CHAPTER 11

SPECIES, SCARCITY AND THE SECULAR STATE

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INTRODUCTION

Biodiversity is our common heritage, or common concern.[2]

What a welcoming phrase. It resonates with inclusiveness, protectiveness and amity on a grand scale. It weighs heavily with an invocation of responsibility to inheritance– to our inheritance, as a global community that produces life in our own name. It calls our greater selves to a single concern and a singular cause. While biodiversity conservation treaties and protection plans abound, however, we are currently in the throes of a mass-extinction crisis. More than 17,000 plants and animal species are threatened because of human activity, and this number is set to increase sharply as climate change continues, rivaling past mass extinctions.[3] The *Convention on Trade in Endangered Species of Flora and Fauna* ('CITES'), and the *Convention on Biological Diversity* ('CBD') are two key legally binding instruments that purport to preserve animal life. The mechanisms they establish, however, fall far short of their promises, failing against any measure to halt large-scale biodiversity loss.[4] 'Lack of political will' is usually cited as the greatest obstacle to the protection of biodiversity and endangered species, and in a recent circular the CBD Conference of the Parties

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[2] This is repeated in key international environmental law documents produced by UNEP and Convention Secretariats, from the 1970s and 1980s onwards.

[3] Report by the Intergovernmental Panel on Climate Change. Regarding the extinction of species in the world's oceans, see a recent report by 27 scientists presented to the United Nations: Rogers, A.D. & Laffoley, D. d'A. 2011. International Earth System Expert Workshop on Ocean Stresses and Impacts. Summary Report. IPSO Oxford (2011). See also Anthony Barnosky et al, 'Has the Earth's Sixth Mass Extinction Already Arrived?' (2011) *Nature* 471, 51. David Suzuki and Faisal Moola, 'Aflockalypse Now: Mass Animal Die-Offs and the Ongoing Extinction Crisis' 13 January 2011: http://www.davidsuzuki.org/blogs/science-matters/2011/01/aflockalypse-now-mass-animal-die-offs-and-the-ongoing-extinction-crisis/.

[4] *Convention on Biological Diversity*, 'Assessment of National Biodiversity Strategies and Action Plans' Information Note by the Executive Secretary, UNEP/CBD/COP/10/INF/11 6 October 2010. For a detailed description of the mechanisms for implementation of the Convention, see Prop, C., Gross, T., Johnston, S., Vierros, M. *Biodiversity Planning: An Assessment of National Biodiversity Strategies and Action Plans* (2010).

cites lack of 'ownership', resources, technical capacity, measurable targets, monitoring and implementation as additional reasons for failure.[5]

This chapter queries whether those reasons are indeed the cause of a failure to protect biodiversity. Through an analysis of the term 'common heritage' and of the above-mentioned Conventions, it proposes a different way of thinking about the rhetoric of animal protection in the international domain. The first section, 'Res Omnium Communes, Res Extra Commercium' looks briefly at how the term 'common heritage' purports to subsume the Roman law categories of 'things held in common' (*res omnium communes*) and 'things outside of commerce' (*res extra commercium).* I suggest that the concept of 'common heritage' in fact does away with this latter category of non-tradable or sacred life altogether. The second section, 'Species and Scarcity' examines how this project (if one may call it that) is carried forth by CITES and the CBD, arguing that those conventions in fact enable the commodification of all remaining animal life that has not already been domesticated, functioning to move it entirely into the sphere of human commerce. The third section, 'A Common Heritage' looks at what relation this may have to the modern state, since states are the primary actors in the conquest of non-human life through the creation of international environmental law.

RES OMNIUM COMMUNES, RES EXTRA COMMERCIUM

International environmental law stories usually begin around the 1960s, with the inception of the environmental movement in the global north. Let me begin somewhat earlier, in the 16th century, with the separation of church and state in Western Europe. There is an extensive history here that is in large part beyond the scope of this chapter; suffice to say that at that time early modern lawyers were moving on from the medieval problem of *dominium* as a matter of theocentric natural law, to a modern conception of a law that had human reason as its authorising force in relation to the colonial appropriation of resources.[6]

One such scholar, Francisco de Vitoria, proposed that divinely created natural law merely recommended, rather than prescribed, common ownership of resources, and that this did not prevent humans from propertising things by consensus amongst themselves.[7] This human-made natural law was "enacted by '[t]he whole world which is in a sense a commonwealth' – a kind of universal positive law…".[8] This propertisation by consensus did, however, need to be controlled, and to that end Vitoria distinguished between two kinds of propertisation and exchange: 'natural' exchanges, on the one hand, the purpose of which was to see to the good of the household and on the other, 'artificial' exchanges, whose aim was to produce profit.

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[5] *Convention on Biological Diversity*, 'Assessment of National Biodiversity Strategies and Action Plans' Information Note by the Executive Secretary, UNEP/CBD/COP/10/INF/11 6 October 2010.
[6] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011), 61 *University of Toronto Law Journal* 15. Scholars such as Francisco de Vitoria, in other words, needed to create "a vocabulary that would accept the political realities of divisiveness – territorial government, private ownership, and war – but that would nevertheless restate the unity of humankind under God."
[7] Ibid.
[8] Declared by Vitoria in a 1528 lecture on civil power: Martti Koskenniemi, above, 16.

The former, he argued, were just and lawful but the latter involved, quote, "great danger for the soul".[9]

Great danger for the soul. One way in which those jurists proposed to stave of the existential threat posed by human commerce was to attach religious prohibition to trade in certain things and forms of life. This prohibition, drawing on the Roman law category '*res extra commercium',* accrued to *res nullius* (things belonging to no-one, including wildlife, the seabed, and space), *res sanctae* (sacred things, including churches and graves), and *res publicae* (things owned by the state for the public good, such as city walls and public squares). In effect, this allowed for some trade in earthly goods, but ensured a sacred and public domain that lay outside of human commerce and within a divine jurisdiction.

The term 'res extra commercium' resurfaced in the late 1960s, where in establishing an international environmental law regime lawyers considered the adoption of two Roman law concepts, *res omnium communes* and *res extra commercium*, to designate life beyond the jurisdiction of the sovereign state.[10] In light of an emerging postcolonial ethos, the first term, *res omnium communes,* was deemed too closely associated to a colonial era when the great powers monopolised access to resources in the global south. By apparent analogy with the second term, *res extra commercium* – in translation, 'common heritage' – was chosen to describe the air, outer space, the sea bed and wild flora and fauna beyond the limits of national jurisdiction.[11] To this day, 'common heritage of mankind' has dominated the international scene as the primary term describing the regulation of these resources through a sui generis regime.

This term, however, effectively reinscribes the global environment as the heritage of *human*kind. Non-human life-as-common-heritage, in other words, becomes tradable, consumable, stripped of religious prohibition. On its face the term 'common heritage' invokes a postcolonial utopia of a united humanity committed to the care of a world without borders. In its operation, however, it leaves nothing to the category of *res extra commercium* in its original sense. To demonstrate this, the following section examines two international agreements that regulate animals as 'common heritage'.

SPECIES AND SCARCITY

The 1975 *Convention on International Trade in Endangered Species of Flora and Fauna* ('CITES') and the 1993 *Convention on Biological Diversity* ('CBD') are two key multilateral instruments that purport to preserve biodiversity and endangered species. First, a brief description of both:

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[9] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011), 61 *University of Toronto Law Journal* 19.

[10] Rudolph Sohm, *The Institutes: A Textbook of the History and System of the Roman Private Law,* 320-3 (1901).

[11] Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law,* 41-2 (1998). It is now only very occasionally referred to in describing areas between state borders such as air, space or the high seas, as well as cultural objects or body parts. Bernstein of Leigh (Baron) v Skyviews & General Ltd [1978] QB 479. Also the Civil Aviation Act 1982, s.76(1) excludes liability for nuisance or trespass for aircraft lawfully flying at a reasonable height.

CITES is a regulatory pre-Rio Convention, overseeing trade in the import and export of listed species through a system of licensing authorization. The listed species in question are nominated by Parties to the Convention, vetted by Scientific Authorities and then placed in one of three Annexes (depending on the species' risk of extinction). CITES' Objectives recognize that "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come", and the Preamble states that Parties are "Conscious of the ever-growing value of wild fauna and flora…recognizing…that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade." Article 3 sets out the requirements for the export of any specimen of a species, which includes authorization by a Scientific Authority of the State of export (to ensure that it would not be detrimental to the survival of that species) and a Management Authority of the State of Export (to ensure that the specimen was obtained legally, has an import permit). CITES requires Parties to ensure that "specimens shall pass through any formalities…with a minimum of delay."[12] It also describes living non-human animals as living specimens that must be "properly cared for so as to minimize the risk of injury, damage to health or cruel treatment".[13]

CITES is therefore essentially a trade convention, setting up an institution (in the form of the Secretariat) to harmonize the implementation of rules for the movement of animals. It educates its members so that they are able to identify certain species as 'endangered', nominate those species for inclusion into an Annex (one to three depending on the level of endangerment), set up a national licensing authority, and prosecute any unlicensed capture and movement of those species. Among other airs, CITES seeks to facilitate the recognition of species that are declared endangered, ensure standardization of the punishment meted out by members against individuals who carry out unlicensed trade, and centralise decision-making power in the state.

Opened for signature at the 'Earth Summit' in Rio de Janeiro on 5 June 1992, CBD currently has 193 Parties. As a framework convention it purports to have three main goals: the conservation of biodiversity, the sustainable use of biodiversity, and fair and equitable sharing of benefits arising from the use of genetic resources.[14] It not only covers the regulation of species of fauna but also plants, ecosystems, genetic resources and biotechnology.[15] CBD's governing body is the Conference of the Parties (COP), whose government representatives meet every two years to review progress, set priorities and commit to work plans. Administration related to CBD is undertaken by the Convention's Secretariat, and national government authorities are responsible for implementation through the establishment of conservation plans. A subsidiary body provides scientific, technical and technological advice to the COP, alongside other working groups convened according to the COP's requirements.

The CBD begins in its Preamble by stating that the Parties are "conscious of the intrinsic value of biological diversity…" It then describes 'habitat' as a "place or type

[12] Article 8.
[13] *Convention on International Trade in Endangered Species of Flora and Fauna.*
[14] The latter goal is essentially a stated commitment to ensuring equitable access for developing countries.
[15] See the *Cartagena Protocol on Biosafety*. The 'ecosystem approach' is used in the CBD as a framework for action under the Convention.

of site where an organism or population naturally occurs," and 'biological diversity' as 'the variability among living organisms from all sources". The Convention includes a concern for 'fair and equitable sharing of benefits' (from biodiversity), organizing its goals around the idea of sustainable development and North/South equity. As part of this concern, it highlights the importance of 'indigenous and local communities' to the conservation of biological diversity, stressing in particular the 'close and traditional dependence' of those communities on biological resources.[16]

The CBD's 'equitable sharing of benefits' extends to "future generations", "ultimately…strengthen[ing] friendly relations among States and contribut[ing] to peace for humankind."[17] The Convention's CoP has recently produced a strategic plan that includes goals such as promoting the sustainable use of biodiversity, improving the status of biodiversity by safeguarding ecosystems, and enhancing implementation through capacity building. These goals (as with previous similar goals) have been pursued (so the CBD claims) through the redistribution of financial resources, technology transfer, the creation of partnerships, and the monitoring and assessment of implementation by member states.

Interestingly, both treaties and their working documents contain statements along the lines of the following:

> Biodiversity should be treated as a natural capital asset and the economic costs of the loss of biodiversity acknowledged…the true value of biodiversity [should be] incorporated into…accounting systems and prices…

Here, biodiversity is declared to have a 'true value' or 'intrinsic value' that can be captured by 'accounting systems and prices', within an international market. And then, such statements are often followed by declarations such as, and I quote:

> [V]aluation exercises are ultimately academic as the ecosystem services in question are essential to human wellbeing and survival, irreplaceable and therefore priceless.[18]

Here, biodiversity is declared to be a ground or condition of human survival, as opposed to a tradable good. This kind of formulation sets up a tension between perfect pricing, on the one hand, and pricelessness, on the other. Non-human life is declared to have, at once, 'intrinsic value', 'ever-growing value' and 'value for humanity'. Above all, the CBD's Executive Secretary claims,

> Biodiversity should be treated as a natural capital asset and the economic costs of the loss of biodiversity acknowledged. [Strategic action plans] should be an instrument for ensuring that the true value of biodiversity is incorporated into…accounting systems and prices…

Biodiversity, in this statement, is declared to have a 'true value' that is recognizable, measurable and useable. This value, furthermore, is one that can be captured by

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[16] *Convention on Biological Diversity,* Preamble.
[17] Ibid.
[18] *Convention on Biological Diversity*, 'Assessment of National Biodiversity Strategies and Action Plans' Information Note by the Executive Secretary, UNEP/CBD/COP/10/INF/11 6 October 2010.

'accounting systems and prices', within an international market. The Executive Secretary continues, saying:

> [However] such valuation exercises are ultimately academic as the ecosystem services in question are essential to human wellbeing and survival, irreplaceable and therefore priceless.[19]

Thus, biodiversity is declared to be a ground or *condition* of human survival, as opposed to a tradable good. This formulation of biodiversity as at once having a perfect price and being priceless is a strange one that indicates a problem at the heart of our so-called 'biodiversity crisis'. How can non-human life have 'intrinsic value', 'ever-growing value' *and* 'value for humanity'? What is the measure of this good, for whom, and to whose past and whose future does it extend? Why is there an implicit approval of speedy trade in non-human bodies and body parts, rather than an outright prohibition if their extinction really does threaten our very survival? Is this survival biological, or does it pertain to the survival of a particular vision of mankind, couched in terms of peaceful state relations?

A COMMON HERITAGE

If we think through these questions, the work that CITES and CBD undertake start to make some sense. They function, in effect, to facilitate the consumption of a nature that has intrinsic value. They both do so by emulating a religious economy, taking certain things outside of human trade, placing them within a logic of scarcity (the market) and then granting dispensations so as to make them available for trade and for consumption.[20] In nature non-human life is 'priceless', part of a diffuse mass that is distinct from human life. In the market this nature becomes a capital asset that has a 'true value', with traction within an actuarial political economy. The movement of non-human bodies between these two sites is enabled by first returning non-human life to the realm of the sacred by prohibiting trade in them altogether, by rendering them exchangeable but not for profit. This takes place through licensing and conservation programs, and the designation of certain species as endangered and therefore in need of protection.

These species, taken out of an indeterminate and self-reproducing 'nature' (what we could call 'nature A') are thereby transformed into a 'nature' that exists only as the corollary to 'humanity', subject to human jurisdiction ('nature B'). Through a system of certification and dispensations, endangered species are then made profane: in other words, available for human use within a secular economy. Not only, then, is non-human life made consumable, but the body of the animal itself conserves value (the good) as it moves from God's nature (nature A), to self-reproducing nature (nature B), to the human market. Scarcity in the form of, for example, endangered species, places a value upon the body of the wild animal, turning it into an object entirely in the international human domain: consumable in the form of ivory, pets, zoo specimens, and fashion items.

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[19] *Convention on Biological Diversity*, 'Assessment of National Biodiversity Strategies and Action Plans' Information Note by the Executive Secretary, UNEP/CBD/COP/10/INF/11 6 October 2010.
[20] Things in which trade is prohibited are known as *res extra commercium.*

In this way the human/non-human distinction reified in CBD and CITES is central to shoring up the human*ness* paraded as international law's *raison d'être.* This distinction ensures that we humans remain connected to, but distinct from, other forms of life. The term 'humanity' here designates humans not as a biological species, but as an idea, just as the term 'nature' refers to two 'natures': one produced by God, and one that produces itself. Whereas the nature produced by God can be consumed in his name, nature that reproduces itself is more difficult to consume without disturbing an essential ontological separation between human and non-human. The conventions draw all non-human life into a secular political economy, thereby ensuring the autonomy of the human, free from any threat of becoming indistinguishable from non-human beings.

We are currently in the throes of a mass extinction of non-human life: this much is true. The global response to this in the form of multilateral environmental agreements has not met with any success in the form of preventing the ongoing extinction of non-human life. So when we talk about conserving biodiversity as common heritage, what is it that we are really conserving?

In this chapter I have argued that the reason for our failure to stop this extinction is not due to a lack of administration or political will, but a deeper problem that we face in proving our ontological uniqueness in a modern world where God cannot be relied on as an authorizing force. In this world in which the life on which we depend is ontologically separate from us, we have no choice but to create ritual institutions by which that life is in turns sacrified and profaned. CBD and CITES, along with other multilateral environmental treaties, appear as 'soft' optional extras to the guns and crime of international law. Their coffee-table landscapes and large-eyed mascots conceal, however, a vast machine that shores up the existence of the modern state. They set up a forum in the international domain for playing out a sacrificial logic that enables the ongoing commodification and consumption of non-human life.

While many practitioners in the international environmental law field no doubt have the best intentions toward animals, biodiversity conservation as it currently stands has only a superficial relation to protecting non-human animals, and in fact exemplifies our struggle for existential surety (to have a body that is both material, and transcendental) in a post-secular world. Regulating the trade in endangered species, furthermore, does not indicate fear of losing particular forms of non-human life so much as fear of losing a fragile claim to universal humanness.

Reflecting on the justifications of empire, Martti Koskenniemi observes that "[l]ove is often difficult to distinguish from a desire to dominate – which is not to say that no distinction should be made between them."[21] The same could be said of our purported love for the 'common heritage of mankind'. To end, I suggest that in the unfolding tragedy of prohibition, possession and exchange that marks our desire to become immanently human, we have to try to understand how we are in common, what it is we inherit, and who we mean, by 'our kind'. Rather than accelerating the valuation of 'biodiversity' and increasing the volume of legislation regulating their consumption, we could instead be stepping back and thinking about what kind of political economy we are casting non-human animals into. We could also think about what kind of

[21] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011), 61 *University of Toronto Law Journal* 12.

human that very political economy produces, and how we might resist or convert this production. The question that remains is, as always, one of responsibility. How are we to take responsibility for living, as Eve who loved the serpent, or as Adam who kept the animals, or as Noah, or as Prometheus, or as Daedelus?