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Protecting the Cultural and Natural Heritage: Finding Common Ground

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Protecting the Cultural and Natural Heritage: Finding Common Ground

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The cultural heritage of indigenous peoples, a segment of the DNA of our global community, faces elimination. Because a significant part of the cultural heritage of humankind is finite and non-renewable, it confronts a threat more perilous than the possible destruction facing the biological diversity of the natural heritage.[1] More poignantly, the reasons for protecting biological diversity apply with even greater force to the cultural heritage. While species and animals facing extinction can reproduce themselves and be raised in captivity, cultural resources are not capable of such renewal, and are unable to propagate themselves. Once destroyed, they are lost forever.

This paper focuses, very briefly, on how this critical, non-renewable, component of human civilization may be preserved. The "cultural heritage" being canvassed in this article possesses intrinsic religious and cultural importance as the heritage of humanity as well as utilitarian value as the DNA of our civilization. It traverses a broad spectrum of human creativity expressed in archaeological sites, monuments, art, sculpture, architecture, oral & written records, and living cultures. This cultural heritage deserves protection for historical, religious, aesthetic, ethnological, anthropological, and scientific reasons spanning both utilitarian and non-utilitarian rationales.

From a utilitarian standpoint, the cultural heritage embodies invaluable non-replicable information and data about the historic and prehistoric story of humankind. Such information may relate to the social, economic, cultural, environmental and climatic conditions of

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[1] *See generally* PROTECTION OF GLOBAL BIODIVERSITY: CONVERGING STRATEGIES, Lakshman Guruswamy & Jeffrey McNeely, eds. (1998)

past peoples, their evolving ecologies, adaptive strategies and early forms of environmental management. The destruction of these storehouses of knowledge, and the information contained in these libraries of life, could critically affect how we respond to the continuing challenges of population growth, resource exhaustion, pollution, and environmental management. From a non-utilitarian perspective, the despoliation of cultural resources, where they form part of the religious and cultural traditions of people and civilizations, desecrates the sacred.

The primary objective of this paper is to move toward establishing a jurisprudential framework which recognizes the rights of indigenous peoples to their own cultural heritage, and the duty of the international community to protect such cultural resources. An examination of the form and nature of the cultural heritage reveals why it is important. Even such archetypal examples of cultural resources such as archaeological sites should be protected for reasons that go beyond the narrow utilitarian basis hitherto advanced. They ignore indigenous perspectives for protecting the cultural heritage, and has led to skepticism felt by indigenous people about the efforts of outsiders, as distinguished from the efforts of indigenous peoples themselves, to protect their own cultural heritage.

A review of the jurisprudential principles that might govern the cultural heritage of humankind argues for an ethnographic, as distinct from a state centric legal framework. An ethnographic seam of International Law recognizes the need to protect the base of the cultural resources pyramid, and thereby supports the cultural resources belonging to indigenous peoples and communities. This strand of International Law consists of instruments such as the ILO Convention (169), the Draft Declaration, and cognate judicial decisions. This premise accepts the view offered by some modern publicists that we are witnessing the crystallization and development of customary international law relating to the human and cultural rights of indigenous peoples.

There is also a growing body of general principles of law, as defined by Art. 38(1) (c) of the Statute of the International Court of Justice, found in the legislation of countries such as the United States of America, Australia, Canada and New Zealand, that recognizes and institutionalizes the ownership and protection of cultural resources belonging to indigenous and native peoples.

It is also clear that the responsibility for protecting cultural resources as the heritage of humanity, was recognized in embryo by the 1972 UNESCO Convention, and has now become the duty of the entire international community. This suggests a conceptual framework for reconciling the rights of indigenous peoples to their own cultural resources, with the responsibility of the entire community of nations. Such a synthesis can be achieved by finding common ground occupied by cultural and natural resources law and policy. The modern international community should address the problems confronting cultural resources law similar to the manner in which it dealt with the problems of global warming and the depletion of biological diversity. It should embrace the principle of common but differentiated responsibility (CBDR),[2] and incorporate the equitable notion that developed countries should assume primary responsibility for addressing these common concerns of humanity.

A rider must be entered. This short exposition has the limited objective of establishing a jurisprudential baseline that recognizes the duty of the international community to protect the cultural heritage of humankind. The manner in which this principle ought to be implemented, together with the modalities and operational methods of doing so will be explored in a sequential article.

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[2] This principle is specifically articulated in the Preamble para 6, and Art 3(1) of the Climate Change Convention, United Nations Framework Convention on Climate Change, 31 I.L.M. 849 (1992) [hereafter Climate Change Convention], and impliedly, by the Convention on Biological Diversity, 31 I.L.M. 818 (1992).