

Indigenous Peoples' Rights At The Intersection of Human Rights And Intellectual Property Rights

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ARTICLES

INDIGENOUS PEOPLES' RIGHTS AT THE INTERSECTION OF HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS

CHIDI OGUAMANAM*

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INTRODUCTION

Dedicated exploration of the interface between human rights (HRs) and intellectual property rights (IPRs or IP) is a venture still in its gestational stage. Early outcomes of the conversations seem to agree on a few first impressions.

First, even though HRs and IPRs developed along different paths, the foundation of their underexplored intersection is historically rooted.¹ Second, the development of both legal domains is influenced by the same historical factors; such as the industrial revolution and the expansion of international trade, which were catalysts for social, political, and economic transformations.² Third, at no time has the empirical importance of the relationship between HRs and IPRs been more palpable than the period beginning in the mid-1990s, and symbolized by the coming into effect of the Trade-Related Agreement on Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO).³

Fourth, as a conjecture, the normative outlook of the relationship between HRs and IPRs is clouded by complex paradoxes and are allergic to simple resolution. On the face of it, HRs cater to the optimal realization of human potential; while intellectual creativity, which is the concern of IP, is integral to realization of human capability and progress. Fifth, early enthusiasts of this important conversation have a historic opportunity to frame and influence the understanding of a subject matter that is developing at the pace of its equally growing relevance.⁴ In that expectation, the mapping of indigenous peoples' rights onto the interface between HRs and IP is a critical aspect of the ongoing conversation. However, present attempts to explore the interface of broader HRs jurisprudence with its IPRs counterpart reveal apparent conceptual obfuscation in regard to how indigenous peoples' rights are implicated.

The extent to which indigenous peoples' rights are integrated into core HRs instruments, especially the international bill of rights (IBRs)⁵ and other

1. See WILLEM GROSHEIDE *INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX* (Willem Grosheide, ed., 2010) [hereinafter Grosheide Paradox].

2. Grosheide argues that both IP and HRs developed in the coincidental contexts of industrial revolution in Europe in the nineteenth and twentieth centuries and the resulting expansion in international trade by technologically advanced countries. WILLEM GROSHEIDE, *General Introduction*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX* 3, 4–5 (Willem Grosheide, ed., 2010) [hereinafter Grosheide Introduction].

3. See Audrey R. Chapman, *The Human Rights Implications of Intellectual Property Protection*, 5 J. INTELL. ECON. L. 861, 870–71 (2002).

4. For perspective on the increasing imperative to explore HRs implications of IP, see generally Peter K. Yu, *Intellectual Property and Human Rights in the Nonmultilateral Era*, 64 FLA. L. REV. 1045 (2012).

5. The IBR refers to the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights and the Optional Protocols made under the last two. See generally UNDHR, *infra* note 30; CESCR, *infra* note 31; CCPR, *infra* note 32.

international or regional HRs instruments is not apparent; and is at best peripheral. Similarly, the status of indigenous peoples' rights—as “group” or “collective rights”—continues to pose normative challenges to HRs jurisprudence, which evolved, in part, as a counterpoise to group tyranny.⁶ Perhaps, more important, as an aggregation of rights, indigenous peoples' rights constitute analogous misfits to any specific head of conventional HRs or IPRs. Put differently, as opposed to paralleling any specific class of HRs, indigenous peoples' rights are complementary components of virtually every conventional HR category;⁷ the same is true, to some degree, in relation to conventional categories of IPRs.

Indigenous peoples' rights, especially those relating to their knowledge systems; continue to be treated with disdain under the conventional IP system. Indigenous peoples' attitude towards the IP system remains dialectical. As summarized by analysts, “[a]ssertions of rights by indigenous peoples in the context of intellectual property encompass two distinct and opposing elements—claims *to* intellectual property protection, and claims *to be protected from* intellectual property laws and institutions.”⁸ Given the inability of IPRs to account for indigenous knowledge, let alone indigenous peoples' rights, it is logical to look to HRs to fill the gaps in IPRs in these areas.

The evolution and details of indigenous peoples' rights within HRs theory remains a work in progress. Rather than being a *fait accompli*, indigenous peoples' rights are part of the inchoate, yet progressive elaboration of indigenous issues within HRs jurisprudence. Even if there is a merit in exploring indigenous peoples' rights from a HRs framework, as a process and a state of affair, those rights are sources of irritation on traditional HRs jurisprudence. Substantiating indigenous peoples' rights within the HRs paradigm remains an arduous task.

Finally, beyond the IBRs, the elements of indigenous peoples' rights are scattered in varying degree of emphasis and details across innumerable international legal instruments of varying juridical status. Within this complex and open-ended framework of indigenous peoples' rights, charting them onto conventional HRs categories remains problematic.

As its primary objective, this article attempts to contribute to an improved understanding of the complex nature of indigenous peoples' rights. It focuses

6. See Peter Jones, *Human Rights, Group Rights, and Peoples' Rights*, 21 HUM. RTS. Q. 80, 82 (1999).

7. There is hardly a specific head of human rights under international human rights instruments in which indigenous people's right as vulnerable groups are not implicated.

8. See LAURENCE R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* 461 (2011).

on how the latter are implicated in the contemporary discourse on HRs and IPRs, and highlights conceptual and analytical challenges invoked by the concept of indigenous peoples' rights within the HRs-IPRs interface.

Indigenous peoples' rights, it is argued, constitute critical components of the HRs-IP interface. There is a need to unveil the conceptual obfuscation of indigenous peoples' rights in the context of contemporary interests in the articulation of the nature of the increasingly emergent interaction of HRs with IPRs. Hopefully, such an attempt will illuminate the complexly layered nature of this trilogy of rights, and assist all stakeholders to approach these subject matters with reflection. Without this kind of introspection, it is easy to perpetuate the historical marginalization of indigenous peoples' rights. To do so squanders the prospect for a rejuvenation of indigenous peoples' rights discourse now opportune by the current interest in HRs' relationship with IP.

Excluding the present introduction and the concluding outline, this article is divided into three parts. Part I explores the evolution and nature of indigenous peoples' rights within the core HRs instruments and highlights the extent of their marginalization under that framework. It also examines recent iterations of indigenous peoples' rights, identifies the pivotal elements of those rights and their implication for HRs-IPRs interface. Part II outlines the tenor of the discourse on the convergence of HRs and IPRs, and the peripheral treatment of indigenous peoples' rights in that context. It highlights fairly recent interpretive accommodation of aspects of indigenous rights in tertiary HRs instruments. Part III outlines elements of the peculiar status of indigenous peoples' rights, which constitute conceptual hurdles to framing indigenous rights at the intersection of HRs and IPRs.

I. INDIGENOUS PEOPLES' RIGHTS IN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The unhelpful but lingering definitional imbroglio around "indigenous peoples" will not detain us at this point.⁹ Rather, it serves our present purpose to focus on the uncontested facts about the status of indigenous peoples. All over the world, indigenous peoples rank at the base of most human development indicators. They "are among the most economically destitute members of the human family and have frequently experienced adverse treatment, including forced assimilation, destruction of their cultures, racism, loss of land and resources to colonizers, governments and commercial

9. See Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999); see also Chidi Oguamanam, *Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics*, 11 J. WORLD INTEL. PROP. 29, 37 (2008) [hereinafter Oguamanam 2008].

entities.”¹⁰ In addition, most indigenous peoples are under continuing threat of cultural asphyxiation, necessitating the struggle to realize their right to self-determination and to negotiate the control of their resources, innovation, and knowledge systems.¹¹

The evolutionary history of indigenous peoples’ rights has been articulated elsewhere.¹² However, it bears mentioning that the struggle for indigenous peoples’ rights dates back to the earliest attempts to understand and resist the colonial experience by victims, adversaries, and actors within and outside the colonial process.¹³

Symbolically, how to deal with indigenous peoples shaped the contestation between natural and positivist ideologies that characterize international law jurisprudence. The resurgence of naturalist thinking, beginning in the late nineteenth-century, forced a reconsideration of alternative political structures to the Westphalia state model favoured by the positivist ideology. This development gave a new understanding to tribal, kinship, and various decentralized political configurations through which indigenous peoples related to the colonial authorities via various forms of treaties.¹⁴ In addition, it paved the way for modest accommodation of new actors in the international process outside the traditional nation state.¹⁵ These new actors are mainly non-governmental organizations (NGOs), intergovernmental organizations, and various civil society groups who opposed the degrading and inhuman treatment of indigenous peoples.

The middle of the twentieth-century marked perhaps the most important transformation in the development of international law. Enshrined in the United Nations Charter, that transformation is anchored in the recognition of

10. See HELFER & AUSTIN, *supra* note 8, at 432.

11. See Antony Taubman, *Preface: Indigenous Innovation: New Dialogues, New Pathways*, in INDIGENOUS PEOPLE’S INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT (Peter Drahos and Susy Frankel, eds., 2012).

12. See, e.g., S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 15-72 (2d ed. 2004) [hereinafter Anaya 2004]. See generally Wiessner, *supra* note 9; Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT’L LAW 369 (1986).

13. See Anaya 2004, *supra* note 12; see also ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

14. From an Austinian positivist mindset, only *nation states* were cable of entering into treaties with one another; since international law was the law of nations. As such, there was no legal significance to any treaties signed by indigenous peoples (as tribal, ethnic, sub-ethnic or kinship entities) with colonial powers. In essence, the “positivist view denied any legal significance to treaties entered into between indigenous peoples and the colonial powers.” See Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN’S L.J. 348, 357 & n.23 (2004) [hereinafter Oguamanam 2004].

15. This was championed by the United Nations through the progressive accommodation of non-state actors in its processes.

“peoples” as the bearers of inalienable HRs.¹⁶ Those rights exist as a result of the *humanity* of peoples without regard to the nation state. The reconfiguration was necessitated, in part, by the horrors of Nazi Germany, after which citizens were no longer deemed to owe their HRs to the whims and caprice of the nation state.¹⁷ Rather, the latter had both positive and negative obligations to prevent the violation of HRs of peoples.

The controversy over the appropriate approach to dealing with indigenous peoples was instrumental to the evolution of international law, and international HRs jurisprudence in particular.¹⁸ Ironically, however, international HRs instruments shied away from making prescriptions in regard to indigenous peoples in any direct sense, at least at the foundational stage under the IBRs. Even though HRs were rights that accrued to “all peoples,” the “peopleness” of indigenous peoples could not be guaranteed. Indigenous peoples were for the most part targets of selective, rather than automatic, application of HRs.¹⁹ In the next section, we sketch the gradual integration of indigenous peoples into the HRs discourse.

A. Beyond Human Rights

Indigenous peoples make several claims on international and domestic processes. Those claims may be contingent upon the specific historical, political, economic, social and cultural experiences of the indigenous peoples and the international, regional, or domestic circumstance at any given point in time. Many such claims may not have HRs elements in any direct way. For the most part, however, given that violations or denials of indigenous peoples’ HRs are at the core of their experience with colonial powers, HRs have shaped and will continue to shape indigenous claims for a number of reasons.²⁰

The urgency of HRs resonates more with disadvantaged and marginalized members of the human family.²¹ Accordingly, indigenous peoples represent

16. U.N. Charter art I.

17. See Keith D. Nunes, “*We Can Do . . . Better*”: *Rights of Singular Peoples and the United Nations Draft Declaration on the “Rights of Indigenous Peoples”*, 7 ST. THOMAS L. REV. 521, 549 (1995).

18. See generally Anaya 2004, *supra* note 12; S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009) [hereinafter Anaya 2009].

19. For example, while self-determination was a principal premise for granting independence to colonial outposts outside the enclave territories, indigenous peoples of the enclave territories were denied the right to political self-determination despite the affirmation of that right in core HRs instruments.

20. See Anaya 2009, *supra* note 18.

21. See Comm. On Econ., Soc. & Cultural Rights, Econ. & Soc. Council, Rep. on its 25th, 26th, & 27th Sess., Annex XIII, ¶¶ 4, 8, U.N. Doc. E/2002/22, Supp. No. 2 (2002); see also Philippe Cullet, *Human Rights and Intellectual Property Protection in the TRIPS Era*, 29 HUM. RTS. Q. 403, 415 n.48

the mirror for viewing the progress of HRs. Similarly, scholars²² agree that diverse subjects, including racial discrimination, self-determination, cultural and minority rights, labour right, environmental rights and, lately, access to knowledge, and resource control implicate aspects of HRs which now constitute “the launching pad for an indigenous renaissance in contemporary international law.”²³

According to Kingsbury, diverse claims by indigenous peoples may not necessarily lend themselves to neat categorization.²⁴ He counsels that as a genre, indigenous claims cannot and should not be pigeonholed into one fixed exclusive human or non-human rights category.²⁵ Despite, locating indigenous peoples claims mainly within the international HRs framework, we must not presume that the framework adequately addresses indigenous peoples’ rights. As it will become clear shortly, “the peculiar problems facing indigenous peoples required more than a shift in emphasis from the general human rights framework to a focus on specific indigenous issues.”²⁶

B. Three Convenient Frameworks for Indigenous Rights

For analytical convenience, we identify three convenient frameworks for exploring the extent of accommodation of indigenous peoples within the international HRs framework. The first is through the IBRs,²⁷ the principal and foundational HRs instruments of the United Nations. The second is through specific treaty instruments with variegated degrees of interest in indigenous peoples’ rights.²⁸ The third is through recent soft law and miscellaneous instruments that reiterate or synthesize the international consensus on indigenous peoples’ rights within and beyond the HRs framework.²⁹

(2007).

22. See Douglas Sanders, *The Re-Emergence of Indigenous Question in International Law*, 1983 CAN. HUM. RTS. Y.B. 3 (1983); Benedict Kingsbury, *Self-Determination and “Indigenous Peoples”*, 86 AM. SOC’Y INT’L L. PROC. 383 (1992); Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT’L L. 127 (1991); Sigfried Wiessner, *Joining Control to Authority: The Hardened “Indigenous Norm”*, 25 YALE J. INT’L L. 301 (2000).

23. Oguamanam 2004, *supra* note 14, at 362.

24. See Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples’ Claims in International and Comparative Law*, 34 N.Y.U. J. INT’L L. & POL. 189 (2001).

25. *Id.* at 202.

26. Oguamanam 2004, *supra* note 14, at 362 & n.47 (citing Barsh, *supra* note 12, at 378).

27. See *supra* note 5.

28. Virtually all HRs treaties have some bearing with indigenous peoples to the extent not only that the treaties’ subject matters are relevant to specific indigenous issues but, perhaps more important, because indigenous peoples are implicated in the treaty subject as the most vulnerable of the human society.

29. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP]. See generally Anaya 2004, *supra* note

1. The International Bill of Rights

The IBRs refer to the trio of the Universal Declaration of Human Rights (UNDHR)³⁰ and its subsequent elaboration in two treaty texts, namely the Covenant on Economic, Social and Cultural Rights (CESCR)³¹ and the Covenant on Civil and Political Rights (CCPR),³² as well as the associated optional protocols. In terms of history and *raison d'être*, the IBRs derive from the Charter of the United Nations. There is a degree of harmony in the languages of the Charter and the three constitutive documents of the IBRs.

However, comparatively, the CCPR provisions are specific statements of negative obligations for state parties in the areas of civil and political rights of citizens. Concerning those rights, signatory countries are committed to their immediate implementation. There are fewer controversies on the provisions of the CCPR among state parties despite the pro Cold-War-style ideological tensions that characterized the negotiations of the IBRs.

In contrast, the CESCR contains a less precise and broader statement of amorphous categories of mainly positive and realizable obligations for states in the areas of economic, social, and cultural rights. The CESCR is an instrument of pre-eminence in the area of indigenous rights, not necessarily because indigenous peoples expectations are less problematic under the CCPR but, perhaps, because the density of rights under the CESCR implicate a corresponding concentration of indigenous claims. Moreover, the progressive realization principle of CESCR seemed a more pragmatic approach to indigenous rights in the context of then unfolding decolonization processes.

Based on the concept of universality of HRs, the IBRs emphatically extend their protective provisions to³³: all members of the human family; (all) peoples of the United Nations; the human person; all peoples; all/every human being(s); all individuals, everyone, etc. Clearly, from the texts of the IBRs, there is no attempt to isolate indigenous peoples outside the general categories of human beings as the exclusive targets of HRs. However, indigenous peoples are implicated by inferences through prohibitions against diverse categories of discrimination to which they have been historically subjected. These include

12, at 55–104.

30. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UNDHR].

31. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), [hereinafter CESCR].

32. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter CCPR].

33. The following words and phrases appear in the texts of the constitutive instruments of the IBRs. See UNDHR, *supra* note 30; CESCR, *supra* note 31; CCPR, *supra* note 32; and the Optional Protocols made under the last two.

references to: race, equality, colour, language, religion, social origin, birth, slavery and servitude, forced or compulsory labour, torture and other forms of inhuman and degrading treatment.³⁴

The indirect accommodation of indigenous peoples' rights, albeit in negative and non-exclusive terms under the IBRs, has had counterintuitive effects. First, subsequent secondary elaborations of relevant provisions of the IBRs have been more proactive in not only drawing indigenous peoples' rights into the ambit of IBR provisions, but also in fleshing out the practical translations of those rights. For example, even though Article 27 of the CCPR makes no reference to indigenous peoples,³⁵ its reference to minorities has been interpreted to include indigenous peoples.³⁶

Similarly, in their interpretive elaboration of specific provisions of the CESC, through the general comments (GCs), the Committee on Economic Social and Cultural Rights (the Committee or CESC)³⁷ has made direct references to various forms of accommodation of indigenous peoples' rights within the ambit of the Covenant.³⁸

2. Specific Treaty Instruments

The International Labour Organization (ILO) is the institutional source of two integral HRs treaties that directly addressed indigenous peoples' rights.³⁹ They are the Convention on Indigenous and Tribal *Populations*, 1957 (No. 107)⁴⁰ and the Indigenous and Tribal Peoples Convention, 1989 (No. 169).⁴¹

34. See, e.g., UNDHR, *supra* note 30, arts. 4, 5, 16, 18; CESC, *supra* note 31, arts. 2, 7, 10; CCPR, *supra* note 32, arts. 8, 18, 27.

35. CCPR, *supra* note 32, art. 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").

36. See U.N. Human Rights Comm., CCPR General Comment No. 23: Article 27 (Rights of Minorities), Apr. 8, 1994, ¶ 3.2, CCPR/C/21/Rev.1/Add.5, available at <http://www.unhcr.org/refworld/category,LEGAL,,GENERAL,,453883fc0,0.html>.

37. Part of the responsibility of this Committee of human rights experts is to interpret the provision of the CESC and to monitor and report on its implementations by state parties. In providing guidance to the potential prescriptive details of the CESC, the committee issues General Comments on specific articles of the treaty. These comments do not have binding force, but they "serve as focal points for change in national legal systems and provide a standard against which the Committee can review states' compliance with the Covenant." See HRs Framework, *infra* note 80, at 988.

38. See *infra* notes 113–121 and accompanying texts.

39. See Anaya 2009, *supra* note 18, at 133.

40. See generally *Convention No. 107*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm> (last visited May 15, 2014) [hereinafter *Convention 107*].

41. See generally *Convention No. 169*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm> (last visited May 15, 2014)

Convention 107 “was a first attempt to codify international obligations of States in respect [of] indigenous and tribal populations and was the first international convention on the subject.”⁴² The treaty adopted an integrationist approach, with the ultimate objective of annihilation of indigenous cultural practices, identities and worldviews, to be replaced with those of the dominant western colonial powers.

Subsequent global developments around indigenous policies resulted in the rejection of the assimilation model.⁴³ Rather, there was a policy shift toward respect for ethnic diversity and cultural pluralism in a manner that raised hope for eventual self-determination for indigenous peoples. This change in tone was symbolized by Convention 169’s displacement of Convention 107.

The transition to Convention No. 169 created a few symbolic impressions. First, negotiated on the heels of the IBRs, Convention 107 reflected the dominant sentiments in regard to indigenous peoples at the time of the IBR negotiations. Symbolically, as evident in its title, it refers to its subject matter as *populations* as opposed to *peoples*. Arguably, construed as *populations*, members of indigenous and tribal communities become equivocal subjects of HRs protection in strict construction of the language of the IBRs discussed above.

Convention 107 came at the peak of independence movements of most colonized states. In this charged atmosphere of pro-independence movements, it was not only self-serving but also politically prudent to not broach the idea of self-determination for the surviving members of pre-colonial civilizations, especially in the enclave territories. There was a fixation on external self-determination and its unpredictable consequences, notable among which is the idea of end-state.

Third, despite symbolizing a change in the approach to dealing with indigenous *peoples*, Convention 169 is not radical in regard to self-determination. In Article 1(3), it declares, “[t]he use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”⁴⁴ It is remarkable, however, that “[w]hile many of the provisions [of Convention 169] are consistent with the principle of self-determination the Convention does not recognize this right as such.”⁴⁵

[hereinafter Convention 169].

42. See Convention 107, *supra* note 40.

43. Anaya 2004, *supra* note 12, at 58.

44. Convention 169, *supra* note 41, art. 1(3).

45. See *What are the Intellectual Property Related Rights of Indigenous Peoples and where are they Discussed?*, CALL OF THE EARTH LLAMO DE LA TIERRA, <http://calloftheearth.wordpress.com/>

As problematic as they are, issues around the two concepts of peoples and self-determination need not overshadow the important contributions of the ILO on the development of indigenous peoples' rights. Without question, Convention 107 and its transmutation in Convention 169 are elaborate statements of the rights of indigenous peoples. In a way, they focus on indigenous-specific HRs⁴⁶ on *sui generis* basis. Despite their low numbers of ratification, the Conventions⁴⁷ represent the most authoritative, albeit less comprehensive,⁴⁸ binding instrument on indigenous peoples' rights. Along with the IBRs, they provide part of the foundation for progressive elaboration of these rights in subsequent instruments, notably the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁴⁹ to which we shall turn shortly.

Like the ILO, the United Nations Educational, Scientific and Cultural Organization (UNESCO) also champions the implementation of indigenous peoples' rights through various treaty instruments and development-oriented programs.⁵⁰ Given the symbiotic relationship between education, science, and development, UNESCO is an important player in the promotion of HRs. It is a strategic platform for the promotion of indigenous cultural rights (including traditional cultural expression, expressions of folklore, intangible cultural heritage, etc). It calls attention to the need for equity in the diffusion of global cultural diversity.⁵¹

resourcesimportant-terms/what-are-the-intellectual-property-related-rights-of-indigenous-peoples-and-where-are-they-discussed/ [hereinafter Call of the Earth].

46. Anaya observes that the declaration elaborates on fundamental HRs "in the specific cultural, historical, social and economic circumstances of indigenous peoples." See HELFER & AUSTIN, *supra* note 8, at 442. See generally REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE (Stephen Allen & Alexandra Xanthaki, eds., 2011) [hereinafter Allen & Xanthaki].

47. Upon the coming into effect of Convention No. 169, Convention No. 107 was withdrawn for ratification purposes; but it remains in force in 18 countries. On the other hand, only 20 countries at the time of writing this article have ratified Convention No. 169. See generally Convention 169, *supra* note 41; Convention 107, *supra* note 40.

48. A few of the gaps in the ILO Conventions include their limited and less direct provisions on the rights of indigenous peoples regarding cultural resources. In addition, the Conventions vest much responsibilities on governments toward the realization of indigenous peoples' aspirations. See generally Call of the Earth, *supra* note 45.

49. Anaya notes that UNDRIP "is coherent with, and expands upon the provisions of ILO Convention No. 169" among other international HRs instruments. See HELFER & AUSTIN, *supra* note 8, at 443 (citing 2008 Report on the Situation of HRs and Fundamental Freedoms of Indigenous at ¶ 43).

50. There are seven treaty documents relevant to the subject of indigenous peoples' rights. See *infra* note 53.

51. See UNESCO Universal Declaration on Cultural Diversity, UNESCO Res. 15, U.N. Doc. 31 C/Res. 15 (Nov. 2, 2001). The declaration was the precursor to the Convention on the Protection

As the “hub for international law and policy on culture,”⁵² UNESCO represents the fusion of culture and knowledge, both of which are at the intersection of indigenous peoples’ right to self-determination. The organization is associated with seven important treaties⁵³ dealing with different aspects of culture in recognition of the pivotal importance of the latter to indigenous peoples’ rights.

The World Intellectual Property Organization (WIPO), a special agency of the United Nations, is primarily charged with the promotion of IPRs. Lately, WIPO is attuned to navigate the challenges which indigenous knowledge poses for the IP system. Compared to UNESCO, WIPO’s exposure to indigenous peoples’ rights is not a direct factor of its enabling instrument, but an incidence of the implementation of its mandate and administration of other treaties with indirect impact on indigenous knowledge. Pursuant to that mandate, WIPO views indigenous knowledge from the narrow lens of IPRs as opposed to HRs. WIPO is therefore a major platform for the discussion of indigenous knowledge issues. At present, it supervises indigenous knowledge issues through the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional (indigenous) Knowledge and Folklore. In the course of over decade-long deliberations, the IGC is expected to produce comprehensive treaties on the protection of various manifestations of traditional knowledge.

International environmental law instruments in their soft and hard law renditions are yet another aggregate platform for promoting indigenous peoples’ rights, especially those dealing with biological resources and associated indigenous knowledge and environmental stewardship. A few of the instruments include: The Rio Declaration; Agenda 21; the Convention on Biological Diversity (CBD),⁵⁴ the Forest Principles,⁵⁵ and the Desertification

and Promotion of the Diversity of Cultural Expressions (2005).

52. CHIDI OGUAMANAM, INTELLECTUAL PROPERTY IN GLOBAL GOVERNANCE A DEVELOPMENT QUESTION 184 (2012) [hereinafter IP in Global Governance].

53. They are the Convention on the Protection and Promotion of Diversity of Cultural Expressions, 2005, Convention on the Safeguarding of Intangible Cultural Heritage, 2003, Convention on the Protection of Underwater Cultural Heritage, 2001, Convention on the Protection of the World Cultural and Natural Heritage, 1972, Convention on Fighting Against Illicit Trafficking of Cultural Property, 1970, Convention on the Protection of Cultural Property in the Event of Armed Conflict, 1954 and the Convention on the Protection of Copyright and Neighboring Rights, 1971.

54. Including all associated instruments, especially the 2010 Nagoya Protocol to the Convention on Biological Diversity, Feb. 2, 2011, <https://www.cbd.int/abs/> (currently 39 of 50 signatories needed for entry into force) and its precursor, the 2000 Bonn Guidelines on Access to Genetic Resources and Benefit Sharing, Convention on Biological Diversity (CBD), Conference of the Parties (COP), Decision VI/24 A (2002) [hereinafter “the Bonn Guidelines”].

55. See, e.g., United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Non-legally Binding Authoritative Statement of Principles of Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. Doc.

Convention.⁵⁶

The famous Article 8(j) of the CBD is perhaps the single most important provision on indigenous knowledge in a substantive international environmental treaty. That Article has foisted progressive and practical strategies for the realization of indigenous peoples' rights to their knowledge through access and benefit sharing (ABS), and the migration of these rights into other regimes, notably IPRs and plant genetic resources for food and agriculture (PGRFA). The promotion of farmers' rights as an integral aspect of indigenous knowledge under the PGRFA predates the CBD.⁵⁷ However, the CBD, especially its ABS principles and programs, inspired the principal treaty on farmers' rights; The International Treaty on Plant Genetic Resources for Food and Agriculture.⁵⁸ The CBD is the framework instrument for the 2010 Nagoya Protocol on Access and Benefit-Sharing,⁵⁹ which reflects the highpoint of Convention's work on indigenous knowledge.

Other substantive treaty instruments relevant to aspects of indigenous peoples' rights include: the International Covenant on the Elimination of All Forms of Racial Discrimination;⁶⁰ the Convention on the Elimination of All Forms of Discrimination Against Women;⁶¹ and the Convention on the Rights of the Child.⁶² Jointly and severally, these instruments focus on discrimination, and the vulnerability of women and children. As the most destitute members

A/CONF.151/26 (Vol. III) (Aug. 14, 1992).

56. See, e.g., The Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994, Sen. Treat. Doc. No. 104-29, 1954 U.N.T.S. 3.

57. The PGRFA has its roots in the 1983 International Undertaking on Plant Genetic Resources for Food and Agriculture, which resulted from FAO Conference Resolution 8/83. Food and Agricultural Organization, Comm. on Genetic Res. for Food and Agric., *International Undertaking on Plant Genetic Resources for Food and Agriculture*, Res. 8/83, FAO Doc. CPGR/87/Inf.3, (August, 1983), available at <http://www.fao.org/ag/CGRFA/iu.htm>.

58. See *International Treaty on Plant Genetic Resources for Food and Agriculture*, available at <ftp://ftp.fao.org/docrep/fao/011/i0510e/i0510e.pdf> [hereinafter ITPGRFA]. Article 1.1 of the ITPGRFA provides: "The objectives of this Treaty are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security." *Id.* art 1.1.

59. See particularly preambular sections of the 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, available at <http://www.cbd.int/abs/>.

60. Int. Conv. on the Elim. of All Forms of Racial Discrim., 660 U.N.T.S. 212 (1969), available at <http://www.unhcr.org/refworld/docid/3ae6b3940.html>.

61. Conv. on the Elim. of All Forms of Discrim. of Women, 1249 U.N.T.S. 13 (1981), available at <http://www.unhcr.org/refworld/docid/3ae6b3970.html>.

62. Conv. On the Rights of the Child, 1577 U.N.T.S. 3 (1990), available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

of the human family, these themes resonate strongly with indigenous peoples, especially indigenous women and children. It is instructive that the Committee on the Rights of the Child has called attention on the implication of Convention on the Rights of the Child on indigenous children in its general comment.⁶³

3. Recent Developments – UNDRIP

Perhaps the most important instrument on indigenous peoples' rights generally, and from HRs perspective, is the 2007 UNDRIP.⁶⁴ Despite its doubtful status as a binding instrument, the document derives its significance from a number of factors. First, it is most unlike any other “declaration” given its long evolutionary process and unquestionable legitimacy as evidenced in the robust participation of indigenous peoples in its making.⁶⁵ Second, according to James Anaya, the UNDRIP:

[D]oes not [necessarily] affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather *elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples . . .* [it] reflects the existing international consensus regarding the individual and collective rights of indigenous peoples⁶⁶

Third, UNDRIP is the most comprehensive elaboration of indigenous peoples' rights in a single document. Consequently, it helps to capture the scope and complexity of those rights at a glance. Fourth, it represents, in a consolidated form, the climax of the attempts hitherto to locate and justify peculiarly indigenous peoples' rights outside the broader conventional HRs

63. See Conv. on the Rights of the Child, General Comment No. 11 (2009), U.N. Doc. No. CRC/C/GC/11 (Feb. 12, 2009), available at <http://www2.ohchr.org/english/bodies/crc/docs/CRC.GC.C.11.pdf>.

64. On the significance of UNDRIP, see Allen & Xanthaki, *supra* note 46; see also James Anaya, *The Rights of Indigenous Peoples to Self-Determination in the Post Declaration Era*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 184 (Claire Charters & Rodolfo Stavenhagen, eds., 2009) [hereinafter Anaya 2009b].

65. See CHIDI OGUAMANAM, INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE 82 (2006) (arguing that “[UNDRIP’s] legitimacy is unimpeachable, given the highly participatory process that led to it”).

66. Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶¶ 40, 43, Human Rights Council, U.N. Doc. A/HRC/9/9 (Aug. 11, 2008) (by S. James Anaya) (cited in HELFER & AUSTIN, *supra* note 8, at 442 (emphasis added)); see also Anaya 2009b, *supra* note 64.

frameworks.⁶⁷ Fifth, being essentially a declaration, UNDRIP represents a more effective and practical approach to indigenous rights than a new treaty could possibly accomplish. Finally, the declaration represents a bold attempt to put to rest the lingering historical controversy over the inchoate status of self-determination as it applies to indigenous peoples.

UNDRIP's exceptional legal and historical status marks it out as a unique instrument. There is no other document more qualified as the starting point for distilling pivotal elements of indigenous peoples' rights, especially those that will assist in mapping them onto the intersection between HRs and IPR. Without discounting the diverse range of rights under UNDRIP, we can identify two of those rights from which all other rights issue. They are the right to self-determination,⁶⁸ and the rights associated with knowledge and culture. The latter are elaborated across the Declaration's text⁶⁹ and are associated with its provision on IP.⁷⁰ In a way, the rights to knowledge and culture are extensions of the right to self-determination.

Self-determination is the chart with which to navigate indigenous peoples' rights in their entire detail. It is "the most central human rights issue for indigenous peoples."⁷¹ As an aggregation of indigenous peoples' rights, self-determination is one that comfortably situates within economic, social, and cultural rights as well as civil and political rights. It exemplifies the indivisibility of HRs.

The IBRs basically provide the legal foundation of the right to self-determination. The CESCR and the CCPR share an exact textual statement of the right in their respective first Articles, which states: "All *peoples* have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁷² Self-determination is an enabling right, one that capacitates the realization of every other promise of HRs. However, expressed that way, self-determination may appear hollow, and runs the risk of representing everything, but amounting to nothing. More meaningfully expressed, the

67. More than elaborating fundamental HRs in the specific cultural, historical, social and economic contexts of indigenous peoples, the declaration also articulated specific indigenous claims that are not accommodated within the fundamental HRs framework.

68. See Anaya 2009b, *supra* note 64.

69. See, e.g., UNDRIP, *supra* note 29, art. 5, 8(2), 9, 11–16, 20, 24, 25, 26, 27, 31.

70. See *id.* art. 31.

71. HELFER & AUSTIN, *supra* note 8, at 447; see also Anaya 2004, *supra* note 12, at 97 (noting that no discussion of indigenous peoples' rights under international law is complete without a discussion of self-determination).

72. CESCR, *supra* note 31, art. 1 (emphasis added); CCPR, *supra* note 32, art. 1 (emphasis added).

fulcrum of HRs is the dignity and integrity of the human person for the realization of their potential, made possible through the exercise of the right to self-determination.

As noted earlier, despite the pre-eminence of self-determination in HRs jurisprudence, indigenous peoples have remained equivocal candidates for the full realization of the right. Because of the state-centred nature of the right to self-determination, extending the right to indigenous peoples or *populations* remained a matter of jurisprudential hair-splitting for a long time.⁷³ As we have noted, the ILO Convention 169 exemplifies the trepidation over extending the right to self-determination to indigenous peoples. Hence, it shrouded the rights in caveats. In contrast to the reluctance of preceding substantive and interpretive documents on the issue of self-determination, the UNDRIP lays to rest any lingering scepticism over the application of the right to self-determination to indigenous peoples. In Article 3, it reiterates exact textual provisions of the right to self-determination borrowed from the CDESCR and the CCPR.⁷⁴ The difference is that it unequivocally states that “*indigenous peoples* have the right to self-determination.”⁷⁵

In its provisions, the right to self-determination is designed to be translated into the political, economic, social, and cultural development realms. As a result, virtually all the provisions of CDESCR, CCPR, even UNDRIP and other HRs instruments are elaborations of the political, economic, social, and cultural aspects of self-determination. Here are two examples: Article 27 of the CCPR reads as follows: “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”⁷⁶ Also, Article 20 of UNDRIP provides as follows: “[i]ndigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.”⁷⁷

IP, and specifically knowledge governance is “directly relevant to self-determination claims, in particular the cultural and technological, and economic development of indigenous peoples.”⁷⁸ A look at the provisions of UNDRIP

73. See Anaya 2004, *supra* note 12, at 100–103.

74. UNDRIP, *supra* note 29, art. 3.

75. *Id.*

76. CCPR, *supra* note 32, art. 27.

77. UNDRIP, *supra* note 29, art. 20.

78. See HELFER & AUSTIN, *supra* note 8, at 448.

and, indeed, most of the international HRs instruments relevant to indigenous peoples' rights reveal a link between self-determination, and indigenous knowledge and cultural practices and, by extension, an exposure of the latter to the IP. In the next part, we synthesize the discourse on the convergence between HRs and IPRs, and highlight the peripheral treatment of indigenous peoples' rights in that context.

II. HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHTS

According to Helfer, the fairly recent engagement of HRs and IPRs is a reactionary consequence of two developments. The first is the historical negligence of the cultural rights of indigenous peoples.⁷⁹ The second is the linking of IP with trade via the TRIPS and TRIPS-plus agreements.⁸⁰ One can add a third reason, namely the continued expansion of both HRs and IPRs in the last quarter of the twentieth century, which has resulted in their overlapping interest in identical subject matters.⁸¹

On the first point, the 2007 UNDRIP and the 1995 Guidelines for the Protection of the Heritage of Indigenous Peoples⁸² resulted from the U.N. HRs system's bid to close the gap that the cultural rights of indigenous peoples posed for IPRs.⁸³ In regard to the second and third points, the WTO—through TRIPS—now supervises an unprecedented trend of IPRs expansion by extending the scope of IPRs coverage to all fields of technology.⁸⁴ In the same

79. *Id.*

80. Laurence R. Helfer, *International Rights Approaches to Intellectual Property: Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971, 982 (2007) [hereinafter HRs Framework]. TRIPS-plus refers to regional and various other forms of free trade agreements with intellectual property standard that go beyond the TRIPS' standard.

81. See Chidi Oguamanam, *Intellectual Property: The Promise and Risk of Human Rights*, in INTELLECTUAL PROPERTY FOR THE 21ST CENTURY 319: Interdisciplinary Approaches (B. Courtney Doagoo et al., eds., 2013) [hereinafter Oguamanam 2013].

82. Special Rapporteur on the Protection of the Heritage of Indigenous People, Comm. On Human Rights, Subcomm. On Prev. of Discrim. & Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1995/26 (Jun. 21, 1995) (by Erica-Irene Daes); see HRs Framework, *supra* note 80, at 983.

83. HRs Framework, *supra* note 80, at 982–983. The *raison d'être* for UNDRIP goes beyond IP. Indeed, the process that eventually resulted in the United Nations Draft Declaration on the Rights of Indigenous Peoples dates back to 1970s, some accounts even trace it to 1960s. It is part of the broader struggle for the emancipation of indigenous peoples from colonialism through self-determination. It received greater impetus in the 1980s when the subjects of indigenous knowledge, cultural heritage and intellectual property received more traction in the discourse of indigenous issues. For insight, see Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 Eur. J. Int. Law 141 (2011).

84. TRIPS' expansion of IPRs is captured under Article 27 which, among other things, provides for patent rights on “any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.” TRIPS:

timeframe, public international law advances interpretative permissiveness of economic, social, and cultural rights.⁸⁵ As well, pressure by IPRs holders on both political and economic scenes has resulted in regulatory capture of important IPRs norm-creating bodies, including the WTO itself and the WIPO.⁸⁶

In terms of impacts, TRIPS and TRIPS-plus agreements have been linked to setbacks in global progress in HRs.⁸⁷ Given the ubiquity of IPRs in the global social, economic, and cultural fabric, such setbacks pervade all facets of HRs. In virtually every traditional HRs realm, notably the rights to health, access to essential medicines, rights to food, education, information, freedom of expression, and even the emergent right to development, IPRs appear to be on trial. TRIPS is associated with escalating inequities between the global north and south. As well, IPRs are perceived as the tools for freezing access to knowledge,⁸⁸ especially against those in direst need.

Eschewing elaborations of IPRs' complicity in fuelling specific HRs crises,⁸⁹ our interest is in the conceptual tenor of those discussions. In that regard, the relationship between HRs and IPRs is expressed from diverse perspectives. The first thinking is that HRs are directly conflicted with IPRs.⁹⁰ While HRs are essentially public rights, IPRs are for the most part private rights, albeit heavily mediated by public regarding considerations. By their

Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 21, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

85. The consequences is that while various forms of innovations in the life sciences (such as genes), with ramifications for pharmaceutical, food, agriculture and medicines, are subject of patents, on the human rights front, the right to health, access to medicines and the rights to adequate food, as well as the right to moral and material interest in intellectual creations are also being fleshed out pursuant to the general comments on the CESCR. *See generally* CESCR, *supra* note 31.

86. *See* SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* (2003); *see also* PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* (2002).

87. *See generally* Cynthia M. Ho, *Current Controversies Surrounding Patent Rights and Public Health in a World of International Norms*, in *PATENT LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* 673 (Toshiko Takenaka, ed., 2008) [hereinafter Ho]; *INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS* (Tzen Wong & Graham Dutfield, eds., 2011).

88. A caveat is necessary here to indicate that while the undisputed visibility of IP makes it a flash point for the escalating HRs gaps in the areas of access to knowledge goods, there are many factors that mediate access to knowledge and HRs beyond IPRs. For instance, while the patent regime is complicit in regard to access to life saving medicines by the world's neediest, factors such as political corruption or inadequate infrastructure, to name the few, can also militate against access to essential medicines, and other health care deliverables even when patent-related barriers are addressed.

89. *See generally* Grosheide Paradox, *supra* note 1; *see also* HELFER & AUSTIN, *supra* note 8.

90. Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Co-existence?*, 22 NETH. Q. HUM. RTS. 167, 168 (2004) [hereinafter Conflict or Co-existence].

nature, public rights constrain or moderate private rights. The second is premised on the compatibility of the objectives of HRs and IPRs, i.e., the advancement of human capacity, welfare, and potential. In this conceptual matrix, HRs and IPRs are mutually re-enforcing and therefore capable of co-existence.⁹¹

The third is more pragmatic. It does not see HRs and IPRs as exclusive concepts. Rather, it recognizes that there are HRs and non-HRs aspects of IPRs.⁹² Fourth—and closely related—is that IP can serve as an instrument to foster the objectives of HRs. Fifth, (which is a converse of the third and still in the instrumental realm), is that HRs considerations can be a check on unbridled IPRs claims.⁹³

Another tenable view is that IPRs jurisprudence has in-built capacity to accommodate variegated HRs-friendly policy-oriented exceptions.⁹⁴ This is a euphemistic way of insisting that IPRs have inherent capacity to resolve the ever-permanent question of balance between rights holders and those seeking access to intellectual works.⁹⁵ A well-negotiated balance between HRs and IP mitigates the idea of conflict. Overall, HRs constitute a fairly new and important, yet long neglected conceptual platform for negotiating the elusive balance in IPRs.

The HRs regime is the first in time and the most proactive in engaging its IPRs counterpart.⁹⁶ The latter has been historically reluctant to engage HRs.⁹⁷ As such, IPRs have yet to demonstrate an understanding of their relationship with HRs. IPRs' chilling attitude to HRs reflects the gaps in the former's *modus*

91. See Christophe Geiger, *Fundamental Rights, a Safeguard for the Coherence of Intellectual Property?*, 35 INT'L REV. INTELL. PROP. & COMPETITION L. 268 (2004); see also Groesheide Introduction, *supra* note 2, at 22–23.

92. Peter K. Yu, *Ten Common Questions About Intellectual Property and Human Rights*, 23 GA. ST. U. L. REV. 709, 710–11 (2007) [hereinafter Ten Questions].

93. Groesheide Introduction, *supra* note 2, at 22–23.

94. See generally Ysolde Gendreau, *Copyright and Freedom of Expression in Canada*, in *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION - INTELLECTUAL PROPERTY, PRIVACY* 21 (Paul L.C. Torremans, ed. 2004).

95. At national level, the prospects of the legal system negotiating this balance toward positive outcome for users of intellectual works is higher in relation to the international level where states' obligations to international agreements are easily undermined by claims to sovereignty. Also, at international level, asymmetrical power relations and negotiating leverage between technological strong countries and their less endowed counterparts are more pronounced than the prevailing dynamics at national levels. See Wendy J. Gordon, *Do we have a Right to Speak with Another's Language? Eldred and the Duration of Copyright*, in *COPYRIGHT AND HUMAN RIGHTS: FREEDOM OF EXPRESSION - INTELLECTUAL PROPERTY, PRIVACY* 109 (Paul L.C. Torremans, ed. 2004).

96. See Conflict and Co-existence, *supra* note 90.

97. There is no reference to HRs in major international intellectual property agreements, including the Berne and Paris Conventions as well as the TRIPS Agreement. The converse is true in regards to the UNDHR and the CESCR.

operandi. A major challenge in the HRs-IPRs discourse is to fill those gaps so that IPRs, in the words of Drahos, can accommodate the “interests and needs that it currently does not.”⁹⁸

The ongoing rapprochement that the HRs system is making on IPRs is not without results. There are two important illustrations of gestational attempts to map HRs framework for IPRs. One is through the general HRs system of the U.N. The other is through the more focused interpretative process of the CESCR. The first initiative was animated by public health crisis perceived to have been aggravated by TRIPS.⁹⁹ For the most part, the other is both a response to the first as well as an incidence of the efforts toward progressive realization of economic, social, and cultural rights of the IBRs. We focus more on the economic, social, and cultural rights categories because of their implication for indigenous peoples' rights.

First, insisting on the primacy of HRs over IP,¹⁰⁰ the U.N. HRs system capitalized on TRIPS negative outcomes, especially in the area of health in developing countries, to stoke tensions between trade-based orientation to IPRs and HRs, especially the right to health. This approach was initiated in 2000 through Resolution 2000/7 of the Sub-Commission on the Protection and Promotion of Human Rights (the Sub-Commission).¹⁰¹ Titled *Intellectual Property and Human Rights*¹⁰² the resolution was, in way, a bold attack on TRIPS' negative effects on aspects of HRs. That perception quickly spread to other key U.N. bodies.¹⁰³ A combination of events during the early 2000s resulted in a perfect alignment of circumstances and opportunities around the HIV/AIDS pandemic, which marked a period of concerted pressure and resistance to TRIPS across regimes.¹⁰⁴

For instance, the World Health Organization (WHO) was instrumental to

98. See Grosheide Introduction, *supra* note 2, at 22 (quoting World Intellectual Property Organization [WIPO], *The Universality of Intellectual Property: Origins and Developments*, at 25, WIPO-UNHCHR/IP/PNL/98/1 (Oct. 28, 1998) (by Peter Drahos)).

99. See IP in Global Governance, *supra* note 52, at 87–91; see also Ho, *supra* note 87.

100. See Intellectual Property Rights and Human rights, U.N. High Comm. for Human Rights, Sub-Commission on Human Rights, Res.2000/7, 52nd Sess., ¶ 3, U.N. Doc. E/CN.4/Sub.2/2000/7 (August 17, 2000) (Adopted without a vote).

101. Comm. Hum. Rts., 25th Sess., Res. 2000/7, Intellectual Property and Human Rights, UN Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000), <http://www.twinside.org.sg/title/subcom.htm> (May 15, 2014).

102. Intellectual Property Rights and Human rights, U.N. High Comm. for Human Rights, Sub-Commission on Human Rights, Res.2000/7, 52nd Sess., ¶ 3, U.N. Doc. E/CN.4/Sub.2/2000/7 (August 17, 2000) (Adopted without a vote).

103. See IP in Global Governance, *supra* note 52, at 87–88.

104. Resolution 2000/7 articulated the scope of HRs crisis posed by IP in many contexts, including technology transfer, right to food, genetic resources, access to patented medicines and the exploitation of the indigenous knowledge.

the 2001 Doha Ministerial Declaration on TRIPS Agreement and Public Health.¹⁰⁵ That declaration forced a hurried but failed attempt to “retouch” TRIPS with a compassionate primer in response to a dire humanitarian and public health crisis it was perceived to have escalated. WHO’s efforts were complemented by emboldened new actors in global health governance committed to addressing pharmaceutical R&D gaps in poor peoples’ disease and the problem of patent-driven access freezes to essential medicines at a time when the world faced a global health crisis of historic proportion.¹⁰⁶ Not only did the U.N. HRs system insist upon the primacy of HRs over IP, it committed to deepen the understanding of the relationship between HRs and IPRs through, among other things, commissioned studies and reports. Perhaps more important, it sought to participate or have observer status in important IPRs policy making fora, such as the WTO and the WIPO-IGC.¹⁰⁷

The efforts under the auspices of the U.N. HRs system to promote normative primacy of HRs over IPRs lacked legal force for a number of reasons.¹⁰⁸ First, resolutions of the Sub-Commission are not binding.¹⁰⁹ Second, the Sub-Commission’s claim that TRIPS violates HRs has yet to be rigorously scrutinized through the rules of customary international law.¹¹⁰ Third, along with other initiatives that have promoted the primacy of HRs over IPRs, the Sub-Commission’s efforts do not provide textual analysis of HRs framework for IPRs.¹¹¹ In short, claims of HRs supremacy over IPRs appear not *directly* supported by core HRs instruments or principles of customary international law.¹¹²

Despite the legal weaknesses of the initiatives of the UN HRs systems,

105. Laurence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 Y. J. INT’L L. 2 (2004).

106. See Ho, *supra* note 87; Taiwo A. Oriola, *Strong Medicine: Patents, Market, and Policy Challenges for Managing Neglected Diseases and Affordable Prescription Drugs*, 7 CAN. J. L. & TECH. 57 (2009); Chidi Oguamanam, *Patents and Pharmaceutical R&D: Consolidating Private-Public Partnership Approach to Global Public Health Crises*, 13 J. WORLD INTELL. PROP. 556 (2010).

107. HRs Framework, *supra* note 80, at 987.

108. *Id.* at 985–986.

109. *Id.* at 985.

110. *Id.* at 985–86.

111. *Id.*

112. According to Yu, two forms of conflict are activated by IP and HRs. One is external and the other internal. In regard to external conflict, we need to first distinguish non-human rights aspects of IP. As to internal conflict which exists within the HRs paradigm, he argues, “the principle of human rights primacy is inapplicable, because all the conflicting rights have a human rights basis.” See Ten Questions, *supra* note 92, at 711–12. This Author hesitates to entirely dispense with the human right primacy in the context of internal conflict, especially given the interpretative trend of the CESCR. See GC 17, *infra* note 118, ¶ 1. However, the problem with a primacy approach is that it has to provide a response to the concept of indivisibility of HRs.

Resolution 2000/7 represents an “ambitious new agenda for reviewing intellectual property issues within the U.N. human rights system, an agenda animated by the basic principle of human rights primacy.”¹¹³ But the rather belated task of attempting a textual elaboration of HRs framework for IPRs fell on the CESCR via its GCs, which have, essentially, advisory status.

In 2001, the Committee issued a statement on HRs and IP¹¹⁴ in an attempt to “identify some of the key human rights principles deriving from the Covenant that are required to be taken into account in the development, interpretation and implementation of contemporary intellectual property regimes.”¹¹⁵ Though subject to progressive refinement,¹¹⁶ the statement provided the foundation for the Committee’s current and long term interest in the exploration of IPRs from HRs perspectives. The Committee identified ten cardinal HRs principles pursuant to the Covenant to guide the elaboration of IPRs.¹¹⁷

In accordance with the 2001 statement of principles the Committee issued, in 2005, GC No. 17 (Article 15(1)(c)).¹¹⁸ The Article in question deals with authors’ right. It is the key Covenant provision with perhaps the most direct relevance to IPRs. It provides as follows: “The States Parties to the present Covenant recognize the right of everyone . . . [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”¹¹⁹

Without delving into the elaborate interpretative details of the GC¹²⁰ on the above deceptively simple provision of the Covenant, a highlight of its important contributions to the textual elements of Article 15(1)(c) is helpful. First, the GC notes that despite the narrowness of the language of Article 15(1)(c) that identifies authors to be natural persons only, “[the authors] could also be groups of individuals.”¹²¹ Similarly, despite the emphasis of Article 15(1) on

113. HRs Framework, *supra* note 80, at 986.

114. U.N. Econ. & Soc. Council, Comm. on Econ., Social & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2001/15 (Dec. 14, 2001).

115. *Id.* ¶ 2.

116. *Id.*

117. They are universality, indivisibility, interdependence, equality, non-discrimination, participation, accountability, general legal obligations, core obligations, international cooperation and assistance. The Statement indicates that these principles are essentially basic and not exhaustive.

118. *See* U.N. Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rights, General Comment No. 17 (2005), U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) [hereinafter GC 17]; *see* Hans Morten Haugen, *General Comment 17 on “Authors’ Rights”*, 10 J. WORLD INTELL. PROP. 53 (2007).

119. CESCR, *supra* note 31, art. 15(1)(c).

120. They are contained in a 17 page document spanning 57 paragraphs.

121. GC 17, *supra* note 118, ¶ 7.

individual creators as beneficiaries of moral rights (protection of moral and materials interest), “under certain circumstances,” the GC notes, such rights, can “also be enjoyed by groups of individuals or by communities.”¹²² It further remarks that even though legal entities are recognized holders of IP, “their entitlements [to IPRs], because of their different nature, are not protected at the level of human rights.”¹²³

The GC douses the apparent bias of Article 15(c) for authors as opposed to inventors and other categories of innovators outside the authorial realm.¹²⁴ Perhaps more important, it breaks the textual silence of the Covenant on indigenous peoples. It clarifies that reference to “scientific, literary or artistic production” encompasses “creations of the human mind, that is to ‘scientific productions’, such as scientific publication and innovations, including *knowledge, innovations and practices of indigenous and local communities . . . performances and oral traditions.*”¹²⁵ The GC notes that the modality to protect moral and material interests need not equate with those obtained under conventional IPRs so long as such interests can be protected by other means.¹²⁶

Referring to “moral interest,” the GC acknowledges that moral rights protect the intrinsic personal character of every creation of the human mind as an extension of a creator’s personality, toward sustaining “the durable link between creators and their creations.”¹²⁷ Given the recognition of group rights, this view fits perfectly within the immemorial link between indigenous peoples and their knowledge systems. On “material interest,” the GC identifies a parallel between this right and property rights and the right of workers to adequate remuneration pursuant to UNDHR and Article 7(a) of CESCR. It notes that as opposed to other HRs categories, material interests have no link to author’s personality but they assist to realize the enjoyment of the right to an adequate standard of living. Shifting the rights from conventional HRs, the GC notes that the term of protection of authors’ right on the basis of material interest may not be premised on the lifespan of an author. What is important is a remuneration scheme that enables authors to enjoy adequate standard of

122. *Id.* ¶ 8. An example of the practical implication of this can be found in the famous Australian cases of *Milpururru v Indofurn Pty. Ltd.* (1994) 130 ALR 659 (Austl.) and *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481 (Austl.). Furthermore, *Bulun Bulun v R & T Textiles Pty. Ltd.* (1998) 157 ALR 193 (Austl.), provides a judicial perspective on Aboriginal communal interest in copyright, and by extension intellectual property.

123. GC 17, *supra* note 118, ¶ 7.

124. See Rochelle C. Dreyfuss, *Patents and Human Rights: Where is the Paradox?*, in *INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX 72* (Grosheide ed., 2010) (underlining the modest ramification of Article 15(1)(c) for inventors). *But see* Ten Questions, *supra* note 92.

125. GC 17, *supra* note 118, at ¶ 9 (emphasis added).

126. *Id.* ¶ 10.

127. *Id.* ¶ 12.

living. While this fits within indigenous peoples' expectation from the IPRs system, unlike the GC's position on moral rights, it conflicts with the immemorial tenor of traditional knowledge.

In elaborating the principle of general legal obligations of states on HRs, the GC reiterates the notion of progressive obligation. It notes that like all other HRs, the rights under Article 15(1)(c) impose three levels of obligations on state parties, namely to *respect, protect* and *fulfil*.¹²⁸

Under the consideration of principles of special legal and related obligations,¹²⁹ the GC makes two important observations that have ramifications for indigenous peoples' rights. They deserve recalling in *extenso*:

States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. 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 under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or artistic production; where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions.¹³⁰

The GC recognizes that the provisos of Article 15(1)(c) ought to be viewed in relation to other rights recognized under the Covenant. It insists that for the realization of full range of rights, parties must strike "adequate balance" between rights under that Article and other Covenant provisions.¹³¹ Hence: "[i]n striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions

128. *Id.* ¶ 28.

129. These are further amplifications of the principles set out under the Statement on Human Rights and Intellectual Property. The one refers to obligation that are special to given provision or subject matter while the other refers to obligations that have related application to other rights recognized under the Covenant.

130. GC 17, *supra* note 118, ¶ 32.

131. *Id.* ¶¶ 35, 40(e).

should be given due consideration.”¹³²

Continuing, the GC observes further:

Ultimately, intellectual property is a social product and has a social function. States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education. Moreover, States parties should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights. States parties should, in particular, consider to what extent the patenting of the human body and its parts would affect their obligations under the Covenant or under other relevant international human rights instruments.¹³³

On a balance, it would seem that the approach adopted by the GC embraces both a conflict and a complementary model. It, however, leaves the impression that the prevailing relationship between HRs and IPRs is conflict-driven, without disclaiming the potential for HRs complementary framework for IPRs. Setting the tone for its approach, the GC points out that Article 15(1)(c) rights, like other HRs, are distinct from most legal entitlements incidental to IP and should not be equated with them.¹³⁴ It distinguishes IPRs from HRs as follows:

Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity [Unlike human rights] intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else.¹³⁵

The significance of GC No.17 is not diminished by its status as a non-binding advisory opinion. Rather, it is a major attempt under normative

132. *Id.* ¶ 35 (footnotes omitted).

133. *Id.* (footnotes omitted).

134. *Id.* ¶¶ 1–2.

135. *Id.*

international HRs jurisprudence to explore the HRs-IP intersection, and appears to have set the tone on this important subject. GC No. 17 deals directly with just a sub-section of Article 15.¹³⁶ It is essentially the most preliminary of what promises to be a long-term work for the CESCR.

In addition, by adopting the principles of related obligations, universality, indivisibility, and interdependence of HRs,¹³⁷ the scope of the GC No. 17 is not limited to Article 15(1)(c), but includes other aspects of the Covenant. Subsequent GC, such as No. 21 (2009) on the *rights of everyone to take part in cultural life* (Article 15(1)(a)) re-echoes the sentiments enunciated under GC No. 17. Unless there is a radical change in orientation of the Committee, its future elaborations relevant to HRs and IPRs could be fairly predictable.¹³⁸

The belated interest of the Committee on the issues of HRs and IPRs raises some concern in terms of cohesion and scope. Before 2001 when the Committee issued the HRs principles for exploring IPRs, it is not clear to what extent its previous GCs, for example, GC Nos. 12 and 13—*right to adequate food* (art 11) and *right to education* (art 13) of 1999—took those principles into account. Undoubtedly, food and education are sites for innovation and creativity pursuant to “scientific, literary and artistic production.”

In contrast, there is remarkable synergy in the language and in the proactive engagement with HRs and IPRs in GC Nos. 17 and 21 (right to benefit from moral and material interest)—15(1)(c) and (right to take part in cultural life)—15(1)(a) respectively. This is not necessarily because of the location of these rights in the same Article text. Rather, both build upon the 2001 key HRs principles for the interpretation of IPRs regimes.¹³⁹ Notably, there is growing recognition of indigenous peoples in the post-2001 GC as a group requiring special protection. Also, remarkable is the increased recognition of the collective and communal nature of indigenous peoples' rights.¹⁴⁰

From the above outlook on the tenor of the HRs interface with IPRs, some observations are pertinent. Indigenous peoples' rights as HRs are barely recognized in the core international HRs instruments, and are not the subject of

136. Econ. & Soc. Council, Comm. on Econ., Social and Cultural Rights, General Comment No. 21, Right of Everyone to Take Part in Cultural Life, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter GC 21].

137. See *supra* note 118.

138. Presently, there is no GC on the right to enjoy the benefit of scientific progress. It is expected that any such GC would build on the framework of the post 2001 GCs and would give reasonable accommodation to indigenous peoples and their knowledge system.

139. The general text, scope and interpretive framework of these two documents are influenced by the 2001 general principles.

140. See, e.g., GC 21, *supra* note 136, ¶¶ 7, 9, 16(e), 36, 37; see also GC 17, *supra* note 118, ¶ 32.

direct references across diverse HRs instruments.¹⁴¹ Indeed, “[w]hen the UDHR and the ICESCR were drafted, the drafters did not have indigenous groups and traditional communities in mind.”¹⁴² Textual accommodation or dedicated references to indigenous peoples’ rights appear in secondary interpretive HRs instruments, notably the work of the Committee, especially in the context of its belated interest in HRs and IPRs. Even then, the Committee’s pre-2001 GCs were not issued with the same level of consciousness over the rapprochement between HRs and IPRs.

On its face, there is a paradoxical undertone in regard to indigenous peoples’ rights within the IP-HRs interface. While indigenous peoples’ rights can be potentially impacted in negative ways by the boomerang effect of HRs ratchet of IP,¹⁴³ “the use of human rights regime may even alleviate the existing bias against those performing intellectual labour outside the Western model.”¹⁴⁴ And yet, indigenous HRs have yet to be fully integrated onto the normative core of international HRs jurisprudence. The pivotal aspect of indigenous rights, namely the right to self-determination remains a right in a state of continuing negotiation over the detail of its application to indigenous peoples. The pre-eminence of the UNDRIP and its dedication to indigenous-specific HRs issues does not necessarily dispense with the need to justify indigenous groups or collective rights claims *via a vis* the individual thrust of HRs. That then provides the starting point in the next section for exploring the difficulties that arise in trying to configure indigenous rights at the intersection of HRs and IPRs.

III. MAPPING INDIGENOUS RIGHTS ONTO HRs-IPRS INTERFACE

Attempts to locate indigenous rights at the intersection of HRs and IPRs readily unveil the root of indigenous peoples disadvantage in both domains. This foundational negligence is at the heart of both the desperation to embrace, and trepidation to abhor, which depicts the dialectics of indigenous peoples’ response to both IPRs and HRs. Fitting the communal and collective nature of indigenous socio-cultural dynamics and their knowledge production processes within two individual-centred regimes is an inherently knotty endeavour. It evokes all the tractions of discrimination and exclusion that indigenous peoples endure in the colonization project as outliers in western legal traditions.

Because HRs and IPRs share a unity of focus on the individual, the collective character of indigenous rights remains alien to the two legal regimes.

141. This was the situation before the adoption on UNDRIP in 2007.

142. Ten Questions, *supra* note 92, at 740.

143. See Oguamanam 2013, *supra* note 81.

144. Ten Questions, *supra* note 92, at 744.

However, the expansive character of HRs supports their extension to groups.¹⁴⁵ Indigenous rights are subtly distinguished as a group right of *collective* nature as opposed to one of *corporate* nature. According to Peter Jones, conceived as corporate rights, group rights, cannot be represented as HRs. But conceived as collective rights, it is possible to represent such rights “either as human rights or as closely akin to human rights.”¹⁴⁶ Unlike collective rights, “corporate conception accords groups a status that is ultimate rather than derivative” from rights of individual members of the collective.¹⁴⁷

Understood as collective rights, indigenous peoples’ rights are immune from the traditional objections against group rights in HRs jurisprudence. Collective rights do not ascribe a morally distinct or significant identity to a group that is separate from its individual members.¹⁴⁸ Unlike corporate rights, group rights are not a licence to oppress. They do not subsume the rights of their individual members. They are not necessarily exclusionary in regard to other human beings. Rather, “[a] collective right will be eligible for consideration as a human right, or for membership in the same moral family as human rights, only if it is a right that we can ascribe universally to human beings and that rests upon their moral status as human beings.”¹⁴⁹ This nuance in the nature of indigenous rights as group rights may have informed the firm but controversial preference of indigenous over corporate right holders for protection in Article 15(1)(c) of the Covenant pursuant to GC No.17.

Another challenge that arises in locating indigenous peoples’ rights at the intersection of IPRs and HRs is a carryover from the HRs and IP debate. Just as not all IPRs warrant consideration as HRs,¹⁵⁰ not all indigenous rights are HRs. The ubiquitous nature of self-determination as an amorphous aggregation of indigenous rights runs the potential and real risk of cooptation of all forms of indigenous rights, including indigenous knowledge into the HRs rhetoric. Along similar lines, referring to the broader HRs jurisprudence, Helfer warns that “[w]ithout greater normative clarity, however, such ‘rights talk’ risks creating a legal environment in which every claim (and therefore no claim)

145. *See id.* at 741 (arguing that “human rights instruments contain considerable language that allows one to explore collective rights.”).

146. Jones, *supra* note 6, at 88; *see* Geoff Gilbert, *Individuals, Collectives and Rights*, in *MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY* 148 (Nazila Ghanea & Alexandra Xanthaki, eds., 2005); *see also* Douglas Sanders, *Collective Rights*, 13 *HUM. RTS. Q.* 368 (1991).

147. Jones, *supra* note 6, at 92.

148. *Id.* at 88.

149. *Id.* at 88–89.

150. Ten Questions, *supra* note 92, at 727.

enjoys the distinctive protections that attach to human rights.”¹⁵¹

The same temptation is true in regard to the collective nature of indigenous rights explored above. The fact that a right has a collective status does not necessarily make it a HR.¹⁵² According to Peter Yu, one of the potential dangers of HRs rhetoric in the IP arena is corporate hijack of IP protection via HRs claims.¹⁵³ He warns that “[s]uch development would exacerbate the already severe imbalance in the existing intellectual property rights system and would ultimately backfire on those who seek to use the human rights forum to enrich the public domain and to set maximum limits of intellectual property protection”¹⁵⁴

The dangers of HRs rhetoric, especially in regard to indigenous knowledge are manifold. Because of the primacy of HRs, there would be very marginal room for regulatory intervention in order to balance real public regarding conflicts.¹⁵⁵ Such consideration would include access to knowledge, and scrutiny of cultural practices that may be in conflict with other HRs. The outcome would be one in which indigenous knowledge is protected beyond the dictates of balance, scrutiny¹⁵⁶ and critical reflection.¹⁵⁷ Also, in a HRs ratchet of IPRs, indigenous peoples are in a weaker position to match corporate stakeholders in a running contest that has the potential of “a zero-sum game.”¹⁵⁸ In a reference to authors’ rights as HRs (which can be extrapolated to indigenous knowledge), Helfer notes that the trend of using HRs to expand IPRs has the potential to embolden:

[I]ndustries and interest groups that rely upon intellectual property for their economic well-being [to] invoke the authors’ rights and property rights provisions in human rights treaties to further augment existing

151. HRs Framework, *supra* note 80, at 976.

152. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 25 (2nd ed. 2003) (noting that “[c]ollectivities of all sorts have many and varied rights. But these are not—cannot be—human rights, unless we substantially recast the concept”) (quoted in Ten Questions, *supra* note 92, at 730 n.73).

153. See Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039, 1112–13 (2007).

154. Ten Questions, *supra* note 92, at 738.

155. See HRs Framework, *supra* note 80, at 994.

156. *Id.* at 996–97.

157. Indigenous peoples are not disposed to setting term limit to their knowledge forms which is perceived as immemorial, trans-generational and ongoing. This orientation is in conflict with term limit under conventional intellectual property.

158. See Dreyfuss, *supra* note 124, at 90 (observing that “by framing the issues as a battle among [corporate and indigenous] rights holders, this discourse promotes an adversarial perspective, where rights are construed as inuring to one group’s benefit over another’s, and the system as a whole is viewed a zero-sum game”).

standards of protection. The fear of such expansions helps to explain why some commentators are skeptical of attempts to analyze intellectual property issues in human rights terms.¹⁵⁹

Not all indigenous claims regarding IPRs or indigenous knowledge are necessarily HRs claim. In locating indigenous knowledge within the intersection of HRs and IPRs, it is important to identify the extent or circumstance in which indigenous claims may be located on HRs platform and when they fit within the instrumentalist economic rights of IP.¹⁶⁰ GC No.17 (Art 15(1)(c) is clear that the scope of the protection of rights recognized therein “does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.”¹⁶¹ It advises against equating IPRs with the HRs recognized under that Article.¹⁶²

Some rights, such as authors' rights may have, on the surface, the attributes of both HRs and IPRs. It is helpful therefore that in addition to identifying the attributes of the right in question, a crucial issue is to determine the status of rights' claimants. When the rights claimants are technically the narrow category recognized as indigenous in international law, such claims whether presented as *indigenous knowledge* or IPRs are more likely to have a HRs ramification. This is because given the precarious nature of indigenous peoples' civilizations and the extant threat to their cultural survival, the instrumental economic logic comes secondary to the urgency to deploy their knowledge and culture to salvage their vanishing identities, individual and collective integrity and self-determination.¹⁶³ On the other hand, other categories of rights claimants who are technically not *indigenous* and who are not faced with dire HRs crisis and threats to cultural survival are more likely to stake their claims to knowledge on the instrumental economic logic of IPRs.¹⁶⁴

The last major issue that saddle indigenous peoples right at the intersection of HRs and IP arises from the dialectic of HRs and IPRs, which has a spillover effect on indigenous rights. On their merits, without reference to indigenous peoples' rights, HRs and IP have a mutually re-enforcing and yet paradoxical relationship. The one is capable of undermining and re-enforcing the other.

159. HRs Framework, *supra* 80, at 1015.

160. See HELFER & AUSTIN, *supra* note 8, at 475.

161. GC 17, *supra* note 118, ¶ 2.

162. *Id.* ¶ 3.

163. Chidi Oguamanam, *Protecting Indigenous Knowledge in International Law: Solidarity Beyond the Nation-State*, 8 L. TEXT CULTURE 191, 213-14 (2004); Oguamanam 2008, *supra* note 9, at 39-40.

164. Right claimants in this category are mostly local communities in the non-enclave territories of the present day global south.

While HRs framework is capable of bolstering indigenous rights, especially indigenous knowledge, the latter is unlikely to fare better under HRs ratchet. Not many would disagree that those claims are still at the periphery of HRs, and recent attempts in HRs jurisprudence to accommodate indigenous knowledge are at their very early stage.¹⁶⁵ Inevitably, they are being elaborated on *ad hoc* basis. As such, they are hardly capable of bridging the dichotomous theoretical and philosophical foundations of indigenous peoples' rights and HRs.

On IPRs, indigenous rights claimants are fully conscious of IPRs' double-edged nature, especially in the context of indigenous knowledge. IP has the ability to serve the ends of economic empowerment for indigenous knowledge holders. Yet, it potentially represents a threat to cultural survival because of its reductionist inclination to weigh creativity and cultural production on narrow scale of economic or market values.¹⁶⁶ Not to mention its overall disdain for indigenous knowledge as *unowned* knowledge, devoid of intellectual ingenuity. In a critical appraisal of the dialectical relationship between IP and indigenous knowledge, it has been observed that “[i]ndigenous and local communities . . . have a complex relationship with the intellectual property system. From suspicion and trepidation, they engage that system reluctantly, but often proactively . . . [and] [l]ike the ‘dialectics of the colonized mind,’ indigenous peoples’ attitude toward intellectual property reflects both admiration, and disaffection or resistance.”¹⁶⁷

For example, indigenous peoples oppose IP expansion in the realm of health and essential medicines, and in the appropriation of intangible cultural knowledge and expression of folklore. On the other hand, they are not averse to the use of IP to protect their knowledge systems, especially in the realm of biodiversity or bio-cultural knowledge, including farmers' rights and place-based innovation or forms of geographical indications.¹⁶⁸

This complex dialectical approach to IP by indigenous rights holders is even affirmed in the two important documents on indigenous rights, the UNDRIP and the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples.¹⁶⁹ While these documents encourage traditional

165. See generally, INDIGENOUS PEOPLES INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT (Peter Drahos and Susy Frankle, eds., 2012).

166. See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997).

167. See Chidi Oguamanam, *Patents and Traditional Medicine: Digital Capture, Creative Legal Intervention, and the Dialectics of Knowledge Transformation*, 15 IND. J. GLOBAL LEGAL STUD. 489, 490 (2008).

168. See Madhavi Sunder, *IP³*, 59 STAN. L. REV. 257, 297–98 (2006).

169. Special Rapporteur on the Discrimination Against Indigenous Peoples, *Protection of the*

knowledge within existing IPRs paradigms, their approach to protectable subject matters transcend the IP system.¹⁷⁰ Along these line, Helfer notes that “a human rights-inspired analysis of traditional knowledge views intellectual property as one of the problems facing indigenous communities, and only perhaps, as part of the solution to those problems.”¹⁷¹

CONCLUSION

Extant exploration of the interface between HRs and IP focuses on conventional HRs categories. The extent to which these categories include indigenous peoples' rights remains inchoate. Unexpectedly, the historical and jurisprudential orientation of both HRs and IPRs on individual as opposed to group rights does not dispose them to engage fully with indigenous peoples' rights, including their knowledge systems. Consequently, HRs-IPRs interface inevitably exposes the roots of the historical challenge, which the indigenous question poses for the colonial western legal tradition.

Yet, HRs-IP interface presents a unique opportunity for revisiting the gaps in both HRs and IP jurisprudence on account of indigenous peoples' rights. In a counterintuitive way, as both a negotiating process and its outcome HRs encounter with IP can be measured meaningfully by focusing on its ramification for indigenous peoples as the most vulnerable members of the human family. After all, “the realization of human rights must be judged according to the level of implementation among the most disadvantaged.”¹⁷² A critical understanding in both historical and contemporary contexts of the nature and evolution of the rights of indigenous peoples is necessary. In the least, such understanding is a foundational matter to make the case that no meaningful discourse of HRs-IP interface is possible without engaging the rights of indigenous peoples.

Heritage of Indigenous People, Comm. On Human Rights, Subcomm. On Prev. of Discr. & Prot. Of Minorities, U.N. Doc. E/CN.4/Sub.2/1995/26 (Jun. 21, 1995) (by Erica-Irene Daes); see also HRs Framework, *supra* note 80, at 984; HELFER & AUSTIN, *supra* note 8, at 450.

170. HRs Framework, *supra* note 80, at 984.

171. *Id.*

172. Cullet, *supra* note 21, at 417.