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## Cultural Rights v. Species Protection: A case study of pacific leatherback sea turtles

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## Cultural Rights v. Species Protection: A case study of pacific leatherback sea turtles

*Mohit Khubchandani & Mehul Parti<sup>†</sup>*

*“I am in favour of animal rights as well as human rights. That is the way of a whole human being.” - ABRAHAM LINCOLN*

*The leatherback sea turtle (*Dermochelys coriacea*), sometimes called the lute turtle, is the largest of all living turtles. It is the fourth-heaviest modern reptile behind three crocodilians. These species are categorized as critically endangered under the International Union for Conservation of Nature (IUCN) Red List. These turtles avail protection under the Convention on Illicit Trade in Endangered Species (CITES); a treaty enacted to protect wildlife against over-exploitation and with an aim to ensure that international trade in specimens of wild animals and plants does not threaten their survival. The said treaty is applicable to species in general unless a specific exception applies. However, inasmuch as these turtles are concerned, it prohibits all trade for “primarily commercial purposes”. The reproduction rate of these turtles is extremely low and their nesting beaches are un-protected. As a corollary, many perpetrators, like various communities of ‘peoples’ consume their eggs. In addition to the widespread consumption of turtle eggs in Mexico, the indigenous Seri Indians also used leatherback sea turtles during important cultural ceremonies. Moreover, these turtles are killed as a ‘by-catch’ while shrimps are caught within shrimp nets for the fisheries industry. The killing of these turtles disrupts the oceanic food chain as they feed on*

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*jellyfish, which if increases, could reduce the population of commercially viable fish.*

*The entire debate which emanates here is that, although various communities of “peoples” have a cultural right to self-determination under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), the rights of fishing these turtles beyond their territories is prohibited by the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on Biodiversity (CBD).*

*This paper endeavors to analyze the applicability of these conventions to the situation at hand, along with the efforts made by various countries in their domestic legislations to conserve these turtles and their nesting beaches. The bone of contention which also comes to the fore here is the question of ‘who has the right to conserve these turtles?’, considering that these turtles have extraterritorial movements and any conservation measures can only possibly be taken in the high seas. The paper also tries to address the said pertinent issue.*

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## I. INTRODUCTION

This section deals with outlaying the problem of countervailing rights of conservation of the pacific leatherback sea turtles vis-à-vis cultural rights of killing them, whilst keeping in hindsight the special biological characteristics of the turtle. The authors endeavor to unravel the deadlock of rights by distinguishing the erstwhile cultural practices with the present practices which, under international law, do not enjoy the same protection as before.

### *A. Biological characteristics of the pacific leatherback sea turtle*

The leatherback sea turtle (*Dermochelys coriacea*), occasionally termed the lute turtle, is the largest of all living turtles. It is the fourth-heaviest modern reptile following three crocodilians. As the sole surviving species of the family Dermochelyidae, the leatherback traces its evolutionary history back over 100 million years. Leatherback turtles are living acquaintances to an ancient past, but their continued subsistence is now critically threatened. These species are categorized as critically endangered under the IUCN Red List.<sup>1</sup> Unless a specific exemption applies, the CITES prohibits all trade for “primarily commercial purposes” of these species.<sup>2</sup>

### **1. Nesting patterns of the pacific leatherback sea turtle**

Some of the largest nesting populations of leatherback turtles in the world border the Pacific Ocean. Today this population has strikingly declined. Leatherbacks do not generally nest in the insular Central and South Pacific regions (exceptions include the Solomon Islands, Vanuatu, and

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1. *The IUCN Red List of Threatened Species*, INT’L UNION FOR CONSERVATION OF NATURE, <http://www.iucnredlist.org/details/6494/0> (last visited Apr. 11, 2016).

2. Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. 3, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

Fiji). Nesting is widely reported from the western Pacific areas, including China, Southeast Asia, Indonesia and Australia.<sup>3</sup>

## **2. Factors contributing to the decline of the pacific leatherback sea turtles' population**

One of the major contributors of decreasing sea turtle populations includes the consumption and collection of eggs by people.<sup>4</sup> Their hatching success rates are extremely low,<sup>5</sup> which is evidenced by the fact that they are the world's most endangered sea turtle population.<sup>6</sup> Since the dawn of man, humans have hunted and used sea turtles for food, oil, leather, and shells. Today, many people still consume sea turtle adults and eggs based on traditional cultural practices. Sea turtles' eggs are believed to be an aphrodisiac, though this myth has been widely debunked. Intentionally killing sea turtles has been prohibited in many countries, but still takes place throughout the world.<sup>7</sup>

## **3. The real problem: countervailing protection in international law that permits the killing of the pacific leatherback sea turtles**

According to the prevailing norms of International Law, everyone has a right to follow a way of life associated with the use of cultural goods and resources such as land, water and biodiversity.<sup>8</sup> Moreover, the Committee on Economic Social & Cultural Rights (CESCR), as well as the Human Rights Council (HRC), have confirmed fishing and hunting as aspects of cultural life.<sup>9</sup> The traditional use of land for hunting, food gather-

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3. National Marine Fisheries Service and U.S. Fish and Wildlife Service, Recovery Plan for U.S. Pacific Populations of the Leatherback Turtle (*Dermochelys coriacea*) 6 (1998), [http://www.nmfs.noaa.gov/pr/pdfs/recovery/turtle\\_leatherback\\_pacific.pdf](http://www.nmfs.noaa.gov/pr/pdfs/recovery/turtle_leatherback_pacific.pdf).

4. BOBBIE KALMAN, ENDANGERED SEA TURTLES 24 (2004).

5. JAMES R. SPOTILA, SEA TURTLES: A COMPLETE GUIDE TO THEIR BIOLOGY, BEHAVIOR, AND CONSERVATION 17 (2004).

6. ELIZABETH KEMF ET AL., WORLD WILDLIFE FUND, MARINE TURTLES IN THE WILD 15 (2000).

7. Jeffrey Seminoff, *Global Chelonian Assessment: A Summary*, in PROCEEDINGS OF THE WESTERN PACIFIC SEA TURTLE COOPERATIVE RESEARCH AND MANAGEMENT WORKSHOP 199 (Irene Kinan, ed., 2002).

8. Comm. on Econ., Soc. and Cultural Rights, U.N. Doc. E/C.12/GC/21 (2009) [hereinafter *General Comment No. 21*].

9. See *George Howard v. Canada*, Human Rights Council [H.R. Council], Communication No. 879/1999, U.N. Doc. CCPR/C/84/D/879/1999, ¶ 12.5 (2005); *Apirana Mahuika v. New Zealand*, H.R. Council, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993, ¶ 9.3 (2000); *Länsman v. Finland*, H.R. Council, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992, ¶ 9.2 (1994); *Äärelä v. Finland*, H.R. Council, Communication No. 779/1997, U.N. Doc. CCPR/C/73/D/779/1997, ¶ 7.5 (1997).

ing and ceremonial or religious purposes has been recognized in the various domestic legislations.<sup>10</sup> In *Kitok v. Sweden*,<sup>11</sup> it was highlighted that the legal right to traditional hunting applies to the fishing activities of the Samis living in the Sami villages, meaning that the activities belong to “culture” within the meaning of Article 27 of ICECSR. Therefore, in light of the established state practice (through the HRC Committee and various domestic legislations) and judicial precedents, one is led to believe that the traditional rights of cultures and communities, such as hunting and fishing, have now transformed into a legal right for that specific culture and community.

*B. The author’s proposal and prelude to unravel the deadlock of countervailing rights*

**1. The right to kill the pacific leatherback sea turtle is subject to various exceptions**

The authors are of the opinion that, the aforesaid cultures and the purported protection being sought by the communities whilst practicing these cultures under the garb of the right to self-determination (RSD) is unfounded. By way of this article, it will be elicited that RSD extends only to “peoples” and not to minorities. Furthermore, it will be discussed in detail that, hunting and fishing rights are recognised as a part of culture only if the species are used as a means of “subsistence” for a community, which is not the case with the leatherbacks. Therefore, this article seeks to prove that most of the communities that kill these turtles do not enjoy the protections under the ICCPR, ICESCR and the RSD.

**2. *Alternatively*, even if such cultural practices are encapsulated within RSD; the modes and reasons of killing these turtles change the cultures themselves**

Even if such activities can be regarded as a part of “culture”, the article contends that the modes of killing these turtles have changed, thus changing the cultures themselves. For instance, the Seri Indians were the first native Mexicans to utilize sea turtles; they hunted sea turtles from balsas, or reed boats, using long harpoons made of ironwood. The relationship between these sea turtles and the Seri people was complex and

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10. Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–712 (2004); Marine Mammal Protection Act, 16 U.S.C. §1379 (2003); The Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a (2015); Endangered Species Act, 16 U.S.C. § 1539 (2015); *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ch 1 (Austl.)

11. *Kitok v. Sweden*, Communication No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985, ¶ 4.2 (1988).

strongly spiritual, with a rich body of dance, song, and traditions associated with the animals. Nearly all parts of the turtle were eaten, either immediately or within days of capture.<sup>12</sup>

In contrast, in spite of legislation enacted by the Mexican government, female leatherbacks are being killed by poachers on nesting beaches; primarily for eggs, but also for their oil, which can fetch a high price.<sup>13</sup> They are also killed as a byproduct of irresponsible longline fishing,<sup>14</sup> in shrimp nets,<sup>15</sup> and by oil exploration and extraction.<sup>16</sup> These human activities are neither inspired by the cultures, nor do they involve the tools used by these communities to kill the turtles as mark of cultural traditions. Thus, the change of motive to kill the turtles changes the cultures themselves, which cannot be protected.

### **3. Conservation of turtles which are not killed for cultural practices, is a duty cast upon states under international law**

As noted above, there has been a paradigm shift in the motives and techniques involved in the killing of the pacific leatherbacks. There are various other human activities that are also leading to the depletion of the pacific leatherback population, which cannot be qualified as being protected under RSD.

Therefore, at this juncture, the need of the hour is conservation of turtles. The authors, by way of the article, will bolster their stance with the help of various provisions of the UNCLOS, CBD, CITES, principles of customary international law and the domestic legislations and agreements of the pacific region, which endorse the conservation of these turtles. Additionally, the article will also address this imminent question: “*Who has the right to conserve these species which are often outside the domestic jurisdictions of nations and do not have a particular habitat?*”

Finally, after an examination of all facets, the authors will conclude with an open-ended question that is the subject matter of a worldwide debate on this topic: “*If these turtles become extinct, will the cultures seize*

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12. Comm’n for Env’tl. Conservation, *North American Conservation Action Plan: Pacific Leatherback Sea Turtle*, 4 (2005), <http://www.ccc.org/islandora/en/item/2262-pacific-leatherback-sea-turtle-north-american-conservation-action-plan-en.pdf>.

13. *Id.*

14. Rebecca L. Lewison et al., *Quantifying the Effects of Fisheries on Threatened Species: The Impact of Pelagic Longlines on Loggerhead and Leatherback Sea Turtles*, 7 *ECOLOGY LETTERS* 221, 221–231 (2004).

15. Programa Restauracion de Tortugas Marinas, *Conservation of Leatherback Sea Turtles, Dermochelys Coriacea, and Monitoring of Sea Turtle Nesting Activity in Playa Caletas and Playa Pencil, Costa Rica*, 19–20 (2003) <http://www.pretoma.org/downloads/pdf/Caletas0203.pdf>.

16. Sarah Milton et al., *Oil Toxicity and Impacts on Sea Turtles*, in *OIL AND SEA TURTLES: BIOLOGY, PLANNING, AND RESPONSE* 35 (National Oceanic and Atmospheric Administration, 2010).



to exist? And if not, then why is killing of these so imminent to these ap-parent cultures?"

## II. THE EMANATING PROBLEMS: CURRENT DAY SCENARIO

This section deals with the current day problems which contribute to the decline in populations of the leatherback sea turtles. It starts by eliciting unfounded claims by countries to extend their Exclusive Economic Zones (EEZ) in terms of fishing rights and the violations under UNCLOS and CITES that may follow as a sequitur if such claims are permitted in International Law. The section finally deals with the effects of over-exploitation of these turtles on the ecological balance of the oceans.

### *A. Unfounded and Prospective Presential Sea Claims by Some Countries*

#### **1. Claims by Chile and Argentina, endorsed by some nations**

Pacific leatherback sea turtle populations are declining tremendously due to long-line fishing techniques adopted by hunters. To extend their geographic periphery in terms of fishing rights, countries like Chile and Argentina have enacted domestic legislations to transcend their EEZ.<sup>17</sup> This alleged extension is deemed by them to be a "presential sea." Although this concept has met with a degree of support<sup>18</sup> from various nations<sup>19</sup>, the International Court of Justice (ICJ) has recently dismissed Chile's claim for a "presential sea."<sup>20</sup> Rightfully so, as if such claims are permitted, then the nations proposing such claims may also assert their own presential sea claims, thereby posing a threat to various security and sovereignty concerns. The authors elicit that this problem has a direct nexus and can lead to turtle killings in the high seas, in the garb of such proclamations. If permitted under international law, such purported extensions will increase the range of longline fishing of these turtles by hunters.

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17. Law No. 19.080, Septiembre 6, 1991, D.O. (Chile); Law No. 23.968, Dec. 5, 1991, 1 B.O. (Arg.).

18. Barbara Kwiatkowska, *The High Seas Fisheries Regime: at a Point of No Return?*, 8 INT'L J. OF MARINE AND COASTAL L., 340–41 (1993); Jane Gilliland Dalton, *The Chilean Mar Presencial: A Harmless Concept or a Dangerous Precedent?*, 8 INT'L J. OF MARINE AND COASTAL L., 397–418 (1993).

19. ZOU KEYUAN, *LAW OF THE SEA IN EAST ASIA: ISSUES AND PROSPECTS* (2005).

20. Case Concerning Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014, p.3 (27.01.2014), available at <http://www.icj-cij.org/docket/files/137/17930.pdf>.

## 2. International Law prohibits proclamation of such presential sea claims

Strong academic dissent has also been expressed in lieu of such claims.<sup>21</sup> Even under the UNCLOS, such claims find no support.<sup>22</sup> It is also true in international law that a state cannot plead provisions of its own law to answer a claim against it for an alleged breach of its obligations under international law.<sup>23</sup> The paramount status of this rule is evidenced in the *Free Zones case* when it was observed that “*France cannot rely on her legislation to limit the scope of her international obligations. . .*”<sup>24</sup> Similar grounds were taken by Peru before the ICJ, whilst denouncing Chile’s claims.<sup>25</sup> Moreover, it is pertinent to take note that CITES invalidates its applicability to the activities of state parties only when they employ stricter measures through their domestic legislations<sup>26</sup> and not otherwise. The Stockholm Declaration also reflects this.<sup>27</sup> In juxtaposition, such domestic legislations would have more adverse effects and would only serve the national interests of these countries. They are by no means stricter than the norms of the laws of the seas and are in contravention to international law.

### *B. Illegal “Introduction from the sea” within the meaning of CITES*

This is a problem arising from the alleged presential sea claims and, in fact, amounts to a violation of the norms of international law. CITES deems a specimen to be introduced from the sea if it is “taken in the marine environment not under the jurisdiction of any state” and it is imported into that state.<sup>28</sup> It has been affirmed by the conferences<sup>29</sup> to the convention that “marine environment not under the jurisdiction of any state” may be interpreted as being equivalent to the “high seas” as defined by UNCLOS.<sup>30</sup> Therefore, if any person captures a turtle from the purported presential sea

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21. ARMAS PFIRTER & FRIDA M., *THE INTERNATIONAL LAW OF MARITIME FISHERIES FRONT AND THE RIO DE LA PLATA* 124 (Argentine Council for International Relations, 1994).

22. United Nations Convention on the Law of the Sea art. 56, 76, 86, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

23. Vienna Convention on the Law of Treaties art. 27, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT].

24. *Free Zones of Upper Savoy and the District of Gex*, (Fr. v Switz.), Merits, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (June 1932); G.A. Res. 56/83, at 8 (Jan. 28, 2002); LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 82-6 (2003); *Nottebohm Case* (Liech. V. Guat.), Merits, 1955 I.C.J. Rep. 4, at 20-1 (April 1955).

25. Memorial for Peru, *supra* note 18.

26. CITES, *supra* note 2, at art. XIV(1)(a).

27. G.A. Res. 2581, Declaration on the Human Environment, U.N. Doc. A/CONF.48/14/Rev. 1 (June 16, 1972) [hereinafter Stockholm Declaration].

28. CITES, *supra* note 2, at art. 1(c).

29. CITES, Conference of the Parties to CITES, Resolution Conf. 14.6 (Rev. CoP16), at 1 (Mar. 03, 2013).

30. UNCLOS, *supra* note 22, at art. 86.

(i.e., high seas, without a certificate to transport the turtle by the scientific and management authorities) it is reckoned to be a violation of Article III (5) of the convention, whether it be it for the purpose of cultural practice or otherwise. The same is reflected in the decisions of the parties to CITES.<sup>31</sup> Therefore, if presentational sea claims are permitted, then it would amount to a direct violation of the principles of UNCLOS and CITES. This will lead to over-exploitation of the population of these turtles because they are a highly migratory species with migration patterns throughout the high seas.

*C. Disruption of the natural biological food chain of the oceans*

**1. Overkilling of leatherbacks increases the jellyfish population which leads to reduction in population of commercially viable fish**

There has been a decline in the populations of the leatherback turtles as a result of the human activities of turtle killing in the name of cultural rights as well as oil exploration, bycatch in shrimp nets by longline fishing and hunting of eggs for sale. It is noteworthy that this turtle feeds on jellyfish<sup>32</sup> and provides natural ecological control of their populations. The over abundance of jellyfish may pose a major threat to nations' marine ecosystems as they feed on zooplankton (fish larvae). If their population exceeds, it would result in the reduction of the commercially viable fish population.<sup>33</sup>

**2. Not maintaining minimum stocks of turtles is a violation of the norms of the law of the seas**

In the *Southern Bluefin Tuna* cases, the ITLOS stopped Japan from continuing its practice "to prevent serious harm to the marine environment."<sup>34</sup> It found that Japan had failed to cooperate in the conservation of southern Bluefin tuna stock by unilaterally undertaking experimental fishing in violation of its obligations under Articles 64 and 116 of the UNCLOS.<sup>35</sup> Similarly, all pacific nations that encourage these activities

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31. CITES, Decisions of the Conference of the Parties to CITES in Effect After its 16th Meeting, Decision 16.118 (Rev. CoP16) (2013), <https://cites.org/sites/default/files/eng/dec/valid16/E16-Dec.pdf>.

32. CARL H. ERNST & ROGER W. BARBOUR, *TURTLES OF THE WORLD* 126 (1989).

33. *Leatherback Turtle*, WORLD WILDLIFE FUND, [http://wwf.panda.org/what\\_we\\_do/endangered\\_species/marine\\_turtles/leatherback\\_turtle/](http://wwf.panda.org/what_we_do/endangered_species/marine_turtles/leatherback_turtle/).

34. *Southern Bluefin Tuna Case* (Austl. & N.Z. v. Japan), Provisional Measures, Case Nos. 3 and 4, Order of Aug. 27, 1999, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_3\\_4/Order.27.08.99.E.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf).

35. *Id.*

resulting in the killing of the pacific leatherback sea turtles by communities for non-cultural purposes are violating their obligations under international law. If the minimum stocks of these turtles are not maintained, it will create an imbalance in the oceanic food chain. In essence, the hunting of these turtles also poses a major threat to the oceanic food chain. The following graphic shows the prime areas for foraging and nesting, and migratory movements of these turtles, which provide a better understanding of the hunting areas of these turtles.

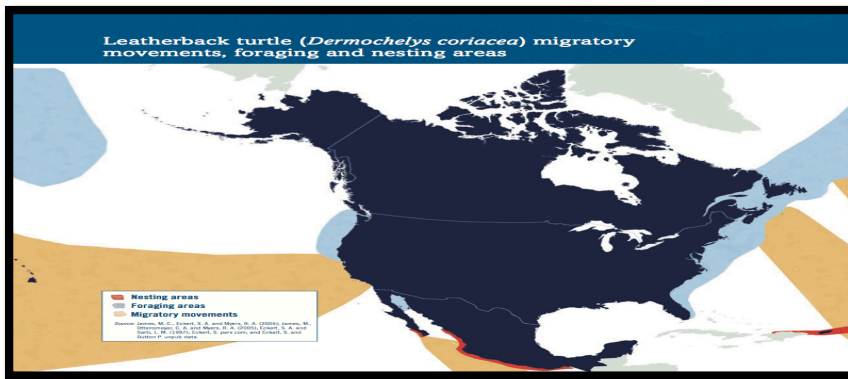


Fig. (1) Geographical Representation of the nesting and moving patterns of the turtles.<sup>36</sup>

### III. RESPONSIBILITIES OF NATIONS FOR PROTECTION OF THE LEATHERBACK TURTLES UNDER PUBLIC INTERNATIONAL LAW NORMS

In this section, the article discusses the legal obligations of species conservation under the UNCLOS and the CBD upon contracting parties to these conventions. The article additionally covers the principles of customary international law that govern the conservationist approach of international law. This approach gives high priority to ensuring healthy ecosystems and protecting biodiversity, including restoring populations and ecosystems, wherever necessary.<sup>37</sup> This section finally counters the

36. Michael C. James et al., *Migratory and Reproductive Movements of Male Leatherback Turtles (Dermochelys Coriacea)*, 147 MAR BIOL 147, 845–853 (2005); Michael C. James et al., *Identification of High-Use Habitat and Threats to Leatherback Turtles (Dermochelys Coriacea)*, 8 ECOLOGY LETTERS 127, 195–201 (2005); Scott A. Eckert & Laura M. Sarti, *Distant Fisheries Implicated in the Loss of the World's Largest Leatherback Nesting Population*, 78 MARINE TURTLE NEWSLETTER 2 (1997); COMM'N FOR ENVTL. CONSERVATION, NORTH AMERICAN CONSERVATION ACTION PLAN: PACIFIC LEATHERBACK SEA TURTLE 6 (2005), <http://www.cec.org/islandora/en/item/2262-pacific-leatherback-sea-turtle-north-american-conservation-action-plan-en.pdf>.

37. U.N. Food and Agriculture Organization, *Overcoming Factors of Unsustainability and Over-exploitation in Fisheries: Selected Papers on Issues and Approaches*, FAO Fisheries Rep. FIPP/R782 (2005), <http://www.fao.org/docrep/009/a0312e/a0312e00.htm>.

plea taken by certain developing countries, expressing their inability to initiate structured leatherback conservation programs, due to their financial incapability.

*A. Treaty obligations of states under the UNCLOS & the CBD*

**1. Duties of coastal states under the United Nations Convention on Law of the Seas**

A coastal state has the sovereign right to exploit living resources only after giving due regard to the rights of others,<sup>38</sup> as this right does not absolve a state from protecting the marine environment.<sup>39</sup> It must take into account the best scientific evidence available to ensure that living resources are not over-exploited.<sup>40</sup> It must promote their optimum utilization.<sup>41</sup> It should also, in coordination with other coastal states, take measures that are necessary to conserve such stocks of species which commonly occur in their EEZ.<sup>42</sup>

It must also be borne in mind that the principle of Permanent Sovereignty is subject to restrictions. The application of the principle of permanent sovereignty over natural resources can be seen in various international instruments,<sup>43</sup> and has been adjudged by various judicial bodies.<sup>44</sup> Permanent sovereignty over natural resources has limitations. States have the duty “to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other States of areas beyond the limits of national jurisdiction.”<sup>45</sup> Exploitation of sovereign resources in an arbitrary manner amounts to an abuse of rights. Abuse of rights is a general principle of public international law that disciplines state action. It occurs where a state exercises its rights in a manner that prevents other states from exercising their rights or arbitrarily exercises rights and causes injury to another state but does not clearly violate its rights.<sup>46</sup> It is generally concluded that the concept of abuse of rights is an offshoot of

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38. UNCLOS, *supra* note 22, at art. 56(1), (3).

39. UNCLOS, *supra* note 22, at art. 193.

40. UNCLOS, *supra* note 22, at art. 61(2).

41. UNCLOS, *supra* note 22, at art. 62(1).

42. UNCLOS, *supra* note 22, at art. 63(1).

43. Convention on Biological Diversity, *entered into force* Dec. 29, 1992, art. 3, 1760 U.N.T.S. 79 [hereinafter CBD]; G.A. Res. 48/190, U.N. GAOR, 48<sup>th</sup> Sess., at Principle 2, U.N. Doc. A/Res/48/190 (1993) [hereinafter as Rio Declaration]; Stockholm Declaration, *supra* note 28.

44. Corfu Channel (U.K. v. Albania), Merits, 1949 I.C.J. 4, 22 (Apr. 9) [hereinafter Corfu Channel Case]; Trail Smelter Arbitration (U.S. v. Canada), 3 R.I.A.A. 1905 (1938, 1941) [hereinafter Trail Smelter Arbitration]; Lac Lanoux Arbitration (Spain v. France), 12 R.I.A.A. 281 (1957).

45. CBD, *supra* note 43; Rio Declaration *supra* note 43; Stockholm Declaration, *supra* note 27.

46. A. Kiss, *Abuse of Rights*, in 1 ENCYCLOPEDIA OF PUBLIC INT'L LAW 4 (R. Bernhardt ed., 1992).

the principle of good faith which has been codified under Article 26 of the Vienna Convention on the Law of Treaties. This provides that every treaty must be performed in good faith by the parties. Therefore, the pacific nations cannot take a plea that the turtles which they hunt in their own territorial waters are their natural resources over which they have permanent sovereignty.

## 2. Responsibilities of states under the Convention on Biological Diversity

Maintenance of viable populations of biological resources is important for the protection of ecosystems and must be promoted.<sup>47</sup> Parties are required to cooperate on matters beyond the national jurisdiction of any country and other matters of “mutual interest.”<sup>48</sup> The transcending reckoning of this concern in international law can be evidenced from the number of international declarations<sup>49</sup> and treaties.<sup>50</sup>

A country is responsible for its hunting activities regardless of where their effects occur.<sup>51</sup> In *Gabcikovo Nagymaros*, H.E. Judge Weeramantry asserted that “*there is substantial evidence to suggest that the general protection of the environment beyond national jurisdiction has been received as obligations erga omnes.*”<sup>52</sup> Similar opinions have been expressed in the *Trail Smelter Arbitration*<sup>53</sup> and the *Corfu Channel Case*.<sup>54</sup> Therefore, the findings of the World Court in the *Pulp Mills Case*,<sup>55</sup> read in conjunction with its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, imply that there is a general obligation for States to avoid activities under their jurisdiction that cause significant damage to the environment of areas beyond national jurisdiction.<sup>56</sup>

The country is also obliged to promote the recovery of threatened species,<sup>57</sup> and to conform its domestic legislations to the CBD with a view

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47. CBD, *supra* note 43, at arts. 8(c) & 8(d).

48. CBD, *supra* note 43, at art. 5.

49. The African Convention on the Conservation of Nature and Natural Resources, Sep. 15, 1968, 1001 U.N.T.S. 3; Convention on the Conservation of European Wildlife and Natural Habitats, Sep. 19, 1979, 1284 U.N.T.S. 209 [hereinafter European Convention].

50. G.A. Res. 37/7, World Charter for Nature (Oct. 28, 1982).

51. CBD, *supra* note 43, at art. 4.

52. *Gabcikovo Nagymaros Project*, “Case Concerning the Gabcikovo Nagymaros Project (Hungary v. Slovakia) (Judgment), Spec. Op. of V.P. Weeramantry, 1997 I.C.J. 95.

53. *Trail Smelter Arbitration*, *supra* note 44.

54. *Corfu Channel Case*, *supra* note 44, at 22.

55. *Pulp Mills on River Uruguay* (Arg. v. Urug.), Provisional Measures, 2007 I.C.J. 113, ¶ 204 (July 13, 2006) [hereinafter *Pulp Mills Case*].

56. Responsibilities and Obligation of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, 2011 I.T.L.O.S. 17, ¶ 148.

57. CBD, *supra* note 43, at art. 4.

to protect the turtle.<sup>58</sup> The CBD envisages detailed regulations for “in-situ” and “ex-situ” conservation. While the former seeks to establish a system of protected areas,<sup>59</sup> the latter urges the creation of recovery and rehabilitation measures, and reintroduction of threatened species into natural habitats under appropriate conditions.<sup>60</sup>

### 3. Protective measures to safeguard turtle nests and habitats

Nests can be protected from poachers and predators by fencing to maximize the number of hatchlings produced. Activities like measuring the temperature of nests to record human activity on the beach<sup>61</sup> and putting estrogen solution onto eggs for increasing the number of females under normal incubation<sup>62</sup> are some of the measures that can conserve their habitats. The CBD additionally obligates parties to conduct research, training, public education and awareness, planning<sup>63</sup> and monitoring<sup>64</sup> of species.

#### *B. Obligations of states under the principles of “customary international law”*

##### 1. Conservation of Biodiversity is an obligation owed “*erga omnes*”

Conservation of biodiversity is a common concern of humankind,<sup>65</sup> which extends to living resources that are of migratory nature in the high seas.<sup>66</sup> The WTO in the Shrimp Turtle Case acknowledged the existence of a “sufficient nexus” between the endangered population of sea turtles located in Asian Waters and the U.S. to allow the latter to claim a legal interest in their conservation.<sup>67</sup> The Appellate Body also separated economic trade law from environmental law by leaving improved

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58. CBD, *supra* note 43, at art. 8(k); Exchange of Greek and Turkish Populations, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, 20 (Feb. 21).

59. CBD, *supra* note 43, at art. 8(a), (b).

60. CBD, *supra* note 43, at art. 9(a)-(c).

61. *Nesting Development and Hatching: The Leatherback at Sea*, THE LEATHERBACK TRUST, (Oct. 17, 2014, 4:16 PM), [http://www.leatherback.org/turtle\\_biology.html](http://www.leatherback.org/turtle_biology.html) [[https://web.archive.org/web/20141017161628/http://www.leatherback.org/turtle\\_biology.html](https://web.archive.org/web/20141017161628/http://www.leatherback.org/turtle_biology.html)].

62. *Sea Turtles: Conservation and Research*, SEAWORLD PARKS & ENTERTAINMENT, <http://seaworld.org/en/animal-info/animal-infobooks/sea-turtles/conservation-and-research> (last visited Mar. 24, 2016).

63. CBD, *supra* note 43, at art. 6(a), (b).

64. CBD, *supra* note 43, at art. 7.

65. CBD, *supra* note 43, at Preamble.

66. Bering Sea Fur Seals Arbitration (U.K. v. U.S.) 1 R.I.A.A. 755, 1898.

67. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 51, WTO Doc. WT/DS58/AB/R (1998) [hereinafter Shrimp Turtle Case].

environmental standards to further negotiations by stating that: “*We have not decided that sovereign states that are members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should.*”<sup>68</sup> Therefore, conservation of sea turtles is an obligation owed by nations to the international community.

## 2. Existence of *Opinio Juris* and State Practice

The presence of treaties<sup>69</sup> and national legislation<sup>70</sup> demonstrates uniform state practice regarding the protection of habitats. The lawmaking intention evident in negotiation of multilateral treaties satisfies the *opinio juris* requirement of a customary norm. Moreover, the “preventive principle,” which has been endorsed by the Stockholm Declaration,<sup>71</sup> and Principle 11 of the Rio Declaration requires states to enact “effective environmental legislation.” The Honorable International Court of Justice has time and again reiterated that the principle of prevention as a customary rule, has its origins in the due diligence that is required of a State in its territory.<sup>72</sup> It is “*every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.*”<sup>73</sup> The Court has established that this obligation “*is now part of the corpus of international law relating to the environment.*”<sup>74</sup>

On the opposing side, many developing countries in the Pacific plead that they have different capacities, and consequently, different levels and kinds of responsibility for dealing with international environmental issues.<sup>75</sup> They argue that a State also takes into account the circumstances and particular requirements,<sup>76</sup> or the “means at their disposal and their capabilities.”<sup>77</sup> However, they are required to take such measures

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68. *Id.*

69. European Convention, *supra* note 49; Inter-American Convention for the Protection and Conservation of Sea Turtles, art. IV(2)(d), May 2001, 2164 U.N.T.S. 29.

70. Endangered Species Act, 7 U.S.C. § 136 (1973); Conservation of Habitats and Species Regulations 2010, SI 2010/490 (U.K.).

71. Stockholm Declaration, *supra* note 28, at Principles 6, 7, 15, 18, 24.

72. Pulp Mills Case, *supra* note 55, at ¶ 101.

73. Corfu Channel, *supra* note 44, at 22.

74. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, at ¶ 29 (July 8).

75. Graham Mayeda, *Where should Johannesburg take us? Ethical and legal approaches to sustainable development in the context of International Environmental Law*, 15 COLO. J. OF INT’L ENVTL. L. & POL’Y 29, 50 (2004); Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 INT’L COMP. L. Q. 35 (2000).

76. Vienna Convention for the Protection of the Ozone Layer, preamble, Sept. 22, 1988, 1513 U.N.T.S. 293 [hereinafter Vienna Convention]; Stockholm Declaration, *supra* note 27, at Principle 12; UNCLOS, *supra* note 22, at Preamble.

77. Vienna Convention, *supra* note 76, at art. 2(2).



complying with international obligations “as far as possible.”<sup>78</sup> Therefore, cost effective techniques like sharing vital data that promotes exchange of information<sup>79</sup> and technical and scientific cooperation<sup>80</sup> are the least that developing countries can promulgate whilst complying with their obligations under the CBD.

#### IV. THE CONFLICTING RIGHT OF “SELF DETERMINATION” OF “PEOPLES”

Despite the aforementioned responsibilities vested upon nation states, there exists a conflicting, yet well-recognized right of cultural self-determination of “peoples.” This section maintains that the right of self-determination of “peoples” is not absolute. In this regard, the term “people” is of utmost importance. Primarily, many communities who hunt the pacific leatherback sea turtles do not qualify as “people.” Moreover, since none of the communities rely on the turtle for their “subsistence,” they should not enjoy such a right. In the latter part, it will be discussed as to how longline fishing techniques have led to the modification of cultures, and therefore the protection has ceased to exist.

##### *A. RSD as a principle of customary international law*

Article 1(2) of the U.N. Charter fosters to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” By virtue of this right, all “peoples” freely determine their political status and freely pursue their economic, social, and cultural development.<sup>81</sup> The ICJ has also recognized the customary nature of the right to self-determination.<sup>82</sup> The Court in the *Western Sahara* Advisory Opinion emphasized that “*the application of the right of self-determination requires a free and genuine expression of the will of the*

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78. CBD, *supra* note 43, at art. 6.

79. CBD, *supra* note 43, at art. 17.

80. CBD, *supra* note 43, at art. 18(1).

81. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶ 2 (Dec. 14, 1960) (reiterated in S.C. Res. 183 (1963), ¶ 4, and in Common Article 1 of the 1966 Human Rights Covenants); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at art. 1 (Dec. 19, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), at art. 1 (Jan 3, 1976) [hereinafter ICESCR] (note also that one of the enumerated purposes of the United Nations is to “develop friendly relations based on respect for the principle of equal rights and self-determination of peoples,” according to U.N. Charter, art. 1(2), and the Charter itself speaks in the name of “We the Peoples of the United Nations,” at the preamble).

82. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 31 (June 21); East Timor Case (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (June 30) [hereinafter East Timor Case].

*peoples concerned.*”<sup>83</sup> The right is so well established that many eminent publicists consider it to be a *jus cogens* norm.<sup>84</sup> A number of General Assembly resolutions<sup>85</sup> on self-determination reflect binding customary norms, as they intend to declare law and were adopted by genuine consensus.

*B. RSD is not absolute and does not extend to all “peoples”*

### **1. The Right to cultural self-determination is vested only with the “indigenous”**

Article 1 of the ICCPR and ICESCR lays down the right of all “peoples” to economic and cultural self-determination.<sup>86</sup> The basic mandate of Article 1 of the ICESCR is to be qualified as “people.” The term “peoples” encompasses distinguished social entities with clear and common identities under colonial or other foreign domination and national groups.<sup>87</sup> The ICJ and international community has generally recognized entities as people only in these limited contexts.<sup>88</sup> Recent practice by the UNHRC, along with International Labour Organization Convention No. 169, clearly identifies self-determination as a right held by Indigenous peoples.<sup>89</sup> The said convention applies to:

peoples in independent countries who are regarded as indigenous on account of their descent of the populations, which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or their establishment of present state boundaries and who, irrespective of their legal status, retain

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83. Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12, at 32 (Oct. 16); Western Sahara, Separate Op. of Judge Dillard, 1975 I.C.J. Rep. 12, at 120 (Oct. 16).

84. JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 511–512 (8th ed. 2012).

85. G.A. Res. 1541 (XV), U.N. GAOR, 15<sup>th</sup> Sess., Supp. No. 16, at ¶ 29, U.N. Doc. A/4684 (Dec. 14, 1960) [hereinafter Res. 1541]; G.A. Res. 2625 (XXV), U.N. GAOR, 25<sup>th</sup> Sess., Supp. No. 28, at 121, U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter Res. 2625].

86. ICCPR, *supra* note 81, at art. 1; ICESCR *supra* note 81, at art. 1.

87. KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW 57 (2002); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 14, 20 (2nd ed. 2005).

88. East Timor, *supra* note 82, at 96–97, 102; Western Sahara, Advisory Opinion, *supra* note 84, at 31–33.

89. U.N. Human Rights Comm’n, Concluding Observations on Sweden, 74th Sess., at ¶ 15, U.N. Doc. CCPR/CO/74/SWE (Apr. 24, 2002); U.N. C.E.S.C.R., Concluding Observations on Columbia, 74th Sess., at ¶ 12, 33, U.N. Doc. E/C.12/1/Add.74 (Dec. 1, 2001); Lubicon Lake Band v. Canada, U.N. Doc. Supp. No. 40 A/45/40 (1990).

some or all of their social, economic, cultural and political institutions.<sup>90</sup>

Indigenous peoples also include colonized peoples in the economic, political, and historical sense—those who have been subjected to unfair treatment and those who have permanent sovereignty over natural resources have a right to development and active participation in the realization of that right. These are often the “peoples” to whom natural resources originally belonged and were not, in most situations, freely and fairly given up.<sup>91</sup>

Thus, assuming without conceding the justifiability of such activities, there are only a few communities where the long tradition of turtle hunting and consumption runs from indigenous peoples through current inhabitants of the region. These include the Seri Indians and the Miskito Indians of Nicaragua.<sup>92</sup>

Given the wealth of traditional history and connection, the green turtle may be the most important animal in northwest Mexico.<sup>93</sup> The green sea turtle in particular was essential to the diet of this hunter-gatherer society, and little or none of a captured animal was wasted. After the turtle meat was eaten, its flippers were fashioned into footwear, its stomach was used as a water bag, and its shell was used as a covering for a Seri abode. Moreover, sea turtles were an important part of the culture of this indigenous society. As a part of community celebrations and ceremonies, the Seri honored sea turtles in poems, myths, chants, and songs.<sup>94</sup> Therefore, evidently these cultures not only are distinct from the purported cultures now, but also are no longer dependent upon the turtles for their subsistence.

## **2. Even if such right exists, it is only for “subsistence” purposes and must be proportionate**

The right under Article 1(2) may be curtailed if the particular population is not dependent upon the resource for its subsistence needs. A

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90. U.N. Human Rights Comm’n, *Indigenous and Tribal Peoples Convention* at art. 1(b), no. 169 (1989).

91. U.N. ESCOR, *Prevention of Discrimination and Protection of Indigenous Peoples: Final Report of the Special Rapporteur*, Erica-Irene A. Daes, 56th Sess., at 32, E/CN.4/Sub.2/2004/30 (Jul. 13, 2004).

92. WALLACE J. NICHOLS & JENNIFER PALMER, WWF GERMANY, *WHEN REPTILES BECOME FISH: ON THE CONSUMPTION OF SEA TURTLES DURING LENT 11* (2006).

93. GARY PAUL NABHAN, *SINGING THE TURTLES TO SEA: THE COMCAAC (SERI) ART AND SCIENCE OF REPTILES* (2003).

94. DAVID K. CALDWELL, *THE SEA TURTLE FISHERY OF BAJA CALIFORNIA, MEXICO*, CALIFORNIA FISH AND GAME 140–151 (1963).

testament to the same is reflected in Principles 1 of the Stockholm and Rio Declarations. They proclaim generally that,

All persons have the right to ‘a secure, healthy and ecologically sound environment’ and to ‘an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.’ This right would include, *inter alia* . . . ‘*enjoyment of traditional life and subsistence for indigenous peoples.*’ (emphasis added).<sup>95</sup>

Therefore, the right extends to indigenous peoples, inasmuch as their subsistence needs are concerned. A better understanding can be reached at by analyzing the definition of subsistence. Subsistence is defined by Black’s Law Dictionary as support or means of support, or things that are indispensable to living.<sup>96</sup> Using turtles for oil, cartilage, skin, and shell does not qualify as subsistence.

The factor of proportionality plays a major role in jurisprudence.<sup>97</sup> The principles of proportionality should be in harmony with the rules of international law.<sup>98</sup> The principle of proportionality means that the burdens imposed on the persons concerned must not exceed the steps required in order to meet the public interest involved. Therefore, if a measure imposes on certain categories of persons, a burden that is in excess of what is necessary, appraised in the light of the actual economic and social conditions and regarding the means available, it violates the principle of proportionality.<sup>99</sup>

In the *Nicaragua Case*,<sup>100</sup> the American military action inside Nicaragua was considered graver and disproportionate to Nicaragua’s aid to the Salvadorian insurgents. A similar verdict was declared in the *Armed Activities on the Territory of the Congo Case*,<sup>101</sup> where the court did not support the Ugandan claim to have been attacked or threatened on such a scale to give right to resort to military force in self-defense on the territory of the Congo.

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95. Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471, 483 (2007).

96. Subsistence, BLACK’S LAW DICTIONARY (9th ed. 2009).

97. *Open Door & Dublin Well Woman v. Ireland*, App. No. 14234/88, 64 Eur. Ct. H.R. 316, 387-388 at ¶ 72 (1992).

98. *Fogarty v. United Kingdom*, App. No. 37112/97, 2001 Eur. Ct. H.R. at ¶ 35-6.

99. *Case C-114/76, Bela-Mühle Josef Bergmann KG v Crows-Farm GmbH & Co. KG*, Opinion of Advocate-General Capotorti, 1977 E.C.R. 1211, 1232.

100. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. Rep. 14 (Jun. 27). [hereinafter *Nicaragua Case*].

101. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. Rep. 168 (Dec. 19). [hereinafter *Armed Activities in the Territory of Congo Case*].

In light of these decisions, a balancing test should be adopted that weighs the relative harm of the cultural practice against its relative value to those who participate in it.<sup>102</sup> This interference must correspond to a pressing social need and, in particular, it must be proportionate to the legitimate aim pursued.<sup>103</sup>

In the context of Economic Social and Cultural rights, a difference can be made between subsistence rights, the upholding of which is necessary for the very survival of people, rather than other rights which are not as vital for the immediate survival of people, such as the right to take part in cultural life.<sup>104</sup> Henceforth, a traditional way of life cannot be preserved at all costs but must be weighed against the overall environmental impact on the state.<sup>105</sup> In Pacific Mexico, during Semana Santa, the Holy Week preceding Easter, thousands of inland residents journey to coastal communities in search of sea turtles and other seafood. During this week, as many as five thousand turtles are consumed in this region alone, and much of the conservation gains made during the year are negated.<sup>106</sup> Thus, such large-scale killing of turtles cannot be deemed to be proportionate to the imminence of the cultural celebrations, which are not even used for subsistence purposes.

### 3. The right to cultural life under Article 15 of ICESCR is not absolute

All “peoples” possess the right to economic and cultural self-determination.<sup>107</sup> Article 15(1)(a) of the ICESCR refers to the culture of the nation in the broad sense,<sup>108</sup> and can be enjoyed only in a collective manner, like the rights to self-determination, independence or sovereignty.<sup>109</sup>

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102. Anni Äärelä & Jouni Näkkäläjärvi v. Finland, Judgment, U.N. Human Rights Comm’n, at ¶ 7.5, U.N. Doc. CCPR/C/73/D/779/1997 (2001).

103. Olsson v. Sweden (No.1), App. No. 10465/83 11 Eur. Ct. H.R. 259 at ¶ 67 (1989); Office of the Commissioner for Human Rights, 80th Sess., at ¶ 6, CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter General Comment No. 31]

104. Amrei Muller, *Limitations to and Derogations from Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS L. REV. 557 (2009).

105. ICCPR, *supra* note 81, at art. 47; Sandra Lovelace v. Canada, Judgment, Communication No. 24, 13th Sess., at ¶ 15–16 CCPR/C/OP/2 (Dec. 29, 1977) [hereinafter Lovelace]; NOWAK, *supra* note 87, at 655, 800.

106. R.S. FELGER, ET. AL., SEA TURTLES IN NORTHWESTERN MEXICO: CONSERVATION, ETHNO BIOLOGY, AND DESPERATION 405–424 (2005).

107. ICCPR, *supra* note 81, at art. 1; ICESCR *supra* note 81, at art. 1.

108. Hans Morton Haugen, *Traditional Knowledge and Human Rights*, 8 J. WORLD. INTELL. PROP. 663, 672–673 (2005).

109. Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, ACHPR, 28th Sess., 72-3 (2005).



Figure 5: Sea turtles are typically butchered alive, their hearts beating for as long as 20 minutes after slaughter. © WJ Nichols

Figure 2. Representation of killing of Pacific Leatherback Sea Turtles by Mexican Communities as delicacies.<sup>110</sup>

Everyone has a right to follow a way of life associated with the use of cultural goods and resources such as land, water, and biodiversity.<sup>111</sup> Moreover, the U.N. Committee on Economic, Social and Cultural Rights, as well as the Human Rights Council, have confirmed fishing and hunting as aspects of cultural life.<sup>112</sup> The traditional use of land for hunting, food gathering, and ceremonial or religious purposes has been recognized in the various domestic legislations.<sup>113</sup>

According to General Comment No. 21, Article 15 (1)(a) grants everyone the right to take part in the cultural life of their choice; whether it is the majority culture, a minority culture, or both.<sup>114</sup> The rights enshrined in the Covenant imposes three types of obligations on State parties: (a) the obligation to respect;<sup>115</sup> (b) the obligation to protect; and (c)

110. NICHOLS & PALMER, *supra* note 92, at 7.

111. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 21, U.N. GAOR 43rd Sess., U.N. Doc. E/C.12/GC/21 (2009) [hereinafter General Comment No. 21].

112. *George Howard v. Canada*, Judgment, Communication No. 879, U.N. Doc. CCPR/C/84/D/879 at ¶ 12.5 (1999); *Apirana Mahuika, et al. v. New Zealand*, Judgment, Communication No. 547, U.N. Doc. CCPR/C/70/D/547 at ¶ 9.3 (1993); *Länsman, et al. v. Finland*, Judgment, Communication No. 511, U.N. Doc. CCPR/C/52/D/511 at ¶ 9.2 (1992); *Äärelä v. Finland*, *supra* note 102, at ¶ 7.5.

113. Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (1918); Marine Mammal Protection Act, 16 U.S.C. Chapter 31 (1972); The Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (1940); Endangered Species Act, 16 U.S.C. Chapter 35 (1973); Environment Protection and Biodiversity Conservation Act 1999 (Austl.).

114. General Comment No. 21, *supra* note 111.

115. I.E. Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5(1) HUMAN RIGHTS L. REV. 81, 82 (2005).

the obligation to fulfill.<sup>116</sup> The obligation to respect imposes a positive obligation to ensure that existing access is maintained.<sup>117</sup> The obligation to fulfill requires the State to facilitate, provide<sup>118</sup> or promote<sup>119</sup> the enjoyment of rights when people cannot secure the enjoyment of those rights of their own accord.

ICESCR. These must, in addition, be acceptable “in a democratic society” and implemented “in accordance with the law.” The “law” does not need to be statutory law, it can also be judge-made law, or it can be made by an international organization.<sup>120</sup> Article 1(2) of the ICESCR gives a right to all peoples to freely dispose of their resources based upon the principles of mutual benefit and international law. “Peoples” are not provided with permanent sovereignty<sup>121</sup> but only with a right of free disposition. This right of disposition is itself restricted by a number of restrictions. Such a right may not prejudice either the treaty obligations arising out of international cooperation or customary international law.

### *C. The right to culture does not extend to “communities” or minorities*

#### **1. Meaning of the term “community”**

When turtle meat is shared among family and friends, the process is imbued with symbolism, consciously or not. An offer of a turtle feast is considered among the highest honors and displays of trust.<sup>122</sup> The ritual of eating turtle meat during holidays still poses one of the major and significant threats to sea turtle survival. The right to culture must not be interpreted to be enjoyed by “communities”. The term “community” has been defined by the Permanent Court of International Justice as a minority group “*having a race, religion, language and traditions in a sentiment of solidarity, with a view to preserving the traditions of the group.*”<sup>123</sup> In northwest Mexico, a turtle moves from the fisher to the butcher (typically

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116. U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 13, U.N. GAOR, 21st Sess., at ¶ 46-7, U.N. Doc. E/C.12/1999/10 (1999) [hereinafter General Comment No. 13]; U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14, U.N. GAOR, 22nd Sess., U.N. Doc. E/C.12/2000/4 (2000) [hereinafter General Comment No. 14].

117. General Comment No. 14, *supra* note 116; I.E. Koch, *supra* note 115.

118. U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 12, U.N. GAOR, 21st Sess., at ¶ 15, U.N. Doc. E/C.12/1999/5 (1999) [hereinafter General Comment No. 12].

119. General Comment No. 14, *supra* note 116, at ¶ 33-37.

120. DAVID HARRIS ET AL, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 344-45 (D.J. Harris et al. eds., 3rd ed. 2014).

121. R. Dolzer, *Permanent Sovereignty over Natural Resources and Economic Decolonization*, 7 HUMAN RIGHTS L. J., 217 (1986).

122. Delgado S. & W.J. Nichols, *Saving Sea Turtles from the Ground up: Awakening Sea Turtle Conservation in Northwestern Mexico*, 3(2)/4(1) J. OF MARINE STUD., 89 (2005).

123. The Greco-Bulgarian Communities, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17, at 4.

male) to the women who prepare the meat. The meat is then shared with kin and friends. When a sea turtle is hunted, it is an event. There is a deep fondness, respect, and curiosity for the turtles—although the process of butchering of turtles appears brutally cruel.<sup>124</sup> Similar practices are also followed in India by the Great Andamanese Negritos but they are almost extinct.<sup>125</sup> In a similar vein, such a right cannot be extended to minorities.

## 2. The travaux préparatoires of the ICESCR & ICCPR do not regard “minorities” as “peoples”

The term peoples under Article 1 gives rise to various opinions and definitions since the wordings leave the meaning abstruse.<sup>126</sup> In accordance with Articles 31 and 32 of the Vienna Convention, a treaty’s terms must be interpreted giving regard to their ordinary meaning. If terms remain ambiguous, the preparatory works (*travaux préparatoires*) may be consulted.<sup>127</sup> According to the provisions of Article 31, where the interpretation needs confirmation, or determination, since the meaning is ambiguous, obscure, or leads to a manifestly absurd or unreasonable result, recourse may be had to supplementary means of interpretation under Article 32. These means include the *travaux préparatoires* of the treaty and the circumstances of its conclusion. These means may be employed in the above circumstances to aid the process of interpreting the treaty in question.<sup>128</sup>

The drafters envisaged that minorities would not be included in the term “peoples” nor accorded the right of self-determination.<sup>129</sup> International law is clear on the fact that the right to self-determination is

124. JOHN STEINBECK, *THE LOG FROM THE SEA OF CORTEZ* (1951).

125. D.K. Chakraborty, *Turtle Eating Ceremony among the Great Andamanese*, 41 J. ANTHROPOLOGICAL SURV. INDIA, 11–17 (1992).

126. Malcolm N. Shaw, *International Law* 230–31 (6th ed. 2003).

127. *Lighthouses Case (France v. Greece)*, 1934 P.C.I.J. (ser. A/B) No. 62, 4 at 13; *Polish Postal Service in Danzig, Advisory Opinion*, 1925 P.C.I.J. (ser. B) No. 11, at 6, 39.

128. *See Yearbook of the Int’l L. Comm.*, 1966, vol. II, at 223 (doubting the rule in the River Oder case that the *travaux préparatoires* of certain provisions of the Treaty of Versailles could not be taken into account since three of the states before the Court had not participated in the preparatory conference, 1929 P.C.I.J. (ser. A) No. 23; 5 AD, pp. 381, 383). *See also* 59 I.L.R., pp. 495, 544–5; Sinclair, *Vienna Convention*, pp. 141–7, and the *Lithgow Case*, *European Court of Human Rights*, Series A, No. 102, para. 117; 75 ILR, pp. 438, 484. Note that in both the *Libya v. Chad* case, ICJ Reports, 1994, pp. 6, 27; 100 ILR, pp. 1, 26, and *Qatar v. Bahrain* case, ICJ Reports, 1995, pp. 6, 21; 102 ILR, pp. 47, 62, the International Court held that while it was not necessary to have recourse to the *travaux préparatoires* to elucidate the content of the instruments in question, it could turn to them to confirm its reading of the text. *See also* the *Construction of a Wall Advisory Opinion*, ICJ Reports, 2004, pp. 136, 174 ff.; 129 ILR, pp. 37, 92 ff.

129. Annotations on the Text of the Draft International Covenants on Human Rights, U.N. GAOR, 10th Sess., at 14–15, U.N. Doc. A/2929 (1955).



conferred on “peoples” and not minorities.<sup>130</sup> Under customary international law, minority protection is limited to the general rights of equality and non-discrimination which clearly do not include the right to culture.<sup>131</sup> It is an individual right to participate in the life of a minority group and does not amount to a group right *per se*.<sup>132</sup> Even if States are required to uphold minority rights under the ICCPR, these rights are not absolute.<sup>133</sup> States may restrict minority rights when such measures “have both a reasonable and objective justification.”<sup>134</sup>

The ICESCR Article 15 refers to the culture of the nation in the broad sense rather than to the culture of a specific minority or an indigenous people.<sup>135</sup> Article 27 of the ICCPR specifically grants to minorities, the right to participate in their own culture. This interpretation is supported by the absence of any mention of minorities or minority cultures in Article 15 of the ICESCR<sup>136</sup> and it refers to the fact that the drafters of Article 15 originally intended the right to apply only to the culture of the State.<sup>137</sup>

## V. CONCLUSION: SPECIES PROTECTION OUTWEIGHS HUNTING FOR CULTURAL PURPOSES UNDER INTERNATIONAL LAW

### *A. Existing domestic legislation paves the way for nations to adopt turtle protection laws*

#### 1. Legislation in Oceania

In conclusion, it is postulated that there should be amendments in the existing domestic structures without infringing on the existing cultural practices. For instance, there have been recommendations to amend the Native Title Act of Australia: (1) For a particular number of takings, upon a finding that takings will not adversely affect recovery; (2) For subsistence purposes only; and, (3) Requiring all takings to be conducted in a humane manner.<sup>138</sup>

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130. Martti Koskenniemi, *National Self-Determination Today: Problem of Legal Theory and Practice*, INTERNATIONAL & COMPARATIVE LAW QUARTERLY 249 (1994).

131. Report of the U.N. Human Rights Comm’n, U.N. GAOR, 45th Sess., Supp. No. 40, at 133, U.N. Doc. A/45/40 (1979).

132. Lovelace, *supra* note 105.

133. MANFRED NOWAK, CONDITIONALITY IN RELATION TO ENTRY TO, AND FULL PARTICIPATION IN THE EU AND HUMAN RIGHTS 687–698 (Phillip Alston et al. eds., 1999).

134. Lovelace, *supra* note 105, at ¶ 15–16; NOWAK, *supra* note 135, at 655.

135. Hans Haugen, *Traditional Knowledge and Human Rights*, 8 J. OF WORLD INTELL. PROP. 663, 672–673 (2005).

136. Yvonne M. Donders, *Towards a Right to Cultural Identity?* in 15 SCHOOL OF RIGHTS RESEARCH SERIES 152 (2002).

137. *Id.* at 4.

138. *Native Title Act 1993* (Cth) s 211 (Austl.).

## 2. Legislation in the United States of America

Similarly, U.S Federal legislation such as the Migratory Bird Treaty Act of 1918,<sup>139</sup> the Marine Mammal Protection Act of 1972,<sup>140</sup> the Bald Eagle Protection Act of 1940,<sup>141</sup> and the Endangered Species Act of 1973<sup>142</sup> (which bans all takings with the exception of hunting by Alaskan Natives) permit all these activities only for subsistence purposes.

## 3. A purposive approach to bridge the deadlock of rights: Canada

The Supreme Court of Canada, in the landmark *Sparrow's* decision, established the general rule in Canada for resolving conflicts between indigenous rights and environmental conservation. It established a purposive approach to the resolution of conflicts over the rights assured by the Constitution Act of Canada. In such an approach, environmental protection measures may limit aboriginal and treaty-guaranteed hunting and fishing rights to the extent needed to preserve the resource. Once conservation of the resource is assured, natives have priority in use.<sup>143</sup>

The court further stated that section 35(1) should be interpreted in the same manner as other sections of the Constitution Act, in a purposive manner, and in the context of aboriginal rights, such a purposive approach demands “*generous and liberal interpretation of the words of s. 35(1).*”<sup>144</sup> The court went on to state that this approach must take into account the fiduciary relationship between government and aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.<sup>145</sup> Such an approach, if followed by the world comity at large, will help break the deadlock situations of species protection versus cultural rights. All these implementations in domestic spheres will considerably reduce turtle killings.

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139. Migratory Bird Treaty Act, *supra* note 113.

140. Marine Mammal Protection Act, *supra* note 113.

141. *The Bald and Golden Eagle Act*, U.S. FISH & WILDLIFE SERVICE (Feb. 1, 2016), <http://www.fws.gov/midwest/midwestbird/eaglepermits/bagepa.html>.

142. *Endangered Species Act (ESA)*, NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION (Feb 11, 2016), <http://www.nmfs.noaa.gov/pr/laws/esa/>.

143. *R v. Sparrow*, [1990] 1 S.C.R. 1075 (Can.).

144. *Id.* at 1106.

145. *Id.* at 1108.

#### 4. Legislation in South America

All these implementations in domestic spheres will considerably reduce turtle killings. The Law for the Protection, Conservation and Recuperation of the Marine Turtle Population of Costa Rica, designed to help protect declining sea turtle numbers, mandates three years of prison for anyone who “kills, hunts, captures, decapitates, or disturbs marine turtles.”<sup>146</sup> The said law also imposes three months to two years of jail time for “those who detain marine turtles with the intention of marketing or commercializing products made from marine turtles.”<sup>147</sup> Therefore, the aforementioned legislation of these various countries, read conjunctively, lays down a guiding framework for nations to adopt stringent and effective turtle protection laws whilst respecting the cultural rights of communities.

##### *B. Extinction of species will lead to the extinction of the culture itself*

If the current rates of turtle killing prevail, then the pacific leatherback sea turtles will soon be extinct. The population of these turtles has dropped more than 95 percent since the 1980s.<sup>148</sup> The result of illegal poaching is that as few as approximately 2,300 adult females now remain, making the Pacific leatherback the world's most endangered marine turtle population.<sup>149</sup> Therefore, if the turtles become extinct, the cultures too will inevitably cease to exist. In such a situation, it is only plausible that the existing cultures be altered by applying the precautionary approach, rather than waiting for a catastrophe when the species becomes extinct. Even if hunting the pacific leatherback sea turtle is part of a culture, not all cultural traditions should be passed down to the next generation.<sup>150</sup> For instance, cock-fighting, a 2500-year-old cultural practice, has now been banned by many countries, as it constitutes an inhumane cruelty to animals.<sup>151</sup>

In the *Norway-IWC Dispute* on whaling, similar to the dispute at hand, Norway contented that the northern coastal villages of Norway were dependent on hunting and fishing for their livelihoods and that whaling served as a means for supplementing incomes in rural areas. An argument was also made that culture is important to the people whose lifestyles and

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146. Marine Turtle Population Law (2002) (Costa Rica).

147. *Id.*

148. Becky Oskin, *Pacific Leatherback Turtles' Alarming Decline Continues*, LIVESCIENCE (February 27, 2013, 3:20 PM), <http://www.livescience.com/27519-pacific-leatherback-turtle-decline.html>.

149. *Leatherback Turtle*, WWF GLOBAL, [http://wwf.panda.org/what\\_we\\_do/endangered\\_species/marine\\_turtles/leatherback\\_turtle/](http://wwf.panda.org/what_we_do/endangered_species/marine_turtles/leatherback_turtle/) (last visited Mar. 24 2016).

150. *Norway-IWC Dispute on Whaling* (Norway v. IWC), Case No. 53, *available at* <http://www1.american.edu/TED/nwhale.htm>.

151. *THE COCKFIGHT: A CASEBOOK*, (Alan Dundes ed., 1994).

diets are supported by catching Minke whales. However, these contentions were not considered persuasive by the International Whaling Commission, as it noted that whale meat could be substituted by other forms of red meat (such as beef or pork) or fish, and still issued a moratorium.<sup>152</sup> In juxtaposition, in the present case, sea turtles are not even used for the subsistence and there exists a stronger footing for such cultural practices to be abandoned.

Hence, sea turtle conservation must be fostered as the interest of all states in the environment is secured by virtue of it being “common concern of humankind.”<sup>153</sup> Further, *opinio juris*, which reflects the opinions of states by way of domestic legislation, suggests that whenever there is a threat of extinction of a species, then the conservation of that species will be given precedence over cultural rights.<sup>154</sup> The conservation of species is part of customary international law,<sup>155</sup> and nations are under a legal obligation to promote the recovery of threatened species<sup>156</sup> and to maintain legislation to protect them.<sup>157</sup> If the world comity at large chooses to save pacific sea turtles, it must confront the challenges of international industrial fishing, widespread small-scale fisheries, traditional harvesting of turtles, illegal poaching markets, and our irresponsible use of plastics.<sup>158</sup>

*If we succeed, sea turtles will unite people from different cultures across the world in a shared vision for conservation on planet Earth.*<sup>159</sup>

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152. Norway-IWC Dispute on Whaling, *supra* note 149.

153. CBD, *supra* note 43, at Preamble.

154. Marine Turtle Population Law, *supra* note 146; Código Penal Federal [CPF], Diario Oficial de la Federación [DOF] 1931, (Mex.).

155. R. Baxter, *Treaties and Customs*, 44 RECUEIL DES COURS 31, 62 (1970).

156. CBD *supra* note 43, at arts. 4(1), 8(f); UNCLOS, *supra* note 23, at art. 63(1).

157. CBD *supra* note 43, at 8(k).

158. OCEANA: PROTECTING THE WORLD’S OCEANS, [www.oceana.org](http://www.oceana.org) (last visited Mar. 24, 2016).

159. *Id.*

