

ARTICLES – CLIMATE CHANGE

THE VOICE OF THE TREES IN THE LAW OF ARMED CONFLICT[#]

*Helen Pringle**

ABSTRACT

This article takes up questions of environmental protection, in the law and practice of armed conflict with a specific focus on the figure of the speaking tree as invoked in discussions of the protection of tree and plant life. The article canvasses historical works in which this figure appears, from the early work of Philo of Alexandria and Josephus through to the discussion of their work by Hugo Grotius. Through this endeavour, the article attempts to take seriously the figure of animated trees with the standing to speak and to be heard in legal forums. I conclude that it is not only a common humanity that is at stake in doing this, but re-orienting the interests of human creatures as in relation to the protection of trees and forests, and other ‘inanimate objects’.

Keywords: environment forests Grotius Josephus Philo of Alexandria standing international humanitarian law necessity common humanity

In his memorably lively dissent in the 1972 case of *Sierra Club v Morton* at the US Supreme Court, Justice Douglas addressed the topic of the voice of inanimate natural objects.¹ The case involved a claim by the environmental group the Sierra Club to restrain the development by Disney of a large ski resort in the Mineral King valley in California’s Sequoia National Forest, with the question of standing

* BA (Hons), MA, PhD, Associate Professor, School of Social Sciences, Faculty of Arts, Design and Architecture, UNSW, Sydney h.pringle@unsw.edu.au

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¹ *Sierra Club v Morton* 405 US 727, 741–755 (1972) U.S. Reports: *Sierra Club v. Morton*, 405 U.S. 727 (1972). (loc.gov) (accessed 1 October 2024) (Douglas J, dissenting).

forming the centre of dispute. Throughout his dissent, Douglas J focuses on what he claims is ‘the present question’: ‘The sole question is, who has standing to *be heard* [italics added, for emphasis]?’² Justice Douglas parses questions of standing as involving *who is the speaker* of what is heard. He canvasses this by picturing natural objects speaking in a very literal sense of, by and for themselves within a legal forum. In noting that ‘environmental issues should be tendered by the inanimate object itself’, Douglas claims that ‘Then there will be assurances that all of the forms of life which it represents will stand before the court – the woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams.’³ And in that case, the Sequoia forests.

In this article, I explore the provenance of the figure of the speaking tree in the law of war, with a view to making sense of this image in how we can understand what is at stake in environmental protection during armed conflict. I begin by providing a brief outline of general international legal provisions and procedures around forests that are currently in place, along with making note of specific international legal provisions in the law of armed conflict. I then discuss the specific works on the law of war in which the speaking tree appears, from Josephus and Philo of Alexandria through to Hugo Grotius. By doing this, I wish to set out not only the historical progress of the speaking tree, but also to embellish the authority of this image in our discussion today around who has standing to speak and to be heard in the law. I conclude by suggesting how such figures can work in international (humanitarian) law to give it greater persuasiveness in the claims it makes upon us, whether as individuals or as states, in terms of our common humanity.

THE PRESENT INTERNATIONAL FRAMEWORK FOR THE PROTECTION OF FORESTS AND TREES IN PEACE AND WAR

The 1972 United Nations Conference on the Human Environment held in Stockholm marked a beginning to the present phase of concern at the international level with environmental issues. The Conference adopted the Stockholm Declaration and Plan of Action and established the United Nations Environment Program

² *Sierra Club v Morton* (n1), 751 (1972) (Douglas J, dissenting). Justice Douglas makes favourable reference to Christopher D Stone, ‘Should Trees Have Standing? Toward Legal Rights for Natural Objects’ *Southern California Law Review* 45 (1972) 450–501. A longer version of Stone’s argument was published in 2010 as *Should Trees Have Standing? Law, Morality, and the Environment* (Oxford University Press, 2010).

³ *Sierra Club v Morton* (n1), 752 (Douglas J, dissenting).

(UNEP).⁴ The Declaration includes 26 Principles and 109 Recommendations, forming the basis of a Plan of Action for international environmental progress. One noteworthy aspect of the Conference documents is their emphasis on protection of forests and forest management.⁵ This thread of particular concern for forests has run throughout international environmental discourse and action since the Stockholm conference.

At the 1992 UN Conference on Environment and Development (the Earth Summit) in Rio de Janeiro, the 172 attending states adopted Agenda 21 and the Rio Declaration, along with the *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* (generally known as the *Statement of Forest Principles*) in order to govern the sustainable management of forests.⁶ In 2000, the UN Economic and Social Council [ECOSOC] set up the International Arrangement on Forests [IAF] as the foundation for the international governance of forests. A central part of the IAF is the UN Forum on Forests [UNFF], whose announced primary aim is ‘the management, conservation and sustainable development of all types of forests and to strengthen long-term political commitment to this end’.⁷ The *Non-Legally Binding Instrument on All Types of Forests* was adopted in 2007 by the UNFF and in turn by the General Assembly, and was renamed in 2015 as the *United Nations Forest Instrument*.⁸ These various instruments form a framework of counsel and aspiration for proposals and

⁴ *Report of the United Nations Conference on the Human Environment*, Stockholm 5–16 June 1972, A/CONF.48/14/Rev.1, <https://documents.un.org/doc/undoc/gen/n17/300/05/pdf/n1730005.pdf> (accessed 1 October 2024). For background to the conference and an index to its documents, see <https://www.un.org/en/conferences/environment/stockholm1972> (accessed 1 October 2024).

⁵ *Report of the United Nations Conference* (n4), esp. Recommendations 25–28.

⁶ *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, 1992, A/CONF-151/6-E, <https://digitallibrary.un.org/record/144461?v=pdf> (accessed 1 October 2024). For background and documents to the Rio Summit, see <https://www.un.org/en/conferences/environment/rio1992> (accessed 1 October 2024).

⁷ For details of the work of the Forum, see <https://www.un.org/esa/forests/index.html> (accessed 1 October 2024).

⁸ See respectively the *Non-Legally Binding Instrument on All Types of Forests*, 2nd Comm, 62nd session, Agenda Item 54, UN Doc A/C.2/62/L.5 (22 October 2007), and United Nations General Assembly, Resolution adopted by the General Assembly on 22 December 2015, A/RES/70/199, Seventieth session, Agenda Item 20 [UN Forest Instrument] Article 3, <https://documents.un.org/doc/undoc/gen/n15/450/10/pdf/n1545010.pdf> (accessed 1 October 2024).

programmes at the national, regional and international levels, guiding states to similar commitments on forests.⁹

A specific emphasis on forests also extends through deliberations in the sphere of international humanitarian law, which is my particular concern in this article. The updated Red Cross *Guidelines on the Protection of the Natural Environment in Armed Conflict* of 2020 note under Rule 23: ‘For States party to Protocol III to the Convention on Certain Conventional Weapons, it is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons, except when these are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.’¹⁰ This caution to states is repeated in the 2009 UNEP report, *Protecting the Environment during Armed Conflict, An Inventory and Analysis of International Law*.¹¹ In fact, the UNEP report traces the provenance of public concern about the environment during conflict as being related to damage to forests, noting:

[It] first peaked during the Viet Nam War. The use of the toxic herbicide Agent Orange, and the resulting massive deforestation and chemical contamination it caused, sparked an international outcry leading to the creation of two new international legal instruments. The Environmental Modification Convention (ENMOD) was adopted in 1976 to prohibit the use of environmental modification techniques as a means of warfare. Additional Protocol I to the Geneva Conventions, adopted in the following year [1977], included two

⁹ A major obstacle to successful monitoring and compliance in this area has been identified by various bodies and writers as difficulties around sovereignty: see for example Klaus Bosselmann, ‘Environmental Governance: A New Approach to Territorial Sovereignty’ in *Environmental Ethics and Law* ed Robert J Goldstein (Ashgate, 2004) 293–313.

¹⁰ International Committee of the Red Cross, *Guidelines on the Protection of the Natural Environment in Armed Conflict* (2020), www.icrc.org/en/publication/4382-guidelines-protection-natural-environment-armed-conflict (accessed 1 October 2024). A useful discussion of the context and substance of the 2020 Guidelines is Helen Obregón Gieseken and Vanessa Murphy, ‘The Protection of the Natural Environment under International Humanitarian Law: The ICRC’s 2020 Guidelines’ *International Review of the Red Cross* 105.924(2023) 1180–1207.

¹¹ United Nations Environment Programme, *Protecting the Environment during Armed Conflict, An Inventory and Analysis of International Law*, November 2009, <https://www.unep.org/resources/report/protecting-environment-during-armed-conflict-inventory-and-analysis-international> (accessed 1 October 2024).

articles (35 and 55) prohibiting warfare that may cause ‘widespread, long-term and severe damage to the natural environment’.¹²

The 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects* (usually referred to as the Convention on Certain Conventional Weapons [CCW]) draws on the stipulation of the two Additional Protocol I articles as to what is prohibited warfare with regard to the environment.¹³ The CCW Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons repeats that ‘It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons, except when these are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.’¹⁴ Articles 35(3) and 55 are the first norms of international humanitarian law to codify environmental protection in the course of armed conflict.

A specific solicitude for forests in various provisions of international law, with an emphasis on protection of trees in particular, is usually presented in explanatory statements within a general context of the criterion of their usefulness in maintaining the broader environment for human use. Indeed, central reference to the continued sustainability of human uses is common throughout international discussions of the protection of the environment more broadly. However, there is another much older strand protective of trees in the law of armed conflict, providing a basis for the force of *legal* claims in regard to forests. This strand grew out of discussions by philosophers and historians about the law of war, rather than being reflective of a more general environmental concern. These discussions mark out a separate path in the evolution of measures for the protection of forests, which leads more directly to a consideration of trees and forests with ‘interests’ of their own,

¹² UNEP, *Protecting the Environment during Armed Conflict, An Inventory and Analysis of International Law*, November 2009, <https://www.unep.org/resources/report/protecting-environment-during-armed-conflict-inventory-and-analysis-international> (accessed 1 October 2024).

¹³ *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, Geneva, 10 October 1980, UNTS, vol. 1342 p. 137, <https://treaties.un.org/doc/Publication/UNTS/Volume%201342/volume-1342-I-22495-English.pdf> (accessed 1 October 2024).

¹⁴ *CCW Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons* (Protocol III), Geneva, 10 October 1980, Article 2.4, <https://treaties.un.org/doc/Publication/UNTS/Volume%201342/volume-1342-I-22495-English.pdf> (accessed 1 October 2024).

interests that in some sense are capable of being voiced and might be heard in legal forums of binding law.

THE SPEAKING TREES OF WAR

This separate path is often traced back via Hugo Grotius to a passage in *Antiquities of the Jews*, by Flavius Josephus [henceforth, Josephus]. After his defeat and enslavement by the Romans, Josephus (37 CE–100 CE) wrote as a historian in residence with the Emperor Titus, chronicling the Jewish revolt against the Romans as well as broader Jewish history. His *Antiquities of the Jews*, written around 92 CE, chronicles Jewish history, constitutions and mores in detail. In discussing Mosaic political organisation in the *Antiquities*, Josephus refers to the proper waging of war, his advice being, for example:

When you have pitched your camp, take care that you do nothing that is cruel. And when you are engaged in a siege; and want timber for the making of warlike engines, do not you render the land naked by cutting down trees that bear fruit, but spare them, as considering that they were made for the benefit of men; *and that if they could speak, they would have a just plea against you, because, though they are not occasions of the war, they are unjustly treated, and suffer in it, and would, if they were able, remove themselves into another land.* When you have beaten your enemies in battle, slay those that have fought against you; but preserve the others alive, that they may pay you tribute, excepting the nation of the Canaanites; for as to that people, you must entirely destroy them [italics added as emphasis].¹⁵

Josephus here states an argument for the protection of trees as resting first in their usefulness to men, at least of those trees that bear fruit for our sustenance: ‘spare them, as considering that they were made for the benefit of men’. Josephus is drawing on a passage in chapters 19–20 of the Book of Deuteronomy, which concerns the establishment of the cities of refuge in the wake of conquest, as well as the conduct of war.

The Biblical passage (Deuteronomy 20:19–20) concludes:

¹⁵ Flavius Josephus, *Antiquities of the Jews* in *Works* trans William Whiston (John E Beardsley, 1895), 4.8.42 (299); also available with notes at Perseus Digital Archive, <https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0146%3Abook%3D4%3Asection%3D299> (accessed 1 October 2024).

When thou shalt besiege a city a long time, in making war against it to take it, thou shalt not destroy the trees thereof by forcing an axe against them: for thou mayest eat of them, and thou shalt not cut them down (for the tree of the field is man's life) to employ them in the siege:

Only the trees which thou knowest that they be not trees for meat, thou shalt destroy and cut them down; and thou shalt build bulwarks against the city that maketh war with thee, until it be subdued.

Josephus however proceeds by adding an argument as to the *justice* of the plea of trees to be spared, that is, what they would invoke 'if they could speak' of their plight.

The context of this topic in Josephus concerns the situation of a lengthy siege,¹⁶ and his advice is not explicitly presented as an injunction about how trees should be approached and addressed – and listened to – in other circumstances. In the scholarly literature there is also a great deal of dispute about the exact meaning and significance of Josephus' discussion, in part involving analysis of the terms used and their relation to ancient traditions.¹⁷ However, for the purposes of this article, the most striking sentence of Josephus' passage is the pleading of the suffering trees, who 'though they are not occasions of the war, they are unjustly treated, and suffer in it, and would, if they were able, remove themselves into another land'.

This image of an inanimate but animated tree, pleading for justice in a situation in which it had no 'say' and played no part in its onset, reappears in the 1625 work of Grotius, *De iure belli ac pacis* (*On the Rights of War and Peace*). In Book III of this work, Grotius notes the passage from Deuteronomy in a chapter entitled 'Concerning Moderation in regard to the spoiling the Country of our Enemies, and such other Things'.¹⁸ The chapter explores the rights of those waging war to take

¹⁶ And perhaps only to the siege of the cities of Canaan, as cautioned in a notation to Hugo Grotius, *The Rights of War and Peace*, 3 vols, ed Richard Tuck (Liberty Fund, 2005 edn) Book III, chapter xii, 1459.

¹⁷ See for example Jacob L Wright, 'Warfare and Wanton Destruction: A Reexamination of Deuteronomy 20: 19–20 in Relation to Ancient Siegecraft' *Journal of Biblical Literature* 127.3 (Fall 2008); Nili Wazana, 'Are Trees of the Field Human? A Biblical War Law (Deuteronomy 20:19–20) and Neo-Assyrian Propaganda' in *Treasures on Camels' Humps: Historical and Literary Studies from the Ancient Near East Presented to Israel Ephcal*, ed Mordechai Cogan and Dan'el Kahn (Hebrew University Magnes Press, 2008), 274–295; Michael Avioz, *Legal Exegesis of Scripture in the Works of Josephus* (Bloomsbury Publishing, 2021), 112–113.

¹⁸ Hugo Grotius (n16), Book III, chapter xii, 1457–1474. I owe this reference to Joanne Pemberton, and am grateful for her emphasis on its poignancy.

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and/or destroy property of the enemy, and considers the limits placed on belligerent action towards persons and things by principles of necessity and proportionality. Throughout this discussion, the contributions of various authors on the permissibility of cutting down trees are noted by Grotius. For example, Philo of Alexandria (20 BCE–50 CE) is cited as quoting Moses to the effect that the reason for the prohibition on cutting down trees is not only the delight we take in (eating) their fruits. Philo had praised the sensibility of Moses in these terms:

But MOSES goes farther: He even forbids wasting the Lands of an Enemy. He enjoins us to abstain from cutting down the Trees upon them, holding it unjust to discharge the Resentment, with which we are animated against Men, upon innocent Things...

Nothing of that Kind [plants and trees] is at War with us: On the contrary all such Things are at Peace, and conduce to our good. Fruit Trees especially and cultivated Plants are very necessary to us, as their Fruits serve for our Nourishment, or something equivalent to it. We ought not therefore to make War upon what neither would nor could do us any Hurt. We ought not to cut down, burn, or root up Things, which Nature herself takes care to form and raise by the Waters with which she moistens them, and the Temperature of the Seasons, which she regularly brings on, in order that each revolving Year should pay tribute to Men, as to so many Kings. That wise and good Mother gives perpetual Force and Vigour not only to Animals, but Plants, especially such as are cultivated, that require the greatest Care, and are not so fruitful as those that are wild [italics in original].¹⁹

Grotius reads the divine provisions here as allowing the cutting down of wild and unfruitful trees for the purpose of ‘Fortifications and Engines of War’, but he counsels that those trees bearing fruit should be preserved, with the law (Torah) ‘giving this Reason, because Trees cannot, as Men may, rise up in Arms against

¹⁹ Hugo Grotius (n16), Book III, chapter xii, fn 1459–1460. The reference to a ‘wise and good Mother’ seems to be an overly free translation here: see the passage in its original setting in Philo, *De Humanitate* in *Works* vol. viii trans. F.H. Colson (Cambridge: Harvard University Press, Loeb Classical Library, 1939), 150–156 at 155. Note that in 2009 the United Nations proclaimed 22 April as International Mother Earth Day, and on that date in 2010 the World People’s Conference on Climate Change and the Rights of Mother Earth was held in Bolivia to consider a Universal Declaration of the Rights of Mother Earth (see <https://pwccc.wordpress.com/programa/>).

us.²⁰ I would read this as referring to the helplessness of trees in not having the capacity to strike back at their ‘attackers’.

Philo had provided a somewhat different version of the pleading of the trees from that of Josephus. Grotius notes Philo’s rendering of the injunction: but as Grotius notes, Philo in this case had done so by introducing *the Law* as evincing a care for those things that cannot, ‘as Men may, rise up in Arms against us.’ As Grotius continues:

Which *Philo*, by a Parity of Reason, extends also to Fruitful Fields; and by a pathetic Fiction introduces the Law itself thus speaking to those who ought to observe it. *Why are you angry with Things inanimate, particularly those that are mild, and yield grateful Fruit? Do they, like Men, discover any hostile (or disobliging) Intentions against you? Do they deserve to be entirely rooted up, for what they do, or threaten to do against you? But they are very beneficial to the Conqueror, and afford a large plenty of Things immediately necessary, and even contribute to our Pleasures; Men do not only pay Tribute, but even Trees, and that of more Value in their proper Seasons, and also such as Man cannot live without* [italics in original].²¹

It is at this point in his analysis that Grotius quotes from Josephus: ‘And *Josephus* to the same Purpose says: If Trees could speak, they would cry out, and reproach us with Injustice, for making them suffer the Punishment of War, who were no Occasion of it.’ Grotius concludes, ‘And hence it is, in my Opinion, that the *Pythagoreans* have derived their Maxim, *That we ought not to destroy or hurt a cultivated Plant or Fruit-Tree* [italics in original].’²²

Grotius’ exploration of the status that is and/or should be accorded to trees in belligerent conduct of armed men against each other raises an unresolved question as to the basis of the reasoning by philosophical and theological friends of the trees. The distinction made between fruit-bearing trees and the rest in terms of their relative vulnerability to being rightfully cut down does align with a distinction in their relative usefulness to human life and lives. However, there does not seem to be any solid basis made out in these various passages in terms of the virtue and sentiment of justice for making a distinction between the fruit-bearers and the rest. It seems implausible that wild trees would (or do) speak in a different voice from

²⁰ Hugo Grotius, *The Rights of War and Peace*, 3 vols, ed Richard Tuck (Indianapolis: Liberty Fund) Book III, chapter xii, 1459.

²¹ Hugo Grotius, *The Rights of War and Peace*, 3 vols. ed. Richard Tuck (Indianapolis: Liberty Fund) Book III, chapter xii, 1459–1460.

²² Hugo Grotius (n16), Book III, chapter xii, 1461.

the domesticated about being unjustly treated and made to suffer in wars they had not occasioned. Implausible also that wild trees are more, or less, able to ‘remove themselves into another land’ than fruit trees. An argument for an exceptional status of fruit trees in terms of justice rendered to them seems at first reading to be precarious.

In Grotius’ account of the standing of trees, there do seem to be the tentative makings of a claim about the unique ‘friendliness’ to men of cultivated and fruit trees, as evidenced in their offering of ‘a large plenty of Things’ for human lives and even for our pleasure. Such a friendliness would mandate a kind of reciprocity between men and trees, but only certain trees. However, Grotius seems to slip out of this quandary by invoking Porphyry’s extension of the requisite largesse to ‘all Beasts serviceable to Husbandry’ – and then immediately calling on Talmud writings and Hebrew interpreters as ‘declaring that *this Law ought to reach to every Thing that may be destroyed without Cause*, as the burning of Houses, the spoiling of Eatables and Drinkables [italics added for emphasis].’²³ That is, in this short passage, the rationale for the treatment of trees in war is assimilated by Grotius to a broader prohibition of *any* destruction ‘without Cause’. Both the special usefulness of trees to men, and the specific voice of arboreal justice, become more ornamental than crucial to questions of *jus in bello*. In this context, ‘cause’ seems to be allied to general considerations of necessity and proportionality, where ‘necessity’ means ‘only what is necessary’, not ‘whatever is necessary’ (a distinction on which Joanne Pemberton is appropriately insistent).

The shift in Grotius’ discussion to the notion of ‘without cause’ as a more general prohibition on belligerent conduct towards *any* creature or thing is also accompanied by a subtle but decisive shift in the evaluation of the particular wrong at stake in violations of the Law. Throughout his discussion, Grotius remarks on what such violations say about their perpetrators: it can be said that these violations ‘speak’ of the anger and the cruelty of men who commit them. Take, for example, Grotius’ reiteration of the voice of the Law to men on behalf of the trees in Philo’s ‘pathetical Fiction’: ‘*Why are you angry with Things inanimate, particularly those that are mild, and yield grateful Fruit? Do they, like Men, discover any hostile (or disobliging) Intentions against you?*’²⁴ This plaintive questioning by the Law

²³ Hugo Grotius (n16), Book III, chapter xii, 1461. For different assessments of Grotius’ expertise and accuracy in the interpretation of Jewish materials, see Phyllis S. Lachs, ‘Hugo Grotius’ Use of Jewish Sources in *On the Law of War and Peace*’ *Renaissance Quarterly* 30.2 (Summer 1977) 181–200; J Meijer, ‘Hugo Grotius’ Knowledge of Hebrew’ *Histórica Judaica* 14 part 1 (1952) 133–144; AW Rosenberg, ‘Hugo Grotius as Hebraist’ *Studia Rosenthaliana* 12.1/2 (July 1978) 62–90.

²⁴ Hugo Grotius (n16), Book III, chapter xii, 1460, as cited above.

locates the wrong not so much in the harm done to the tree, but in a fault of character in the perpetrator. It is unseemly to rouse oneself to anger (or resentment) to such a degree as to mis-direct it ‘without Cause’ in this way. In Grotius’ account, there seems to be something almost comical in directing the fury of anger against inanimate things in a way that does not befit a man, as also being something like ‘extream Madness’, which it resembles in the unmanly discomposure it both betrays and exacerbates.

These considerations as to how the conduct of war reflects on the character of belligerents underlie the comments of Grotius not only in regard to trees, but throughout his chapter ‘Concerning Moderation in regard to the spoiling the Country of our Enemies, and such other Things’, which is concerned with what is permitted and what prohibited in the ‘wasting’ or destruction of such other things as buildings and monuments. For example, in this context, Grotius writes, ‘What I have said of sacred Things, the same may also be understood of Sepulchres, and even of Monuments that have been erected in Honour of the Dead. For even those (tho’ the Law of Nations hath not exempted them from the Fury of the Conqueror) *cannot be violated without Breach of common Humanity* [italics added for emphasis].’²⁵ In other words, the wrong of attacks on inanimate things more broadly is now no longer primarily located in the damage done to those things and the impairment of their uses for human sustenance. Rather, the *wrong* lies in the flawed character of the perpetrator, with that character implicated further in a breach not simply of individual humanity, but of a *common* humanity. The voice of trees now becomes more like a reminder to men of who they are, recalling them to what men should keep ‘in mind’ about themselves when waging war.

In this way, the clearing opened by the trees speaking of their suffering in the wars of men and pleading for justice on their own account is quickly closed again, albeit in the cause of recognition of a ‘common humanity’ by their attackers. It is also hardly necessary to add that the cautions and warnings made by Grotius and those whom he cites are rarely if ever heeded in battles or their aftermath.

THE IMPORTANCE OF BEING SERIOUS ABOUT SPEAKING AND STANDING

It might appear rather precious, if charming, to speak of the voice of inanimate things, even in the conditional of a ‘pathetical fiction’ (ie ‘*if* they could speak, they would say...’). However, it is by no means as amusing as it might seem. Philo, for example, writes about how the virtues ‘speak’ to us, as well as about the (loudly misleading) voice of pleasure speaking to our bodies. In a short work on such

²⁵ Hugo Grotius (n16), Book III, chapter xii, 1470.

topics of virtue, Philo writes of how inanimate things can speak to us with as much liveliness and power (animation) as other persons do:

... as I said before, things holy in virtue of their essential goodness cannot but through their very nature have speech for us, though we pass them by in silence,... For neither do sun and moon need an interpreter, because their rising by day or night fills the whole world with light. Their shining is a proof that needs no further witness, established by the evidence of the eyes, an evidence clearer than the ears can give.²⁶

Philo's understanding of trees speaking is embedded in narratives of virtue to which, for example, the 'Tree of Life' is central. Being a tree is a very serious matter indeed in Philo's theological explorations and cosmological speculations, and within that context, a speaking tree does not seem an implausible figure at all. However, the modern institution and practice of law as secular science appears to rule out theology and its language as an appropriate basis of legal reasoning or interpretation, leaving us with the difficulty of finding another way to place inanimate objects in the courtroom, and to hear what they say as a claim of a legal wrong with a remedy. Justice Douglas does point out that there are many occasions on which the law has long been comfortable with assigning or accepting the legal personality of inanimate objects, as for example in admiralty and maritime law.²⁷

Canvassing the 'voice' of plant life or even of living animal creatures can seem unsettling if we take the notion as anything much more than a fiction, a dramatic conceit or a poetic 'metaphor'. Although the dissent of Justice Douglas in the *Sierra Club* case is more well-known, Justices Brennan and Blackmun also filed dissenting opinions. Justice Blackmun concluded his opinion by citing John Donne's 'older and particularly pertinent observation and warning' in the familiar passage from *Devotions* xvii, 'No man is an Iland'.²⁸ Donne's poem is cited by Justice Blackmun as a *legal argument* to counter the majority's reliance on de

²⁶ Philo, *On Abel and the Sacrifices Offered by Him and by Cain* in *Works* 12 vols. (Cambridge: Harvard University Press Loeb Classical Library, 1929), vol 2 trans FH Colson and GH Whitaker, 87–195, VI.34. This passage on seeing the voice of the sun or moon is reminiscent of the synaesthetic joviality in *A Midsummer Night's Dream* v.1, in which Bottom (acting as Pyramus) cries, 'I see a voice. Now will I to the chink/To spy an I can hear my Thisbe's face.'

²⁷ *Sierra Club v Morton* (n1), 741–743 (Blackmun J, dissenting).

²⁸ *Sierra Club v Morton* (n1), 760 (Blackmun J, dissenting).

Tocqueville's warning on the expansion of judicial review.²⁹ Perhaps however, the citing of the poem is not best understood as an argument in a strict sense, but rather as forming a basis on which legal argumentation may (preferably) proceed – as pointing to the entanglement of human persons with other creatures and things as the context of legal resolution and settlement.

Just as 'person' is not a natural kind but a legal stipulation for certain purposes, so according to Justice Douglas can we recognise different forms of nomination as person, with standing to speak and to be heard:

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes – fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger – must be able to speak for the values which the river represents and which are threatened with destruction.³⁰

That is, the stress here is on a plaintiff speaking from the position not only of an individual but of a *relationship* within a 'field' of disparate (legal) persons, and in turn, speaking of and to that relationship. The recognition of relations in terms of standing involves re-envisioning ourselves as humans with greater humility, and demands that we admit to legal consideration the materiality of the interests of the creatures of the river – or those of the forest. Along these lines also, it is likely crucial to consider trees as creatures of the forest, rather than consider forests as constituted by there being a lot of trees in a particular place. In this context, Eduardo Kohn writes of:

... our [humans] failure to recognize the ways a forest is actually something greater than the sum of its individual parts. A 'forest,' then, is not just a human abstraction we impose on a world supposedly made up exclusively of so many 'trees.' Rather, the general, or abstract, quality of a forest is an emergent

²⁹ See *Sierra Club v Morton* (n1), 740–741.

³⁰ *Sierra Club v Morton* (n1), 743 (Douglas J, dissenting). In this context, I have found both helpful and challenging, the work of Eduardo Viveiros de Castro, Philippe Descola and Eduardo Kohn, as also Claude Lévi-Strauss' *Mythologiques*.

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property that dense, semiotic, self-organizing living systems intrinsically manifest. That is, a forest qua forest manifests thought and is not just the product of our thinking.³¹

As I noted above, Grotius had invoked ‘*common Humanity*’ as restraint on ‘the Fury of the Conqueror’ against inanimate things in armed conflict. What this common humanity requires of us is not merely recognising other human persons as ‘brothers’,³² but might be as simple as allowing other creatures to speak of their wrong in forums of law that are attuned to recognise their standing to be ‘heard’ – whether they and their evidence are heard by our ears or by our eyes, as Philo notes. The very least that can be asked of the law is that their voice not be stilled in our thinking and action towards them.³³

³¹ Eduardo Kohn, ‘Forest Forms and Ethical Life’ *Environmental Humanities* 14.2 (July 2022) 404. See also Eduardo Kohn, *How Forests Think: Toward an Anthropology beyond the Human* (University of California Press, 2013)

³² Article 1 of the Universal Declaration of Human Rights refers to ‘a spirit of brotherhood’ among all human beings, which should be animated in their actions to one another.

³³ See *Sierra Club v Morton* (n1), 749 (Douglas J, dissenting): ‘The voice of the inanimate object, therefore, should not be stilled.’