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International Law of Abeyance: Our Sovereign Wild

Alexandra Carleton *

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Alexandra Carleton

alexandralcarleton@gmail.com

Summary: This article works through the ethic behind granting sovereignty to the wilderness. It examines briefly those ways in which jurisdiction has attempted to move beyond state only conceptions and how ownership and acquisition concepts have attempted to move beyond single state-based interests. Previous attempts to move beyond state-centeredness have failed. This article works through the reasons for granting jurisdiction anew to a non-state based territory and proposes how this may be conceptually configured.

Abstract: Ecological ethics is gaining traction. Can this new attitude towards our ecosystems help to motivate a change in our relationship with land and nature? Can we move towards a legal system that supports the legal personality of land, devoid of human ownership? There are substantial amounts of international environmental law that have been hovering on the fringes of defining and then redefining our relationship with land, with more emphasis on respecting the land as itself, rather than as a vehicle with which humanity can gain wealth. This article briefly explores the conjunction of international environmental law history and ecological ethics in the hope that it will encourage a segue in our approach to conservation, ecology and being.

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1. Introduction

"Individual thinkers since the days of Ezekiel and Isaiah have asserted that the despoliation of land is not only inexpedient but wrong. Society, however, has not yet affirmed their belief. I regard the present conservation movement as the embryo of such an affirmation" Aldo Leopold.[1]

Abeyance means without owner or claimant. So it is an appropriate application of the term to seeing whether there is a way to codify a system of laws that do not involve ownership by humans. Up until now the development of ways to protect wilderness has been in relation to and for the benefit of the anthropomorph. Even international environmental law, which is the real forerunner to the concepts presented in this piece, had two glaring mistakes: it was made in relation to humans and their nations (presented as a necessary condition of international law); and started without a direct engagement of the notion of property. In fact, at the outset, it avoided the clash, altogether. So perhaps it is not such a problem that international environmental law did not have the success which was hoped for.

Abeyance is about restoring value - latent value, as an object in and of itself - in the land. This involves, once protected, all sentience that exists upon that land and within that land also as well as any functionality that does not directly involve humanity. From environmental law has developed various other types of laws - conservation law, laws on air and space, climate law. There has also developed fringe aspects of property law including native title and indigenous rights law. But nothing seems to get to the center of this all. In previous work I have discussed two core themes: 1) the nature of ontology or, rather, the relationship between our ontological foundations and how we see land and space; and 2) the concept of reframing treaties according to wilderness needs.

Man has an ongoing attempt to subdue nature, to destroy her, vilify her, brutalise her.[2] In the era of the anthropocene, humanity has gone down the dark side of laying bare nature, dissecting her and pulling her apart.[3] We have forgotten myth which call us to take our place *within* Nature [4] and instead have celebrated the God-like abilities of the human. In this we have lost sight of the planet, gone down a sticky avenue where it has become a contest, a bargaining school, for the wealthiest and the most magnanimous to see how many spoils could be taken, for what price, and in

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consideration of market economies and the growth of both prosperity, economy and animal food stocks. Nature, however, has not partaken. Rather than read the many ideas about internalising market externalities, or how to value ecosystem services, or how to equate the overstocking of fish farms within an amorphous rate of sustainability, there is only one true message - it is too much that we take, too quickly, for too long, and with the wrong focus entirely. There have been many groups calling out to the incorrectness of thinking, without getting much traction. There have been groups rewording Nature to try to make it understandable to those who have been conditioned with the fiction of their lives having no impact, regardless of the waste they generate, the children they have or the number of animals they consume. "Resources", "genetic components", "species", food." We have, as Young declares, completely lost sight of the narrative. The right one.

As powerful as the environmental lobby may have become,[5] there are still occasions when the right of an ecosystem, the biome, our non-human species to thrive and survive are bandied around as negotiable tools in the mixing pot and on less than equal terms with ideas of free trade, market access, mining rights and self-determination. People are to determine the destiny of a territory and not the other way around.[6] Yet some indigenous, and some naturalist thinkers, would have us believe differently - indeed, it is the *very territory, the land itself* which determines the people. Kolers' by now older idea of mutually formative relationship never quite got the attention it deserved.[7]

Many relationships towards the land have and will remain unable to be grasped in national or supranational law because of the key distinction that there are peoples who simply do not believe in their right or power to dominate the land or other beings on it and that the land takes priority - its sovereignty comes first. And why not? The law is a tool of humankind only, to keep order, to manage relations. It fails to manage non-human animals and anything that is not human. It simply manages our relations to those other beings and gives a certain legitimacy to our behaviour and actions. Yet killing every pet dog on the Chagos Island [8] as a tool of forcible relocation is *not* right and proper behaviour for humans. Any reading of Aristotle, Pascal, Lindsay or Emerson would rubbish the legality as unaligned to the notion of goodness and the true path of each human towards goodness. The question is whether our laws are affirming our humanity. And in what we know about our connection to land, space and sentience, the burgeoning evidence around non-human animal pain and emotion, even sentience of the non-human, it is becoming clear that our *law* is not serving us. Our *state-based* international law is not serving the collective *us.* What is required is a new understanding of the Sovereign and *our* place (including our states and nations) within that context.

Abeyance as a concept must refuse to run alongside any notion of possessory interest in territory, denying rights of inheritance, ownership, claiming for all and every group. It places the needs of the vast space of wilderness and semi-wilderness as priority. Rather than becoming entrenched in legal ideals as to the characteristics of wilderness and whether and when this concept may apply, it is applicable to all land undominated by human activity. This is why the high north and high south are the case studies. The polar regions are our last vestiges of true wilderness. Indigenous "rights" (which seem to run counter to the notion that there are no rights over land and other beings, only responsibility) are a moot point, because where there is an ill mother nature, and endangered species, any and all "rights" attached to humans don't matter. The European High North remains keen to reassess indigenous claims to ownership.[9] But our "right" to hunt seal is irrelevant where the seals carry zoonoses, are endangered, are sylvatic reservoirs for disease and where their dwindling numbers mean the extinction of polar bears. "Rights", in a world where every other living thing is on the verge of non-existence, are an inhumanity visited upon the rest of beingness. As such, ownership debates and the prevalence of the Westphalian concept of ownership provide an interesting historical background. The absence of understanding of indigenous "rights" over land, regardless of the fact that this issue is still discussed in international fora, is really redundant when it comes to the holistic picture of environment, conservation, evolution and responsibility. The focus is not on ownership and right but rather the creation of a system of balance, which is the true function of law.

This raises questions of why our law has not progressed beyond being a forum where there must be owners and claimants, couched in the terms of sole possessors (even if collective or customary) and sole inheritors. It may seem that the fundamental axiologic problem with Native Title in Australia, or the recognition of sacred landscapes of the Sioux or Sami, have always been forced to conform to the 'box' placed before them by the anglophile western system of law. Not only is this short sighted but bound to be increasingly problematic as the divide between the haves and havenots, between the rich and powerful and others, and between those who believe in accumulating things,

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possessions, wealth are pitted inexorably against those who do not care about much besides roaming the boundless wonders of nature. Historically ideas of the latter group permeated some of our thinking, ideas, movements and trade. Yet somehow this history has been unremarkable enough to forget. Our understanding of the human condition is as poor today as ever before, for not only does general education not teach the philosophy of Aristotle, Blaise Pascal or Goethe but nor does it include the ideals and movements of the Xiongnu, the Mongols, or the Yognu. Can we change the anthropocentric nature of environmental treaties - that the other perspectives considered includes the one that matters - the one that does not involve our eyes or dominance?

The idea behind introducing an international law of abeyance is to reassert the primacy of philosophy - of determining and actuating a moral consciousness at the international level - back into the international legal regime. To think about the individual and collective responsibility we must take if we are to better the situation here on this planet. As Allott states: "[t]he *aggiornamento* of international society means purposively bringing international society into line with our best ideas and highest expectations about society in general…It is an enterprise in which the re-conceiving of the international legal system is an integral part"[10] and which suffers from: the degradation of universal values such that the redeeming of transcendental values may be impossible; the dominance of economic phenomena and the well-being of the economy at the expense of other common interests; the loss of broad intellectual debate in politics; the removal of the moral accountable individual in acting in the world and; as mentioned, the poverty of philosophy and assertion of higher values and the neutralization of the moral agent.[11] It is an opportunity to remedy the current dissociation of the international legal regime, as identified by Allott decades ago, and create a greater moral awareness. This starts with extending international law beyond, well beyond, its original purpose for actualising collective consciousness and designing a system for humans and humanity (even though as Allott identifies we are part of "one species among so many in a habitat shared by all"[12]), and extending this towards a system that incorporates and cares for the non-human aspects of existence. International law should be able to be discovered by "rational intelligence"[13] such is the nature of "natural law". Vattel stated that neither positivism nor contractarianism would suffice to arrive at an understanding of the foundation of international environmental law and so the space has been open as to what and how we can define these foundations.[14] The development of a situation which considers the other, and deals with that other with compassion may be the beginning of a new approach to what is 'natural' may reverse the firm cynicism of Allott that "material progress has not been matched by spiritual progress."[15]

2. Without Owner

"A tree is a scene, it is human…I seemed to hear them whispering intimately of love and hate."
Zhong, Two White Poplars, 1975.[16]

Does not ownership include self-ownership? If we are not self-owned then we are slaves. The notion of self-ownership is a human construct. There must be a subject who can self-identify. We do not know all there is to know about sentience or consciousness but the subjectivity of ownership stems from a human mind. The idea behind abeyance is to suspend this. To forgo the human owner or possessor and, more than this, to forgo an idea that must be bound to human constructs. It is, in relation to land, to allow the land its own being, its own imperative.

Aldo Leopold asserted that more than just humans have the right to continued existence including plants, animals and the land. That these things should continue as a "matter of biotic right, regardless of the presence or absence of economic advantage to us."[17] More than this, these biota have the right to presence or absence regardless of us entirely, even absence in the sense that there is no human observer. It is quite abstract. And there are arguments to suggest that the law should not apply where there is no human involvement. But this has never been the case. Law has been applied to animals for thousands of years and today animal law is in resurgence.

There have been many ideas and proponents of different avenues of encouraging a reformulation of our relationship with nature. And many ways of trying to have those divorced from our impact to consider those impacts - property rights over common resources, a return to indigenous management, tariffs and taxes on pollution, compliance with international protocols around disease management in animals, treaties, subsidies and delegated pressure to implement domestic changes. There have been impacts. We are still destroying habitat, losing species, killing animals in the millions, seeing an increase in mass mortality events, witnessing shifting faunal boundaries and with it shifting

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disease locations. We are not winning. We require a reformulation of our primary seat in the ecological house. Ecological advocates have been around for a long time. Even at the opening to the largest focus on environment the modern international legal scene had seen - the Stockholm Conference, Dubos and Ward stated:

"Now that mankind is in the process of completing the colonization of the planet, learning to manage it intelligently is an urgent imperative. Man must accept responsibility for the stewardship of the earth." [18]

I would reframe this as follows:

"Now that humankind has colonized the planet, learning to reinvoke our stewardship of the earth is an urgent imperative. We must accept that we cannot and must not always be dominant in every facet of life."

3. Letting Others Live

"There is as yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. Land, like Odysseus' slave-girls, is still property. The land-relation is still strictly economic, entailing privileges but not obligations." Aldo Leopold.[19]

Most people do not react when someone says they have just put out 1080 poison, or snail bait. Or when the government announces a cull. There is no discernible reaction to this from the majority. There is no thought, no action to think. Is it not ridiculous to kill creatures who provide an ecosystem service for our gardens like snails do, a small but significant life? And for what purpose? There is a significant movement towards allowing other beings their own ability and even right to flourish.[20] To choose. To not be treated cruelly. The idea of granting legal rights to other sentient creatures, or entities like trees, has been around for a little while along with wondering how to translate duties to these others into law.[21] More significantly both culture and religion have converged to asking how the environment can be protected for its intrinsic value rather than for any use or functionality that humans can derive from its existence.

The Interim Guiding Principles for the Prevention, Introduction, and Mitigation of Impacts of Alien Species [22] Principle 1 states: "Given the unpredictability of the impacts on biological diversity of alien species…Lack of scientific certainty about the environmental, social and economic risk posed by a potentially invasive alien species …should not be used as a reason for not taking preventative action…as a reason for postponing eradication, containment or control measures." Any hesitancy is removed here in terms of conservation, in relation to the killing of other beings who may, without prejudice or malice, accustomed themselves to a life in a new place. There is in this some degree of hypocrisy in that humans are the primary invasive species with a hugely detrimental impact on biodiversity.

Environmental ethics can take two viewpoints. "[T]he anthropocentric-ecocentric, and individual-systemic axes. The first of these is the valuebearing axis—what sorts of things have morally relevant interests that should guide our deliberations? Humans alone? Sentient creatures, or those who do not have a "subjectively barren form of existence"…Or should we practice the "biospherical egalitarianism"…of Deep Ecology? The second axis is…the level of individuation or aggregation of entities, and relevant temporal intervals, in terms of which a problem is being considered."[23]

Environmental ethics is an emerging field. As much as laws and policies have changed there is a deeper crisis underpinning our poor ecological philosophy.[24] Devall and Sessions believe we need a returning, to the ancient ecological wisdom that has humans as just one part of the whole consciousness of being. "[W]e need to accept the invitation to the dance - the dance of unity of humans, plants, animals, the Earth. We need to cultivate an ecological consciousness."[25] Deep historical ecology has also had its focus and should increasingly, given the far wider context for ecological disturbances over geological time and the better context it places the extremely damaging influence of the anthropomorph.

"Few modern ecological studies take into account the former natural abundances of large marine vertebrates. There are dozens of places in the Caribbean named after large sea turtles whose adult populations now number in the tens of thousands rather than the tens of millions of a few centuries ago. Whales, manatees, dugongs, sea cows, monk seals, crocodiles, codfish, jewfish, swordfish, sharks, and rays are other large marine vertebrates that are now functionally or entirely extinct in most coastal ecosystems. Place names for oysters, pearls, and conches conjure up

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other ecological ghosts of marine invertebrates that were once so abundant as to pose hazards to navigation, but are witnessed now only by massive garbage heaps of empty shells."[26]

Valuing wild animals entails both love and respect, not penning it, using it, manipulating it.[27] We must learn to appreciate their wildness and sovereignty.[28] This is true of and would be aided by, seeing sovereign wilderness the same way - as Sovereign. Even where conservation programs are meted out, the only true benefit to species on the brink - like the polar bear - will be respect not just for the sovereign bear but respect for the sovereign wilds of which it is a part. Sovereignty of Place, devoid of human presence. So what is sovereign without a human object or subject? How do we return to a state where land is above people, as it has been in many indigenous cultures?

From a religious perspective, there has been the odd stand against the traditional idea that man was made to possess and dominate Nature. Andrew Lindzey is first among proponents for a re-reading of the Christian text, where animals are for our care not decimation. In Judaism there is a midrash (rabbinical commentary) that stated that God created the world for man but that the intent was for man not to "spoil and destroy" what was created.[29] Religion has been cited in international law cases, notably the Separate Opinion by Judge Weeramantry in the Gabcikovo case (1997) that cited early India and the beginnings of conservation laws [30]; the buddhist belief that humans are the guardians only of this world. Religion has necessarily become a part of the ecological debate:

"The environmental crisis cannot be addressed without coming to terms with the spiritual dimension of the problem, and the spiritual problems of humanity cannot be worked out apart from a transformation of humanity's relation with nature." [31]

The history of environmental treaties arguably does very little to advance our deep ecological understanding and, in so failing, will remain mere attempts at organising thoughts and priorities rather than an actual and real shift in the way we live. The Rio Declaration on Environment and Development states in its first principle that *[h]uman beings are at the centre of concerns for sustainable development.* Principle 23 states that the *environment and natural resources of people under oppression, domination and occupation shall be protected.* The anthropocene remains at the center of the agreement. The question therefore remains: how can there be any agreement on the environment when the environment and all sentient creatures, flora and geology are not considered worthy of mention? It is not simply peoples under oppression and occupation but the vast majority of species. It is not sustainable development if any development occurs without consideration of the needs, abilities, freedoms, livelihoods, happiness and sentience of other creatures. Ask a koala to be happy without a gum tree. Ask a polar bear to be happy without seals to eat. Every time we measure our sustainable development by quotas dealing only with the reproductive capacities of the species we desire to consume and measure it against the consumption we have is a net loss - what of the species that *others* prefer to eat?

For countless centuries we have documented evidence of abuses committed by us - the human - on other species. To focus for a few words on the simple case of theft of food: seal hunts while polar bears have none to eat; fish trawling so that other species who might enjoy fish have none. We take apex predators like sharks and otters so that systems that require apex predators to consume mid-tier predators are not around, creating imbalance. An example of this is the loss of shark communities which consume sea urchins: sea urchins are prolific survivors and consume many lower food chain items.

The Scottish wild cat is functionally extinct in the wild, killed in vengeance due to natural hunting of the birds and pheasants, only so that we might be able to hunt and kill these same birds. We destroy both hunter and hunted and disallow any chance, chaos or play of life in between. This is not to simplify what science calls confounding factors: climate, disease, migrations and more, that obviously also impact on the survival and fitness of species eaten as food. But it shows our brutality at disallowing life for life's sake and only for our chance at control. There is only one question that everyone need ask at this point: if a famous matador in the middle of a fight suddenly sees the eyes of the bull, a bull bleeding from hooks and cuts and lacerations, a bull not angry by his persecution but simply confused, confused why this man in funny costume is inflicting such cruelty, suddenly replaces his dance on the ground, sit down and weeps, then there *is something that we are missing* if we kill a creature for hunting only to take joy in the hunt ourselves.

Land ethics must move from an individualist approach to a community based approach (Wardrope)[32]. The "community concept [is a]... fundamental value—rather than a function of the

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good of its individual members—".[33] Yet even in Leopold's, the members of a land community are, arguably, inaccurately characterised. An oak, Leopold states, cannot respect us. And yet trees do show respect; to each other and space. They grow with an awareness of other members of both their species and other species. Is there a reason that it cannot detect the existential space occupied by another? The ethics theory of consequentialism argues that the absence of "individual …suffering actively makes the world a better place" (Lee, 2017, 538). Yet individual suffering brings deep compassion, which in turn, yields the sensitivity to the land which Leopold argues for. It can be argued that it is *only* through suffering that a moral shift towards the land community itself and away from the anthropocentrism that so demarcates the era of the anthropocene that the *other* - sentient beings, land, ecosystem components and the ecosystem as a whole - can be properly considered.

Humanity has systematically dispossessed animals of their identity (through gene manipulation), habitat, freedom (through zoos and trade) and then respect for their ability to survive and thrive in spite of what we do to them. Felines used to be drowned in bags in medieval times. Yet they still return to be companions of humans and are one of the most successful species on the planet. What do we do? We kill them, as pests, kittens, invaders, killers. But are we not simply killing a species so similar to ourselves? As Marris asks, how do we perform restitution for our damage?[34] Perhaps restitution is simply about restoring freedom to our animals. Freedom is in choice - in what to eat for breakfast.[35] Often ethics gets caught up in population dynamics which just means we excuse ourselves for our loss of empathy. Caring for the individual is important - this animal in front of you, dying, living, suffering, experiencing joy. This moment. Now. That is where the empathy, beauty and freedom exists. Not in identifying this animal as cat and one of many and thus does not deserve to exist. Does not *deserve* to exist. *Should not* exist. It *does* exist. Now, what are you going to do for it? How are you going to love and cherish that life and sentience in front of you?

Philip Allott in 1989 expounds on the ethics of the intolerable. There are two types of people, he says, the "so whats" and the "whys". The former believe the world as it is, "human beings are as they are, corrupt or corruptible…it will always be." The whys believe in the human as they could be, that systems are made by humans for human prospering.[36] I argue that there is a third, those who argue for the world as it could be, for all sentience and that we must engage to become better moral agents rather than unthinking blobs. Allott may agree with my addition for he states further that :[w]e treat the symptoms of world wide disorder, because we cannot, or dare not, understand the disease. We see the effects because we cannot, or will not, see the cause.

Concepts such as the precautionary principle have attempted to correct the imbalance between negative human input and environmental outcomes, but have only complicated an already confused state of affairs involving the permanent sovereignty over natural resources and attempting to preserve some integrity to our global commons. The principle of subsidiarity perhaps does better at delegating decision-making to the local community, in cases where removed decision-making does not benefit the environment or listens to the wishes of the ones who delegate their power.

But perhaps there is simply something wrong with the development of these principles which make a statement, backtrack, try to remedy, give an excuse and on and on. Take an example of the harvest of a local crab which is the main food source for a population of marine creatures which have decided on that exact location as their seasonal nursery. Suppose now that this population is migratory and that it is the only population with genetic heterogeneity left in the world. The argument for permanent sovereignty over natural resources (PSNR) says that the state can take as much as it likes. It has no responsibility to inflict damage to another state, as the nursery is within its own borders and the population which migrates belongs to no one. The state may have a duty to be a good neighbour, but not in relation to the environment or its creatures (Art 1.3 UN Charter) and it may perform its own environmental impact assessment according to rules set down by itself.

So who is in charge of the clearly ethical violation of disturbing an environment needed for the offspring of an endangered endemic species? Who is considering the ethics of the situation, the overharvesting, the right to use and exploit in amongst all the legal jargon which keeps the minds of international lawyers dancing? The answer is no one at the 'top' level of our jargon-filled and ego driven economic, political and legal system.

> "Lack of economic value is sometimes a character not only of species or groups, but of entire biotic communities: marshes, bogs, dunes, and "deserts" are examples. Our formula in such cases is to relegate their conservation to government as refuges, monuments, or parks."[37]

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This question is beyond enforcement and effectiveness questions. It challenges the status quo of law (including that which applies across borders) as its role as the ethical ombudsmen of humanity focused on greed. Law and religious observance ran closely together for all human history. It seems recently we have completely lost the idea that law serves our ethical and moral betterment and not the whims of the few who seek control and *rights.* It is beyond this piece to consider the development of rights law but suffice it to say that Elenor Roosevelt in sitting down to write the Charter which would dictate humans in war, was not thinking about the powerful.

4. Conceptions of Ownerless Land: What We Have Attempted

The history of international environmental law has been to foster a protection towards aspects of the environment - animals, biodiversity, landscapes, ecosystems - as resources, as items to be used by the anthropomorph. Essentially, this continues to ascribe a property notion to these aspects which denies any sovereignty to the very same. Whether Terra Nullius, global commons, the common heritage of mankind, or the law of the sea, the only attempts at removing human jurisdiction from land has resulted from and resulted in that same land being available for exploitation. How morally superior would it be if the land that was reserved for non-jurisdictional existence was founded on a concept of allowing the land and its non-human inhabitants the ability of being, without our dominion, without our domination, and without our desire to possess, control, change, exploit and damage?

Leaving aside for the moment the question of standing and the question of legal personality, both of which could be sorted through the idea of proxy and collectivity, the premise of devising a jurisdiction for an area absent human-based ownership is about giving 'sovereignty' back to the 'sovereign', the Being herself, the living and breathing essence that is and is recognised by millions of humans, of Nature. It is not new. It is a return to the old, the ancient. Such an understanding of return is beyond the scope of this paper and is, perhaps, more religious in scope, given as ancient codes of law were in such close alignment with religious lives. Perhaps an area of work which could amount to a lifetime's work. Grotius encouraged looking to the past for inspiration for the precepts of international law - "[r]ather than laying down a set of principles *a priori* for the new discipline of international law, he sought them also *a posteriori* from the experience of the past, searching through the whole range of cultures available to him for this purpose".[38] We are in good company then to dig into the past for a once extant idea of such a concept as the international law of abeyance. Cicero, in *Laws, Book Two, 60*[39] refers to the rights of tombs - "There are, moreover, two laws about tombs…The other, by forbidding the 'forum' (i.e., the entrance chamber of a tomb) or the mound to be acquired by possession, safeguards the rights of tombs." Ergo rights can belong to that which is not human. But to those stagnant nonhuman elements. The following is very brief in stating the various legal attempts at giving some identity to ownerless land; it is a mere outline of what has been tried.

(a) Terra Nullius

Terra Nullius. Empty land. Owned by no one. Claimed by no one. No true possessory interest or use. No current exploitation. No current profit. Hallmarks of the justification that led to declarations of empty land free for the 'taking': to be changed, cut down, planted, cultivated. We can say we have come a long way to understanding that possessory interest in the land is perhaps myopic, discriminatory and very narrow-minded. It changes not the historical sweep of disrespecting the land and its ecosystem dynamic in Australia, nor the dispossession of many many indigenous peoples. "...terra nullius …[in] the 18th and 19th centuries…morphed in meaning from Captain Cook's claim that the land of Australia and New Zealand was basically empty, to the idea that there was no sovereignty among the inhabitants prior to the "discovery of the land," and finally to the idea that there was no civilization among the 'native' inhabitants of the newly discovered lands."[40] More profoundly, terra nullius reduced the plenitude of a peoples' connection with their soil - a conjoined sovereignty - to something not capable of political or national identification. The biggest problem is not that it was not capable of such reduction, but that a soil-people conjoined sovereignty is much greater than either a national or political identity. Even if it were reduced, the ontology of these indigenous could not have felt any kinship with the invaders because the very approach to sacred land was missing.

"...No people in Nowhere [may] feel more kinship with the No people in No man's-land than with the Where-dominated state of which they are said to be nationals. The No people in No-

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man's-land feel that Nowhere and its incoming Where people have usurped some part of the No birthright."[41]

(b) Global Commons

Perhaps had the development of international law focused on a response to the problem of overuse of areas of commons we may be faced with the same challenge, differently framed. As it stands two main concepts have been mooted and fallen short. The first is the Common heritage of mankind and the second the common concern of humankind. Both conceptions were devised as a hope to provide enough flexibility to the notion of protection that the sovereign would not be too distressed at losing a fraction of itself. Thus the failure. These two attempts were legal fictions designed around the existence of the *res communis*. The global commons. Herein lies the flaw. Land not belonging to anyone is not functionally belonging to all.[42] It is actually *res nullius.* But as seen above the *res nullius* is open for annexation or occupation.

The flaw is contextual. The infantile understanding of what *res nullius* was. Land not permanently occupied was not unoccupied, nor uncared for. Nevertheless the *res nullius* was open for acquisition *in toto*.[43] The *res communis* on the other hand was only open for plunder not acquisition *in toto*. Its parts could be taken and used, exploited and sold but the area itself was not able to be taken. Thus the legal theory of territory at work in international law. All territory and its parts therein must be subject to possession or ownership of some form. Ownership or possession based, initially at least, on one single identifiable legal code - the Westphalian. From this flows sovereignty, sovereign rights and statehood. Brownlie:

"In spatial terms the law knows four types of regime: territorial sovereignty, territory not subject to the sovereignty of any state or states and which possesses a status of its own (mandated and trust territories, for example), the *res nullius*, and the *res communis*. The concept of territory includes islands, islets, rocks, and reefs. A *res nullius* consists of the same subject-matter legally susceptible to acquisition by states but not as yet placed under territorial sovereignty. The *res communis,* consisting of the high seas…and also outer space, is not capable of being placed under state sovereignty."[44]

Attempts at protecting the "global commons" failed due to the anthropocentric premise of *right to use*. If there is a right to use (which there is underlying all territoriality) then there is, automatically a right to use *without regard to other users.* The Antarctic treaties are perhaps the only exception to the rule but I would argue that it is the only series of treaties which derogates from the underlying idea of right to use. The Moon Treaty 1979 (*Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*) begins "The moon *shall be used* by all States Parties exclusively for peaceful purposes (Article 3, emphasis added). Article 11 states: "The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement…". Article 11 focuses on the managed exploitation of the natural resources of the moon. The Framework Convention on the Protection of the Space Environment as suggested by David Tan in his piece,[45] debunks many of the traditional global commons' ideas. He notes that space treaties utilise the "province of all mankind", which is anthropocentric, focusing on the use and exploitation *for humans* rather than any environmental concerns.[46]

"The principle of the "province of all mankind" as a limitation on the freedom of exploration appears to lack the requisite *opinio juris* to attain the status of a customary norm."[47]

Tan's SEFC (Space Environment Framework Convention) wants States to undertake: 1. cooperate on the assessment of human impacts on the outer space environment; 2. be guided by such principles as intergenerational equity and the precautionary principle; and 3. develop mechanisms for implementation, dispute avoidance and compliance.[48] The issue here is still the focus on the human species as beneficiary though the examination of human activities as the first point is a good start.

(c) Common heritage

The concept of common heritage never fully reached consensus in the international community and in a sense that is good news: it is an idea still born of exploitation and human rights to use. It is based on the *res communis* [49] but still lacks a plurilateral ontological basis, including any ideas that exploration and exploitation for the use of humankind is actually not in the best interests of either other sentient beings or, even, the cosmos. Thus despite one of the four framing principles being non-appropriation; another is shared benefits so the former may be read as *non-appropriation by one state*

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for use by one state. As Hunter *et al.* note the concept of non-appropriation does not mean states are not allowed to capture natural resources and remove them for sovereign gain.[50]

The *Convention on Biological Diversity*, the key treaty for conservation law, switched tactics and utilised the concept of the common concern of humankind. The common heritage was not favoured given its association with equitable sharing regardless of who bore the costs of, for example, extraction and technological capture. To its credit the concept attempts to move the international community closer to altruism. The commentary on the Draft Covenant on Environment and Development (1995) noted the strength of the principle as follows:

> The conclusion that the global environment is a matter of "common concern" implies that it can no longer be considered as solely within the domestic jurisdiction of states due to its global importance and consequences for all. It also expresses a shift from classical treaty-making notions of reciprocity and material advantage, to action in the long-term interests of humanity."[51]

But is this enough? There have been motions every now and then within the international environmental law network that anthropocentric concerns ought not to be the *only* concerns on the negotiating table. International law has a history of negotiating for and on behalf of those who have no voice, who are not present in the negotiating room (international rights of the child, international labour rights, humanitarian law). The Framework Convention on Climate Change was "designed as a first step in dealing with the threat of anthropogenic climate change…"[52] for example. What is, as Joyner and Martell ask, meant by good citizenship beyond not polluting?[53]

5. Attempts to Secure the 'Rights' of Ownerless Land

The mass of attempts at delineating an 'international environmental law' of sorts speaks to the demand, overwhelming at times, for a much much better system of law that respects our environment better. The notion of "sustainable development" is drummed in. It is an impossible concept. Development is anything other than sustainable for the environment. Habitat destruction cannot be done in a way that conserves species because our knowledge about territoriality, behaviour and hunting requirements for each different species is unknown. Sustainable development is a human fiction, for the anthropomorph to be able to continue to damage the environment as long as it is done with enough legality. But there is no sustainable development from the perspective of a tiger that is having its landscape fragmented. Higher competition between individuals will simply mean a reduction in the number of individuals. The more we take for our development and use, the less there is for other species.

Without going through all international environmental law it is pertinent perhaps to take a look at the much touted and followed reasoning of Judge Weeramantry in the the Nagymaros case. His clarity of thought is useful to realise, in a later decade, the narrowness of approach. Overall, Judge Weeramantry believed that sustainable development was the law's answer to steering a path between environmental protection and development. He relied on two international laws: the right to development and the right to a clean environment. Here we stop. The focus is the anthropomorph: the *human* right to development and the "*human* right to the protection of their environment".[54] Perhaps the law has always intended to be speciest. Perhaps animals do not deserve to have standing in law. Yet, if we are to have a system which tends to order rather than chaos, and tends to safeguard the betterment of the planet wholistically, then perhaps a reversion to a more non-speciest approach is better. Beyond the scope of this piece, animals have not always been denied legal standing. Certainly, in some cultures they had sufficient moral and legal personality to be held responsible for actions of killing or maiming such as in the Accords of the ancient emperor Ashoka.

Yet we have taken an inordinate period of time in the modern era to even reach a point where we are discussing this, or there is a shadow of a discussion happening. Environmental law ought to be about conservation, of habitat, of species, of the entitlement of the 'others' to exist. Without this, there is no environmental law, no conservation law. It is simply another mechanism humans use to change their surroundings rather than pay respect to it. If animals may be considered in the context of legal personality, and their habitats and ecosystems (which would be a truer form of conservation/environmental law for example), then ascribing a similar personality to the environment herself is not such a drastic leap. Even where agreements attempt to secure some type of protection for the environment it is always an addendum to some other thought process. Protocol I Additional Protocol

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to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,[55] article 35(3) states:

"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."

Article 55(1) states:

"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."

The ENMOD (Environmental Modification Convention),[56] Article 1:

"Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party."

In the case regarding the *Legality of the Threat or Use of Nuclear Weapons General List* No. 95, Advisory Opinion of July 8, 1996, para 27,

"[S]ome States…argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance."

No area has been successful in safeguarding absolute sovereignty for the environment, because of the focus on human needs. But there have been attempts at the national level. Primarily, in recognition of indigenous belonging to land through various schemes such as Native Title in Australia, and preserving wilderness areas for its own intrinsic value, such as with wilderness trusts in the United States. Again, legal attempts at owning the ownerless are described in brief.

(a) Native Title

Native title fails for an obvious reason: the anglocentric notion of land ownership and exclusivity disregarded the indigenous concept that it is not *human control* that is important but *Nature's control* which is important. Similar to other ancient cultures, humans are recognised as simply players on the field of life, not as the all important centerpiece. It is the loss of the religious concept of our small role which means that environmental law fails and only through its restoration - and through the restoration of a submissive ego - that Nature will regain her sovereignty. Nevertheless it is worth a short discussion to see how the modern era's law attempted to deal with our anthropomorphic Ego.

Native Title had its foundation in Australia in the *Mabo [57]* and *Wik* [58] decisions of the Australian High Court. They argued that the indigenous had a right to reclaim lost ancestral land and began the decades long search by indigenous peoples to prove, despite being dispossessed of their heartlands, that they maintained a connection to land that had been unbroken. Leaving aside the glaring problem with subjecting a spiritually distinct peoples who have a vastly different conception of land than that of the Westphalian system to that very systems understanding of land and the horrifying lack of insight into plurilateral legal conceptions, the courts have found in favour of restoring indigenous land back to the descendants of the inhabitants present on the land at the time of dispossession.

Mabo v Queensland [59] was the first case in Australian law that found a continuance of indigenous rights over land regardless of a change in 'sovereign' control. It recognised that every grove or tree of importance had an "owner"[60] and that rights "for use" (ibid, para 74) of the Murray Island indigenous were never extinguished. Curiously it referenced "common law native title" which seems a strange amalgam of western concepts even as it tries to acknowledge the indigenous occupancy. Such a concept would be the terrain firstly, of anthropologists and secondly, applicable only by those who have accepted its legal authority.

Extensions to jurisdiction taken by the Crown cannot be challenged, annexation of land or sea by the Crown cannot be challenged, conquest, cession and occupation of territory that is terra nullius is a legal acquisition of territory and cannot be challenged.[61] Yet, in this case, a law that grants sovereign title to a Crown for land that was not ceded nor taken by conquest and yet denied occupants the right of occupation, and deprived of religious and economic sustenance from the land, without any right to compensation, is an unjust law.[62] So the Crown's right to annex, take and conquer, in this particular situation was nuanced. A loophole was found, to bring the unbridled greed

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of the take back into line with contemporary values. The burgeoning realisation that the indigenous (and not simply the indigenous) have a connection to land beyond the material and economic was taking root and either the law could accommodate or it could ignore. Judicial activism at its best. Where a rule does not align with contemporary values, it ought to be challenged in a way that brings it into line with those values. Bearing in mind that sole protection of the Crown's right and jurisdiction was cemented well before any examination of indigenous rights of use and access, and well before examination of environmental protection, perhaps the idea that "[i]f a postulated rule of the common law…seriously offends…contemporary values, the question arises whether the rule should be maintained and applied" (para 29) can be now applied to decentralizing the place of the anthropomorph. Even acceptance in Canada that grounds not ceded or conquered were to remain with the indigenous inhabitants, were for denoted *purposes*, ie; "hunting".[63]

(b) Wilderness trusts in North America

"Our duty to the whole, including the unborn generations, bids us to restrain an unprincipled present-day minority from wasting the heritage of these unborn generations." (Roosevelt, 1916).[64]

There are six components to the American Model of Wildlife Conservation. The first states that wildlife is a public trust resource,[65] of which the human dimensions are an instrumental part.[66] Thus wildlife can be killed only for a legitimate purpose which makes hunting legitimate because it gives value to the animal.[67] The public trust doctrine is the central tenet to the system and it sees wildlife not as sentient beings but as resources, to be sustainably used in pursuit of their enduring for future generations. Where we dispute the sentience of non-human animals, the idea of the public trust that keeping humanity in association with Nature to maintain the wilderness' relevance, the beings within such areas are reduced to their values of use and enjoyment for the human. "The loss of access to wildlife for a diversity of uses is likely to erode support for public custodianship of wildlife resources…".[68] Does this beg the question whether humans are only capable of appreciating wilderness trusts if they can use other species at will? Hunting still denies their right *not* to be hunted by us and rather endure a life of intrinsic value, beyond human use and pleasure. It flies in the face of the arguments for sovereignty for wild animals by Kymlicka and Donaldson.[69]

Certainly humans are part of the ecosystem and just part of the food chain, but are we? It may be arguable that where wildlife is only protected where it is of use to humans, that in fact their protection is not an advancement of protection of our natural world, because it does not expand a moral or religious awareness of the existence of an-other. Our flimsy in again out again attitude to both being part of an ecosystem and also disregarding it where inconvenient, does nothing to advance the ecological ethic. Can we be both hunters and developers? Can we be both part of this Whole and yet partake in disregarding our impact? Where animals are only valued for their pelt, or meat, our advancement in granting sovereign status to others, and thereby inducing a moral imperative to our living, is somewhat reduced. Such creatures are not valued for their beingness, just as objects to practice the art of killing.

The idea of intergenerational equity was the concept that embarked on giving the beneficiary status to as yet unborn people. Still anthropocentric but an attempt, nevertheless, to extend our range of sight to beyond our current needs and desires. It works on the basis of duty, however, the duty to *not* do something which restrains our ability to use the planet for whatever purpose now. It flies in the face of liberalism, market economics, private enterprise and the belief that true freedom is doing whatever we want. Giving duties to humankind - asking humans to be aware enough to constrain their activities may not have much chance of succeeding. Even in the case of Antarctica, every human does not question their *right* to travel should they have the money. They do not question their impact, that other species have called that land mass home for many many generations and the devastation caused by their visitations (for example, penguins getting used to human researchers and using the vicinity of the huts as breeding areas). Our impacts are, as yet, untold in that territory: even human introduced *E. coli* will have an impact.

Having areas of wilderness kept in trust for future generations may come the closest to earmarking areas of land itself as intrinsically valuable and giving a form of sovereignty to those areas. Yet it has limited future application if the beings within such a landscape are decimated through fires, fragmentation and disease, or food sources run out, or feral populations take over and then the 'enjoyment', 'hunting value', or leisure of observing wild animals becomes equally irrelevant because those beings no longer exist. In short, the wilderness trust works as long as threats like evolving disease or

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exploding feral dog populations remain unchanged. On the other hand, removing wildlife from a property conception would mean they are no longer protected by the public trust as wilderness trusts work to keep wildlife within the concept of property.[70]

The approach of a law of abeyance is to do something that humans are not going to like. It is to remove our *right to do as we please entirely*. There are some places we are *not* entitled to go, visit, defecate, tread, explore. There are some places that, should we embark on a visit, then it is with much training, much trepidation, much respect, much humility, and a complete eradication of the 17th century explorer's mind that we go out to conquer, discover and win fame.

(c) Conservation law - protection of the global commons

Can the preservation of ecosystems be utilized in effect to protect wilderness areas? This is already done in the designation of national parks, zones of less human habitation and zones marked as any one of a number of protected areas. But is this sufficient? Does "ecosystem" as a philosophy protect wilderness in and of itself? Is the slow process of conservation working? Can the law change to offer a new paradigm for protecting our world and all of the species that live on this planet?

Protection of the global commons in the modern era arguably began with its antithesis - the freedom of the seas - which guaranteed a right to take for all. Formulated by Grotius, it was first laid out as a way to argue against the exclusive Portuguese exploitation of high seas trade.[71] The freedom of seas was for the non-exclusive ability *to trade*, about common goods,[72] not about unbridled taking from the sea itself. Historical conceptions of that which lies beyond the limits of national jurisdiction has meant that the area is beyond the rights of sovereign nations to claim, or to protect. It has not stopped these same sovereign nations from exercising the free-for-all approach that so often results in a rush to the bottom, or a grab what you can such as ends in a substantial decimation of the vitality of the planet.

Under UNCLOS article 236, protection and preservation of the marine environment excludes warships and other vessels and craft for non-commercial purposes (as though simple transit has no bearing at all on the environment and only harvesting does).[73] The United Nations GA in the Declaration of Principles in 1970 affirmed that as regards the deep seabed and ocean floor and subsoil of the ocean floor that they were beyond the limits of national jurisdiction,[74] interpreted to mean that nations are in a position to "explore and to exploit" the resources under law.[75] Where nations attempt to protect the ecosystem, it fails. In the case of the seizure of the Estai, where Canadian warships seized a Spanish trawler for its fish haul, the act of the Canadian government was dubbed piracy.[76] Overexploitation is the primary threat to other species.[77] Global Commons Law [78] thus has failed. Even in relation to outer space, the 1967 Outer Space Treaty article 1 denotes exploration and use without discrimination as being of primary import and Article IX about having regard to other states interests.[79]

Conservation law presently may be defined as the collection of international agreements which attempt to delineate a code of partial respect for the different aspects of Nature. Partial respect, because the treaties are littered with phrases such as "stocks", "rational use" and "sustainable", which denotes a purely anthropocentric ideal of use and abuse of Nature. As long as our use is rational then conservation is guaranteed? These agreements include, notably, the Ramsar Convention on Wetlands, the Convention on Biodiversity and Convention for the protection of migratory bird species, and in relation to our last wilderness in the Antarctic the numerous agreements designed to protect the ice continent from military exploitation and reserve it for tourism and science. Such mechanisms overall may form part of the conservation principle yet such agreements place conservation as a priority and not sustainable development. Under the Convention on Biological Diversity (CBD):

> "The Parties to the Convention: Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components…is a good start which is undone two sentences later when it states …Reaffirming that States have sovereign rights over their own biological resources."

In situ conservation measures under the Convention of biological Diversity (CBD) includes that each party establish protected areas for the conservation of biological diversity (Article 8(a), (b) and (c)). The first sentence of the introduction states: "The Earth's biological resources are vital to humanity's economic and social development." The premise is clear. The biodiversity for human prosperity. From protected areas under the 1982 CBD to the development of MPAs and SPAs as utilised in the Antarctic the focus has been on sustainable use.

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(d) International law for the protection of habitat

There are numerous international agreements which have attempted and failed to protect habitat. The main problem behind almost all of the agreements - and certainly its leaders - are that there are no clauses actually designed for the *protection of habitat itself.* Everything, like all conservation agreements, is a bargain, a negotiation and hard work won is undone in the next clause through allowances and national jurisdiction measures. It is with most of international law: in principle this holds but only if not x or y or z. The prime mover on the protection of habitat is the RAMSAR Convention.[80] It is significant in that it creates the linkage between species and specific habitat needed to survive. So a habitat, biodiversity and conservation convention it *could have been*. Yet despite its declarations of sites of importance, designation depends on either the rarity or uniqueness of the type of wetland (Group A sites) or else its support of threatened or endangered species (Group B sites) which in the case of waterbirds is known to support 20,000 or more individuals or 1% of a population. The overall values lack nuance, any appreciation of population dynamics or the greater relationships between food and species abundance. A wetland may support 12,000 birds of a species which is 0.2% of the known population that nests in that site and only that site for a season, for example. But does it support the 0.2% of the population which are maturing females who are yet to breed? It is understandable that the Convention lacks scientific detail. Much research into varying flight migration routes of migratory birds has been more recent, yet the un-nuanced specificity is a downfall of the Convention. Nothing however takes the place of the Article 2(3) reminder that sovereign rights are exclusively held and not to be trumped. Despite the arguments, the RAMSAR Convention comes the closest to an actual conservation treaty, keeping the short and concise articles in the favour of preserving and designating wetland sites for conservation.

The non-binding statement for the management of forests written in 1992[81] shows a trend in the development of the idea of sustainable use. Whatever success the statement provides in conservation of these unique areas is undone immediately by the continued abutment of this phrase. Sustainable use cannot run alongside conservation. We can sustainably use twenty year old trees and replant them. But 150 year old trees? Trees that are older? One particular tree that has sacred value? Article 1(2)(a) states again the sovereign rights of the nation to "utilize, manage and develop" the forests to meet under article 1(2)(b) the "social, economic, cultural and spiritual needs" of its people. The statement is structured around the essentially false idea of sustainable harvest or wise use. The question is whether *use* can correlate at all to conservation. This enters the sticky debate about preservation vs conservation and the dynamism involved in the environment. Nothing is stagnant. True. Yet nothing changes at such a rapid pace as what current human consumption would dictate.

The FTA signed between Jordan and the USA in 2000[82] may come the closest in terms of an actual conservation agreement (albeit with the usual proviso of non-interference). Article 5 (4) of that agreement unashamedly gives each nation the right to actively control any threat to the environment, which steps it beyond mere platitudes:

4. For purposes of this Article, "environmental laws" mean any statutes or regulations of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

(a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or

(c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statutes or regulations, or provision thereof, directly related to worker safety or health.

The Ramsar Convention acknowledges its premise as the protection of wetlands for their ecological importance to waterfowl in the first instance and then based on "ecology, botany, zoology, limnology or hydrology".[83] Yet even the Ramsar Convention leaves the exclusive rights of the sovereign intact (Art 2(3)) all at once undoing the primal import of the territory for itself and others, in and of itself. Art 3(3) states: "The inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated." Further, a Contracting Party (CP) is able to delete or restrict the boundaries of a wetland where it is of "urgent national interest" though it must "as far as possible compensate for any loss of wetland resources…" (Art 42). Thus apparently a wetland destroyed can be supplemented for elsewhere, the birds whose

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breeding sites have been obliterated will suddenly know to breed elsewhere once they return from a migration flight to find their wetland covered in concrete, and an urgent national interest (which may involve a runway for the promotion of GDP) may wipe out a species…but the runway was urgent. The conventions safeguarding our animals tend to lack any form of understanding about our animals or the millennia of evolution that has seen them in a particular location. Our international treaties are, at best, anti-Darwinian. Art 3(1) requires CPs to implement a "wise use" strategy without any understanding of wise use and still the terminology of anthropocentric entitlement that we are able to "use" and are able to formulate, within our limited understanding of deep ecology and a changing biosphere what "wise" means.

Perhaps the preservation of habitat is the model which potentially comes the closest to a law on abeyance: ceasing activity, holding off, leaving alone. At least of those areas of land deemed extraordinary and important for different reasons. Nothing can restore the loss of habitat which has its own memory and evolution, taken down in a few minutes by the incessant belief that there is only one way of living and breathing and planting and sowing. An example: "[t]he loss of native habitat is the single greatest threat to owl populations. In the past centuries, urbanization, deforestation, and agricultural development have stripped many owls of their forest and grassland habitats."[84] In the case of the Blakiston's Fish Owl in the Primorye region in eastern Russia, "[t]he chief threat to owl habitat there is human use of these areas."[85] That is, human presence ,even just an access road. It is *us* and our activity that is the threat. Even the science of monitoring as part of conservation efforts cause harm: "[u]sing playback to draw in owls can stress already stressed birds."[86] There is no overlapping use, no living *with.* We just need to be gone, to move away, to *not occupy.* To leave the area as a wilderness, as its own sovereign, as having its own nations that does not include us. Part of our ability to reason, if that is what makes the human species unique, should be our ability to reason us *out of the equation*. Is our primary function in life to enjoy? To take? To partake? Or simply to worship? Is it to dominate or to have the role of guardian?

6. A New Approach, Sovereign Wilderness

Why is any of this necessary to examine? Even from an intuitive point of view it seems necessary even though something better must be devised given the human proclivity for simply encroaching. The end of that sentence need not be "encroaching onto someone else's land," it simply can be "encroaching" because that is what we appear to do, without any thought for the consequences for other natural processes or sentient beings. It has required enormous efforts over many years to have the vested interests in industry take notice of the "other" that exists on the planet. Yet it is always in terms they understand and find favourable. It rarely has seemed to come purely out of the moral understanding of our place on the planet, rarely without the emotional outcry that it creates in many people. It is a question whether the response has been a reaction to the emotional outcry, a public relations stunt, more than an actual appreciation for what needs to happen. And until we reach that actual understanding, the measured expansion of humanity (or not at all), the action of compassion, and the curtailment of the wondrous term "rights", no actual and lasting change will occur. Even within the bounds of international law-making there has always been extensive discussion around the notion of customary law and that custom precedes the development of international codes. So, in this sense at the very least, a trip back through our own history is necessary. As Allott has stated:

> "As governments further extend their Faustian ambitions into international society and international society becomes the main arena for the human struggle to survive and progress, the highest professional duty now rests on international lawyers to exert eternal vigilance on behalf of the people, because lawyers have power over the law, the only thing which can have power over the government. The task of the contemporary international lawyer is to redeem governments in the name of justice…and in the name of humanity, whose interests transcend the interests of states and governments."[87]

Thus, looking at international environmental law as a first pass it is clear that there are many concepts that form part of the codes and yet they all still seem to float around the edges of something more solid. These principles have changed little from their inception and include: "permanent sovereignty over natural resources, the principle of cooperation, the no-harm rule, the precautionary principle, the principles of prevention, due diligence, and obligation to conduct environmental impact assessment (EIA), the principles of integration and intergenerational equity, common but

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differentiated responsibilities, and the polluter pays principle…in dubio pro natura, the principle of ecological proportionality, and the principle of access to information, public participation, and access to justice in environmental matters (principle of good governance, environmental democracy)"[88] and possibly a right to development, good neighbourliness and duties to provide prior notification and to consult in good faith.[89] Most of these are an attempt at forcing compliance and forcing a concern for the other. A better approach may encourage us to take stock of all these 'others' in a more holistic way.

In a way similar to the reductionism of compartmentalising the 'services' of the ecosystem into food, health, aesthetics etc. the idea of the wilds as an ecosystem reduces the sovereign itself. The wilderness is more than its ecosystems. Many ecosystems overlap, from the micro to the macro. Ecosystem services is a way of encouraging the economists to think about how their bottom line was actually derived from a number of things that did not cost in terms of dollars. The ethic of reductionism goes hand in hand with a devalued position on spiritual or religious values or other disciplines that seek better understanding of indigenous land rights, concepts of belonging and anti-speciesism. The lack of questioning the ethic means we remain anthrocentric, whilst humans often are responsible for devastating others. A case on this point was the discovery that the introduction of the deadly ranavirus into the populations of amphibians in the Picos de Europa National Park was due to fomite transfer (introduced by a human boot). These viruses have devastated the amphibian communities.[90]

Many conservationists vie for more scientific endeavour to encourage an understanding of our animals. More cataloging of behaviours, of species, of knowledge. Cataloguing for conservation. The problem is that all cataloguing, all intervention is still just human intervention in wild species. Even in Ackerman's book does she note eventually that banding owls for science caused a frozen shock response. The ethical justification for much of these types of invasions is less than certain or clear. Does ascribing sovereign respect for wilderness and wild species necessary to enforce a minimum ecological ethic? Fishing in the Primorye region in eastern Russia disturbs Blakiston's Fish Owl so the "chief solution is reducing access."[91] Fishing disturbs the fish owl so the chief solution is to remove human intervention.

The Sovereign has its foundation in non-interference. State sovereignty is: 1) sovereign equality 2) political independence 3) exclusive jurisdiction over a territory 4) territorial integrity 5) freedom from intervention 6) freedom to choose the systems by which a state is governed (political, economic, cultural) 7) dependence on international treaty.[92] The sovereign state dictates international law, even those laws that aim to include the environment, such as sustainable development law. This law mentions sovereignty over natural resources and that development must accord with protection of the environment for the benefit of the population. Abeyance argues for protection of nature regardless of benefit to humans. The sovereignty sought for is an absence of human rights and development, in preference for the defence of the livelihoods and beingness of other *non-human beings*. Even the CBD argues for sustainable use with an eye to future generations (of humans). Can we move beyond an international law that is anthropocentric? Have we reached that stage where we aren't the only species who exist in line with divinity? Can we seek the protection of our animals for their own sake?

Changes to the concept of sovereignty arguably amount to denying its existence, that sovereignty is so abused, devolved and eroded today that its effect is meaningless.[93] Originally based in the West on the notion of human-controlled territorial jurisdiction as well as non-intervention and state consent,[94] the rise of transnational corporations, NGOs and a number of other institutions have challenged even the idea of state control and state-state relations.[95] The slow encroachment into sovereignty by human rights standards and the growing understanding that violation of state sovereignty for this purpose is legitimate,[96] may herald a time when the traditional concept of state sovereignty with all the human-bound, legal personality encumbrances may dissolve. Would this herald a new creativity towards the concept of The Sovereign? Granting sovereignty to the wilderness itself is a direct challenge to Francis Bacon and the idea that humans, at their maximum progressive moment, have control over nature. This was what Bacon believed was the meaning of Dominion. Locke notes that "God assisted Hezekiah to throw off the dominion of that conquering empire" (referring to Assyria) in his Second Treatise when talking about conquest.[97]

The question here is whether untitled land will leave the land open to a land grab and how to prevent this.

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> "There appears, then, to be some truth in the conservative dictum that everybody's property is nobody's property. Wealth that is free for all is valued by no one because he who is foolhardy enough to wait for its proper time of use will only find that it has been taken by another…The fish in the sea are valueless to the fisherman, because there is no assurance that they will be there for him tomorrow if they are left behind today."[98]

Is the meaning of sovereign tied up in control and boundedness.[99] What is a governing sovereign and territorial jurisdiction and is it necessarily tied up with a nation-state?[100] "The notion [of sovereignty] is in flux and it will not mean the same in a few years' time as it does today."[101] It could be as simple as protecting the sovereign from "profit-oriented encroachments of more powerful peoples".[102]

Accepting that land can be without owner, its sovereign status in itself known, it must be addressed that therefore there is no recognised claimant in legal proceedings. Claimants in international law are states. The difficulty, legally, in denoting sovereignty absent a claimant may be seen in the moratorium for claims over Antarctica. But, equally, the treaties preserving the status quo of Antarctica (in their refusal to address claimants or give full sovereignty to any claimant), the Antarctic Treaties may show us that preserving Nature for herself may, in fact, be possible.

7. Rights of Water, Water as Living Goddess

The furthest development in ecological ethics is giving rights to nature herself. There has been, intermittently and in different locations, attempts to shift Nature's designation as property to subject in law.[103] "Just as people have fundamental rights, so too should nature….ecosystems have the right to exist, thrive, and evolve".[104] Mother earth has rights in Bolivia, questioning the human centered approach to both rights and human domination over the environment.

Water, in particular, has been the focus of attention in redefining Nature's role as sovereign and equal to humanity, as worthy of having legal personhood and consequently worthy of its own rights. Water as sovereign, with its own legal personality and accompanying rights, has been recognised in a number of countries already: in the constitution of Ecuador, and rights given to the sacred Whanganui river in New Zealand.[105] Water being of such vital importance may be a good place to start. As Strang notes: "Enshrining non-human rights in law is fundamentally a statement of values, and – as relationships between beliefs and values and actions are recursive – a pragmatic view might be that to establish legal rights for rivers in the first place will initiate a relational shift."[106] In the context of expanding populations, "...for larger societies, this means that efforts to rethink relations with non-human beings must be accompanied by real striving to reduce the pressure of human needs and interests: by addressing population issues; by cutting excessive resource exploitation, and by eschewing short-termist capitalist ideologies and overdependence on growth-based economic systems."[107]

In India, attempts at defining the Ganges as living goddess ultimately did not work, but the case was important for both arguing for personhood to the river, as a way to conserve her flow and also as a way of paying reverence to the river's role as Goddess. Indian courts have a history of granting personhood to idols. "Hindu idol is a juristic entity capable of holding property and of being taxed through its Shebaits who are entrusted with the possession and management of its property".[108] Further to the deities role as taxpayer and legal person, the Goddess, "as a potential juristic person, is also nature, and can therefore be granted rights of nature."[109]

Regardless of whether it is the Goddess herself, the river as Goddess, or the sacred use of the river, the entity of the river was ascribed its own existence, its own legal subjecthood..[110] "All the Hindus have deep Astha in rivers Ganga and Yamuna and they collectively connect with these rivers. Rivers Ganga and Yamuna are central to the existence of half of [the] Indian population and their health and well being. The rivers have provided both physical and spiritual sustenance to all of us from time immemorial. Rivers Ganga and Yamuna have spiritual and physical sustenance. They support and assist both the life and natural resources and health and well-being of the entire community. Rivers Ganga and Yamuna are breathing, living and sustaining the communities from mountains to sea."[111]

Perhaps the extension that could be made from this case is that bringing the Goddess as living water within the context of human relationships is not sufficient. A better outcome may ascribe full autonomy or sovereign status to the water herself. So that rather than bringing the water within the

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realm of the human, the water stands apart as another sovereign to be negotiated with, respected and revered.

8. Abeyance in Antarctica

"Claimed by seven states but recognised by none as sovereign territory, the governance of the continent rests on the 'without prejudice' clause in Article IV of the Antarctic Treaty 1959. This device preserves the rights of claimants from potential competition while ensuring that other states are generally free to pursue activities without permission."[112]

Antarctica's 'sovereignty' is yet to be determined.[113] Multiple claimants dividing the continent of Antarctica concurrent with a freedom to pursue activities, appears that the Antarctic mass has the worst of both worlds. The converse then, a unified territory with high regulation over access and use, is the opposite and would mean both a unified land mass and strict observation over access and use. Is the latter to be achieved only through imparting jurisdiction to a nation-state? Or can sovereignty and unified territoriality be accomplished another way? Can we give legal personality to geographic features? Would this amount to a new sovereignty, more than a trusteeship.[114]

Can Antarctica be the first Abeyant Sovereign? The current regime is a poor foundation because the purpose of the Antarctic Treaty to preserve and conserve living resources holistically has been undermined by the series of protected and managed areas and their associated ecosystems, fragmenting the very unity of this landscape. Such partitioning reduces the positive elements such as a focus on wilderness and intrinsic value, environmental impacts and the EIAs required for access and use. MPAs, SPAs, SMAs, SASSs, VMEs have proliferated over the map of Antarctica in the last twenty years. Yet the map of Antarctica has many little areas set aside for specific biodiversity protection. Do these tools for management say anything other than the failure to recognise that, holistically and as an entirety, Antarctica is unique and we are struggling to reach a conception of this vestigial wilderness that makes sense?

Conservation agreements which aim to protect Antarctic heritage and biodiversity to some degree, even its aesthetic and intrinsic values do not place conservation as the preeminent aim. In particular, CCAMLR cannot deliver on conservation aims when it is focused on and only able to deliver on fisheries management objectives, so broader conservation aims are unlikely to be delivered. Fisheries objectives also do not consider a rapidly changing environment both physical and geopolitical.[115] Compliance systems are already in place as with the DROMLAN system (air transport between Cape Town and Dronning Maud Land)[116] and the systems of applying for ASMAs (Specially Managed Areas).[117]

The predominance of the Antarctic wilderness has been of preeminent concern since the inception of the international regimes governing its territory. Regulation of mineral exploration took a backseat to the biological value of Antarctica (albeit for science and research as much as for its inherent beauty) with the entry into force, in 1998 of the Protocol on Environmental Protection (1991) to the Antarctic Treaty. The Protocol on Environmental Protection to the Antarctic Treaty (1991) comes close to beginning to state a program that actually places the geography first. Article 3's main precepts include planning for all activities so as to reduce adverse impacts on air, water, marine or other environments, abundance or productivity of species, threatened species, areas of wilderness significance. Antarctica is divided into sixteen biogeographical regions under the Antarctic Conservation Biogeographical Regions [118] which illustrates the type of geographically based ecosystem diversity that exists on this continent.

Advocates of a CHM (common heritage of mankind) approach to Antarctica still miss the overall issue with exploitation. Joyner adequately summarises the CHM debate for Antarctica where he lists five considerations: 1) negating appropriation 2) benefit-sharing for the international community 3) exploitation of natural resources for all 4) peaceful purposes and 5) guarantee for scientific exploitation.[119] CHM wherein the benefits are shared, or where scientific exploits are shared still results in the very exploitation that conservation argues for. An international law of abeyance is not about the common heritage of *mankind/humankind* but simply the negation of human domination, exploitation and hithertofore unchallenged necessity to prospect, prosper and debilitate.

9. Justice for Nature

There are several concepts which may be utilised in bringing action to seek remedy and restitution for impediment against abeyant land. Similar to the Martens clause, *erga omnes* obligations arise

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in the public interest and to maintain a level of conscience in international law; that principles of international law are informed and guided by the dictates of public conscience which change according to the tolerance of the international community and practically applied in changing conditions.[120] *Erga Omnes* obligations arise in the face of extreme situations perhaps including massive environmental damage. How do we seek justice for a sovereign area in such circumstances? Prosecution for damage against a defended nation-state charged with a crime of aggression against the environment may be a start. With no definitive or exhaustive list of *erga omnes* obligations, there is always the possibility of expansion including bringing an action for future impacts to the global commons.

A crime of aggression applies to acts where the use of force is considered out of proportion or where the use of force is unjustified. Unjustified use of force includes annexation.[121] Could annexation be applied to a wilderness sovereign? In 1996, Yugoslavia filed an action in ICJ against ten NATO members, for aggression against the environment. Allegations included bombing of oil refineries and chemical plants, the USA acted in breach of obligations not to cause environmental damage.[122] *Mens rea* in this case was considered "actual or constructive knowledge as to the grave environmental effects of a military attack; a standard which would be difficult to establish for the purposes of prosecution and which may prove an insufficient basis to prosecute military commanders inflicting environmental harm in the (mistaken) belief that such conduct was warranted by military necessity…"[123] Unfortunately, the "notion of 'excessive' environmental destruction is imprecise and the actual…impact, both present and long term…is at present unknown and difficult to measure."[124]

Other tools which may be worth exploring are prosecution for failure to conserve biodiversity or ecocide.[125] But there have not been any draconian punishments for not meeting reductions in pollution under the climate conventions so this is wishful thinking. Leaving the development of a standard to the international legal community is unwise, given the proclivity to negotiate between environmental prosperity and other forms of human prosperity. An *amicus natura* may be the only answer, though the whom of occupying that role is a question. Yet as a whole, the idea of trusteeship of the global commons has had proponents from the creation of an ocean guardian [126] to a future generations ombudsmen,[127] to a UN Trusteeship Council.

10. Conclusion: Quantifying the Costs of Failure

It is a redundant question; how do we quantify the costs of failing to protect nature? A question asked peremptorily because contriving an internalising mechanism for environmental failure has been the way and the method that humanity has attempted to justify its moderated and unthinking middle line approach to the world that surrounds us. It is not possible to quantify the costs. Many costs go unnoticed, like the number of Australian koalas which suffer from Chlamydia infections and the untold role of their new noisy urban environments as a contributing factor. Or the number of felines justified killed as part of conservation efforts when there is little known about the comorbidities affecting birds which cannot fly away from a feline with a bell on.

The issue for compliance in strict terms needs addressing, even if briefly. In environmental terms it has been noted that only when deleterious effects of environmental failure are seen do states begin the process towards change. In international environmental treaty terms, only then do we see steps towards compliance.[128] Liability for environmental damage has been a problematic issue. Cases are varied on the principles for liability for environmental damage done to the territory of a sovereign state, even the prospect where obligations are *erga omnes* obligations. However whether there is general right, held by states or, the future, non-government organizations to the protection of the environment in global commons areas "is a question which remains difficult to answer in the absence of state practice."[129]

The question of Abeyance is, *de facto* and *de jure*, existent. The Sovereign Wilderness, Sovereign Nature, is to be protected in its entirety. *We* are the outsiders. *We* do not have sovereign claim. It is time international law recognised more than simply the predominance of the anthropomorph. Time to acknowledge that where a state can have sovereignty, so too can a continent regardless of human claim. The sovereign is first and the human is second. In this way, it becomes not a question of how many areas we can negotiate to be conserved or used for science. Rather a question of preservation of ecosystems for the rights of other beings to exist and our right to rational use, profiteering and privateering very much second. It is a question of moral good. *Our* moral good. Justified for centuries,

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our human use of everything has gone unchecked. Should we allow this to continue? Does it serve our growth as a peoples? Or is destroying and using and categorising Nature, Biodiversity, Animals, Sentience, Being, actually destroying us?

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