Governing Indigenous Knowledge?

A Study of International Law, Policy, and Human Rights

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<u>ABSTRACT</u>

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A Study of International Law, Policy, and Human Rights

Rebecca C. FAN (PhD)

The story of indigenous peoples' knowledge systems, also known as indigenous knowledge (hereafter IK), is a complex one tangled with different and sometimes conflicting interests, values, and interpretations from a variety of disciplines, or specialized fields. A number of international treaty and trade agreements that want to 'harness' IK also turned it into an object of global governance, as this PhD study argues. This study also argues that the well-being of IK has gradually emerged as a global agenda for sustainable development and intergenerational justice, which constitute the defining characteristics of contemporary discourse of heritage. Consequently, IK issues and debates have become more versatile and multifaceted with a widening scope and mounting stakes.

This is a sociological and legal study of knowledge that analyses the epistemological struggle resulting from different understandings of the nature and purpose of IK, which has causal relationship with the inadequacies of the governing regimes documented in this study. This study argues that such struggle and inadequacy form the core problem for IK governance. Furthermore, this study takes a novel approach guided by indigenous peoples' epistemology, which represents ties between ecology, landscape, and people in a web of connections, to argue that IK is a cross-cutting subject and a form of emplaced knowledge. Hence it is not simply a property issue or debate as most literature tends to focus on. This study further argues that what constitutes the cornerstone of IK claims by indigenous peoples is essentially biocultural diversity that nurtured and sustained IK as well as IK-holder communities as distinct peoples.

Through an interdisciplinary approach of synergy and synthesis, this study developed a number of original ideas and frameworks to analyse this complex story of IK. By doing so, this study shows how IK is a challenging subject that is inevitably political; it is also tangled with inherently heterogenetic and incoherent regimes of governance, from intellectual property and trade to environmental governance and development to natural and cultural heritage and human rights. This study takes these regimes as sites of inquiry in the tradition of critical theory to further unpack and problematize the development imperative and the private-property-based system exercised by these regimes. Finally, this study concludes that IK governance can make or break vulnerable groups like indigenous peoples to a point of prosperity or deeper poverty and extinction. Therefore, it requires particular care with an integrated approach. This study aims to fill an important gap in the literature with recommendations for future policy and research.

KEYWORD: emplacement, displacement, biocultural diversity, socio-cultural ecology, cultural and natural heritage, development with culture and identity, community, subsistence rights, dignity and well-being.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACHPR: African Commission on Human and Peoples' Rights
ACtHPR: African Court on Human and Peoples' Rights
AICHR: ASEAN Intergovernmental Commission on Human Rights
AIPP: Asia Indigenous Peoples Pact
ASEAN: Association of Southeast Asian Nations
BINGO : big international non-governmental organizations
CBD: Convention on Biological Diversity
CESCR: Committee on Economic, Social and Cultural Rights
CITES: Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP: Conference of Parties
CSD: United Nations Commission on Sustainable Development
CSIR: Council for Scientific and Industrial Research
DCI: development with culture and identity
dDRIP: draft Declaration on the Rights of Indigenous Peoples
doCip: Indigenous Peoples' Center for Documentation, Research and Information
DRD : Declaration on the Right to Development
ECOSOC: Economic and Social Council (of the United Nations)
EMRIP: Expert Mechanism for the Rights of Indigenous Peoples
FAO: Food and Agriculture Organization
FFP: Forest Peoples Programme
FPIC: Free, Prior and Informed Consent
GC: General Comment
GDP: gross domestic product
GEF: Global Environment Facility
GNP: gross national product
GPO: Global Partnership for Oceans
HRC: Human Rights Council
IACHR: Inter-American Court of Human Rights
IASG: Inter-agency Support Group (IASG) on indigenous peoples
ICCPR: International Covenant on Civil and Political Rights
ICDP: Integrated Conservation and Development Project
ICERD: International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR: International Covenant on Economic, Social and Cultural Rights
ICH: intangible cultural heritage
IDB: Inter-American Development Bank
IFAD: International Fund for Agricultural Development
IFIs: international financial institutions
IGC: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IIED: *International Institute for Environment and Development*
IIFB: International Indigenous Forum on Biodiversity
IK: indigenous knowledge
ILO: International Labour Organization
IPCC: International Panel on Climate Change
IPOs: indigenous peoples' organization
IPRs: intellectual property rights
IUCN: International Union for Conservation of Nature
IWGIA: International Work Group for Indigenous Affairs

MDGs: Millennium Development Goals
NGOs: non-governmental organization
NHRIs: national human rights institutions
NTFPs: non-timber forest products
OHCHR: Office of the High Commissioner for Human Rights
PAR: participatory action research
PoA: Program of Action
REDD: Reducing Emissions from Deforestation and Degradation
TEK: traditional ecological/environmental knowledge
TGKP: traditional group knowledge and practice
TRIPs: Agreement on Trade Related Aspects of Intellectual Property Rights
UDHR: Universal Declaration of Human Rights
UN: United Nations
UNCLOS: UN Convention on the Law of the Sea
UNCTAD: United Nations Conference on Trade and Development
UNDRIP: UN Declaration on the Rights of Indigenous Peoples
UNDP: United Nations Development Programme
UNEP: United Nations Environment Programme
UNESCO: UN Educational, Scientific and Cultural Organization
UNFCCC: United Nations Framework Convention on Climate Change
UNFPA: United Nations Population Fund
UNGA: UN General Assembly
UNPFII: UN Permanent Forum for Indigenous Issues
UNSR: UN Special Rapporteur
UNWGIP: UN Working Group on Indigenous Populations
UPR: universal periodic review
WCED: World Commission on Environment and Development
WCIP: World Conference on Indigenous Peoples
WCPA: World Commission on Protected Areas
WFF: World Forum of Fish Harvesters and Fish Workers
WGDD: Working Group on a Draft Declaration on the Rights of Indigenous Peoples
WHC: World Heritage Convention (a.k.a. Convention Concerning the Protection of the World Cultural and Natural Heritage)
WHComm: World Heritage Committee
WHO: World Health Organization
WIPO: World Intellectual Property Organization
WTO: World Trade Organization
WWF: World Wide Fund for Nature

Chapter I:

Introduction

This is a sociological and legal study of knowledge that analyses the core problem for IK governance. I am not only interested in how IK can be better protected but also in the ways in which social forces surrounding power and control work to articulate IK into certain forms of property/knowledge. Contrary to the mainstream debates about IK that tend to be preoccupied with intellectual property law, this study takes a novel approach guided by indigenous peoples' epistemology, which represents ties between ecology, landscape, and people in a web of connections, to argue that IK is a cross-cutting subject and a form of emplaced knowledge. Therefore, it is much more than a property issue and debate. Furthermore, this study argues that what constitutes the cornerstone of IK claims by indigenous peoples is biocultural diversity that nurtured and sustained IK – that of which is essential for indigenous peoples' communal dignity and well-being as distinct peoples. However, at present, there is no conclusive body of law regulating or safeguarding the wide range of practices and manifestations of IK that embody biocultural diversity. This study will examine why that is the case and further identify and analyse the challenges as well as prospects in this area of study for future work.

In order to bring together the disparate protocols, standards, and laws on IK, which are often difficult to fully grasp due to its fragmented nature, this study developed an interdisciplinary approach of synergy and synthesis to examine discursive practices and concepts in institutional settings. By doing so, this study demonstrates how such institutional fragmentation is a result of different conceptualization about the nature and purpose of IK that does not reflect the interconnectivity envisioned and practiced by IK-holder communities. As such, it inevitably leads to incoherent and inadequate law and policy or governing regimes that either have no capacity or no incentive to meet the needs of IK-holder

communities. Through this analytical process, this study provides a novel perspective to argue that the problem for IK governance is the epistemological struggle resulting from different understandings of the nature and purpose of IK that has causal relationship with the inadequacies of the governing regimes documented in this study. Moreover, this study demonstrates how the story of IK is unavoidably political and tangled with inherently heterogenetic and incoherent regimes of governance, from intellectual property and trade to environmental governance and development to natural and cultural heritage and human rights. This study takes these regimes as sites of inquiry and meaning-making in the Foucaultian tradition on discourse, power, and governance, to further unpack and problematize the development imperative and the property-based system exercised by these regimes. Finally, this study concludes that IK governance can make or break vulnerable groups such as indigenous peoples to a point of prosperity or to deeper poverty and extinction. Therefore, it requires particular care with an integrated approach. This study aims to fill an important gap in the literature with recommendations for future policy and research.

I.   Overview

Since the United Nations officially adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, indigenous peoples' rights have emerged as a specialized category of human rights. Although the adoption of UNDRIP is fairly recent, the global process that shaped this declaration began a few decades earlier, most notably through the rise of international movement for indigenous peoples' rights in the 1970s (Morgan 2011, 2007, Maiguashca 1994). This was an extraordinary process that in many ways challenged the normative establishment of the UN and the scope of international human rights law. This provides the larger context for this study. Among the topics covered by the UNDRIP are issues concerning indigenous peoples' knowledge systems. The debates about rights associated with such knowledge are among the most challenging and critical, because of their

broad implications and significance; they also constitute some of the most conceptually contested areas in law and policy.

What is indigenous knowledge (hereafter IK)? How and why did it emerge from a discourse of human rights at the UN? These seemingly straightforward questions do not have straightforward answers. To begin with, there is not a single agreed upon definition for IK. Secondly, indigenous peoples have a rich reservoir of knowledge systems based on their particular ways of life that are intrinsically connected to the natural environment and the ecosystems of which they are a part. Such 'web of connections' is largely ignored or poorly understood outside of the immediate indigenous communities. What I meant by 'web of connections' is closely associated with Darrell Posey's work that recognized the inter-linkages between nature and culture 'with all of life linked in a web of relations' (Posey 1998, p. 53). This is a rich notion that this thesis will return to throughout the chapters.

The question about rights, including human rights, is no less complex, especially since the law tends to compartmentalize rights into different categories: such as cultural rights, intellectual property rights, land rights, *inter alia*. At the same time, a number of governing regimes that do not often cross paths with each other have increasingly invested interests in IK for different reason and purpose, most notably the domains of trade and intellectual property, environmental governance, heritage management, and sustainable development. Although these domains are under different regimes that conduct their business in different and separate ways, they have become part of the IK story, either because of their common interest in IK or because their policy and practice have an effect on indigenous peoples and their IK.

An inquiry into these initial questions, then, leads to a story of IK that is entangled with different and sometimes conflicting interests, values, and interpretations from a variety of disciplines or specialized fields. The matter is further complicated by the fact that an

increasing number of international treaties and frameworks concerning IK are being negotiated or are taking effect. These ongoing developments have moved the subject of IK and its related debates into the realm of global politics. There is a level of inherent diversity in this complex story of IK, which makes a holistic and comprehensive understanding of it very challenging. Perhaps that is why most literature tends to either focus on one aspect of IK or a particular governing regime or law at a time. This led me to consider a synergy and synthesis approach that would present the IK story more fully. The aim is to better resemble indigenous peoples' holistic view about IK, which in my opinion provides a more critical engagement and analytical angle to understand the complex story of IK, especially as it concerns law and governance affecting indigenous peoples.

This PhD study has greatly benefited from my professional work as a practitioner in the field for a number of human rights organizations and indigenous peoples' organizations over the years. My advocacy role has allowed me critical access to valuable contacts, data, networks and exclusive meetings and proceedings at the UN. Such a role inevitably shaped my positionality, which is articulated by Anthropologist Lila Abu-Lughod as 'every view is a view from somewhere and every act of speaking a speaking from somewhere' (Abu-Lughod 1991, p. 141). Such a role also gave me a dual perspective informed by theory and practice, which helped me to gain critical insights.

The remainder of this introductory chapter will provide an overview of the key context, issues, and debates as well as my methodology and theoretical orientation that shaped this PhD thesis. As the subject of IK continues to evolve along with the evolving rights of indigenous peoples in international law and policy, this thesis does not attempt to offer definitive answers or solutions *per se*. Rather, it builds on existing scholarship to shed some light on understudied areas that would lead us to ask further questions in order to advance our understanding of this topic. This approach is inspired by Stuart Firestein's

stimulating introduction on Immanuel Kant's 'principle of question propagation' (Firestein 2013) – I interpret that as 'the more we know the more we know what we don't know'. I consider this way of knowing as a constructive approach to do research. To that end, this thesis will conclude by suggesting a set of ideas for further research and policy recommendations for future work.

The following section will first contextualize the IK story by identifying the key issues and debates that the subsequent chapters will discuss. It will then be followed by section 3, which provides an overview of my research design and orientation. The fourth and final section will provide a brief introduction of each chapter.

II.   Key Contexts and Contestations

IK has become an object of global governance evidenced by an increasing number of international treaties that recognized the potential application of IK. The key treaties include the Convention on Biological Diversity (CBD, enforced 1993) administered by the United Nations Environment Programme (UNEP) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs, enforced 1995) administered by the World Trade Organization (WTO) and facilitated by the World Intellectual Property Organization (WIPO). In addition, governing regimes for sustainable management of the environment and natural resources have increasingly recognized IK as providing valuable insights and possible solutions to ecological problems. For example, both the United Nations Framework Convention on Climate Change (UNFCCC) and the UN Commission on Sustainable Development (CSD) recognized and promoted further utilization of IK for their respective programs.[1] The above treaties, governing bodies, and global frameworks have created a complex amalgam of multiple interests, forces and consequences for indigenous peoples who might not benefit from them. As this thesis will show, such complex amalgam has

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[1] See chapter 3 of this thesis for more discussion on the governing regimes.

contributed to the contested views and unsettled disputes concerning access and control of IK.

As indicated above, there are a number of interpretations of IK that attempt to define, capture or classify it. A sample of the terminologies used by various disciplines, governing regimes, and advocacy groups, provide a window for us to see the range of these interpretations. For example, these include and are not limited to: traditional knowledge, traditional cultural expressions, intellectual property, collective heritage, collective bio-cultural heritage, traditional ecological knowledge, traditional forest-related knowledge, or indigenous traditional knowledge.[2] IK, then, is a critical test case that opens up challenging questions about existing law and governing regimes that tend to slice up IK into different categories. It also poses conceptual and practical challenges for scholars and practitioners alike to work with such fragmented system. This thesis will identify and address some of these complexities by working through a set of questions and analytical frames proposed below (i.e. section 3 'Research Background and Orientation').

For the purpose of consistency and communication, this thesis adopts the term indigenous knowledge (IK) when referring to the subject. My reason is twofold. First, it is intended to draw a closer attention to the link between IK and indigenous peoples who are the knowledge-holders. Therefore, this thesis also refers to them as IK-holders. Second, for the lack of a better term, it is an interim strategy to avoid the contested usage of the word 'traditional', which is often associated with the lack of innovation. IK as a working terminology is by no means perfect, especially when it comes to the term 'indigenous'. In the postcolonial context, the word can be particularly ambiguous since former colonial subjects can all claim to be 'indigenous'. As illustrated by Benedict Kingsbury (1995) and Andrew Gray (1995), such contestation can be particularly complex in Asia and Africa. In another

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[2] It is beyond the scope of this chapter to engage with definitional discussion, which can be found elsewhere. For further reading, see: e.g. IIED (2005), Coombe (2005), Dutfield (2004), Semali & Kincheloe (1999), Simpson (1997), Posey & Dutfield (1996).

context, 'indigenous knowledge' can be interpreted as 'the common-sense ideas and cultural knowledges of local peoples concerning the everyday realities of living' (Dei *et al.* 2002). In this broader context and interpretation of 'indigenous knowledge', which clearly differs from mine in this thesis, traditions such as Ayurveda in India, *inter alia*, is sometimes referred to as 'indigenous knowledge' as well. The latter example is obviously beyond the scope of this thesis.

Furthermore, this thesis is not particularly concerned with the first example regarding 'indigenous' in the postcolonial context for the following reason. Although the debate concerning who are indigenous peoples might still take place in some corners of the world, most notably in Asia and Africa,[3] international jurisprudence including regional human rights mechanism[4] have by now established a fairly good understanding of the conditions that define indigenous peoples. In addition to international jurisprudence provided by the UN system, the latest contribution was provided by the regional mechanism of human rights in Africa over the case cited as the 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, 276/2003', hereafter cited as the 'Endorois v Kenya 276/2003' (ACHPR 2010) in this PhD thesis.[5] This landmark ruling concerning the Endorois people in central Kenya has significantly settled the matter by providing an unprecedented interpretation of who are indigenous peoples in the African continent (see chapter 3 section 2.2 for more discussion).

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[3] In the context of Asia and Africa, the colonial history and experience as lived memories of indigenous peoples were not as straight-forward as the settler states scenario such as in the United States, Canada, Australia, and New Zealand. As such, it is not as clear-cut to use the word 'indigenous' to distinguish the colonized from the colonizer who are not European. This is an understudied area that requires more scholarly attention. For further reading on relevant concepts and historical accounts, see: e.g. Paul Havemann (2009) on the salt water thesis and Andrew Erueti (2011) on indigenous peoples from the Asia Pacific region via the context of international movement for the rights of indigenous peoples.

[4] Except Asia, all major regions in the world have established a regional human rights mechanism with a regional court. These regional mechanisms are commonly referred to as the European system, the Inter-American system, and the African system.

[5] For earlier studies produced by the UN system, see the widely cited study by Special Rapporteur José Martínez Cobo (1983) that included a working definition on indigenous peoples. See also the working paper issued by the UN Sub-commission on the Promotion and Protection of Human Rights that discussed the distinction between indigenous peoples and minorities (Daes and Eide 2000).

The African Commission on Human and People's Rights (ACHPR) stated the following as the most prominent feature that identified indigenous peoples:

> '…indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept [of indigenous peoples] recognize the linkages between people, their land, and culture' (ACHPR 2010, paragraph 154).

ACHPR also settled the commonly disputed term 'indigenous' by stating that the term is 'not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities' (ACHPR 2010, paragraph 149). The African Court on Human and People's Rights (ACtHPR) has adopted this interpretation by the ACHPR accordingly. This thesis also observes and adopts the same rationale.

Returning to the IK story, the pivotal point in the IK debate was prompted by the recognition of IK for its wider application by the Convention on Biological Diversity (CBD), which was further intensified by the Agreement on Trade Related Aspects of Intellectual Property Rights (a.k.a. TRIPs) with its strong enforcement mechanism. This agreement attracted entrenched commercial interests from public to private sectors that met head-on with indigenous peoples' concerns for present and future generations (see the next chapter for further discussion and case scenarios from bio-piracy to copyright infringement and beyond). Since the early phase of the UN's standard-setting process for indigenous peoples' rights in the 1980s, the subject of IK was raised by indigenous delegations as an urgent priority issue (Daes 1993). Evidenced by numerous testimonies and interventions delivered to the UN, the level of urgency had largely to do with the devastation associated with the detrimental and violent displacement and dispossession experienced by indigenous peoples. As such dire conditions continue to exacerbate, indigenous peoples might soon lose their capacity and capability to maintain and practice their IK, which is intrinsically linked to their lands/territories. This study incorporates the concept of land and territory together, in accordance with the Convention concerning Indigenous and Tribal Peoples in Independent

Countries (a.k.a. ILO 169, enforced 1989). Article 13(2) of the ILO 169 specified that: '[t]he use of the term lands...shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.' This led me to consider IK as 'emplaced knowledge' to better describe the closely knitted relationship or web of connections between IK and the people and environment that nurtured IK. Therefore, this thesis uses 'IK' and 'emplaced knowledge' interchangeably. Section 3 of this introductory chapter will further introduce 'emplacement' as an analytical frame that I developed during the course of this PhD research that guides this thesis (i.e. section 3.1 'Main Analytical Frames').

As indigenous peoples continue to face displacement and dispossession, emplaced knowledge like IK is increasingly becoming endangered. Yet, as this study will discuss, such consequences and ongoing challenges are not fully understood by the non-indigenous world including the governing regimes described above. For example, in today's knowledge economy,[6] the trade regime is keen on capitalizing 'intangibles', such as intellectual property for growth. In this context, IK emerged as a new growth area based on private ownership and monopoly (May 2006). IK also has the potential to save costs for research and development (commonly referred to as 'R and D' in industrial parlance). In addition to the trade regime, the environmental regime is also enthusiastic about tapping into the rich reservoir of IK for its problem-solving potential, especially as it concerns biodiversity conservation and climate science. Although it might not be immediately apparent, certain strands of environmental governance also rely heavily on the market for mediation and regulation. For example, Nicholas Low & Brendan Gleeson (1998) discussed 'market environmentalism' and its

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[6] Management theorist Peter Drucker (2011) credited Austrian-American economist Fritz Machlup as the one who provided the early usage of the term 'knowledge economy' in 1968. The term was originally referring to the intangible subjects such as computer software or intellectual property. The term was later utilized by different disciplines including sociology. For example, sociologists Walter Powell & Kaisa Snellman (2004, p. 199) considered knowledge economy as 'production and services based on knowledge-intensive activities that contribute to an accelerated pace of technical and scientific advance, as well as rapid obsolescence'. For further reading, see also Drahos & Braithwaite (2003).

underpinning principles of operation based on utilitarian, individualistic, and anthropocentric ideas.[7] While both of the trade and environmental regimes contributed to a growing recognition of IK and its value, they also contributed to the problematic practice rooted in utilitarian mentality that is almost saying 'I want your knowledge but I do not care about you.'

In other words, when the outside world takes interest in IK, its aim is largely to utilize aspects of IK for its own agenda, mandate, and/or constituencies. These often do not include indigenous peoples or their concerns. Despite their common interests in IK, these regimes do not necessarily share the same view about IK with indigenous peoples, nor do they bear the consequences of their policy and practice with indigenous peoples. Furthermore, they generally have no concerns for issues like displacement or dispossession faced by indigenous peoples who are indispensable to keep IK alive and well (see chapter 3 for more discussion). What characterizes these regimes' selective approach and indifference seems to be the view that either sees indigenous peoples as obstacles or aids to development. This has often led to uncoordinated governance and management with undesirable outcomes for indigenous peoples who are disproportionally affected, yet are often kept marginalized in the decision-making process. These scenarios provide some of the main contexts for this study to investigate the developmental agenda and how it contributes to the making of IK as a particular category in the global debates.

The making of IK as a 'very specific category' was suggested by Jane Anderson (2009, p. 5). In her analysis, she discussed how the making and remaking process was done through various social, cultural, political and economic interventions that reflected vividly the internal struggle of law. Such struggle continues to evolve as the global debates about IK become more and more multifaceted. I am particularly interested in how the subject of IK sits

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[7] For further reading on the utilitarian school of thought, see: e.g. Waldron (2010) and Schofield (2003).

at the intersection between nature and culture, biological and cultural diversity, tangible and intangible heritage as well as private and public domains – more importantly, I am interested in the way that this position and/or nexus constantly challenges the *status quo* of existing law and policy. As a point of departure, this study takes Article 31(1) of the UNDRIP as the main reference point that reflects such nexus as well as indigenous peoples' perspectives on IK. UNDRIP was drafted and negotiated with indigenous peoples' direct input and participation over two decades, which is rather unique. In fact, it is unprecedented in the history of UN. The next chapter will discuss this further. Article 31(1) provided the scope of IK and established the rights of indigenous peoples to maintain, control, protect and develop their IK. At present, there is no conclusive body of law currently regulating or safeguarding the wide range of practices and manifestations of IK according to Article 31(1). This poses significant challenges as well as opportunities to explore the shaping of IK rights, potentially leading to emerging jurisprudence in the area of biocultural diversity. The following section will provide an overview on how I explore this subject of IK, including an overview on the theoretical and methodological orientation.

III.   Research Background and Orientation

This study is largely informed by my professional work as a practitioner in the field of human rights including indigenous peoples' rights since 1999. Through my professional capacity, I have attended key UN forums concerning indigenous peoples' rights, including the UN Working Group on Indigenous Populations (UNWGIP), UN Permanent Forum for Indigenous Issues (UNPFII), and the newest among them, the Expert Mechanism for the Rights of Indigenous Peoples (EMRIP).[8] During the course of this PhD project, I have continued to take part at the UNPFII (in 2011) and the EMRIP (in 2012). I consider the UN

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[8] I have attended the UNPFII consecutively since its first session from 2002 to 2007, then in selective years since 2009. I have also attended the UNWGIP and EMRIP in selective years.

as a critical site of inquiry to examine the key debates and processes that shape the rights of indigenous peoples.

Building on this rich field experience, this study employs an interdisciplinary approach for the tasks at hand. At the outset, I should make known that this study is not particularly interested in disciplinary boundaries and I have no intention of defending any one over another. For me, theories and methods are analytical tools for tackling designated issues, problems or hypotheses. Therefore, I draw from a wide range that helps me to address the questions that I pose in this PhD thesis.[9] I also do not see theory and method as separate entities; they are complementary to each other, or ought to be. Therefore I do not allocate individual sections for each but rather interweave them in this section.

During my first assignment to the UNWGIP in Geneva in 1999, I joined a petition initiated by delegations of indigenous peoples with the slogan 'No to Patenting of Life!' (see attached as annex 1 to accompany this thesis). This petition was a direct response to the newly adopted TRIPs Agreement that gave a green light to patenting genetic materials and life forms that already exist in nature. At the time, much of the IK debate was centred on intellectual property rights and trade implications. Since then, I have kept an interest in IK and subsequently carried out two dissertations at the MA level on relevant debates: one for a degree in anthropology and musicology, the other degree in politics and human rights. Many years later, during the 10th Session of UNPFII in New York in 2011, I reflected on the subject of IK and wrote the following observation to myself: 'IK is really about land-territory-based subsistence rights for indigenous peoples that are equivalent to the right to life; it's not simply a property issue.' At first glance, this observation might appear to be an overstated assertion with conceptual leaps that require further elaboration. For example, what is 'land-territory-based subsistence rights'? How does it invoke 'the right to life'? And, 'isn't property

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[9] I am grateful to my supervisor Prof. Colin Samson and the Department of Sociology for the freedom to develop my own scholarship.

protection an important component of the IK debate'? In other words, this observation led to a series of questions that I will need to address in order to develop an effective argument. That is what I plan to do. Rather than starting with a hypothesis of the unknown, this thesis takes a somewhat unorthodox approach and works backward from this observation (hereafter will be referred to as my 2011 observation). My goal is to invite my readers on a journey with me to see what I have observed and understood, as I continue to navigate through this tangled story of IK.

As the rights of indigenous peoples continue to evolve in international law and policy, indigenous peoples' claim for IK has posed a series of challenges to existing norms in conceptual terms and in practice. As indicated above, I am especially interested in how indigenous peoples' claims for IK pushed boundaries of existing establishments. More specifically, I am interested in how such claim for IK demands adequate recognition of the intersection between environmental governance, developmental agenda, and human rights. In other words, indigenous peoples' claim for IK demands adequate recognition of the nexus between biodiversity, cultural diversity and communal rights that expands the scope of existing law and policy. Such intersection has not received enough attention in the literature on IK. This led me to conduct a mapping of the global processes in the policy arena that would help me to identify the links (or the lack of) that are either not yet fully explored by the literature or could be further articulated for further analysis. To that end, this thesis is guided by the following questions, which also provide an organizational framework for each chapter:

- How IK becomes an object of global governance and what does it have to do with human rights? (chapter 2)

- What regimes govern IK and how do they affect IK-holders? (chapter 3)

- What characterizes an IK claim? (chapter 4)

Each question will be discussed through a set of analytical frames that the following section will explain further.

3.1 Main Analytical Frames

Informed by my dual role and perspective, this study considers the international movement for indigenous peoples' rights as a vital force and context that brought the IK debate into sharper focus. The movement provides a particular angle and analytical frame that brings out the local-global dynamism at key international forums, such as the ones that will be discussed in this thesis. The second frame is 'emplacement', which constitutes the core of indigenous peoples' rights claims. It is a conceptual frame that I developed during the course of this PhD research when considering ways to address two set of issues. One centres on the issues raised by my 2011 observation described above. The other is how to take into account the 'web of connections' that position IK in a critical intersection of nature and culture, which evolves along with the changing nature of the lands/territories where indigenous peoples live. It is a working concept that will be further developed and articulated in chapter 2 and throughout the rest of this thesis. The third and final frame is the recognition that IK is a cross-cutting subject. This frame provides a critical point of engagement that led me to develop a synergy and synthesis approach to reflect indigenous peoples' holistic conceptualization of IK. This frame also opens up a critical understanding of key governance regimes that have vested interests in IK, yet have limited or no interaction and coordination between each other. As such, it provides a fertile ground for examining gaps and limitations of current systems of governance, which have serious implications for the well-being of indigenous peoples. Please take note that the numbering of each frame is not intended to convey any sense of hierarchy or order. Each chapter in the remainder of this thesis will engage with these frames either together or more focused on one than the other, according to the tasks at hand.

My dual role as a practitioner and researcher with action-orientated activities and insights naturally put me in the realm of participatory action research (a.k.a. PAR or action research). Social psychologist Kurt Lewin was credited as the one who coined the term action research in 1946 (Robson 1993, Kemmis & McTaggart 2008). Before learning about the academic theorization of PAR, I was practically practicing PAR to a large extent. A number of commentators have noted that PAR is more than a method but a methodology with a particular epistemology (Walter 2009, Reason 1998). For example, Maggie Walter summarized that, 'PAR comes with its own in-built value system (axiology) and way of perceiving the reality of an issue or problem (ontology) and values the knowledges and knowledge systems of the community of research interest above others, thereby exhibiting a specific epistemology' (2009, p.2). To that end, PAR may use a range of methods,[10] in order to take into account the interests, knowledge and knowledge systems of its research subjects. Furthermore, PAR actually values the interests, knowledge and knowledge systems of its research subjects above all others. This epistemology resembles certain anthropological sentiments that I am familiar with from my previous training. But it differs from anthropology by embracing action and social change as embedded elements in its approach and objective. As Maggie Walter (2009) noted, this action-oriented purpose is the defining trait that differentiated PAR from other methods whose principle aim is to research or to investigate. PAR also differs from conventional social science research in that the researcher is considered an 'outsider expert' or 'independent observer' who comes to a given community to either examines, theorizes, or proposes solutions. From this standpoint, PAR is considered by some as a call to reconstruct orthodox social science inquiry and be more aware of the power relation between the researcher and his/her subjects (Winter 1989). It is encouraging to see this strand of scholarship that is more mindful of the power relations that

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[10] The range of methods may include qualitative as well as quantitative methods and including oral traditions of communication and dissemination of knowledge.

researchers bring to the research context. I observe and practice this mindfulness, which is of particular importance when working with vulnerable subjects. What I hope to contribute through this methodology is in line with the dual objective of PAR defined by Peter Reason (1998, p. 269): that is, to produce knowledge and action that will be directly beneficial to the subjects of our research, at the same time, aim to empower our research subjects through their own knowledge. This dual objective serves as a guiding principle for this thesis.

Given the cross-cutting nature of IK and relevant rights that concern different governance regimes,[11] this study requires interdisciplinary approach not limited to sociology. I consult a wide range of literature whenever appropriate to inform my research, drawing from the study of law and society, socio-legal studies, politics, political theory, political ecology, anthropology, and development studies. This PhD study follows the tradition of critical theory that questions all institutions and social power relationships. I am not only interested in how IK can be better protected, but also in the ways in which social forces surrounding power and control work to articulate IK into certain form of property/knowledge (i.e. commodified form of knowledge) or intangible heritage. Furthermore, I consider law and policy from a social constructionist perspective (Morgan and Turner 2009). Guided by this angle, I consider and examine the evolving nature of law and policy as social constructs with certain values and judgment embedded in them, including discrimination. For example, women used to be prohibited to own property by the law[12] and heterosexuality is the norm. Those who behave otherwise might be charged with a criminal offence that can result in severe punishment, even death. Another example is how indigenous peoples' ways of life are

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[11] These different governance regimes range from natural resources, biodiversity, heritage, science and innovation, business and human rights, and climate change, to name a few of the most prominent ones often discussed at the UN proceedings.

[12] In certain parts of the world, this is still the case. The law not only regulates what women can own but also what they can wear, *inter alia*. Among the abundant examples around the world, a rather peculiar one that received some media attention recently was the law that prohibited women wearing trousers in Paris, France. This 200-year-old rule was challenged a few times in France but unsuccessfully. It was finally abolished in 2013.

still subject to criminal offense in some parts of the world. For example, their practice of rotating agriculture or subsistence hunting can be punishable by the law in a number of Asia-Pacific countries. By looking at law as a social construct, this study takes into account how law is by no means absolute, but involves multiple interests, negotiations, and power relationships. From this perspective, one begins to see how the law does not always have to do with justice; rather, it is about who is making the law for whom and who is in charge. In the same vein, rights are also analysed as socially constructed phenomenon (Wilson 1997, Samson & Short 2006), which takes into account indigenous peoples as emerging political actors on the global stage.

In terms of theoretical orientation, this study is informed by the work of Michel Foucault on discourse, power, and governance (Miller, Gordon, and Burchell 1991). My approach to discursive practices and concepts is close to Foucault's approach of genealogy for studying conceptual contestation and how concepts operate in institutional settings. Douglas Dow (2014, p. 75) characterized Foucault's approach as 'the genealogy of a concept' and considered it as providing a novel practice of conceptual analysis. This thesis is in line with the Foucauldian approach and could be considered as a conceptual analysis of the IK debates. Furthermore, this study examines the regimes as sites of meaning-making. This study examines the key regimes that generate important discourses that shape IK and indigenous peoples' rights. This study also identifies key paradigm shifts in respective regimes that are significant for IK.

Before moving on to the final section of this introductory chapter, it is necessary to take note of the key terms such as 'regime', 'discourse' and 'governance' that appear frequently in this thesis. These terms are commonly used by different disciplines with complex meanings. Therefore, they require further explanation here for better clarity and consistency.

3.2   A Note on Key Terms and Concepts

- *Regime:*

This study is informed by methods of regime analysis and institutional study from political science and environmental sociology that looks at regimes as governing systems and social institutions (Buttel 2010, Stokke 1997). In Oran Young's analysis, he regarded regimes as consisting of 'sets of rules, decision-making procedures, and programs that define social practices, assign roles to the participants in these practices, and govern their interactions' (Young 1997, p. 278). Such rules and procedures are established through political processes by various actors and stakeholders for consensus-building. Building on these analogies, this study takes 'regimes' as sites of inquiry that refer to particular bodies of law and policy that involve single or multiple governing entities and processes. These governing entities might have decision-making and regulatory powers, either through legal instruments or policy means that authorize codes of conduct based on their respective mandate. For example, UN bodies or specialized agencies could be such entities. They might function as governing bodies with various degrees of regulatory and/or monitoring power via specific mechanisms that generate rules and procedures on a range of subjects or themes, such as intellectual property, heritage, environmental governance, or human rights.

As such, I also consider regimes as formal political channels that attract or absorb a variety of discourses, however contested they might be, which are constantly engaging in meaning-making. I advanced my understanding of this critical perspective through the inspiring works edited by Sheila Jasanoff and Marybeth Long Martello in the compilation titled *Earthly Politics: Local and Global in Environmental Governance* (Jasanoff and Martello 2004a). In particular, Jasanoff and Martello's co-authored chapter was instrumental for me to further articulate my understanding about regimes (Jasanoff and Martello 2004b). Furthermore, I also consider regimes as sites of struggle for influence or domination that

constitute certain aspects of institutional interrelations. The way I articulate this line of analogy resonates with the work by sociologist Frederick H. Buttel (2010) to a certain extent. Buttel analysed regimes as social institutions that involve a range of norms and relationships. In particular, he looked at behaviour that was channelled by clusters of norms and relationships in order to meet a range of human needs including 'physical, psychological or social needs such as consumption, governance and protection, primordial bonding and human meaning, human faith, and socialization and learning'(Buttel 2010, p.33). This study is guided by the above scholarship when examining the governance regimes invested in IK. These governance regimes are actively trying to administer how IK is conceptualized, classified, and utilized through legal and political means. Consequentially, such practice or 'behaviour' has produced a number of ramifications in the local contexts affecting vulnerable groups like indigenous peoples. Jane Anderson (2009) has also examined these dimensions from the perspective of the law. Therefore, it is necessary to take a closer look at regimes as sites of meaning-making and struggle of governance that not only represent forms of institutionalization and knowledge production, but also generate local-global dynamism. Chapter 3 of this thesis will provide more discussion on regime analysis.

- *Discourse:*

This study takes 'discourse' to refer to debates, sets of concepts and contexts that generate abundant meanings and interpretations. These meanings and interpretations could evolve through time and might be heterogeneous. For example, works by Maarten A. Hajer and Richard Lee on environmental discourses and politics demonstrated how these complex dimensions, which consisted of an ensemble of ideas, concepts and categories, can be considerably incoherent (Hajer 1995, Lee 2013). I am particularly interested in the processes of meaning-making and practices based on or generated by the meanings made, which are key to this study's inquiry on IK at the global fora and proceedings such as the UN. This

study examines the discourses generated by key UN processes or frameworks (legal and political) that highlight the contested space created by particular ideas, concepts and categories. By identifying the contested space, it becomes clearer what the gaps and limitations are in a given process and framework.

- *Governance:*

The key social science question that guided this study throughout is the question of 'by whom and for whom'; or it can be asked in another way, that is 'who is doing what and for whose benefit'. This has been an effective way for me to make sense of the complex issues and processes during the course of this research. It also led me to take a closer look at governance. This study takes the view advanced by Grazia Borrini-Feyerabend *et al.* (2006) that distinguished 'management' from 'governance'. They considered the former as about getting things done and interpreted the latter as about 'who has influence, who decides and how decision-makers are held accountable' (2006, p.116). This study also takes note of the framing of governance by John Graham *et al.* (2003, p. 2-3), to mean: 'the interactions among structures, processes and traditions that determine how power is exercised, how decisions are taken on issues of public concern, and how citizens or other stakeholders have their say'.[13]

Other key terms and concepts that are important in shaping the main argument of this study include 'dignity' and 'well-being'. They are particularly invoked against the utilitarian approach associated with Jeremy Bentham, which is characterized by its calculative nature with a focus on means to reach 'the greatest happiness for the greatest number'.[14] By the utilitarian view, it is easily justifiable to sacrifice minorities for 'the greatest number'. Such utilitarian tradition also placed primacy on private property, majority rule and classic

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[13] This conceptualization was subsequently adopted by the International Union for Conservation of Nature (IUCN) on governance. Graham *et al.* initially presented this conceptualization via their paper titled 'Indigenous Peoples, Human Rights, and the Environment' at the 5th IUCN World Parks Congress in Durban, South Africa.
[14] See also Colin Samson's discussion on utilitarianism and the 'economic man' (Samson 2013, p. 54-59).

economics, *inter alia*, that reified and naturalized the self-regulatory market economy (Samson & Short 2006). By contrast, the concepts of dignity and well-being that this thesis will further develop invoke discourses of human rights and human development (Kleinig and Evans 2013). Chapter 4 of this thesis will elaborate on them more, but here is a brief introduction on the core references and ideas. Article 1 of the Universal Declaration of Human Rights (UDHR) stated that '[a]ll human beings are born free and equal in dignity and rights.' The first paragraph of UDHR's Preamble also emphasized the inherent and inalienable nature of human dignity and rights.[15] The concept of 'well-being' on the other hand is largely inspired by Amartya Sen's (1999, 1993) thesis of capabilities. Sen's thesis had contributed to the shaping of 'human development' as a concept and endeavour adopted by the United Nations Development Programme (UNDP). The new paradigm known as the Human Development Index (established since 1989) was a rival paradigm to the World Bank's indicators for development that aimed to respond to what gross national product (GNP) and gross domestic product (GDP) cannot capture (UNDP 2010, p. 6; Sen 2005, p. 159). Chapter 4 will bring together these conceptual frames for further discussion.

3.3   *Data Sources*

Considering the vast population and diversity of the world's indigenous peoples,[16] there are practical and logistical constraints as well as financial challenges to generate original data for analysis. This study does not attempt to provide a comprehensive coverage of the issues or field cases, but to examine a selected number of controversies that best illustrate the issues and debates reviewed in this study. Likewise, the databases available from the UN system

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[15] Preamble of the UDHR states that, '[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.

[16] International Fund for Agricultural Development (IFAD, n.d.) estimated that there are more than 5000 indigenous groups living in some 70-plus countries. These groups represent an impressive level of diversity; the scenarios concerning their knowledge, innovations, and practices are also very diverse.

and different regime processes are also vast. This study uses a strategic approach to target the ones most relevant to the debates concerning IK and indigenous peoples' rights. To that end, this thesis is largely based on text-based regime analysis and document analysis. This section provides an overview of the archival targets for this study, including document types.

The databases of the UN system, including its specialized agencies, provide a systematic compilation of materials for investigation that are very rich. Guided by subject and relevance, this study relies on both academic literature and policy documents. The latter includes a wide range produced by the UN system, indigenous peoples' organizations (IPOs) and non-governmental organizations (NGOs). I also consult jurisprudence generated by the UN system and regional or national court rulings when necessary, including legally binding instruments (a.k.a. 'hard law') as well as so-called 'soft law', such as declarations, principles and guidelines.[17] The goal for consulting different sources is to identify linkages and conceptual formations that shape and reshape indigenous peoples' rights and their claims for IK. These include and are not limited to the following document type: treaty body comments, communication on proceedings of targeted meetings (including various testimonies and interventions), official publications, newsletters, expert reports, thematic studies, policy papers and reports, discussion papers, working papers, concept papers, and conference papers.

The environmental regime and human rights regime are generally more receptive to inputs from rights-holders as well as from IPOs, NGOs, and the academia. The regime of intellectual property, on the other hand, is much less so. The intellectual property regime often conducts closed-door processes that exclude outsider input or monitoring. For example, my application to the WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (a.k.a. IGC) for an academic

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[17] For further reading on the role of soft law with particular reference to the evolving rights of indigenous peoples, see Barelli (2009).

observer status was denied. Although the WIPO claims to welcome academic observers, it is not clear what criteria it uses to accept one applicant over another. Nevertheless, I am able to follow the WIPO process and key debates through networks of IPOs/NGOs that have observer status at the IGC or through the Global Caucus of Indigenous Peoples at the UN. WIPO's closed-door culture has allowed only a handful of indigenous peoples' organizations (IPOs), non-governmental organizations (NGOs), or academics to attend IGC meetings. All of them have to go through a process of accreditation to obtain an observer status.

My professional work and role as a practitioner has allowed me to gain access to specialized meetings, networks and key actors at the international level for further inquiry and consultation when necessary. In particular, annual meetings at the UN included the UNPFII and EMRIP, as well as side-events organized by specialized agencies of the UN such as the WIPO and Secretariat of the CBD, have been helpful outlets for me to gain insights into the global processes. Other significant meetings included global and regional consultations with indigenous delegations as well as UN agencies and mechanisms. These included *ad hoc* caucus meetings organized by indigenous delegates alongside the UN meetings, such as the Global Caucus of Indigenous Peoples and Asia Indigenous Peoples Caucus; as well as consultations with the UN Special Rapporteur (UNSR) on the Rights of Indigenous Peoples, International Labour Organization (ILO), and Office of the High Commissioner for Human Rights (OHCHR). When in-person participation is not possible, this study also utilizes electronic mailing lists and online working groups designated for targeted UN mechanisms that I am already a member (via my professional network) as alternative means. The following provides a compilation of principal data sources for this study.

UN System Source:
- Office of the High Commissioner for Human Rights (OHCHR), particularly the materials generated by the UN Working Group on

Indigenous Populations (UNWGIP)[18] and Expert Mechanism for the Rights of Indigenous Peoples (EMRIP)
- UN Permanent Forum on Indigenous Issues (UNPFII)
- UN Special Procedures: mainly Special Rapporteur on the Rights of Indigenous Peoples and Special Rapporteur in the Field of Cultural Rights
- UN Treaty Bodies
- UN Educational, Scientific and Cultural Organization (UNESCO)
- World Intellectual Property Organization (WIPO)
- International Labour Organization (ILO): particularly materials relating to ILO Convention No.107 and No. 169 concerning indigenous peoples
- Food and Agriculture Organization (FAO)

IPO/NGO Source:
- The main ones include (but are not limited to) Indigenous Peoples' Center for Documentation, Research and Information (doCip), Forest Peoples Programme (FPP), International Institute for Environment and Development (IIED), International Work Group for Indigenous Affairs (IWGIA), Asia Indigenous Peoples' Pact (AIPP), Indigenous Peoples' International Centre for Policy Research and Education (a.k.a. TEBTEBBA), Indigenous Environmental Network (IEN), International Indigenous Forum on Biodiversity (IIFB), International Land Coalition (ILC)

Other International and Regional Source:
- International Union for Conservation of Nature (IUCN)
- World Trade Organization (WTO): only the materials relating to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)
- International financial institutions (IFIs) such as the World Bank and regional ones like the Inter-American Development Bank or Asia Development Bank that have specific policies on indigenous peoples
- Regional human rights mechanisms, particularly the Inter-American system and the African system: only the materials relating to indigenous peoples' rights

IV. Chapter Outline

This PhD study consists of five chapters, including this introductory one, which is titled chapter 1. As presented above in section 3 of this chapter titled 'Research Background and Orientation', each substantial chapter is guided by a set of questions that serves as a structural grid. Following the key issues and debates introduced in this chapter, chapter 2 will take on the first set of questions, namely 'how IK becomes an object of global governance and what

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[18] UNWGIP was terminated by the UN system in 2006.

does it have to do with human rights?' It will do so by further contextualizing the IK story in the history and struggle for the recognition of indigenous peoples' rights in the international system of the UN. Chapter 2 will discuss a number of case scenarios to engage with the parallel debate of intellectual property rights and human rights, which is very much part of the IK debate as result of controversies generated by the trade regime. Chapter 2 will also provide further elaboration on the analytical frames that I introduced in this chapter, particularly the key notion of 'emplacement' that I developed during the course of this PhD research.

Although a substantial number of studies in the literature are focusing on the intellectual property debate, it would be mistaken to consider IK solely as concerning intellectual property issues. Before the trade regime imposed a universal scheme through the TRIPs Agreement that put IK on the marketplace for its commercial value, it was the environmental regime that critically impacted the well-being of IK and IK-holder-communities through a universal scheme of conservation. Therefore, chapter 3 will address the second set of questions, namely 'what regimes govern IK and how do they affect IK-holders', by examining the environmental regime that is much more heterogenetic than the trade regime of intellectual property. Chapter 3 will look at how the multifaceted environmental regime that behaves like 'an animal with many heads' contributed to the complexity of the tangled story of IK. Furthermore, chapter 3 will explore the less studied areas and examine significant paradigm shifts from the 1970s onward through an exercise of synthesis mapping of the relevant law and policy. By doing so, it will identify and assess the overarching developmental agenda embedded in the law and policy that affects marginalized groups such as indigenous peoples.

Building on the previous chapters, chapter 4 will bring together the issues and debates to address the final question, namely 'what characterizes an IK claim' to explore critical

linkages and their respective challenge and prospect. This line of inquiry led me to further examine the regime of natural and cultural heritage and its recent developments, which connect the interface of culture, environment and development together. I consider this interface as representing the most significant linkages that resonate with indigenous peoples' concerns for IK. This line of inquiry leads to further examination of the critical yet understudied area, as I argue in chapter 4, that is the nexus between biodiversity and cultural diversity that highlights the intersection between the discourses of heritage, human rights, and human development. Chapter 4 will advance this line of analysis by articulating and proposing a framework of dignity and well-being to explore its possibility for addressing the challenge of bring together critical linkages for IK claims.

Finally, the concluding chapter 5 will revisit, reflect, and further interpret the key arguments developed in respective chapters. I consciously devoted about half of chapter 5 to propose policy recommendations and suggestions for future research directions as a way forward for this study. My aim is to contribute to the scholarship that has an objective to work on public policy and translational research for the betterment of vulnerable groups.

Chapter II:

How Indigenous Knowledge Becomes An Object of Global Governance

This chapter addresses the first set of research questions presented in the introductory chapter (see chapter 1 section 3: 'Research Background and Orientation'). That is, 'how indigenous knowledge (hereafter IK) becomes an object of global governance, and what does it have to do with human rights?' This chapter will begin by examining how IK came to occupy a contested space and category in the international arena. It will contextualize IK in the history and struggle for the recognition of indigenous peoples' rights in the international system of the United Nations (UN). The UN, including its specialized agencies, provides the main context for considering both the institutional as well as social movement dimensions of the IK story. Furthermore, this chapter will argue against the backdrop of mainstream debate preoccupied with the trade regime of intellectual property law. It will do so by reviewing the parallel debate concerning the topic of 'intellectual property rights as human rights' that generated significant discourses in the IK debate. It will also examine key commentaries issued by the UN system, including thematic working group, treaty monitoring body, and special procedures, to engage with their responses in relation to IK and indigenous peoples' rights. By examining the above contexts and debates, this chapter will advance my argument about IK as a cross-cutting subject and a form of emplaced knowledge. Hence it is much more than a property issue that requires particular consideration. This is one of the main arguments derived from this PhD research, which will be further developed in the following chapters. As introduced in chapter 1 (see section 3.1), this chapter will further develop and engage with the three analytical frames in preparation for the following chapters to tackle the designated research questions.

I.   Introduction

There is a significant body of literature that documents the unique characteristics of IK. Therefore, it is necessary to first review and takes note of these unique characteristics that reflect indigenous peoples' relationship to their surroundings. For example, Antony Taubman & Matthias Leistner (2008, p. 77) characterized IK by the following traits: strong linkage with a given community; intergenerational and dynamic quality; a spiritual and cultural element as well as historical, ethical and religious dimension that taps into the very identity of the respective indigenous group or local community that may symbolize a deeper belief system or order. Some of these unique aspects of IK are reflected in the following testimonies by indigenous representatives (Posey & Dutfield 1996, p. 121):[19]

> 'Much of what they want to commercialize is sacred to us. We see intellectual property as part of our culture. It cannot be separated into categories as lawyers would want.' – Ray Apoaka of the North American Indian Congress

> 'Indigenous peoples do not limit their religion to buildings, but rather see the sacred in all life' – Pauline Tangiora, a Maori leader

Another key attribute that is often found among the majority of indigenous societies is characterized by Stefano Varese (1996, p. 123) as 'moral management of the cosmos, a type of moral ecology, of environmental ethics'. The above traits resonate soundly with ethnographer David Anderson's theorization of sentient ecology that recognized the interconnected and communicative relationship between all living beings in all ecological life. Anderson's argument extended the idea of personhood to all such living beings, which formed a solidary and obligatory relationship between humans, places and all life forms. The following chapter (especially section 2.1) will further elaborate on it.[20]

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[19] These testimonies were recalled by anthropologist Darrell Posey from a seminar on intellectual property at the UN World Conference on Human Rights held in Vienna, June 1993.

[20] For further reading, see: e.g. Dove (2006), Lye (2004), West (2005).

These unique characteristics of IK represent high levels of interconnectivity or web of connections discussed in the previous chapter. Such connectivity has gradually been recognized and captured by conservation practitioners. For example, one of the recent studies issued by the World Wide Fund for Nature (WWF 2013)[21] highlighted the web of connections that tied indigenous peoples with their land/territory and natural resources therein.[22] The WWF study also confirmed how such connections constituted a community's identity, livelihoods and well-being by drawing out the nuances and the evolving nature of IK that supplemented the studies mentioned above. The following is an excerpt that summarized it well (WWF 2013, p. 3):

> '[i]ndigenous and local knowledge systems have co-evolved in conjunction with an enormous diversity of ecological systems. It is embedded in a context of values and social conventions, ethical principles, religious beliefs, ritual taboos, customs, innovations, and other cultural practices'.

Implicitly or explicitly, the above studies demonstrated how IK is fundamentally connected to indigenous peoples' lands/territories. This led me to identify 'emplacement' as a key motif in the IK debate that reflects such interconnectivity. The following section will further discuss this rich notion.

1.1   *Emplacement: Emplaced Knowledge, Emplaced Resistance*

The unique nature of IK is indeed characterized by the rich layers of interconnectivity associated with indigenous peoples' ways of life and their relationship with the land/territory. This led me to consider IK as 'emplaced knowledge' to highlight such intrinsic linkages. As noted in the introductory chapter (see section 2 of chapter 1), this thesis adopts the more inclusive concept of lands/territories, in accordance with the ILO 169, to refer to 'the total environment of the areas' where indigenous peoples live.[23] Although the ILO 169 did not

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[21] WWF is an international NGO established in 1961 in Switzerland.
[22] For the integrated concept of land/territory, see below (section 1.1 of this chapter).
[23] I first introduced this integrated concept of land/territory in the introductory chapter of this thesis. Article

spell it out fully, this thesis takes into account the diversity of indigenous peoples' ways of life and their habitat, as reflected in the UNDRIP, that also include waterways, such as rivers and ocean.[24] From the perspective of emplaced knowledge, it also led me to see how the rich layers of interconnectivity form a kind of holistic epistemology that is constantly present in indigenous peoples' claims for rights by way of the international movement. For example, the following testimony demonstrates a typical narrative of such holistic epistemology by indigenous peoples:[25]

> 'we do not see the protection of our rights to our cultures as separate from territorial rights and our right to self-determination…' (Tauli-Corpuz 2004, p. 1)

This testimony is an example of what I have observed in the field. I consider such a claim as 'emplaced resistance', which constitutes the core of indigenous peoples' rights claims, including claims for IK. This led me to look into 'emplacement' as a conceptual frame and an analytical tool that embodies both dimensions of emplaced knowledge and emplaced resistance, in order to reflect indigenous peoples' holistic epistemology. This shows how the story of IK is inevitably political.

Indigenous peoples have persistently explained their conceptualization of IK as an interdependent and integrated whole as opposed to the compartmentalization imposed by the legal regime that tends to distinguish culture from knowledge. Indigenous peoples have also persistently emphasized the link and non-separation principle between IK and their cultural rights, territorial rights and the right to self-determination.[26] Furthermore, numerous

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13(2) of ILO 169 adopted the term lands to include 'the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.'

[24] The diversity of indigenous ways of life include the Bajau people who are sometimes referred to by outsiders as 'sea-gypsies' in Southeast Asia. They live across national borders of Malaysia, Indonesia, Brunei, and the Philippines (Clifton and Majors 2012).

[25] This testimony was delivered by Victoria Tauli-Corpuz who is a veteran indigenous activist from the Philippines. She was appointed the Chair of the UN Permanent Forum on Indigenous Issues (UNPFII) for two consecutive terms (2005-2010). She is currently the UN Special Rapporteur on the rights of indigenous peoples (since 2014, as the third mandate-holder).

[26] This is what I have observed at UN forums over the years by attending annual meetings and talking to indigenous delegates during and in between those meetings. These views are also captured by Simpson (1997) and the documentations recorded by the doCip, a Swiss non-profit organization (doCip stands for the Indigenous

testimonies delivered at the UN since the 1980s have emphasized the communal

characteristics of IK.[27] The first study on IK issued by the United Nations Permanent Forum

for Indigenous Issues (UNPFII)[28] provided the following account that described the code of

conduct commonly practiced by IK-holders:

> 'traditional practices and culture and the knowledge of plants and animals and of their
> methods of propagation; it includes expressions of cultural values, beliefs, rituals and
> community laws, and it includes knowledge regarding land and ecosystem
> management. It is more often unwritten and handed down orally from generation to
> generation, and it is transmitted and preserved in that way. Some of the knowledge is
> of a highly sacred and secret nature and therefore extremely sensitive and culturally
> significant and not readily publicly available, even to members of the particular
> group' (Dodson 2007, p. 3).

This UNPFII study was prepared by veteran indigenous activist Michael Dodson (of

Australia) who was appointed by the UNPFII as the Special Rapporteur to prepare its first

report on IK. This UNPFII study along with the earlier studies discussed above demonstrated

the unique characteristics of IK, which is a living testimony of diversity of humanity. They

also presented a very complex picture of governance and practice that cannot be easily

captured by a single definition that will do justice.[29] In fact, as activists and commentators

alike have noted with caution, a fixed definition of IK is probably not desirable in order to

avoid any dogmatic treatment (Dodson 2007, Dutfield 2004). Dodson particularly advocated

that it would not be in the best interest of indigenous peoples to fix a definition, given the

diversity of indigenous peoples' communities and their practices, as well as indigenous

customary laws. Instead, he recommended the UNDRIP as a good reference point for

indigenous peoples' conceptualization of IK.

Peoples' Center for Documentation, Research and Information, see its website: http://www.docip.org/).

[27] For further reading on interventions and documents delivered to the UN Working Group of Indigenous Populations (UNWGIP) and UN Permanent Forum for Indigenous Issues (UNPFII), see the doCip database via its website (http://www.docip.org/).

[28] This UNPFII study referred to IK as 'indigenous traditional knowledge'. As noted in the previous chapter, there are a number of different terminologies in circulation that tried to capture IK. For the purpose of consistency, this thesis adopts the term 'indigenous knowledge' (IK) when referring to the subject. See the previous chapter (section 2 of chapter 1) where I introduced my rationale for adopting the term IK.

[29] It is beyond the scope of this chapter to engage with definitional discussion, which can be found elsewhere. For further reading, see: e.g. Coombe (2005), Dutfield (2004), Daes (1993).

Before moving on to discuss the UNDRIP and its extraordinary process, it would be helpful to illustrate the different dimensions of the IK debate by a few real-world cases for contextualization. The following section will provide three case scenarios to demonstrate the specific issues as well as the larger picture that show how the IK story is more than trade related intellectual property debate. The snapshots will also illustrate how the seemingly distinct categories of rights, such as intellectual property rights, cultural rights, or land rights, are not always clear but blurred.

II.   A Snapshot: Scenarios and Analysis

One of the better known cases is probably the bio-piracy case of the Hoodia plant. This case involved the San people of the Kalahari Desert, a governmental arm of a research institute in South Africa, and three commercial companies in the United States and United Kingdom. San people have been using the Hoodia plant for generations to combat hunger during long journeys in the harsh environment of the desert. This plant was studied by the Council for Scientific and Industrial Research (CSIR), especially for its potential as an appetite suppressant. Without informing or consulting the San communities about their commercial plans, the CSIR filed for a patent on its study in 1997. Subsequently, the CSIR signed a business agreement with the pharmaceutical company Phytopharm that led to further business deals with another pharmaceutical company Pfizer and the multinational consumer-goods firm Unilever. Through the assistance of international and local civil society organizations (CSOs), the San communities pursued their rights as recognized in the CBD and the Bonn Guidelines[30] to obtain a benefit-sharing agreement with the CSIR in 2001. Although they were successful in reaching a benefit-sharing agreement in 2003, which granted the San communities a royalty share from the sales, it has been far from straight-

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[30] This refers to 'The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization.' It was adopted by the CBD's Conference of the Parties (COP) – see COP 6 Decision VI/24 (https://www.cbd.int/decision/cop/default.shtml?id=7198).

forward to receive that royalty (see Tellez 2011, Wynberg 2010, and Wynberg, Schroeder, and Chennells 2009).

The second case entered an American courtroom for copyright infringement in 1997 and cast a shadow on the Summer Olympics Games in Atlanta. This case concerned two indigenous elders[31] of the Pangcah people in Taiwan and a German popular music group named Enigma. The pop song in question was called *Return to Innocence* released by Enigma, which prominently featured the elders' singing of a Pangcah tune without their knowledge or consent through the technique of 'sampling'. Enigma claimed original authorship of the song without any acknowledgement or documentation of credit to the elders or Pangcah musical tradition. The song later became a world-wide best seller and was on the *Billboard Magazine's* international chart for thirty-two consecutive weeks. It was subsequently selected by the Olympic Committee as the theme song for 1996. With the assistance of sympathetic parties and lawyers, the Pangcah elders were informed about the sampling practice and filed a lawsuit against Enigma, its associated record companies and the International Olympic Committee. The case was eventually settled with confidentiality clause in 1999, not too long before the elders passed away.[32]

The above cases demonstrated how IK is often treated as something in the public domain for free exploitation. In addition, cases like these are generally considered as disputes of intellectual property rights (hereafter IPRs). However, indigenous peoples do not necessarily see them solely as such. First and foremost, they do not separate culture from knowledge as the IPR regime does. Secondly, they identify their IK as intrinsic to their survival and well-being as distinct peoples. Hence it is also linked to their sense of identity.

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[31] Difang and Inguay (the Pangcah elders) were a married couple in their seventies from a village on the east-coast of Taiwan. In the colonial literature during the Japanese occupation in Taiwan, colonial scholars referred to the Pangcah people as 'Amis'. Based on my fieldwork in Taiwan, 'Pangcah' is the self-identified name by this group, particularly among indigenous activists. 'Pangcah' means human or people; they are the only matrilineal society among the fourteen-plus Austronesian groups in Taiwan.

[32] For further reading, see: Taylor (2003) and Guy (2002).

As such, their IK claims called into question the basic human rights established in the International Bill of Rights, which consisted of the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). In particular, the right to self-determination and economic, social and cultural rights (ESC rights), which are also embedded in the UNDRIP, are especially important. Furthermore, the principle of Free, Prior and Informed Consent (FPIC) enshrined in the UNDRIP, which is key for indigenous peoples to exercise their self-determination (Xanthaki 2007, Buxton & Wilson 2013, MacKay 2010, Westra 2008, Motoc & Tebtebba 2005), is often disrespected, as demonstrated by the above two cases. The legal foundations of FPIC included international jurisprudence based on the Convention concerning Indigenous and Tribal Peoples in Independent Countries (a.k.a. ILO 169), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and ICESCR, as well as some domestic legal instruments (Motoc and Tebtebba 2005).[33]

Another international instrument relevant to the discussion here is the Convention on Biological Diversity (CBD). Article 8(j) of the CBD requested its member-states to 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles'. This provision represents an area where concerns of solidarity rights[34] for biodiversity and the environment overlapped with indigenous peoples' rights. It also leads us to further examine the ways in which IPRs meet human rights, which will be further explored in section 3.1 of this chapter. CBD will be further discussed in chapter 4.

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[33] Antoanella-Iulia Motoc and the Tebtebba Foundation (2005) submitted an expanded working paper to the 23rd session of UNWGIP, which provided guidelines to implement the principle of FPIC in relation to development affecting indigenous peoples' lands and natural resources.

[34] For further reading on solidarity rights, see Alston (2001).

It is not surprising that both of the examples above involved corporate actors. IK cases often involve actors in the private sector taking part in some form of commercial use or exploitation of intellectual property for trade, which tend to incite conflict. The international human rights regime typically addresses the relationship between the state and its people(s). In such a classic scenario of the duty-bearer (the state) vs. the rights-holder (the people), corporate actors are not the typical subjects for the classic scenario of the human rights debate. Nevertheless, more critical attention is increasingly focusing on non-state actors in recent years as they become ever more powerful and destructive. These non-state actors include (and are not limited to) private corporations and international financial institutions, such as the World Bank and International Monetary Fund, as well as so-called 'terrorist groups'. The appointment of John Ruggies as the UN Special Representative for Business and Human Rights in 2005 has elevated the issues. The subsequent development and adoption[35] of the Guiding Principles on Business and Human Rights and Ruggies' framework of 'protect, respect and remedy' (Ruggies 2011) have also led to a more structured effort within the UN to address these issues. Debates concerning non-state actors and their obligations to human rights have now emerged as a critical area of study (Alston 2005, Bradlow 2010, MacKay 2010).

Before the formal launch of the UN framework on business and human rights developed by Ruggies, there was an interesting initiative by some of the industry partners toward better understanding and practice concerning international standards. For example, a group of companies from the flavour, fragrance, cosmetics, personal hygiene, and food processing industries launched a voluntary network known as the Natural Resources Stewardship Circle (NRSC) in October 2008. I attended a consultation in 2009 at the UN Headquarters in New York where introduction of the NRSC and discussion on effective

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[35] It was adopted by the Human Rights Council on 16 June 2011.

implementation of the CBD and multi-stakeholders engagement were taking place.[36] The NRSC collaborated with a US-based NGO focused on indigenous peoples' rights and adopted a self-regulatory declaration known as the Natural Resources Stewardship Circle Declaration in 2008. This NRSC declaration established advisory protocols and guidelines for its members working with indigenous communities to comply with international standards. It enlisted a number of international instruments and programs to show its commitment to a set of universal principles including human rights: these included, the UNDRIP, CBD, ILO 169 and other relevant ILO labour standards, as well as the global initiative known as the United Nations Global Compact[37] that promoted corporate social responsibility. It is still too soon to assess the impact of the NRSC, if any. But at the minimum, these companies can no longer use ignorance as their excuse to dismiss indigenous peoples' rights.

The third example moved from specific cases to grand scenarios that further escalated the debate of IK and well-being of IK-holders to another level. Testimonies of damaging activities on indigenous lands/territories were never short of supply at the UN forums.[38] These testimonies demonstrated how the land/territory that nurtured and sustained indigenous peoples and their IK for generations have been either confiscated or invaded without their consent. This is the area where issues concerning lands/territories and other forms of tangible and intangible property become tangled, particularly so when looking from a perspective of subsistence rights and survival means. At one of the more recent sessions at the UNPFII in 2011 that I attended, I continued to witness testimonies about devastating impact of large scale mining, mega-hydro dams, logging, plantations and infrastructure development involving public and private actors. As reported by the indigenous representatives, the impact

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[36] Further documentation on the consultation can be accessed via the UNEP website and its report (UNEP 2009).

[37] The UN Global Compact is a strategic policy initiative launched in 2000 for businesses that are committed to uphold universally accepted principles in the areas of human rights, labour, environment and anti-corruption (http://www.unglobalcompact.org/). This initiative of corporate social responsibility is based on voluntary participation and is not legally binding.

[38] For example, see the doCip database (http://www.docip.org/).

of these devastations included violent conflicts and displacement of indigenous peoples on their lands/territories, loss of livelihoods, health complications, and environmental degradation. All of the above had severely undermined indigenous communities' ability to sustain their ways of life. These ongoing atrocities led me to conclude with a clear message: that is, 'no land/territory, no IK'. However, indigenous peoples continue to face forced eviction and other forms of harassment to make way for projects in the name of development and/or conservation that do not necessarily benefit them (MacKay & Caruso 2004, Poirier & Ostergren 2002). The climate change scenario is adding yet another layer of complication that has made the matter worse (Roe and Elliott 2010). Testimonies presented before the UN included negative impact of mitigation schemes in the name of 'green' economy funded by international financial institutions like the World Bank.[39] One of the oral interventions delivered by the Asia Indigenous Peoples' Caucus at the 10th session of the UNPFII provided the following account:[40]

> '[w]e are now additionally confronted with actions related to Reducing Emissions from Deforestation and Degradation (REDD) programmes. Such actions can threaten our livelihoods, including our practice of traditional forest management systems. Conversion of indigenous peoples' lands and forests for large scale production of biofuels as part of climate change mitigation measures have also adversely affected indigenous peoples' food sovereignty and rights to water, shelter and health etc.'

Some of these cases have been reported by NGOs and critical scholars,[41] but most of them remain unreported and unknown to the general public who might be under the impression that indigenous peoples have long died off. Such assumption was the justification made by the South African CSIR in the Hoodia case discussed earlier that assumed 'all the San people had died' (Tellez 2011, p. 2).

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[39] For a case study of the so-called 'green' economy and what comes to be known as 'green-grabbing' as well as the negative impacts, see Mousseau & Biggs (2014), Fairhead *et al.* (2012).
[40] This is an excerpt of the Asia Caucus statement for the Agenda Item 3(b) on Environment at the UNPFII.
[41] For example, reports by NGOs such as the REDD-Monitor.Org, Forest Peoples Programme, Cultural Survival, and Asia Indigenous Peoples Pack, to name a few. For further reading, see also Pearse (2012) and Cabello & Gilbertson (2012).

The testimonies presented before the UN were not isolated incidents but recurring violations of indigenous peoples' rights. These violations provoked a number of cross-cutting issues about human rights and human development not limited to issues of IPRs, land rights and the right to self-determination.[42] They also raised critical questions about a number of seemingly positive-sounding governance regimes that have caused more harm than good on the ground:[43] such as conservation policies and designation of protected areas (e.g. national parks, wildlife reserves), mitigation schemes of climate change (e.g. REDD, biofuel plantations, carbon trading), and developmental projects funded by international financial institutions like the World Bank, Asia Development Bank, etc.[44] The above scenarios reported by IPOs/NGOs demonstrated how the foundation of IK is constantly under threat. In other words, the lands/territories that nurtured and sustained indigenous peoples and their emplaced knowledge for generations are either confiscated or invaded by external destructive forces without the consent of indigenous peoples. This is where issues concerning land/territory and other forms of property (including intellectual property) become poignantly entangled, particularly when looking from a perspective of land/territory as means to subsistence living and survival.[45] Land-grabbing is the most notorious trademark of colonial invasion, in addition to physical killing and cultural destruction that constitute genocide in its original meaning proposed by Raphaël Lemkin (1944). Neo-colonial forms of land-grabbing continue to take place in the name of development or conservation today, pushing indigenous peoples into deeper poverty and devastating mental and physical suffering for generations.

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[42] For further analysis on human rights and human development, see chapter 4 section 4 of this thesis.

[43] It is particularly so in indigenous territories. I have witnessed and observed protests and resentments expressed repeatedly by indigenous representatives, either at UN forums via oral interventions and/or informal communications or at regional meetings organized by Asia Indigenous Peoples' Caucus during the course of my professional work as a NGO worker and researcher.

[44] For further reading on conservation, international development, and related debates, see: e.g. Desmet (2011) and Roe and Elliott (2010).

[45] For more discussion on my framing of survival and subsistence, see the previous chapter where I first introduced it as well as chapter 4 of this thesis.

The next chapter will take a closer look at the discourse of conservation and development and discuss the relevant debates further.

These grand scenarios covered by the third example illustrated some of the cross-cutting issues that blurred the seemingly distinct categories of legal rights that resonated soundly with the analysis by Kabir Bavikatte and Daniel Robinson (2011). These scenarios also demonstrated how the subject of IK is much more than an intellectual property debate. Moreover, they highlight the problem of displacement caused by land-grabbing that continues to threaten the well-being of IK and IK-holders. This long-standing problem has seriously disabled indigenous peoples in their ability to exercise their right to maintain, control, protect, and develop their emplaced knowledge ingrained in their particular locales for subsistence living. These ongoing problems further contribute to the vulnerability of indigenous peoples to more exploitation and hardship. This is where it becomes clear that in order to protect IK, one must protect the human rights of indigenous peoples, including their ability to hold onto their residential lands/territories and livelihoods.[46] I gained this understanding from the field and it echoes soundly with some of the studies that addressed similar points. For example, Lorie Graham and Nicole Friederichs concluded that (Graham & Friederichs 2011, p. 2):

> '[a]lthough many indigenous land rights cases have roots in resisting the destruction of their lands and preventing the harmful extraction of natural resources, one stark conclusion that the sampling of cases illustrates is that these types of cases are driven primarily by the threats to the physical and cultural survival of indigenous peoples.'

However, such understanding taken together with its compelling evidence is not widely shared by policy makers domestically or internationally. This is what caused indigenous peoples to march to the UN in Geneva to challenge the existing regime of human rights that largely ignored indigenous peoples in its early history of establishment. The following

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[46] A hunter or fisherman would know how the well-being of diversity of species and ecosystems are connected to the well-being of her/his communities. Therefore, s/he would be more vigilant about her/his conduct in relation to that wealth of diversity. Such life connection and co-dependence is probably the most constructive and sustaining framework to cultivate respect and aspiration for human-nature relationship. Studies of the commons or common-pool resources led by Elinor Ostrom, as well as studies on the hunter-gatherer society, provide good evidence for the above view (e.g. Gowdy 1998, Lee 1998, Gibson *et al.* 2000, Ostrom *et al.* 1999, Smith & Wishnie 2000).

section will review the extraordinary journey that brought the issues concerning IK onto the global stage. It will also review the parallel debates on IPRs as human rights that generated significant discourses that are important to the IK story.

III.   The United Nations System and Indigenous Knowledge

Despite the odds, international movement for indigenous peoples' rights have brought extraordinary vitality and force to the global stage and have achieved unprecedented success at the UN for the recognition of indigenous peoples' rights. This is an important context for the IK debate that I will engage further here. Indigenous peoples are relatively latecomers to the international scene. Their early efforts to speak to the League of Nations as sovereign nations before the formation of the UN dated back to 1923, which were not successful (UNPFII 2009). Their demand for recognition of their collective rights was also not greeted with favour, because it posed critical challenges to the existing regime of human rights. Despite ongoing criticism, the practice of international human rights law tended to favour individual rights. This reflected the liberal ideology triumphed in 'the West' that became the 'orthodox legal thinking that shapes the International Bill of Rights' (Hunt 2000, p. 38). In many ways, the drafting process of the UNDRIP challenged that orthodox legal thinking, which was considered by Paul Hunt (2000) as one of the significant merits of the UNDRIP. Indigenous lawyer and activist Andrew Erueti (2011) and a thoughtful study by Rhiannon Morgan (2011) have also demonstrated that indigenous peoples have challenged the UN system and transformed the law. This section will visit some of the significant moments in history *en route* to better recognition of indigenous peoples' rights to engage with the key debates concerning IK.

Prior to the UNDRIP, which took more than two decades to reach the UN General Assembly for a formal adoption, the only international instrument addressing indigenous peoples directly was the Indigenous and Tribal Populations Convention of 1957 (a.k.a. ILO 107, adopted 1957, enforced 1959). This ILO Convention No. 107 was later replaced by the Convention concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (a.k.a. ILO 169, adopted 1989, enforced 1991).[47] Although they are legally binding instruments, the ILO Conventions only obtained limited ratification by member-states (each of them had less than 30 ratifications on record). Furthermore, some of the states that ratified ILO 107 did not follow through to ratify ILO 169 for it to take effect. Another problematic area is the language of the text, which reflected evolutionist and assimilationist ideology and developmental policy in a state-centred framework that has been heavily criticized by indigenous peoples. For example, Article 1(1)(a) and 1(2) of ILO 107 stated the following:

Article 1(1)(a) of ILO 107:
'members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;'

Article 1(2) of ILO 107:
'[f]or the purposes of this Convention, the term semi-tribal includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.'

ILO 169 had modified such wording with more respectable and progressive language and better understanding of indigenous peoples' conditions, particularly their connection to lands/territories and natural resources as well as associated rights. The ILO 169 also adopted the term 'indigenous peoples' into its text. However, it still operated within a state-centric framework. For example, Article 1(3) of ILO 169 carefully confined the touchy word

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[47] Interestingly, these Conventions were not adopted by the human rights branch of the UN but the International Labour Organization (ILO), which had an older history than the UN. The ILO was established in 1919. It later joined the UN as one of its specialized agencies.

'peoples' to assure its member-states from worries of any separatist movement for

independence (see reproduced below).

> Article 1(3) of ILO 169:
> '[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.'

These are among the problems concerning the ILO Conventions concerning indigenous

peoples, which illustrate how indigenous peoples were largely left behind without proper

instruments to defend their rights.[48]

Through the international movement for indigenous peoples' rights and persistent

campaign, the historical neglect of indigenous peoples at the UN has gradually changed,

albeit through a long process.[49] In 1972, the UN commissioned its first attempt to understand

the situation faced by indigenous peoples and appointed Special Rapporteur José Martínez

Cobo to carry out a study that lasted more than a decade.[50] Cobo was appointed by the UN

Sub-commission on Prevention of Discrimination and Protection of Minorities. His final

report titled 'Study of the Problem of Discrimination Against Indigenous Populations', which

consisted of three parts, was submitted to the UN system during the years of 1981 and

1983.[51] In Cobo's final report, one of the recommendations identified the need to 'prepare a

declaration of the rights and freedoms of indigenous populations as a possible basis for a

convention' (Cobo 1983, paragraph 627). In response to that, the UN established its first

working group focusing on indigenous peoples in 1982 at the concluding phase of the Cobo

study, which was known as the UN Working Group on Indigenous Populations (UNWGIP)

based in Geneva. It was established under the UN Charter body, the Economic and Social

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[48] For further reading on the ILO and its development in relation to indigenous peoples' rights, see two informative studies by Rodríguez-Piñero (2005) and Rodgers *et al.* (2009).

[49] For the history and struggle of indigenous peoples in the international system as well as the international movement for indigenous peoples' rights, see: Allen & Xanthaki (2011), Hartlet *et al.* (2010), Morgan (2011, 2009, 2007), Charters & Stavenhagen (2009), Havemann (2009), Anaya (2009, 2004), Gilbert (2007), Pritchard (1998), Maiguashca (1994), Barsh (1994).

[50] Prior to the UN's first official attempt and study, the ILO carried out its first research phase on indigenous peoples in the 1950s to better understand their conditions. The ILO research led to the subsequent drafting of the Convention known as ILO 107. For a historical account on the ILO, see Rodgers *et al.* (2009).

[51] See UN Documents: E/CN.4/Sub.2/476, E/CN.4/Sub.2/1982/2, and E/CN.4/Sub.2/1983/21/Add.8.

Council (a.k.a. ECOSOC). Although it was positioned at the bottom of the command chain (see table 1 below), it provided the first global platform for indigenous delegations to come together annually and to embark on the drafting of a declaration for their rights (it was commonly referred to as the draft Declaration on the Rights of Indigenous Peoples, or shorthanded as dDRIP).

Table 1: UNWGIP Structure
WGIP: Chain of Command UN General Assembly ↑ Economic and Social Council ↑ Commission on Human Rights (replaced by Human Rights Council) ↑ Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (replaced by Advisory Committee) ↑ WGIP (1982-2006)
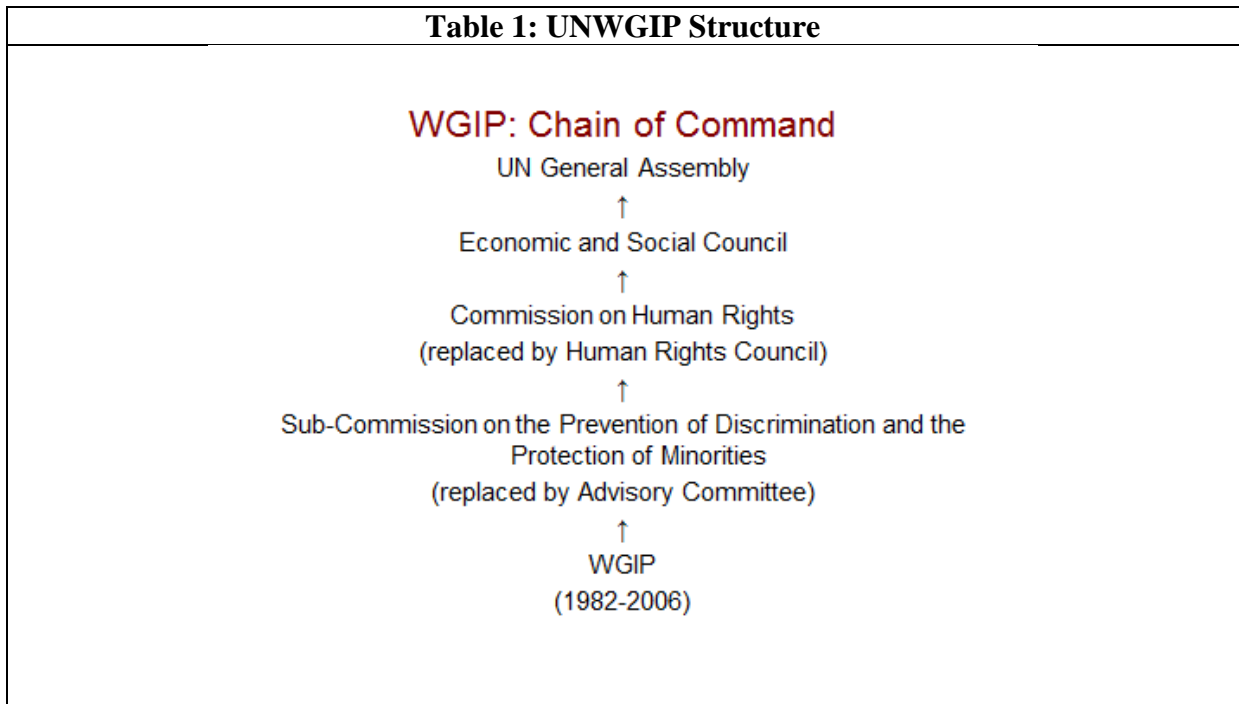
By 1995, a Working Group on the Draft Declaration on the Rights of Indigenous Peoples (WGDD) was established to further debate the dDRIP proposed by the UNWGIP with indigenous rights-holders. The dDRIP was subsequently adopted by the UN Sub-commission on the Promotion and Protection of Human Rights (see table 2 below for a brief chronology). This working method was unlike any other in the UN system where rights-holders were involved directly in the drafting and negotiation processes alongside the member-states. UNWGIP's open participation procedure facilitated the international movement for indigenous peoples' rights to strengthen its combined force and solidarity, which was unprecedented in the UN system. The long negotiation process for the dDRIP finally concluded with historical success in 2007 at the UN General Assembly (UNGA) in

New York with a majority vote of 144 states in favour. The voting record also showed that 4 states voted against the declaration (i.e. Australia, Canada, New Zealand and the United States) and 11 voted abstentions (i.e. Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).[52] Since 2007, all of the four settler-states that voted against the UNDRIP had reversed their position. But the states recorded with abstention did not. Regardless of the remaining states that continued to be reluctant, the majority vote indicated a remarkable achievement for the international recognition of indigenous peoples' rights.

Table 2: UNDRIP Chronology in Brief

1982	1985	1993	1994	1995	2007
UNWGIP established	UNWGIP began drafting dDRIP[55]	dDRIP submitted to the Sub-Comm[56]	Sub-Comm adopted the dDRIP	WGDD[53] established	UNGA[54] adopted the UNDRIP

1st Int'l Decade (1995-2004)

2nd Int'l Decade (2005-2015)

Despite its legal status as non-binding, the UNDRIP and its long process demonstrated a remarkable achievement by indigenous peoples and their international movement. It provided the first comprehensive international standards for indigenous peoples' rights and significantly advanced collective cultural rights, which will be further discussed in chapter 4 of this thesis. UNWGIP's unprecedented participatory working method that facilitated a long and active engagement of rights-holders alongside member-states and civil-society organizations also brought a level of legitimacy and people power to the UN,

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[52] For further reading, see the UNPFII website:
http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx.
[53] WGDD was established by the UN Commission on Human Rights (CHR), which was replaced by today's Human Rights Council in 2006.
[54] UNGA stands for the UN General Assembly.
[55] 'dDRIP' was the common abbreviation for the draft version of the UNDRIP.
[56] 'Sub-Comm' refers to the UN Sub-commission on the Promotion and Protection of Human Rights.

which reformed the system to a certain extent. Furthermore, two UN mechanisms in particular have taken on an active role to implement the UNDRIP, which has reinforced its effect to advance indigenous peoples rights: namely the UNPFII and the UN special procedure known as the UN Special Rapporteur on the Rights of Indigenous Peoples (hereafter UNSR for Indigenous Peoples). They are acting in good faith according to Article 41 and 42 of the UNDRIP, which stated the following:

> (Article 41)
> The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

> (Article 42)
> The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

As such, the UNDRIP has established international standard of indigenous peoples' rights and part of it has obtained the status of customary international law. James Anaya, the mandate-holder of UNSR for Indigenous Peoples for 2008-2014 and a professor of law, also stated that '[w]hatever its legal status, the [UN]DRIP serves as a benchmark to measure the conditions faced by indigenous peoples worldwide and to motivate and guide state and international action in this regard' (Anaya 2009, p. 105).

The following section will take a closer look at the substantial debates that have generated questions about the relationship between IPRs and human rights, which have been the dominating discourse since issues concerning IK became part of the international agenda.

3.1   Key Debates

While the human rights strand of the UN was embarking on setting standards for the rights of indigenous peoples, including their emplaced knowledge, two other global processes of

significance were also taking place. These parallel processes that focused on the environment and commerce were the CBD (enforced 1993) and the TRIPs Agreement (enforced 1995). On the positive side, these two international instruments had promoted and attracted global attention to the value of IK. On the negative side, such global recognition encouraged commercialization of IK mainly for its market value. As such, it introduced a different context and value system that disconnected IK from its communal origins and hence raised alarming concerns for indigenous peoples. More specifically, the CBD promoted the 'wider application' of IK (Article 8(j)) and attracted invested commercial interests. Such commercial application was further facilitated by the TRIPs Agreement that imposed a universal scheme with an aggressive expansionist agenda, which unprecedentedly broadened the scope of what can be claimed or owned as intellectual property. This expansionist agenda opened up areas that were previously outside of private ownership and monopoly for moral or cultural reasons (Helfer 2004, Dutfield 2003). These reserved areas included genetic resources, plant varieties, and pharmaceuticals. As a result, these global processes and the expansionist scheme created contested zones where commercial interests of IPRs collided with concerns over human rights, including indigenous peoples' rights, which, in turn, led to controversies.

It remains an ongoing debate about whether IPRs belong to the same category of human rights (Helfer & Austin 2011, Helfer 2007, Chapman 2002, Haugen 2005a, Haugen 2005b). Historically, these two domains of rights had separate paths without much interaction. For example, a review of major instruments regulating IPRs revealed that there was not much reference to human rights, if at all: e.g. from the early days such as the Paris Convention for the Protection of Industrial Property of 1883 (last revised in 1967), Berne Convention for the Protection of Literary and Artistic Works of 1886 (last revised in 1979), Universal Copyright Convention of 1952 (last revised in 1971), International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of

1961, to the more recent agreements such as the TRIPs Agreement of 1995 and the WIPO treaties of 1996 on copyright, performances and phonograms. The UN's treaty monitoring body known as the Committee on Economic, Social and Cultural Rights (CESCR) also noted that the content of the above international agreements did not coincide with the same scope of human rights enshrined in the ICESCR (CESCR 2006). However, an increasing number of controversies and studies suggested that the relationship between human rights and IPRs as well as their ramifications have been becoming more and more intertwined.[57] In particular, Laurence Helfer (2003) identified two critical discourses developed within the human rights circle that placed intellectual property issues under heated scrutiny. These included concerns over ESC rights and concerns over the neglect of indigenous peoples' rights. The following sections will review the UN responses to these concerns and their ramifications for IK.

3.1.1   Economic Social and Cultural Rights Perspective

The IPRs regime is mainly concerned with private rights and financial benefits resulting from protecting intellectual products across national borders. It is essentially a business model that encourages profit-generating innovation and trade. The IPRs regime also has strong enforcement power, as opposed to international human rights regulations that have weak enforcement mechanism, if at all. Many rights-holders and commentators with human rights concerns do not feel comfortable with that objective, especially given the expansionist agenda of the IPRs regime that tends to commercialize all things profitable without considering the risks of human rights violation. Such human rights concerns were echoed by the UN system at the occasion of UDHR's 50th Anniversary by a panel discussion organized

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[57] In addition to human rights concerns, other factors heightened by TRIPs also pushed intellectual property issues and debates onto the global stage. For example, Ha-joon Chang (2001) noted two other factors: namely the grace period allowed for certain developing countries to comply with TRIPs expired by the end of 2000 (exceptions included the least developed countries till 2006, before sanctions can take effect); and the increasingly outrageous patent claims on common knowledge or practice known to certain developing countries (such as the turmeric case).

between the WIPO and the UN Office of the High Commissioner for Human Rights (OHCHR) in 1998. This was one of the early human rights responses to intellectual property issues at a global level. A world event in the same year concerning HIV/AIDs drugs in South Africa also heightened public awareness about the implication of IPRs law and human rights, particularly the right to health in regard to essential medicine. The relationship between IPRs and human rights is probably most clearly addressed in the context of health (Grover 2009). This case concerned thirty-nine pharmaceutical companies who collectively filed a lawsuit against the South African government over a legislation that enabled compulsory licensing and parallel imports, which would undermine the IPRs privilege of the companies (L. Anderson 2002). The legislation in question is the Medicines and Related Substances in South Africa. The lawsuit was filed by the companies in 1998 and dropped in 2001.

The UN followed up on these concerns in 2000 at the 52nd Session of the Sub-Commission on the Promotion and Protection of Human Rights. The outcome of the 52nd Session included adoption of a significant and timely resolution (No. 2000/7) that specifically identified potential violations of human rights posed by the TRIPs Agreement (Sub-Commission 2000). It also noted concerns in regard to indigenous communities and their genetic materials and natural resources, *inter alia*. The potential violations identified in the Resolution 2000/7 included: 1) the right of everyone to enjoy the benefits of scientific progress and its applications, 2) the right to health, 3) the right to food, and 4) the right to self-determination. The right to self-determination already comes through as one of the central themes throughout the discussion in this chapter. The following segment will take on the first item identified by the above Resolution, which was based on Article 15(1) of ICESCR (see table 3 below) and constituted the core debate of IPRs and human rights, for further discussion.

Article 15 consisted of four subsections of which 15(1) described the nature of the rights. Prior to issuing its authoritative interpretations on Article 15, the treaty body that monitors the ICESCR known as the Committee on Economic, Social and Cultural Rights (CESCR) issued a statement in 2001, which clearly identified the core issues and ramifications concerning human rights and intellectual property. First and foremost, the CESCR stated firmly that '[u]ltimately, intellectual property is a social product and has a social function' (CESCR 2001, paragraph 4). Secondly, all parties (including states and non-state actors like business entities) are required to observe the human rights-based approach that 'focuses particularly on the needs of the most disadvantaged and marginalized individuals and communities' (CESCR 2001, paragraph 8), including indigenous peoples. CESCR also expressed concerns about how the IPRs regime has increasingly focused on corporate interests and investments and not on the persons or communities as its beneficiaries. These concerns over corporate interests and investments were also raised by the High Commissioner for Human Rights (2001) through a report submitted to the 52nd Session of the Sub-Commission on the Promotion and Protection of Human Rights (UNHCHR 2001). The High Commissioner's report questioned the TRIPs Agreement's lack of substance to promote and protect human rights. For example, the TRIPs Agreement might limit the states' capacities to protect and promote human rights (UNHCHR 2001, paragraph 24). The report also noted that the TRIPs Agreement did not provide protection for traditional knowledge (UNHCHR 2001, paragraph 26).

Table 3: ICESCR Article 15
1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development

and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

Subsequently, the CESCR issued its authoritative interpretations known as the General Comment on Article 15(1)(c) and 15(1)(a) respectively.[58] Article 15(1)(b) was later interpreted (in 2012) by the newly appointed UN Special Rapporteur (UNSR) in the Field of Cultural Rights, Farida Shaheed. In summary, all of the above UN commentaries noted the different nature of IPRs versus human rights based on the grounds that human rights are inalienable, fundamental and timeless, while IPRs are alienable, instrumental and temporary. The CESCR (2001) further reiterated that the central subject and primary beneficiary of human rights is the human person; whereas the IPRs regime recognizes both the human person and corporations as rightful beneficiaries. Furthermore, the CESCR's General Comment No. 17 noted that, 'intellectual property regimes primarily protect business and corporate interests and investments' (CESCR 2006: paragraph 2). These clearly demonstrated the different priority and objective identified by the CESCR that set them apart.

A number of commentators proposed to take into account other considerations. For example, in response to the General Comment No. 17, Davinia Ovett (2006) advocated for a more thorough consideration of the interconnectedness between Article 15 and other human rights. Christophe Golay and Ioana Cismas (2010) provided another perspective that suggested that the inalienability principle of human rights might present a mind-set preoccupied with civil and political rights (CP rights). They justified their argument through the examples of food and housing, which have the alienable characteristics of property, yet no one questioned them based on that ground to undermine the right to food or the right to

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[58] See General Comment No. 17 (2006) and No. 21 (2009).

housing according to the ICESCR. Another critical example that I would add to this line of critique is water. In the world that we live today, water is both a sold commodity for the privileged who can afford to buy it, but also a commonly shared necessity that is indispensable to stay alive. The latter is recognized by ICESCR (Article 11 and 12), which stipulated the right to water as a human right. Such a right was further elaborated by the CESCR via its General Comment No. 15 (paragraph 2), which stated that:

> '[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.

In other words, the CESCR did not find it problematic to buy or sell water as commercial property, as long as it is affordable. But when it comes to intellectual property, the CESCR opposed the claim for IPRs as a human right based on the ground that intellectual property can be bought and sold. Following the argument of the right to water, one could apply the same logic to demand for affordable intellectual property, especially if it plays a major role in enhancing or undermining human life or prosperity. A case in point would be the South African case concerning HIV/AIDs drugs discussed earlier. Another critical case would be IK that can make or break indigenous peoples' prosperity as distinct peoples (of which this thesis will continue to explore further during the course of this thesis). Clearly, the CESCR needs to explore more nuanced grounds when examining the human rights claim of intellectual property.

To a certain extent, Ovett's critique was addressed by the subsequent interpretations via the General Comment No.21 (CESCR, 2009) and the UNSR report by Shaheed (2012).[59] These interpretations took note of the implication of intellectual property regulation that could have detrimental effect on the realization of Article 15 as a whole, which contained the rights necessary to advance other human rights. For example, Shaheed affirmed the

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[59] One of the most significant developments in the second half of the 2000s is likely the full interpretation of ICESCR's Article 15 addressing cultural rights, which took nearly fifty years to complete. Chapter IV of this thesis will discuss them further.

undeniable link between Article 15 and 'the rights to health, water, housing and education, as well as the right to development and the emerging right to a clean and healthy environment' (2012: paragraph 23). She further noted the relevance of Article 15 to the right to food and climate change that have increasingly received keen attention (Shaheed 2012, paragraphs 56, 60, 67).[60] General Comment No.21 also indicated the linkage of relevant human rights, which further emphasized the important principle of cultural appropriateness in regard to implementation of these rights (2009: paragraph 16e). Both the CESCR and UNSR Shaheed called upon all member-states, UN organs and specialized agencies as well as international organizations to take effective measures to implement Article 15 of ICESCR as required by the international law.[61] They also called upon the member-states to regulate non-state actors who might infringe upon these rights. The most direct recommendation and critique on the IPRs regime's expansionist scheme was addressed by Shaheed. She recommended a minimalist approach to intellectual property protection that might otherwise obstruct individuals' and communities' ability 'to take part in cultural life and to enjoy the fruits of scientific progress, which would also impoverish society as whole' (2012: paragraph 65).

3.1.2 Indigenous Peoples' Rights Perspective

Since the first session of the UN Working Group on Indigenous Populations (UNWGIP) in 1982, indigenous peoples have been addressing the priority and urgency of IK protection (Daes 1993). UNWGIP's first formal response was appointing Erica-Irene Daes as the Special Rapporteur to carry out a study on the cultural and intellectual property of indigenous peoples, which led to subsequent drafting of the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples (Daes 1995). Daes' study recognized the importance of land for indigenous peoples as IK-holders. She also recognized the communal dimension of

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[60] See also OHCHR (2009) on the relationship between climate change and human rights.
[61] CESCR's 2001 statement also identified the CBD in addition to other specialized agencies of the UN. But, curiously, the CESCR did not follow up to consider the CBD in its subsequent comments.

IK by invoking the notion of 'collective heritage', which in her opinion was more appropriate for IK (Daes 1993). The following chapters will further explore this notion of heritage and its governing regime. Furthermore, Daes considered the common separation between intellectual property and cultural property as artificial. Her interpretation reflected indigenous peoples' holistic views. She further expressed an urgency to protect such collective heritage, particularly since indigenous peoples were losing their lands at an alarming rate. Subsequent reports by the UNWGIP (2005) and UNPFII (2005 and 2007) all echoed this concern over land loss. These reports also recognized the inextricable link between IK and indigenous peoples' lands/territories, including natural resources therein (Dodson 2007, Martínez 2005).[62] Among them, the UNPFII study authored by Special Rapporteur Michael Dodson (2007) discussed earlier was the most bold.

Dodson's study reviewed relevant provisions in international instruments and summarized that they were either offering protection as an aspect of human rights or based on grounds of intellectual property or biodiversity. As such, they only addressed some aspects of IK. Dodson also noted the limitation of the normative human rights framework, which is mainly based on liberal individualism. Therefore, he concluded that these existing international instruments were incomplete and inadequate to protect IK. Earlier studies also drew similar conclusions. For example, Peter Drahos noted that although the CBD and other treaties adopted by the UN specialized agency, the Food and Agriculture Organization (FAO), provided relevant standards for the protection of IK, they were not comprehensive for the full scope of IK (Drahos 2004).

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[62] The main theme of UNWGIP's 23rd Session (2005) was 'Indigenous peoples and the international and domestic protection of traditional knowledge'. The special theme of UNPFII's 6th Session (2007) was 'Territories, Lands and Natural Resources'. The UNWGIP was terminated by the UN system after 24 years of profound work for the advancement of indigenous peoples' rights, particularly in terms of standard-setting. Around the same time, a higher ranking mechanism was established via the Human Rights Council in 2007 as an advisory body to the Human Rights Council, i.e. the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). The main difference between the UNWGIP and EMRIP lies in the standard-setting mandate.

Considering the unique characteristics of IK and its scope, it is clear that the diverse knowledge system of IK requires a different conceptual order and practice that would cut across existing regimes of law and policy, from trade to environmental conservation including agriculture, *inter alia*. As noted above, the main provision concerning IK in the UNDRIP is Article 31, which Dodson recommended as a guiding reference for indigenous peoples' conceptualization of IK. Article 31(1) stipulated that,

> '[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.'

This provision presented a wide range of practices that are considered by indigenous peoples to be integrated, holistic and collective, which challenges the existing legal framework that is largely fragmented, compartmentalized and individualistic. It also presented an integrated approach and worldview of IK that recognized indigenous peoples' subsistence relationship to their lands/territories, including ecology and natural resources therein. Whether it is practical to include such a cross-cutting view of rights in one article is up for debate to some observers, but indigenous delegates who participated in the drafting process of the UNDRIP generally considered these practices and manifestations of their culture and identity inseparable. Such a claim for IK posed significant challenges to existing treaties that either tended to compartmentalize knowledge from culture, or took environmental resources as ordinary commodities for trade. The market has become such a core belief and key mechanism in the mainstream developmental paradigm, including environmental governance, that it has become 'an institution for achieving sustainability' (Adams 2009, p. 117). Such market-driven practice aimed for a particular type of development or capital gains is problematic for indigenous peoples who might not want to subscribe to it (the next chapter

will further explore these issues). Furthermore, such holistic conceptualization of IK poses challenges to the international regime of human rights that generally gives individual rights priority. UNDRIP placed strong emphasis on collective rights associated with indigenous peoples as distinct peoples and at the same time reiterated individual rights as recognized in the core human rights treaties. As such, Alexandra Xanthaki (2011, p. 414) noted that the UNDRIP in effect enshrined 'collective intellectual property rights' to indigenous peoples.

At present, the range of diversity presented in Article 31(1) is not yet recognized by the law. Therefore, Dodson recommended further study to fully evaluate the merits of relevant methods and laws. In particular, he suggested a thorough review of the issues concerning uniformity, flexibility, dispute resolution and interpretation that would take into account the operation of diverse customary legal systems, including indigenous customary laws. His recommendations suggested a call for plural legal order that had remained largely overlooked by the IPR regime. In fact, as Graham Dutfield (2012) testified, legal pluralism is not welcomed at forums like the WIPO. Another significant part of Dodson's recommendation included a proposal for developing possible new treaties or other structures to deal with the challenges, such as a framework agreement or a memorandum of understanding. At present, draft texts of possible new treaties for three thematic areas relating to IK are under negotiation at the WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (a.k.a. IGC). These include: genetic resources, traditional knowledge, and traditional cultural expressions. Despite their immediate relevance between IK and these three thematic areas, IK-holders generally find it difficult to participate in the IGC process, which is not as open as the UNWGIP process for the UNDRIP. In fact, indigenous delegates have expressed growing concerns about the suitability of WIPO as the forum for IK, since it is still reluctant to

endorse the UNDRIP (Harry 2012). Section 4 below will further discuss the WIPO and address indigenous peoples' concerns in regard to its practice.

Another contested area is the concept of 'property' and the application of that concept to IK as tradable commodity (Dutfield 2005). This is especially true when indigenous peoples are not the beneficiaries of the trade, or do not consider IK as something for sale in the first place. The genesis of property (as represented by the IPRs regime) is about privilege of the few, which inevitably posed tension between 'the right to property as a civil liberty and its social function' (Golay & Cismas 2010, p. 2). Although the UDHR enshrined the right to property as part of human rights,[63] the legally binding covenants derived from the UDHR (i.e. ICCPR, ICESCR) did not codify such a right, due to lack of consensus during international negotiation. Part of the challenge has to do with the 'paradox of property' (Drahos 1998, p. 16). On the one hand, the stability of individual possession ought to be secured for subsistence and/or adequate standard of living, *inter alia*. On the other hand, no other rules like the rules of property require constant adjustment by the states. As such, a general right of property in a human rights instrument would often be made subject to qualification. It is indeed the case for all of the regional human rights instruments that codified the right to property. They all included limitation clauses.[64] Furthermore, Nicole Graham's (2012, 2011) critical examination of the regime of private property law exposed how such regime is not only historically, culturally, and geographically specific; such regime also asserted a person-thing model that disconnected people and place. Such disconnection is exactly the opposite of what IK is about, which is inseparable from the web of connections.

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[63] See Article 17(1) of the UDHR. For further reading on the drafting history of this provision, see Glendon (2001).

[64] See the American Declaration on the Rights and Duties of Man (1948, Article 23), European Convention for the Protection of Human Rights and Fundamental Freedoms (1952, Article 1 of the First Protocol), American Convention on Human Rights (1969, Article 21), the African Charter on Human and Peoples' Rights (1981, Article 14), Arab Charter on Human Rights (2004, Article 31), and the Charter of Fundamental Rights of the European Union (2009, Article 17).

Moreover, indigenous representatives to the UN have persistently expressed their opposition to the market treatment of IK as 'property' that can be privatized, bought and sold out of its communal context. Opposite to indigenous peoples' perception, the IPRs regime is mostly based on the concept of individual and exclusive rights for a fixed term monopoly on something regarded as new invention or creation (Stoll and von Hahn 2008). The expansionist scheme of the TRIPs Agreement further extended the scope to include genetic materials already existing in nature. Such a market-based scheme worries indigenous peoples who generally consider themselves as custodians (not owners) of IK for present and future generations. Clearly, there is a clash of value and objective here. At the practical level, the threshold for granting IPRs is high and most indigenous peoples do not meet the requirement of existing law to claim such rights as communities, let alone the means to do so.

Consider the scenario of Enigma versus the Pangcah elders for an example. The indigenous singers in that case did not claim to be 'the creators' of the Pangcah tune that they sung, which was passed down from generation to generation. This is simply because no one 'owns' it in the communal context of Pangcah society. This fact could be used against the Pangcah elders in the court under IPRs law, which is largely based on the concept of individual rights and the notion of a single author that is the basis for granting ownership. That does not translate very well to consider communal creations or ownership (Coombe 2001, von Lewinski 2008). In James Boyle's (1996) critical examination of the IPRs law, he pointed out that the concept of authorship acted as 'a gate that shuts out a disproportionate number of non-western, traditional, collaborative, or folklore modes of production'. Such 'gate-keeping' is very much rooted in the IPRs system as the prerequisite for granting rights protection (Chapman 1994). This is the kind of system that the WIPO is promoting, which explains why the WIPO is historically unsympathetic to the concerns of minorities and indigenous peoples and their collective creations (Coombe 1998). This has presented a major

problem for IK protection and generated much criticism on the ground. Miguel Alfonso Martínez (2005) had also addressed this problem with reference to the TRIPs Agreement in his report to the UNWGIP and noted how indigenous peoples' traditional systems of ownership had been largely disregarded. In short, the collective rights of indigenous and local communities are generally not regarded as subjects for protection under existing intellectual property law (von Lewinaki 2008). Furthermore, as discussed earlier, the international human rights regime is also largely based on individual rights. This led Peter-Tobias Stoll and Anja von Hahn to conclude that the human rights provisions in the UDHR and ICESCR would not provide adequate foundation to protect IK (Stoll and von Hahn 2008). This conclusion echoed Dodson's 2007 report. As a result, IK often falls into the so-called 'public domain' and becomes 'free for all', a concept and practice similar to the rules of *terra nullius* commonly employed by settler societies to legitimize land-grabbing.

As noted earlier, indigenous peoples also consider their IK as inseparable from their right to self-determination. Such a right was recognized by the Sub-Commission's Resolution 2000/7 and the official commentaries by the CESCR and the UNSR discussed previously. It is also recognized by the CBD that established 'the approval and involvement' principle to take into account IK-holders whose ways of life are valued for sustaining biodiversity.[65] While it is encouraging to see such norm-building, it is not possible to overlook the caveat that the CBD framework is based on national sovereignty over natural resources (Taubman 2008). In other words, it is in the discretion of the member-states to determine the terms to protect biodiversity-related IK, it is not up to the IK-holders. In countries where indigenous peoples are still treated as primitive others without basic rights or remain the subjects of the state's assimilation and/or modernization schemes, their valuable ways of life are seriously in danger.

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[65] See Article 8(j) of CBD quoted in earlier discussion in Section 1 of this chapter.

So far, this chapter has established that IK is more than a property issue and the private property model is inadequate to meet the concerns of IK-holders. Given the unique characteristics of IK and its scope, the discrepancy between the concerns of indigenous peoples for their present and future generations as distinct peoples versus the trade-based regime of intellectual property is huge. However, at present, the WIPO is taking the lead in the negotiation of possible new treaties relating to IK. Therefore, it is necessary to take a closer look at this specialized agency of the UN.

IV.   WIPO: A Reluctant Agency of the UN

Before the controversies prompted by the TRIPs Agreement, the WIPO was largely unknown to the human rights debates. WIPO was established in 1967 via the WIPO Convention, which stated its central mission and objective as: 'to promote the protection of intellectual property throughout the world' (Article 3). Its mission was modified somewhat when the WIPO joined the UN in 1974 as one of its specialized agencies through the Agreement between the United Nations and the World Intellectual Property Organization (hereafter the UN-WIPO Agreement). In particular, the UN-WIPO Agreement obliged the WIPO to respect human rights in accordance with the Charter of the United Nations. Article 1 of this Agreement stated a redefined goal for WIPO as the following: 'for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development.' It also required the WIPO to be observant to the work of relevant entities within the UN system.

However, a number of commentators in an increasing number of studies suggested that the WIPO had not fully embraced its new role as a specialized agency of the UN (May 2006, 2000, Musungu & Dutfield 2003). For a long time, the WIPO managed to escape possible scrutiny by successfully positioned itself as a technical and supporting unit.

Nevertheless, since the WIPO took on the role to assist the TRIPs Agreement administered by the WTO, it had been under heated scrutiny as never before. In 2000, the WIPO established a treaty-making body known as the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (a.k.a. IGC) that is currently negotiating draft texts to become the new treaties that would have implications for the well-being of IK and IK-holder communities. In comparative terms, there is a huge discrepancy between the IGC and the practice of drafting the UNDRIP, as discussed above. Indigenous peoples have openly expressed frustration and difficulty engaging with the WIPO/IGC process affecting them.[66] Unlike the UNDRIP process, the IGC is not based on open participation but selective participation at best. Full participation and decision-making power are reserved and guaranteed for the WIPO's constituencies, that is the member-states and powerful interest groups like business corporations. This is one of the major problems for indigenous delegates whom I have spoken to at UN forums. At best, indigenous peoples could be considered as stakeholders (not rights-holders), if taken into account at all. Even with the status of stakeholder, indigenous peoples are simply too small in number for the WIPO to consider them significant or relevant.[67] As Claudia Geiringer (2012) pointed out, the WIPO largely operates on utilitarian and welfare economics models.

In addition to the non-participatory working method, the WIPO does not subscribe to international standards for indigenous peoples' rights according to the UNDRIP. This poses the most serious problem for indigenous peoples. The UNPFII had called upon the WIPO to adopt the UNDRIP and to engage with UN mechanisms regarding indigenous peoples' rights. However, the WIPO remained reluctant. In a joint statement delivered at the 5th session of EMRIP in Geneva, the Indigenous Peoples Council on Biocolonialism (IPCB) and Indigenous Peoples and Nations Coalition (IPNC) reiterated the recommendations issued by

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[66] Rosemary Coombe (2001) also noted the WIPO's early track record of hostility toward indigenous peoples.
[67] Not many indigenous persons register for IPRs like patent, copyright, or trademark.

the UNPFII (Harry 2012, ECOSOC 2012). They reiterated concerns about the suitability of WIPO for drafting treaties concerning IK. In their opinion, IK should be handled elsewhere and with direct participation of indigenous peoples as rights-holders according to the UNDRIP process. Another concerning practice is the CBD's governing body known as the Conference of the Parties (COP). As Peter Drahos pointed out, the COP has in effect 'deferred developments on TGKP [traditional group knowledge and practice] largely to WIPO' (Drahos 2004, p. 14). This is seriously problematic, because it means that the COP is endorsing the WIPO's practice and narrow interpretation of IK. Article 2 of the CBD, which laid out the scope of the Convention, overlapped with indigenous peoples' conceptualization of IK (see table 4 below). By handing IK over to the WIPO, IK is potentially at the disposal of powerful companies who are behind the IPRs regime. Unless the IPRs regime undergoes dramatic reform, there is nothing to curb its expansionist practice from cashing in on what it considers profitable from the wide scope of IK. There is also no incentive for it to develop its capacity to care for the communal needs and aspirations of indigenous peoples.

Table 4: CBD Article 2 and 8(j)
(Article 2 [excerpt]):   "Biological diversity" means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.   "Biological resources" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.   "Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.   "Genetic material" means any material of plant, animal, microbial or other origin containing functional units of heredity.   "Genetic resources" means genetic material of actual or potential value.   (Article 8(j)):   Subject to its national legislation, respect, preserve and maintain knowledge, innovations and

practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

However, as a specialized agency of the UN, the WIPO needs to recognize that its role is not only to promote IPRs as widely as possible to the world through WTO agreements or otherwise. It has the obligation to take into account the impact of trade agreements on human rights such as the TRIPs. At a minimum, it should uphold the basic principle of 'do no harm'. These are unresolved problems at the institutional level that are not easy to overcome. Furthermore, I also question whether the property model is the answer to protect IK. The following section explores an alternative framework for further consideration.

V.   A Provisional Proposition: Subsistence Rights Reconsidered

In the previous chapter (see section 3 of chapter 1), I presented my 2011 observation on IK that has more to do with land-territory-based subsistence rights for indigenous peoples beyond a property debate. My observation resonated soundly with Toki Blah (2005) and his insights gained through working with IPOs and witnessing their struggle over the years:[68]

> '[t]he insights gained…that I value most is the realization that the knowledge and wisdom of indigenous peoples had little to do with intellectual satisfaction. Its impact had more to do with the question of survival in harsh and inhospitable conditions.'

This understanding led me to examine the meaning of survival and subsistence rights in a more connected way that is not only about the narrow interpretation of bare essentials often defined in material terms. By 'connected', I mean not only to take into account the Vienna consensus of 1993,[69] which advocated the interdependence and indivisibility of human rights,

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[68] Blah shared his experience at the 28th Governing Council meeting of the International Fund for Agricultural Development (IFAD); it was based on his work on community resource management as the IFAD's former project director.

[69] See the previous chapter where I discussed the UN's first World Conference on Human Rights in Vienna that established the 1993 consensus.

but also to reflect on indigenous peoples' conceptualization of IK that embodies a holistic worldview of interconnectivity. Furthermore, by building on existing literature, I consider a more elaborated argument for subsistence rights that would provide substantial grounds for further consideration in regard to safeguarding measures for IK and IK-holder communities. This section will further articulate it.

Article 1(2) of both the ICESCR and ICCPR invoked the term 'subsistence' and stated that, '[i]n no case may a people be deprived of its own means of subsistence'. Henry Shue (1996) further elaborated on that to consider subsistence rights as including adequate living environment, which consisted of drinkable water, unpolluted air, and adequate food, *inter alia*. Chapter 4 will engage with further discussion on what constitutes 'adequate' (i.e. section 4 of chapter 4). Based on Shue's interpretation, Linda Hajjar Leib (2011) further established environmental rights as subsistence rights 'that are necessary to the fulfilment of other rights' (2011, p. 53). This expanded frame of subsistence rights provides a way to advance further understanding of IK, especially the link between IK and the right to food in the context of biodiversity. This is of particular relevance and importance in the IK debate. However, these issues are largely overlooked in the intellectual property debate of IK. Gradually, through progressive interpretation and recommendation by UN mechanisms such as the UNSR on the Right to Food (Olivier de Schutter) and the UNSR in the Field of Cultural Rights (Farida Shaheed), the right to food as a legal concept has been strengthened, especially as it connects to culture and the environment. In addition, Article 11(2)(a) of ICESCR explicitly invoked the right to science in regard to the right to food,[70] which was also considered as a prerequisite for the realization of a number of other human rights (de Schutter 2011, 2009, Shaheed 2012). More and more, the UN mechanisms have observed the

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[70] Article 11(2)(a) of ICESCR specified the need to 'improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources'.

principle of interdependence and indivisibility of human rights to better recognize the critical

connection among rights, such as the rights to health, water, housing, education, and

development as well as the emerging right to a clean and healthy environment. Most

noticeably are the following three UN special procedures: the UNSR on the right of everyone

to the enjoyment of the highest attainable standard of physical and mental health, the UNSR

on the Right to Food, and the UNSR in the Field of Cultural Rights (Grover 2011, 2009, de

Schutter 2009).

When I speak of survival or subsistence, then, I do not mean that indigenous peoples

only deserve minimum standards or the bare essentials in life. Too often, subsistence living

and subsistence rights are narrowly interpreted as such. Contrary to that narrow

interpretation, this study takes into account the current and ongoing predicament faced by

indigenous peoples to suggest a reconsideration of subsistence living and subsistence rights

based on Shue (1980) and Leib (2011) discussed above. Chapter 4 will further expand on this

proposition to consider a paradigm of dignity and well-being for future work.

VI.   Concluding Note

This chapter reviewed the specific background of key debates and global processes

concerning IK. In particular, it discussed the UN system (including its specialized agencies)

and the international movement for indigenous peoples' rights. By looking at both the social

movement dimension and the institutional dimension, this chapter demonstrated how both

dimensions constitute critical contexts in understanding how IK comes to occupy a contested

space and category in the international arena. Through case scenarios, this chapter also

illustrated how IK is a cross-cutting subject that often blurred the legal categories of rights,

which tend to break IK into different compartments. Taking into account the larger context

concerning indigenous peoples' subsistence living as intimately connected with their lands/territories, this chapter confirmed that IK is indeed more than a property issue.

The core of indigenous peoples' claim and struggle for IK is probably the right to self-determination.[71] This right is embodied by the principle of free prior and informed consent (FPIC) enshrined in the UNDRIP, a concept that indigenous peoples negotiated and fought for over two decades. What they demanded was meaningful participation in making the decisions that would affect them. As discussed in this chapter, the official resolution and commentaries adopted by the UN system all recognized the need for a human rights-based approach to the issue. The CBD also recognized the importance of rights-holders' participation as well as consent through its protocol that required 'the approval and involvement' of the knowledge-holders. Commentator such as Ikechi Mgbeoji considered the most positive outcome of the CBD was its 'unprecedented recognition of the contribution of local communities and indigenous peoples, particularly women' (Mgbeoji 2005, p. 83). Other scholar such as Francoise Burhenne-Guilmin (2008) traced an earlier recognition by the FAO Undertaking in 1983 of which the CBD took into account and expanded from it. While it is encouraging to see such recognition and norm-building, the CBD prioritized the sovereignty of the states over natural resources (Anaya 2014, Corpuz 2009). In other words, it is at the discretion of the member states, then, to determine the terms to protect biodiversity-related IK. This puts indigenous peoples in a vulnerable situation, especially in countries where source communities of IK are still treated as primitive 'others' without basic rights, or still remain the subjects of the state's assimilation and/or modernization schemes. In such cases, indigenous peoples' 'traditional lifestyles' so valued and recognized by the CBD are not only

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[71] See for example, the 'Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples' resulted from the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples (12-18 June 1993 in Aotearoa, New Zealand). The full text can be accessed via the WIPO link: http://www.wipo.int/tk/en/databases/creative_heritage/indigenous/link0002.html.

undermined but in danger. Chapter 4 will further discuss the CBD process and its protocol on access and benefit sharing that recently entered into force in 2014.

As discussed in this chapter, the tension between the state-centric interpretation of self-determination versus 'the right of all peoples to self-determination' (Article 1 of both the ICCPR and ICESCR) was one of the key dividing lines that initially prompted the four settler-states with indigenous populations to vote against the UNDRIP in 2007.[72] The statement issued by the CESCR (2001: paragraph 16) discussed earlier also recognized sovereignty of the state in the control of its natural resources. However, at the same time, the CESCR reiterated the duty of the state to implement a human rights-based approach focusing on vulnerable groups, including due respect for the social function principle. Both the CESCR (via its General Comment No.21) and the UNSR for Cultural Rights (Shaheed 2012) further recalled Article 1 of the ICCPR and ICESCR with a focus on empowerment of the peoples. Despite these progressive interpretations that serve as authoritative guidelines, the tension between the states and the peoples remains a complicated one that is not easy to resolve here or any time soon.

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[72] For further reading and analysis, see: Anaya (2009), Errico (2011), Quane (2011), Graham & Friederichs (2011).

Chapter III:

Struggle of Governance and Paradigm Shifts: The Environmental Regime and Its Impact

As discussed in the previous chapter, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) demonstrated indigenous peoples' holistic vision and conceptualization of their knowledge systems (a.k.a. IK) that encompassed a wide range of subjects currently governed by different regimes of law and policy. These different regimes do not necessarily share the same view about IK with indigenous peoples – particularly not their holistic epistemology that embodies 'emplacement' and interconnects indigenous peoples' cultural rights, territorial rights, and their right to self-determination, *inter alia*. I developed this conceptual frame of emplacement (see the previous chapter) to better reflect the unique nature of IK, which is characterized by the rich layers of interconnectivity and holistic epistemology represented by indigenous peoples' ways of life and their relationship with their lands/territories.[73] However, such complex relationships and web of connections are not understood by the regimes documented in this study. As a result, these regimes created a kind of heterogeneity and fragmentation in governance that contributed to the complex story of IK, which prompted me to undertake this PhD research.

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[73] For the integrated concept of land/territory, see the previous chapter (i.e. section 1.1 of chapter 2) where I explain how I consider the concept of land and territory together.

Although a lot of attention has been given to the intellectual property regime and trade, largely because of the World Trade Organization (WTO) and its powerful enforcement mechanism that generated much controversy,[74] it would be remiss to consider IK as only concerning intellectual property debates. Before the trade regime imposed a universal scheme via the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), which put IK on the marketplace for its commercial value, it was the environmental regime that critically impacted the well-being of IK and IK-holder communities via a universal scheme of conservation. Therefore, this chapter will focus on the environmental regime that is much less coherent than the intellectual property regime discussed in the previous chapter. Furthermore, this chapter will address the second research question (as proposed in chapter 1, section 3) about regimes as sites of inquiry and how they affect IK-holder communities. It will do so by reviewing the key processes and paradigm shifts affecting IK with special attention paid to the less-studied area in the IK debate. It will also continue to examine the conceptual contestations identified in the previous chapters to further argue how such epistemological struggle is correlated to the fragmented nature of existing regimes, which leads to inadequate protection for IK. This is an overarching theme that has emerged from this PhD research, which will be revisited again in the following chapter. Finally, this chapter will further articulate the rich notion of 'the web of connections' introduced in chapter 1. It will do so by proposing the idea of socio-cultural ecology to better convey the relationships between indigenous peoples and their ecological world, which warren better chance for long term sustainability. In conclusion, this chapter will argue how the loss of IK leads to poverty, not as interpreted by the mainstream paradigm based on GDP or GNP as indicators,[75] but by indigenous peoples' indicators.

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[74] The most significant is the TRIPs Agreement. See the previous chapter for more discussion on the intellectual property debates.
[75] Examples of such mainstream paradigm included the MDGs that supposed to aim for poverty alleviation for

I.   Introduction

Since the 1980s, indigenous peoples have been fighting with urgency for their rights to safeguard their knowledge systems on the global stage through the United Nations (UN). As discussed in the previous chapter, these knowledge systems are referred to as IK or emplaced knowledge in this thesis. The successful adoption of UNDRIP by the UN General Assembly in 2007 provided a human rights framework for their IK claims. However, as many practitioners can testify, there is a long way and many significant obstacles ahead before a full realization of such human rights framework for IK with integrated vision could be possible. For example, the following testimony demonstrated vividly the kind of epistemological struggle and frustration of IK-holders in the heterogenetic and fragmented world of governance, which constitutes a major part of the IK story:

> '…the WIPO[76] maintains that its mandate is to promote and protect intellectual property rights and not human rights. The CBD[77] says its mandate is the conservation and sustainable use, and equitable sharing of biological diversity. Therefore, human rights issues such as land rights and self-determination should be brought to the UN Commission on Human Rights[78]' (Tauli-Corpuz 2004, p. 13).

This testimony was delivered by veteran activist Victoria Tauli-Corpuz, an indigenous woman of the Igorot people from the Philippines who was recently appointed as the third UN Special Rapportuer on the Rights of Indigenous Peoples in 2014. Her testimony demonstrated soundly a level of frustration about the gaps and limitations of existing regimes that are far from coherent to care for IK or IK-holders' concerns. It is this kind of tension and frustration that led me to contemplate on this chapter and this PhD project as a whole, by asking: 'who is governing what and for whom?' This is another way to ask the second research question proposed in the introductory chapter, which is 'what regimes govern IK and how do they affect IK-holders?' These questions will serve as structural grids that guide this chapter.

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target groups including indigenous peoples.
[76] WIPO stands for the World Intellectual Property Organization.
[77] CBD stands for the Convention on Biological Diversity, enforced in 1993.
[78] UN Commission on Human Rights was replaced by today's UN Human Rights Council (HRC) in 2006.

The link between the WIPO, CBD, and UN Human Rights Council (formerly the UN Commission on Human Rights) might not be immediately apparent to some who might wonder 'what do the WIPO and CBD have to do with indigenous peoples and human rights?' A straight-forward answer, in short, is that they all want a valuable asset that indigenous peoples possess.[79] In a nutshell, that valuable asset is IK, as this chapter will illustrate. The CBD is the first legally-binding treaty that recognized the value inherent in the indigenous peoples' ways of life and their IK for biodiversity conservation. Article 8(j) of the CBD in effect legitimized indigenous peoples' rights to biodiversity (Xanthaki 2007).[80] However, the CBD did not go beyond declaring such rights. Instead, it stopped short on substantial measures to provide normative protection for such rights. It also did not recognize that the value of IK is not only for general environmental benefits or business potentials based on economic growth; IK is also a means of survival for indigenous communities as distinct peoples for present and future generations.[81] This is the kind of conceptual discrepancies or epistemological struggle that this chapter will continue to explore.

1.1   *Regimes: Sites of Meaning-making and Struggle of Governance*

As introduced in chapter 1, this thesis considers 'regimes' as governing systems and social institutions (Buttel 2010, Stokke 1997, Young 1997). More specifically, regimes are the sites of meaning-making and struggle for governance that represent forms of institutionalization and knowledge production that generate local-global dynamism and impact. By looking into the legal, bureaucratic and policy spaces with historical depth, this chapter aims to provide a better understanding of the discourses concerning conservation and development, and how the relationship between specific regimes and IK is regulatory. Particularly so when policy

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[79] As demonstrated by the CBD (Article 8(j)) and subsequent reports by the UNCTAD (2001) and the IPCC (2007), *inter alia*.
[80] Xanthaki referred to them as 'indigenous bio-diversity rights' (2007, p. 226).
[81] See the previous chapter for more discussion on this topic.

and law are actively and critically involved in managing how 'IK' is conceptualized, constructed or classified within these contexts. This affects how indigenous peoples' rights in regard to IK is configured and understood, and what kinds of protection could be possible. Therefore, it is important to examine them.

IK as a cross-cutting subject provides an interesting and challenging case to examine the development agenda embedded in the environmental regime that raised questions about human rights, particularly for vulnerable groups such as indigenous peoples. I identify the linkages and intersections between development, environment and human rights as the essential pieces in the IK debate, which are often overlooked. Such linkages were highlighted by indigenous representatives' demand for culture as the added fourth pillar of sustainable development at the UN Conference on Sustainable Development in 2012, which was more widely known as the 'Rio+20' to acknowledge the first Earth Summit took place in 1992 in Rio de Janeiro, Brazil. At present, pillars of sustainable development included: economic growth, social inclusion, and environmental balance. The following chapter 4 will discuss indigenous peoples' intervention on the fourth pillar of culture.

Legal paradigms of intellectual property and environmental law often function as mechanisms of governance that produce ways or frameworks for authorizing and regulating the value of knowledge and knowledge circulation, as well as legitimizing the different types of knowledge authorities. Therefore, it is important to examine them more closely. This study adopts the trajectory suggested by Oran Young, who urged future scholars to examine 'the complex linkages between individual regimes and other institutional arrangements' (Young 1997, p. 298). This study takes on the brave task of mapping out multiple regimes, which is required for a cross-cutting subject like IK, to provide a better understanding of this tangled story of global regime and governance.

It is no accident that most of the biodiversity-rich areas remaining today are located in indigenous peoples' ancestral territories (Harmon 1996, Gorenflo *et al.* 2012). This fact suggests that indigenous peoples have managed these areas well, according to their ways of life and emplaced knowledge[82] that appear to be more sustainable than the modern consumption-based lifestyles of capitalism. Early studies in the 1950s by community ecologists already suggested that the cultural diversity of indigenous peoples have contributed to biodiversity.[83] This critical link between cultural diversity and biological diversity was increasingly recognized and endorsed by more studies from the 1980s onward that recommended that indigenous peoples are more likely to be the best stewards of the environment (SwedBio 2012, Dowie 2009, Pretty *et al.* 2008, Colchester 2003, Schwartzman *et al.* 2000). Furthermore, the United Nations Environment Programme (UNEP) issued an outcome document derived from the Workshop on Traditional Knowledge and Biological Diversity that drew a direct link between biological diversity with cultural and linguistic diversity; and how the loss of IK corresponded to biodiversity loss (UNEP 1997). The recognition of this linkage is crucial because IK-holder communities are often societies of oral tradition that transmit and obtain IK through culture and language. Increasingly, the governing regimes responsible for generating global policies and regulations have begun to recognize the value of IK for their respective mandate, particularly the regimes concerning the environment, including climate science, and intellectual property.

For example, the legally-binding CBD was unprecedented when it recognized the value of IK and stipulated that the member-states should 'respect, preserve and maintain

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[82] As introduced in chapter 1, I consider IK as emplaced knowledge in this thesis to highlight the intrinsic relationship between the source-communities of IK-holders with their lands/territories that nurtured such knowledge. Such emplaced knowledge, practices, and ways of life are also very much collective in nature. For more discussion on emplaced knowledge, see the previous chapter.

[83] For further reading on the linkage between cultural diversity and biodiversity, see: Durning (1992), Orlove & Brush (1996), Schwartzman *et al.* (2000), Yibarbuk *et al.* (2001), Colchester (2003), Schwartzman & Zimmerman (2005), Pretty *et al.* (2008), Hunt & Rabett (2013), Pilgrim & Pretty (2010).

knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity' (Article 8j). The CBD is the first legally-binding instrument of this sort. The WIPO also established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (a.k.a. IGC) in 2000 to address IK issues with a treaty-making mandate (WIPO 2000). The IGC is the first and probably still the only standard-setting body focusing on IK at the global level. As discussed in the previous chapter 2, new treaties concerning IK are currently under negotiation at the IGC. Furthermore, the United Nations Conference on Trade and Development (UNCTAD) identified IK as a valuable and 'underutilized' resource for trade and development and subsequently called upon relevant parties to better 'harness' IK for future growth (UNCTAD 2001, p. 5). For example, IK is considered by the trade-based regime of intellectual property as a new 'growth' area for industries like biotechnology firms (May 2006). IK could also provide convenient short-cuts to reduce the costs of research and development (R&D) for new products. Finally, IK is recognized by global initiatives for climate change such as the International Panel on Climate Change (IPCC) for its climate science value. The IPCC took note of IK in its 2007 assessment report as 'an invaluable basis for developing adaptation and natural resource management strategies in response to environmental and other forms of change' (IPCC 2007). The aforementioned global endeavours provided a glimpse of the key regimes that want a piece of the pie from IK for their respective mandates and constituencies. The overarching developmental imperative from these regimes and its mixed and often controversial impact on the environment and local communities have generated further discussion on the thematic debate of the environment and development that informed this chapter for further analysis.

Despite the understanding gained about the critical linkage between cultural and biological diversity (Maffi and Woodley 2010), and positive recognition for IK as containing valuable knowledge systems about biocultural diversity, IK-holders generally do not have a positive experience on the ground. In the name of biodiversity conservation, or privatization of intellectual property, or climate change mitigation, IK-holders frequently experience structural discrimination, unjust dispossession and denial of access, participation or consultation in the decision-making process and benefit-sharing. The most destructive factor of all for indigenous peoples has been the involuntary displacement that contributes to a rapid loss of emplaced knowledge, which has an intrinsic relationship and dependency on its immediate environment. As noted before, this thesis also refers to IK as emplaced knowledge interchangeably. Furthermore, different regulatory/governing regimes tend to conceptualize IK differently to suit their respective mandate, interest, and/or the concerns of their constituencies. A quick review of the major international instruments pertaining to IK and the rights of knowledge holders show a wide range of issues and the inevitable linkages between them (see table 5 below).

Table 5 compiles the most relevant ones based on a synthesis of different policy papers and academic literatures that emphasized different terrains.[84] The range of topics and issues demonstrated by this compilation include, but are not limited to trade (e.g. intellectual property, forest products, non-timber forest products and other environmental goods and services), conservation and environment (include: mainly about species and habitat but also more generally ecology, biodiversity, agriculture, and climate change), heritage (include both tangible and intangible heritage as well as cultural and natural landscapes), and human rights (not only indigenous peoples' rights but also rights to property, culture, health, development and the environment), *inter alia*. Table 5 also shows a range of distinct legal instruments that

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[84] The main sources included the following as well as my own compilation as addition: Lang (1993), Furtado *et al.* (2000), Roe & Elliott (2010), Dodson (2007).

are independent from each other (some with its own secretariats) without any one holding a

superior jurisdiction or covering the full range of IK. From the perspective of indigenous

peoples' holistic epistemology of IK, these legal instruments and their corresponding

governing regimes present a rather incoherent picture. This corresponds to the legal and

institutional fragmentation discussed in previous chapters. A similar problem of

fragmentation was also raised by scholars working on the intangible cultural heritage (ICH),

which overlapped with IK. For example, Christoph Graber *et al.* (2012, p. xxii) discussed

Table 5: Key International Instruments and Frameworks
1886: Berne Convention for the Protection of Literary and Artistic Works
1948: Universal Declaration of Human Rights
1952: Universal Copyright Convention
1954: Convention for the Protection of Cultural Property in the Event of Armed Conflict
1957: International Labour Organization Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (a.k.a. ILO 107)
1966: International Covenant on Civil and Political Rights
1966: International Covenant on Economic, Social and Cultural Rights
1970: Prohibition and Preventing the Illicit Import, Export and Transfer of Cultural Property
1971: Ramsar Convention on Wetlands
1972: Convention Concerning the Protection of the World Cultural and Natural Heritage
1972: Declaration of the United Nations Conference on the Human Environment
1973: Convention on International Trade in Endangered Species of Wild Fauna and Flora
1979: Conservation of Migratory Species of Wild Animals
1982: UN Convention on the Law of the Sea
1986: Declaration on the Right to Development
1989: Convention concerning Indigenous and Tribal Peoples in Independent Countries (a.k.a. ILO 169)
1992: Operational Guidelines for the Implementation of the World Heritage Convention
1992: Convention on Biological Diversity
1992: Agenda 21
1992: Rio Declaration on Environment and Development
1992: Non-legally Binding Authoritative Statement of the Principles of Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (a.k.a. The Forest Principles)
1992: UN Framework Convention on Climate Change
1993: Vienna Declaration on Human Rights and Program of Action
1994: UN Convention to Combat Desertification
1994: UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa
1995: Agreement on Trade Related Aspects of Intellectual Property Rights
2000: Millennium Development Goals (2000-2015)
2001: FAO International Treaty on Plant Genetic Resources for Food and Agriculture
2001: UNESCO Protection of the Underwater Cultural Heritage

2002: World Health Organization, traditional medicine strategy (2002-2005)
2003: UNESCO Convention on the Safeguarding of the Intangible Heritage
2004: Second International Decade of the World's Indigenous Peoples (2004-2015)
2005: UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions
2007: UN Declaration on the Rights of Indigenous Peoples
2012: FAO Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

how the law itself has been highly fragmented with regard to ICH. Rosemary Coombe and Joseph Turcotte also commented on the same point and noted how 'ICH is internationally governed by a variety of distinctive legal instruments, none of which has superior jurisdiction in all contexts' (Coombe & Turcotte 2012, p. 272). These are the general problems for IK.

At a practical level, this problem of fragmentation poses challenges for me to carry out a comprehensive mapping for this chapter. Nevertheless, I managed to navigate this problem by prioritizing the key regimes and institutions that have particularly invested in IK at the global level with dynamic processes and significant power and control over the governance of IK or have significant impact on indigenous communities. That directed me to look at the regimes of environmental governance and trade that have consequential impact on the governance of IK and IK-holder communities. There are multiple regimes under the heading of trade and environment, respectively. The previous chapter 2 has discussed the trade regime of intellectual property and relevant debates. This chapter will explore the regime of environmental governance that crosses over to the heritage regime, which governs both natural and cultural heritage and the domain of biodiversity. This is an understudied area that the following sections will explore further.

II.   Contested Terrain and Paradigms of Conservation

This section will review the origin and transformation of the conservation scheme, including the key concepts that influenced the practice. It will also explore the contested zones as a

result of the conceptual framing, as well as the evolving discourse of the environment and development for further analysis.

2.1   Idea and Value of 'Wilderness'

Although the concept of conservation has older roots historically,[85] the globalization of conservation is a rather contemporary phenomenon based on distinct ideas and values about nature. The most salient concept underpinning this contemporary phenomenon of conservation in its early days was the romanticized concept of pristine nature as 'primitive' and 'wild' without human interference. Such a concept was championed by the American naturalist, John Muir (1838-1914), during the United States national park movement of the late 1800s. Muir campaigned long and hard for the protection of 'wilderness' areas, which in his view should be set aside for recreation to fulfil an emotional need for wild places (Colchester 2003). This romantic ideal of nature has resulted in massive violence and the displacement of Native Americans living in historical continuity in the imposed demarcation zones without consultation, systematic documentation or compensation for their loss and hardship (Spence 1999). Adrian Phillips also noted that, '[i]n the past, many protected areas were established with a near-exclusive focus on scenery and wildlife, with a minimum concern for, and recognition of, their cultural values' (Phillips 2003, p. 44). The first attempt to establish such a park was in 1864 in Yosemite, California. It involved the bloody killings of the Miwok people and the subsequent and repeated evictions of Miwok survivors for the following 105 years (Keller and Turek 1998). The second attempt was the establishment of Yellowstone National Park in 1872 in today's Wyoming. It continued to deny Native Americans' claims for their lands/territories and natural resources. Yellowstone is officially

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[85] Marcus Colchester (2003) traced it back to Mesopotamia in the first millennium B.C.

considered the first national park in the United States,[86] and it is the most popularized model dominating the global practice.

The key concept driving the national park practice is the concept of 'wilderness' (Oelschlaeger 1993). That concept seems to be dominated by certain aesthetic and recreational ideals supported by the bourgeois, i.e. for the privileged ones who have the leisure and means. It also represents a particular kind of conceptualization and relationship to nature where human beings are positioned to be spectators. The notion of 'wilderness' was formally legalized in 1964 via the Wilderness Act in the United States, which defined wilderness as 'an area of undeveloped Federal land retaining its primeval character and influence without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions'.[87] It not only imposed a property claim on lands/territories that the settler-state confiscated by force, but also asserted a certain notion and value of development (section 3 of this chapter below will further examine this notion and value of development). This positive idea and value of wilderness without human presence had long been the driving force behind conservation policy and practice with lasting impact, until today (Adams 2012, Rangarajan & Shahabuddin 2006, Schama 1995, Cronon 1996, Nash 2014). Furthermore, it artificially disconnected and separated humans from nature. Such disconnection is in sharp contrast to indigenous peoples' perception of and relationship with their surroundings that could be described as sentient ecology (Anderson 2000, Dove 2006, Lye 2004, West 2005). In the previous chapter, I discussed the unique characteristics of IK and introduced the concept of sentient ecology. The following segment will elaborate on this concept based on ethnographer David Anderson's idea to advance my interpretation.

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[86] See the USA National Park Service portal: http://www.nps.gov/yell/index.htm.

[87] Section 2(c) of the Wilderness Act also stated that: '[a] wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.'

Anderson's theorization of sentient ecology described the communicative relationships between all living beings in all ecological life (2000, p. 116). Anderson's argument extended the idea of personhood to all such living beings, which formed a solidary and obligatory relationship between humans, places and animals. In other words, as noted by geographer Jessica Weir (2008), sentient ecology established the kind of ecological relationships rooted in emotional and ethical foundations. These multiple relationships and bonding recognized by sentient ecology are regular features in indigenous peoples' claims of interconnectivity and holistic worldview. Inspired by Native American elder Oren Lyons[88] and my fieldwork experience, I propose to expand on the concept of sentient ecology to further convey the kinship relationship described by indigenous peoples based on responsibility and compassion toward all living beings in all ecological life.[89] As Lyons presented in a number of public speeches and interviews, indigenous peoples consider human as part of nature and not superior to nature; and all living beings in the cosmos are family members for whom we bear responsibility and compassion as community. Therefore, he said, 'simply replanting trees is not replanting community; you lose a lot in the process' (Lyons, n.d.). His inspiring speech and acute observation led me to develop the idea of socio-cultural ecology to better describe the communal relationships between indigenous peoples and their ecological world.

Considering the degree of social conflict and long-term human suffering caused by the policies and practices of national parks, such operation rooted in the specific idea and value of wilderness did not go on without critics or reflection. Slowly, concerns for the social impact of conservation policies and practices emerged in the 1950s that polarized opinions (Holdgate 1999, Roe & Elliott 2010), particularly over questions like 'to protect species, or to

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[88] Oren Lyons is a Native American Faithkeeper of the Turtle Clan who belongs to the Seneca Nations of the Iroquois Confederacy. He has been an active advocate for indigenous peoples' rights at global forums. I met him during the 10th Session of UNPFII in 2011.

[89] Lyons inspired me to expand my understanding of sentient ecology and to think more about the socio-cultural relations with all ecological life.

benefit people'? By the 1970s, these concerns grew even more prominently over the impact of the conservation scheme of 'protected areas' (Adams & Hutton 2007, Adams 2004, Ghimire *et al.* 1997). The following sections will take a closer look at these issues.

2.2   *Human Costs of 'Wilderness' (Bully Wears White Gloves)*

Environmental causes or protection efforts are often perceived as noble or pure with the moral high ground. However, as scholars of political economy and political ecology have pointed out, it would be delusional to think that environmental objectives are apolitical or 'other than distributive' (Redclift 1984, p. 130). In fact, environmental debates and projects like conservation are inherently and inevitably political (Adams 2009, 2008). This section will discuss these issues and examine the modern conservation practice that mainly operates via the model of protected areas that are designed to fence off people and development in order to protect nature – this has been the dominating practice since the 20th century with lasting effect. Such practice like protected areas was driven by ideologies and principles that prioritized conservation of nonhuman life in the name of nature as 'wilderness' and aimed to eliminate human habitation (Dowie 2009). It also exemplified an ahistorical view about the lands/territories without taking into account the long-term human-nature relationships. As a result, it created mixed impact on the environment (Orlove & Brush 1996, Yibarbuk *et al.* 2001, Durning 1992, Hunt & Rabett 2013, Schwartzman & Zimmerman 2005). Contemporary studies actually showed that the scheme of protected areas had been counterproductive to conservation goals (Carey, Dudley, and Stolton 2000). Despite the mixed results and criticisms, the scheme of protected areas is still going strong. This causes one to wonder who is protecting what, for whom and at whose costs?

While the question of social impact still remained unresolved, the number of protected areas has doubled in the world via the model of national parks in the 1970s (J.

Harrison, Miller, and McNeely 1982). It doubled again during the 1990s into the early 2000s (Terborgh 2004). It was estimated that 12% of the world's land surface had been officially demarcated as protected areas, which roughly translated to more than 100,000 protected areas around the globe (Chape *et al.* 2005). Most of them were and still are in some cases inhabited by indigenous peoples (Colchester 2004). Those were the areas where reported and unreported cases of forced eviction and other forms of harassment or violence took place in the name of conservation and nature, which made indigenous peoples in biodiversity-rich areas the most affected population. This chapter will discuss some of the particular cases shortly.

It is difficult to know the number of peoples displaced by conservation since global implementation, because credible statistics are hard to come by, if available at all. However, a few studies have provided us with some snapshots of the scale. For example, it was estimated that about 1 million square kilometres of forests, pasture, and farmlands have been expropriated in the name of conservation in Africa (Nelson and Hossack 2003). The single creation of the Selous Game Reserve in Tanzania has displaced some 40,000 people in the name of 'wilderness' (Neumann 1998).[90] In Asia, it was estimated by the Society for Participatory Research in Asia (SPRA) that about 600,000 indigenous persons have been evicted by conservation projects in India alone (SPRA 1993). It is not clear how many people have been displaced by conservation projects in Latin America, but some source provided that about 85% of the so-called protected areas are actually inhabited lands (Amend and Amend 1995).

Forced evictions in the name of conservation is not yet a thing of the past and it often goes unreported or undocumented, unless someone gets arrested or the victims get a hold of

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[90] Selous Game Reserve is one of the World Heritage Sites since 1982. See UNESCO website: http://whc.unesco.org/en/list/199.

sympathetic NGOs willing to make complaints on their behalf. One of the more recent cases

included the Karen people in Thailand. In late December 2011, Karen communities were

violently evicted without prior notification by the wardens of Kaeng Krachan National Park,

who were joined by military forces (AIPP 2013). The unlawful evictions carried out by the

national park authority involved house-burning, looting and continuous harassment in spite of

Thailand's domestic law that guaranteed the rights of the Karen people to live on their

ancestral land and to practice their livelihoods including agricultural rotation, *inter alia*.[91]

Such evictions also violated the CBD of which Thailand is a signatory state since 2004. The

legally-binding CBD requires member-states to provide appropriate measures to protect

indigenous peoples and local communities in protected areas. Finally, it violated the

UNDRIP, which Thailand also endorsed in 2007. In addition to land-based forest peoples,

sea-based indigenous peoples such as the Moken, the Moklen and the Urak Lawoi had also

been threatened and criminalized by the Thai authority for living their traditional way of life

by the sea.[92] Travelling to another continent, the Endorois people in Kenya have been

suffering forced eviction in the name of a wildlife reserve for decades. Unlike their

counterparts in Asia, which remains the only region in the world without a regional human

rights mechanism, the Endorois case received an unprecedented decision in 2010 by the

African regional human rights mechanism. As noted in chapter 1 section 2, this case is cited

in short as the 'Endorois v Kenya 276/2003' and it established a landmark ruling in favour of

the Endorois people against the Kenyan government for removing them from their ancestral

land. The judgment was made by the African Commission on Human and Peoples' Rights

(ACHPR), which is a quasi-judicial mechanism mandated by the African Charter on Human

and Peoples' Rights. This judgment was also adopted by the African Union. Another positive

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[91] See Thai Constitution (Sections 66 and 67 of Part 12, 2007) and Thai Cabinet Resolution on the restoration of traditional practices and livelihoods of Karen people (3 August 2010).
[92] For example, see a rare news report in the TTR Weekly titled 'Phuket sea gypsies evicted' (6 June 2013): http://www.ttrweekly.com/site/2013/06/phuket-sea-gypsies-evicted/.

development was the National Land Commission established by Kenya's new Constitution of 2010 with a mandate to review past wrongs and redress. However, as NGOs cautiously noted, the journey from the landmark ruling to the actual implementation of the law has been slow and uncertain for the Endorois people.

While indigenous peoples continue to receive positive recognition for their sound stewardship and ecological management that preserved much of the planet's biodiversity, contemporary regimes of environmental governance have systematically contributed to the massive displacement and hardships of indigenous peoples from their rightful place on their lands/territories (Jacoby 2001, Runte 1990). This, in turn, has contributed to a significant loss of indigenous peoples' emplaced knowledge. As discussed previously, the concept of 'wilderness' that underpinned much of the conservation practices, like the national parks or protected areas, generally disregarded and dismissed human habitation prior to its demarcation without acknowledgement. In the case of United States, such acknowledgement has been made only slowly in relatively recent time (Denevan 1992, Whitney 1996). Such conservation practices largely ignore the social, cultural as well as political and historical dimension of managing the environment. Lands/territories have histories and complex human-nature relationships that need to be taken into account if aiming for sustainable management. In this regard, it becomes essential to examine the protected areas by asking the question of 'by who and for whom' – i.e. who demarcates the protected areas according to whose priority, benefit and enjoyment? Particularly so when the evidence-based studies discussed above have shown that indigenous peoples contributed significantly to biodiversity, yet they remained marginalized in the decision-making processes for conservation of biodiversity. This fact led me to look at the theme of power and control as well as the role of the states and big international non-governmental organizations (BINGOs) that are the key agents and actors in shaping and executing policies (Dowie 2009, Adams & Hutton 2007).

Along this line of power and control, it is also important to take note of the colonial roots of conservation that can be traced back to the 18th and 19th centuries and how that colonial legacy is currently reproducing injustice for local communities (Roe and Elliott 2010). For example, William Adams and Jon Hutton (2007) traced the link between the game-reserve schemes governed by the colonial power of Great Britain and how the game-reserve was 'underpinned by the British tradition of private reserves where the elite could hunt, and where non-proprietors lacked rights to access and use'. The closing statement given by indigenous representatives at the fifth World Parks Congress (Durban, South Africa 2003) vividly depicted how conservation coupled with colonization had framed disadvantaged groups like indigenous peoples as obstacles to be removed for the various authorities' mandates since their arrogant beginnings.[93] An excerpt from the closing statement was documented by Fergus MacKay and Emily Caruso (2004, p. 14), which is reproduced below:

> '[t]he declaration of protected areas on indigenous territories without our consent and engagement has resulted in our dispossession and resettlement, the violation of our rights, the displacement of our peoples, the loss of our sacred sites and the slow but continuous loss of our culture, as well as impoverishment. It is thus difficult to talk about benefits for Indigenous Peoples when protected areas are being declared on our territories unilaterally. First we were dispossessed in the name of kings and emperors, later in the name of State development and now in the name of conservation.'

While the practice of conservation schemes have been criticized as problematic for decades, the scenario of climate change is adding yet another layer of demands to further complicate the matter. In effect, as testified by indigenous representatives at the UN, the schemes of climate change mitigation provide a 'green' justification for further displacement of indigenous peoples via an even bigger scale of land-grabbing, such as the scheme of Reducing Emissions from Deforestation and Forest Degradation (REDD).[94] This added layer

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[93] The World Parks Congress is organized every ten years by the International Union for Conservation of Nature (IUCN), which was established in 1948 – i.e. the same year as the Universal Declaration of Human Rights (UDHR) was adopted.

[94] For further reading on the so-called 'green' economy and conservation-related activities as well as its negative impact, see Mousseau & Biggs (2014), Blomley *et al.* (2013), and reports by the NGO known as REDD-Monitor.org (http://www.redd-monitor.org/redd-an-introduction/).

of complexity has consequently turned conservation into the number one threat to indigenous peoples' livelihoods and well-being. For example, see indigenous peoples' intervention delivered by the Asia Indigenous Peoples Caucus to the UNPFII in 2011 under the Agenda Item 3(b) on the environment (attached as annex 2 with this thesis). UNPFII had issued a number of analysis and recommendations on the issues concerning REDD and the envrionment in regard to FPIC, in response to indigenous peoples' interventions (UNPFII 2013, 2011). In addition to this kind of threat in the name of conservation, indigenous peoples are also confronted with multiple destructive activities such as the extractive industries with entrenched commercial interests in natural resources on indigenous peoples' lands/territories (EMRIP 2012).

2.3   *'Ecological Guardians' or 'Enemies of Conservation'?*

As the subheading for this section suggests,[95] there are polarized perceptions about the role of indigenous peoples in environmental governance. The objectives of the environmental movement and indigenous peoples' concerns have not been compatible historically (Richardson 2008). The early perception that considered indigenous peoples' ways of life as anti-environmentalism or incompatible with environmental ideals is competing with the more modern perception that considers indigenous peoples as the best possible stewards for a sustainable ecology (Jessup and Rubenstein 2012). These are rival opinions that evolved through time and are not yet fully settled. This matter is further contested by the fact that environmentalism or the environmental movement are not necessarily coherent. For example, William Adams (2009) discussed the market-based environmentalism versus the 'deep ecology' movement and the other shades of grey that exist in between. The market-based environmentalism or 'free-market environmentalism' is the dominant force in the mainstream model of sustainable development (Adams 2009, Low & Gleeson 1998). In a nutshell, the tug

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[95] My subheading is inspired by the works of Mark Dowie (2009, p. xvi) and Benjamin Richardson (2008, p. 6).

of war between the different strands could be characterized by the two ends of the spectrum: with the techno-centric camp (e.g. market environmentalism) on the one hand and the eco-centric or bio-centric camp (e.g. 'deep ecology') on the other hand. Frederick Buttel also pointed out that, 'many contemporary expressions of environmentalism (e.g. indigenous resistance to rainforest destruction in the developing world) would not have been seen as environmental activism three decades ago' (Buttel 2010, p. 44). These heterogeneous ideas and practices either had roots in the ideals of the wilderness and pristine nature, or mixed in with science/technology-based rational choice for a particular kind of development. Such heterogeneity has created many contested zones in the name of the environment or progress. The link between science and progress is a critical one that often escaped further scrutiny. The most critical is how science in effect has been silencing nature and by doing so materialized nature for further exploitation to meet developmental needs (Harrison 2002, Samson 2013). Such silencing effect kills all ecological relationships according to socio-cultural ecology proposed above (see section 2.2 of this chapter).

The strand of conservation practices that disregarded or simply did not understand the socio-cultural ecology of indigenous peoples frequently labelled indigenous peoples and local communities as the perpetrators, thieves and intruders upon nature. For example, conservationists and academics, like John Terborgh (1999, p. 7), referred to indigenous peoples and local communities as 'the danger within'. Some of the early studies also provided controversial cases in support of the scepticism that questioned indigenous peoples' practices as incompatible with environmental goals (Martin 1978, Anderson 1983, McGlone 1983). Other studies questioned indigenous peoples' lack of apparent intention for conservation, and suggested that indigenous peoples probably had never consciously practiced 'conservation', whoever defined it.[96] In particular, the work by Shepard Krech

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[96] For further debates, including the controvercial debte of 'ecological noble savage', see: Jackson *et al.* (2001),

(2000) had prompted much controversy, which illustrated soundly the contestation in regard to this topic. The next chapter will further discuss this controversy. Counter studies, in abundance, demonstrated opposing views. For example, Benjamin Richardson (2008) reviewed a number of significant studies that praised and advocated indigenous peoples' invaluable knowledge about the ecology and evidence-based guardianship to vast areas of habitats in the world. These included studies that considered traditional ecological knowledge (a.k.a. TEK) most notably by Darrell Posey and many others (Posey 2000, Johannes 2002, Morin-Labatut & Akhtar 1992). Studies by the International Union for Conservation of Nature (IUCN 1997) also demonstrated positive linkages between indigenous peoples and sustainability. Still other supporting studies concluded that local communities were the best defenders of the tropical forest against the private and public sectors (Shepard Jr *et al.* 2010, Schwartzman *et al.* 2000).

While opposing arguments continue to take place in academia, the practice of conservation has historically considered indigenous peoples and local communities as getting in the way of conservation, if not the actual cause of environmental degradation. Such accusations have led to a series of violation of indigenous peoples' rights in the name of conservation. For example, since the 1990s, indigenous peoples' traditional method of shifting cultivation in Asia has been targeted as the cause of deforestation without presenting supporting evidence for this accusation (Novellino 2010, AIPP/IWGIA 2012). Other cases included the ones that I brought before the UN concerning the criminalization of indigenous peoples' livelihoods and practices based on their cultural norms and customary law. For example, one of these cases concerned the Truku people's traditional hunting practice on their ancestral territory that was subsequently demarcated as the Taroko National Park in the northeast coast of Taiwan. Still other cases concerned the Atayal people, whose members

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Shields (2000), Alvard (1993), Stearman (1994), Buege (1996), Hames (2007).

were criminalized by Taiwan's national forest law for collecting naturally fallen tree trunks for non-commercial use on their traditional territory.[97]

The accusation that alienated human habitation from nature as wilderness was later supported by the neo-Malthusian view that became a persistent and prominent feature during the 1960s and 1970s. The main concern of the neo-Malthusian view was 'population growth outstripping available resources' (Dove 2006, p. 196, Adams 2009, p. 51). Such concern over population growth was captured in the widely-cited essay by Garret Hardin (1968), entitled 'The Tragedy of the Commons' as well as other publications, such as the book by Paul R. Ehrlich (1972), entitled *The Population Bomb.* Both of these publications stirred up heated debates. The neo-Malthusian view has now been widely criticized for being overly simplistic, particularly for ignoring overarching drivers of political-economic sorts. Such counter studies of political ecology included: James Fairhead & Melissa Leach (1996) on forests, M. Thompson & M. Warburton (1988) on the Himalayan ecosystem, and Piers Blaikie (1985) on soils. All of the above studies have argued against the neo-Malthusian view. Other studies in defence of indigenous peoples against the unjust accusation of environmental degradation included studies of 'traditional ecological knowledge' (a.k.a. TEK) mentioned above, largely associated with the work and activism of Darrell Addison Posey on ecosystems of the tropical forests in Brazil and other countries (Darrell A. Posey 2004).

Increasingly, the scientific community as well as policymakers have come to recognize that without indigenous peoples and their emplaced knowledge guiding them to live with (not against) the diverse ecosystems and species on their lands/territories, there would not be much biodiversity to conserve today. Such recognition has led to a number of paradigm shifts in conservation practices. The following section will examine the ongoing

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[97] This case has attracted high-profile attention in Taiwan. The Atayal community in question was locally known as Smangus and their story was later featured in an award-winning documentary film titled 'Smangus: A Year in the Clouds' (2011 UK/Taiwan Production).

interactions or collisions between these differing ideologies, agendas and priorities by taking a closer look at the transformation of conservation policies and the intersection of environmental governance and development affecting IK-holders.

III.   Environment and Development: A Tale of Collision and Negotiation

One of the key documents that marked a paradigm shift in conservation was the *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (IUCN/UNEP/WWF 1980). It marked a paradigm shift by establishing conceptual linkages that bridged the conventional divide between the environment and development with sustainability for the first time (Allen 1980, McCormick 1986, Roe and Elliott 2010). The conceptual linkages advanced by the *World Conservation Strategy* provided the first global framework that led to the establishment of a number of important institutions and policy papers: such as the World Commission on Environment and Development (WCED) and its influential report *Our Common Future*, which will be discussed further in section 3.2.1 below. As these conceptual linkages developed, the political challenges and framing of key issues at the global level are increasingly marked by 'the environmental claims of the rich versus the subsistence needs of the poor' (Adams & Hutton 2007, p. 165). As such, the discourses of poverty and conservation in the larger debate of the environment and development became more and more politicized and contested, particularly the debate on whether to link issues of poverty with conservation (Brockington, Duffy, and Igoe 2008).

These conceptual linkages, along with policy framings, had particular significance for indigenous peoples who comprised about 4.5% of the world's population but nearly 10% of the world's poor (WorldBank 2011). According to the World Bank's data, most of them live in developing countries; about 80% of them reside in Asia. In regard to poverty indicators, the data provided by the UN agencies showed that indigenous peoples' perception of poverty

included dispossession of land and resource rights that were directly linked to the breakdown of food security, food sovereignty, and cultural degradation (IASG 2006). Such a perception of poverty differed from the grand initiative, such as the Millennium Development Goals (MDGs), which are mainly based on a narrow interpretation of economic deprivation without taking into account the multifaceted face of poverty. As Bryan Stevenson (2012) critically concluded in his inspiring talk, 'poverty is not the opposite of wealth but it is the opposite of justice'.[98] A NGO report published by the Minority Rights Group International (a.k.a. MRG) resonated soundly with the above insight by taking note of another face of poverty that is embedded with structural discrimination against indigenous peoples and minorities (Mihlar 2012). In other words, poverty is increasingly linked to identity if not defined by it. By this account, the global framework of MDGs is bound to fail indigenous peoples as one of its target groups to eliminate poverty; because indigenous peoples' perception of poverty is largely not accounted for within the MDGs framework (see the next chapter for more discussion on the MDGs in relation to indigenous peoples).

Although indigenous peoples' ways of life that embodies their emplaced knowledge have received high praise and recognition (as demonstrated previously), studies continued to show that indigenous peoples largely remained the victims or 'obstacles' and not the beneficiaries or partners of development mostly due to structural discrimination (UNPFII 2010, UNESCO 2009). Despite more recent initiatives that promoted (or have been more receptive to) integration of scientific knowledge with local knowledge like IK,[99] the imbalanced relationship of power in the decision-making processes continued to marginalize or exclude IK-holders (the next chapter will further engage with these issues). This raised the question of 'whose/what knowledge for whose/what development' that pushed this thesis to

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[98] Although Stevenson was not addressing indigenous peoples *per se*, I find his critical observation resonated soundly with indigenous peoples' experience in regard to poverty.

[99] Examples of this kind include and are not limited to Community-based Adaptation (CBA) and Ecosystem-based Adaptation (EBA). For example, see ELAN (2012).

investigate further, particularly in the context of sustainable development that is the key concept that linked the environment and development together (Adams 2009).

As discussed in the previous section above, I have indicated how certain notions and values of 'development' were common in both of the trade and environment regimes. Hence, the following sections will first review the deeply rooted imperative of 'development' and then provide an interdisciplinary mapping of significant policies and processes that impacted IK and IK-holders. The aim is to identify and analyse key international regimes of governance to discuss conceptual debates that generate discourses and thematic debates of environment and development that bear consequences for indigenous peoples and their emplaced knowledge.

3.1   A Brief Genealogy of 'Development'

At the outset, it is necessary to take note of the word 'development' that often has different meanings for different users. Since the word 'development' came into the English language in the 18th century, it already had a clear association with the notion of 'growth'. It was later bundled with the 19th century concept of 'progress' and the colonial imperialist's idea of 'improvement' as well as capitalism and the cultural hegemony of the West (Nisbet 1980, Nisbet 1969). As examined by Robert Nisbet (1980), the metaphor of 'development' was rooted in the enlightenment thoughts of the 18th and 19th century. As such, it carried with it a normative aura to development thinking (Goulet 1995). Instead of recognizing this concept of 'development' as a social-cultural construct with particular roots, goals and direction (Samson 2013), the above forces normalized it via globalization without much reflection but righteous attitude. The exemplary model that dominated the orthodox development thinking was the American model of foreign aid. It was based on the success of the European

Recovery Program (1948-1951) more widely known as the Marshall Plan[100] carried out by the Harry Truman Administration for the aid of post-war Europe. The subsequent framing of development by American economist, Walt Rostow, (1960) was probably the most influential. Rostow's framing of development was based on stages of economic growth aimed to reach 'the age of high mass consumption' as its goal. His idea of development was then endorsed and adopted by U.S. President John F. Kennedy's Administration and gained prominence.[101] Since then, the meaning of development has been fixated on means to reproduce economic growth and also extended that model to newly decolonized states.

The above meaning of development and operational model based on economic growth[102] was put to the test in the 1980s during the global crisis of poverty and environmental degradation. That prompted a proliferation of debates on the once certain meaning of development and its operation. It also led to further theorization of development that led to better recognition of the complex linkages between poverty, environment and development (Adams 2009, Blaikie 1995). Among them, Amartya Sen's take on poverty was a fundamental paradigm shift unlike the influential Malthusian reading of society (Sen 2000, 1999, 1989). The Malthusian view considered poverty as 'the punishment of the improvident and unscrupulous for their lack of industry and morality' (Samson 2013, p. 58). The next chapter 4 will discuss further Sen's thesis in the context of human development.

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[100] It was named after the Secretary of State George Catlett Marshall who was instrumental during the process.

[101] President Kennedy addressed the United Nations General Assembly (UNGA) on 25 September 1961 to launch a proposal for a Development Decade. The proposal aimed to 'lessen the gap between developed and underdeveloped countries, to speed up the processes of modernization, and to release the majority of mankind from poverty' (Jolly *et al.* 2004, p. 86). Henceforth, the UNGA passed a Resolution that established the 1960s as the UN Development Decade. It called upon its member-states and their peoples to 'intensify their efforts to mobilize and to sustain support for the measures required on the part of both developed and developing countries to accelerate progress towards self-sustaining growth of the economy of the individual nations and their social advancement' (Paragraph 1 of Resolution 1710 (XVI) 1961). For further reading, see UN (1962).

[102] Such economic growth was measured by the market value. However, as Karl Polanyi noted, '[a] market economy can only exist in a market society' (Polanyi 1944, p. 71). That was its limitation.

Despite growing critical reflection on 'development' in more recent times, the normative imperative associated with the lineage of 'growth', 'progress' and 'improvement' discussed earlier continues to be generalized as a universal value and measure for advancement without much questioning today.[103] How much is this lineage born out of particular context and historical climate embedded in the contemporary policies affecting the governance of IK and knowledge-holders? That is a question that echoed an earlier question posed above, i.e. 'whose/what knowledge for whose/what development'. The following sections will address them further by reviewing significant junctures that indicated policy origins and transformations affecting indigenous peoples and their emplaced knowledge for further analysis.

3.2 Mapping: Shifting Value, Changing Paradigm

This section will provide an interdisciplinary mapping of the processes leading up to the influential policy document known as the *World Conservation Strategy* that provided the conceptual linkages for sustainable development, as well as subsequent developments for policy and practice. This section will identify and analyse significant international regimes of governance to discuss conceptual debates that generate discourses and thematic debates of environment and development that bear consequences for indigenous peoples.

3.2.1 The 1970s to 1980s

A number of significant global processes and treaties with new conceptual frameworks and trends took place at the international level during the 1970s to 1980s (see table 5 above for a compilation of key international instruments and frameworks). In regard to international treaties, one of the earliest and better known environmental instruments was the Ramsar

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[103] For example, Colin Samson commented on how the changing organization of societies from hunter-gathering to agriculture and to industry 'became generalized measures of universal progress' (2013: 47).

Convention on Wetlands (adopted 1971, enforced 1975). Its significance lays in its recognition of not only the ecological values of wetlands but also the cultural values of wetlands (Gillespie 2007).[104] Another key international convention was the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (a.k.a. World Heritage Convention, adopted 1972, enforced 1975). It recognized both tangible and intangible cultural values of protected areas as well as the close relationship between humans and the natural environment. More significantly, the World Heritage Convention (WHC) is equipped with a mechanism to save endangered heritage. In regard to global initiatives and processes, the 1972 UN Conference on the Human Environment (a.k.a. Stockholm Conference) was an important precursor to subsequent forums and influential instruments on environmental governance.[105] It not only provided the necessary foundation for the social movement for environmental concerns but also the outcome document known as the Stockholm Declaration that established normative principles for the modern development of environmental law (Burhenne-Guilmin 2008). Some commentators credited the Stockholm Conference as the first forum that addressed issues with regard to the environment and development. Others considered the Stockholm Conference as a follow-up drawing on the concepts and affirmation from an earlier initiative by the UNESCO on the Biosphere in 1968 (McCormick 1989). The Biosphere Conference of 1968 is worth noting because of its integrated vision and interdisciplinary orientation for conservation and development. The Biosphere Conference advocated that 'the utilization and the conservation of our land and water resources should go hand in hand rather than [in] opposition' (UNESCO 1993, p. 4). It also promoted international cooperation to achieve that goal, which was one of the early attempts to establish an intergovernmental platform to discuss what would be called

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[104] See the Ramsar Convention's Preamble and two resolutions adopted by the Conference of the Parties to the Convention on Wetlands: namely the Resolution VIII.19 (2002) 'Guiding principles for taking into account the cultural values of wetlands for the effective management of sites' and the Resolution IX.21 (2005) 'Taking into account the cultural values of wetlands'.

[105] It was established via the UNGA Resolution 2398 (1968).

'sustainable development' today. These global initiatives and emerging trends have moved thematic issues of environment and development into the mainstream arena.[106]

Considering the core value of 'wilderness' and the associated romantic notion of pristine nature discussed in earlier sections above, which underpinned conservation practices, the Stockholm Conference and its outcome document stood out as progressive. A change of value and paradigm seemed to have emerged from that process to consider 'human' and 'environment' together rather than apart. However, upon closer look, the main concerns for the Stockholm Conference were not driven by the conservation discourse or how to fence off humans and development from nature. It was more concerned about pollution, such as the by-products of industrialization and how to manage and control them. Commentators such as John McCormick (1986) and William Adams (2009) identified these concerns as the key factors that occupied and mobilized the 'First World environmentalism'. The 'First World' versus the rest scenario had created certain divides in different historical moments of environmental debates. As noted above (see section 2.3), different strands of environmentalism and environmental movement were not necessarily coherent. Such heterogeneity demonstrates how environmental issues are multifaceted, especially when the same word 'environment' does not necessarily correspond to the same concerns or issues. That said, it is beyond the scope of this thesis to cover the heterogenetic debates under the rubric of 'the environment' at this time.[107] The purpose of this chapter is to focus on the global processes that have the most impact on IK and IK-holders via examination of the linkages between the environment, development and human rights.

Terminologies such as 'sustainability' or 'sustainable development' were not yet part of the common language at the Stockholm Conference in 1972. But, the basic premise of

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[106] For example, one of the indicators could include international financial institutions such as the World Bank's new job position for an Environmental Advisor in 1970.

[107] The scope of these divides and associated debates can probably take up another thesis of its own.

sustainable development was clearly part of its agenda. For example, its outcome document known as the Declaration of the UN Conference on the Human Environment (a.k.a. the Stockholm Declaration) stated its goal to 'defend and improve the human environment for present and future generations' (paragraph 6 of its Preamble).[108] In addition, the Stockholm Declaration also called for a better utilization of 'fuller knowledge' (paragraph 6 of its Preamble),[109] in generalized terms, with accompanying provisions that specified science and technology (paragraph 18 and 20) as the means to 'improve' the environment for the realization of human rights (paragraph 1 and 16). A certain level of anthropocentrism and metaphor of developmental imperative based on science/technology were undoubtedly present in Stockholm at the time. Nevertheless, the Stockholm process provided the necessary precursors and conceptual frameworks for later developments. Another important process in the 1970s that bore significant relevance for the discussion of IK and IK-holder-communities was the World Heritage Convention mentioned earlier, especially its development since the 1990s that indicated a paradigm shift (Francioni and Lenzerini 2008). The following section 3.2.2 will discuss it further.

At the time of the 1970s, issues concerning indigenous peoples were still new to the UN system. Indigenous peoples' emplaced knowledge and its potential contribution to the environment and development were also largely unrecognized by the UN system. Although the effect of environmental governance on indigenous peoples had gone on for a while, particularly the practice of protected areas, the UN had only begun to commission its first study on indigenous peoples and their conditions in 1972 (see earlier discussion above on the Cobo study in chapter 2 section 3). As discussed above, concerns for the social impact surrounding conservation policy and the practice of protected areas had emerged in the 1950s

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[108] See also Principle 1 and 2 of the Stockholm Declaration.
[109] Paragraph 6 of the Preamble stated that, '…through fuller knowledge and wiser action, we can achieve for ourselves and our posterity a better life in an environment more in keeping with human needs and hopes.'

and then became prominent fixtures in the 1970s. As a result, significant changes had begun

to surface in the policy arena during this time. The first international body to recognize the

continuous problem of human displacement caused by protected areas was the International

Union for Conservation of Nature (IUCN). The IUCN consisted of member-states, NGOs and

experts; it was created in 1948 under the sponsorship of UNESCO for the international

conservation of nature and natural resources.[110]

During its 12th General Assembly (in Kinshasa 1975), the IUCN addressed the social

impact concerns for the first time by officially adopting a resolution entitled *Protection of*

Traditional Ways of Life (IUCN Resolution 12.5). This is also known as the Kinshasa

Resolution. The Kinshasa Resolution included a number of significant recommendations that

urged the states to 'maintain and encourage traditional methods of living and customs'

(IUCN 2006, p. 12) and to respect and integrate them into respective development schemes at

their earliest stages of planning. It also urged the states to stop human displacement by

recognizing indigenous peoples' rights to their ancestral lands. Following the Kinshasa

process that recognized past wrongs, the IUCN co-authored a strategy document that initiated

a sea change in conservation thinking. Other co-authored agencies included the United

Nations Environment Programme (UNEP) and the World Wildlife Fund (WWF) in

collaboration with the Food and Agriculture Organization (FAO). This strategy document is

the influential *World Conservation Strategy* (IUCN/UNEP/WWF 1980), which was noted by

a number of commentators as marking a paradigm shift and rhetorical turn for conservation

policy (Adams & Hulme 2001, Hulme & Murphree 1999, McCormick 1986, Adams &

Hutton 2007). More specifically, the *World Conservation Strategy* took into account the

needs of local communities and included keywords like participation, inclusion, and

sustainability. Most significantly, it established the conceptual linkages that bridged the

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[110] For a historical account, see Burhenne-Guilmin (2008).

conventional divide between conservation and development with sustainability and further linked poverty with ecological degradation (Roe & Elliott 2010). This new paradigm and conceptual framework leading to sustainable development was argued by the *World Conservation Strategy* as 'the conservation and sustainable use of living organisms and ecosystems' (IUCN/UNEP/WWF 1980, p. 151).

Following the *World Conservation Strategy,* the Food and Agriculture Organization (FAO) adopted the International Undertaking on Plant Genetic Resources for Food and Agriculture (hereafter FAO's International Undertaking, adopted in 1983).[111] It was the first international instrument to recognize the critical importance of indigenous peoples and local communities including IK for conservation of crop diversity. The FAO's International Undertaking was the precursor that provided important context and foundation for the CBD to build on.[112] Another influential document released in the 1980s was the policy paper titled *Our Common Future*. It was released in 1987 and was more widely known as the Brundtland Report to acknowledge the role of former Norwegian Prime Minister Gro Harlem Brundtland as the Chair of the WCED that issued this policy paper. The Brundtland Report was the first of its kind to provide policy framing for sustainable development, which is the key concept that linked the environment with development. It was also the first to use the concept of biodiversity[113] and further linked the concept of biodiversity with state responsibility to natural resources (Burhenne-Guilmin 2008).

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[111] See Resolution 8/83. See also the FAO website (http://www.fao.org/Ag/cgrfa/iu.htm) and the Commission on Genetic Resources for Food and Agriculture established in 1983 (http://www.fao.org/nr/cgrfa/cgrfa-about/cgrfa-history/en/). The negotiations finally concluded via the adoption of an International Treaty on Plant Genetic Resources for Food and Agriculture by the FAO Conference on 3 November 2001.

[112] FAO's International Undertaking also provided instrumental context for subsequent articulation of farmer's rights in 1986, which is beyond the scope of this thesis at this time. For further reading, see Burhenne-Guilmin (2008) and the Farmers' Rights Project at Fridtjof Nansen Institute (http://www.farmersrights.org/about/fr_history_part2.html).

[113] The concept of biological diversity was coined by scientists to bring ecological, species, and genetic diversity together (Burhenne-Guilmin 2008).

The 1980s was also marked by greater awareness of indigenous peoples' rights and community-based programming. The first UN initiative on indigenous peoples' issues was the UN Working Group on Indigenous Populations (UNWGIP) established in 1982. As discussed in the previous chapter 2, the UNWGIP process gave birth to the UNDRIP. The new paradigm of sustainable conservation that took into account local communities also encouraged a new approach of natural resource management and attracted major funding agencies to support them. However, the rise of indigenous peoples' rights and the new trend of community-based programming prompted mixed responses and polarized opinions. For example, one of the new schemes known as the Integrated Conservation and Development Project (ICDP) aggravated fierce debates and encountered harsh criticism.[114] Much of the criticism was generated by ICDP's weak and/or inconsistent impacts, either as a result of elite capture or contested trade-offs with conservation goals, *inter alia* (Brechin *et al.* 2003, Brockington 2003, Campbell & Vainio-Mattila 2003). That led to major backlash from hard-core conservationists and academics that genuinely defended the fortress model of protected areas as the only right way to preserve conservation.

Stern critics such as John Terborgh (1999) and John Oates (1999) were strong defenders of the orthodox approach of protected areas as strictly 'no man zone'. Both of them considered the trend that aimed to integrate conservation and development was wrong. Oates further blamed population growth as the cause for environmental degradation and biodiversity loss. They also opposed the integration of conservation and development as well as linking poverty alleviation with conservation. One of the key values that they and other like-minded critics uphold was the view of nature as pristine (Adams 2012). For example, Oates advocated that such pristine nature should be protected for its 'aesthetic and intrinsic

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[114] One of the controversial examples of ICDP was the extractive reserves of the Amazon forest that meant to address both conservation and development goals through non-invasive and sustainable extraction of forest products. That did not go down well with its critics. For further reading, see Dove (2006) and Wells & Brandon (1992).

values', i.e. 'for its own sake' and not for 'utilitarian value' (Oates 2006, p. 232). Greater

recognition of indigenous peoples' rights also worried critics like Oates and Terborgh. The

key concern for them was the loose definition of 'indigenous people' that might potentially

grant anyone as the rights-holder[115] to participate in the administration and/or management of

protected areas. Furthermore, Oates did not consider it a problem to displace people for

developmental projects like railways, airports, and so on, as long as appropriate

compensation will be provided. In the same vein, he also did not consider it a problem to

displace people for conservation. It is indeed problematic to see how critics like Oates and

others were unaware of their 'positionality' (Abu-Lughod 1991) and privilege while

overlooking the unjust history of conservation that disproportionally targeting marginalized

groups such as indigenous peoples.

To a certain extent, the developmental debate in the environmental discourse was

further complicated by another discourse in the human rights debate that declared

development as a human right. In 1986, the Declaration on the Right to Development (DRD)

was adopted by the UN General Assembly. It was adopted at a time of late colonial era

largely preoccupied with newly independent states' nation-building agenda that either did not

include indigenous peoples or considered them as subjects for assimilation into the

mainstream labour force.[116] In addition, among the basic requirements of the DRD (see table

6 below), the one that required due respect to the right of self-determination and sovereignty

over natural resources would be a poignant one for indigenous peoples and the IK debate.

Table 6: Basic Requirements of the UN Declaration on the Right to Development:[117]
• putting people at the center of development

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[115] At the 2003 World National Parks Congress in Duran, indigenous peoples delivered a declaration called for recognition of indigenous peoples as rights-holders; not merely stakeholders.

[116] To a large extent, these ILO conventions were considered as developmental tools to assimilate and integrate indigenous peoples into the nation-state framework. For further reading, see Erueti (2011), Rodríguez-Piñero (2005).

[117] Source: UN website (http://www.un.org/en/events/righttodevelopment/background.shtml).

- ensuring free, active and meaningful participation
- securing non-discrimination
- fairly distributing the benefits of development
- respecting self-determination, and sovereignty over natural resources
- all in a process that advances other civil, political, economic, social and cultural rights

It is not clear whether the DRD enshrined the right of the people or the right of the state to development. It is also not clear what kind of development it is advocating for. Despite different interpretations of the DRD and the global politics and bargaining sport between the donor countries and the recipient countries, what came across more from the DRD context were the postcolonial-states claiming the right to development for nation-building and economic growth. Such a developmental agenda is likely to further marginalize indigenous peoples and to contribute to the loss of IK.

While polarized opinions continued to occupy a space in the conservation debate since the 1980s and into the 1990s, a proliferation of international instruments receptive to greater understanding and appreciation of indigenous peoples' rights and IK was booming.[118] The 1980s was an important period for the international movement of indigenous peoples' rights where significant standard-setting instruments were taking shape. These included the drafting of an UNDRIP shortly after the establishment of the UNWGIP in 1982 and the legally-binding instrument adopted by the International Labour Organization (ILO), i.e. the Convention concerning Indigenous and Tribal Peoples in Independent Countries (a.k.a. ILO 169, adopted 1989, enforced 1991). While the draft of UNDRIP was on its way to be adopted through the human rights branch of the UN hierarchy , the ILO 169 advanced indigenous peoples' rights by recognizing their rights to their lands/territories and natural resources therein. As discussed in the previous chapter, the ILO conventions concerning indigenous peoples were not without critics, most notably was criticism for its assimilationist framework and lack of indigenous peoples' participation and input.

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[118] See table 5 for a compilation of major international instruments and frameworks in the 1990s.

Since the 1990s, parallel developments in three key regimes affecting IK and IK-holders were taking shape: namely heritage, environment and human rights. The following section will review the most significant ones, accordingly.

3.2.2 The 1990s Onward

As noted in section 3.2.1 above, one of the important processes that bore significant relevance for IK and IK-holder-communities was the World Heritage Convention (hereafter WHC). Its significant development since the 1990s has indicated a paradigm shift, which will be further discussed in this section. The concept of heritage is an evolving one that reflects changing values and priorities through time. The early concept of heritage upheld by the governing body of the WHC considered natural heritage as pristine without human intervention (UNESCO 1977). The governing body of WHC is known as the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (hereafter WHComm). In other words, natural and cultural heritage were treated as two distinct categories (Gillespie 2007, Phillips 2003). Such binary approach has increasingly been questioned by contemporary studies that demonstrated how most 'natural' landscapes are not really 'natural' without the imprint of humans (W. Adams 2010). For example, a number of studies have shown how indigenous communities have been carefully managing the environment from the tropical to the Arctic for centuries (Berkes *et al.* 2000, Gunderson & Holling 2002, Tyrrell 2010). Furthermore, the WHComm also largely focused on the material aspects of heritage, such as monuments, archaeological sites, and icons or symbols subject to the state's recognition (Coombe & Turcotte 2012, Holder 2008). As the concept of heritage gradually evolved to reflect local values and practices, the dualism of natural versus cultural began to soften somewhat. More specifically, it began to recognize human action that contributed to the special qualities of protected areas with historical and cultural significance.

This advanced understanding and interpretation of heritage was reflected in the WHComm's decision in 1992 to revise the WHC's selection criteria. The decision led to the creation of a new 'mixed' category that came to be known as 'cultural landscape', which codified heritage value to natural landscapes with cultural significance (UNESCO 2008). Although the dual nature of the WHC obliged the WHComm to address both cultural and natural heritage, it took two decades for an integrated concept such as 'cultural landscape' to finally evolved and emerged into an inscription category.[119] A number of commentators had applauded this move as marking a paradigm shift (Rössler 2006, Boer & Gruber 2012). In particular, Mechtild Rössler (2006) noted this changing conceptualization of heritage was most significant in its shift toward (and not against) people and communities. Ben Boer and Stefan Gruber considered this shift as an indicator that 'illustrates the changing attitudes towards the heritage of indigenous peoples and local communities whose economies and identities are geographically and ecologically specific' (2012, p. 378). However, considering earlier initiatives and insights that already recognized cultural values in association with natural habitat; the WHComm had fallen behind by a few decades. For example, Alexander Gillespie acutely pointed out that the Ramsar Convention on Wetlands (1971), which was only one year older than the WHC, was widely known for its recognition of cultural values of the wetlands.[120] Prior to the Ramsar, the first session of the IUCN's World Parks Congress in 1962 (Seattle, USA) already noted the intangible human values of protected areas.

Nevertheless, this conceptual change and change in attitude is a welcome development. In particular, it is significant for indigenous peoples whose lands/territories are often demarcated by the modern states as protected areas in the name of conservation. For example, the first cultural landscape was inscribed in 1993 and it was the Maori people's

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[119] IUCN was working closely with the UNESCO to develop the concept of cultural landscape (Phillips 2003). IUCN has a consultative status with the UNESCO.
[120] See also the Preamble of the Ramsar Convention.

sacred site known as today's Tongariro National Park in New Zealand (Forbes 1993).[121] In

1994, the Anangu people's sacred site, known as today's Uluru-Kata Tjuta National Park in

Australia, was re-nominated into the new cultural landscape category (it was first inscribed to

the WHC's list as a natural site in 1987). This growing interest and recognition of cultural

values associated with natural sites in the WHC context is most noticeable in regard to the

overlap of both tangible and intangible values between people and the natural sites, which is

remarked by Alexander Gillespie as 'very difficult to disentangle, both institutionally…and

philosophically' (2007, p. 92). Gillespie's sentiment resonates with my earlier discussion

above on fragmentation of the law and institution that resulting in multiple disconnections.

The next chapter 4 will discuss further this evolving paradigm of heritage from a more socio-

legal perspective and what these evolving concepts mean for the future of IK and IK-holders.

The 1990s continued to witness the tug of war between different fractions that

generated the discourse of environment and development. Following the conceptual

framework advanced by the *World Conservation Strategy*, which led to further articulation

and policy initiative for sustainable development, had encouraged donor agencies to support

community-based conservation projects (Adams & Hutton 2007). Among them, the Global

Environment Facility (GEF) was specifically established in 1991 as a global financial

mechanism to fund environmental projects and programs to recipient countries. The focal

areas qualified for GEF funding had evolved though time since 1991. According to the more

recent version of GEF-5 Focal Area Strategies,[122] they included: 1) biodiversity, 2) climate

change mitigation, 3) international waters, 4) land degradation, 5) chemicals, 6) sustainable

forest management/REDD,[123] and 7) cross-cutting capacity development. These are thematic

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[121] For a global list of heritage sites around the world, see the UNESCO website:
http://whc.unesco.org/en/list/421.
[122] Full text of the GEF-5 Focal Area Strategies (2012 edition) can be accessed via the GEF portal:
http://www.thegef.org/gef/pubs/GEF-5_FA_Strategies.
[123] 'REDD' refers to the global scheme of Reducing Emissions from Deforestation and Forest Degradation.

areas that could have a real impact on IK and IK-holders on the ground, but there is no mechanism to carry out systematic monitoring according to the UNDRIP. The GEF is managed by three implementing agencies (see table 7 below for a structural chart): the World Bank, United Nations Development Programme (UNDP) and United Nations Environment Programme (UNEP). One of the World Bank's reports indicated that in the duration of twelve years it has provided $450 million in biodiversity conservation through the GEF (Oates 2006).

Despite opposition and scepticism by the hard-core conservationists discussed earlier, the period of 1990s and onward witnessed greater recognition of indigenous peoples' rights and their contribution to biodiversity conservation. The most notable event was the 1992 process officially known as the UN Conference on Environment and Development (a.k.a. the Earth Summit), which took place in Rio de Janeiro, Brazil. The Earth Summit was significant because it was the global venue where the concept of sustainable development, as shaped by the 1987 WCED Report (a.k.a. *Our Common Future*), was formally launched.[124] These concepts were formally launched at the Earth Summit via its outcome document, i.e. the Rio Declaration on Environment and Development (hereafter the Rio Declaration, see in particular Principle 4). Since then, 'sustainable development' has become the core concept of subsequent conferences and outcome instruments at the international level.

Table 7: GEF Structural Chart[125]

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[124] As discussed above, the WCED stands for the World Commission on Environment and Development (established in 1983), which provided the groundwork for the Earth Summit to take place.

[125] Source: GEF website (http://www.thegef.org/gef/gef_structure).
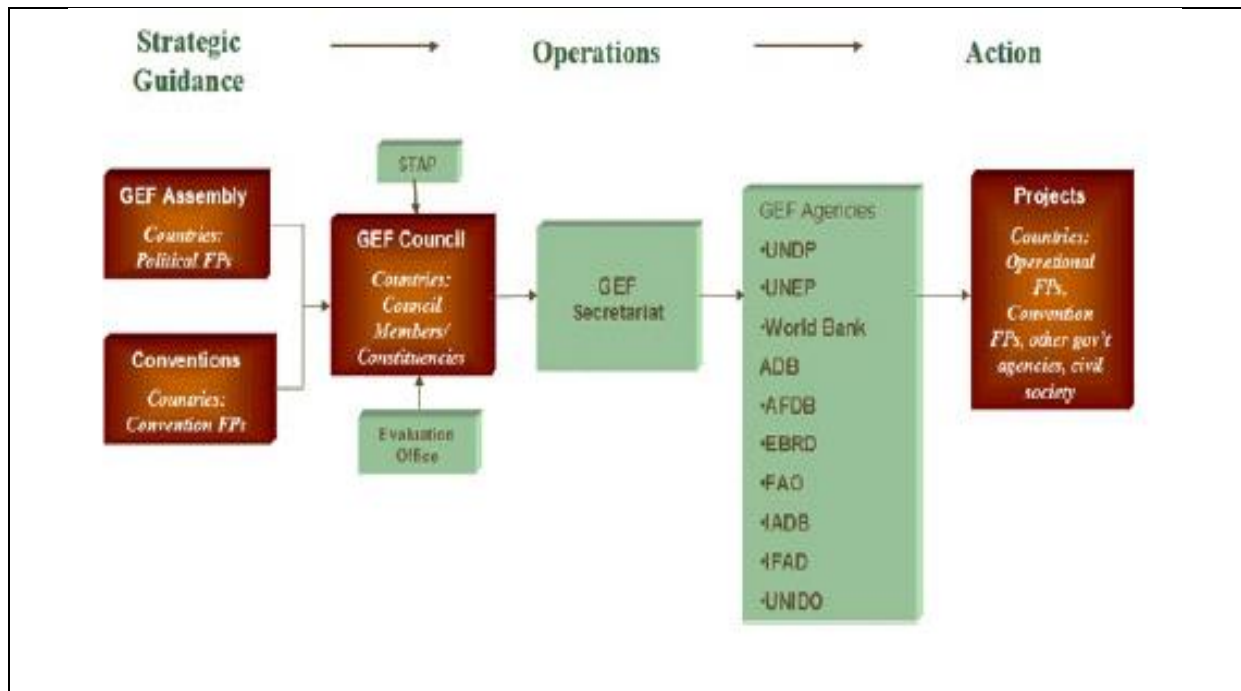
The Rio process of 1992 was a prolific one. In addition to its outcome document the Rio Declaration, it also included the following that established former mechanism for future work: Agenda 21, the Statement of Forest Principles, United Nations Framework Convention on Climate Change (UNFCCC), and the United Nations Convention on Biological Diversity (CBD). Among them, recognition and keen interest in IK was clearly demonstrated by the Rio Declaration (see Principle 22) and the CBD (see Article 8(j)). Shortly after the Rio process, the World Bank declared its commitment to IK in 1996 by committing itself to becoming 'the knowledge bank' (Dove 2006, p. 195). Subsequent mechanisms designated for sustainable development were also established at the Earth Summit; these included the Commission on Sustainable Development (CSD), Inter-agency Committee on Sustainable Development, and High-level Advisory Board on Sustainable Development. Among them, the CSD was given the responsibility to organize the Rio+20 in 2012, where a large number of indigenous delegates were in attendance. As noted above, the 'Rio+20' refers to the UN Conference on Sustainable Development, which indicated an acknowledgement to the landmark Earth Summit took place in 1992 in Rio de Janeiro, Brazil.

Around the same time, parallel development within the regime of human rights also witnessed significant advancement in Geneva. After nearly ten years of engaging in a drafting process that involved indigenous delegations at the UNWGIP, a final draft of the UNDRIP (dDRIP) was formally submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 1993 for further adoption in the UN hierarchy. In 1995, the Commission on Human Rights (CHR)[126] adopted the dDRIP and established the Working Group on a Draft Declaration on the Rights of Indigenous Peoples (a.k.a. WGDD) to further consider the draft for final adoption at the UN General Assembly. Although it took many years for the dDRIP to reach final adoption in 2007, the long and engaging process directly involved indigenous peoples as the rights-holders and active advocates had transformed indigenous peoples' status in the UN system. This process also contributed to awareness-building and encouraged good practices that gradually granted the UNDRIP a status of international customary law.

Even before the UNDRIP was formerly adopted by the UNGA, its working document known as the dDRIP had already received positive acceptance. For example, the WWF adopted a Statement of Principles on Indigenous Peoples and Conservation (hereafter the WWF Statement of Principles) in 1996 that endorsed the dDRIP. This WWF Statement of Principles included the rights of indigenous peoples to own, manage, and control their lands and territories and to benefit from the application of their knowledge. It also stated that constructive engagement with indigenous peoples must start with recognition of their rights. The governing body of the IUCN known as the World Conservation Congress also adopted a series of resolutions on indigenous peoples in the 1990s. Among them, three resolutions were adopted in 1994 that recognized indigenous peoples' rights to their lands and territories, particularly in regard to forests, marine and coastal ecosystems as well as protected areas. Four resolutions were adopted in 1996 that recognized indigenous peoples' rights to manage

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[126] As noted above, the CHR was later replaced by today's Human Rights Council.

their natural resources in protected areas either on their own or jointly with others. Yet another IUCN resolution endorsed the principles enshrined in the ILO 169 and the dDRIP. In response to the newly adopted TRIPs Agreement of 1995, the World Conservation Congress of IUCN governing body further adopted a resolution in 1996 entitled 'Indigenous Peoples, Intellectual Property Rights, and Bio Diversity'.

In 1997, the IUCN followed up on its commitment and published a two-volume resource guide entitled *Beyond Fences* that made suggestions about how conservation objectives can be achieved through greater collaboration with local communities, including indigenous peoples. This guide advocated that a collaborative approach would not only be justifiable but required for conservation effectiveness, if conservation aims to be morally and ethically responsible. By 1999, the world's top network of expertise for protected areas – i.e. the World Commission on Protected Areas (WCPA)[127] – adopted guidelines that incorporated some of the above resolutions into practice. The WCPA guidelines emphasized a number of practices, including: co-management of protected areas, agreements between indigenous peoples and conservation bodies, indigenous participation in protected areas, and recognition of indigenous peoples' rights to sustainable and traditional use of their lands and territories. The link between sustainability and secure tenure was clearly recognized by these guidelines, which was significant.

Developments since the 2000s have been mixed with greater prospects as well as challenges. In particular, it has been marked by significant developments in the legal regime of human rights and heritage that have signalled a greater recognition of culture, cultural rights and community. The next chapter will discuss these developments and the significant progress most relevant to IK and IK-holders from the 2000s onward.

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[127] WCPA is administered by the IUCN's Global Programme on Protected Areas and has over 1,700 members spanning 140 countries.

IV.   Concluding Note

Following the previous chapter that engaged with the debates aggravated by the trade regime of IPRs, this chapter moved on to examine and discuss the environmental regime, which is much more heterogenetic than the intellectual property regime. Despite the environmental regime's profound and lasting impact on indigenous peoples and their IK, it often does not receive as much attention or focused scrutiny as the intellectual property regime in the IK debates. There are a number of reasons why this is the case, as this chapter has discussed. One of which is the fact that the environmental regime is very multifaceted. It is like an animal with many heads. As such, it acts more like 'regimes' of environmental governance in plural terms, which range from biodiversity conservation to ozone pollution and climate change, *inter alia*. By conducting a synthesis mapping of significant policies and processes that impacted indigenous peoples and their IK, this chapter managed to piece together different domains under the umbrella of environmental governance via an interdisciplinary approach. Such an approach and mapping brings out the different elements that contributed to the tangled story of IK. It also led me to target the problem of governance. Through this mapping exercise, this chapter provides an inventory of major international instruments and historical analysis to illustrate the conceptual linkages and development of the contemporary face of environmental governance in its (neo)colonial forms to date.

Synthesis mapping is a useful method to sort out this fragmented terrain that is not often addressed systematically via an interdisciplinary approach. It is also a good way to identify the shifting paradigms that reflect influential trends in the policy arena with consequential effects on indigenous peoples and their IK. Through mapping and regime analysis, this chapter concludes that the environmental regime is heterogenetic that contributed to the fragmentation of governance for IK and IK-holders. Furthermore, there is a lack of understanding in the legal/policy realm that IK is not merely utilities for growth

according to the development paradigm, but a means of survival for indigenous peoples. From this perspective, secure tenure to land/territory including livelihood security is crucial to safeguard the well-being of emplaced knowledge and its source-communities. Furthermore, this chapter argues that the loss of IK leads to poverty not by the indicator of gross domestic product (GDP) as the mainstream paradigm often employs,[128] but by indigenous peoples' indicators that include dispossession of land and resource rights that link to the breakdown of food security, food sovereignty, cultural integrity and overall well-being of communities. Such dispossessions and displacements increase indigenous peoples' vulnerability and threaten the baseline of their subsistence survival.

The analysis and arguments advanced in this chapter correspond to the key message presented in the previous chapter 2, that is 'no land/territory no IK'. It further pushes this study to ask the question, 'what/whose knowledge for what/whose development?' Informed by the discussions in this chapter, the above question could probably be amended to 'whose/what heritage for whose/what development', because heritage embodies nature, culture and knowledge. Particularly so when some thirty years later after the release of the *World Conservation Strategy* that supposed to take into account marginalized groups like indigenous peoples, indigenous peoples continue to remain marginalized in current decision-making processes (EMRIP 2011). Although a few initiatives have been introduced that promoted or were more receptive to the integration of scientific knowledge with emplaced knowledge like IK, there is still no adequate mechanism to ensure the consultation or participation of IK-holders, which indicates a structural imbalance of power in their relationship. It is no surprise then to see indigenous peoples demand a redefining of 'development' and calling for 'development with culture and identity' at global forums such as the UNPFII and the Earth Summit. The next chapter will take a closer look at these issues,

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[128] Examples of such mainstream paradigm included the MDGs that supposed to aim for poverty alleviation for target groups including indigenous peoples.

particularly the emerging recognition for the inter-linkage between biodiversity and cultural diversity and the emerging jurisprudence of biocultural rights for further discussion.

Chapter IV:

Heritage, Diversity, and Human Rights: The Challenge and Prospect of Bringing Together Critical Linkages

The widening issues and debates unpacked in the previous substantial chapters demonstrate how indigenous knowledge (IK)[129] is a cross-cutting subject and a form of emplaced knowledge. They also show how IK is not yet adequately recognized as such by respective regimes with different mandates and constituencies discussed so far. This ongoing problem not only contributed to incoherent safeguards for IK and IK-holder communities, it also engendered emplaced resistance by indigenous peoples who consider their IK as inseparable from their rights to culture, land/territory, and self-determination. This chapter will further engage with this complex story of IK in the legal and policy arena of heritage and human rights, which is the understudied area in the IK debate identified by this study. This chapter will further address the contested zones where the epistemological struggle and the

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[129] See chapter 1 and 2 for discussion on terminology and why I adopt the term 'IK' in this thesis.

inadequacy of the regimes continue to be problematic for IK governance. In particular, this chapter will articulate the main argument of this PhD thesis that considers biocultural diversity as the cornerstone of indigenous peoples' claim for IK. It will do so by examining the discourses of heritage, which connect the interface of culture, environment, and sustainable development with consideration of intergenerational justice, which resonates with indigenous peoples' concerns and claims for IK. The above issues and debates will be examined in the evolving context of human rights in relation to natural and cultural heritage, the notion of diversity, and communal rights through an interdisciplinary approach. This is my way to address the third and final question proposed in chapter 1 (see section 3) that asked, 'what characterizes an IK claim?'

This chapter builds upon discussions carried out in chapter 2 and 3 to further investigate the conceptual linkages and policy frameworks as they evolve in the 2000s that are significant for safeguarding IK and IK-holders' communal rights. In particular, this chapter will expand from the discussion in chapter 3 to further examine the heritage regime that is not yet fully explored in the literature on IK. As articulated in the previous chapter, the heritage regime bridges two previously separate domains together that have significant ramifications for the well-being of IK and IK-holder communities: namely, the domain of environment and development (as discussed in chapter 3) and the domain of culture and development (of which this chapter 4 will discuss further). I identify this intersection of the two domains as one of the most critical yet understudied areas for the IK debate. The evolving notion of heritage is of particular significance here, as this chapter will show how it encompasses both biodiversity and cultural diversity that is important for contextualizing my main argument about IK that embodies biocultural diversity. This line of inquiry inevitably draws our attention to the relationship between heritage and human rights that has not received enough scholarly attention. Among the few scholars who do address this

relationship, Janet Blake (2011) acutely notes how the link between heritage and human rights has long been recognized but not yet taken seriously. Furthermore, Helaine Silverman and Fairchild Ruggles (2007, p. 7) critically concluded how there is a vast body of literature on indigenous peoples rights 'but relatively little of it is phrased in terms of cultural heritage.' This chapter will examine these understudied areas through a series of legal genealogy and conceptual analysis to identify critical linkages and contestations for further analysis. It will pay special attention to the significant developments and recent advancements in the legal regime of human rights and heritage that signal a greater recognition of culture, diversity, and community. To that end, this chapter will examine the most neglected and less articulated bundle of rights in the normative framework – that is cultural rights – and how they are mixed with greater prospects as well as challenges for safeguarding IK that embodies biocultural diversity. This chapter will conclude by proposing a framework of dignity and wellbeing to reiterate the importance of integrated approach for IK, as this PhD study continues to advocate.

I.   Introduction

As discussed in the previous chapter, the UN Working Group for Indigenous Populations (hereafter UNWGIP) issued its first study on IK around the same time when the World Heritage Convention inscribed the Maori people's sacred site into its newly established category of cultural landscape. The UNWGIP study on IK (Daes 1993), hereafter the Daes study, invoked the concept of collective heritage that recognized the linkages between the cultural and natural dimensions of humanities as a more appropriate term to describe IK. The Daes study also emphasized the undivided connection between culture and knowledge, which reflected indigenous peoples' conceptualization of IK in contrast with the compartmentalized

treatment of intellectual property law.[130] The subsequent drafting of a declaration for

indigenous peoples' rights (a.k.a. dDRIP to refer to the draft Declaration on the Rights of

Indigenous Peoples) had reflected the Daes study by adopting 'heritage' to replace the word

'property' (Xanthaki 2000, p. 364, Sub-Commission 1994, paragraph 6). Such interpretation

of IK through the conceptual frame of heritage was further articulated through the United

Nations processes. In particular, the United Nations Permanent Forum for Indigenous Issues

(UNPFII) organized its first technical workshop on IK in 2005 where an important concept

emerged. This concept was known as 'collective bio-cultural heritage' (CBCH) and it was

soon proposed by the UNPFII in its subsequent report and recommendations to UN agencies

and relevant bodies for further elaboration (Swiderska & Argumedo 2006, UNPFII 2005).

Immediately, the Working Group on Article 8(j) of the Convention on Biological Diversity

(CBD) adopted the concept of CBCH in the same year for its future work. The Working

Group on Article 8(j) also incorporated the following definition, which was developed by

nongovernmental organizations (NGOs) led by the International Institute for Environment

and Development (IIED) in collaboration with its partner organizations in Peru:

> '[b]io-cultural heritage: the knowledge, innovations, practices of Indigenous and local
> communities which are often collectively held and inextricably linked to traditional
> resources and lands and waters traditionally occupied and used by indigenous and
> local communities; including the diversity of genes, varieties, species and ecosystems;
> cultural and spiritual values; and customary laws shaped within the socio-ecological
> context of communities. By emphasizing the collective rather than individual rights,
> and addressing biodiversity and culture together, this concept reflects the holistic
> approach of many indigenous and local communities. This concept also is linked to
> knowledge as 'heritage' as opposed to 'property', thereby reflecting its custodianship
> and intergenerational character' (CBD 2005, p. 22, Annex II).

It is interesting to juxtapose the notion of heritage invoked above and an earlier

concept of 'common heritage of mankind' embedded in the 1982 UN Convention on the Law

of the Sea (UNCLOS) and a subsequent Resolution adopted in 1983 by the world's leading

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[130] See chapter 2 for more discussion on the debates about intellectual property rights (IPRs) and indigenous
peoples' rights.

environmental network known as the International Union for Conservation of Nature

(IUCN).[131] The Preamble of UNCLOS stated that,

> '…the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States' (Paragraph 6 of Preamble).

This concept of common heritage of mankind was the governing principle specified by

Article 136 of UNCLOS and it was reiterated throughout the Convention. Following the

adoption of UNCLOS in 1982 (enforced in 1994), the IUCN adopted a resolution known as

the Resolution 15/10 in 1983 that invoked a similar concept by referring to the diversity of

genetic materials as constituting 'the natural heritage of mankind' (paragraph 49).[132] This

IUCN Resolution further advocated the principle of open access to such common heritage.

This is an interesting historical moment in time that provided a sharp contrast to the CBD

adopted a decade later in 1992 (enforced in 1993). The CBD not only moved away from the

idea of common heritage and open access, it also shifted to conditional access based on

national sovereignty over natural resources (Taubman 2008). Considering this major shift

that established the CBD framework based on national sovereignty, it prompted one to ask,

what does it mean for the CBD to return to the notion of heritage by adopting the CBCH

concept after more than ten years since the CBD entered into force? What are the

implications? Does it mean that, in effect, the CBD is legitimizing state ownership and

control of biological and cultural heritage?

Under the CBD framework, only the states have the authority to permit conditional

access (Anuradha 2001). In other words, indigenous peoples do not really have control or

access to natural resources necessary to practice their IK according to the rights enshrined in

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[131] Established in 1948, the IUCN is the oldest and largest environmental network in the world. Its membership consists of member-states, NGOs, and experts. For more discussion on the IUCN, see the previous chapter (especially section 3.2).

[132] The IUCN Resolution 15/10 was adopted at its 15th session of General Assembly.

Article 31 of UNDRIP – i.e. indigenous peoples' rights to 'maintain, control, protect and develop' their IK. As discussed in the previous chapters, the scope of the CBD overlapped with indigenous peoples' conceptualization of IK (see table 4 in chapter 2 for an excerpt of CBD's Article 2 that defined its scope). In countries that have no national laws that recognize or safeguard indigenous peoples' rights, such control and access specified above are most likely restricted to indigenous peoples who live in those hostile countries (Anuradha 2001, p. 14-15).

The following sections will further explore this key concept of heritage that encompasses both biodiversity and cultural diversity to contextualize the issues highlighted above, particularly in regard to the question of how and whether the inter-linkage between biodiversity and cultural diversity is recognized or regulated by the law, or not. This PhD study takes into account both the so-called 'hard law' (i.e. legally binding instruments) and 'soft law' (i.e. international customary law, such as declarations, principles and guidelines), as introduced in chapter 1.[133] This line of inquiry will inevitably lead us to examine the intersection between heritage and human rights, especially cultural rights, which remain the most neglected bundle of rights in the international human rights lexicon (McGoldrick 2007, Stamatopoulou 2012). By examining the legal regimes of heritage and human rights, and how they evolve in relation to the IK debate, this chapter raises further questions about the law's *de facto* practice based on private property regime and state sovereignty that ought to be examined more critically for future research.

II.   Natural and Cultural Heritage: An Evolving Regime

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[133] For further reading on the role of soft law, particularly in relation to indigenous peoples' rights, see Mauro Barelli (2009).

Although the link between biodiversity (nature) and cultural diversity (culture) has been established by growing studies since the 1950s,[134] the legal development is slow to catch on. There is not yet a legal instrument to safeguard biodiversity and cultural diversity together as biocultural diversity. Instead, the law's tendency to compartmentalize led to separate legal instruments with no one holding a superior jurisdiction or covering the full range of IK, as discussed in the previous chapter. The Ramsar Convention on Wetlands (adopted 1971, enforced 1975) was probably the first one in this area that recognized both the ecological and cultural values.[135] However, natural heritage as a category for legal protection was not really recognized or regulated by international law until after the Ramsar (Gillespie 2007). The first instrument that recognized natural heritage along with the cultural ones was the Convention Concerning the Protection of the World Cultural and Natural Heritage, also known as the World Heritage Convention (hereafter WHC). It was adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1972 and entered into force in 1975. This section will take a closer look at this Convention.

Before doing so, it is necessary to take a quick review first on the concept of 'heritage', which has a particular origin and focus in law. As Francesco Francioni acutely observed, the legal concept of heritage was largely perceived in a narrow sense of cultural property based on state sovereignty and private property rights (Francioni 2008). Such perception and preoccupation of cultural property has its roots traced back to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (a.k.a. the Hague Convention, adopted 1954, enforced 1956). This is the first legal instrument to use the term 'cultural property' (Frigo 2004), which was defined by the Hague Convention as 'movable and immovable property of great importance to the cultural heritage of every

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[134] See Supra note 83.

[135] See the Ramsar Convention's Preamble and two resolutions adopted by the Conference of the Parties to the Convention on Wetlands: namely the Resolution VIII.19 (2002) 'Guiding principles for taking into account the cultural values of wetlands for the effective management of sites' and the Resolution IX.21 (2005) 'Taking into account the cultural values of wetlands'.

people'. As the definition suggested, it was mainly concerned with material manifestations of culture, such as monuments, architecture, archaeological sites, art works, manuscripts, books and other objects of artistic, historical or archaeological significance.[136] Although the Hague Convention referred to the cultural heritage of 'every people', a review of the Convention's drafting process revealed that the drafters used 'people' and 'State' interchangeably (Xanthaki 2000, Clements 1991). The second such instrument was the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 1970, enforced 1972; hereafter the Paris Convention). This Convention also exhibited the same preoccupation with material manifestations of culture. In addition, it reinforced state sovereignty over heritage matters. Article 4 of the Paris Convention stated that:

> [t]he States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; (b) cultural property found within the national territory; (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property; (d) cultural property which has been the subject of a freely agreed exchange; (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

Such materialistic interpretation of heritage within a state framework is unmistakably reflected in the WHC as well.

Although the WHC recognized both cultural and natural heritage, they are typically treated as two distinct categories by the WHC's governing body known as the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage (a.k.a. World Heritage Committee, hereafter WHComm). Article 1 and 2 of the WHC defined

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[136] For more resources on the Hague Convention, see the UNESCO's website (http://www.unesco.org.uk/convention_for_the_protection_of_cultural_property_in_the_event_of_armed_conflict_%281954%29).

the cultural and natural category of heritage (see table 8 below). These provisions demonstrated how international law was still predominantly occupied with the notion of 'cultural property' without much understanding or reflection on the interconnection between nature and culture that embodies biocultural diversity, or web of connections as indigenous peoples conceptualize it. Moreover, it is unmistakably and unapologetically clear how certain values were highlighted more than others under the WHC's key principle of 'outstanding universal value'. For example, the 'universal value' for the cultural heritage category was judged by either 'history, art or science' or based on a 'historical, aesthetic, ethnological or anthropological point of view'. For the natural heritage category, it was based on 'aesthetic or scientific' point of view or evaluated for the purpose of 'science, conservation or natural beauty'. While these criteria were clearly indicated, what remained unclear and unspoken was how the key terms like 'art', 'aesthetic' or 'beauty' as well as 'history', 'science' and 'conservation' were prioritized and/or interpreted and for whom. Furthermore, there was no mentioning of local communities or their oral tradition(s) of the landscape and/or heritage, most likely traced back to generations.

Interestingly though, Article 1 of the WHC contained a phrase that recognized 'combined works of nature and man' under its subheading of 'sites'. That suggested a certain level of understanding about the cultural life of an individual in relation to her/his environment. It also provided some foundation for later articulation of a 'mixed category' that would recognize combined characteristics of both cultural and natural heritage. It was not an easy process for the WHComm to break the old mind-set that kept cultural and natural heritage as two distinct categories. As discussed in the previous chapter, the main challenge was twofold. Firstly, the WHComm generally considers natural heritage as pristine without human presence or intervention (UNESCO 1977). As discussed in the previous chapter, the concept of pristine nature is a deeply rooted one that underpins conservation practices and

remains influential until this day (Adams 2009, 2012). Secondly, as discussed above, the WHComm is preoccupied with the legal notion of cultural property, which largely focuses on the material aspects of heritage, subject to the state's recognition (Coombe & Turcotte 2012, Holder 2008). As a matter of fact, it took two decades for the WHComm to finally realize a mixed category that came to be known as 'cultural landscape'. The IUCN, which has a consultative status with the UNESCO, played an active role in this process to develop the concept of cultural landscape (Phillips 2003). Another factor that pushed the WHComm to change was the global process leading up to the 1992 UN Conference on Environment and Development (a.k.a. Earth Summit) where the subjects of IK and biodiversity were prominently on the agenda (Coombe & Turcotte 2012).

The WHComm formally adopted the new mixed category in 1992 via the 'Operational Guidelines for the Implementation of the World Heritage Convention', which defined the new category as the following (UNESCO 2008, paragraph 6, Annex III):

> '[c]ultural landscapes are cultural properties and represent the "combined works of nature and of man" designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.'

It remains problematic to frame cultural landscape as 'property' for reasons discussed above and will be further problematized below. Nevertheless, a number of commentators had applauded the WHComm, as noted in the previous chapter, for marking a paradigm shift (Boer & Gruber 2012, Rössler 2006). In particular, this new mixed category indicated a changing conceptualization of heritage that takes into account the communities, as opposed to against them. This change in attitude is significant for indigenous peoples whose economies and identities are geographically and ecologically specific (Boer & Gruber 2012, p. 378). The growing interest and recognition of cultural values associated with natural sites in the WHC context is most noticeable in regard to the overlap of both tangible and intangible values

between people and the natural sites (Gillespie 2007).[137] Such overlap or interconnectivity is well observed and practiced by indigenous peoples who do not differentiate tangible from intangible aspects of their culture. Contrary to the above view of interconnectivity, Western legal systems tend to distinguish tangible objects (e.g. cultural property) from intangible ones (e.g. intellectual property). However, a number of scholars have noted how such distinction is foreign to indigenous peoples' holistic approach and understanding of their culture and heritage, as well as their view of the web of relations between nature and culture (Tsosie 2012, Stoll & von Hahn 2008, Posey 1999). My fieldwork also confirms such interconnected perception upheld by indigenous peoples.

Table 8: UNESCO World Heritage Convention (Article 1 and 2)
(Article 1) For the purposes of this Convention, the following shall be considered as "cultural heritage": **monuments:** architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; **groups of buildings:** groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; **sites:** works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view. (Article 2) For the purposes of this Convention, the following shall be considered as "natural heritage": **natural features** consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; **geological and physiographical formations** and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; **natural sites** or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

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[137] Alexander Gillespie (2007, p. 92) considered such overlap as 'very difficult to disentangle, both institutionally…and philosophically'.

The first two inscriptions of cultural landscape were indigenous peoples' traditional land/territory.[138] They were the Maori people's sacred site, known as today's Tongariro National Park in New Zealand, inscribed in 1993 (Forbes 1993), and the Anangu people's sacred site, known as today's Uluru-Kata Tjuta National Park in Australia (inscribed in 1994).[139] The Uluru-Kata Tjuta National Park was first inscribed to the WHC's list as a natural site in 1987; then it was re-nominated into the new category of cultural landscape in 1994. The process to consider the first indigenous site for the new category of cultural landscape was one of the most difficult discussions, recalled Mechtild Rössler as the Chief of the Policy and Statutory Meetings Section at the UNESCO World Heritage Centre (Disko and Tugendhat 2013). As Rössler recounted, members of the WHComm struggled to classify Maori's sacred site (Tongariro National Park) with recognizable cultural values based on what they were accustomed to identify.[140] At the end, the Tongariro National Park entered into the new category as an 'associative' cultural landscape in 1993 for its quality 'by virtue of the powerful religious, artistic or cultural associations of the natural element rather than material cultural evidence, which may be insignificant or even absent' (UNESCO 2008, paragraph 10, Annex III).

Compare to earlier initiatives and insights gained in the field of environmental law and policy that already recognized cultural values in association with natural habitat, the WHC and its governing body WHComm is fallen behind by a few decades. A case in point is the Ramsar Convention of 1971 discussed above, which was only one year older than the WHC. Fast forward one decade, the first session of World Parks Congress in 1962 already noted the intangible human values of protected areas. It is rather perplexing and ironic to

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[138] For the integrated concept of 'land/territory', see chapter 2 (section 1.1) where I discussed how I adopted this concept.

[139] See the UNESCO website for the global list of heritage sites: http://whc.unesco.org/en/list/421.

[140] 'We don't see anything… [w]hat is cultural heritage here? This is exclusively natural heritage!' These were some of the responses from the committee members of the WHComm recalled by Rössler, as cited in Disko & Tugendhat (2013, p. 14).

revisit historical moments in time like these, when reflecting on the notorious record of conservation paradigm including national parks associated with forced eviction and other atrocities, which disproportionally targeted indigenous peoples around the world (e.g. Runte 1990, Amend & Amend 1995, Neumann 1998, Jacoby 2001, Colchester 2004, Adams & Hutton 2007, Dowie 2009). One of the recent reported cases included the Karen communities in Thailand who were violently evicted without prior notification by the wardens of Kaeng Krachan National Park in collaboration with military forces (see the previous chapter for more discussion on this case). In such context, it is difficult not to question the WHC about which humans and whose values were accounted for that tend to exclude indigenous peoples. As illustrated in the previous chapter via the Durban process of World Parks Congress in 2003, indigenous peoples spoke out about their experience that vividly depicted how conservation coupled with colonization had framed them as obstacles to be removed for various authorities' mandates.[141]

Although the UNESCO celebrated the mixed category of cultural landscape as a positive change toward better recognition of people and communities with a claim that this mixed category also established better recognition of the interconnectedness of 'nature and culture, tangible and intangible heritage, and biological and cultural diversity' (Rössler 2006, p. 334), the gap between concept and operation remains huge (Trask 2014, Coombe & Turcotte 2012, Carter 2010). For example, indigenous peoples (and local communities) continue to be marginalized in heritage management on their lands/territories. Laurajane Smith's critical discussion on the politics of cultural resources management in Australia further illustrated how indigenous peoples' knowledge, identity, and authority have often been devalued to empower archaeologists, some of whom went as far to deny their contemporary existence as indigenous peoples (L. Smith 2006). Furthermore, as discussed

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[141] For an excerpt of the closing statement delivered by indigenous representatives at the 2003 World Parks Congress that took place in Durban, South African, see the previous chapter (section 2.2 of chapter 3).

above, the WHC's criteria of 'universal value' also raised questions about 'who is interpreting what and for whom' that ought to be examined more critically. Do marginalized groups like indigenous peoples get to have a say in the decision-making process for heritage inscription on their ancestral lands/territories? Or, would they have the right to reject such inscription if they would be alienated from the heritage management, which could cause further destruction to their ways of life?

Furthermore, as noted above on the treatment of heritage as 'property', it is deeply problematic to consider collective heritage like cultural landscape, which embodies emplaced biocultural diversity, as property. The dominating regime of private property law is not only historically, culturally, and geographically specific; it also asserts a person-thing model that disconnects people and place (Graham 2012, 2011). As such, the property approach is inappropriate and inadequate to realize or safeguard heritage that embodies biocultural diversity and the interconnectivity represented by indigenous peoples' socio-cultural ecology. In the previous chapter (see section 2.1), I elaborated on David Anderson's sentient ecology to further consider the kinship and communal relationship between humans, places and all living beings in all ecological life as socio-cultural ecology. Furthermore, indigenous peoples do not share the same view as the Euro-American law that distinguished tangible and intangible aspects of cultural heritage. There are a number of conceptual differences and challenges in this area that demonstrated how the international law's preoccupation with the tangibles such as the notion of 'cultural property' is a peculiar one (Tsosie 2012). Rebecca Tsosie's (2012) critical analysis illustrated how the practice of law designated tangible items under the protection of property law, which is separated from the intangible ones selectively protected by the intellectual property law. Moreover, such property regime enabled each property item to be owned by individuals or corporations for commodity trading. This is precisely what is problematic to apply this kind of property regime to heritage, which

overlaps with IK. It is problematic to treat collective heritage and/or IK as ordinary merchandise for trade. Despite growing recognition of the problems posed by this property regime, major international treaties such as the WHC and its governing body remained indifferent to the critical debate, without reflecting on its practice that continued to enlist each heritage site as 'property' today.

Another problem that is difficult to ignore is the elephant in the room that framed the categories of heritage, which is the absolute sovereignty of the state. As Alexandra Xanthaki (2000) critically examined, such state-centric framework of heritage undermined and often times overrode indigenous peoples' self-determination. Rosemary Coombe and Joseph Turcotte (2012) also pointed out the paradox of heritage protection and management. On the one hand, it is ultimately the state party to the WHC that identify and nominate potential heritage sites for conservation. But, they noted, 'state duties have little discernible positive content' (2012, p. 283) while communities have been kept at the margin. The CBD also observed the same practice. Article 15 of the CBD recognized 'the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation'. This has significant implications for the governance of IK and IK-holders' rights. Considering the CBD's recent adoption of the CBCH concept, this development led me to bring together the two domains discussed in the previous chapter and this chapter so far to further contextualize heritage in relation to human rights, particularly collective cultural rights. As noted in the introduction of this chapter, the two domains are 'the environment and development' (discussed in the previous chapter) and 'culture and development' as this chapter continues to explore. The following section will discuss the evolving development of cultural rights that bears significant importance for further discussion on biocultural diversity and associated rights for

communities. It will also look into the notion of diversity that is of particular importance in this discussion.

III.   The Linkage between Culture, Rights, and the Environment

As noted above, despite supporting evidence and growing recognition for the inter-linkage between biodiversity and cultural diversity, the law's tendency to compartmentalize led to a number of separate instruments. The most recent and relevant ones, which are the focus of this section, include the CBD and two UNESCO Conventions, namely the Convention for the Safeguarding of the Intangible Cultural Heritage (a.k.a. ICH Convention) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (a.k.a. Diversity Convention). Section 3.1.1 and 3.1.2 below will discuss these UNESCO initiatives and the CBD process. During the roughly ten-year period in between the CBD and the two UNESCO Conventions, the World Commission on Culture and Development (WCCD)[142] issued its first report titled *Our Creative Diversity* (WCCD 1996). This policy paper is significant in a number of ways. Firstly, it affirmed an anthropologically informed concept of culture that embodied ways of life beyond tangible artefacts. Secondly, it recognized heritage as consisting both tangible and intangible aspects beyond monuments and historical sites. Thirdly, it included a section titled 'Culture and the Environment' that linked culture to sustainable development. As discussed in the previous chapter, sustainable development is the key concept that linked together the environment and development that used to be two distinct domains (Roe & Elliott 2010, Adams 2009). In other words, the WCCD had in effect bridged previously separate domains together through this policy paper: namely the domain of culture, the environment, and development. What I bring to the mix is the dimension of human rights that is largely missing. This section will further explore the intersection of the above domains as they gradually come together through the evolving concepts of heritage

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[142] WCCD was established via the UN General Assembly Resolution A/RES/46/158 (1991).

and culture in the human rights context, particularly through the advancement of indigenous peoples' rights that significantly changed the law's perception of culture and cultural rights.

A brief review on the perception of culture in international law would quickly reveal how 'culture' is largely objectified by the law. A look at the legally binding instruments before the core human rights covenants were adopted in 1966,[143] it is evident that the concept of culture was mainly perceived in its tangible aspects of artistic or literary types. For example, the 1886 Berne Convention for the Protection of Literary and Artistic Works, the 1952 Universal Copyright Convention, and the 1954 Hague Convention discussed earlier. An exception was the 1957 International Labour Organization Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries (a.k.a. ILO 107). The ILO 107 recognized the right to mother tongue and the principle of cultural appropriateness (Article 23 and 26), which suggested a wider perception of culture. However, the ILO 107 reflected the ultimate integration agenda of the time that could easily turn into an outright assimilationist tool. As such, it would be incompatible with the basic principles of human rights, including non-discrimination and equality, *inter alia*. Exactly because of those reasons, the ILO began consultation processes in the 1980s to revise the ILO 107. In 1989, the revised convention known as the ILO 169 was adopted to replace the old one and established a positive change to shift from ultimate assimilation and integration goal to securing rights (Rodríguez-Piñero 2005, Rodgers *et al.* 2009).[144]

In essence, none of the above instruments before 1966 engaged with culture in a human rights context. Their tendency to focus on the tangible (material manifestations of culture) was influenced by the legal concept of 'cultural property' first utilized in the Hague Convention discussed above. Although the Hague Convention did not invoke human rights

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[143] Namely, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), both of them were adopted in 1966.

[144] For a comparative study on the ILO 107 and 169, see: Rodríguez-Piñero (2005), Rodgers *et al.* (2009).

per se, Francesco Francioni (2012, p. 25) argued that it established an *erga omnes* obligation to protect the cultural heritage of any people as 'the object of a general interest of the international community' for conservation and enjoyment. He further noted that in effect the legal practice qualified any destruction of such heritage or associated community as liable to international criminal responsibility, including discriminatory intention toward the community in question. However, indigenous peoples rarely benefited from that progressive interpretation of the law. When such discrimination and destruction happened to indigenous peoples and their heritage, including IK, not much evidence if any has shown equal treatment and liability onto the perpetrator(s). As evident by a recent compilation titled *Reparations for Indigenous Peoples* (Lenzerini 2008), many indigenous communities are still struggling to fight for reparation of their stolen heritage. A recent controversy further illustrated how non-state actors in the private sector are very much part of the problem as well. The controversy took place in 2013 Paris where a private auction house sold sacred objects belonged to the Hopi and San Carlos Apache (of North America) for approximately 1.6 million US Dollars.[145] This controversy illustrated the gap in the legal regime of heritage and human rights.

Continuing with the review on the legal perception of culture, the early 1980s marked a number of important development and turning points for a more elaborated understanding of culture and cultural rights in the international system. One of the significant events was the first World Conference on Cultural Policies (a.k.a. MONDIACULT) launched by the UNESCO in 1982 where a remarkable move toward an anthropologically informed understanding of culture was officially adopted. This move was identified by the UNESCO as one of the key achievements of the MONDIACULT that considered culture 'as the way of life and form of social organization of a group, along with their traditions and other cultural

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[145] See two news reports dated 9 December 2013: 'Hopi objects go on sale in Paris despite US challenge' (http://www.france24.com/en/20131209-hopi-apache-objects-auction-sale-paris-despite-us-embassy-legal-challenge) and 'Contested Native American artifact sale in Paris makes $1.6 million, despite US plea to delay' (http://www.startribune.com/world/235023281.html).

manifestations' (MONDIACULT 1982, paragraph 6 of the Preamble, Blake 2009). UNESCO often describes this move as its 'anthropological turn' and credited it as marking a paradigm shift in its practice. Although it is applaudable indeed to see the UNESCO taking the lead in the international system to go beyond the largely materialistic interpretation of culture by the law, it is necessary to also take note of the evolving debates about culture within the academic discipline of anthropology (Cowan *et al.* 2001, Wilson 1997). The classic definition of culture most cited is probably the one by anthropologist Edward Burnett Tylor who defined culture as: '[t]hat complex whole which includes knowledge, belief, art, morals, law, custom and other capabilities and habits acquired by man as a member of society' (Tylor 1871, p. 1). Later anthropologists rejected Tylor's static view of culture, which was largely based on traits and/or characteristics, and turned to a more sophisticated understanding of culture as a dynamic process and meaning that is constantly created and interpreted (Geertz 1973, 1983). Still other considered culture as a contested concept. Some arguments went as far as to oppose claims for cultural rights including indigenous peoples' rights based on controversial thesis of fluidity and hybridity that dismissed culture all together.[146] Clearly, the latter was not what the MONDIACULT or UNESCO subscribed to.

In addition to adopting the anthropologically informed notion of culture in plural terms, another significant output of the MONDIACULT was linking cultures with development. In effect, the MONDIACULT inscribed economic value to culture and heritage, both tangible and intangible. This might be the first occasion where 'intangible heritage' was officially termed and discussed as such.[147] As such, it contributed to the debates about the 'indivisibility between development and culture', as some commentators noted

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[146] See for example the controversy prompted by Adam Kuper's ambush to the rights movement of indigenous peoples, which provoked a chain of responses and counter arguments published in the journals of Current Anthropology and Social Anthropology (Kuper 2003, Asch *et al.* 2004, Asch *et al.* 2006, Guenther *et al.* 2006).

[147] UNESCO claimed that the term 'intangible heritage' was first used at the MONDIACULT. See UNESCO's website source (http://www.unesco.org/culture/ich/?pg=00309). For further reading on linking culture and development, see Leach (1998), Warren *et al.* (1995).

(IASG 2010, p. 7). Furthermore, it was significant that the MONDIACULT invoked the language of rights to recognize cultural identity as collective rights and called upon the states as duty bearers to preserve and protect it (MONDIACULT 1982, paragraph 1 to 9, especially paragraph 9). The advances made by the MONDIACULT were subsequently taken up by the UN's first proclamation of International Decade for Culture Development (1987-1997). The International Decade endorsed the expanded notion of culture, at the same time subscribed economic value and group identity to culture.

In the same year as the MONDIACULT was the establishment of the UN Working Group on Indigenous Populations (UNWGIP) in 1982, which led to significant development in the 1980s onward for the advancement of indigenous peoples' rights. A number of commentators have noted how the development of indigenous peoples' rights has changed the international law's perception of culture and cultural rights (Stamatopoulou 2012, Holder 2008). The following section will take a closer look at this significant development in the evolving context of cultural rights.

3.1 Significant Development: Evolution of Cultural Rights

Cultural rights are the most neglected and less articulated bundle of rights in the normative framework of human rights. Some commentators considered it as the 'failed Cinderella of the international human rights lexicon' (McGoldrick 2007, p. 447). There are a number of reasons for the long neglect (Stamatopoulou 2012, 2007, Eide *et al.* 2001, Xanthaki 2000, Symonides 1998). One of the main problems and contestations has to do with the concept of 'culture', which is often narrowly interpreted or misunderstood (Stavenhagen 2001, Eide 2001, Prott 1998, Donders 2007). It is sometimes given a bad name as the scapegoat or justification for human rights violations, as if culture is on the opposite side of human rights. The fact that the right to culture is a claim of human rights enshrined in international legal

instruments demonstrates that human rights are not opposed to culture and *vice versa*.[148] Most often, 'culture' remains in the rhetoric with narrow interpretation associated with arts and artefacts in general. Occasionally, 'culture' is also invoked to insinuate problematic judgement of high versus low cultures. As such, culture and cultural rights are often perceived as non-essential or outright dismissed. It is not uncommon for legal professionals to drop the word 'culture' when speaking of the rights enshrined in the ICESCR, verbally or in writing.[149] This is rather problematic. Furthermore, Andrew Erueti's (2011) analysis also demonstrated a 'double-edged sword effect' of culture that undermined rather than empowered indigenous peoples. For example, some states framed indigenous peoples' rights in a reductionist scheme of cultural rights that allowed them to keep their cultural manifestations such as performing arts or artefacts but nothing else. Such reductionist interpretation of culture and cultural rights could easily lead to commodification of indigenous peoples' culture while ignoring their rights enshrined in the UNDRIP.

As indicated above in the introduction, this chapter will cover the significant progress in the 2000s leading up to a greater recognition of culture, diversity, and collective cultural rights. This section will discuss a number of global processes: from the human rights branch of the UN, to the global processes for cultural diversity and biodiversity by reviewing the UNESCO initiatives and the CBD process. The early 2000s marked a prolific period for the development of cultural rights. Significant developments in the field of human rights included: 1) the formal adoption of UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007; 2) the newly established UN Special Rapporteur in the Field of Cultural Rights since 2009; 3) the full interpretation of Article 15(1) of the International Covenant on

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[148] This argument was inspired by Michael Freeman's stimulating lectures on political theory and human rights. I attended Prof. Freeman's course in the autumn of 2012 at the Department of Government, University of Essex.

[149] Oftentimes, the author(s) sets out to discuss economic, social and cultural rights; then almost immediately dismissing cultural rights without justification. To name a few printed examples, see Pasqualucci (2008), Churchill and Khaliq (2007), or the widely used textbook for international human rights by Steiner, Alston, and Goodman (2008).

Economic, Social and Cultural Rights (ICESCR)[150] that took nearly five decades to finally complete in 2012; and 4) the much anticipated Optional Protocol to the ICESCR that finally entered into force in May 2013.[151] The latter was a couple decades behind its twin-sister convention, the International Covenant on Civil and Political Rights (ICCPR) that has two optional protocols.[152] This recent adoption of the Optional Protocol of ICESCR is a step forward for economic, social, and cultural rights (ESC rights) to finally obtain a similar status like civil and political rights (CP rights). The Universal Declaration of Human Rights (UDHR), as it was originally envisioned, did not prioritize CP rights over ESC rights. It was a pity that the UDHR was divided into two covenants due to political negotiation during the Cold War and did not have the success to become one coherent covenant. Nevertheless, the 1993 World Conference on Human Rights in Vienna reaffirmed the indivisibility and interconnectedness of human rights as envisioned by the UDHR.[153]

By many accounts, the most remarkable development in the field of cultural rights is the universal acceptance of UNDRIP adopted by the UN General Assembly (chapter 2 section 3 also provided a brief historical account of this remarkable development). This extraordinary development began with the establishment of the UN Working Group on Indigenous Populations (UNWGIP) under the UN Charter body Economic and Social Council (see table 1 in chapter 2 for a structural chart of the UNWGIP). Despite its lower ranking in the UN structure, it was the first significant forum that contributed to an extensive process of standard-setting for the rights of indigenous peoples. UNWGIP's open and participatory process was also unlike any other in the UN system where rights-holders were

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[150] Article 15(1)(a) of the ICESCR stipulated 'the right of everyone to take part in cultural life'. For an official interpretation on this article by the UN treaty monitoring body, see General Comment No. 21 (CESCR 2009).
[151] CESCR issued its first recommendations under the OP-ICESCR on 17 Sept 2015 concerning the right to housing (for further reading, see: https://www.escr-net.org/node/366942).
[152] ICCPR has two optional protocols (a.k.a. OP). Its first OP, which established a mechanism to receive individual complaint, was adopted on 16 December 1966 and enforced on 23 March 1976. The second OP on abolishing death penalty was adopted on 15 Dec 1989.
[153] This is sometimes referred to as the 1993 Vienna Consensus.

involved directly in the drafting and negotiation processes alongside the member-states (Erueti 2011, Hunt 2000). The most remarkable output of the UNWGIP process was the landmark UNDRIP, which took over two decades in the making, from 1985 to 2007. Cindy Holder (2008) particularly noted how it changed the international consensus on both the scope and meaning of cultural rights. Among the particular attributes of the UNDRIP is its endorsement of collective rights,[154] which are not so much pronounced in other core human rights instruments that tend to emphasize individual rights. As noted above, the practice of international human rights law tends to favour individual rights, which reflects the liberal ideology that became the 'orthodox legal thinking which shapes the International Bill of Rights' (Hunt 2000, p. 38). Through a concerted effort by the international movement for indigenous peoples' rights, indigenous peoples' communal rights claim, including collective cultural rights, is reflected throughout the UNDRIP. Among the provisions, Article 31(1) covered a wide range of indigenous peoples' cultural practices in association with their lands/territories, the ecology, and natural resources as well as cultural manifestations that constitute their IK. This provision is indeed a complex one that encompassed a wide range of categories and rights that no one body of law currently regulates or governs, particularly the interconnected zones that link cultural diversity to biodiversity.

Considering the core human rights jurisprudence and mechanisms in the field of cultural rights, the most significant development in the first half of the 2000s would be the full interpretation of ICESCR's provision on the right to culture and the establishment of a special procedure known as the UN Special Rapporteur in the Field of Cultural Rights (hereafter UNSR of Cultural Rights). Article 15 of ICESCR is its only provision that addressed cultural rights. This provision consisted of four subsections of which 15(1) described the nature of the right (see table 3 in chapter 2). The UN treaty body known as the

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[154] UNDRIP also affirmed individual rights according to existing laws of universal human rights.

Committee on Economic, Social and Cultural Rights (CESCR) had provided official interpretation on two sub-provisions, namely Article 15(1)(a) and 15(1)(c) via General Comment Number 17 (CESCR 2006) and Number 21 (CESCR 2009) respectively. The final sub-provision of Article 15(1)(b) was addressed by the UNSR of Cultural Rights in 2012, shortly after Farida Shaheed was appointed as the first mandate-holder. Chapter 2 had reviewed these official commentaries especially in relations to the debate on ESC rights and intellectual property. Concerning the role of cultures and communities as well as associated rights relevant to IK, these official commentaries all recognized cultural rights as both individual and collective rights. They expressed the unanimous opinion that it is the duty of the states to protect the rights of both individuals and communities – particularly the most disadvantaged and marginalized ones. Furthermore, they reaffirmed the 1993 consensus at the World Conference of Human Rights in Vienna, which stressed the principle that regarded all human rights as universal, indivisible, interdependent, and interrelated (paragraph 5, Vienna Declaration and Programme of Action). Moreover, they also embraced the wider interpretation of culture as embodying ways of life. Most significantly, they echoed an important concept emerged from the heritage discourses since the 1980s, that is cultural diversity constitutes human dignity. For example, General Comment No. 21 (CESCR 2009) recalled the UNESCO Diversity Declaration (Article 4 & 5) and stated that '[t]he protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, and requires the full implementation of cultural rights, including the right to take part in cultural life' (paragraph 40). It also reiterated that '[t]he full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world' (paragraph 1). The 1980s was when debates about the meaning and value of cultural heritage emerged in the larger context and

debate of culture and development. This is a significant step forward for better understanding

IK in the human rights context. The notion of dignity will be further discussed in section 4

below. All of the above UN commentaries on ESC rights were made after UNESCO's

initiatives on cultural diversity and intangible cultural heritage, which will be discussed in the

following section 3.1.1 shortly.

The fact that it took the UN system nearly fifty years since the ICESCR was adopted

in the 1960s to complete the interpretation of Article 15 illustrates the historical neglect

discussed above in the opening of this section. Evident by the recent dates of all of the new

developments referenced above, it further illustrated how the jurisprudence for cultural rights

is only beginning to catch up with other human rights enshrined in the UDHR of 1948. The

limited number of provision addressing cultural rights in the core human rights treaties also

demonstrated the same point. The main provision that specifically mentioned culture was

Article 15 of ICESCR. It was derived from Article 27 of the UDHR that stipulated the

following:

> '[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits' (Article 27.1)
>
> '[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' (Article 27.2)

The twin-sister of ICESCR also has one provision that covered cultural rights. Article 27 of

ICCPR framed the right to culture in the minority context and enshrined the rights of

minority persons to their own culture, *inter alia*.

Looking further into the history via the *travaux préparatoires* that documented the

drafting process of the UDHR in the 1940s, it was not clear how culture was conceptualized

by the original drafters (Pineschi 2012, Morsink 1999). The main provision in the UDHR that

addressed cultural rights was Article 27 (reproduced in full above). Article 27 clearly

reflected a legal reference to the Berne Convention for the Protection of Literary and Artistic Works (1886), although the Bern Convention was mainly concerned about copyrights protection. What was less clear in Article 27 was the phrase about 'the cultural life of community'. Did it intend to promote cultural diversity in its pluralistic and anthropologically informed understanding of culture, or was it referring to particular kind of activities as cultural? The subsequent codification of UDHR that turned into two covenants provided some indications to the above questions. As mentioned above, Article 27 of the ICCPR took into account the rights of minorities and their culture(s), which stipulated the following:

> '[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.'

Some might argue that the framing of minority groups included indigenous peoples as well. However, it is not clear whether indigenous peoples were considered as subjects by the UDHR drafters at the time. Furthermore, not all indigenous peoples comprise the minority population in a post-colonial context of modern state.

For example, indigenous peoples are the majority in Bolivia and Guatemala.[155] More significantly, indigenous peoples differ from most other minority groups in terms of their ties with their lands/territories and the natural environment. Indigenous peoples also have a different colonial history and experience with the modern states. Some of them might have treaty relations with the modern states and refer to themselves as treaty peoples,[156] others might not. Such conditions were covered by the UNDRIP via Article 37, which took into account different conditions beyond treaties to include other forms of agreements as well.[157]

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[155] Bolivia's President Evo Morales (since 2005) is the first indigenous person to be elected as the president of a state. He is an indigenous person from the country's indigenous majority.

[156] For example, in the Anglo-Saxon settler-states scenario of North America, indigenous peoples sometimes refer to themselves as treaty peoples and nations. Among the Anglo-Saxon settler-states with indigenous populations, Australia is an interesting case that did not enter into any treaty relations with indigenous peoples historically.

[157] Article 37(1) of UNDRIP stipulated that: '[i]ndigenous peoples have the right to the recognition, observance

With or without treaty, the reality is that most of the treaties have been broken by the settler-states. As a result, indigenous peoples have lost their soverity along with their lands/territories and were coerced into a single state framework with restricted autonomy on their lands/territories, if at all. Therefore, it is necessary to observe the distinction between indigenous peoples and minority groups, as noted by the working paper commissioned by the UN Sub-Commission on the Promotion and Protection of Human Rights (Daes and Eide 2000). It is also necessary to be mindful of the state-centric mind-set that often is the common frame for minority rights in international law, which would be inadequate and inappropriate to address indigenous peoples and their unique history and circumstances.

In addition to the significant development by the human rights branch of the UN system discussed above, two other parallel processes are also making significant progress. Since the early 2000s, the UNESCO had carried out a number of important initiatives concerning cultural diversity, heritage and human rights. At the forefront of biodiversity, the CBD process is also making significant progress in the domain of environment and development. These are important parallel processes and advancements that established conceptual linkages that bridged culture, communal rights, and the environment together (as summarized in table 9 below). The following sections will further discuss them.

Table 9: Culture, Rights and the Environment: Significant Parallel Processes		
	Culture	**Environment**
1990s	UNESCO World Heritage Committee adopted a mixed category of 'cultural landscape'.	CBD was adopted (enforced 1993), along with other Rio Conventions.[158]

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and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.'

[158] Rio Conventions refer to the normative instruments adopted at the Earth Summit in 1992 at Rio de Janeiro, Brazil. These included the CBD, Rio Declaration on Environment and Development, UNFCCC, Agenda 21, and The Forest Principles.

2000s	2003: ICH Convention was adopted (enforced 2006).[159] 2005: Diversity Convention was adopted (enforced 2007).[160]	2004: Negotiation process for the Nagoya Protocol began in February 2004 and adopted in 2010 (enforced 2014). 2005: CBD Article 8(j) Working Group adopted 'bio-cultural heritage' emerged from the UNPFII process.
Human Rights (Cross-Cutting Background Development) UNDRIP, 1985-2007		

3.1.1   UNESCO Initiatives

UNESCO, the oldest UN agency for the field of culture, had carried out a number of significant initiatives since the 2000s. They are the UNESCO Universal Declaration on Cultural Diversity (a.k.a. Diversity Declaration, adopted 2001) and the two Conventions mentioned above: namely the ICH Convention (adopted 2003, enforced 2006) and the Diversity Convention (adopted 2005, enforced 2007). A number of commentators have noted the remarkable advancement of these UNESCO initiatives that established explicit links between cultural diversity, heritage, and human rights (Francioni 2008). This section will now turn to these UNESCO initiatives for further discussion.

The Diversity Declaration of 2001 was the first international instrument that officially recognized the importance of cultural diversity. This Declaration is progressive in a number of ways. It established the link between cultural diversity and human rights and invoked the core value of human dignity (Preamble and Article 4 to 6, especially Article 4).[161] Furthermore, it advocated cultural diversity as a common heritage of humanity.[162] The momentum generated by the Diversity Declaration had subsequently secured a legally

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[159] As of 2014, settler states such as the USA and Canada have not yet sign on to the ICH Convention. To check the latest signatories, see UNESCO: http://www.unesco.org/culture/ich/index.php?lg=en&pg=00024.
[160] To check the signatories of the Diversity Convention, see UNESCO: http://www.unesco.org/eri/la/convention.asp?KO=31038&language=E.
[161] For further reading on cultural diversity and human rights, see Pineschi (2012), Francioni & Scheinin (2008).
[162] For further reading on cultural diversity and heritage, see Yusuf (2008).

binding instrument, which is the Diversity Convention of 2005. On a more positive note, the Diversity Convention endorsed universal human rights while it elevated the importance of culture by requesting the state-parties to integrate culture into sustainable development (Article 13).[163] The latter point on sustainable development echoed the WCCD paper known as *Our Creative Diversity* discussed above. The Diversity Convention was also credited as the first legal instrument to enshrine principles of cultural rights in relation to trade (Coombe & Turcotte 2012). However, compared to the Diversity Declaration of 2001 that gave birth to it, the Convention is a much-compromised version. Commentators such as Jan Wouters and Maarten Vidal (2010) noted how in effect the Diversity Convention is lacking normative content. In particular, they commented on how the scope of the Diversity Convention was obscured by lengthy elaboration on definitions, hence 'the interaction between the different cardinal concepts, the exact scope of the Convention is rather ambiguous' (Wouters & Vidal 2010, p. 786). The most significant setbacks were the clauses that emphasized state sovereignty and autonomy regarding governance of cultural products by creative industries (Obuljen 2006, Coombe & Turcotte 2012). It remains uncertain how the Diversity Convention's lack of normative content could have an impact in relation to the World Trade Organization when push comes to shove.

Another UNESCO treaty that made advances in the field of culture and cultural rights was the ICH Convention of 2003. The most significant achievement of the ICH Convention was its inclusion of community and their rights. Although the intangible manifestation of culture was recognized by the UNESCO early on,[164] there was no legal instrument safeguarding it as such until the ICH Convention. Janet Blake (2009) considered the most

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[163] Article 13 stipulated that, '[p]arties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.'
[164] UNESCO collaborated with the WIPO in the 1970s to consider folklore for copyright protection. Rosemary Coombe and Joseph Turcotte (2012) identified this collaboration as one of the earliest attempts by the UNESCO.

ground-breaking aspect of this ICH Convention was its recognition of cultural communities and their cultural rights. Blake noted this advancement as unprecedented in this field of international law. Rosemary Coombe and Joseph Turcotte (2012) also applauded the ICH Convention for its recognition of community, which in their view provided the indispensable social context for maintaining the vitality and viability of ICH. They also considered the recognition of ICH as providing a positive counterbalance to the WHC and WHComm that tended to overlook non-Western conceptualizations and practices of heritage. Based on these grounds, they advocated for the economic, social and cultural rights of communities that should have priority status in heritage management (2012, p. 297). This is a particularly salient subject in the heated debate of IPRs and human rights. For example, as discussed in chapter 2 section 3.1.1, the Sub-Commission on the Promotion and Protection of Human Rights identified potential violation of economic, social, and cultural rights by the intellectual property regime. The potential violations included: 1) the right of everyone to enjoy the benefits of scientific progress and its applications, 2) the right to health, 3) the right to food, and 4) the right to self-determination.[165]

Another positive contribution of the ICH Convention was its adoption of the principle of consultation and community involvement.[166] It persuaded the WHComm to follow suit and adopted a proposal in 2007 that included community into its existing strategy of operation known as the four 'Cs' strategy: that is creditability, conservation, capacity-building and communication (IASG 2010a, p. 19, footnote 51). Judging from the recommendations proposed by the UN system in recent years that called upon the WHComm to engage with indigenous peoples (UNPFII 2011), the WHComm's strategy and operation are not quite coming together yet. On the negative end, the ICH Convention has a rather limited scope

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[165] For further reading, see Sub-Commission (2000), Helfer & Austin (2011), Grosheide (2010), Wong & Dutfield (2011).
[166] See the ICH Convention's implementation mechanism.

evident by UNESCO's decision not to overlap with other UN agencies' work, such as the WIPO, ILO, CBD, etc. (L. Smith and Akagawa 2009). Furthermore, major countries with indigenous populations voted abstention to the ICH Convention (notably included Australia, Canada, and the USA), which indicated a lack of interest and commitment to protect indigenous peoples' cultural rights. As noted by Coombe & Turcotte (2012, p. 292), 'the safeguarding of ICH is an exercise of cultural rights'. Indigenous peoples also noted how the ICH Convention failed to meet the standards established by the ILO 169 and UNDRIP.

While the UNESCO Conventions were making noticeable progress in the larger context of heritage and sustainable development, particularly in the area that recognized collective cultural rights and the role of communities, the parallel process in the domain of environment and development was also making significant progress. Table 9 above summarizes the significant parallel processes that are important for the IK debate, which noted the CBD process and its recent development in the 2000s. The following section will now turn to the CBD process for a closer look.

3.1.2   CBD Process

In addition to the progress in the field of culture and heritage, parallel processes in the area of biodiversity conservation were also taking place. The CBD adopted in 1992 was a formalization of a number of former initiatives in the 1980s. The most important precursor to the CBD included the following. In 1983, the Food and Agriculture Organization (FAO) adopted the International Undertaking on Plant Genetic Resources for Food and Agriculture (hereafter FAO's International Undertaking),[167] which was the first international instrument to recognize the critical importance of indigenous peoples and local communities including

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[167] See Resolution 8/83. For further reading, see FAO website (http://www.fao.org/Ag/cgrfa/iu.htm) and the Commission on Genetic Resources for Food and Agriculture established in 1983 via its web link (http://www.fao.org/nr/cgrfa/cgrfa-about/cgrfa-history/en/). The negotiations finally concluded via the adoption of an International Treaty on Plant Genetic Resources for Food and Agriculture by the FAO Conference on 3 November 2001.

IK for conservation of crop diversity. The FAO's International Undertaking was the precursor that provided important context and foundation for the CBD to build on (Burhenne-Guilmin 2008).[168] Subsequent policy initiative such as the influential Brundtland Report of 1987 further linked the concept of biodiversity[169] with sustainable development, as discussed in the previous chapter (see section 3.2 of chapter 3). The Brundtland Report also installed state responsibility to natural resources, which was the first to do so, before the CBD.

After achieving a historical success with the UNDRIP, the CBD process for a protocol on access and benefit sharing (a.k.a. ABS) became the second battleground for indigenous peoples in international treaty-making. The CBD process that took six years to negotiate a supplementary agreement was finally adopted in 2010 and came to be known as the 'Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity' (a.k.a. Nagoya Protocol, enforced only recently on 12 October 2014). The Nagoya Protocol marked the latest legal advancement in communal rights following the ICH Convention of 2003 and the UNDRIP of 2007. Although the UNDRIP is not a legally binding instrument, it has obtained the status of customary international law during its long and engaging process with the rights-holders over two decades (as discussed in the previous chapters). The Nagoya Protocol is considered by some as the latest advancement in regard to indigenous peoples' collective rights and their IK. For example, Kabir Bavikatte & Daniel F. Robinson (2011) considered the Nagoya Protocol as marking a giant leap from the CBD that only contained weak provisions in regard to collective rights of communities, such as Article 8(j) and 10(c). Most significantly, they considered this CBD process as contributing to an emerging jurisprudence of biocultural rights, which was defined by them as the following (Bavikatte & Robinson 2011, p. 50):

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[168] See Supra note 112.
[169] The concept of biological diversity was coined by scientists to bring ecological, species and genetic diversity together (Burhenne-Guilmin 2008).

> 'the theory and practice of applying a biocultural rights framework to law and policy, when such law and policy affects a community whose peoplehood is integrally tied to their traditional stewardship role and fiduciary duties vis-à-vis their lands and concomitant knowledge'.

The merit of this emerging jurisprudence can be summarized as threefold. It established due recognition of the linkage between cultural diversity and biodiversity. It also took into account the role of communities in managing biocultural diversity. Furthermore, it codified communal rights in association with biocultural diversity and marked the latest legal development in communal rights (following the ICH Convention).

This is indeed a welcoming development. At the same time, it also calls upon us to take a closer examination, which leads to a number of further questions and concerns. Firstly, this framework of biocultural rights is specifically considered under the rubric of environmental rights concerning conservation and sustainability. Secondly, it operates within the private property regime, which is the *de facto* practice of the CBD, as noted by a number of commentators including Bavikatte and Robinson (2011) discussed above. This is probably why the member-states did not stage their firewall of anxiety over the legal ramification of collective rights, which is the right to self-determination by association. While it is not difficult to work out the strategy to play it safe, by not rocking the boat to question the state or the property regime, it is difficult not to raise questions and concerns about the implications. The following will further discuss these two problematic areas.

As the introductory section of this chapter indicated (i.e. section 1.1), the CBD adopted the concept of biocultural heritage for its future work during the negotiation process for the Nagoya Protocol. By revisiting the CBCH concept ('collective bio-cultural heritage') discussed above, one can see the merit of this emerging jurisprudence for biocultural rights reflected some of the key principles of CBCH discussed in the introductory section of this chapter. These included: 1) addressing biodiversity and culture together to reflect the holistic approach of many indigenous peoples and local communities, and 2) recognizing the role of

community and their collective rights. However, it left out the third principle, which is taking into account knowledge as heritage and not property, to reflect its custodianship and intergenerational character. Indigenous peoples' conceptualization of IK includes genetic materials that are part of their collective cultural identity and their right to self-determination. Therefore, this is a concerning area for indigenous peoples that calls for further examination.

As a number of commentators have pointed out, the governing body of the CBD known as the Conference of Parties (COP) does not take ownership of its own convention in regard to issues concerning intellectual property (Corpuz 2009, Drahos 2004). In effect, the COP has 'deferred developments on TGKP [traditional group knowledge and practice] largely to WIPO' (Drahos 2004, p. 14). In other words, biocultural diversity is now at the disposal of commercial claims of IPR. As discussed in chapter 2, the IPRs regime recognizes both the human person and corporate entity as rightful beneficiaries. In most cases, the corporations outweigh any individual person, demonstrated by the funding arrangement of the WIPO (May 2006). Clearly, the corporations have more power and leverage to run the show at WIPO. This is deeply problematic and concerning for indigenous peoples who do not see biocultural diversity or their CBCH as commodities for sale. In addition, it is difficult for indigenous peoples to have a voice during the WIPO process, which is often conducted via closed-door negotiation. WIPO is known to be inhospitable and non-participatory for indigenous peoples who are barely considered by the WIPO as stake-holders or share-holders. Moreover, WIPO has continued to dismiss recommendations from the UN system calling upon it to adopt the UNDRIP into its policy and operation.[170]

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[170] Its lack of structural commitment to indigenous peoples' rights is again demonstrated by the current crisis in regard to the funding arrangement known as the Voluntary Fund for indigenous peoples to participate at WIPO proceedings concerning the new treaties for IK. For a recent news report by the Intellectual Property Watch, an NGO monitoring organization, see 'In "Great Shame," WIPO Fund For Indigenous Peoples' Participation Running Dry' dated 26 April 2013: http://www.ip-watch.org/2013/04/26/in-great-shame-wipo-fund-for-indigenous-peoples-participation-running-dry/.

The second concern is in regard to the relevance of conservation and sustainable use of biodiversity. It is unclear who decides what is conservation or what is sustainable use, and furthermore, sustainable for what and for whom? Measured by the notorious record of conservation, which disproportionally harmed indigenous peoples, it is clear that indigenous peoples are neither the decision makers nor beneficiaries. This raises serious questions about human rights.[171] Furthermore, as discussed in the previous chapter, the conservation paradigm's outdated obsession with the idea of 'pristine nature' and 'wilderness' that disconnected human from nature also raises serious questions about its operation and whether it is part of a solution or the problem for sustainable development.

The stakes are high, not only from the vantage point of the profit-seeking capitalist looking for the next frontier to cash in on, but also the detriment of the environment and increasingly violent displacement and dispossession experienced by indigenous peoples. As the trend continues, indigenous peoples may no longer be able to maintain and contribute their collective biocultural heritage that can benefit us all. Furthermore, it led us to ask the more fundamental question, how do we perceive biocultural diversity? Is it part of our humanity hence common heritage? Or, is it subject to modern states' sovereign control over access and usage, including granting commercial entities the rights to monopolize biocultural diversity as private property? Such trend of commercialization that places price tags on nature is already in practice, evident by the changing language by economists from natural resources to 'natural capital'. Such conceptualization is transforming nature and natural resources into merchandise for the neoliberal market.[172] The impact of this transformation is not yet fully understood by today's scholarship. But a number of cases and studies have already shown worrying signs. For example, Joan Martinez-Alier's analysis pointed out that

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[171] For further reading, see an extensive study on indigenous peoples' rights and conservation by Ellen Desmet (2011).

[172] For more discussion, see also chapter 5 (sections 1.1 and 2.2).

the market is about power and income, especially the power of consumption and the power to buy (Martinez-Alier 1997). In such a marketplace, the poor often sells cheap, and future generations of human as well as other species are not yet present to defend themselves.[173] As such, the market can hardly be qualified for sustainable development according to the *World Conservation Strategy* discussed in the previous chapter.[174] If the CBD is taking the lead on emerging jurisprudence of biocultural rights, given the concerns discussed in this chapter so far (especially concerning state-centric framework and private property approach), it is uncertain where it is going.

Moreover, is securing private property rights the answer to biocultural diversity? Would marginalized groups like indigenous peoples benefit? In the previous chapters, I have already raised questions about the property regime. A recent study by Terra Lawson-Remer (2012, 2011) from a rarely explored perspective also led us to reconsider the conventional view about property security. Lawson-Remer's study compared minority groups and the elite group (including foreign investors) to find the correlation between their property security and economic growth. Her finding demonstrated a strong correlation between securing property rights for elites and/or foreign investors and economic growth; but no correlation between securing property rights for minority groups and economic growth. Further study in this area with critical perspective like Lawson-Remer's could help us to address more refined questions about the dominating property regime and the monolithic approach of development that aimed for a particular kind of economic growth, which is exclusive rather than inclusive

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[173] See Joan Martinez-Alier (1997, p. 201-203) for an example case about a trade agreement signed between the National Biological Diversity Institute (a.k.a. INBio) of Costa Rica and a major pharmaceutical company Merck. This case demonstrated that it made no sense to perceive biocultural diversity by artificial borders defined by the modern states.

[174] See the previous chapter (section 3 of chapter 3) for discussion on the discourse of poverty and conservation as well as sustainable development that takes into account future generations.

and incomplete (Lawson-Remer 2011: 27).[175] It could also help us to see who really benefits from such developmental scheme.

The next and final section before conclusion will build on the significant processes and advances discussed so far to further explore the critical bridges and groundwork for further consideration. As the linkages between cultural rights, the environment, and sustainable development gradually merge, they led me to consider a potential paradigm of dignity and well-being as an alternative framework that might provide better safeguards for collective cultural rights and biocultural diversity, which are essential for IK-holders.

IV.   A Proposition: A Framework of Dignity (Human Rights) and Well-being (Human Development)

The point of departure for this section is Article 43 of the UNDRIP that spoke of 'the survival, dignity and well-being of the indigenous peoples of the world'.[176] I modify the above phrase slightly to say 'survival *with* dignity and well-being' to establish a better baseline for what I am about to propose in this section. I consider Article 43 as a precursor to an emerging paradigm that this section will further discuss and develop.

As indicated in the introductory section of this chapter, the general approach for this chapter is legal genealogy and conceptual analysis. By conducting a legal genealogy, I trace the roots of this emerging paradigm of dignity and well-being to a much earlier initiative that brought together the links between human rights and the environment with a progressive message that advocated for a synergy approach. This early initiative was the UN Declaration on the Human Environment adopted at Stockholm on 16 June 1972 (a.k.a. Stockholm

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[175] See also the previous chapter for further critique on the development imperative.
[176] Article 43 of UNDRIP stipulated that, '[t]he rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.'

Declaration) – the same year as the adoption of the World Heritage Convention (WHC).

Principle 1 of the Stockholm Declaration stipulated that,

> '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'.

Despite this early initiative with progressive insight and vision, the UN system has been slow to operationalize it. As a matter of fact, it took three decades after the Stockholm Declaration for the UN system to establish a special procedure for the environment and human rights. This UN special procedure is known as the 'Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment';[177] it was recently established in 2012. For this line of work, I consider the conceptual framework of dignity and well-being as a potentially fruitful undertaking for future work, for both academia and policy-making. It also bears great potential to better accommodate the needs and concerns for IK-holders. This potential paradigm of dignity and well-being, as I call it, brings together key principles of human rights and human development. It emphasizes the interconnectedness of human rights discourse associated with 'dignity' and the human development discourse associated with 'well-being'. This segment will introduce them respectively.

The concept of dignity as a constituting principle of human rights was enshrined in both the UN Charter (1945) and UDHR (1948). The opening paragraph of UDHR spoke of dignity as inherent to all human persons. Article 1 stipulated that, '[a]ll human beings are born free and equal in dignity and rights.' Article 22 further stated the realization of economic, social and cultural rights as indispensable to the realization of human dignity. UDHR also spoke of well-being in the context of adequate standard of living with a listing of criteria, such as food, clothing, housing as well as medical care and social services (Article

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[177] The first mandate holder of this special procedure is John Knox (USA). For further reading on this mandate, see: http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/JohnKnox.aspx.

25(1)). Somehow such wording for well-being did not survive in the two covenants derived from the UDHR. For example, the ICESCR did not mention well-being at all. In regard to the ICCPR, the notion of well-being was only invoked in Article 8.3(c)(iii) as additional explanation to Article 8 on forced or compulsory labor. The question of what qualifies as 'adequate' has been debated for years. Among the commentators, Henry Shue's elaboration on subsistence rights to include adequate living environment was further argued by Linda Hajjar Leib to establish environmental rights as subsistence rights for the fulfilment of human rights. Based on Shue's and Leib's arguments, I proposed in chapter 2 to reconsider subsistence rights beyond the narrow interpretation of bare essentials and to take into account the larger context. In particular, I specified that my aim was to highlight the current and ongoing predicament faced by indigenous peoples without diminishing their means to only the minimum standards defined by the narrow interpretation. The UN treaty bodies and special procedures have also provided additional elaboration and interpretation on this matter, all of which reiterated the principle of cultural appropriateness as the code of conduct that required pluralistic understanding and due recognition to diversity.[178] Most significant and relevant to our discussion here (as presented above in section 3 of this chapter) is the recognition of cultural diversity as constituting human dignity. Through these examinations discussed above, it becomes noticeable that the notion of diversity (both cultural diversity and biodiversity) has emerged as an important concept in the discussion about IK and associated rights. I will return to it again shortly.

The concept of well-being is inspired by a more recent endeavour since the 1990s. In particular, I consider Amartya Sen's capability thesis that stimulated the field of development

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[178] In particular, see reports by the UN Special Rapporteur (UNSR) on the right to food (established since 2000) who emphasized the right to food as a collective right and the cultural dimension of such legal right. For further reading, see general comments by the UN treaty body CESCR. See also related UN special procedures, particularly the following two: the UNSR on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (established since 2000); and the UNSR on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (established since 2002).

studies and different ways of thinking about 'development'. Through collaboration with

Mahbub ul Haq,[179] who invited Sen to develop indictors of human development in 1989,

Sen's capability thesis was incorporated into the human development paradigm launched by

the UNDP. UNDP's annual Human Development Report was first published in 1990 as a

pluralist response to its counterpart issued by the World Bank (i.e. the World Development

Report).[180] The capability approach aims to capture what the major indicators such as the

gross domestic product (GDP) and gross national product (GNP) failed to do – that is by

taking into account a broader framework to assess and evaluate individual well-being and

social arrangements (Sen 2005, Robeyns 2005). By considering a broader approach of well-

being, this human development paradigm sought to focus on people's capability growth that

would enhance people's choices and freedom. Michael Walton and Vijayendra Rao (2004, p.

4) elaborated on Sen's framework of well-being as a set of capabilities that include culture,

which resonated with UNDP's 2004 report that focused on cultural liberty (UNDP 2004). The

first comprehensive document on the rights of indigenous peoples (i.e., the UNDRIP) also

addressed the collective dimension of well-being. Its Preamble stated that 'indigenous

peoples possess collective rights which are indispensable for their existence, well-being and

integral development as peoples.'

From the outset, it is necessary to take note of the following. Although some may see

a close link between the capability thesis and human rights, Sen (2005) differentiated them as

distinct without dismissing their complementary potentials and some possible common

motivation. In his words, Sen concluded that the capability thesis and human rights 'go well

with each other, so long as we do not try to subsume either entirely within the other' (2005:

163). In regard to their shared grounds, Sen articulated that capabilities can be broadly

considered as 'freedoms of particular kind' (Sen 2005, p. 152). On this basis, capabilities and

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[179] Mahbub ul Haq is the founder of UNDP's annual Human Development Report.
[180] The World Development Report was first published in 1978.

human rights might share a common ground, if human rights are best seen as rights to certain freedoms. However, Sen considered two distinct aspects of freedom that clearly distinguished the capability thesis from human rights: these are the 'opportunity' aspect of freedom versus the 'process' aspect of freedom. As Sen explained, 'capabilities are characteristics of individual advantages' and as such the capability approach can offer to assess the 'opportunity' aspect of freedom (2005, p. 156). But it cannot offer to address the 'process' aspect of freedom, such as fairness or equity of the processes involved.

I take into account the above interpretations and advancements as my building blocks to develop a proposed paradigm of dignity and well-being, which requires a synergy and synthesis approach of human rights and human development. I also take into account the growing social agenda to reconsider the problematic development paradigm and its utilitarian approach to IK,[181] especially the one taking place at key UN forums for indigenous peoples' rights since 2000. The ongoing social agenda for reform, particularly the demand for more substantial recognition of culture, could be leading a way to a more prosperous undertaking for the realization of a paradigm for dignity and well-being. This led me to explore an emerging framework known as 'development with culture and identity' (a.k.a. DCI) to further discuss its significance and relevance to indigenous peoples and their IK claims toward this calling of reform.

4.1   *Development with Culture and Identity: Conceptual Frameworks and Linkages*

In the previous chapter, I identified the linkages and intersections between the environment, development, and human rights as the essential pieces in the IK debate. These essential pieces form a critical discourse that resonates soundly with an emerging framework came to be known as 'development with culture and identity' or hereafter DCI, which calls for an

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[181] For further reading on how the development paradigm is problematic in its conceptualization of IK, see Agrawal (1995).

integration of cultural rights, environmental rights, the right to self-determination (SD), and sustainable development (SDev). I would argue that these linkages are of particular importance to the IK debate; most significantly are the latter two SD and SDev that constitute key discourses for the DCI framework. This section will review its origin and significance in relation to my proposal for a potential paradigm of dignity and well-being as I continue to explore.

As noted in the introduction above, this chapter builds on the previous chapter's discussion on the domain of the environment and development to further explore the parallel domain of culture and development. These two domains have been largely kept separate until recently through the evolving regime of heritage and human rights that brought them together, as this chapter continues to discuss. The growing recognition of diversity and the role of culture are of particular significance in this evolving process. I have discussed the policy paper known as *Our Creative Diversity* (WCCD 1996) above that in effect bridged the domains of culture, the environment, and development together. Furthermore, it linked culture to sustainable development, which was subsequently codified into the UNESCO Diversity Convention (2005) via Article 13. At the UN Conference on Sustainable Development known as the Rio+20, indigenous representatives actually tabled an intervention demanding for the inclusion of culture as the fourth pillar of sustainable development. The existing pillars of sustainable development were established by the Brundtland Report discussed in the previous chapter, which consist of economic growth, social inclusion, and environmental balance.[182] Although they are interrelated, these pillars are often implemented seperately.

Indigenous peoples' intervention for a cultural pillar was submitted through a global consultation process held in August 2011 at Manaus, Amazonia, Brazil to consolidate inputs

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[182] See the previous chapter for a historical review on the Brundtland Report.

from indigenous peoples around the globe who participated. The outcome document of this global consultation was known as the 'Manaus Declaration, Conclusions and Recommendations: Global Preparatory Meeting of Indigenous Peoples on Rio+20 and Kari-Oca 2' and it was submitted through the 'Indigenous Peoples Major Group (IPMG)[183] Submission for the Zero Draft of the Outcome Document of the UNCSD/Rio+20' (IPMG 2012). The role of culture as well as communal rights and diversity were reiterated again in the subsequent statement prepared by indigenous delegations on the day before Rio+20 through a declaration known as the 'Indigenous Peoples International Declaration on Self-Determination and Sustainable Development, 19 June 2012, Rio De Janeiro' (attached as annex 3 with this thesis).[184] More specifically, it stated three key demands: 1) culture as a fundamental dimension of sustainable development, 2) full exercise of indigenous peoples' human and collective rights, and 3) strengthening diverse local economies and territorial management. Although, at the end, their demand for culture as the fourth pillar did not successfully enter into the official outcome statement of the Rio+20 known as *The Future We Want* in 2012, indigenous peoples continued to petition for the above demands in regard to their self-determination and sustainable development within the UN system – such as the UN's first high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples (WCIP) took place on 22-23 September 2014 in New York (IITC 2014).

From the issuing of the 1996 policy paper known as *Our Creative Diversity* (WCCD 1996) to the demand of indigenous peoples for a cultural pillar of sustainable development at the Rio+20 in 2012, there has been a growing demand for a social agenda taking place at the UNPFII that has generated the necessary discourse for the emergence of DCI framework.

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[183] Indigenous Peoples Major Group (IPMG) consisted of indigenous peoples' organizations and representatives.
[184] Full text of this declaration known as the 'Indigenous Peoples International Declaration on Self-Determination and Sustainable Development' can be accessed via the IWGIA's website (http://www.iwgia.org/news/search-news?news_id=542).

Among the lessons learned was a critical reflection on the development imperative embedded in various policies across the board that largely discounted indigenous peoples for economic growth (i.e. according to the capitalist market mechanism). These issues and problems have increasingly received due attention at global forums such as the UNPFII. For example, the UNPFII designated a number of sessions since 2005 to review the Millennium Development Goals (MDGs)[185] and what those development goals meant for indigenous peoples. The special theme for the 4th session of UNPFII was 'Millennium Development Goals and indigenous peoples with a focus on Goal 1 to eradicate poverty and extreme hunger, and Goal 2 to achieve universal primary education' (2005). For the 5th session, the special theme was 'The Millennium Development Goals and indigenous peoples: Re-defining the Millennium Development Goals' (2006). A summary of the MDGs is provided below in table 10. At its 10th session, the UNPFII adopted the special theme of 'Indigenous peoples: development with culture and identity; articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples' (2010) to focus on the implementation of UNDRIP. These are the discourses generated by various actors (including rights-holders and stake-holders) engaging with UN processes that invoked principles of human rights, governance, and well-being. I find these discourses critically significant for the IK debate that is increasingly becoming more versatile and multifaceted with widening scope. Looking through the documents generated by the above processes, they highlight the inescapable presence of culture and ever-growing strong demand for collective cultural rights that is only beginning to receive due attention. Indigenous peoples' demand for expanding existing pillars of sustainable development at the Rio+20 was a clear indicator that marginalized groups like indigenous peoples remain marginalized in the mainstream development agenda, in spite of the paradigm shift established by the *World Conservation Strategy* that supposed to take them into account.

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[185] MDGs were developed out of the Millennium Declaration adopted by UN members-states at the Millennium Summit in 2000.

In addition to the MDGs, the UN General Assembly's proclamation of the Second International Decade of the World's Indigenous Peoples (hereafter the Second Decade, adopted in 2004)[186] also aligned global attention to (re)assess the development paradigm. The theme of the Second Decade was 'Partnership for Action and Dignity' and its Program of Action (hereafter PoA) provided important reference for the emerging framework of DCI to move forward (see table 10 below in comparison with the MDGs). This section will come back to the PoA for further discussion shortly. Both of the MDGs and the Second Decade are due for final assessment by 2015. Although they share a similar timeline and some overlapping themes, they differ greatly in terms of their take on 'development'. For example, considering the first target area of MDGs that aimed to end poverty, a major discrepancy is the conceptualization of poverty and how or whether the current development paradigm could really do something about it. The MDGs' interpretation of poverty is mono-dimensional and largely based on economic deprivation (Mihlar 2012). According to such perception, they seek solution or remedy through a mainstream development model for economic growth to alleviate poverty. However, for indigenous peoples who comprise about 4.5% of the world's population but about 10% of the world's poor (WorldBank 2011), the face of poverty is much more multidimensional. This multifaceted scenario of poverty also tells the story of identity-based discrimination, dispossession, and displacement that led to a breakdown of indigenous peoples' survival mechanisms including cultural integrity, food security, and sovereignty (see also the previous chapter for related discussion). As Amartya Sen (2008) indicated, inequality and violence could be exacerbated by combining cultural identity and poverty. NGO practitioners such as the ones working on minority groups and indigenous peoples also noted that poverty is increasingly defined by identity (Lattimer 2013, Mihlar 2012) and the global development agenda needs to pay attention to this dimension.

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[186] The Second Decade was adopted by the UN General Assembly (UNGA) on 22 Dec 2004. The First International Decade was designated for 1995 to 2004 (see: http://www.un.org/rights/indigenous/mediaadv.html).

The above studies and insights highlight the frequently neglected dimensions of culture and associated identity in development paradigm for issues such as poverty that is multifaceted. Another problematic area that also contributed to the multifaceted poverty is the climate change mitigation scheme that I touched upon in chapter 2. Among the studies that looked at this problem, Hannah Reid and Krystyna Swiderska (2008) examined the mitigation scheme that mainly focused on mono-approach afforestation. Such mono-approach overlooked the larger picture of complex biodiversity conservation and the enhancing aspect of biodiversity that can increase our ability to cope with increasingly severe episodes of climate change. By exploring the crucial aspects of biodiversity, Reid and Swiderska established the critical linkage between biodiversity and poverty. Michael I. Jeffery's work also emphasized similar point by concluding that, '[i]mproving environmental governance to create an enabling environment for resolving poverty-environment concerns and enhancing the asset base of the poor can expand sustainable livelihoods and reduce vulnerability' (2008, p. 69). Another line of critique to the mono-approach is socio-cultural ecology that I proposed in the previous chapter (see section 2.1 of chapter 3). Recall the speech by Oren Lyon that I discussed in the previous chapter, 'simply replanting trees is not replanting community; you lose a lot in the process' (Lyons, n.d.). This is indeed a crucial area concerning IK and relevant debates that identify the link between cultural and biological diversity in the discourse of sustainable development.[187]

Table 10:[188] MDGs vs. the Second Decade (PoA)	
MDGs (2000-2015)	**Second Decade / Program of Action (2005-2015)**
1. End poverty and hunger 2. Universal	1) Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws,

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[187] The previous chapter (see section 3.2 of chapter 3) has explored some of these issues including discussions on the Brundtland Report of 1987 that provided the first global framework for sustainable development – it was the first to take into account biodiversity.

[188] Source: for MDGs, see its official website (http://www.un.org/millenniumgoals/); for the Second Decade, see its Program of Action (PoA, paragraph 9) via the UNPFII portal (http://undesadspd.org/IndigenousPeoples/LibraryDocuments/StateoftheWorldsIndigenousPeoples.aspx).

education 3. Gender equality 4. Child health 5. Maternal health 6. Combat HIV/AIDS 7. Environmental sustainability 8. Global partnership	policies, resources, programmes and projects; 2) Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent; **3) Redefining development policies that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples;** 4) Adopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth; 5) Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives. diversity of indigenous peoples

Considering the reform agenda that I discussed earlier and the goal to take into account both biodiversity as well as cultural diversity in a sustainable development framework, there remains a number of challenges. In particular concerning indigenous peoples, the Report of the International Expert Group Meeting (UNPFII 2010) identified some of these ongoing challenges posed by the dominant paradigm of development – I hereby summarize them below:

1. Indigenous peoples' societies have often been regarded as "backward, primitive and uncivilized", where their "development" is understood to be their assimilation into the so-called "civilized world."
2. Indigenous peoples' cultures and values are seen to be contradictory to the values of the market economy, such as the accumulation of profit, hyper-consumption and competitiveness. Indigenous peoples are seen as "obstacles" to progress because their lands and territories are rich in resources and indigenous peoples are not willing to freely dispose of them.
3. In many countries, the history and the continuing practice of assimilation has resulted in blanket public policies that have excluded indigenous peoples and are discriminatory with respect to their cultures and identities.

Although a call for human rights-based approach to development (a.k.a., HRBA) has emerged since the 1980s, which advocated for empowering vulnerable groups such as

indigenous peoples, it largely remained in rhetoric and not practices. At the institutional level, there remained multiple challenges as well. The main problems identified by the ILO office responsible for implementing the ILO 169 are threefold: 1) lack of permanent mechanisms for securing indigenous peoples' participation; 2) scarcity of specific statistics or data on the situation of indigenous peoples; and 3) the government and development institutions often lack adequate knowledge about indigenous peoples' rights, needs, and priorities (ILO 2009, p. 119). The Inter-agency Support Group on indigenous peoples (a.k.a. IASG) also noted significant gaps in regard to information related to indigenous peoples such as data collection and/or disaggregation that are either unavailable or incomplete (IASG 2006, p. 1). These are among the common problems.

Given the above grim picture and substantial challenges, it is not surprising that calls for developmental reform are roaring evermore louder. It also becomes clear that in the current context of 'development', there is not much room for indigenous peoples to participate in decision-making processes affecting them as equal-partners. As such, indigenous peoples often end up as victims of development and not beneficiaries of development (UNESCO 2009). There is a good reason why the Second Decade included in its Program of Action (hereafter PoA) a call to redefine development policies (see Objective 3 of the PoA in table 10 above). The Second Decade was proclaimed by the UN General Assembly (UNGA 2005) with a well-defined timeframe and PoA for implementation and assessment. The UNPFII's mandated areas are the same as the Second Decade, which included: culture, education, health, human rights, the environment, and social and economic development.[189] As noted above, one of the PoA's five objectives called for redefining development policies to take into account indigenous peoples' aspiration and priority.

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[189] UNPFII's mandated areas were defined by the ECOSOC Resolution 2000/22, which established the UNPFII (ECOSOC 2000). Article 43 of the UNDRIP (2007) further refined the role and responsibility of the UNPFII to implement the UNDRIP.

Furthermore, the PoA requested the member-states to respect the principle of cultural appropriateness and diversities of indigenous peoples with reference to the UNESCO's conventions discussed previously, that is the ICH Convention, Diversity Convention and World Heritage Convention. Other human rights principles highlighted by the PoA included non-discrimination, collective cultural rights, effective participation, and the principle of free prior informed consent. The above considerations and defined areas of action provided an institutional commitment and implementation mechanism for the DCI paradigm to emerge. It was a gradual process that took many years to come together, most noticeably through the initiatives of the Second Decade. For example, the PoA explicitly stated that 'culture should be integrated as a prerequisite and a basis for development project design in order to build "development with identity", respecting people's way of life and building sustainable human development' (paragraph 12). As such, it was credited as marking a turning point in this regard (IASG 2010a). The genesis of DCI also shares an earlier lineage dated back to the 1970s via UNESCO initiatives such as the MONDIACULT discussed in this chapter (see section 3 above).

The above agenda encouraged a more pluralistic understanding and approach to development with human rights consideration. Some recent developments adopted by international financial institutions (IFIs) suggested positive changes toward this direction. For example, the Inter-American Development Bank (IDB) had recently taken a positive step to reflect the PoA in its Operational Policy on Indigenous Peoples and Strategy for Indigenous Development (IDB 2006). In this Operational Policy, the IDB adopted a framework of 'development with identity of indigenous peoples' and defined it as (IDB 2006, p. 5):

> 'a process that includes the strengthening of indigenous peoples, harmony with their environment, sound management of territories and natural resources, the generation and exercise of authority, and respect for indigenous rights, including the cultural, economic, social and institutional rights and values of indigenous peoples in accordance with their own worldview and governance. This concept rests on the

> principles of equity, wholeness, reciprocity, and solidarity and seeks to consolidate the conditions for indigenous peoples and their constituents to thrive and grow in harmony with their surroundings, and in so doing, tapping for that purpose, in accordance with their own priorities, the potential of their cultural heritage, natural assets, and social capital.'

Following up with this adoption, the IDB subsequently teamed up with two UN specialized agencies (UNESCO and International Fund for Agricultural Development [IFAD]) to further promote DCI as a new paradigm for indigenous peoples and development. As this emerging paradigm of DCI gradually took shape and gained grounds in the international policy arena, it further promoted and recognized IK in this new framework of development. For example, the UN General Assembly (UNGA) issued three consecutive resolutions since 2010 on the theme of 'culture and development' and all of them recognized IK as one of the key components for culture and development (UNGA 2013, UNGA 2011, UNGA 2010). A timely training manual for national human rights institutions (NHRI) also included a section on DCI as follows (APF/OHCHR 2013, p. 34-35):[190]

> '[DCI] is characterized by a holistic approach that seeks to build on collective rights, security and greater control and self-governance of lands, territories and resources.'

> 'Traditional knowledge and language are key elements in development with culture and identity and indigenous peoples' interests, knowledge and experience must be at the centre of methodologies when constructing knowledge about indigenous peoples.'

As noted above, the most significant of this DCI paradigm is that it recognizes the two SDs (i.e., self-determination and sustainable development) that constitute key discourses regarding IK governance. While the DCI might be regarded as an emerging framework or paradigm in the policy sphere, its normative foundations have substantial roots in international treaties and jurisprudence concerning indigenous peoples' rights: from the ILO 169 to jurisprudence established by the regional mechanism such as the Inter-American Commission on Human Rights (IASG 2010a, 2010b).

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[190] For a more elaborated report, see the Report of the International Expert Group Meeting (UNPFII 2010), especially its Section IV on 'Conclusion and Recommendations'.

It is important to take note how the normative foundations of DCI all highlight collective cultural rights with particular link to the land/territory and biocultural diversity in the SDs context for indigenous peoples' survival with dignity and well-being. This observation is further confirmed by the record of recommendations issued by the UNPFII over the years, particularly on the significance of culture. Table 11 below provides a statistics compiled by the Secretariat of UNPFII (2013, p. 17) which demonstrated how 'culture is an essential component for the survival of indigenous peoples' (UNPFII 2013, paragrpah 46). The UNGA's report also supports the above conclusion via its 'Midterm assessment of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People' (UNGA 2011b). More specifically, the cultural dimension of collective rights is of particular importance for indigenous peoples' rights and their IK claims, which is about the nexus between culture and the environment in the web of connections for a sustainable future. This perspective highlights the missing piece discussed above in regard to the legal system at present that is inadequate to care for IK as conceptualized and practiced by indigenous peoples, particularly the inter-linkage between cultural diversity and biodiversity as one interconnected whole.

V.   Concluding Note

As outlined in the introduction above, this chapter builds on the previous chapter to further explore the heritage regime that bridged two key domains together: namely the domain of environment and development (as discussed in the previous chapter) and the domain of culture and development. The latter is the focus of this chapter. To that end, this chapter explored the historically neglected set of cultural rights and its recent advancements in relation to the emerged concept of collective biocultural heritage for further analysis. This line of inquiry led me to further explore the evolving jurisprudence and policy arenas

concerning heritage, biocultural diversity, and communal rights to examine its significance for IK and the rights of IK-holders. These legal and policy arenas have created an amalgam of meaning and value concerning culture, heritage, conservation, and communal rights that are often clashing with discourses of development between economic growth and sustainability.[191] In the mix of this amalgam of meaning and value, as demonstrated in this chapter, the role of culture and community has gradually risen to a more prominent place in the 2000s.

To a certain extent, culture, identity, and communal rights are regarded by the modern states as threats to its authority and sovereignty (Stamatopoulou 2012). Therefore, they could be considered as thorny issues by the states.[192] As such, these issues are carefully interpreted or mostly neglected in the international human rights system, which ironically is governed by the states acting as gatekeepers rather than advocates. However, the role of culture in its diverse forms as well as collective cultural rights constitutes a crucial area of enquiry for the IK debate, particularly its link to biodiversity and subsistence living. As discussed previously, indigenous peoples' holistic conceptualization of IK embodies both tangible and intangible dimensions of culture and heritage with intrinsic relationship with their lands/territories and ecosystems. Such conceptualization of IK and associated claims for collective cultural rights have been and will continue to pose challenges and pushing boundaries in international law and policy.

Although the link between cultural diversity and biological diversity has been established by growing studies discussed in this and previous chapters, there is still no legal instrument safeguarding them as such in a coherent way. This is the missing piece identified

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[191] The previous chapter has discussed some of these issues in the larger context of environment and development.

[192] For further reading, see Will Kymlicka (1995) for the theoretical question of compatibility between a liberal theory of the state and the recognition of collective rights to groups or minorities. See also a compilation of essays on peoples' rights edited by Philip Alston (2001).

in the previous chapter and confirmed by this chapter. Recall the question proposed by Darrell Addison Posey (1998) at the occasion of the UDHR's 50th anniversary, he asked '[c]an cultural rights protect traditional cultural knowledge and biodiversity?' The main problem identified by Posey rested on the inability of the legal regimes to address the interconnection between culture and nature, which is crucial for understanding IK and IK-holders' rights.[193] In other words, his answer to the question was not positive. Nearly a decade later around the occasion of the UDHR's 60th anniversary, Michael Dodson (2007) pointed out yet again that the international human rights regime was inadequate to protect IK. This study echoes the concerns and observations by both Posey and Dodson, especially in regard to the narrow interpretation and practice of cultural rights that was inadequate to look beyond 'cultural property'.[194] Furthermore, this chapter and the previous chapters demonstrate how the problem of fragmentation embedded in the law is also incapable to accommodate indigenous peoples' needs and concerns for IK that do not disconnect nature from culture or separate culture from knowledge. Nevertheless, this chapter explored the field of cultural rights has evolved with a more positive outlook and expanded understanding of culture defined as ways of life that take into account both tangible and intangible dimensions. There is also a better recognition of the communal dimension of biocultural diversity and its importance to indigenous peoples' subsistence living and survival. With this positive trend, the prospect is more optimistic now than in Posey's time in 1998. However, it is not without challenges ahead. As we are approaching the 70th anniversary of the UDHR, there is much to do to build jurisprudence for the field of cultural rights in the expanded understanding of heritage, biocultural diversity, and communal rights.

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[193] In his words, Posey concluded that (1998, p. 53): '[f]or indigenous peoples, "nature" and "culture" are inextricably linked, with all of life linked in a web of relations. This makes cultural rights instruments difficult to apply to many aspects of "nature", just as it makes environmental law inappropriate for the protection of traditional ecological knowledge and genetic resources'.

[194] Posey actually opened his 1998 essay by stating that: '[o]ne of the major functions of cultural rights is to protect the "cultural property" of humans, such as art, music, dance forms, images, performances, oral literature, handicrafts and other expressions of distinct and distinctive societies' (1998: 42).

Evident by recent treaties discussed in this chapter, the most significant development is probably the growing recognition of diversity that included biodiversity and cultural diversity as well as their inter-linkages. Such recognition is gradually gaining currency. For example, as noted above, the recent UNGA resolutions under the theme of 'Culture and Development' (UNGA 2013, UNGA 2011, UNGA 2010) all recognized and reiterated such inter-linkages by sharing this same paragraph below in its respective Preamble:

> '[r]ecognizing the linkages between cultural and biological diversity and the positive contribution of local and indigenous traditional knowledge in addressing environmental challenges in a sustainable manner'.

This is an encouraging trend that could be explored further in future research. At present, biocultural diversity as an emerging area is not yet fully developed in law or policy, as this chapter illustrated. As a result, IK has been framed in ways that up until now do not recognise indigenous peoples' conceptualization in the web of connections characterized by socio-cultural ecology, as articulated and proposed in this study (see the previous chapter). This problem is further illustrated by the challenges that I encountered during the course of research for this PhD project when I had to navigate through a variety of materials in order to pull together different pieces for further examination: these included various international instruments, regimes, and protocols relevant or significant to IK. The result of this synergy and synthesis approach might appear to be bitty at times for the readers, but it actually reflects the fragmented nature of the law that is an ongoing challenge for this line of inquiry. This is also my response to the current scholarship in this area that is not coherent enough for me to see the interconnection in a bigger picture. In this regard, I am thankful to my work experience as a practitioner that kept me grounded and informed with the necessary context. I am also grateful to indigenous colleagues and representatives from the NGOs network whose struggles have kept me on track with the key issues to navigate this fragmented terrain.

Building on the analysis presented in this chapter and the proceeding ones, I concluded that biocultural diversity constitutes the cornerstone of IK claims, which is rooted in land-territory-based claim for human rights. Such claims that require synergy and synthesis approach and understanding about the interconnectivity of biodiversity and cultural diversity cannot be accommodated by the legal system at present, but is critical for indigenous peoples to sustain their ways of life with dignity and well-being. With this understanding, I advanced to explore and propose a potential framework or paradigm that would take into account the principles of human rights (dignity) and human development (well-being) with collective cultural rights at its centre. The goal is to seek ways to better maintain the vitality of biocultural diversity and heritage in the expanded discourses discussed in this chapter that merged critical domains together, which is what IK is about.

Table 11: UNPFII Recommendations on Culture

Implementation of the recommendations of the Permanent Forum on culture

Permanent Forum session	Total	Recommendations	
		Implemented (ongoing or complete)	Not yet implemented or reporting not received
Second	11	0	11
Third	14	12	2
Fourth	0	0	0
Fifth	0	0	0
Sixth	2	0	2
Seventh	0	0	0
Eighth	0	0	0
Ninth	5	1	4
Tenth	4	1	3
Total	**36**	**14**	**22**

Chapter V:

Conclusion

This final chapter is organized into three sections. The first section takes a look back on each chapter to synthesize the discussion and argument advanced therein. It will also provide further reflection on the chapters as a whole to suggest potential implication and significance to round up key findings and arguments. There is a level of inherent diversity in this tangled story of IK as this study shows. As the issues and debates about IK and associated rights continue to evolve, this chapter will conclude by proposing a number of ideas for future research directions and policy recommendations (i.e. sections 2 and 3 of this chapter) as a way forward in this field of study.

I.   Summary Statement

This is a sociological and legal study of knowledge that looks at the tangled story of IK to analyze the core problem for IK governance. To a large extent, this PhD study shows how the story of IK is about clashing worldviews and sovereignty. It is a story about indigenous peoples' holistic vision and intimate relationship with their living environment that is not fully understood by the outside world, a world often possesses different perceptions and objectives. Such a lack of understanding is reflected in the fragmented space of law and policy that this study identifies and examines. What struck me the most was how the obvious behind the IK story is the most poorly understood – that is the overarching theme of emplacement that uniquely characterizes IK for indigenous peoples. I developed this conceptual frame of emplacement (see chapter 2) during the course of this PhD research and considered IK as emplaced knowledge to better reflect the unique nature of IK, which is characterized by the rich layers of interconnectivity and holistic epistemology represented by indigenous peoples' ways of life and their relationship with their lands/territories. I also advanced the notion of socio-cultural ecology (see chapter 3) to further convey the kinship

and communal relationships observed by indigenous peoples with all living beings in the ecological world, to better describe the web of connections, which is an important aspect of IK and IK-holders' practices. As argued in respective chapters, indigenous peoples' sense of identity and their aspirations are geographically and ecologically specific, hence the conceptual frame of emplacement that I developed as a critical analytical tool to capture the central motif in indigenous peoples' IK claims. This central motif of emplacement sits at the heart of indigenous peoples' claims for rights throughout the international movement and generates what I have come to identify as emplaced resistance during negotiations. From this vantage point, one can see how IK issues and debates are inevitably political.

There are a number of fundamental reasons why IK issues and debates are inevitably political, as this study shows. First, IK as a form of emplaced knowledge has an inseparable relationship with indigenous peoples' lands/territories, including what the outside world calls 'natural resources' therein, which increasingly are becoming scarce and uncertain today. Secondly, the question of who has ownership and control or access rights to these lands/territories/natural resources is the landmine question that directly challenges the modern state and its claim for sovereign power over its 'territorial integrity'. Although historically a number of indigenous nations had established treaty relations with the settler-states as sovereign entities (e.g., cases in the United States, New Zealand, Canada), indigenous peoples' respective sovereignty was not honoured in the same way as the modern states in contemporary international relations or by the law. As such, the state versus indigenous peoples' sovereignty is a constant theme that generates tension and grievance in the IK story and debates. Thirdly, in addition to the clash of sovereignty, there is also the clash of worldview between indigenous peoples' holistic perspective and the utilitarian one that underpinned the dominating scheme of development. These major clashes exposed vividly the kind of power struggle that is off balance, leading to structural discrimination

against indigenous peoples. Furthermore, resulting from the long history of displacement and dispossession, indigenous peoples often do not possess the governing role in matters concerning them. The governing role often resides with the states whose sovereignty is regularly supported, enforced, and emphasized in treaties or international negotiations. This is the kind of political space that made IK issues complicated and tangled by multiple forces and interests shaped by different priorities, conceptualizations, and values.

What contributed further to the complexity of the IK story and debates is the inherently heterogenetic and incoherent regimes of governance, from intellectual property and trade to environmental governance and development to natural and cultural heritage and human rights. These are the contexts that this study examined. As discussed in respective chapters, these governing regimes occupy different domains that largely remain indifferent to each other until only recently. As the world is facing new challenges, such as climate change, these regimes are pressured to cross paths, either voluntarily or involuntarily, like never before. Moreover, they all want a piece of IK to serve their agenda, mandate and/or to enhance their programs. This shows that IK is indeed a cross-cutting subject. However, it is not adequately recognized as such, legally and institutionally, as this study shows. This kind of heterogeneity and fragmentation not only contributed to the complexity of IK governance, it also undermined the rights of indigenous peoples who are marginalized in the decision-making process.

It is not an easy job to navigate through this eclectic and incoherent terrain in the midst of international law and policy, where indigenous peoples and their IK became enmeshed. Nevertheless, this PhD study managed to do so by prioritizing the key regimes that have particularly invested in IK at the global level with dynamic processes and significant power and control over the governance of IK, or have significant impact on

indigenous communities. The following section will review and reflect on this PhD study as a whole to consolidate key findings and arguments that have emerged from this research.

1.1   *Revisit, Reflect, Interpret*

This study started out by reflecting on my observations and insights gained through years of advocacy work on human rights with indigenous peoples at regional and international levels, including the United Nations. My practitioner experience led me to conclude that IK is much more than a property issue. Moreover, it is about land-territory-based subsistence living and subsistence rights for indigenous peoples that are about survival as distinct peoples with dignity and well-being. To that end, this study worked out a set of steps in the form of questions for each chapter to address (i.e. as presented in chapter 1 section 3 'Research Background and Orientation'). This section will review the discussion and arguments advanced in respective chapters.

IK and associated rights claims probably constitute some of the most highly challenging topics of today. As noted by this study, no one body of law currently regulates or protects the wide range of practices and manifestations of IK according to Article 31 of UNDRIP.[195] This PhD study investigated the conceptual divide as well as legal and institutional fragmentation that contributed to the global injustice affecting indigenous peoples, who are among the most vulnerable and marginalized. More specifically, this study problematized existing regimes that tend to treat IK as one category or the other according to its mandate and/or constituencies: for example, from 'genetic resources' to ecological management, *inter alia*. These regimes failed to fully grasp what this study demonstrates,

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[195] Article 31(1) stipulates that, '…[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.'

which is how IK is a cross-cutting subject that requires more comprehensive handling. From the first UN study on IK where Rapporteur Daes (1993) invoked the heritage discourse to the second UN study on IK where Rapporteur Dodson (2007) boldly declared that the current system is inadequate to protect IK,[196] their studies led me to take note of the following. Firstly, it is important to take into account indigenous peoples' holistic conceptualization of IK; and secondly, I needed to address the cross-cutting nature of IK to respond to the wide spectrum covered in the UNDRIP. The UNDRIP, which took more than two decades in the making, is the first comprehensive instrument and human rights framework on indigenous peoples and IK. However, its full spectrum is not yet adequately understood or translated into the realm of law and policy, as this study illustrates. In particular, IK as a cross-cutting subject is arguably the most poorly handled. This calls for a more integrated approach.

Through an interdisciplinary approach of synergy and synthesis, this study works through the eclectic terrain of law and policy affecting IK, which is not always coherent, to confirm that IK is indeed a cross-cutting subject and it is much more than a property debate. Furthermore, contrary to the mainstream debate that tends to be occupied with intellectual property discourse, this study shows and argues that what constitutes the cornerstone of IK claims by indigenous peoples is a call for biocultural diversity that sustains their ways of life. However, it is often overlooked or outright dismissed in the mainstream debates preoccupied with intellectual property law, which has neither the capacity nor the incentive to care for biocultural diversity. This is a critical finding and a fatal oversight that I identified through the course of this PhD research; it is an area that has not been articulated well in the existing literature. This PhD study also found that such a claim for biocultural diversity rooted in indigenous peoples' rights is not currently supported or accommodated by the legal regime, despite some recent advancements in collective cultural rights discussed in chapter 4. Clearly,

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[196] Dodson's study was launched at the UNPFII's 6th session, only a few months before the UNDRIP was formally adopted by the UN General Assembly in September 2007.

this is an emerging area that requires further development in law and policy, as advocated in this study.

Another key finding and argument advanced by this study is how legal and institutional fragmentation has contributed to the problem of IK governance. As a result, the existing regimes failed to protect IK and IK-holder communities. I argue that such fragmentation is the result of conceptual divide or epistemological struggle rooted in major discrepancies concerning different values, interpretations, and power imbalance. As such, it became essential and critical to ask the question, 'whose/what knowledge for whose/what development,' and who is interpreting what and for whom? Furthermore, I identified that the most problematic aspect of the governance problem is how the imbalance of power relations in the decision-making processes has kept local groups or IK-holders, who are the most affected, marginalized. Such marginalization is detrimental for reasons discussed in respective chapters. In particular, as this study demonstrated, IK is governed by culturally defined regulations based on indigenous peoples' lifelong bonding and interaction with nature without objectifying or silencing nature. Indigenous peoples' governing system rooted in socio-cultural ecology is in sharp contrast to the assumptions underpinned by the development imperative commonly upheld by global regimes discussed in this study. Moreover, this study analysed how the development imperative is largely based on a particular set of ideas/assumptions for certain utilities, market values, and/or science-driven knowledge production. Such development imperative is not interested in establishing relationship or having the same respect for nature that indigenous peoples have. In Peter Harrison's critical examination of 'science', he concluded how in effect scientific explanation comes with the precondition to silence nature and such silencing enables material exploitation to take place (P. Harrison 2002). I interpret such effects of 'silencing' as among the contributing factors that objectifies nature for capital exploitation. In this line of operation,

the market has become the mechanism to manage nature, from natural resources to climate change. As a result, it has become a common practice to place a price tag on nature. This kind of practice prioritized economic functions while stripped away social functions and cultural meanings between humans and nature (Pedersen *et al.* 2014). Such tendency to detach humans from nature facilitated further objectification of nature. This is the opposite of the 'web of connections' discussed in previous chapters about indigenous peoples' vision and practice of interconnectivity and their relations with nature, including all ecological beings, which are very important for practicing their IK.

Once commodification is accomplished, it becomes easy to treat nature as just merchandise on the market for sale. Such market-based approach is increasingly gaining grounds, evident by the following expressions and service providers: such as 'natural capital', 'ecosystem services', or the emerging 'environmental goods and services sector and industry', to name a few. Today, it is not uncommon to find a service portal, such as this one called the 'Ecosystem Marketplace', that provides information and analysis on markets and payment for carbon mitigation, clean water, and biodiversity. The vision statement provided by the Ecosystem Marketplace predicted that 'markets for ecosystem services will one day become a fundamental part of our economic system, helping give value to environmental services.'[197] It is uncertain what kind of value or ecological future that market-based vision will lead us to. One thing for sure is how such market-based mechanism will further exclude or disable indigenous peoples from IK governance, which will inevitably lead to ineffective or undesirable outcomes, if not disasters. Despite widely acknowledged recognition of the importance of participation in governance, the UN's Inter-agency Support Group (IASG) on indigenous peoples concluded that 'critical barriers to involving indigenous peoples in

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[197] See the website of Ecosystem Marketplace:
http://www.ecosystemmarketplace.com/pages/dynamic/web.page.php?page_name=overview&section=about_us&eod=1.

governance processes remain' (IASG 2010, p. 27). It is important to emphasize here again that indigenous peoples and their ways of life are indispensable to the well-being of IK that protected much of today's remaining biodiversity-rich areas in the world. Therefore, it is a critical mistake to exclude indigenous peoples in governance processes.

Through the course of this PhD research, I have developed a number of original ideas and frameworks that facilitated and supported further articulation of my arguments in respective chapters. By demonstrating and advancing the understanding that IK is a cross-cutting subject and a form of emplaced knowledge, this PhD study further problematized the development imperative and the property-based system exercised by the respective regimes as well as their impact on IK: from the trade regime of intellectual property to the heterogenetic regime of the environment that ranged from biodiversity, heritage, and climate change. The following segment will consolidate and highlight the main arguments developed in this study.

- ***IK as Emplaced Knowledge: No Land/Territory, No IK***[198]

The main finding and argument emerged from this PhD research is the following: the story of IK is deeply ingrained in the story of indigenous peoples' emplaced struggles. IK needs the people and the habitat to sustain it, and *vice versa*. In other words, one cannot discuss IK without considering indigenous peoples and their welfare, including the welfare of their environment. I recall a vivid description from Mayaw Biho (an indigenous filmmaker/activist who I came to know and worked with for many years on Austronesian issues in Taiwan) that reflects such conditions and predicaments. Mayaw described his people, the Pangcah,[199] as in a state of 'involuntary exile on one's (our) own homeland' (roughly translated into English).

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[198] See chapter 2 section 1.1 for discussion on this integrated concept of land/territory according to the ILO 169.
[199] Mayaw Biho is a member of the same Pangcah community discussed in chapter 2 concerning the copyright infringement case. Pangcah is one of the many indigenous Austronesian peoples living in the island country known as Taiwan.

Such a state of involuntary exile has been very destructive for generations of indigenous peoples, to say the least. If there is one central message or argument that this study would emphatically state and advocate, it would be to reiterate that IK is a form of emplaced knowledge and 'no land/territory, no IK'. I developed this core argument in each chapter through contextual discussion, which illustrated the structural problems and power struggles embedded in historical discrimination and bias against indigenous peoples. Such fundamental problems are the result of major clashes of worldview and sovereignty, as discussed above.

Imagine if indigenous peoples all become assimilated as city-dwellers. In such a scenario, they would not have the kind of IK so valued in the international treaty such as the Convention on Biological Diversity (CBD), would they? With this understanding, it is obvious that the protection of indigenous peoples' ways of life ought to be a priority. In order to protect the indigenous peoples' ways of life, it is necessary to protect their lands/territories as well as their residential tenure on their lands/territories (see discussion on the WCPA guidelines of 1999 in chapter 3, section 3.2.2). Following this logic and priority, it becomes crystal clear that any law or policy that would decontextualize indigenous peoples' IK rights from their tenure to lands/territories would not be sustaining in meaningful ways, nor would it be constructive or productive. These problems cannot be easily unpacked or solved without major reconfiguration and/or reform of the clashing worldview and sovereignty.

- *Handle with Care: Loss of IK Leads to Poverty and Extinction of Indigenous Peoples*

As discussed in chapter 3, IK is not merely 'raw material' or 'utility' for economic growth as considered in the development paradigm. IK consists of means of survival for indigenous peoples. Chapter 3 further argues that the loss of IK leads to poverty, not as interpreted by the

mainstream paradigm based on GDP or GNP as indicators,[200] but by indigenous peoples' indicators that include dispossession of land and resource rights that link to a breakdown of food security, food sovereignty, cultural integrity, and overall well-being of communities. Such dispossession and displacement threaten the vitality of IK that formed the baseline of indigenous peoples' subsistence survival. As this trend continues, it only increases indigenous peoples' vulnerability and pushes them to the breaking point of extinction.

As the conditions of displacement and dispossession exacerbate, indigenous peoples are under enormous stress to maintain their emplaced knowledge systems. In this regard, what is not sufficiently recognized and/or emphasized enough in the literature is how IK is actually becoming endangered as a result of prolonged displacement and dispossession. This study illustrated and argued that IK governance affects vulnerable groups like indigenous peoples to the extent that it could make or break indigenous peoples' prosperity as distinct peoples. Therefore, it requires particular care to protect it against the utilitarian approach that only sees indigenous peoples as obstacles or aids to development. In this context, this study advocates for a reconsideration of subsistence living and subsistence rights from the point of view of empowerment; especially as empowerment to enhance people's freedom against the dogmatic model of economic growth that has evidently contributed more to the problem than inspiring a solution in the world (see chapter 4 section 4 for discussion on the discourse of capability thesis).

By proposing a subsistence frame that reconsiders subsistence living as empowerment, I am not suggesting a romantic return to the preindustrial ways of production. Rather, I am advocating for better awareness and control of external inputs (e.g. such as fossil fuels, pesticides, and other chemical substance, etc.) so that people can be less dependent on

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[200] Examples of such mainstream paradigm included the MDGs that supposed to aim for poverty alleviation for target groups including indigenous peoples.

the commercialized system of food production. The food system of our modern societies is largely monopolized by big companies with short-term outlooks without much concern or obligation for people's health or well-being. My proposal of subsistence living and subsistence rights as empowerment is also guided by the UNDRIP that presented an integrated approach and worldview of IK that recognized indigenous peoples' subsistence relationship to their lands/territories, ecology, and natural resources. My proposal is particularly aimed to empower indigenous peoples to have better control of their destiny. It is time to recognize IK-holders as active partners and leaders, not passive recipients or add-ons to the respective schemes or programs imposed on them that may or may not benefit indigenous peoples.

- *A Proposition: Dignity and Well-being*

Demonstrated by scenarios discussed in this study, the result of legal and institutional fragmentation coupled with the development imperative driven by utilitarianism had led to practices that I would describe as 'harnessing IK and discarding IK-holders'. Despite ongoing talks and treaty-making about how to protect IK, the irony is, without first caring for indigenous peoples as IK-holders, no measure can safeguard IK by itself. A few pioneer scholars who paid attention to this ongoing neglect early on were Tony Simpson (1997), Rosemary Coombe (2001), and Graham Dutfield (2005). Respectively, they noted the importance of meeting the fundamental needs of indigenous peoples when considering IK protection. This study reiterates that importance. Furthermore, this study considers the oversight or outright neglect characterized by practices of 'harnessing IK and discarding IK-holders' to be the fundamental problem of most international negotiation concerning IK. What needs to be understood are the socio-cultural meanings of IK for indigenous peoples, if one wishes to sustain it. In such a socio-cultural context, IK cannot be reduced to utility for economic growth or other materialistic interpretation underpinned by the particular idea of

'progress' in the name of 'science' or 'development' (as discussed in chapter 3). However, as Wade Davis (2001, p. 18) acutely pointed out in his lecture delivered at the Inter-American Development Bank, the destruction of a people's way of life, which is also known as ethnocide, is often not condemned but rather 'encouraged and advocated as appropriate policy', particularly in the name of development. The unjust history of conservation that disproportionally targeted marginalized groups such as indigenous peoples also contributed to such brutal reality for indigenous peoples. These serious problems are not yet properly addressed today, as this study demonstrates.

Moreover, it needs to be emphasized how, to a large extent, the story of IK is ingrained in the long and ongoing struggle of indigenous peoples' emplaced resistance to threats that have been or would further result in physical and cultural destruction of indigenous peoples as distinct peoples. In other words, it is a survival battle for indigenous peoples against genocide, in the original sense of the word coined by Raphaël Lemkin (1944) – that is recognizing both physical as well as cultural destruction of a people as genocide. However, as discussed in chapter 4, this richer meaning of genocide got lost in the political negotiation at the UN to a compromised interpretation that mainly meant the physical extermination of a people (see the Convention on the Prevention and Punishment of the Crime of Genocide).[201] But if we stay true to the original meaning of genocide, indigenous peoples' emplaced resistance is in fact a battle for the right to life. This argument for the right to life is further articulated via my argument of subsistence rights built on scholarship by Henry Shue (1996) and Linda Hajjar Leib (2011) in regard to an adequate living environment (as discussed in chapter 2). This integrated argument would take into account collective rights to remedy the common practice by the international human rights regime that tend to prioritize individual rights.

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[201] The Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) was adopted by the UN General Assembly on 9 December 1948.

Indigenous peoples rely on their ways of life and emplaced knowledge for subsistence living as distinct peoples. Recall Article 1(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which stipulates that, '[i]n no case may a people be deprived of its own means of subsistence'. Recalling recommendations adopted by the 6th session of UNPFII (2007, paragraph 6), it reiterates that, '[i]n order to survive as distinct peoples, indigenous peoples and their communities need to be able to own, conserve and manage their territories, lands and resources'. This study echoes the above by arguing that IK is the means of subsistence for indigenous peoples, which is essential for their survival. Therefore, it is an integral part of indigenous peoples' rights. As such, IK requires adequate safeguards for indigenous peoples to continue living on/in their lands/territories that nurtured IK – this is essential for emplaced knowledge like IK that needs the people and the habitat to sustain it and *vice versa*. I would argue that unless we care for IK-holders including their habitat in the context of socio-cultural ecology, any seemingly legitimate initiatives or measures can easily turn into land-grabbing or eviction schemes that further displace and dispossess indigenous peoples from their rightful place/homeland and livelihoods. Furthermore, current mitigation schemes for climate change tend to adopt a mono-approach without holistic understanding of the larger context that an IK-guided approach could offer. That remains a problem. If the climate change scheme looks beyond its mono-approach of forestation and considers the larger context of biocultural diversity discussed in this study, the result could be more sustainable in the long run, not only for indigenous peoples but for us all.

Based on the above insights and normative groundwork, I developed a framework of dignity and well-being rooted in the conceptual lineage of human rights and human development that could better guide future mechanism for IK protection (as discussed in chapter 4). To that end, I explored the historically neglected set of cultural rights and its

recent advancement to consider the evolving jurisprudence concerning heritage, biocultural diversity, and communal rights to elaborate on its significance for IK and the rights of IK-holders. By examining recent treaties in the above areas, I identified and argued that the most significant aspect is the growing recognition of diversity, which includes biodiversity and cultural diversity as well as their inter-linkages. Further development is needed in this area.

II.   Future Research Directions

This story about IK and governance is complex and it is still evolving along with the evolving rights of indigenous peoples in international law and policy. This thesis does not claim to cover all of the grounds at this time. There could be a number of different angles to address the issues and problems identified in this study. My approach and perspective is based on the insights gained through my advocacy work and participatory action research that led me to work out the set of questions and analytical frames presented in this thesis. Rather than attempting to claim that I have found all of the answers or solutions at this time, this thesis is inspired by the 'principle of question propagation' (Firestein 2013) introduced in chapter 1 to work through and refine the proposed questions in order to explore more questions as a way to advance this field of study. I interpret the 'principle of question propagation' as 'the more we know the more we know what we don't know'. To that end, this section suggests the following areas for future research. It will be followed by a section on policy recommendations before the final section of concluding note.

2.1   Biocultural Diversity, Heritage, and Socio-Cultural Ecology

This study has pulled together a wide range of sources and analysis to contextualize the inter-linkage between human rights and heritage, which embodies nature, culture, and knowledge to highlight the emerging issues of biocultural diversity and communal rights in international law. This is an area that is not yet fully explored and requires more research. In particular,

this study would suggest the following dimensions for further research. First of all, a comparative study on the principle of common-heritage-of-mankind and the emerging concept of collective bio-cultural heritage (CBCH) might yield interesting results that can contribute to the ongoing legal development of biocultural diversity and associated rights (as discussed in chapter 4). One approach could be building on the study by Michael Jeffery (2008) where he compared the 1982 UN Convention on the Law of the Sea (which enshrined the common-heritage-of-mankind principle) and the 1992 Convention on Biological Diversity (which moved away from the idea of common heritage). Furthermore, building on this study's proposition to reconsider subsistence living and subsistence rights from the perspective of empowerment, more research in this area could contribute to our understanding about biocultural diversity and associated rights. I developed this concept and linkage of empowerment through engaging with the discourses of poverty alleviation, food sovereignty, and sustainable environment during the course of this PhD research, which led me to connect with the work by Michael Jeffery (2008) and Andrew Mushita & Carol Thompson (2002). For example, as Jeffery (2008, p. 86) succinctly stated: '[p]reserving biodiversity and access rights is also necessary for ensuring daily food supply for the poor and to ensure ecological sustainability to increase the poor's resilience to drought, environmental changes, and war.'

The empowerment perspective could further stimulate critical thinking on better and less harmful ways to secure food diversity, including variety of crops and diets, and diversity of knowledge systems – the aim is to empower communities to feed itself without dependent solely on the industrialized food system that creates more health hazards, excessive waste, and environmental problems than solutions. This line of study could contribute to developmental studies in significant ways on poverty reduction for marginalized groups like indigenous peoples. Another aspect that also needs to be explored in greater detail is how to

reconcile the legal tendency to compartmentalize rights into disconnected sets, and to address the interconnectedness of biocultural diversity for communal concerns of IK-holders.

The above proposal and suggestion for further study could provide different perspectives on the so-called 'food crisis' of today. We already know that the global food production today is capable of feeding more than the total population of the world (Holt-Giménez *et al.* 2012). In other words, the 'food crisis' fright is not really about shortage of food supply but distribution. Yet, the 'crisis' rhetoric legitimizes new waves of land-grabbing without addressing the real problem of distribution as well as the problem of waste and lack of diversified diet, which are the real issues. In other words, the solution cannot be more commercial production that mainly benefits the corporations who have monopolized the food production chains. A more constructive way forward is to establish better distribution and capacity-building that could benefit people and empower communities. These are particularly poignant issues for vulnerable groups like indigenous peoples whose subsistence living is tied to their well-being and identity. Further exploration on subsistence living as empowerment and how that might secure and enhance biocultural diversity and food sovereignty for indigenous peoples is recommended. Some of the insights gained from studies of hunter-gatherer societies on diversified food source and sustainable management of that food source could inspire creative thinking on this topic (e.g. Lee 1998).

2.2   A Pluralistic Debate of Property and Human Rights

As discussed in this thesis, although the debates about human rights and property rights remain contested, the critical relationship between them is undeniable. A more pluralistic approach to explore alternative systems beyond the dominant private property regime is needed. As discussed in this study, biocultural diversity constitutes the cornerstone of IK claims by indigenous peoples that concern communal wellbeing and survival. Such IK claims

are rooted in indigenous peoples' customary law and cultural regulations that speaks of communal rights and individual responsibility (Dutfield 2005). However, such claims and legal pluralism are not taken into account by the legal system such as the intellectual property rights (IPRs) regime based on modern private property law. Furthermore, this study posed further questions by asking: is securing property rights the answer to biocultural diversity? Considering the critical study by Terra Lawson-Remer (2011, 2012) discussed in chapter 4, it is particularly poignant to ask such a question. Lawson-Remer's study shown that, although the private property system warrant property security for domestic elites and foreign investors, it does not necessarily benefit minority groups in her sampled countries. Finally, it is necessary to conduct more studies on the diverse practices of indigenous customary law to gain a better understanding into the diversity of communal regulations for IK. In this regard, emerging research on what is called 'non-timber forest products' (NTFPs) could provide rich materials and different dimensions for further exploration (Laird *et al.* 2010, Belcher *et al.* 2005). At the moment, NTFPs are sporadically regulated by both the trade and environmental regimes, which further illustrates the problem of legal and institutional fragmentation discussed in this thesis on IK. Further research on NTFPs could yield more insights into the practice of IK associated with the livelihoods of indigenous peoples, which is beyond the scope of this study at this time. More advanced research on IK in relation to indigenous peoples' livelihoods could also address the unjust criminalization of indigenous peoples' ways of life including livelihoods by the states.

2.3   The Role of Science in the Neoliberal Market of Nature

Another dimension that requires more attention is how the neoliberal practice, which converts nature into merchandise with a price tag set by market value, affects biocultural diversity. As discussed in chapter 3, the market has becoming the mainstream mechanism for

environmental problems of today, evident by the change of language such as 'natural capital' that is increasingly used by economists. As Joan Martinez-Alier (1997) rightly pointed out, the market is about power and income, especially the power to buy and consume. Furthermore, the market is where the poor is weak and the future generations are not yet present. Therefore it is problematic to rely on the market to assign value to nature, or to achieve sustainable development. Moreover, from the perspective of socio-cultural ecology, what is considered as 'natural resources' by economists is considered by indigenous peoples as family that requires respect, responsibility and compassion (Lyons, n.d.). This is the moral dimension that Oren Lyons spoke of but is missing in the neoliberal marketplace.

There are a growing number of studies on the marketization of nature, but not enough on the role of science in such marketization. This thesis suggests further study on the linkage between science and 'development' as discussed in chapter 3 to unveil this seemingly neutral and normative framework of science that rarely gets questioned. The environmental regime, including many of the climate mitigation schemes, is heavily dependent on what science can offer, which made this line of study especially crucial. A few critical scholars including Michael Burger (2013) and Sheila Jasanoff & Marybeth Long Martello (2004) have problematized how the environmental regime is based on science-driven decision making. More critical studies in this area are recommended. We need to better understand science and its impact, both positive and negative, as well as its underpinning ideology and value – most significantly is the epistemology of science embedded within certain biases that require further examination and scrutiny. For example, we could build on earlier studies that began investigating these biases and impacts, such as Fritjof Capra (1983) and Will Wright (1992) or works that presented us with different dimensions (e.g. Nader 1996). More recent studies by Peter Harrison (2002) and Colin Samson (2013) have also contributed to this line of critical thinking. The above studies alerted us about the link between science and the kind of

development imperative that is not always apparent right away. More study along this line of inquiry is necessary to inform present and future policy or practice that might do more harm than good, especially in its silencing effect on nature.

Like the 'wilderness' idea that repositioned humans as spectators of nature, and ultimately distanced humans from nature, science further contributed to that distancing and eventually disconnection. The above concepts and associated practices nurtured a level of indifference within humans to nature. As discussed in this thesis, such disconnection is a problem and is one of the defining lines that differentiate indigenous peoples' epistemology from non-indigenous peoples. Informed by indigenous worldview, this study reached an understanding that human indifference and arrogance are among the destructive forces that will obliterate nature along with humanity. This is a critical time to re-evaluate the trade-offs of development based on particular models of economic growth, such as capitalism and neoliberalism. It is necessary to ask the question: are these trade-offs of development worthy pursuits that bring longevity to our environment that we are part of, or are they turning both our environment and us into drug-addicts, submissive to chemical substances? In Vandana Shiva's critical examination of the Western systems of knowledge in agriculture and medicine, she pointed out how 'the chemical route to strengthening agriculture and health care has failed' (Shiva 2002: viii). She further recommended a re-evaluation of different knowledge systems as a way forward in order to 'move away from the false hierarchy of knowledge systems back toward a plurality' (2002: viii).

2.4   'Ocean-grabbing'

The global phenomenon of land-grabbing, which is increasingly taking place to an unprecedented scale, has raised many red flags and attracted growing criticism. The latest wave of land-grabbing has been carried out in the name of 'green' initiatives such as climate

change related conservation or mitigation schemes like the Reducing Emissions from Deforestation and Degradation (REDD). Such 'green' initiatives are sometimes labelled as 'green economy' that could dress up the extractive industry or dam construction as 'good' (Mousseau & Biggs 2014, Fairhead *et al.* 2012). Other types of justification for large scale land acquisition include pseudo concerns for food security or so-called 'food crisis' that legitimize land-grabbing to meet the demands of endless capitalist consumption (Chao 2013, Daniel & Mittal 2009, IIED 2013, RRI 2014, Oxfam 2013). In addition to land-based acquisition, similar threats to oceanic territories, which is much less known, also require diligent attention and more study.

Although the term 'ocean-grabbing' might be new, the scenarios are not new at all (Pedersen *et al.* 2014). It is a continuation of the story about grabbing natural resources. Ocean-grabbing acutely reveals how the stories of all sorts of 'grab' are connected. Case scenarios ranged from Chesapeake Bay in the eastern United States to Southeast Asian cases in Lao and Thailand have been reported by members of the civil society networks known as the World Forum of Fish Harvesters and Fish Workers (WFF). These scenarios highlighted how ocean-grabbing is not only about access to aquatic resources, but also about access to the associated land and land-based resources. As such, ocean-grabbing is intertwined with land-grabbing, water-grabbing, and what is dubbed 'green' grabbing (Fairhead, Leach, and Scoones 2012). The latest wave of grabbing was exacerbated by the global initiative known as the Global Partnership for Oceans (GPO) launched by the World Bank in 2012 at the Rio+20; its official document of guiding principles was recently published in March 2014. In response to this GPO, civil society networks such as the WFF have raised alarming concerns about the increasingly devastating scale of ocean-grabbing that could be on its way with powerful forces. This has led Olivier de Shutter, the mandate holder of the UN Special Rapporteur on the Right to Food, to take note in his recent report about such imminent threats

of ocean-grabbing (de Schutter 2012). As de Shutter noted, the ocean-grabbing threat is as serious as the threat of land-grabbing. This is an understudied area by social scientists. More concerted studies in this area are needed.

III.   Policy Recommendations

3.1   Recognize IK as Constituting Land-Territory-Based Subsistence Rights

Indigenous peoples' claims for IK are claims for heritage and biocultural diversity, which constitute land-territory-based subsistence rights equivalent to the right to life. As such, it requires synergy and synthesis approach and consideration when comes to measures of protection. Furthermore, IK consists of knowledge about genetic diversity (or as 'genetic resources' labelled by the intellectual property regime), which constitutes 'the natural heritage of mankind' (IUCN 1983). As such, it calls for a different framing of IK. Furthermore, it calls for an integrated handling that not only would recognize the cross-cutting nature of IK, but also bridge the legal frameworks of heritage and human rights together. As analysed in this study, what remains missing is a legal instrument that would protect both cultural and biological diversity together as biocultural diversity. Nevertheless, there are existing foundations to build upon. These include the emerging jurisprudence of biocultural rights established via the CBD process of Nagoya Protocol (2010) and the UNESCO initiatives such as the Diversity Convention (2005), the ICH Convention (2003), and the World Heritage Convention (1972) discussed in this thesis.

In essence, this recommendation is a call to defend biocultural diversity and communal rights by calling the first step to recognize IK as constituting land-territory-based subsistence rights. Such communal rights-based recognition is not only necessary but essential for emplaced knowledge like IK that needs the people and the habitat to sustain it, and *vice versa*. By establishing the above recognition, it could prevent the states from

continuing to criminalize indigenous peoples for their livelihoods or ways of life, such as slash-and-burn agriculture,[202] subsistence hunting, and gathering of NTFPs for subsistence living (see above for discussion on what came to be known as non-timber-forest-products or NTFPs). The UNDRIP already provided some normative groundwork for this, such as Article 11, 24, and 31.

One of the critical dimensions largely overlooked in the intellectual property debate is the fact that the protection of genetic diversity is intrinsically linked to the protection of species (van Heijnsbergen 1997). Therefore, we need to establish an interface between relevant treaties compiled in chapter 3 (see table 5) with the drafting process of new treaties concerning IK currently under negotiation at the WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (a.k.a. IGC). Such an interface could amend the legal and institutional fragmentation and start building bridges. The key ones include, but are not limited to the Ramsar Convention on Wetlands (1971), World Heritage Convention (1972), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, 1973), and the Conservation of Migratory Species of Wild Animals (CMS, 1979). Furthermore, given the arguments advanced in this thesis, it becomes clear that the subject of IK is not about commodity trading. Therefore, IK should be taken off the negotiation table for commercial trade immediately. It is particularly so, given the many failed attempts to push for necessary amendments to the expansionist scheme of the TRIPs Agreement due to strong corporate defence, which raised concerns for many observers about public interests and the principle of social function.[203] In addition, the governing body of World Heritage Convention needs to

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[202] Such practice is also known as 'shifting cultivation', 'rotational farming', or 'swidden agriculture' (AIPP/IWGIA 2012).
[203] The TRIPs Agreement is heavily guarded by the corporate interest against demand for amendment based on public interests or social function principle. As such, even influential figure like Thomas Pogge admitted that it would be more productive to seek alternative proposal than working in vein to push for amendment. Pogge's

take into account the contested concept and practice of property and re-examine its current practice that frames each heritage site as 'property'.

Finally, we need further elaboration on collective cultural rights in light of recent advancements in this area concerning IK and communities of IK-holders. The Inter-American Court of Human Rights (IACHR) has already established precedence that recognized indigenous peoples' communal property rights rooted in culture. For example, the IACHR's 2001 ruling on the case of Awas Tingni v. Nicaragua was a significant one, which was considered by James Anaya and Claudio Grossman (2002, p. 13) as '[r]einforcing the understanding that indigenous property rights derive from indigenous custom and tradition'. Through international movement, indigenous peoples have also spoken out and taken a stand on their communal rights for biocultural diversity to push for better legal recognition. One of such examples was an intervention tabled by the Indigenous Peoples Council on Biocolonialism (IPCB 2004) at the third session of UNPFII under the agenda item 49(e) on culture; it was a response to the CBD. This intervention by the IPCB called for 'no access zones' to IK including genetic materials. In addition to continuous effort to push the TRIPs Agreement for amendment, the alternative proposal of 'no access zone' could be an interim way forward.

3.2   Recognize IK as Endangered Knowledge Systems

The ongoing threats of displacement and dispossession faced by indigenous peoples remain destructive to indigenous communities and their emplaced knowledge. These threats, *inter alia*, have steadily contributed to the loss of IK as a number of studies have shown. For example, Paul Cox (2000) and Erik Gómez-Baggethun *et al.* (2013) had noted and expressed concerns for the widespread loss of traditional lifestyles and associated knowledge over the

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ongoing project known as the Health Impact Fund is one such alternative effort to meet global health challenge (Pogge 2011, 2009).

second half of the 20th century. Many feared that such knowledge systems would not survive the millennium. However, most discussions about protective measures for IK do not take the above warning into account enough. Dire situations require swift measures. A number of existing normative frameworks might provide food for thought or working models for further contemplation. For example, the CITES mentioned above is one of the few legal instruments that specifically focuses on subjects categorized as endangered. Although the CITES did not define the word 'endangered' *per se*, its Appendices I-II demonstrated what it could mean. Another model for consideration could be the World Heritage Convention, which also has a working method on heritage at risk.

Moreover, IK is largely transmitted via oral tradition. The report issued by the UNEP (1997) reiterated the direct link between biological diversity with cultural and linguistic diversity. This highlights the crucial and urgent need for language preservation. Clearly, the loss of IK would indicate not only the loss of biodiversity but also cultural and linguistic diversity. UNESCO has already issued a warning about the rapidly growing list of languages that have become extinct, particularly indigenous peoples' languages. This calls for urgent action.

Finally, it is fundamentally crucial to recognize IK as both emplaced knowledge and an endangered system of knowledge, which requires integrated measures to secure indigenous peoples' land-territory-based livelihoods/ways of life. Indigenous peoples' ancestral lands/territories are their homes, kitchens, schools, and hospitals that nurture who they are as distinct peoples. Without that environment, indigenous peoples' distinct ways of life and identities die, and so dies their IK. The death of IK might not be considered as catastrophic for most of us who are city-dwellers in the short run – the UN Population Fund (UNFPA 2007) reported that more than half of the world's population live in urban areas by 2008. But the death of IK might signal bigger environmental disasters to come; some of

which are already happening as more and more studies and NGO reports have shown at various forums, including the Earth Summit.

3.3   Better Monitoring Mechanism for Indigenous Peoples' Rights

There needs to be a better and more harmonized monitoring mechanism to ensure the rights of indigenous peoples. Such a mechanism could address the problems caused by legal and institutional fragmentation discussed in this study. Current working methods by the UN treaty bodies and the process of universal periodic review (a.k.a. UPR) exercised by the Human Rights Council could be possible ways forward. For example, the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) could serve a similar role as a treaty body to provide authoritative interpretation on UNDRIP. For monitoring, the UN Permanent Forum for Indigenous Issues (UNPFII) could take on functions like the UPR on issues affecting indigenous peoples. In addition, the normative framework provided by UN Declaration on the Rights of Indigenous Peoples (UNDRIP) could also establish some working methods for future work. Although a declaration is only considered as soft law, the UNDRIP constitutes the binding effect of customary international law with majority support from the UN member-states as well as substantive rights and obligations based on existing treaty law. Moreover, recent development that might lead to the drafting of an optional protocol of UNDRIP could further strengthen its legal effect (UNPFII 2014).

More specifically, Article 42 of the UNDRIP stipulated the following:

'[t]he United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.'

Among the named entities in Article 42, the UNPFII would be the most suitable mechanism to carry out monitoring work.[204] In effect, this Article mandated the UNPFII to follow

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[204] This is the opinion that I have gathered from indigenous delegates at the UN forums, including the UNPFII

through with the effective implementation of the UNDRIP. At the 10th Session of the UNPFII (2011), I drafted an intervention in collaboration with members of the Asia Indigenous Peoples Caucus under the Agenda Item 4(a) on implementation of the UNDRIP (attached as annex 4 with this thesis). In this intervention, we specifically invoked Article 42 to call upon the UN General Assembly to formalize the mandate of the UNPFII according to the UNDRIP. This could be a way to move forward with monitoring and implementation for indigenous peoples' rights.

3.4   Principle of 'Do No Harm': Better Mainstreaming, Harmonization and Coordination of UNDRIP

All entities that work on projects affecting indigenous peoples need to align themselves with the UNDRIP, as the minimum standards, and respect the basic principle of 'do no harm'. These include the WIPO and governing bodies of the CBD and WHC as well as international financial institutions (IFIs) and corporate actors obliged by the UN Guiding Principles for Business and Human Rights.

Given the forceful impact of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement), it is necessary to have a better monitoring of the WIPO, which is currently negotiating new treaties on three categories concerning IK: including genetic resources, traditional knowledge, and traditional cultural expressions. At present, the WIPO has not adopted the UNDRIP into its policy or operation. This raises serious questions about the WIPO as the leading entity to negotiate new treaties concerning IK. Furthermore, as a specialized agency of the UN, it is not possible for the WIPO to remain legitimate by position itself only to the narrow technical concerns based on developed country's models (Musungu and Dutfield 2003). Another problem concerning the WIPO is its hesitation to

and EMRIP.

facilitate open participation for IK-holders to take part in its processes as rights-holders (see chapter 2). If IK is not pulled out of the WIPO-led negotiation immediately, it must at least follow the precedence of UNDRIP and adopt open participation procedure to include IK-holders.

Here, it is necessary to take note of the opposing opinions that are either in favour of, or cautious about, turning the UNDRIP into a legally-binding convention. The main argument for caution has to do with the possible risk of dogmatic treatment that might do more harm than good (Dodson 2007). For example, a convention would require the drafter to define indigenous peoples, which could have an effect of double-edged sword. Given the diversity of indigenous societies and their experience with colonial forces, a rigid definition might result in excluding certain indigenous peoples and not others, hence not desirable. For example, about 80% of the world's indigenous peoples live in Asia (WorldBank 2011); many of them might not fit into the settler-state scenario that typically characterizes indigenous peoples of North America. The African context is also not straight-forward. The common narrative used by African states is that all Africans are indigenous to the continent; therefore, there is no need to have a special category for indigenous peoples. This matter is largely considered as settled by the landmark ruling on the 'Endorois v Kenya 276/2003' case in 2010. This ruling is significant on a number of grounds. As discussed in chapter 2 and 3, the Endorois case is the first to respond to the question of who are indigenous peoples in Africa. Most significant is how the ruling by African Commission on Human and Peoples' Rights (ACHPR 2010) recognized the past and present injustice and inequality that characterized indigenous peoples and defined them based on those grounds.

Some of the Asian states on the other hand confined the indigenous peoples question in the minority context within a nation-state framework. They exhibit persistent efforts to differentiate themselves from the settler-states scenario. For example, China considered the

widely referenced UN definition of indigenous peoples as mainly applicable to the settler-states scenario, such as the North American context. The UN definition was proposed by Special Rapporteur José Martínez Cobo (1983) as a working definition derived from his study commissioned by the UN Sub-commission on Prevention of Discrimination and Protection of Minorities in 1972 (as discussed in chapter 2). By confining the definition to a particular scenario, China could then say that there are no indigenous peoples within its territory, only minorities. Such disclaimer is rather common among the states that assert its authority and border control as absolute and unquestionable. The interesting twist is that China had openly condemned the settler-states' violation of indigenous peoples rights and has been a big supporter for the UNDRIP. Another irony is that, China continues to refer to indigenous peoples as '土著' at the UN, which is a derogatory term in the Chinese language to connote the uncivilized and backward populations. Despite our repeated protests to China at the UNWGIP and UNPFII respectively, China continues to use such a derogatory term in official UN documents.

In other words, the states are carefully guarding their interpretation of indigenous peoples to make sure that they are exempt from obligations derived from internationally recognized indigenous peoples' rights. The common practice by abusive states is to define sensitive issues as domestic issues; then insisting on the principle of non-interference to keep the international community out of their domestic affairs. For example, the Association of Southeast Asian Nations (ASEAN) is doing exactly that, which severely undermined its newly established human rights mechanism known as the ASEAN Intergovernmental Commission on Human Rights (AICHR).[205]

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[205] The AICHR was inaugurated in October 2009. Its operation based on non-interference principle was heavily criticized by regional NGOs and beyond.

3.5   Call for a Regional Human Rights Mechanism in the Asia-Pacific

As noted above, 80% of the world's indigenous peoples live in Asia.[206] However, this is the remaining region in the world that has no regional human rights mechanism, such as the European system, the Inter-American system, and the African system. Moreover, many states in this region still deny the fact that there are indigenous peoples living within their borders: for example, China and Bangladesh. As a result, this region is the most neglected area in human rights curriculum around the world, including the Pacific. Most of the human rights curriculum, if not all of them, only focuses on regions that have regional mechanisms, such as the three systems listed above. Despite positive developments in a handful of countries in the Asia-Pacific that established national human rights institutions (NHRIs) according to the Paris Principles,[207] this region is falling far behind its counterparts in terms of building jurisprudence for human rights, including indigenous peoples' rights.

IV.   Concluding Note

This PhD study is guided by indigenous peoples' conceptualization of IK that represents ties between ecology, landscape, and people in a web of connections. From this main point of departure, this study analysed and illustrated how the subject of IK is a challenging one that not only pushes boundaries of existing law and policy that tend to compartmentalize IK into separate niche, but also demands paradigm shifts in respective regimes documented and analysed in this study. In particular, what emerged from this study is how the holistic conceptualization of IK by indigenous peoples has challenged different domains to recognize the interconnection between humans and nature, nature and culture, biological and cultural diversity, as well as intangible and tangible heritage as never before – most notably the

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[206] It is not clear whether the statistics compiled by the World Bank (2011) also include the Pacific.

[207] The Paris Principles (1991) refer to the Principles Relating to the Status of National Human Rights Institutions. This document established the minimum standards for credibility and effectiveness of all national human rights institutions (NHRIs) to be monitored by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (a.k.a. ICC).

domains concerning culture, environment, and development. In order to gain more clarity and better understanding about the issues and discourses, this study brings together different pieces of the puzzle by identifying and examining discursive practices and concepts in institutional settings, including the disparate protocols, standards, and laws. The specific regimes examined in this study included the regimes of intellectual property law, environmental law, heritage law, and human rights law.

The first substantial chapter of this study (i.e. chapter 2) reviews how the debates about IK have been largely dominated by intellectual property discourse prompted by the TRIPs Agreement entering into force in 1995. This chapter discusses the domains of intellectual property rights and human rights that have kept separate paths historically and how they intersect now. It is followed by chapter 3 that explores the lesser studied area in the IK debate. In particular, chapter 3 brings together studies of the environment, development, and human rights by investigating and navigating through an eclectic terrain of law and policy generated by relevant regimes. Chapter 3 also discusses how these fields of studies (i.e., studies of the environment, development, and human rights) have, until recently, largely remained three distinctly separate disciplines with respective literature and approaches. By exploring how these separate fields begin to merge and cross over to the heritage regime, chapter 3 identifies the evolving regime of heritage as the most understudied area in the IK debate. Building on chapter 3's analysis, chapter 4 looks further into the concept of heritage and how it evolved in international law concerning cultural and natural heritage. By doing so, chapter 4 articulates the intersection between biodiversity and cultural diversity and how it bears critical significance for indigenous peoples' rights and their IK. As the heritage regime continues to evolve, it bridges two separate domains together: namely the domain of the environment and development (discussed in chapter 3) plus the domain of culture and development (discussed in chapter 4). Through examining the above critical nexus, chapter 4

argues that such inquiry draws our attention to the relationship between heritage and human rights, which is critical yet understudied.

As noted above, this PhD study also demonstrates that, contrary to indigenous peoples' perception of IK embedded in a web of connections, the legal and political institutions all have the tendency to box IK into disconnected niches to suit their respective purpose or mandate. As such, this PhD study argues that IK, as a subject of enquiry, is unique and critical in its wide spectrum that cuts across different domains. In particular, indigenous peoples' holistic epistemology embedded in their conceptualization of IK is constantly pushing boundaries and challenging the *status quo* in the realm of international law and policy. To a certain extent, indigenous peoples have managed to gradually push the international community to build bridges and recognize linkages that were not envisioned previously, mostly through the momentums gained at the international movement for indigenous peoples' rights. However, more needs to be done. This PhD study argues that in order to realize indigenous peoples' holistic vision it is necessary to bring together previously separated domains, such as the ones analyzed in respective chapters. Furthermore, this study would also argue that indigenous peoples' call for better recognition and safeguarding of IK has gradually emerged as a universal agenda[208] for sustainable development and intergenerational justice, which constitute the defining characteristics of contemporary discourse of heritage (Carino 2013, Boer & Gruber 2012).

In conclusion, this PhD study identifies and argues that the main problem for IK governance is the epistemological struggle resulting from different understandings of the nature and purpose of IK and how that epistemological struggle contributed to the

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[208] This insight was inspired by a veteran indigenous activist Joji Carino who delivered a plenary discussion at the Institute of Commonwealth Studies on 26 September 2013 in London, which I attended. The theme of the event was 'The Commonwealth's First Nations: Rights, Status and Struggles in the run up to the UN World Conference on Indigenous Peoples, 2014'.

inadequacies of the law and policy examined in this study. Such problem is coupled with power imbalance and dogmatic development imperative that has kept indigenous peoples at the margin, if counted at all. Hence the questions that I raised in chapters 3 and 4 – by inquiring 'whose/what knowledge for whose/what development', that could shed some light on the reality of multifaceted poverty faced by indigenous peoples. As such, I argue that IK issues and debates are inevitably political. Furthermore, this study demonstrates how IK claims are fundamentally about indigenous peoples' claims for biocultural diversity that is not currently understood or can be accommodated by existing regimes, which are inadequate and fragmented. In other words, here comes a full circle of catastrophe of the IK story.

Nevertheless, this study concludes with a positive outlook by recommending ideas for future research and policy directions as a way forward. More specifically, the first step forward would be to recognize IK as a cross-cutting subject and a system of emplaced knowledge that is not only about property debate or protection alone. It is essential also to take into account the much larger picture of environmental governance that would care for both biodiversity and cultural diversity together. As the story of IK continues to evolve, this study recommends further exploration of the understudied areas that bear consequences for indigenous peoples – particularly the discourses of heritage that connect the interface of culture, environment, and sustainable development with consideration of intergenerational justice and human rights that resonates with indigenous peoples' concerns and claims for IK.

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ANNEX

Annex 1:
Indigenous Peoples' Petition on TRIPs, 'No Patent to Life!' (1999)[209]

No to Patenting of Life! Indigenous Peoples' Statement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs) of the WTO Agreement

WE, INDIGENOUS PEOPLES from around the world, believe that nobody can own what exists in nature except nature herself. A human being cannot own its own mother. Humankind is part of Mother Nature, we have created nothing and so we can in no way claim to be owners of what does not belong to us. But time and again, western legal property regimes have been imposed on us, contradicting our own cosmologies and values.

WE VIEW with regret and anxiety how, Article 27.3b of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) of the World Trade Organization (WTO) Agreements will further denigrate and undermine our rights to our cultural and intellectual heritage, our plant, animal, and even human genetic resources and discriminate against our indigenous ways of thinking and behaving. This Article makes an artificial distinction between plants, animals, and micro-organisms and between "essentially biological" and "microbiological processes" for making plants and animals. As far as we are concerned all these are life forms and life creating processes which are sacred and which should not become the subject of proprietary ownership.

WE KNOW that intellectual property rights as defined in the TRIPs Agreement are monopoly rights given to individual or legal persons (e.g. transnational corporations) who can prove that the inventions or innovations they made are novel, involve an innovative step and are capable of industrial application. The application of this form of property rights over living things as if they are mechanical or industrial inventions is inappropriate. Indigenous knowledge and cultural heritage are collectively and accretionally evolved through generations. Thus, no single person can claim invention or discovery of medicinal plants, seeds or other living things.

The inherent conflict between these two knowledge systems and the manner in which they are protected and used will cause further disintegration of our communal values and practices. It can also lead to infighting between indigenous communities over who has ownership over a particular knowledge or innovation. Furthermore, it goes against the very essence of indigenous spirituality which regards all creation as sacred.

WE ARE AWARE of the various implications of the TRIPs Agreement on our lives as indigenous peoples. It will lead to the appropriation of our traditional medicinal plants and seeds and our indigenous knowledge on health, agriculture and biodiversity conservation. It will undermine food security, since the diversity and agricultural production on which our communities depend would be eroded and would be controlled by individual, private and foreign interests. In addition, the TRIPs Agreement will substantially weaken our access to and control over genetic and biological resources; plunder our resources and territories; and contribute to the deterioration of our quality of life.

IN THE REVIEW of the Article 27.3 (b) of the TRIPs Agreement, therefore, our proposals are as follows;

This Article should be amended to categorically disallow the patenting of life forms. Thus, the revised Article 27.3b should clearly prohibit the patenting of plants and animals including all their parts, meaning, genes, gene sequences, cells, proteins, seeds, etc. It should also prohibit the patenting of natural processes involving the use of plants, animals and other living organisms and their parts and processes used in producing variations of plants, animals, and micro-organisms.

The provision for the protection of plant varieties by either a patent, a sui generis system, or a combination of both should amended and elaborated further: It should;

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[209] Full text of this petition can also be accessed via GRAIN's website (http://www.grain.org/article/entries/1957-indigenous-peoples-statement-on-trips-27-3-b). N.B. there was an error in this online version; my university affiliation was mistakenly recorded as 'University of Colombia USA' (see signatory No. 87). It should be 'Columbia University, USA'.

- Disallow the use of patents to protect plant varieties.

- Ensure that the sui generis system which may be created will protect the knowledge and innovations and practices in farming, agriculture, health and medical care, and conservation of biodiversity of indigenous peoples and farmers.

- Build upon the indigenous methods and customary laws protecting knowledge and heritage and biological resources.

- Ensure that the protection offered to the indigenous and traditional innovation, knowledge, and practices are consistent with the Convention of Biological Diversity (i.e. Articles 8j, 10c, 17.2, and 18.4) and the International Undertaking on Plant Genetic Resources.

- Allow for the right of indigenous peoples and farmers to continue their traditional practices of saving, sharing, and exchanging seeds; and harvesting, cultivating, and using medicinal plants;

- Prevent the appropriation, theft, and piracy of indigenous seeds, medicinal plants, and the knowledge around the use of these by researchers, academic institutions, and corporations, etc.

- Integrate the principle and practice of prior informed consent, which means that the consent of indigenous peoples' as communities or as collectivities should be obtained before any research or collection of plants will be undertaken. The right of indigenous peoples to veto any bioprospecting activity should be guaranteed. Mechanisms to enforce prior informed consent should be installed.

- Prevent the destruction and conversion of indigenous peoples' lands which are rich in biodiversity through projects like mines, monocrop commercial plantations, dams, etc. and recognize the rights of indigenous peoples to these lands and territories.

We urge the WTO Member-States to put the amendment of the TRIPs Agreement as a priority item in agenda of the forthcoming WTO Ministerial Conference in Seattle. The implementation of the TRIPs Agreement in its present form will have devastating social and environmental consequences which will be irreversible. It is an imperative, therefore, that this Agreement be amended to prohibit the patenting of lifeforms and the piracy of indigenous peoples knowledge and resources.

We also call on all the WTO Member-States to work for the extension of the deadline of the implementation of Article 27.3b of TRIPs to the year 2006, five years after the completion of the review of this has been done.

Finally, we reiterate our commitment to sustain our struggle to have our rights to our intellectual and cultural heritage and our lands and resources promoted and protected. We call on the WTO to become an instrument in promoting our rights instead of enacting and imposing Agreements which are violative or undermining our rights as distinct peoples.

Signed at the United Nations, Geneva, Switzerland, on 25 July l999

SIGNATORIES:

INDIGENOUS PEOPLES' ORGANIZATIONS, NGOs AND NETWORKS

NAME ORGANIZATION COUNTRY

l. Victoria Tauli Corpuz Tebtebba Foundation and Philippines Asian Indigenous Women's Network

2. Aucan Huilcaman Consejo de Todas Las Tierras Chile Mapuche

3. Johnson Ole Kaunga OSILIGI (Organisation for the Kenya Survival of Il-Laikipiak Indigenous Group Initiative)

4. Mililani Trask Na Koa Ikai Ka o Kalahui United States of Hawai'i America

5. Antonio Jacanimijoy COICA (Coordinadora de las Ecuador Organizaciones Indigenas De la Cuenca Amazonica)

6. Rodrigo de la Cruz COICA Ecuador

7. Fortunato Turpo Comision Juridica de los Pueblos Peru De Integracion Tahuantinsuyana (COJPITA)

8. Marcial Arias Associacion Napguana Panama

9. Tomas Condori CISA Bolivia

10. Nolasco Mamani CISA (Consejo Indio de Bolivia Sud America)

11. Ramon Conde Taller de Historia Andina (THOA) Bolivia

12. Eugenio Poma World Council of Churches Bolivia

13. Cesar Sarasara Confederacion de Nacionalidades Peru Amazonicos del Peru (CONAP

14. Eduardo Gaunilo Guatemala

15. Jose Canceunco Cocio Mexico

16. Ara Rusuramang Aboriginal Cultural Promotion Taiwan Association

17. Nger-Nger Aboriginal Cultural Promotion Taiwan Association

18. Ligerlale A-wu Aboriginal Cultural Promotion Taiwan Association

18. Julius Madulu Hadza People Tanzania

19. Lourdes Maldonado Federacion Indigena y Campesina Ecuador de Imbabura (FICI)

20. Simon Charles Hadza Peoples Tanzania

21. Alison Johnston Caldwell First Nation Canada

22. Lucy Mulenkei African Indigenous Womens Kenya Network/Indigenous Information Network

23. Tracey Whare Ngatira Marae/ Ngatira Lands Aotearoa/New Trust Zealand

24. Estebancio Castro Movimiento de la Juventud Panama Kuna (MJK)

25. Marty Waters Native Council of Port Heiden USA

26. Loyal David Hauheng Bawm Indigenous Peoples' Bangladesh Organization

27. Samiran Dewan Forum for Development in Bangladesh Chittagong Hill Tracts

28. Khua Ukltan Chin Human Rights Organization Burma

29. Hkun Okker PaO Peoples Liberation Thailand Organization

30. David Cung Bik Ling Chin Human Rights Organization Switzerland

31. Joan Carling Cordillera Peoples' Alliance (CPA) Philippines

32. Chito Balintay Pagkakaisa ng Aeta ng Pinatubo Philippines

33. Nepuni Piku Naga Peoples' Movement India for Human Rights (NPMHR)

34. Clotilde Musabeyezu Association Pour La Promotion Rwanda Des Batwa (APB) Femmes Masnabamdi

35. Jose Morales Asociacion Tohil Morales Guatemala de los Ninos Mayas de Guatemala

36. Kittisack Rattanakanjangrii IMPECT (Inter-Mountain Peoples Thailand Education and Culture in Thailand

37. Maria Mangte Indian Confederation of India Indigenous and Tribal Peoples (ICITP)

38. Derhagra Mochahary United Bodo Nationalists India Liberation Front

39. Prithibi Majhi Adivasi Socio-Education and India Cultural Association

40. Francoise Crozier Federation des Organisations French Guiana Amerindiennes de Guyane Francaise

41. Alfred Ilenre International Alliance of Indigenous Nigeria and Tribal Peoples of the Tropical Forests/ Ethnic Minority Rights Organization of Africa

42. Robi Lal Basumatra India

43. Jebra Ram Muchahary Tribal Welfare Society India Assam Branch

44. Hubertus Samangun IAITPTP Indonesia

45. Parshu Ram Tamang Nepal Tamang Ghedung Nepal

46. Euclides Pereira COICA Brazil

47. Senchumo Lotha Naga Students Federation Nagaland,India

48. Ratnaker Bhengra JOHAR India

49. Lars Anders Baer Saami Council Sweden

50. Eduardo Solang Cordillera Peoples' Alliance Philippines

51. Oki Kano Ainu International Network Japan

52. Kiyomi Matsushima AIP in Ryukyus/Uchinan-Chu Japan

53. Hidenori Chinen AIP in Ryukyus Japan

54. Andrea Flores Tonconi Organicacion de Mujereres Bolivia Aymaras del Kollasuyo (OMAK)

55. Tarcila Rivera Zea CHIRAPAQ Peru

56. Bineet Jaynel Mundu Chotanagpur Adivasi Seva India Samiti (CASS/Munda)

57. Liton Bom Chin Human Rights Organization Burma

58. Juan Leon Defensoria Maya Guatemala

59. Rigoberto Juarez Mateo Coordinadora de Organizaciones Guatemala del Pueblo Maya de Guatemala

60. Helena Begay Sovereign Dineh Nation of Cactus USA Valley/Red Willow Springs Community

61. Neingulo Krome Naga Peoples' Movement for India Human Rights (NPMHR)

62. Amina Zioual ANCAP-Tamaynut Morocco

63. Ahmed Arehmouch ANCAP-Tamaynut Morocco

64. Hjalmar Dahl Inuit Circumpolar Conference Greenland

65. Raja Devasish Roy Chakma Chief: TAUNGYA Bangladesh

66. Joji Carino Tebtebba Foundation United Kingdom

67. Jimid Mansayagan Lumad Mindanaw Peoples' Philippines Federation

INDIGENOUS PEOPLES' SUPPORT AND ADVOCATE GROUPS

68. Jose Montes France

69. Miriam Anne Frank Netherlands Centre for Indigenous The Netherlands Peoples (NCIV)

70. Fiona Archer South Africa

71. Maurizio Farhan Ferrari Forest Peoples' Programme United Kingdom

72. Enrique Cano Spain

73. Richard Rainsford

74. Genaro Blanco Pagkakaisa ng Aeta ng Pinatubo Philippines

75. Roger Gaberell Switzerland

76. Thomas Stenersen Switzerland

77. Josdoa Inaki Arregi Basque, Spain

78. Toshi Aiuchi Shimin Gaikou Centre (SGC) Japan

79. Uemura Hideaki SGC Japan

80. Lo Man Fong SGC Japan

81. Chika Onaka SGC Japan

82. Kelly Dietz SGC Japan

83. Eri Ocho SGC Japan

84. Anneke Groth Tourism Alert Switzerland

85. Carla Barbosa Secretaria do Estado de Sao Brazil Paulo do Meio Ambiente

86. Andrea Muhlebach International Workgroup for USA Indigenous Affairs

87. Rebecca Fan University of Colombia USA

86. Yvonne Mei-Jung Aboriginal Cultural Promotion Taiwan Association

87. Raymundo Rovillos Tebtebba Foundation Philippines

Those who would like to sign on please send an e-mail to tebtebba@skyinet.net or vco@skyinet.net or a fax message to TEBTEBBA FOUNDATION at 63-74-4439459. Please write your name, your organization, and your address.

Annex 2:

Statement by Asia Indigenous Peoples' Caucus at the UNPFII (2011), Agenda Item 3(b) Environment

044

10th Session of the United Nations Permanent Forum on Indigenous Issues
UN Headquarter, 16 – 27 May 2011

Tuesday, 17 May, 2011 10 a.m.-1 p.m.
Conference Room 1, United Nations, New York

Agenda Item 3: Follow-up to the Recommendations of the Permanent Forum: (b) Environment

Statement by Asia Indigenous Peoples' Caucus
Delivered by Rukka Sombolinggi

MADAM CHAIRPERSON, distinguished members of the PFII, Indigenous Brothers and Sisters, State delegations, ladies and gentlemen.

I am speaking on behalf of the Asia Indigenous Peoples' Caucus. The following is the result of the Regional Preparatory Meeting of Asia's Indigenous Peoples on the UN Mechanisms and Procedures relating to Indigenous Peoples in Chiang Mai, Thailand in February 2011. One of the key discussions was on agenda of the UNPFII 10th session, particularly to review the recommendations on the Economic and Social Development, Environment, and the Free Prior Informed Consent (FPIC) made by previous sessions.

In relation to environment and forests, we continue to experience the following:

Asian indigenous peoples' land, territories and resources continue to be the targets of governments and multinational companies for resource extraction and development aggression projects, including large-scale mining, mega-hydro dams, logging, plantations and infrastructure development. These projects cause conflicts and displacement of indigenous peoples from our ancestral lands and territories; loss of livelihoods and health complications; serious environmental degradations; and severely affect the social economic development of our communities, as well as our capability to sustain our traditional conservation of our lands and natural resources, including of our forests.

In many Asian countries, governments impose restrictive policies and laws in the name of forest conservation and development, seeking to eradicate shifting cultivation and other traditional livelihoods of Indigenous Peoples. This can be equated to cultural genocide as our peoples have relied on traditional livelihoods for generations to survive. In many instances, indigenous farmers are criminalized and fined for practicing our traditional farming systems.

We are now additionally confronted with actions related to Reducing Emissions from Deforestation and Forest Degradation (REDD) programmes. Such actions can threaten our livelihoods, including our practice of traditional forest management systems. Conversion of indigenous peoples' lands and forests for large scale production of biofuels as part of climate change mitigation measures have also adversely affected indigenous peoples' food sovereignty and rights to water, shelter and health etc.

There are grave concerns among us about these ongoing threats to our traditional use of forests for spiritual and ceremonial purposes, shifting cultivation, source of timber and non-timber forest products, medicines and other agro-forestry activities.

Madam Chair, we continue to reiterate that governments, intergovernmental bodies and corporations should recognize the rights of indigenous peoples to the forests, which include our traditional knowledge, practices and customary governance systems on forests and other ecosystems. To protect these rights, State policies and programmes in environmental and forest related-sectors should be consistent with the UN DRIP.

Madam Chair, the Asia Indigenous Peoples' Caucus acknowledges that the PFII have made substantive recommendations on environmental and forest issues relevant to indigenous peoples over the past nine years that were addressed to the States, UN agencies, multilateral bodies and inter-governmental organizations. However, there are still major gaps towards the implementation of those recommendations. The PFII should therefore reiterate and remind the States of their obligations and for the relevant agencies to ensure implementation.

In particular, we would like to call your attention to the efforts of the Global Environment Facility (GEF) to develop a policy of engagement for indigenous peoples. The GEF is the funding facility for the implementation of various environmental conventions and as such most of its work impacts on indigenous peoples. It is therefore, urgent and imperative that indigenous peoples are fully involve in this process. We also recommend the active participation of the UNPFII in this process to ensure consistency of the UNDRIP with the GEF indigenous peoples policy.

We urge the UNPFII to establish a sub-committee to follow up directly the implementation of recommendations issued to specific Member States, UN agencies, funds and programs.

In addition to the above, we further request the Forum to make the following recommendations:
- States should be accountable in implementing measures to ensure that private companies/corporations respect the UN DRIP and to comply with their corporate social responsibility – including the application of the FPIC in projects of corporations affecting indigenous peoples.
- States should establish an independent recourse mechanisms consistent with the UNDRIP.
- States should ensure that Indigenous Peoples rights are respected in the Climate Change agreements, strategies and measures at the global and national levels. The implementation of these safeguards shall be subjected to Monitoring Reporting and Verification (MRV).

Thank you Madam Chair

Annex 3:
Indigenous Peoples International Declaration on Self-Determination and Sustainable Development, 19 June 2012, Rio De Janeiro

Indigenous Peoples from all regions of the world met at the "Indigenous Peoples International Conference on Sustainable Development and Self Determination," from June 17th – 19th 2012 at the Museu da República in Rio de Janeiro, Brazil.

We thank the Indigenous Peoples of Brazil for welcoming us their homelands and express our solidarity for their struggles imposed development such as the Belo Monte Dam which threaten their homelands and ways of life. We also thank indigenous peoples from all regions of the world for their preparatory activities and engagement in this process.

We affirm with one voice that it is time to assume the historical responsibilities to reverse centuries of predation, pollution, colonialism, the violation of rights and genocide. It is time to assume the responsibilities towards our future generations. It is time to choose life.

1. Culture as a fundamental dimension of Sustainable Development

As Indigenous Peoples, our fundamental cultural belief systems and world views based on our sacred relationships to each other and Mother Earth have sustained our peoples through time. We recognize the contributions and participation of our traditional knowledge holders, indigenous women and youth.

Cultures are ways of being and living with nature, underpinning our values, moral and ethical choices and our actions. Indigenous peoples' abiding survival is supported by our cultures, providing us with social, material, and spiritual strength. We believe that all societies must foster cultures of sustainability, and that Rio +20 should highlight the cultural, moral and ethical dimensions, as the most fundamental dimension of sustainable development.

2. Full Exercise of our human and collective rights

We see that Mother Earth and all life is in a serious state of peril. We see the current model of sustainable development continues to proceed on the road of peril. As indigenous peoples we have experienced the terrible and negative impacts of this approach. These threats extend to peoples in voluntary isolation.

Sustainable development is realized through the full exercise and fulfillment of human rights. Indigenous Peoples see sustainable development and self-determination as complementary. Progress in various countries has happened to the extent that States have fulfilled their duties to respect, protect and promote our human rights, while conflicts have escalated where governments have imposed top-down development, whether labeled "sustainable", "pro-poor" or "green".

The UN Declaration on the Rights of Indigenous Peoples is the standard to be applied in the implementation of sustainable development at all levels, including respect for full participation in decision-making and our Free, Prior, Informed Consent (FPIC) to policies, programmes and projects affecting us.

3.Strengthening diverse local economies and territorial management

For Indigenous Peoples, self determination is the basis for Buen Vivir/ living well , and this is realised through secure land rights and territorial management and the the building of vibrant community economies. These local economies provide sustainable local livelihoods, community solidarity and are critical components of resilient ecosystems.

We will continue to strengthen and defend our economies and rights to our lands, territories and resources, against extractive industries, predatory investments, land-grabbing, forced relocation and unsustainable development projects.These include large scale dams, plantations, large-scale infrastructure, tar sands extraction and other mega-projects, as well as the theft and appropriation of our biodiversity and traditional knowledge.

From the conference emerged many answers to address the global crises, as varied as the many cultures present at the meeting. The greatest wealth is nature's diversity and its associated cultural diversity, both of which are intimately connected and which should be protected in the same way.

Indigenous peoples call upon the world to return to dialogue and harmony with Mother Earth, and to adopt a new paradigm of civilization based on Buen Vivir – Living Well. In the spirit of humanity and our collective survial, dignity and well-being, we respectfully offer our cultural world views as an important foundation to collectively renew our relationships with each other and Mother Earth and to ensure Buen Vivir/ living well proceeds with integrity.

Based on these affirmations and agreements, we commit to carry out the following actions:

Within and among Indigenous communities, Peoples and Nations

1) We will define and implement our own priorities for economic, social and cultural development and environmental protection , based on our traditional cultures, knowledge and practices, and the implementation of our inherent right to Self-determination

2) We will revitalize, strengthen and restore our institutions and methods for the transmission of our traditional knowledge and practices focusing on transmission by our women and men elders to the next generations

3) We will restore knowledge and trade exchanges, including seed exchanges, among our communities and Peoples reinforcing the genetic integrity of our biodiversity.

4) We will stand in firm solidarity with each other's struggles to oppose projects that threaten our lands, forests, waters, cultural practices, food sovereignty, traditional livelihoods, ecosystems, rights and ways of life. We also stand in solidarity with others whose rights are being violated, including campesinos, fishers and pastoralists.

Regarding Actions of States and Corporations:

1) We will continue to reject the dominant neo-liberal concept and practice of development based on colonization, commodification, contamination and exploitation of the natural world, and policies and projects based on this model.

2) We insist that States fully implement their commitments under National and International laws and standards which uphold the inherent, inalienable, collective and inter-generational rights of Indigenous Peoples and rights affirmed in Treaties, Agreements and Constructive Arrangements, the UN Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169.

3) We will reject and firmly oppose States policies and programs that negatively impact Indigenous Peoples' lands and territories, ecosystems and livelihoods, or which permit corporations or any other third parties to do so.

At the United Nations

1) We insist on full and effective participation in all discussions and standard setting activities regarding sustainable development, biodiversity, environment and climate change and for the implementation of the UN Declaration on the Rights of Indigenous Peoples in all these processes.

2) We will carry these messages to the UN Conference on Sustainable Development, the World Conference on Indigenous Peoples (WCIP, 2014) and all other International processes where our rights and survival are affected. We propose that Indigenous Peoples vision and practice of Sustainable Development be a focus of discussion at the WCIP.

We adopt this Declaration on the 19th of June, 2012, in Rio affirming our rights and reiterating our sacred responsibilities. to future generations

Annex 4:

Statement by Asia Indigenous Peoples' Caucus at the UNPFII (2011), Agenda Item 4(a) Implementation of the UNDRIP

Permanent Forum on Indigenous Issues
Tenth Session
New York 16-27 May 2011
Agenda Item 4(a): Implementation of the United Nations Declaration on the Rights of Indigenous Peoples

ASIA CAUCUS STATEMENT

On this agenda item on implementation of the United Nations Declaration on the Rights of Indigenous Peoples, the Asia Caucus wishes to put forward this collective statement recalling the General Comment No.1 (Annex of E/2009/43) and its related issues contained in the document no. E/C.19/2011/2 that referenced Article 42 of the Declaration regarding the mandate of the Permanent Forum on Indigenous Issues.

Article 42 stipulates that, "The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."

The Declaration provides the legal framework of the Forum, together with resolution 2000/22 of the Economic and Social Council, therefore the Forum has the mandate to follow up on the effective implementation of the Declaration.

The Declaration constitutes universal human rights for indigenous peoples that affirmed substantive rights and obligations under existing treaty law. It also has majority support from the member-states and therefore has the binding effect of customary international law. As such, we request all member-states to fulfill their obligations under the Charter of the United Nations[210] to promote and respect for human rights, including the rights of indigenous peoples.

This holds true also for international negotiations being conducted under the UN Commission on Sustainable Development, the Convention on Biological Diversity and the UN Framework Convention on Climate Change, as well as in the review of safeguard policies by international financial institutions.

However, the UN Permanent Forum is informed that at the session of the UN Commission on Sustainable Development (UNCSD19) member-states, led by Canada, the United States, Australia and New Zealand, deleted indigenous peoples' right to Free, Prior and Informed Consent with respect to mining on ancestral lands.

Finally, we wish to acknowledge the Questionnaire to Governments developed by the Secretariat of the Forum that demonstrates a good working method leading to effective implementation of the Declaration. We noted that no Asian states have responded to this good practice at this time of our intervention. We urge the Asian states as well as all other

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[210] Article 1, 55, and 56.

member-states to participate in this exercise to demonstrate their pledge and commitment to the Declaration.

Given the above,

♦ We call upon the General Assembly to formalize the mandate of the Forum according to Article 42 of the Declaration,

♦ We call upon all member-states to fulfill their obligations according to the UN Charter to respect and promote human rights, including the rights of indigenous peoples enshrined in the Declaration,

♦ We call upon the 11 member-states voted abstention at the time of the Declaration's adoption (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine) to change their position and pledge to support the Declaration,

♦ We call on the governments of Canada, the United States, Australia and New Zealand to inhibit themselves from undermining respect for the right to Free, Prior, Infortmed Consent of Indigenous Peoples to policies, programmes and projects affecting our lands and our well-being,

♦ We call upon all member-states to respond to the Questionnaire to Governments prepared by the Forum that provides a good practice leading to the effective implementation of Declaration,

♦ Finally, we urge the member-states to recognize the status of indigenous peoples in their respective countries through Constitution or other legal means to ensure that the beneficiaries of the Declaration are counted for.

Thank you very much for your kind attention, Madam Chairperson.