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# Saving the Paper Tiger: Biodiversity as an Irreplaceable Element of Our Common Cultural Heritage

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# Saving the Paper Tiger: Biodiversity as an Irreplaceable Element of Our Common Cultural Heritage

NOTE

Lisa Meissner<sup>†</sup>

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## Abstract

This Note examines the role of international law and human rights in the conservation of global biodiversity as an element of our shared cultural heritage. International instruments like the Convention on the International Trade in Endangered Species of Wild Fauna and Flora and the World Heritage Convention have changed the discourse of international conservation law by connecting natural resources, including animal species, to incentives-based structures in local or regional communities. Such a legal foundation is critical to engaging with evolving international concepts of sustainable development and rural livelihoods protection that promote making biodiversity conservation cognizably valuable to humanity, both tangibly and intangibly. To explore the connection between natural heritage and cultural

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heritage, this Note analyzes international treaties, customary international law, and human rights principles. It draws these three spheres together to conclude that a philosophical integration of law and nature is necessary in the international community to prevent irreparable harm to both our common natural patrimony and ourselves.

## I INTRODUCTION

“On the surface it is a tiger, but it’s made of paper and cannot withstand the wind and the rain.”<sup>1</sup> While Mao Zedong used this analogy to describe American imperialism during the Cultural Revolution, the proverbial “paper tiger” could today be illustrative of the precarious state of the wild tiger, and of species biodiversity in general. Studies have shown that tigers currently occupy only seven percent of their historic ranges, while Asia’s fourteen tiger-range countries have experienced a dramatic growth in human population, reaching 4.3 billion in 2013.<sup>2</sup> Conservation groups estimate that tigers are being killed at a rate of one per day, primarily as the result of poaching activities, followed by habitat destruction.<sup>3</sup> These external pressures have had an alarming impact on sustainable tiger populations. In India—host to eighty percent of the world’s wild tiger population—tiger numbers have decreased from approximately 100,000 in 1900 to just 2,000 today.<sup>4</sup> The tiger has been a constant “living presence for millions of people in Asia, from Turkey to the Russian Far East, and from India through Southeast Asia to Bali, in the southern tropics of Indonesia.”<sup>5</sup> As numbers indicate, however, wild tigers rank among the top species threatened with extinction in Asia today.<sup>6</sup>

Declining tiger populations reflect a broader symbolic assault on the world’s natural resources. Biological diversity, or biodiversity, loss threatens not only specific species but also the roots of our natural world with extinction. Loosely defined as “the variety and variability among the multitude of plant and animal

<sup>1</sup> Mao Zedong, U.S. Imperialism is a Paper Tiger (July 14, 1956), in 2 THE WRITINGS OF MAO ZEDONG, 1949–1976, at 85, 88 (Michael Kau & John K. Leung eds., 1992).

<sup>2</sup> Eric Dinerstein et al., *The Fate of Wild Tigers*, 57 *BIOSCIENCE* 508, 508 (2007) (seven percent of historic tiger ranges is approximately forty percent less than what they occupied in 1995); 2013 *World Population Data Sheet*, POPULATION REFERENCE BUREAU (Sept. 2013), [http://www.prb.org/pdf13/2013-population-data-sheet\\_eng.pdf](http://www.prb.org/pdf13/2013-population-data-sheet_eng.pdf).

<sup>3</sup> JACQUELINE L. SCHNEIDER, *SOLD INTO EXTINCTION: THE GLOBAL TRADE IN ENDANGERED SPECIES* 69 (2012). In the world, of the nine subspecies of tiger, three are extinct (the Bali, Javan, and Caspian), one is functionally extinct (the South China tiger, with an estimated fifty left in the wild), and the remaining subspecies are critically endangered or endangered (the Amur, Bengal, Indo-Chinese, Malayan, and Sumatran).

<sup>4</sup> Milan Dalal, Note, *Tiger, Tiger Flickering Light*, 31 *B.C. INT’L & COMP. L. REV.* 103, 104 (2008).

<sup>5</sup> Peter Jackson, *The Tiger in Human Consciousness and Its Significance in Crafting Solutions for Tiger Conservation*, in *RIDING THE TIGER: TIGER CONSERVATION IN HUMAN-DOMINATED LANDSCAPES* 50, 50 (John Seidensticker et al. eds., 1999). Five Asian nations—Bangladesh, India, Malaysia, North Korea, and South Korea—have honored the tiger with the title of “National Animal.” *Id.*

<sup>6</sup> See HEMANTA MISHRA & JIM OTTAWAY JR., *BONES OF THE TIGER: PROTECTING THE MAN-EATERS OF NEPAL* 84 (2010); SCHNEIDER, *supra* note 3, at 66.

species and the ecological complexes in which they occur,”<sup>7</sup> biodiversity embodies the processes that make life possible. Biodiversity’s rich and multifaceted nature serves a myriad of essential functions in the contexts of local, regional, and global ecosystems, as well as supporting humankind. The main contributing factor to biodiversity loss is habitat destruction, driven principally by the adverse effects of human activities.<sup>8</sup> Destruction of natural environments affects more than just diversity of the animal species therein; it also affects the cultural diversity of the communities of human beings, primarily minority and indigenous peoples, who live in these landscapes.

Culture is a unique, non-renewable resource. Threats to the preservation of cultural heritage include war, economic development, natural disasters and degradation, tourism, and the loss of natural biodiversity. When natural settings are destroyed, the cultures that depend on those resources for tangible and intangible sustenance will themselves be inevitably and permanently altered. As forests and the species within them disappear, communities are losing the cultural canopy that these environments once provided. What happens when communities cease to have a meaningful connection to the landscape surrounding them?

The precarious state of our global biodiversity may speak volumes—or at least essays—about our status as members of the human species. Biodiversity depletion threatens the whole of humanity with an irreparable harm to our shared natural and cultural heritage.<sup>9</sup> The disappearance of the “paper tiger,” as well as other emblematic species, is indicative of the fragile state of our international community. How can we change our conceptions of international law and human capabilities in relation to the natural world in a way that allows us to maintain both biodiversity and ourselves? When the real tigers of our world become nothing more than shadows on the pages of history, will human beings be far behind?

Part II begins the examination with a review of existing international legal instruments designed to protect and further the conservation of global biodiversity. These include the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Convention on Biological Diversity, and principles of customary international law. It also presents the argument that the model of “World Heritage Species” should be developed as a parallel preservation instrument to the established mechanism of the United Nations Educational, Scientific and Cultural Organization’s (UNESCO) World Heritage List, to underscore the importance of species conservation as a “common heritage of humankind.”

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<sup>7</sup> Tracy Dobson, *Loss of Biodiversity: An International Environmental Policy Perspective*, 17 N.C.J. INT’L L. & COM. REG. 277, 278 (1992).

<sup>8</sup> *Id.* at 287.

<sup>9</sup> “The disappearance of native species is obvious in other ways as well. The town of ‘Wild Yak Gully now has no wild yaks; Wild Horse Sands, no wild horses.’” John Copeland Nagle, *The Effectiveness of Biodiversity Law*, 24 J. LAND USE & ENVTL. L. 203, 219 (2009) (quoting NAT’L ENVTL. PROT. AGENCY, CHINA: BIODIVERSITY CONSERVATION ACTION PLAN 15 (Charlotte Maxey & Julia Lutz eds., 1994)).

Part III presents a discussion of the overlapping realms of environmental protection and human rights, exploring the role that biodiversity conservation plays, if any, in the controversial concept of a human right to a healthy environment. It will also explore the potential links between cultural heritage and natural heritage, and how these two concepts implicate one another and are inseparable within the context of the international community. Subsidiary to this discussion will be an analysis of the rural livelihoods argument for biodiversity protection, which proposes that wildlife conservation and poverty reduction be made mutually supportive for the benefit of all those affected by natural resource exploitation.

Part IV analyzes the connection between cultural and natural heritage and argues that biodiversity forms a part of an intangible cultural heritage, similar to religious traditions or agricultural practices, which provides a defining element in the identities of rural and indigenous communities around the world. Consequently, I will argue for an approach to international development that recognizes cultural heritage as intertwined with a living natural heritage, and that both should be mutually preserved in the overall interest of humanity.

## II PRINCIPLES AND INSTRUMENTS OF INTERNATIONAL ENVIRONMENTAL LAW

While there is no supreme international legislative authority similar to that of domestic legislatures, Article 38(1) of the Statute of the International Court of Justice (ICJ) lists the main sources of international law as treaties, customs, and general principles of law.<sup>10</sup> Principles established through international agreement or the common law are generally understood to have legal standing as principles of customary international law.<sup>11</sup>

### A TREATIES

Treaties enjoy status as accepted practice and are binding under international law. The international community has created several legal instruments to enable environmental conservation, including the Convention on Biological Diversity and CITES. However, states must often look to international organizations for the infrastructure, funding, and other support needed for implementing subsequent domestic programs.<sup>12</sup> As a result, the success of treaty-based conservation projects correlates with both the strength of law enforcement and public support at the local level, as well as with the level of support provided by the international community.

<sup>10</sup> Statute of the International Court of Justice, art. 38, ¶ 1. Judicial teachings and the teachings of the most highly qualified publicists are listed as subsidiary sources.

<sup>11</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (AM. LAW INST. 1987).

<sup>12</sup> The Nature Conservancy, for example, is active in Yunnan Province, China, and supports ecotourism, operation of a community conservation development fund, and has established a comprehensive fisheries management plan in the endangered black-necked crane's habitat. See Nagle, *supra* note 9, at 226.

## I CITES

By the 1960s, it was evident that several species of animals, including the tiger, would soon become extinct without the adoption of necessary and immediate conservation measures. On that account, in 1973, the representatives of twenty-one nations convened with the goal of “ensur[ing] that international trade in specimens of wild animals and plants does not threaten their survival.”<sup>13</sup> The resultant Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is considered to be one of the most successful international treaties, and is the definitive tool by which endangered species are provided protection on a global scale.<sup>14</sup> Moreover, the substantial growth in membership over the last forty years to 178 signatory parties is indicative of an increasingly pervasive international concern for the conservation of the world’s remaining wildlife species.

CITES has two essential purposes: “first, to reduce the harmful effects of commercial trade on threatened or endangered species; and second, ‘to establish a worldwide system for ensuring that trade in other species is conducted on a sustainable basis for the future.’”<sup>15</sup> CITES does not seek to prohibit all trade in wildlife and its derivatives, rather it seeks to manage it on a sustainable scale. Basically, the treaty advocates strict regulation of trade that would protect species facing extinction so that numbers can improve, while permitting legitimate economic interests in the wildlife trade the opportunity to continue.<sup>16</sup> To accomplish this balance, CITES obligates its member parties to control wildlife imports and exports through self-regulation, on the rationale that individual countries “are and should be, ‘the best protectors of their own wild fauna and flora.’”<sup>17</sup>

As CITES is a voluntary treaty, there are no remedies for non-party nations

<sup>13</sup> Dalal, *supra* note 4, at 107 (quoting *What is CITES?*, CITES.ORG, <http://cites.org/eng/disc/what.php> (last visited Aug. 7, 2015)); *see also* Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

<sup>14</sup> SCHNEIDER, *supra* note 3, at 33. Bahrain, the Maldives and Lebanon were the three most recent signers joining in 2012.

<sup>15</sup> Shennie Patel, Comment, *The Convention on International Trade in Endangered Species: Enforcement and the Last Unicorn*, 18 Hous. J. INT’L L. 157, 163 (1995) (quoting Mollie Beattie, Director of the U.S. Fish & Wildlife Service, Speech at the CITES Ninth Conference of the Parties (Nov. 7, 1994) (transcript on file with Shennie Patel)).

<sup>16</sup> Three appendices lie at the heart of CITES. Appendix I lists those species most severely threatened with extinction and in which commercial trade is entirely prohibited. A listing as “threatened with extinction” takes into consideration population size, geographic range, and potential causes of extinction. Appendix II species are not yet endangered but at risk of becoming so and thus require intervention through stringent trade regulation. Appendix III restrictions are limited to specimens originating in the member state which listed them, and provides a mechanism whereby a party may seek international aid in enforcing its domestic regulation of species not listed in Appendix I or II. *See* CITES, *supra* note 13, arts. 3–5; *see also* SCHNEIDER, *supra* note 3, at 34.

<sup>17</sup> Patel, *supra* note 15, at 204 (quoting CITES, *supra* note 13, pmbl.). This is CITES’ greatest weakness: the spectrum of penalties ranges from a maximum of five years in Spain, to two years in Italy (but twelve if they are connected to the mafia), to a \$100 bond with community service in Brazil. Yet, had CITES been a binding treaty capable of independent enforcement of its provisions, it is unlikely that the majority of current members would have ever signed the treaty, rendering it completely ineffectual for species conservation worldwide.

who violate the spirit and tenets of the treaty.<sup>18</sup> Each member party must therefore develop its own enforcement capabilities and structures of legal adjudication.<sup>19</sup> The success of this formidable endeavor is dependent upon a host of variables including, but not limited to: existing local laws, finances, pervasiveness of political corruption, general public interest, and policing strategies. Discrepancies in available state resources cannot be reconciled by a central enforcement body, and thus CITES requires the states themselves to develop essential enforcement methods centered upon the proper functioning of a permit system,<sup>20</sup> as well as the sufficiency of domestic laws. If these elements are ineffective, the treaty becomes little more than a political nicety, politely asking the international community to observe its tenets without having any means to give its provisions bite.

## 2 CONVENTION ON BIOLOGICAL DIVERSITY

Biodiversity protection formally moved from soft to “semi-binding” law with the 1993 entry into force of the Convention on Biological Diversity,<sup>21</sup> adopted at the 1992 Rio de Janeiro Conference on Environment and Economic Development. Biodiversity lends itself to subjective rather than objective measures, as “the core idea, species richness, is essentially a normative rather than a scientific construct.”<sup>22</sup> As a result, the Convention adopts a higher-level ecosystem management approach to species conservation, rather than tailoring protections to individual species or sites. In its preamble, the Convention stresses the “intrinsic value” of biodiversity and proclaims its conservation to be a “common concern of humankind.”<sup>23</sup> It then proceeds to focus its main regulatory efforts on preserving genetic resources through a three-fold approach: “the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.”<sup>24</sup> These objectives reflect a categorical shift away from the previously dominant conservationist approach towards an incentives-based structure of sustainable use.

<sup>18</sup> SCHNEIDER, *supra* note 3, at 35.

<sup>19</sup> *Id.* at 44.

<sup>20</sup> For a local management authority to actually issue a permit for export the following preconditions must be met:

- (1) the export is not detrimental to the survival of the species;
- (2) the specimen was not obtained illegally in the country of export;
- (3) shipments of live specimens will be under humane conditions; and
- (4) an import permit has been granted by the destination state.

Joonmoo Lee, Comment, *Poachers, Tigers and Bears . . . Oh My! Asia's Illegal Wildlife Trade*, 16 NW. J. INT'L L. & BUS. 497, 503 (1996) (citing DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES 71 (1989)).

<sup>21</sup> Convention on Biological Diversity, art. 1, June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993).

<sup>22</sup> A. Dan Tarlock, *Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management*, 32 TEX. INT'L L.J. 37, 55 (1997).

<sup>23</sup> Convention on Biological Diversity, *supra* note 21, pmb1.

<sup>24</sup> *Id.* art. 1

One of the most important goals of the Convention rests in balancing the conservation and utilization of natural resources. Obligations for each state party include the development of strategies for conservation and sustainable use of natural resources, establishment of protected areas of conservation (reserves), implementation of national conservation incentives, and engagement with groups of people traditionally excluded from resource management.<sup>25</sup> By focusing on the economic concerns, the Convention addresses the underlying causes of biodiversity loss and works to reduce direct pressures on resource exploitation by improving the status of biodiversity in both the local and national markets.

Ultimately, however, the Convention recognizes an explicit right of national sovereignty over the natural resources within a state's territory.<sup>26</sup> Such an approach directly incentivizes states to develop domestic conservation measures in order to take advantage of the inherent economic values of natural resources now recognized in international law.<sup>27</sup> Thus, the Convention, while requiring signatory parties to restore threatened species and take a range of actions to conserve and sustainably use biological diversity, does not impose any specific obligations on the parties to do so.<sup>28</sup>

### III CUSTOMARY INTERNATIONAL LAW

The two-pronged requirement for the formation of customary law requires both state conduct and *opinio juris sive necessitatis* that are in compliance with a rule of law, and not merely with concepts of morality, courtesy, or ceremony.<sup>29</sup> The ICJ has recognized the existence of "obligations of a state towards the international community as a whole" distinct from those that arise between individual nation-states.<sup>30</sup> These are obligations *erga omnes*, which prohibit the use of state territory for acts that may harm other states, such as the spread of transboundary pollution.<sup>31</sup>

Consequently, as more states adopt environmental conservation measures, basic principles of environmental law have been incorporated into customary international law through state practice, multilateral treaties, and judicial decisions. Such internationally recognized norms include the precautionary principle, the polluter-pays principle, and the principle of transboundary harm.<sup>32</sup>

<sup>25</sup> *Id.* arts. 6(a), 7(a), 8(a), 10.

<sup>26</sup> *Id.* art. 3. This right is subject to party states' obligation not to "cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." In other words, the national right to exploit territorially sovereign resources is tempered by the customary international law obligation not to cause transboundary harm.

<sup>27</sup> ULRICH BEYERLIN & THILO MARAUHN, *INTERNATIONAL ENVIRONMENTAL LAW* 93 (2011).

<sup>28</sup> For more limitations of the Convention on Biological Diversity, see Rachele Adam, *Missing the 2010 Biodiversity Target: A Wake-Up Call for the Convention on Biodiversity?*, 21 *COLO. J. INT'L ENVTL. L. & POL'Y* 123 (2010).

<sup>29</sup> *North Sea Continental Shelf (Ger./Den.; Ger./Neth.)*, Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20).

<sup>30</sup> *Barcelona Traction Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 4, 32 (Feb. 5).

<sup>31</sup> *Id.*

<sup>32</sup> Jessica M. Sawyer & Sarah C. Sawyer, Essay, *Lessons from the Mist: What can International Environmental Law Learn from Gorilla Conservation Efforts?*, 23 *GEO. INT'L ENVTL. L. REV.* 365,



Debate has arisen, however, over the precise legal status of many international environmental norms and principles assumed to enjoy binding force as customary international law. For example, assertions about the prohibition on transboundary harm and the precautionary principle that are based on the utilization of texts produced by state and non-state actors, such as courts, intergovernmental and non-governmental organizations, and legal scholars, seem to characterize these norms as “declarative” rather than customary law.<sup>33</sup> However, these ambiguous legal roots still contribute significantly to the process of custom generation, and allow the norms to play an important role in terms of voluntary compliance and in bilateral and multilateral negotiations.<sup>34</sup> The consistent articulation of certain rules in conventional regimes lends support to the argument that such rules have achieved the status of customary international law.<sup>35</sup>

Many critics would argue that biodiversity protection has not yet crystallized into a peremptory international norm for two related reasons. First, it remains an extremely underdeveloped legal regime dependent upon a non-integrated mix of soft law declarations and regional initiatives.<sup>36</sup> Second, it takes place within the evolving framework of the concept of sustainable development. Despite these defects, however, a colorable argument still exists that the prevention of biodiversity loss is at least carving a path towards becoming a principle of customary international law, even if it has not yet reached its final destination. The World Commission on Environment and Development’s Experts Group on Environmental Law, for instance, linked the obligation to cooperate closely with the principle of equitable utilization, stating that, “the duty to provide information may in principle pertain to many factors . . . which may have to be taken into account in order to arrive at a reasonable and equitable use of a transboundary natural resource.”<sup>37</sup> States are therefore under a binding obligation to notify, in-

373 (2011); Alhaji B.M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 GEO. INT’L ENVTL. L. REV. 21, 64–74 (2003).

<sup>33</sup> Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 112 (1995).

<sup>34</sup> For instance, the precautionary principle can play a vital role in identifying when a transboundary environmental impact assessment (EIA) would be necessary and then comprehensively setting out all the environmental risks inherent in a planned project. See Owen McIntyre, *The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources*, 46 NAT. RESOURCES J. 157, 171 (2006).

<sup>35</sup> In *Gabčíkovo-Nagymaros*, the ICJ stated:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed[] . . . Such new norms have to be taken into consideration, . . . not only when States contemplate new activities but also when continuing with activities begun in the past.

*Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, ¶ 140 (Sept. 25).

<sup>36</sup> Tarlock, *supra* note 22, at 51.

<sup>37</sup> EXPERTS GRP. ON ENVTL. LAW OF THE WORLD COMM’N ON ENV’T & DEV., ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS 75 (1987).

form, and consult with neighboring nations regarding domestic actions with the potential to affect shared natural resources.<sup>38</sup> This standard facilitates international cooperation towards the effective application of the equitable utilization principle in environmental law.

Transboundary natural resources do not exist in isolation, but form an integrated whole within which the legal concepts of biodiversity conservation and human development coexist. Likewise, cultural heritage and migratory species—such as the tiger—do not stop at arbitrary national borders. Rather, they exist in a transboundary state themselves. As a result, and consistent with the principles articulated above, species and the communities that utilize them as part of their cultural heritage should be protected under customary international law. “Indeed, regardless of whether or not they have formally achieved customary status, the sophisticated and detailed articulation of the rules and principles of international environmental law provides a comprehensive set of reference standards and procedures to assist the consideration of transboundary environmental impacts and benefits” in a wide variety of areas, including species conservation and cultural heritage preservation.<sup>39</sup>

#### A CONCEPT OF “WORLD HERITAGE SPECIES” UNDER THE WORLD HERITAGE CONVENTION

The Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) was adopted by the UNESCO General Conference in Paris on November 16, 1972.<sup>40</sup> In order to facilitate its goals of preserving sites important to the “common heritage of humankind,” the Convention called for the development of a World Heritage List to protect “cultural *and* natural heritage [sites] of outstanding universal value.”<sup>41</sup> The notion of “outstanding value” embraces a common view of global history and recognizes that loss of such heritage would be irreplaceable. The World Heritage List “often serves as a catalyst to raising awareness for heritage preservation,” and can increase tourism to the heritage site, which in turn “can bring important

<sup>38</sup> McIntyre, *supra* note 34, at 187.

<sup>39</sup> *Id.* at 193.

<sup>40</sup> Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 (entered into force Dec. 17, 1975).

<sup>41</sup> UNESCO World Heritage Committee, *Budapest Declaration on World Heritage*, pmbll., UNESCO Doc. WC-02/CONF.202/5 (June 28, 2002), <http://whc.unesco.org/en/decisions/1217/>.

In all regions of the world there is growing evidence of the increasing number and intensity of threats to natural and cultural heritage sites. There is also an awareness that the future of many of these irreplaceable properties will be decided, for better or worse, within the next 10–20 years. It is all the more important, therefore, to assure that existing legal instruments . . . be allowed to reach their full potential in the service of monument and site protection worldwide.

Richard J. Cook, *The World Heritage Convention: Looking Ahead*, 17 CRM (Nat'l Park Serv., Washington, D.C.), no. 3, 1994, at 4, 6, <http://www.nps.gov/history/crmjournal/CRM/v17n3.pdf>.

funds to the site and to the local economy.”<sup>42</sup> It can also serve as a catalyst for preserving the surrounding habitat of a site,<sup>43</sup> often to the benefit of the species therein. Once a site is listed, parties must do their “utmost” to protect and conserve those sites and are precluded from taking “any deliberate measures” that might directly or indirectly damage listed sites.<sup>44</sup>

The concept of World Heritage Species has been discussed since early 2001, primarily in reference to the conservation of the world’s great apes.<sup>45</sup> Whereas the World Heritage Convention protects cultural and natural *sites* of “outstanding universal value” to humankind, the World Heritage Species Protocol would protect *species* of comparable value.<sup>46</sup> While the question remains open as to how to quantify such a value threshold, the increasing number of registers established by organizations such as UNESCO provide objective parameters for at least a *prima facie* determination of a given species’ international significance.<sup>47</sup> Tigers, with their deep cultural connection to humans, clearly have such value, and their disappearance would constitute a critical loss for humanity. They, like other emblematic species, are “irreplaceable testaments to human evolution,” cultural pillars to many indigenous populations, and natural legacies to be passed on for future generations.<sup>48</sup>

Obviously, tigers are not cultural sites, such as monuments, buildings, or sites within the meaning of the World Heritage Convention. Therefore, any amendment to incorporate species into the World Heritage regime requires additional ratification by the parties; those who do not ratify the amendment would not be bound by it.<sup>49</sup> However, a designation that highlights the significance of the area to the species, such as a “Malayan Tiger World Heritage Site,” could lend itself to listing under the current regime. As a result, the concept could benefit the conser-

<sup>42</sup> *The World Heritage Convention: Benefits of Ratification*, UNESCO: WORLD HERITAGE CONVENTION, <http://whc.unesco.org/en/convention/#Benefits-of-Ratification> (last visited Aug. 7, 2015). Moreover, if a site is selected for inscription, that site becomes eligible for international assistance from the World Heritage Fund, a trust fund established by Article 15 of the World Heritage Convention—aid that flows from a sense of collective responsibility for preserving a shared world cultural heritage. See Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 40, art. 15.

<sup>43</sup> The Operational Guidelines for the World Heritage Convention provide that sites listed because they contain the most important and significant natural habitats, including those with threatened species, should be large enough to contain wide ranging species and “include the most critical habitats essential to the survival of viable populations of those species.” WORLD HERITAGE CENTRE, OPERATIONAL GUIDELINES FOR THE IMPLEMENTATION OF THE WORLD HERITAGE CONVENTION ¶ 95 (2013), <http://whc.unesco.org/archive/opguide13-en.pdf>.

<sup>44</sup> World Heritage Convention, *supra* note 40, arts. 4, 6(3).

<sup>45</sup> The original idea is generally credited to Dr. Toshida Nishida.

<sup>46</sup> See Jan van Hooff, *Report Meeting Ad-hoc Committee of IPS on the Great Ape Declaration with UNESCO*, PAN AFRICA NEWS (Comm. for the Care & Conservation of Chimpanzees, & The Mahale Wildlife Conservation Soc’y, Inuyama, Japan), Dec. 2001, [http://mahale.main.jp/PAN/8\\_2/8\(2\)-01.html](http://mahale.main.jp/PAN/8_2/8(2)-01.html); see also Chris Wold, *World Heritage Species: A New Legal Approach to Conservation*, 20 GEO. INT’L ENVTL. L. REV. 337, 339 (2008).

<sup>47</sup> Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209, 1220 (2004).

<sup>48</sup> Wold, *supra* note 46, at 372.

<sup>49</sup> Convention for the Protection of the World Cultural and Natural Heritage, *supra* note 40, art. 37.

vation of those species, such as the tiger, whose conservation status is diminished by a variety of threats or by a lack of political will, by bringing their conservation within the parameters of UNESCO's World Heritage mandate. Consequently, a World Heritage Species register could be effectively established by amalgamating existing legal obligations with an emphasis on cooperative decision-making in species conservation and management.<sup>50</sup>

#### IV INTERNATIONAL ENVIRONMENTAL LAW AND HUMAN RIGHTS

A review of the existing multilateral agreements most applicable to tiger conservation—that is, CITES, the Convention on Biological Diversity, and the World Heritage Convention—concludes that none of these adequately protects the species from the various threats to their survival, including poaching and habitat destruction. It is therefore necessary to approach biodiversity conservation from a new perspective: its link to human rights and cultural identity. The 1972 Stockholm Declaration on the Human Environment triggered the discussion on adopting a human rights approach to environmental protection.<sup>51</sup> In its preamble, the Stockholm Declaration clearly established the link between these two legal realms, stating, “[b]oth aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.”<sup>52</sup> Vice-President Christopher Weeramantry later accentuated this linkage in his eloquent separate opinion to *Gabčíkovo-Nagymaros*.<sup>53</sup>

For the most part, biodiversity exists within a matrix of resources lying within the sovereign boundaries of nation-states and the local sphere. This dynamic contributes to an acute tension between conservation needs and economic and social development needs, especially in Southeast Asia. For example, of the 15 countries that feature prominently in terms of diversity of higher species (reptiles, birds and mammals), none has an average annual per capita income greater than \$2000.<sup>54</sup> In fact, most of these countries register annual incomes that are

<sup>50</sup> Wold, *supra* note 46, at 349.

<sup>51</sup> U.N. Conference on the Human Environment, *Stockholm Declaration on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, U.N. Sales No. E.73.II.A.14 (June 16, 1972) [hereinafter *Stockholm Declaration*].

<sup>52</sup> *Id.*, pmbl.

<sup>53</sup> Weeramantry saw the protection of the environment as being very much a question of human rights. He said that it was

a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, 91–92 (Sept. 25) (separate opinion by Weeramantry, Vice-President).

<sup>54</sup> Timothy Swanson, *Developing CITES: Making the Convention Work for All of the Parties, in* ENDANGERED SPECIES, THREATENED CONVENTION: THE PAST, PRESENT, AND FUTURE OF CITES 134, 138 (Jon Hutton & Barnabas Dickson eds., 2000).

among the lowest in the world, around \$200–\$500 annually.<sup>55</sup> Conservationists recognize that many of the primary threats to species survival are often driven by poverty, and that poverty reduction is thus essential if conservation objectives are to be achieved.<sup>56</sup> The Millennium Development Goals, which commit the international community to halving poverty by 2015, indicate that several important targets for poverty reduction in these regions have or will be met by 2015, but that progress in many regions is far from sufficient to meet its stated goals.<sup>57</sup>

#### A HUMAN RIGHT TO A HEALTHY ENVIRONMENT

The human right to a healthy environment is defined through diverse and controversial terminology. For present purposes, it refers to a human right to live in an environment of such minimum quality as to allow for the realization of a life of dignity and well-being.<sup>58</sup> The focus—neither rightly nor wrongly—is on humans and the global disparity between communities and their development, rather than the environment in its own right.<sup>59</sup> Principle 1 of the Rio Declaration provides that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”<sup>60</sup> This principle was accepted without reservations by almost every nation and captures the ideals of linking a human right to a healthy environment with the principle of sustainable development, if not explicitly recognizing it as a right per se.<sup>61</sup>

Even if the right to a healthy environment cannot be regarded as a “human right” in any orthodox sense, it may still be considered a political and civil right, or an economic and social right, with particular applicability to indigenous peoples.<sup>62</sup> The United Nations Declaration on the Rights of Indigenous Peoples, for

<sup>55</sup> *Id.*

<sup>56</sup> WORLD WILDLIFE FOUND., SPECIES AND PEOPLE: LINKED FUTURES 13 (2006), [http://assets.panda.org/downloads/wwf\\_mdgreport\\_2006.pdf](http://assets.panda.org/downloads/wwf_mdgreport_2006.pdf).

<sup>57</sup> U.N. Dep't of Econ. & Soc. Affairs, Millennium Development Goals: 2013 Progress Chart (June 2013), [http://www.un.org/millenniumgoals/pdf/report-2013/2013\\_progress\\_english.pdf](http://www.un.org/millenniumgoals/pdf/report-2013/2013_progress_english.pdf).

<sup>58</sup> Which itself raises the question of whether it is realistic to have a precise minimum standard of environmental quality that allows for a life of dignity and well-being, given the complex scientific, social, and political factors involved. However, it is important to note that ambiguity is a common feature of most human rights, especially economic, social, and cultural rights. See Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 10–11 (2001).

<sup>59</sup> Justice Susan Glazebrook, *Human Rights and the Environment*, 40 VICT. U. WELLINGTON L. REV. 293, 298 (2009).

<sup>60</sup> U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) [hereinafter Rio Declaration].

<sup>61</sup> John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 308 (2000) (noting that, according to *Black's Law Dictionary*, one definition of being entitled to something is to be granted a legal right to it).

<sup>62</sup> Ximena Fuentes, *International Law-Making in the Field of Sustainable Development: The*

example, contains complex language linking the rights of indigenous peoples, future generations, sustainable development, and the environment,<sup>63</sup> as does the Organization of American States (O.A.S.) Proposed American Declaration on the Rights of Indigenous Peoples.<sup>64</sup> Considering Principle 1 in conjunction with the contextual development of a right to a healthy environment, a right to sustainable development, and the rights of future generations, it follows that effects on health and a continuation of an established way of life are integral components of any right to a healthy environment for the local communities involved.<sup>65</sup> Moreover, Article 27 of the International Covenant on Civil and Political Rights has been interpreted by the Human Rights Committee to ensure special entitlement to minorities and indigenous groups to have access to natural resources.<sup>66</sup> Such entitlement necessarily entails a negative obligation not to interfere and a positive obligation to protect on the part of the state, in contrast to current international documents reaffirming exclusive state sovereignty over natural resources.<sup>67</sup> A healthy environment thus entails more than a minimum quality of tangible resources, such as air, water, and shelter, and encompasses intangible elements, such as culture and a way of life. Emblematic species, such as the tiger, form pillars of cultural identity for communities around the world. For example, the Makah Tribe of the Olympic Peninsula in Washington is a seafaring culture in which whales and whaling hold a preeminent role in maintaining traditional culture and religious expression.<sup>68</sup> Access to this species, a natural resource, is thus essential to their way of life and to enjoying a healthy environment. Without the whale, the Makah would not be able to realize their economic, social, and cultural rights to the full extent required by international law. Such a right consequently respects the complex linkages between local communities and their immediate environment and seeks to mitigate the global disparity in natural resource management, including of the species therein. As a result, the articulation

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*Unequal Competition Between Development and the Environment*, 2 INT'L ENVTL. AGREEMENTS: POL., L. & ECON. 109, 128 (2002). This is further supported by the fact that one-quarter of all nations have given constitutional recognition to a right to a healthy environment, which may be considered evidence of state practice for customary human rights law purposes.

<sup>63</sup> G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

<sup>64</sup> See Annual Rep. of the Inter-Am. Comm'n of Human Rights, ch. 4, O.A.S. Doc. OEA/Ser.L./V/II.95, doc. 7 rev. (Mar. 14, 1997) ("Indigenous peoples are entitled to a healthy environment, which is an essential condition for the enjoyment of the right to life and well-being.").

<sup>65</sup> Lee, *supra* note 61, at 332.

<sup>66</sup> See *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (Human Rights Comm'n 1990), reprinted in 3 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 101, U.N. Doc. CCPR/C/OP/3, U.N. Sales No. E.02.XIV.1 (2002).

<sup>67</sup> See G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, art. 2(1) (Dec. 12, 1974) ("Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over its . . . natural resources . . ."); Rio Declaration, *supra* note 60, princ. 2 ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies.").

<sup>68</sup> Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 175 (2002).

of a human right to a healthy environment ultimately seeks to influence domestic decisions through international law.<sup>69</sup> An international agreement on the issue would offer states an aspirational framework in which to operate to pursue the combined purposes of promoting human development and environmental protection. Such an endeavor, however, would require national conservation programs to move beyond principled legislation to the serious consideration of local needs and cultural norms.<sup>70</sup> The interim gap between national and local levels of natural resource management capacity could be filled by non-governmental organizations, working with local communities to administer national programs. Moreover, the development of committed, sustainable sources of funding and enforcement must be pursued and may be more attainable if coupled with regional commitments that facilitate cooperation and accountability.<sup>71</sup>

## B SUSTAINABLE DEVELOPMENT

Since World War II, self-determination has been expanded to encompass a right to exploit natural resources, and provides the foundation for the customary right to develop.<sup>72</sup> However, development—economic or otherwise—cannot occur in a vacuum. Sustainable development, as introduced by Principle 1 of the Rio Declaration above, requires diverse objectives, such as environmental, economic, and human rights, be addressed in an integrated manner. The Vienna Declaration of the World Conference on Human Rights clarified the link between the environment and the right to development by declaring, “the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.”<sup>73</sup> As a result, the principles of sustainable development apply equally to the international standards of human development and to the protection of species and habitat ecosystems.

The current working definition of sustainable development is contained in the 1987 Brundtland report which defines it as development “that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>74</sup> This concept has the potential to evolve into a binding legal principle that applies to both external and internal natural resource management decisions, including species exploitation.<sup>75</sup> It was crystallized by the international community in Principle 21 of the Stockholm Declaration,<sup>76</sup>

<sup>69</sup> Tarlock, *supra* note 22, at 42.

<sup>70</sup> Sawyer & Sawyer, *supra* note 32, at 395.

<sup>71</sup> *Id.*

<sup>72</sup> G.A. Res. 41/128, annex, United Nations Declaration on the Right to Development (Dec. 4, 1986); *see also* 1 PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 118–25 (1995) (the persistent objector principle is the one counterargument to the universality of the norm of the right to develop and its corollary duty not to interfere in the decisions of other states).

<sup>73</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 37, U.N. Doc. A/CONF.157/23 (June 25, 1993).

<sup>74</sup> U.N. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE 8 (1987).

<sup>75</sup> Tarlock, *supra* note 22, at 42.

<sup>76</sup> *Stockholm Declaration*, *supra* note 51, princ. 21.

States have, in accordance with the Charter of the United Nations and the principle of

and extends from preceding customary international law, implying that international duties in development is not locked into a state-centric model, but runs both to individual states and the international community as a whole.<sup>77</sup> Legal regimes and decision processes based on the precautionary principle embodied in Principle 21 help to balance the pursuit of economic development with the need for environmental preservation.<sup>78</sup> However, these objectives face considerable hurdles in the context of rural communities, where poverty often causes the two to exist in competition with one another rather than in collaboration.

### C INTERCONNECTION OF RURAL LIVELIHOODS WITH BIODIVERSITY CONSERVATION

At present, the prevailing rule is that no one owns biodiversity until a crop is harvested or a plant, animal or derivative product is manipulated by human effort to create something new.<sup>79</sup> This is in tune with the historical perspective of landscapes as resources, which acquire value only when exploited. Recent developments in scientific and political thought, however, have now come to understand bioregions as lands that possess values both as natural spaces, sacred and otherwise, as well as for commodity production.<sup>80</sup> In the abstract, the value of biodiversity to the world at large nonetheless often remains at odds with the specific value of a plant or animal species to the local population.<sup>81</sup> This is partially an effect of time preference—a reluctance to wait for future returns from maintaining wild resources due to immediate financial needs or uncertainty regarding the future, such as poverty alleviation.<sup>82</sup>

In 2004, the CITES Conference of Parties added a new paragraph to Resolution 8.3, stating, “implementation of CITES-listing decisions should take into account potential impacts on livelihoods of the poor.”<sup>83</sup> The Resolution also stresses that commercial trade can be beneficial to species conservation and the development of local people “when carried out at levels that are not detrimental to the survival of the species in question.”<sup>84</sup> The exploitation of wildlife at unsustainable levels not only hinders biodiversity conservation but also serves the long-term detriment of rural livelihoods; when the species disappear, the in-

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international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment or other States or of areas beyond the limits of national jurisdiction.

*Id.*

<sup>77</sup> Tarlock, *supra* note 22, at 49–50.

<sup>78</sup> Marong, *supra* note 32, at 70.

<sup>79</sup> Tarlock, *supra* note 22, at 61.

<sup>80</sup> *Id.* at 57.

<sup>81</sup> Anup Shah, *Addressing Biodiversity Loss*, GLOB. ISSUES, <http://www.globalissues.org/article/787/addressing-biodiversity-loss> (last visited Feb. 22, 2014).

<sup>82</sup> EDWARD BARBIER, *Economics for the Wilds*, in *THE ECONOMICS OF ENVIRONMENT AND DEVELOPMENT: SELECTED ESSAYS* 308, 317 (1998).

<sup>83</sup> CITES Res. Conf. 8.3 (revised by the thirteenth Conference of the Parties), <http://cites.org/sites/default/files/eng/res/all/08/E08-03R13.pdf>.

<sup>84</sup> *Id.*



come they provide also will disappear.<sup>85</sup> “The benefits that wildlife trade can offer rural communities [led] many to contend that, from an ethical standpoint, CITES should be required to consider the livelihoods of the poor,” who rely upon wildlife and its habitat not just as a source of income, but also for subsistence purposes.<sup>86</sup>

An alternative sub-category of sustainable development linked to the rural livelihoods argument is that of stewardship sovereignty, an evolving concept implicating the relatively non-controversial idea that the use of natural resources entails an obligation to protect them for future use.<sup>87</sup> In other words, the rural livelihoods argument proposes a sustainability theory based on intergenerational equity. For example, under this approach, rainforest management is shared between traditional state authorities and local communities economically tied to the resource.<sup>88</sup> However, it may be presumptuous to assume that a given sustainable management regime may always be economically worthwhile for all situations and communities. For many developing countries, the option of preserving all or most of their remaining areas of natural habitat for conservation is infeasible, given the social and economic pressures for increased economic development and poverty alleviation.<sup>89</sup> It is important to reiterate that international trade that is not for commercial purposes is still permitted under CITES, as long as that trade is sustainable. There are, for example, rural communities in Africa that have been able to benefit from the selling of wildlife on the safari hunting market and from eco-tourism.<sup>90</sup> If returns from such wildlife-related tourism and hunting concessions are consistently channeled back to rural communities to decide how the money is to be spent, then communal development will be tied to species conservation, with all around survival benefits for both the species and the rural communities. What is needed, then, is a broader shift from an essentially preservationist perspective on conservation to one that takes into account the benefits of sustainable use, per the tenets of the Convention on Biological Diversity.

Correspondingly, “[t]he problem lies not so much with restrictions upon international trade itself, but rather with the lack of mechanisms at the national level to ensure that rural communities benefit from trade that *is* allowed.”<sup>91</sup>

<sup>85</sup> Melissa Geane Lewis, *CITES and Rural Livelihoods: The Role of CITES in Making Wildlife Conservation and Poverty Reduction Mutually Supportive*, 12 J. INT'L WILDLIFE L. & POL'Y 248, 249–50 (2009).

<sup>86</sup> See CITES Res. Conf. 8.3 (revised by the thirteenth Conference of the Parties), *supra* note 83; see also Lewis, *supra* note 86, at 254. The CITES Appendix I listing of leopards, for example, negatively impacted some African communities by removing the animals' financial value to local farmers, who already viewed leopards as nuisances that preyed upon livestock, thus removing any incentive rural communities had not to eradicate those leopards in the vicinity.

<sup>87</sup> Tarlock, *supra* note 22, at 65–66 (quoting Bryan G. Norton, *Why I am Not a Nonanthropocentrist: Callicott and the Failure of Monistic Inherentism*, 17 ENVTL. ETHICS 341, 356 (1995)).

<sup>88</sup> Tarlock, *supra* note 22, at 39–40.

<sup>89</sup> BARBIER, *supra* note 82, at 308.

<sup>90</sup> See Ed Lavandera, *Winner of Black Rhino Hunting Auction: My \$350,000 will Help Save the Species*, CNN (Jan. 17, 2014), <http://www.cnn.com/2014/01/16/us/black-rhino-hunting-permit/>.

<sup>91</sup> Lewis, *supra* note 85, at 275.

Thus, the important question is whether new international catalysts can be developed for the creation of these mechanisms. Another significant consideration in designing mechanisms that uplift rural communities—while simultaneously providing incentives for conservation—is that, in the absence of secure property or exclusive access rights, communities will often be unwilling to refrain from exploiting wildlife or from using wildlife habitat for other purposes (such as the production of domestic livestock, which can be easily owned).<sup>92</sup> For example, because no individual, community, or nation-state owns the tiger species in themselves, there is little incentive on the part of these groups to use these common resources wisely, to preserve them or their quality. This has been called “the tragedy of the commons.”<sup>93</sup> By granting property rights in the animals, or at least in animals’ habitat, to the communities with which the tigers share their land, local communities can become invested in the species’ conservation for the long-term.

“In recent years, developing countries have begun to rely on livelihoods arguments as a means of avoiding the restrictions imposed by CITES.”<sup>94</sup> This is unfortunate, as the livelihoods argument should be used not to avoid restrictions, but as a vehicle of positive reinforcement; a mechanism through which wildlife conservation and poverty reduction are made mutually supportive for the benefit of all those involved—both man and beast.

## V CULTURAL HERITAGE AS INTERTWINED WITH NATURAL HERITAGE

Culture—the “manifestation of diversity” in the international community—expresses itself “as language, religion, literary and artistic traditions,” and provides “the legitimizing element to support the claim to independent statehood.”<sup>95</sup> We tend to think of the destruction of cultural heritage in terms of sites and monuments, such as the demolition of the Buddha statues of Bamiyan by the Taliban in 2001.<sup>96</sup> However, it is also possible to conceptualize the destruction of cultural

<sup>92</sup> DILYS ROE, *TRADING NATURE* 30 (2008), [http://www.traffic.org/general-reports/traffic\\_pub\\_gen19.pdf](http://www.traffic.org/general-reports/traffic_pub_gen19.pdf).

<sup>93</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244 (1968); see also Lewis, *supra* note 85, at 272 (noting that this consideration was clearly recognized in Peru’s approach to vicuña conservation: one of the first steps taken by the Peruvian government after the split-listing of vicuña was to grant property rights in the animals to the communities with which they share their land).

<sup>94</sup> Lewis, *supra* note 85, at 274. At the 2007 Conference of the Parties, Indonesia opposed the United States’ proposal to list the Banggai cardinalfish relying, *inter alia*, upon the extent to which rural communities were dependent upon trade in the fish. See *id.* at 249.

<sup>95</sup> Francioni, *supra* note 47, at 1209–10; see also UNESCO Res. 33 C/41, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, pmbl. (Oct. 20, 2005), *reprinted in* UNESCO, 1 *RECORDS OF THE GENERAL CONFERENCE: 33RD SESSION* 83, 83 (2005).

*Affirming* that cultural diversity is a defining characteristic of humanity.

*Conscious* that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all.

UNESCO Res. 33 C/41, *supra*, pmbl.

<sup>96</sup> See *Cultural Landscape and Archaeological Remains of the Bamiyan Valley*, UNESCO: WORLD HERITAGE CONVENTION, <http://whc.unesco.org/en/list/208> (last visited Feb. 17, 2015); see

heritage in terms of living natural resources, like the impact of tiger destruction on the communities of Assam, India or of whale extinction on the Makah communities of Washington. Moreover, the concept of human dignity includes entitlement to the respect of the cultural heritage that forms an integral part of peoples' identity, history, and civilization.<sup>97</sup> Destruction or desecration of symbolic objects and sites that are essential to a people's culture is a violation of their collective dignity, no less than a violation of their personal dignity.<sup>98</sup>

The UN Charter, however, does not contain specific clauses connecting culture to human rights. Even so, the development of international law since 1948 "provides evidence that the protection of human rights, now part of positive international law, extends to the culture and cultural heritage of peoples."<sup>99</sup> The Inter-American Commission on Human Rights, for example, has found that Brazil violated the Yanomani Indians' right to life, liberty, and personal security by not taking measures to prevent environmental damage that resulted in the loss of life and cultural identity among the Yanomani.<sup>100</sup> As serious damage to the environment is often linked to the repression of affected groups and the denial of access to information, increased participation of local communities in managing natural resources would encourage transparency and accountability in policy decisions.<sup>101</sup> Without articulating an explicit right to cultural heritage as connected to the environment, however, participation rights may exist in somewhat of a vacuum.<sup>102</sup>

Part of that environment is biological diversity, a form of intangible cultural heritage,<sup>103</sup> such as religious traditions and agricultural practices, which

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also Barbara Crossette, *Taliban Explains Buddha Demolition*, N.Y. TIMES (Mar. 19, 2001), <http://www.nytimes.com/2001/03/19/world/19TALI.html>; Elizabeth A. Klesmith, *Nigeria and Mali: The Case for Repatriation and Protection of Cultural Heritage in Post-Colonial Africa*, 4 NOTRE DAME J. INT'L & COMP. L. 45, 65 (2015).

<sup>97</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948) ("recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family . . .").

<sup>98</sup> Francioni, *supra* note 47, at 1213.

<sup>99</sup> *Id.* at 1212.

<sup>100</sup> *Yanomani Indians v. Brazil*, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L.V/II/66 doc. 10 rev. 1 (1984-1985). No such explicit recognition has yet been found by the European Court of Justice or the European Court of Human Rights. See also *Confederación de Nacionalidades Indígenas de la Amazonia Ecuatoriana v. Ecuador*, [1990] Env'tl. L. Rep. Pending Litig. (Env'tl. L. Inst.) 66,103, [http://www.law.uh.edu/faculty/thester/courses/Environmental-Enforcement-2012/syllabus/rf\\_hrp.html](http://www.law.uh.edu/faculty/thester/courses/Environmental-Enforcement-2012/syllabus/rf_hrp.html). The Huaorani people of the Amazon petitioned the Inter-American Commission on Human Rights for the Organization of American States alleging that the Ecuadorian government violated the Huaorani's human rights by allowing road construction and large-scale oil development within their traditional Amazonian homeland. The president of the energy company involved, Maxus Ecuador, Inc., responded: "[t]he way [the Huaorani] live is going to change because of the outside world . . . It's inevitable." Michael Stott, *U.S. Oil Firm Seen Threatening Amazon Tribal Ways*, REUTERS, Sept. 6, 1993, Factiva, Doc. No. LBA0000020011121dp9702y1q.

<sup>101</sup> Glazebrook, *supra* note 59, at 323.

<sup>102</sup> *Id.*

<sup>103</sup> Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3 (defining cultural heritage as "the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—

provides a defining element in the identity of a cultural community with its specific social and intellectual processes and distinct worldview.<sup>104</sup> The Convention on the Safeguarding of Intangible Cultural Heritage stresses the close interrelation between cultural diversity and intangible heritage by noting that “[such] heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature, and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”<sup>105</sup> Some may argue that biodiversity loss is distinct from cultural loss, as the former is dependent on its environment while the latter has the capability of adapting to changed environmental circumstances.<sup>106</sup> However, the mere fact that culture is adaptable is not a plausible reason for holding that this aspect of its nature should be an obstacle to the legal recognition of the value of cultural diversity and the need to conserve such diversity as a general interest of humanity.<sup>107</sup>

In response, cultural property law has developed two competing ideologies: cultural property nationalism, in which property “belongs” to the nation in which it originates, and cultural property internationalism, in which property “belongs” to the world as a whole.<sup>108</sup> Cultural property internationalism conceives of cultural heritage “as part of the ‘common heritage of humankind’ so that these objects are a common resource, like air or water, and states hosting these resources become custodians of the property for the benefit of all.”<sup>109</sup> “Although UNESCO may boldly declare that ‘World Heritage sites belong to all the peoples of the world, irrespective of the territory on which they are located,’ such a pronouncement is decidedly metaphorical, as selected sites continue to belong to and remain the responsibility of that ‘territory.’”<sup>110</sup> “The host state necessarily bears the burden of protecting cultural sites because of their location, and this puts preservation in direct conflict with fundamental principles of international law—state sovereignty and the right of non-intervention.”<sup>111</sup>

These general principles are still respected, however, through the introduction of an international feedback loop that would allow other nation-states or non-state actors to sponsor heritage sites within another state’s territory.<sup>112</sup> A state would consequently tolerate scrutiny, especially by international organizations, when they willfully engage in, or intentionally fail to prevent, the de-

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that communities, groups and, in some cases, individuals recognize as part of their cultural heritage”).

<sup>104</sup> Francioni, *supra* note 47, at 1223.

<sup>105</sup> Safeguarding Intangible Cultural Heritage, *supra* note 103, art. 2.

<sup>106</sup> Francioni, *supra* note 47, at 1221.

<sup>107</sup> *Id.*

<sup>108</sup> Raechel Anglin, Note, *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J.L. & HUMAN. 241, 242 (2008).

<sup>109</sup> Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT’L L. 183, 186 (2003).

<sup>110</sup> Anglin, *supra* note 108, at 252 (quoting *About World Heritage*, UNESCO: WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/about/> (last visited Aug. 7, 2015)).

<sup>111</sup> *Id.* at 246.

<sup>112</sup> *Id.* at 272.

struction of, or serious damage to, species' populations of significant value to humanity, while still preserving their national sovereignty.<sup>113</sup> In return, the host state would stand to gain respect from the international community for promoting cultural diversity, see economic gain through tourism, and gain international recognition in the field of biodiversity conservation.

In essence, this proposition shifts from viewing cultural heritage as a purely material product to the broader goal of conserving the social structures and environments that allow such products to be maintained throughout generations. In other words, it views the context of cultural heritage as a value in itself to be preserved. Cultural heritage transmits irreplaceable elements of our identities, including family networks, communal values, and worldviews. Included in that heritage are also the species that surround us. Animal species, in particular emblematic species like the wild tiger, can form as much a part of a community's identity as local cuisine or ethnic clothing. The General Conference of UNESCO adopted the Universal Declaration on Cultural Diversity in 2001, stating in Article I that, "cultural diversity is as necessary for humankind as biodiversity is for nature."<sup>114</sup> Just as the Convention on Biological Diversity recognizes that it is in the interest of humanity to preserve biodiversity as a value in itself—beyond the value of the single species—this approach recognizes that cultural heritage is intertwined with the living natural heritage that envelops it, and that these should be mutually preserved in the interest of humanity on the whole.

## VI CONCLUSION

"The adequacy of existing regulatory mechanisms is one of the [Endangered Species Act's] criteria for determining whether a species is endangered or threatened."<sup>115</sup> Unfortunately, within the framework of today's international law regimes, comprehensive international policy-making in the realm of biodiversity protection remains elusive, especially for the wild tiger. A fundamental obstacle to species conservation "is the relationship of insatiable consumption patterns and non-suitable resource utilization practices in [industrial] countries to the world's fragile [rain forest] systems."<sup>116</sup> When diversity—both in terms of cultures and species—is threatened within the international community, the threat of a "uniform commercial monoculture"<sup>117</sup> looms, and irreplaceable elements of our human identity are lost. What is needed is the introduction of humanity as a new non-state actor, entitled to the conservation of cultural diversity in the

<sup>113</sup> Francioni, *supra* note 47, at 1220. A subsequent topic I hope to engage with is whether such a designation would then make violators eligible for indictment for intentional destruction of cultural property of great interest for humanity as a whole, although there is certainly a colorable argument that this could form the basis of bringing new charges against poachers and illegal wildlife traffickers in the future.

<sup>114</sup> UNESCO Res. 31 C/25, annex, Universal Declaration on Cultural Diversity, art. 1 (Nov. 2, 2001), *reprinted in* UNESCO, 1 RECORDS OF THE GENERAL CONFERENCE: 31ST SESSION 62 (2002).

<sup>115</sup> Nagle, *supra* note 9, at 248.

<sup>116</sup> JASON W. CLAY, INDIGENOUS PEOPLES AND TROPICAL FORESTS, at v (1988).

<sup>117</sup> Francioni, *supra* note 47, at 1222.

international community.<sup>118</sup> Ultimately, this would remove biodiversity conservation from the exclusive control of national sovereignty and make humanity, as such, the titleholder of the general interest in the protection of biodiversity as a common and indivisible patrimony of humankind.

In September 2009, a prominent British wildlife expert, Chris Packham, argued, to much controversy, that it is time to let emblematic species, like the panda or the tiger, go extinct in the wild. He argued that the process of evolution has destined such species to extinction, and that consequently, it is a waste of resources to expend large amounts of capital, both financial and political, to save species that are not strong enough to survive.<sup>119</sup> “How can you conserve an animal that is worth more dead than alive?” he asked, “You can’t.”<sup>120</sup>

However, a theory that recognizes only two categories for each listed species, success or failure, does not address the complex reality of wildlife conservation.<sup>121</sup> Mr. Packham’s approach does not take into consideration the evolving international concepts of sustainable development, rural livelihoods, and World Heritage species that promote making species conservation economically *valuable* to the human communities involved, both tangibly and intangibly. Flagship species,<sup>122</sup> such as the tiger, help ensure the survival of entire ecosystems and the species within those ecosystems, human beings included. They beckon the world to take collective responsibility for the preservation of biodiversity, alongside the pressures of human growth and development, by reminding us of our shared heritage, common to all humankind.<sup>123</sup>

So the real question is not whether our laws have succeeded, but whether our expectations of the law are appropriate. What is the value of biodiversity? How does the importance of biodiversity compare to economic development, health care, or education in the human experience? Societal ends themselves must be changed to recognize more clearly the true human role as a small part of nature,

<sup>118</sup> *Id.* at 1226.

<sup>119</sup> MISHRA & OTTAWAY, *supra* note 6, at 199.

<sup>120</sup> Chris Packham: ‘Giant Pandas Should Be Allowed to Die Out,’ TELEGRAPH (Sept. 22, 2009, 7:00 AM), <http://www.telegraph.co.uk/news/earth/wildlife/6216775/Chris-Packham-Giant-pandas-should-be-allowed-to-die-out.html>.

<sup>121</sup> MICHAEL J. BEAN, THE ENDANGERED SPECIES ACT: SUCCESS OR FAILURE? 5 (Env’tl. Def. Ctr. for Conservation Incentives, Incentive Paper No. 2, 2005); *see also* Nagle, *supra* note 9, at 215–16. Nagle explains that during the Great Leap Forward of 1958 to 1960, for example,

Mao Zedong targeted the “Four Pests”: rats, sparrows, flies, and mosquitoes. The attack on sparrows enlisted schoolchildren to knock down nests and to beat gongs so that the sparrows could not find a place to rest. Only after the sparrows were virtually eliminated throughout China did the country’s leaders recognize the value of the birds in controlling insects.

Nagle, *supra* note 9, at 215–16.

<sup>122</sup> A flagship species is a species that represents an environmental cause, such as an ecosystem in need of conservation. These species may be chosen due to their conservation status, attractiveness, or other factors to best engender attention and support. Promotion of a flagship species may thus successfully leverage conservation of an entire ecosystem and all species dependent on that ecosystem. *See, e.g.*, T.M. Caro & Gillian O’Doherty, *On the Use of Surrogate Species in Conservation Biology*, 13 CONSERVATION BIOLOGY 805, 810 (1999).

<sup>123</sup> Wold, *supra* note 46, at 374.

and stop seeing nature as some kind of “other” to be used and manipulated.<sup>124</sup>

Human fascination with wild tigers has never waned throughout history, and over time the tiger has become an icon that challenges human courage.<sup>125</sup> We identify tigers with strength, power, and mystery, yet we have also reached the biological tipping point. Has the tiger become so much a part of the intangible aspects of our cultural heritage that we no longer recognize its tangible value to local communities today? Is it that the tiger is not strong enough to survive, as Mr. Packman would have us believe, or is it that we are ruthless enough in our never-ending quest for economic development to destroy anything in our path—including the emblematic species that stretch so deeply the shared patrimony of humankind? What does their extinction, should it ultimately come to that, say about *us* as a species? This is the great tragedy of the tiger, an animal so revered in global tradition that is so ill-treated by human beings today, a living presence that may soon be lost completely to the weathered pages of history books, as the real tigers of the wild silently disappear, taking a part of ourselves with them as they go.

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<sup>124</sup> Cynthia Giagnocavo & Howard Goldstein, *Law Reform or World Re-form: The Problem of Environmental Rights*, 35 MCGILL L.J. 345, 377 (1990).

<sup>125</sup> MISHRA & OTTAWAY, *supra* note 6, at 153. From the arenas of Ancient Greece to big cat hunting in Mogul India (and later carried on by the British colonists), the tiger has longed been viewed as a ferocious wild animal prized for blood sport.