DISMANTLING THE FORTRESS: REFORMING INTERNATIONAL CONSERVATION

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Species and ecosystems are declining more rapidly than ever before in human history. The global biodiversity crisis is also a crisis of human rights, especially for the Indigenous peoples who depend directly on nature for their material and cultural existence. For most of the history of international conservation, however, its leading advocates treated Indigenous peoples as part of the problem. They pursued a goal of "fortress conservation" that excluded human residents from national parks and other protected areas. This vision was embraced and disseminated by an international conservation regime composed not only of states, but also of large conservation organizations in the Global North. These organizations have urged the creation of new protected areas, provided support for them, and in many cases managed them directly.

The pursuit of fortress conservation has not just led to the violent dispossession of millions of people from their ancestral homes; it has also failed to conserve. Many studies have confirmed what might seem obvious: protecting Indigenous rights results in better conservation. Faced with the ugly facts of fortress conservation, most states and conservation organizations have committed on paper to respect human rights in conservation. But their commitments have been vague and often poorly implemented. In many countries, especially in Africa and Asia, fortress conservation has continued to give rise to horrific abuses.

Although states are primarily responsible for compliance with international human rights standards, private conservation organizations and funders also have a responsibility to respect human rights. This Article argues that they should do much more to put their promises into practice. To that end, they should be guided by the concrete ways that international human rights bodies have already applied human rights norms to Indigenous rights, protected areas, and private multinational organizations. By embedding human rights in a new vision of inclusive conservation, conservation organizations and funders can dismantle the fortresses of conservation that they did so much to create.

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In the interest of full disclosure, I should make clear at the outset that I have been involved in some of the efforts described in this article to bring human rights to bear on biodiversity protection: From 2012 to 2018, I was the first United Nations ("U.N.") independent expert and then the first U.N. special rapporteur on human rights and the environment; in 2019 and 2020, I participated in an investigation of alleged abuses in protected areas in six countries in Africa and Asia; and in 2021 and 2022, I testified to Congress about the abuses and ways to address them. *See infra* Part II. Since 2022, I have advised the U.N. Environment Programme on an initiative to develop human rights standards for conservation organizations and funders, which is described in Part IV. I have learned a great deal from my conversations with dozens of people at Indigenous, rights-based, and conservation organizations and funders. There are too many to thank them individually here, but they all have my deep gratitude. Of course, any remaining errors are mine alone.

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Introduction

The Earth is entering an age of extinction for the sixth time. The last global extinction, 66 million years ago, resulted from an asteroid hitting the planet.[1] This time, industrial human society is playing the role of the asteroid. Through the pursuit of rapid economic development, humans are destroying forests and other habitats, over-fishing and -hunting species, degrading ecosystems with toxic pollution, and warming the entire planet by burning fossil fuels. Biological diversity of all kinds is declining more rapidly today than ever before in human history, and at least one million species face extinction.[2]

The global biodiversity crisis is also a crisis of human rights. The loss of biodiversity undermines the ability of everyone, everywhere, to enjoy their rights to life and health, by increasing the incidence of disease, reducing the storehouse of medicinal information, and decreasing the productivity and stability of fisheries and crops, among many other adverse effects.[3] But the assault on nature is more immediately catastrophic for the Indigenous peoples and others who live in the places that remain relatively untouched by industrial development.[4] The loss of

1. Pincelli M. Hull et al., *On Impact and Volcanism Across the Cretaceous-Paleogene Boundary*, 367 Sci. 266 (2020).
2. Intergovernmental Sci.-Pol'y Platform on Biodiversity & Ecosystem Serv., Global Assessment Report on Biodiversity and Ecosystem Services xv–xvi (2019) (hereinafter IPBES Report).
3. *See generally* John H. Knox (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶¶ 13–21, U.N. Doc. A/HRC/34/49 (Jan. 19, 2017); World Health Org. & Secretariat of the Convention on Biological Diversity, Connecting Global Priorities: Biodiversity and Human Health — a State of Knowledge Review (2015).
4. The United Nations has estimated that there are more than 5,000 Indigenous peoples, totaling more than 370 million persons, in 70 countries. U.N. Indigenous Peoples' P'ship (UNIPP), Delivering as One UN at the Country Level in Partnership with Indigenous Peoples and Governments 3 (2012). Many Indigenous persons no longer reside in forests or other natural ecosystems, but millions still do. *See generally* David Kaimowitz, Forest Governance by Indigenous Peoples: An Opportunity for Climate Action in Latin America and the Caribbean (2021).

   Indigenous persons are not the only people who live in forests and other natural ecosystems. The Rights and Resources Initiative has estimated that between 1.65 and 1.87 billion people live in important areas for biodiversity conservation, and 363 million live in areas already designated as protected. These numbers include not only Indigenous peoples, but also Afro-descendants whose ancestors escaped from slavery and formed new communities in the forests of Latin America and the Caribbean, as well as various other types of traditional communities. Rts. & Res. Initiative, Rights-Based Conservation: The Path to Preserving Earth's Biological and Cultural Diversity? 5 (2020). Although all of these people share human rights that may be violated by violent dispossession, they do not all have collective land rights, as Indigenous peoples do. *See infra* Part III.B. This Article focuses primarily but not exclusively on the effects of conservation on the rights of Indigenous peoples.

natural ecosystems destroys their food, water, homes, and culture. When they take action to protect the forests, rivers, and lakes on which they depend, they are targeted by governments, extractive corporations, large landowners, and criminal networks that are damming, mining, logging, ranching, and poaching in their ancestral territories. One telling indication of the costs they pay is that Indigenous peoples suffer more than one-third of the approximately 200 deaths of environmental and land defenders killed every year, even though they constitute only about five percent of the global population.[5]

It might seem obvious that, to be successful, efforts to conserve natural ecosystems must protect the rights of Indigenous peoples and others who are seeking to defend their homes from these threats. For most of the history of international conservation, however, its advocates have ignored Indigenous peoples or treated them as part of the problem. Rather than support their rights, the dominant conservation strategy in much of the world (with the partial exception of Latin America) has been to create national parks and other protected areas that prohibit not just industrial exploitation, but almost all human activities. According to this ideal, humans should enter these fortresses of conservation only to experience the beauty of nature and to study it respectfully. Those who live in these areas already, no matter how ancient or profound their cultural and material ties, must leave.

Conservationists have long considered protected areas the jewel in the crown of natural preservation, the most certain way to safeguard ecosystems from human destruction.[6] Born in the nineteenth century with the creation of Yosemite and Yellowstone National Parks in the United States, the concept of fortress conservation spread rapidly throughout the world. Its dissemination was greatly facilitated by colonialism: in many countries in Africa and Asia, the first national parks were created by colonial powers. But even after states in the Global South achieved independence, they continued to embrace the logic of fortress conservation, assisted by an extensive international network based in the Global North that provided intellectual and financial support. Conservation organizations such as the International Union for the Conservation of Nature (IUCN), the World Wildlife Fund (WWF), and the Wildlife Conservation Society (WCS) proselytized for protected areas, and governments and foundations in the Global North provided billions of dollars to support their efforts.

Together, states and large conservation organizations created an international conservation regime with fortress conservation as its central animating

5. Global Witness, Decade of Defiance: Ten Years of Reporting Land and Environmental Activism Worldwide 6, 16 (2022); *Land and Environmental Defenders Killed*, Global Witness (2023), https://perma.cc/3S74-XCYV; *see* UNIPP, *supra* note 4.

6. *See* Dilys Roe, *The Origins and Evolution of the Conservation-Poverty Debate: A Review of Key Literature, Events and Policy Processes*, 42 Oryx 491, 493 (2008).

purpose.[7] The number and scope of protected areas rapidly grew, until by 1980, their total coverage was larger than Brazil. Over the next three decades, their size doubled again.[8] Their creation violently displaced millions of Indigenous people, destroying their material, cultural, and spiritual ways of life.[9] When they tried to return to their ancestral territories, they were often arrested, beaten, tortured, and even killed.[10]

As the human costs of fortress conservation mounted and became more widely known, it also became clearer that fortress conservation was failing to deliver on its ecological promises. Many studies confirm what might have seemed self-evident: protecting the rights of Indigenous peoples not only results in better lives for them but also results in better conservation. Their lands have much of the world's remaining natural ecosystems.[11] Indeed, the total land area managed by Indigenous peoples is almost double that of formally protected areas.[12] They are generally better than governments at protecting against deforestation and the loss of biodiversity,[13] and they do so far more cost-effectively.[14] Faced with the ugly facts of fortress conservation, states and conservation organizations announced in the early 2000s that they rejected it. They vowed to pursue a new paradigm: a rights-based approach to conservation that treated Indigenous peoples as equal partners.[15]

They have failed to live up to their promises. Fortress conservation continues in many countries much as before, especially in Africa and Asia. Governments are still dispossessing Indigenous peoples of their ancestral lands to create protected areas, criminalizing their activities there, and arresting and even killing them if they try to return. It is easy to blame the states with jurisdiction over these protected areas for the abuses: they are primarily responsible for respecting and protecting the human rights of their own people. However, every other part of the international conservation regime has also contributed to the persistence of fortress conservation. Many of the worst abuses have occurred in national parks that are funded by governments in the Global

7. By "international conservation regime," I mean not only treaties, but the entire web of agreements between and commitments by host governments, donor governments, private conservation organizations, and intergovernmental organizations that create, support, and oversee protected areas around the world. *See infra* Part I.A.

8. *See infra* Part I.D.

9. Mark Dowie, Conservation Refugees: The Hundred-Year Conflict Between Global Conservation and Native Peoples xxi (2009).

10. Victoria Tauli-Corpuz (Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples), *Rep. of the U.N. Special Rapporteur on the Rights of Indigenous Peoples*, ¶¶ 51, 53, 87, U.N. Doc. A/71/229 (July 29, 2016).

11. IPBES Report, *supra* note 2, at 31–32.

12. Vicky Tauli-Corpuz et al., *Cornered by PAs: Adopting Rights-Based Approaches to Enable Cost-Effective Conservation and Climate Action*, 130 World Dev. 1, 2 (2020).

13. *Id.*; Kaimowitz, *supra* note 4, at 27–31.

14. Rts. & Res. Initiative, *supra* note 4, at 5.

15. *See infra* Part I.D.

North, advised or co-managed by conservation organizations, and recognized by the World Heritage Committee as having outstanding universal value.[16] All of these actors have fallen short of their human rights duties and responsibilities, and as a result, they have also failed to effectively protect natural ecosystems.

Reforming the international conservation regime is of urgent importance. As biodiversity loss has increased, so have calls for the expansion of the network of protected areas. In 2022, the Conference of Parties to the most important conservation treaty, the Convention on Biological Diversity (CBD),[17] committed to nearly double the coverage of protected areas by 2030, to "at least 30 per cent of terrestrial, inland water, and of coastal and marine areas," and to mobilize at least $200 billion per year to implement national biodiversity strategies.[18] If the international conservation regime pursues these goals without protecting human rights, it will continue to cause massive human rights abuses and fail yet again to avert the biodiversity crisis.

Part I of this Article describes how fortress conservation became the animating idea of the international conservation regime, and how the growing opposition to fortress conservation led to its formal rejection by the international conservation regime in the early 2000s.

Part II describes the persistence of fortress conservation, providing detailed examples from Lobéké National Park in Cameroon and Salonga National Park in the Democratic Republic of the Congo (DRC). Despite the assurances by major conservation actors that they will incorporate human rights norms into their work, recent years have seen credible allegations of murder, rape, and torture in many protected areas supported by the international conservation regime. The human rights abuse typically underlying all of the others remains the violent dispossession of Indigenous peoples from their lands and territories in the name of conservation.

The major actors in the international conservation regime have failed to reorient the regime towards human rights in large part because they have failed to take human rights law seriously. They have made vague, aspirational commitments to comply with human rights, but they have largely ignored the detailed ways that human rights bodies have applied human rights treaties to Indigenous rights and to protected areas. In addition, conservation organizations have failed to incorporate the emerging norm that they should respect human rights at least to the same degree as multinational business enterprises. Part III explains in detail the human rights law relating to conservation and protected areas, and the responsibilities of the major conservation organizations to respect human rights.

16. *See infra* Part II.

17. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

18. Conference of the Parties to the Convention on Biological Diversity, *Kunming-Montreal Global Biodiversity Framework*, ¶13, U.N. Doc. CBD/COP/DEC/15/4 (Dec. 19, 2022) (Targets 3, 19).

Conservation organizations and funders led the dissemination of fortress conservation around the world and too often still support its practice today. They have a responsibility to meet their commitments to replacing fortress conservation with inclusive conservation. Part IV sets out concrete steps they should take to incorporate human rights into their work. It also describes two recent initiatives—one by the United Nations ("U.N.") Environment Programme and one by the U.S. House of Representatives—that would help to safeguard human rights in conservation. By embracing human rights in practice as well as on paper, conservation organizations and funders would help to dismantle the fortresses of conservation that they did so much to create.

I. Fortress Conservation Within the International Conservation Regime

This Part first describes the international conservation regime and its principal actors. It then explains how the actors used the regime to disseminate fortress conservation around the world, until growing criticisms led them to announce that they were rejecting it.

A. The International Conservation Regime

The international conservation regime is the set of "principles, norms, rules, and decision-making procedures around which actor expectations converge" in the field of international conservation.[19] Defined broadly, the term "conservation" simply means the protection of nature, including natural ecosystems, species, and all forms of biological diversity.[20] It encompasses measures designed to protect against threats to ecosystems and species, including regulating the hunting, fishing, or other taking of species, prohibiting or restricting trade in wildlife, banning harmful pollutants, and protecting against invasive species.

For many years, the treaties within the international conservation regime focused on transboundary problems: wildlife or other resources that crossed national lines.[21] International conservation law, like international environmental law generally, deferred to states on how to manage the natural resources within their own territory. The cornerstone of international environmental law

19. *See* Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 Int'l Org. 185, 185 (1982), *reprinted in* International Regimes 1 (Stephen D. Krasner ed., 1983).

20. *See* Ellen Desmet, Indigenous Rights Entwined with Nature Conservation 45 (2011).

21. *See, e.g.*, International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72; Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333; Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 993 U.N.T.S. 243.

is often said to be the *sic utere* or "do-no-harm" principle, which was proclaimed as Principle 21 of the Stockholm Declaration at the first major international environmental conference in 1972.[22] But the "do-no-harm" principle is really a "do-no-transboundary-harm" principle. Principle 21 does not say that states should cause no environmental harm at all, but rather that states should not cause damage to the environment of *other* states, or of areas beyond the limits of national jurisdiction. And it balances even that assertion with the reminder that "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies."[23]

In 1992, states seemed to move beyond a narrow focus on transboundary harm and shared resources by adopting the CBD, which recognizes that conservation of biodiversity is "a common concern of humankind" and sets as a goal the conservation of all biodiversity.[24] It requires its parties to develop national strategies for the conservation and sustainable use of the biodiversity within their territory, whether or not its loss would have obvious effects in other countries.[25] The CBD is in some ways a remarkably successful treaty: its 196 parties include almost every state in the world except the United States, which has signed but not ratified it.[26] However, its breadth of scope and participation is not matched by its depth of obligation. The CBD lists actions its parties should take to conserve and sustainably use biodiversity, but it allows each party to determine for itself what it will actually do.[27]

The CBD also provides a forum for states to discuss issues, set goals, and report on their progress. In 2002 and 2010, the CBD Conference of the Parties (COP) adopted ten-year plans with specific targets to halt and reverse the loss of biodiversity.[28] States failed to meet almost all of the targets.[29] In 2022, the

22. U.N. Conference on the Human Environment, *Rep. of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, at 5 (June 16, 1972).
23. *Id.*
24. Convention on Biological Diversity, *supra* note 17, pmbl., art. 1. The CBD defines "biological diversity" as "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems." *Id.* art. 2. The other objectives of the Convention are the sustainable use of the components of biodiversity and "the fair and equitable sharing of the benefits arising out of the utilization of genetic resources." *Id.* art. 1.
25. *Id.* pmbl., arts. 1, 6.
26. *See List of Parties*, Convention on Biological Diversity, https://perma.cc/HH35-2TYM.
27. *E.g.*, Convention on Biological Diversity, *supra* note 17, art. 8.
28. *See Strategic Plan 2002-2010*, Convention on Biological Diversity, https://perma.cc/J8SM-SFGJ; *Strategic Plan for Biodiversity 2011-2020, including Aichi Biodiversity Targets,* Convention on Biological Diversity, https://perma.cc/WH5W-Q6V8 (hereinafter *Aichi Biodiversity Targets*).
29. *See* U.N. Env't Programme, Global Biodiversity Outlook 3, at 5 (2010); U.N. Env't Programme, Global Biodiversity Outlook 5, at 12–17 (2020).

COP adopted a new plan, the Global Biodiversity Framework, in which states committed to meet yet another set of goals, this time by 2030.[30]

Another component of the international conservation regime is the World Heritage Convention of 1972, which created the World Heritage Committee (WHC), composed of elected state representatives, and mandated it to recognize certain cultural and natural sites as having "outstanding universal value."[31] The Convention states that the task of identifying and protecting cultural and natural heritage belongs primarily to the state where it is located and, like the CBD, it encourages, rather than requires, its parties to take steps to fulfill that goal.[32] States have often requested the WHC to inscribe sites on the World Heritage List, because such sites may be eligible for financial and technical support and, perhaps more importantly, because the prestige of inclusion may attract tourism.[33] The WHC monitors inscribed sites and can decide to remove them from the List.[34] The Convention has 196 parties (including the United States), and the WHC has designated over 250 protected areas in more than 100 countries as "natural sites."[35] Together, they cover a greater land area than India.[36]

In addition to treaties and decisions taken by the parties to the treaties, the conservation regime includes many other sources of "principles, norms, rules, and decision-making procedures."[37] The actors in the regime include not only states, but also non-governmental actors, and together they have created networks of formal and informal agreements and understandings. Protected areas are especially important nodes in this network, because they are the subject of many overlapping and interlocking agreements. Protected areas in the Global South are often subject to grant agreements with public and private donors in the Global North, which may impose certain conditions on the management of the areas. The areas may also be the subject of arrangements with business enterprises that are seeking offset credits for supporting conservation in one area in exchange for being allowed to exploit resources somewhere else.[38]

30. *Kunming-Montreal Global Biodiversity Framework*, *supra* note 18, at 4.
31. Convention Concerning the Protection of the World Cultural and Natural Heritage, arts. 8, 11, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.
32. *Id*. arts. 4, 5.
33. *See World Heritage Fund*, UNESCO World Heritage Convention, https://perma.cc/8J2S-97DV; Lilit Marcus, *How does a UNESCO World Heritage rating affect a tourist destination?*, CNN Travel (Aug. 1, 2021), https://perma.cc/8VTR-GF9H.
34. *See* UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention, ¶¶ 24(b)–(c), U.N. Doc. WHC.23/01 (Sept. 24, 2023).
35. *Natural World Heritage*, UNESCO World Heritage Convention, https://perma.cc/3PEG-972W.
36. *Id*.
37. *Cf.* Krasner, *supra* note 19, at 186.
38. *See generally* Human Rights Watch, Carbon Offsetting's Casualties: Violations of Chong Indigenous People's Rights in Cambodia's Southern Cardamom REDD+ Project (2024).

In some cases, especially in recent years, a protected area may be under a co-management agreement or an arrangement involving shared governance with, or be subject to other commitments concerning, Indigenous peoples or non-Indigenous communities.[39]

These instruments are often not publicly released. They can be submerged elements of the international conservation regime, invisible to everyone but their parties. Sometimes their features may be established only through secondary sources, or through examining their effects on the actors' behavior.

Other than governments, the most important actors for many protected areas have been the major non-profit conservation organizations such as WWF and WCS, sometimes called BINGOs, for Big International Non-Governmental Organizations.[40] A small number of these BINGOs have been extraordinarily influential in the international conservation regime, as the next section describes.

B. The Rise of Fortress Conservation

The most important threat to biodiversity is the loss of ecosystems through their conversion to other uses, such as agriculture, ranching, mining, dams, and the growth of urban areas.[41] So it may be unsurprising that, for over a century, the central conservation tool has been the direct protection of ecosystems by their designation as protected areas.[42]

If protected areas are the crown jewel of conservation, what type of protections should they receive? For more than a century, the major advocates for conservation in the Global North thought that the answer was almost self-evident: especially beautiful or unusual natural areas should be surrounded by legal walls prohibiting virtually all human use. This section describes the rise of this vision of fortress conservation in the United States in the late 1800s and its dissemination around the world by the international conservation regime.

1. The Birth of Fortress Conservation in the United States

The idea of placing some types of land under special protection is not new. For millennia, societies have set aside areas to show respect for sacred places, to

39. *See* Stan Stevens et al., Recognising Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs) Overlapped by Protected Areas 28 (2024) (providing guidelines, good practices, and case studies of territories and areas conserved by Indigenous peoples and local communities that overlap with protected areas in various ways).

40. The term "BINGO" can be confusing because there are many big international NGOs that have nothing to do with conservation. However, it has become so widely used in this context that it is simpler to follow the convention here.

41. IPBES Report, *supra* note 2, at 12.

42. *See* Roe, *supra* note 6, at 493.

memorialize great leaders or important events, and to protect the hunting rights of elite groups.[43] More generally, efforts to protect against deforestation and soil erosion have been recorded from very early in human history.[44] In the nineteenth century, however, a new idea arose in the rapidly industrializing countries in North America and Western Europe: that some areas should be set aside to protect nature for the sake of its beauty and sublimity.[45] This shift had roots in the belief of Romantic writers that nature is vital to spiritual fulfillment, and touchstones for early conservationists included the writings of Rousseau, Wordsworth, and Thoreau.[46] In the United States, the Romantic view of nature especially emphasized the value of what writers and painters described as the "wildness" of the American landscape.[47]

By the late 1800s, the leading exponent of wilderness protection in the United States was John Muir.[48] Muir's strain of conservationism has often been contrasted with the goal of protecting natural resources in order to use them sustainably, which was championed at the time by Gifford Pinchot, the first head of the U.S. Forest Service. The perspectives of strict conservation (sometimes called preservation) and conservation for sustainable use can come into conflict. A famous early battle between them occurred over the proposal in the early twentieth century to dam the Hetch Hetchy Valley in California to provide drinking water to San Francisco, which Muir opposed and Pinchot supported.[49]

However, the contributors to both sides of the growing conservation movement had much in common, including a lack of regard for the interests of those who inhabited the natural ecosystems they were interested in protecting. The early conservationists did not see the Native Americans living in Hetch Hetchy as having any rights worth considering. In extolling the spiritual benefits of nature, Muir and others almost never referred to the beliefs of Indigenous

43. *See* Marcus Colchester, Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation 4 (2003) (citing examples in Assyria, India, and Persia from more than 2000 years ago); Martin Holdgate, The Green Web, A Union for World Conservation 2 (1999) (citing examples in China, India, and Nepal); Robert Boardman, International Organization and the Conservation of Nature 26 (1981) (citing examples in Europe).

44. Richard H. Grove, Green Imperialism: Colonial Expansion, Tropical Island Edens and the Origins of Environmentalism, 1600-1860, at 16 (1995).

45. *See* William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature, in* Uncommon Ground: Rethinking the Human Place in Nature 69, 73–76 (William Cronon, ed., 1996).

46. *See generally* Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 Yale L.J. 1122, 1140–1151 (2010).

47. Mark D. Spence, Dispossessing the Wilderness: Indian Removal and the Making of the National Parks 11–14 (2000).

48. Roderick Nash, Wilderness and the American Mind 122 (5th ed. 2014).

49. *See id.* at 161–81; *see generally* John Clayton, Natural Rivals: John Muir, Gifford Pinchot, and the Creation of America's Public Lands (2019).

peoples, even though they had shaped the very landscapes that European explorers later saw as pristine.[50]

Pinchot won the battle over Hetch Hetchy, and the goal of sustainable use of natural resources has dominated much of environmental law and policy ever since. But advocates of stricter limits on the use of nature have also won many victories. Congress set aside the Yosemite Valley as the first protected area in the United States in 1864; in 1890, spurred by lobbying from Muir, Congress named it as the second U.S. national park, after Yellowstone, which it had created in 1872.[51] By 1916, when Congress created the National Park Service, the United States had already designated 14 national parks.[52] Today, the National Park Service manages 431 individual units (covering more than 85 million acres), including 63 national parks.[53]

National parks in the United States prohibit hunting, commercial fishing, and most other human activities, but they have always encouraged tourism.[54] The rise in the number of tourists to the most popular parks led to renewed calls to prevent "wilderness" from being overrun by human visitors.[55] In response, the United States set aside other areas for stricter conservation. The U.S. government eventually designated more than 800 sites, covering nearly 112 million acres, as "wilderness areas."[56] Humans may visit these areas, but almost all other human uses, including permanent structures, roads, and motorized transportation, are forbidden. The Wilderness Act of 1964 most clearly exemplifies the fortress conservation ideal in its famous definition of "wilderness" as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[57]

The implications of fortress conservation for Indigenous peoples appeared very quickly. The proponents of protected status for Yosemite agreed that the Ahwahneechee, Miwok, Paiute, and Yosemite peoples who had lived there for

50. Dowie, *supra* note 9, at 8; Kenneth Pletcher, *Yosemite National Park*, Britannica (Oct. 16, 2024), https://perma.cc/77CU-9N47.

51. *See* Dowie, *supra* note 9, at 5, 7, 9.

52. *Establishment and Growth of the National Park System, 1916-1933*, Nat'l Park Serv., https://perma.cc/PHC7-N4BE. *See generally* An Act to Establish a National Park Service, and for Other Purposes, Pub. L. No. 64–235, 39 Stat. 535 (1916).

53. *National Park System*, Nat'l Park Serv. (Oct. 3, 2024), https://perma.cc/PL4D-FNDE.

54. The protection of nature for its own sake was not the only motivation for Yosemite, Yellowstone, and the other national parks; their creation was also supported by economic interests, especially opportunities for tourism. Nash, *supra* note 48, at 132. For example, early proponents wanted to preserve Yellowstone's "remarkable curiosities" and "rare wonders," especially its geysers, so that the public would be able to see them. *See id.* at 108–13.

55. Purdy, *supra* note 46, at 1164–66.

56. *The Wilderness Story*, U.S. Forest Serv., https://perma.cc/WW35-UT9M.

57. 16 U.S.C. § 1131(c). For the history of the Act, *see generally* Craig W. Allin, The Politics of Wilderness Preservation (1982).

centuries would have to be removed.[58] The arguments were unabashedly racist. Muir and most of the other leaders of the early conservation movement believed that native peoples were inferior to those of European descent and should either be incorporated into the dominant culture or restricted to reservations.[59] Theodore Roosevelt, perhaps the president most famous for his devotion to conservation, wrote that "[t]he rude, fierce settler who drives the savage from the land lays all civilized mankind under a debt to him. . . . [I]t is of incalculable importance that America, Australia, and Siberia should pass out of the hands of their red, black, and yellow aboriginal owners, and become the heritage of the dominant world races."[60]

It turned out to be difficult to expel Native Americans completely from Yosemite, or perhaps it would be more accurate to say that the park authorities decided it was good for tourism to leave some in the park.[61] An Indian "village" was built in the valley, with tiny shacks that each accommodated six to eight people.[62] Native Americans did not have a right under U.S. law to live in Yosemite, and their presence was conditioned on their working for the National Park Service and meeting its criteria for good behavior.[63] In the 1950s, the Park Service began to evict them, and the last residents were relocated to government housing in 1969.[64] The Park Service burned the remaining buildings in the village to remove the signs that Native Americans had ever lived there.[65]

2. The Dissemination of Fortress Conservation by Colonial States

National parks have been called "America's best idea," including in a documentary series by Ken Burns.[66] Whatever one thinks of the term "best" in this

58. Dowie, *supra* note 9, at 5–7. Muir called them ugly and unclean, and said that they had "no place in the landscape." *Id.* at 6; *see* Philip Burnham, Indian Country, God's Country: Native Americans and the National Parks 21 (2000). In the same way, "the vision of nature that [Yellowstone's] backers sought to enact—nature as pre-human wilderness—was predicated on eliminating any Indian presence from the Yellowstone landscape." Karl Jacoby, Crimes Against Nature: Squatters, Poachers, Thieves, and the Hidden History of American Conservation 87 (2001). On the expulsion of Native Americans from Yellowstone, *see generally* Spence, *supra* note 47, at 55–70.

59. For an extreme example, one of the co-founders of the New York Zoological Society, which became the Wildlife Conservation Society in 1993, was a prominent eugenicist. *See generally* Jonathan Spiro, Defending the Master Race: Conservation, Eugenics, and the Legacy of Madison Grant (2009).

60. 3 Theodore Roosevelt, The Winning of the West 130 (1904).

61. *See* Spence, *supra* note 47, at 116–20.

62. *Id.* at 125–26.

63. *Id.* at 122.

64. *Id.* at 129–30.

65. *Id.* at 130.

66. Ken Burns, *The National Parks: America's Best Idea*, PBS (Sept. 27, 2009), https://perma.cc/Q5WC-JKY8. Burns and others have attributed the line to Wallace Stegner, but Stegner attributed it to someone else, who does not seem to have said it. *See* Alan MacEachern,

characterization, it is true that the U.S. vision of fortress conservation became the dominant international template in the twentieth century, shaping the creation of protected areas almost everywhere in the world.

Australia, Canada, New Zealand, and South Africa created their first national parks in the late nineteenth century, following the U.S. example.[67] Sweden created the first European national parks in 1909, but the Yellowstone model could have only limited application in countries that had already cut down most of their forests.[68] Undeterred, conservationists made the case to European governments that they should create national parks in their colonial possessions. In 1919, for example, U.S. conservationists Carl Akeley, John Merriam and Fairfield Osborn, together with Victor van Straelen of Belgium, convinced King Albert of Belgium to create the first national parks in what are now Rwanda and the DRC.[69]

Many colonial governments were more than willing to use conservation as a justification not only to protect the resources in their colonies, but also to control their "unruly and marginal subjects."[70] Indeed, the spread of fortress conservation depended so much on colonial governments, and colonial attitudes towards the peoples of the Global South, that it can with justice be called colonial conservation.[71]

The conservation movement quickly harnessed international law in support of its vision. In 1933, European colonial governments adopted a convention that required its parties to select suitable areas in their African territories for national parks and strict natural reserves.[72] In national parks, taking fauna and flora would be prohibited except with the approval of the park authorities, and "white or native settlements" should be controlled to ensure "as little disturbance as possible to the natural fauna and flora."[73] In strict natural reserves, as in wilderness areas in the United States, hunting, fishing, agriculture, construction,

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Who had "American's Best Idea"?, Network in Canadian Hist. & Env't (Oct. 23, 2011), https://perma.cc/LT9M-RX96.

67. Dowie, *supra* note 9, at 11; Holdgate, *supra* note 43, at 7; Nash, *supra* note 48, at 355–56.

68. Holdgate, *supra* note 43, at 7–8; *see* Thomas M. Lekan, Our Gigantic Zoo: A German Quest to Save the Serengeti 55–56 (2020).

69. Holdgate, *supra* note 43, at 13; Nash, *supra* note 48, at 356–57. Part of the persuasion was a visit by Albert to Yellowstone. Esther Marijnen, *Public Authority and Conservation in Areas of Armed Conflict: Virunga National Park as a "State within a State" in Eastern Congo*, 49 Dev. & Change 790, 798 (2018).

70. Grove, *supra* note 44, at 15.

71. *See, e.g.*, Alexander Zaitchik, *How Conservation Became Colonialism*, Foreign Pol'y (July 16, 2018), https://perma.cc/N5DA-H6KJ; Helen Tugendhat et al., *Indigenous Voices Demand an End to Colonial Conservation at Africa Protected Areas Congress,* Int'l Union for Conservation of Nature (Aug. 5, 2022), https://perma.cc/DV8Q-224M.

72. Convention Relative to the Preservation of Fauna and Flora in Their Natural State art. 3, *opened for signature* Nov. 8, 1933, 3995 U.N.T.S. 172 (entered into force Jan. 14, 1936).

73. *Id.* arts. 2(1), 4.

and any works altering the soil or likely to disturb the fauna and flora were "strictly forbidden," as was camping in or even entering the area without permission from the authorities.[74] For the Belgians and French, in particular, the goal of these imperial parks would be strictly scientific: they should essentially be "extensions of natural history museums."[75] That usually meant, again, that Africans should be excluded.[76] An additional benefit of fortress conservation to the European colonists was that criminalizing African use of animals and other natural resources would force Africans to seek employment on European plantations.[77]

One European official at the time described the 1933 Convention as the "Magna Carta of wildlife preservation not only in Africa . . . but elsewhere as well."[78] But it had only limited effect in Latin America. Governments there also created many new protected areas on the Yosemite/Yellowstone model, but in practice they often took a less exclusionary approach to Indigenous peoples. In 1940, the United States hosted a conference in Washington to negotiate a convention on nature protection in the Western Hemisphere.[79] Like the 1933 African Convention, the Washington Convention encouraged its parties to create national parks and wildlife reserves, but its definitions of those terms left more room for Indigenous occupation and use.[80] Indigenous peoples in Latin America have been dispossessed for economic exploitation of all kinds, but less often for conservation.[81] By 1991, 158 of the 184 national parks then in South America had some form of human occupation.[82]

3. The Dissemination of Fortress Conservation by Conservation Organizations

In contrast to Latin American governments, the newly independent governments in Africa and Asia largely continued to create new protected areas on

74. *Id.* art. 2.
75. Lekan, *supra* note 68, at 56.
76. *See, e.g.*, *id.* at 57; *see also* Nash, *supra* note 48, at 364 ("the idea of establishing parks and reserves in Africa in the first place had been to protect nature from the natives").
77. Lekan, *supra* note 68, at 100.
78. Boardman, *supra* note 43, at 34 (quoting Marquis of Dufferin, Second International Conference for the Preservation of the Fauna and Flora in Africa).
79. Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193.
80. *Id.* arts. I(4), IV.
81. *See* Daniel Brockington & James Igoe, *Eviction for Conservation: A Global Overview*, 4 Conservation and Soc'y 424, 442 (2006) (suggesting that "the relative lack of eviction in Latin America may reflect either relatively tolerant legislation, or weakly enforced legislation").
82. Stephan Amend & Thora Amend, *Inhabitants in National Parks: An Unsolvable Contradiction?*, *in* National Parks Without People? The South American Experience 449, 455 (Stephan Amend & Thora Amend eds., 1995).

the fortress conservation model even after the recession of colonial sovereignty.[83] For example, when India became independent in 1947, the British colonial government had created state-held forests amounting to over 40 percent of the country's total forest area, but it had designated only a few wildlife reserves.[84] Between 1969 and 2001, the Indian government expanded the area designated as national parks or wildlife sanctuaries by a factor of ten, to five percent of India's total territory.[85]

It is unsurprising that political decision-makers in the Global South decided to conserve and sustainably use their natural resources, for the same mix of cultural, economic, and scientific reasons that had led governments in the Global North to do so. But it is more remarkable that they often continued to embrace fortress conservation as one of the principal means to that end.

In this respect, it is important not to overlook—indeed, it is hard to overstate—the continuing role of conservationists from the Global North and the conservation organizations that they created. The new organizations advocated for the creation of parks throughout the world.[86] The largest of these organizations, or BINGOs, disseminated their views on conservation to agencies in the Global South,[87] as well as to the public everywhere. Among the most visible examples of their influence in shaping views of conservation are the countless documentaries, nature guides, calendars, coloring books, stuffed animals, and other products that present an almost entirely uniform picture of what conservation is and why it is necessary. In their images of beautiful landscapes and fascinating creatures, human beings are either completely absent or

83. *See* Dan Brockington, The Enduring Power of Fortress Conservation in Africa 2 (2015) ("Fortress conservation may have begun as a foreign imposition, but, it has been thoroughly well grafted onto and accepted by its host countries.").

84. Marie Lynn Miranda & Sharon La Palme, *User Rights and Biodiversity Conservation*, *in* Last Stand: Protected Areas and the Defense of Biodiversity 133, 135–36 (Randall Kramer, Carel van Schaik & Julie Johnson eds., 1997).

85. Mahesh Rangarajan & Ghazala Shahabuddin, *Displacement and Relocation from Protected Areas: Towards a Biological and Historical Synthesis*, 4 Conservation and Soc'y 359, 359–60 (2006). *See also* Charles Geisler, *A New Kind of Trouble: Evictions in Eden*, 55 Int'l Soc. Sci. J. 69, 73 (2003) ("During the 1990s, Chad's protected areas went from 0.1% of the national land base to 9.1%, and Mozambique's went from 0.01% to 6.1%.").

86. The efforts by many conservation organizations to lobby for the creation of national parks began in many countries well before decolonization. *See, e.g.*, Roderick P. Neumann, Imposing Wilderness: Struggles over Livelihood and Nature Preservation in Africa 123–28 (1998) (describing efforts by the Society for the Preservation of the Fauna of the British Empire to push for the 1933 African Convention).

87. *See, e.g.*, Ramachandra Guha, *The Authoritarian Biologist and the Arrogance of Antihumanism: Wildlife Conservation in the Third World*, 27(1) Ecologist 14, 16–17 (1997) (describing John Robinson, who directed WCS's international programs from 1990 to 2019, urging India in 1995 to remove "tribal and traditional people" from the Nagarhole National Park in southern Karnataka).

characterized as threats.[88] The message, explicit or implicit, is still that of John Muir: to preserve nature, it must be protected from human beings, with no exceptions made for the people who have lived in the natural world for millennia without destroying it.[89]

That has often meant the dispossession of Indigenous peoples. The famous German conservationist Bernard Grzimek, for example, successfully promoted creation of a vast new protected area on the Serengeti Plains, at the same time he advocated for the exclusion of the Maasai herders from their ancestral territory.[90] Belgian Adrien Deschryver urged the creation of Kahuzi-Biega National Park in the DRC and became its first warden, from which position he oversaw the removal of the Batwa people from the park.[91] Indigenous peoples were targeted despite the fact that the most obvious threats to elephants, rhinos, and other large animals in Africa for much of the twentieth century were colonial hunters.[92]

Conservationists from the Global North do not bear all of the blame for fortress conservation. Governments in the Global South have often used fortress conservation for their own ends and, of course, governments, not conservation organizations, have the direct power to enact and enforce exclusionary laws.[93] Nevertheless, it is clear that conservation organizations often have had more direct responsibility than merely that of disseminating the image of fortress conservation as the ideal form of conservation. Conservation organizations, both large and small, "have played an active role in the creation of protected areas that exclude local people."[94]

The most influential of these organizations may be the International Union for the Conservation of Nature (IUCN). Founded by European and North American conservationists in 1948, the IUCN became an umbrella organization for conservation bodies of all types, from government agencies to private conservation organizations, museums, and universities.[95] From its inception, it regularly hosted conferences and provided a platform for reports and databases.

88. *See* Paige West et al., *Parks and People: The Social Impact of Protected Areas*, 35 Annu. Rev. Anthropol. 251, 256 (2006).
89. *See* Colchester, *supra* note 43, at 86; Guha, *supra* note 87, at 15; Dan Brockington, Fortress Conservation: The Preservation of the Mkomazi Game Reserve 3 (2002).
90. *See* Bernhard Grzimek & Michael Grzimek, Serengeti Shall Not Die 245 (1959); Lekan, *supra* note 68.
91. *See* Colin Luoma, Fortress Conservation and International Accountability for Human Rights Violations Against Batwa in Kahuzi-Biega National Park 15–16 (2022).
92. *See* Boardman, *supra* note 43, at 144 (as early as 1910, it was estimated that "150-200 shooting parties were then visiting British East Africa annually, to take about 10,000 animals").
93. *See* Brockington & Igoe, *supra* note 81, at 443–44.
94. *Id.* (giving examples from Gabon, Ethiopia, India, Kenya, and Tanzania, among others).
95. *See* Holdgate, *supra* note 43, at 31–38; Boardman, *supra* note 43, at 36–44.

Its Red List, for example, is the most widely accepted compilation of information about threatened and endangered species.[96] Although the membership of the IUCN has broadened and diversified over time, in its early decades it was dominated almost entirely by its members from the Global North.[97]

As newly independent states emerged in Africa, the IUCN persuaded them to maintain existing protected areas and add new ones based on the principles of fortress conservation.[98] At its suggestion, the U.N. began to promulgate lists of national parks and "equivalent reserves" in 1961, following the definitions in the 1933 and 1940 conventions.[99] IUCN experts drafted the 1968 African Convention on the Conservation of Nature and Natural Resources, which continued the exclusionary definitions of nature reserves and national parks from the 1933 Convention.[100] And in 1978, the IUCN promulgated a global categorization of protected areas whose first two categories again corresponded to the wilderness reserve and national park classifications and reflected the overarching vision of fortress conservation.[101] Category I areas, called scientific reserves or strict nature reserves, were "free of human intervention" and "generally closed to public access."[102] National parks were Category II areas, where "the highest competent authority of the country has taken steps to prevent or eliminate as soon as possible exploitation or occupation in the area," allowing only scientific, recreational, and educational activities.[103]

96. *See* Boardman, *supra* note 43, at 54–56 (describing early history of the Red List); *see also Red List*, International Union for the Conservation of Nature, https://perma.cc/47JW-AEA9.

97. In 1949, 40 of its 65 members were from Western Europe and 17 from North America. None were from Africa or Asia, and only four from Central and South America. Holdgate, *supra* note 43, at 43. Its various commissions were chaired only by individuals from the Global North until 1984. *Id*. at 71.

98. *Id.* at 71–74; Nash, *supra* note 48, at 363–69. The persuasion was assisted by the fact that many of the leading conservationists in the Global South were educated at universities in the Global North and inculcated in Northern views about conservation. Holdgate, *supra* note 43, at 252.

99. *See* U.N. Secretary-General, *List of National Parks and Equivalent Reserves*, U.N. Doc. E/3436 (Feb. 15, 1961).

100. *See* African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, arts. III(d)(1), III(d)(2); Boardman, *supra* note 43, at 150–152; Holdgate, *supra* note 43, at 73. In 2003, African states adopted a revised version of the 1968 Convention. *See* African Convention on the Conservation of Nature and Natural Resources, July 11, 2003, https://perma.cc/SP36-FG37. The 2003 Convention continues to require its parties to "establish, maintain and extend" conservation areas, *id.* art. XII, but its definition of such areas now refers to the six IUCN categories adopted in 1994. *Id*. art. V(6), Annex 2. *See infra* Part I.D.

101. Int'l Union for Conservation of Nature and Nat. Res., Comm'n on Nat'l Parks and Protected Areas, Categories, Objectives and Criteria for Protected Areas 11 (Aug. 1978).

102. *Id.* at 13.

103. *Id.* at 14–16, 21. Other categories included natural monuments (Category III), managed nature reserves (Category IV), and multiple use management areas (Category VIII).

From the 1960s on, civil society organizations joined the IUCN in shaping and implementing the international conservation regime. Organizations such as World Wildlife Fund (WWF), Wildlife Conservation Society (WCS), Conservation International (CI), and The Nature Conservancy (TNC) began to transmit funds, expertise, and priorities from the Global North to the Global South. They not only urged the creation of new national parks and wilderness areas; they sought funding from governmental and private donors in the Global North, channeled that funding to their preferred projects in the Global South, and publicized the importance of conservation to audiences in the Global North—thereby promoting further revenue streams through tourism. Perhaps most importantly, they advised governments in the Global South on how to administer the protected areas once created.

Their level of involvement in particular protected areas has varied widely. In some cases, they have provided only technical advice; at the other extreme, they have partnered with governments to co-manage areas or administered them directly with permission from the governments. Currently, the leading organization that specializes in this kind of management structure is African Parks, which enters into long-term agreements with governments that authorize it to administer and govern national parks.[104] As of the end of 2023, African Parks administered 22 national parks in 12 countries in Africa, covering over 20 million hectares, or 200,000 square kilometers, an area larger than Senegal.[105]

Much of the influence of the largest conservation organizations comes from their role in funneling money for international conservation from governments in the Global North to projects in the Global South.[106] Such support has been particularly critical to the creation and administration of protected areas.[107] States with the highest levels of biodiversity are often among the poorest countries in the world. Even if they have the will, they do not have the ability to set aside much of their remaining undeveloped land and ensure that it is not exploited by mining, logging, and other extractive industries. Indeed, they have enormous incentives to exploit their natural resources themselves.

States have often tried to harness market forces by monetizing the value of biodiversity, so that protecting nature would pay for itself. In the 1990s, many

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Category VII, anthropological reserves, contemplated the presence of Indigenous people as long as they did not engage in "extensive cultivation or other major modifications of the vegetation and animal life." *Id.* at 20. One of its goals was to enable researchers to study the native peoples in order to conduct "research into the evolution of man and his interaction with the land." *Id.*

104. *See* David Pilling, *The Battle to Control Africa's National Parks*, Fin. Times (July 5, 2024), https://perma.cc/8FH7-ZM3Q.

105. African Parks, Reflecting on the Past, Building for the Future, African Parks Annual Report 2023, at 17 (2023). APF seeks to manage 30 parks by 2030. *Id.*

106. Brockington & Igoe, *supra* note 81, at 448.

107. Prakash Kashwan, *Inequality, Democracy, and the Environment: A Cross-National Analysis*, 131 Ecological Econ. 139, 148 (2017).

people hoped that a source of such monetization would be the pharmaceutical value of biodiversity, but the market for "bioprospecting" plants and other components of natural ecosystems to find such value proved to be disappointing.[108] The most recent hope for monetization centers on efforts to capture the value of forests as carbon sinks. Under REDD+ and other programs, the international climate regime has fostered the use of so-called carbon credits, or carbon offsets, through which governments, corporations, and other private actors may offset their fossil fuel emissions by supporting projects that purport to remove, reduce, or avoid carbon emissions.[109] Conservation organizations have sought to direct the "offset" funds to protected areas,[110] sometimes in ways that further contribute to human rights abuses.[111]

Many donors in the Global North are reluctant to provide money for conservation directly to governments or other recipients in the Global South, but they have been more willing to provide funds to the BINGOs. For example, from 1990 through 2001, the U.S. Agency for International Development (USAID) provided about $270 million to private entities, including universities, for conservation purposes.[112] A remarkable 45% went to just one recipient, WWF.[113]

By 2002, the combined revenues of the three largest BINGOs—WWF, TNC, and CI—for projects in the Global South totaled more than one-half of the entire $1.5 billion available for conservation there.[114] Today, each of the largest conservation organizations effectively controls over hundreds of millions of dollars dedicated to conservation.[115] As the funding for international conservation has grown, so have the BINGOs. In the late 1970s, WWF's U.S. office had only 25 people; by 2004, its U.S. and international offices had nearly 4,000 employees.[116] Today, the WWF Network is active in more than 100 countries and receives grants and donations of over one billion euros annually.[117]

Government funders often expect BINGOs to re-grant some of their funds to other, smaller civil society organizations on the ground. As Mac Chapin has pointed out, their role as intermediaries gives every BINGO "considerable

108. *See* Richard Firn, *Bioprospecting—Why Is It So Unrewarding?*, 12(2) Biodiversity and Conservation 207, 207 (2003); Rex Dalton, *Natural Resources: Bioprospects Less than Golden*, 429 Nature 598, 599 (2004).

109. *See United Nations Carbon Offset Platform*, U.N. Climate Change, https://perma.cc/4F3B-M6EG.

110. *See, e.g.*, *What Are Carbon Credits?*, Conservation Int'l, https://perma.cc/ZF3C-YB3C.

111. *See* Human Rights Watch, *supra* note 38.

112. Mac Chapin, *A Challenge to Conservationists*, 17 World Watch 17, 24 (2004).

113. *Id.*

114. *Id.* at 22.

115. *See, e.g.*, Luoma, *supra* note 91, at 29 (discussing how between 2016 and 2020, WCS spent more than $582 million through its global conservation programs).

116. Chapin, *supra* note 112, at 18.

117. World Wildlife Fund International Annual Review 57 (2023).

power over the agendas of local groups to which it re-grants."[118] More generally, their ability to channel and redirect funding gives them power to influence the creation and administration of all kinds of conservation initiatives, including the creation and management of protected areas.

C. The Criticisms of Fortress Conservation

The number and coverage of protected areas grew steadily throughout the twentieth century. By 1980, states had established terrestrial protected areas covering 8.7 million square kilometers.[119] Together, such areas would have constituted the fifth-largest country in the world. Over the next thirty years, the total coverage doubled in size to about 17 million square kilometers, or nearly 13 per cent of the terrestrial world (except for Antarctica).[120] Not all of these protected areas adhered to strict fortress conservation, but many did, especially in Africa and Asia.[121]

As the number and geographical scope of protected areas expanded, the adverse effects of fortress conservation on human rights became clearer and more visible, in large part due to the advocacy of Indigenous peoples. At the same time, studies increasingly showed that fortress conservation was less effective than rights-based conservation at protecting the natural environment.

1. Human Rights Criticisms

The pursuit of fortress conservation almost always requires the displacement of human populations, because virtually any place on land with significant biodiversity also has human residents. "There is very little 'no-man's land' of any biological importance, since an environment with a dense biodiversity is also a fruitful area to live in."[122] Historically, displacement has often occurred through direct physical eviction, with the use or threat of violence; sometimes, it has taken place as a result of increasingly harsh restrictions on the use of resources, so that people are effectively forced to move.[123]

118. Chapin, *supra* note 112, at 24. In many cases, they have simply created new local organizations that are nominally independent, but in reality "extensions of themselves." *Id.* at 25.

119. Rts. & Res. Initiative, Protected Areas and Land Rights of Indigenous Peoples and Local Communities 2 (2015).

120. U.N. Env't Programme, Protected Planet Report 6 (2012).

121. Brockington & Igoe, *supra* note 81, at 433 (reporting that most evictions have occurred in Africa, South Asia, Southeast Asia, and North America, and that fewer have occurred in Australia, Europe, Latin America, and the Caribbean).

122. Kai Schmidt-Soltau, *Conservation-related Resettlement in Central Africa: Environmental and Social Risks*, 34 Dev. & Change 525, 527 (2003).

123. *See, e.g.*, Michael Cernea & Kai Schmidt-Soltau, *Poverty Risks and National Parks: Policy Issues in Conservation and Resettlement*, 34 World Dev. 1808, 1810 (2006); John Vidal, *The Tribes Paying the Brutal Price of Conservation*, Guardian (Aug. 28, 2016), https://perma.cc/5Y9C-VP8V; *cf.* Desmet, *supra* note 20, at 116 (describing the expansion of the

The exact number of incidents of dispossession is unknown, and estimates of those displaced are necessarily approximate.[124] It seems likely that at least fifty percent of all protected areas have been created on the traditional lands of Indigenous peoples.[125] Mark Dowie states that "world estimates range widely from five million to tens of millions of refugees created since Yosemite Valley was gazetted for protection in 1864."[126] In 2003, Charles Geisler estimated that if all of the more restrictive categories of protected areas created by the late 1990s were exclusionary (an overstatement, since many protected areas, especially in Latin America, did not exclude all residents), and if one could assume previous human density of 1 to 16 persons per square kilometer, then the areas would have displaced between 8.5 and 136 million people.[127] Using the same approach, he estimated that protected areas in Africa alone would have dispossessed 1.5 to 24.5 million people.[128]

There are far too many examples of documented evictions to list them all, but a partial list for Asia would include the expulsion of the Mongondow from the Dumoga-Bone National Park in Sulawesi, Indonesia;[129] the Vedda from Madura Oya National Park in Sri Lanka;[130] and Adivasi from parks and reserves throughout India.[131] In Africa, there seem to have been evictions from the majority of strictly protected areas.[132] The many examples include the removal of the Ik from Kidepo National Park in colonial Uganda;[133] the Orma, Maasai, and Waata from Tsavo National Park in Kenya after its creation in 1948;[134] the Twa from many protected areas in Rwanda, Uganda, and the Congo countries; [135] and the Bushmen from the Central Kalahari Game Reserve in 1997.[136]

A vast quantity of research confirms what should be obvious: evicting people from their ancestral lands and denying them access to their sacred sites

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World Bank definition of "involuntary displacement" to include "restriction of access to natural resources").

124. *See* Brockington & Igoe, *supra* note 81, at 437.
125. *See* Desmet, *supra* note 20, at 14.
126. Dowie, *supra* note 9, at xxi.
127. Geisler, *supra* note 85, at 71.
128. Charles Geisler & Ragendra de Sousa, *From Refuge to Refugee: The African Case*, 21 Pub. Admin. & Dev. 159, 163 (2001).
129. Colchester, *supra* note 43, at 28.
130. *Id.* at 28.
131. Dowie, *supra* note 9, at 119–32.
132. Neumann, *supra* note 86, at 34; Brockington & Igoe, *supra* note 81, at 433.
133. *See generally* Colin Turnbull, The Mountain People (1972).
134. *History of Tsavo West National Park*, Tsavo National Park, https://perma.cc/J6TF-2LXR; *see* Holdgate, *supra* note 43, at 57–58.
135. Colchester, *supra* note 43, at 28–29.
136. *Id.* at 31–32.

and material resources has enormous adverse effects on their well-being.[137] Displaced people suffer severe psychological stresses from losing their homes and cultural identities, as well as harms to their health and well-being through malnutrition and direct physical assaults.[138] Their societies often suffer partial or total breakdowns.[139] Displacing communities for the purpose of conservation—as opposed to displacing them for hydroelectric dams, mining projects, or any other purpose—does not avoid these effects. In 2006, a review of studies concluded that the displacement of more than 50,000 people from twelve national parks in six countries in central Africa had made "this most vulnerable category of forest dwellers—one of the world's poorest—even poorer, more vulnerable and destitute."[140]

When displaced Indigenous peoples do try to return to their ancestral homes, to hunt, fish, obtain resources from the forest, or visit sacred areas, they are usually treated as criminals.[141] In many cases, they are physically attacked, unlawfully detained, and even tortured, raped, and murdered.[142] They often live in countries with high levels of violent conflict and a lack of effective rule of law, so even if the law may purport to provide them legal recourse for some of these abuses, no remedies may be actually available.[143] After dispossession is complete, their previous existence is often erased entirely in depictions of the "recovered" protected area.[144]

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137. *See* Anne M. Larson et al., *New Rights for Forest-Based Communities? Understanding Processes of Forest Tenure Reform*, 12 Int'l Forestry Rev. 78, 83 (2010); Brockington & Igoe, *supra* note 81, at 449; Kai Schmidt-Soltau & Dan Brockington, *Protected Areas and Resettlement: What Scope for Voluntary Relocation?*, 35 World Dev. 2182, 2188 (2007); David R. Boyd & Stephanie Keene, Human Rights-Based Approaches to Conserving Biodiversity: A Policy Brief from the U.N. Special Rapporteur on Human Rights and the Environment 3 (2021).

138. Colchester, *supra* note 43, at 28–31, Schmidt-Soltau, *supra* note 122, at 539–43.

139. Colchester, *supra* note 43, at 30.

140. Cernea and Schmidt-Soltau, *supra* note 123, at 1818, 1823. Conservationists at WCS and WWF challenged this conclusion, arguing that there was no evidence of *involuntary* resettlement. However, they defined "voluntary" resettlement to mean that "people move to a site of their own choice and at their own time," even if the decision to move was itself forced upon them. Bryan Curran et al., *Are Central Africa's Protected Areas Displacing Hundreds of Thousands of Rural Poor?*, 7 Conservation & Soc'y 30, 33 (2009). In response, Schmidt-Soltau disassembled their arguments and concluded that "the critique was not produced in scientific recognition and respect of facts by truth-seeking researchers and scientists," but rather "appears to be a belated echo of the old strategy of camouflaging human rights violations under the guise of the good and necessary cause of biodiversity conservation." Kai Schmidt-Soltau, *Is the Displacement of People from Parks only 'Purported', or is it Real?*, 7 Conservation & Soc'y 46, 46 (2009).

141. West et al., *supra* note 88, at 257, 259.

142. For specific examples, *see infra* Part II.

143. *See* Kaimowitz, *supra* note 4, at 25.

144. Brockington & Igoe, *supra* note 81, at 450; West et al., *supra* note 88, at 260.

2. Ecological Criticisms

Even assessed solely in ecological terms, the global pursuit of fortress conservation has not been successful. The increase in the number and extent of protected areas has not prevented the continued rapid loss of global biodiversity, including in the protected areas themselves.[145] It is relatively easy for a government to draw a line around an area on a map and declare that it is a protected area. It is far more difficult for the government to ensure that the designated area actually conserves the natural ecosystems found within it. As a result, many—perhaps most—of these areas are "paper parks," protected in name only.

There is little information on just how effective, or ineffective, most protected areas are. As of 2020, only eleven percent of the protected areas in the World Database of Protected Areas had been assessed, amounting to slightly over 18 percent of the total area covered.[146] Even when they are conducted, assessments are often unreliable.[147] However, the scant information that is available indicates widespread problems.[148] Natural sites inscribed by the WHC on the World Heritage List, which constitute about eight percent of the total area covered by protected areas, are supposed to be assessed regularly by IUCN teams reporting to the WHC. In 2020, the IUCN reported that "more [World Heritage] sites have deteriorated than have improved since 2017 . . . and only half of the sites have effective protection and management."[149] This result is especially troubling because World Heritage Sites tend to receive far more international attention than other protected areas, which suggests that other protected areas are likely to be even less well-protected.

In 2012, a study based on interviews with experts in 60 tropical protected areas in 36 countries concluded that about half of the areas were "experiencing an erosion of biodiversity that is often alarmingly widespread taxonomically and functionally."[150] A more recent review stated that wildlife populations are "collapsing" inside as well as outside protected areas in central Africa.[151] In 2019, an analysis of more than 2,000 protected areas found that fewer than one quarter had adequate staffing or budgetary resources.[152] The same year, a global

145. *See* Larson et al., *supra* note 137, at 82.
146. *See* U.N. Env't Programme, Protected Planet Report 2020 chs. 1, 6 (2020), https://perma.cc/TKK4-644H.
147. *Id.* ch. 6.
148. *See id.* ch. 1.
149. *Id.* ch. 6.
150. William F. Laurance et al., *Averting Biodiversity Collapse in Tropical Forest Protected Areas,* 489 Nature 290, 290 (2012).
151. Eric D. Nana, *The Paradigm of Conservation in Central Africa is Failing: An Analysis of the Current Situation*, 3349 Academia Letters 1, 1 (2021).
152. Lauren Coad et al., *Widespread Shortfalls in Protected Area Resourcing Undermine Efforts to Conserve Biodiversity*, 17 Frontiers Ecology & Env't 259, 259 (2019).

analysis of more than 12,000 protected areas from 152 countries concluded that, on average, cropland conversion in tropical areas had increased more rapidly within protected areas than in matched areas outside them.[153] In other words, designation of areas as protected—at least in the tropics—was leading to worse conservation outcomes. The authors stressed that some protected areas have seen positive changes, but they concluded that "establishing a large number of [protected areas] without ensuring an appropriate mechanism and resources to stem human pressure can lead to average negative treatment."[154]

A common response among governments and conservation organizations to the problem of "paper parks" is to call for greater financial support, especially for law enforcement.[155] The problem is often portrayed as a failure of support for park rangers who have inadequate training and weapons to combat poachers and illegal loggers, and therefore the suggestion is to provide additional military training and technical support to the rangers.[156] In response, some scholars have strongly argued that the militarization of conservation is itself ineffective and counterproductive.[157] Whatever the other effects of militarization, it has undoubtedly contributed to the displacement and alienation of Indigenous peoples from protected areas in the name of conservation.

This is a problem not only because of the human rights abuses that have accompanied the violent dispossession of Indigenous peoples from their lands. Alienating Indigenous peoples and other local residents contributes to the ineffectiveness of protected areas. From the 1990s on, many studies have confirmed that it is extraordinarily difficult for protected areas to be effective at conservation if they are created and maintained in opposition to those who have historically lived there.[158] After all, the areas sought to be conserved are not pristine Edens historically free from all human influence; they are cultural as well as

153. Jonas Geldmann et al., *A Global-Level Assessment of the Effectiveness of Protected Areas at Resisting Anthropogenic Pressures*, 116 Proc. Nat'l Acad. Sci. 23209, 23209 (2019).

154. *Id.* at 23212.

155. *See, e.g.*, Protected Planet Report 2020, *supra* note 146, ch. 6 (stating that at World Heritage sites, "sustainable financing, law enforcement and staffing remain of serious concern, reinforcing the need for adequate resources to effectively manage protected areas").

156. *See, e.g.*, John Terborgh, Requiem for Nature 199–202 (1999).

157. *See, e.g.*, Rosaleen Duffy, *Waging a War to Save Biodiversity: The Rise of Militarized Conservation*, 90 Int'l Aff. 819 (2014).

158. *See* Dan Brockington & Kai Schmidt-Soltau, *The Social and Environmental Impacts of Wilderness and Development*, 38 Oryx 140, 140 (2004) ("[T]here is a widespread recognition that protected areas which cause harm or inconvenience to local groups will be threatened by non-cooperation or outright resistance."); Colchester, *supra* note 43, at 37 (providing examples from India and Nepal). Even when strict government control of protected areas does protect forests, it often does so at high cost, both in fiscal terms and "in terms of increased conflicts with local communities." Elinor Ostrom & Harini Nagendra, *Insights on Linking Forests, Trees, and People From the Air, on the Ground, and in the Laboratory*, 103 Proc. Nat'l Acad. Sci. 19224, 19227 (2006).

natural landscapes, shaped in countless ways by centuries and millennia of human interaction.[159]

Making matters worse, when countries do not have sufficient resources to effectively manage their protected areas, they can become "open access areas, where local peoples' rights are denied but state protection is unenforced."[160] Often, powerful elites have been able to circumvent restrictions and receive permits to log or mine in these nominally protected areas.[161] Treating the local residents like criminals also makes them less likely to cooperate with the authorities to keep out the real criminals, such as the poachers who come to the protected areas to take endangered species for international markets.[162]

Conversely, studies demonstrate that community-based conservation can be successful at protecting against forest loss and other types of environmental degradation. Although biodiversity is declining everywhere, it is declining less rapidly in Indigenous peoples' lands than elsewhere.[163] In 2015, a meta-analysis of 171 studies of 165 protected areas concluded that their conservation targets were met more often when the protected area "empowered local people, improved cultural benefits, and decreased livelihood costs," and in fact "conservation outcomes were predicted by socioeconomic outcomes more reliably than they were predicted by the physical and management characteristics of PAs."[164] Among many other studies, the World Bank's Independent Evaluation Group concluded in 2011 that "community-managed forests are more effective in reducing deforestation than strict PAs."[165]

A critical reason for the relatively strong conservation outcomes in communally-managed Indigenous territories is that Indigenous cultural practices are generally much less harmful to natural ecosystems.[166] To take a specific example from Latin America, livestock ranching—the largest driver of forest loss in the region—is much less important in Indigenous territories than in *mestizo* farms.[167] More generally, Indigenous peoples' traditional knowledge of ecosystems, animals, and plants, and of how the components of the environment respond to

159. *See, e.g.*, Lekan, *supra* note 68, at 58 (describing Congo basin forests).

160. *Id.* at 38; *see also* Geldmann et al., *supra* note 153, at 23212 (suggesting that designating protected areas can "spur encroachment rather than prevent it," by weakening the tenure rights of Indigenous peoples and local communities, "eroding their authority to deter outsiders and providing opportunities for other people or companies to enter the reserve").

161. *See* Janis Alcorn, *Indigenous Peoples and Conservation*, 7 Conservation Biology 424, 424 (1993).

162. *See* Neumann, *supra* note 86, at 202; Guha, *supra* note 87, at 17; Luoma, *supra* note 91, at 24; Schmidt-Soltau, *supra* note 122, at 545.

163. IPBES Report, *supra* note 2, para. B6.

164. Johan A. Oldekop et al., *A Global Assessment of the Social and Conservation Outcomes of Protected Areas*, 30 Conservation Biology 133, 139 (2016).

165. Tauli-Corpuz et al., *supra* note 12, at 2.

166. *See* Colchester, *supra* note 43, at 51–52; Kaimowitz, *supra* note 4, at 34–38 (summarizing studies).

167. Kaimowitz, *supra* note 4, at 36–37.

human practices and to natural events such as fire, "contribute greatly to forest management, use, restoration, and monitoring, and to adaptation to new situations."[168] Finally, when local communities of all types participate in monitoring restrictions on use, conservation is far more effective.[169]

Of course, powerful forces will seek to exploit the resources within protected areas whether or not they are controlled by Indigenous peoples.[170] Moreover, economic and technological developments can lead Indigenous cultural practices to change over time in ways that are more destructive of natural ecosystems. But these considerations indicate that Indigenous and community-led conservation may need support and assistance, not that traditional rights should be ignored or violated.[171] Most fundamentally, for community-led conservation to resist outside pressures for development and exploitation, the community must have secure property rights, including not just of tenure, but also of access, use, governance, and exclusion.[172] As Elinor Ostrom and others have shown, people are much more likely to comply with, and monitor compliance with, rules on forest protection when their livelihoods are ensured and they are "genuinely engaged in decisions regarding rules" than when rules have been imposed upon them.[173]

The two critiques of fortress conservation thus dovetail with one another. Together, they provide a strong basis for replacing exclusionary, fortress conservation with inclusionary, rights-based conservation. In 2003, the international conservation regime promised to do just that.

D. The Rejection of Fortress Conservation

In the 1980s and 1990s, as criticisms of fortress conservation grew louder, the norm began to emerge that protected areas and other conservation projects

168. *Id.* at 37.

169. Ostrom & Nagendra, *supra* note 158, at 19228.

170. Kaimowitz, *supra* note 4, at 44.

171. *See* Colchester, *supra* note 43, at 110; Stephen T. Garnett et al., *A Spatial Overview of the Global Importance of Indigenous Lands for Conservation*, 1 Nature Sustainability 369, 370 (2018).

172. *See* Owen B. Lynch & Janis B. Alcorn, *Tenurial Rights and Community-Based Conservation, in* Natural Connections: Perspectives in Community-Based Conservation 373, 390–91 (David Western and R. Michael Wright eds., 1994); Edella Schlager & Elinor Ostrom, *Property Rights Regimes and Natural Resources: A Conceptual Analysis*, 68 Land Econ. 249, 251 (1992); Adcharaporn Pagdee et al., *What Makes Community Forest Management Successful: A Meta-Study From Community Forests Throughout the World*, 19 Soc'y & Nat. Res. 33, 43–44, 49 (2006).

173. Ostrom & Nagendra, *supra* note 158, at 19230–31. *See also* Tanya Hayes, *Parks, People, and Forest Protection: An Institutional Assessment of the Effectiveness of Protected Areas*, 34 World Dev. 2064, 2073 (2006) (based on a study of 163 forests, designation as a protected area results in no greater protection of forest vegetation density, but participation by users of the forest in the development of rules for use is positively correlated with such density).

had to respect the human rights of Indigenous peoples and others.[174] Due to the efforts of Indigenous peoples themselves, international human rights law increasingly recognized their rights and the corresponding obligations of states.[175] In 1988, the U.N. Working Group on Indigenous Populations produced the first complete draft of what would eventually become—nearly twenty years later —the U.N. Declaration on the Rights of Indigenous Peoples.[176] In 1989, the International Labour Organization adopted a convention on the rights of Indigenous and tribal peoples that stated that their relocation from the lands they occupy "shall take place only with their free and informed consent."[177]

The CBD, adopted in 1992, reflected the changing attitudes towards Indigenous rights. Unlike the earlier regional conventions, the CBD does not refer to national parks or wilderness areas, much less require that they be exclusionary. Instead, it refers only to "protected areas," which it defines broadly as geographically defined areas "designated or regulated and managed to achieve specific conservation objectives."[178] The CBD even took notice of Indigenous communities, although falling short of expressly recognizing their rights: Article 8(j) of the CBD requires each party to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."[179] However, as elsewhere in the CBD, the language is weaker than it first appears; in addition to the usual caveat that the CBD requires each party to do so only "as far as possible and as appropriate," the duty on the state in Article 8(j) is also made "subject to its national legislation."[180]

Another sign of changing attitudes came in 1994, when the IUCN General Assembly revised its categories of protected areas.[181] Category I areas, which

174. *See* Colchester, *supra* note 43, at 80–81; Roe, *supra* note 6, at 495–96.

175. *See* Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 Duke L. J. 660, 676, 678.

176. *See* James Anaya, International Human Rights and Indigenous Peoples 55 (2d ed. 2009). The U.N. General Assembly adopted the Declaration in 2007. *See* G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter UNDRIP].

177. International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO 169]. Despite this language, the convention also provided for relocation if their consent "cannot be obtained," but only after procedures allowing the opportunity for their effective representation. *Id.*

178. Convention on Biological Diversity, *supra* note 17, art. 2.

179. *Id.* art. 8(j).

180. *Id.*

181. *See* IUCN Comm'n on Nat'l Parks and Protected Areas, Guidelines for Protected Area Management Categories (1994). The resulting guidelines adopted by the IUCN Commission on Protected Areas also included a definition of "protected area" more detailed than that found in the CBD: "An area of land and/or sea especially dedicated to the

had previously been required to exclude all human residence, were now divided into two sub-categories: Category I.A "strict nature reserves" would continue to seek "to preserve habitats, ecosystems, and species in as undisturbed a state as possible" by protecting them from "direct human intervention," but Category I.B "wilderness areas" could include Indigenous residents as long as they were "living at low density and in balance with the available resources."[182] Similarly, Category II national parks could be managed, in part, to take into account the needs of Indigenous people, "in so far as these will not adversely affect the other objectives of management," such as protecting the natural areas for "spiritual, scientific, educational, recreational or tourist purposes."[183]

Although the revised Categories I and II were less strictly exclusive than before, the implication was still that they disfavored human use.[184] Indeed, the continued use of the concept of a "wilderness" protected from human influence remained fundamentally contradictory to the views of Indigenous peoples, for whom "no such areas exist" because "there is no landscape without people or cultural significance."[185] Two other types of protected areas contemplated uses other than conservation—Category V protected landscapes and Category VI managed resource protected areas—and the strong suggestion by the IUCN was that they would have greater potential to respond to the claims of Indigenous peoples.[186]

Finally, in 2003, at the Fifth IUCN World Parks Congress, held in Durban, South Africa, government agencies and private conservation organizations explicitly committed to reject fortress conservation.[187] As part of an overall

protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means." *Id.* at 7.

182. *Id.* at 17–18.

183. *Id.* at 19.

184. For example, the introduction to the Guidelines referred to a finding that 84 percent of national parks in Latin America had "significant resident human populations," and stated that "some of these might be more appropriately placed in another category." *Id.* at 9.

185. Sue Stolton, *The Role of the Categories in Developing Self-Declared Indigenous Protected Areas in Australia*, in Speaking a Common Language: The Uses and Performance of the IUCN System of Management Categories for Protected Areas 141, 142 (Kevin Bishop et al eds., 2004). *See* Colchester, *supra* note 43, at 7; Dowie, *supra* note 9, at 19–20.

186. Sue Stolton, *Issues that Arise for the Categories in a Changing World*, 14 Parks 63, 68 (2004). The other two categories are Category III, for natural monuments, and Category IV, for habitat/species management areas. In 2013, the IUCN made minor modifications to the categories and stated more clearly that none of the categories should be used "as an excuse for expelling people from their traditional lands." IUCN Comm'n on Nat'l Parks and Protected Areas, Guidelines for Applying Protected Area Management Categories 6 (Nigel Dudley ed., 2013) [hereinafter 2013 IUCN Guidelines].

187. Some observers at the time wrote that while "it is tempting to suggest that the narrative of fortress conservation was challenged largely in recognition of its human costs," a more important factor may have been "the self-interest of the conservation constituency, which . . . correctly recognized that fortress conservation would be difficult to maintain politically in the face of objections by local people and their political leaders, in countries with renewed

conservation strategy called the Durban Action Plan, they acknowledged that "indigenous peoples and local communities have often borne the costs of protected areas but received few benefits," and set three "targets" to be met by the next World Parks Congress, to be held in 2014:

- "All existing and future protected areas are established and managed in full compliance with the rights of indigenous peoples, including mobile indigenous peoples, and local communities";
- "The management of all relevant protected areas involves representatives chosen by indigenous peoples, including mobile indigenous peoples, and local communities proportionate to their rights and interests";
- "Participatory mechanisms for the restitution of indigenous peoples' traditional lands and territories that were incorporated in protected areas without their free and informed consent are established and implemented."[188]

Participants also urged that greater recognition and support be given to Indigenous and community-led conservation areas, called CCAs or ICCAs.[189]

In 2004, the CBD Conference of the Parties followed the Durban lead, adopting a decision stating that "the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations."[190] In 2009, the IUCN and seven other major conservation organizations launched the Conservation Initiative for Human Rights (CIHR) and published a Conservation and Human Rights Framework, whose first principle was to "respect internationally proclaimed human rights and make sure that we do not contribute to infringements of human rights while pursuing our mission."[191] In addition, many conservation organizations adopted individual commitments to respect human rights, including in particular the rights of Indigenous peoples.[192]

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democracies." Jon Hutton, William M. Adams & James C. Murombedzi, *Back to the Barriers? Changing Narratives in Biodiversity Conservation*, 32 F. for Dev. Stud. 341, 343 (2005).

188. IUCN, Benefits Beyond Boundaries: Report of the Vth IUCN World Parks Congress 224, 248–49 (2003) [hereinafter Durban Action Plan].

189. *Id.* at 202.

190. Convention on Biological Diversity, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Seventh Meeting, U.N. Doc. UNEP/CBD/COP/DEC/VII/28, at 3 (2004).

191. *See CIHR Principles*, CIHR, https://perma.cc/686N-3JFH. In addition to the IUCN, the members are Birdlife International, Conservation International, Fauna and Flora International, The Nature Conservancy, Wetlands International, WCS, and WWF.

192. *See, e.g.*, WWF Int'l, Indigenous Peoples and Conservation: WWF Statement of Principles 2 (2008). The 2008 statement built on a similar statement WWF adopted in 1996, which may be the earliest such commitment by any of the BINGOs. *Id.* at iii.

The international conservation regime thus proclaimed its turn away from fortress conservation towards a "new paradigm" for protected areas, based on inclusion and human rights.[193] The next Part of this Article examines how far these commitments actually resulted in changes in behavior.

II. The Persistence of Fortress Conservation

Even as states and conservation organizations publicly embraced human rights twenty years ago, critics questioned the sincerity of their commitments.[194] Some conservationists claimed that there was no evidence that protected areas adversely affected local residents.[195] Others argued openly against the new paradigm.[196] For example, Steve Gartlan, the WWF Country Director for Cameroon in the 1990s, wrote, "[i]t is unrealistic and irresponsible to hand over the duty for protection of these unique ecosystems to the local communities who have neither the resources nor the biological education necessary to manage them."[197] Mac Chapin, an anthropologist, reported in 2004 that many in the conservation community shared this view. He wrote that the big international conservation organizations—the BINGOs —did not really see Indigenous peoples as "suitable allies" because Indigenous peoples would not always choose preserving natural resources over their own economic wellbeing.[198] Moreover, many conservationists believed that supporting Indigenous peoples' legal claims or their struggles against extractive companies would take the BINGOs into political controversies that would undermine their relationships with the governments with which they partnered.[199]

Since the adoption of the Durban Action Plan, the number and coverage of protected areas have continued to grow enormously. In 2010, one of the goals set by the CBD parties for the next decade was to designate 17 percent of terrestrial

193. *See* Adrian Phillips, Turning Ideas on Their Head: The New Paradigm for Protected Areas, in Innovative Governance, Indigenous Peoples, Local Communities, and Protected Areas 1–27 (Hanna Jaireth & Dermot Smyth eds., 2003).

194. *See, e.g.*, Colchester, *supra* note 43, at 69, 94; Roe, *supra* note 6, at 496.

195. David S. Wilkie et al., *Parks and People: Assessing the Human Welfare Effects of Establishing Protected Areas for Biodiversity Conservation*, 20 Conservation Biology 247 (2006).

196. *See* Hutton et al., *supra* note 187 (describing and analyzing eight principal arguments being made by the proponents of fortress conservation).

197. Steve Gartlan, *Every Man for Himself And God Against All: History, Social Science, and the Conservation of Nature*, in Resource Use in the Tri-National Sangha River Region of Equatorial Africa: Histories, Knowledge Forms, and Institutions 216, 223 (H. Eves et al. eds., 1998). While at WWF in the 1990s, Gartlan drafted Cameroon's exclusionary forestry laws and supported the relocation of villages from Korup Forest Reserve. Schmidt-Soltau & Brockington, *supra* note 137, at 2184, 2191–92.

198. Chapin, *supra* note 112, at 18.

199. *Id.* at 21. For example, in 2005, Paul van Vlissingen, the founder of African Parks, told an interviewer that it "has never been and will never be involved in questions of a political nature, such as resettlement of people." Dowie, *supra* note 9, at 227.

areas as protected, which would nearly double the previous coverage.[200] In contrast to almost all of the other 2010 targets,[201] states managed to meet that one, designating protected areas of almost 21 million square kilometers.[202] Despite the concerns expressed by critics like Chapin, the new commitments to a rights-based approach gave ground for hope that this enormous expansion of protected areas would reflect the requirements of international human rights law. But is that what happened?

In some places, the answer is a qualified yes. In some countries, tenure rights in forests have been formally transferred to Indigenous communities.[203] It has been estimated that states have formally recognized Indigenous peoples' collective rights in 269 million hectares in Latin America, about two-thirds of the 404 million hectares that they occupy there.[204] Australia instituted a new category of Indigenous Protected Areas and has recognized more than 75, which cover nearly one-half of its total protected areas.[205] In 2019, Canada entered into an agreement with the Łutsël K'é Dene First Nation to establish and co-manage the Thaidene Nëné National Park Reserve, covering over 2.6 million hectares of boreal forest and tundra.[206] The ICCA Consortium, an umbrella organization of Indigenous peoples and community-led conservation organizations, regularly issues detailed reports on its members' "territories of life," their preferred name for ICCAs.[207]

As the number of legally recognized Indigenous territories grew, studies confirmed that they were capable of providing strong conservation outcomes.[208] After reviewing dozens of studies of deforestation in Latin America and the Caribbean, David Kaimowitz concluded in 2021 that "in just about every country in the region indigenous and tribal territories have lower deforestation rates than other forest areas."[209] When Indigenous territories are formally titled, deforestation rates plummet.[210] One comparison of deforestation in

200. *Aichi Biodiversity Targets*, *supra* note 28, Target 11.

201. *See* Global Biodiversity Outlook 5, *supra* note 29, at 12–17.

202. Protected Planet Report 2020, *supra* note 146, ch. 1 (executive summary).

203. *See*, *e.g.*, Larson et al., *supra* note 137, at 83 (listing transfers in Brazil, Bolivia, and Nicaragua).

204. Kaimowitz, *supra* note 4, at 15. He estimates that tribal peoples such as Afro-descendant communities have seen about eight million hectares titled, including five million in Colombia and two million in Brazil. *Id.* at 21.

205. Tauli-Corpuz et al., *supra* note 12.

206. *See* Boyd & Keene, *supra* note 137, at 14.

207. *See, e.g.*, Int'l. Congress & Convention Ass'n Consortium, Territories of Life: Annual Report 2021, at ii (2021).

208. *See* Larson et al., *supra* note 137, at 86–87 (describing positive effects in Brazil, Guatemala, Nepal, India, and the Philippines). Where rights are not clearly granted or supported by the states, outcomes are generally worse. *Id.* at 86.

209. Kaimowitz, *supra* note 4, at 27. For example, the area in large compact forests declined by 11.2 percent in non-indigenous areas, and only 4.9 percent in indigenous areas. *Id.*

210. *See id.* (citing, *inter alia*, an unpublished Ph.D. dissertation by E. Bayi in 2019 showing that "each step in the process of registering indigenous land in Brazil is associated with a lower deforestation rate than the previous step").

Indigenous-titled forests with similar forests elsewhere found that the deforestation rates in the former were 2 to 2.8 times lower.[211] Given the disparity in resources between Indigenous peoples and governments, the relative success of Indigenous-led conservation is amazingly cost-effective.[212]

However, despite such successes, rights-based conservation is still struggling to be accepted in most of the world. There are nearly 200,000 government-managed protected areas, and only about 1,400 ICCAs.[213] They "lack legal standing in most jurisdictions . . . and remain largely undocumented."[214] Recognition of the collective property rights of Indigenous peoples and other forest-dwellers has been very slow, especially outside of Latin America.[215] Even when their rights have been recognized on paper, governments have often retained overriding authority to manage the natural resources within the area, including by imposing new restrictions.[216] States have failed to support communities' right to exclude others and have even encouraged or supported competitive claims.[217] As a result, mines, oil palm plantations, ranches, industrial agriculture, loggers, and petroleum companies have continued to encroach on Indigenous territory.[218]

In 2016, Victoria Tauli-Corpuz, then the U.N. Special Rapporteur on the rights of Indigenous peoples, reported that, since 2001, she and her predecessors had "received numerous allegations of large-scale violations of the rights of indigenous peoples in the context of conservation measures," with the effects of forced displacement from protected areas including "marginalization, poverty, loss of livelihoods, food insecurity, extrajudicial killings, and disrupted links with spiritual sites and denial of access to justice and remedy."[219] She concluded that the targets in the Durban Action Plan "are still far from being achieved."[220] In 2022, her successor, José Francisco Calí Tzay, wrote that since her report, "Indigenous peoples across the globe have overall not seen a concrete

211. Helen Ding et al., World Res. Inst., Climate Benefits, Tenure Costs: The Economic Case for Securing Indigenous Land Rights in the Amazon 3 (2016).
212. *See id.* at 9.
213. U.N. Env't Programme, Protected Planet Report 2018, at 31 (2018).
214. Tauli-Corpuz et al., *supra* note 12 at 2.
215. *See generally* Rts. & Res. Initiative, At a Crossroads: Consequential Trends in Recognition of Community-Based Forest Tenure from 2002-2017, at 13, 18 (2018), https://perma.cc/T496-Y94X.
216. Larson et al., *supra* note 137, at 84; Edmund Barrow et al., *Who Owns Africa's Forests? Exploring the Impacts of Forest Tenure Reform on Forest Ecosystems and Livelihoods*, 25 Forests, Trees & Livelihoods 132, 142 (2016).
217. Larson et al., *supra* note 137, at 85.
218. Kaimowitz, *supra* note 4, at 38–39.
219. Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples*, ¶ 51, U.N. Doc. A/71/229 (July 29, 2016).
220. *Id.* ¶ 42.

improvement in the realization of their rights in the context of conservation initiatives," and that fortress conservation "continued to prevail."[221]

Protected areas in Africa, South Asia, and Southeast Asia, in particular, have seen many instances of conflicts between protected areas and Indigenous peoples in recent years.[222] Most of these cases have received little national or global attention because they occur in remote areas or in areas with larger conflicts.[223] But some that have received wider coverage in the last five years include alleged human rights abuses in: Cardamom National Park in Cambodia;[224] a proposed protected area in Messok Dja in the Republic of the Congo;[225] Kahuzi-Biega National Park in the DRC;[226] the Mau Forest in Kenya;[227] Chitwan National Park in Nepal;[228] Loliondo in Tanzania;[229] and the Kaeng Krachan Forest Complex in Thailand.[230]

Although most reports of such abuses focus on one protected area, some provide a picture of a larger region. In 2016, Rainforest Foundation UK (RFUK) published a detailed study of 34 protected areas in five countries in the Congo Basin.[231] It found that Indigenous peoples and local communities had

221. José Francisco Calí Tzay (Special Rapporteur on the Rights of Indigenous Peoples), *Protected Areas and Indigenous Peoples' Rights: The Obligations of States and International Organizations*, ¶¶ 18, 20, U.N. Doc. A/77/238 (July 19, 2022).

222. *See* Rts. & Res. Initiative, *supra* note 119, at 6–9 (listing examples of conflicts).

223. Tauli-Corpuz et al., *supra* note 12, at 7.

224. Jack Brook, *Burning Homes in the Name of Conservation: NGO Wildlife Alliance Cracks Down on the Poor,* Camboja News (Sept. 5, 2023).

225. *See* Lassana Koné & Anouska Perram, Forest Peoples Programme, FPIC in Messok Dja (2019); Victoria Tauli-Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), *Visit to the Congo*, ¶ 94, U.N. Doc. A/HRC/45/34/Add.1 (July 10, 2020).

226. *See generally* Robert Flummerfelt, Minority Rts. Group, To Purge the Forest by Force: Organized Violence Against Batwa in Kahuzi-Biega National Park (2022).

227. *See* Afr. Ct. Hum. & Peoples' Rts. [international human rights court of the African Union], Afr. Comm'n. Hum. & Peoples' Rts. v. Kenya, No. 006/2012, No. 006/2012, Judgment (on merits) (2017) [hereinafter *Ogiek People v. Kenya*]; Dominic Kirui, *Kenya's Ogiek People Fight on Against Eviction from Mau Forest*, Al Jazeera, Nov. 24, 2023; *see generally* Dowie, *supra* note 9, at 183–89.

228. *Violation of Indigenous Peoples' Human Rights in Chitwan National Park of Nepal*, Lawyers' Ass'n for Human Rts. of Nepalese Indigenous Peoples (LAHURNIP) & Nat'l Indigenous Women Fed'n (NIWF) (Feb. 2020), https://perma.cc/3Q9J-JUMD.

229. *See generally* Amnesty International, "We Have Lost Everything": Forced Evictions of the Maasai in Loliondo, Tanzania (2023); *Tanzania: Maasai Forcibly Displaced for Game Reserve*, Human Rts. Watch (Apr. 27, 2023), https://perma.cc/HG9T-A9BD.

230. *Thailand Forest Park Gets World Heritage Nod Despite Indigenous Rights Warning*, Jakarta Post (July 27, 2021), https://perma.cc/CQ8X-TQH9. Remarkably, the WHC refused to let the Special Rapporteur on the Rights of Indigenous Peoples address the Committee before the vote. Stefan Disko and Dalee Sambo Dorough, *"We are not in Geneva on the Human Rights Council": Indigenous peoples' experiences with the World Heritage Convention*, 29 Int'l J. Cultural Prop. 487, 516 (2022).

231. *See generally* Aili Pyhälä, Ana O. Orozco, & Simon Counsell, Rainforest Foundation UK, Protected Areas in the Congo Basin: Failing Both People and

"virtually no tenure security over their traditional lands" in any of the countries, and that of the 34 protected areas, "the creation of at least 26 resulted in partial or complete relocation or displacement of local indigenous and farming communities present in the park prior to park establishment."[232] Unsurprisingly, their displacement resulted in diminished access to sources of food and other forest products. The report also found many instances of abuses related to "aggressive anti-poaching policing, whereby local communities are disproportionately targeted for hunting, serving as an easier target than the criminal networks driving large-scale commercial hunting."[233] The report emphasized that despite strong restrictions on access and use, the protected areas were generally failing to meet their conservation objectives.[234]

Almost all of the abuses described in the RFUK report and by other sources have taken place in and around protected areas managed and supported by governments and BINGOs that have committed to rights-based conservation. The reports illustrate the enormous gap between these commitments and the reality on the ground. Rather than acknowledge that gap, the principal actors in the international conservation regime have often chosen to minimize or deny their role in the abuses.[235] It is impossible to avoid the conclusion that fortress conservation is still very much a part of the international conservation regime, twenty years after it was supposed to have been rejected.

To illustrate how these abuses implicate multiple actors in the international conservation regime, including states, conservation organizations, and donors, the following sections provide more detailed histories of two situations, involving Lobéké National Park in Cameroon and Salonga National Park in the DRC.

A. Lobéké National Park

In the early 2000s, with technical and financial assistance from WWF and the German government, the government of Cameroon established three national parks in southeastern Cameroon, near its borders with the Central African Republic and the Republic of the Congo: Lobéké National Park in 2001, and Boumba Bek and Nki National Parks in 2005.[236] The parks were created in the ancestral lands of the Baka people. It was understood that continued access

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Biodiversity? (2016). The five countries were Cameroon, Central African Republic, the DRC, Gabon, and the Republic of Congo.

232. *Id.* at 7.

233. *Id.*

234. *Id.* at 6.

235. *See, e.g.*, *infra* Part II.B (describing testimony of WWF official to subcommittee of the U.S. House of Representatives).

236. *See generally* WWF Independent Panel of Experts, Embedding Human Rights in Nature Conservation: From Intent to Action 42–68 (2020) [hereinafter Embedding Human Rights in Conservation] (reviewing allegations of human rights abuses in and around protected areas supported by WWF).

to the forests in the parks would be necessary for the Baka to be able to maintain their livelihoods and cultural life.[237] Although there were consultations with local communities before the creation of the parks, the consultations were dominated by Bantu, the dominant ethnic group living in the area, and the consultations did not adequately take into account Baka needs and perspectives.[238]

From 2006 to 2008, WWF supported a mapping project to identify the Baka uses of the land within the park boundaries, so that their continuing use of the land could be recognized in the park management plans.[239] However, when the management plans for the parks were finalized, they provided for little or no access. Lobéké's plan included a "community zone" covering 15% of the park, and the other park management plans did not provide for any access at all.[240] Lobéké's community zone required Baka to apply for written permits at one location far from many of their villages; Baka found it difficult to understand and use the process, and many did not even know about the existence of the zone.[241] Baka who tried to hunt or fish on their ancestral lands outside the zone were now violating Cameroon law. Park rangers (called ecoguards) received bonuses for seizing weapons and allegedly poached material, which provided them incentives not just to patrol the parks, but also to raid the surrounding villages and seize what they could find.[242] Dispossession here, as elsewhere, contributed to poverty, poor health, and a decline in cultural practices.[243]

In 2010, Cameroon, the Central African Republic, and the Republic of the Congo jointly submitted a nomination to the WHC for several of their protected areas, including Lobéké, to be inscribed together as a World Heritage Site, under the name Sangha Trinational (TNS).[244] Nominations for inscription are evaluated by an IUCN advisory body to the WHC. In this case, the advisory body noted that Indigenous use was either entirely or partially banned in the sites in all three countries and that the nomination had not taken into account

237. Shiho Hattori, *Nature Conservation and Hunter Gatherers' Life in Cameroonian Rainforest*, 29 Afr. Stud. Monographs 41 (2005).

238. Olivier N. Tegomo, Louis Defo, & Leonard Usongo, *Mapping of Resource Use Area by the Baka Pygmies Inside and Around Boumba-Bek National Park in Southeast Cameroon, with Special Reference to Baka's Customary Rights*, 43 Afr. Stud. Monographs 45, 48–50 (2012).

239. *Id.*

240. Embedding Human Rights in Conservation, *supra* note 236, at 60.

241. Cosmas Kombat Lambini et al., Conflicts, Participation and Co-Management in Protected Areas: A Case Study of Lobéké National Park, Cameroon 77–78 (2019).

242. *See* Embedding Human Rights in Conservation, *supra* note 236, at 67.

243. Victor Amougou-Amougou and Olivia Woodburne, The Sangha Trinational World Heritage Site: The Experiences of Indigenous Peoples, in World Heritage Sites and Indigenous Peoples Rights 107–08 (Stefan Disko & Helen Tugendhat eds., 2014).

244. *Sangha Trinational*, UNESCO World Heritage Convention, https://perma.cc/U3YJ-9JE9 (describing the nomination and the other World Heritage-related documents concerning the TNS).

the "rich cultural heritage" associated with the areas.[245] The Committee referred the nomination back to the three governments to allow them to respond to these and other criticisms, in part by "increas[ing] further the involvement and representation of local and indigenous communities in the nomination process and future management."[246]

In 2012, the governments reported that they had conducted consultations and as a result Indigenous peoples and local communities "have given their approval" to the possible inscription.[247] This was not true. In Cameroon, the government did conduct meetings in 13 villages around the park, with the assistance of WWF. But the meetings were often extremely brief, sometimes less than 30 minutes. The WHC nomination document was not provided, and the communities were given no meaningful opportunity to ask questions or share concerns.[248] Instead, the visiting authorities dominated the meeting with their own presentations, many of which concerned entirely separate issues.[249] Moreover, in all three countries, the consultations largely took place after the revised nomination was finalized, so that they could not have influenced it in any event.[250] Despite these obvious problems, the World Heritage Committee approved the resubmitted nomination in 2012.[251]

In 2014, a civil society organization based in the United Kingdom, Survival International, publicly raised allegations that ecoguards had committed abuses against the Baka, including beatings and destruction of property.[252] WWF already knew about such allegations; they had been brought to its attention at least since 2008.[253] Nevertheless, WWF had continued to provide extensive financial and material support for the ecoguards, including their village raids.[254] In 2016, Survival filed a complaint with the OECD National Contact Point in Switzerland (where WWF International is based), arguing that WWF had

245. World Heritage Comm., IUCN Evaluations of Nominations of Natural and Mixed Properties to the World Heritage List, Doc. WHC-11/35.COM/INF.8B2, at 10 (June 29, 2011).

246. World Heritage Comm., Nominations of Properties to the World Heritage List, Doc. WHC-11/35.COM/8B, at 4 (May 6, 2011).

247. *See* Amougou-Amougou & Woodburne, *supra* note 243, at 110 (quoting from the submission).

248. *Id.* at 112.

249. *Id.*

250. *Id.* at 111–113.

251. *Id.* at 114.

252. *Cameroon: WWF Complicit in Tribal People's Abuse*, Survival Int'l (Oct. 6, 2014), https://perma.cc/4KFY-WDLG.

253. *See* J. Nelson & M. Venant, Forest Peoples Programme, Indigenous Peoples' Participation in Mapping of Traditional Forest Resources for Sustainable Livelihoods and Great Ape Conservation 12 (2008).

254. Embedding Human Rights in Conservation, *supra* note 236, ch. 4.

violated the OECD Guidelines for Multinational Enterprises.[255] The Swiss National Contact Point offered mediation, but closed the matter after Survival withdrew from the proceedings.[256]

In response to allegations of abuses, WWF itself commissioned three reports between 2015 and 2017.[257] All of them found that allegations of beatings and torture by ecoguards were widespread.[258] "The reports connected these abuses to the creation of the national parks in the early 2000s, which had resulted in the displacement of the Baka people from their traditional homes and criminalized access to the forests on which they relied for their material, cultural, and spiritual well-being. Many Baka indicated that they faced an untenable choice: either they continued trying to return to the parks to hunt, thereby risking arrest and beatings from ecoguards, or they stopped going into the forest and lost their culture and means of livelihood."[259]

In March 2019, BuzzFeed News began to publish a series of articles describing alleged human rights abuses by rangers in protected areas supported by WWF in several countries, prominently including the three national parks in Cameroon.[260] As a result of the heightened attention, three further independent investigations were carried out, all of which produced reports in 2020.

Two focused on whether external funders—the U.N. Development Programme (UNDP) and the U.S. government—had followed their own safeguards. In August 2020, the UNDP Social and Environmental Compliance Unit (SECU) found that UNDP's Cameroon Country Office had failed to meet the UNDP Social and Environmental Standards in several respects, including by failing to identify affected communities and failing to correctly define the

255. *See* National Contact Point of Switzerland, Initial Assessment: Specific Instance Regarding the World Wide Fund for Nature International (WWF) Submitted by Survival International Charitable Trust 1 (Dec. 20, 2016).

256. National Contact Point of Switzerland, Final Statement: Specific Instance Regarding the World Wide Fund for Nature International (WWF) Submitted by the Survival International Charitable Trust 3, 6 (Nov. 21, 2017).

257. WWF has never published the reports, and in at least one case denied its existence. *See* Shreya Dasgupta, *Survival International Files Formal Complaint Against WWF for Allegedly Violating Human Rights of Baka 'Pygmies'*, Mongabay (Feb. 22, 2016), https://perma.cc/NN2V-8LMD. However, the three reports were reviewed by the Independent Review Panel and described in its own report. Two were conducted by outside experts (Diel Mochire Mwenge and Paul Chiy) and one by a Baka civil society organization that compiled statements by more than 170 Baka men and women in 60 villages near the parks. *See* Embedding Human Rights in Conservation, *supra* note 236, at 48–49.

258. *See* Embedding Human Rights in Conservation, *supra* note 236, ch. 4.

259. Oversight Hearing on Protecting Human Rights in International Conservation: Hearing Before the H. Comm. on Natural Resources Subcommittee on Water, Oceans, and Wildlife, 117th Cong. 5 (2021), https://perma.cc/3HZ9-AKF8 (Testimony of John H. Knox).

260. Tom Warren & Katie Baker, *WWF Funds Guards Who Have Tortured and Killed People*, BuzzFeed News (Mar. 4, 2019), https://perma.cc/AH9G-8RTS.

risk to those communities of the conservation projects it was supporting.[261] In 2021, the UNDP Administrator halted UNDP support until the project could be reformulated in accordance with the SECU report.[262]

The U.S. Department of the Interior reviewed the Central Africa Regional Program for the Environment (CARPE), which funds conservation in central Africa through funds transferred to the U.S. Fish and Wildlife Service (USFWS) from USAID.[263] In September 2020, the Deputy Secretary of the Interior issued a letter stating that the Department had obtained information appearing to substantiate concerns regarding allegations of murder, rape, torture, and abuse, but "it remains unclear the extent of direct allocation of taxpayer resources to these specific activities and bad actors."[264] The Department decided not to award more funds through the program until after a more thorough investigation and the imposition of "significant controls" on the funding.[265] The U.S. House of Representatives Committee on Natural Resources Subcommittee on Waters, Oceans, and Wildlife held an oversight hearing in October 2021, at which members expressed grave concerns, on a bipartisan basis, over the alleged human rights abuses and the failure of the U.S. government to ensure that its funds were not being used to support such abuses.[266]

In 2019, WWF commissioned an Independent Review Panel to review allegations that it was involved in the human rights abuses.[267] The report of the

261. U.N. Dev. Programme, Final Investigation Report Investigating Allegations of Non-Compliance with UNDP Social and Environmental Commitments Relating to the Following UNDP Activities: Integrated and Transboundary Conservation of Biodiversity in the Basins of the Republic of Cameroon, TRIDOM II, at 12–15 (Aug. 27, 2020).

262. U.N. Dev. Programme, Decision on Case No. SECU0008, at 1 (Feb. 8, 2021). This document and the SECU final investigation report are available at https://perma.cc/KT5Y-W3R3. The project has not yet been restarted.

263. Established in 1995, CARPE has been the largest environmental program at USAID, providing hundreds of millions of dollars for conservation in the Congo Basin, mainly through major conservation organizations like WWF and WCS. Luoma, *supra* note 91, at 39. Although USFWS's international conservation program is smaller than that of USAID, USFWS nevertheless made more than 4,200 grants between 1989 and 2019, for a total of $322 million. *Id.*

264. Memorandum from Deputy Secretary Katharine S. MacGregor to Assistant Secretary – Fish and Wildlife and Parks and Director – Fish and Wildlife Service (Sept. 18, 2020), at 1, https://perma.cc/KKN8-WN4S [hereinafter MacGregor Memorandum].

265. *Id.*

266. Oversight Hearing on Protecting Human Rights in International Conservation: Hearing Before the H. Comm. on Natural Resources Subcommittee on Water, Oceans, and Wildlife, 117th Cong. (2021), https://perma.cc/5GRV-BDKG. The author was one of the witnesses who testified at the hearing.

267. *See generally* Embedding Human Rights in Conservation, *supra* note 236 (the report of the Panel). The members of the Panel were: Navi Pillay, the former High Commissioner for Human Rights and judge on the International Criminal Court, who served as the chair; the late Kathy McKinnon, the then-chair of the IUCN World Commission on Protected Areas; and the present author. *See id.* at 1.

Panel stated that while it found no evidence that WWF officials intentionally encouraged human rights abuses in Cameroon, WWF had not taken adequate steps to fulfill its responsibility to respect human rights until recent years. In particular, before WWF developed an action plan in 2016, "it had not incorporated its human rights commitments into its agreement with [the Cameroon forestry agency], operationalised the commitments in its work, ensured that it had the necessary capacity to implement the commitments, or established processes to monitor and ensure compliance with them."[268] The Panel found that WWF had taken a number of positive steps more recently, including by commissioning external reviews of allegations and supporting creation of a local complaints mechanism.[269] However, the Panel stated that "WWF still needs to do more to safeguard the human rights of indigenous peoples and local communities in and around the national parks that it supports," and it made seven recommendations to that end, including steps to prevent abuses by ecoguards and to ensure that Baka have access to the protected areas.[270]

In 2019, the government of Cameroon entered into an MOU that committed to provide the Baka access to the parks on the basis of action plans to be negotiated later. However, at least as of 2022, the communities around the park had still had not seen any actual improvements in their access.[271] Moreover, buffer zones around the park are increasingly under the control of private companies that use them for lumber production or safaris, further obstructing Baka access to their ancestral lands.[272]

B. Salonga National Park

Salonga National Park, in the DRC, is the largest terrestrial national park in Africa, slightly larger than Belgium. It has two blocks, roughly equal in size, which are separated by the Monkoto Corridor, a 45-kilometer-wide area. The establishment of the park in the 1950s and the expansion to its present size in 1970 each caused the forced relocation of people living in the park to areas around it. Within the park, hunting and fishing are strictly prohibited by DRC law, but they are allowed within the Monkoto Corridor.[273] While estimates of the population displaced and of the population now living around the park are only approximate, the DRC government stated in 2018 that about 130,000 people lived in the Monkoto Corridor.[274]

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268. *Id.* at 62.
269. *Id.* at 63–64.
270. *Id.* at 66–68.
271. Macnight Nsioh et al., *Indigenous Peoples' Access to and Participation in Lobéké National Park*, Forest Peoples Programme (Feb. 17, 2022), https://perma.cc/9AAT-R7DM.
272. *Id.*
273. *See* Embedding Human Rights in Conservation, *supra* note 236, ch. 5.
274. World Heritage Comm., State of Conservation of the Properties Inscribed on the List of World Heritage in Danger, U.N. Doc. WHC/18/42.Com/7A.Add, at 79 (May 28, 2018).

Under the terms of an August 2015 MOU between WWF and the Institut Congolais pour la Conservation de la Nature (ICCN), the DRC agency with responsibility for protected areas, WWF and the ICCN co-manage the park. WWF designates the Park Director and provides financial and technical support; ICCN designates the Deputy Director, who is responsible for directing the ecoguards and anti-poaching activities. Salonga has about 300 ecoguards, who are stationed primarily at six locations around the boundaries of the park.[275]

In December 2016, a WWF staff member in the DRC emailed the WWF Country Director and Conservation Director reporting allegations of specific cases of abuse by ecoguards.[276] Apparently because of a desire to avoid conflicts with ICCN, the WWF Country Office did not follow up on the allegations for more than a year, until June 2018, when lawyers working for ICCN and WWF went to see whether ecoguards had been the subject of cases before the military prosecutor in the town of Boende. (The prosecutor has jurisdiction over criminal cases involving soldiers and ecoguards in the province of Tshuapa, which includes most of the northern half of Salonga.) The lawyers found that seven ecoguards and six other park employees had been convicted in 2016 of looting but never imprisoned, and that four other ecoguards had been accused of murder, one of rape, and three of torture and arbitrary arrest. All but one of the fifteen ecoguards either convicted or accused of crimes were still working for the park at the time of the inquiry.[277]

In August 2018, RFUK supported investigators from a local civil society organization, Actions pour la Promotion et Protection des Peuples et Espèces Menacées (APEM), to visit eleven villages near the park: seven in the Monkoto Corridor and four southwest of the park. The investigators interviewed 231 community members and found that 56, or almost one in four, stated that they had been directly victimized by Salonga ecoguards or DRC soldiers working with them.[278] RFUK and APEM published a full report on the investigation in November 2018, which described in detail multiple allegations, including of three murders, four rapes, and several cases of beating and torture.[279] RFUK and APEM also reported on the effects of the DRC laws banning access to the park on the Indigenous people and others living around the park, who could no longer hunt, fish, collect forest products, or visit sacred sites in their former homes. They reported that malnutrition in the Monkoto Corridor was

275. *See* Embedding Human Rights in Conservation, *supra* note 236, ch. 5 at 71.

276. *Id.* at 73.

277. The report was not published, but it is described in Embedding Human Rights in Conservation, *supra* note 236, ch. 5 at 74. No similar visit was paid to the military prosecutors with jurisdiction over other parts of Salonga. *Id.* at 84.

278. RFUK & APEM, Severe Human Rights Abuses Reported in and Around Salonga National Park, Democratic Republic of Congo: Briefing 5 (Nov. 2018, updated May 2019), https://perma.cc/75AV-SRLL.

279. *Id.* at 5–6.

"widespread."[280] Local residents only rarely heard from park management, and when they did, it was not to consult with them, far less to seek their consent, but rather to inform them of restrictions and sanctions.[281]

After the RFUK/APEM report became public, WWF commissioned two investigations in 2019.[282] The first investigation, conducted by the park administration, essentially asked the alleged victims to confirm their allegations, which they did.[283] Notably, because of the residents' hostility to the park management, the investigators did not disclose their real identity to the residents.[284] The second investigation, conducted by the Comité des Droits de l'Homme et Développement (a civil society organization in the DRC) and the office of the military prosecutor in Boende, found multiple additional alleged cases of murder, rape, and torture. It stated that ecoguards and soldiers used torture and other cruel, inhuman, and degrading treatment as a regular part of their operations against people who crossed the boundaries of the park to fish or hunt.[285] It reported that "the most recurrent methods consisted of: beating the victims on various parts of the body with sticks or the butts of weapons; striking the victims with sharp objects such as bayonets; tying women's breast with strings and then pulling on them; and extracting the victims' teeth."[286] As in Cameroon, both of these reports drew a direct connection between such abuses and the exclusion of the communities in the area from access to their traditional resources.[287]

Even after the expulsion of most of the inhabitants of Salonga, a few villages remained within its boundaries: one village of the Kitawala people in the north-eastern sector of the northern block of the park, and eight villages of the Iyaelima people in the southern block.[288] In 1984, Salonga was designated as a World Heritage Site, and in 1999, as a site in danger, which meant that it was subject to regular reports by IUCN advisory bodies on the state of its conservation.[289] For many years, the reports identified the presence of the remaining villages—totaling no more than a few thousand people, in a landscape the size of Belgium—as one of the main threats to the integrity of the park.[290] In 2018, the

280. *Id.* at 10.
281. *Id.* at 13.
282. WWF did not publish either investigative report, but they were each described in the report of the Independent Review Panel. Embedding Human Rights in Conservation, *supra* note 236, at 77–80.
283. *Id.* at 77.
284. *Id.*
285. *Id.* at 80.
286. *Id.*
287. *Id.* at 77–78, 80.
288. *Id.* at 70.
289. *Salonga National Park*, UNESCO World Heritage Convention, https://perma.cc/B4AW-2D9Z.
290. *See, e.g.*, World Heritage Comm., State of Conservation of the Properties Inscribed on the list of World Heritage in Danger, U.N. Doc. WHC-12/36.COM/7A.Add, at 11 (June 1,

DRC told the WHC that it had initiated a process for their removal, although it still has not taken place.[291]

In 2020, shortly after the investigations described above, another IUCN/WHC assessment mission visited Salonga.[292] Despite claiming to have interviewed hundreds of people involved with the park, the members of the mission did not address in their report the ongoing allegations of human rights abuses, and in fact complimented the ICCN and WWF on what it called their inclusive and participatory approach to local communities.[293] They urged the park authorities to continue their anti-poaching efforts with "strict respect" for human rights, but also to prevent human impacts on the integrity of the park by, among other things, carefully monitoring farming and subsistence hunting by the residents of the remaining villages.[294] They concluded that the management of the park had improved since 2012, but recommended that Salonga be retained on the list of World Heritage sites in danger pending the achievement of additional conservation goals.[295] However, the WHC removed Salonga from the List the following year.[296]

At the October 2021 oversight hearing before the U.S. House Subcommittee on Waters, Oceans, and Wildlife, the Salonga allegations were the subject of sustained inquiry by the members. At one point, the chair of the subcommittee, Representative Jared Huffman, criticized the representative of WWF for claiming that the Independent Panel's investigation had exonerated it. He pointed out that while WWF representative was careful always to refer to the Salonga

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2012); World Heritage Comm., State of Conservation of the Properties Inscribed on the list of World Heritage in Danger, U.N. Doc. WHC/16/40.COM/7A, at 63 (May 27, 2016).

291. Since 2018, the WHC has stated that the DRC should ensure that the process is in accordance with international standards, including the principles of prior consent, fair compensation, access to social services, and the preservation of cultural rights. World Heritage Committee, State of Conservation of the Properties Inscribed on the list of World Heritage in Danger, 42d Session at 81, U.N. Doc. WHC/18/42.COM/7A.Add, at 81 (May 28, 2018); World Heritage Committee, Decisions Adopted During the 43rd Session of the WHC, U.N. Doc. WHC/19/43.COM/18, at 28 (July 10, 2019); World Heritage Committee, Decisions Adopted During the 45th Session of the WHC, U.N. Doc. WHC/23/45.COM/19, at 103 (Oct. 6, 2023).

292. *See generally* World Heritage Comm., Rapport de la Mission Conjointe de Suivi Reactif du Centre du Patrimoine Mondial/UICN au Parc National de la Salonga République Démocratique du Congo, 20 Janvier – 4 Février 2020 [Report of the Joint World Heritage Centre/IUCN Reactive Monitoring Mission to Salonga National Park, Democratic Republic of Congo, January 20 to February 4, 2020] (2020).

293. *See id.* at 35.

294. *Id.* at 27, 35, 39.

295. *Id.* at 47; World Heritage Comm., State of Conservation of the Properties Inscribed on the List of World Heritage in Danger, U.N. Doc. WHC/21/44.COM/7A, at 120 (June 4, 2021).

296. *Salonga National Park (Democratic Republic of the Congo) Removed from the List of World Heritage in Danger*, UNESCO World Heritage Convention (July 19, 2021), https://perma.cc/5RKB-BSWU.

ecoguards accused of abuses as "government park rangers," they were paid by WWF, using equipment bought by WWF, in parks managed and funded by WWF, and WWF senior officials in the country had failed to act on the allegations of abuses. He asked her, "Do you believe that WWF bears any responsibility for the abuses that happened in any of the parks that it manages or co-manages?" She did not give him a yes-or-no answer to that question. In response to his follow-up question whether any person at WWF had lost their job, she said only that WWF had new leadership in some places in the Congo Basin, which he construed as a "no." He asked, perhaps rhetorically, "Can you think of any other organization or institution in any walk of life, the corporate world, politics, national sports leagues, where horrific abuses happen under their watch and no one lost their job?"[297]

III. The Human Rights Law of Conservation

The response of the WWF representative to the questioning by Representative Huffman exemplifies how many actors in the international conservation regime respond to the kinds of abuses described in the previous Part: they condemn the abuses but take no responsibility for them. The government agencies and conservation organizations in the Global North that support protected areas in the Global South instead blame governments there for failing to do a better job of training and overseeing their rangers.

There is no doubt that states have the primary obligation to ensure that their officials do not commit murder, torture, or arbitrary detention. Everyone has the right to be free from arbitrary killings, arbitrary detention, torture, and cruel, inhuman and degrading treatment, and virtually every state has accepted treaty obligations to ensure that its agents do not violate these rights and to protect against abuses committed by others.[298] There is no exception for rangers or other law enforcement officials engaged in conservation. Nor can states offload these obligations; even if a government agency signs a long-term agreement with African Parks, for example, to administer a protected area, the state remains responsible under international law for the exercise of its delegated authority.[299]

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297. *Oversight Hearing: Protecting Human Rights in International Conservation Before the Subcomm. on Water, Oceans, and Wildlife of the H. Comm. on Nat. Resources*, 117th Cong. (2021), https://perma.cc/2AFS-T27V. The exchange begins at minute 51.

298. *See* International Covenant on Civil and Political Rights arts. 6(1), 7, 9, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; African Charter on Human and Peoples' Rights arts. 4, 5, 6 (June 27, 1981); American Convention on Human Rights, arts. 4(1), 5(2), 7(3), Nov. 22, 1969, 1144 U.N.T.S. 143; European Convention on Human Rights arts. 2(1), 3, 5(1), Nov. 4, 1950, 213 U.N.T.S. 221.

299. *See* Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 53 U.N. GAOR Supp. (No. 10) at 43, 49, U.N. Doc. A/56/10 (2001).

However, states often do not act alone. As the previous sections of this Article describe, rangers in many protected areas receive financial and technical support from BINGOs, as do the protected areas themselves. In some cases, the BINGOs even co-manage the parks. It would be unjustifiable to conclude that they have absolutely no responsibility for abuses by rangers that they support, in parks that they co-manage, especially after allegations of the abuses are brought to their attention. More fundamentally, a driver of these abuses is the pervasive failure to respect and protect the rights of Indigenous peoples and local residents, a failure that has been exacerbated for decades by the actions of conservation organizations, funders, and states in the Global North.

A major source of this failure, and of the refusal of these actors to take responsibility for their role in it, is their lack of understanding of international human rights law relating to conservation. It is impossible to replace fortress conservation with rights-based conservation without a clear understanding of what rights-based conservation requires. But the international conservation regime as a whole has never adopted such an understanding.

The commitments that states and conservation organizations have made since the early 2000s to respect human rights in conservation have been vague, non-binding, or both. States have never amended the CBD, the World Heritage Convention, or any other conservation treaty to include obligations relating to human rights. The commitments in the 2003 Durban Action Plan treated human rights as targets rather than obligations.[300] The major conservation organizations jointly promised to respect human rights in 2009 through their Conservation Initiative for Human Rights, and most have also made individual commitments to respect human rights, but these statements again treat human rights as general aspirations rather than as a source of binding norms.[301] And the ten-year plan to safeguard biodiversity adopted by the CBD Conference of the Parties in 2010 did not refer to human rights at all.[302]

The most recent CBD biodiversity plan, the Global Biodiversity Framework (GBF) adopted in December 2022, sets 23 targets for 2030, some of which do refer to rights.[303] Perhaps most important, Target 3 sets the goal of protecting at least 30 percent of the planet by 2030, "recognizing indigenous and traditional territories, where applicable," and states that the parties should ensure that "any sustainable use, where appropriate in such areas, is fully consistent with conservation outcomes, recognizing and respecting the rights of indigenous peoples

300. *See* Durban Action Plan, *supra* note 188.

301. *See supra* Part I.D.

302. Neither do guidelines later adopted by the COP on environmental and socio-cultural assessments, and on consent and benefit-sharing from the use of traditional knowledge, although they may nevertheless contribute to implementation of a rights-based approach to these areas. *See* Elisa Morgera, *Dawn of a New Day? The Evolving Relationship between the Convention on Biological Diversity and International Human Rights Law*, 53 Wake Forest L. Rev. 691, 701–08 (2018).

303. *Kunming-Montreal Global Biodiversity Framework*, *supra* note 18.

and local communities, including over their traditional territories."[304] This is a small step in the right direction, but it falls far short of explaining what these rights are and what duties accompany them.

In short, the references to human rights in the international conservation regime have been too vague to provide meaningful guidance. To incorporate a rights-based approach to conservation, the actors must know the answers to some basic questions, including: What are Indigenous peoples, and what are non-Indigenous local communities? Do they have the same rights? If not, how do they differ? What exactly are those rights and their corresponding obligations? Are states the only duty-bearers in relation to the rights, or do other actors, such as conservation organizations, have responsibilities as well?

The obvious place to look for clarification of the application of human rights norms to international conservation is international human rights law itself. To a much greater degree than conservation organizations and other actors in the regime have yet recognized, international human rights bodies have developed detailed norms for inclusive conservation to which the actors in the conservation regime can and should look for guidance. This Part explains four critical aspects of the relevant human rights norms: (a) what are the sources of the relevant human rights law? (b) which groups are entitled to collective property rights? (c) what do those rights entail? and (d) which entities are subject to the corresponding duties and responsibilities?

A. The Sources of Human Rights Law on Conservation

The pillars of international law on Indigenous and tribal peoples are the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP)[305] and the International Labor Organization Indigenous and Tribal Peoples Convention (No. 169) (ILO 169).[306] At first sight, their normative weight may not seem impressive. U.N. declarations are not directly binding, and while the ILO Convention is binding on the states that belong to it, it has only 24 parties, 15 of which are in Latin America.[307] However, the provisions of these instruments have broader reach and more influence than may first appear. The independent bodies charged with overseeing the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of Racial Discrimination (CERD) and the regional tribunals that oversee the American Convention and the African Charter have used UNDRIP and ILO 169 to inform and

304. *Id.* at 9.

305. UNDRIP, *supra* note 176.

306. ILO 169, *supra* note 177.

307. The non-Latin American parties include several countries with significant Indigenous populations, such as Denmark, Norway, Central African Republic, and Nepal. *Ratifications of C169- Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, International Labour Organization, https://perma.cc/GR3R-LZ4U.

concretize the application of those treaties to Indigenous peoples and marginalized communities.[308] The ICCPR and CERD have near-universal membership, and the parties to the African Charter and the American Convention include almost all of the states in Africa, Latin America, and the Caribbean.[309]

The human rights bodies charged with monitoring these treaties have held that they require protecting the relationship of Indigenous peoples with their ancestral lands and resources because that relationship is necessary for them to enjoy their full range of human rights, including the rights of persons belonging to minorities to enjoy their own culture,[310] the principle of non-discrimination,[311] the right to practice religion,[312] and the right to property.[313] Actions that degrade the ecosystems on which Indigenous peoples depend are likely to interfere with other human rights as well, such as their rights to adequate food and water, to a healthy environment, and to private and family life.[314] Human rights bodies have spelled out what obligations states have to protect the relationship between Indigenous peoples and their lands, territories, and resources, have clarified that states have largely equivalent obligations to non-Indigenous communities with

308. *See, e.g.*, Human Rights Comm., General Comment No. 23: Article 27 (Rights of Minorities), ¶¶ 3.2, 7 (1994) [hereinafter General Comment No. 23]; CERD Comm., Agren v. Sweden, U.N. Doc. CERD/C/102/D/54/2013, ¶ 6.5 (2020); Human Rights Comm., Oliveira Pereira v. Paraguay, U.N. Doc. CCPR/C/132/D/2552/2015, ¶ 8.6 (2021); Kichwa Indigenous People of Sarayaku v Ecuador, Inter-Am. Ct. H.R., ¶ 215 (June 27, 2012); *Ogiek People v. Kenya*, *supra* note 227, ¶¶ 181, 209. UNDRIP, in particular, can inform human rights treaties of more general scope because "[i]t is not privileging indigenous peoples with a set of rights unique to them. Rather, indigenous peoples and individuals are entitled to the human rights enjoyed by other peoples and individuals, although these rights are to be understood in the context of the particular characteristics that are common to groups within the indigenous rubric." S. James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 Univ. Haw. L. Rev. 983, 995 (2013).

309. The ICCPR has 174 parties and CERD has 182. *See* U.N. Treaty Collection, https://perma.cc/2HD9-AHL3. The American Convention has 25 parties from Latin America and the Caribbean. *American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32)*, Organization of American States, https://perma.cc/EE92-MFM8 (listing parties). The African Charter has 54 parties, all but one of the member states of the African Union. *State Parties to the African Charter*, African Commission on Human and Peoples' Rights, https://perma.cc/XA4B-PFAA (listing parties).

310. *See, e.g.*, Human Rights Comm., Poma Poma v. Peru, U.N. Doc. CCPR/C/95/D/1457/2006, ¶ 7.2 (2009); *Oliveira Pereira v. Paraguay*, *supra* note 308, ¶ 8.6; Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Afr Comm'n Hum. & Peoples' Rts., No. 276/2003, ¶¶ 151, 154 (2010) [hereinafter *Endorois v Kenya*]; *Ogiek People v. Kenya*, *supra* note 227, ¶ 180.

311. *See, e.g.*, *Agren v. Sweden*, *supra* note 308, ¶ 6.7 (2020).

312. *See, e.g.*, *Endorois v. Kenya*, *supra* note 310, ¶ 173; *Ogiek People v. Kenya*, *supra* note 227, ¶ 164.

313. *See, e.g.*, Saramaka People v. Suriname, Inter-Am. Ct. H.R., ¶ 95 (Nov. 28, 2007); *Ogiek People v. Kenya*, *supra* note 227, ¶¶ 122–131.

314. *See, e.g.*, Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Inter-Am. Ct. H.R., ¶¶ 174–75, 201–54 (Feb. 6, 2020); *Oliveira Pereira v. Paraguay*, *supra* note 308, ¶ 8.4.

similar relationships to natural ecosystems, and have applied all of these obligations in the context of protected areas, as the following sections explain.

In short, international law already provides a detailed framework for applying human rights norms to conservation. States and other actors in the international conservation regime need not recreate it, but simply incorporate it, in order to move towards rights-based conservation. The following sections describe that framework.

B. The Rights-Holders

Two pervasive areas of confusion in the international conservation regime concern which groups qualify as Indigenous peoples, and whether non-Indigenous communities are entitled to any collective rights similar to those of Indigenous peoples. The confusion is heightened by the nearly ubiquitous use of the term "indigenous peoples and local communities" and its abbreviation "IPLCs" throughout the conservation regime.[315] The term is misleading because it conflates two completely different types of rights-holders. To understand the relevant rights, one must start by disaggregating the term into its two components.

1. What Are Indigenous Peoples?

The principal global human rights instrument on the rights of Indigenous peoples, UNDRIP, does not include a definition.[316] In contrast, ILO 169 applies to "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."[317] The ILO convention thus appears to suggest that only peoples residing in an area before "conquest or colonisation or the establishment of present state boundaries" can be considered indigenous. This criterion would seem to exclude the possibility of some pre-colonial peoples being more indigenous than others, and some governments in Africa and Asia have adopted just that position.

However, Indigenous peoples themselves have not construed the term so narrowly.[318] Nor have international human rights bodies. The African Court of

315. *See, e.g.*, Convention on Biological Diversity, *supra* note 17, art. 8(j); Durban Action Plan, *supra* note 188; *Kunming-Montreal Global Biodiversity Framework*, *supra* note 18.

316. *See* Anaya, *supra* note 176, at 29.

317. ILO 169, *supra* note 177, art. 1(1)(b). The Convention also states that it applies to "tribal peoples." *Id.* art. 1(1)(a). For both Indigenous and tribal peoples, self-identification is a "fundamental criterion." *Id.* art. 1(2).

318. *See* Ronald Niezen, The Origins of Indigenism: Human Rights and the Politics of Identity 19–23 (2003).

Human and Peoples' Rights has stated that "the relevant factors to consider are the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by state authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist."[319]

The African Court emphasized that "[t]he most salient feature of most indigenous populations is their strong attachment with nature, particularly, land and the natural environment. Their survival in a particular way depends on unhindered access to and use of their traditional land and the natural resources thereon."[320] Other human rights bodies have similarly stressed the importance of protecting the relationship of Indigenous peoples with their ancestral homes "in order to safeguard their physical and cultural survival."[321] As a result, as a matter of international human rights law, many groups around the world, from the Sami in Finland to the Baka in the DRC to the Karen in Thailand, qualify as Indigenous peoples apart from any consideration of European colonization.[322]

2. What Are "Local Communities"?

In contrast to the rich body of law on Indigenous peoples, "local communities" *per se* are not the subject of any human rights law at all. No international instrument defines the rights of local communities.[323] Virtually everyone in the

319. *Ogiek People v. Kenya*, *supra* note 227, ¶ 107; *see also* Albert Kwokwo Barume, Land Rights of Indigenous Peoples in Africa 37–39 (2d ed. 2014).

320. *Ogiek People v. Kenya*, *supra* note 227, ¶ 109.

321. *Saramaka People v. Suriname*, *supra* note 313, ¶¶ 85, 90; *see also Poma Poma v. Peru*, *supra* note 310, ¶ 7.2; *Agren v. Sweden*, *supra* note 308, ¶ 6.6; *Endorois v. Kenya*, *supra* note 310, ¶¶ 151, 154; Afr. Ct. Hum. & Peoples' Rts., Afr. Comm'n. Hum. & Peoples' Rts. v Kenya, No. 006/2012, Judgment (Reparations), ¶ 109 (2022) [hereinafter *Ogiek People v. Kenya (Reparations)*]; Minority Rights Group Int'l and Environnement Ressources Naturelles et Développement (on behalf of the Batwa of Kahuzi-Biega National Park, DRC) v. Democratic Republic of Congo, Afr. Comm. Hum. & Peoples' Rts, Comm. No. 588/15, ¶ 119 (2024) [hereinafter *Batwa v. DRC*].

322. *See generally* Barume, *supra* note 319 (on the rights of Indigenous peoples in Africa).

323. In 2018, the U.N. General Assembly adopted the U.N. Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP), which does purport to apply "to indigenous peoples and local communities working on the land," as well as many other persons and communities engaged in activities "related to agriculture or a related occupation in a rural area." U.N. G.A. Res. 73/165, annex, ¶¶ 1(2), 1(3) (Dec. 17, 2018). However, UNDROP is less relevant in this context than it might first appear. It broadly addresses the rights of peasants, who are defined as everyone who engages in small-scale agricultural production, relies significantly on family or household labor, and "has a special dependency on and attachment to the land." *Id.* ¶ 1(1). Perhaps as a result, it does not call for the same levels of protection as UNDRIP. *See id.* arts. 2(3), 5(2) (calling for consultation, not consent,

world belongs to some local community, even if it is only their own neighborhood, but the vast majority of local communities do not have a distinctive cultural history or special relationship to their land and therefore are not entitled to collective rights to the territory where they live.

Of course, the members of every human community are entitled to the rights that all humans possess, including rights to be free from torture, rape, and murder. But treating all local communities as somehow akin to Indigenous peoples can result in undermining the collective rights of Indigenous peoples. If all "IPLCs" are lumped together, and the "LCs" are not entitled to collective rights, then it becomes easier to deny such rights to the "IPs" as well. For these reasons, in July 2023, the U.N. Special Rapporteur on the Rights of Indigenous Peoples, the Chairperson of the U.N. Expert Mechanism on the Rights of Indigenous Peoples, and the Chairperson of the U.N. Permanent Forum on Indigenous Issues issued a joint letter urging states to "cease using the term 'local communities' alongside 'Indigenous Peoples,' so that the term 'Indigenous Peoples and local communities' is no longer used."[324]

At the same time, international human rights law recognizes that *some* communities do have collective rights even if they are not indigenous. ILO 169 explicitly extends its protections beyond Indigenous peoples to tribal peoples, which it describes somewhat tautologically as "tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."[325] Similarly, on the basis of treaties of general application, human rights bodies have held that states have obligations to protect the collective rights of some non-Indigenous communities.

The leading case is *Saramaka People v. Suriname,* decided by the Inter-American Court of Human Rights in 2007.[326] The case concerned a community of Afro-descendants: people whose ancestors were brought to the Americas in slavery but escaped to the forests and formed tribal bonds. The Court emphasized that, like Indigenous peoples, such communities have a special relationship with the lands on which they have depended for their material and spiritual well-being, and therefore "require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property

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before actions that may affect them). Moreover, compared to other human rights instruments, UNDROP received only lukewarm support from the General Assembly, with eight negative votes and 54 abstentions. U.N. GAOR, 73rd Sess., 55th plenary meeting, at 24–25, U.N. Doc. A/73/PV.55 (Dec. 17, 2018).

324. Statement by the U.N. Permanent Forum on Indigenous Issues, Special Rapporteur on the Rights of Indigenous Peoples, and the Expert Mechanism on the Rights of Indigenous Peoples (July 2023), https://perma.cc/T5V9-VPW8.

325. ILO 169, *supra* note 177, art. 1(1)(a).

326. *See generally Saramaka People v. Suriname*, *supra* note 313.

rights, in order to safeguard their physical and cultural survival."[327] The Court concluded that the Saramaka are a "tribal community" and that, as for Indigenous peoples, the state must recognize and protect their collective rights in the territory and the natural resources they have traditionally used.[328]

In *Saramaka People,* the Inter-American Court was primarily applying the right to property, but the Human Rights Committee, which interprets the ICCPR, reached an equivalent result through application of ICCPR Article 27, which provides that "persons belonging to [ethnic, religious or linguistic] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[329] The Committee has made clear that culture can involve a way of life closely associated with particular land, and indicated that while this is particularly true of Indigenous peoples, it may be true of other ethnic minorities as well.[330] Like other rights, states are required not only to avoid violating the rights of minorities themselves, but also to protect the rights from interference by others.[331]

In short, if a community is so connected to a particular place that its ability to enjoy its rights and transmit its culture depends on its relationship with that place, human rights bodies have held that states have obligations to protect that relationship. As the next section explains, those obligations are equivalent in many ways to the obligations owed to Indigenous peoples. For the purpose of this discussion, and to distinguish them from other types of local communities, I will refer to these communities here as "traditional place-centered communities."

C. Collective Property Rights

As a general matter, human rights law does not prohibit states from restricting activities within an area if the restrictions are necessary and proportional for a legitimate public purpose, or even preclude states from taking private property as long as it is for a public purpose and is accompanied by fair compensation.[332] But Indigenous peoples and traditional place-centered communities have collective rights to their ancestral territories and resources that give rise to greater protections. Indigenous peoples ground these rights on their right to self-determination, which place-centered communities may not have the same ability to claim, because they are generally not recognized as "peoples."[333]

327. *Id.* ¶¶ 84–85.
328. *Id.*
329. ICCPR, *supra* note 298, art. 27.
330. *Poma Poma v. Peru*, *supra* note 310, ¶ 7.2.
331. General Comment No. 23, *supra* note 308, ¶ 6.1.
332. *See, e.g.*, American Convention, *supra* note 298, art. 21(2); African Charter, *supra* note 298, art. 14; European Convention on Human Rights, Protocol No. 1, art. 1 (1952).
333. *See* UNDRIP, *supra* note 176, art. 3; Anaya, *supra* note 176, at 61.

However, as explained above, human rights bodies have also justified collective property rights for Indigenous peoples and place-centered communities on the need to protect those rights in order to safeguard their relationship with their land, territory, and resources, and thereby protect the entire range of rights that depend on that relationship.[334] In the context of conservation and protected areas, four of these collective rights are particularly relevant.

First, Indigenous peoples and place-centered communities have the right to have states formally recognize their ownership and possession of the lands that they have traditionally occupied and the natural resources that they have traditionally used, including by demarcation of the boundaries of their lands or territories.[335] The protected natural resources include not only those that are "essential for the survival of their way of life," but also those whose "extraction will necessarily affect other resources that are vital to their way of life."[336]

Second, Indigenous peoples and place-centered communities have the right to be consulted and to decide whether to consent before actions are taken that may affect them. On this issue, UNDRIP goes substantially further than ILO 169. ILO 169 provides only that states have obligations to consult with Indigenous and tribal peoples when considering legislative or administrative measures that may affect them directly.[337] UNDRIP also requires consultation, but with the critical additional requirement of consent: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain their free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them."[338]

The principles of consultation and consent serve as "safeguards for all those rights of indigenous peoples that may be affected by external actors."[339] The Special Rapporteur on the Rights of Indigenous Peoples has stated that the only exceptions to the requirement of free, prior, and informed consent (commonly known as FPIC) are: (a) if it is clear that proposed actions "will not substantially

334. *See* Anaya, *supra* note 176, at 62–63.

335. *See* ILO 169, *supra* note 177, arts. 14(1), 15(1); UNDRIP, *supra* note 176, art. 26; Committee on the Elimination of Racial Discrimination (CERD Committee), General Recommendation No. 23: Indigenous Peoples, ¶ 5 (1997); *Endorois v. Kenya*, *supra* note 310, ¶ 209; *Ogiek People v. Kenya (Reparations), supra* note 321, ¶ 107; *Lhaka Honhat v. Argentina*, *supra* note 314, ¶¶ 94, 98; Kaliña and Lokono Peoples v. Suriname, Inter-Am. Ct. H.R., ¶ 129, 133 (Nov. 25, 2015); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R., ¶ 153 (Aug. 31, 2001); Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R., ¶ 137 (June 17, 2005); *Saramaka People v. Suriname*, *supra* note 313, ¶¶ 115, 121; *Batwa v. DRC, supra* note 321, ¶ 155(b).

336. *Saramaka People v. Suriname*, *supra* note 313, ¶¶ 123, 155.

337. ILO 169, *supra* note 177, arts. 6(1), 15(2), 17(2).

338. UNDRIP, *supra* note 176, art. 19 (emphasis added).

339. Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples, U.N. Doc. A/HRC/24/41, ¶ 28 (July 1, 2013) [hereinafter 2013 Report of the Special Rapporteur].

affect indigenous peoples in the exercise of any of their substantive rights in relation to the lands and resources within their territories," or (b) if the state can justify restrictions on the right as necessary and proportional in order to achieve a legitimate public purpose, in accordance with the requirements of international human rights law.[340]

Although UNDRIP is not directly binding in itself, treaty bodies and regional tribunals have incorporated the requirements for consultation and consent into their interpretations of the binding treaties that they interpret, in order to safeguard the culture of Indigenous peoples and place-centered communities and their relationship with their lands.[341] In *Saramaka,* for example, the Inter-American Court stated that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the state has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[342] This requirement applies to the creation of protected areas no less than to other initiatives that would have such a major impact.[343]

A third right that is particularly relevant to protected areas is the right of Indigenous peoples to govern themselves. Like other peoples, Indigenous peoples have the right of self-determination,[344] which includes the right to determine their own course of development[345] and, more generally, "the right to autonomy or self-government in matters relating to their internal and local affairs."[346] Although Indigenous peoples are not exempt from the application of laws of the countries in which they live, they have the right to retain their own customs and institutions as long as they are not incompatible with rights in international or domestic law.[347] With respect to their own lands and resources, in particular, ILO 169 and UNDRIP each emphasize that Indigenous peoples have rights of ownership and management.[348]

On its face, the right of self-determination may provide a basis for obligations of states to Indigenous peoples, especially in relation to self-governance, that go beyond states' obligations to non-Indigenous place-centered communities.

340. *Id.* ¶ 31.

341. *See, e.g.*, *Poma Poma v. Peru*, *supra* note 310, ¶ 7.6; *Oliveira Pereira v. Paraguay*, *supra* note 308, ¶ 8.7; *Agren v. Sweden*, *supra* note 308, ¶ 6.16; *Saramaka People v. Suriname*, *supra* note 313, ¶ 134; Comm. on Economic, Social and Cultural Rights, General Comment No. 21 (Right of Everyone to Take Part in Cultural Life), U.N. Doc. E/C.12/GC/21, ¶ 37 (Dec. 21, 2009); *Endorois v. Kenya, supra* note 310, ¶ 226, 291; *Ogiek People v. Kenya (Reparations), supra* note 321, ¶ 142, 144.

342. *Saramaka People v. Suriname*, *supra* note 313, ¶ 134.

343. *Ogiek People v. Kenya (Reparations)*, *supra* note 321, ¶ 144.

344. ICCPR, *supra* note 298, art. 1; *International Covenant on Economic, Social and Cultural Rights*, art. 1. (Dec. 16, 1966).

345. ILO 169, *supra* note 177, art. 7(1); UNDRIP, *supra* note 176, art. 23.

346. UNDRIP, *supra* note 176, arts. 3, 4.

347. ILO 169, *supra* note 177, art. 8.

348. UNDRIP, *supra* note 176, arts. 26(2), 32(1); ILO 169, *supra* note 177, art. 15(1).

However, in *Saramaka,* the Inter-American Court made clear that it viewed the Afro-descendant community as a "people" for the purpose of defining its rights, and noted that under Common Article 1 of the two International Covenants, peoples may "freely pursue their economic, social and cultural development" and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence."[349] The Court stated that it would not interpret the right to property under the American Convention more restrictively than the Covenants, and that it would apply this rationale to tribal peoples as well as to Indigenous peoples "due to the similar social, cultural, and economic characteristics they share."[350]

The fourth collective property right of particular relevance here is the right to receive benefits from the use of traditional lands and remedies for land, territory, and resources taken in the past. ILO 169 and UNDRIP express a preference for restitution of the property taken, and both provide that if restitution of the property is impossible, the affected people should receive compensation in the form of lands, territories and resources of equal quality or monetary compensation.[351] This is also the approach taken by the treaty bodies and regional tribunals.[352] Again, their reasoning would seem to include non-Indigenous communities with collective property rights, as well as Indigenous peoples.

It is important to underline that these rights are not contingent on the use of the land and resources for conservation. Indigenous peoples and traditional place-centered communities are free to pursue their own paths of development; they are not frozen in amber for all time as Guardians of Nature for the benefit of the rest of the world.[353] Social scientists have debated the extent to which Indigenous peoples have historically engaged in what is now called conservation, while Indigenous peoples themselves sometimes reject the very concept of "conservation" as it has been constructed by states, conservation organizations, and academics.[354] It seems clear that Indigenous peoples have generally used their lands and resources sustainably, so that protecting their rights to do so helps to promote environmental protection.[355] But generally is not always; in

349. *Saramaka People v. Suriname*, *supra* note 321, ¶ 93.

350. *Id.*

351. ILO 169, *supra* note 177, art. 16; UNDRIP, *supra* note 176, art. 28.

352. *See* CERD Committee, General Comment No. 23, *supra* note 335, ¶ 5; Comm. on Economic, Social and Cultural Rights, General Comment No. 21, *supra* note 341, ¶ 36; *Agren v. Sweden*, *supra* note 308, ¶ 6.27; *Endorois v. Kenya*, *supra* note 310, ¶¶ 209, 234; *Ogiek People v. Kenya (Reparations)*, *supra* note 321, ¶ 116; *Kaliña and Lokono Peoples*, *supra* note 335, ¶ 158; *Batwa v. DRC, supra* note 321, ¶ 155(d).

353. *See* 2013 Report of the Special Rapporteur, *supra* note 339; Desmet, *supra* note 20, at 31, 48–54.

354. For examples of the debate, *see, e.g.,* Native Americans and the Environment: Perspectives on the Ecological Indian (M. Harkin & D. Lewis eds. 2007); Raymond Hames, *The Ecologically Noble Savage Debate*, 36 Ann. Rev. Anthropology 177–78 (2007).

355. *See supra* Part I.C.2.

theory, and sometimes in practice, Indigenous peoples can degrade their own environment, especially if that environment is also under assault from outside forces. As a result, conservationists, especially from the Global North, have often questioned whether Indigenous peoples can be trusted to conserve at all.[356]

Here, too, international human rights law provides clearer answers than the international conservation regime appears to recognize. Unlike the rights to be free from torture and arbitrary killings, collective rights to property and to the exercise of cultural and religious beliefs may be restricted under certain conditions. For example, in *Saramaka*, the Inter-American Court stated that "the protection of the right to property . . . is not absolute. . . . Although the Court recognizes the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival, said property rights, like many other rights recognized in the Convention, are subject to certain limitations and restrictions."[357]

However, the restrictions a state may place on these rights are narrowly constrained. The limits themselves have limits. In general, states must justify restrictions on any human rights (when such restrictions are allowed) as being necessary to achieve some legitimate public purpose and strictly proportional to that purpose.[358] Such requirements apply with heightened force to Indigenous peoples and place-centered communities because of the special relationship they have with their traditional homes.[359] The Inter-American Court, for example, has held that "a State may restrict the use and enjoyment of the right to property [including the rights to natural resources found on the territory] where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society."[360] However, the Court has also stressed that any restrictions must not deny a community's survival as a tribal or Indigenous people. To that end, the Court has set out additional safeguards: the state must conduct prior assessment of the potential impacts and carry out consultation and benefit-sharing with them.[361] Moreover, with respect to projects that would have a major impact within their territory, the state must obtain their free, prior, and informed consent.[362]

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356. *See, e.g.*, Kent Redford, *The Ecologically Noble Savage*, Cultural Survival Q. (Jan. 1991).

357. *Saramaka People v. Suriname*, *supra* note 313, ¶ 127; *see also Agren v. Sweden*, *supra* note 308, ¶ 6.10.

358. *See* UNDRIP, *supra* note 176, art. 46(2); *Poma Poma v. Peru*, *supra* note 310, ¶ 7.6; *Agren v. Sweden*, *supra* note 308, ¶ 6.10; *Ogiek People v. Kenya*, *supra* note 227, ¶ 129; *Endorois v. Kenya*, *supra* note 310, ¶ 214.

359. *Endorois v. Kenya*, *supra* note 310, ¶ 212.

360. *Saramaka People v. Suriname*, *supra* note 313, ¶ 127.

361. *Id.* ¶ 129; *Lhaka Honhat*, *supra* note 314, ¶ 174; *Agren v. Sweden*, *supra* note 308, ¶ 6.18; *Endorois v. Kenya*, *supra* note 310, ¶ 228.

362. *Saramaka People v. Suriname*, *supra* note 313, ¶ 134; *see also Poma Poma v. Peru*, *supra* note 310, ¶ 7.6.

Here, the FPIC requirement plays a particularly critical role. In the words of the Special Rapporteur on the Rights of Indigenous Peoples, "When indigenous peoples freely give consent to extractive projects under terms that are aimed to be protective of their rights, there can be a presumption that any limitation on the exercise of rights is permissible and that rights are not being infringed. On the other hand, when indigenous peoples withhold their consent to extractive projects within their territories, no such presumption applies, and in order for a project to be implemented the state has the burden of demonstrating either that no rights are being limited or that, if they are, the limitation is valid."[363]

In several cases, human rights bodies have reviewed states' justifications for restricting Indigenous rights in protected areas and found the justifications to be inadequate. In *Endorois v. Kenya,* for example, the African Commission on Human and Peoples' Rights considered the dispossession of the Endorois people from their traditional lands so that Kenya could create a game reserve. After finding that the dispossession violated their rights to religious practice and to property, it found that "even if the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need."[364] It concluded that Kenya should restitute the Endorois' ancestral land, pay adequate compensation for their loss, and ensure that they benefit from the activities within the game reserve.[365]

Similarly, in *Kaliña and Lokono Peoples v. Suriname*, the Inter-American Court considered the effect of three nature reserves on two Indigenous peoples, and held that while Suriname did not have to provide them exclusive management of the protected areas, it did have to guarantee their effective access, use, and participation in the reserves; the Court stated that "any restriction of their rights must comply with the requirements of legality, necessity and proportionality" and be for a legitimate purpose.[366] The Court emphasized that because traditional practices are also critical for environmental protection, there is no necessary conflict between respecting indigenous rights and pursuing conservation.[367]

In 2017, the African Court of Human and Peoples' Rights held that Kenya had violated the African Charter by evicting the Ogiek people from the Mau Forest.[368] It stated that preservation of a natural ecosystem is a valid public interest,[369] but expelling the Ogiek against their will and without prior consultation was not necessary and proportional to achieve that interest, especially because Kenya had not provided any evidence that their continued presence was

363. 2013 Report of the Special Rapporteur, *supra* note 339, ¶ 33.
364. *Endorois v. Kenya*, *supra* note 310, ¶¶ 173, 191, 215.
365. *Id.* at 80.
366. *Kaliña and Lokono Peoples*, *supra* note 335, ¶ 286.
367. *Id.* ¶ 173.
368. *Ogiek People v. Kenya*, *supra* note 227, ¶ 227.
369. *Id.* ¶¶ 130, 188.

the main cause of the environmental degradation.[370] In 2022, the Court ordered Kenya to pay 57.85 million Kenya shillings (about $400,000) for the material harm suffered by the Ogiek, and another 100 million shillings (about $700,000) for the "moral prejudice" or non-material harm.[371] The Court also ordered Kenya to delimit the Ogiek ancestral land and grant them collective title, in order to ensure their permanent use, occupation, and enjoyment.[372]

Most recently, in 2024, the African Commission on Human and Peoples' Rights held that "the establishment of a natural site as a national park should not be done to the detriment of the original occupants, especially when it is an indigenous people, unless the State can prove that the actions of these populations are harmful to the said protection."[373] It held that the creation of the Kahuzi-Biega National Park in the DRC and the expulsion of the Indigenous Batwa people from the park without their free, prior, and informed consent violated many of their rights, including their rights to life, property, health, culture, and development.[374] The Commission requested the DRC, among other things, to reintegrate the Batwa into their ancestral territory and begin a process to examine the compensation required to redress the harm that they have suffered.[375]

In short, one can imagine circumstances under which an Indigenous people or a traditional community is engaging in, or threatening to engage in, destructive actions that justify non-consensual restrictions.[376] But to comply with international human rights norms, such restrictions must be proportional and necessary to achieve a valid public interest. It is one thing for a state to prohibit taking an endangered species, even if doing so may have an adverse effect on the culture of a particular people or community. But it is impossible to imagine how a state could ever justify involuntary dispossession of Indigenous peoples or traditional place-centered communities, or sweeping prohibitions on all types of their use of their traditional lands and resources.

D. The Responsibilities of Conservation Organizations

As Part I explains, the major conservation organizations have been among the most important actors in the international conservation regime, funneling hundreds of millions of dollars from donors in the Global North to create, support, and manage protected areas in the Global South. As private entities,

370. *Id.* ¶¶ 130, 167, 189. The Court stated that the main causes of the environmental degradation were encroachments by other groups, as well as "government excisions for settlements and ill-advised logging concessions." *Id.* ¶ 130.

371. *Ogiek People v. Kenya (Reparations*), *supra* note 321, ¶¶ 77, 93.

372. *Id.* ¶ 116.

373. *Batwa v. DRC*, *supra* note 321, ¶ 195.

374. *Id.* ¶¶ 140, 161, 167, 187, 205.

375. *Id.* ¶ 233.

376. *See* Desmet, *supra* note 20, at 32.

BINGOs do not have direct obligations under international human rights law in relation to the protected areas that they advise, fund, otherwise support, or administer. International criminal law does impose some obligations on non-state actors, particularly in relation to crimes such as genocide, crimes against humanity, and war crimes, which may be prosecuted before the International Criminal Court (ICC).[377] It is possible that instances of violent eviction directed against a people could meet the requirements for a crime against humanity. Even so, the ICC would have jurisdiction only over individuals, not over organizations.[378]

However, conservation organizations have proclaimed their adherence to human rights norms, both collectively and independently.[379] The first principle in the Conservation and Human Rights Framework adopted by the seven major conservation organizations in 2009 is to "respect internationally proclaimed human rights; and make sure that we do not contribute to infringements of human rights while pursuing our mission."[380] The practical issue, therefore, is not whether human rights norms should apply at all to conservation organizations; it is how they should apply. As with states, the starting point should be the international human rights norms themselves. Just as human rights bodies have clarified the substantive content of those norms in relation to Indigenous peoples, traditional place-centered communities, and protected areas, they have also clarified how human rights law should be taken into account by large non-state actors.

In 2011, the Human Rights Council endorsed the U.N. Guiding Principles on Business and Human Rights (UNGPs).[381] Although the UNGPs were developed in the context of for-profit business enterprises, their principles apply equally well to multinational enterprises like the BINGOs. Indeed, human rights review bodies have already begun to apply the UNGPs to conservation organizations.[382]

The UNGPs were developed by Professor John Ruggie, who was appointed by the Secretary-General in 2005 as his special representative on human rights and transnational corporations and other business enterprises. In 2008, Ruggie presented a Framework for Business and Human Rights consisting of three pillars: a duty on states to protect against human rights abuses by business enterprises; a responsibility on all such enterprises to respect human rights; and a requirement

377. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90.

378. *Id.* art. 25(1).

379. *See supra* Part I.D.

380. *Who We Are*, Conservation Initiative on Human Rights, https://perma.cc/4G79-YDHL. In what may be a sign of waning interest by the BINGOs in the initiative, only four of the original ten principles in the Framework are still visible on the site. *Compare id. with Conservation and Human Rights Framework*, CIHR, https://perma.cc/Z8V5-93ZF (the text as originally adopted in 2009).

381. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011).

382. *See infra* notes 392–398.

on states to provide remedies for human rights abuses by businesses.[383] Although human rights law already required states to protect human rights from interference by non-state actors,[384] Ruggie said that the responsibility of corporations to respect human rights was not required by human rights law, but rather arose from societal expectations that business enterprises would respect human rights norms.[385]

At the end of Ruggie's second term, in 2011, he submitted the UNGPs to the Council as an elaboration of the 2008 Framework.[386] With respect to the second pillar, the most relevant here, the UNGPs state that "[t]he responsibility to respect human rights requires that business enterprises: (a) [a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) [s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[387] To that end, corporations should carry out a human rights due diligence process that includes assessing human rights impacts, integrating the findings from the assessments and taking appropriate actions to address them, tracking the effectiveness of their responses, and publicly communicating how they are addressing human rights issues.[388] When corporations find that they have caused or contributed to adverse impacts on human rights, they should provide for or cooperate in their remediation.[389]

The UNGPs have been very widely accepted as standards for corporate conduct. For example, they have been incorporated into the OECD Guidelines for Multinational Enterprises, non-binding standards adopted by the OECD for multinational businesses operating in or from OECD countries.[390] The OECD Guidelines provide that claims of non-compliance by a multinational enterprise with the Guidelines can be brought to National Contact Points (NCPs) in the home country of the enterprise.[391]

Although the Guiding Principles and the OECD Guidelines apply explicitly only to corporations, they have also been applied to conservation

383. Special Representative of the Secretary-General, Protect, Respect and Remedy: a Framework for Business and Human Rights, U.N. Doc. A/HRC/8/5 (2008) [hereinafter 2008 Framework Report].

384. *See generally* John H. Knox, *Horizontal Human Rights Law*, 102 Am. J. Int'l L. 1, 18–27 (2008).

385. 2008 Framework Report, *supra* note 383, ¶ 9.

386. Special Representative of the Secretary-General, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (2011) [hereinafter UNGPs].

387. *Id.* Principle 13.

388. *Id.* Principles 18, 19, 20, 21.

389. *Id.* Principle 22.

390. Org. for Econ. Co-operation and Dev., OECD Guidelines for Multinational Enterprises on Responsible Business Conduct 25 (2023).

391. *Id.* at 56.

organizations.[392] In the 2016 case brought by Survival International to the Swiss NCP described above,[393] the NCP issued an Initial Assessment in which it held that it had jurisdiction over WWF pursuant to the OECD Guidelines.[394] The NCP stated that while WWF's operations may not be *per se* commercial, its "approach to conservation is to a certain extent market-based and it undertakes commercial activities," for example by selling products and selling its famous panda emblem to be used for products.[395] The NCP concluded that "[t]his would not be possible without projects such as the ones in southeast Cameroon which are part of its activities to protect the environment. Therefore, WWF's involvement in the establishment and maintenance of protected areas in southeast Cameroon can also be considered as activities of commercial nature, to which the OECD Guidelines are applicable."[396]

The Independent Review Panel that reviewed allegations of human rights abuses in protected areas supported by WWF also cited the UNGPs in its 2020 report.[397] Unlike the Swiss NCP, the Panel did not address whether WWF's commercial activities justified application of norms for business and commercial enterprises. Instead, it stated that "the expectation of respect for human rights cannot be lower for multinational conservation organisations than it is for multinational business enterprises. Although non-profit organisations play significantly different societal roles than business enterprises in many respects, they often have similar structures that give rise to similar issues in implementing the responsibility to respect human rights. Most importantly, their institutional activities are capable of causing or contributing to adverse human rights impacts."[398]

Although the UNGPs were aimed at business enterprises, their norms are relevant and useful to virtually any enterprise seeking to avoid adverse human rights impacts. The characteristics of an effective human rights due diligence process, in particular, clearly apply to multinational enterprises of all types, including large conservation organizations. As the Panel stated, it is impossible to see why conservation organizations should be held to a lower standard than that applicable to business enterprises. The last part of this Article explains in more detail how these norms could be translated to the conservation context.

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392. *See, e.g.*, José Francisco Calí Tzay (Special Rapporteur on the Rights of Indigenous Peoples), Green Financing – a Just Transition to Protect the Rights of Indigenous Peoples, ¶ 33, U.N. Doc. A/HRC/54/31 (July 21, 2023).
393. *See supra* Part II.A.
394. National Contact Point of Switzerland, Initial Assessment, *supra* note 255.
395. *Id.* at 8.
396. *Id.*
397. Embedding Human Rights in Conservation, *supra* note 236, at 32–34.
398. *Id.* at 34.

IV. Reforming the International Conservation Regime

The international conservation regime has set itself the monumental task of reversing the global loss of biodiversity by protecting 30 percent of the world by 2030.[399] This goal cannot be effectively met without respecting and supporting the rights of Indigenous peoples and traditional place-centered communities. Indigenous peoples currently occupy 24.9 million square kilometers of the remotest and most sparsely populated anthromes in the world, amounting to nearly two-thirds of all such anthromes.[400] Apart from the massive human rights violations that dispossessing them would cause, it is impossible to protect those places, or reverse the global loss of biodiversity, without their cooperation.[401] There is no viable alternative to rights-based conservation.

The last several decades have shown that reforming the international conservation regime is not easy. Replacing the commitment to fortress conservation that has been part of the DNA of the regime for over a century with meaningful commitments to human rights requires changes by all of the actors in the regime, from the states that create the protected areas to the conservation organizations and private and public funders that support them.

The states with territorial jurisdiction over protected areas have the clearest legal authority over them and the most direct obligations to respect and protect the rights of their inhabitants. They should obviously do far more to comply with these obligations. If they recognized the collective rights of Indigenous peoples and place-centered communities, reaffirmed the value of their traditional knowledge, and supported their ability to govern and prevent encroachment by others, they would enormously improve conservation outcomes as well as protect human rights.[402] However, many of the governments in states with the highest levels of biodiversity and the largest demands for its exploitation lack the capacity, the political will, or both, to protect human rights or effectively enforce their environmental laws.[403] Moreover, Indigenous peoples and traditional place-centered communities are often among the most marginalized segments of the population and therefore lack power to influence state policy.

Host states are not the only entities involved in the governance of protected areas. As this Article has explained, the most influential actors in the international conservation regime include the conservation organizations that urge the creation of new protected areas, provide technical and financial support for them, and manage them. Conservation organizations have the leverage to

399. *Kunming-Montreal Global Biodiversity Framework*, *supra* note 18.

400. Garnett et al., *supra* note 171, at 370.

401. *Id.*; *see generally* Rts. & Res. Initiative, Rights-Based Conservation, *supra* note 4.

402. *See* Kaimowitz, *supra* note 4, at 60–105.

403. *See generally* U.N. Env't Programme, Environmental Rule of Law: Tracking Progress and Charting Future Directions (2023) [hereinafter Environmental Rule of Law 2023].

change the system. Indeed, for many countries in the Global South, contributions from Global North donors, often funneled through Global North conservation organizations, make up almost their entire conservation budget.[404] It is also just and appropriate for conservation organizations—and the public and private entities that fund them—to do everything in their power to reconcile conservation with human rights, because those organizations bear the responsibility for disseminating the concept of fortress conservation around the world and working to center the international conservation regime around it.

No one should be unduly optimistic about the likelihood that the international conservation regime will suddenly change course. Over the last two decades, there have been many excellent proposals for states and conservation organizations to take human rights more seriously.[405] In my own work, I have met many people in conservation organizations working in good faith to promote rights-based conservation. However, those proposals and efforts have struggled because in this area, as in so many others, there are powerful counter-pressures to respecting and protecting human rights. There are always enormous short-term economic incentives to exploit natural resources today at the expense of tomorrow. Many of the most problematic protected areas are in countries that do not have effective rule of law.[406] In addition, as this Article has explained, conservation organizations and other actors in the international conservation regime have failed to commit fully to rejecting fortress conservation in favor of inclusionary conservation.

The necessary first step in that regard is to understand what human rights norms require. What distinguishes the present proposal from previous ones is that it is grounded more concretely in international human rights law, as described in Part III, which is now clearer and more detailed than ever before. The proposal sets out principles, based on that body of law, that conservation organizations and funders should follow to incorporate human rights into their work.

Relying more explicitly on international human rights norms as they have been interpreted by human rights bodies has two main advantages. First, all of the major actors in the international conservation regime, including the BINGOs, have at least nominally committed to comply with human rights norms, even if not always wholeheartedly or with a clear understanding of what such commitments entail. As many studies have shown, positive results from human rights commitments are most likely when domestic constituencies can use those commitments to

404. *See, e.g.*, Luoma, *supra* note 91, at 29 (comparing DRC's tiny budget for conservation with the hundreds of millions of dollars provided by outside donors).

405. *See, e.g.*, Tauli-Corpuz et al., *supra* note 12, at 10; Luoma, *supra* note 91, at 48; Kaimowitz, *supra* note 4; Colchester, *supra* note 43, at 112; Embedding Human Rights in Conservation, *supra* note 236, at 150.

406. *See generally* U.N. Env't Programme, Environmental Rule of Law 2023, *supra* note 403.

press for change.[407] Private conservation organizations and funders in the Global North, which rely on financial and political support from the public there, may be especially receptive to that kind of pressure. Second, international and domestic mechanisms already exist for promoting compliance with human rights norms. As weak as they often are, they are far better than nothing.[408] Indeed, they have already been brought to bear on conservation practices with some beneficial effects.[409]

The first section of this Part explains how the major conservation organizations should adopt and implement human rights norms. The second section sets out the steps that the conservation funders should take to leverage their influence to ensure that the recipients of their support comply with the commitments they have undertaken.

A. Reforming Conservation Organizations

The starting point for conservation organizations for internalizing human rights norms should be the U.N. Guiding Principles on Business and Human Rights (UNGPs).[410] To comply with the UNGPs and other human rights norms, BINGOs should: (1) not only adopt, but actually embed their human rights commitments in their operations; (2) make much clearer their commitments in relation to the rights of Indigenous peoples and place-centered communities; (3) adopt an effective human rights due diligence process; (4) provide remedies for their human rights abuses; (5) regularly report on their human rights record; and (6) protect against human rights abuses by their partners, especially in relation to law enforcement.[411]

1. Adopting and Embedding a Commitment to Human Rights

The UNGPs state that enterprises should express their commitment to meet their responsibility to respect human rights through a policy statement

407. *See generally* Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (2009).

408. *See* Cosette D. Creamer & Beth Simmons, *The Proof is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 Am. J. Int. Law 1, 18–21 (2020); Grainne de Búrca, *Human Rights Experimentalism*, 111 Am. J. Int'l L. 277, 302–304 (2017).

409. *See supra* Part III.

410. *See supra* Part III.C.

411. The UNGPs state that while all enterprises have the responsibility to respect human rights, "the scale and complexity of the means through which enterprises meet that responsibility may vary" according to several factors, including their size and the severity of the possible adverse impacts on human rights. UNGPs, *supra* note 386, Principle 14, at 14. The major conservation organizations, including WWF, WCS, CI, and TNC, all employ thousands of staff, operate in dozens of countries, and dispose of hundreds of millions of dollars in assets. There is no reason why they should not be held to the highest standards. However, smaller organizations whose operations do not implicate human rights may adjust the ways that they meet their human rights responsibilities accordingly.

that is approved at the most senior level of the enterprise, states the specific expectations for the personnel and partners of the enterprise, is communicated publicly, and "is reflected in operational policies and procedures necessary to embed it throughout the business enterprise."[412] As noted above, the BINGOs have published such statements, usually in the form of "social safeguards," although they are typically written in general and rather vague terms.[413] What they have not done is ensure that their commitments are embedded in their operational policies and procedures.[414] For example, for years WWF has relied for implementation of its social policies largely on its Social Development for Conservation (SD4C) program, composed of staff volunteers without adequate resources or the authority to require compliance.[415] Some countries, including the DRC, have had no SD4C volunteer at all.[416]

Embedding human rights requires, among other things, clearly assigning human rights responsibilities to the appropriate staff throughout the organization and giving them the necessary authority. For large organizations, this will almost always require building their internal capacity by adding people knowledgeable in human rights law, community relations, and the relevant Indigenous and other cultures. One critical step in that regard is recruiting and retaining members of Indigenous peoples and other affected populations, at all levels of the organization. The Independent Review Panel investigating WWF recommended: that it appoint a director of human rights commitments and compliance who would report directly to the Director General; that each of its national and program offices "appoint or designate an individual with responsibility to ensure" that the office meets its human rights commitments and who has "the necessary expertise and support"; that where possible its program offices employ Indigenous people and members of local communities, "especially in relation to conservation and protected area management"; and that its International Board has at least one member who is a representative of Indigenous peoples, and at least one with expertise in human rights.[417] Those recommendations are relevant to all of the major conservation organizations.

412. UNGPs, *supra* note 386; Principle 16, at 15.

413. *See generally* Testimony of John H. Knox, *supra* note 259. Perhaps the most detailed of the BINGOs' social safeguard policies is that of WWF. *Our Safeguards*, World Wildlife Fund, https://perma.cc/7HQ2-HFKT. Unfortunately, WWF modeled its safeguards on those of the World Bank, which are based on risk management rather than compliance with human rights norms. For a critique of the WWF approach, *see* Testimony of John H. Knox, *supra* note 259, at 19–25.

414. *See* UNGPs, *supra* note 386; Principle 16, at 15.

415. *See* Embedding Human Rights in Conservation, *supra* note 236, at 133, 136.

416. *Id.* at 133.

417. *Id.* at 152–53, 155.

2. Clarifying Commitments in Relation to the Rights of Indigenous Peoples and Place-Centered Communities

Conservation organizations, like states and other actors in the international conservation regime, should stop using the term "indigenous peoples and local communities," or IPLCs, for the reasons explained above. Instead, they should make clear that while they respect the human rights of all people, only Indigenous peoples and a small subset of local communities have collective property rights.

No conservation organization should undertake or support any actions that adversely affect these rights without their free, prior, and informed consent, in accordance with UNDRIP and human rights bodies' interpretations of the ICCPR, CERD, and other human rights treaties.[418] That means the organization should never support the creation of new protected areas without their free, prior, and informed consent, and never undertake or support the removal of such peoples and communities from their traditional lands and territories. Moreover, they should never support restrictions on their rights of access and use, except under the vary narrow circumstances described above.[419]

With respect to an existing protected area that was created without such free, prior, and informed consent, the responsibility of a conservation organization should depend, first, on the attitude of the affected Indigenous peoples or communities. It should only participate in or support the governance of the protected area if the peoples or communities concerned support its involvement, and it should use its leverage to work towards full respect of their rights, including their rights to remedies. If the conservation organization itself was involved in their previous dispossession, then it should provide appropriate remedies, as described in the next section.

3. Establishing and Implementing a Human Rights Due Diligence Process

One of the cornerstones of the UNGPs is its requirement that business enterprises carry out due diligence "to identify, prevent, mitigate and account for how they address their adverse human rights impacts."[420] The UNGPs and the commentary accompanying them describe the key features of the human rights due diligence (HRDD) process, all of which translate to the conservation context.

Through the HRDD process, every conservation organization should assess the potential human rights impacts of its activities and relationships as early as possible in the development of a new activity or relationship.[421] The

418. *See supra* Part III.B.
419. *See id*.
420. UNGPs, *supra* note 386, Principle 17, at 16.
421. *Id*. Principles 17, 18, at 16, 17.

assessment should include all of the adverse human rights impacts that the organization may cause or contribute to through its own activities, and those to which it may be directly linked through its relationships.[422] It should be revisited and updated if there are significant changes in the activity or relationship or in the context surrounding it.[423] After activities or relationships have begun, the HRDD process should monitor their ongoing effects.

As an integral part of the HRDD process, the conservation organization should engage in meaningful consultation with those who may be affected by its activities or relationships,[424] including in particular Indigenous peoples and traditional place-centered communities. The point is not simply to check a box before the proposed initiative can continue. Rather, the conservation organization must integrate the findings from the assessment and take appropriate action.[425]

If actual or potential impacts are identified, exactly what action should be considered "appropriate"? The UNGPs draw careful distinctions between impacts which the organization causes, those to which it contributes, and those that are "directly linked to its operations, products or services by a business relationship."[426] If the organization causes or may cause an adverse impact on human rights, it "should take the necessary steps to cease or prevent the impact."[427] If the organization contributes or may contribute to an adverse human rights impact, it should "take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible."[428]

If the organization has neither caused nor contributed to an adverse human rights impact, but its relationship with another entity, such as a government agency, directly links its operations to the adverse impact, then the commentary to the UNGPs states that the actions the organization should take depend on whether it has the ability to significantly influence the behavior of the other entity. If the conservation organization has leverage to prevent or mitigate such harm, then it should exercise it. If the organization lacks adequate leverage, then it should consider whether to increase its leverage. Finally, if the conservation organization is unable to exercise or build its leverage, then it should consider curtailing or ending the relationship with the other entity, taking into account the severity of the abuse and any adverse impacts on human rights that might result from termination of the relationship.[429]

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422. *Id*. Principle 17(a), at 16.
423. *Id*. Principle 17(c), at 16.
424. *Id*. Principle 18(b), at 17.
425. *Id*. Principle 19, at 18.
426. *Id*. Principle 19(b), at 18.
427. *Id*. Principle 19, Commentary, at 18.
428. *Id*.
429. *Id*. at 19.

Consider how this might apply in practice. If a BINGO is administering a protected area and directing its rangers, then it is responsible for their actions and must be considered to have caused any abuses that they commit. If a BINGO is only providing financial support to rangers but not directing their activities, but nevertheless knows of alleged human rights abuses by the rangers that it is supporting, then it is effectively contributing to the abuses as long as it continues to provide that support. Finally, if the BINGO is only "directly linked" to the abuses, for example by providing technical advice to rangers alleged to have committed them, the BINGO should use its leverage to induce the government to prevent or mitigate the harm. For example, if the BINGO learns that the park is following a "shoot-on-sight" policy towards suspected poachers, it could publicly criticize the policy, threaten to suspend its cooperation with the park administration unless it changes its policy, and/or provide financial support for shifting to a different policy. However, if the leverage over its government partner that the BINGO has or could obtain is inadequate, then it must seriously consider whether to terminate the relationship, taking into account both the severity of the abuses and any adverse effects that might result from termination.[430]

4. Providing Remedies

Conservation organizations should provide for the remediation of adverse human rights impacts that they cause or to which they contribute, but are not required to do so for abuses to which they are only directly linked.[431] As always in human rights law, the primary goal of remediation should be to make the victims whole, preferably by restitution of the situation that would have existed if the harm had not occurred. To the extent that such restitution is not possible or does not make the victims whole, remediation should include appropriate compensation to the victims of the harm. If the harm could recur, then remediation should include effective measures to prevent future instances.

To this end, conservation organizations should establish, participate in, or facilitate access to an effective grievance mechanism able to receive complaints and concerns from individuals and communities that may be affected by the human rights impacts that they cause or to which they contribute.[432] Larger organizations should have their own formal grievance mechanisms; smaller organizations may have less formal mechanisms for receiving grievances, participate with others in joint mechanisms, and/or facilitate access to mechanisms administered by governments or other entities. To be effective, a grievance mechanism should be developed in consultation with the Indigenous peoples

430. *Id*. at 19.
431. *Id*. Principle 22, at 20.
432. *Id*. Principle 29, at 25.

or other groups for whose use it is intended.[433] It should be legitimate, accessible, predictable, equitable, and transparent.[434] Every conservation organization should take affirmative steps to remediate its adverse human rights impacts as soon as they come to its attention, and not rely on grievance mechanisms as the sole way that abuses are raised or remediated.

5. Reporting on Their Human Rights Record

One of the chief points of criticism of conservation organizations in relation to human rights concerns is that they have failed to be transparent about abuses in protected areas that they manage or support. Writing in 2004, Chapin accused them of seeing the human rights problem as primarily one of image (that is, the image of the organizations) rather than substance.[435] This criticism has continued. The descriptions of Lobéké and Salonga National Parks in Part II gave examples of WWF's deciding not to release reports with detailed information about alleged human rights abuses, and the chair of the 2021 Congressional hearing on those abuses accused WWF of mischaracterizing the Independent Panel's report as exonerating it.[436]

Sometimes this lack of transparency has even occurred within organizations. The Independent Panel report on WWF, for example, stated that "WWF's primary focus on promoting 'good news' may have led to a culture in which Programme Offices were unwilling to share or escalate the full extent of their knowledge about alleged human rights abuses for fear of scaring off donors or offending state partners."[437] Minimizing problems to internal as well as external audiences not only runs counter to the importance of transparency; it also makes it more difficult to develop coherent strategies. The Panel stated that "an important aspect of the human rights due diligence process is communicating how potential and actual human rights impacts are being addressed. Such communications should not be seen as an exercise in public relations or an effort to insulate WWF from criticism. WWF must report honestly and transparently not only its progress in achieving compliance with its commitments, but also the challenges it faces and where it has not been able to meet its goals."[438] Again, this point is relevant to all conservation organizations, not just WWF.

Here, too, the UNGPs provide guidance. They state that "enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them," in an accessible form and frequency that provides enough information to allow others to evaluate the

433. *Id*. Principle 31(h), at 26.
434. *Id*. Principle 31(a), (b), (c), (d), (e), at 26.
435. Chapin, *supra* note 112, at 29.
436. *See supra* Part II.
437. Embedding Human Rights in Conservation, *supra* note 236, at 142.
438. *Id*. at 157.

adequacy of their record.[439] Enterprises should make special efforts to communicate with those who are most directly affected by their actions and relationships, including Indigenous peoples and others in and around the protected areas with which they are involved. Of course, all communications should be provided in ways that do not pose risks of human rights abuses to affected stakeholders or anyone else.[440]

For many protected areas, documents that are highly relevant for assessing potential and actual human rights impacts, such as park management plans, agreements between government agencies and conservation organizations, and codes of conduct for rangers, are either not public at all, or not accessible to local residents. Conservation organizations working in those areas should also make all such documents publicly available.

6. Protecting Against Abuses by Partners, Especially in Relation to Law Enforcement

Conservation organizations should apply the HRDD process to their relationships with government agencies and other partners. Because of the high risk of human rights abuses in relation to law enforcement activities, a conservation organization should take additional specific steps to ensure that its relationship with such activities complies with its human rights responsibilities. If it supports rangers, its agreements with government agencies providing for such support should incorporate standards of conduct that are at least as stringent as those set forth in the U.N. Code of Conduct for Law Enforcement Officials and the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which state, *inter alia,* that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty, and may never inflict any act of torture or other cruel, inhuman or degrading treatment.[441]

Moreover, the conservation organizations should provide such support only if several other conditions are met:

- the rangers receive effective training on these standards of conduct and on how to interact with residents in the area;
- the government has an effective system to hire, train, monitor and discipline rangers and to receive and remediate grievances from those affected; and

439. UNGPs, *supra* note 386, Principle 21, at 20.

440. *Id*., Principle 21(c), at 20.

441. They were adopted, respectively, by the U.N. General Assembly in December 1979, and by a U.N. Congress in September 1990. See G.A. Res. 34/169, art. 3 (Dec. 17, 1979); Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (27 August to 7 September 1990), *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Sept. 7, 1990), https://perma.cc/6FR6-FMW3.

- the conservation organization itself is able to monitor compliance with the standards by rangers, and to consult with Indigenous Peoples, traditional place-centered communities and, as appropriate, other residents in the area on the law enforcement activities and their effects.[442]

If these conditions fail to be met, or systemic human rights abuses occur in relation to the law enforcement activities, the conservation organization should suspend or terminate its support for the law enforcement activities and renew its support only if an independent investigation concludes that the failures or abuses are being effectively addressed and are unlikely to recur.

B. Reforming Conservation Funders

Reforming conservation funding to accord with human rights norms has two aspects: (1) protecting against human rights violations by recipients; and (2) directing more funding to Indigenous peoples and other rights-holders.

1. Protecting Against Human Rights Violations

Some funders of protected areas, especially public funders, already have safeguards against human rights violations. For example, the U.N. Development Programme has Social and Environmental Standards that incorporate human rights in some important respects,[443] and whose implementation can be monitored by UNDP's Social and Environmental Compliance Unit, as described above.[444] In the United States, the "Leahy Amendment" to the Foreign Assistance Act states that "[n]o assistance shall be furnished under this chapter . . . to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights."[445]

However, the safeguards of some public funders, such as the Global Environment Facility, either do not refer to human rights at all or have significant gaps. Private funders, such as the foundations that support many conservation organizations, often have even less explicit human rights policies. Even where safeguards do exist, they have not always been applied in ways that prevent abuses from occurring. In response to the incidents in Cameroon and the DRC described in Part II, UNDP and the U.S. government suspended their funding, but only after the UNDP found that it had not followed its own safeguards

442. *See*, *e.g.*, Embedding Human Rights in Conservation, *supra* note 236, at 151–52.

443. U.N. Dev. Programme, UNDP Social and Environmental Standards 3 (2021), https://perma.cc/JZ9V-SFXU.

444. *See supra* Part II.A.

445. Foreign Assistance Act of 1961, 22 U.S.C. § 2378d(a).

and the U.S. government found that it had not provided effective oversight.[446] Obviously it would have been far preferable if they had employed safeguards to prevent the abuses in the first place.

As a result of the U.S. House oversight hearing described above, the House adopted a bipartisan bill on July 19, 2022, entitled the Advancing Human Rights-Centered International Conservation Act of 2022.[447] The bill was adopted by an overwhelming vote of 379 - 43, but it did not become law because the Senate failed to act on it. In the absence of such legislation, U.S. agencies continue to fail to ensure that U.S. funding does not inadvertently contribute to human rights abuses. In July 2024, the U.S. Government Accountability Office (GAO) published an investigative report that indicated that the agencies providing funding for international conservation are not providing adequate guidance to conservation organizations and other funding recipients, requiring them to submit timely safeguard plans, or effectively monitoring whether they comply.[448]

The bill adopted by the House therefore continues to provide a needed model for legislation in the United States and elsewhere. It also provides possible guidance for private funders, which could adopt equivalent provisions into their own policies. The bill would make clear that the Leahy Amendment applies to conservation funding provided through the U.S. Fish and Wildlife Service (USFWS), a possible gap in Leahy's current coverage, but more importantly, it would require all recipients of conservation funding from USFWS to maintain human rights standards consistent with the UNGPs and UNDRIP.[449] To receive funding, every recipient would have to have in place a "social safeguards plan" that provides for: a process for meaningful consultation and engagement with Indigenous peoples and local communities, including "obtaining their free, prior, and informed consent for any new land-use restriction and, if applicable, procedures for the fair resolution of existing land and resource claims, in the area in which the project will be conducted"; measures to protect their rights and needs and address any potential adverse impacts on their well-being and security; and a grievance mechanism available to address violations of human rights.[450] Funding in relation to law enforcement would be conditioned on human rights training for the law enforcement personnel and effective monitoring

446. *See supra* Part II.

447. Advancing Human Rights-Centered International Conservation Act of 2022, H.R. 7025, 117th Cong. (2022). To view the bill and its legislative history, *see H.R.7025 - Advancing Human Rights-Centered International Conservation Act of 2022*, Congress.gov, https://www.congress.gov/bill/117th-congress/house-bill/7025.

448. U.S. Gov't Accountability Off., Wildlife Trafficking: Agencies Should Improve Efforts to Protect Human Rights in Overseas Activities 44 (2024). *See also* Ashoka Mukpo, *US govt watchdog: Human rights still at risk in overseas conservation aid*, Mongabay (Sept. 17, 2024), https://perma.cc/T3VD-YXXD.

449. Advancing Human Rights-Centered International Conservation Act of 2022, *supra* note 447, § 4(a)(1)(C).

450. *Id*. §§ 4(a)(1)(D), 4(b).

by the recipient.[451] Funding would also require the publication of park management plans, ranger codes of conduct, and other documents "relevant to potential impacts of the project on Indigenous peoples and local communities."[452]

To avoid the situations that arose in the Congo Basin, where the funders only learned of the alleged abuses after they were reported in the media,[453] the House bill would greatly strengthen monitoring of conservation funding, by providing for regular auditing of grants, requiring recipients to investigate alleged human rights abuses and report to the funder within 60 days, and ensuring that the U.S. government itself would investigate credible allegations of abuse. It would also allow USFWS to receive information from other sources of abuses, rather than depend solely on the recipient.

2. Redirecting Conservation Funding

The steps set out in the previous section are essentially protective, designed to ensure that funders are not supporting human rights abuses in the conservation activities that they support. A more transformational step would be to shift the funding away from the traditional recipients of conservation funding towards the Indigenous peoples and others that are directly engaged in protecting and defending the natural ecosystems where they live.

Historically, funding for the protection of tenure and governance rights has been very low in comparison to the needs. In 2021, Rainforest Norway published a study finding that over the previous decade, from 2011 to 2020, donors disbursed an average of $270 million a year for projects supporting tenure and forest management by Indigenous peoples and local communities.[454] This level of support is less than one percent of official development assistance for climate mitigation and adaptation, and it falls "far short of the level of support needed to meaningfully scale up [their] role in fighting climate change and biodiversity loss against growing external pressures."[455] Making matters worse, less than $300 million of the funds disbursed over the previous decade went to tenure reform—about three percent of the eight billion dollars the Rights and Resources Initiative (RRI) has estimated is necessary to delimit and title Indigenous and community lands in just 24 countries.[456]

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451. *Id.* § 4(b)(5).

452. *Id.* § 4(b)(6).

453. *See* MacGregor Memorandum, *supra* note 264, at 1–3.

454. *See* Rainforest Foundation Norway, Falling Short: Donor Funding for Indigenous Peoples and Local Communities to Secure Tenure Rights and Manage Forests in Tropical Countries (2011–2020), at 16 (2021).

455. *Id.* at 4, 15.

456. *Id.* at 30 (citing Rts and Res. Initiative, The Opportunity Framework: Identifying Opportunities to Invest in Securing Collective Tenure Rights in the Forest Areas of Low and Middle-Income Countries (2020) and Rts and Res. Initiative,

Moreover, the study found that the bulk of the funding "flow[ed] through large intermediaries and is unlikely to have reached IPLCs or their organizations directly."[457] Indeed, only about 17 percent of the projects even included the name of an Indigenous or local organization in the description of the project implementation.[458] In other words, even the relatively small amount of money nominally directed towards strengthening tenure and governance rights was spent almost entirely by intermediary organizations such as the BINGOs, rather than by the rights-holders themselves.

In November 2021, at the Conference of the Parties to the U.N. Framework Convention on Climate Change, five governments and 17 private foundations pledged to provide $1.7 billion, from 2021 to 2025, "to support the advancement of Indigenous Peoples' and local communities' forest tenure rights and greater recognition and rewards for their role as guardians of forests and nature."[459] In 2023, the participants, calling themselves the Forest Tenure Funders Group, reported that they had provided $815 million in funding in the first two years of the pledge.[460] However, only $15.4 million—less than 3% of the total—directly reached Indigenous and local organizations.[461]

A reason often given for this disconnect is the difficulty many small, grassroots organizations have in navigating the thicket of bureaucratic requirements to obtain grants from state and multilateral organizations.[462] In principle, intermediaries such as the large conservation organizations could play a useful role in assisting the local entities to obtain the financing for their own priorities. In practice, however, a survey conducted by Rainforest Norway of donors, intermediary organizations, and Indigenous peoples and local groups found that relatively few intermediaries receive high marks. The exceptions are those with "deep grassroots connections, especially those with Indigenous leadership or

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Scaling-Up the Recognition of Indigenous and Community Land Rights: Opportunities, Costs and Climate Implications (2021)).

457. *Id*. at 17.

458. *Id*. at 4.

459. The governments were of Germany, Norway, Netherlands, the United Kingdom, and the United States. The private foundations included the Ford Foundation, the Oak Foundation, the Packard Foundation, and the Bezos Earth Fund. *COP26 IPLC Forest Tenure Joint Donor Statement*, UN Climate Change Conference UK 2021 (Nov. 2, 2021), https://perma.cc/Z2ZT-7QCZ.

460. Forest Tenure Funders Group, Indigenous Peoples and Local Communities Forest Tenure Pledge: Annual Report 2022-2023, at 7 (2023).

461. *Id*.

462. *Id*. at 25; Rainforest Foundation Norway, *supra* note 454, at 23. Other obstacles to direct funding may include "underlying structural racism and colonialism," and concerns of financial actors that "investing in projects led by Indigenous Peoples are high risk because they may perceive participatory and consent processes as onerous delays in the implementation of their projects, or because Indigenous Peoples may lack or be perceived to lack sufficient collateral or other revenue streams and the necessary capacity and experience with fund management and accounting." Calí Tzay, *supra* note 392, ¶ 64.

strong histories working with IPLCs."[463] Even though BINGOs often have the largest local presence, they are "viewed with suspicion by many IPLCs in part because of a history of conflicts between conservation and local priorities."[464]

If the conservation organizations fully incorporated human rights norms in their work along the lines proposed here and elsewhere, that level of suspicion should decrease. However, an even better approach in many cases would be for the funders themselves to do more to support Indigenous recipients directly or through intermediaries chosen by the recipients themselves.[465] Such funding is especially needed to assist Indigenous peoples to secure their collective land rights and their right to self-determination.[466]

In this respect, there are some encouraging signs. The Rainforest Norway report gave examples of private funders, including the Ford Foundation and the Christensen Foundation, that have shown how to make "direct, flexible, and less bureaucratic grants" to Indigenous and local organizations.[467] The Forest Tenure Funders Group has strongly urged its members to increase their direct support, and it commissioned two analyses that provide concrete recommendations for doing so.[468] Similarly, the U.N. Special Rapporteur on the Rights of Indigenous Peoples issued a report in 2023 with recommendations on how conservation funding and other forms of "green financing" should take into account and promote the rights of Indigenous Peoples.[469] However, whether private funders will follow such recommendations without additional pressure from states to do so remains to be seen.

C. UNEP's Core Principles for Conservation Organizations and Funders

On December 13, 2024, the U.N. Environment Programme launched "Core Human Rights Principles for Private Conservation Organizations and Funders."[470] The ten Principles were developed over a two-year period of consultations with representatives of Indigenous peoples, rights-based organizations, conservation organizations, funders, and human rights experts. They attempt to address the issues that this Article has highlighted: the need to reform

463. Rainforest Foundation Norway, *supra* note 454, at 23.

464. *Id.*

465. *See* Calí Tzay, *supra* note 392, ¶¶ 66–69.

466. *Id.* ¶¶ 70–73.

467. Rainforest Foundation Norway, *supra* note 454, at 20.

468. Forest Tenure Funders Group, *supra* note 459, at 6, 7. *See generally* Charapa Consult, Directing Funds to Rights: Principles, Standards and Modalities for Supporting Indigenous Peoples' Tenure Rights and Forest Guardianship (2022); Indufor, Forging Resilient Pathways: Scaling up Funding in Support of Indigenous Peoples' and Local Communities' Tenure and Forest Guardianship in the Global South (2023).

469. *See* Calí Tzay, *supra* note 392, ¶ 77.

470. *See Core Human Rights Principles for Private Conservation Organizations and Funders*, UNEP (Dec. 9, 2024), https://perma.cc/9HY9-X965.

international conservation by clarifying the human rights standards that conservation organizations and funders should apply.

As the Core Principles themselves make clear, they were not designed to develop *new* norms, but rather to apply existing ones, such as UNDRIP and the UNGPs, to conservation organizations and funders. While they do not address all of the specific issues set out above, they do make some fundamental points clear.

Drawing on the UNGPs, the first of the Core Principles states that every private conservation organization and funder should adopt a high-level policy commitment to meet its responsibility to respect human rights, embed that commitment in its operational activities, and take effective measures to implement it.[471]

The second and third principles address the rights of Indigenous Peoples and others, respectively. The second principle states that every private conservation organization and funder should ensure that it respects the rights of Indigenous Peoples, including their right to self-determination, and their right to the lands, territories, and resources that they have traditionally owned, occupied, or otherwise used or acquired.[472] Conservation organizations and funders should never undertake or support actions that adversely affect the rights of Indigenous Peoples without their free, prior, and informed consent.[473] The third principle states, more generally, that organizations and funders should respect the rights of all communities, groups, and individuals, in particular those who may be at heightened risk of vulnerability or marginalization.[474]

The fourth through seventh principles set out the contours of a human rights due diligence process, again drawing on the UNGPs, but as informed by UNDRIP. The fourth principle states that every conservation organization and funder should establish and implement a human rights due diligence process so that it may prevent, mitigate, and remedy any impacts of its actions and relationships. When the conservation organization or funder provides financial or other support for conservation activities, it should ensure that it provides such support only to recipients that have the capacity to meet their own responsibility to respect human rights and are effectively taking steps to fulfil that responsibility.[475]

The fifth, sixth, and seventh principles provide more detail on what the due diligence process should include. The fifth principle states that as part of its due diligence process, every conservation organization and funder should engage in meaningful and inclusive consultation with those who may be

471. *Id.* Principle 1, at 4.
472. *Id.* Principle 2, at 4.
473. *Id.*
474. *Id.* Principle 3, at 5.
475. *Id.* Principle 4, at 5.

adversely affected by its activities or relationships from the earliest stages.[476] The sixth and seventh principles state that every conservation organization and funder should prevent potential adverse human rights impacts that it may cause or to which it may contribute and immediately cease any actual adverse impacts that it causes or to which it contributes,[477] and that it should also provide for the effective remediation of adverse human rights impacts that it causes or to which it contributes.[478] To this end, every conservation organization and funder should establish, participate in, or facilitate access to an effective and independent grievance mechanisms.[479]

The eighth and ninth principles address partnerships. The eighth principle states that each conservation organization and funder should protect against the adverse human rights impacts that result from or are directly linked to its relationships. If a recipient of its support fails to effectively address such violations or abuses, the conservation organization or funder should restrict or terminate its support.[480] And the ninth states that every conservation organization and funder should condition its support for anti-poaching and other law enforcement activities—including those conducted by law enforcement agencies, rangers, eco-guards, private and public militias, armed forces, and non-state actors—on compliance by those activities with international human rights norms and standards.[481] If the activities fail to comply with such human rights norms and standards, the conservation organization or funder should restrict or terminate the support.[482]

Finally, the tenth principle provides that every conservation organization and funder should report regularly and publicly on how it identifies, assesses, monitors, and addresses its potential and actual human rights impacts, including on the rights of Indigenous Peoples.[483]

The Core Principles have been supported by the UN Special Rapporteurs on the Rights of Indigenous Peoples, on the Right to a Healthy Environment, on Climate Change and Human Rights, and on Environmental Human Rights Defenders, as well as by more than seventy other individuals and organizations, including Indigenous and rights-based organizations, conservation organizations, and private funders.[484]

476. *Id.* Principle 5, at 5.
477. *Id.* Principle 6, at 6.
478. *Id.* Principle 7, at 6.
479. *Id.*
480. *Id.* Principle 8, at 6.
481. *Id.* Principle 9, at 6.
482. *Id.*
483. *Id.* Principle 10, at 6.
484. *Id.* at 7, 9, 11, 18, 28–29.

While the Principles help to provide clearer human rights standards for conservation organizations and funders, much more remains to be done to ensure that they are followed. In particular, it remains to be seen whether the organizations and funders at which they are directed will take them fully into account in their operations.

Conclusion

The protection of human rights and the protection of biodiversity are interdependent. They will fall or rise together. The states, conservation organizations, and conservation funders in the international conservation regime therefore face a clear choice. They can continue on the path they have pursued for more than a century, which will lead to further human rights abuses and the continued rapid decline of biodiversity. Or they can take the steps necessary to protect both nature and human rights by embedding human rights norms in the international conservation regime itself.