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# THE CONSERVATION OF MIGRATORY ANIMALS THROUGH INTERNATIONAL LAW

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Wildlife is an integral part of the natural resources of a nation. Full sovereign rights over all natural resources under present conditions of international law leave states free to use or misuse their wildlife as they wish, subject only to any international agreements that may have been concluded on the matter.

The misuse of sedentary animal populations in the absence of adequate conservation measures and regulations will not normally affect other sedentary populations of the same species in other countries.

Migratory animals present a completely different problem. Migration can be defined as the periodic movement of animals between alternate areas which they inhabit at different times, one area being that in which they breed. Many species perform such migrations over considerable distances and cross international borders in the course of their journey.

For legal purposes, migratory animals can be divided into two groups: interstate migrants—birds and certain species of fish which are at all times during their life cycle under the jurisdiction of at least one of the states in their range;<sup>1</sup> and international migrants—marine animals such as seals, turtles and some fish, which migrate from the high seas to the territory of a coastal state to breed.

It is obvious that if conservation measures are to be effective they must be over the whole range of a migratory species, requiring agreement between all the countries concerned; an international problem whose solution must be found through international law.

## INTERSTATE MIGRATIONS

Many species of birds are migratory, but there may be a great difference from one species to another in the extent of the migration. Some species migrate several thousand miles. This is particularly true of species of the northern hemisphere which winter in temperate countries in the southern hemisphere. Each species has its own migration pattern, the dates of migration for a particular species being

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1. Many birds cross the open sea in the course of their migration. They are obviously not under the jurisdiction of any state at that time. Since they are not likely to be hunted either, this situation for practical purposes can be disregarded.

remarkably constant. Birds tend generally to migrate in flocks, halting on their way in suitable habitats from one to several days at a time. Ducks and geese will stop for several weeks during autumn migration while they shed their feathers and molt.

Some striking examples of long-distance migration are the Tahiti curlew which breeds in the northeastern United States and winters in the South Pacific; the European swallows which winter in southern Africa; and the many Siberian birds that cross the Himalayas on their way to India, while waders from eastern Siberia winter in Australia.

Certain species of fish which have spent their adult life in the sea go up the rivers to spawn. These are salmon, sturgeon, and shad. When they go up an international river such as the Rhine<sup>2</sup> or the Danube, they find themselves in a situation identical, legally speaking, to that of migratory birds since, as they proceed on their journey, they come under the jurisdiction of several successive states. Their conservation will, therefore, require an agreement between all the states concerned, as well as additional measures in the high seas.

Migratory birds and anadromous fish can be considered the objects of successive ownership on the part of all states exercising jurisdiction along their migration route, which means that when the migrants are on its territory, each one of the states concerned is free to collect as many animals as it wishes without taking into consideration the interests of the other states. A state is quite entitled to destroy large areas of essential habitat of a migratory species, causing a distortion in the migration pattern or even the very extinction of that species, possibly causing major damage to other states. The principle of successive ownership<sup>3</sup> based on territoriality and national sovereignty over natural resources can not apply to migratory animals. No state will take the pains to carry out extensive conservation measures when such measures are likely to be nullified by the absence of similar action on the part of the other states concerned. No country will feel inclined to limit shooting or fishing of migratory birds or fish if other countries do not impose similar restrictions.

Migratory populations need to be considered as constituting a joint resource of all the states along the migration route, which those states would mutually conserve or exploit. This principle, which is already implied in some international agreements dealing with the

2. The Rhine was a salmon river. In 1885 a Convention between Germany, the Netherlands and Switzerland reproduced in *Legislative Texts & Treaty Provisions*, U.N. Legislative Series ST/Leg/Ser. B/12, was concluded in order to regulate salmon fishing. Because of pollution the salmon runs have disappeared from the Rhine.

3. Ownership must be understood here as title. True ownership exists in socialist countries when all wildlife is the property of the state.

conservation of migratory species such as the Fraser River Sockeye Convention<sup>4</sup> should become the basis for all future treaties of that kind. Joint ownership would mean that all states concerned would have an equal interest in the preservation and rational management of a species, with research and management costs as well as benefits being allocated among the various parties according to a formula arrived at by negotiation.

A distinction should be drawn here between species which are harvested for commercial purposes or by sportsmen, and all other species which are completely protected. For these completely protected species, treaties based on the principle of joint ownership would harmonize national regulations, organize and coordinate research, prohibit international trade of protected animals and their products, and establish along the migration routes adequate reserves of suitable habitat. In some cases, it may not be easy to persuade all the countries concerned to join such an agreement. Several European countries presently allow the killing of birds of prey and the netting of large numbers of small song birds during their migration. The very existence of an international convention may go a long way toward helping national public opinion to exercise enough pressure on the government concerned to make it adhere to the convention. Special attention would have to be devoted to species threatened with extinction as full cooperation between the different wildlife administrations concerned is essential if these species are to survive. An exemplary case is that of the American whooping crane where excellent collaboration, based on the 1916 Anglo-American Bird Treaty, has been long established. Another example, providing complete protection for certain species of sturgeon which are at present seriously threatened, can be found in the Danube Fisheries Convention.

Joint ownership of exploited animal populations should have as its primary objective the establishment of management practices designed to secure the maximum sustainable yield, which can be achieved by the conclusion of treaties setting up the appropriate machinery and organizing the allocation of the resource between the various partners. The best example of such a treaty is still the Fraser River Salmon Convention of 1940. Sockeye salmon from the North Pacific go up the Fraser River system in Canada where they spawn. Before they get into Canadian waters, they have to pass through American waters along the coast of the state of Washington. A joint commission set up under the Convention is empowered to

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4. Convention between Canada and the U.S. for the Protection, Preservation, and Extension of the Sockeye Salmon Fisheries in the Fraser River System, signed May 26, 1930, CLXXXIV L.N.T.S. 305.

take regulatory action, including opening and closing of fishing periods and areas. It ensures that the catch is equally shared between the nationals of each country. It carries out the necessary research and makes recommendations on all matters which may affect the salmon runs, such as dams and other obstructions, as well as water pollution. The Sockeye Convention, which was extended in 1957 to another species, the pink salmon, has been a success. It must be realized, however, that it applies to two states only and to a relatively limited area. Similar treaties might be concluded with respect to other international resources such as migratory game birds. Such treaties would have to cope with situations which would be materially more complicated although, legally speaking, they would not differ much from that of the Sockeye. In addition to provisions on research, management, control of trade and setting up of reserves, these treaties would have to provide machinery for regulation of hunting, for deciding on open and closed seasons, and on the basis of research establish the total number of birds which may be harvested in a given year.

#### EXISTING BIRD TREATIES—NORTH AMERICA

The most successful bird treaty to date has been the Convention signed in 1916 between the United States and Great Britain (acting for Canada).<sup>5</sup> This treaty applies to migratory game birds, small insectivorous birds and other non-game birds mainly water birds, excluding birds of prey. The harvesting of non-game birds listed by the convention is prohibited at all times. A long closed season protects game birds. The taking of nests or eggs of all birds covered by the convention, game or non-game, is forbidden. The export or international traffic of protected birds during the closed season is prohibited. There is no provision, however, for the setting up of reserves or habitat preservation.

This treaty was supplemented in 1936 by another, signed between the United States and Mexico<sup>6</sup> which extended southward the protection already granted to North American birds. In the 1936 treaty there is an article providing for the establishment of reserves, making it an international obligation for the United States and Mexico, but exempting Canada.

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5. Convention with Great Britain on the Protection of Migratory Birds, Aug. 16, 1916, T.S. 628.

6. Convention with Mexico on the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, T.S. 912.

These two treaties have constituted the basis for all the federal migratory bird legislation which has been enacted in the three countries concerned. The treaties do not provide for joint commissions of advisement and enforcement, but in spite of this shortcoming, excellent cooperation exists between the wildlife administrations concerned. A number of ad hoc arrangements have made it possible to bring into effect many sound conservation measures; for example, the bag limit imposed on duck shooting in the United States is dependent on duck production in the Canadian Prairie area. Bird counting in Canada is therefore essential to determine what the bag should be, it being obvious that conservation measures in Canada will affect directly the number of birds which can be harvested in the United States. Although the treaty did not contemplate such developments, it can be said that the present arrangements derived from the treaty, informal as they may be, provide for a determination of the maximum sustainable yield of duck stocks as well as for a certain allocation of the resource.

Successful as these arrangements have been, an up-dated revision of the treaty should provide for a "well-financed internationally coordinated action program built on a solid foundation."<sup>7</sup> A further extension southward of the area covered by the present agreements would be most desirable in order to give adequate protection to birds that migrate to Central or South America.

#### EXISTING BIRD TREATIES—EUROPE

Many birds in Europe and Northern Asia migrate to Southern Europe, Africa, India, Southeast Asia, and Australia. The majority of waterfowl breed in Scandinavia, Russia, and Siberia. In the winter, however, they move to the lakes and deltas of dozens of different countries. Bird conservation on the old continent should be an international matter.

As early as 1902 a first convention on the protection of birds was signed by a number of European nations. It applied to both migratory and non-migratory species, but only to those which were deemed to be "useful to agriculture." Birds of prey and other so-called "harmful" birds received no protection. The convention prohibited large scale destruction methods such as the netting of song birds, and set as a target the prohibition of all taking of "useful" species. Although still in force, this treaty has been largely ineffective. Netting is still going on in some of the signatory nations. A new

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7. Evans, *Beyond National Boundaries in Waterfowl Tomorrow* 712 (USDI 1964).

and improved convention was signed in 1950.<sup>8</sup> It lays down the principle that all birds are to be protected, with certain exceptions; it regulates hunting methods and provides for a closed season which is designed to protect wildfowl during the breeding migration in the late winter and early spring. To date the treaty has been ratified by only seven states, having met with heavy opposition from many vested interests.

Presently there is no comprehensive system in Europe for the preservation of migratory birds. A new convention is desperately needed, but the difficulties seem enormous. One possibility might be to distinguish between game and non-game birds, providing for the non-game birds, which should be completely protected everywhere, the necessary harmonization of national legislation. The highly complex matter of game birds, geese, ducks and waders in particular, has hardly been considered by governments. A non-governmental organization, the International Wildfowl Research Bureau (IWRB), with headquarters in England, has been able through voluntary contributions to gather considerable information on the status of wildfowl populations along the various flyways, as well as on the numbers wintering in the wetlands of many countries. This could be the basis of future scientific management. On a purely tentative basis the following system could be suggested: each major flyway would be served by a committee composed of representatives of all states within that flyway. The committee would be empowered to coordinate research and to recommend or possibly even decide on the open and closed seasons in the various parts of the area under its jurisdiction as well as on the number of birds which it will allow to be shot at various stages of their migration. A central committee would have to be established to coordinate, when necessary, the activities of the various flyway committees, and perhaps also to make the most important decisions. Provision would have to be made for the setting up of wildfowl habitat reserves along the migration routes. These reserves being essential to the survival of the common resource, they would have to be considered as permanent reserves, and their ecological condition not altered except in very exceptional circumstances and then perhaps only with the assent of the central committee. Reserves would naturally remain under national sovereignty, but they would be subject to a servitude contracted for by international agreement. If a state enjoys a right over wild birds which merely cross its territory at a certain time of year, it seems

8. The International Convention for the Protection of Birds was signed in Paris on October 18, 1950.

logical that other states enjoying the same right should obtain from the first state a commitment that it will preserve the habitat essential to the movements of these birds.<sup>9</sup>

It is hoped that the governments concerned will realize the need for concluding such agreements, for the future of many increasingly important open air leisure activities may well now be at stake.

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9. A draft, Convention on Wetlands of International Importance Especially as Waterfowl Habitat, has been adopted by the International Conference on the Conservation of Wetlands and Waterfowl convened by IWRB at Ramzar, Iran, in February, 1971, and is now open for signature. Its main feature consists of the compiling of a list of wetlands which contracting parties would undertake to preserve. Unfortunately, this provision is drafted in terms which are so weak that this obligation is almost non-existent. The text of this draft can be found in IWRB Bulletin No. 31 (July 1971).