational equity implies the current generation become stewards of the environment, maintaining it or repairing it for future generations. As with understandings of the Christian conception of the ethic of stewardship, intergenerational equity is anthropocentric in that it emphasises the environment as a means to human ends, but it is a form of anthropocentrism that imposes a sense of duty. As with anthropocentrism, this understanding of intergenerational equity suggests that only humans have intrinsic value. However, unlike the anthropocentric perspective, that the environment is to be carefully managed implies a qualified form of instrumental value. This can be understood in two ways. One interpretation is that despite being anthropocentric intergenerational equity entails a more onerous environmental responsibility. D'Amato finds explanations of intergenerational equity to be overly and unnecessarily anthropocentric and "too dependent upon finding an articulate

[114] Our Common Future (n 76) ch 2 para 1.

link to the improvement of the *human* condition."[115] The result is human chauvinism; any environmental goods are only regarded as by-products that arise from the purpose of creating an environment in which future generations of humans have similar opportunities as those had by the current generation. More in line with the aspirations of sustainable development, Weiss interprets intergenerational equity as establishing a moral relationship between humans and the environment.[116]

A second interpretation qualifies the first, recognising that despite the onerous environmental responsibilities that may restrain human action towards the environment, these are for the benefit of humans, albeit future generations. Though intergenerational equity may produce ecological and environmental goods, these would be instrumentally providing usefulness and opportunities to future generations. Such opportunities may include the aesthetic or cultural values that can be associated with the environment. They may also include opportunities to derive economic benefit from natural resources. This is identical to the paradigmatic environmentally ruinous human relationship to the environment of the current generation. What this second interpretation suggests is that intergenerational equity may simply be postponing the exploitative human relationship to the environment. The rationale for this may illustrate a hope that future technologies will produce solutions, itself suggestive that the point of no return has passed.

Another important aspect of sustainable development is intragenerational equity. This principle addresses inequalities between humans in the current generation by distributing

[115] D'Amato specifically criticises the arguments of Richard Posner, R G Frey and Edith Brown Weiss. Anthony D'Amato, 'Do We Owe a Duty to Future Generations to Preserve the Global Environment' (1990) 84 American Journal of International Law 190, 196.
[116] Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 American Journal of International Law 198, 199 fn 3.

resources so that the "poor get their fair share of the resources required to sustain that growth."[117] Addressing social and economic disparity constitutes part of the policy and philosophy of sustainable development, but it can also be seen to eclipse conceptions of duty as well as the environmental protection focus of the concept. Confirming the importance of intragenerational equity the Brandt Report was requested to "make recommendations on ways of breaking through the existing international political impasse in North-South negotiations for global development."[118] The Rio Declaration's Principle 7 seems to address this with the principle of common but differentiated responsibility acknowledging the different responsibilities of different states.[119] Yet the required political compromise has more generally resulted in disconnect between human action and environmentally ruinous outcomes.[120] Principle 7 suggests a deficient acceptance of responsibility amongst developed states when compared to the draft of the Principle advanced by the G77. A clearer conception of responsibility can be identified in the draft where it is stated: "The major cause of the continuing deterioration of the global environment is the unsustainable patterns of production and consumption, particularly in developed countries…"[121]

Though it is conceivable that notions of a responsibility to the environment could contain stronger pronouncements, intragenerational equity nevertheless implies a degree of restraint in relation to the human inclination to instrumentally use natural resources. Intragenerational equity has both anthropocentric and non-anthropocentric overtones. Restraint does not

[117] Our Common Future (n 76) ch 3 para 28.
[118] 'About the Brandt Commission' (*Brandt 21 Forum*, 2010) <http://www.brandt21forum.info/About_BrandtCommission.htm> accessed 30 October 2015.
[119] "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystems. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities..." Rio Declaration Principle 7.
[120] The compromise of "Principle 7 was particularly controversial with the text satisfying neither developed nor developing States." Duncan French, 'Developing States and International Environmental Law: The Importance of Differentiated Responsibilities' (2000) 49 International and Comparative Law Quarterly 35, 36.
[121] UNGA Report of the United Nations Conference on Environment and Development UN Doc A/151/20/Rev 1 (1992).

particularly distance sustainable development from anthropocentric values in so far as the redistribution of wealth it encourages is for the purpose of addressing inequalities between humans. However, this redistribution is intended to produce positive environmental outcomes – a more equitable growth strategy would be less resource intensive and therefore less energy intensive.[122] Along with integration of environmental and developmental values and intergenerational equity, intragenerational equity suggests sustainable development is closely associated with the core value of anthropocentrism that only humans have intrinsic value and environmental goods are a means to human ends. Yet in seeking to orientate human ends so that they are conducive to environmental goods, sustainable development can be understood as a stronger movement away from the modern ethical default of utilitarian thinking.

**d) Ecocentrism**

Ecocentrism is informed by principles of ecology. The science of ecology studies the "relation of association amongst living things, their non-living context and solar energy."[123] This is distinct from biocentrism that, as discussed above, emphasises the value of individual life. Ecocentrism presents a nature-centred system of value; ecosystems and their composite parts are regarded holistically. This can be contrasted with the other three perspectives discussed that have each been shown to contain elements of utilitarian thinking, viewing nature as something that provides utility to humans. The ecocentric perspective presents the strongest movement away from utilitarianism, advocating limits to human action and a responsibility to the rest of the world.

[122] Our Common Future (n 76) ch 2 para 35.
[123] Roderick Frazier Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press 1989) 55 quoting Arthur G Tansley.

The central claim of ecocentrism is that all organic life and the inorganic environment has intrinsic value. This claim reveals the ontological basis of ecocentrism, that there is no reason why only humans should have intrinsic value. Ecocentrism counters conceptions of the environment in which humans are regarded as distinct and separate from the environment. Seen in this light, ecocentrism can be understood as a response to the insufficient environmental protections provided for by the other perspectives. Holistic conceptions of the environment advocate the ecosystemic importance of all organisms and the inorganic "life support community" on which all life depends.[124] The central claim of ecocentrism also reveals the ethic of biospherical egalitarianism that it promotes. An advocate of ecocentrism, Leopold presented biospherical egalitarianism as the "land ethic".[125] According to Callicott, Leopold reasoned that in the same way that individual humans can come together to form communities, these ethics that prompt cooperation amongst individuals can be enlarged to include soils, waters, plants, and animals.[126] For Leopold, how humans ought to relate to the environment should be determined according to what preserves environmental integrity, stability and beauty.[127]

Ecocentrism suggests constraining human action so that it is in accordance with environmental goods. This illustrates a distinction that can be made between ecocentrism and the other perspectives; anthropocentrism and to lesser extents biocentrism and sustainable development can be understood as determining the value of all that is nonhuman based upon systems of human value or by comparison to human attributes. In contrast, Leopold argues for universal moral considerability based on the various and interrelated needs of ecosystems, as

[124] Aldo Leopold, *A Sand County Almanac and Sketches Here and There* (OUP 1989) 203-04.
[125] ibid 261.
[126] Callicott writes, adapted from the work of Aldo Leopold, "the integrity, beauty and stability of the biotic community is the measure of right and wrong actions affecting the environment." Callicott, *In Defense of the Land Ethic* (n 40) 58.
[127] ibid 58.

determined by ecology. Leopold conveys this, setting out that "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."[128] Basing moral considerability[129] on the needs of ecosystems is, for Leopold, to avoid assimilations of nature into the human value system. Were ecocentrism to extend moral considerability in an approach similar to that of the other perspectives, human values would retain control over what aspects of organic life and the inorganic environment are to be protected.

Recent ecological studies have cast doubt on Leopold's conception of the environment. Contemporary ecological science suggests the environment is not stable and integrated but is constantly undergoing processes of change.[130] If "nature is fundamentally erratic, discontinuous and unpredictable"[131] then the obligation of preservation advocated by Leopold could be contrary to the ever-changing environmental good. This suggests that, at least by current scientific knowledge, humans cannot appreciate what is in the best interests of the environment, which in turn makes the project of environmental protection without purpose. Nevertheless, a need for ecological prudence can be implied from Leopold's request to uphold integrity and beauty that does not require ecosystems to be operating in a stable manner.

Ecocentrism finds faults in the approaches of the other three perspectives. Ecocentrism is opposed to the anthropocentric perspective in its perception of the environment as a resource base and as a source of objects that can only be of instrumental value to humans.

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[128] Leopold (n 124) 262.
[129] Emyr Vaughan Thomas, 'Rolston, Naturogenic Value and Genuine Biocentrism' (1997) 6 Environmental Values 355, 355.
[130] For example see, Daniel Botkin, *Discordant Harmonies: A New Ecology for the Twenty-first Century* (OUP 1992); Robert Costanza, Bryan G Norton and Benjamin Haskell, *Ecosystem Health: New Goals for Environmental Management* (Island Press 1992).
[131] Donald Worster, 'The Ecology of Order and Chaos' (1990) 14 Environmental History Review 1, 13.

Anthropocentrism appears to altogether ignore the importance of the environment as providing the life support of humans. Anthropocentrism instead favours human control and dominion over the environment – something that stands in stark contrast to the preservation ethic of ecocentrism. By ecocentric standards, the biocentric perspective also provides inadequate environmental protections. The biocentric claim of equality between the species is dependent on an arbitrary hierarchy of animals based upon a human valuation of the various attributes identified in nonhuman life. Preventing pain and maximising pleasure, a prevalent mode of value, is an instrumental end to the individual animal's survival. Ecocentrism also finds the compromise between environmental and developmental priorities of sustainable development to be insufficient, in terms of the environmental protections it can bestow. The importance of ecosystems was recognised in the perspective of sustainable development as something to be integrated with human priorities. However, and contrary to ecocentrism, though sustainable development implies some level of responsible environmental use that limits human action, these goals are continually eroded by sustainable development's reinforcement of the human right to development.

Ecocentrism regards even the most well-intentioned human values as "anthropomorphising or paternally substituting"[132] how parts of ecosystems are regarded and valued. An influence of human values would align ecocentrism more closely with the other perspectives and in turn expose it to similar criticisms. To intercept this criticism ecocentrism – informed by ecological principles – cares not for individual animals of any species *per se*. The inclination to survive is something regarded as common to all individuals of all species of animal and

[132] Tal Scriven, *Wrongness, Wisdom, and Wilderness: Toward a Libertarian Theory of Ethics and the Environment* (State University of New York Press 1997) 179.

plant.[133] The survival of all animals and plants is mutually dependent on the land, sea and air of the environment. Yet ecocentrism is itself open to criticisms of anthropomorphising, as the science of ecology is also exposed to human values. Ecology's interrelatedness of all things may depict the environment as a complex machine; its organic nature is at risk of being made redundant by humans in favour of notions of improving the machine.[134]

The ecocentric perspective has been criticised over its account of the relationship between humans and the environment. One criticism centres on the human dominion that needs to be curbed if ecological integrity is to be attained. That the human population has grown to seven billion has caused a dramatic imbalance in ecological integrity. Sustainable practices that advocate low impact resource usage may provide insufficient environmental redress, because when multiplied by seven billion the effects are still disastrous in environmental terms. Instigating biospherical egalitarianism demands a kind of environmental fascism.[135] To return the human population to a level whereby ecological interference would not be presumed, there would have to be massive human "diebacks" of ninety per cent of the total population.[136] This argument is understandably contentious and so detracts from the viability of ecocentrism as an ethical viewpoint. It does, however, illustrate the severity of the environmental issues of modern times and the direct connection human responsibility has to these issues.

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[133] Aquinas recognised the inclination to survive as something common to all life: "Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances". Thomas Aquinas, *Summa Theologiae* (tr Fathers of the English Dominican Province, Benziger Bros 1947) II-I q94 a2, see below text to n 50ff in ch 5 [cited by Part (I, I-II, II-II, III) Question (q) and Article (a)].
[134] Scriven (n 132) 180.
[135] Tom Regan, *The Case for Animal Rights* (Routledge 1983) 262.
[136] William Aiken, 'Ethical Issues in Agriculture' in Tom Regan (ed), *Earthbound: New Introductory Essays in Environmental Ethics* (Random House 1984) 269.

Fritzell's paradox offers a second criticism of ecocentrism that suggests that because humans are natural organisms no human action can be deemed morally wrong, even if it affects other life or the environment.[137] Fritzell's paradox is based upon an interpretation of ecological principles in which humans, as part of the environment, are also regarded as part of the community of ecosystems and as such are equal to all other animals and the land. The paradox forms that if humans are to be treated equally and like all other animals, then humans must be regarded as amoral in the same way wolves cannot be "blamed" for killing deer.[138] Just as it is the nature of the wolf to kill deer, so too it may be the nature of humans to bring about the extinction of other animals and develop environmentally destructive practices. If accepted, the paradox provides no room for conceptions of responsibility or duty to exist in humans towards other organisms or the environment. Discussions of utilitarianism have shown that no limits to human action lead to a ruinous environmental regard. Were the paradox to acknowledge humans as moral beings then this perceived lack of environmental or ecological responsibility may diminish. As moral reflection is a natural biological function, the formation of duties or notions of responsibility – regardless of their moral content – are innate to humans in the same way that wolves have an innate desire or need to kill deer. Human morality is contained within and contextualised by ecology: "[humans] are moral beings not in spite of, but in accordance with, nature."[139] Though this goes towards addressing the criticism posed by the paradox, in so doing it leaves ecocentrism exposed to the criticism of speciesism; adjusting the paradox to allow for the possibility of human duties to the world is to privilege humans.

[137] Peter Fritzell, 'The Conflicts of Ecological Conscience' in J Baird Callicott (ed), *Companion to the Sand County Almanac: Interpretive and Critical Essays* (University of Wisconsin Press 1987) 129.
[138] This example comes from Callicott, *In Defense of the Land Ethic* (n 40) 96.
[139] ibid 97.

Ecocentrism can be seen to encourage a shift in human thinking and the reinstatement of an identity with nature and the environment. This relationship has been presented as being gradually eroded by the various traditions that shaped environmental philosophy. Some supporters of ecocentrism have proposed conciliation between human-centred and nature-centred conceptions of the world, though in a different manner to the perspective of sustainable development. Where sustainable development positions a compromised integration of environmental and developmental priorities, in contrast, this conciliatory approach encourages human instrumental values to be more in line with ecological and environmental requirements. The recent programme of culling Ash trees diseased with the fungus Chalara fraxinea provides an example of such arguments being employed in British domestic law. In a report on the fungus and its effects, the trees were acknowledged as being of instrumental value: useful to humans for the making of furniture, for firewood, and for their decorative value.[140] In addition their ecosystemic usefulness was recognised as providing a context for their instrumental use, with the trees acknowledged as having "high conservation value", their loss having "knock-on effects to the wider ecosystem."[141] This conciliatory approach requires a "nurturing" as opposed to a "manipulative" attitude to form the basis of the interrelationship between humans and the environment.[142] Such attitudes adjoin instrumental value in protecting ecosystems onto the central claims of ecocentrism, namely the intrinsic worth of all organic life and the inorganic environment. This approach would achieve environmental protection of the environment and – of benefit to humans – would ensure a diverse set of ecological possibilities for human culture and society to continue to

[140] Nikki Sutherland, 'Ash Dieback' (*Commons Library Debate Pack*, 12 November 2012) <http://www.sarahnewton.org.uk/sites/www.sarahnewton.org.uk/files/ashdieback.pdf> accessed 30 October 2015, 9-10.
[141] Emma Downing, 'Ash dieback disease: Chalara fraxinea' (*Commons Library Standard Note*, 6 December 2012) <http://www.parliament.uk/briefing-papers/SN06498.pdf> accessed 30 October 2015, 6.
[142] Timothy O'Riordan, 'The challenge for environmentalism' in Richard Peet and Nigel Thrift (eds), *New Models in Geography: The Political-Economy Perspective* (Routledge 1989) 44.

develop and flourish.[143] It is intended that a realisation of the interrelationship between humans with the entire process of life will establish a far wider sense of the self that goes beyond an individual's "egoic, biographical, or personal sense of self."[144]

This interpretation of ecocentrism has been criticised for reducing the perspective to "enlightened" human values and interests.[145] In seeking to accommodate ecological principles with human values such a conception of ecocentrism is at risk of subsuming ecological principles under human values. The approach is of merit though, in that humans having a transpersonal sense of the self could lead to stronger environmental protections. However, it may also compromise the central claim of ecology since any psychological basis of understanding, even one that seeks to highlight environmental interdependencies, is contingent, at least to some extent, on anthropocentric reasoning and human valuations.

Deep Ecology is one such attempt that has sought to reject the "man-in-environment image" in favour of "organism interdependence."[146] Deep Ecology can be seen to establish a responsibility to adhere to ecological principles. Achieving this change requires a deep questioning and reorientation of human values and practices. Deep Ecology can be seen to argue that human values narrow the way the environment is construed. To be concerned with conservation and the outcomes of human development (for example, pollution and resource depletion) is, according to Deep Ecology, the shallow approach to ecology. This approach constructs a context in which the "health and affluence" of people in developed countries are

[143] Brian H Baxter, 'Ecocentrism and Persons' (1996) 5 Environmental Values 205, 217.
[144] Warwick Fox, Towards a Transpersonal Ecology: Developing New Foundations for Environmentalism (Shambhala 1990) 198 quoting Abraham Maslow.
[145] Scriven (n 132) 149.
[146] Arne Naess, *Ecology, Community and Lifestyle* (tr David Rothenberg, CUP 1991) 28.

the ultimate reasons for any changes in how the environment is to be used or regarded.[147] What Deep Ecology argues ought to be focused upon are the principles of "diversity, complexity, autonomy, decentralization, symbiosis, egalitarianism, and classlessness."[148]

In terms of the expectations of Deep Ecology, the other three perspectives provide insufficient environmental redress. Deep Ecology can be understood as a strong movement away from the utilitarian default of modern ethical thinking. In maintaining focus on shallow concerns the deep principles have been ignored, which only worsens the current ecological situation. Deep Ecology can be seen to advance an "ecological responsibility" that is required for humans to progress towards self-actualisation, a "deeper" understanding of the self as part of the ecological community.[149] Ignoring the principles will continue to detrimentally affect an aesthetic or spiritual communion with the environment.[150] This sense of responsibility to ecosystems seeks to change human values profoundly, acknowledging the anthropogenic truth that they cannot be entirely set aside. The complex interrelations between entities in ecosystems provide the conditions in which humans, among other species, have flourished. Human values are used as an incentive to recognise that all living things, together with the principles of diversity and richness have intrinsic value.[151]

[147] Arne Naess, 'The Shallow and the Deep, Long-Range Ecology Movement: A Summary' (1973) 16 Inquiry 95, 95.
[148] ibid.
[149] Alan Drengson, Bill Devall and Mark A Schroll, 'The Deep Ecology Movement: Origins, Development, and Future Prospects (Towards a Transpersonal Ecology)' (2011) 30 International Journal of Transnational Studies 101, 102.
[150] ibid 107.
[151] Arne Naess, 'The Deep Ecology Movement: Some Philosophical Aspects' in Frederik Kaufman (ed), *Foundations of Environmental Philosophy: A Text with Readings* (McGraw Hill 2002) 405.

### 3.2 A biocentric environmental philosophy

This section continues to challenge the moral philosophy of utilitarianism, that – paradigmatic though it is – it is untenable as a moral theory which can protect the environment. The previous sections have shown that, respectively, utilitarianism does not abandon the notion of objective goods, that they merely become represented by the singular notion of utility, and that the modern environmental philosophies of anthropocentrism, biocentrism, sustainable development and ecocentrism can be understood as responses to utilitarianism. However, to protect the environment adequately a biocentric environmental philosophy is required. Anything less does not provide sufficient principled movement away from the limitless sense of human entitlement that utilitarianism denotes.

The section first challenges the assumptions of human superiority within utilitarianism. Second, Paul Taylor's "biocentric outlook on nature" is positioned as an example of an environmental philosophy that makes the necessary movement away from utilitarianism and can protect the environment sufficiently. This provides for further understanding of any underlying philosophical approach that the International Court of Justice (ICJ) is found to have. Lastly, this section confronts the species egalitarianism in Taylor's biocentric account – a dilemma that many environmental philosophical perspectives share; if all individual life forms are equal in principle then how may any action that affects another life be permissible?

The moral philosophy of utilitarianism is unable to protect the natural environment adequately; utilitarian calculus is wholly derivative of human pleasure or preference that cannot be ensured to have regard for nonhuman life and the environment.[152] Utilitarian thinking affords humans a position of superiority in relation to all other life and the natural

[152] This claim is argued and defended above, text to n 71ff in ch 2.

environment, though there is no meaningful basis for this human nonhuman distinction. Non-taxonomical differences between human and nonhuman life are wrongly premised on the notion that certain capacities enjoyed by humans alone are in some way more valuable. Human capacities such as rational thought, aesthetic creativity, moral freedom, autonomy and self-determination[153] may be more valuable than the speed of a cheetah, but this is only when judged by human standards. For example, from the perspective of peregrine falcons, speed is a better capacity to have than aesthetic creativity. Humans are not superior in every sense. The human species is not the biggest life form on the planet, they are not the fastest and they do not have the best vision. Why should size or speed not be the determinants of the value of a species? Mounting a similar claim Routley and Routley state, "The accident of being a zoological human, defined in terms of various physical characteristics, cannot be morally relevant."[154]

It is a self-validating argument (and therefore one not be accepted *prima facie*) that utility calculations cannot extend to nonhuman life because of the absence of uniquely human characteristics. There is nothing about morality itself that makes it a characteristic that elevates humans to a superior position over nonhumans. Although humans do appear to be the only species capable of moral deliberation this only allows for one human's actions to be judged as morally better or worse than another human's. Three reasons may be given as to why utilitarian thinking offers an incoherent means of determining what can be afforded (or deprived of) utility. [155] Together the reasons support the claim that utilitarianism is speciesist and that an alternative moral philosophy is required. The first reason is that any distinguishing

[153] Taylor provides these characteristics as those that humans singularly possess. Paul W Taylor, 'The Ethics of Respect for Nature' (1981) 3 Environmental Ethics 197, 211-12.
[154] Richard Routley and Val Routley, 'Against the Inevitability of Human Chauvinism' in Kenneth E Goodpaster and Kennet M Sayre (eds) *Ethics and Problems of the 21st Century* (University of Notre Dame Press 1979) 39.
[155] ibid 39-40.

characteristic for what can have greater or lesser utility must include all functioning humans including infants, young children and adults (comprising, for example "primitive tribesman"[156]). These members of the species must be included since modern western values of life confirm that each have inherent dignity and moral worth and therefore ought to be allowed to flourish and have inviolable human rights.[157] However, examples such as the possession of consciousness or the ability to think rationally, though seemingly human only characteristics, exclude too many humans for it to be considered a coherent basis for discrimination. A second reason why utilitarianism provides an incoherent criteria is that the distinguishing characteristics of humans must also exclude all nonhumans since otherwise the pleasures or preferences of other primates would accordingly have to be considered in utility calculations. For example, possessing awareness or communication may allow for all humans to be the beneficiaries of greater utility but the criteria will also allow for many nonhumans, making it an incoherent choice. A third reason is that a distinguishing characteristic cannot be arbitrary, such as "being human"[158], since otherwise the claim is speciesist. Being morally responsible for one's actions, being able to love and being capable of altruism may again appear to accommodate all humans but these tendencies are not exclusive to humans.[159]

Taylor suggests that in place of utilitarianism's speciesist self-validating characteristics or sets of characteristics such as awareness, interests, desires or feelings there is the objective state of whether a human, animal or plant can be benefitted, advantaged or fulfil its biological potential.[160] These conditions, Taylor argues, are objectively good for all human and

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[156] ibid 39.
[157] For example the Universal Declaration of Human Rights states that, "*All human beings* are born free and equal in dignity and rights." Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 1 (emphasis added).
[158] Routley and Routley (n 154) 40.
[159] ibid 42.
[160] Taylor, *Respect for Nature* (n 1) 41.

nonhuman forms of life, though they are by no means the same for each form of life. Although the good of life is not derived from ideas of human wellbeing or human flourishing Taylor acknowledges that it requires humans to adopt a particular "belief system."[161] Within this system "each moral agent conceives of others in a certain way."[162] All moral agents are to adopt the "ultimate moral attitude"[163], which is to have respect for nature and to value it for its own good and not for its instrumental uses.[164]

Taylor calls the content of this belief system the "biocentric outlook on nature."[165] The outlook justifies the attitude of respect for nature by presenting an "internally coherent" picture of the entire natural world.[166] The biocentric outlook consists of four conditions that must be accepted. The first condition is that humans are to be recognised as holding equal membership with all other members of the Earth's community of life.[167] This is logical since, in this belief system, humans and nonhumans are recognised as having a good of their own and an inherent worth. To recognise that all entities have a good of their own is to recognise that situations such as environmental conditions can be good or bad for that entity and that this is independent from the entity's usefulness to others.[168] To recognise that all entities have inherent worth is to adopt the belief that life itself is reason enough to be a possessor of value; merits, instrumental usefulness and likeableness are irrelevant considerations.[169]

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[161] ibid 44.
[162] ibid 45.
[163] ibid 46.
[164] Whether and how this creates a human obligation to protect nonhuman life is discussed below, text to n 47ff in ch 5.
[165] Taylor, *Respect for Nature* (n 1) 44.
[166] ibid 156.
[167] ibid 99.
[168] ibid 61.
[169] ibid 71.

The second condition of the biocentric outlook requires recognition that life forms are interdependent and require not just a particular physical environment for survival and flourishing but also particular relations with an array of other entities.[170] Modern ecological science supports this statement: "All the different ecosystems that make up the Earth's biosphere fit together in such a way that if one is radically changed or totally destroyed, an adjustment takes place in others and the whole structure undergoes a certain shift."[171] The third condition requires recognition that all life is an "irreplaceable individual."[172] All life is a teleological centre with a unique good of its own.[173] The fourth condition is that humans are not inherently superior to nonhumans. In addition to the conditions explained above Taylor notes how the first three conditions serve to dismiss the assumption of an inherent human superiority. The first three conditions suggest a "deep kinship [between humans and] all other living things, sharing with them many common characteristics and being, like them, integral parts of one great whole encompassing the natural order of life on our planet."[174]

Taylor suggests that the biocentric outlook will come to be adopted by humans because it is the ultimate moral attitude humans can possess in relation to nonhuman life and the environment. The content of the outlook establishes criteria of what is a good way to act towards other life (other humans and nonhumans) and the environment. Being the ultimate moral attitude, humans ought to aspire to live to its principles since the outlook "sets the final criteria for what reasons are good reasons when actions that affect the natural world are

[170] ibid 100.
[171] ibid 117.
[172] ibid 120.
[173] ibid 121.
[174] ibid 154.

justified or shown to be unjustified."[175] Taylor positions the biocentric outlook as the final step of humanity's projects of equality, impartiality, and human rights.[176]

Taylor's theory does not provide an inviolable environmental theory because it is reliant on human values and cannot resolve the practical dilemma of species egalitarianism.[177] The first shortcoming in Taylor's theory is that the biocentric outlook is still based upon human value judgements and determinations as to whether something is considered life. Nutrition, excretion, respiration, sensitivity, reproduction, growth and movement are commonly considered to be necessary operations for entities to perform in order to be considered living.[178] However, the selections of such criteria suggest "life" is an abstraction; it is human values, science and epistemology that have led to the formation of the above criteria. It is an assumption that human individuals constitute centres of life (because, for example, they practice the operations listed above). This in turn creates a bias of how humans expect the world (its entities and environment) to operate. Why, for example, is it not the individual cells within humans or nonhumans that designate life? Why is it not the atoms that constitute a human or nonhuman animal (or an inanimate object) that designate life? Consideration of the acorn further explores this shortcoming.[179] If the purpose of the acorn is considered to be to grow into an oak tree then it is observed as healthy and flourishing if it grows accordingly. What of the acorn? Is the acorn merely a tree in waiting? If, during its growth, the acorn develops a bacterial infection and starts to rot, convention speaks of the tree being diseased.

[175] ibid 97.
[176] ibid 226.
[177] The coherence of Taylor's biocentric outlook provides a means of further understanding and situating any underlying philosophical approach that the Court is found to have. However, because of the shortcomings identified in the subsequent chapter, analysis of Court decisions will not be conducted against Taylor's philosophy directly.
[178] Anna Claybourne, *Life Processes* (Raintree 2012) 6.
[179] Discussion of the acorn follows Aristotle's questioning of telos. See Aristotle, 'Metaphysics' in Aristotle, *Aristotle in 23 Volumes Vol 17 and 18* (tr Hugh Tredennick, William Heinemann Ltd 1989) bk 9 [1050a].

This, however, is an anthropocentric imposition of value – a healthy tree is one state and an unhealthy tree is another. Despite being a life form the bacteria are not considered relevant because this does not conform to the human standard that imposes a value judgement of what is natural (the acorn becoming an oak tree) and unnatural (the bacteria altering in some way the development of an acorn into an oak tree).

A second shortcoming is that even if the biocentric outlook were to be accepted as a moral theory that is capable of creating genuine human duties to nonhumans and to the environment, there remains the question of how to resolve conflicts between entities that are afforded equal worth. In certain scenarios it is possible to envisage a mutuality of benefit for both humans and nonhumans. For example, a clean and healthy atmosphere provides advantage to both humans and nonhuman mammals; both require particular atmospheric conditions to survive and flourish. In other scenarios mutuality is lacking and one life form may only reach their full biological powers by depriving another of their life. The dependency on deprivation of life presents a dilemma for the biocentric outlook that Taylor offers, especially where humans are concerned. Despite no normative reasons for it, if a human can only act to save one life they will choose the human life over the nonhuman life (and indeed other animals exhibit the same intra-species favouring). A human life that is unable to deprive nonhumans of their life is completely immobilised from living and flourishing. Taken to its logical conclusion the result of inaction would be physical and moral paralysis for it would be an injustice in respect of the biocentric outlook to save one life over another, even if one is a human and the other is, for example, disliked bacteria. This dilemma makes the entire theory appear if not irrational then at least contrary to the interests of humans and therefore impractical.

There appear to be three ways of accommodating this dilemma with the conclusions reached above that there is no normative basis for human superiority to nonhuman life and that there are good reasons to recognise the intrinsic good of all life. One way is to accept the theological arguments (or at least the Western historical and cultural legacy) that have been set out in the preceding chapter and that provide an explanation for human superiority. Christianity positions humans as stewards of the world and charges them with the task of improving nature and the lives of nonhumans. As has been discussed in the previous chapter's historical account the development of natural law and expanding notions of human entitlement, alongside subsiding notions of inherent moral restrictions significantly affected the relationship between humans and nonhumans and the environment.

A second way of accommodating the dilemma is to concede that though there is no normative reason for attributing humans with greater worth than nonhumans, an environmental ethic requires this if it is to provide a realistic and practical code by which individuals are to live. This understanding finds that humans are not superior *per se* but are in a superior position. If understood in this way the human superiority need only assert itself where there is an ethical choice between humans and nonhumans. Where mutuality of benefit or advantage could be secured between humans and nonhumans the biocentric claim of species egalitarianism would remain. Where mutuality could not be reached the need to avoid a moral and practical paralysis would circumvent the presumption of all life possessing equal value. This understanding acknowledges that the human species acts selfishly to secure their benefit, advantage and flourishing but it also accepts that another dominant species would do the same were they to exist; it is not the zoological characteristics of humanity that affords humans their dominance, it is only their superior situation.

A problem with both of these means of accommodating the posed dilemma is that once humans are hierarchically differentiated from nonhumans the existence of a hierarchy develops into human values being used to determine the worth of all nonhumans. Once a hierarchy is introduced with humans sat atop, nonhuman species will tend to be ranked by the similarities or differences observed between them and the human valuers, despite all such argument having been shown to be groundless.

A third way of accommodating the dilemma requires a fundamental shift in how the world is viewed. A coevolutionary perspective confronts the categorical separation of humans as subjects and nonhumans or the environment as objects. Coevolution also confronts the presumption that humans and nonhumans are in constant competition with one another. In place of inaccurate yet commonplace linguistic and cultural tendencies, a realisation must be nurtured to ensure that relationships between all life and the environment are coevolutionary. Coevolution may be defined as, "The simultaneous development of advantages in two or more populations, species or other categories that interact so closely that each is a strong selective force on the other."[180] Relationships between any species and another, or between any species and the environment may be mutualistic or hostile[181]: The species that survive and flourish are those that adapt in response to the selective forces that operate on them. Although human numerical supremacy and technological dominance conceal many of the selective forces that may threaten the species, humans are no different in this regard.[182]

[180] John Cairns Jr, 'Sustainable co-evolution' (2007) 14 International Journal of Sustainable development and World Ecology 103, 104 quoting Peter H Raven and George B Johnson.
[181] ibid 104.
[182] The avian influenza pandemic suggests a hostile coevolution between species. Recent reports indicate the virus has begun adapting in ways that allow human-to-human transmission. Although establishing whether this adaption is due to human involvement in the strain may be difficult, the virus' new pattern of transmission would demonstrate an adaption that can be understood as a response to the selective force of human efforts to eradicate the threat the virus poses. See Andrew Marszal, 'Deadly avian flu 'spreads person-to-person' for first time' (*The*

Coevolution challenges anthropocentric hubris. Coevolution exists between notions of human dominance of the environment and of immobilising subservience to the environment, the other ways of accommodating (or of not accommodating) the lack of normative foundation for humans having anything other than equal value to nonhuman life. Coevolution challenges the inherently anthropocentric assumptions of epistemology that are incapable of acknowledging biocentric or ecocentric conception of the world. Although from the point of view of the environment anthropocentric assumptions may produce advantageous environmental outcomes, being based on human needs or structured on human beliefs and values, nonhuman life and the environment are positioned as human artefacts or resources. Coevolution presents an alternative model that recognises both parties in the "grand evolutionary contract"[183]: The observation that humans are a selective force on nonhuman life and the environment can be positioned alongside the view that nonhuman life and the environment evolve mutually with humans, exploiting and capitalising on human characteristics. Pollan, an advocate of the coevolutionary model, argues that the flower uses the bee as much as the bee uses the flower. The bee and the flower have a mutual dependency. Pollan writes; "In a coevolutionary relationship every subject is also an object, every object a subject."[184] In his investigations of apples, tulips, marijuana and potatoes Pollan finds that the species have coevolved to capitalise on the respective human desires of sweetness, beauty, intoxication and control.

Coevolution does not overcome entirely the posed dilemma because human values remain the determinants of whether instances of coevolution are deemed mutualistic or hostile and what

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*Telegraph*, 7 August 2013) <http://www.telegraph.co.uk/health/flu/10226810/Deadly-avian-flu-spreads-person-to-person-for-first-time.html> accessed 30 October 2015.

[183] Michael Pollan, *The Botany of Desire: A Plant's-Eye View of the World* (Random House 2001) 108.

[184] ibid xxi.

is of benefit to nonhumans or ecosystems (however scientifically accurate and empirically supported these values may be). However, the approach illustrates that a mutualistic good for humans and nonhumans and the environment can be brought about by human action. The coevolutionary perspective is situated between the other accommodations of theological duty of stewardship or the default human superiority. Coevolution accommodates the superior situation of humans in the world by insisting upon a sense of responsibility. Coevolution suggests a correlation between the uniquely human awareness of ecological effects on the planet and a sense of responsibility to the planet; the notion and extent of human responsibility is symbiotically linked to the human role in natural selection and evolution. Anything less breaks the evolutionary contract.

### 3.3 Conclusion

The previous chapter charted the changing conceptions of the place of humans in the world and related notions of responsibility in the traditions that anticipate modern environmental thinking. Building upon this, this chapter has analysed the four environmental perspectives (of anthropocentrism, biocentrism, sustainable development and ecocentrism) as movements away from and contrary to the paradigmatic utilitarianism arrangement of value. Utilitarianism completely separates humans from the rest of the world, dispenses with inherent limits to human action, and discards all conceptions of duty to nonhuman life and the natural environment. However, upon such movements away from utilitarianism it becomes increasingly unrealistic that the moral theory will obligate human behaviour to protect the environment. An environmental ethic must accept a human position of superiority – whether

by divine entitlement or by default (despite neither having a normative basis that can be defended) – if it is to be operational and considered rational.

The typology of environmental perspectives, understood in this context, provides a basis from which attitudes towards the environment can be assessed, if they are found in the decisions of the ICJ.

## Chapter four

## ANALYSIS OF THE INTERNATIONAL COURT OF JUSTICE'S ENVIRONMENTAL JUDGMENTS

The preceding theoretical chapters justify the appropriateness of conducting case analysis to ascertain the existence and coherency of an environmental philosophy that may underlie judicial reasoning in the International Court of Justice (ICJ). Chapter one established the Court's consideration of environmental issues. Chapter two's overview of the traditions shaping environmental philosophy provided the basis for the four environmental philosophical perspectives presented in chapter three that can be used to understand and situate any underlying philosophical approach that the Court is found to have. Proceeding upon this foundation of understanding this chapter first explains its analytical methodology and the selection of cases. It then provides a detailed assessment of the Court's environmental philosophy, in particular its approach to sustainable development, the principles of prevention and precaution, and environmental impact assessments. The section on sustainable development contains subsections on separate and dissenting opinions in the Court and provides context for these through a consideration of judicial opinion in non-environmental cases.

The analysis that follows finds that the ICJ ostensibly adheres to the environmental philosophical perspective of sustainable development. In adopting this perspective the Court can be regarded as taking a moderate approach to international environmental law; sustainable development does not provide for environmental protections to the same degree as biocentrism or ecocentrism. Sustainable development regards the environment as something

that ought to be protected for the benefit of humans and therefore prioritises human interests over those of nonhumans. However, sustainable development encourages greater environmental protections than anthropocentric perspectives that only generate such protections if aesthetically or culturally of value to humans. Sustainable development, as will be recalled from the analysis of the previous chapter, requires the integration of developmental and environmental priorities. Successful integration is intended to produce intergenerational and intragenerational equity among humans. These different aspects of sustainable development are reflected in the Our Common Future report that defines the concept as, "to ensure that [humanity] meets the needs of the present without compromising the ability of future generations to meet their own needs."[1] However, though the Court seemingly adopts the perspective of sustainable development it takes a primarily conservative approach to it in its application of the concept and its related components of prevention, precaution and environmental impact assessments. An application of sustainable development that adheres to the Our Common Future report's articulation would see the Court regarding economic development as being constrained by environmental considerations; the right states have to exploit their own resources for the purposes of economic development, reiterated in numerous international conventions, should be curtailed by environmental obligations.[2] The Court, however, betrays an anthropocentric characterisation of the concept where its decisions suggest a minimal curtailment of economic and development priorities.

[1] UNGA 'Report of the World Commission on Environment and Development: Our Common Future' (11 December 1987) Annex to UN Doc A/42/427 (Our Common Future) ch 2 para 1.

[2] For example, Principle 2 of the Rio Declaration recognises, "the sovereign right [of states] to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national." Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development (14 June 1992) 31 ILM 874 (Rio Declaration) Principle 2.

This chapter makes two primary wide-ranging claims: i) the Court is inconsistent, hesitant and accordingly slow to acknowledge existing environmental obligations. It is reluctant to develop international environmental law; and ii) that as a result states continue to have different understandings of environmental principles, the obligatory status they have and the imposition they present to other (perhaps conflicting) state priorities. Two subsequent effects of these observations can be posited; that states take a lead in developing environmental understandings and that through its omission the ICJ forgoes environmental protection for sovereignty and development. These effects are highlighted throughout the following discussion.

For the most part the Court's general approach to international environmental law has been hesitant and inconsistent. This chapter finds that the Court's indecision suggests its unwillingness to impose limitations on the economic development of states. The claim of indecision is supported by the Court's reluctance to engage with the concept of sustainable development and its lack of clarification and certainty when it is pertinent. A reluctance to employ the concept is clear from the Court's first discussion of sustainable development in *Gabčíkovo-Nagymaros Project* where the concept was considered in aspirational terms only. The Court only stated, "This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[3] Although reference to the concept conveys its importance and situates sustainable development as the centrepiece of international environmental law, the Court's statement was well overdue.

The analysis that follows reveals a pattern of missed opportunities where the Court has shied away from discussing principles of international environmental law. As this chapter

[3] *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Judgment) [1997] ICJ Rep 7, 78 [140] [hereinafter "*Gabčíkovo-Nagymaros Project*"].

demonstrates this is the case in relation to sustainable development, the principle of prevention, the precautionary principle and with environmental impact assessments. In Judge Weeramantry's dissenting opinion in *Gabčíkovo-Nagymaros Project* sustainable development was traced back to 1971, which means that although the Court had the opportunity to assess the concept it did not in four subsequent environmental cases.[4] Analysis of the *Nuclear Tests* cases[5] and *Nauru*[6] reveal the Court's other missed opportunities to mention and question the concept of sustainable development indicating how seemingly out of touch the Court is with recent developments in international environmental law. This pattern of missed opportunities – which supports the arguments of hesitancy on the part of the Court – detracts from the potential limitations on economic development that sustainable development can be used to provide. The Court's hesitancy therefore adds further concessions to the already compromised position of sustainable development, if the perspective is compared to biocentrism or ecocentrism. In rare instances of lucidity the Court's approach to environmental protection conveys an overt philosophy of sustainable development that is underpinned by an anthropocentric instrumental valuation of the environment.

Without comprehensive and consistent explanation of principles of international environmental law the Court is unable to provide states with, for the example of sustainable development, any instruction on how to reconcile development and environmental priorities. The below analysis finds that when the Court has discussed sustainable development it has said nothing of the state obligations that flow from the concept. By omitting clear explanation

[4] *Nuclear Tests* (*Australia v France*) (Judgment) [1974] ICJ Rep 457; *Nuclear Tests* (*New Zealand v France*) (Judgment) [1974] ICJ Rep 457; *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) (Judgment) [1992] ICJ Rep 240 [hereinafter "*Nauru*"]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [hereinafter "*Nuclear Weapons* advisory opinion"].
[5] Reference made to the singular decision of the Court for the cases *Nuclear Tests* (*Australia v France*) (Judgment) (n 4); *Nuclear Tests* (*New Zealand v France*) (Judgment) (n 4) hereinafter takes the form "*Nuclear Tests* cases (Judgment)".
[6] *Nauru* (Judgment) (n 4).

of limitations that may be imposed by sustainable development to the economic development of states the Court avoids stating the concept's legal implications, which suggests its reluctance to expound a philosophy that underpins its approach to international environmental law. That the Court can be a developer of sustainable development and of international environmental law appears a distant prospect. However, this general picture of conservatism in the Court's approach to sustainable development does have exceptions. The separate and dissenting opinions of Judges Weeramantry and Cançado Trindade are found to be progressive as compared with the Court's majority judgments. If the Court wishes to adopt a more developmental role in environmental protection it would benefit from considering the arguments set out by these two judges. Weeramantry and Cançado Trindade's understandings of sustainable development, for example, accord with the ambitions of the Our Common Future report and represent a more robust framework of environmental protection. Weeramantry and Cançado Trindade's opinions suggest a latent progressive philosophical outlook could form in the ICJ, though so far such views have been repressed in the Court's majority judgments. The result of this repression is that though certain judges find the Court able, it does not develop international environmental law. Weeramantry and Cançado Trindade's comments suggest the state-centric characterisation of international law is unhelpful for the development of environmental principles because it inhibits the cooperation required to change how states act towards the environment.[7]

Another finding of this analysis can be gleaned from the separate and dissenting opinions of other judges that reveal a sentimental regard for the natural environmental that further obstructs the Court's elaboration of principles of international environmental law. These

[7] The relationship between sovereignty and environmental priorities is discussed in further detail below, text to n 5ff in ch 6.

statements suggest that at times the Court appears more comfortable with expressing environmental sympathies as opposed to questioning and adjudicating on the performance of states' legal obligations. The analysis assesses the contributions of separate and dissenting opinions against majority judgments of the Court and in comparison with disputes in other disciplines of international law. This demonstrates that progressive approaches to environmental principles do exist in the margins of the Court's jurisprudence, but that the latent progressivism in judge opinions seldom informs the Court's majority judgments explicitly. Moreover, though comments in separate and dissenting opinions may intimate progressive attitudes in relation to international environmental law, the discussions are for the most part underpinned by principles of justice or general principles of law and are not premised on conceptions of environmental duties or morals.

The chapter also finds that the Court's reluctance to fully explain principles of environmental law may stem from the Court's treatment of the environment as an issue of science. Consequently the environmental imperative being questioned by the Court is valued according to, and in so far as, it corresponds to human values and determinations of the environmental sciences. Consideration of the cases displays the Court's use of emotive language or appeals to science as preventing its pronouncements on states' legal obligations. Use of emotive language or appeals to science highlight the Court's apprehension, where it would rather discuss the environment as *either* a concern of law *or* one of science or philosophy, which in particular misrepresents sustainable development's aim of adopting an integrated approach.[8]

[8] Unfamiliarity is not to be accepted as an excuse. The Court is entitled to call experts to provide it with any advice it deems necessary. Rules of the Court (adopted 14 April 1978, entered into force 1 July 1978, amendment entered into force on 14 April 2005) <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0> accessed 30 October 2015 art 67(1).

In light of these findings the subsequent chapter presents an environmental moral framework based upon notions of duty to the environment by which the Court can address the deficiencies highlighted in the following analysis.

### 4.1 Methodology for the selection of ICJ cases

This section provides a brief account and justification of the methodology used in this chapter's analysis. The section also explains how the cases have been selected and the appropriateness of this sample.

#### a) Quantitative and qualitative approaches

Existing analyses of environmental decisions from domestic courts and investigations into ICJ decisions that relate to areas of law besides those of an environmental nature offer an analytical approach that will be adopted in this examination. Qualitative or "impressionistic" analysis of patterns in judicial reasoning that do or do not promote environmental protection has been conducted with respect to domestic legal systems.[9] The domestic setting has also provided for quantitative analyses where the presence of certain search terms such as "environmental morals" or "balance of nature" have provided the basis for criticism and for inference of underlying philosophical approaches in court decisions.[10] Existing analyses of ICJ decisions, though without an environmental focus, note the Court's missed opportunities

[9] Cheyne reviews United States Congressional debates "in light of some relevant ethical theories and examine[s] the extent to which a coherent ethical approach can be identified." Ilona Cheyne, 'Law and Ethics in the Trade and Environment Debate: Tuna, Dolphins and Turtles' (2000) 12 Journal of Environmental Law 293, 294.
[10] Christopher Stone, 'Do Morals Matter? The Influence of Ethics on Courts and Congress in Shaping US Environmental Policies' (2003) 27 Environs, Environmental Law and Policy Journal 13, 26.

to explore further the issues before it. Criticism and commentary of the Court has employed analyses of separate and dissenting opinions[11], voting patterns[12] and the process of drafting Court decisions[13] to identify and assess decision-making motivations. This approach is equally applicable to environment related cases. Accordingly, both quantitative and qualitative approaches will be adopted in the course of this chapter's analysis. The Court's terminology may indicate whether the Court has a philosophical approach to its environmental decisions, what this may be and how coherent it is. At other times a qualitative analysis will provide for delicate questioning of why the Court approaches environmental decisions in the way it does.

**b) Justification of the types of cases analysed**

This chapter will analyse the following cases: *Nuclear Tests* (*Australia v France*)[14], *Nuclear Tests* (*New Zealand v France*)[15], *Certain Phosphate Lands in Nauru*[16], *Legality of the Threat or Use of Nuclear Weapons*[17], *Gabčíkovo-Nagymaros Project*[18], *Pulp Mills on the River Uruguay*[19], *Aerial Herbicide Spraying*[20], *Whaling in the Antarctic*[21], *Certain Activities carried*

[11] Iain Scobbie, 'Smoke, Mirrors and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall' (2004) 5 German Law Journal 1107.
[12] ibid 1108-09.
[13] ibid 1111-13.
[14] *Nuclear Tests* (*Australia v France*) (Judgment) (n 4).
[15] *Nuclear Tests* (*New Zealand v France*) (Judgment) (n 4). In 1995 New Zealand requested the Court return to its 1974 decision in order to judge the legality of France's eight final nuclear tests in the South Pacific. As this later case was initiated as a resumption of the earlier decision it will be considered as part of the same dispute. *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (*New Zealand v France*) *Case* (Request for an examination of the situation - Request for the Indication of Provisional Measures: Order) [1995] ICJ Rep 288 [hereinafter "*Nuclear Tests II*"].
[16] *Nauru* (Judgment) (n 4).
[17] *Nuclear Weapons* advisory opinion (n 4).
[18] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3).
[19] *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Judgment) [2010] ICJ Rep 14 [hereinafter "*Pulp Mills*"].

*out by Nicaragua in the Border Area*[22], and *Construction of a Road in Costa Rica along the San Juan River*[23]. The selection of these cases is justified for two reasons. First, they have been selected primarily for their consideration of environmental issues.[24] Eight of the ten cases directly request the Court to consider environmental issues such as air and water pollution, species preservation, and ecological and environmental protection of land. The other two cases, *Nauru* and the *Nuclear Weapons* advisory opinion are also to be analysed since they present instances in which the Court had opportunities to relate the dispute and advisory opinion in hand to international environmental law.[25]

**c) Justification of the size of the sample analysed**

The second justification for this sample is that ten cases allows for robust and penetrative analysis. This avoids the risk of broad conclusions being made prematurely or without sufficient supportive evidence: too small a sample provides an insufficient resource from which to assess the coherency and systematicity of the Court's philosophy in relation to environmental issues. Supporting this is the forty-year period over which these cases span. This allows an assessment of the ICJ's jurisprudence in the context of evolving

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[20] *Aerial Herbicide Spraying* (*Ecuador v Colombia*) (Application Instituting Proceedings) 2008 <http://www.icj-cij.org/docket/files/138/14474.pdf> accessed 30 October 2015 [hereinafter "*Aerial Herbicide Spraying*"].
[21] *Whaling in the Antarctic* (*Australia v Japan: New Zealand Intervening*) [2014] (Judgment) ICJ Rep 1 [hereinafter "*Whaling in the Antarctic*"].
[22] *Certain Activities carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*) (Application Instituting Proceedings) 2010 <http://www.icj-cij.org/docket/files/150/16279.pdf> accessed 30 October 2015 [hereinafter "*Certain Activities*"].
[23] *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v Costa Rica*) (Application Instituting Proceedings) 2011 <http://www.icj-cij.org/docket/files/152/16917.pdf> accessed 30 October 2015 [hereinafter "*Construction of a Road*"].
[24] For overviews on how these cases concern environmental matters see above, text to n 102ff ch 1.
[25] Indeed consideration of these cases supports the use of both qualitative and quantitative methods, since without the former the Court's pronouncements in these cases may not have been included.

understandings of the environment, as gleaned from environmental conferences such as the 1992 United Nations Conference on Environment and Development in Rio de Janeiro.

Although ten cases will be consulted in this analysis, due to orders of discontinuance and joinders the case sample remains manageable. These circumstances provide for deeper analysis: too large a sample of cases could lead to oversimplified analysis of the Court's approach to environmental issues. The *Nuclear Tests* cases, *Nauru* and *Aerial Herbicide Spraying* were discontinued before the Court passed judgment on the merits of the cases. Nevertheless the arguments advanced by states in these different decisions, along with the Court's pronouncements during preliminary stages, provide sufficient material from which it is possible to ascertain the existence and nature of any philosophical approach it may have. Additionally, of the cases sampled the Court has merged four. The Court merged the *Nuclear Tests* cases though these were not subject to a Joinder.[26] Also, the Court ordered a Joinder of Proceedings between the *Certain Activities* and the *Construction of a Road* cases. In accordance with Article 47 of the Rules of the Court[27], cases may be joined if "consonant not only with the principle of the sound administration of justice, but also with the need for judicial economy."[28] Despite the joining of proceedings cases retain their precedential independence. This prevents judicial compromise of the different subject matter presented to the Court and ensures the procedural equality of the parties. Explaining the consequences of the Joinder the Court has stated, "Hearing and deciding the two cases together will have

[26] See n 5.
[27] Art 47 of the Rules of Court provides that, "The Court may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Court may, without effecting any formal joinder, direct common action in any of these respects". Rules of the Court (n 8).
[28] *Construction of a Road* (Joinder of Proceedings: Order) General List No 152 [2013] ICJ 1 [12].

significant advantages. The Court does not expect any undue delay in rendering its judgment in the two cases."[29]

### 4.2 Analysis of the ICJ's environmental philosophy

The variety of approaches the Court has taken in environmental cases, the vagueness of its articulation of principles of international environmental law and the sometimes-contradictory parts of its decisions make it difficult to determine whether the Court has an environmental philosophy and what it may be. The Court's consideration of the soft or hard law status of environmental principles makes these difficulties more apparent. By missing opportunities to clarify the status of the principles the Court has allowed the principles to remain open to state interpretation. An analysis of these general observations follows.

Analysis of decisions of the ICJ reveals a variety of approaches taken in relation to international environmental law. In support of claim i) that the Court is inconsistent, hesitant and accordingly slow to acknowledge existing environmental obligations, and is reluctant to develop international environmental law, these different approaches of the Court suggest a lack of coherence in its regard for the environment. The Court primarily embraces the philosophy of sustainable development, as is discussed below. However, some pronouncements are suggestive of the Court's anthropocentric philosophical perspective. For example, in the *Nuclear Tests* cases the Court judged the severity of environmental pollution purely in terms of the effects it may pose to humans. The Court regarded the levels of atmospheric pollution as "so infinitesimal that it may be regarded as negligible, and that such

[29] ibid [17].

fallout on Australian territory does not constitute a danger to the health of the Australian population."[30] Alternatively, some aspects of judgments demonstrate the Court's acceptance that environmental law should be approached in a preventative manner. In these instances the language employed by the Court reflects valuations of the environment that suggest an ecocentric philosophical perspective. Such statements are isolated, which prevents concluding that the Court genuinely advances environmental principles because of the environment's intrinsic value. In a statement that suggests the environment is to be recognised for its intrinsic value the Court declared, "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment".[31] Also suggesting a precautionary environmental regard is the *Pulp Mills* decision where the issue of the quality of the waters of the River Uruguay was framed as if it were an issue separate from sustainable development. This appears to introduce a high threshold; the concept of sustainable development appears only to permit economic development if it does not pollute the River. The Court felt compelled to highlight the "importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development".[32]

In other statements the Court is vague in its pronouncements of international environmental law and does not explain, for example, the reasons why environmental protections are to be considered important. The Court's hesitancy and reservations in expounding principles of international environmental law suggest it has yet to determine how it regards the environment. In the *Nuclear Weapons* advisory opinion the Court discussed the arguments advanced by certain states that any use of nuclear weapons would be contrary to "existing

[30] *Nuclear Tests* cases (Judgment) (n 26) 462 [18].
[31] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 78 [140].
[32] *Pulp Mills* (Request for the Indication of Provisional Measures: Order) [2006] ICJ Rep 113, 133 [80].

norms relating to the safeguarding and protection of the environment, in view of their essential importance."[33] This example explains how the two general claims of this chapter relate to one another; legitimate though it may be, the Court's hesitancy in failing to specify why norms that protect the environment are important, enable inconsistencies in the arguments of disputing states.

The Court's different approaches can be contradictory to one another if understood in terms of environmental philosophy. Contradiction is evident even within particular decisions of the Court, which in support of claim i) suggests the Court does not have a coherent understanding of international environmental law. The *Nuclear Weapons* advisory opinion provides a clear example of this. Whereas the Court stipulated the environment is "not an abstraction but represents the living space, the quality of life and very health of human beings, including generations unborn"[34], to the contrary, in the preceding paragraph the Court validated the arguments put before it by some states that treaties and norms of environmental protection only operate in times of peace.[35] The Court's recognition of different notions of environmental protection pertaining to times of war and to times of peace does present the environment as an abstraction, and that it is malleable to the human context. The Court's justification was that, as they understood it, the central issue concerned whether the states had

[33] *Nuclear Weapons* advisory opinion (n 4) 241 [27].
[34] ibid [29].
[35] The Court refers to the argument of "some states." ibid [28]. One such state was the United States of America who argued that many international environmental agreements were not negotiated with the intention of limiting the use of nuclear weapons. As examples they cited Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293; United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC); Convention on Biological Diversity (adopted 11-22 May 1992, entered into force 29 December 1993) 1760 UNTS 79. *Nuclear Weapons* advisory opinion (Oral Statement: CR 1995/34) <http://www.icj-cij.org/docket/files/95/5947.pdf> accessed 30 October 2015, 65.

obligations of total restraint during military conflict, a conception that did not reconcile its contradictory statements concerning the environment.[36]

The categorisation of international law as soft law or hard law provides a reason for the Court's conservative application of principles of international environmental law. The terms soft and hard law are used to distinguish between different degrees of normativity, enforceability, precision and legal status that exist in international rules.[37] These criterions and the status of the rules to which they relate continue to be the subject of disputes, but such opportunities for clarification (and possibly development) have not been taken up by the Court. Instead, a cautious approach has been followed because too progressive a decision could affect the soft law status of the concerned rule and its content, which would be contrary to the notion of *pacta sunt servanda*.

The Court has missed opportunities to engage with the issue of soft and hard international environmental law. The Court's neglect suggests indifference in relation to environmental principles and its silence on the matter contributes to claim i) that the ICJ is slow to acknowledge existing international obligations. Demonstrating the Court's missed opportunities are the decisions of *Gabčíkovo-Nagymaros Project* and *Pulp Mills*. In these cases the states appearing before the Court invoked the soft law status of principles within their arguments. The different arguments that follow support claim ii) that without clear articulation by the Court, states party to the dispute frame principles of international environmental law to fit their case. In *Gabčíkovo-Nagymaros Project* Slovakia regarded rules on environmental protection measures such as Principle 4 of the Stockholm Declaration and

[36] *Nuclear Weapons* advisory opinion (n 4) 242 [30].
[37] Ellis uses these criteria as a means of seeking to define soft law as compared with hard law. Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 Leiden Journal of International Law 313.

Principle 3 of the World Charter for Nature as "at most "soft law", and reflect[ing] a developing consensus about the importance of environmental factors in decision making."[38] Providing a clear window of opportunity for the Court to discuss the consequences of the soft law categorisation Hungary understood Slovakia's interpretation of soft law as incorrect because if accepted the rules would "impose little or no constraints on state action."[39] In a statement that appears to invite discussion on the part of the Court in *Pulp Mills* Uruguay noted the different normative statuses of international environmental rules, "the legal character of these various "principles" is diverse. Some are rules of international law, others are general principles endorsed by States in multilateral treaties or non-binding soft-law instruments."[40] Despite these opportunities the Court did not discuss the soft law category or the soft law status of any principles of international environmental law in its majority judgments. However, in his dissenting opinion of the Court's *Pulp Mills* judgment (Provisional Measures) Judge *ad hoc* Vinuesa drew attention to the potential misuse of the soft law categorisation as a means of states avoiding their obligations. Vinuesa found that, "the precautionary principle is not an abstraction or an academic component of desirable soft law, but a rule of law within general international law as it stands today."[41]

The soft and hard categories of international law may bestow rights onto states or obligations expected of states. Soft law has been described as "a naked norm, whereas hard law is a norm

[38] *Gabčíkovo-Nagymaros Project* (Memorial of the Slovak Republic Volume 1) [1994] <http://www.icj-cij.org/docket/files/92/10939.pdf> accessed 30 October 2015 [8.112] referring to Stockholm Declaration of the United Nations Conference on the Human Environment (16 June 1972) 11 ILM 1461 (Stockholm Declaration) Principle 4; UNGA 'World Charter for Nature' (28 October 1982) UN Doc A/RES/37/7.
[39] *Gabčíkovo-Nagymaros Project* (Counter-Memorial of the Republic of Hungary Volume 1) [1994] <http://www.icj-cij.org/docket/files/92/10949.pdf> accessed 30 October 2015 [4.10].
[40] *Pulp Mills* (Rejoinder of Uruguay) [2008] <http://www.icj-cij.org/docket/files/135/15432.pdf> accessed 30 October 2015 [5.41].
[41] *Pulp Mills* (Request of the Indication of Provisional Measures: Dissenting Opinion of Judge *ad hoc* Vinuesa) [2006] <http://www.icj-cij.org/docket/files/135/11245.pdf> accessed 30 October 2015, 152.

clothed in a penalty"[42], which suggests enforcement marks the division. Some international environmental agreements may indicate an accepted understanding as to its normativity.[43] However, in contentious examples where normativity is disputed the Court has the opportunity to interpret the normative status of rules disputed before it. As the preceding paragraph demonstrates, such opportunities have not been seized.

The precision of rules provides the Court an additional way to question environmental rules and would assist it in resolving state disputes and fulfilling its competences. However, the Court does not attempt to integrate or reconcile international law's imperatives of balancing the need for state consensus (and the resulting international environmental agreements) with ensuring rules are interpreted as precisely as possible. Discussing the precision of international environmental rules would not necessarily require the Court develop principles of international environmental law as the Statute of the International Court of Justice gives the Court the jurisdiction to interpret treaties and to address any question of international law.[44] In its environmental decisions the Court has not fulfilled its competency of clarifying the rights of states or state obligations that may flow from the vague or ambiguous language of rules. In relation to the criterion of precision, though writing about international human rights law, Baxter notes the "widespread phenomenon of papering over international differences and of avoiding hard problems with generalisations that carry little or no legal consequences."[45] This phenomenon is apparent in international environmental law too. For example, Principle 3 of

[42] Anthony D'Amato, 'Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont' (2009) 20 European Journal of International Law 897, 902.
[43] For example, the Kyoto Protocol contains language that imparts particular obligations on states. The Protocol states, "The Parties included in Annex I *shall, individually or jointly, ensure* that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts". Non-compliance procedures and mechanisms are provided for in art 18. Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) 2303 UNTS 148 (Kyoto Protocol) arts 3(1) and 18 (emphasis added).
[44] Statute of the International Court of Justice art 36(2) [hereinafter "the Statute"].
[45] R R Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 International and Comparative Law Quarterly 549, 561.

the Rio Declaration states, "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." This rule is vague in so far as it does not convey to states specific requirements regarding what the needs of future generations might be and how they are to be provided.

The legal status of a disputed rule is another consideration that has not been employed by the Court to confirm the implications of principles of environmental law. Again this supports claim i) that the Court is hesitant in its approach and is reluctant to develop international environmental law. The Court's caution corresponds to the struggle between the formal sources of international law that flow from the Court's Statute and the role of state consent in producing rules.[46] The Court's sensitivity towards this issue affects judicial reasoning and covers any philosophical approach to the environmental principles that it may understand to lie at the centre of the concerned rule. The Court is aware of "the continuous efforts [in international discourse] to nudge the field beyond states-will theories of sources, beyond bilaterality and opposability, toward community norms, beyond a focus on managing disputes and adversarial proceedings, toward a deeper structure of normative enunciation and claims arising from neighbourhood and impact rather than contract and technical legal interests."[47]

Separate and dissenting opinions demonstrate an awareness of divergent accounts of the legal status of rules. In this respect the opinions support claim i)'s observance of hesitancy since the Court is found impeded in its pronouncement of existing obligations. Accordingly, it can be inferred that, in support of claim ii), disputed legal status of environmental norms sustains a

[46] Art 38(1) of the Statute provides a "starting point" of the sources of international law. Jan Klabbers, 'Constitutionalism and the Making of International Law: Fuller's Procedural Natural Law' (2008) 5 No Foundations: Journal of Extreme Legal Positivism 84, 84. For further discussion surrounding the sources of international law see above, text to n 3ff in ch 1.

[47] Benedict Kingsbury, 'International Law as Inter-Public Law' in Henry Richardson and Melissa Williams (eds), *Moral Universalism and Pluralism (Nomos XLIX)* (New York University Press 2009) 181.

permissive culture of unbounded state entitlement. Judge Weeramantry's dissenting opinion in the *Nuclear Weapons* advisory opinion demonstrates this inference, noting, "Such extreme positivism in legal doctrine has led humanity to some of its worst excesses."[48] Weeramantry supports his view with reference to Hart – "a leading jurist of the positivistic school"[49] – whose acceptance of a "minimum content of Natural Law"[50] leads the Judge to regard there being limits to what states can consent to, in this instance nuclear annihilation: "[Members of the international community] must ask themselves whether there is a place in that set of rules for a rule under which it would be legal, for whatever reason, to eliminate members of that community or, indeed, the entire community itself."[51] Weeramantry expects the Court to do more than observe this formalism. His opinion in *Gabčíkovo-Nagymaros Project* suggests the Court has a duty to uphold this minimum content. Weeramantry lamented, "We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare."[52] Statements such as this do not exist in the Court's majority judgments, suggesting the questions surrounding formalism paralyse the Court. One exception in addition to Weeramantry is Judge Cançado Trindade. In his separate opinion in *Pulp Mills* Cançado Trindade questions whether the Court "can and should" have recourse to principles of environmental law under Article 38(1)(c) of its Statute.[53] Contrary to the cautious approach of the Court's majority Cançado Trindade understood that, "The

[48] *Nuclear Weapons* advisory opinion (Dissenting Opinion of Judge Weeramantry) [1996] <http://www.icj-cij.org/docket/files/95/7521.pdf> accessed 30 October 2015, 494.
[49] ibid 520.
[50] ibid 521 quoting H L A Hart, *The Concept of Law* (2nd edn, OUP 1994) 189.
[51] *Nuclear Weapons* advisory opinion (Dissenting Opinion of Judge Weeramantry) (n 48) 521.
[52] *Gabčíkovo-Nagymaros Project* (Separate Opinion of Judge Weeramantry) [1997] <http://www.icj-cij.org/docket/files/92/7383.pdf> accessed 30 October 2015, 117.
[53] *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) [2010] < http://www.icj-cij.org/docket/files/135/15885.pdf> accessed 30 October 2015 [5].

aforementioned general principles, and temporal dimension, are to be kept in mind, in the exercise of the international judicial function".[54]

**a) The Court's approach to sustainable development**

Of the four environmental philosophical perspectives presented in chapter three the ICJ has primarily embraced the philosophy of sustainable development in its reasoning, though it has been reluctant to fully explain its approach and understanding of the concept as a principle of international environmental law. This has resulted in incoherent and inconsistent approaches. This is lamentable since states routinely advance competing views of sustainable development, suggesting the international community would benefit from the Court putting forward a clear and consistent determination of the obligations sustainable development places on states. Where the Court has begun to explain the concept of sustainable development its approach has presented a compromised characterisation of sustainable development in which, contrary to the Our Common Future report's definition of the concept, environmental and developmental priorities are not integrated or harmonised.

States appearing before the Court routinely advance legal arguments relating to principles of international environmental law. In most instances the arguments presume Court acceptance of sustainable development as the underlying theoretical basis for determinations. However, the Court does not take advantage of this opportunity to clarify environmental norms. The earliest example of the Court's tacit acceptance of sustainable development is the *Nuclear*

[54] ibid [148].

*Tests* cases.[55] Foreshadowing the concept of sustainable development the Court heard Australia's argument concerning the need to harmonise developmental priorities with a consideration for the environment: "The contamination of the environment with radio-active debris from atmospheric nuclear explosions subject[ing] man and his biosphere to radiation doses."[56] Despite hearing this, the Court neglected to discuss the matter.

Indeed there is a pattern of the Court being hesitant to acknowledge existing environmental norms (even those uncontentious) that allows states to continue to present their own understandings as if they were authoritative, as claims i) and ii) suggest. Uruguay's Counter-Memorial in *Pulp Mills* is further evidence of this pattern. Even though the Court had said very little on the subject of sustainable development in *Gabčíkovo-Nagymaros Project* Uruguay presumed the Court would use the concept to form its decision. Uruguay relied on the Court's statement that sustainable development is the "need to reconcile economic development with protection of the environment",[57] and accordingly interpreted the Rio Declaration as requiring harmonisation and integration between economic development and environmental protection. Uruguay argued, "Principle 2 of the Rio Declaration is neither an absolute prohibition on environmental damage nor a license to exercise absolute freedom in exploiting natural resources. Like Principle 4, it too requires integration or accommodation of development and environmental protection."[58] However, as discussed in the previous chapter, the philosophical perspective of sustainable development can be interpreted and applied in different ways. In *Pulp Mills* the Court neglected to engage in discussions of different understandings of harmonisation, instead adopting a conservative approach that avoids

[55] *Nuclear Tests* cases (Judgment) (n 26).
[56] *Nuclear Tests* (*Australia v France*) (Application Instituting Proceedings) General List No 58 [1973] ICJ 1, 7 [23].
[57] *Pulp Mills* (Counter-Memorial of Uruguay) [2007] <http://www.icj-cij.org/docket/files/135/15427.pdf> accessed 30 October 2015 [2.32] quoting *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 77-78 [140].
[58] ibid.

expounding the requirements of sustainable development. This conservatism includes: the Court's reluctance to recognise and endorse the concept, its reticence to apply sustainable development's ideal of integration in a manner that balances or harmonises developmental and environmental priorities, and its interpretation of the concept in a manner that resembles valuations of the environment that bestow an anthropocentric characterisation of the concept. Evidence of these claims follows.

The Court's hearing of the *Nuclear Tests* cases occurred during the onset of the modern environmental movement.[59] In these cases the Court was requested to decide on the legality of nuclear testing. In support of claim i) analysis of these cases suggests the Court was hesitant to make pronouncements on international environmental law and that during the early 1970s it did not regard environment issues as a constraint on state priorities of defence. At the time of the cases usage of the concept of sustainable development was not yet common in the international community. However, the dispute can be interpreted as involving the extent to which environmental considerations could mitigate other state priorities, such as maintaining national security. Furthermore, although international environmental law was in its infancy the international rules on transboundary pollution were already well developed. Despite these opportunities the Court neglected to expound on principles of international environmental law, including the principle of transboundary harm that had been formulated in the *Trail Smelter*[60] arbitration. The *Trail Smelter* arbitration established that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious

[59] *Nuclear Tests* case (Judgment) (n 26).
[60] *Trail Smelter (USA v Canada)* (1941) 3 United Nations Reports on International Arbitral Awards 1905.

consequence and the injury is established by clear and convincing evidence."[61] The principle also featured in Principle 21 of the Stockholm Declaration but was ignored by the Court just one year later despite the unquestionable resemblance between the dispute and the environmental principles discussed in *Trail Smelter* and Principle 21.[62] Although the Court acknowledged the environmental impact of the nuclear tests, in its majority judgment there is no connection made between this impact and possible environmental damage and pollution.[63]

In *Nuclear Tests II* the Court was given the opportunity to clarify its earlier decision. In support of this chapter's claims, the reappearance of this dispute suggests the Court was not clear in its first articulation and that because of this states continued to operate under different understandings of international obligations. New Zealand argued that France's eight underground nuclear tests in the South Pacific were prohibited because of the Court's 1974 decision.[64] On the basis of the environmental protections it had advanced in 1974 New Zealand asked the Court to prohibit France's tests. New Zealand accepted that its 1974 Application had been based on atmospheric and not underground tests but did not consider this prohibitive of the Court resuming the case since "a shift to underground testing would not remove the risks of contamination; that, according to a variety of scientific evidence, underground nuclear testing at Mururoa and Fangataufa has already led to some

[61] ibid 1965.
[62] Principle 21 of the Stockholm Declaration confirms, "States have … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."
[63] Acknowledging the environmental impact of the nuclear tests the Court notes, "the testing of nuclear devices in the atmosphere has entailed the release into the atmosphere, and the consequent dissipation in varying degrees throughout the world, of measurable quantities of radio-active matter." *Nuclear Tests* cases (Judgment) (n 26) 462 [18].
[64] New Zealand's 1995 argument was based upon para 63 of the Court's 1974 decision that it interpreted as an obligation on France that they not continue with nuclear testing. Para 63 sets out, "Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute." ibid 477 [63].

contamination of the marine environment, and risks leading to further, potentially significant, contamination".[65] Despite this second chance the Court did not take this opportunity to clarify or develop principles of international environmental law and instead "interpreted its jurisdiction very narrowly"[66] preferring to respect the notion of *pacta sunt servanda* and show deference to state sovereignty and state priorities of the testing of nuclear weaponry.

Claim i) is supported by the Court's avoidance of the concept of sustainable development in *Nauru,* indicating its hesitancy and conservative approach. Although this dispute largely concerned matters that predated the onset of the modern environmental movement, it is still reasonable to expect the language of the Court to have indicated its regard for the environment and the environmental obligations of states. As a comparison, the Court's discussion in the *Nuclear Weapons* advisory opinion just three years after the *Nauru* case was vastly different, even though this too had to have consideration for the events that preceded the environmental movement. The Court's conservatism becomes more apparent if this decision is seen in the wider context of international environmental law, as it existed in 1992. During the five years leading up to the Court's judgment (preliminary objections) in *Nauru* the concept of sustainable development had enjoyed a significant ascent to prominence and acceptance within the international community, since its first articulation in the Brundtland Commission's Our Common Future report.[67] Despite the prolific character of the concept the Court gave no attention to international environmental law whatsoever in its judgment (preliminary objections). The Court's avoidance of principles of environmental law is to be regarded as starker since the judgment occurred only twelve days after the conclusion of the

[65] *Nuclear Tests II* order (n 15) 290.
[66] Malgosia Fitzmaurice, 'The International Court of Justice and the environment' (2004) 4 Non-State Actors and International Law 173, 179.
[67] Our Common Future (n 1). Reasons for this rise to prominence along with associated strengths and weaknesses are discussed above, see text to n 73ff in ch 3.1 c).

Rio Conference[68], when international environmental law – though still in its infancy – was receiving much attention. In not mentioning the concept of sustainable development the Court avoided the task of striking a balance between allowing development and protecting the environment, and so the Court did not need to further discuss specific ways of mitigating the *status quo* of uninhibited economic development.

The dispute in *Nauru* concerned the rehabilitation of the environment following decades of phosphate extraction and in anticipation of further removal of the mineral. The Court acknowledged that phosphate mining had left Nauru with the "two distinct problems" of the need for rehabilitation and the future depletion of the deposits.[69] That the Court referred to the rehabilitation of land as a "problem" for the Nauruans corresponds to the accepted environmental outcomes that pertain from phosphate mining. From Nauru's preliminary objections written statement the Court heard claims that less intrusive phosphate mining practices on Christmas Island had been accepted as "environmentally damaging to forests and certain wildlife."[70] Further evidence came from the Davey Committee that was set up by Nauru's Administering Authority prior to its independence. The Committee confirmed that phosphate mining led to the "loss of current useful production [and] the loss of opportunities for future utilization of these areas for habitation, agriculture or other purposes."[71]

In failing to associate such claims with what appears to be their clear environmental content the Court omitted to recognise the body of international environmental rules that had

[68] The Court's Judgment was given on 26 June 1992. The Rio Conference was held between 3-14 June 1992.
[69] *Nauru* (Preliminary Objections) [1992] ICJ Rep 240, 250 [20].
[70] *Nauru* (Written Statement of Nauru: Preliminary Objections) [1991] <http://www.icj-cij.org/docket/files/80/11275.pdf> accessed 30 October 2015 [77].
[71] *Nauru* (Memorial of the Republic of Nauru) [1990] <http://www.icj-cij.org/docket/files/80/6655.pdf> accessed 30 October 2015[182] quoting The Davey Committee, *Report on Rehabilitating Mined Phosphate Lands* (1966) 10.

developed during the previous twenty years. This body of rules included the responsibilities set out in the 1972 Stockholm Declaration for states to develop in a way that does not do harm to human beings and the human environment and does not cause "dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources."[72] If, as may be expected of the Court, it had addressed recent developments in international environmental law, it is not unreasonable to suggest the Court should have associated the actions that took place on Nauru with the concept of sustainable development. The concept has clear expectations of states that were readily available to the Court in the years leading up to *Nauru*. Relating to the first of Nauru's "two distinct problems", sustainable development urges states to accept that "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[73] The Court did not demonstrate any consideration of the responsibilities that can be found in the Rio Declaration; the environment is not attributed as an integral or even peripheral part of the development process. Some degree of neglect can be expected of the Court in this regard since the development being disputed had occurred before the arrival of international environmental obligations. However, the Court could still have used this case as an opportunity to discuss the emergence of particular principles of international environmental law.

Also in complete disregard of the Rio Declaration is the lack of association that the Court made between the second "problem" of the future depletion of phosphate deposits and the need "to equitably meet developmental and environmental needs of present and future

[72] Stockholm Declaration Principle 3.
[73] Rio Declaration Principle 4.

generations."[74] Claim i)'s observation of reticence on Court's association states assertions with areas of international law that are in their infancy constitutes inaction in these areas and gives the appearance of the Court regarding environmental protection as subservient to development, since environmental protections are not being integrated within development as priorities for present or future generations. The "problem" of the future depletion of phosphate deposits can also be understood within the context of international environmental law, and here the Court cannot be so easily excused for disregarding the growing body of environmental rules. That the Court continued to neglect the impact of development on the environment demonstrates its conservative approach. None of the international environmental standards of the Stockholm Declaration are visible in any statements the Court made. The Court missed the opportunity to support the temporal relationship between the needs of present and future generations that should mitigate current development practices in order to secure an environment that can sustain future generations. The Court did not discuss Principle 6 of the Declaration, for example, that calls for states, "To defend and improve the human environment for present and future generations [which] has become an imperative goal for mankind – a goal to be pursued together with, and in harmony with, the established and fundamental goals of peace and of worldwide economic and social development." The Court's failure to attend to the environmental aspects of the *Nauru* dispute is further highlighted by its treatment of developmental and environmental integration and intergenerational equity as "distinct" issues. The language used by the Court in the *Nauru*

[74] ibid Principle 3.

case stands in stark contrast to the language and intentions contained in the concept of sustainable development, which understands its composites as intimately interrelated.[75]

Further evidence of claim i) is the Court's overall conservative approach in relation to sustainable development in the *Nuclear Weapons* advisory opinion. In certain parts of the decision the Court demonstrated a high regard for the environment. For example, "The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, quality of life and the very health of human beings, including generations unborn."[76] However, the concessions that the Court then proceeded to grant to states regarding the use of nuclear weapons illustrates how the high regard for the environment is contingent on circumstances, which accords with an instrumental environmental perspective. The *Nuclear Weapons* advisory opinion exemplifies the Court's deference to national security imperatives (in this instance the threat or use of nuclear weapons) over those that concern environmental protection.

This conservatism of the Court's approach is more evident upon consideration of the arguments put forward by states in this case. States presenting their views on the matter before the Court adopted a restrictive interpretation of the situations in which a state could use nuclear weapons. Iran interpreted sustainable development as providing inherent limits to usage of nuclear weapons. Iran referred to Principle 24 of the Rio Declaration that states: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-

[75] It will be recalled that the Our Common Future report defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." Our Common Future (n 1) ch 2.1.
[76] *Nuclear Weapons* advisory opinion (n 4) 241 [29].

operate in its future development, as necessary."[77] However, Iran interpreted this to constitute a restriction on nuclear weapons usage since, in its opinion, such weapons inevitably cause widespread, long-term and severe damage to the natural environment which is clearly contrary to the "Principle of Environmental Security"[78] afforded by Principle 24.[79] The Solomon Islands also adopted a restrictive interpretation of the permitted uses of nuclear weapons. They expected the Court to decide that any use of nuclear weapons violates state obligations under international law for the protection of human health, the environment and fundamental human rights or that these imperatives ought to be interpreted as placing inherent limits on nuclear weapon usage.[80] Egypt suggested that international law impliedly prohibited the use of nuclear weapons because of the principle of transboundary harm, which the Stockholm and Rio Declarations confirmed as being "declaratory of the evolving normative regulation for the protection of the environment."[81]

Contrary to such statements on the presumed limits to state practice, the Court was reticent to establish limits to nuclear weapons usage. It is reasonable to suppose that the Court reached this compromise because the states that called for nuclear weapon restricted are not as influential as other states in the international community. In the advisory opinion none of the permanent five members of the Security Council asked the Court to recognise inherent limitations to nuclear weapon usage because of the importance of the environment. In its advisory opinion the Court, referring to its understanding of Principle 24, articulated that the environmental protections that had been established in various treaties could not to be

[77] Rio Declaration Principle 24.
[78] *Nuclear Weapons* advisory opinion (Oral Statement of Iran) Verbatim Record No 95/26 [1995] <http://www.icj-cij.org/docket/files/95/5933.pdf> accessed 30 October 2015 [65].
[79] ibid [62].
[80] *Nuclear Weapons* advisory opinion (Written Comments of the Government of the Solomon Islands) [1995] <http://www.icj-cij.org/docket/files/95/8724.pdf> accessed 30 October 2015 [35(c)].
[81] *Nuclear Weapons* advisory opinion (Written Comments of the Government of Egypt) [1995] <http://www.icj-cij.org/docket/files/95/8722.pdf> accessed 30 October 2015 [70].

understood as depriving states of the right to self defence. They established that respect for the environment was one factor that would be used to assess whether state action would be deemed necessary and proportionate.[82] The Court recognised that the widespread, long-term and severe damage to the natural environment affects of nuclear weapons are "powerful constraints"[83] on states, something recognised by the Geneva Convention Additional Protocol I[84], but do not constitute prohibition.

In its judgment in *Gabçikovo-Nagymaros Project* the Court offered a robust description of sustainable development but in discussing the concept the Court did little to address the concept's inherent vague and ambiguous nature. Consequently, in support of claim ii) the Court's pronouncement did little in the way of progressing international environmental law in terms of establishing a course of practice that states must adhere to. Aspects of the Court's judgment convey the need to place limitations on practices that produce negative effects on the environment. The Court recognised that industrial and economic developmental practices have caused "interference with nature"[85]. The Court also recognised that new scientific insights and a growing awareness of risks to both present and future generations of humans have led to new norms and standards being developed.[86] It is sustainable development that the Court regards as accommodating any pertaining state obligations as well as mitigating and providing for environmental redress for past exploitation. The Court stated, "This need to

[82] *Nuclear Weapons* advisory opinion (n 4) 242 [30].
[83] ibid 242 [31].
[84] Art35(3) "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment." and art 55(1) "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population." International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3 arts 35(3) and 55(1).
[85] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 78 [140].
[86] ibid.

reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[87] However, these comments merely state the different dimensions of the concept of sustainable development. They illustrate a need to conduct economic development with environmental concerns in mind, such as the finite status of natural resources, and they imply a need for greater equity among humans. The Court's comments, however, do not explain how integration and reconciliation is to take place or what the limits on economic development may be, and they do not provide any indication of how the Court regards sustainable development as obliging particular state behaviour. Despite this conservatism the International Law Commission (ILC) regards the majority judgment of the Court in the *Gabčíkovo-Nagymaros Project* as taking "a holistic approach"[88], defining the environment as more than its "natural resources such as air, soil, water, fauna and flora, and their interaction. A broader definition could embrace environmental values [such as aesthetic appreciations of the landscape] also."[89] However, the ILC also notes that in *Gabčíkovo-Nagymaros Project* the Court only "alluded to the need to keep in view the inter-generational and intra-generational interests"[90], and so did not present a complete account of sustainable development as the Our Common Future report defines it.

In an effort towards consistency and coherency in its international environmental jurisprudence and to strengthen its interpretation the Court quoted a passage from its *Nuclear Weapons* advisory opinion. The Court confirmed that, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings,

[87] ibid.
[88] ILC, 'Third report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities' (2006) UN Doc A/CN4/566, 133 para 21.
[89] ibid, [(20)].
[90] ILC, '… transboundary harm arising out of hazardous activities' (n 88) 133 fn 361.

including generations unborn."[91] This, however, does not absolve the Court of claim ii) and repeated ambiguous phrases still allow states to follow their own determinations of international environmental obligations. Avoiding discussion of what may constitute such balance presented sustainable development as an aspirational concept only. Failing to specify any aspects or obligations connected to sustainable development allows both states in a dispute to justify their actions according to the concept.[92] The Court's neglect is starker upon consideration of the dramatically different interpretations of sustainable development that were advanced by the parties in the case. Slovakia regarded Hungary's abandonment of the barrage system on the grounds of environmental obligations, as a "curious distortion of reality" since the principal objectives of the Project was to protect and improve the environment.[93] Hungary's Counter-Memorial asserted that, "Slovakia mischaracterises the concept of sustainable development, ignoring the integrity of environment and development, the interdependence of natural resources and processes, and the relevance of environmental harm and risk to economic viability."[94] Hungary's criticism of Slovakia indicated its expectation of sustainable development that it wanted the Court to confirm. Hungary was of the view that sustainable development ought to stipulate genuine and significant limitations to the economic development of states. Hungary claimed "[Slovakia's] approach is reminiscent of that adopted to science and technology in the 1960s. At that time little attention was paid to consequences of technical development, which was viewed as inherently beneficial."[95] To support its claims Hungary asserted the existence of numerous environmental norms that may be considered as contained within or intimately connected to sustainable development. These

[91] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 68 [112] quoting *Nuclear Weapons* advisory opinion (n 4) 241 [29].
[92] Birnie, Boyle and Redgwell among others regard "the essentially relative character" of sustainable development as contributing to its acceptance by states. Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (OUP 2009) 116.
[93] *Gabčíkovo-Nagymaros Project* (Memorial of the Slovak Republic Volume 1) (n 38) [6.132].
[94] *Gabčíkovo-Nagymaros Project* (Counter-Memorial of the Republic of Hungary Volume 1) (n 39) [1.04].
[95] ibid [1.04].

included the integration of development and environmental priorities[96], the precautionary principle[97], conducting environmental impact assessments[98] and taking account of biological diversity.[99] That Slovakia challenged each of these claims gave the Court opportunity to clarify the content of each norm as well as their obligatory status.

More indicative of the claim of hesitancy and indeed inconsistency was the Court's particular approach to the sustainable development in its singular mention in *Gabčíkovo-Nagymaros Project*. The language used by the Court in this paragraph is important because it suggests that it regards states as having a duty to adhere to sustainable development practices because of humanity's history of environmental exploitation. Demonstrating this the Court recognised, "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment."[100] This comment suggests the Court regards the environment as possessing a great degree of intrinsic value and as constituting more than a mere resource that exists for human exploitation. However, the Court did not elaborate on this point. Instead, the Court situated this seemingly ecocentric perspective alongside an additional passage that reveals an anthropocentric characterisation of sustainable development. In this additional passage the Court constructed its reasons for state action on what it understood as the vital and urgent need to alleviate the risks posed to humans, so contextualising environmental obligations within a framework of anthropocentric entitlement. The Court implied that sustainable development is of instrumental use to humans, stating "Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of

[96] ibid [1.08(1)].
[97] ibid [1.08(4)].
[98] ibid [1.08(2)].
[99] ibid [1.09].
[100] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 78 [140].

pursuit of such interventions at an unconsidered and unabated pace of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed."[101]

In its discussion of sustainable development the Court did not consider whether there was an applicable binding norm of international environmental law that the parties were expected to meet. The judgment contained no reference to any binding conventions relating to sustainable development. Also, the Court made no reference to its jurisprudence, which it is likely to have done if it wanted to confirm the existence of binding relevant customary international law.[102] Rather, the standard expected of Hungary and Slovakia was, in the Court's view, only that to which the states had agreed. In support of this interpretation of the decision the Court said, "It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty."[103] Nevertheless, the statement made by the Court relating to sustainable development still evidences a degree of obligatory force suggesting the Court does regard the concept as conferring upon states certain environment related obligations even though it does not proceed to question what these may be.

The claim that the Court was hesitant in its first discussion of sustainable development is supported by the commentary by the International Law Association (ILA). The ILA provides an overview of the concept, as it existed in 2000, but is unable to affirm its obligatory status.

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[101] ibid.

[102] There was no trace in the *Gabčíkovo-Nagymaros Project* of the Court's Judgment in *Paramilitary Activities* relating to customary international law. In *Paramilitary Activities* the Court confirmed that, "In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general be consistent with such a rule; and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule." *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 98 [186].

[103] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 78 [141].

Unlike the Court the ILA confirms the "sustainable development has become an established objective of the international community and a concept with a certain status in international law, as exemplified in its incorporation in various conventions and in international judicial decisions."[104]

The Court also avoided elaborating on sustainable development in *Pulp Mills*. The concept was unaddressed, and as claim ii) suggests, vulnerable to states interpreting the concept so as to best fit their case. As in *Gabčíkovo-Nagymaros Project* the Court showed deference to the parties and the relevant Treaty, resulting in environmental protection obligations being side-lined in favour of non-environment related obligations, in particular the notion of *pacta sunt servanda*. Despite state proclamations on sustainable development the Court did not proceed to clarify what sustainable development might mean in practice in the dispute at hand. In its Counter-Memorial Uruguay challenged Argentina's interpretation of their bilateral Treaty, on which the case in part hinged, as "subjugating considerations of economic development to unyielding environmental concerns."[105] Rather than a Treaty that is primarily concerned with environmental protection Uruguay understood it to enable the finding of "the proper balance between use of the river for economic development activities and environmental protection."[106] Uruguay's notion of the inherent balance and integration that sustainable development makes between development and environmental priorities is related to its interpretation of Principle 2 of the Rio Declaration which it understood as "neither an absolute prohibition on environmental damage nor a license to exercise absolute freedom in exploiting

[104] Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (International Law Association, London 2000) (Fourth Report) 15.
[105] *Pulp Mills* (Counter-Memorial of Uruguay) [2007] <http://www.icj-cij.org/docket/files/135/15427.pdf> accessed 30 October 2015 [2.33].
[106] ibid [1.8].

natural resources."[107] In support of this interpretation Uruguay discussed the Convention on Biological Diversity (CBD).[108] Uruguay suggested the CBD does not require parties to preserve every living thing or develop in a way that leaves the natural environment unchanged. Rather, these environmental measures are to be adhered to when possible and if appropriate.[109]

In support of claim i) the *Pulp Mills* decision provides evidence of the Court's reluctance to precisely define sustainable development, instead leaving it ambiguous and vague. The Court's judgment only determined whether state discretion has been exercised appropriately. The Court kept the issue of sustainable development at a distance, which kept the concept abstract. The Court recognised "the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development."[110] The Court did wish to add that sustainable development requires an interconnected approach of sharing the world's resources between states.[111] The Court added that it "observes that it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them".[112] However, such statements are aspirational only and do not inform states as to how cooperative sharing of the world's resources is to occur or what this ought to result in.

The Court has recently decided *Whaling in the Antarctic.* The rich content of the Memorials of Australia and Japan provided strong reason to suspect sustainable development would be

[107] ibid [2.32].
[108] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.
[109] *Pulp Mills* (Rejoinder of Uruguay) (n 40) [5.45].
[110] *Pulp Mills* (Judgment) (n 19) 74-75 [177].
[111] The Court said that the Treaty between Argentina and Uruguay "embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development." ibid.
[112] ibid 49 [77].

an integral component in the Court's reasoning since the parties offered different interpretations of sustainable development. The existence of such different interpretations of sustainable development forty years after the emergence of the concept provides evidence of claim ii), that the Court's indecision allows for a permissive culture where states can determine their own environmental obligations.[113] In the *Whaling in the Antarctic* case interpretations resulted from the states' different interpretations of the object and purpose of the International Convention for the Regulation of Whaling (ICRW)[114] and the role of the International Whaling Commission (IWC)[115]. Australia understood Japan's obligations to entail the conservation of whales.[116] Japan interpreted sustainable development to include notions of whale conservation and management responsibilities but that these are for the purposes of sustaining the commercial whaling industry.[117] Japan refuted Australia's claim of Australia that the IWC concerned the protection of whales *per se*.[118] Australia did not dispute that development of the whaling industry *was* the object and purpose of the IWRC, but it contended that this original object and purpose had evolved. Australia suggested "The IWC now pursues conservation of whales as an end in itself. In so doing, it places greater reliance on a precautionary approach to conservation and management combined with a focus on non-consumptive use."[119] Japan challenged Australia's notion of the evolution of the ICRW's object and purposes. Japan argued that during the drafting of the ICRW international law had established how to phrase legal language in a manner that prioritised conservation over

[113] The inherent conceptual issues relating to sustainable development are also culpable here; see above text to n 78ff in ch 3.
[114] International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72 (ICRW).
[115] The creation of the International Whaling Commission is provided for in art III of the ICRW, ibid.
[116] *Whaling in the Antarctic* (Memorial of Australia) [2011] <http://www.icj-cij.org/docket/files/148/17382.pdf> accessed 30 October 2015 [2.98].
[117] *Whaling in the Antarctic* (Counter-Memorial of Japan) [2012] <http://www.icj-cij.org/docket/files/148/17384.pdf> accessed 30 October 2015 [2.29].
[118] ibid [2.35].
[119] *Whaling in the Antarctic* (Memorial of Australia) (n 116) [2.99].

development. Accordingly, drafters of the ICRW were not naïve to this but agreed upon the alternative approach of "the management of natural resources, including plants and animals, so as to secure their sustainable use."[120]

The interpretation of sustainable development that Japan advanced leans towards anthropocentrism in that sustainability is to be pursued to maintain stock levels of whales for the purposes of human use. Making this claim Japan submitted that "[t]here is no contradiction between the conservation of whales and the exploitation of whales. The ICRW is not at all unusual in pursuing the aim of conservation in order to secure the sustainable use of natural resources."[121] To support this interpretation Japan referred to the CBD, which "is premised upon the idea that there will be greater incentives to conserve biological resources where they are used and have a direct benefit to society."[122] According to Japan the "combination of conservation and sustainable use as the policy behind the CBD is a matter of practical necessity" and accordingly it does not establish "a specific rate at which species may be exploited".[123] Japan relied on comments by the Secretariat to the CBD that find, "sustainable use is not a fixed state, but rather the consequence of balancing an array of factors, which vary according to the context of the use."[124]

The judgment confirms claim i)'s pattern of conservatism and hesitancy on the part of the Court. The judgment makes no explicit reference to sustainable development. However, the Court did find that Japan's special permits to kill, take and treat whales were not in

[120] *Whaling in the Antarctic* (Counter-Memorial of Japan) (n 117) [6.34].
[121] ibid [6.15].
[122] *Whaling in the Antarctic* (Counter-Memorial of Japan) (n 117) [6.17].
[123] ibid [6.20].
[124] ibid [6.21] quoting Conference of the Parties to the Convention on Biological Diversity 'Note by the Executive Secretary on Sustainable Use Prepared for the Ninth Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice' (2004) UNEP/CBD/SBSTTA/9/9 Annex I, Decision VII/12 [11].

conformity with its obligations under the ICRW.[125] The Court determined that Japan's JARPA II programme did not accord with its supposed research objectives of ecosystem monitoring and observance of multi-species competition.[126] Illustrative of a proactive approach (at least in comparison to the Court's earlier forays into international environmental law), the Court confirmed the ranging environmental obligations of sustainable development by the Court's questioning of the reasonableness of JARPA II in relation to the stated objectives of the programme.[127] The Court assessed the reasonableness of state compliance with international law according to their own standard and expectations and not those of the applicable whaling regime. A test of reasonableness not based on relevant international agreements or upon state submissions of expected behaviour is novel for the Court[128] and shows its progressive, if often hidden, approach.

The Court held that though Japan's whaling programme could be broadly characterised as scientific research[129] in this instance is was not because Japan failed to demonstrate any implementation of IWC recommendations regarding the limited use of lethal sampling, use of non-lethal methods or use of smaller catches.[130] It asserted that Japan's research plan lacked transparency[131], particularly in not explaining its requirement for a sample size of 850 minke whales per year[132], to be reviewed every six years.[133] These considerations formed the Court's

[125] *Whaling in the Antarctic* (Merits) (n 21) 298-300 [247].
[126] ibid 274 [153].
[127] ibid 292-93 [223-27].
[128] The Court has employed tests of reasonableness to determine party interpretation of or compliance with relevant international law, but in these instances the criteria for reasonableness were derived from the concerned law itself. For example in *Barcelona Traction* the Court determined that "in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably". *Barcelona Traction Light and Power Company Limited* (*Belgium v Spain*) (Second Phase) (Judgment) [1970] ICJ Rep 3, 48 [93].
[129] *Whaling in the Antarctic* (Merits) (n 21) 267 [127].
[130] ibid 271 [141].
[131] The Court reached this finding because the programme had produced only two peer-reviewed papers and because Japan's had not cooperated with any suitable communities of practice as might be expected. ibid 291 [219] and 292 [222] respectively.
[132] ibid 283 [188]

understanding of reasonableness and what would constitute sustainable exploitation of whale stocks.[134] The Court's approach may have been more emphatic than usual because of comments by the Director-General of Japan's Fisheries Agency that minke whale meat is to be secured through JARPA II and is "prized because it is said to have a very good flavour and aroma when eaten as sashimi and the like."[135] His comments seemed to support Australia's claim that Japan's whaling programme was commercial in all but name. Since the Court's decision Japan has complied with the judgment to halt its whaling in the Southern Ocean but has continued its JARPN II programme in the North Pacific.[136]

The Court's conservatism in relation to its interpretation and application of sustainable development in both *Gabčíkovo-Nagymaros Project* and *Pulp Mills* is further supported by its approach to treaty interpretation. The Court's reasoning in both cases demonstrates deference on the part of the Court to the rights states have to enter into treaties over principles of international environmental law. The Court's deference suggests an aversion to discussing sustainable development in a genuine and interrogative manner. In *Pulp Mills* the Court decided that the Treaty between Uruguay and Argentina imparted an obligation of cooperation on the states.[137] The Court differentiated between the procedural adherence to facilitating the obligations and their substantive performance, finding a procedural obligation for the states to initiate measures that would prevent environmental damage[138] and that

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[133] ibid 284 [193]
[134] ibid 252 [58].
[135] ibid 285 [197].
[136] 'Japan kills 30 minke whales in first hunt since UN court order' (*Guardian*, 17 June 2014) <http://www.theguardian.com/environment/2014/jun/17/japan-kills-minke-whale-hunt-un-court-order-antarctic> accessed 30 October 2015.
[137] The Court regards the Treaty as endowing the institution that was set up to monitor river pollution with legal personality "in order to perform its functions" which is to provide "the necessary resources and all the information and facilities essential to its operations". *Pulp Mills* (Judgment) (n 21) 53 [87].
[138] ibid 56 [102].

environmental impact assessments should be taken into account.[139] However, the Court did not find that any particular obligations of performance had been violated.[140] Instead the Court noted, during its consideration of substantive obligations, that the relevant bilateral Treaty "informs the interpretation of the substantive obligations, but does not by itself lay down specific rights and obligations for the parties."[141] This finding by the Court mirrors its approach in *Gabčíkovo-Nagymaros Project* where principles of international environmental law also appear subservient to the right of states to enter into treaties. In *Pulp Mills* the Court refers to its decision in *Gabčíkovo-Nagymaros Project* that, "It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty."[142]

The Court failed to capitalise on the opportunity to stipulate state obligations despite state parties invocating the Vienna Convention on the Law of Treaties (VCLT).[143] The VCLT stipulates that treaties should be interpreted in good faith and within their ordinary meaning in their context and in light of the treaty's object and purpose.[144] Interpretations can also have regard to state practice in the application of the treaty and to relevant rules of international law.[145] Consideration of the cases suggests the Court has resisted using the VCLT's interpretation directions in its decisions. Instead the cases indicate the Court only goes so far as to acknowledge the relevance of the VCLT in terms of providing states with the entitlement to interpret their obligations. The Court's reluctance to speculate on the arguments made by states in relation to interpretations of treaty provisions in accordance with VCLT

[139] ibid 60 [120].
[140] By eleven votes to three the Court found that Uruguay had not breached any of its substantive obligations. ibid 106 [282].
[141] ibid [173].
[142] *Pulp Mills* (Judgment) 48-49 [76] quoting *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 78 [141].
[143] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[144] ibid art 31(1).
[145] ibid art 31(3).

means it does not have to provide its own authoritative interpretation. The Court's reluctance suggests deference to state sovereignty and it suggests the Court is content to validate the existence of the legal machinery of international legal system as opposed to developing substantive principles that may result from it. In *Gabčíkovo-Nagymaros Project* the Court recognised that treaty interpretation constituted part of the dispute but instead of interpreting the Treaty the Court deflected the issue. The Court showed recognition of the interpretation articles of the VCLT but did not explicitly discuss them, commenting only that the bilateral Treaty "is not static, and is open to adapt to emerging norms of international law."[146] In the *Pulp Mills* case both parties advanced arguments that were based on their interpretation articles of the VCLT. For example, Uruguay refuted Argentina's use of the VCLT to "add or alter" the provisions of their bilateral treaty.[147] The Court did not discuss this issue since doing so would have required it assert its own interpretation.

In the *Whaling in the Antarctic* case the Court missed a further opportunity to use the VCLT in a progressive manner to interpret relevant principles of international environmental law. Australia and Japan understood the object and purpose of the ICRW to impose different obligations. Both parties used the VCLT to support their argument[148], which gave reason to suggest the Court would do the same to establish how the ICRW ought to be interpreted. The Court's majority judgment did not meet these reasonable expectations. The Court noted that the ICRW was an "evolving instrument"[149] from which it can be inferred that state obligations also evolve. However, the Court did not refer to the VCLT in this context where it could have

[146] *Gabčíkovo-Nagymaros Project* (Judgment) 67-68 [112].
[147] *Pulp Mills* (Rejoinder of Uruguay) (n 40) 295.
[148] Australia uses the provisions of the VCLT to interpret the object and purpose of the ICRW to have developed in light of changing principles of international law so as to now acknowledge an obligation of whale conservation. *Whaling in the Antarctic* (Memorial of Australia) (n 116) [4.81]-[4.83]; Japan uses the provisions of the VCLT to interpret its JARPA and JAPRA II scientific programmes of whaling as consistent with the ICRW. *Whaling in the Antarctic* (Counter-Memorial of Japan) (n 117) [8.16].
[149] *Whaling in the Antarctic* (Merits) (n 21) 247 [45].

stipulated how "relevant rules of international law applicable in the relations between the parties" had relevance to the claims of the parties.[150] Moreover, even in the answer that the Court did provide, it did not explain what was entailed by the existence of an "evolving instrument" or what the corresponding state obligations were or could be.

**i) Sustainable development in the separate and dissenting opinions of the Court**

Separate and dissenting opinions of judges further highlight the deficiencies with the approaches of the Court in its majority judgments. Some opinions present a philosophical understanding of the environment, but patterns of coherence between different judges are largely absent. Through analysis of opinion satisfaction or dissatisfaction with the approach of the Court it is claimed that the Court adheres to a compromised form of sustainable development in which environmental and developmental priorities are not integrated or harmonised. This supports the overall claims of this chapter that i) the Court is inconsistent, hesitant and accordingly slow to acknowledge existing environmental obligations, and ii) that as a result states continue to have different understandings of environmental principles, the obligatory status they have and the imposition they present to other (perhaps conflicting) state priorities. Closer examination of dissenting and separate opinions reveals isolated instances in which environmental principles have been explained in a greater degree as compared to the Court's majority judgments. This suggests majority judgments are not conducive to expounding philosophical views regarding the environment.

[150] VCLT art 31 (3,c).

The earliest environmental decision of the ICJ that demonstrates the concealment of latent philosophical views relating to the environment is the *Nuclear Tests* cases where, contrary to the majority judgment, Judge de Castro did refer to the "general rule" of transboundary harm that was formulated in the *Trail Smelter* arbitration.[151] De Castro struck an obvious analogy, absent in the judgment, between the noxious fumes emitted from Canada into the United States of America and the radioactive deposits made by France.[152] However, the progressive statements of de Castro must be set against other opinions that reveal a greater conservatism than the Court's majority. The dissenting opinion of Judge Barwick is demonstrative of the neglect of environmental considerations during this initial stage of international environmental law. Barwick recognised the "deleterious fall-out on to and into [Australia and New Zealand's] land and environment" but does not connect this damage to any rules that prevent such damage. This neglect echoes the apparent unfamiliarity of environmental awareness that the Court bestows in its majority judgment.[153] Dissenting opinions were also voiced in *Nuclear Tests II*. Most pointedly, Judge *ad hoc* Sir Palmer lamented the Court's refusal to link atmospheric and underground testing, which amounted to a "triumph of formalism over substance."[154] Sir Palmer regarded the Court's decision as "legal reasoning of a highly mechanical quality" and "fundamentally unsound in common-sense" resulting in the Court taking no action on New Zealand's request.[155] Sir Palmer regarded the Court's restrictive interpretation as failing to reflect the developing "comprehensive protection for the

[151] *Nuclear Tests* cases (Dissenting Opinion of Judge de Castro) [1974] <http://www.icj-cij.org/docket/files/59/6173.pdf> accessed 30 October 2015, 389.
[152] ibid.
[153] The Court found that the risk of nuclear fall out contamination was "so infinitesimal that it may be regarded as negligible, and that such fallout on Australia territory does not constitute a danger to the health of the Australian population." *Nuclear Tests* cases (Judgment) (n 26) 462 [18].
[154] *Nuclear Tests II* (Dissenting Opinion of Judge *ad hoc* Sir Palmer: Order) [1995] <http://www.icj-cij.org/docket/files/97/7571.pdf> accessed 30 October 2015 [96].
[155] ibid [97].

natural environment" [156] and "exert a salutary and needed influence on international environmental law".[157] The approach of the Court's majority disappointed Sir Palmer because he felt it was the duty of the Court to develop international law and expound it; roles it is responsible for due to the absence of a legislature in the international community of the United Nations.[158]

In contrast to the Court's majority judgment that contained only a brief mention of sustainable development, Vice-President Weeramantry's separate opinion in the *Gabčíkovo-Nagymaros Project* devoted substantial attention to the concept. As well as far more expansive, Weeramantry's comments are very progressive when compared to the Court's majority judgment. Rather than referring to sustainable development as a "mere concept" Weeramantry regarded it as "a principle with normative value."[159] Weeramantry understood sustainable development as requiring states "steer a course between" national interests and the need for "continuing vigilance in respect of environmental harm."[160] Other passages in Weeramantry's discussion on sustainable development amount to criticism of the cautious approach adopted in the Court's majority judgment. The Court's neglectful treatment of the issue led to, according to the Judge, a "state of normative anarchy".[161] Weeramantry wrote that, "To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation."[162] To support his argument that the Court ought to have confirmed the binding nature of sustainable development Weeramantry

[156] ibid [91].
[157] ibid [93].
[158] ibid [110].
[159] *Gabčíkovo-Nagymaros Project* (Separate Opinion of Vice-President Weeramantry) [1997] <http://www.icj-cij.org/docket/files/92/7383.pdf> accessed 30 October 2015, 88.
[160] ibid 89.
[161] ibid.
[162] ibid.

referenced several multilateral treaties, international declarations and state practice that indicate the concept has "wide and general recognition".[163] In the dispute, both states invoked the concept of sustainable development[164], though they interpreted its meaning and obligatory force differently. In response to these competing claims Weeramantry regarded the Court as being obligated to provide sufficient guidance to apply the concept to the situation at hand. He doubted the Court's provision of such guidance: whereas the Court's majority judgment explained that, "The need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development [implies] … it is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty"[165], Weeramantry understood sustainable development to stipulate that development and environment priorities are to be "harmonized".[166] Weeramantry regarded sustainable development to place a qualification on development and that the right to development is "relative always to its tolerance by the environment."[167] Weeramantry's choice of the word "harmonisation" is indicative of his view that consonance is possible both within the dualistic concept itself and in terms of how it is employed by states. Weeramantry accepted that sustainable development has become part of international law both because of its "wide and general acceptance by the global community" and because of its "inescapable logical necessity".[168] Weeramantry's opinion demonstrates that progressive understandings of principles of international environmental law do exist in the jurisprudence of the Court, but

[163] ibid 93.
[164] Hungary states, "sustainable development, as formulated in the Brundtland Report, the Rio Declaration and Agenda 21 is applicable to this dispute." *Gabčíkovo-Nagymaros Project* (Reply of the Republic of Hungary Volume 1) [1995] <http://www.icj-cij.org/docket/files/92/10965.pdf> accessed 30 October 2015 [1.45]; Slovakia states, "inherent in the concept of sustainable development is the principle that developmental needs are to be taken into account in interpreting and applying environmental obligations." *Gabčíkovo-Nagymaros Project* (Counter-Memorial of the Slovak Republic) [1994] <http://www.icj-cij.org/docket/files/92/10961.pdf> accessed 30 October 2015 [9.53].
[165] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 77-78 [140-141].
[166] *Gabčíkovo-Nagymaros Project* (Separate Opinion of Vice-President Weeramantry) (n 159) 90.
[167] ibid 92.
[168] ibid 95.

that they require the nurturing space of separate and dissenting opinions. In addition Weeramantry has commented that global acceptance is not necessarily required and that the Court is empowered to concern itself and lead the way in matters that concern all of humanity. Weeramantry understood that "when a duty such as the duty to protect the environment is so well accepted that all citizens act upon it, that duty is part of the legal system in question."[169] Weeramantry regarded the Court as being "charged with a duty to draw upon the wisdom of the world's several civilizations."[170] This duty, as Weeramantry understood it, is to reflect upon such global traditions and act with sensitivity to them in order to perform its role in the legal system.[171] This duty empowers the ICJ to draw upon the wealth of past experience and is explicitly provided for by the Court's Statute.[172]

The Court's conservative approach that suggests an anthropocentric characterisation of sustainable development can also be evidenced in separate and dissenting opinions. Supporting this finding is Judge Oda's dissenting opinion in *Gabčíkovo-Nagymaros Project* where technological and scientific fixes to environmental problems were presented in a manner that negates sustainable development's goal of mitigating economic development. Oda suggested that, "Any construction work relating to economic development would be bound to affect the existing environment to some extent but modern technology would, I am sure, be able to provide some acceptable ways of balancing the two conflicting interests."[173] Oda's Cornucopian view that presumes technology will be able to deliver humanity out of all environmental problems is contrary to the two main aspects of sustainable development and suggests a concealed assumption of human superiority. Oda's view is contrary to sustainable

[169] ibid 109.
[170] ibid 96.
[171] ibid 109.
[172] ibid 110 quoting the Statute art 38(1)(c).
[173] *Gabčíkovo-Nagymaros Project* (Dissenting Opinion of Judge Oda) [1997] <http://www.icj-cij.org/docket/files/92/7389.pdf> accessed 30 October 2015 [14].

development's requirement for integration between environmental and developmental priorities because he understands environmental problems as technologically resolvable. Oda's view is also contrary to sustainable development in that a reliance on technological fixes removes the need for the present generation to have any consideration for future generations based on the principle of equity, since any environmental problems or resource shortages could, again, be resolved by future generations.

The separate and dissenting opinions in *Pulp Mills* also contained elements of an anthropocentric characterisation of sustainable development. It will be recalled that the Court interpreted sustainable development as a means of ensuring a sustainable amount of environmental resources to provide a means of exploitation for future generations of the states party to the dispute: the Court found the decision to centre on "ensur[ing] environmental protection of shared natural resources while allowing for sustainable economic development."[174] Judge *ad hoc* Vinuesa's dissenting opinion suggests this constitutes an anthropocentric perspective. Rather than regarding Argentina's Request as an abstract confrontation concerning the concept of sustainable development on which the Court would be reticent to adjudicate, to the contrary Vinuesa understood the Request to concern whether the river developments, to which the case relates, generated sufficient environmental issues to oblige Uruguay to change its practices. Accordingly, the Judge was unable to agree with the majority of the Court and its framing of the Request as a dispute between environmental protection rights and the rights of development.[175] Two conclusions can be drawn from Vinuesa's interpretation. The first is that in suggesting the Court would have done better to avoid the abstract issue of sustainable development altogether, Vinuesa appears to endorse an

[174] *Pulp Mills* (Request for the Indication of Provisional Measures: Order) (n 32) [80].
[175] *Pulp Mills* (Request for the Indication of Provisional Measures: Dissenting Opinion of Judge *ad hoc* Vinuesa) (n 41) 148.

even more conservative position to that of the majority of the Court. A second conclusion is that in viewing the issue as one that relates to the precautionary principle and not sustainable development Vinuesa clearly regarded the Court as being more capable of presenting a stronger decision through the use of this principle. In support of this second conclusion Vinuesa explained, "the precautionary principle is not an abstraction or an academic component of desirable soft law, but a rule of law within general international law as it stands today."[176]

The separate opinion of Judge Cançado Trindade in *Pulp Mills* also demonstrates criticism of the Court's conservative approach to international environmental law in that case. Cançado Trindade listed several instances where the international community has identified responsibilities to protect the environment for future generations[177] that were overlooked by the Court, which preferred to "guard silence"[178] on the issue. That the *Pulp Mills* decision occurred thirteen years after *Gabçikovo-Nagymaros Project* gives further reason for Cançado Trindade's disappointment since the Court once again failed to capitalise on opportunities it had to clarify international obligations. In the *Gabçikovo-Nagymaros Project* the Court acknowledged that development presents risks for present and future generations and that as such the responsibilities associated with development are "necessarily evolving"[179] – but to what? These evolutions were not discussed in *Pulp Mills*.

[176] ibid 152.
[177] Cançado Trindade's citations include UNESCO 'Declaration on the Responsibilities of the Present Generations Towards Future Generations' (12 November 1997) UN Doc 29 C/RES/44.
[178] *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) [119].
[179] The Court said "Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades." *Gabçikovo-Nagymaros Project* (Judgment) (n 3) 78 [140].

In accordance with this chapter's claim i) Cançado Trindade's separate opinion suggests the Court is failing to keep apace of current movements in international environmental law let alone set and develop new standards, such as those expected by the ILA that considers the Court to have a role in the "extremely difficult" task of integrating environmental and developmental concerns.[180] Cançado Trindade's comments suggest bemusement that the Court failed to adopt the approach to sustainable development that was first articulated in 1987 in the Our Common Future report. Whereas the Report contextualised development priorities within a world of finite and therefore limited resources the Court, on the contrary, did not expressly link the continuing obligations to monitor river water quality to the issue of intergenerational equity. Cançado Trindade lamented, "As it did not, [the Court] unnecessarily and unfortunately deprived its own reasoning of the long-term temporal dimension, so noticeably present in the domain of environmental protection."[181]

Cançado Trindade's comments are progressive in character but are also to be expected since the parties before the Court expressed awareness of international obligations to intergenerational equity as the temporal dimension that underlies sustainable development. Cançado Trindade complains that the ICJ should have "taken note of, and endorsed, sustainable development *as such*, thus contributing to the progressive development of International Environmental Law."[182] To remedy the Court's antiquated approach Cançado Trindade suggested it should join the growing number of academic commentaries that recognise sustainable development as a general principle of international environmental

[180] Committee on Legal Aspects of Sustainable Development, 'Legal Aspects of Sustainable Development' (n 104) 15.
[181] *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) [124].
[182] ibid [147] (emphasis in original).

law.[183] Doing so would have, according to the Cançado Trindade, demonstrated the Court's "preparedness and open-mindedness" to environmental issues.[184] Cançado Trindade criticised what he regarded as the Court's anthropocentric philosophy. He suggested the Court adopt a "cosmocentric" philosophy where all life and the environment are viewed holistically.[185] In his opinion Cançado Trindade united the mutual concerns of international environmental law and international law relating to human rights to construct an alternative view of the world where goals such as environmental protection and human rights are what lead to developments in international law as opposed to it being state-orientated.[186] Cançado Trindade sought to construct environmental obligations so that "[r]ules on the protection of the environment are adopted, and obligations to that effect are undertaken, in the common superior interest of humankind."[187] Cançado Trindade's construction is one that exists separate from interstate reciprocity and disputes, and his comments suggest a significantly altered role for the Court, which heightens his dissatisfaction with the Court's approach of hesitancy and conservatism.

Cançado Trindade's comments echo those made by Weeramantry in the *Gabçikovo-Nagymaros Project*. Cançado Trindade interpreted the Court's Statute as obliging the Court refer to general principles of law that constitute an "autonomous formal "source" of International Law".[188] According to Cançado Trindade, rather than differentiate between procedural and substantive environmental obligations or by the supposed different obligations

[183] Judge Cançado Trindade cites Philippe Sands, *Principles of International Environmental Law* (2nd edn, CUP 2003) 252, 260 and 266; C Voigt, *Sustainable Development as a Principle of International Law* (Nijhoff 2009) 145, 147, 162, 171 and 186.
[184] *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) [138].
[185] ibid [159] fn 145.
[186] ibid [160-62].
[187] ibid [173].
[188] Judge Cançado Trindade states that, "The ICJ, in settling peacefully the disputes submitted to it, is perfectly entitled to resort to general principles of law (Article 38(1)(c) of its Statute), and should do so; if it, furthermore, wishes, in the faithful exercise of its functions, not only to settle the disputes brought into its cognizance but concomitantly to foster the progressive development of International Law." ibid [219].

of conduct and of result[189], the Court should have decided on state adherence to the principles of precaution, prevention and sustainable development based on the standards of general principles of law, those "principles [that] emanate from human conscience, the universal juridical conscience"[190]. These principles, according to Cançado Trindade, "reveal the values which inspire the whole legal order, and which, ultimately, provide its foundations themselves."[191] Coming from such a progressive viewpoint Cançado Trindade found the *Pulp Mills* majority judgment both insufficient and unsatisfactory since the Court restricts itself to debates regarding the existence of environmental obligations as either international law by way of custom or treaty. No aspects of Cançado Trindade's more ambitious project, where the Court is regarded a Court of *justice* that bases decisions on principles, was to be found in the majority judgment. [192] To support this progressive conception Cançado Trindade recalled the Pleadings in the *Nuclear Tests* case where New Zealand argued it represented the views of several states and thereby the rights of people (as opposed to just New Zealanders) to health and well-being.[193] He supported this view with reference to several international conventions that affirm the existence of the human right to a healthy environment.[194] Cançado Trindade interpreted the Court's duty to continue along such lines and represent the "*status conscientiae* of the international community as a whole."[195]

[189] ibid [174].
[190] ibid [217].
[191] ibid [201].
[192] ibid [220].
[193] ibid quoting *Nuclear Tests* (*New Zealand v France*) (Memorial on Jurisdiction and Admissibility submitted by New Zealand) [1973] <http://www.icj-cij.org/docket/files/59/9451.pdf> accessed 30 October 2015 [189].
[194] *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) [159] fn 144 quotes instances in which environmental rights are not restricted by state boundaries. These include, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (adopted 17 November 1988, entered into force 16 November 1999) OAS TS No 69 (Protocol of San Salvador) art 11 which recognises that the right of everyone to healthy environment; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force October 21 1986) 1001 UNTS 45 art 24 which contains the right to a general satisfactory environment of all people.
[195] *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) [212].

In the *Whaling* decision Cançado Trindade used his separate opinion to again identify what he perceived as the Court's shortcomings in relation to international environmental law. Seemingly typical of the Judge, Cançado Trindade found that the object and purpose of the International Convention for the Regulation of Whaling (ICRW) is for the conservation and recovery of whale stocks.[196] He understood sustainable development of the whaling industry as subservient to these priorities and for its practice to be delineated by them.[197] Cançado Trindade conceived of the ICRW as a framework of "collective guarantee and collective regulation"[198] and accordingly that it is wholly inappropriate for Japan to assert its right to unilateral unregulated whaling practices.[199] Cançado Trindade's conception can be contrasted with the view of Judge Bounanna in the same decision wherein state sovereignty is exalted. Bounanna found that "a State is perfectly entitled, for purposes of scientific research, to eschew the use of non-lethal methods if it considers them too costly and, if need be, to fund the costs of research out of the proceeds from the sale of the whales taken and processed."[200]

Separate and dissenting opinions are not legally binding on the parties before the Court.[201] In this regard they do not hold the same importance as majority judgments. Nevertheless, the opinions may affect the future jurisprudence of the Court in so far as judicial reasoning can develop principles of international environmental law. In disputes relating to environmental

[196] *Whaling in the Antarctic* (Separate Opinion of Judge Cançado Trindade) [2014] <http://www.icj-cij.org/docket/files/148/18146.pdf> [7].
[197] ibid.
[198] ibid [12]. To make this argument Cançado Trindade refers to New Zealand's oral pleadings in which the IWC was explained as a permanent body that supervises the "collective enterprise" that is the ICRW. *Whaling in the Antarctic* (Oral Statement: CR 2013/17) [2013] <http://www.icj-cij.org/docket/files/148/17444.pdf> accessed 30 October 2015 [1-3].
[199] "States granting Special Permits do not have an unfettered freedom to issue such permits." *Whaling in the Antarctic* (Separate Opinion of Judge Cançado Trindade) (n 196) [16].
[200] *Whaling in the Antarctic* (Separate Opinion of Judge Bennouna) [2014] <http://www.icj-cij.org/docket/files/148/18144.pdf> accessed 30 October 2015, 3.
[201] Art 57 of the Statute of the ICJ provides for separate opinions. The language of the art indicates that in disagreeing with the majority judgment the separate opinion does not hold the binding force of the majority judgment. Art 57 states, "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."

principles there is mixed evidence as to whether the progressive approaches in separate and dissenting opinions have developed the Court's jurisprudence. Fitzmaurice implies that progressive approaches often stagnate and are not more widely adopted by the Court.[202] Fitzmaurice provides the example of *Nuclear Tests II* in which Judges Weeramantry, Koroma and Judge *ad hoc* Sir Palmer suggested that the Court should become a trustee of the rights of future generations. Although three judges supported this conception, the Court did not further develop this approach in subsequent decisions.[203] However, this example of the Court's ineffective ability to develop its fringe progressivism in future jurisprudence may be explained by the fact that this particular judicial lament required developing not just an approach to the application of an environmental principle but changing the role of the Court itself. Becoming a trustee of the rights of future generations would require the Court to act beyond its statutory jurisdiction and would challenge the notion of *pacta sunt servanda* and the international community's foundations of state sovereignty.

Other evidence suggests that separate and dissenting opinions do have implications on the jurisprudence of the Court and its approach to environmental principles. Supporting this claim is the gaining significance of the approaches of Weeramantry and Cançado Trindade whose laments against the conservative approach of the Court have, in the ICJ's more recent environmental cases, grown in size. If compared to Weeramantry's dissenting opinion in *Nuclear Tests II* Cançado Trindade's separate opinion in *Pulp Mills* is evidence of the increasing size of separate and dissenting opinions in terms of the discussion of environmental principles. [204] This increased attention to principles of international

[202] Malgosia Fitzmaurice, 'The International Court of Justice and the environment' (2004) 4 Non-State Actors and International Law 173, 179.
[203] ibid.
[204] In *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) there are three pages dedicated to discussing nature of the principle of prevention [54-61], ten pages on the precautionary principle [62-92], seven

environmental law is to be hoped for, since the international community has come to accept the urgent need to protect the environment. Clear evidence of this comes from the latest report of the Intergovernmental Panel on Climate Change's advice to policymakers, which confirms that "[h]uman influence on the climate system is clear" and that the world's environment is unequivocally warming, which poses severe consequences for humanity.[205] As well as in size, separate and dissenting opinions have also increased in significance. Weeramantry's approach, although "solitary"[206] and on the fringes of the Court's jurisprudence, spearheaded the Court's response to the urgent need for environmental redress, a need recognised by the international community.[207] Voigt regards Weeramantry's approach as a "courageous attempt to direct the legal significance of the concept of sustainable development".[208] Weeramantry's progressive approach has received much celebration, contributing to the "theoretical consensus"[209] surrounding sustainable development and its goals of intergenerational and intragenerational equity.

The complexity of environmental cases, including their scientific and technical nature, provides another reason to suspect that the approaches taken in separate and dissenting opinions may be one day found in the Court's majority judgments. Complexity in environmental cases prohibits the Court's typically extensive assessment of principles of

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pages on intergenerational equity [114-131], and six pages on formulation and implications of sustainable development [132-147]; In *Nuclear Tests II* (Dissenting Opinion of Judge Weeramantry) [1995] <http://www.icj-cij.org/docket/files/97/7567.pdf> accessed 30 October 2015, 341-44 there are only two pages discussing the precautionary principle, one page on intergenerational equity, and no pages devoted to a discussion of sustainable development.

[205] IPCC, 'Summary for Policymakers' in Thomas Stocker and others (eds), *Climate Change 2013: The Physical Science Basis: Working Group 1 Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014) 2.

[206] Christina Voigt, 'From Climate Change to Sustainability: As Essay on Sustainable Development, Legal and Ethical Choices (2005) 9 Worldviews 112, 115.

[207] Evidence of this recognition includes the Rio Declaration, which was endorsed by the General Assembly of United Nations. UNGA 'Report of the United Nations Conference on Environment and Development' A/Res/47/190 (22 December 1992) UN Doc A/47/49.

[208] ibid.

[209] ibid.

international law and their obligatory status. As Posner notes, in complex decisions "[judges] fall back on their intuitions, because the empirical challenges to their intuitions do not have the force required to dislodge those intuitions."[210] As an example of the judicial resort to "worldviews, biases and heuristics"[211] Pederson refers to the approach of Weeramantry in his separate opinion in *Gabčíkovo-Nagymaros Project*. Pederson regards Weeramantry's approach as being based on his "sub-conscious preference" for sustainable development since it is supported by an assessment of Buddhist sermons and ancient historical practices and not by a robust discussion of state practice and *opinio juris*[212], the legal standard routinely used by the Court to decide whether a norm has become part of customary international law.

However, the appearance of judicial preferences in Court opinions does not guarantee progressive approaches to principles of international environmental law and could just as easily result in conservative approaches. The more intensified the views are the more the judges will be regarded by states as acting beyond their jurisdiction, regardless of whether the views are progressive or conservative in their approaches to environmental principles. This explains why the progressive arguments of Weeramantry and Cançado Trindade remain concealed as separate or dissenting opinions. Weeramantry and Cançado Trindade's approaches may permeate into the Court's majority judgments if their content comes to be understood as representative of the accepted understanding of environmental principles; acceptance requires the consent of the international community. Weeramantry acknowledged the effects of his approach on state sovereignty and the conception of international law as a system of state consent to agreed upon rules in *Gabčíkovo-Nagymaros Project*. Weeramantry

[210] Richard A Posner, *How Judges Think* (Harvard University Press 2008) 116.
[211] Ole W Pederson, 'Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law' (2013) 33 Oxford Journal of Legal Studies 103, 119.
[212] Ibid 119-20.

stated: "We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare."[213] An assessment into what notion of responsibility Weeramantry's vision might encourage and what underpins it follows in the subsequent chapters.

The variety of approaches that separate and dissenting opinions allow for further contributes to the picture of incoherence the Court has been asserted as having in relation to principles of international environmental law. Separate and dissenting opinions allow the Court to discuss the context of environmental principles that may not be part of the specific legal question put to the Court by the appellant state. This wider context is of special importance in the field of international environmental law because of the different interpretations of environmental principles that exist. For example, there are different understandings of how sustainable development should oblige states to integrate environmental protection with economic policy.[214] As Boyle has noted in relation to the *Pulp Mills* decision the Court was not empowered to consider whether the building of pulp mills is a sustainable practice.[215] On the contrary, the Court was only empowered to decide whether Uruguay had complied with its international obligations relating to sustainable development, precaution and environmental impact assessments when authorising the construction of the two mills disputed in that case. Separate and dissenting opinions in *Pulp Mills* provided opportunity for the Court to discuss conceptually how the principles ought to be applied.

[213] *Gabčíkovo-Nagymaros Project* (Separate Opinion of Judge Weeramantry) (n 159) 118.
[214] See above, text to n 73ff in ch 3.
[215] Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 European Journal of International Law 613, 630.

Although this mixed evidence conveys the imprecise nature of assessing the implications of separate and dissenting opinions on the jurisprudence of the Court the legacy of Weeramantry and Cançado Trindade's progressive opinions may be attested to by the support of their approaches by other international courts and tribunals. This gives reason to hope the ICJ will develop its jurisprudence in a similar manner. Demonstrating this legacy the World Trade Organization (WTO) Appellate Body approached sustainable development in a way that mirrors Weeramantry's practical understanding and application of the concept in his separate opinion in *Gabčíkovo-Nagymaros Project*. In the case Weeramantry understood sustainable development as a principle of harmonisation that has the effect of "steering a course between the needs of development and the necessity to protect the environment."[216] Schwartz interprets Weeramantry's approach as "[defining] the concept by its instrumental capacity to direct sound processes".[217] A similar approach to that of Weeramantry was taken by the WTO in the *Shrimp Products*[218] case where the Appellate Body sought to interpret the concept beyond its aspirational character. Indicative of its instrumentalist application of sustainable development the Appellate Body confirmed that its approach was to "elucidate the objectives of WTO Members with respect to the relationship between trade and the environment".[219]

**ii) The approaches of Weeramantry and Cançado Trindade in non-environmental cases**

Court judgments and separate and dissenting opinions show that Weeramantry and Cançado Trindade have very progressive approaches when it comes to environmental matters.

[216] *Gabčíkovo-Nagymaros Project* (Separate Opinion of Judge Weeramantry) (n 159) 87.
[217] Priscilla Schwartz, 'Sustainable Development in International Law' (2005) 5 Non-State Actors and International Law 127, 134.
[218] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R [153]-[55].
[219] ibid [153-55].

However, further assessment of the Court's philosophical approach to the environment may be gleaned from placing these progressive approaches alongside the Judges' opinions in relation to other disciplines of international law. This wider context demonstrates that Weeramantry and Cançado Trindade's approaches to environmental principles form part of their project to develop international law according to general principles recognised by civilised nations, which they regard as expressly inviting the Court to decide disputes according to principles of human conscience.[220] The following discussion suggests that Weeramantry and Cançado Trindade may not have a particular environmental philosophical perspective underpinning their decisions *per se*. Instead, their reasoning is influenced by their general activism. This does not detract from the conclusions of the previous section, that Weeramantry and Cançado Trindade are the most progressive judges in the ICJ in relation to environmental matters. Rather, it suggests the Judges' understanding of the foundations of international law's environmental obligations reside in their particular conceptions of justice, which inform their approaches to the environment.

Judge Weeramantry's opinions demonstrate that his progressive approach is evident in other disciplines of international law besides international environmental law. Weeramantry regards international law as tending to be "monocultural, monogenerational, monodisciplinary, anthropocentric, rights-centred, individually-oriented, and monetaristically dominated."[221] It can be inferred that, in response to these tendencies, Weeramantry regards it as the responsibility of the Court to develop international law. In support of this claim Weeramantry

[220] Weeramantry claims that, "when the Statute of the Court described the sources of international law as including the "general principles of law recognized by civilized nations", it expressly opened a door to the entry of such principles into modern international law." *Gabčíkovo-Nagymaros Project* (Separate Opinion of Judge Weeramantry) (n 159) 109-10. Cançado Trindade similarly understands art 38(1)(c) of the Statute as inviting the Court to consult principles that "emanate, in my perception, from human conscience, from the universal juridical conscience, which I regard as the ultimate material "source" of all Law." *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) [52].

[221] Christopher G Weeramantry, *Universalising International Law* (Brill 2004) 102.

understands several areas of international law as needing urgent attention. These include: the outlawing of nuclear weapons[222]; control of biotechnology because it is "an area fraught with as much danger to humanity as the nuclear bomb"[223]; addressing inequalities of the north south divide[224]; developing the UN Charter and the Statute of the International Court of Justice so it is "responsive to the needs of changing times"[225], and; monitoring media, scientific, armaments, and economic institutions that are not subject to the same constraints states are under international law.[226] Moreover, Weeramantry regards the protection of human rights as "one of the principal concerns of the contemporary international legal system"[227] and that, "It is vitally important that the principle of protection of populations against human rights abuses and atrocities should be strengthened in every manner available under current legal principles."[228] Weeramantry's view of human rights indicates that he regards the rights as having "the object of protecting and benefitting the international community as a whole, and for the maintenance of world order and co-operation rather than of protecting and advancing one particular State's interests."[229] Weeramantry regards the concept of the nation state as out-dated and outmoded to modern challenges that face the world. Weeramantry claims the nation state "in the context of modern international law has become an obstacle in many areas vital to global harmony."[230]

In contrast to the state sovereignty model that previously defined international law Weeramantry regards international law since 1945 as being socially orientated. His approach

[222] ibid 95.
[223] ibid.
[224] ibid 96.
[225] ibid 97.
[226] ibid 100.
[227] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Separate Opinion of Judge Weeramantry: Preliminary Objections) [1996] <http://www.icj-cij.org/docket/files/91/7361.pdf> accessed 30 October 2015, 641.
[228] ibid.
[229] ibid 646.
[230] Weeramantry, *Universalising International Law* (n 221) 102.

to principles of international environmental law form part of this philosophy because, "Environmental damage does not respect national boundaries. Pollution does not recognise the doctrine of state sovereignty and end at the boundaries of a nation state."[231] The progressive approach gleaned from the writings of Weeramantry support the view of justice to which he wishes to contribute. Weeramantry regards human principles of justice and the protection of the environment as interrelated: "True peace is impossible without justice. A principal element of justice is economic justice. Economic justice is impossible without sustainable development. Sustainable development is thus an important prerequisite to peace."[232] Weeramantry's view that international law should be socially orientated can be interpreted as an acknowledgment of the substantive understanding of sustainable development as was expressed in the Our Common Future report. Whereas the Court has been found to take a conservative approach towards the concept, Weeramantry, to the contrary, appears to have a holistic appreciation of it. He regards there being inviolable limits to economic development to ensure protection of the environment. Weeramantry's views on human rights also correspond to a progressive understanding of sustainable development; his concern for equity and justice resemble the concept's principles of intergenerational and intragenerational equity. This reading of Weeramantry's approach is informed by his lament of modern international law's concentration on rights to the exclusion of duties and responsibilities, which presents a "lop-sided legal picture of the network of rights and duties."[233] This notion of responsibility that Weeramantry regards as lacking in international law ought to lead to environmental obligations on both states and individuals. The urgency of this "impose[s] a heavy responsibility on the judiciary to contribute to the progressive

[231] ibid 436.
[232] ibid 447.
[233] ibid 91.

development of international law in this field."[234] Weeramantry endorses judicial activism in so far as he regards judges as being able to elevate the standing of international environmental law by moving its principles, such as sustainable development, "up the hierarchy of legal norms and principles, thus preventing [them] from being lightly brushed aside by political, commercial or other interests that seek to advance "development" whatever the cost."[235]

Cançado Trindade has only been a member of the ICJ since 6 February 2009.[236] Nevertheless, within this short period of time he has demonstrated his progressive stance in relation to other disciplines of international law, as well as in environmental matters. His discussion of the prohibition of torture in his separate opinion in *Questions relating to the Obligation to Prosecute or Extradite*[237] shows this. Cançado Trindade recalls, "For years, within the [Inter-American Court of Human Rights], I insisted on the jurisprudential construction of the material expansion of *jus cogens* and the corresponding obligations *erga omnes* of protection, in their two dimensions, the horizontal (*vis-à-vis* the international community as a whole) as well as the vertical".[238] Cançado Trindade's interpretation of human rights in this decision as obligations *erga omnes* suggests a progressive attitude when seen in the context of an international system of law that adheres to *pacta sunt servanda* strictly, and where its Court conducts disputes *inter partes*. Cançado Trindade discusses the importance of a "collective

[234] ibid 463.
[235] ibid 445.
[236] ICJ 'Current Members' <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=167> accessed 30 October 2015.
[237] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (Merits) [2012] ICJ Rep 1.
[238] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (Separate Opinion of Judge Cançado Trindade) [2012] <http://www.icj-cij.org/docket/files/144/17072.pdf> accessed 30 October 2015 [108].

guarantee" of obligations *erga omnes* in relation to the prohibition of torture.[239] According to Cançado Trindade, any impunity from these crimes is a denial of justice.[240]

Cançado Trindade's progressive approach in relation to human rights suggests he does not have a particular environmental agenda to develop international environmental law or ensure the Court is seen to have a particular approach in how it interprets and applies principles of international environmental law. Instead, Cançado Trindade's comments suggest a realistic, albeit progressive, approach to a specific account of justice that encompasses human rights principles and those relating to environmental protection. Cançado Trindade's discussion of both environmental protection and human rights suggests he understands the two disciplines as closely interrelated, an understanding that adheres to the more rigorous formulations and demands of the concept of sustainable development.[241] Another motivation explaining Cançado Trindade's progressive approach that relates to his justice project is that both international environmental law and human rights are disciplines of international law that are in their infancy — if compared to, for example, state sovereignty or the use of force.[242] In *Pulp Mills* Cançado Trindade regarded principles of international environmental law as "part

[239] ibid.
[240] "The passing of time with impunity renders the gravity of the situation even greater, and stresses more forcefully the urgency to make justice to prevail." ibid [160].
[241] For example, on the topic of "risks" Judge Cançado Trindade notes, "The last decades have indeed witnessed a growing awareness of the vulnerability of human beings and of the environment, requiring care and due diligence in face of surrounding risks, incurred into by man himself." *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) [2008] [69].
[242] State sovereignty and rules prohibiting the use of force have been at the concern of international law for a longer period of time than human rights or environmental law. Steinberger identifies the emergence of state sovereignty following the end of the Thirty Years' War as marking the beginning of international law, around 1648. Steinberger also notes how by the 17th Century state sovereignty connoted the exclusion of any extraterritorial pressures and that it had developed principles of non-intervention, both of which relate to "territorial integrity" and "political independence" which, under the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi art 2.4 prohibit the use of force. Helmut Steinberger, 'Sovereignty' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, *Vol IV* (Elsvier 2000) 501, 507.

of a new *corpus juris*", which the Court ought to seize upon to construct new international regulations.[243]

Weeramantry and Cançado Trindade share an agenda to develop international law according to principles of justice and to loosen the hold of state sovereignty. In the *Nuclear Weapons* advisory opinion Weeramantry appealed to the concerns of "all members of human society"[244] in relation to the effects of nuclear weapons, "Such is the risk attendant on the use of nuclear weapons - a risk which no single nation is entitled to take, whatever the dangers to itself."[245] Rather than dismissing this idealism Weeramantry regards it as paramount for international law: "Idealism affords international lawyers both a special source of inspiration and a special ground of justification for injecting that idealism into the continuing development of their discipline."[246] Cançado Trindade's comments suggest he too has sought to diminish the role played by state sovereignty in international law in favour of other general principles of law such as those of prevention and precaution that emanate, in his view, from universal human conscience.[247] Weeramantry and Cançado Trindade's respective comments on universal principles of international law and obligations *erga omnes* suggest the state-centric characterisation of international law is unhelpful for disciplines that require

[243] *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) [38].
[244] *Nuclear Weapons* advisory opinion (Dissenting Opinion of Judge Weeramantry) (n 48) [488] quoting Weston H Burns, "Nuclear Weapons and International Law: Prolegomenon to General Illegality" (1982-1983) 4 New York Law School Journal of international and Comparative Law 227, 252.
[245] ibid [465].
[246] Weeramantry, *Universalising International Law* (n 221) 80.
[247] "General principles of law emanate, in my perception, from human conscience, from the universal juridical conscience, which I regard as the ultimate material "source" of all Law. A clear illustration is provided by the gradual acknowledgment, in the last decades, of the principles proper to a domain like that of International Environmental Law  such as those of prevention and of precaution  as the consciousness has emerged of the pressing need to secure the protection of the environment, given its vulnerability, the risks surrounding everyone, and the harmful consequences of irreparable damages caused to it." *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) [52].

cooperation, including the environment.[248] Weeramantry has expressed that "We have now passed out of the era of co-existence into the era of cooperation and not merely passive cooperation but active cooperation because if we are to save our global inheritance we have to do so actively."[249] The approaches of Weeramantry and Cançado Trindade are supported more widely in the literature. For example, Miyoshi has discussed the obstacles states pose to human rights and protection of the environment. He suggests, "[preventing] such abuses of human rights and environmental conditions would logically require super-State controls, as advocated by some human rights and environmental law experts."[250]

**b) The Court's approach to the principles of prevention and precaution**

The Court's inconsistent explanations of the principles of prevention and precaution further support claim i) that the Court has a conservative approach to principles of environmental law. Inconsistency of this nature presents the Court as not regarding the environment as sufficient reason to determine genuine limits to economic development, which in turn suggests an underlying anthropocentric valuation of the environment. As with the above analysis of sustainable development this observation is lamentable since states regularly put forward competing understandings of how the principles apply to the disputes at hand and the international community would benefit from authoritative statements on the matters by the ICJ. As claim ii) suggests by not providing clarification on international environmental norms

[248] The relationship between state sovereignty and environmental protection is further discussed below, text to n 6ff in ch 6.
[249] Weeramantry, *Universalising International Law* (n 221) 437.
[250] Masahiro Miyoshi, 'Sovereignty and International Law' (University of Durham April 2009) <http://www.dur.ac.uk/resources/ibru/conferences/sos/masahiro_miyoshi_paper.pdf> accessed 30 October 2015, 4.

and their legal status the Court fails to sufficiently constrain state action in relation to the natural environment.

The Court has not had many opportunities to comment on the principle of prevention directly. However, when opportunity has presented itself the Court has been ineffectual in clarifying the content or obligatory nature of the principle. On the issue of the principle of prevention the majority judgment of the Court in *Gabčíkovo-Nagymaros Project* was silent. By ignoring this issue the Court overlooked an opportunity to clarify when preventing potential environmental harm is deemed serious enough to preclude development. It is reasonable to expect the Court to have referred to Principle 2 of the Rio Declaration that provides an example of the principle of prevention.[251] Since the Principle specifically obligates states not to cause damage to the environment of other states, it was clearly applicable in *Gabčíkovo-Nagymaros Project*. Ignoring the issue resulted in the Court providing no clear indication of the sorts of environmental harms that should be prevented or the level of scientific certainty required before state intervention should occur.

Neglect of this sort portrays the Court as unappreciative of any need to establish limits to economic development however environmentally ruinous the development may be. The Court's inaction conveys an anthropocentric regard for the environment and creates a permissive culture whereby states regard the principle of prevention as without content and lacking in genuine limitations. Not only did the Court miss an opportunity but also it specifically ignored an issue that was in dispute between the two parties before it. In evidence

[251] With its origins traceable back to the *Trail Smelter* (n 60) arbitration the precautionary principle is widely considered to be part of customary international law. See, for example Nicolas de Sadeleer, 'The principles of prevention and precaution in international law: two heads of the same coin?' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010) 182; Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, CUP 2013) 188.

of claim ii), this allowed both parties to maintain their own interpretations of prevention as authoritative. Slovakia claimed Hungary adopted an "extreme" interpretation of international law, that the "principle of prevention … must be considered an *erga omnes* obligation."[252] This was considered extreme since it would mean, in Slovakia's understanding, that states would have to halt their development in case any third state complained, no matter how affected they were by the environmental pollution.[253]

Perhaps seeking to address this neglect the Court explored the principle of prevention in slightly more detail and with more commitment in *Pulp Mills*. The Court confirmed that, "vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil." Nevertheless, the Court gave no statement confirming the obligatory nature of the principle, though they did confirm that the parties in the dispute had such an obligation owing to their bilateral treaty concerning the River Uruguay.[254] As was found in the previous discussions relating to sustainable development the Court shows deference to the notion of *pacta sunt servanda* in its consideration of the principle of precaution.

The Court's reticence to discuss the precautionary principle is further evidence of its hesitancy and conservative approach to international environmental law generally and its anthropocentric characterisation of sustainable development. Consideration of the Court's decisions shows an unwillingness to mention the principle in earlier environmental cases, and

[252] *Gabčíkovo-Nagymaros Project* (Counter-Memorial of the Slovak Republic) (n 164) [9.67].
[253] ibid [9.68].
[254] "The Court is of the view that Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision." *Pulp Mills* (Judgment) (n 19) 77 [189].

an unwillingness to fully explain the obligatory nature of the principle in later cases. The requirement for precaution was first raised in the Court during the *Nuclear Tests* cases but the Court did not comment on the principle whatsoever. In their arguments put before the Court New Zealand took a progressive stance in relation to the need for precaution in any state activity that could negatively impact the environment. The comments of New Zealand suggest a high threshold of precaution is required. New Zealand contended that, "[Nuclear testing] is not made acceptable even by the most stringent safety precautions; nor can such precautions avoid all risks."[255] In subsequent decisions where the Court has commented on the precautionary principle, though the Court has seemingly confirmed the existence of the principle, the confirmation has been unclear in terms of the limitations it imposes on states. The Court's consideration of the precautionary principle reveals a pattern in its reasoning, indicative of an anthropocentric approach to environmental protection, whereby environmental priorities are not regarded as providing sufficient reason to constrain economic development or the national security imperative of states that may lead to the development of nuclear weapons.

In *Gabčíkovo-Nagymaros Project*, which occurred twenty-four years after the *Nuclear Tests* cases, the Court also had opportunity to clarify the remit of the precautionary principle and again there was no mention of it in the Court's majority judgment. In the case Slovakia asserted that the principle is "yet to ripen into a norm of general international law."[256] Slovakia implied that the precautionary principle was constrained by its initial remit since, according to Slovakia, "The principle was first developed in the context of agreements to

[255] *Nuclear Tests (New Zealand v France)* (Request for the indication of Interim Measures of Protection submitted by the Government of New Zealand) [1973] <http://www.icj-cij.org/docket/files/59/10731.pdf> accessed 30 October 2015 [41].
[256] *Gabčíkovo-Nagymaros Project* (Counter-Memorial of the Slovak Republic) (n 164) [9.80].

protect the stratospheric ozone layer, and thus to prevent catastrophic damage to all biological organisms on Earth." Slovakia's interpretation of the precautionary principle provided the Court with the opportunity to approve the biocentric philosophy of ozone protection and extend it more widely. The Court did accept the emergence of new norms of environmental law and they suggested the need for "vigilance and prevention", but they did not specify to what damage could be caused and they limited the type of damage to that which had an "irreversible character".[257]

In not addressing the precautionary principle directly the Court appears inconsistent as well as ignorant of evolutions in approaches to international environmental law by other bodies such as the International Law Commission (ILC). Inaction presents the appearance of backtracking: Court inaction creates doubt regarding the obligatory force of international environmental law. This undermines progress that has been made and, in support of claim ii), furthers the different understandings state have to the binding nature of precaution. Evidence of this claim is found in the ILC's Commentary on the precautionary principle.[258] The ILC notes that at the time of the *Gabčíkovo-Nagymaros Project* the precautionary principle was regarded as part of customary international law by many regional treaties and conventions.[259] However, the ILC also recognises that states not party to such treaties remained able to claim the principle presents only an "approach" or series of measures as opposed to being a binding principle that informs state behaviour. Allaying this paralysis does not demand the Court definitively decides whether precaution is a principle or an approach (setting out the different consequences that flow from such terms). The Court need only account for different

[257] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 78 [140].
[258] ILC, '… transboundary harm arising out of hazardous activities' (n 88) 221-223.
[259] The ILC reported that members of the Commission regarded "precautionary approach" as less disputed than the "precautionary principle" since some universal treaties and conventions use the terms "approach" or "precautionary measures." ibid 223 para 6.

interpretations of the emergence of the precautionary principle as customary international law. This approach, as opposed to ignoring the issue, would prevent the Court from damaging its reputation, contribute to its consistency and it would still be operating within its jurisdiction.[260]

It may be objected that the Court did address the issue of the need for environmental precautions in all but name when it considered Hungary's "defence of ecological necessity" as reason to terminate the Treaty it had with Slovakia.[261] Regardless, the Court's response demonstrates its ineffective reconciliation of international environmental obligations with environmental and ecological scientific uncertainty. Considered alongside the Court's neglect of the precautionary principle in the strict sense, the judgment discharged any notion of there being a genuine obligation for states to act with precaution in environmental matters. This suggests the Court's approach is anthropocentric, in that an insurmountable threshold is established in order for any limitations to an instrumental regard for the environment to exist. As evidence of this claim the Court reasoned that because a defence of necessity requires "grave and imminent peril" the mere risk of environmental consequences (however severe they may be) that were in this instance presented by the barrage system were not sufficiently established.[262] Since much of the concerned environmental and ecological science was inconclusive the Court had to discount Hungary's scientific evidence regarding ecological harm.

[260] Art 38 permits the Court to decide disputes on the basis of international conventions and international custom, both of which could contain interpretations of the precautionary principle. The Statute arts 38(1)(a) and (b).
[261] *Gabčíkovo-Nagymaros Project* (Memorial of the Republic of Hungary) [1994] <http://www.icj-cij.org/docket/files/92/10921.pdf> accessed 30 October 2015 [10.06]-[10.16].
[262] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 42 [54].

The precautionary principle was again part of the dispute in *Pulp Mills*. Despite hearing very different statements regarding the scope of the principle and its obligatory nature the Court did not discuss the matter and, in support of claim i), the principle was not developed. As claim ii) proposes this pattern of hesitancy maintains different conceptions of precaution being advanced by states. In *Pulp Mills* Uruguay interpreted the principle in a manner that does not entail the same burdensome obligations as claimed by Argentina. Argentina understood precaution to be of paramount importance even if it means Uruguay must desist from its planned development. This is because, according to Argentina, Uruguayan development risked, "the implications of reverse flow for the concentration of pollutants, wind direction, climate change and the likely impact of the presence of pollutants on the fish in the river."[263] To the contrary Uruguay claimed that its development of the river had adhered to the principle since, "The point about the precautionary principle as articulated in Principal 15 of the Rio Declaration is that it applies where *some evidence of risk exists* but there is a "lack of full scientific certainty" about the probability that it will occur or how serious the consequences may be."[264]

Avoiding discussion of the principle confounded some judges of the Court. Cançado Trindade was dismayed since, "The Court had a unique opportunity to [discuss the issue], in the present case of the *Pulp Mills*, when *both* contending parties, Uruguay and Argentina, expressly referred to both the preventive principle and the precautionary principle."[265] In being silent on the principle of precaution the Court allowed for conservative and potentially environmentally damaging interpretations to persist, supporting claim ii). According to Uruguay and

[263] *Pulp Mills* (Memorial of Argentina) [2007] <http://www.icj-cij.org/docket/files/135/15425.pdf> accessed 30 October 2015 [5.17]-[5.18].
[264] *Pulp Mills* (Rejoinder of Uruguay) (n 40) [5.61] [emphasis in original].
[265] *Pulp Mills* (Separate Opinion of Judge Cançado Trindade) (n 53) [67].

unchallenged by the Court the precautionary principle exists as an economic consideration and not as a normative principle in its own right, "The real issue is not whether environmental risk has been eliminated, but whether it has been properly managed and minimized to the fullest extent possible using cost-effective measures."[266]

Had it continued, the *Aerial Herbicide Spraying* case would have provided the Court with another opportunity to clarify the obligations expected of states in relation to the principle of precaution. Ecuador claimed that the aerial spraying of toxic herbicides constituted a breach of Colombia's obligations of prevention and precaution.[267] Ecuador alleged Colombia's spraying of toxic herbicides was causing "serious damage to people, to crops, to animals, and to the natural environment".[268] Among Ecuador's complaints was that vegetation and animals had been and would continue to be affected.[269] Investigating the reports the United Nations Special rapporteur documented "[s]kin and other diseases, pollution of rivers and aquifers, and other damage".[270] Such environmental pollution would affect Ecuador's biodiversity, some of the richest in the world.[271] Colombia disputed this interpretation of the principle of precaution. They claimed the spraying "is accepted as a legitimate method in the fight against illicit crops, and is carried out based on procedures compatible with the preservation of human health and the environment, in conformity with the principle of precaution."[272] That different interpretations of the precautionary principle continue to be brought before the Court

[266] *Pulp Mills* (Rejoinder of Uruguay) (n 40) [5.62].
[267] *Aerial Herbicide Spraying* (Application Instituting Proceedings) (n 20) 26 [37].
[268] ibid [2].
[269] ibid [15].
[270] UNHRC 'Addendum to the Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to Ecuador' (28 December 2006) UN Doc A/HRC/4/32/Add2.
[271] *Aerial Herbicide Spraying* (Application Instituting Proceedings) (n 20) 28 [25].
[272] ibid [30].

provide further reason to suggest the Court has been ineffectual in providing a clear and consistent determination of the issue and that this is something states routinely require.

In *Whaling in the Antarctic* Australia and Japan disputed the extent to which the obligation of precaution had brought about an evolution in the object and purposes of the International Convention for the Regulation of Whaling (ICRW). Australia regarded "the establishment of [whale] sanctuaries [as demonstrating] the increasing importance of the precautionary approach in the [International Whaling Commission] IWC's management and conservation of whales."[273] Australia specifically mentioned the "precautionary approach" as part of the relevant international environmental law that must be taken into account when interpreting the ICRW obligations.[274] Japan interpreted the obligation of the precautionary principle to impose only minimal limitations. Japan claimed, "Australia has misunderstood and misinterpreted the facts. The role of the [IWC] has been, and continues to be, to implement whale conservation and management measures in pursuance of the object and purpose of the ICRW as stipulated in its Preamble, which is essentially to ensure the sustainable use of whales."[275]

The Memorials and Counter-Memorials provided reason to suspect the Court would discuss the obligatory status of the precautionary principle and develop its content. However, this opportunity was missed and the Court did not. The Court intentionally confined itself to the procedural questions at issues and did little to expand or clarify the obligatory status of any

[273] *Whaling in the Antarctic* (Memorial of Australia) (n 116) [2.80].
[274] Australia contended, "The *Vienna Convention* [art 31(3)(c)] requires that "any relevant rules of international law applicable in the relations between the parties" must be taken into account in interpreting the ICRW. As regards Australia and Japan, there are a number of relevant rules of international law in force as between them, the application of which commits both countries to promote the conservation of biodiversity and to apply specific principles, including the precautionary approach." (Footnote omitted) ibid, [4.81]
[275] *Whaling in the Antarctic* (Counter-Memorial of Japan) (n 117) [1.28]

international environmental norm.[276] In a momentary acknowledgement of the broader context of environmental law – which could have included reference to the precautionary principle – the Court commented that Australia and New Zealand "overstate the legal significance of IWC recommendations and guidelines."[277] Nevertheless in a statement that admonishes the minimised regard for how states are obligated by environmental principles the Court also held that a state's "scientific research" and how it kills, takes and treats whales "cannot depend solely on that State's perception."[278] These statements by the Court confirm what has been observed in other cases, that the Court upholds the notion of state sovereignty (on which the Court's jurisdiction depends) and that this accordingly compromises the resolve by which environmental principles, such as taking a precautionary approach to the conservation of whale species, are upheld. On this conceptual compromise Caddell suggests the Court's avowedly unprincipled approach may be excusable since it was intentionally mirroring the fickle and philosophically unpredictable nature and substantive work of the IWC, from which the disputed international obligations originated.[279]

Cançado Trindade noted the Court's hesitation in pronouncing on intergenerational equity, the precautionary principle and the principle of prevention. Cançado Trindade did not offer a view as to how the Court ought to have evaluated the state's conduct in relation to these principles but he lamented the Court ignoring the *opinio juris communis* relating to

[276] "The Court observes that, in applying the above standard of review, it is not called upon to resolve matters of scientific or whaling policy. The Court is aware that members of the international community hold divergent views about the appropriate policy towards whales and whaling, but it is not for the Court to settle these differences. The Court's task is only to ascertain whether the special permits granted in relation to JARPA II fall within the scope of Article VIII, paragraph 1, of the ICRW." *Whaling in the Antarctic* (Merits) (n 21) 241 [69].
[277] ibid 257 [83].
[278] ibid 253 [61].
[279] Caddell notes how the "ethos" of the IWC has shifted from preservation to sustainable development in just three years, between International Whaling Commission 'Annual Report of the International Whaling Commission 55th Annual Meeting: Res 2003-1 The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission' (2003) and International Whaling Commission 'Res 2006-1: St. Kitts and Nevis Declaration' (2006). Richard Caddell, 'Science Friction: Antarctic Research Whaling and the International Court of Justice' (2014) 26 Journal of Environmental Law 331, 338.

conservation and sustainable use of living marine resources.[280] Indicating the missed opportunity of the Court to clarify the obligatory relationship between sovereignty and international environmental norms Cançado Trindade held that states must yield to the juridical conscience of what is necessary and abandon the ranging claim of *jus voluntarism*.[281] A similar criticism of the Court's conservatism comes from Judge Bhandari who understood Japan's whaling programme to constitute a commercial enterprise.[282] Mirroring Cançado Trindade's conception of the relationship between sovereignty and international environmental norms, Bhandari dissented from the Court's majority judgment because he understood Japan to have failed to uphold the duty states have under the ICRW to cooperate with the Commission and its Scientific Committee.[283] Despite criticisms of the Court not being sufficiently progressive others lamented the Court's lack of restraint. Judge Owada dissented from the Court's majority opinion because he understood it to compromise the state sovereignty foundations of international law. From his interpretation of the IWC Owada held that it is contracting parties and not the Court that ought determine research agendas and assess their adequacy.[284]

There is good reason to suggest the precautionary principle should form part of the Court's forthcoming judgment in its two decisions concerning Costa Rica and Nicaragua.[285] In its judgment (Provisional Measures) in *Certain Activities* the Court acknowledged Costa Rica's argument that Nicaragua should stop their dredging activities until it has been established that

[280] *Whaling in the Antarctic* (Separate Opinion of Judge Cançado Trindade) (n 196) [89]
[281] ibid [90].
[282] Judge Bhandari Separate Opinion "there is ample evidence on the record to support the conclusion that JARPA II is not a programme for purposes of scientific research, but in fact, a commercial whaling programme." *Whaling in the Antarctic* (Separate Opinion of Judge Bhandari) [2014] <http://www.icj-cij.org/docket/files/148/18156.pdf> accessed 30 October 2015 [21].
[283] ibid [7].
[284] *Whaling in the Antarctic* (Dissenting Opinion of Judge Owada) [2014] <http://www.icj-cij.org/docket/files/148/18138.pdf> accessed 30 October 2015 [21].
[285] *Certain Activities* (Application Instituting Proceedings) (n 22) and *Construction of a Road* (Application Instituting Proceedings) (n 23).

these activities will not damage the Costa Rican rivers or threaten wildlife refuges.[286] Although the Court did not explicitly refer to an established precautionary principle, the Court noted Nicaragua's obligation to adhere to precaution. In a part of the judgment titled "Risk of Irreparable Prejudice and Urgency" the Court granted Costa Rica's request to prevent Nicaraguan dredging. However, the Court acknowledged that, "it cannot be concluded at this stage from the evidence adduced by the Parties that the dredging of the San Juan River is creating a risk of irreparable prejudice to Costa Rica's environment." Although in effect the Court upheld the need for precaution in what it understood as wetland areas of international importance[287] this may have been motivated by the high value it places on the principle of honouring treaty obligations as opposed to a genuine concern for the environment. Under the Ramsar Convention Nicaragua has an obligation to "endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna."[288]

**c) The Court's approach to environmental impact assessments**

The issue of environmental impact assessments (EIAs) has been raised in four of the ten environment related ICJ cases. Consideration of EIAs demonstrates claim i) that, as has been found with other principles of international environmental law, the Court has not determined the scope of states' obligations to undertake EIAs. As claim ii) suggests this has permitted states to argue various accounts of EIAs and for the assessments to become a pretence for environmental protection. The Court's reluctance to determine the expectations of EIAs can

[286] *Certain Activities* (Provisional Measures: Order) [2011] ICJ Rep 6, 10 [14]-[15].
[287] ibid 25 [79].
[288] ibid referring to the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 (Ramsar Convention) art 5.

be explained by the emotive approach it appears to take in environmental disputes and by its discomfort in accommodating the environmental sciences within international law.

EIAs were briefly addressed by the majority judgment of the Court in *Gabčíkovo-Nagymaros Project*, albeit not expressly. Since the 1977 Treaty between the Parties stipulated certain steps to be taken to avoid environmental damage[289] the Court found little need to reiterate the parameters of an undisputed issue. Nevertheless the Court could have seized this opportunity to reiterate the obligations of the parties. Instead, the Court made the more hesitant statement that it recognised that "vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis".[290] This statement is equally suggestive of the need for precaution as it is of requiring EIAs, indicative of the Court's incoherence when it comes to articulating principles of international environmental law. However, providing a clue to the Court's intention is the subsequent paragraph in which the Court decides that Hungary and Slovakia should employ a third party to help them find a solution to their respective needs to take account of environmental concerns[291], an arrangement that is more usually associated with EIAs than the precautionary principle.

In the *Pulp Mills* case Argentina claimed that Uruguay had failed to perform their "obligation to prepare a full and objective environmental impact study"[292], and that this had contributed to the "jeopardised" conservation of the environment of the River Uruguay and of the areas affected by the river.[293] Uruguay disputed these claims and regarded itself as fulfilling the

[289] Arts 15, 19 and 20 of the bilateral Budapest Treaty obligate both parties to protect water quality, nature and fishing respectively. Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks (Czechoslovakia–Hungary) (signed 16 September 1977) 1109 UNTS 235 (Budapest Treaty).
[290] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 67-68 [112].
[291] ibid 68 [113].
[292] *Pulp Mills* (Application Instituting Proceedings) [2006] 19 [25(d)].
[293] ibid 17 [21].

requirements of assessment. The different standards advanced by the two states could not be starker, which could be expected to translate into significant and detailed discussion of the issue on part of the Court. Whereas Argentina regarded EIAs as providing an objective standard, Uruguay claimed, "the only minimum content of an EIA in international law is that there must be an assessment of possible harmful transboundary effects on people, property, and the environment. The rest is a matter for national law to prescribe."[294] The Court's discussion of the matter further suggests its reluctance to stipulate state obligations relating to international environmental law. The Court did not decide on the issue of which party had presented the (more) accurate account of the requirements of EIAs instead resigning itself to stating the general ambitions of assessments. The Court observed that it is part of general international law to "undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[295]

In *Whaling in the Antarctic* the Court strived to not impose imposing itself on the larger environmental issues to which the decision relates. The Court also sought to show deference to the IWC's Scientific Committee that has the required technical expertise for the dispute and is lacking in the ICJ.[296] The Court's balance has received praise; conservationist and member of the IWC's Scientific Committee, C Scott Baker commented, "This is a clear victory for whales and for the integrity of science… The court's ruling recognizes what many of us [on

[294] *Pulp Mills* (Counter-Memorial of Uruguay) (n 105) [4.89].
[295] *Pulp Mills* (Judgment) (n 19) 82-83 [204].
[296] The Court held that it "does not seek here to pass judgment on the scientific merit of the JARPA II objectives and that the activities of JARPA II can broadly be characterized as "scientific research" … the Court seeks here only to evaluate whether the evidence supports a conclusion that the sample sizes are reasonable in relation to achieving JARPA II's stated objectives." *Whaling in the Antarctic* (Merits) (n 21) 278 [172]. At three other points the Court mentioned its deficiency in scientific expertise, 254 [69], 257 [82] and 282 [185].

the Committee] have argued for 20 years that Japan's scientific whaling is simply a thinly veiled commercial whaling program."[297]

Cançado Trindade's separate opinion commends parts of the *Whaling in the Antarctic* judgment. He agreed with the Court's majority that states do not have unfettered discretion to decide the legitimacy of their own actions: such an approach would be contrary to the existence of the ICRW framework and the International Whaling Committee (IWC) regulatory body.[298] However, Cançado Trindade still thought the Court should have taken a more progressive approach and further reduced the influence of the state; specifically that when deciding whether to grant a permit for scientific purposes Japan has a duty to abide by the principles of prevention and precaution.[299] Cançado Trindade understood the Court's majority judgment to view the ICRW as a "living instrument" that can and ought respond to the changing demands of the international community, not least in international environmental law where conservation is of fundamental importance.[300] This proactive interpretation would develop the Court's decision in *Gabčíkovo-Nagymaros Project* where it was held that the disputed treaty "is not static, and is open to adapt to emerging norms of international law".[301]

Not all ICJ judges viewed the *Whaling in the Antarctic* decision favourably or as successful. Judge Owada understood the Court to have conducted scientific assessment despite claiming that questions of science are a matter for qualified experts and that it is not for the Court to

[297] Virginia Morell, 'Court Slams Japan's Scientific Whaling' (2014) 344 Science 22, 22, quoting C Scott Baker.
[298] *Whaling in the Antarctic* (Separate Opinion of Judge Cançado Trindade) (n 196) [22].
[299] ibid [23].
[300] ibid [29]. In its majority judgment the Court uses the phrase "evolving instrument". *Whaling in the Antarctic* (Merits) (n 21) 247 [45].
[301] *Gabčíkovo-Nagymaros Project* (Judgment) (n 3) 68 [112].

assert its own view as to how such divergent views should be reconciled.[302] Similarly, other judges deplored the Court's theoretical distinction of the phrase "for purposes of scientific research" from "scientific research"[303]. Bennouna regarded it as a "paradox" and a "perilous exercise".[304] Owada determined this distinction "so artificial that it loses any sense of reality when applied to a concrete situation."[305] For Judge Yusuf it was not just confusing but was the Court acting beyond its remit and substituting itself for the IWC's Scientific Committee.[306] Yusuf intimates that this occurred because the Court had been overly influenced by the emotional and ethical arguments relating to the taking and killing of whales.[307]

The parties in the *Certain Activities* and *Construction of a Road* cases construct their arguments with reference to EIAs, providing another occasion for the Court to comment on the expected elements of EIAs, now that, since the *Pulp Mills decision,* the requirement of EIAs is uncontentious. Arguments in both cases reveal the state's uncontentious regard for EIAs, which invites the Court to discuss the issue before a receptive and accepting audience. In *Certain Activities* Nicaragua use EIAs to support the appropriateness of their dredging of the San Juan River. The presence of EIAs in Nicaragua's argument suggests such assessments are customarily understood as necessary. The Court has reflected the obligatory tone of Nicaragua's argument when recounting the developments of the case; "[Nicaragua's dredging] had only been authorized after an environmental impact assessment had been duly

[302] *Whaling in the Antarctic* (Dissenting Opinion of Judge Owada) (n 284) [25].
[303] *Whaling in the Antarctic* (Merits) (n 21) 258 [86]-[87].
[304] *Whaling in the Antarctic* (Separate Opinion of Judge Bennouna) [2014] <http://www.icj-cij.org/docket/files/148/18144.pdf> accessed 30 October 2015, 3.
[305] *Whaling in the Antarctic* (Dissenting Opinion of Judge Owada) (n 284) [23].
[306] *Whaling in the Antarctic* (Dissenting Opinion of Judge Yusuf) [2014] <http://www.icj-cij.org/docket/files/148/18148.pdf> accessed 30 October 2015 [61]. Bennouna concurred, *Whaling in the Antarctic* (Separate Opinion of Judge Bennouna) (n 304) 3.
[307] Judge Yusuf appreciates this sensitivity but urges the Court not to be swayed: "The juridical settlement of disputes between States cannot be made on emotional or purely ethical grounds." *Whaling in the Antarctic* (Dissenting Opinion of Judge Yusuf) (n 306) [2].

completed."[308] Further supporting Nicaragua's understanding as to the binding nature of conducting EIAs is their claim that Dutch experts have validated the assessment.[309] EIAs are also part of the *Construction of a Road* dispute; Nicaragua claim the Costa Rican development threatens the San Juan River and its ecosystem and that no EIA has been conducted because the construction of the new road was passed under an emergency decree that exempted the project from these requirements.[310] Nicaragua contends that Costa Rica have failed to perform their obligation "to undertake an environmental impact assessment where there is a risk that the proposed activity may have a significant adverse effect in a transboundary context."[311]

Reasons for the Court's reluctance to fully explain state obligations to conduct EIAs include the Court's sentimental approach to environmental protection and unfamiliarity in the environmental sciences, which prohibit them from undertaking comprehensively critiquing assessments. Analysis of the Court's majority judgments and the separate and dissenting opinions of judges presents a tendency to portray environmental issues as part of the domain of science or philosophy and not that of international law. Consequently, when the Court is required to balance protection of the environment against other international norms, the environment appears to be treated as subservient.

Judge Ago's dissenting opinion in *Nauru* (preliminary objections) demonstrates this tendency. In Ago's opinion the environment occupied an emotional space in his reasoning. The environment was discussed as an issue of sentiment from which it may be inferred that the environment is regarded as less important than the needs of states. Ago confirmed, "I am

[308] *Certain Activities* (Provisional Measures: Order) (n 286) 15 [40].
[309] ibid 15 [41].
[310] *Construction of a Road* (Application Instituting Proceedings) (n 23) 13-14 [23].
[311] ibid 28 [46].

certainly no less sensitive than my colleagues to the frustration felt by the Nauruans when they gaze upon the present state of their small island's territory. I also hope with all my heart that it will be possible for this people once again to find in its country of origin conditions of life favourable to its development." [312] Although Ago's opinion related to preliminary objections that did not raise environmental issues directly, it nevertheless illustrates a missed opportunity to highlight the increasing importance of environmental law and its obligations. None was raised. Instead, Ago echoed the Court's emotive treatment of environmental issues, an issue that was treated as being separate from questions of law. In support of this finding Ago wrote, "these perfectly justified emotional reactions should not blind us to the fact that the questions we have to consider in this preliminary phase are very specific questions of law and that it is by reference to the law, and only to the law, that they have to be answered."[313]

Similar associations of the environment with sentimentality are evident in Judge Oda's dissenting opinion. Oda was clearly motivated by the environmental consequences facing the Nauruans but such motivations could not lead him to find any international environmental *law* relevant to the issue of rehabilitation of the environment. Demonstrating his emotional response Oda expressed, "By saying that the Application of Nauru in the present case should be rejected as inadmissible, I am not denying the importance of the preservation of an environment from any damage that may be caused by the development or exploitation of resources, particularly in the developing regions of the world."[314] Demonstrating this pattern whereby the importance of environmental principles is lessened through the use of emotive language is the declaration of Bedjaoui in the *Nuclear Weapons* advisory opinion. Bedjaoui

[312] *Nauru* (Preliminary Objections: Dissenting Opinion of Judge Ago) [1992] <http://www.icj-cij.org/docket/files/80/6805.pdf> accessed 30 October 2015 [1].
[313] ibid.
[314] *Nauru* (Preliminary Objections: Dissenting Opinion of Vice-President Oda) [1992] <http://www.icj-cij.org/docket/files/80/6803.pdf> accessed 30 October 2015 [30].

suggested, "The moral dilemma [of the survival of mankind] which confronted individual consciences finds many a reflection in this Opinion. But the Court could obviously not go beyond what the law says. It could not say what the law does not say."[315] Bedjaoui explained the necessity of separating principles – however morally imperative they may be regarded – from the positivist statements of international law. Reminiscent of the comments of Judge Ago in *Nauru*[316], Bedjaoui claimed that the "Advisory Opinion frankly states the legal reality, while faithfully expressing and reflecting the hope, shared by all, peoples and States alike".[317]

The separation of environmental issues from issues of law is not without criticism from other ICJ judges. Confronting this situation Weeramantry has expressed the importance of aligning international environmental law with environmental science. Demonstrating his dissatisfaction with the Court's tendency to artificially separate environmental law from its related fields of knowledge Weeramantry has suggested, "When incontrovertible scientific evidence speaks of pollution of the environment on a scale that spans hundreds of generations, this Court would fail in its trust if it did not take serious note of the ways in which the distant future is protected by present law."[318] Weeramantry's views indicate his dissatisfaction with the Court's timidity in engaging with international environmental law. Weeramantry called for the knowledge, morality and legality of the time of the opinion to have "deep impact" upon the Court's reasoning.[319] Nevertheless the artificial separation is still somewhat evident in Weeramantry's opinion. Although contrary to the majority judgment of the Court, Weeramantry appeared to prioritise science over law, "After this factual review,

[315] *Nuclear Weapons* advisory opinion (Declaration of President Bedjaoui) [1996] <http://www.icj-cij.org/docket/files/95/7499.pdf> accessed 30 October 2015 [9].
[316] *Nauru* (Preliminary Objections: Dissenting Opinion of Judge Ago) (n 312) [1].
[317] *Nuclear Weapons* advisory opinion (Declaration of President Bedjaoui) (n 315) [24].
[318] *Nuclear Weapons* advisory opinion (Dissenting Opinion of Judge Weeramantry) (n 48) 456.
[319] ibid 473.

legal argument becomes almost superfluous".[320] Weeramantry's reasoning for this, discussed in his separate opinion to the *Nuclear Weapons* advisory opinion, was based on his understanding of justice and fairness which he regarded as providing a minimum content of natural law in which "universally recognized principles of conduct" are accepted as having the basis for the human relationship with the environment.[321]

The issue of environmental science appears to divide Court judgments. At times this allows the Court to ignore the merits of different scientific evidence advanced by parties in different disputes. Separate and dissenting opinions suggest there is widespread disagreement and inconsistency amongst judges as to the value held by the scientific evidence that is put before the Court. Some opinions reflect a feeling of command over science. For example, Judge Oda has claimed that any ecological assessment made in the 1970s would not be different if done in the 1980s.[322] Additionally, Judge *ad hoc* Skubiszewski discussed the existence of "objectively verified environmental needs."[323] Judge Weeramantry's assuredness as to scientific information led him to suggest "incontrovertible scientific evidence"[324] makes subsequent consultation of international environmental law "almost superfluous".[325]

However, other opinions suggest the Court is unable to adequately address scientific matters. Judge Herczegh was critical of the approach of the Court in the majority judgment of *Gabçikovo-Nagymaros Project* where ecological concerns were given only a modest

[320] ibid 471.
[321] ibid 520 quoting H L A Hart. Weeramantry's conception of the human relationship with the environment is considered in greater detail above, n 220.
[322] *Gabçikovo-Nagymaros Project* (Dissenting Opinion of Judge Oda) (n 173) [159].
[323] *Gabçikovo-Nagymaros Project* (Dissenting Opinion of Judge Skubiszewski) [1997] <http://www.icj-cij.org/docket/files/92/7401.pdf> accessed 30 October 2015 [232].
[324] *Nuclear Weapons* advisory opinion (Dissenting Opinion of Judge Weeramantry) (n 48) 456.
[325] ibid 471.

consideration.[326] Judge Herczegh's opinion suggests the Court ought to adopt a more harmonious consideration of environmental sciences and international environmental law. Judge Herczegh recognised that "ecological knowledge has become considerably broader and deeper whilst international environmental law has also progressed."[327] However, Herczegh was himself cautious, recognising that the Court does not possess the power to "decide scientific questions touching on biology, hydrology, and so on, or questions of a technical type which arose out of the *Gabçikovo-Nagymaros Project*."[328]

### 4.3 Concluding remarks

This chapter's analysis has demonstrated that for the most part the ICJ has been hesitant and inconsistent in precisely defining sustainable development, the principles of prevention and precaution and the obligation to conduct environmental impact assessments. This has established a picture of incoherence in terms of the Court's approach to environmental principles. However, there have been exceptions to this pattern that indicate a concealed environmental proto-philosophical approach does exist in the Court. Weeramantry and Cançado Trindades' approaches to environmental principles reveal progressive elements in the Court in which the environment is understood as being more than instrumentally valuable to humans. Weeramantry and Cançado Trindade regard the Court as having a duty to develop international environmental law according to fundamental principles of justice and human conscience and they lament the Court's missed opportunities to establish a normative agenda.

[326] *Gabçikovo-Nagymaros Project* (Dissenting Opinion of Judge Herczegh) [1997] <http://www.icj-cij.org/docket/files/92/7393.pdf> accessed 30 October 2015 [177].
[327] ibid [178].
[328] ibid [177].

Although the Court has the opportunity to discuss environmental principles in the cases currently on its docket, previous decisions such as *Nauru* suggest the Court may not confront these seemingly relevant principles because, as claim i) establishes, it does not keep pace with developments in international environmental law.[329] Placing decisions of the Court in the wider context of multilateral environmental agreements identifies a pattern in which the Court has been slow to acknowledge the various environmental obligations that have been accepted by states. When the Court has shown signs of an awareness of this wider context it has been inconsistent in its application of the principles and rules that may relate to the disputes that came before it.

In the rare instances where the Court has been proactive in developing international environmental law, the Court has been inconsistent and has lacked commitment in its articulation of the related principles. One such example is the Court's initial development of the principle of state responsibility to ensure damage is not done to the environment of other states. In *Corfu Channel* in 1949 the Court evolved the *Trail Smelter* principle of transboundary harm[330], considering it to be a general reproach to state activities that are contrary to the rights of other states.[331] The Court's application of this principle in its first contentious case predated any international agreements on the subject[332], which seemingly suggests the Court was setting the agenda in relation to this principle. The Court's initial approval of this principle may be explained by the affront transboundary pollution poses to

[329] It will be recalled that in *Nauru* the Court did not discuss principles of international environmental law even though this decision came twelve days after the conclusion of the Rio Conference, see above n 68.
[330] The principle asserts that, "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Trail Smelter* (n 60) 1965.
[331] *Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v Albania*) (Merits) ICJ Reports 4, 22.
[332] The responsibility of states to ensure that activities within their jurisdiction do not cause damage beyond their jurisdiction formed the basis of Principle 21 of the Stockholm Declaration.

state sovereignty – a notion the Court would be encouraged to uphold – but this should not detract from regarding this as a progressive approach.

The Court could have limited the scope of the concept by discussing it in relation to state sovereignty. However, it did the opposite, broadening the application of the transboundary harm principle. Regardless, despite this initial progressive approach the Court only confirmed the customary international law obligation of states not to cause damage to the environment beyond their jurisdiction in 1996.[333] In the forty-seven years between these decisions the Court did not capitalise on opportunities it had to further develop the principle and confirm its status. This may be explained in part by the infrequency of the Court's environment related cases. However, even in its environmental cases during this period, such as the *Nuclear Tests* cases, the principle of transboundary harm was not discussed. Although the *Nuclear Tests* cases did not proceed to merits the Court still had the opportunity to reiterate the importance of the principle of transboundary harm; contrary to the majority judgment, in his dissenting opinion Judge de Castro took the opportunity to compare the transboundary damage caused by nuclear tests to the Trail Smelter incident.[334]

It is reasonable to expect the Court to have acknowledged the development of principles of international environmental law during this interim period. Several multilateral environmental agreements had demonstrated the international community's concern for the environment, including: the 1948 International Union for the Protection of Nature[335] and the 1949 United Nations Conference on the Conservation and Utilisation of Resources[336], which recognised

[333] *Nuclear Weapons* advisory opinion (n 4) 241-42 [29].
[334] *Nuclear Tests* cases (Dissenting Opinion of Judge de Castro) (n 159) 389.
[335] UNESCO 'International Union for the Protection of Nature' (5 October 1948) (Later renamed International Union for the Conservation of Nature) <https://portals.iucn.org/library/efiles/documents/1948-001.pdf> accessed 30 October 2015.
[336] ECOSOC 'United Nations Scientific Conference on the Conservation and Utilization of Resources' (17 August – 6 September 1949) UN Doc E/CONF 7/7.

the interdependence of resources (including the "legacy of resource depletion"), the use and conservation of resources, the development of new resources through technology, conservation education, and resource techniques for less-developed countries[337]; the 1968 Biosphere Conference[338]; and, the 1972 Stockholm Conference, which resulted in the Stockholm Declaration and an Action Plan[339] with 109 recommendations for state practice relating to the environment.

Also demonstrating the Court's apparent detachment from general developments in environmental issues are the decisions that followed the Rio Declaration, which do not reflect the philosophical perspective of the international agreements concluded there. By 1992 the concept of sustainable development was ubiquitous in international environmental law, with the Rio Declaration containing numerous references to it.[340] For example, Principle 4 implies that sustainable development limits development by insisting on the consideration of environmental protection.[341] The Rio Conference also established the United Nations Framework Convention on Climate Change that placed binding obligations on states[342], a commitment from which the Court should have inferred state acceptance of the need to protect the environment. Despite international agreement advocating principled limits to development the Court missed the opportunity to discuss sustainable development in the *Nuclear Weapons* advisory opinion, in which only a passing reference to the concept was

[337] ECOSOC 'United Nations Scientific Conference on the Conservation and Utilization of Resources' (1948-1949) United Nations Year Book 481.
[338] UNESCO 'Final Report of the Intergovernmental Conference of Experts on the Scientific Basis for the Rational Use and Conservation of the Resources of the Biosphere' (4 – 13 September 1968) SC/MD/9 (Biosphere Conference).
[339] UNGA 'Action Plan for the Human Environment' Report of the United Nations Conference on the Human Environment (1972) UN Doc A/CONF.48/14, 2-65 and Corr.1.
[340] Principles 1, 4, 5, 8, 9, 12, 20, 21, 22, 24 and 27 of the Rio Declaration mention sustainable development.
[341] Principle 4 states, "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Rio Declaration Principle 4.
[342] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

made. The Court's reticence to engage with sustainable development in this advisory opinion is especially clear since they discuss the extent to which environmental factors may restrain the rights of states. They also cite Principle 24 of the Rio Declaration, which states "warfare is inherently destructive of sustainable development."[343]

As discussed above, the Court devoted more attention to environmental principles in *Gabčíkovo-Nagymaros Project*.[344] However, the Court's understanding of environmental obligations again falls short of that of the Rio Declaration. Rather than adhering to Principle 4 of the Rio Declaration the Court's approach does not unequivocally demonstrate the need to integrate environmental protections with the development process. Instead, the Court considered the financial implications of the barrage system and environmental consequences separately. Although, on the one hand, the Court appeared to acknowledge the need for states to adopt an integrated approach to environmental and developmental priorities, they identified the obligation "to evaluate the environmental risks, [and that] current standards must be taken into consideration."[345] On the other hand, and contrary to Principle 4 of the Rio Declaration, the Court also found that if Slovakia had not made the barrage system operable it would have "led to considerable financial losses, and that it could have given rise to serious problems for the environment."[346]

When placed in the context of the international community's changing perceptions of sustainable development the Court's conservative approach appears defendable since it would not wish to articulate principles of international environmental law that do not have coherency and support in the international community. However, changing articulations of sustainable

[343] Rio Declaration Principle 24.
[344] See above n 85ff.
[345] *Gabčíkovo-Nagymaros Project* (n 3) 77 [140].
[346] ibid 53 [72].

development do not provide a reason for the Court's lack of determination in relation to the concept, since if necessary the Court could adjust its understanding and decisions in accordance with the concept's evolutions, as may be indicated by state acceptance of multilateral environmental agreements. The anthropocentric characterisation of sustainable development in recent international environmental agreements now matches the approach of the Court, though this observation does not correspond to the Court having recovered lost ground to the wider developments in international law.

Supporting this analysis is the Court's reluctance in the *Pulp Mills* decision to regard any substantive principles of international environmental law to have been violated by Uruguay.[347] Finding procedural violations was relatively uncontentious since the Treaty between the parties specified particular adherence to certain environmental principles.[348] However, a finding of substantive violations would entail the Court asserting a particular understanding as to the obligations of result of sustainable development, understandings that fluctuate or remain ambiguous in international environmental agreements. The Court did find a "functional link" between the procedural obligations and obligations of result in relation to the principle of prevention[349] but in its discussions of other environmental principles it refused to specify substantive state obligations.

[347] *Pulp Mills* (Judgment) (n 19) 106 [282].
[348] The 1975 Statute between Argentina and Uruguay stipulated the states' obligations regarding the construction and operation of the mill. It included: the obligation to contribute to the optimum and rational utilisation of the river (art 1); the obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (art 35); the obligation to co-ordinate measures to avoid changes in the ecological balance (art 36); and, the obligation to prevent pollution and preserve the aquatic environment (art 41).
[349] *Pulp Mills* (Judgment) (n 19) 49 [79].

Evidence of the decline of environmental concerns within the concept of sustainable development comes from the 2002 Johannesburg Declaration on Sustainable Development.[350] The Johannesburg Declaration was agreed upon eight years before the *Pulp Mills* decision and its content presents a way of comparing the approach of the Court to international environmental agreements that, to different extents, present accounts of the international community's attitude towards environmental obligations at different times. The section of the Declaration titled "Our Commitment to Sustainable Development" contains no explicit mention of the environment. Instead, the fifteen paragraphs in this section focus on the importance of human rights and intergenerational equity. Where the paragraphs do imply protection of the environment an anthropocentric characterisation is adopted; environmental concerns are to be mitigated for the instrumental dangers they pose to humans. One paragraph calls for attention to be given to natural disasters as part of "the fight against the worldwide conditions that pose severe threats to the sustainable development of our people".[351] The environmental focus of sustainable development appears to have become subsumed by all of the aspirations of the international community that the concept now acknowledges.[352]

The foregoing case analysis demonstrates the Court's hesitancy and its inconsistency when it does articulate the content and status of principles of international environmental law. As has been discussed in support of claim ii) this creates a permissive culture in which states can continue to (and do) present their own interpretations of environmental principles. The result of this is a weak state commitment to sustainable development and the principles of

[350] UNGA 'Johannesburg Declaration on Sustainable Development' (4 September 2002) UN Doc A/CONF 199/20 (Johannesburg Declaration).
[351] ibid para 19.
[352] Having no specific mention of the environment in its section on sustainable development, the Declaration instead gives priority to "poverty eradication", and "chronic hunger; malnutrition; foreign occupation; armed conflict; illicit drug problems; organized crime; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorism; intolerance and incitement to racial, ethnic, religious and other hatreds; xenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis." ibid paras 21 and 19.

precaution and prevention, and leaves the fate of the natural environment very much in the hands of the state.

## Chapter five

## A NORMATIVE ARGUMENT FOR THE OBJECTIVE GOOD OF THE BIOSPHERE

Chapter one has justified that international legal argument can acknowledge environmental moral theories and that the International Court of Justice (ICJ) is an appropriate forum in which this normativity can be determined. Chapter two has questioned notions of environmental duties and their traditions of thought that may inform the Court's tacit philosophy. Chapter three has analysed the four dominant environmental philosophical perspectives, characterising them as movements away from utilitarian thinking and placing them in the historical context of changing notions of responsibility. Chapter four consisted of assessment of decisions of the ICJ according to the principles of the four environmental philosophical perspectives and found that the ICJ has taken an inconsistent and unsystematic approach to environmental issues, but that elements of a more progressive approach to environmental matters are identifiable. Cognisant of these findings and the deficiencies they represent (if assessed against the criteria of the perspectives set out in chapter three) this chapter identifies and defends a normative argument that would result in robust environmental decisions that is both reasonable (rational and acceptable) and can be implemented by the Court (forming the architectonic basis of the Court's decision making process). The normative argument would present the Court with a systematic approach to international environmental law (something which international-facing judges have requested[1]) and would provide states with a body of jurisprudence that reforms the way the environment is regarded.

It is prudent to protect the natural environment. Humans are dependent upon the environment for the basic needs of food and shelter. Additionally, many humans are now dependent on the

[1] See below, text to n 71ff in ch 6.

environment for the natural resources it is comprised of that enable the current (Western) way of life. Conceiving of the environment in this way is to regard the environment as something (or a collection of things) instrumental to humans, as something that can increase utility perhaps. This section argues that, contrary to this prevalent view, there are genuine duties to the environment and the nonhuman life that also depends upon it. This section expands upon the view that utilitarianism is untenable as a moral theory that can protect the environment.[2] By asserting that objective goods must include the good of the biosphere it is possible (and, it will be argued, reasonable) to suggest that humans are morally obligated to protect the environment for its own sake, and should adjust their behaviour accordingly. To establish this normative argument this chapter has the following structure. First, the claim will be made that there are genuine duties that place limitations on human action. This claim will be supported through an exposition of Finnis' argument for the existence of objective goods and the existence of exceptionless duties. Second, the notion of objective goods will be shown to be extendable to nonhuman animals, all individual life forms and to ecosystems, each to different degrees of reasonableness. It will be argued that objective goods can and should be recognised as pertaining to all individual forms of life, according with the biocentrist philosophical perspective. Having established the possibility of a biocentric natural law philosophy the chapter will conclude by defending it against some potential objections.

### 5.1 Duties to objective goods

This section argues that humans have genuine duties and that the content of these are revealed by the presence of objective goods. 'Lists' of objective goods provide substantive accounts of

[2] See above, text to n 67ff in ch 2.

what constitutes human wellbeing.[3] So, for an individual to lead the good life they ought to pursue these goods. Finnis is a proponent of this view. He presents seven basic goods: life; knowledge; play; aesthetic experience; sociability (friendship); practical reasonableness and religion.[4] In presenting accounts of human flourishing Finnis follows the Aristotelian and Thomist tradition that understands humans as having genuine duties and that human action ought to be limited by such notions of duty.

This section has two parts that follow Finnis' line of argument that individuals participate in the basic goods through practical reasonableness, which directs them towards wellbeing. The first part reconstructs one of Finnis' seven basic goods, the good of knowledge. Finnis' construction is selected to support the claim that there are objective goods because he is a strong advocate of this position and because his basic goods are pre-moral in that they do not constitute prescriptive moral principles.[5] For example, "'knowledge is good' does not mean that knowledge is to be pursued by everybody, at all times, in all circumstances … [it] is not, here, to be understood as a moral proposition."[6] Avoiding the contentious claims of appealing to nature to determine the good Finnis' objective list provides an account for "all the basic

[3] Derek Parfit uses the general term of "Objective List Theories" to describe substantive accounts of wellbeing where particular things are to be regarded as good or bad for humans, regardless of whether good things are wanted or pursued and bad things actively avoided. Derek Parfit, *Reasons and Persons* (Clarendon Press 1984) 493.

[4] This thesis will use Finnis' original list of basic goods because it is better known. The original list is to be found in John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980) 86-90, reprinted in the second edition, John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 86-90. Although Finnis has updated his list of the seven basic goods the *Natural Law and Natural Rights* original list will be used here as they are outlined and defended in greater detail. Moreover, Finnis' list is principally updated with the addition of marriage, which is not relevant for this argument. For the updated list see John Finnis, 'Commensurism and Public Reason' in John Finnis (ed), *Reason in Action: Collected Essays: Volume I* (OUP 2011) 244 fn 25. As a point of comparison, offering a different list Nussbaum presents ten "central human capabilities": life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment. Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press 2006) 76-78.

[5] Finnis writes, "A statement of the basic goods entails an account of human nature. But it does not presuppose such an account." John Finnis, 'Legal Reasoning as Practical Reason' in John Finnis (ed), *Reason in Action: Collected Essays: Volume I* (OUP 2011) 213.

[6] Finnis, *Natural Law and Natural Rights* (n 4) 62.

purposes of human action."[7] The second part of this section considers how, and the extent to which, an individual's practical reasonableness enables them to recognise and participate in the objective goods and consequently directs human action and imparts moral prescription.

**a) Objective goods**

The following exposition of Finnis' basic good of knowledge demonstrates that it is reasonable to suggest that humans have particular and identifiable goods and a duty to attain to these goods. Although only one of the goods will be discussed in detail they are all equally fundamental. Indeed, when focused upon each of the basic goods appear to be the most important. Finnis provides the example of someone drowning, where in such a situation the basic goods of knowledge or play "will seem secondary, even rather optional extras."[8] The "plasticity of human inclinations"[9] demands limitless arrangement (and rearrangement) of the basic goods and as such as they exist without a predetermined hierarchy and are incommensurable.

Finnis regards knowledge as objective in the sense that it is an intrinsic good[10]; Finnis does not suggest that all knowledge is equally valuable, instead he refers to the state of having knowledge being a better state than "ignorance and muddle" since this facilitates a "well-informed and clear-headed person".[11] Also, it is not only good to have instrumental knowledge, that which may be used merely to impress the audience or to contribute to

[7] ibid 92.
[8] ibid 92.
[9] ibid 84.
[10] ibid 62.
[11] ibid 61.

survival:[12] being knowledgeable, as opposed to being muddled or ignorant is, as a practical principle, "something good to have".[13] The appropriateness of this good, along with the other goods, constituting wellbeing is regarded by Finnis as following from its self-evident status. Writing in relation to the self-evidence of the good of knowledge, but equally appropriate to a discussion of the basic goods more generally, Finnis writes, "It cannot be demonstrated, but equally it needs no demonstration."[14] Finnis' line of argument develops that of his natural law forbearers in a manner that escapes the criticisms that would befall them: Finnis acknowledges the "discredited Aristotelian conception of axiomatized sciences of nature"[15]; the "appeal to nature", that "a thing is good *because* it is 'natural', or bad *because* it is 'unnatural'."[16] Whereas Aristotle and Aquinas understood humans as having an innate purpose to attain to the good[17], Finnis demonstrates that it is both possible and reasonable to equate notions of the good with that which is learned through sound judgement. This difference is crucial since it allows for the existence of objective goods in a manner that does not depend on teleology. Focusing on the good of knowledge Finnis writes, "the value of truth becomes obvious only to one who has experienced the urge to question".[18]

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[12] ibid 62.
[13] ibid 63.
[14] ibid 65.
[15] ibid 67.
[16] George E Moore, *Principa Ethica* (Barnes and Noble 2005) 47 (emphasis in original).
[17] For Aristotle this inference may be made from his politically orientated texts since he regards the purpose of politics as reaching the best end. This is to be attained by "making the citizens to be of [good] character." Aristotle, *Nicomachean Ethics* (tr Roger Crisp, CUP 2000) bk 1 ch 9 [1099b]. Similarly to Aristotle, Aquinas regards the natural law as the divine providence from which humans derive their intrinsic purpose. Thomas Aquinas, *Summa Theologiae* (tr Fathers of the English Dominican Province, Benziger Bros 1947) II-I q91 a1 (cited by Part (I, I-II, II-II, III) Question (q) and Article (a)).
[18] Finnis, *Natural Law and Natural Rights* (n 4) 65. To support his argument Finnis invokes principles of logic that cannot be substantiated without invoking them; objective goods "are obvious – and obviously valid – to anyone who has experience of inquiry into matters of fact or of theoretical (including historical and philosophical) judgment; they do not stand in need in demonstration." Finnis, *Natural Law and Natural Rights* (n 4) 69. This has led Crisp to call Finnis an "intuitionist", "who believes that human beings have a rational capacity to grasp the truth of certain theoretical and practical self-evident propositions." Roger Crisp, 'Finnis on Well-being' in John Keown and Robert P George (eds), *Reason, Morality and Law: The Philosophy of John Finnis* (OUP 2013) 26.

Considered together, the seven basic goods and Finnis' assertion of their self-evident applicability to human nature present a robust challenge to the utilitarian orthodoxy in which there are no inherent limits to human action. To the contrary, Finnis' conception offers a substantive account of human wellbeing to which humans are directed by their self-evidently good status.

**b) Practical reasonableness**

Having posited a list of basic intelligible goods and accounted for their objective existence the task remains of setting out how genuine human duties are derived from these; how a sense of moral obligation is derived from pre-moral goods. Each of the basic goods – assuming they are to be accepted – has numerous ways in which they can be participated. It is reason that enables individuals to participate in the basic goods. Denying this proposition denies the objective goods since practical reasonableness is itself one of the goods: the intelligent and reasonable choosing of how to shape one's character, how to live and how to act in relation to the other basic goods.[19] Accordingly, if an individual does not exercise their intelligence they will not be able to choose the actions, lifestyle and character that befit their pursuit of the basic goods in the manner to which they want to be orientated.[20] Yet practical reasonableness also places both a moral and a legal injunction on individuals and the community of

[19] Finnis regards this basic good as having two aspects. There is the "internal" aspect where all individuals seek to reconcile, order and understand their emotions, thoughts and actions. There is also the "external" aspect where all individuals strive to make their evaluations, preferences, hopes and self-determination authentic. Finnis, *Natural Law and Natural Rights* (n 4) 88.

[20] Finnis follows Aquinas' understanding of the relationship between intellect and will. Finnis quotes Aquinas to make his claim that "the act by which one's will intends something which is proposed [to will] as being good—good because directed by one's reason to an end". John Finnis, 'Reflections and Responses' in John Keown and Robert P George (eds), *Reason, Morality and Law: The Philosophy of John Finnis* (OUP 2013) 492 quoting Aquinas, *Summa Theologiae* (n 17) II-I q13 a1.

individuals to participate in the basic goods. Duties to act or refrain from acting result from these injunctions.

Aquinas and Finnis may be referred to in support of the argument that human reason contains a moral injunction that accounts for why individuals ought to participate in the basic goods. Finnis writes, in his analysis of Thomistic thought, "Reason, then, seeks a more complete – one may say, integral – directiveness, the directiveness not of each first practical principle taken on its own but of all taken together."[21] Prudentia and practical reasonableness present an understanding of the reasoning individuals employ when they undertake a life of wellbeing (which is how to live by and participate in the objective goods).[22] Finnis' practical reasonableness accounts for the "reasons why (and thus the ways in which) there are things that morally ought ([and ought] not) to be done."[23] To establish this sense of moral obligation Finnis sets out nine basic requirements that determine what an individual must do and how they must act if they are to participate in the basic goods. The requirements direct individuals towards striving towards fulfilment: "Practical intelligence is not slave to the will any more than it is the slave of the passions. It moves our wills just in so far as, and in that, reasons can and often do *motivate* us. [Humans] are intelligently attracted by goods which are attractive to reason by reason of their intelligible goodness, i.e. by the benefits their instantiation promises."[24] The nine requirements of practical reasonableness which attract individuals towards moral goodness are: a coherent plan of life; no arbitrary preferences among the basic goods; no arbitrary preferences among persons; detachment and commitment; efficiency;

[21] John Finnis, *Aquinas: Moral, Political, and Legal Theory* (OUP 1998) 106.
[22] Finnis' nine principles of practical reasonableness are "proto-ethical principles as specifications of morality's master principle (that one should remain open, in all one's deliberating and willing, to integral fulfilment – fulfilment which is not one's own, nor indifferent to one's own, but is to be located in the fulfilment of all human persons in all their communities)." John Finnis, 'Practical Reason's Foundations' in John Finnis (ed), *Reason in Action: Collected Essays: Volume I* (OUP 2011) 32.
[23] Finnis, *Natural Law and Natural Rights* (n 4) 103.
[24] Finnis, *Aquinas* (n 21) 89-90.

respect for every basic good in every act; responsibilities to the common good, and; following one's conscience.[25] The normative aspect of practical reasonableness is derived from the practical character of the claim. For instance, because life is objectively and self-evidently good, you *ought* not to jump off a fatally high cliff because your life will end. The *ought* "is nothing more nor less than the intelligible, propositional content of the attractiveness of that basic human good towards which the principle in question directs."[26] Adhering to the requirements may necessitate particular actions or refrains from action on the part of the individual, such as not jumping off a cliff. Accordingly, if the principles of practical reasonableness are accepted – which individuals acting intelligibly and reasonably and in recognition of the basic goods will – then that action or refrain ought to be performed.[27]

Sceptics may claim that an individual's self-interest or (misguided or corrupted) sense of the good undermines the normativity set out in the above argument, since an individual – even if they accept life to be a basic good – might proceed to maim, torture or kill others if it (or if they believe that it) fulfils one of the other basic goods. Such claims, however, can be countered, further illustrating the reasonableness of the normative argument that there are objective goods and that humans have a duty to adhere to them. Reason is only that which is in pursuit of the objective goods since anything else is unreasonable: Jumping off a cliff is bad in so far as it guarantees an end to life and so is in opposition to one of the objective goods. In support of such a view Finnis understands reason as seeking ("i.e. it is unintelligent not to seek") a more complete "directiveness" of all the nine principles considered holistically

[25] Finnis, *Natural Law and Natural Rights* (n 4) 103-126. Finnis' Thomistic inheritance is clear. Aquinas writes that, "The good of the human being is being in accord with reason, and human evil is being outside the order of reasonableness." For Aquinas, to do or act to the contrary of the good would not be reasonable and so would not be in accordance with human nature. Aquinas, *Summa Theologiae* (n 17) II-I q71 a2.
[26] Finnis, *Aquinas* (n 21) 87.
[27] Finnis, *Natural Law and Natural Rights* (n 4) 126-27.

because of the multitude of ways the different goods can be realised.[28] Jumping off a cliff to one's death is not conducive to any of the principles of practical reasonableness and cannot bring about any of the basic goods. Locating normativity in practical reasonableness in this manner allows for the accommodation of several aspects of human autonomy: reductions in pain, increases in wellbeing or flourishing, universalising practical judgement, and preserving freedom.[29] Still, the sceptic may claim, this account of reason is unsophisticated since it only designates good reason as that which is in pursuit of the objective goods and this is unsatisfactory and insufficient instruction as an account of why humans ought to do specific things and abstain from other things. Specifically, this unsophisticated example does not account for why certain actions should be avoided, for instance, if a particular action results in some short-term good or a good for few people but a long-term bad or a bad for most.[30] Finnis' normative framework (his seven basic goods and his discussion of how through practical reasonableness individuals can participate in them) is able to refute such a claim. For Finnis, the partial good that may result from such a choice is nevertheless morally bad because the majority of the requirements of practical reasonableness are not being fulfilled and the basic goods are not being participated in. It is in this way that moral injunctions are to be understood as forming from reason; practical reasonableness (which reasonable individuals cannot deny) establishes the process by which individuals evaluate how to attain to the basic goods (which are objectively good). Accordingly, proponents of this position suggest, "The *directiveness* of practical knowledge *becomes normativity* because what is to be might not

[28] Finnis, *Aquinas* (n 21) 106. Aquinas writes, "we should take our estimation of human goods not from the foolish but from the wise: just as it is for a person whose sense of taste is in good order, to judge whether a thing is palatable." Aquinas, *Summa Theologiae* (n 17) II-I q2 a1.
[29] Finnis, *Natural Law and Natural Rights* (n 4) 126.
[30] There may be, for example, a "potential benefit of vengeful action. For taking revenge will mollify hurt feelings and bring harmony between them and one's choice – since that *choice will be in accord with one's feelings!*" Germain Grisez, Joseph Boyle and John Finnis, 'Practical Principles, Moral Truth, and Ultimate Ends' (1987) 32 The American Journal of Jurisprudence 99, 124 (emphasis in original).

actually come to be [if action contrary to practical reasonableness is pursued] and yet still rationally is to be."[31]

In addition to indicating moral courses of action, practical reasonableness has the moral authority of law, derived from the common good, which places additional stipulations on human behaviour and accordingly constructs genuine legal human duties. This presents a second counterargument to the claim of the sceptic that individual self-interest or a (misguided or corrupted) sense of the good undermines the normativity of practical reasonableness. The common good may be described as "a set of conditions which enables members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community."[32] The common good directs individuals towards finding shared understandings of the basic goods and how to participate in them collectively. This is required since there are many different conceptions of the common good that each individual may hold; which aims *should* be shared and the extent to which they *should* be shared. Also, each individual's pursuit of the basic goods through practical reasonableness is as valuable as the next persons and the basic goods sought are incommensurate. In acknowledgment of this situation practical reasonableness obliges coordination in areas where there are shared values amongst all individuals (whether these be towards "open-ended commitments" or "fully realizable project[s]").[33] In the normative framework of practical reasonableness legal injunctions result in so far as rules enable individuals to participate in the basic goods and in so far as it is practically reasonable to recognise these rules as the best means of attaining the common good necessary for full

[31] ibid 125 (emphasis in original).
[32] Finnis, *Natural Law and Natural Rights* (n 4) 155.
[33] Finnis, *Natural Law and Natural Rights* (n 4) 153.

participation.[34] This is because law ought to correspond to reason; the law "anticipates and seeks to captialize upon, indeed to absorb and take over, the 'good citizen's' schema of practical reasoning".[35] If law does not it will deprive reason and will deny individuals their participation in the basic and objective goods.[36]

Finnis' normative framework stipulates exceptionless moral rights and, correlatively, exceptionless moral duties. These are derived from practical reasonableness and the conditions for what is required to be acting morally, in relation to the common good. Substantiating this argument is crucial for establishing a case for there being genuine duties. Since life, for example, is a basic good and because, as a principle of practical reasonableness, it is always unreasonable to choose directly against any basic good, there exists, for Finnis, a moral injunction for individuals not to deprive others of their life. An individual has the right "not to have one's life taken directly as a means to any further end"[37] because of "the literally immeasurable value of human personality in each of its basic aspects (the solid core of the notion of human dignity)".[38] Individuals are engaged in processes of cognitive empathy and evaluate that since for them it would not be good if they were lied to in factual communications, if they were condemned on knowingly false charges, if they were deprived of their reproductive capacities or if they were not considered as constituting part of the common good, neither would such treatment be good for others.[39] Such rights and their correlative duties must be exceptionless because they correspond to the basic goods and it is

[34] This is not to say that all law is good. The alignment of practical reasonableness to the law exists only and in so far as the individuals or the community to which the law relates regards it as being in accordance with the basic goods, encompassing the common good.
[35] Finnis, *Natural Law and Natural Rights* (n 4) 318.
[36] Conducive to this argument, Aquinas regards reason as the building blocks of law: "Law is something pertaining to reason… Just as … we may consider the work and the work done, for instance the work of building and the house built; so in the acts of reason, we may consider the act itself of reason, i.e. to understand and to reason, and something [law] produced by this act." Aquinas, *Summa Theologiae* (n 17) II-I q90 a1.
[37] Finnis, *Natural Law and Natural Rights* (n 4) 225.
[38] ibid.
[39] ibid.

irrational to act contrary to these. For example it is irrational to constitute relationships or a community of relationships in which surety or notions of promise are absent for such interactions would deny that knowledge is good in itself, that it is objectively better to be knowledgeable as opposed to being muddled or ignorant; to conceive and live one's life on the basis of some ascertainable and reliable notion of truth.

The right not to be lied to and the duty not to lie to others are exceptionless, for Finnis, because they are acts that go against the basic goods, notably that of knowledge. There are, however, instances in which lies may be widely accepted as permissible or necessary, such as lying to deceive the enemy through the use of counterintelligence or 'white lies' where lying is felt to be the correct choice. In such instances the claims of exceptionless norms appear flawed. To resolve this difficulty Murphy suggests that whilst lies are acts that go against the good of knowledge, in the course of transgressing this good, they are also damaging of the good of practical reasoning.[40] Individuals do not deliberatively and intelligibly reason to always arrive at correct outcomes and "practical reasoning is concerned as much with the quality of the process as with the quality of the outcome".[41] Lying constitutes a deficiency in an individual's practical reasonableness but in instances of counterintelligence deception or white lies, individuals commit the lie (and commit an absolute moral wrong by contravening their exceptionless duty not to lie) because of the intelligible evaluation they have made.

Finnis establishes exceptionless moral rights through a conception of reciprocity: Exceptionless moral rights exist because of and in so far as their correlative duties. This notion of reciprocity will be adhered to because and in so far it is reasonable to do so in that it

[40] Mark C Murphy, 'Natural Law and the Moral Absolute Against Lying' (1996) 41 American Journal of Jurisprudence 81, 87.
[41] ibid 96.

is fundamental for the participation in the basic goods. For example, an individual would conclude that they have the right not be lied to in factual communications because they believe others have a duty not to lie to them since they would not want to be lied to. Finnis' exceptionless moral norms are premised on the inviolability of human dignity and the human good that demarcates such rights and how far they may intrude on others' rights. Such personal rights conform to Finnis' vision of what the common good requires and as such represent norms applicable to humans collectively. This common good cannot, for Finnis, be reduced to utilitarian calculations because attaining the good requires "steady determination to respect human good in one's own existence and the equivalent humanity or human rights of others."[42] Whereas utilitarians must deny absolute rights because of the "moral priority of circumstances"[43] Finnis' conception of basic goods and practical reasonableness inform, to the contrary, that it is always unreasonable for an individual or a community to choose against a basic good (and accordingly, that exceptionless duties towards others result).[44] This argument may appear opposite to governmental policy, as Finnis himself admits[45]. Nevertheless, several international conventions posit non-derogable rights[46], peremptory norms that in turn posit negative but genuine duties.

[42] Finnis, *Natural Law and Natural Rights* (n 4) 226.

[43] Michael Shortall, *Human Rights and Moral Reasoning: A Comparative Investigation by Way of Three Theorists and Their Respective Traditions of Enquiry: John Finnis, Ronald Dworkin and Jürgen Habermas* (Gregorian and Biblical Press 2009) 168.

[44] "Are there no fixed points in that pattern of life which one must hold in one's mind's eye, in resolving problems of rights? Are there no *absolute* rights, rights that are not be limited or overridden for the sake of any conception of the good life in community, not even *to prevent catastrophe*?" Finnis, *Natural Law and Natural Rights* (n 4) 224.

[45] Finnis, Boyle and Grisez maintain the argument of exceptionless duties to life in numerous instances that would impact government policy, such as contraception, abortion, assisted suicide and nuclear deterrence. They write "In voluntarily acting for human goods and avoiding what is opposed to them, we ought to choose and otherwise will those and only those alternatives whose willing is compatible with a will toward integral human fulfillment", John Finnis, Joseph Boyle and German Grisez, *Nuclear Deterrence* (OUP 1987) 283.

[46] For example art 4(2) of the International Covenant on Civil and Political Rights states "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision." The inviolable rights contained therein include, the right to life, prohibition of torture or to cruel, inhuman or degrading treatment,

Accordingly, this section has argued that humans have fundamental goods and that practical reasonableness both enables humans to participate in the goods and provides a moral and legal injunction therein. It has also presented the case for exceptionless norms, anticipated and denounced the counterarguments of sceptics who would assert that value is only that which provides humans with utility. Yet Finnis' examples of exceptionless moral rights and their correlative duties are limited in that they are intra human and are derived from conceptions of *human* good. Finnis' conception of exceptionless moral rights and their correlative duties is unnecessarily restrictive and this limits the capability of reason to comprehend a more inclusive view of the good, including – in accordance with the biocentric philosophical perspective – the good of other life forms. Contrary to Finnis' account reason does not exhaust the good. Of course, human reason is required to perceive and understand this good but this does not necessitate that the good is to be restricted to humans only. Indeed, contrary to Finnis' claims, if this discussion of exceptionless moral rights is contrasted to utilitarianism the potential for environmental duties to exist becomes plain. Accordingly, a reasonable individual would conclude that ill environmental treatment (such as engaging in activities which lead to a species extinction) or wasteful practices (such as the burning of fossil fuels beyond the environment's natural regenerative capacity) ought not be done in so far as environmental devastation deprives other humans of the basic goods. Also, correlatively, to ensure that the individual's own participation in the basic goods is not denied through environmental destruction they would regard others as having a duty to avoid such actions.

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prohibition of slavery, and retroactive penal measures. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

## 5.2 Duties to nonhuman life

This section of the chapter argues that notions of the good ought to be extended to nonhuman life. This argument is made in three stages. First Finnis' construction of the basic goods will be shown to be limited and imperfect in determining the good. If compared to Aquinas, Finnis' account of ethics gives undue weight to reason over inclinations. Aquinas' three levels of inclinations that are used to distinguish plants, animals and humans according to their different teleological tendencies to the good, demonstrates a comprehension of the good of nonhuman life. Accordingly, this first stage of the argument makes the claim that i) the cosmos provides an order in which all life has a good that can be intelligibly understood (by humans) in terms of the teleological causal operations of life. The second stage undertakes a study of prerational human functions to further support the first claim. It finds that prerational functions that partially determine human nature and the human good also exist in nonhuman life (in plants and animals to different extents). Accordingly the claim is posited that ii) human reason does not provide an adequate foundation from which to dismiss the continuities of all life and their respective participation in the good. The final stage of this section's argument returns to Finnis' notion of exceptionless moral rights and their correlative duties. Based on the preceding claims of this section that all life tends towards the good and that human reason is underdeterminative of the good, this stage claims that iii) exceptionless human duties (entailed through practical reasonableness) extend to the good of nonhuman life.

**a) Human nature**

This first stage of this section's argument uses Aquinas' conception of the good to illustrate Finnis' limited account. Aquinas presents a useful counterpoint to Finnis because he develops an analysis of human nature's inclinations to the good by distinguishing human inclinations from those of nonhumans. A study of Aquinas demonstrates that Finnis is overly restrictive in his ethical account. Whereas Finnis confines his discussion of the good to the human good, Aquinas's inclinations of life forms represent the cosmological order, which provide the foundations for claim i) that all life has a good of its own and that this can be intelligibly understood in terms of the teleological causal operations of life. Formulating Aquinas' account of the good requires a brief discussion of his cosmological order that consists of teleological causality and God's command. Aquinas views all things, including all life forms, as teleologically inclined to the good: "God imprints on the whole of nature the principles of its proper actions. And so, in this way, God is said to command the whole of nature".[47] For Aquinas it is God's command that determines the ends towards which all life is inclined: "All things that are ordained to one, even in different ways, can be denominated from it."[48] It is by way of God's providence that all life is good because all life has been given predetermined ends; Aquinas explains that "good is that which all things seek after."[49] Aquinas' cosmological order presents a picture of the continuity in life to tend towards the good that is suggested by all life's teleological inclinations and their Godly instantiation. In comparison to Finnis' conception of the good, Aquinas' conception is far less restrictive. Indeed it is only

[47] Aquinas, *Summa Theologiae* (n 17) II-I q93 a5.
[48] ibid II-I q60 a1.
[49] ibid II-I q94 a2. More modern translations of Aquinas understand the word "appetit" to mean "incline" and not "seek" in this context. These translations, discussed below at text to n 59ff, appear more accurate since they emphasise that Aquinas did not regard plants as purposefully seeking the good. See Coyle's translation, Sean Coyle, 'Labour Rights as Natural Rights' (A Workshop on Labour and Employment, Emory University School of Law, Atlanta, April 2014).

through setting out his understanding of the continuities of all life that Aquinas is able to proceed to distinguish plants, animals and humans from one another.

The categorisation of plant and animals in Aquinas' analysis of the natural inclinations remains central to the modern sciences of biology and ecology. However, as the following discussion argues, Aquinas' analysis of the inclinations makes definitive claims about the uniqueness of humans in relation to animals and assumes too much of human reason, both of which make his account vulnerable to questioning. Before undertaking this questioning it is pertinent to set out Aquinas' inclinations. The first level of natural inclinations that Aquinas considers is the inclination to live that humans share with all other life, both plant and animal. On this Aquinas writes, "Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances".[50] For humans this inclination is to live a flourishing human life, to preserve one's life and to ward off its obstacles. Living in this way is to follow the first precept of law that "good is to be done and pursued, and evil is to be avoided."[51] This acknowledges human teleological causality to pursue a virtuous life for "by God alone is man made happy".[52] Aquinas' analysis of the second level of natural inclinations identifies further continuities in life forms. Aquinas finds that between humans and the other animals there are continuities "such as sexual intercourse, education of offspring and so forth."[53] What this shared inclination refers to is the desire amongst all animals to exist and the appropriate ways of ensuring survival and the developmental processes natural to them. Aquinas' third level of natural inclinations is that which distinguishes humans from all else. Aquinas understands that "there is in man an

[50] Aquinas, *Summa Theologiae* (n 17) II-I q94 a2.
[51] ibid.
[52] ibid.
[53] ibid.

inclination to good, according to the nature of his reason, which nature is proper to him".[54] Aquinas regards only humans as demonstrating the capability of reason and as tending to seek knowledge, to know God, and to live in societies.[55] For Aquinas, these tendencies, discovered through reason, require virtuous performance. In relation to living in societies for example, Aquinas has a particular view on how to live virtuously to this end: "Whatever is for an end should be proportionate to that end. Now the end of law is the common good… Hence human laws should be proportionate to the common good."[56]

Further consideration of Aquinas' analysis demonstrates that it is not unreasonable to assert claims of the good of nonhuman species albeit that the good argued for is, for Aquinas, distinct from the *moral* good that is determined by reason and is the preserve of humans. Aquinas uses the inclinations to distinguish human nature from nonhuman life but he does not dispute the claim made here that there are important and intelligible continuities between all life from which the good of all life can be positioned. In support of this claim is Aquinas' analysis of the first inclination, to preserve one's life, which is shared across all forms of life. This seems right both intuitively and by way of the biological sciences that validate such assumptions. Indeed it is from all life's continuity of self-preservation that botanists and zoologists deem plants and animals to be ill or unfit according to whether they meet particular tendencies recognised as natural to them. As well as the integrity of individuals that the inclination to life affords, life can also be understood holistically; all individual life is part of an intelligible cosmological existence. Aquinas can be seen to recognise what modern ecological science acknowledges as the interdependencies and interrelatedness of all life:

[54] ibid.
[55] ibid.
[56] ibid II-I q96 a1. See also Aquinas' discussion of human law that he finds must be useful and just, in terms of origin, quality and treatment, from which virtue may be implied, II-Iq95a1-4.

"God exercises justice, when He gives to each thing what is due to it by its nature and condition."[57] Accordingly, in the same way that human life denotes more than the isolated flourishing of individuals (relationships formed between partners, families and communities intra humanly), the inclination to life for nonhuman life forms denotes intelligible interactions and interdependencies. In support of this holistic understanding of life Porter notes, in her exploration of this first level of Aquinas' analysis, that the inclination to life is more than just a self-preservation mandate, "otherwise the inclination of the male black widow spider to mate would be unintelligible."[58]

Aquinas' analysis of the second level of inclinations distinguishes animals including humans from plants. This level includes the tendency to secure food and safety, which necessarily involves relating to the environment in particular ways. Questions can be raised in relation to this impermeable categorisation that Aquinas posits and the continuity of the good that this structures. On the one hand Aquinas is correct to distinguish plant life from animal life because plants do not *desire* nutrients or *want* for the continuation of their species in a purposive manner.[59] However, on the other hand and contrary to Aquinas' analysis, this distinction is only terminological since there is no further biological merit in desiring nutrients as compared with chemically attaining them in a unconscious and spontaneous (as opposed to rational) way through photosynthesis. A life form receives the same sustenance from nutrients whether or not they consciously desire them. This counterpoint to Aquinas' analysis does not need to conflate the second level of inclinations with the first. Rather its task

[57] ibid I q21 a1.
[58] Jean Porter, *Nature as Reason: A Thomistic Theory of the Natural Law* (William B Eerdmans Publishing Company 2005) 120.
[59] Confronting such assumptions Chamovitz has recently explored plant "senses". For example he compares the photoreceptors of human eyes that receive particular light waves to the "bending to the light" phototropism of plants from their blue light reception. Daniel Chamovitz, *What a Plant Knows: A Field Guide to the Senses of Your Garden – And Beyond* (Oneworld 2012) 9-33.

is to illustrate that particular human and animal (and to some extent plant) tendencies relate to the first *and* second levels of inclinations identified by Aquinas. This criticism of Aquinas' analysis only need claim that the continuities of all life extend into the second inclination *somewhat* and provide intelligibility to that which links the cosmological inclination to life and the inclinations to continue one's species through securing food and species reproduction.

Continuities of preservation and the (partial) continuities of establishing security and sustenance amongst all life accord with the biocentric philosophical perspective wherein all individuals are equal and all life forms are to be recognised for their intrinsic value. It is no defence of Aquinas' distinctions of the inclinations to suppose that plant and animal species secure nutrients and procreate in sufficiently different ways because at a fundamental biological level the differences are superficial. Modern science has long been unequivocal that, "In biology, no essential difference is considered to exist between animal and vegetal life. Resemblances of reproduction, cell-construction and development, nutrition, digestion, and metabolism are observable in the two states. Some organisms partake of the nature of both kingdoms. Some spores and leaves of plants are motile, and a few animals possess characteristics which are common in plant life."[60] Genetic scientific thought confirms the continuities of life and contributes further complexity to its understanding.[61] Accordingly, whilst Aquinas recognises certain continuities in all life his distinctions are overly restrictive (though, in comparison to Finnis they are more inclusive) because of his lack of scientific knowledge. Aquinas' biological understanding offers much that is to be commended but his resultant hierarchy of the good is nevertheless vulnerable to modern biological argument. In

[60] F Carrel, 'Differences in Animal and Plant Life' (1914) 8 Science Progress 511, 511.
[61] Rokas summarises the position: "Animal genomes contain thousands of genes involved in carrying out vital routine tasks, such as metabolism and cell division. Many of these genes are shared across eukaryotes and predate the origin of animals per se". Antonis Rokas, 'The Origins of Multicellularity and the Early History of the Genetic Toolkit For Animal Development' (2008) 42 Annual Review of Genetics 235, 236.

modern science taxonomic differences in the procreation of different species do not imply particular value judgements or species hierarchy. For example, in evolutionary terms, the parthenogenesis process of reproduction is understood by biologists to be more efficient than sexual reproduction.[62] Although more efficient as a biological process there need not be any value attached to this efficiency and indeed if there were it would challenge the anthropocentric hierarchy suggested by Aquinas' inclinations or result in speciesist human preferences.

Aquinas' analysis of the third level of natural inclinations does the most to distinguish the good between different life forms. Nevertheless there are arguments that question the extent to which humans are to be distinguished from other life. Raising such questions (perhaps accepting that they cannot be definitively answered) further suggests there are greater continuities among all life than Aquinas offers, and accordingly that Finnis' restrictive account of the good as a human good presents space for a nonhuman good. This view would endorse the perspective of biocentrism and would present a challenge to the utilitarian orthodoxy that has been discussed as lacking the required sense of duty to motivate genuine environmental redress. The modern sciences emphasise the continuities in life and support claim i) that the cosmos provides an order in which all life has a good that can be intelligibly understood (by humans) in terms of the teleological causal operations of life. The questioning of Aquinas' third level of analysis takes two approaches. The first undertakes a comparison of human and animal life as a means of questioning the dissimilarity posed by Aquinas. The second approach assesses the particular human application of reason as constitutive of human

[62] Smith questions, "From the selfish-genetic point of view, there are obvious advantages to parthenogenesis. A gene that suppressed meiosis in female diploids would be transmitted to all female offspring instead of only to half and thus would, all else being equal double in frequency in each generation. Why then, does parthenogenesis not replace sex?" John Maynard Smith, 'Evolution: Contemplating life without Sex' (1986) 324 Nature 300, 300.

nature and how this "mediates" or "transforms"[63] the shared inclinations to such an extent as to suggest discontinuities in species, their according good and the applicability of exceptionless norms between humans and nonhumans (as well as between human individuals).

In terms of raising questions, the first approach is relatively straightforward; reason, suspected by Aquinas to be unique to humans, involves particular capacities that have been shown to exist, to different extents, in nonhuman animal species. The modern sciences observe the particular capacities denoted by reason in nonhuman animals that challenge the discontinuities identified in Aquinas' third level of inclinations. This challenge also presents an affront to anthropocentrism since it exposes the perspective as being speciesist, with reason failing to distinguish comprehensively human from nonhuman life. Unlike Aquinas the modern sciences do not arrange life in a hierarchy derived from taxonomical differences.[64] To the contrary, "It remains open whether humans have truly unique cognitive properties. Experts recognize aspects of imitation, theory of mind, grammatical–syntactical language and consciousness in non-human primates and other large-brained mammals. This would mean that the outstanding intelligence of humans results not so much from qualitative differences, but from a combination and improvement of these abilities."[65] Reader, Hager and Laland have researched continuities in the behavioural innovation, social learning, tool use, extractive

[63] To describe this feature of Aquinas' analysis Porter understands that shared inclinations are "mediated through rational judgment and reflection" and as such the shared inclinations are qualified by reason. Porter, *Nature as Reason* (n 58) 72. From Aquinas' understanding that, "All the inclinations of any parts whatsoever of human nature, e.g. of the concupiscible and irascible parts, in so far as they are ruled by reason belong to the natural law, and are reduced to one first precept" (Aquinas, *Summa Theologiae* (n 17) II-I q94 a2), Coyle uses the term "transforms" to describe the process of reason on shared inclinations. Sean Coyle, 'Labour Rights as Natural Rights' (n 49).

[64] This, of course, was not Aquinas' reason for distinguishing humans from other forms of life. As further discussed below his project was to use reason as a means of knowing God and living a life according to virtue in the name of God's good. However, if separated from this theological understanding, Aquinas' views represent mere taxonomical distinctions.

[65] Kathleen R Gibson, 'Evolution of human intelligence: The roles of brain size and mental construction' (2002) 59 Brain Behavior and Evolution 10, 11.

foraging and tactical deception in sixty two primate species and they find a "highly correlated composite of cognitive traits [that] suggests social, technical and ecological abilities have coevolved in primates, indicative of an across-species general intelligence that includes elements of cultural intelligence."[66] Contrary to Aquinas, the biological explanation suggests these capacities are not discontinuities between human and nonhuman animals (and an inability to attain to the good) and instead represent evolutionarily enhanced versions of capacities found in other life. It is the number of cortical neurons in combination with the high conduction velocity of cortical fibres along with the mirroring neuron system that differentiates humans from nonhuman life.[67] These factors provide the "neural scaffold" for empathy from which developed human morality and the social relationships this governs.[68]

The second approach to questioning Aquinas' analysis of the third level of inclinations concerns how the particular arrangement of human reason (regardless of whether reason is understood as not unique and is accepted as seemingly incipient in nonhuman primates) might mediate or transform tendencies that have so far been presented as continuities between human and firstly plant and secondly animal life. Human reason mediates the inclinations to survive or to reproduce that are shared with plant and animal life; Aquinas understands the first and second level of inclinations as being shared with humans but experienced differently.[69] For Aquinas, it is because of the operation of human reason that humans are inclined to live in peaceful and just societies, to seek knowledge and to know God. Reason may be understood as transformative in that it enables the imposition of a framework of

[66] Simon M Reader, Yfke Hager and Kevin N Laland, 'The evolution of primate general and cultural intelligence' (2011) 366 Philosophical Transactions of the Royal Society of Biological Sciences 1017, 1017.
[67] Gerhard Roth and Ursula Dicke, 'Evolution of the Brain and Intelligence' (2005) 9 Trends in Cognitive Science 250, 254.
[68] Istvan Molnar-Szakacs, 'From actions to empathy and morality – A neural perspective' (2011) 77 Journal of Economic Behavior and Organization 76, 77.
[69] See n 63.

ethical tendencies. Ayala suggests that the particular human arrangement of their shared – but nevertheless further developed – inclinations that might account for reason's transformative power are the capability for free will, abstract thought and anticipation of the future.[70] These capabilities have developed through shared capacities but "some threshold" has been crossed in the human species alone.[71] However, these constitutive aspects of reason can be questioned. Undertaking such questioning supports claim i) that the cosmos provides an order in which all life has a good that can be intelligibly understood in terms of the teleological causal operations of life.

In relation to living in societies although humans have "gone considerably further" other primates have been observed as demonstrating empathy, the internalisation of rules and a sense of justice and community concern.[72] The identification of these tendencies questions the uniquely transformative role of reason in humans. Contrary to Aquinas' argument, nonhumans have also been observed to mediate their second level inclinations for procreation and sustenance. This standpoint can be supported by the collated research of the primatologist De Waal. He finds that many animals share with humans sympathy-related traits (the forming of attachments, succorance, emotional contagion, learned adjustment to and special treatment of the disabled and injured), norm-related characteristics (the creation of prescriptive social rules), reciprocity (concepts of giving, trading and revenge, moralistic aggression against violators of reciprocity rules), and notions of getting along (peacekeeping and avoiding conflict, and accommodation of conflicting interests through negotiation).[73] De Waal's identification of, in particular, primate moralistic aggression and the creation and enforcement

[70] Francisco J Ayala, 'The difference of being human: Morality' (2010) 107 Proceedings of the National Academy of Sciences 9015, 9020.
[71] ibid.
[72] Frans de Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* (Harvard University Press 1996) 211.
[73] ibid.

of social rules may antagonise sceptics and certainly challenges Aquinas' analysis of the third level of inclinations. Importantly, De Waal does not identify strict moral principles, which is a distinctively human preserve. Nevertheless his findings undermine the Hobbesian characterisation of nature as "the ill condition"[74] from which only humans may emerge and present it as additionally constitutive of "tight communities"[75], particularly in primate species. Aquinas cannot have it both ways: if evidence suggests nonhuman animals live according to rules that bind them in societal relationships but that these rules are to be discounted because they may often break down and nature may return to its "red in tooth and claw" [76] characterisation then, to avoid a distinction solely premised on speciesism, the same must apply for humans who also often disregard social rules to appease other appetites. Distinctions between animal life forms are evident but they are psychological: Bees die for their hive, chimpanzees share food with orphaned young and a human may jump into a river to rescue a stranger and so, "From an evolutionary perspective, both kinds of helping are comparable, but psychologically speaking they are radically different."[77] These claims further suggests the appropriateness of the biocentric natural law philosophy in that reason does not appear an adequate criterion by which to restrict moral consideration. Derivatively, and contrary to anthropocentrism, all life ought to impact conceptions of human (exceptionless) duty. Also, and contrary to ecocentrism, interrelationships between life ought not be prioritised because this discounts the autonomy of life, the teleology of which presupposes such interrelationships.[78]

[74] Thomas Hobbes, *Leviathan* (Clarendon Press 1909) pt I ch XVIII, 98.
[75] Supported from his own research and that of other primatologists De Waal suggest "writers prefer to simplify things by describing the lives of chimpanzees either in Hobbesian terms, as nasty and brutish, or by stressing their friendly side, but in fact it's never one or the other. It's always both." Frans de Waal, *The Bonobo and the Atheist* (Norton 2013) 27.
[76] Alfred Tennyson, *In Memoriam A. H. H.* (Houghton Mifflin 1895) Canto 56.
[77] de Waal, *The Bonobo and the Atheist* (n 75) 33.
[78] This point is expanded upon and defended below, text to n 159ff.

So far the analysis of Aquinas' third level of natural inclinations has argued that reason underdetermines the good. If this argument is resisted and reason is held to mediate or transform the shared inclinations the anthropocentric distinction of humans is nevertheless undermined because some nonhuman animals demonstrate particular capacities that are associated with reason. Reason is more accurately particularised as, for example, enabling cognition or facilitating decision-making. If maintained as a singular capacity that is either possessed by humans or not it may be distinguishable, but since reason is a term used to denote differences between humans and nonhumans the argument of whether it can be determinative is inherently biased. Finnis and Aquinas employ reason as an impenetrable inclination that separates humans from other life but Finnis explicitly claims that human experience differs from that of other sentient entities to the extent that nonhumans are unable to participate in the basic goods: "The basic human goods are not abstract forms, such as 'life' or 'conscious life': they are good as aspects of the flourishing of a person."[79] This is because, for Finnis, human experience is "expressive of decision, choice, reflectiveness, commitment, fruition of purpose, self-discipline, self-abandonment and as the act of responsible personality."[80] If Finnis does not think nonhuman sentient life experience in this human manner it is clear that he would not deem non-sentient animals, plants or ecosystems as capable of attaining to the basic goods.

In respect of the four environmental philosophical perspectives, Finnis' views are anthropocentric. For the most part Finnis does not take up the issue of the nonhuman good. Finnis' justification of the human good is impoverished since he acknowledges that there exist classes of humans such as the ill, or the very young, which may not be able to pursue the

[79] Finnis, *Natural Law and Natural Rights* (n 4) 195, fn VII.4.
[80] ibid.

goods in the supposedly unique human way that is set out above. More importantly, the existence of "clever dogs"[81] that may possess some or all of these characteristics is not discussed in any detail. Finnis' focus is on human goods but his views nevertheless exhibit speciesism since they demarcate notions of the good as something for humans alone. Finnis' views stress discontinuities between humans and nonhuman life and ignore the continuities. Finnis' position is contrary to the body of modern scientific thought that has seldom gone so far as to suggest the operation of reason in nonhuman life but has, as the foregoing discussion has argued, identified comparative tendencies shared in all life from which genuine human duties can be derived.

Finnis does concede that there are "sets of unifying relationships"[82] in the cosmos that in part recognise the inclinations humans share with nonhuman life. Finnis identifies four sets of unifying relationships – or "four orders" – that underpin communities of self-constituted individuals.[83] Although Finnis stresses that the four orders do not present a hierarchy of value or importance, his discussion of them is anthropocentric in that it is used to distinguish humanity; that humans alone have the capacity for practical reason, directive to the basic goods. Throughout his discussion of the four orders Finnis acknowledges that the latter orders are not only dependent on the former, but are based upon and derived from the cosmological order they establish. Finnis writes, "Some degree of unity of the other three sorts is clearly needed if there is to be the [fourth order] community of joint action or of mutual commitment to the pursuit of some common good."[84] This derivation of the latter orders from the former suggests that if reason were taken in isolation it would underdetermine human nature and

[81] ibid.
[82] ibid 136.
[83] ibid 134-36.
[84] ibid 138.

therefore that human nature must be determined, at least to some extent, by the prerational. Accordingly, reason – though necessary for the practical reasonableness that allows humans to participate in the good – is limited in so far as it defines the nature of life forms (humans or otherwise) and their respective good. From this non-anthropocentric concession it becomes appropriate to look to the prerational functions of nonhumans as a source from which they can participate in their own (practical and not moral) good.

**b) The prerational and the good it determines**

This second stage of the argument uses understandings of prerational human functions to support the claim made in the first stage that the cosmos provides an order in which all life has a good that can be intelligibly understood in terms of the teleological causal operations of life. The analysis of prerational human functions that follows suggests that human reason does not provide an adequate foundation from which to dismiss the continuities of all life and their participation in the good. Shedding "reason" as that which determines comprehensively human nature avoids the fallacy addressed in the preceding stage of the argument that the good is derived from reason alone and that, accordingly, notions of the practical good and the practical bad are the preserve of humans and perhaps higher primates who demonstrate *most* of the functions of reason. Instead, as the discussion of Aquinas' inclinations suggests, it is not unreasonable to claim, as Porter does that, "human persons are naturally – implying, in this context, spontaneously, without reflection – orientated towards fundamental goods".[85] Since reason is not wholly determinative of the good there is cause to suggest that nonhuman life can also, spontaneously, live practically good lives or practically bad lives. This stage of

[85] Jean Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (William B Eerdmans Publishing Company 1999) 127.

the argument positions claim ii) that human reason does not provide an adequate foundation from which to dismiss the continuities of all life and their inclinations to their own good. This point does not contradict the assumption of Aquinas or Finnis that humans participate in the good through reason; rather it offers a means of addressing the overlooked aspect of the nature that is shared by all life forms and to which human (exceptionless) duties extend.

As with reason, the prerational also underdetermines the good. Prerational values do not provide for all of human nature comprehensively; different societies may prescribe different moral precepts.[86] Nevertheless prerational and spontaneous functions help determine the ends towards which life forms are directed. It is in this sense that nature is to be understood as normative. This is the case in so far as the prerational and spontaneous can be regarded as functions of particular species or taxa, to which continuities and discontinuities between individuals can be observed. These are identifiable to humans in descriptive accounts of the natural world but such descriptions also have evaluative elements. This relationship between the descriptive and the evaluative accounts for why, for example, when a usually aloft bird can no longer fly it is regarded (at least by human evaluation) as being injured. The evaluation of the bird is derived from observable and descriptive accounts of the bird's flourishing. The evaluations may depend on human observers but that which is observed is intelligible within and between the nonhuman species. De Waal notices that a spider repairs its web when its structure is interrupted because it has a notion of its "ideal structure in mind … Corrections are by definition normative: they reflect how animals feel things ought to be."[87] De Waal's

[86] Porter understands the prerational as a level between the primary level of natural interactions that all human societies exhibit, for example, the preferences parents attach to their children over other individuals, and the secondary level of theorising that structures different attempts to rationalise and reflect upon the primary level. Porter's argument here is influenced by Lee Yearley's comparison of the accounts of virtue of Aquinas and Mencius and a distinction of primary and secondary levels that she attributes to the anthropologist Robin Horton. ibid 132.

[87] de Waal, *The Bonobo and the Atheist* (n 75) 227.

phrasing is provocative. Spiders do not have a "mind" or indeed feelings in the common understanding of these terms. But this common understanding assumes the human mind and sensory capacity as the base level. Confronting anthropomorphic assumptions is precisely De Waal's intention and advances in cognitive ethology support the challenge. Scientists are engaged in such questioning: "When animals represent contingencies between actions and outcomes, perhaps in thinking about how to tailor means to ends, they are going beyond the sensorimotor schemas envisaged by the minimalist conception"[88] by which it is possible to talk of the mind of the spider and its non-linguistic purposeful intention to rebuild a damaged web.[89]

Deriving this constitutive but not comprehensive degree of intelligible purpose from descriptions of the prerationality of all life, as this argument does, can be supported by Thomistic teleology. Locating teleological causality in the prerational presents a biocentric challenge to utilitarian orthodoxy because human *and* nonhuman lives are identified as spontaneously being inclined to the good, undermining the uninhibited pursuit of human pleasure or preference.[90] Modern science accommodates elements of Thomistic teleology. Fundamental particle physics, chemical reactions and evolutionary principles provide an intelligible account of the planet's order. This is not purposeful in the Thomistic sense but Aquinas' teleological conception can nevertheless accommodate the modern scientific order: To support God's providence Aquinas discusses the "seedlike" form of life that grows and

[88] Jose Luis Bermudez 'Thinking Without Words: An Overview for Animal Ethics' (2007) 11 Journal of Ethics 319, 323.
[89] In support of this point Carruthers maintains that invertebrates, particularly honey bees and jumping spiders, "possess a belief-desire-planning cognitive architecture" that is sufficient to hold that they have a mind and act according to that structure and not mere reflexes. Peter Carruthers, 'Invertebrate Minds: A Challenge for Ethical Theory' (2007) 11 Journal of Ethics 275, 282.
[90] Teleological argument cannot accommodate the ecocentric philosophical perspective because inanimate artefacts and interrelationships between life forms to which the philosophy attributes value do not possess a telos in the Thomistic sense, instead these values presuppose the telos of life forms. This point is further discussed below, text to n185ff.

produces God's created life.[91] Aquinas endorses St. Augustine's interpretation of the Christian story of creation that the Earth itself can bring forth the green herb[92], "indicating the production of perfection of perfect species, from which the seed of others should arise."[93] If Aquinas' teleology from God's creation is replaced by evolutionary directedness then there results an atheistic intelligible order.[94] In Thomistic thought, as Himes and Himes concur, this presents the notion that "Every event is caused… completely by both God and natural agencies but in two different ways."[95] These "two ways" are able to coexist harmoniously in Aquinas' conception because of his understanding of the doctrine of creation as God both creating life and also, crucially, creating the relationships and interdependencies for life itself.[96]

In a Thomistic understanding proper human flourishing is the human telos and to understand what this purpose entails requires an appreciation of what human life ought to look like. This context of purpose is formatively the same for other species but allows for substantive differences to exist.[97] This view compliments the argument that there are both continuities and discontinuities between the inclinations of human and nonhuman life and, derivatively, a continuum of the proper ends of all life that accords with the perspective of biocentrism. The

[91] "For we see that all things which, in the process of time, being created by the work of Divine Providence, were produced by the operation of God, were created in the first fashioning of things according to seedlike forms, as Augustine says, such as trees, animals, and the rest." Aquinas, *Summa Theologiae* (n 17) I q62 a3 (parenthesis omitted).
[92] "Let the earth bring forth the green herb, and such as may seed." Genesis 1:11 (Bible, King James version).
[93] Aquinas, *Summa Theologiae* (n 17) I q69 a2.
[94] Evolutionary directedness is not purposive in the Thomistic sense of intelligent design but it nevertheless suggests a genetic conformity, derived from randomness, in which genes that provide a life form with the required apparatus for survival are likely to live longer and succeed in procreation.
[95] Kenneth Himes and Michael Himes, *Fullness of Faith: The Public Significance of Theology* (Paulist Press 1993) 79.
[96] Stephen J Pope, 'The Evolutionary Roots of Morality in Theological Perspective' (1998) 33 Zygon 545, 546.
[97] Aquinas' teleological approach inherits much from Aristotle who, as an example of his teleological model, regards the eye not as good or bad in so far as it operates to provide sight but in so far as this provision of sight is then something which does or does not contribute to the overall flourishing of the individual to whom the eye belongs. Aristotle, *De Anima* (tr R D Hicks, CUP 1907) bk 2 [412b].

good is determined referentially from the fulfilment of the operation of functions natural to humans, such as using one's mouth and digestive system to eat and nourish the body. Accordingly these goods are not moral goods but practical goods for they account for not what humans ought to do but what humans do *as humans*.[98] Importantly, prerational inclinations are exhibited in the flourishing of nonhuman life; natural and spontaneous inclinations are not confined to humans and so there is strong cause to recognise the good in nonhuman life. Identifying continuities such as in the social structures of primates that De Waal does need not be understood as implying that higher primates ought to be regarded as moral beings.[99] It does, by naturalistic teleological accounts, identify Finnis' account as giving undue weight to reason over inclinations in his ethical account, which in turn illustrates a space for a biocentric view of the good. De Waal similarly addresses this space: "To classify the chimpanzee's behavior as based on instinct and the person's behavior as proof of moral decency is misleading, and probably incorrect."[100]

In support of claim ii) that human reason does not provide an adequate foundation from which to dismiss the continuities of all life and their inclinations to their own good, are Aquinas's inclinations, Finnis' unifying relationships, De Waal's continuum and Porter's continuities. They share the view that the functionality to be found in the prerational, despite it being underdeterminate, is present in all individual life and forms an intelligible order of teleological purpose that exists independent of humans, although it also applies to humans and is observed by them. The writers share elements of a nascent biocentric philosophy although

[98] Natural and spontaneous inclinations do not discount that, for humans, practical reasonableness affects the natural and the spontaneous, for example one may *decide* what they desire to eat. Nevertheless, eating and nourishment can occur without the operation of reason; comatose humans can have their bodies fed and nourished intravenously showing that the absence of reason in an individual does not preclude the fulfilment of a practical good.
[99] de Waal, *Good Natured* (n 72) 210.
[100] ibid 210.

none explicitly argue for the species-egalitarian principle of biocentrism whereby all life is supposed to be of equal moral worth.[101] The shared elements present a philosophy centred on all individual life forms fulfilling their teleological purpose, a perspective that presents the good as structured upon the notions of differences in kind and so accepts different treatment of different kinds. All four writers are correct in this finding for though there are important differences between different species and the individuals constituting them the differences more accurately correspond to an absence of certain similarities since that which designates individuals as species-distinct from one another can only be accepted if some presupposed teleological purpose of wellbeing is. In support of this argument it will be recalled that Aquinas' second and third level of inclinations presuppose the first level. Likewise, Finnis' discussion of the latter three sets of unifying relationships presupposes the first that denotes a particular teleology that is presented by the sciences and the "laws of nature". Although Finnis understands practical reasoning to relate to the human person he also accepts the constituting causal forces of the molecular and the genetic that possess an intrinsic order to them, an integrity and regularity.[102] The presupposed and directive tendencies of wellbeing are also evident in De Waal's continuum of life forms and their functionality, as De Waal visualises using the metaphor of a tower.[103] All functionality of all life occupies floors in the tower and humans reside at its top. However, those at the top of the tower ought not disregard the floors below; rejecting the biocentric philosophy is to reject the intelligible order of the prerational and would be an attack on the very foundations of the tower. Modern evolutionary biology reflects this philosophical perspective, that continuities between humans, animals and plants may represent shared evolutionary history and ancestry.[104] Porter's discussion of

[101] Criticisms of the biocentric principle of egalitarianism are discussed above, text to n132ff in ch 3.
[102] Finnis, *Natural Law and Natural Rights* (n 4) 136.
[103] de Waal, *Good Natured* (n 72) 212.
[104] ibid.

continuities between human and nonhuman life also fits into this biocentric philosophy: For if human nature is fundamentally orientated towards certain practical goods such as life and procreation, then it is reasonable to regard nonhuman life that is similarly orientated as also living good lives.

**c) Human duties towards the good of nonhumans**

The notions of the good of nonhuman life that have been argued in the preceding stages of this section's argument challenge the assumptions of discontinuities between humans and nonhumans. To the contrary, claim i) has argued that all life can be understood as being teleologically orientated to their own good. Claim ii) has argued that since the human good is partly constituted by the prerational, the deficiency of reason in nonhuman life does not provide cause to discount their good. Consequently, if these claims are accepted and notions of the good are to be recognised more inclusively than Finnis' conception posits, it is possible to extend to nonhumans Finnis' exceptionless moral rights and their correlative duties. The final stage of the argument returns to practical reasonableness as participation in the basic goods and to Finnis' notion of exceptionless rights and duties as a means to establish claim iii) that exceptionless moral rights obligate humans to the nonhuman good.

Aquinas presents different thoughts on how his conception of the good ought to engender particular action on the part of humans. Foremost is Aquinas' anthropocentric cosmological order. This can be inferred from Aquinas' discussion of the different inclinations of plants, animals and humans.[105] However, within this posited order human reason requires a particular

[105] See above, text to n 50ff.

and onerous valuation of nonhuman life. Natural law thinking establishes a hierarchical order but with a requirement to uphold and respect the order. Indicative of Aquinas' fusion of Aristotelian teleology and Christian theology all life is understood to have its own species-distinct end inclination to which it is directed and yet all life is at the same time united in God's divinity. Demonstrative of this fusion Aquinas writes, "every creature intends to acquire its own perfection, which is the likeness of the divine perfections and goodness."[106] Yet this hierarchy does not conflate the inherent goodness of all of God's life forms with a view as to their moral worth.[107] Aquinas' hierarchy allows for instrumental usage of one life form by another but it is a unique instrumental usage that is markedly different from utilitarianism's "means to an end" arrangements. Aquinas sets out the subordination of nonhuman to human life as "the way in which other things were created, things which have no dominion over their acts, shows this fact, that they are cared for, not for their own sake, but as subordinated to others."[108] For Aquinas nonhuman life is subservient to rational operation: Nonhuman life is an instrument or tool that is to be implemented in servitude to humans.[109] However, and crucially, though equipment nonhuman life is to be used in a particular and onerous manner because it also has value to God.[110] Accordingly, for Aquinas, only virtuous instrumental use of God's creation is permitted.[111]

[106] Aquinas, *Summa Theologiae* (n 17) I q44 a4.
[107] Aquinas writes "Hence in natural things species seem to be arranged in degrees; as the mixed things are more perfect than the elements, and plants than minerals, and animals than plants, and men than other animals; and in each of these one species is more perfect than others." ibid I q47 a2.
[108] Aquinas also writes "through divine providence provision is made for intellectual creatures on their own account, but for the remaining creatures for the sake of the intellectual ones." Thomas Aquinas, *Contra Gentiles* (tr Joseph Kenny, Hanover House 1955) III q112 paras 1 and 2.
[109] Aquinas' Latin reads "servus", which translates as slave or servant, and "instrumentum", which translates as equipment, instrument, tool or implement". *Oxford Latin Dictionary* (2nd edn, OUP 2012)
[110] Aquinas holds that "the mutual relationship of creatures makes up the good of the universe." Aquinas, *Summa Theologiae* (n 17) I q61 a3.
[111] Aquinas writes, "Because we know and name God from creatures, the names we attribute to God signify what belongs to material creatures, of which the knowledge is natural to us." ibid I q13 a1.

Aquinas' conception of justice instils a cosmological and hierarchical order that humans have a responsibility to follow.[112] In this regard Aquinas' natural law account posits a human duty towards all life that requires adherence to the ordered relationships between all life as well as the hierarchy of life.[113] Aquinas follows the Genesis understanding that "God saw that it was good", which means, "that everything was brought into being for the reason that it was good for it to be."[114] For Aquinas any instrumental usage must be careful and practiced in accordance with reverence for God, which for humans is usage towards the end of virtue.[115] Aquinas finds no sin in humans using nonhuman animals or animals using plants if doing so contributes toward their attainment of the good.[116] Human instrumental usage is to be moderate because humans occupy an "intermediate"[117] position in God's hierarchical order, above the plants and animals but below the angels.[118] For Aquinas the world's diversity of life translates into a duty that comprises two parts. The first is a negative duty not to deprive other life of their inclinations; "in the state of innocence man's mastership over plants and inanimate things consisted not in commanding or in changing them, but in making use of them without hindrance."[119] The second part of the duty is a positive obligation of prudence;

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[112] In support of this notion of responsibility Aquinas writes, "God's justice regards what befits Him; inasmuch as He renders to Himself what is due to Himself. It is also due to a created thing that it should possess what is ordered to it; thus it is due to man to have hands, and that other animals should serve him. Thus also God exercises justice, when He gives to each thing what is due to it by its nature and condition." ibid I q21 a1.
[113] See above, text to n 96. This is supported by Aquinas who writes, "this cannot in any way be represented by any created likeness; for every created form is determined according to some aspect of wisdom, or of power, or of being itself, or of some like thing. Hence to say that God is seen by some similitude, is to say that the divine essence is not seen at all; which is false". Aquinas, *Summa Theologiae* (n 17) I q12 a2.
[114] ibid I q65 a2.
[115] In support of this claim Aquinas writes, "Now, an instrument is not valued for its own sake, but as useful to a principal agent. Hence it must be that all the careful work that is devoted to instruments is actually done for the sake of the agent". Aquinas, *Contra Gentiles* (n 108) III q112 para 1.
[116] Aquinas writes, "There is no sin in using a thing for the purpose for which it is." Aquinas, *Summa Theologiae* (n 17) II-II q64 a1.
[117] Patrick Halligan, 'The Environmental Policy of Saint Thomas Aquinas' (1988-1989) 19 Environmental Law 767, 773.
[118] Illustrative of this position Aquinas writes, "Now in man reason has the position of a master and not of a subject. Wherefore man had no mastership over the angels in the primitive state." Aquinas, *Summa Theologiae* (n 17) I q96 a2.
[119] ibid

humans are to act as stewards to God's order; "All animals by their natural instinct have a certain participation of prudence and reason: which accounts for the fact that cranes follow their leader, and bees obey their queen."[120]

The above review of Aquinas's analysis of the human relationship to nonhuman life does not correspond with the more permitting sense of obligation that Finnis' intra human exceptionless moral duties establish. Contrary to Finnis, Aquinas is to be understood as presenting God's created world (its relationships and hierarchy) as a source of norms that impose duties on humans. Human reason is only virtuous if it inclines towards the wisdom of God's reverence that is achieved, in terms of how humans relate to other life, through stewardship and prudential use. Acting outside of this measured usage is contrary to reason and is a perversion of the natural law.[121] Finnis' understanding of practical reasonableness is to be returned to since his account argues for human duties that, unlike Aquinas' conception, need not be premised on theology. The subsequent expansion upon Finnis' account provides for claim iii) that exceptionless human duties (entailed through practical reasonableness) are to be extended to the good of nonhuman life. To this end it will be recalled that Finnis' practical reasonableness operates to transform the basic goods into moral precepts. It does this because of the objective practical content of the goods and in a way so as to best provide for participation in the goods themselves. Yet by Finnis' account the moral framework he posits only creates intra human duties because, for Finnis, practical reasonableness is something unique to the human person. However, and contrary to Finnis' unnecessarily restrictive account, the moral precepts that are derivable from practical reasonableness should be

[120] ibid I q96 a1.
[121] "Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law." ibid II-I q95 a2.

extended to include all life forms (even if it is accepted that nonhuman life cannot participate in practical reasoning). This expansion of Finnis' account is suggested because – as has been established in the preceding stages of this argument – all life is be understood as tending towards their own practical good and human reason (if distinctive) provides insufficient cause to disregard the shared prerational (spontaneous) functions that exist in nonhuman life.

It is appropriate to revise Finnis' understanding in this manner for he regards "the basic forms of good [as] opportunities of *being*; the more fully a man participates in them the more he is what he can be."[122] This challenge to Finnis' requirements of practical reasonableness clarifies what it is for individuals to have Aristotle's *phronesis* or Aquinas' *prudentia*. The argument can be made by suggesting that natural law accounts of practical reason present an implicit potential for nonhuman life to figure; to this extent the natural law is able to accommodate a biocentric philosophy without Aquinas's theological basis. One way to support the above argument that nonhuman goods ought to constitute part of practical reasoning is to transpose the notion onto the stipulation that individuals are to have no arbitrary preferences among persons in those people's pursuit of the basic goods, one of Finnis' requirements of practical reasonableness.[123] In discussing this requirement of practical reasoning Finnis writes: "Another person's survival, his coming to know, his creativity, his all-round flourishing, may not interest me, may not concern me, may in any event be beyond my power to affect. But have I any *reason* to deny that they are really good, or that they are fit matters of interest, concern, and favour by that man and by all those who have to do with

[122] Finnis, *Natural Law and Natural Rights* (n 4) 103.
[123] ibid 106-109. It is not necessary to transpose the good of nonhuman life onto all of Finnis' requirements or indeed those of other writers for all requirements are interrelated and are to be understood as aspects of one another. Finnis makes this point clear in writing that "The content and significance of this first requirement [a coherent plan of life] will be better understood in the light of the other requirements. For indeed, all the requirements are interrelated and capable of being regarded as aspects of one another." ibid 105.

him?" [124] Finnis is right in the general principle of impartiality this establishes but unnecessarily restrictive in in terms of whom he determines to be the "partakers of those goods." [125] By restricting the granting of respect to humans alone Finnis discounts the teleological good that exists not only in humans but also in animals and plants to different extents, as has been argued above. Just as it is a natural inclination – and self-evidently so Finnis would attest – for humans to each seek to participate fully in the goods, nonhuman life possesses their own notions of the good to which they are inclined.

Finnis' aforementioned notion of reciprocity may again be employed to assess the validity of this claim: One individual will respect another's participation in the basic goods, through practical reasonableness, because they want other individuals to be obligated and therefore have a duty to do the same to them. On a superficial level it appears as if only humans would be relevant in this relationship since nonhumans could not rationally come to the conclusion to perform a duty for the correlative rights it affords. However, two counterclaims may be made that refute this understanding. These two counterclaims further support claim iii) that exceptionless moral rights obligate humans to the nonhuman good. First, Finnis' reciprocity may be more adequately understood as a prerational function and as such it is not only humans that demonstrate it. In support of this De Waal refers to an encounter with a pod of whales that demonstrated protective tendencies when one was injured. Exhibiting a whale-centric example of Finnis' reciprocity notion, twenty-nine whales surrounded the injured one, touching the injured party to calm it, caring for it, as they themselves would want to be cared for.[126] This claim is not defeated by the deficit of practical reasonableness in nonhuman life's

[124] ibid 106.
[125] ibid 107.
[126] de Waal, *Good Natured* (n 72) 42-43.

pursuit of their good because their good is practical and not moral and so is not contingent on the operation of practical reasoning.

Second, if Finnis' notion of reciprocity is analysed in further detail (in the context of practical reasonableness as participation in the basic goods) it reveals a variance between the expected rights of an individual and the performed duties of others in relation to those rights. The individual in question does not have any greater claim than others but objective impartiality is nevertheless challenged: An individual may respect the participation in the basic goods of other individuals but they nevertheless prioritise their own. Likewise, as Finnis has been shown to concede, familial or communal relationships also qualify the inherent respect that impartiality implies. Although differences between species may preclude inter-species impartiality (except perhaps to the sociobiologist or the botanist trained in plant behaviour), the lack of understanding that forms the basis for this is also abundant in and between different human cultures and yet this does not preclude respect of the intelligibility of diverse notions of human wellbeing, nor does it preclude the universal scope of exceptionless moral norms.

Additionally, it might be claimed that if all species have characteristic modes of flourishing (and thus of good) then none, including humans, should act contrary to their nature for the benefit of another species.[127] On this premise the discussed notion of reciprocity is one unique

[127] Such a claim is biased and presumes humans are altruistic (at least towards other humans) and that other life is not. To the contrary, in addition to the numerous historical accounts to the country, in so far as human altruism can be demonstrated within and between species the same can be said of numerous other species. Cooperation within species for sustenance and procreation occurs throughout the human and nonhuman animal world. Relationships of mutualistic symbiosis (where both species cooperate to receive benefits) do exist in nonhuman life. For example, between Egyptian plovers that clean the teeth of crocodiles and Ox-peckers that clean the hide of deer and zebra. Plants have also been observed in mutualistic symbiosis with bacteria. Pea aphids contain symbiot bacteria that provide them nutrients lacking in their diet. Mutualistic symbiosis demonstrates the practical application of the co-evolutionary relationships advocated by Pollen, as discussed above at text to n 180ff in ch 3. More informal cooperation has also been documented, famously, between whales and dolphins

to humans because human choice, exercised with knowledge and understanding of consequences of action or inaction, can determine responsibility towards any form of life or not. As such, like all life, humans should follow their own good, regardless of the positive or negative effect this has on nonhuman life and the environment.

Finnis' practical reasonableness can be used as a counterargument to such a claim in so far as his objective goods delineate constrained notions of responsibility. Whilst Finnis acknowledges, "There is real creativity in free choices… And this creativity is also self-creative, self-determining, more or less self-constitutive"[128] he also notes that the difficulty of moral reasoning is in participating in intelligent and reasonable commitments and projects so as to produce "personal full-being".[129] Finnis writes that individuals should be "looking creatively for new and better ways of carrying out one's commitments"[130] in the pursuit of practical reasonableness in order to participate in the basic goods. Accordingly, Finnis' conception of the human good is not an uninhibited free choice because "choice is responsive to practical judgement. Practical reason, in turn, is human intelligence directing action towards goals that are worth realizing."[131]

In the era of environmental and ecological awareness, individuals ought to respond to such concerns and reformulate their participation and their coherent plan of life accordingly. This is a view of the world in which the good of all life is to be recognised if it is to constitute a

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that rescue humans drowning at sea. For example, Sam Jones 'Dolphins save swimmers from shark' (*The Guardian*, 24 November 2004) <http://www.theguardian.com/science/2004/nov/24/internationalnews> accessed 30 October 2015; 'Beluga whale 'saves' diver' (*The Telegraph*, 29 July 2009) <http://www.telegraph.co.uk/news/newstopics/howaboutthat/5931345/Beluga-whale-saves-diver.html> accessed 30 October 2015.

[128] Finnis, 'Commensurism and Public Reason' (n 4) 239.

[129] Finnis, *Natural Law and Natural Rights* (n 4) 126.

[130] ibid 110.

[131] Joseph Boyle, 'On the Most Fundamental Principle of Morality' in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 58.

life pursued in accordance with practical reasonableness; it is irrational to act to the contrary. It is irrational to conduct a life of abuse or waste of environmental resources because the consequences of abuse or waste interferes with the human participation in the basic goods and interferes with nonhuman life's inclinations to their own good, which in turn deprives human virtue. Accordingly, if Finnis' exceptionless moral duties are reformulated in the manner suggested here it is apparent that the cause of this irrationality is derived from the exceptionless moral duty humans have to not damage (impoverish, inhibit or interfere with) other life forms because all life forms are directed towards their own teleological final ends. These final ends reflect their own nature, which is living their life in accordance with their own basic goods.

### 5.3 Defending the biocentric natural law philosophy

Having established the possibility of a biocentric natural law philosophy this section will defend it against some potential objections. First the philosophy will be defended against anticipated positions that are more sceptical about the environment; claims that nonhuman life and the environment are of instrumental value. Second, defences will be offered against more ambitious environmental philosophical perspectives, such as the positions of Deep Ecology and Gaia theory, that would regard the biocentric philosophical model as inadequate since it does not call directly for the protection of the environment but only indirectly, in so far as the environment is necessary for the good of all organic life.

**a) Defending the biocentric natural law philosophy against sceptics**

The conceptions of the good and human duties towards others who share in that good, as was structured by the biocentric natural law philosophy, may be objected to by those who only value the environment instrumentally, as something to be conserved or improved upon for human ends.[132] To refute this potential objection this section establishes that the position of this type of sceptic is unreasonable. It will be shown that moral theories of instrumentalism that are underpinned by principles of self-interest ultimately erode the common good by negatively impacting the environment. The biocentric natural law philosophy counters the claims of the sceptic by challenging self-interest.

Conceiving of the environment and all life forms as instrumental to human ends or to the human good is an anthropocentric perspective that betrays self-interest. Instrumental thinking has consistently been afforded a legitimate role in practical reasoning in the natural law canon (as it has in many other schools of thought) because instrumentalism legitimises desires: Vogler offers the understanding that "instrumentalism is the view that all of one's reasons for acting express, engage, or otherwise involve one's desires."[133]

Focusing on the natural law accommodation of self-interest and instrumentalist thought, Aquinas accepts self-interest and instrumental wanting (which could encompass even those desires that have detrimental environmental consequences) although such appetites are explained as deficient. Aquinas recognises that human will is naturally inclined to the good[134]

[132] John Passmore, 'Philosophy and Ecology' (1999) 1 Proceedings of the Twentieth World Congress on Philosophy 141, 146.
[133] Candace Vogler, *Reasonably Vicious* (Harvard University Press 2002) 10.
[134] Aquinas writes, "Since, therefore, the will is an immaterial power like the intellect, some one general thing corresponds to it, naturally which is the good". Aquinas, *Summa Theologiae* (n 17) I-II q10 a1.

and that the will of an individual is naturally inclined toward that individuals' happiness.[135] However, Aquinas qualifies instrumentalism and constrains individual self-fulfilment within the good of the community: Aquinas writes, "my will's intrinsic object is *good*, not *mine*."[136] Aquinas' acceptance of self-interest is narrow: Fulfilment (beatitude) denotes more than individual self-fulfilment or individual happiness and requires directing one's reasonable deliberations towards the common good.[137] As Finnis writes in his study of Aquinas, people who exploit others for an overabundance of money, honour, food and sex turn "their backs on the good of reason and thus of virtue", the participation in practical reasoning, "their condition is truly misery, the antithesis of fulfilment."[138]

Finnis presents a similar accommodation of self-interest and instrumental wanting. Although Finnis accepts that human desires in part constitute practical reasoning he rejects the sceptical position of self-interest as providing a complete moral theory. His rejection is premised on the erosion of the common good made by self-interest instrumentalism.[139] Instrumental valuations of nonhuman life and the environment are outweighed by the greater worth of the common good. Instrumental valuations "will often accord with our feelings, our generosity, our

[135] Aquinas writes, "It is impossible for any created good to constitute man's happiness. For happiness is the perfect good, which lulls the appetite altogether; else it would not be the last end, if something yet remained to be desired. Now the object of the will, i.e. of man's appetite, is the universal good; just as the object of the intellect is the universal true." ibid I-II q2 a8.
[136] Finnis, *Aquinas* (n 21) 111 quoting Thomas Aquinas, *Commentary on the Sentences of Peter Lombard* (c 1255), bk 1 distinction 3 q4 a1.
[137] "Boethius, in defining happiness, considered happiness in general: for considered thus it is the perfect common good" Aquinas, *Summa Theologiae* (n 17) I-II q3 a2.
[138] Finnis, *Aquinas* (n 21) 112-3.
[139] Instrumental acts that destroy other life and deteriorate the natural environment deny others (even just other humans) the circumstances in which they can pursue their own basic goods. Finnis writes that the common good is "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community." Catastrophic climate change, for example, would frustrate this conception of the common good. Finnis, *Natural Law and Natural Rights* (n 4) 155.

sympathy, and with our commitments and projects in the forms in which we undertook them. But it can never be justified in reason."[140]

Finnis regards instrumental thinking as capable of constituting practical reasonableness but that practical reasonableness will be incomplete if only instrumental calculations have been evaluated in the reasoning process. Like Aquinas, Finnis accepts the need to accommodate human desires but, also like Aquinas, proposes to qualify which desires are appropriate. Finnis' sixth basic requirement of practical reasonableness is "the (limited) relevance of consequences: efficiency, within reason".[141] Finnis explains "[t]here is a wide range of contexts in which it is possible and only reasonable to calculate, measure, compare, weigh, and assess the consequences of alternative decisions."[142] For example, because it is better (more reasonable) to act in a manner in which more of the goods are participated in, it is prudent to weigh up which course of action should be followed. Finnis is careful to constrain consequential thinking and the maximisation of satisfaction that it leads to, through the existence of the other basic requirements. Accordingly, whereas the utilitarian is unable to discount the pleasure or satisfaction derived by the sadist in the overall calculation of utility Finnis, on the other hand, is able to limit the bounds of instrumental thinking through the imposition of the other requirements. The sceptic's insistence is unreasonable since, for example, sadists who act on impulse and against the value of life cannot be considered as acting reasonably; their wanting is irrational and there has been no intelligible evaluation in their choice of action pursued. If all individuals acted as sadists there would be no rational actions and no common good.

[140] ibid 120.
[141] ibid 111.
[142] ibid 111.

The limits to self-interest that are confined within Aquinas and Finnis' larger projects of moral duty come to bear in the processes of calculative reasoning: the weighing up of basic wanting with other considerations of practical reasonableness. Reasoning must undergo such processes because reasons for acting depend on desires and desires are to some extent a-rational: "sometimes, after all, just wanting to do something is reason enough to do it."[143] Sceptical instrumental valuations of the environment are "concupiscible and irascible" lower human appetites that Aquinas, for example, would not attribute as wholly good. They far surpass the narrow confines of self-interest that is permitted within his moral theory. Actions are not reasonable simply because they emerge from an individual who has the capacity of reason. To the contrary, appetites of self-interest that erode the common good would, for Aquinas, need to be mitigated within the common foundation of reason.[144]

Aquinas' limits to self-interest for the preservation of the common good (that would preclude instrumental valuations of nonhuman life and the environment) inform Locke's moral theory. However, because Locke maintains that natural inclinations cannot form the moral principles of the natural law[145], his limitations form from instrumental thinking alone and accordingly can be used to strengthen this section's rebuttal. Whereas Aquinas maintains that the moral law of nature reveals natural human inclinations, Locke, to the contrary derives limits to self-interest from his finding that humans do not appear inclined to moral notions of the good and "there appears not even the slightest trace of piety, gentleness, good faith, chastity, and other virtues, but [humans] spend their lives wretchedly in rapine, theft, debauchery, and

[143] Vogler, *Reasonably Vicious* (n 133) 16.
[144] Aquinas, *Summa Theologiae* (n 17) I-II q94 a2.
[145] At a lecture Locke asked himself the question (Q6): "Can the law of nature be known from the natural inclination of man?" Locke answered "No." For Q11 he states, "Those who have no other guide than nature herself, among whom the dictates of nature are least corrupted by positive regulation concerning morals, live ignorant of any law, as if they needed to take no account at all of what is right and virtuous." John Locke, *Questions Concerning the Law of Nature* (Cornell University Press 1990) folio 42.

murder."[146] Since all humans act in this manner something is required to preserve the common good. This view of human nature recalls Hobbes' view of "the life of man, [as] solitary, poore, nasty, brutish, and short".[147] It was for this reason that Hobbes thought the state should intervene and posit limitations to the otherwise unlimited claims of entitlement that would erode the common good.[148]

Zuckert's critique of the natural law focuses on Aquinas and Lockes' conceptions of the relationship between the good and desires (which for this section's purposes may include the desire to commit environment harm). Zuckert's comparison has important implications for this section's rebuttal and can be used to illustrate how the instrumentalist objection is untenable. According to Zuckert, Aquinas adopts an objectivist relationship between desires and the good. Aquinas acknowledges the issue of incomplete instrumental desires and desires held that might be detrimental to others, which today could include environmental harms. Aquinas writes, "There is no problem from the fact that some men desire evil. For they desire evil only under the aspect of good, that is, insofar as they think it good."[149] In support of this section's rebuttal Aquinas' conception of instrumental thinking reveals its theoretical lack of reasonableness. If the common good is to accommodate instrumental evils (even those capable of eroding the common good itself) so long as they are truly desired then the natural law is not able to prohibit any action outright and the objection is untenable. As Zuckert exemplifies, Aquinas' argument would hold that the "crack addict's desire for cocaine" must

[146] ibid.
[147] Hobbes, *Leviathan* (Clarendon Press 1909) pt I ch XIII, 97.
[148] Hobbes understood that were it not for the state "so long as man is in the condition of meer Nature, (which is a condition of War,) as private Appetite is the measure of Good and Evill." ibid pt 1 ch XV, 122.
[149] Thomas Aquinas, *Commentary on Aristotle's Nicomachean Ethics* (tr C I Litzinger, Henry Regnery Company 1964) bk 1 lecture 1 para 10.

remain part of the objective good, despite the error of judgement that it is in the eyes of others and the harm it may cause to the common good.[150]

Avoiding this theoretical difficulty Locke takes a subjectivist view of human inclinations and their relation to the good, which exposes the claim of the instrumentalist as untenable and requiring restraint. He appreciates that individuals may determine their own desires as a good but insists upon the caveat that this does not mean others sharing in the common good will find that desire (or its consequences) good.[151] Locke strongly disagrees that moral principles would dictate good desires and instead positions the objective determination of the good as a standard to which individuals' desires must reach. In Locke's words, "Principles of action indeed there are lodged in Men's appetites, but these are so far from being Moral Principles, that if they were left to their full swing, they would carry men to the overturning of all morality."[152]

The consequences of self-interest alluded to by Locke as the "overturning of all morality", have been explored by Hardin as the "tragedy of the commons".[153] For Hardin, the environmental consequences of self-interest demonstrate the unreasonable nature of favouring the fulfilment of individual desire to the detriment of the shared common good. The tragedy reveals that the claims of the self-interested instrumentalist are deficient since each self-interested individual will seek to maximise their gain and will discount the negative components of environmental impacts in favour of the positive components of the production

[150] Contrary to the instrumentalist account Finnis finds that "the reasonableness of taking the claims seriously and of treating them as giving one a reason to spend time reflecting on their content is inconsistent with that content." Finnis, *Aquinas* (n 21) 60.
[151] Michael Zuckert, 'The Fullness of Being: Thomas Aquinas and the Modern Critique of Natural Law' (2007) 69 The Review of Politics 28, 39-40.
[152] John Locke, *An Essay Concerning Human Understanding* (Hackett Publishing Company 1996) ch 3 para 13.
[153] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

derived from environmental resources.[154] Self-interest over the interests of others and the common good discounts the negative components of environmental impacts and exhibits an instrumental valuation of the nonhuman life and the environment from which positive utility is derived: Nonhuman life and the inorganic environment are subject to anthropocentric ideals that find only instrumental value in the commons. This causes environmental pressures, including the scarcity of resources, which heightens self-interest and operates to undermine the common good; environmental pressures destabilise the principle of impartiality (since each individual becomes more in need of what another has) and consequently the intra-human relationships (which were discussed above as being based upon reciprocity) can no longer be maintained.

This section has refuted the instrumentalist objections to the biocentric natural law philosophy. It has demonstrated that moral theories of instrumentalism, which are underpinned by principles of self-interest, erode the common good by negatively impacting the environment.

**b) Defending the biocentric natural law philosophy against more ambitious environmental perspectives**

The human duty to the good of all life that has been grounded in practical reasonableness requires a particular and onerous valuation of nonhuman life. Implicit within this is a requirement to protect the abiotic environment because otherwise the practical good of all life is denied and this is, for humans, a moral bad. Yet a Thomistic conception of the natural law

[154] Use of the typologies of "positive" and "negative" components are adapted from Hardin, ibid 1244.

cannot be the source of human duty to the abiotic environment any more directly than this allows for. The biocentric natural law philosophy constrains human behaviour and orientates it to recognise the practical good of all life but it leaves the abiotic environment in a state of dominion to life. For ecocentrists this is unsatisfactory. However, ecocentric environmental perspectives cannot demonstrate a genuine human duty to the abiotic environment that does not reduce down into the biocentric position that has been argued for.

One way to make this counterclaim to the position of ecocentrism centres on the differences between organisms and ecosystems. These differences illustrate the teleological deficiency in ecocentric arguments and therefore underscore the inability of employing the natural law to substantiate genuine conceptions of human duty within ecocentrism. Organisms are teleological entities whereas the ecosystems and the relationships that structure them are not. Organisms are hierarchically organised systems that are composed of particular parts that interact in particular ways. Their systems are flexible and their functions allow them to perform internally and externally and maintain a "steady state" [155] to maintain their structure over time, though there will be a consistent exchange of energy with the environment around them. Organic life has genes and the traits in life forms contribute to produce a "common project" that unites them into individual organisms that operates to promote the intergenerational replication of genes. [156] Modern biological thought accords with this distinction and can be used to intensify the counterclaim. Dawkins, for example, observes that genes in this state of co-adaptation towards the individual organism "cooperate with one another because they share the same outlet – sperm or egg – into the future."[157]

[155] Freya Mathews, *The Ecological Self* (Routledge 1991) 94.
[156] William J Fitzpatrick, *Teleology and the Norms of Nature* (Garland 2000) 83-5.
[157] Richard Dawkins, *The Selfish Gene* (2nd edn, OUP 1989) 245.

Ecosystems enable cooperative relations both within and between species. Ecosystems are fundamental for individual life to participate in their respective practical good but this does not necessarily substantiate a good of ecosystems. Detracting from the arguments of more ambitious environmental philosophies than the biocentric natural law philosophy ecosystems are defined as the diversity of individual life forms within a geographical region but also to the relationships between individual organisms and species, and the interaction between life forms and the inorganic world.[158] Fitzpatrick highlights this difference through the use of a thought experiment. He supposes a world in which without dung beetles ecological conditions would change so profoundly that all oak trees would die. Accordingly oak trees could be understood as depending on the beetles for their existence but this does not mean that the proper function of the beetles is to promote the good of the ecosystem or ensure oak tree welfare.[159] It is incoherent when discussing conceptions of duty derived from teleology to suppose entities such as ecosystems can comply: telos refers to the internalised processes and operations that determines individual life forms and so teleology can only apply to organic life. Dawkins' comments also suggest teleological argument cannot extend to ecocentric philosophical perspectives. The complexity of ecosystem interaction results from natural selection genetic "design" but this is derivative of the organic life to which ecosystems and its network of relationships refers to. Accordingly such ecocentric philosophical arguments, wherein the good of the ecosystem is posited, presuppose the biocentric teleological good (supporting the biocentric natural law argument) but in doing so they establish nothing more.[160] Dawkins attacks the view of ecosystems as ordered or "exquisitely fashioned

[158] An ecosystem is defined as "a system involving the interactions between a community of living organisms in a particular area and its nonliving environment". *Collins Dictionary* (HarperCollins 2000).
[159] Fitzpatrick, *Teleology* (n 156) 174.
[160] ibid 175.

machines" where everything has a role that is for the end good of ecologies.[161] Ecosystems are groupings of teleological centres: "Organisms have not generally evolved to be "public spirited" contributors to the good of an ecosystem."[162]

Strengthening the ecocentric objections to the biocentric natural law Mathews challenges whether the claim that ecocentrism is unable to accommodate a teleological basis for genuine human duties results from the individualistic lens through which humans view, understand and value the world. Mathews questions this presumptive starting point: "Set in a geometrodynamic framework, this principle [of individuation] renders inanimate matter a mere backdrop to the true individuals"[163] To challenge this bias Mathews seeks to structure an argument for human duties to ecosystems based upon Spinoza's holistic understanding of the world and his conception of conatus.[164] Spinoza conceived of the universe as one entity: although humans may categorise and understand the universe as complex and incongruent (perhaps because of the individualistic presumption Mathews identifies) God, according to Spinoza, has always maintained a holistic understanding of the universe existing as one substance of which he is a part. The one substance conception conflates God with nature; "the reason or cause why God, or nature, acts, and the reason or cause why he exists, are one and the same."[165] For Spinoza all things, individual humans, animals, plants and ecosystems are one. Spinoza writes, "Nature is always the same, and its force and power of acting is

[161] Richard Dawkins, *The Extended Phenotype* (OUP 1982) 236-7.
[162] Fitzpatrick, *Teleology* (n 156) 174.
[163] Mathews, *The Ecological Self* (n 155) 108.
[164] ibid 109.
[165] Spinoza, 'Ethics' in Spinoza (ed), *Complete Works* (tr Samuel Shirley, Hackett Publishing 2002) pt IV preface 321. Spinoza also writes, "God is one, that is… in the universe there is only one substance, and this is absolutely infinite". ibid pt 1 proposition 14, 224. Mason uses nuclear structure as a metaphor that aids explanation of the "God, or nature" singular and perfected substance: "We see an implosion or compression of terminology, where technical language seems to be crushed together in a way that can look in the end like a circular trick with mirrors." Richard Mason, *The God of Spinoza* (CUP 2001) 25.

everywhere one and the same; that is, the laws and rules of Nature according to which all things happen and change from one form to another are everywhere and always the same."[166]

Similarities can be found between Spinoza's conception of the universe and the philosophy of ecocentrism that asserts that ecosystems are valuable for their own sake and not only for the instrumental value they provide to organic life. For Spinoza the principle of conatus accounts for the self-maintenance and self-realisation of the singular substance and what humans perceive as its composites: conatus is that "Each thing, insofar as it is in itself endeavors to persist in its own being."[167] Spinoza identifies conatus with life; "Therefore by life we for our part understand the force through which things persevere in their own being."[168] However, Spinoza's account does not necessarily endorse the ecocentric claim and demonstrate a genuine human duty to the abiotic environment. To the contrary it is also possible, as Bidney does, to find that Spinoza's understanding of conatus is more widely identified with the principle of inertia that is afforded to all things, organic and inorganic alike. This allows Bidney to speculate whether Spinoza sought to assert that rocks have an impulse or inertia towards self-preservation.[169] Ultimately, Mathews also accepts that a foundation for human duties to the abiotic environment may not be found from this particular approach; that unlike organic life the rock or the mountain does not maintain its own integrity and that the laws of physics instead account for this.[170]

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[166] Spinoza, 'Ethics' (n 165) pt III preface 278.
[167] ibid pt III proposition 6, 283.
[168] Spinoza, 'Principles of Cartesian Philosophy and Metaphysical Thoughts' in Spinoza (ed), *Complete Works* (tr Samuel Shirley, Hackett Publishing 2002) pt 2 ch 6 app, 197.
[169] David Bidney, *The Psychology and Ethics of Spinoza: A Study in the History and Logic of Ideas* (Russell and Russell 1962) 96.
[170] Mathews, *The Ecological Self* (n 155) 111.

Regardless, Spinoza's conception marks a departure from teleology and so cannot be used to extend or enlarge the ambit of the biocentric natural law philosophy to accommodate that which the philosophy of ecocentrism seeks to protect. Spinoza's conception is deterministic and does not allow any room for the natural inclinations from which Aquinas derived his teleological conception. For Aquinas all precepts of the natural law are unified by the first reason for action, that good is to be done and pursued and that bad is to be avoided.[171] Purposefulness, i.e. reason for action, comes from "deliberation and morally significant choice".[172] For example, human goods are what practical reasoning understands as good ends[173], because for Aquinas human goods are indefinable from human ends.[174] Aquinas' practical reasonableness understands the good synonymously with understanding its intelligible object *and inclination*, which transforms the Aristotelian notion of telos so that it includes that which humans are naturally inclined towards, the order of nature that humans both share with other organic life and are distinct from, as elaborated upon in Aquinas' treatise on law.[175]

Spinoza can be read as explicitly rejecting teleology, including the wider Thomistic conception: "All the prejudices I here undertake to expose depend on this one: that men commonly suppose that all natural things act, as men do, on account of an end; indeed, they maintain as certain that God himself directs all things to some certain end, for they say that God has made all things for man, and man that he might worship God."[176] Instead Spinoza finds that, "Nothing in nature is contingent, but all things are from the necessity of the divine

[171] Aquinas, *Summa Theologiae* (n 17) I-II q94 a2.
[172] Finnis, *Aquinas* (n 21) 80.
[173] Aquinas, *Summa Theologiae* (n 17) I-II q56 a3.
[174] ibid I-II q94 a2.
[175] See above, text to n 69ff in ch 5.
[176] Spinoza, 'Ethics' (n 165) pt 1 app, 239.

nature determined to exist and to act in a definite way."[177] Accordingly, if all of nature is determined by God and God and nature are conflated as the one substance then there can be no teleology whatsoever in the universe.[178] The order of things just is what it is and any assertions to the contrary are just anthropomorphic projections onto God.[179]

An alternative argument that may challenge the biocentric natural law philosophy is proposed by Jenkins.[180] He understands Aquinas' cosmological order to argue for an explicit human duty to all life *and* ecosystems. Accordingly, if coherent, his position suggests that the natural law philosophy established above is unnecessarily restrictive in the biocentric good that it establishes and that the framework of genuine human duties ought extend to ecosystems. Jenkins' project to establish a robust Thomistic environmental ethics requiring ecodiversity has merit in that a direct duty to the abiotic environment might mitigate much of the environmental and ecological damage humankind has wrought. However, Jenkins' argument is wrong since Aquinas' account of the natural law does not recognise the inorganic environment as capable of being inclined to the good. Certainly Aquinas recognises the importance of the abiotic environment and he notes that, "whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law."[181] However, where Aquinas expresses the importance of nonhuman life his comments are insufficient in accommodating a natural law derived human duty to protect the inorganic world. For Aquinas all of creation constitutes God's cosmological order. Aquinas writes, "The best among all

[177] Spinoza, 'Ethics' (n 165) pt 1 proposition 29, 234.
[178] Spinoza writes, "Things could not have been produced by God in any other way or in any other order than is the case." ibid pt 1 proposition 33, 235.
[179] In support of this claim Spinoza writes, "Nature does not act with an end in view; that the eternal and infinite being, whom we call God, or Nature, acts by the same necessity whereby it exists." ibid pt IV preface, 321.
[180] Willis Jenkins, 'Biodiversity and Salvation: Thomistic Roots for Environmental Ethics' (2003) 83 Journal of Religion 401.
[181] Aquinas, *Summa Theologiae* (n 17) I-II q94 a2.

things is the order of the universe, wherein the good of the universe consists."[182] Yet in Aquinas' conception there is a distinction to be made between the organic and the inorganic. Indeed Aquinas suggests "the way in which other things were created, things which no dominion over their acts, shows this fact, that they are cared for, not for their own sake, but as subordinated to others."[183] This distinction, which functions to obviate human duties, results from an injunction to preserve life forms to maintain God's likeness as it is expressed in all his life forms. Aquinas understands that "because His goodness could not be adequately represented by one creature alone, He produced many and diverse creatures, that what was wanting to one in the representation of the divine goodness could be supplied by another."[184] God can be known through life, both human and nonhuman, though not – importantly for this argument – through inorganic life. For Aquinas, the inorganic world is to be maintained and protected for the sake of the life forms that depend on it for survival, sustenance and procreation.

The source of Jenkins' error is located in his analysis of Aquinas' discussion of the first inclination. Aquinas writes, "Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature".[185] The inclusion of the word "substances" allows for Jenkins to argue for the good of diversity, in accordance with the philosophical perspective of ecocentrism. However, Aquinas' understanding of the natural law does not make the additional step that Jenkins does of finding a duty to the good

[182] Aquinas, *Contra Gentiles* (n 108) II q42 para 3.
[183] ibid III q112 para 1.
[184] Aquinas, *Summa Theologiae* (n 17) I q47 a1.
[185] Aquinas, *Summa Theologiae* (n 17) II-I q94 a2 (emphasis added).

that future (potential) life would be inclined to.[186] For Jenkins the inorganic world is to be afforded more than instrumental value because it represents the wellspring from which new means of knowing God may arise. Based upon this view of instrumental use of the abiotic environment contextualised in virtuous use Jenkins suggests, "[D]iversity is a sort of adumbration of God (God's own phenomenological self-description, given for us), and its preservation promises the continual issue of surprising new descriptions."[187] On the one hand Jenkins' account of Aquinas reinforces the biocentric natural law philosophy advanced above: The teleological inclination to the practical good of all life forms provides a foundation for the human duty to all organic life. Aquinas' conception of justice instils a cosmological and hierarchical order that humans have a responsibility to follow that God's justice "is also due to a created thing that it should possess what is ordered to it."[188] However, on the other hand, for Jenkins this demands more than "gardens and zoos" to ensure the preservation of some individuals from the various species in the world. According to Jenkins' Thomistic account without the protection of ecosystems for their own sake (as distinct from protecting them to ensure human interests or the interests of all life forms are met) there cannot be the possibility of new creatures that continue to reveal God.[189] Jenkins' attributes too much in Aquinas' account and he discounts the limitations clearly set out by Aquinas. Jenkins' argument is only successful "if God is truly affected by the world and if human beings are truly ontologically continuous with the rest of creation."[190] Aquinas maintains this cannot be the case, that God is in no way affected by the world, its organic or its inorganic entities, because "[t]he names

[186] Indeed, adhering to this injunction would be onerous to the point of being unreasonable and accordingly unrealistic. It is not known how life forms will evolve in the short or long term. Only paralysis of human action (or perhaps far ranging culls) would be certain to avoid disruption of these future (potential) life forms.
[187] Jenkins, 'Biodiversity and Salvation: Thomistic Roots for Environmental Ethics' (n 180) 412.
[188] Aquinas, *Summa Theologiae* (n 17) I q21 a1.
[189] In Aquinas' theistic conception these new creatures would result from God's predetermined "seedlike" cosmic order, and by modern evolutionary understanding it would result from genetic anomalies and the environmental conditions to which the genetic differences lend greater or reduced survival success.
[190] Francisco Benzoni, 'Thomas Aquinas and Environmental Ethics: A Reconsideration of Providence and Salvation' (2005) 85 Journal of Religion 446, 447.

which import relation to creatures are applied to God temporally, and not from eternity. To see this we must learn that some have said that relation is not a reality, but only an idea."[191] Ultimately the argument in Jenkins' article only serves to reiterate the onerous responsible use of nonhuman life and the environment, which supports the biocentric natural law philosophy but takes it no further.

Only a brief word need be said about Deep Ecology for it does not seek to support its claims – some of which are ecocentric – on a foundation of human duty. Accordingly, its views do not present a direct challenge to the biocentric natural law philosophy. However, since Deep Ecology encourages a questioning of mainstream values to contrast the "Shallow Ecology" orthodoxy that maintains anthropocentric environmental protections it serves as an additional position by which to assess the adequacy of the biocentric position. In Arne Naess' first pronouncement on Deep Ecology seven "deeper" environmental and intra-human imperatives were advanced.[192] These, for example the principle of biospherical egalitarianism, were not supported with any normative argument since, for Naess, it is important that Deep Ecology remains descriptive: Naess has said, "I'm not much interested in ethics or morals. I'm interested in how we experience the world."[193] Claims such as "all organisms and entities in the ecosphere, as parts of the interrelated whole, are equal in intrinsic worth"[194] may have merit but without moral theoretical explanation they do not provide any motivation for obliging particular human action to achieve their ends. The position of the biocentric natural

[191] Aquinas, *Summa Theologiae* (n 17) I q13 a7.
[192] The seven imperatives are: rejection of the "man-in-environment" image in favour of the relational, total-field image, biospherical egalitarianism, adopting principles of diversity and symbiosis, adopting an anti-class posture, fighting against pollution and resource depletion, complexity, not complication, and local autonomy and decentralisation. Arne Naess, 'The Shallow and the Deep, Long-Range Ecology Movement. A Summary' (1973) 16 Inquiry 95, 95-98. The imperatives are assessed above, at text to n 143ff in ch 3.
[193] Warwick Fox, *Toward a Transpersonal Ecology: Developing New Foundations for Environmentalism* (University of New York Press 1995) 219 quoting Arne Naess.
[194] Bill Devall and George Sessions, *Deep Ecology: Living as if Nature Mattered* (Peregrine Smith 1985) 67.

law philosophy delivers the same principled claim but additionally provides a moral foundation to it. Deep Ecology disparages teleological accounts since they necessarily appoint a "pecking order in [the] moral barnyard".[195] However, the biocentric natural law philosophy shows this to be incorrect since the teleological inclination to the respective good of all life has been argued to be – like Deep Ecology – principally equal for all plants, animals and humans. The biocentric natural law philosophy additionally resolves the primary objection of Deep Ecology that, consequent to their principle of biosopherical egalitarianism, the 120,000$^{th}$ elk must be regarded as equal to the last California condor – even though this could guarantee the end of a species.[196] This unreasonable egalitarianism is not guaranteed in the natural law philosophy presented above because, though the principle of biospherical egalitarianism is established, it is filtered through practical reasonableness in order to derive genuine human duties. Accordingly, on assessing how to best participate in practical reasoning to orientate oneself to the good an individual may decide that saving the last condor is preferable to saving the 120,000$^{th}$ elk, even though their lives are of equal worth due their own teleological inclination to their good.

The biocentric natural law philosophy must also confront some accounts of the Gaia hypothesis.[197] Homeostatic accounts of Gaia hold "that biological feedbacks contribute to the regulation of the environment, and that they help to maintain habitable or comfortable

[195] George Sessions, 'Western Process Metaphysics (Heraclitus, Whitehead, and Spinoza)' ibid app D, 230.
[196] Bryan G Norton, *Toward Unity Among Environmentalists* (OUP 1991) 224.
[197] Some accounts do call for a defence of the biocentric natural law philosophy, though others do not. To separate these Kirchner distinguishes between "weak" and "strong" forms of the Gaia hypothesis, with only the weaker representations having a robust intellectual heritage and support from empirical science. Weaker accounts hold that all life forms influence (to different extents) the Earth's systems that in turn influence the continuance and development of (new) life forms. Accordingly life and the ecosystems in which life exists are intertwined. Stronger accounts of the Gaia theory are, for Kirchner, "useful as metaphors but are unfalsifiable, and therefore misleading". These present the entire biosphere as one organism to which all life and the physical inorganic environment exists for the optimisation of the biosphere. Homeostatic accounts represent the acceptable "strongest". James W Kirchner, 'The Gaia Hypothesis: Fact, Theory, and Wishful Thinking' (2002) 52 Climate Change 391, 393.

conditions for 'life'".[198] In such accounts the inorganic world that facilitates life and the complex interrelationships and interdependencies of ecosystems are attributed with as great significance as life forms themselves. Evaluated from scientific understanding of ecosystems (and their interaction) feedbacks can be positive or negative and from this the normative claim is positioned that negative feedbacks are to be ensured and positive feedbacks avoided. The Gaia hypothesis is vulnerable to the criticisms and counterclaims – and ultimately in the reduction into biocentrism – that have been put to the perspective of ecocentrism more generally. Additionally, holistic conceptions of ecocentrism raise further questions. How does the Gaia theory determine why the current ecological state is to be preferred (and attributed value and accordingly safeguarded) over that of the Earth's initial ecosystem when the planet formed or the ecosystems of a future period? Proposing duties to the ecosystem to ensure homeostatic harmony, as the Gaia hypothesis does, proposes an ideal ecosystem, which introduces an anthropogenic imposition. One answer may be biodiversity since evolutionary history evidences an increase in the number and diversity of species. However, if there is an injunction to increase diversity then by stipulating duties to ecosystems there may result confrontations between the good of particular life forms and the good of the inorganic environment and its systems. One such confrontation, termed by its detractors "environmental fascism"[199], supposes drastic culls to human populations may be what is required to best ensure continuing ecological and biological diversity. Although this outcome is unlikely the confrontation presents a theoretically sound and scientifically robust counterclaim to ecocentrism and the Gaia hypothesis. The biocentric natural law philosophy is not challenged by these criticisms. The biocentric natural law philosophy is able to assert that responsibilities to the inorganic world are subsumed into the teleological good of all life. Due to the

[198] Kirchner makes this observation having reviewed Gaia hypothesis as far back as 1974. James W Kirchner, 'The Gaia Hypothesis: Conjectures and Refutations' (2003) 58 Climate Change 21, 26.
[199] Tom Regan, *The Case for Animal Rights* (Routledge 1983) 262.

inviolable and inherent dignity of all life that is espoused by the biocentric philosophy no limits to the human population (or to any other animal population) would be regarded as reasonable and so they could not be introduced.

This section has concentrated on the difficulties inherent in the moral foundations of ecocentric philosophy. In addition to these points of philosophical incoherence the difference between implementing (or moving towards) a biocentric philosophy and implementing (or moving towards) an ecocentric position is also worthy of careful consideration. Practical deficiencies of the more ambitious environmental perspectives further suggest the appropriateness of advocating a biocentric philosophy. Ecocentrists such as Mathews have identified that liberal political organisation presents inherent "obstacles" to the principles of ecocentrism.[200] This is because the democratic foundations of liberal societies are based upon reciprocated individual autonomy and this relation cannot extend beyond humans. Accordingly the interests of nonhuman life and ecosystems are subsumed within anthropocentric interests. This observance does not afflict the biocentric natural law philosophy since though it is accepted that nonhuman life does not participate in the same good of humans (whether or not this be the prevalent models of Western democracy) this does not provide sufficient cause to discount their participation in their own conception of the good. Contrary to Mathews' claim the biocentric natural law philosophy does identify a "common moral or altruistic underpinning to society"[201] but it is limited to all life and does not extend to the inorganic world: all (but only) life is teleologically inclined to attain to the

[200] Mathews maintains that "democracies *cannot* consistently require any common moral or altruistic commitment from their members - they *cannot* be founded on a public morality - since if they were, this would in itself violate the autonomy of their members, such autonomy entailing as it does the freedom of individuals to choose their own conception of the good." Freya Mathews, 'Community and the Ecological Self' (1995) 4 Environmental Politics 4, 7.
[201] ibid.

practical good and humans, through practical reason, have genuine duties to this ensure this good can be participated in as they would that of other humans.

## Chapter six

## THE BIOCENTRIC NATURAL LAW PHILOSOPHY IN INTERNATIONAL LAW

Using chapter three's typology of environmental philosophy chapter four presented two primary claims: i) the International Court of Justice (ICJ) is inconsistent, hesitant and accordingly slow to acknowledge existing environmental obligations, and that it is reluctant to develop international environmental law and ii) as a result states continue to have different understandings of environmental principles, the obligatory status they have and the imposition they present to other (perhaps conflicting) state priorities. To address these claims chapter five presented a sketch of a biocentric natural law philosophy that could address the identified deficiencies (from the point of view of sufficient and adequate environmental protection). Chapter five established the possibility of a biocentric philosophy for individuals but it did not assess its applicability to states. Presupposing the acceptability of the previous chapter's arguments, this chapter undertakes to transfer the established conception of duty to international law. Accordingly, this chapter questions a) how the biocentric natural law philosophy could be applicable to states through existing and emergent norms of international environmental law, and b) what it would take for the ICJ to develop a biocentric legal doctrine.

### 6.1 Transferring the biocentric natural law philosophy to states

To explore how the biocentric natural law philosophy could be applicable to states this section considers the different extents to which states can be understood to have duties: natural duties that are reflected in positive international rules, natural duties that are not reflected in positive

international rules, duties to other states and duties to the international community of states as a whole. Establishing a case for the existence of these many duties substantiates the applicability of the biocentric natural law philosophy as an environmental perspective the ICJ could employ in its decision-making.

The notion of duties established by the biocentric natural law philosophy can be transferred from individuals to states through Finnis' conception of the common good. As will be recalled from the previous chapter Finnis regards human rights as a fundamental part of the common good[1], with human rights being understood as the only moral idea that commands "universal nominal acceptance."[2] Finnis describes human rights as "public morality", "public health" and "public order" and regards them as reciprocal relationships that are "subject to or limited by each other and by other aspects of the common good."[3] As has been established in the previous chapter human rights exist because it is irrational and unreasonable for any individual to act against any of the basic values, which in turn establishes a correlative duty for all other individuals to respect the basic goods, without exception. According to Finnis, practical reasonableness determines that it is always "unreasonable to choose directly against any basic value, whether in oneself or in one's fellow human beings correlative to the exceptionless duties entailed by this requirement."[4] Finnis' account is applicable to all humans because every human has an exceptionless duty to uphold the exceptionless rights of all other humans.

Having established this notion of duty, the problem remains as to whether it is frustrated by the legal and political order of international law and its Westphalian construction of state

[1] John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 218.
[2] Louis Henkin, *The Age of Rights* (Columbia University Press 1990) x.
[3] Finnis, *Natural Law and Natural Rights* (n 1) 218.
[4] ibid 225.

sovereignty which supplants individuals' pursuit of the basic goods, practical reasonableness, the common good and the universal moral norms they establish. To address this problem the argument will be made that although states do rely on arguments of sovereignty to frustrate the universal applicability of human rights it is clear that they cannot frustrate universalism completely.[5] Although state sovereignty is extensive it is limited in so far as states have duties under international law. Accordingly, even in its most strict sense state sovereignty does not frustrate the applicability of the biocentric natural law philosophy to international law.

The sovereign equality of all states is ingrained in the United Nations Charter.[6] The juridical equality of all states results in political, social, economic and cultural pluralism, reflected in the principle of territorial integrity and political independence of states that provides the basis for the United Nations' prohibition on the use of force.[7] It follows from this understanding of international law that states generally act out of self-interest, to protect their sovereignty and promote their national interests. Accordingly, it may be claimed, environmental rules that do not accord with the interests of sovereign states are unlikely to be adhered to.

However, ideas of state sovereignty can be understood as accommodating global interests, thereby removing the foundations of the claim. Environmental philosophies, including the biocentric natural law position advocated here, can be defended against such claims in so far as sovereignty is able to accommodate supra-sovereign issues. A superficial look to the foundations of international environmental law reflects the canonical view of international

[5] Donnelly suggests sovereignty can frustrate absolute universality but notes that states only rely on this to a limited extent. Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 Human Rights Quarterly 281, 289.
[6] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi art 2(1).
[7] ibid art 2(4).

law, where state sovereignty is paramount. Principle 21 of the Stockholm Declaration[8] and Principle 2 of the Rio Declaration[9] reiterate the centrality of state sovereignty in international law. These rules are similarly composed and establish that states maintain the right to the sovereign use of the environmental resources within their borders whilst also recognising that states have a responsibility to ensure they do not cause harm to the environmental resources of other states.[10] This principle of transboundary harm contains an inherent tension. How states use their natural and environmental resources is both determined by individual states and constrained in so far as how it impacts other states. This tension forms part of a broader relationship between international law's fundamental principle of state sovereignty and the peremptory norms of international law that inhibit particular state action.[11] Accordingly, it is appropriate to question the exalted position of state sovereignty, considering state interests may be ambiguous and they may be short term or long term.[12] Even seemingly benign state action may lead to environmental disasters in other parts of the world. Two examples illustrate this tension in relation to international environmental law and how modern representations to the common good have, to a degree, subjugated state sovereignty to supra-sovereign issues. The examples illustrate that states operate under the conception of reciprocity, which has been discussed above as a constraint to behaviour, which in turn can

[8] Stockholm Declaration of the United Nations Conference on the Human Environment (16 June 1972) 11 ILM 1461 (Stockholm Declaration) Principle 21.
[9] Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development (14 June 1992) 31 ILM 874 (Rio Declaration) Principle 2.
[10] The ICJ confirmed the transboundary harm principle is part of customary international law: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 1996 ICJ Rep 226, 241-42 [29] [hereinafter "*Nuclear Weapons* advisory opinion"].
[11] International law prohibits states from derogating from their responsibilities to abide by *jus cogens* principles. The norms were formalised in the Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53 which states "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Accepted examples include rules relating to the use of force, self-determination and genocide, Ian Brownlie, *Principles of Public International Law* (OUP 2003) 490.
[12] Brad R Roth, 'The Enduring Significance of State Sovereignty' (2004) 56 Florida Law Review 1017, 1018-23.

limit action that is contrary to the rights of others so that correlative duties are likewise upheld.

The Montreal Protocol[13] is one example of how states have placed global interests above their individual interests.[14] The Protocol seeks to address "world-wide emissions of certain substances [that] 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."[15] Difficulties associated in reconciling state sovereignty with global environmental imperatives included who was to monitor and control the banned substances, how much control was necessary, how quickly controls should be imposed, and how different consumption patterns of different states would be recognised.[16] The Protocol's limitations on pollutants and the compromise to sovereignty that this represents through the control of trade resulted from a balanced regulatory approach of incentives and penalties. Regarding incentives, the Protocol establishes a mechanism for financial and technical cooperation including the transfers of technologies.[17] Regarding penalties, the non-compliance mechanism determines that accused states defend their actions to the Implementation Committee, which will make recommendations towards a return to compliance.[18] Competition plays a crucial regulatory role with states reporting on other states that are believed to be exploiting trade restrictions to

[13] Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3 (Montreal Protocol).
[14] Of course a remedy to a global concern may address concerns of individual states wholly; global interests mirroring sovereign interests. For example, a binding international agreement that mitigates climate change completely would realise the sovereign interests of the Small Island Developing States who continue to "confirm the responsibility of all to act to urgently reduce and phase down greenhouse gas pollution in order to avert a climate crisis for present and future generations." 'Majuro Declaration for Climate Leadership' (*Pacific Islands Forum*, 5 September 2013) <http://www.majurodeclaration.org/the_declaration> accessed 30 October 2015, para 6.
[15] ibid Premable.
[16] A James Barnes, 'The Growing International Dimension to Environmental Issues' (1987) 13 Colombia Journal of Environmental Law 389, 392.
[17] Montreal Protocol art 10(1).
[18] UNEP 'Tenth Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer' (3 December 1998) UN Doc UNEP/OzL.Pro.10/9, Decision X/10.

economic advantage. Along with incentives and penalties political compromise was made possible by the scientific consensus that was achieved regarding risks posed by ozone layer depletion.[19]

The Convention on Biological Diversity also suggests global interests can subjugate the individual interests of states without questioning the foundations of state sovereignty because states have mutually accepted constraints on their exploitation of natural resources. Rather, the multilateral environmental agreement uses states as conduits through which global issues can be addressed. Similar to the tension contained in the principle of transboundary harm the Convention strives to protect the "intrinsic value of biological diversity" whilst also affirming "states have sovereign rights over their own biological resources."[20] Again, this relationship between states recalls the conception of reciprocity presented in the previous chapter in that states uphold their environmental commitments to the international community because they require others to do the same. In the Convention the tension between global environmental imperatives and state sovereignty is addressed by making it a responsibility of states to protect biological diversity through the use of national strategies, plans or programmes for the conservation and sustainable use of biological diversity.[21] The Convention produced an international framework that comprises diverse state-level actions.

These two examples confront the realist presumption of state sovereignty as wholly dictating international law, wherein environmental priorities may or may not figure. Riphagen is correct to regard state sovereignty and global environmental imperatives and the common

[19] Irving Mintzer, 'Cooling Down a Warming World: Chlorofluorocarbons, the Greenhouse Effect, and Montreal Protocol' (1989) 1 International Environmental Affairs 12, 12.
[20] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 preamble.
[21] ibid art 6(a).

resources to which they relate as parts of "a particular substratum"[22] of international law as distinct from the diametrically opposed notion of rights and duties between states only, as the canonical view of state sovereignty would have it. Riphagen's conception finds space within legal scholarship on globalisation and the resultant "myriad networks" [23] of national, international and supranational organisations and mechanisms that supplant the view of the international community as solely constituted by sovereign states.[24] With the two issues of state sovereignty and global environmental issues understood as parts of a substratum of international law, state obligations to the international order appear as a counterbalance to state sovereignty. For example, it is possible to regard the principle of transboundary harm as both an acknowledgement of state sovereignty in that state A cannot have its territory polluted by state B, as well as understanding the same rule as obliging all states to take particular care over their actions because of the potential effects their conduct may pose towards all other states.

The canonical view of international law depicts the sovereign interests of states as combative of global interests. However, this view is out-dated and discounts modern understandings of international law. In the canonical understanding global environmental issues are discounted in favour of the instrumental interests of individual states, who in most international fora have the decision-making powers.[25] Contrary to this incomplete and inaccurate understanding

[22] Willem Riphagen, 'The International Concern for the Environment as Expressed in the Concepts of the "Common Heritage of Mankind" and of "Shared Natural Resources"' in Michael Bothe (ed), *Trends in Environmental Policy and Law* (International Union for Conservation of Nature and Natural Resources 1980) 344.
[23] Helen Stacy, 'Relational Sovereignty' (2002-2003) 55 Standford Law Review 2029, 2042.
[24] Koh suggests globalisation and its resultant "conflict has few boundaries and a complex new order has supplanted the realist world order dominated by sovereign states." Harold Honju Koh, 'A United States Human Rights Policy for the 21st Century' (2002) 46 St Louis University Law Journal 293, 303.
[25] Agents in public international law are states, except for the International Criminal Court and the *ad hoc* tribunals established by the Security Council where individuals may be prosecuted for violating peremptory norms.

Koskenniemi understands international law to be a "distinct discourse".[26] Fragmentation "reflects the expansion of international legal activity into new fields and the attendant diversification of its objects and techniques."[27] In this respect fragmentation accounts can be seen to regard international law as informal in that it is presented as a composite of institutional arrangements and dialogues between states, including bilateral, regional and multilateral agreements. Although the traditional view of international law recognises these factors they are not adequately accounted for; as Krotochwil explains the "conventional taxonomy of 'politics' and 'law' hides rather than illuminates important conceptual dimensions." [28] In an environmental context, hidden by the canonical view is state sovereignty's inherent anthropocentrism, the instrumental regard for nonhuman life and the environment.

Peters understands sovereignty as limited by peremptory norms and also determined and qualified by the rights, interests and needs of humanity; sovereignty has been humanised.[29] Sovereignty is a morally "empty vessel"[30] and requires other values to determine the ends to which it is directed; sovereignty must have a justifiable goal-orientated purpose. Without such purpose sovereignty exists only as a cloak behind which state actions go unquestioned.[31]

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[26] Martii Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, CUP 2005) 19.
[27] International Law Commission 'Final Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (18 July 2006) A/CN.4/L.702, 5 para 9.
[28] Kratochwil, *Norms, Rules and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP 1989) 252.
[29] Anne Peters, 'Humanity as the A and O of Sovereignty' (2009) 20 European Journal of International Law 513, 514.
[30] David Rodin, *War and Self-Defense* (OUP 2002) 119.
[31] For example, Johnson suggests "the term "sovereignty" is invoked in a context or manner designed to avoid and prevent analysis, sometimes with an advocate's intent to fend off criticism or justifications for international "infringements" on the activities of a nation-state or its internal stakeholders and power operators… [Sovereignty] plays a role in defining the status and rights of nation-states and their officials… It can also play an anti-democratic role in enforcing extravagant concepts of special privilege of government officials." John H Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 American Journal of International Law 782, 782.

Peters' argument is informed by the constraints she expects of human rights norms, but environmental norms have been presented as capable of constraining state sovereignty and environmental sceptics and realists are wrong to discount this. This argument can be made, as Peters does in the human rights context, using the language of responsibility to understand international environment law. The language of responsibility presents a more accurate characterisation of international law following the proposals of Responsibility 2 Protect (R2P).[32] These proposals agreed that the international community has a responsibility to protect all citizens of all states from human rights abuses; "the principle of non-intervention yields to the international responsibility to protect."[33] The R2P's proposals are premised on *human* protection purposes that suggest human rights norms underpin the international community. However, as the proposal notes, "environmental security"[34] and "environmental hazard"[35] are inescapable elements of this; "when thousands are killed by floods resulting from a ravaged countryside … it is just insufficient to think of security in terms of national or territorial security alone."[36] In this understanding of international law, dismantling the presumption of priority afforded to state sovereignty allows the international community to instead prioritise global issues that pose threats to humans. This includes environmental degradation to the extent that humans are dependent on the natural environment. The Montreal Protocol, the Convention on Biological Diversity and the R2P suggest that the international community has obligations to the environmental resources on which humans depend.

[32] Gareth Evans and others, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001).
[33] ibid xi.
[34] ibid para 2.22
[35] ibid para 2.23
[36] ibid para 2.23

State sovereignty contains a number of inherent conceptual inconsistencies. The national interests that state sovereignty is traditionally understood to represent are "the main signpost that helps political realism through the landscape of international politics."[37] Nevertheless, "realism" in this context is a misnomer; attempts to find a thread common to substantive descriptions of national interests is a misguided task. As Krotochwil notes, as a descriptive term state interests "do not exhibit any clear referent and are therefore assumed to be solely indicators of personal preference." [38] This realisation provides reason to discount environmental sceptics for their claims appear to result from self-interest alone. However, it might be supposed that the national interest to which state sovereignty is directed is representative of the public interest. Kratochwil finds the two terms "interrelated" and that public interest imparts a way to assess the justifications of state sovereignty.[39] Kratochwil's understanding follows that of Hobbes and Locke, both of whom regarded sovereignty as being constrained by the rights of citizens.[40] However, like state interest public interest does not have a singular referent but many ideals of what would count as good public interest. There are questions relating to universalism and consequences. For example, need the entirety of the public be consulted or agree upon policy choices? Does public support necessarily legitimise a particular policy?[41] Presuming some acceptable framework can be found in which public interests are conveyed to decision makers there does result a situation in which state interests cannot be mere preferences but are reasoned choices. Accordingly, the public

[37] Hans Morgenthau, *Politics Among Nations* (5th edn, Knopf 1978) 5.
[38] Friedrich Kratochwil, 'On the Notion of "Interest" in International Relations' (1982) 36 International Organization 1, 3.
[39] ibid 4.
[40] On sovereignty Hobbes writes that individuals covenant "to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will." Hobbes, *Leviathan* (Clarendon Press 1909) pt II ch XVII, 131; Locke writes "it is not every compact that puts an end to the state of Nature between men, but only this one of agreeing together mutually to enter into one community, and make one body politic". Locke, 'Two Treatises on Government' in Locke, *The Works of John Locke Vol 5* (Thomas Tegg 1823) pt 2 ch II para 14.
[41] Kratochwil, 'On the Notion of "Interest" in International Relations' (n 38) 7-8.

interests of different sovereign states is a more useful term since it "has a commendatory function that it aids in our deliberation for choosing policies and serves as a yardstick of criticism."[42]

Claims that the legitimacy of state sovereignty rests in its representation do not contradict notions of universal moral norms. To the contrary, within such a claim a simple transposition of Finnis' account is possible; from the individual human to the international community of states, with members being representatives of individuals. To adapt Finnis' account, states would evaluate that since for them it would not be good if another state did not conduct negotiations in good faith (similar to being lied to in factual communications), if one state were deprived of their territorial capacities or if they were not considered as constituting part of the common good by another state, neither would such treatment be good for other states.[43] State rights and correlative duties would form, delineated by the common good.

To the detriment of the above transposition it may be contended that although state interests may be informed by reasoned public interests there remains a pre-eminence afforded to sovereignty and its legitimacy. This pre-eminence begins with international law appearing as a mere convergence of inter-state will, international law has an auxiliary and instrumental role to the state. Characterising this view, Hegel regards international law as the external law of the state and functions only to extend the state's reach: "The state in and by itself is the ethical whole, the actualization of freedom; and it is an *absolute* end of reason that freedom should

[42] ibid 9.
[43] Finnis, *Natural Law and Natural Rights* (n 1) 225.

be actual."[44] However, as a consequence persists "absolute sovereignty, nationalist fanaticism, state mysticism, and the sacrifice of the individual to the State."[45]

This view, however, overlooks changes that have occurred in the structure, procedure and substance of international law since the inception of the United Nations, which has transformed state sovereignty from being the axiom of international law into an obstacle for international law and the values it espouses. For example, human rights have changed international law placing individuals and governments under new systems of legal regulation that are "indifferent to state boundaries."[46] Henkin suggests state sovereignty "is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology."[47] Part of this mythology entails an instrumental valuation of the natural environment and an anthropocentric ethic in relation to nonhuman life. For example, Humphreys and Otomo present two of international environmental law's heritages that engender instrumental environmental views. The heritages are romanticism, from which particular ideas about beauty and wilderness were established, and the colonial legacy from which a largely exploitative environmental attitude has begun to develop towards one of preservation.[48] Where the environment is concerned the biocentric natural law philosophy provides a suitable remedy to the conceptions of the human relationship with the earth that have led to the environmental damage of modern times. The philosophy's notion of duty to all life supplants

[44] T M Know (ed), *Hegel's Philosophy of Right* (OUP 1967) 279.
[45] Janne Elisabeth Nijman and André Nollkaemper 'Introduction' in Janne Elisabeth Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (OUP 2007) 8.
[46] David Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in David Held and Anthony McGrew (eds) *The Global Transformations Reader* (2nd edn, Wiley 2003) 169.
[47] Louis Henkin, 'Human Rights and State "Sovereignty"' (1995) 25 Georgia Journal of International and Comparative Law 31, 31.
[48] Stephen Humphreys and Yoriko Otomo, 'Theorising International Environmental Law' in Anne Orford, Florian Hoffmann and Martin Clark (eds), *The Oxford Handbook of International Legal Theory* (OUP *forthcoming*).

the instrumentalist understandings of the environment from which aesthetic valuations of the world and an exploitative attitude have become widespread.[49]

Global environmental issues confront the viability of the state centric view of international law in two major ways. Accordingly the argument of the environmental sceptic who prioritises state sovereignty is undermined. The first challenge to state sovereignty is the global reach of environmental pollution; climate change and the scarcity of resources around the world cause problems for the state in so far as they create an additional burden. The impacts of climate change, for example, rises in sea level and droughts may be combatted locally or nationally but inherently the state is unable to address issues taking place beyond its borders, whether this action be preventive or in response to current environmental situations. Left unchecked environmental issues pose grave threats to various aspects of statehood.[50] Environmental issues leave the state unable to protect its citizens, as the Intergovernmental Panel on Climate Change's Fifth Assessment Report notes "climate change is expected to lead to increases in ill-health in many regions".[51] Other changes pose challenges to the physical territorial integrity of the state and its security both internally and externally; coasts and low-lying areas that define many borders and contribute to industry are likely to be affected by climate change.[52] Freshwater management and food, fibre and forest productivity will fluctuate and require adaptive capacities.[53]

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[49] Gray characterises the emergence of this instrumental valuation of the environment as "Baconian". John Gray, *Enlightenment's Wake* (Routledge 2007) 217.
[50] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 17. Art 1 reads: "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."
[51] IPCC, 'Summary for Policymakers' in Christopher Field and others (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability, Part A: Global and Sectoral Aspect: Working Group II Contribution to the IPCC Fifth Assessment Report* (CUP 2015) 19.
[52] ibid.
[53] ibid.

The second challenge to the traditional view of state sovereignty is that many of the environmental issues currently facing the world necessarily require a global and integrated response; environmental issues "increase the mutual dependence" of states.[54] Unlike economic interdependence, ecological interdependence is "truly global, indissoluble and inescapable, even for the most powerful nations."[55] The Montreal Protocol, discussed above, provides an example of necessity being translated into policy and where self-interest became unreasonable. The Treaty has universal membership suggesting that even states that have historically emitted low levels of carboflourocarbons and halons accept the urgent need to comply with the ban.[56] Environmental issues that have yet to be resolved continue to cause conflict, economic hardships, migration impacts as well as environmental damage. Biermann, Petschel-Held and Rohloff identify three groups of issues relating to the environment that constitute both direct threats to states and to the Westphalian notion of the nation state. The groups are, firstly, problems associated with utilisation (overcultivation of marginal land combined with rural poverty, overexploitation of natural ecosystems, abandonment of traditional agricultural practices, the agro-industry, depletion of non-renewable resources, destruction of nature by tourism, and destruction through military impacts); secondly, problems associated with development (large-scale centrally planned developmental projects, inappropriate rural development, disregard for environmental standards in favour of rapid economic growth, uncontrolled urbanisation, destruction through city and infrastructure expansion, and disasters as a result of failures or accidents); and lastly, the sink group (degradation through large-scale diffusion of long-lived substances, disposal of waste, and

[54] Frank Biermann and Klaus Dingwerth, 'Global Environmental Change and the Nation State' (2004) 4 Global Environmental Politics 1, 2.
[55] ibid 5.
[56] Universal membership (197 states) of the Montreal Protocol was reached on 16 September 2009.

long-term pollution at or near industrial locations).[57] Global environmental institutions (including the ICJ) and international environmental law can address many of these issues by mitigating state self-interest.

International jurisprudence has long maintained a qualified understanding of state sovereignty. In 1928 the Permanent Court of International Justice set out the inherent conceptual limitation to sovereignty that flows from the juridical equality of states: "Territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States."[58] Following this reasoning in the Trail Smelter arbitration the principle of transboundary harm was established, reasoning which the ICJ in turn followed in the Corfu Channel Case.[59] The *Lac Lanoux* arbitration developed this notion of duty stating "Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their source, but only for such obligations."[60] Such cases illustrate that state sovereignty does not frustrate notions of duty but that, to the contrary, they qualify the concept. Specific positive legal duties are expected of states, such as meaningful negotiations to resolve disputes[61] or a duty to co-operate[62], with sanctions and dispute settlement occurring following non-performance.

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[57] Frank Biermann, Gerhard Petschel-Held and Christoph Rohloff, 'Environmental Degradation as a Cause of Conflict? Theoretical Conceptualization and Empirical Analysis of the Relationship between "Environment" and "Security"' (1999) 59 Law and State 158, 170.
[58] *Island of Palmas Case* (*Netherlands v USA*) (1928) 2 United Nations Reports on International Arbitral Awards 829, 839.
[59] The Court held that Albania had an obligation to notify foreign ships "for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and to warn the approaching British warships of the imminent dangers to which the minefield exposed them." *Corfu Channel Case* (*United Kingdom v Albania*) [1949] ICJ Rep 4, 22.
[60] *Lac Lanoux Case* (*Spain v France*) (1957) 24 ILR 101, 120.
[61] *North Sea Continental Shelf Case* (*Germany v Holland*) [1969] ICJ Rep 3, 47 [85].

The emergent norm of *obligations erga omnes* presents an additional way to construct state duties. In the *Barcelona Traction* case the Court distinguished between state obligations to other states and state obligations to the international community as a whole. In outlining the concept the Court found that *obligations erga omnes* pertain "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection."[63] The Court held that the concept might derive from the outlawing of acts of aggression, genocide and human rights.[64] From these possible applications it can be inferred that *obligations erga omnes* could apply to, for example, the global threats of climate change or loss of biodiversity. Without specifying its normative force the ICJ acknowledged the importance of *obligations erga omnes* for environmental issues in the *Nuclear Weapons Advisory Opinion* stating "The existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other State or of areas beyond national control is now part of the corpus of international law relating to the environment."[65] To this Judge Weeramantry added "these principles of Environmental Law thus do not depend for their validity on treaty provisions. They are part of customary international law. They are part of the '*sine qua non*' for human survival."[66]

This section has presented an extension to Finnis' conception of the common good by making duties (such as those established by the biocentric natural law philosophy) applicable to states. It has also shown that such a transposition is necessary as only international law can constrain

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[62] UNGA Res 3129 'Co-operation in the field of the environment concerning natural resources shared by two or more states' (13 December 1973) UN Doc A/Res/34/186; UNGA Res 3281 'Charter of Economic Rights and Duties of States' (12 December 1974) UN Doc A/Res/29/3281 art 3.
[63] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (*Second Phase*) (Judgment) [1970] ICJ Rep 32 [33].
[64] ibid 32 [34].
[65] *Nuclear Weapons* advisory opinion (n 10) 241-42 [29].
[66] *Nuclear Weapons* advisory opinion (Dissenting Opinion of Judge Weeramantry) 1996 <http://www.icj-cij.org/docket/files/95/7521.pdf> accessed 30 October 2015, 504.

the activities of states and prevent a global "tragedy of the commons".[67] State self-interest generates anthropocentric bias and an instrumental valuation of nonhuman life and the environment. This is done in spite of the interconnectedness and interdependency of the global environment and ecosystems. States, competing with one another for economic prosperity, have to pursue this utility for if they do not another state will. None is left in the global commons because the commons is not recognised as having value. However, if a responsibility towards life is pursued through the crystallisation of emergent norms such as *obligations erga omnes* that protect and preserve the natural environment, then the utilitarian principles underpinning the tragedy are replaced and "ruin to all" may be avoided.[68] The effect of transferring the biocentric natural law philosophy to states is to qualify the assumption of the tragedy; states can derive utility from the commons but only in so far as it does not contravene the duty to life.

### 6.2 Concluding remarks on the development of a biocentric legal doctrine for the ICJ

Judges in international fora accept that there exists a moral foundation underpinning the protection of the environment. The preceding chapters of the thesis provide a framework in which such acceptance can be situated and supported. Chapter one advanced an argument for the appropriateness of analysing decisions of the ICJ, a court that is able to develop international environmental law through the articulation and clarification of appropriate and applicable international rules. The jurists' requests for a moral foundation underpinning the protection of the environment can be understood through the historical transition set out in chapter two; comments of judges indicate that the utilitarian orthodoxy presents an inadequate

[67] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.
[68] ibid.

protection of the environment and that a systematic and coherent philosophy is required to establish genuine notions of duty towards the environment. The jurist's comments explored in this section contain architectonic environmental duties, which demonstrates an awareness of the sorts of deficiencies regarding the ICJ's approach to environment related decisions that were identified in chapter four. The comments correspond to the isolated though progressive approach to environmental matters exhibited by select ICJ judges. Indeed the comments of the judges indicate that a robust conception of sustainable development should provide the moral foundations for environment related decisions. These views do not wholly accord with chapter five's normative proposal for a biocentric natural law philosophy but judicial comments do suggest that there is a willingness in the international community to align sustainable development more closely with the principles of biocentrism than the anthropocentrism to which it is more usually associated.[69] This section collates jurists' calls for a doctrine of international environmental law based upon duties to the environment. It also analyses the extent to which this requested notion of duty accords with the biocentric natural law philosophy, thereby validating the philosophy and demonstrating its practical application.

In 2002 leading jurists met to discuss the role of the judiciary in advancing sustainable development as the normative foundation of international environmental law.[70] The Global Judges Symposium yielded the Johannesburg Principles on the Role of Law and Sustainable Development. The Principles encourage judges from around the world "to boldly and fearlessly implement and enforce applicable international and national laws."[71] Presenting at

[69] Relationships between the four main environmental philosophical perspectives are analysed above, text to n 90ff in ch 3.
[70] 'The Global Judges Symposium on Sustainable Development and the Role of Law' (*UNEP*, 2002) <http://www.unep.org/delc/judgesprogramme/GlobalJudgesSymposium/tabid/106158/Default.aspx> accessed 30 October 2015.
[71] 'Johannesburg Principles on the Role of Law and Sustainable Development' (2003) 15 Journal of Environmental Law 107, 107 preamble.

the Symposium Declaris suggested that sustainable development has, since the Rio Conference, become the fundamental global grundnorm and that accordingly it is "the obligation of the Courts to impose the fundamental rule of sustainability."[72] Sustainability is, for Declaris, the "modern version of justice having a new dimension of moral duty to future generations and reaffirming respect to nature."[73] Declaris' view of the role of judges invokes a challenge to the utilitarian orthodoxy that has been presented as providing an inadequate principled foundation for environmental protection.[74] By introducing the "new dimension" of future generations Declaris is suggesting that there are principles that ought to limit human action; that human action ought to be constrained by moral duties. Similarly, advocating the practice of "respect of nature" also suggests limits to human action in relation to the environment and nonhuman life ought be established. This is, however, worded almost as an afterthought in Declaris' understanding of sustainable development that appears to principally compromise duties intra humans. Responding to this duty addresses the deficiencies of the orthodox understanding of the relationship between growth and development that is in need of "re-examination" and an imposition of limits to human action so as to constrain environmental devastation.[75]

At the Symposium other judges framed similar conceptions of duty-based foundations to international environmental law. Robinson considered it the task of the judiciary to try to integrate principles of environmental justice within the "parochial and narrow controversies"

[72] Michael Declaris. 'Strengthening the Judiciary for Sustainable Development' (*UNEP*, 2002) <http://www.unep.org/delc/Portals/119/publications/Speeches/MICHAEL_DECLARIS.pdf> accessed 30 October 2015, 1.
[73] ibid 5.
[74] For criticism of the environmental protection possible in utilitarianism see above, text to n 67ff in ch 2.
[75] Declaris. 'Strengthening the Judiciary for Sustainable Development' (n 72) 5.

that come before the courts.[76] Robinson's comments on international environmental law suggest he interprets environmental justice as grounded in teleology, which accounts for the sense of duty he highlights. Robinson assumes that all life has conditions that allow them to "sustain their biological and social well-being" and that this provides a foundation for subsequent human efforts to protect all life and the inorganic environment, the "potable water, breathable air…" that nourishes such life.[77] For Robinson this source of duty and its normative consequences for law ought to underpin all environmental norms, laws and ethical principles alike. Robinson's position is amenable to the biocentric natural law philosophy in that, cognisant of the teleological causality of all life, it bestows upon humans a duty to treat all environmental needs in equal manner.

Weeramantry advocates a conception of duty to nonhuman life and the inorganic environment that is based upon traditional cultures in which such duties existed.[78] Weeramantry's objective recalls the historical transition charted above where notions of human duty that had maintained prudential environmental use and stewardship were shown to recede, and the utilitarian sense of entitlement emerged in which maximisation of pleasure or preferences discounts all value.[79] Weeramantry clarifies his understanding of duty by distinguishing between two conceptions of international law. The first is the "old" conception that centres on the individual sovereignty of states, which is premised upon theories of individualism and rights. Weeramantry discourages this untenable view in favour of a second "modern"

[76] Nicolas A Robinson, 'Environmental Law: The Bedrock for Sustainability' (*UNEP*, 2002) <http://www.unep.org/delc/Portals/119/publications/Speeches/Robinson.pdf> accessed 30 October 2015, 8.
[77] "There is a fundamental right, in each human and in other living beings, to live in the conditions that sustain their biological and social well being, variously described as the right to life. This means that potable water, breathable air, and the enjoyment of natural beauty are birth rights of individuals. Where ambient environmental conditions deny individuals these rights, it is the role of environmental law to restore such conditions." ibid 5.
[78] Christopher Weeramantry, 'Sustainable Development: An Ancient Concept Recently Revived' (*UNEP*, 2002) <http://www.unep.org/delc/Portals/119/publications/Speeches/Weeramantry.pdf> accessed 30 October 2015, 3.
[79] The historical transition is traced in ch 2.

conception of international law that is "socially orientated."[80] Weeramantry's socially orientated conception implies a challenge to the anthropocentric environmental views that are encouraged by the old conception. Weeramantry maintains that humans must cooperate to ensure the global inheritance.

By constructing his conception on a foundation of duty Weeramantry's views can be understood as compatible with the biocentric natural law philosophy; it is through practical reasoning that humans will be orientated to protect the good of all life. According to Weeramantry, "We have now passed out of the era of co-existence into the era of cooperation and not merely passive cooperation but active cooperation because if we are to save our global inheritance we have to do so actively."[81] For Weeramantry the socially orientated conception where global imperatives are prioritised above the interests of states is necessary because environmental protection requires cooperation: "Environmental damage does not respect national boundaries. Pollution does not recognise the doctrine of state sovereignty and end at the boundaries of a nation state."[82]

Weeramantry's views can be seen in his separate and dissenting opinions of decisions of the ICJ, from which his desire to develop a sympathetic legal doctrine for the Court can be implied. In *Gabčíkovo-Nagymaros Project* he questioned the viability of the state sovereignty model when global environmental issues are concerned: "We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of

[80] Weeramantry, 'Sustainable Development: An Ancient Concept Recently Revived' (n 78) 5.
[81] ibid.
[82] ibid.

humanity and planetary welfare."[83] Similarly and more recently in the Court, Cançado Trindade has identified responsibilities to protect the environment for future generations[84] including state adherence to the principles of precaution, prevention and sustainable development based on the standards of general principles of law, those "principles [that] emanate from human conscience, the universal juridical conscience"[85]

This brief survey of judge comments suggests that notions of human duty towards the environment underpin their calls for judicial capacity building. The substance of this duty largely reflects the principles of sustainable development. However, agreement on what the duty to act sustainably means has not been reached. On the one hand the endorsement of sustainable development by judges takes a narrow approach and exhibits emphasis of the instrumental benefit sustainability affords humans, present and future. For example, Corell discusses the imperative for international courts "to address matters of common interest in need".[86] Similarly, Stein has expressed that regarding the role of courts that the "balancing of the rights and needs of citizens, present and future, with development, is a delicate one. It is a balance often between powerful interests (private and public) and the voiceless poor."[87] On the other hand Weeramantry's understanding demonstrates the breadth by which sustainable development can be substantively interpreted and the accordant need, undertaken in this thesis, to distinguish the major environmental philosophical perspectives on the basis of their movement away from utilitarianism, which afford inadequate environmental protection.

[83] *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*) (Separate Opinion of Vice-President Weeramantry) [1997] <http://www.icj-cij.org/docket/files/92/7383.pdf> accessed 30 October 2015, 118.
[84] Cançado Trindade's citations include, UNESCO 'Declaration on the Responsibilities of the Present Generations Towards Future Generations' (12 November 1997) UN Doc 29 C/RES/44.
[85] *Pulp Mills on the River Uruguay* (*Argentina v Uruguay*) (Separate Opinion of Judge Trindade) 2006 <http://www.icj-cij.org/docket/files/135/15885.pdf> accessed 30 October 2015 [217].
[86] Hans Corell, 'Ethical Dimensions of International Jurisprudence and Adjudication' (*UNEP*, 2002) <http://www.unep.org/delc/Portals/119/publications/Speeches/Corell.pdf> accessed 30 October 2015, 3.
[87] Paul Stein, 'Why judges are essential to the rule of law and environmental protection' in Thomas Greiber (ed) *Judges and the Rule of Law: Creating the Links: Environment, Human Rights and Poverty* (International Union for Conservation of Nature and Natural Resources 2004) 54.

Weeramantry implores concern for "other living creatures", and asks that judges "think a little beyond the confined vision that human beings are the only creatures that mattered on this planet."[88] Although "other living creatures" suggests a biocentric environmental philosophy Weeramantry's normative claim is not solely biocentric but also encompasses anthropocentric and ecocentric elements. Weeramantry's anthropocentric element may be gleaned from his discussion of Australian Aboriginals where he commends the respect and reverence Aboriginals show the land for the instrumental ends it provided to its future users.[89] Weeramantry's ecocentric element may be illustrated by his brief and unsubstantiated comment that "There is also the feeling that land has a vitality of its own."[90]

The sketch of the biocentric natural law philosophy that this thesis presents addresses concerns of international-facing judges and provides them with a systematic and architectonic basis for decision-making that would generate principled and consistent international environmental law, and which would better protect the natural environment and the life that inhabits it. The biocentric natural law philosophy provides a justifiable, systematic and coherent underpinning based upon notions of duty that can allay the fragmented approach to environment related decisions in the ICJ. This can provide the Court with the opportunities to develop international environmental law in a manner that articulates and affirms the concept of sustainable development, which has been seen as moving to encapsulate biocentric principles: "We call for holistic and integrated approaches to sustainable development which

[88] Weeramantry, 'Sustainable Development: An Ancient Concept Recently Revived' (n 78) 3.
[89] ibid 7.
[90] ibid.

will guide humanity to live in harmony with nature and lead to efforts to restore the health and integrity of the Earth's ecosystem."[91]

[91] UNGA 'The Future We Want' Rio+20 United Nations Conference on Sustainable Development (20 – 22 June 2012) (19 June 2012) UN Doc A/Conf.216/L1 para 40.

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