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CONSERVATION OF ENDANGERED SPECIES: THE ROLE OF LAW IN BALANCING SOVEREIGNTY AND GLOBAL GOOD

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Abstract

This paper considers the role of law in conservation of endangered species. The traditional sovereignty that States have enjoyed over their resources has been limited by the development of international environmental law. The conservation of biodiversity is now treated as a common concern of mankind as a whole and there is a need to balance this against the specific rights of communities and States. This paper deals specifically with the manner in which economic rights and cultural rights are curtailed because of concerns relating to endangered species. The WTO regime has developed to take into account environmental conventions while interpreting trade agreements. Cultural practices have been modified to some extent to prevent extinction of species. However, international law does not provide any definitive principles to resolve conflicting rights. This paper identifies certain guiding principles and makes recommendations for the manner in which such conflicting rights may be balanced.

INTRODUCTION

International law has evolved over the past century and especially after World War II, from dealing with conflicts of political interests to furthering the interests of humanity as a whole. Over the same period, there has been increasing awareness of the need to preserve the global environment and concerns about extinction of species.[2]

This essay considers the role that international law and environmental law can play in the conservation of the increasing number of endangered species. It discusses the need to balance between mankind's common right to the conservation of biodiversity and specific

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[2] Federico Lenzerini, *The Interplay Between Environmental Protection and Human and Peoples' Rights in International Law*, 10 AFRICAN YEARBOOK OF INTERNATIONAL LAW, 63 (2002).

cultural and economic rights of communities and nations to biological resources. The paper considers the existing conservation regimes, analyses the manner in which they balance these rights and suggests how these considerations may be better balanced.

CONSERVATION: A GLOBAL, ANTHROPOCENTRIC ISSUE

The conservation of endangered species is a *global* issue for numerous reasons. Ecosystems are not isolated or demarcated on territorial lines. The consequences of extinction of a species are often felt across borders, especially in the case of migratory species.[3]

The fauna of a nation is considered as part of its natural resources over which the State has sovereign rights. It is, however, commonly accepted that the sovereignty of a state over its resources may be curtailed if its activities cause harm in the territory of other states.[4] But even in cases where the effects of extinction are less direct i.e. when there is no significant harm caused to another State, it may be possible to restrain State's activities if it affects humanity as a whole. Biodiversity is now considered to be a 'common concern' of mankind.[5] In other words, all human beings have an interest in the conservation of endangered species, even if there are no direct effects on the environment of the state they live in. Thus, the rights of nations and communities over the fauna of their territories come into conflict with the global right to conservation of species, when the actions of nation or the community could endanger species or lead to extinction.

The resolution of such conflicts is in the realm of International environmental law. It is still an evolving field, but it is important to note that it is has a largely anthropocentric perspective. It seeks to protect the environment both for its own sake as well as for the benefit of humanity in its entirety, thus overlapping to a certain extent with human rights law.[6] In cases where the exercise of sovereignty over resources causes environmental concerns, the right of communities needs to be balanced with the rights of mankind as a whole.[7] However, no clear principles of law have yet evolved that can determine the weight to be given to different rights in cases of conflict.

CONSERVATION OF SPECIES – A RIGHT OF HUMANITY?

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[3] Philippe Sands, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, (2nd edn., 2003).
[4] Alexander Kiss and Dinah Shelton, INTERNATIONAL ENVIRONMENTAL LAW, (1991).
[5] Dinah Shelton, *Common Concern of Humanity*, 5 IUSTUM ACQUUM SALUTARE, 33 (2009).
[6] Cullet, *supra* note 26.
[7] Lenzerini, *supra* note 1.

Traditionally, there was no international regulation of the rights of states to exploit species resident in their territories. It was accepted that States had 'sovereignty over natural resources' in their territories, which included plant and animal species.[8] But International law – through both treaties and custom – has developed to restrain the exercise of sovereignty in certain cases. Most States have participated in the formulation of treaties related to the conservation of species and soft law instruments like the Rio Declaration, 1992 and the Stockholm Declaration, 2002. They have thus recognised in some form the need to implement conservation policies.

There are numerous multilateral environment treaties related to conservation. The Convention on Biological Diversity (CBD) is an overarching treaty concerned with biodiversity in general. Biodiversity, as defined in the Convention, includes living organisms in terrestrial, marine and aquatic ecosystems and thus includes the conservation of endangered species.[9] Other multilateral treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES) and the Convention on the Conservation of Migratory Species of Wild Animals, 1979 (CMS) regulate different aspects of conservation. In addition, treaties like the International Whaling Convention or the Agreement on the Conservation of Polar Bears, 1973 deal with the conservation of a specific species.

The migration of animals from one area to another in a cyclic manner is a global phenomenon. Migratory species are also more susceptible to threats ranging from habitat shrinkage to overhunting on their migration routes.[10] The CMS attempts to regulate the conservation of migratory species that are in danger of extinction throughout their range. It encourages implementation at both the national and international level through research and monitoring.[11] In addition there are several agreements concluded under the CMS for the conservation of different species.

Overexploitation for commercial trade is another cause for concern. For instance, the vicuna of the High Andes is near extinction as a result of the great demand for its wool. The CITES regulates international trade in endangered species and grants varying degrees of protection to over 30,000 species of both plants and animals. It is notable that since the Convention came

[8] Nico Schrijver, Sovereignty Over Natural Resources
[9] Article 2, Convention on Biological Diversity, 1992.
[10] UNEP, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW *available at http://www.iucnael.org/online-resources/unep-training-manual.html* (Last Visited on August 8, 2014).
[11] Article V, Convention on the Conservation of Migratory Species of Wild Animals, 1979.

into force none of the species protected by it have become extinct as a result of trade.[12] The CITES does not altogether ban the hunting of endangered species but requires the Scientific and Management Authority of a State to give permits and certificates, thus regulating the hunting.[13]

It is clear that there are numerous multilateral international treaties relating to conservation of endangered species. However, treaties only bind the States that are parties to them. Some jurists like Richard Baxter have argued that such international multilateral treaties constitute evidence of customary international law.[14] In addition to these treaties, judicial decisions have also contributed to the development of customary law.

In the *Gabcikovo-Nagymaros* case, Justice Weeramantry recognised that the protection of the environment is a vital part of human rights doctrine.[15] The International Tribunal on the Law of the Sea applied the 'precautionary principle' in the *Southern Bluefish Tuna*[16] judgment to restrict overexploitation of the species in question. It was held that considering the scientific uncertainty surrounding the status of the fish stock, provisional measures to protect further depletion was justified. The recent decision of the International Court of Justice on *Whaling in the Antarctic* saw the court declare that Japan halt its whaling programme in the Southern Ocean. Japan had earlier justified this hunting as a 'scientific activity' – a permitted exemption under the International Convention on Regulation of Whaling. However, the court found no scientific merit in the programme, largely because of the excessive large-scale lethal sampling that was indulged in.[17] While this decision was related to treaty obligations, it is also a reflection of the general trend in international law to account for environmental considerations.

A NEED FOR BALANCE

Nations continue to have sovereign rights over the resources in their territory. Animals are exploited for livelihood and cultural practices. However, with the development of the law relating to conservation, it appears that the exercise of sovereignty may be curtailed when

[12] *Supra* note 9.
[13] Article VI, Convention on International Trade in Endangered Species of Wild Flora and Fauna, 1973.
[14] R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRITISH YEARBOOK OF INTERNATIONAL LAW 275 (1965-66).
[15] Gabcikovo-Nagymaros Project (Hunary v Slovakia), 1997 ICJ 92 (Sept 27).
[16] Southern Bluefish Tuna Cases (New Zealand v. Japan; Australia v. Japan), Order of 27 August 1999, (International Tribunal on the Law of the Sea).
[17] Whaling in the Antarctic, (March 31, 2014).

there is the threat of overwhelming harm to environment i.e. threat of extinction. There is a clear need to balance these rights but there is lack of clarity on how this is to be done.

Balance with Economic Rights

Trade, especially after the establishment of the World Trade Organisation appears to be focussed only on the production and exchange of goods, not accounting for any sort of environmental concerns. This changed after the Uruguay Round negotiations when the WTO Agreement was amended to state that the development of trade has to be in accordance with the principles of sustainable development and accounting for environmental considerations. The WTO Committee on Trade and Environment was also established with a broad mandate of reconciling trade policies and environmental considerations.[18]

Early decisions like the *Reformulated Gasoline* case[19] and *Beef Hormones* case[20] saw some development in environmental awareness in the WTO dispute process. In the former, the dispute resolution body considered the meaning of exhaustible natural resources and the latter imported the precautionary principle to state that governments should follow the same in issues relating to irreversible health risks. While these are not related to conservation, the relevance of environmental concerns is accepted. However, the most significant case was the 1998 *Shrimp-Turtle* case that considered balancing trade policies with conservation measures.[21]

It is relevant to note that the decision was given at a time when the sea turtle population was already on the decline and six out of the seven species are classified as endangered under the CITES. There have been measures taken in numerous countries to ensure a reduction in sea turtle harvest. While direct hunting has been banned a problem that persists is that turtles are incidentally captured in shrimp trawl nets. The use of Turtle Excluder Devices (TEDs) by trawlers reduces this incidental catch.[22]

The *Shrimp-Turtle* case concerned the use of TEDs by shrimp exporting countries and the extraterritorial application of US legislation mandating such use. The decision of the WTO

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[18] Howard Mann, *Of Revolution and Results: Trade-and-Environment Law in the Afterglow of the Shrimp-Turtle case*, 9 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, 29 (1998).
[19] United States – Standards for Reformulated and Conventional Gasoline, WTO Doc WTDSS/AB/R (20 May 1996).
[20] European Community – Measures Concerning Meat and Meat Products, WTO Doc.WR/DS26/AB/R (16 January 1998).
[21] United States – Prohibition of Shrimps and Certain Shrimp Products, WT/DS58/AB/R (October 12, 1998).
[22] Ronald Salz, Sea Turtle Mortality, Shrimp Fisheries and International Trade, *available at* http://www.umass.edu/hd/research/turtle.pdf (Last visited on August 8, 2014). s

Appellate body was in favour of the exporting countries on the grounds that the US domestic law regulations could not apply to other states. However, this decision also took into consideration various other factors such as that these restrictions were imposed in a discriminatory manner, that the countries in question were developing and they had conservation regimes of their own. They were all members of CITES and were independently bound to ensure conservation of these turtles.[23]

It is significant to note that despite the outcome of the case, the WTO Appellate Body still gave a broad interpretation to the word 'exhaustible natural resources' and held that a restriction that was uniform would have been justifiable. This implies that the acting country does not have to deal only with resources within its jurisdiction when it imposes such restrictions. It was recognised that migratory species are 'shared resources' that numerous states have sovereignty over. Most importantly, the decision also dealt with the problem of balancing obligations. It considered the various environment conservation instruments that the states were parties to and held that its rights as members of the WTO must also be balanced with its environmental obligations under other instruments as per the Vienna Convention on the Law of Treaties.[24]

Balance with Cultural Rights

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides that persons belonging to minority communities should not be denied the right to enjoy their own culture or profess and practice their own religion[25] and Article 15 of the International Covenant on Economic Social and Cultural Rights, 1966 (ICESCR) similarly provides that everyone has the right to culture.[26] The term 'culture' in these treaties includes practices that are a part of a community's living culture such as the tradition use of resources by communities.[27] The right to culture is specifically linked to the conservation of living resources since the practices sought to be protected invariably involve the exploitation, either by hunting or otherwise, of living resources.

Conservation treaties are occasionally criticised as promoting 'eco-colonialism' but even they recognise the rights of local communities over their natural resources and their traditional use

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[23] Elli Louka, INTERNATIONAL ENVIRONMENTAL LAW, 390 (2006).
[24] United States – Prohibition of Shrimps and Certain Shrimp Products, WT/DS58/AB/R (October 12, 1998).
[25] Article 27, International Covenant on Civil and Political Rights, 1966.
[26] Article 15, International Covenant on Economic, Social and Cultural Rights, 1966.
[27] Francesco Francioni, *Culture, Heritage and Human Rights: An Introduction*, CULTURAL HUMAN RIGHTS, 7 (Francesco Francioni and Martin Scheinin eds., 2008).

of animals. The CBD recognises the link between traditional environmental knowledge and sustainable use as well as the necessity to encourage customary use of biological resources.[28] The CMS also recognises the need to accommodate the needs of traditional subsistence users of the species it covers.[29] Even the Conference of Parties to the CITES have considered cultural exemptions in certain cases. It permitted Pakistan to export a small number of the *markhor* goat, despite it being an endangered species in Appendix I. This permit was granted to communities who practice trophy hunting, contingent on them proposing a management plan for conservation areas.[30]

There have been various cases relating to cultural practices that involve killing of endangered species. In the case of the *Endorois* people, the restrictions imposed on a game reserve to conserve wildlife were considered to be too harsh since they did not take into account the right to practice religion.[31] In *Lansman v Finland*[32] and *Ivan Kitok v Sweden*[33] it was recognised that the right of the Sami tribe to continue reindeer hunting was protected under Article 27, ICCPR. In *Apirana Mahuika v New Zealand*[34] the cultural right of Maoris to engage in fishing activities were in question. While it was recognised as a part of their right to culture, it was also held that the cultural right could be modified by imposing quotas in order to conserve the depleted inshore fisheries.

One of the best examples of a conservation regime that balances cultural and environmental concerns is the International Whaling Commission (IWC). The IWC currently has 89 State parties. Many of these have communities that claim that whaling is an intrinsic part of their cultural and subsistence activities. The Greenland Inuit has claimed that the exchange of whale products reinforces the Inuit identity and that whale meat is central to kin-based practices to bind hunters and families together.[35] The Maoris of New Zealand also have a

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[28] Arts 8(j) and 10(c), Convention on Biological Diversity, 1992.
[29] Article III(5)(c), Convention on the Conservation of Migratory Species of Wild Animals, 1979.
[30] Sajjad Ali, *Conservation Status of Markhor in the Northern parts of North West Frontier Province, Pakistan*, (May, 2008) *available at* http://www.cfc.umt.edu/nwfp/docs/SajjadAli%20pp%20final.pdf (Last seen on August 7, 2014).
[31] Centre for Minority Rights Development (Kenya) on behalf of the Endorois Welfare Council v Kenya, Afr. Comm HPR Case 276/2003 (February 4, 2010)
[32] Länsman et al. v. Finland, Communication No. 511/1992**, U.N. Doc. CCPR/C/52/D/511/1992 (1994).**
[33] Ivan Kitok v Sweden, (Communication No. 197/1985)
[34] Apirana Mahuika v New Zealand, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000).
[35] Alexander Gillespie, *Aboriginal Subsistence Whaling*, 12 COLORADO JOURNAL OF INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, (2001).

cultural relationship with whales and claim that whaling is more than a commercial or subsistence practice.[36]

The IWC has imposed a moratorium on whaling on all its members, making exceptions only for scientific whaling and for 'aboriginal subsistence'. The latter was defined in 1981 as whaling for the "purpose of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a continuing dependence on whaling and on the use of whales."[37]

The IWC regime is unique in the manner in which it balances cultural concerns and environmental rights. It recognises that indigenous culture may be the antithesis of environmental sustainability and does not always take precedence before environmental concerns. It has modified traditional practices in several ways. *First,* to ensure that calves, suckling whales or females accompanies by calves are not hunted; *Second*, traditional weapons have been replaced with more humane methods of killing whales. *Third,* by laying down that such whaling should not significantly increase the risk of extinction.[38]

Recommendations

International law does not provide us with definitive principles to resolve such conflicting rights. Article 31(3)(c) of the Vienna Convention on the Law of Treaties is relevant to the extent that it states that a general rule of interpretation of treaties includes taking into account all relevant rules of international law applicable in the relation between two parties.[39] In the *Shrimp-Turtle* case, environment conventions that the States were party to were considered to be principles of international law applicable between the two parties. They were considered to conclude that environmental rights may be given priority in certain cases.[40]

It is important to remember that most of the cases discussed have been about treaty obligations. It is not possible to arrive at a common principle that has been followed through these cases and treat it as an accepted view in international law. Every decision has taken into account very specific aspects of the treaties in question and the circumstances surrounding the case.

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[36] Alexander Gillespie, CONSERVATION, BIODIVERSITY AND INTERNATIONAL LAW, 236, (2011).
[37] IWC, Technical Committee Working Group on Development of Management Principles and Guidelines for Subsistence Catches of Whales by Indigenous (Aboriginal) Peoples, (1982).
[38] Gillespie, *supra* note 36.
[39] Article 31(3)(c), Vienna Convention on the Law of Treaties, 1969.
[40] United States – Prohibition of Shrimps and Certain Shrimp Products, WT/DS58/AB/R (October 12, 1998).

Given the very nature of international law, it is difficult to expect that a uniform principle for conflict resolution would be accepted. The most practical way to reduce ambiguity would be for specific regimes to adopt a model similar to the IWC or at least follow a similar policy to determine exceptions and quotas for the same. Treaties like the CBD and CMS should not only recognise the rights of specific communities but also provide a mechanism by which the extent of the exceptions made could be determined. For instance, a scientific authority could be appointed (similar to CITES) to grant permits or licenses based on the latest scientific data of the species in question. A mechanism to determine quotas will be helpful both for ensuring sustainable trade and permitting cultural activities that affect the population of endangered species.

CONCLUSION

There is thus no uniform framework of laws relating to endangered species that apply to all States. States are free to assume treaty obligations that bind them to follow certain conservation policies. Different treaty regimes impose different obligations and create different exemptions. The need to reconcile environment concerns with conditions in trade agreements and cultural practices has been recognised in treaties as well in several cases.

Despite the fact that the need to balance conflicting obligations has been recognised, the manner in which it is done has been determined on a case to case basis. There are no accepted principles in international law regarding the same However, the increasing number of endangered species has become an issue of global importance and it appears that we are moving towards an era where it would be imperative to develop such principles. In the meantime, the most practical way to reduce ambiguity would be for specific conservation regimes to adopt a model similar to the IWC that regulates the manner in which exceptions may be made.