

Indigenous Cultural Heritage and Artistic Expressions: “Localizing” Intellectual Property Rights and UNESCO Claims

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This article examines the protection of indigenous peoples' intangible heritage at the international level by addressing the problem of appropriation and commodification of traditional and artistic cultural expressions (TCEs) through the multiplicity of existing international legal regimes. These legal regimes include general and indigenous-specific human rights rules, UNESCO conventions and guidelines, as well as international norms of general application, such as those pertaining to intellectual property (IP). The author adopts a skeptical approach towards the suitability of international norms and processes to address the question of indigenous heritage. Drawing upon the efforts of regional bodies and national paradigms from Canada, Australia, the United States and New Zealand, the author argues that, in legal planning and decision-making, priority should be given to the “localization” of indigenous claims and peoples' local empowerment.

Cet article examine la protection du patrimoine immatériel des peuples autochtones au niveau international en abordant le problème de l'appropriation et de la marchandisation des expressions culturelles artistiques et traditionnelles à la lumière des multiples régimes juridiques internationaux existants. Ces régimes intègrent des règles générales régissant les droits de la personne et d'autres règles spécifiques aux peuples autochtones, des conventions et des lignes directrices de l'UNESCO, ainsi que des normes internationales d'application générale, comme celles ayant trait à la propriété intellectuelle. L'auteure se montre sceptique à l'endroit de l'adéquation des normes et des processus internationaux pour résoudre la question du patrimoine autochtone. En se fondant sur les efforts d'organismes régionaux et les paradigmes nationaux du Canada, de l'Australie, des États-Unis et de la Nouvelle-Zélande, elle soutient qu'au moment de la planification des lois et de la prise de décisions, la priorité devrait être accordée à la « localisation » des revendications autochtones et à la pleine participation des acteurs locaux.

I. Introduction

In 2015, *Tanna*, a “spectacularly exotic film”, appeared in Australian cinemas.¹ Narrating the story between two lovers of an indigenous community living in Yakel village, Vanuatu, and benefiting from the participation of the local inhabitants who spoke Trivia (the local language) and who “up until two years ago had never seen a movie”², the film received dithyrambic critiques and a number of prestigious international awards. The film was unique in many ways; not only did the filmmakers engage in consultation with the community prior to filming, the filmmakers and their families also stayed in Yakel for several months prior to filming.³

This is not the first time that an “indigenous” film has become a success. Indigenous cinema, along with other types of indigenous arts, has become increasingly popular over the last few years.⁴ In some cases, this popularization has empowered indigenous cultural rights, offering financial rewards to indigenous communities. Aboriginal and First Nations peoples’ tales and myths, for instance, have been published in books and translated into numerous languages, thus making their cultural treasures known around the world.⁵ In other cases however, indigenous characteristics have been reduced to stereotypes towards a view of increasing commercial profitability, usually for non-indigenously run corporations and markets. Controversial examples are numerous: from the American Westerns of the 1980s representing Native Americans as the “bad Indians”, to the Aboriginal superheroes of the new millennium;⁶ and from there to the increasingly popular touristic agencies that offer tribal-traveling and unique adventures combining “ancient wisdom and local expertise”.⁷ Even spiritual performances such as the *haka* have received

¹ See Elizabeth Peet, “No Reservations: The Rise of Indigenous Cinema”, *The Wilson Quarterly* (11 July 2015), online: <wilsonquarterly.com/stories/no-reservations-the-rise-of-indigenous-cinema/>.

² Amy Sherden, “Vanuatu to Venice: First-time Tanna Actors Arrive in Sydney Ahead of Debut at Film Festival”, *ABC News* (23 February 2016), online: <www.abc.net.au/news/2015-09-08/tanna-actors-debut-in-venice/6757810>.

³ “The Making of Tanna - The Story Behind the Film that Stole Our Hearts”, *Island Life Magazine* (26 January 2017), online: <www.islandlifemag.com/editors-pick/tanna_film/>.

⁴ See Jesse Wentz, “Top 10 Indigenous Films of All Time”, *CBC News* (22 October 2014), <www.cbc.ca/news/indigenous/top-10-indigenous-films-of-all-time-1.280755>.

⁵ Many of these stories have either been published in the original indigenous language or translated by indigenous native speakers, see e.g. Mere Whaanga, *The Legend of the Seven Whales of Ngai Tahu Matawhaiti (Te Pakiwaitara Ngā Tahora Tokowhitu A Ngai Tahu Matawhaiti)* (Ashton Scholastic, 1990). See also Anna Cottrell & Agbotaduah Togbi Kumassah, *Once Upon a Time in Ghana*, 2d ed (Afram Publications, 2015); Pablo Gonzalez Casanova, *Nahuatl Stories: Indigenous Tales from Mexico* (Victoria University Press, 2013).

⁶ See e.g. Luke Backmaster, “Cleverman First Look Review - Wickedly Exciting Indigenous Superhero Story”, *The Guardian* (16 May 2016), online: <www.theguardian.com/tv-and-radio/2016/may/16/cleverman-first-look-review-wickedly-exciting-aboriginal-superhero-story>.

⁷ See e.g. “Tourism Australia Corporate Website”, online: <www.tourism.australia.com/aboriginal.aspx>; Dorine Reinstein, “The Quest for Authentic Africa”, *Travel Weekly* (7 January 2014), online: <www.travelweekly.com/Middle-East-Africa-Travel/The-quest-for-authentic-Africa>.

worldwide celebrity acclaim through the New Zealand rugby team,⁸ while several indigenous tools that fulfill Western aesthetic criteria have found their way into museums of modern art.⁹

The gradual visibility of indigenous culture in the global marketplace also conceals significant challenges. These challenges, commonly related to physical destruction and exploitation of indigenous lands, usually go unnoticed. By way of illustration, Canada recently passed a regulation that bans the wearing of headdresses in music festivals on grounds of “cultural ignorance”.¹⁰ Yet, a year earlier Canada approved the passing of a gigantic pipeline project affecting indigenous livelihoods.¹¹ Likewise, although the United States has now officially changed its stance towards indigenous matters at the United Nations level,¹² significant works on oil pipelines are devastating indigenous lands, sparking protests at a national scale.¹³ More alarmingly, indigenous livelihoods in Latin America, Africa and Asia are fiercely suppressed without receiving adequate consideration or media attention. But, some typically intolerant States that do not recognize minority or indigenous rights have been eager to promote and mediatize indigenous heritage. China, for instance, has been sponsoring ethnic minority music festivals,¹⁴ and has also recently inscribed a Mongolian type of singing, the Khoomei, at the United Nations Educational, Scientific and Cultural Organization (UNESCO) World (Intangible) Heritage list.¹⁵ In many other cases, indigenous artists are themselves objects of attacks, as in the case

⁸ See e.g. YouTube, “Aboriginal Dreamtime War Dance vs Maori HAKA” (October 22, 2013), online: <www.youtube.com/watch?v=HdhrUKRdKM8>.

⁹ By way of illustration, the stick charts made by the Marshallese inhabitants used to navigate the Pacific are now exhibited as artwork in several modern art museums, including the Boston Museum of Fine Arts and the Übersee-Museum in Bremen.

¹⁰ Patricia Kozicka, “Osheaga Bans Headdresses: Why Wearing Them is ‘Cultural Ignorance’”, *Global News* (14 July 2015), online: <globalnews.ca/news/2109566/osheaga-music-festival-bans-wearing-headaddresses-as-fashion-accessories/>; Calum Mash, “Osheaga’s headdress ban shows festival’s zero tolerance for cultural appropriation”, *The Guardian* (17 July 2015), online: <www.theguardian.com/culture/2015/jul/17/osheaga-music-festival-headaddress-cultural-appropriation>.

¹¹ Ian Austen, “Despite Protests, Canada Approves Northern Gateway Oil Pipeline”, *The New York Times* (17 June 2014), online: <www.nytimes.com/2014/06/18/business/energy-environment/canada-approves-northern-gateway-pipeline.html>.

¹² See Caren Bohan, “Obama Backs U.N. Indigenous Rights Declaration”, *Reuters News Agency* (16 December 2010), online: <www.reuters.com/article/us-obama-tribes-idUSTRE6BF4QJ20101216>; “A Symbolic Apology to Indians”, *The New York Times* (7 October 2009), online: <www.nytimes.com/2009/10/08/us/politics/08brfs-ASYMBOLICAPO_BRF.html?_r=0>.

¹³ See e.g. “Native American Protesters Disrupt Work on Oil Pipeline”, *BBC News* (16 August 2016), online: www.bbc.com/news/world-us-canada-37099094; Niky Woolf, “Native American Tribes Mobilize Against Proposed North Dakota Oil Pipeline”, *The Guardian* (2 April 2016), online: <www.theguardian.com/us-news/2016/apr/01/native-american-north-dakota-oil-pipeline-protest>.

¹⁴ Clarissa Sabag Montefiore, “How China Distorts its Minorities Through Propaganda”, *BBC News* (16 December 2013), online: <www.bbc.com/culture/story/20131215-how-china-portrays-its-minorities>.

¹⁵ See UNESCO Multimedia Archives eServices, “Mongolian Art of Singing Khoomei” (2008), online: <www.unesco.org/archives/multimedia/?s=films_details&pg=33&id=343>.

of indigenous Mayan music teacher Guarcax Gonzales, who was murdered in Guatemala in 2010.¹⁶

In the beginning of the new millennium, international bodies such as the World Intellectual Property Organization (WIPO) and the UNESCO, as well as human rights bodies, intensified their effort to set up international norms for the protection of indigenous cultural heritage. It has generally been assumed that these norms are indispensable and would complete the already existing local and national frameworks.¹⁷ However, the reasons for these assumptions have never been particularly straightforward. On the contrary, an oxymoron has been created with international solutions being proposed in parallel to the increasing exploitation of traditional indigenous knowledge (TKs) and TCEs.

This article argues that the current international framework does not adequately protect indigenous interests in relation to their TCEs, and suggests several reasons as to why this is so. It further juxtaposes this with the gradual efficacy of local and national approaches, drawing from examples seen in both national and regional bodies. In order to articulate its reasoning, this article examines the complexity of the international protection of indigenous intangible heritage and its implications in the debates over indigenous rights. The analysis includes a discussion on the array of norms that exist for the protection of indigenous artistic expressions. These norms may be generally distinguished into three categories: culture-protective norms adopted under the auspices of the UNESCO; IP and other international norms, including those emanating from the WIPO and the World Trade Organization (WTO); and international human rights law (IHRL) emanating from the various UN human rights bodies, including UN Committees, treaty bodies and the UN Permanent Forum on Indigenous Issues (UNPFPII).

Furthermore, the article is divided into six sections. Following this introduction, part II offers a brief overview of the problems of commodification and “cultural piracy” from a legal perspective, addressing terminology issues and their impact on the complexity of the subject. Part III discusses the efforts of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) that functioned within the WIPO over the last ten years, arguing that the international IP regime has not become more effective in protecting indigenous peoples against

¹⁶ “Teacher of Indigenous Music Brutally Murdered”, *Freemuse* (31 August 2010), online: <freemuse.org/archives/1631>; Oliver Spencer, “Artist Alert: August 2010”, *Article19* (13 September 2010), online: <www.article19.org/resources.php/resource/1616/en/artist-alert:-august-2010>.

¹⁷ Graeme Austin, “Re-Treating Intellectual Property? The Wai 262 Proceeding and the Heuristics Of Intellectual Property Law” (2003) 11:2 *Cardozo J Intl & Comp L* 333 at 334. An indicative list of relevant international and regional instruments can be found on the website of the WIPO at: <www.wipo.int/wipolex/en/results_treaty.jsp?col_id=&organizations=&cat_id=16>. See also Peter Drahos, *Intellectual Property, Indigenous People and their Knowledge* (Cambridge: Cambridge University Press, 2014) at 8ff.

commodification of their cultural and artistic expressions. In Part IV, this article finds that protective UNESCO norms, even when contributing to indigenous development, generally reflect States' financial agendas rather than indigenous interests. Part V discusses the human rights regime, finding that IHRL norms, and particularly indigenous-specific norms on indigenous heritage and TCEs, suffer from a lack of enforcement and should be read in the context of other mechanisms that offer stronger protection. In contrast, Part VI outlines local approaches, focusing on national solutions, best practices and local activism. In this respect, the article distinguishes between the different needs of well-organized peoples who are fortunate to receive recognition within a legal order on the one hand, and the remaining (majority of) indigenous peoples on the other, whose host states openly and systematically violate their land rights, depriving them from their right to self-determination. The article concludes that indigenous activism needs to shift its focus to the national and regional, rather than the international, level.

Ultimately, this article has a twofold purpose. Firstly, it aims to map the international laws and processes of cultural heritage pertaining to indigenous peoples. Secondly, by setting out such laws and processes at the international level, it aims to show that these processes are not well suited to protecting, fulfilling and implementing indigenous rights at a domestic level.

II. Addressing the Complexity of the International Legal Regime

A. Terminology Issues

The most common terms describing indigenous artistic expressions are “intangible cultural heritage” (ICH) and the previously mentioned “traditional cultural expressions” (TCEs). The two terms are used intermittingly in the now extensive discourse and literature on cultural and intellectual property issues pertaining to indigenous peoples. It is generally the case, however, that the term “ICH” is preferred in the context of UNESCO and UN discourse and related literature (usually pointing to the relevant 2003 UNESCO Convention¹⁸ as well as to juxtapose “intangible” and “tangible” cultural heritage),¹⁹ whereas the term “TCEs” is preferred within the IP and WIPO-

¹⁸ *Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCOR, 32nd Sess, Un Doc MISC/2003/CLT/CH/14, (2003) art 2 at ss 1-2 [CSICH]. The CSICH is principally concerned with oral traditions and expressions, the performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, and traditional craftsmanship.

¹⁹ This preference for the term “ICH” has been prevalent since at least 1982 and the Mexico international Conference, where UNESCO representatives referred to ‘heritage’ rather than merely artworks, monuments and objects. See *Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies*, 6 August 1982.

based discourse and literature,²⁰ usually in combination with indigenous traditional knowledge (TK)²¹ and to highlight the moral and pecuniary aspects of this heritage. There have been efforts to define “cultural heritage” within the WIPO, resulting, however, in a very general (and certainly cumbersome) working definition.²²

This overriding terminology is not only a source of complexity as regarding the applicable rules pertaining to indigenous IP rights, culture and heritage. It is also symptomatic of an essential problem: that of fragmented legal norms addressing similar or identical issues related to indigenous arts and culture, yet emanating from distinct sources. The impact of the terminology on the ongoing debates on indigenous rights is obvious as there are relatively few studies addressing simultaneously cultural heritage and economic aspects of indigenous arts and heritage.²³ Until the creation of the IGC within the WIPO, there were equally few initiatives by the WIPO and UNESCO addressing issues related to the ICH Convention and IP norms concerning TK and TCEs.²⁴

Moreover, there are situations that raise questions that do not seem to fit either of the aforementioned categories. An illustrative example is the debate over the team name of the Washington Redskins.²⁵ Naming a football team after a diminishing appellation of Native Americans raises questions that certainly touch upon IP rights and financial aspects of their intangible cultural

²⁰ See *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, 17th Sess, WIPO Doc WIPO/GTRKF/IC/17/12 (2011). See also Erica-Irene Daes, *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, UNCHROR, 1993, UN Doc E/CN.4/Sub.2/1993/28.

²¹ On the definitions of TK, see Daniel Gervais, “Traditional Knowledge & Intellectual Property: A Trips-Compatible Approach” (2005) 2005:1 Michigan State L Rev 137 at 139. For a sampling of the literature that has been produced between 2003–2009 on TK and TCEs see e.g. Jane Anderson, “Indigenous/Traditional Knowledge & Intellectual Property” (2010) Duke University School of Law: Center for the Study of the Public Domain at 45–62, online: <web.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf>.

²² See Paolo Farah & Riccardo Tremolada, “Conflict Between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage” (2015) 94:1 Or L Rev 125, which notes that the WIPO has come up with a database containing 1780 documents that attempt to define the parameters of protected cultural heritage.

²³ See especially John Henry Merryman, “Two Ways of Thinking About Cultural Property” (1986) 80:4 Am J Intl L 831 at 841 cited in Robert Paterson & Dennis Karjala, “Looking Beyond Intellectual Property In Resolving Protection Of The Intangible Cultural Heritage Of Indigenous Peoples” (2003) 11:2 Cardozo J Intl & Comp Law 633 at 655, addressing the Hague Conventions on the protection of Cultural Heritage and IP rights. See also Peter Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40:3 UC Davis L Rev 1039 at 1140, discussing the “intellectual property regime complex”.

²⁴ For instance, the World Forum on the Protection of Folklore that took place in Phuket in April 1997 due to the initiative of the government of Thailand.

²⁵ The case surrounding the team name is currently pending before the US Supreme Court. In 2014 the US patents and trademark office (USPTO) cancelled the appellation “Redskins” finding that it was offensive. See *Amanda Blackhorse et al v Pro-Football, Inc., Cancellation No. 92046185*, US Trademark Trial and Appeal Board. See generally James Fenelon, *Redskins?: Sport Mascots, Indian Nations and White Racism* (Routledge, 2016).

heritage. Yet, the essence of the controversy goes way beyond that, raising the question of human dignity as part of a people's cultural identity. In the case at hand, an initial survey in 2008 found that seven out of ten Native Americans felt offended by the use of the name "redskins", whereas another poll a few years later found precisely the opposite, namely that nine out of ten did not feel offended.²⁶ It is illustrative, however, that pro-indigenous and human rights activists did not seem swayed. As Wade Henderson puts it,

The fact that we're poll-testing racial slurs against Native Americans shows how much we've ignored their basic humanity to begin with... A slur is a slur. ... Celebrating and commodifying stereotypes should have no place in 21st century America. Even if the poll's results about this slur are accurate, that wouldn't give license to [the team's owner] to cash in by appropriating it.²⁷

Certainly, the results of such polls may not always be thoroughly or adequately scrutinized—they are also unavoidably subject to a margin of error.²⁸ Yet, they also indicate that the gist of the controversies over ICH and TCEs many times concern not only racial and cultural politics, but also values. It equally indicates that some forms of expression, including marketed and commercialized expressions, should be protected by human-centric norms, aiming to preserve human dignity and ultimately, human value; otherwise, they may be damaged and ultimately lost.

And yet, human rights and particularly rights that are not well consolidated in human rights theory (such as the right to a cultural identity)²⁹ constitute only a small part of the IP and ICH discourse.³⁰ With the exception of the United Nations Declaration on the Rights of Indigenous Peoples³¹ (that is now increasingly cited by the WIPO "as a source that reflects the aspirations of indigenous peoples")³²

²⁶ John Woodrow Cox, Scott Clement & Theresa Vargas, "New Poll Finds 9 in 10 Native Americans Aren't Offended by Redskins Name", *The Washington Post* (19 May 2016), online: <www.washingtonpost.com/local/new-poll-finds-9-in-10-native-americans-arent-offended-by-redskins-name/2016/05/18/3ea11cfa-161a-11e6-924d-838753295f9a_story.html?utm_term=.dfedd3bc0e13>.

²⁷ Theresa Vargas, "For Native American Activists, a New Post Poll on Redskins Name Won't End Their Fight", *The Washington Post* (20 May 2016), online: <www.washingtonpost.com/local/for-native-american-activists-a-new-post-poll-on-redskins-name-wont-end-their-fight/2016/05/20/fb10824e-1e09-11e6-8c7b-6931e66333e7_story.html>.

²⁸ *Ibid*, highlighting that such polls have "a 5.5 percentage-point margin of sampling error".

²⁹ On the right to a cultural identity, see generally Yvonne Donders, *Towards a Right to Cultural Identity?* (Antwerp: Intersentia, 2002).

³⁰ See especially *Recommendation concerning the Status of the Artist*, UNESCOR, 21st Sess (1980) s 4(2), which highlights that "artists ... [should be] made aware of their community's cultural identity, including traditional and folk cultures, thereby contributing to the affirmation or revival of that identity and those cultures".

³¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNDRIPOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2011) [UNDRIP].

³² *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, 13th Sess, WIPO Doc WIPO/GRTKF/IC/13/4(b) (2008). See also Adelfo Regino Montes & Gustavo Torres Cisneros, "The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples, States and Societies" in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009) 138 at 162, noting that at one occasion the Declaration circulated as a

and UNESCO,³³ human rights instruments were only randomly circulating among, and cited by, IP policy makers and cultural heritage experts (and vice-versa), at least until the early 2000s.³⁴ As Helfer and Yu remark, it is only in the last decade that intellectual property-related lawmaking initiatives within UNESCO and WIPO have utilized approaches that “closely aligned with the human rights framework for intellectual property reflected in the CESCR Committee’s recent interpretive statements”.³⁵ As for the rights that are more frequently invoked, these are usually proclaimed in *UNDRIP*,³⁶ or predicated on other, more general and better entrenched rights such as the right to take part in cultural life, which is enunciated in article 15, paragraph 1(a) of the *International Covenant on Economic Social and Cultural Rights* and includes “the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the person is the author”.³⁷ This latter, in particular, is intrinsically linked to indigenous rights, given the views of the Committee on Economic Social and Cultural Rights (CESCR—the UN body mandated to monitor the *ICESCR*) which has declared that “the right to take part in cultural life is also interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination”.³⁸

B. Stripping Indigenous Resources: Commodification and Cultural Piracy

The marketing of indigenous arts and crafts has been beneficial for some peoples’ economic development. Native Americans, in particular, have developed their economies and trade in such a way that they have managed to gain significant financial benefits by selling hand-crafted pottery, native leather moccasins, traditional clothing and leather goods, porcupine quill baskets, musical instruments and jewelry.³⁹ Selling indigenous arts and handicrafts is of course acceptable provided that people give their “free,

WIPO document.

³³ Refer to Part IV of this paper for further information.

³⁴ Noticeable exceptions include a panel discussion in 1998 on IP and Human Rights, cited by Yu, *supra* note 23 at 1140.

³⁵ *Ibid* citing Laurence Helfer, “Human Rights and Intellectual Property: Conflict or Coexistence?” (2003) 5:1 *Minnesota Intellectual Property Rev* 47.

³⁶ Refer to Part V of this paper for further information.

³⁷ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, art 15 (1)(a) (entered into force 3 January 1976) [*ICESCR*].

³⁸ *Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of Everyone to Take Part in Cultural Life* (art. 15, para. 1(a), of the *International Covenant on Economic, Social and Cultural Rights*), UNCESCR, 43rd Sess, UN Doc E/C.12/GC/21 (2009) at para 2 [General Comment No 21].

³⁹ For example, it is estimated that Indian arts and crafts in New Mexico constitute a multi-million dollar industry. See e.g. Tristan Ahtone, “Dueling Markets Show Native American Art is Big Business”, *NPR* (26 July 2014), online: <www.npr.org/sections/codeswitch/2014/07/26/335395322/dueling-markets-show-native-american-art-is-big-business>.

prior and informed consent” as proclaimed in *UNDRIP*.⁴⁰ When sold by non-members of the relevant communities without their consent, however, or even worse, when appropriated by third entities, such as corporations, legal issues arise: generally characterized as misappropriation,⁴¹ or “biopiracy” depending on the extent of the conduct in question.⁴² Clearly, the impact of biopiracy is disastrous and related not only to land issues, but also to indigenous peoples’ economic development.⁴³ In addition, in many cases, and even if some members of a community provide their consent to non-members to sell or benefit from cultural goods, the intrinsic value of indigenous cultural identities and the eventual prevalence of diversity over profit come into question. This is generally known as the problem of commodification, or, to use the wording of Erica-Irene Daes, the transformation of cultural objects or even intangible expressions “into commodities that can be bought and sold”.⁴⁴

The debate on commodification and biopiracy has been primarily triggered by illegitimate appropriation and commercialization of indigenous TK, without the peoples’ consent, and many times without adequate compensation. This is one of the largest claims advanced by indigenous peoples who, in their large majority, live in conditions of extreme poverty. The main actors behind this appropriation have been primarily medical corporations, pharmaceutical companies and cosmetic brands worldwide, looting indigenous and ecological know-how in the making of traditional herbal medicine and cosmetics. This traditional know-how covers an extremely vast area, encompassing botanical knowledge on fauna and flora, medicinal properties of plants and animals, knowledge about biodiversity, genetic and natural resources, and of course, in a more general sense, know-how on the sustainable management of land and forest resources.⁴⁵ Acts of biopiracy therefore amount to breaches of the right of indigenous peoples to maintain and control their heritage, as well as the

⁴⁰ Especially art 19 in relation to “legislative or administrative measures that may affect them” and art 32(2) in relation to “any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.

⁴¹ On the common law doctrine of misappropriation, from where the term is borrowed, see Paterson & Karjala, *supra* note 23 at 655–57.

⁴² See Winston Nagan et al, “Misappropriation Of Shuar Traditional Knowledge (TK) and Trade Secrets: A Case Study on Biopiracy in the Amazon” (2010) 15:9 J Tech L & Pol’y 9 at 10, writing in the context of a thorough case-study on TK misappropriation of the Shuar, a nation living in the Ecuadorian Amazon, and noting that “despite a growing recognition of its harmful and widespread consequences and its near unanimous characterization as a blatantly unjust practice, the act of biopiracy is neither a tort nor a crime”.

⁴³ *Ibid* at 15, observing that “the mass dissemination of stolen TK has stripped indigenous people of an essential method for maintaining their economic viability”.

⁴⁴ Daes, *supra* note 20 at 56.

⁴⁵ See Nagan et al, *supra* note 42 at 15–20. See also Tania Bubela & Richard Gold, “Introduction: Indigenous Rights and Traditional Knowledge” in Tania Bubela & Richard Gold, eds, *Genetic Resources and Traditional Knowledge: Case Studies and Conflicting Interests* (Cheltenham: Edward Elgar Publishing Limited, 2012) 1; Daes, *supra* note 20 at 34; Vel Suminguit, “Indigenous Knowledge Systems and Intellectual Property Rights: An Enabling Tool for Development with Identity” (Paper delivered at the International Workshop on Traditional Knowledge, Panama, 23 September 2005) [unpublished] at 7, calling the forest “the living pharmacy of the indigenous communities”.

right to benefit from the associated IP rights. The controversy surrounding the Mexican Enola soya bean variety is one of the best known cases exemplifying the manner by which such appropriation functions.⁴⁶ Described by the 1999 UNDP report on Human Development as “silent looting”, biopiracy has had catastrophic effects on indigenous development.⁴⁷ The report, written under the direction of (Sami) Sakiko Fukuda-Parr, points out in particular that:

new patent laws pay scant attention to the knowledge of indigenous people, leaving it vulnerable to claim by others. These laws ignore cultural diversity in creating and sharing innovations – and diversity in views on what can and should be owned, from plant varieties to human life. The result is a silent theft of centuries of knowledge from developing to developed countries.⁴⁸

The same report also highlighted that

for indigenous peoples’ interests, too, open debate is needed across countries to bring together the most up-to-date thinking for use by negotiators and policy-makers. The framework needs to consider collective rights to knowledge and resources, the need for prior informed consent for use of materials and knowledge—i.e. that of the indigenous groups concerned—and the need for transparency in the findings of research.⁴⁹

C. Associating TK, TCEs and Cultural Heritage

The protection against extraction of indigenous TK has been achieved at an international level by relying on the 1992 *Convention on Bio-Diversity*.⁵⁰ The CBD is widely ratified and provides that States should “respect, preserve and maintain practices of indigenous and local communities embodying traditional lifestyles that promote their wider application with the approval and involvement of the holders of such knowledge”,⁵¹ as well as the subsequent Nagoya Protocol that provides for “fair and equitable sharing of the benefits

⁴⁶ See USPTO, *Appeal 2007-3938*, (Board of Patent Appeals and Interferences US, 29 April 2008), where a businessman named Proctor travelled to Mexico and purchased, at an indigenous market, a bag of yellow bean seeds that contained two varieties from the same family. Upon his return, Proctor crossed the two varieties resulting in the Enola variety, the “invention” in this case. This variety closely resembled a variety known to indigenous peoples (Mayas) and other Mexican peasants for years under the name “Pimono” or “Mayacoba”. Proctor patented Enola through the USPTO and created an American company to sell it. The result was that indigenous peoples had to pay royalties to the American company in order to be allowed to cultivate and sell their crops, even though these indigenous peoples are the ones who have been cultivating this variety for generations. In 2008, in a case brought by the Centro Internacional de Agricultura Tropical (CIAT) challenging the patent, the Appeal Board of the USPTO ruled against Proctor. See also Gillian Rattray, “The Enola Bean Patent Controversy: Biopiracy, Novelty and Fish-and-Chips” (2002) 1:1 *Duke L & Tech Rev* 1.

⁴⁷ *Human Development Report 2010, The Real Wealth of Nations: Pathways to Human Development*, UNDPOR, (2010) at 68ff.

⁴⁸ *Ibid.*

⁴⁹ *Ibid* at 75.

⁵⁰ See e.g. Drahos, *supra* note 17 at 140ff, for an overview of issues related to biodiversity.

⁵¹ *Convention on Biological Diversity*, 5 May 1992, art 8(j) (entered into force 29 December 1993) [CBD].

arising from the utilization of genetic resources”.⁵² The roots of the *CBD* trace back to the 1992 Rio Declaration, particularly the first principle on the preservation of bio-diversity and the 1992 UN Conference on Environment and Development.⁵³ It is partially successful as indigenous rights are now taken into account in the context of the WTO and specifically the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires the protection of indigenous knowledge in relation to inventions related to plants and animals. The protection has been partially achieved through a Declaration by the TRIPS Council adopted after the Doha round, which recognized that certain existing forms of protection of TCEs apply as such,⁵⁴ proclaiming in addition that article 27(3)(b) of the TRIPS agreement, which allows patents on nature and microorganisms, should be construed in such a way as to take into account the *CBD*.⁵⁵

As a result, marginal as it may be, the protection of indigenous TK at the international level has had a profound impact on the protection of TCEs.⁵⁶ On the one hand, it set an important precedent for the protection of indigenous cultural identities, while on the other hand it shifted the weight of the discussion on indigenous IP rights within the WIPO and WTO from a purely defensive approach (i.e. against misappropriation and illicit use) towards a more dynamic one, which has the potential of taking into account indigenous needs while promoting their economic interests.⁵⁷ The question is extremely pertinent, given that “most indigenous peoples appear in the lower end of socioeconomic statistics”.⁵⁸

⁵² *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, 29 October 2010, art 1 (entered into force 12 October 2014) [*Nagoya Protocol*].

⁵³ *Report of the UN Conference on Environment and Development*, UNGAOR, UN Doc A/CONF.151/5/Rev.1 (1992). See Yu, *supra* note 23 at 1118. On the relationship between the *Rio Declaration* and human rights, see also Francesco Francioni, “Principle 1: Human Beings and the Environment” in Jorge Vinuales, ed, *The Rio Declaration on Environment and Development: A Commentary* (Oxford: Oxford University Press, 2015) 93; Jonas Ebbesson, “Principle 10: Public Participation” in Vinuales, *supra* note 53, 287 at 296–98; Dinah Shelton, “Principle 22: Indigenous Peoples and Sustainable Development” in Vinuales, *supra* note 53, 541.

⁵⁴ *Doha Declaration on the TRIPS Agreement and Public Health*, WTO, 14 November 2001, WTO Doc WT/MIN(01)/DEC/2.

⁵⁵ Gervais, *supra* note 21 at 160ff, discussing the benefits of a Declaration over the reopening of the TRIPS agreement. See also Montes & Cisneros, *supra* note 32 at 162, n 42.

⁵⁶ Despite the fact that “the dialogue on the nexus between trade and traditional knowledge is undeveloped and stagnant at the WTO”, see Susy Frankel, “‘Ka Mate Ka Mate’ and the protection of traditional knowledge” in Rochelle Cooper Dreyfuss & Jane Ginsburg, eds, *Intellectual Property at the Edge: The Contested Contours of IP* (New York: Cambridge University Press, 2014) 193 at 196. See also Erica-Irene Daes, *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty over Natural Resources*, ECOSOCOR, 2004, UN Doc E/CN.4/Sub.2/2004/30.

⁵⁷ See Christoph Graber & Jessica Lai, “Indigenous Cultural Heritage and Fairtrade: Voluntary Certification standards in the light of WIPO and WTO law and policymaking” (2011) 29:3 *Prometheus* 287.

⁵⁸ *Ibid* at 289. See also Cortelyou Kenney, “Reframing Indigenous Cultural Artifacts Disputes: An Intellectual Property-Based Approach” (2011) 28:3 *Cardozo Arts & Ent LJ* 502 at 511; Siegfried Wiessner, “The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges” (2011) 22:1 *Eur J Intl L* 121 at 127, noting that “indigenous peoples may be, and often are, at the bottom of the social and economic

In addition, when TK is recorded or in any other way embodied in an artistic or cultural form, TK and TCEs become directly interrelated.⁵⁹ Most commonly, such controversies involve appropriation of indigenous TCEs (and, by implication, also TK), as exemplified by the numerous cases over Aboriginal paintings and drawings.⁶⁰ An inverse example is the appropriation of secret or confidential knowledge that is incorporated into a book or an artwork. Rarely, however, do such incidents give rise to judicial proceedings. Noticeable exceptions include the *Mountford* case that found its way to the Federal Court of Australia.⁶¹

III. The International Intellectual Property Regime in Relation to TCEs

Precisely like the international development and investment framework that is considered inadequate to protect indigenous rights,⁶² the IP regime lacks concrete norms to address the protection of collective and oral expressions. This inadequacy is inextricably linked with the foundational concepts of the copyright system itself and the creation of IP norms as a means to protect individual rights.

A. Foundational Concepts of the IP Regime and Indigenous TK/TCEs

Intellectual property rights in the former colonial territories in the nineteenth and twentieth century, and until the 1960s, were used as mechanisms of appropriation and plundering of both the colonized peoples' and the indigenous peoples' heritage for the benefit of the western colonizers.⁶³ In this manner, virtually all indigenous TK fell into the public

ladder in virtually all societies they live in".

⁵⁹ On the relationship between the two, see Kenney, *ibid* at 508–11. See also Farah & Tremolada, *supra* note 22.

⁶⁰ Refer to Part VI(A)(b) of this paper for further information.

⁶¹ *Foster v Mountford* (1976) 29 FLR 233 [*Mountford*]. Mountford was an anthropologist who, back in the 1980s, took a camel excursion to Southern Australia to meet with Aboriginal peoples. He met with representatives of the Pitjantatjara people and asked them about their customs and traditions, taking several notes. After his departure he decided to publish the information he had gathered in a book titled "Nomads of the Desert", without the consent of the Pitjantatjara people. The book sold particularly well in Australia and the highest Aboriginal body, the Pitjantatjara Council, decided to bring an action against Mountford for unauthorized publication of secret material and breach of confidence. This case was one of the first occasions in which a national court (the Australian Northern Territory Supreme Court in this case) formally established that indigenous TK may be kept confidential. The Pitjantatjara Council requested an injunction to restrain publication of what was claimed to be confidential material. See also Michael Blakeney, "Protecting The Spiritual Beliefs Of Indigenous Peoples-Australian Case Studies" (2013) 22:2 Pac Rim L & Pol'y J 391 at 404; Anderson, *supra* note 21.

⁶² See Valentina Vadi, "When Cultures Collide: Foreign Direct Investment, Natural Resources, And Indigenous Heritage In International Investment Law" (2010) 42:3 Colum HRLR 797 at 837.

⁶³ John Kiggundu, "Intellectual Property Law and the Protection of Indigenous Knowledge" in Isaac

domain or was otherwise appropriated by corporations and other private actors. Indigenous TCEs, on the other hand, have always been a grey area for the colonizers and the then emerging international IP regime. The latter, a then nascent system granting “legal rights of ownership to individuals and corporations over their creations”⁶⁴ was built upon western notions of art, including the individualistic approach to the sole artist-creator.⁶⁵ The colonizers’ perspective on the meaning and concept of art therefore differed substantially from the arts and crafts encountered in the colonized lands. Contrary to the “civilized” western artistic expressions, tribal indigenous arts were initially considered exotic and primitive, objects of anthropological observation rather than subjects of legal protection.⁶⁶

No doubt, indigenous arts have substantially evolved over the years, especially, but not exclusively, by their immersion in western liberal artistic discourse. Numerous eminent native and aboriginal artists are increasingly distinguishing themselves in the global art scene or winning prestigious nominations,⁶⁷ including those who advocate in favour of indigenous land rights.⁶⁸ In essence, however, the concepts of western and non-western arts remain radically different. It is still expected in the West that paintings are placed in museums, acquired by private collections or marketed and exploited by corporations; that handicrafts are bought to decorate houses; that sculptures are exhibited in public spaces according to local cultural policies; and that music is played in concert halls. On the contrary, from an indigenous perspective it is typically collectivities rather than individuals who are the owners of their art, their TK and their TCEs.⁶⁹ Moreover, drawings, dances, music, paintings and children’s stories may be conceived of as sacred or as

Mazonde & Pradip Thomas, eds, *Indigenous Knowledge Systems and Intellectual Property in the Twenty-First Century: Perspectives from Southern Africa* (Dakar: Imprimerie Graphiplus, 2007) 26 at 27.

⁶⁴ Tom Greaves, “IPR: A Current Survey” in Tom Greaves, ed, *Intellectual Property Rights for Indigenous Peoples: A Source Book* (Society for Applied Anthropology, 1994) 3 at 8. See also Dinisha Fernando, “Intellectual Property and the Protection of Indigenous Culture in the United States and New Zealand: An Effective Solution for Indigenous Communities?” (2013) 12:1 *Cardozo Public L Pol’y & Ethics J* 149 at 156.

⁶⁵ For a discussion on the notion of individual versus collective artistic expressions, see Howard Becker, *Art Worlds: 25th Anniversary Edition, Updated and Expanded* (University of California Press, 2008).

⁶⁶ Fred Myers, “‘Primitivism’, Anthropology, and the Category of ‘Primitive Art’” in Chris Tilley et al, eds, *Handbook of Material Culture* (Sage Publications, 2013) 267.

⁶⁷ See Jenelle Dellar, “Indigenous Artists Encouraged to Enter Emerging Art Award” (21 January 2016), *Copyright Agency: Viscopy* (blog), online: <viscopy.net.au/indigenous-artists-encouraged-to-enter-emerging-art-award/>.

⁶⁸ One may think here of Australian indigenous artist Tracey Moffat or Julie Gough, or recent collective artworks that have gained publicity, such as the installation entitled, “Indigenous Artwork: Postcommodity’s Do You Remember When?”, that was presented at the Biennale of Sydney in 2012. See Mark Watson, “Centring the Indigenous: Postcommodity’s Trans-Indigenous Relational Art” (2015) 29:3 *Third Text* 141 at 142.

⁶⁹ See especially Karolina Kuprecht, *Indigenous Peoples’ Cultural Property Claims: Repatriation and Beyond* (Heidelberg: Springer, 2013) at 177, noting that “[i]ndigenous peoples do not share the western ideal of preserving humanity’s artistic and archaeological property for the benefit of all mankind” as seen in the form of museums.

possessing vivid symbolism (for instance, by incarnating ancestors, or spirits) and are therefore, by definition, inadequate for wide publicity. The rights/claims that stem from such knowledge and traditions therefore may only be conceived as inalienable in nature, many times owed to ancestors and transmitted from generation to generation. In contrast, the IP law conceived in the West does not recognize inter-generational, collective IP rights, whether in the arts or other fields of intellectual work.

The implications for the efficacy of the IP system vis-à-vis indigenous rights therefore raise numerous issues and a number of practical (legal) incompatibilities between the need for indigenous TCE protection and the functioning of national IP regimes. Identified previously by UN bodies⁷⁰ as well as by WIPO,⁷¹ there is no need to reiterate them in this study. One may only indicatively refer to the fact that IP rights apply: a) to something original that has a specific date of creation rather than artworks that are thousands of years old, b) protection is guaranteed to individuals rather than communities, c) creators of indigenous artworks are not always identified, and/or d) the protection offered by IP norms is only temporary. In addition, defences against copyright breaches such as “fair use”, especially in the context of appropriation techniques that are common in artistic practices, are entirely unsuitable for indigenous TK and TCE. As regards the latter, all types of appropriation of sacred or secret know-how should be excluded from any otherwise applicable defences.

B. Fruitless Efforts by the WIPO and the WTO to Protect Indigenous TK/TCEs

As a result of increased NGO activism and criticism from numerous scholars,⁷² the WIPO intensified its efforts to protect TK and TCEs through a *sui generis* system of IP rights over the last few years. This regime attempts to reconcile two antagonist views: those favoring indigenous rights and those advocating for a more liberal regime of access to knowledge and cultural

⁷⁰ As seen in the 1990s by Irina Erica Daes (then Chairperson of the Working Group on Indigenous Populations of the UN Human Rights Council). See Daes, *supra* note 20 at 9, noting that “existing forms of legal protection of cultural and intellectual property, such as copyright and patent, are not only inadequate for the protection of indigenous people’s heritage but inherently unsuitable”.

⁷¹ Particularly by WIPO’s intergovernmental committee. By way of illustration, see *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, 3rd Sess, WIPO Doc WIPO/GTRKF/IC/3/11 (2002).

⁷² See e.g. Blakeney, *supra* note 61 at 409; Paterson & Karjala, *supra* note 23 at 638, 668–69; Gervais, *supra* note 21 at 139ff, suggesting (in 2005) that “if IP laws are found to be inappropriate, we may need to consider new international norms, including a *sui generis* right and norms related to environmental protection”. See also Chih-Chieh Yang, “A Comparative Study of the Models Employed to Protect Indigenous Traditional Cultural Expressions” (2010) 11:2 Asian Pac L & Pol’y J 49; Manuela Carneiro da Cunha, “Culture” and Culture: *Traditional Knowledge and Intellectual Rights* (Chicago: Prickly Paradigm Press, 2009); Greaves, *supra* note 64 at 8. Costes Cyril, *Propriété intellectuelle et peuples autochtones: la question de la protection juridique des biens intellectuels des peuples autochtones* (PhD Thesis, University Aix-Marseille, 2000) [unpublished].

expressions. As part of these efforts, WIPO has set up an intergovernmental committee (the aforementioned IGC) that is mandated to explore problematic issues in the fields of intellectual property, genetic resources, traditional knowledge and folklore, with a view to drafting an international instrument reconciling governmental and indigenous peoples' interests.

The questions of misappropriation and misuse were discussed within the IGC over several sessions,⁷³ in view of the adoption of a draft that would include specific elements of protective standards (such as benefit sharing, authenticity controls, labeling and certificates of origin). At the same time, WIPO experts and members of the IGC have advanced the view that copyright claims emanating from TK and TCEs could be protected not only through these specially adapted IP norms, but also through other protective regimes, including defamation, privacy, stewardship and property rights.⁷⁴ In 2008, a "draft gap analysis"⁷⁵ was prepared by WIPO facilitators, to be reviewed "by the IGC and sent to Member States, indigenous peoples and other traditional and cultural communities, civil society organizations and a range of other interested parties received during several consultation processes".⁷⁶ In addition, the IGC opened its sessions for consultations with representatives of numerous indigenous peoples and tribes that participated in the negotiations,⁷⁷ with the aim of drafting two conventions "repress[ing] the misappropriation of [protected, secret] traditional knowledge"⁷⁸ and "prevent[ing] the misappropriation and misuse of traditional cultural expressions".⁷⁹

⁷³ Additionally, the Committee has organized a number of joint initiatives with the United Nations Permanent Forum on Indigenous Issues, the Office of the United Nations High Commissioner on Human Rights, UNESCO, and occasionally other bodies such as the Secretariat for the Convention on Biological Diversity.

⁷⁴ See e.g. *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, 5th Sess, WIPO Doc WIPO/GRTKF/IC/5/3 (2003) at paras 24-25; *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, 6th Sess, WIPO Doc WIPO/GRTKF/IC/6/3 (2003) at paras 2-4, noting that "the options include existing intellectual property systems (including unfair competition), adapted IP rights (*sui generis* aspects of IP systems), and new, stand alone *sui generis* systems, as well as non IP options, such as trade practices and labeling laws, use of contracts, customary and indigenous laws and protocols, cultural heritage preservation laws and programs, common law remedies such as unjust enrichment, rights of publicity, blasphemy, and criminal law". See also Nagan et al, *supra* note 42 at 27ff, 43, arguing that "the arbitrary deprivation or misappropriation of this TK property would be analogous to the tortious harm with which industrial and trade secret law is concerned". On the main approaches within the WIPO, see e.g. Wend B. Wendland, "Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions" in Barbara T Hoffman, ed, *Art and Cultural Heritage: Law, Policy and Practice* (New York: Cambridge University Press, 2006) 327 at 334.

⁷⁵ Mountford, *supra* note 61.

⁷⁶ *Ibid.*

⁷⁷ The participation of indigenous groups and tribes has increased since the opening of the *Voluntary Fund for Accredited Indigenous and Local Communities* in 2016. See also *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, 30th Sess, WIPO Doc WIPO/GRTKF/IC/30/10 (2016).

⁷⁸ *Ibid.*, s 8.

⁷⁹ Likewise, refer to the *TCE Draft articles on the 'administration of rights/interests*, art 4 (Objectives).

During this process, the two NGOs that commented on the drafts raised only general concerns.⁸⁰ However, many parts of the drafts were the object of substantial disagreements between States and indigenous representatives. States seemed to be concerned about the question of “ownership” of indigenous property, as well as the duration and form of the protection. The United States, in particular noted that, “IGC participants will need to return to the very complex and important issue of ownership of TCEs” and that “a discussion of issues related to the capacity of Member States to use existing IP tools to protect TCEs may lead to concrete outcomes”.⁸¹ Likewise, the Mexican Commission for the development of indigenous peoples emphasized that it “considers it important, for the future work of the IGC on this matter, to clarify what is understood by ownership, given that in the case of indigenous peoples, this concept can create confusion in the analysis, as stated in paragraph 34 of the same document”.⁸² In the same spirit, Australia, with respect to the argument that “the very conception of “ownership” in the conventional IP system is incompatible with notions of responsibility and custodianship under customary laws and systems, noted that:

this analysis cannot fully address let alone offer solutions for these more fundamental differences. The copyright system is intended, in essence, to permit the commercial exploitation of creative works in as fair and balanced a manner as possible. On the other hand, many TCEs are created primarily for spiritual and religious purposes and not to reach as broad a public as possible. As has been discussed previously in the Committee, Indigenous communities’ needs with respect to their TCEs that cannot be met within an IP framework (even if adapted to respond to the more technical shortcomings) could perhaps be met through use of other non-IP mechanisms, such as laws relating to blasphemy, cultural rights, dignity, cultural heritage preservation, defamation, rights of publicity, and privacy.⁸³

As a result, following the gap analysis, the two conventions contained varied versions of the objectives of the entitlement/protection. The more

⁸⁰ The Arts Law Centre of Australia and the International Publishers Association (IPA) both commented on the TCE draft and welcomed the WIPO’s efforts in a general way.

⁸¹ *GAP Analysis on the Protection of Traditional Cultural Expressions/Expressions of Folklore: Comments of the United States of America*, United States at 4, online: <www.wipo.int/export/sites/www/tk/en/igc/gap_analyses_pdf/tce_usa.pdf>.

⁸² *Comments and Observations by the National Commission for the Development of Indigenous Peoples (CDI) on the Draft Working Documents Prepared by the Secretariat of the World Intellectual Property Organization (WIPO) Concerning the “GAP Analysis on the Protection of Traditional Cultural Expressions/Expressions of Folklore and Traditional Knowledge”*, Mexico at 5-6 online: <www.wipo.int/export/sites/www/tk/en/igc/gap_analyses_pdf/tk_mexico.pdf>.

⁸³ *Comments by Australia: GAP Analysis on the Protection of Traditional Cultural Expressions/Expressions of Folklore*, Australia at 12, online: <www.wipo.int/export/sites/www/tk/en/igc/gap_analyses_pdf/tce_australia.pdf>, citing *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, 5th Sess, WIPO Doc WIPO/GRTKF/IC/5/3 and *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, 6th Sess, WIPO Doc WIPO/GRTKF/IC/6/3.

recent draft versions included two drafts, dated April 2013⁸⁴ and July 2013⁸⁵ respectively discussed at the 25th session of the IGC in 2013 as well as another version on TK discussed at the 27th IGC session in 2014.⁸⁶ By way of illustration, the beneficiaries of the protection are described alternatively as TK/TCE “holders/owners” in one section and “peoples, local communities and nations/beneficiaries” in another.⁸⁷ Likewise, the duration of protection of both TK and TCEs remains to be discussed in two alternatives, with one option pointing out that the duration shall/should endure for as long as the traditional cultural expressions continue to meet the criteria for protection, and another stipulating that at least as regards the economic aspects of traditional cultural expressions, their protection shall/should be limited in time. These prospective conventions are still drafts and not open to negotiation.⁸⁸

In addition, the approach of the WIPO has been acutely criticized for its ineffectiveness, and the draft treaties in particular as being over-inclusive.⁸⁹ Therefore, what remains is the usual protection through the Berne Convention (1971) and the TRIPS agreement (1994), the WIPO Copyright Treaty, and other treaties that are applicable to literary and artistic works or performances, as long as the originality criterion is fulfilled and the authors identified. Since there is no single definition in either national laws or international treaties, and authors are scarcely individuals, it is left to the applicable national judge to determine whether traditional and indigenous forms of art are protected on a case-by-case basis.

IV. Culture-Specific Norms Adopted by UNESCO

Within the UNESCO system a number of declarations and resolutions are

⁸⁴ *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore - The Protection of Traditional Knowledge: Draft Articles*, WIPO, 27th Sess, WIPO Doc WIPO/GRTKF/IC/27/4.

⁸⁵ *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore - The Protection of Traditional Cultural Expressions: Draft Articles*, WIPO, 27th Sess, WIPO Doc WIPO/GRTKF/IC/27/5.

⁸⁶ *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore - The Protection of Traditional Knowledge: Draft Articles*, WIPO, 31st Sess, WIPO Doc WIPO/GRTKF/IC/31/4.

⁸⁷ The term “nations” would therefore encompass States’ concerns over their TK and TCEs, such as India’s claim over traditional know-how in practices like the medicinal use of plants and the practice of Yoga. See e.g. United States Patent and Trademark Office, Press Release, “India Grants Access to U.S. Patent Examiners for New Traditional Knowledge Search Tool” (23 November 2009), online: <www.uspto.gov/about-us/news-updates/india-grants-access-us-patent-examiners-new-traditional-knowledge-search-tool>.

⁸⁸ See World Intellectual Property Organization, News Release, “Update on the 28th Session of the WIPO IGC” (23 November 2015), online: <www.wipo.int/tk/en/news/igc/2014/news_0017.html>.

⁸⁹ See Sean A Pager, “Traditional Knowledge Rights and Wrongs” (2016) 20:1 *Va JL & Tech* 82 at 197, which additionally argues that cultural integrity and economic justice are two “diverging normative imperatives” and points to the “asymmetrical benefits of the IP regime”.

understood as embracing cultural diversity and cultural cooperation. This is true, for example, in respect of the Cultural Diversity Declaration in 2001; the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore in 1989 that set up the UNESCO section for ICH in 1990; and even the 1966 Declaration on the Principles of Cultural Cooperation. Other instruments have enhanced the marketing of cultural goods, as is the case with the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005).⁹⁰ In practice however, the main UNESCO conventions that are most relevant to indigenous peoples' heritage and TCEs are those that protect cultural heritage, namely: the 1972 World Heritage Convention that was conceived to protect cultural objects, sites and monuments (tangible heritage) and the 2003 Convention for the Safeguarding of Intangible Cultural Heritage (*CSICH*).

A. Efforts to Include the *UNDRIP* in the UNESCO Agenda

Both the World Heritage Convention and the *CSICH* have been widely ratified by States⁹¹ and may be potentially applicable in the case of indigenous tangible objects and artifacts, as well as indigenous TCEs. In fact, UNESCO bodies have already pointed out numerous times that indigenous rights, and especially *UNDRIP*, should be taken into consideration in the interpretation of the World Heritage Convention.⁹² In addition, when *UNDRIP* was adopted in 2007, the then Director General of UNESCO, Koïchiro Matsuura, hailed the declaration.⁹³ In the same vein, in 2012, UNESCO organized an expert meeting on the topic of "World Heritage and Sustainable Development: the Role of Local Communities", in addition to a workshop entitled "How to ensure that the implementation of the World Heritage Convention is consistent with *UNDRIP*". One of the main objectives of the workshop was to promote the realization of indigenous peoples in the interpretation and implementation of the World Heritage Convention, taking *UNDRIP* into particular consideration. Following the workshop, UNESCO issued

⁹⁰ For an overview of instruments enhancing cultural diversity having an impact on indigenous protection, see Henrietta Marrie, "The UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* and the protection and maintenance of the intangible cultural heritage of Indigenous peoples" in Laurajane Smith & Natsuko Akagawa, eds, *Intangible Heritage* (New York: Routledge, 2009) 169 at 174–75.

⁹¹ To date, the 1972 *Convention concerning the Protection of the World Cultural and Natural Heritage* enjoys 191 ratifications (Thailand denounced the Convention in 2011) while the *Intangible Cultural Heritage Convention* can claim 163 ratifications. On the *CSICH*, see Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford: Oxford University Press, 2013). See also Janet Blake, "UNESCO's 2003 *Convention on Intangible Cultural Heritage*: The Implications of Community Involvement in 'Safeguarding'" in Smith & Akagawa, *supra* note 90 at 45; Federico Lenzerini, "Intangible Cultural Heritage: The Living Culture of Peoples" (2011) 22:1 *Eur J Intl L* 101.

⁹² See Stefan Disko & Helen Tugendhat, "International Expert Workshop on the World Heritage Convention and Indigenous Peoples" (2012) International Work Group for Indigenous Affairs Workshop.

⁹³ *Ibid* at 1. See also Siegfried Wiessner, "Culture and The Rights of Indigenous Peoples" in Ana Filipa Vrdoljak, ed, *The Cultural Dimension of Human Rights* (Oxford: Oxford University Press, 2013) 117 at 147, n 194.

guidelines on the interpretation of the 1972 World Heritage Convention.⁹⁴ These UNESCO criteria included indigenous peoples' values, as the meaning of "authenticity" may subsequently be viewed as encompassing attributes such as "spirit and feeling" and "cultural continuity". In particular, while considering nominations to the World Heritage list, the criteria held that States should:

*bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared ... [while] depending on the type of cultural heritage, and its cultural context, properties may be understood to meet the conditions of authenticity if their cultural values ... are truthfully and credibly expressed through a variety of attributes including ... language ... spirit and feeling.*⁹⁵

This criterion has been repeatedly used as one of the first checklists of the World Heritage Committee. As a result, a number of indigenous sites have been included on the World Heritage List, while indigenous TCEs have been nominated as protected intangible heritage. Furthermore, UNESCO has given State Parties specific guidelines that involve participation of communities in all actions of the UNESCO Committee. It is suggested, for instance, that the Committee implementing the CSICH shall examine whether a program or suggested activity that is proposed to be inscribed in the ICH list "is or has been implemented with the participation of the community, group or, if applicable, individuals concerned and with their free, prior and informed consent".⁹⁶

B. Unsuitability of the World Heritage and the ICH Convention to Protect Indigenous TCEs

Precisely like the international IP regime, the UNESCO regime is equally unsuited to protect indigenous needs. Its incompatibility stems from the very beginning of UNESCO's functioning. In fact, when UNESCO was created back in 1945 with the aim of establishing the "intellectual and moral solidarity of mankind", the very notion of "culture" was different from what it is today. At that time, "culture" was generally related to education, museums and schools and was very different to the more exotic concept of "civilization". A right to a "cultural identity" in the sense of "a right to be different" was, in principle, excluded from the initial debates on the definition of "culture". Debates

⁹⁴ Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO, 2008, UN Doc WHC. 08/01 [UNESCO Guidelines]. This workshop, attended by both indigenous and non-indigenous representatives and experts (and supported by the Danish and Greenland Governments), culminated in the drafting of a plan of action and principles which recognized, *inter alia*, "the vibrant contribution that Indigenous peoples make to the maintenance of the common heritage of humankind through their world perspectives, knowledge, cultures, laws, customs, practices, lives, and institutions".

⁹⁵ *Ibid* at paras 77–83.

⁹⁶ See *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO, 2008, at 2 [UNESCO Directives].

on the concept of “indigeneity” in particular,⁹⁷ referring to “well-being and sustainability” of indigenous peoples and the concept of historical continuity, took place for the first time during the UNESCO World Heritage Conference in 1972 (i.e. after the decolonization movement and almost thirty years after the organization was created).

By implication, akin to the unsuitability of the World Heritage Convention,⁹⁸ the CSICH also appears unsuitable to protect indigenous interests. While it is true that the protection of indigenous IP rights and associated intangible heritage was one of the unresolved issues that triggered its conception,⁹⁹ the CSICH mechanisms have a marginal (if not damaging) impact on indigenous interests. First, the nominations appear problematic in the case of peoples who are spread out in more than one nation. The *yoik* for example, which is a traditional form of Sami folk singing, was under consideration for inclusion in the ICH list through a request from Sweden,¹⁰⁰ even though the Sami are also located in Lapland in the Arctic Circle region of Finland, Norway and north-western Russia. Likewise, the practice of *Al-Zajal*, the musical poetry that is usually sang by nomadic women in the Middle East and the Touareg, has been inscribed on the UNESCO list of intangible heritage since 2014 on behalf of Lebanon only, but not of Jordan or Palestine.¹⁰¹ Another musical practice of the Touareg, that of the *imzad*, has been inscribed on the UNESCO list on behalf of Algeria, Mali and Niger, rather than the Touareg who live in Western Sahara and Morocco.¹⁰² Furthermore, among all indigenous throat singing traditions it is only the Mongolian practice that has acquired, on behalf of China, intangible heritage status in 2009.¹⁰³ Reading these observations along with the States’ refusal to return stolen and illicitly trafficked artifacts and other objects of indigenous cultural property,¹⁰⁴ and their continuous denial to provide restitution and redress for those already stolen,¹⁰⁵ it is not difficult to perceive the enormous lack of political will to

⁹⁷ On defining “indigeneity”, see e.g. Kenney, *supra* note 58 at 535–37. See also Vadi, *supra* note 62 at 803–4.

⁹⁸ For an overview of these criticisms, see Vadi, *supra* note 62 at 811–14.

⁹⁹ See Thomas M Schmitt, “The UNESCO Concept of Safeguarding Intangible Cultural Heritage: Its Background and Marrakchi Roots” (2008) 14:2 Intl J of Heritage Studies 95 at 102.

¹⁰⁰ See Per-Nils Idivuoma, “Jojken kan få ett lyft” (9 December 2010), *Sameradion & SVT Sápmi*, online: <sverigesradio.se/sida/artikel.aspx?programid=2327&artikel=4231764#>.

¹⁰¹ See *Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage*, UNESCO, 9th Sess, UNESCO Doc ITH/14/9.COM/Decisions.

¹⁰² See *Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage*, UNESCO, 8th Sess, UNESCO Doc ITH/13/8.COM/Decisions.

¹⁰³ See *Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage*, UNESCO, 4th Sess, UNESCO Doc ITH/09/4.COM/CONF.209/Decisions.

¹⁰⁴ See Athanasios Yupsanis, “Cultural Property Aspects in International Law: The Case of the (Still) Inadequate Safeguarding of Indigenous Peoples’ (Tangible) Cultural Heritage” (2011) 58:3 Nethl Intl L Rev 335 at 360.

¹⁰⁵ See Ana F Vrdoljak, “Reparations for Cultural Loss” in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008) 197 at 213–14. See also Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2006). On the difficulties of the exceptional cases of repatriation, see Kuprecht, *supra* note 69.

provide protection or the willingness to give protection through “soft” political initiatives rather than by directly empowering indigenous communities. In fact, efforts to maintain cultural heritage sites are commonly outside the scope of legal protection. They are undertaken by inter-governmental bodies such as the International Council on Monuments and Sites (ICOMOS) or even academic and volunteer-led organizations.¹⁰⁶

Secondly, States are generally unlikely to protect indigenous tribal and nomadic practices, and even where they do so their objective is national touristic development.¹⁰⁷ Therefore, successful inscriptions on the list usually include popular touristic sites such as the inscription relating to the Easter Islands (Rapa Nui National Park) on behalf of Chile, or those that are the result of indigenous activism at a national level. Recent illustrative examples include the *Koogere* oral tradition of the Basongora, Banyabindi and Batooro peoples of Kasese in Western Uganda that has been nominated on behalf of Uganda,¹⁰⁸ and also includes the celebration of the New Year festival of the Sidama peoples in Ethiopia, the Fichee-Chambalaalla in 2015.¹⁰⁹ These successful inscriptions legitimize these two states to advertise pictures of the indigenous participants among their other major national touristic attractions. Provided that the indigenous peoples under consideration granted their permission to be included on such touristic advertising websites (and that they reap equal benefits from the touristic development of their lands) this is not a problematic situation in a legal sense. The consent of indigenous peoples’ following their “free prior and informed consent” is a unique safeguard in the implementation of the indigenous collective rights to cultural self-determination. Whether or not the UNESCO conventions indeed offer adequate mechanisms so that indigenous consent remains free and informed continue to be highly a highly controversial topic.¹¹⁰

¹⁰⁶ For instance, the efforts for the preservation of the rock art of Native Americans such as the Salt River Pima-Maricopa Indian Community and the Hopi tribe in South Mountain, Arizona. See Steve Swanson & Todd W Bostwick, “South Mountain Rock Art Project Field Manual: Recording Rock Art as Archaeology in the South Mountains, Arizona” (2007), *Arizona State University*, online: <repository.asu.edu/attachments/113131/content/South%20Mountain%20Rock%20Art%20Project%20Field%20Manual.pdf>.

¹⁰⁷ A successful example of nomination in this sense has been that of the Haida people territory and their living traditions (British Columbia) on behalf of Canada, a region that has been subsequently selected as one of the top twenty places in the world by National Geographic Magazine. See *Convention Concerning the Protection of the World Cultural and Natural Heritage: Report of the Rapporteur*, UNESCO, 5th Sess, UNESCO Doc CC-81/CONF/003/6.

¹⁰⁸ *Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage – Item 10.a of the Provisional Agenda: Examination of nomination for inscriptions on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding*, UNESCO, 10th Sess, UNESCO Doc ITH/15/10.COM/10.a.8.

¹⁰⁹ *Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage – Item 10.b of the Provisional Agenda: Examination of nomination for inscriptions on the List of the Intangible Cultural Heritage of Humanity*, UNESCO, 10th Sess, UNESCO Doc ITH/15/10.COM/10.b.16.

¹¹⁰ See Robert James Hales et al, “Indigenous Free Prior Informed Consent: A Case for Self Determination in World Heritage Nomination Processes” (2012) 19:3 Intl J of Heritage Studies 1. See also *Report of the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli Corpuz*, UNGAOR, 13th Sess, UN Doc

Thirdly, and most importantly, the documentation requirement of the ICH Convention seems to contrast and challenge the nature of indigenous arts as such, usually encompassing secret or even sacred symbols and expressions. In addition, the ICH subjects indigenous participation to States' discretion rather than allowing them to keep their arts confidential.¹¹¹ In relation to State obligations, for instance, Article 11 mandates States to "take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in [their] territory", and "identify and define the various elements of the intangible cultural heritage present in [their] territory, with the participation of communities, groups and relevant non-governmental organizations."¹¹² It does not, however, offer any monitoring mechanism for this participation. Likewise, in article 15 the ICH Convention stresses that:

within the framework of [their] safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.¹¹³

V. Human Rights and Indigenous-Specific Norms

It remains to be seen whether the existing international human rights framework can effectively protect indigenous intangible heritage, as well as artistic and other cultural expressions. This protection is achieved at the international level by two types of human rights norms: general human rights and indigenous-specific rules.

A. Norms Pertaining Only to Indigenous Peoples

Until 2007, when the *UNDRIP* was still a draft, indigenous-specific norms for the protection of indigenous ICH were sparse. The most relevant instrument was the *Mataatua Declaration on Indigenous IP rights*,¹¹⁴ adopted following the "First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples", convened in New Zealand by the Nine Tribes of Mataatua. Due to the fact that the final text was drafted by civil actors alone, the Declaration, despite its strong affirmations of ownership and robust language on States' obligations,¹¹⁵ failed to make significant impact.

A/HRC/30/41 (2015) at para 35.

¹¹¹ Marrie, *supra* note 90 at 174.

¹¹² *Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO, 17 October 2003, UNESCO Doc MISC/2003/CLT/CH/14 art 11 [ICH Convention].

¹¹³ *Ibid*, art 15. Cf Marrie, *supra* note 90 at 175, pointing out that "much will depend on the extent of indigenous participation".

¹¹⁴ *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, 30 July 1993.

¹¹⁵ *Ibid* at para 1.1, which provides that indigenous peoples should "define for themselves their own intellectual and cultural property". Also *ibid* at para 2.14, which provides that "indigenous cultural objects

In 2007 the *UNDRIP* was finally adopted by a majority of 144 States, representing a more realistic perspective for the fulfillment of the right to benefit from copyright claims, the fight against misappropriation of indigenous TCEs, and the prevention of any future alienation of indigenous heritage. Indeed, the *UNDRIP* is an extremely detailed instrument¹¹⁶ and several of its provisions may be read in a way that either includes a cultural understanding of rights or explicitly protects traditional arts and folklore. The protection is entrenched chiefly in two articles¹¹⁷ that should be read in conjunction with the proclamation of indigenous cultural self-determination.¹¹⁸ Firstly, article 11(1) proclaims “the right to maintain, protect and develop the past, present and future manifestations of their cultures”.¹¹⁹ Secondly, article 31(1) provides for a collective right of indigenous peoples to maintain, protect and develop their related TK, TCEs and intangible cultural heritage, and also adds two additional entitlements: a right to “control” and a right to benefit from the corresponding IP rights.¹²⁰ The *UNDRIP*, however, is not formally monitored by a permanent UN body and despite the literature on its legal significance¹²¹ its provisions still suffer from lack of direct judicial enforcement, a problem much accentuated due to the lack of *locus standi* for the indigenous peoples before international courts.¹²²

B. General Human Rights Norms

The rights of indigenous peoples in international law are indirectly

held in museums and other institutions must be offered back to their traditional owners”.

¹¹⁶ Among the numerous authors who have commented on the declaration in detail, see e.g. Alexandra Xanthaki, “Culture” in Marc Weller & Jessie Hohmann, eds, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2017) n 39–41.

¹¹⁷ A number of other articles could also be relevant, especially art 5, which states that “indigenous peoples have the right to maintain and strengthen their distinct [inter alia] cultural institutions, while retaining their right to participate fully, if they so choose, in the [inter alia] cultural life of the State”, and art 9, which states that “indigenous peoples have the right to maintain and strengthen their [inter alia] cultural institutions, while retaining their right to participate fully, if they so choose, in the [inter alia] cultural life of the State”.

¹¹⁸ The landmark provision of this declaration is the collective right to indigenous self-determination, proclaimed in Article 3 of the *UNDRIP*. As such, this right, by definition, also includes cultural development and, by implication, the maintenance of intangible heritage and identities.

¹¹⁹ As the *UNDRIP* highlights, this right comprises any form of tangible or intangible heritage, encompassing “archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature”.

¹²⁰ Article 31 of the *UNDRIP* refers to oral traditions and literature, as well as designs, sports, visual and performing arts, whereas Article 31(2) provides for less stringent protection than Article 11, stating that “in conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights”. In addition, Article 11(2) specifically provides for a right to “redress through effective mechanisms”.

¹²¹ On the controversy over the *UNDRIP*’s non-binding character, see e.g. Luis Rodríguez-Piñero Royo, “‘Where Appropriate’: Monitoring/Implementing of Indigenous Peoples’ Rights Under the Declaration” in Charters & Stavenhagen, *supra* note 32, 314 at 315–18.

¹²² See Ana Filipa Vrdoljak, “Standing and Collective Cultural Rights” in Andrzej Jakubowski, ed, *Cultural Rights as Collective Rights: An International Law Perspective* (Leiden: Brill Publishers, 2016) 272.

encompassed within general human rights norms and institutions, and enforced by UN treaty bodies such as CESCR, the *Convention on the Elimination of all forms of Discrimination Against Women*,¹²³ the Committee on the Elimination of Racial Discrimination (CERD), and the Human Rights Committee. In many cases, the role of these bodies has been crucial in consolidating indigenous rights. The Human Rights Committee, in particular, has produced seminal jurisprudence on minority rights, particularly through its interpretation of Article 27 of the *International Covenant on Civil and Political Rights*.¹²⁴ Although Article 27 protects individual rights of persons belonging to minorities, the Committee added a dimension that also protects collective rights, and specifically collective cultural rights.¹²⁵

However, in matters related to cultural heritage and indigenous TCEs the ICESCR is mostly relevant, and particularly so in the application of article 15 and the “right of access to culture”.¹²⁶ By implication, the CESCR is, in practice, the most appropriate expert body for addressing cultural heritage issues. Indeed, this Committee and its Working Group on Indigenous Peoples, while the negotiations on the then draft *UNDRIP* were still ongoing, revived a project aimed at the adaptation of “principles and guidelines for the protection of indigenous peoples heritage”, stressing that a “comprehensive protection system should be developed in a way that would integrate the work undertaken by, and involve, United Nations bodies and organizations ... ensuring, inter alia, a human rights-based approach to the issue of protection for indigenous peoples’ heritage.”¹²⁷

In addition, that same year, the CESCR issued an interesting general comment in which it attempted to restore the “lost links” between individual IP rights and collective artistic traditions. In this comment, in which it interpreted article 15 of the Covenant, the Committee referred to specific State obligations in relation to indigenous rights over TK and TCEs:

In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences ... such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples...In implementing

¹²³ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [CEDAW].

¹²⁴ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 27 (entered into force 23 March 1976) [ICCPR].

¹²⁵ United Nations High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Rights of Indigenous Peoples*, UNGAOR, 21st Sess, UN Doc A/HRC/21/23 at para 33 [UN High Commissioner Report]. See also Lenzerini, *supra* note 91 at 115; Vadi, *supra* note 62 at 809–10; Wiessner, *supra* note 58 (discussing the 1992 and 2001 *Apriana Mahuika* cases); Sarah Joseph, “Human Rights Committee: Recent Cases” (2001) 1:1 Human Rights L Rev 83 at 83.

¹²⁶ ICESCR, *supra* note 37.

¹²⁷ Yozo Yokota and the Saami Council, “Standard-Setting: Review of the Draft Principles and Guidelines on the Heritage Of Indigenous Peoples” (2005) Commission on Human Rights: Sub-Commission on the Promotion and Protection of Human Rights Working Paper, Doc ID E/CN.4/Sub.2/AC.4/2005/3.

these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors.¹²⁸

Following the adoption of the *UNDRIP* in 2007, the language of the CESCR became clearer in affirming indigenous peoples' rights to their TCEs, specifically by integrating the *UNDRIP* phraseology in both its general comments and state periodic reports. Particularly, in its second general comment concerning the right to take part in cultural life, the CESCR noted that rights should be realized in a way that is "respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples", and further that "indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions".¹²⁹ Flagging the relationship between indigenous cultural rights and the *ICESCR*, it also noted that "States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights"¹³⁰ and also, that all obligations stemming from international bodies active "in the field of culture and related areas" (including therefore WIPO and UNESCO) should be read in conformity with their obligations under the Covenant.¹³¹ In addition, in 2010, the Optional Protocol¹³² of the CESCR came into force, allowing individual petitions to reach the Committee. In this way, the Committee could, in theory, decide on claims related to copyright and cultural heritage under Article 15 of the *ICESCR*. Yet, to date only a few States where indigenous peoples reside have ratified the Protocol,¹³³ while no claim under article 15 has reached the CESCR Committee.¹³⁴

Despite their noble character, comments and recommendations issued by UN treaty and other bodies, and even individual communication mechanisms, have generally produced minimal impact on indigenous peoples' interests. There are undoubtedly other UN procedures that could, potentially, protect indigenous cultural heritage and IP rights: for instance, the expert mechanisms of the United Nations, the Special Rapporteur and Expert working groups on

¹²⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 17 (2005): The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1(c) of the Covenant)*, UNESCOR, 5th Sess, UN Doc E/C.12/GC/17 at para 32.

¹²⁹ General Comment No 21, *supra* note 38 at para 16(6)(e).

¹³⁰ *Ibid* at para 37.

¹³¹ *Ibid* at para 75.

¹³² "Optional protocols" to the UN Covenants may confer the UN expert bodies with an additional, quasi-judicial role, allowing them to determine the sort of individual complaints.

¹³³ Particularly Latin American countries that are also bound by the American Convention on Human Rights, such as Argentina, Costa Rica, Bolivia, El Salvador, and Ecuador. See Status of Ratification: Interactive Dashboard, online: <indicators.ohchr.org/>.

¹³⁴ To date, the CESCR Committee has decided a handful of cases related to the right to work and the right to social security, all against Spain.

Indigenous rights, as well as the Universal Periodic Review (UPR).¹³⁵ These last two, in particular, could play an important role given the increasingly successful “name and shame” policy during the UPR, and the collaboration between the Special Rapporteur and human rights activists. As Dorough points out:

A significant spin-off effect of the Declaration proceedings was that indigenous peoples gained first-hand training in international relations... All of the relationships that were initiated, especially those cultivated with friendly states such as Mexico and Denmark, can be regarded as confidence-building measures which, in the long run, will help to ensure that the Declaration's standards are operationalised. Maintaining those relationships will assist indigenous peoples both domestically and internationally. For example, there will be an important opportunity to implement the Declaration through the Human Rights Council's Universal Periodic Review process.]¹³⁶

With the Declaration as a checklist and reference point, such mechanisms could partially recompense for the lack of its binding effect. Indeed, since 2007, there has been a spectacular increase in references to the *UNDRIP* as a source of interpretation of international human rights obligations by United Nations' bodies, including by the Human Rights Council (in annual State reports during their UPR) and in the comments and periodic reports during State examinations by the various treaty bodies.¹³⁷ Yet, it is the practice of the regional human rights bodies, as well as that of national courts, that has paved the way for a more perceptible impact of the *UNDRIP*.

VI. Why “Local” Works Better

Efforts to address indigenous cultural heritage and the appropriation of their TCEs appear to be more effective and successful at the local level. Two situations may be distinguished here. The first situation is that of well-organized indigenous groups, such as the Navajo, the Māori or the Saami, residing in powerful industrialised States. In those cases, indigenous peoples are an important social and political force and their affairs are part of the public debate. Therefore, activism at the local level is usually well informed and may lead to specific legislative outcomes in relation to TCEs protection.

The second situation is that of indigenous peoples residing in host states that openly or effectively negate their right to self-determination in spite

¹³⁵ See e.g. United Nations: Human Rights Office of the High Commissioner, *Indigenous Peoples and the United Nations Human Rights System: Fact Sheet No 9/Rev 2* (2013), online: <www.ohchr.org/Documents/Publications/fs9Rev.2.pdf>; UN High Commissioner Report, *supra* note 125 at para 33.

¹³⁶ Dalee Sambo Dorough, “The Significance of the Declaration on the Rights of Indigenous Peoples and its Future Implementation” in Charters & Stavenhagen, *supra* note 32, 264 at 267.

¹³⁷ See e.g. Noelle Higgins, “Advancing the Rights of Minorities and Indigenous Peoples: Getting UN Attention via the Universal Periodic Review” (2014) 32:4 *Nethl QHR* 379; Luis Alfonso De Alba, “The Human Rights Council's Adoption of The United Nations Declaration on the Rights of Indigenous Peoples” in Charters & Stavenhagen, *supra* note 32 at 108.

of international commitments, typically by evicting them from their lands. In those cases, local activism is the first, if not the only, way to affirm legal recognition and judicial protection.

A. Concrete and Justiciable National Solutions: Canada, Australia, the United States of America and New Zealand

i. Examples of National Laws and Best Practices

Direct contact and information exchange among local actors, communities and associations has, in many instances, amounted to positive steps for the preservation of cultural heritage sites as well as for the protection and promotion of TCEs. Examples include the official recognition of indigenous peoples as the custodians of such sites by government representatives,¹³⁸ the involvement of indigenous peoples in the management of these sites, including for purposes of tourism,¹³⁹ and even the adoption of aboriginal land titles according to indigenous customary laws.¹⁴⁰ In addition, as a result of local initiatives and dialogue, the so-called “powerful” developed States, where a large number of indigenous peoples reside, have all included cultural-sensitive policies in their artistic and cultural agendas and are organizing national indigenous festivals and music awards.¹⁴¹ These States have also passed laws that enhance the granting of (national) cultural heritage status to indigenous artistic expressions.¹⁴² In turn, local activism and awareness in those States has resulted in the establishment of databases of TCEs elaborated by the peoples themselves. These initiatives (that include, for instance, the “Cultural Stories Project: Integrating Traditional Knowledge into a Tribal Information System” of the Tulalip Tribes in the United States) have amounted to considerable self-empowerment of indigenous peoples, and are the first step towards State policies, protocols, standard agreements and other good practices.

¹³⁸ For example, after much pressure from indigenous representatives and non-governmental organizations, the South African government recognized in 2003 the San people as custodians of the 15,000 rock art sites in the Drakensberg mountain range. See T.M. Chan, “The Richtersveld challenge: South Africa finally adopts aboriginal Title” in Robert Hitchcock & Diana Vinding, eds, *Indigenous Peoples’ Rights in Southern Africa* (Copenhagen: IWGIA, 2004) 114.

¹³⁹ See for instance, the 2011 agreement between Sweden and Lapland, discussing the fact that Sweden owns the land but Sami councils would be able to decide whether and when they agree to touristic and subsequent management of their sites.

¹⁴⁰ See Chan, *supra* note 138, regarding the Richtersveld Cultural and Botanical park in South Africa where the Nama people live.

¹⁴¹ Indigenous awards are presented at the Canadian Music Awards, the American Music Awards, the Australian National Indigenous Arts Awards, the Swaziland Bushfire Music Festival, and amongst the annual prizes of the Art Association of Australia and New Zealand.

¹⁴² By way of illustration, Canada granted such status to Inuit throat singing, see Amanda Kelly, “Inuit throat singing gets cultural heritage status in Quebec”, *Global News* (29 January 2014), online: <globalnews.ca/news/1116482/throat-singing-gets-cultural-heritage-status-in-quebec/>.

These same States developed extensive legal frameworks to protect indigenous heritage and actively encouraged best practices. For example, Canada has adopted laws that ban the use of trademarks depicting sacred indigenous symbols as well as laws that exclude indigenous objects from the market.¹⁴³ Australia, a few years after the *Mountford* case,¹⁴⁴ adopted an Act that specifically protected aboriginal cultural heritage,¹⁴⁵ while in 2003 it passed the “Aboriginal law” and other laws recognizing the value of indigenous heritage.¹⁴⁶ New Zealand, where the Māori form over 15% of the population, not only recognizes traditional rights under Māori customary laws, but has amended its laws in order to exclude trademarks that are deemed to be offensive to the Māori.¹⁴⁷ Likewise, the (American) *Indian Arts and Crafts Act* of 1990 contains regulations that prohibit appropriation of arts and crafts anywhere within the United States in relation to products that constitute the heritage “of a particular Indian or Indian Tribe or Indian arts and crafts organization, resident within the United States”.¹⁴⁸ *The Native American Graves Protection and Repatriation Act* protects tangible indigenous property,¹⁴⁹ requiring museums to consult and notify indigenous peoples about relevant acquisitions and encouraging alternative dispute resolution in relevant cases,¹⁵⁰ and obliging all State funded museums to return sacred objects to Indian tribes.¹⁵¹ Furthermore, the *National Museum of the American Indian Act*¹⁵² contains obligations for federal cultural institutions to create inventories and archives of TK and TCEs.¹⁵³ Activism in the Pacific has also played a chief role in the elaboration of a draft *sui generis* “Model Law” on the protection of TK and TCEs in the context of the Pacific Regional Framework that has largely enhanced digitization and archiving of a variety of indigenous TCEs in the region.¹⁵⁴

¹⁴³ Paterson & Karjala, *supra* note 23 at 660–61, noting that “[t]itle to such objects, some times called imprescriptibles, cannot be obtained, as with other moveables, through the lapse of time” and discussing a leading case related to Aboriginal cultural property that reached the Canadian Supreme Court (*Delgamuukw v British Columbia*, 1997).

¹⁴⁴ *Mountford*, *supra* note 61.

¹⁴⁵ The 1984 Aboriginal and Torres Strait Islander Heritage Protection on the “preservation and protection from injury and desecration of areas and objects in Australia when these are significant for Aboriginal populations”.

¹⁴⁶ For an overview on Australian laws, see Drahos, *supra* note 17 at 5 n 15, 139 n 4. See generally Michael F Brown, *Who Owns Native Culture?* (Cambridge: Harvard University Press, 2004).

¹⁴⁷ Fernando, *supra* note 64 at 158–59 (noting that New Zealand law offers “TRIPS plus” standard protection); Farah & Tremolada, *supra* note 22 at 162.

¹⁴⁸ *The Indian Arts and Crafts Act*, PL 101-644 (1990).

¹⁴⁹ *Native American Graves Protection and Repatriation Act*, PL 101-601 (1990) [NAGPRA].

¹⁵⁰ Paterson & Karjala, *supra* note 23 at 655. See also Kenney, *supra* note 58 at 521ff.

¹⁵¹ See Kuprecht, *supra* note 69.

¹⁵² *National Museum of the American Indian Act*, PL 101-185 (1989).

¹⁵³ See Intergovernmental Committee on Intellectual Property and Genetic Resources, *Traditional Knowledge and Folklore: Overview of Activities and Outcomes of the Intergovernmental Committee*, WIPO, 5th Sess, WIPO Doc WIPO/GTRKF/IC/5/12 at 9, n 18.

¹⁵⁴ See e.g. Susan Corbett & Mark Boddington, “Copyright Law and the Digitisation of Cultural Heritage” (2011) Centre for Accounting, Taxation and Research Working Paper No 77.

ii. *The Contribution of National Courts*

Over the years, and as pressure to respect the *UNDRIP* standards has steadily grown,¹⁵⁵ these national laws proved relatively successful before domestic courts, making it increasingly more difficult to appropriate aboriginal and first nations TCEs, especially those of powerful and well-represented aboriginal and first nations tribes. Illustrative examples include the controversies over traditional artworks of the Ganalbingu people that have been appropriated by textile companies, all of which found their way to the Federal Court of Australia (known as the T-shirt Cases¹⁵⁶ and the Carpets Case¹⁵⁷); Yumbulul's representation of the *Morning Pole* on the Australian bank notes (known as the 10\$ case);¹⁵⁸ and more recently, the appropriation of Navajo sacred symbols by Urban Outfitters and their use on the "Navajo hipster" underwear and the "Navajo Scarf"¹⁵⁹.

These are widely discussed cases that have acquired significant media publicity. It is not the purpose of this paper to discuss them analytically, but it is interesting to highlight particular points of relevance to this article. The first concerns the different worldviews clashing in the aforementioned cases. For the indigenous peoples involved in the *Bulun Bulun* case, the artworks appropriated were virtually sacred. They incorporated ritual knowledge and information about the Yolngu tribe's ancestral birth place, namely, the sacred Waterhole Djulibinyamurr,¹⁶⁰ which is one of the two sacred waterholes

¹⁵⁵ See Alexandra Xanthaki, "Indigenous Rights in International Law over the Last 10 Years and Future Developments" (2009) 10:1 Melbourne J of Intl L 27 at 29.

¹⁵⁶ *Bulun Bulun, John & Anor v R & T Textiles Pty Ltd*, [1998] FCA 1082, 157 ALR 193 [*Bulun Bulun*]; *Bulun Bulun v Nejlam Pty Lam* (1989) Unreported FCA. See generally Barbara T Hoffman, "Introduction: Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy" in Hoffman, *supra* note 74 at 8–9; Brown, *supra* note 146 at 4; Kimberlee Weatherall, "Culture, Autonomy and Djulibinyamurr: Individual and Community in the Construction of Rights to Traditional Designs" (2001) 64:2 Mod L Rev 215 at 218ff; Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Geneva: WIPO, 2003) at 51–60; Stephen Gray, "Peeking into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art" (2000) 9:2 Griffith L Rev 227 at 233; Martin Hardie, "Current Litigation in Native Title and Intellectual Property: *Bulun Bulun* and *Milpurrruru v. R & T Textiles*" (1997) 3:90 Aboriginal Law Bulletin 25 at 26. See also Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions* (Cheltenham: Edward Elgar, 2010) at 31–40.

¹⁵⁷ *Milpurrruru and Others v Indofurn Pty Ltd and Others*, [1994] FCA 975, 130 ALR 659 [Carpets Case]. See generally Janke, *supra* note 156 at 13–21; Rachael Grad, "Indigenous Rights and Intellectual Property Law: A Comparison of the United States and Australia" (2003) 13:1 Duke J of Comparative & International L 203 at 217; Terri Janke, "The Carpets Case" (1995) 3:72 Aboriginal Law Bulletin 36.

¹⁵⁸ *Yumbulul, T. v Reserve Bank of Australia, Reserve Agency Ltd & Anor*, [1991] FCA 448, 21 IPR 481 at 1 [*Yumbulul*]. In the late 1990s the Australian National Bank (Reserve Bank) wished to release special \$10 bank notes depicting Aboriginal designs. The designs included the reproduction of an artwork representing the 'Morning Star Pole', a symbol of ancestral knowledge to indigenous peoples (and planet Venus to non-indigenous), which alludes to the power to take spirits of the dead to the Morning Star, and is usually used in rituals and ceremonies.

¹⁵⁹ *Navajo Nation v Urban Outfitters, Inc*, 935 F Supp (2d) 1147 (N Mex Dist Ct 2013).

¹⁶⁰ *Bulun Bulun*, *supra* note 156 at 197–98. According to Aboriginal law, the waterhole known as "Djulibinyamurr" is the place where "Barnda" (the long-necked tortoise) first emerged on earth, and subsequently created and populated the country.

from where the Ganalbignu lineage emerged.¹⁶¹ In contrast, the respondent companies not only unlawfully and with no prior authorization infringed the copyright, they also used the artworks inappropriately, insensibly (and presumably also unethically) in order to make T-shirts, carpets and underwear.¹⁶²

The second point of relevance is the manifold role required by a judge in order to determine the extent to which cultural expropriation causes offence or other harm to indigenous peoples. This is not an easy task to perform as it requires significant familiarity with local realities. The artworks in the aforementioned cases, for instance, were already publicly available at the time of the proceedings with the consent of the artists. George Milpurrurru's *Goose Egg Hunt*, for instance, had already been printed on the 85 cents Australian stamp.¹⁶³ Bulun-Bulun's *Magpie Geese and the Water Lilies at the Waterhole* had already been printed in a book on Native Australia (currently owned and displayed by the Museum of the Northern Territory).¹⁶⁴ While in the Carpets case, all artworks were part of "an educational portfolio of Aboriginal artworks produced by the Australian National Gallery and a calendar produced by the Australian Information Service".¹⁶⁵ Therefore, a "western" judge, who is not familiar with the radically different indigenous worldviews, would have difficulty in understanding the extent of the harm inflicted upon the communities. This goes way beyond questions of western laws, touching upon the spiritual dimension of a peoples' existence according to its own ancestral customary laws. Precisely because of these radically different worldviews, a court in charge of such controversies needs to be exposed to local realities and have a thorough understanding of the functioning of the local community. A judge needs to be well-informed, familiar with a nation's rituals, customs and traditions, and take into account a variety of elements, including a clan's customary laws. The understanding of the cultural value of the specific TCEs, as well as the special duties and responsibilities of the artists within a certain clan, are also part of the task of familiarising oneself with these elements.¹⁶⁶ Even more importantly, the local laws must create a legal framework that imposes a duty on the courts to consider these cultural dimensions as a matter

¹⁶¹ *Ibid* at 206-7; Weatherall, *supra* note 156 at 219-20, discussing the communal nature of such 'ownership' and explaining that "the 'rights' in customary law in this context are more akin to 'custodianship' than 'ownership', a 'bundle of relationships, rather than a bundle of economic rights', involving responsibility to past and future generations (in strong contrast to more usual Western notions of proprietorship)".

¹⁶² On other incidents of "cultural insensitivity" and misappropriation, see Pager, *supra* note 89 at 140ff.

¹⁶³ Carpets Case, *supra* note 157 at 661.

¹⁶⁴ *Bulun Bulun*, *supra* note 156 at 200.

¹⁶⁵ Carpets Case, *supra* note 157 at 661.

¹⁶⁶ For instance, under customary Aboriginal law, artists would act as custodian trust-holders with a duty and responsibility to create artworks associated with the tribe's ancestral places, and hold the copyright in trust for their people. Their artworks are painted with the permission of the senior members of the clan. For a thoughtful analysis on Aboriginal laws related to art and their coexistence with IP laws, see Gray, *supra* note 156 at 236ff.

of law.

In addition, the judge is in many ways the mediator between indigenous and non-indigenous peoples, and even between the members of the communities. This role not only requires an understanding of the competing legal claims, but also of the competing cultural claims. In the 10\$ case, for instance, the Reserve Bank sought and obtained a formal license arrangement from Yumbulul, represented by the Aboriginal Artists Agency Ltd.¹⁶⁷ The artist's decision sparked controversy among Aboriginal tribes,¹⁶⁸ and this despite the fact that Yumbulul had authority amongst his clan to depict and even publicly display such ancestral symbols. It is precisely because of that controversy that the artist filed an action for copyright infringement, contending before first instance courts that he was "induced to sign the license by deceptive conduct", turning against both the bank and the Aboriginal Agency.¹⁶⁹ The Court did not accept his claim. On the contrary, it found that the reproduction paid tribute to the indigenous culture, namely, that "it was and should be seen, as a mark of the high respect that has all too slowly developed in Australia for the beauty and richness of Aboriginal culture".¹⁷⁰

iii. Making Indigenous Affairs Part of the Public Debate: The Example of the Waitangi Tribunal

In exceptional instances, quasi-judicial bodies also possess the power to address indigenous claims and initiate reconciliation strategies between indigenous and non-indigenous parties. Illustrative examples include the National Native Title Tribunal in the United States and the Waitangi tribunal of Inquiry in New Zealand, established to uphold the terms of the Treaty of Waitangi. The Waitangi Tribunal is mandated to make recommendations on claims brought by Māori relating to legislation, policies, actions or omissions of the Crown that are alleged to breach the promises made in the Treaty of Waitangi.¹⁷¹ Its mandate encompasses not only land and property rights, but also indigenous claims to their TCEs

In the famous *Fauna and Flora Report*, which discussed what has become known as as the *Wai 262* claim (the 262th claim heard by the Waitangi tribunal), six *Iwi* complained about the appropriation of their (environmental) TK relating to their fauna and flora, claiming that the Crown failed to protect their sole authority over flora, fauna and other *taong*.¹⁷² As a result, the judges

¹⁶⁷ *Yumbulul*, *supra* note 158 at 1.

¹⁶⁸ *Ibid* at 11, 21.

¹⁶⁹ *Ibid* at 2. See generally Blakeney, *supra* note 61 at 404–5, n 97.

¹⁷⁰ *Yumbulul*, *supra* note 158 at 2.

¹⁷¹ See Waitangi Tribunal, *Strategic Direction: 2014–2025* (Wellington: Waitangi Tribunal, 2014). See also Frankel, *supra* note 56 at 203ff; Austin, *supra* note 17 at 346–47; Maui Solomon, "Protecting Maori Heritage in New Zealand" in Hoffman, *supra* note 74 at 352.

¹⁷² Waitangi Tribunal, *Ko Aoteroa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting*

prepared a detailed, 268-page long report, which it submitted to parliament and the government, according to the Waitangi Tribunal's rules, recognized the breach of the Waitangi treaty. In its report, the Tribunal made strategic recommendations to the Government in relation to each aspect of Māori rights vis-à-vis biopiracy and appropriation, by reference also to the CBD and *UNDRIP*.¹⁷³

At its face, the existence and functioning of such quasi-judicial institutions could be the object of criticism. The decisions of the Waitangi tribunal are not binding, and their procedures may be slow and cumbersome.¹⁷⁴ Nonetheless, this criticism is not fully justified. The political impact of decisions such as that seen in the *Fauna and Flora Report*, "one of the most complex and far-reaching claims ever to come before the Waitangi Tribunal",¹⁷⁵ are largely overshadowing its non-binding legal value. As a result of that case, the Māori were significantly empowered and their cultural claims gained a substantial position in the public debate. In addition, the Waitangi Tribunal assumed an "indigenous-centric" approach, taking into account the various aspects of the Māori world view, prior to recognizing the breach of the Waitangi treaty.

More than a decade after that claim, the work of the Waitangi Tribunal expanded even further. To date, more than 2,500 district claims (*iwi*) have been addressed, including historical settlements.¹⁷⁶ This number will presumably increase in the future given that from 2020 the tribunal will also be addressing contemporary claims. Its decisions have culminated not only in the production of reports but have also led to the adoption of national laws. An illustrative example is the Tribunal's decisions regarding the appropriation of the Māori *haka* by the All Blacks, New Zealand's rugby team. In this claim, the Tribunal recognized the right of a particular *iwi* to control the commercial exploitation of their *haka*. As a result of the case, *Ka Mate* legislation was passed.¹⁷⁷

iv. Domestic Legal Protection Against International Exploitation

Local developments/policies and the existence of model laws and indigenous-focused tribunals provide significant input to international

Māori Culture and Identity - Waitangi Tribunal Report 2011 (Wellington: Legislation Direct, 2011) [*Fauna and Flora Report*]. See also Fernando, *supra* note 63 at 158ff; Austin, *supra* note 17 at 341ff; Solomon, *supra* note 171 at 358-59.

¹⁷³ *Fauna and Flora Report*, *supra* note 172 at 237.

¹⁷⁴ It is indicative that the *Wai 262* claim took several years to be decided. See Austin, *supra* note 17 at 362, observing that "there is much to be worked through at the domestic level before international solutions can be entertained".

¹⁷⁵ *Fauna and Flora Report*, *supra* note 172 at xxiii.

¹⁷⁶ See Waitangi Tribunal, *supra* note 171 at 3, noting that "the great majority of Māori *iwi* [tribes] and *hapū* [tribes] have had their claims reported on or are in the process of being heard" through Tribunal district inquiries.

¹⁷⁷ Frankel, *supra* note 56 at 205. See also Ellen Connolly, "Māori Win Battle to Control All Blacks' Haka Ritual", *The Guardian* (12 February 2009) online: <www.theguardian.com/world/2009/feb/12/new-zealand-haka-maoris>.

debates on TK and TCEs. The WIPO, in particular, has now elaborated extensive documentation on local and regional best practices and has also issued a guidance that includes “codes of conduct and protocols of behaviour”.¹⁷⁸ Similarly, more recent legal instruments contain provisions that value local participation. The 2010 Nagoya Protocol to the CBD, for example, contains a number of provisions stipulating awareness raising,¹⁷⁹ and provides that access to genetic resources within a State’s territory should be done in accordance with domestic law and with the free, prior and informed consent of indigenous communities residing there.¹⁸⁰

One may wonder whether local approaches and national solutions are equally effective in the context of exploitation or misappropriation of indigenous creativity by international corporations, or by internet users. In those cases, private international law would be useful: a community that sees a judgement issued in its favour is better placed to enforce said judgement in any country where the debtor has assets under such international law,¹⁸¹ with particular bilateral or multilateral enforcement of civil judgments treaties.¹⁸²

B. Local and Regional Activism Enhancing Indigenous Empowerment

i. A Step-by-Step Approach

Legislation promoting indigenous interests and initiatives amounting to the development of best practices remains, nonetheless, exceptional. In most parts of the developed world, as well as in the developing world, indigenous peoples are helpless vis-a-vis “violence and brutality, continuing assimilation policies, dispossession of land, marginalization, forced removal or relocation,

¹⁷⁸ See Molly Torsen & Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* (WIPO, 2010) at 42, discussing the experiences of the Hopi and Navajo, and practices of institutions such as the Vanuatu Museum and the Musée du Quai Brony and subsequently flagging the antithesis between the need to digitize (and diffuse) TCEs on the one hand, and the need to confidentially preserve them under customary laws on the other.

¹⁷⁹ *Nagoya Protocol*, *supra* note 52 art 21, providing, *inter alia*, that parties “shall take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues”. Additionally, the Protocol held that such measures would involve local communities in a number of ways, for instance: “the establishment and maintenance of a help desk for indigenous and local communities and relevant stakeholders”.

¹⁸⁰ *Ibid*, art 6. See Sam F Halabi, “International Intellectual Property Shelters” (2016) 90:4 Tul L Rev 903 at 954.

¹⁸¹ For instance, under New Zealand’s *Reciprocal Enforcement of Judgments Act* (1934), the Crown would be able to enforce, in New Zealand, judgments that are obtained in countries where reciprocal treatment with that country exist. The procedure is simple: involving an application at the High Court requesting the judgement’s registration.

¹⁸² For a multilateral instrument of this nature, see *Council of Europe, Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, [2001] OJ L 12. To the best knowledge of this author, transnational enforcement of civil judgments has been sparsely, if at all, used.

denial of land rights, impacts of large-scale development, abuses by military forces and a host of other abuses”,¹⁸³ yet their voices are not heard and their cultural heritage claims are not part of the public debate or included with the “consultation and cooperation with the peoples concerned”.¹⁸⁴ As noted by the UN Special Rapporteur on the rights of indigenous peoples:

Typically, the host States involved employ economic development policies aimed at the exploitation of energy, mineral, land or other resources that are predominantly located in the territories of indigenous peoples. The government agencies responsible for implementing those policies regard such lands and resources as available for unhindered exploitation and actively promote them as such abroad to generate capital inflows. Recognition of indigenous peoples’ rights in the domestic legal framework is either non-existent, inadequate or not enforced. Where they exist, institutions mandated to uphold indigenous peoples’ rights are politically weak, unaccountable or underfunded. Indigenous peoples lack access to remedies in home and host States and are forced to mobilize, leading to criminalization, violence and deaths. They experience profound human rights violations as a result of impacts on their lands, livelihoods, cultures, development options and governance structures, which, in some cases, threaten their very cultural and physical survival[.]¹⁸⁵

The vindication of land rights in those instances takes precedent over the promotion of indigenous interests of their TCEs. The reason for this is not only the urgency of the preservation of livelihoods, but also the *de facto* lack of standing or effective remedies of indigenous peoples before national courts.

By way of illustration, one could mention a case that has acquired little publicity, that of Belize. Following the invasion of the Maya communities of the Toledo district in the southern part of the country, and the permission granted to logging and oil business to exploit these territories without obtaining their consent, several individuals, along with a local association, complained to the authorities in the late 1990s.¹⁸⁶ Their efforts were fruitless as the claims of the Maya leaders were entirely ignored by the government. The lawsuits “stalled with no action on the part of the Court as it became apparent that the Court was plagued with corruption and ineptitude”.¹⁸⁷ It was only when the case arrived before the Inter-American Commission on Human Rights (IACHR) that the claim was vindicated. The IACHR found a violation of the Maya communal right to property as well as their right to judicial protection,

¹⁸³ UNPFII, Press Release, 09-64058, “Indigenous peoples make up one-third of the world’s poorest and suffer alarming conditions in all countries” (14 January 2010), online: <www.un.org/esa/socdev/unpfii/documents/SOWIP/press%20package/sowip-press-package-en.pdf>.

¹⁸⁴ See *UNDRIP*, *supra* note 31, Preamble.

¹⁸⁵ *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UNHRC, 33rd Sess, UN Doc A/HRC/33/42 at para 27.

¹⁸⁶ See S James Anaya, “Reparations for Neglect of Indigenous Land Rights at the Intersection of Domestic and International Law - The *Maya* Cases in the Supreme Court of Belize” in Federico Lenzerini, ed, *Reparations for Indigenous Peoples: International and Comparative Perspectives* (New York: Oxford University Press, 2008) 567 at 568.

¹⁸⁷ *Ibid.*

protected under the American Declaration on the Rights and Duties of Man, and ordered Belize to demarcate the ancestral Maya territory.¹⁸⁸ This decision inspired the Caribbean Court of Justice (acting as a Supreme Court, on appeal from the Court of Appeal of Belize) to not only respect communal property rights, but also, to award damages of \$300,000 to the communities involved.¹⁸⁹ Most notably, in substantiating their ruling the Court referred to the *Universal Declaration of Human Rights*,¹⁹⁰ as well as the *UNDRIP*.¹⁹¹

ii. *The Contribution of the Inter-American System of Human Rights*

The Inter-American Commission and Court are in fact, despite the lack of resources and funding, the bodies that have played a key role in promoting indigenous interests. The IACHR enjoys an “enlarged” mandate. Not only does it act as a quasi-judicial body by deciding on individual complaints, it is also the political body of the Organisation of American States (OAS) and in the context of its mandate it has developed regional and thematic rapporteurships on the human rights situation in the Americas that involves field research on human rights violations in the region.¹⁹² In situations of utmost urgency and seriousness the IACHR has the jurisdiction to issue precautionary measures and regularly does so to protect indigenous peoples.¹⁹³ The Inter-American Court of Human Rights (IACtHR), on the other hand, has developed its jurisprudence on collective rights more than any other human rights body. In addition, its practice of hearing detailed evidence, “which makes the judgments records of violation on their own right”,¹⁹⁴ has been particularly useful for indigenous peoples’ claims to gain visibility worldwide. As a result, in the context of the Inter-American system, indigenous rights have been effectively endowed with justiciability, contributing to advancing indigenous interests through UN mechanisms.¹⁹⁵

¹⁸⁸ *Maya Indigenous Communities of the Toledo District v Belize* (2004), Inter-Am Comm HR, No 40/04, Annual Report of the Inter-American Commission on Human Rights: 2004, OEA/Ser.L/V/II.122/Doc 5 727 at para 136.

¹⁸⁹ *The Maya Leaders Alliance et al v The Attorney General of Belize*, [2015] CCJ 15 (AJ) at para 79, CCJ Appeal No BZCV2014/002.

¹⁹⁰ *Universal Declaration of Human Rights*, GA Res 217A(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

¹⁹¹ *Ibid* at para 53.

¹⁹² See Article 18 of the Statute of the IACHR which further notes that this Rapporteurship on the Rights of Indigenous Peoples is the first to function within the IACHR. See also Dinah Shelton, “The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System” (2015) 5:1 *Notre Dame J Intl & Comp L* 1 at 6-7.

¹⁹³ See e.g. Precautionary Measures: Teribe and Bribri of Salitre Indigenous People, Costa Rica, IACHR, Doc ID PM 321/12; Precautionary Measures: Members of the Triqui Indigenous Community in the San Pedro River Valley, San Juan Cópala, Putla de Guerrero, Oaxaca, Mexico, IACHR, Doc ID PM 60/12.

¹⁹⁴ Ilias Bantekas & Lutz Oette, *International Human Rights: Law and Practice*, 2nd ed (New York: Cambridge University Press, 2016) at 250.

¹⁹⁵ See e.g. Laurence Burgorgue-Larsen & Amaya Ubeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (New York: Oxford University Press, 2011) at 497-528; Kristin Hausler,

To the best knowledge of this author, neither the IACHR nor the IACtHR has pronounced on the specific issue of indigenous copyright claims or the protection of indigenous cultural heritage. The IACHR and the IACtHR have discussed indigenous cultural rights in a general way and almost exclusively in relation to other claims, particularly with regards to land rights and reparations.¹⁹⁶ This, however, does not necessarily mean that indigenous peoples' claims related to their TCEs stand absolutely no chance before the Inter-American bodies. In fact, both the Commission and Court have, to date, privileged an extended notion of "property rights" in order to protect the communal notion of indigenous rights,¹⁹⁷ and it is on this basis that communal IP rights would potentially be addressed.

In addition, the task of the Commission and the Court in relation to indigenous cultural heritage has largely been facilitated since 2016, when OAS member States finally adopted (by consensus) the *American Declaration on the Rights of Indigenous Peoples* (ADRIP).¹⁹⁸ This declaration is a landmark monument for indigenous rights and has legitimately been characterised as a "historic milestone" by pro-indigenous activists and lawyers.¹⁹⁹ In fact, apart from the proclamation of the usual rights and the principle of self-

"Collective Cultural Rights in the Inter-American Human Rights System" in Jakubowski, *supra* note 122 at 241–46; Dorrough, *supra* note 136; S James Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in Charters & Stavenhagen, *supra* note 32, 184 at 192; Royo, *supra* note 121 at 327–28; Shelton, *supra* note 53 at 551; Pedro Nikken, "Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights" in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann & Francesco Francioni, eds, *Human Rights in International Investment Law and Arbitration* (Oxford Scholarship Online, 2010) 246 at 261; Isabel Madariaga Cuneo, "The Rights of Indigenous Peoples and the Inter-American Human Rights System" (2005) 22:1 *Ariz J Intl & Comp L* 53 at 62–63. See also S. James Anaya & Robert A. Williams Jr, "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System" (2001) 14:1 *Harv Hum Rts J* 33 at 34–35.

¹⁹⁶ See e.g. *Case of Plan de Sánchez Massacre v Guatemala* (2004) Inter-Am Ct HR (Ser C) No 105, Annual Report of the Inter-American Court of Human Rights: 2004, OEA/Ser.L/V/III.65/doc.1 6, in which the Court accepted a claim for reparations because the death of the women and elders (traditionally, the oral transmitters of the Maya-Achí culture) caused a cultural vacuum; *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) Inter-Am Ct HR (Ser C) No 79, at para 135, Annual Report of the Inter-American Court of Human Rights: 2001, OEA/Ser.L/V/III.54/doc.4 29 [*Mayagna*]; *Case of Saramaka People v Suriname* (2007) Inter-Am Ct HR (Ser C) No 172, at para 121 [*Saramaka*], in which the Court affirmed the relationship between lands and cultural identity. See also Cuneo, *supra* note 195 at 55; Hausler, *supra* note 195 at 242.

¹⁹⁷ See e.g. *Mayagna, supra* note 196 at para 148; *Saramaka, supra* note 196 at para 97ff. See also *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006) Inter-Am Ct HR (Ser C) No 146 at para 21.

¹⁹⁸ *American Declaration on the Rights of Indigenous Peoples*, AS Res.22888 (XLVI-O/16 in OAS, General Assembly, 46th Sess, *Declarations and Resolutions Adopted by the General Assembly*, OR OEA/Ser.P/AG/doc.5557/16 (2016) at 167 [*American Declaration*]. See also OAS, Committee on Judicial and Political Affairs, *Procedure for Promptly Concluding the Negotiations in the Quest for Points of Consensus of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples*, OR OEA/Ser.K//XVI/GT/DADIN/doc.246/06, rev. 7; Cuneo, *supra* note 195 at 62–63. The first draft of the American Convention on Indigenous Peoples had been prepared back in 1999 by the "working group on indigenous rights" (consisting of representatives of OAS States, representatives of indigenous communities, intergovernmental organizations and experts).

¹⁹⁹ The Organization of American States, Press Release, E-075/16, "A 17-Year Wait Pays off for Indigenous Peoples" (15 June 2016), online: <www.oas.org/en/media_center/press_release.asp?sCodigo=E-075/16>.

determination,²⁰⁰ the Declaration contains affirmations of rights that have been seldom included in any human rights instrument, such as “the right of indigenous persons to their own cultural identity and cultural heritage”.²⁰¹ The Declaration equally contains a separate section on the protection of cultural heritage and intellectual property. Article XXVIII of the declaration further provides, inter alia, that States should adopt “special measures” in relation to indigenous TK.²⁰²

In this way, the *American Declaration* could serve as a successful paradigm for other regional forms of heritage protection. It could, for instance, open interesting inroads for indigenous activism in other continents and regions, particularly in the European Samiland where the 2007 draft Nordic Sami Convention is still negotiating (and once into force will bind Scandinavian States to effectively establish conditions enabling the Sami people to secure and develop their language, culture, livelihoods and society)²⁰³ and the African continent where the African Commission may consider human rights claims by “drawing inspiration” from virtually all existing human rights instruments.²⁰⁴

²⁰⁰ See *American Declaration*, *supra* note 198, art 3, which holds that “[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

²⁰¹ *Ibid*, art 13(1), which holds that “[i]ndigenous peoples have the right to their own cultural identity and integrity and to their cultural heritage, both tangible and intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations”.

²⁰² *Ibid*, art 28, which holds that “[i]ndigenous peoples have the right to the full recognition and respect for their property, ownership, possession, control, development, and protection of their tangible and intangible cultural heritage and intellectual property, including its collective nature, transmitted through millennia, from generation to generation”.

²⁰³ See Mattias Åhrén, “The Saami Convention” (2007) 3:1 J of Indigenous Peoples Rights 1 at 1-12. See also James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UNHRCOR, 18th Sess, 2011, UN Doc A/HRC/18/35/Add.2 at para 13.

²⁰⁴ See *African Charter on Human and Peoples Rights* (21 October 1986) art 20, 60.

VII. Conclusion

The protection of indigenous intangible cultural heritage and their TCEs is a particularly sensitive topic in the indigenous rights debate. TCEs constitute not only a substantial dimension of indigenous peoples' right to cultural self-determination, but also, of their economic and social development. Appropriating, misrepresenting or trivializing peoples' cultural goods and artifacts deprives them not only of their dignity, but also from any financial benefits. The list of controversies is long, reaching every aspect of intellectual property and international trade norms. In most cases, indigenous knowledge and traditions are appropriated either without the free, prior and informed consent of the indigenous peoples or without providing adequate compensation.

At the international level, a multiplicity of legal norms exists for the protection of indigenous cultural heritage. The existence of these norms is undoubtedly valuable, not only because of the guidance they offer to the national legislator, but further, because dialogue and exchange of experiences between the national and international regimes is inevitable in the context of an increasingly globalized world. The significance of the international framework however, may be overestimated, at least in doctrine. Indeed, it is impossible to ignore that, despite the efforts of the WIPO intergovernmental committee to protect indigenous TK/TCEs for over a decade, there is still no visible perspective of drafting a pertinent convention that would reconcile indigenous and State interests. Likewise, the UNESCO protection system has in practice little impact on indigenous heritage as it concerns chiefly States' interests and the development of their touristic agendas, two usually opposing interests that only seldomly coincide. This comes into sharp contrast with the increasing effectiveness of local approaches and solutions. This paper suggests three reasons as to why these local solutions and approaches prove to be more effective and sustainable.

First, in many cases, local and regional activism amounts to meaningful legislative initiatives, justiciable outcomes and policy directions. This activism, in addition, has amounted in many cases to the mushrooming of best practices at the local level, leading to indigenous self-empowerment.

Second, the efforts of both national courts and traditional quasi-judicial bodies, such as the Waitangi Tribunal in New Zealand, have managed to make indigenous interests in preserving their TCEs part of the public debate (as in the case of the *Wai 262* claim), and even to lawmaking initiatives at the national level (as in the case of the *Haka* legislation).

Third, in those states where legal recognition and judicial protection are completely absent, local activism serves as a "first step" towards the preservation of land rights that are still suppressed and endangered in most

parts of the world. It remains undisputed that the *UNDRIP* has held an inspiring role for the interpretation of international human rights obligations worldwide, yet, it is precisely these local and regional bodies that have given teeth to them. Regional activism in the Americas in particular, along with the concerted efforts within the Inter-American Human rights system, has been especially fruitful in endowing indigenous cultural rights with justiciability. In addition, the recently passed American Declaration contains provisions on the protection of TK and TCEs that could serve as a paradigm for other regions, including the African continent, that benefits from the African human rights system, and the European Samiland, where the 2007 draft Nordic Sami Convention is currently being negotiated.