

3. Traditional Cultural Expressions in a Matrix of Copyright, Cultural Diversity and Human Rights

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For quite some time now, there has been a discussion at the international level regarding the protection of the knowledge and creativity of indigenous communities against misappropriation. The increased interest in this sphere is primarily a response to the negative effects of economic globalisation on indigenous communities. In particular, there is a risk of the knowledge and creativity of traditional communities being continuously appropriated and commercialised by global players without any possibility for these communities to prevent this.¹

During the last few years, the focus of this discussion has been on the technological aspects of traditional knowledge and the key question was how adequate safeguards could be developed on the basis of existing and/or *sui generis* forms of patent law or biodiversity rights.² There was however from

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1 Whereas from the fifteenth to the twentieth century substantial harm was inflicted on indigenous peoples' cultural heritage by European colonisation, tourism and an increased consumer demand for 'primitive' art in recent years represent a major threat to indigenous peoples' ability to protect their cultural property (see E.-I. Daes, *Discrimination Against Indigenous Peoples – Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, 1993, Document of the UN Commission on Human Rights, E/CN.4/Sub.2/1993/28, at paragraphs 18 and 159). With the development of technology in the electronic media and telecommunications sectors, abuses have multiplied (see M. Ficsor, *The Law of Copyright and the Internet* (Oxford: Oxford University Press, 2002), at paragraph 10.67). Today, the ubiquitous digitisation and the pervasiveness of the Internet constitute new challenges with potentially grave consequences.

2 See T. Cottier and M. Panizzon, 'Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection', *Journal of International Economic Law* 7 (2004), 371

the beginning, an agreement among the interested parties to the discussion that culture is an important and indispensable aspect of traditional knowledge.³ Nevertheless, driven by the need to reduce the complexity of the discussion, the cultural aspects of traditional knowledge were separated from the technological ones.⁴

A typical example involving illicit exploitation of the cultural aspects of traditional knowledge is the famous *Milpurruru v Indofurn* case.⁵ Indofurn, a carpet producer based in Vietnam, used designs from paintings by Australian aboriginal artists without authorisation. The artists had consented to a reproduction of their pictures in a publication created for educational use but did not authorise other uses. The publication highlighted, *inter alia*, that the paintings depicted sacred stories, that the aboriginal painters had to undergo a procedure of initiation before being allowed to use the sacred symbols, that customary aboriginal law strictly controlled the painting techniques, and that the use of the symbols in an inappropriate context could deeply offend the traditional community. When the carpets were imported into Australia, George Milpurruru and other aboriginal painters successfully instituted a copyright infringement case before the Australian courts.⁶

Milpurruru v Indofurn is however one of the exceptional cases where indigenous peoples effectively used copyright law to combat misappropriation of traditional cultural expression (TCE). In contrast to this case involving paintings by living members of an indigenous people, copyright cannot be successfully invoked in most other instances of

ff; and M. Blakeney, 'Hans Christian Andersen and the Protection of Traditional Cultural Expressions', in H. Porsdam, ed., *Copyright and Other Fairy Tales, Hans Christian Andersen and the Commodification of Creativity* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2006), 108–28, at 111.

3 See for example, Erica-Irene Daes' seminal report on the cultural and intellectual property of indigenous peoples, commissioned by the UN Commission on Human Rights (Daes, supra n. 1), at paragraphs 2–4.

4 Erica-Irene Daes stressed that cultural and biological/agricultural aspects of indigenous peoples' heritage are interrelated and should not be separated (Daes, supra n. 1, at paragraphs 21, 31 and 164).

5 Australian Law Reports 130 (1994) 659; available online at http://www.austlii.edu.au/au/cases/cth/federal_ct/unrep7290.html (last visited 20 July 2006). For a discussion of this case, see M. Blakeney, 'Milpurruru & Ors. v. Indofurn Pty Ltd & Ors. – Protecting Expressions of Aboriginal Folklore Under Copyright Law', *Murdoch University Electronic Journal of Law* 2 (1995), 1 ff.; Blakeney, supra n. 2; D. Wüger, 'Prevention of Misappropriation of Intangible Cultural Heritage Through Intellectual Property Laws', in J.M. Finger and P. Schuler, eds, *Poor People's Knowledge, Promoting Intellectual Property in Developing Countries* (Washington: World Bank and Oxford University Press, 2004), 183–206.

6 In a 1994 ruling, the Federal Court of Australia found that Indofurn had infringed Australian copyright law and ordered the company to pay damages of AUD 188,000 to the aboriginal artists. Of this amount, AUD 70,000 was awarded to the living artists for the 'cultural harm' they had suffered within their own communities because they were involuntarily implicated in an offence against aboriginal laws on intellectual property.

misappropriation of indigenous heritage *inter alia* because the cultural expressions at issue have publicly existed for a long time and thus belong to the ‘public domain’⁷ or because it is not possible to attribute them to an individual author.⁸

Many folklore expressions came into being a long time before copyright emerged and they went through a long series of limitations combined with step-by-step minor changes as a result of which they were transformed in an incremental manner. . . . The creator is a community and the creative contributions are from consecutive generations.⁹

Above all, as Erica-Irene Daes pointed out, ‘indigenous peoples do not view their heritage in terms of property at all – that is, [as] something which has an owner and is used for the purpose of extracting economic benefits – but [rather] in terms of community and individual responsibility’.¹⁰ The conflict between a modern concept of copyright law and a traditional understanding of the rights in artwork is well exemplified by the Yumbulul Case.

In the *Yumbulul Case*¹¹ the Reserve Bank of Australia reproduced a ‘Morning Star Pole’¹² on an Australian ten dollar banknote, without due authorisation. The artefact was created by the Australian aboriginal artist Terry Yumbulul under the authority given to him as a member of the Galpu clan. Terry Yumbulul had licensed the right to reproduce the Morning Star Pole to the Aboriginal Artists Agency who sublicensed the Reserve Bank. The Galpu clan, however, criticised Yumbulul’s licensing as exceeding the authority that had been given to the artist.¹³ The tribe members argued that Yumbulul had been trained by the community in the preparation of the pole and that he was only allowed to sell the work to a place where it would be displayed to educate a wider audience about aboriginal art.¹⁴ As a result of this criticism Yumbulul sued the Australian Reserve Bank and the Aboriginal

7 See C. Golvan, ‘Aboriginal Art and the Protection of Indigenous Cultural Rights’, *European Intellectual Property Review* 14 (1992), 227–32, at 231, discussing the example of the Wandjina image of north-west Australia, which has been reproduced many times without the consent of the local aboriginal community.

8 Golvan, *ibid.*, at 227; WIPO Secretariat 2001, at 160.

9 M. Ficsor, *supra* n. 1, at paragraph 10.68.

10 Daes, *supra* n. 1, at paragraph 26.

11 *Yumbulul v Reserve Bank of Australia*, Intellectual Property Reports 21 (1991) 481.

12 Morning Star Poles are artefacts having a crucial function in sacred aboriginal rituals commemorating the deaths of important members of the tribe. Blakeney, 1995, *supra* n. 5, at 1.

13 For a discussion of this case, see Golvan, *supra* n. 7, at 229; Blakeney, 1995, *supra* n. 5, at 1; C. Haight Farley, ‘Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?’ *Connecticut Law Review* 30 (1997), 1 ff, at 31–2; T. Janke, *Minding Culture. Case Studies on Intellectual Property and Traditional Cultural Expressions*, (WIPO: Geneva, 2003), at 61; and Wüger, *supra* n. 5, at 187.

14 Janke, *ibid.*, at 61.

Artists Agency claiming that his licence was invalid since only the Galpu clan would have had the power to assign copyright to the bank. Finally, the case against the Reserve Bank was settled out of court. The case against the Aboriginal Artists Agency, however, came to court, where it was dismissed. The district judge decided that 'Australia's copyright law does not provide adequate recognition of aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin'.¹⁵

Whereas there is extensive literature on the agro- and biotechnological aspects of traditional knowledge,¹⁶ its cultural aspects have received much less attention. We are of the view that this neglect is not justified since the cultural expressions of indigenous peoples are basic components of their collective heritage and traditional knowledge. As such, they must be included in the current intellectual, political and legal processes aspiring to safeguard cultural diversity at the global level.

The objective of this chapter is to attempt an assessment of the relationship between copyright, human rights and cultural diversity as related to the protection of TCE. It will be argued that the existing fragmentation of international law and the lack of coordination between international fora in dealing with TCE thwart its effectiveness as a means of protection. A human rights framework is suggested for use as a conceptual blueprint for drawing up a more complete picture of the issue and balancing conflicting private property and public goods interests.

1. THE PROBLEMATIC DEFINITION OF TCE – NARROW OR BROAD IN SCOPE?

It is very difficult to find an appropriate definition of indigenous peoples' cultural expressions. The term 'folklore', which was originally used to describe the subject matter, has been replaced by the term 'traditional cultural expressions'. The main reason for this is that the Western notion of 'folklore' often carries connotations of something 'dead' and of inferior aesthetic quality.¹⁷ The term 'traditional cultural expressions', by contrast,

15 *Yumbulul v Reserve Bank of Australia*, Intellectual Property Reports 21 (1991) 481; see also Wüger, supra n. 5, at 187.

16 For an overview see the various contributions in S. von Lewinski, ed., *Indigenous Heritage and Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore* (The Hague: Kluwer Law International, 2004); and S. Biber-Klemm and T. Cottier, eds, *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives* (CABi Publishing UK, 2006).

17 For a discussion of the pejorative connotations of 'folklore' see Blakeney, supra n. 2, at 109–11; see also R.J. Coombe, 'Protecting Cultural Industries to Promote Cultural Diversity: Dilemmas for International Policy-Making Posed by the Recognition of Traditional Knowledge', in K. Maskus and J. Reichman, eds, *International Public Goods*

signifies that traditional cultures are living and that they may encompass artistic expressions that are of high aesthetic quality.

Furthermore, there has been a dispute as to whether the term ‘culture’ in ‘traditional cultural expressions’ should be defined broadly or narrowly. The Model Provisions drafted by the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1982¹⁸ provided for a definition, which related TCE to ‘productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community’. The Model Provisions thus considered the artistic character to be the defining element of TCE.¹⁹ In order to exemplify this definition, the WIPO/UNESCO Model provisions distinguish between four typical genres of TCE:²⁰

and Transfer of Technology Under a Globalized Intellectual Property Regime (Cambridge: Cambridge University Press, 2005), 599–614, at 600; C.J. Visser, ‘Making Intellectual Property Laws Work for Traditional Knowledge’, in Finger and Schuler, supra n. 5, at 207 ff, at footnote 4; W.B. Wendland, ‘Intellectual Property, Traditional Knowledge and Folklore: WIPO’s Exploratory Program’, *International Review of Industrial Property and Copyright Law* 33 (2002), 485–504 (Part I), and 606–21 (Part II), at 492; and WIPO-Secretariat 2001: *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*. WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999), Geneva, April 2001, at 22. Document available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>, last visited 2 August 2006.

18 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (Model Provisions) of 1982, available at <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf>, last visited 1 August 2006.

19 WIPO Secretariat, 2001, supra n. 17, at 43.

20 Basically restating this distinction, in a recent WIPO document (WIPO IGC, 2005: *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, WIPO-document WIPO/GRTKF/IC/8/4 (8 April 2005) Annex, at 11, Article 1, the following working definition of ‘traditional cultural expressions’ was proposed:

- (a) ‘Traditional cultural expressions’ or ‘expressions of folklore’ are any forms, whether tangible [or] intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:
 - (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
 - (ii) musical expressions, such as songs and instrumental music;
 - (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and,
 - (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes, handicrafts, musical instruments, and architectural forms, which are:
 - (aa) the products of creative intellectual activity, including individual and communal creativity;
 - (bb) characteristic of a community’s cultural and social identity and cultural heritage; and

1. verbal expressions (folk tales, poetry, and so on);
2. musical expressions (folk songs and instrumental music);
3. physical expressions (folk dances and performances, artistic expressions of rituals); and
4. tangible expressions (including drawings, paintings and sculptures).

Interestingly, representatives of indigenous communities have recently criticised this definition as being too narrow.²¹ According to these critics, TCE should encompass a much broader range of cultural expressions including traditional beliefs, scientific views and the substance of legends or practical traditions.

Although this broader definition would arguably better reflect the complex reality of TCE, we take the view that such a definition would risk making an effective *legal* protection of TCE impractical. This is a lesson that can be learned from the shortcomings of UNESCO's very broad standard definition of 'culture', operational since 1982. This definition, adopted at the 1982 UNESCO World Conference on Cultural Policies in Mexico City, defined 'culture' as encompassing 'the whole complex of distinctive spiritual, material, intellectual and emotional features that characterise a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs'. Ivan Bernier rightly pointed out that this definition is ambiguous since it refers to two rather distinct realities.

First, there is a conception centred on art and literature, which refers to the cultural expressions of a community or group and encompasses cultural creation in all forms, whether by individuals or cultural enterprises. Secondly, there are lifestyles, basic human rights, value systems, traditions and beliefs, which refer to a more sociological and anthropological perspective of culture.²²

If one extends the notion of culture beyond expressions of artistic creation and chooses to include any feature that might contribute to characterising a society or a social group, it becomes, in a legal context, almost impossible to discern an object of protection. Thus, with a view to the effective protection

(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

See http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_4.doc for document, last visited 4 August 2006.

²¹ See Blakeney, *supra* n. 2, at 110.

²² I. Bernier, 'A UNESCO International Convention on Cultural Diversity', in C. Beat Graber, M. Girsberger and M. Nenova, eds, *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services* (Zurich: Schulthess, 2004), 65–76, at 67.

of TCE, there are strong arguments for a narrow definition conceiving TCE as expressions of traditional artistic creation.²³ One should however constantly bear in mind that, '[i]ndigenous peoples regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationship between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world'.²⁴

2. ACTIVITIES OF INTERNATIONAL FORA WITH REGARD TO TCE PROTECTION

Many multilateral institutions and initiatives are engaged in the protection of indigenous peoples' cultural and intellectual property (IP), including the United Nations Environment Programme (UNEP), the Convention on Biological Diversity, the Food and Agriculture Organization of the United Nations (FAO), the United Nations Working Group on Indigenous Populations, UNESCO, the International Labour Organization (ILO), the World Health Organization (WHO), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), the United Nations Development Program (UNDP), the Open-ended Ad Hoc Intergovernmental Panel on Forests and WIPO.²⁵ All these initiatives reveal the extreme fragmentation of international law and policymaking in this field. Furthermore, it is important to take account of the various statements and declarations made by indigenous peoples themselves, for instance, in the regions of New Zealand, Australia, the South Pacific and the Amazon Basin.²⁶ These declarations and statements are not state-driven initiatives but emerge from civil society. With regard to the protection of TCE at the global level, undoubtedly the most important fora for policymaking exist within WIPO and UNESCO and we shall focus our analysis on them.

23 The UNESCO Resolution on traditional culture and folklore provided for a working definition of folklore, which, similarly to the narrow definition used in the 'WIPO/UNESCO Model Provisions', limits folklore to 'artistic' heritage. It reads as follows: 'Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.' UNESCO, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, adopted by the General Conference at its twenty fifth session, Paris, 15 November 1989. Available at http://www.unesco.org/culture/laws/paris/html_eng/page1.shtml, last visited 2 August 2006, at paragraph 5; see also WIPO Secretariat, 2001, *supra* n. 17, at 22.

24 Daes, *supra* n. 1, at paragraph 21.

25 For an overview, see WIPO Secretariat, 2001, *supra* n. 1, at 49–55.

26 For an overview, see Blakeney, *supra* n. 2, at 111–14.

2.1 WIPO

WIPO has been active in the area of TCE for several decades. In 1982, the above-mentioned Model Provisions on the Protection of Folklore resulted from its efforts.²⁷ These were elaborated by WIPO in cooperation with UNESCO and provided for a *sui generis* model for IP-type protection of TCE.²⁸ In 1984, WIPO and UNESCO convened a group of experts to develop an international treaty protecting expressions of folklore. Although the experts managed to prepare a draft treaty – based on the Model Provisions of 1982 – the majority of the participants believed that it was premature to establish an international treaty on the subject.²⁹ Because of this failure, WIPO activities in the field of TCE were halted until the end of the twentieth century.³⁰ In 1997, the WIPO–UNESCO World Forum on the Protection of Folklore took place in Phuket, Thailand.³¹ Subsequently, in 1998 and 1999, WIPO conducted broad fact-finding missions in 28 countries in order to identify the IP-related needs and expectations of traditional knowledge holders.³² In 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC or IGC) was established.³³ Under the guidance of the

27 See above at Section 2; see Ficsor, *supra* n. 1, at paragraph 10.70 and Wendland, *supra* n. 17, at 486.

28 WIPO-IGC, 2002: *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*. WIPO-document WIPO/GRTKF/IC/3/10 (25 March 2002). Document at http://www.wipo.int/documents/en/meetings/2002/igc/pdf/grtkfic3_10.pdf, last visited 17 August 2006, at paragraphs 17–21. For a comment on the major features, see WIPO Secretariat, 2001, *supra* n. 1, at 43–5.

29 WIPO-IGC, 2002, *ibid.*, at paragraphs 22–3; according to Ficsor, *supra* n. 1, at paragraph 10.71, the idea of a treaty was rejected by industrialised countries because of ‘the absence of any reliable source of identification of folklore creations in many countries’ and because of ‘folklore shared by more than one country’.

30 However, in December 1996 the WIPO Performances and Phonograms Treaty (WPPT) was adopted. Article 2(a) WPPT provides that the definition of ‘performer’ for purposes of the treaty includes the performer of folklore. See WIPO-IGC, 2002, *supra* n. 28, at paragraph 27 and Ficsor, *supra* n. 1, at paragraph PP2.04.

31 The organisation of this forum was recommended by WIPO’s 1996 diplomatic conference. See WIPO-IGC, 2002, *supra* n. 28, at paragraph 29 and Ficsor, *supra* n. 1, at paragraph 2.51.

32 The results of these missions were subsequently published in 2001. See WIPO Secretariat, 2001, *supra* n. 17; on expressions of folklore, see in particular at 42–7, 57–9, 64–5, 73–75, 95, 110–11, 123–5, 127–8, 134–6, 151, 160–65, 168, 187–8, 229–30 and annex 5. For a detailed discussion of this report, see Wendland, *supra* n. 17.

33 WIPO-GA, 2000b: *Report of the 26th Session of the WIPO General Assembly, 25 September to 3 October 2000*, WIPO-document WO/GA/26/10 (3 October 2000). See http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/ga26_10.pdf, for document, last visited 2 August 2006, paragraphs 27–71, particularly paragraph 71. See generally WIPO-GA, 2000a: *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO-document WO/GA/26/6 (25

IGC, the Secretariat of WIPO issued detailed questionnaires on national experiences of dealing with protection of folklore. Building on the responses, the WIPO Secretariat prepared a number of analytical studies on the protection of TCE,³⁴ which formed the basis for the ongoing international policy debate within the IGC. Notwithstanding the intense discussion, the IGC has not yet been able to agree on any shared definitions, objectives or principles with regard to the protection of TCE.³⁵

2.2 UNESCO

In recognition of the fact that TCE form part of the universal heritage of humanity, in 1989, UNESCO issued a Recommendation on the Safeguarding of Traditional Culture and Folklore.³⁶ As mentioned above, the

August 2000). Document (last visited 2 August 2006) available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/ga26_6.pdf. See also Wendland, supra n. 17, at 484–6, and Ficsor, supra n. 1, at paragraph 10.73.

- 34 See WIPO-IGC, 2002, supra n. 28; WIPO-IGC, 2003a: *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*. WIPO-document WIPO/GRTKF/IC/5/3 (2 May 2003): document last visited 17 August 2006 and available at: http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_3.pdf; WIPO-IGC, 2003b: *Traditional Cultural Expressions/Expressions of Folklore – Legal and Policy Options*. WIPO-document WIPO/GRTKF/IC/6/3 (1 December 2003). Document available at http://www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf_ic_6_3.pdf, last visited 17 August 2006; WIPO-IGC, 2004a: *Traditional Cultural Expressions: Defensive Protection Measures Related to the Intellectual Property Classification Tools*. WIPO-document WIPO/GRTKF/IC/6/3 Add. (1 March 2004). Document available at http://www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf_ic_6_3_add.pdf, last visited 17 August 2006; WIPO-IGC, 2004b: *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles*, WIPO-document WIPO/GRTKF/IC/7/3 (20 August 2004). Document available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3.doc, last visited 4 August 2006; WIPO-IGC, 2004c: *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Outline of Policy Options and Legal Mechanisms*, WIPO-document WIPO/GRTKF/IC/7/4 (27 August 2004). Document available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_4.doc, last visited 17 August 2006; WIPO-IGC, 2005: *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, WIPO-document WIPO/GRTKF/IC/8/4 (8 April 2005). Document available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_4.doc, last visited 4 August 2006.
- 35 According to items 8 and 9 of the Document ‘Decisions of the Ninth Session of the Committee’ of 28 April 2006, many Members provided oral or written comments on the previous documents and thus no agreement could be reached. Document available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_decisions.doc, last visited 15 August 2006.
- 36 UNESCO, 1989, supra n. 23. Part of the work of UNESCO that should be taken into account in a context of TCE is the 1966 Declaration on the Principles of International Cultural Cooperation, in particular Article 1, (*UNESCO Declaration on the Principles of International Cultural Cooperation*, 1 November 1966). Document available at http://www.unesco.org/culture/laws/cooperation/html_eng/page1.shtml, last visited July 10

Recommendation provides a definition of TCE (folklore), which is similar to the one contained in the WIPO/UNESCO Model provisions.³⁷

In 2003, UNESCO adopted the Convention on the Safeguarding of the Intangible Cultural Heritage (CIH).³⁸ Intangible cultural heritage is defined in Article 2 CIH as the practices, representations, expressions, as well as the knowledge and skills that social groups or individuals recognise as part of their cultural heritage. Paragraph 2 of the same Article specifies that traditional cultural expressions, such as oral traditions, language, performing arts and rituals are manifestations covered by this definition as long as they are *intangible*.

Inventories are envisaged as the major means of protecting intangible cultural heritage both on the national and international levels. On the national level, inventories must be drawn up by the contracting parties with regard to the intangible cultural heritage available on their territories. On the international level, an Intergovernmental Committee, established by Article 5 CIH, is supposed to maintain lists of the internationally most representative and the most endangered intangible cultural heritage. The purpose of these lists is to ensure better visibility of the intangible cultural heritage and greater awareness of its significance.

On 20 October 2005, the UNESCO General Conference adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD).³⁹ A reference to TCE was introduced into the CCD only at a late stage of the negotiations. Whereas the preliminary draft of the convention of July 2004 did not yet address the issue,⁴⁰ the Preliminary

2006; the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, entry into force 24 April 1972. Available at http://www.unesco.org/culture/laws/1970/html_eng/page1.shtml, last visited 11 August 2006); the Convention Concerning the Protection of the World Cultural and Natural Heritage (UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972, entry into force 17 December 1975. Available at http://whc.unesco.org/world_he.htm, last visited 11 August 2006); and the 2001 Convention on the Protection of the Underwater Cultural Heritage (UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001 (not yet in force). Available at www.unesco.org/culture/laws/underwater/html_eng/convention.shtml, last visited 11 August 2005).

³⁷ See *supra* n. 23.

³⁸ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by the General Conference on 17 October 2003, entered into force on 21 April 2006. Available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>, last visited 2 August 2006.

³⁹ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions adopted by the General Conference on 20 October 2005 (not yet in force). Available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>, last visited 2 August 2006. The Convention will enter into force as soon as 30 countries have ratified it.

⁴⁰ See Preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expressions, CLT-2004/CONF.201/CLD.2, Paris, July 2004. The first draft was

Report of the Director-General of 21 April 2005 included for the first time references to TCE and indigenous peoples.⁴¹ The adopted text recognises in paragraph 8 of the preamble, '*the importance of traditional knowledge*'. Furthermore, paragraph 13 of the preamble recognises that diversity of cultural expressions, including '*traditional cultural expressions*', is an important factor that allows peoples and individuals to express and to share with others their ideas and values.⁴² Finally, paragraph 15 of the preamble, Article 2 (principle 3) and Article 7.1(a) refer to the relevance of the CCD for persons belonging to indigenous peoples.

It is noteworthy that neither the CIH nor the CCD addresses IP-related questions.⁴³

2.3 Interim Conclusion on the Existing WIPO and UNESCO Instruments

Deliberations in WIPO seek to protect TCE in a framework of IP rights.⁴⁴ The major shortcomings of this approach are as follows:

- Copyright grants exclusive IP rights, whereas a concept of individual property rights is alien to most indigenous communities.
- Copyright protects only the rights of individuals and does not recognise collective rights.⁴⁵
- Copyright presupposes fixation, whereas traditional stories, songs, rituals, dances, and so forth often lack a fixed form.
- The time frame of copyright protection is too short to protect TCE that are older than the standard term copyright of protection.
- Even in the case of TCE still being within the period of protection, copyright is of limited help to communities wishing to prevent unauthorised use (including citation) of secret or sacred TCE. In the case of TCE that embodies spiritual and religious qualities, any use that

prepared by an international group of 15 independent experts appointed by UNESCO's Director-General. Subsequently, this draft was discussed and modified at three meetings of intergovernmental experts between September 2004 and June 2005.

41 See Appendices 1 and 2 to the Preliminary Report of the Director-General on the draft convention on the protection of the diversity of cultural contents and artistic expressions, 171 EX/INF.18, PARIS, 21 April 2005.

42 Emphasis added.

43 A modest reference to IP can be found in the Preamble of the CCD, recognising 'the importance of intellectual property rights in sustaining those involved in cultural creativity'.

44 See Wendland, *supra* n. 17, at 497–8.

45 Wendland, *supra* n. 17, at 606.

does not conform to the customary laws of the indigenous community is often considered to be particularly offensive.⁴⁶

- Copyright presupposes originality, whereas TCE often lack originality.⁴⁷
- The importance of moral rights and work integrity is not sufficiently taken into account in copyright practice.

Whereas discussions within WIPO IGC seek to protect TCE in a framework of *private property rights*, UNESCO's initiatives on cultural diversity and intangible cultural heritage are concerned with safeguarding *public interests* rather than private ones.⁴⁸ The CIH and the CCD may be seen as the first responses of international law to the emerging conviction that cultural diversity is a 'global public good', which needs to be protected and promoted by policy measures on the local and international levels. However, the UNESCO policies also have several shortcomings that can be summarised as follows:

- The CCD does not impose great responsibilities or binding commitments on the signatory States.⁴⁹
- The CCD does not appear to consider TCE to be an issue of major importance.
- With regard to the CIH, the drawing up of lists enumerating precisely what the important intangible heritage is, presupposes that this heritage has been identified and fixed. However, in many cases of misappropriated TCE a lack of fixation was at the core of the conflict.
- The documentation of TCE may be detrimental for those indigenous peoples who want to keep their heritage secret.⁵⁰
- Finally, drawing up lists as a means of protection may be criticised since it presupposes acceptance of methodological concepts of

46 Moreover, Wendland, *supra* n. 17, at 500–501, notes the problem that members of an indigenous people are often driven by poverty to perform ritual dances or musical performances outside their proper contexts (for example, on television or in front of tourists). Such a loss of cultural context may expose a tradition to ridicule.

47 D. Zografos, 'The Legal Protection of Traditional Cultural Expressions: Is Copyright the Answer?' in F. Macmillan, ed., *New Directions in Copyright Law, Volume 2* (Cheltenham, UK and Northampton, MA, USA: Edward Elgar, 2006), 181–97, at 184.

48 See WIPO IGC, 2003b, *supra* n. 34, at paragraphs 52–3 and WIPO IGC, 2005, *supra* n. 20, at paragraph 15.

49 C.B. Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?' *Journal of International Economic Law* 9 (2006), 553–74, at 563–4.

50 S. von Lewinski, 'Final Considerations', in von Lewinski, *supra* n. 16, at 379–97, at 393, and M.F. Brown, 'Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property', *International Journal of Cultural Property*, 12 (2005), 40–61, at 48–9.

reification⁵¹ and commoditisation, which have been rejected by some representatives of indigenous peoples.

A further serious flaw of the existing international endeavours to develop TCE safeguards lies in their fragmentation. As mentioned above, numerous organisations and institutions are undertaking activities in this field without a conceptual framework that would enable them to interrelate the various elements within a coherent structure. Since WIPO and UNESCO are the most important fora for TCE protection and promotion, it is unfortunate that the work of these two specialised agencies of the United Nations system is not sufficiently coordinated. Although a successful first effort at cooperation between WIPO and UNESCO resulted – as previously mentioned – in the Model Provisions of 1982, cooperation between the two fora since then has – with the exception of the jointly organised World Forum 1997 and regional consultations 1999⁵² – not continued. The main reason for this failure is dissension at the level of the individual States regarding the attribution of competences among governmental departments (that is, those responsible for IP protection against those responsible for cultural policy). Today, exchanges between WIPO IGC and UNESCO are limited to sending observers to one another's conferences.⁵³

3. MAKING USE OF HUMAN RIGHTS IN A TCE CONTEXT

An analysis of the political and scientific work undertaken in the field of TCE protection reveals that the human rights dimensions of TCE are often insufficiently taken into account. It is the objective of this paper to compensate for this oversight and shed more light on the pertinent issues. Furthermore, it suggests exploring whether human rights could be used as a conceptual framework for academic and political discussions on TCE. The following sections will first identify the relevant human rights provisions and then attempt to conceptualise the private and public aspects of TCE protection and promotion in a more coherent theoretical framework.

51 Documentation 'fixes a certain state of the living heritage at a certain point of time', whereas traditional heritage evolves. Von Lewinski, *supra* n. 16, at 394.

52 See WIPO IGC, 2003a, *supra* n. 34, at paragraph 86.

53 See C.B. Graber and M. Girsberger 'Traditional Knowledge at the International Level: Current Approaches and Proposals for a Bigger Picture that Include Cultural Diversity', in H. Seiler and J. Schmid, eds, *Recht des ländlichen Raums. Festgabe der Rechtswissenschaftlichen Fakultät der Universität Luzern für Paul Richli zum 60. Geburtstag* (Zurich: Schulthess, 2006), 243–82, at 274–5.

3.1 Identifying Relevant Sources

Since we are focusing on the international level, our analysis of relevant human rights law for TCE protection and promotion is centred on the so-called International Bill of Rights that comprises the Universal Declaration of Human Rights (UDHR),⁵⁴ the International Covenant on Civil and Political Rights (CCPR)⁵⁵ and the International Covenant on Economic, Social and Cultural Rights (CESCR).⁵⁶ Although the UDHR is a non-binding instrument of international law, it has strongly influenced the CCPR and the CESCR, which are both binding upon the parties.⁵⁷ As we shall see below, the UDHR provisions relevant to TCE are almost identical to those in both the CCPR and the CESCR.

It is debatable whether the CCPR and the CESCR should be conceived of as two separate treaties protecting distinct categories of human rights, or as a single system. In 1952, it was the influence of the Western states that led the UN General Assembly to adopt a resolution calling upon the United Nations Commission on Human Rights to draft two separate covenants rather than a single one, as originally planned.⁵⁸ Asbjørn Eide holds that some of the assumptions underlying this decision were ill-founded.⁵⁹ According to one of these controversial assumptions, civil and political rights have a different nature to social, economic and cultural rights. ‘Civil and political rights were considered to be “absolute” and “immediate”, whereas economic, social and cultural rights were held to be programmatic, to be realised gradually, and therefore not a matter of rights.’⁶⁰ It was emphasised that civil and political rights have a direct effect in the sense that they can be directly applied by courts in contrast to social, cultural and economic rights, which must be implemented and thus have a more political nature.

54 The Universal Declaration of Human Rights was adopted and proclaimed by the United Nations in General Assembly Resolution 217 A (III) of 10 December 1948, UN Doc. A/810.

55 International Covenant on Civil and Political Rights. Concluded 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

56 International Covenant on Economic, Social and Cultural Rights. Concluded 16 December 1966, entered into force 3 January 1976, 993 UNTS 3.

57 Up to 8 May 2006, 156 states were parties to the CCPR and 153 were parties to the CESCR. See <http://www.ohchr.org/english/countries/ratification/4.htm> (last visited 31 August 2006) for the lists of the parties.

58 A. Eide and A. Rosas, ‘Economic, Social and Cultural Rights: A Universal Challenge’, in A. Eide, C. Krause and A. Rosas, eds, *Economic, Social and Cultural Rights* (The Hague: Kluwer Law International: The Hague, 2001 2nd revised edn), 3–7, at 3, referring to General Assembly Resolution 543 (VI) of 5 February 1952. The latter resolution reverses General Assembly Resolution 421 (V) of 4 December 1950, which stressed the interrelatedness of all human rights and opted for a single treaty.

59 A. Eide, 2001a: ‘Economic, Social and Cultural Rights as Human Rights’, in Eide, Krause and Rosas, *ibid.*, 9–28, at p. 10.

60 Eide, 2001a, *ibid.*, at 10.

Without doubt some states may find it more difficult than others to make available the necessary means for such implementation. However, difficulties with regard to the 'justiciability' of social, economic and cultural rights do 'not relate to their validity but rather to their applicability'.⁶¹ That is, the problems states may face in making available the necessary financial means do not alter their obligations under the CESC. According to Article 2(1) CESC, each state is obliged 'to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'. This provision has been further clarified in the so-called 'Limburg Principles', stating that those provisions of the CESC that cannot be made justiciable immediately 'can become justiciable over time'.⁶²

All in all, it follows from this brief structural overview that human rights should be conceived as being interrelated rather than separated into two categories. This view has been emphasised in many United Nations fora⁶³ and found its most telling expression in the Declaration adopted at the 1993 World Conference on Human Rights, which states that, 'all human rights are universal, indivisible and interdependent and interrelated'.⁶⁴

Looking more closely at the individual provisions of the CCPR and the CESC, we find that Article 15 CESC is the provision most directly relevant to TCE. Further provisions with potential importance for our subject are Article 27 CCPR (minority rights), Article 19 CCPR (freedom of expression) and Article 1 CCPR and Article 1 CESC (self-determination of peoples).

Of particular interest for the TCE issue is Article 15(1)(c) CESC recognising the right of everyone '[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. This paragraph is a literal reproduction of the text contained in Article 27(2) UDHR. According to a recent interpretation, Article 15(1)(c) CESC provides for a linkage between copyright and indigenous cultural expressions. This follows from General Comment No. 17 on Article 15(1)(c) CESC, which the Committee on

61 M. Scheinin, 'Economic, Social and Cultural Rights as Legal Rights', in Eide, Krause and Rosas, *supra* n. 58, 29–54, at 29.

62 See the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17 (reproduced as Annex 4 in Eide, Krause and Rosas, *supra* n. 58). See also Eide, 2001a, *supra* n. 59, at 25–6.

63 Eide, Krause and Rosas, *supra* n. 58, at 4.

64 World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc.A/CONF.157/23, Part I, at paragraph 5.

Economic, Social and Cultural Rights (CESCR Committee)⁶⁵ adopted in November 2005.⁶⁶

Paragraph 32 of that Comment reads as follows:

With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned, the oral or other customary forms of transmission of scientific, literary or artistic production and, where appropriate, they should provide for the collective administration by indigenous peoples' of the benefits derived from their productions.

This paragraph of the comment emphasises the obligation of the States parties to the CESCR to ensure the effective protection of scientific, literary and artistic productions of indigenous peoples. With a view to gaining a precise understanding of this paragraph, it is necessary to recall that the rights provided by the International Bill of Rights are all individual rights rather than group rights. Thus, at their centre must be individuals in their capacity as members of indigenous peoples. As we shall show below, however, this does not preclude human rights from enshrining a collective aspect as well.

According to established human rights theory and practice, recognition of human rights imposes three levels of obligation on the contracting state: 'the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil

65 For an analysis of the function and importance of the CESCR Committee, see M. Craven, 'The UN Committee on Economic, Social and Cultural Rights', in Eide, Krause and Rosas, *supra* n. 58, at 455–72.

66 Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005) on Article 15(1)(c) CESCR. General Comments of the CESCR Committee (and the HRC) are an important means to provide the States parties to the Covenant with guidance as to the Covenant's meaning and the nature of the obligations resulting from it. Another important instrument to ensure that States parties discharge their obligations are periodic State reports on the implementation of the obligations held. These reports and the subsequent discussions in the Committee bring possible breaches of the Covenants to the attention of all parties and exert political pressure on the nonconforming States parties to comply with their Covenant obligations. See generally Human Rights Committee General Comment 31 (2004), at paragraph 2.

incorporates both an obligation to facilitate and an obligation to provide'.⁶⁷ This obligations approach to human rights underlies the whole of the International Bill of Rights.⁶⁸ It has also been used by the CESCR Committee (and the Human Rights Committee [HRC]) as a blueprint for its Comments.

The *obligation to respect* is essentially an obligation of the state not to interfere with the freedom at issue. This obligation is mirrored by an entitlement of the human rights holder to object to any state intervention infringing the rights afforded. Hence, this obligation has also been called a 'negative duty'.⁶⁹ With respect to cultural heritage of indigenous peoples, this obligation would translate for instance, into a duty of the state (and its agencies) to abstain from unauthorised reproduction of a ceremonial indigenous sculpture on a banknote – as occurred in the Yumbulul Case⁷⁰ discussed above – or to refrain from clearing rainforest in areas that have a spiritual meaning for indigenous communities.

In our view, the obligation to respect would also prohibit a State Party from drawing up legislation protecting copyrights of persons who had misappropriated cultural heritage in the public domain in a way that is offensive to traditional communities. Such a negative duty may be based on the moral rights of authors of TCE. According to paragraph 12 of Comment No. 17 the moral right 'shall not disappear', even after an artistic, literary or scientific work 'has become the common property of mankind'. This interpretation stresses the 'intrinsically personal character of every creation of the human mind and the ensuing link between creators and their creations'.⁷¹ Because the concept of authorship underlying Article 15(1)(c) 'does not necessarily reflect the level and means of protection found in present copyright'⁷² regimes, the states' obligation to respect may be interpreted as a duty to adopt legislation, which is suited to safeguarding effectively the moral rights of indigenous creators.

This duty transcends the obligation to respect: it is a *positive duty*, which is covered by the obligation to protect. The *obligation to protect* is a requirement that the state should take any legislative measures necessary to protect indigenous people from illicit interference by third persons. The whole of paragraph 32 of Comment No. 17 appears to deal with the duty to protect. It spells out this obligation by highlighting the need to protect not

67 Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), at 102–10. See also Eide, 2001a, *supra* n. 59, at 23.

68 W. Kälin and J. Künzli, *Universeller Menschenrechtsschutz* (Basel: Helbing & Lichtenhahn and Nomos, 2005), at 101.

69 Kälin and Künzli, *ibid.*, at 101.

70 *Ibid.*, Section 1.

71 Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005), at paragraph 12.

72 *Ibid.*, at paragraph 10.

only material but also moral interests and stressing that not only individual but also collective ownership is covered, recalling the principle of prior informed consent and recognising the importance of IP rights as means of protection. A key question that remains open in this respect is how to deal with the cultural heritage of indigenous peoples who do not conceive TCE in terms of property at all.

Finally, the *obligation to fulfil* consists in a positive duty to take ‘all necessary steps within their available resources’⁷³ (for example, regulatory or financial measures), which are necessary to ensure effective protection of the human rights of individuals. According to paragraph 34 of General Comment No. 17, ‘[t]he obligation to fulfil (provide) requires States parties to provide administrative, judicial or other appropriate remedies in order to enable authors to claim the moral and material interests resulting from their scientific, literary or artistic productions and to seek and obtain effective redress in cases of violation of these interests’. As clarified in the following sentence of paragraph 34, such ‘appropriate remedies’ may also include financial measures. In the context of TCE one might think, for example, of governmental measures facilitating the formation of an agency assisting indigenous communities in taking legal action against unauthorised appropriation of their cultural heritage by third parties. Furthermore, the obligation to fulfil might translate into a duty to provide – according to the resources available to the state – for schemes promoting the conservation of secret land, sites and indigenous cultural heritage.

Article 1 CCPR, which is formulated in language identical to that of Article 1 CESCR,⁷⁴ guarantees self-determination of peoples including cultural self-determination.⁷⁵ With regard to cultural expressions of indigenous peoples, however, several obstacles hinder the application of this provision. Firstly, it is still not clear whether Article 1 is merely a vague political principle or a genuine right.⁷⁶ Secondly, it is disputed whether the concept of ‘peoples’ would also include minorities, such as indigenous

⁷³ Ibid., at paragraph 46.

⁷⁴ On the right of self-determination see Human Rights Committee, General Comment 12 on peoples’ right of self-determination Report of the Human Rights Committee, UN doc. A/39/40 and Corr.1 and 2, document available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f3c99406d528f37fc12563ed004960b4?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?Opendocument), last visited 28 August 2006, at 142–3; T.D. Musgrave, *Self Determination and National Minorities* (Oxford: Oxford University Press, 1997); A. Rosas, ‘The Right of Self-Determination’, in Eide, Krause and Rosas, *supra* n. 58, 111–18.

⁷⁵ Article 1 CCPR reads as follows: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and *cultural development* . . .’ (emphasis added). Self-determination of peoples also appears in the Charter of the United Nations.

⁷⁶ Musgrave, *supra* n. 74, at 90.

communities. Finally, the HRC itself insists on a clear distinction between Article 1 and Article 27 CCPR, which explicitly protects minority rights.⁷⁷

Cultural issues have been addressed by the HRC in relation to Article 27 CCPR, safeguarding the rights of persons belonging to ethnic, religious or linguistic minorities.⁷⁸ The HRC has used Article 27 as the basis for protecting the ‘cultural identity’ of individuals in their capacity as members of an indigenous people.⁷⁹ The safeguard of indigenous peoples’ cultural identity ‘may make it necessary that they control their land and other resources and to ensure their standard of living in ways which correspond to their own traditions’.⁸⁰ Accordingly, the HRC applies a broad definition of culture that also includes land use patterns such as fishing or hunting.⁸¹ In this regard, since 1982, a Draft Declaration of the Rights of Indigenous Peoples has been deliberated within a Working Group on Indigenous Populations of the UN Human Rights Commission.⁸² The discussion was however blocked in the Human Rights Commission and it was unable – for more than ten years – to agree on the Draft Declaration, as contained in the annex to resolution 1994/45 of the Sub-Commission on the Protection and Promotion of Human Rights of 26 August 1994.⁸³ It was only very recently, on 23 June 2006, that the newly founded Human Rights Council consented to submit a recommendation to the United Nations General Assembly to consider and adopt the Declaration on the Rights of Indigenous Peoples.⁸⁴ Article 29 of the Draft Declaration⁸⁵ provides that, ‘[i]ndigenous peoples

77 See Human Rights Committee, General Comment 23 on Article 27 CCPR, at paragraph 2.

78 Article 27 CCPR reads as follows: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own *culture*, to profess and practise their own *religion*, or to use their own *language*’ (emphasis added).

79 For an overview of the HRC’s case law, see S.J. Anaya, *Indigenous Peoples in International Law*, (Oxford: Oxford University Press, 2004, 2nd edn), at 134–7.

80 Eide, 2001a, *supra* n. 59, at 20.

81 See Human Rights Committee, General Comment 23 on Article 27 CCPR, at paragraph 7.

82 See R. Stavenhagen, ‘Cultural Rights: A Social Science Perspective’, in Eide, Krause and Rosas, *supra* n. 58, at 85–109, at 105.

83 Draft Declaration on the Rights of Indigenous Peoples, prepared by the Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/1994/2/Add.1. See also Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, Final Report of the Special Rapporteur (Erica-Irene Daes), E/CN.4/Sub.2/1995/26, Annex, 21 June 1995.

84 See Human Rights Council, UN Doc. A/HRC/1/L.3, 23 June 2006.

85 The draft Declaration adopted by the Human Rights Council is an amended version of the 1994 Draft. A working group for the elaboration of a draft United Nations declaration on the rights of indigenous peoples, established by Commission on Human Rights resolution 1995/32 of 3 March 1995, met for eleven sessions between 1994 and 2006 to further review the original draft. See Report of the working group E/CN.4/2006/79, of 22 March 2006. The report reveals that the adopted draft is a compromise text, since it was not possible to obtain consensus on fundamental issues including self-determination, lands and resources, and the nature of collective rights (*ibid.*, at paragraph 29).

have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions'.⁸⁶ Moreover, according to Article 12 'indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature'. Finally, Article 14 provides for a right of indigenous peoples 'to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures'. These provisions may be of particular importance for indigenous peoples, who treat their cultural heritage as effectively 'un-owned'.⁸⁷ As highlighted above, an IP-based approach to TCE may have shortcomings in this respect. The draft Declaration may thus be perceived as an effort of the UN Human Rights system to compensate for this deficiency of the copyright-based approach. Provided that it is finally adopted by the General Assembly of the United Nations, one would have to take this declaration into account when interpreting Articles 27 CCPR and 15(1)(c) CESCR.

Finally, the freedom of expression and information as safeguarded by Article 19 CCPR is a further provision with potential relevance for TCE. Article 19 paragraph 2 CCPR protects the right of everyone 'to seek, receive and impart information and ideas of all kinds . . . either orally, in writing or in print, in the form of art, or through any other media of his choice'. This wording indicates a broad scope of freedom of expression and information (also including expressions of art, such as literature, music, painting and dance).⁸⁸ According to Asbjørn Eide, '[t]he right to freedom of expression and information includes a right to cultural expressions and access to and

86 In this context, one should also take note of ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organization at its seventy-sixth session, entry into force 5 September 1991, ILM 28 (1989) 1384. Article 8(2) ILO Convention 169 provides that indigenous peoples 'shall have the right to retain their own customs and institutions, where these are not incompatible with internationally recognised human rights'. However, the legal impact of ILO Convention 169 is rather small, since it has been ratified only by 17 States. See state of ratifications at <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169> (last visited 17 August 2006).

87 See L. Helfer, 'Towards a Human Rights Framework for Intellectual Property', *Vanderbilt University Law School, Public Law and Legal Theory Working Paper Number 06-03* (2006), available at <http://ssrn.com/abstract=891303>, last visited 15 August 2006, at paragraph I.A.

88 In a communication regarding an individual complaint against South Korea the HRC held in 2004 that paintings fall 'within the scope of the right of freedom of expression protected by article 19, paragraph 2' CCPR. See Communication No. 926/2000: Republic of Korea. CCPR/C/80/D/926/2000, 19 March 2004; available at <http://www.unhchr.ch/tbs/doc.nsf/0/963903e05b5730b4c1256ed100485df9?Opendocument>, last visited 22 August 2006.

dissemination of cultural activities'.⁸⁹ Freedom of expression and information has also been interpreted as a human rights' basis for the protection and promotion of the diversity of cultural expressions.⁹⁰ However, the UN human rights bodies have not dealt with TCE-related issues directly⁹¹ under Article 19 CCPR. By contrast, the UNESCO Convention on Cultural Diversity (CCD) emphasises in its preamble that, 'freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies'.

In conclusion, it is important to note that the CESCR and the CCPR must not be perceived as two separate covenants but rather as integral parts of a single international system of 'universal, indivisible, interdependent and interrelated' human rights. This is also true for the human rights protecting the productions and cultural identity of indigenous communities. Articles 15(1)(c) CESCR and 27 CCPR are the most relevant provisions of the International Bill of Rights safeguarding traditional cultural expressions. In addition, Article 19 CCPR is a provision that could potentially be further clarified by the HRC with respect to states parties' obligations in the context of freedom of expression and information. The CESCR Committee emphasised in paragraph 4 of General Comment No. 17 that the realisation of Article 15(1)(c) CESCR is dependent on the enjoyment of other human rights guaranteed in the International Bill of Rights, including Article 27 CCPR, with respect to cultural rights of specific groups, and Article 19 CCPR, providing 'freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds'. The interrelatedness and interdependence of CCPR and CESCR is further highlighted on a methodological level by the fact that the HRC and the CESCR Committee both follow an obligations' approach to human rights, distinguishing contracting states' obligations to respect, protect and fulfil.⁹²

3.2 Collective Aspects of Human Rights

89 A. Eide, 2001b, 'Cultural Rights as Individual Human Rights', in Eide, Krause and Rosas, supra n. 58, at 289–301, at 292.

90 See C.B. Graber, *Handel und Kultur im Audiovisionsrecht der WTO* (Bern: Stämpfli, 2003), at 102–7 and 114–19 and Graber, 2006, supra n. 49, at 562–3.

91 The CESCR Committee in Paragraph 4 of Comment No. 17 on Article 15(1)(c) CESCR states that the realisation of Article 15(1)(c) CESCR is dependent on the enjoyment of other human rights guaranteed in the International Bill of Rights, including freedom of expression and information.

92 Human Rights Committee, General Comment 31 (2004), Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument), last visited 24 August 2006; see generally Kälin and Künzli, supra n. 68, at 100–102.

Our analysis above⁹³ has revealed that a lack of coordination between WIPO and UNESCO is a major cause of the fragmentation of international law and policy in the field of TCE safeguard. We found the poor coordination to stem from the inherent tension between the rights of individual authors and the interests of indigenous groups and their cultural heritage. Subsequently, we conceptualised a possible division of tasks between the two organisations, attributing to WIPO the responsibility for *protecting* TCE in a copyright-based framework of *private property rights*, while UNESCO would be assigned the task of *protecting and promoting* the collective aspects of TCE, based on a *public goods* approach to TCE. Since this chapter aims to explore how a human rights' framework could contribute to providing a more coherent concept of TCE protection and promotion at the international level, the question arises of how this could be achieved within the obligations' approach to human rights described in the previous section.

In meeting this challenge, a major difficulty faced by the current human rights doctrine is to explain how a collective or public goods' dimension could be integrated within a conceptual setting based on human rights as individual rights.

In fact, human rights' theory and practice do perceive human rights as individual rights.⁹⁴ This is also true for the so-called 'cultural rights' in the narrow sense of the word, that is, Article 27 UDHR and Article 15 CESC.⁹⁵ As highlighted above, it is established that Article 15(1)(c) CESC provides for a human rights' basis for understanding *individual* author's literary and artistic rights. By contrast, indigenous peoples, seconded by several scholars of social sciences, have been claiming *collective* cultural rights.⁹⁶ Will Kymlicka, from the perspective of liberal political theory, deems any attempt to protect legally cultural minorities to be insufficient, as long as it is not based on a concept of group rights.⁹⁷ In a similar vein, Rodolfo Stavenhagen, a social scientist, argues that a concept of collective or communitarian rights would be a necessary complement to the individualistic understanding of the rights of cultural minorities.⁹⁸

From a legal perspective, however, a concept of collective rights, in the sense of rights that can only be exercised by the group rather than by its individual members, must be rejected primarily because of the unclear relationship between the rights of the group and the rights of its individual

93 In particular Section 3.

94 See, for example, Eide, 2001b, *supra* n. 89, at 290–91, and 300–301.

95 See Eide, 2001b, *supra* n. 89, at 289–90.

96 See Stavenhagen, *supra* n. 82, at 102.

97 W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1996), at 4–5.

98 Stavenhagen, *supra* n. 82, at 100–109.

members.⁹⁹ Group rights would pose the danger of taking away the individual human rights of the powerless group members and exposing them to pressures from the powerful ones.¹⁰⁰ A better solution, which has been adopted in recent human rights' theory and practice, is to recognise that most individual human rights may have a collective dimension without thus becoming collective rights.¹⁰¹ This collective dimension is sometimes referred to as the 'institutional aspect' of human rights.¹⁰²

Freedom of art may serve as an example taken from the 'cultural rights' context to explain the interplay between the individual and the collective/institutional aspect of human rights.¹⁰³

Of course, freedom of art has its individual dimension. It protects the free expression of the artist's personality and – in a broader interpretation – the social and economic conditions of the artist's activities. But at the same time freedom of art is a fundamental right which is concerned with the discourse of art itself. Art in this sense is a self-reproductive communicative process that includes all kinds of communicative observations of artistic distinctions, from the creation of artistic artefacts to their enjoyment by the public and their critique. At the centre of this process is not the artist, neither as a god-like genius, nor in his right to personal expression, nor in his private property of the piece of art, rather it is the *discourse* between artist and public which is attracted by the artistic artefact.¹⁰⁴

Since the discourse of art is an institution of society, it becomes clear why this aspect of human rights is called the institutional one. Another relevant example is Article 27 CCPR. The minority rights provided by this article are rights of individuals in their capacity as members of a minority. Accordingly, the HRC held that only individuals may invoke Article 27,¹⁰⁵ and has denied

99 See Brown, *supra* n. 50, at 51.

100 An example of such a conflict is discrimination against women, including imposed marriages or female circumcision.

101 See Kälin and Künzli, *supra* n. 68, at 117–18.

102 For an influential theoretical foundation of an institutional concept of human rights see N. Luhmann, *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie* (Berlin: Duncker & Humblot, 1986, 3rd edn), *passim*; and H. Willke, *Stand und Kritik der neueren Grundrechtstheorie. Schritte zu einer normativen Systemtheorie* (Berlin: Duncker & Humblot, 1975), in particular at 111–56. For a discussion of the institutional aspect of freedom of expression and information see C.B. Graber, 'Copyright and Access – a Human Rights Perspective', in C.B. Graber, C. Govoni, M. Girsberger and M. Nenova, eds, *Digital Rights Management: The End of Collecting Societies?* (Bern: Stämpfl, 2005), 71 ff, at 82–3; and Graber and Girsberger, *supra* n. 53, at 271–2.

103 Freedom of art is protected both by Article 19(2) CCPR and Article 15(3) CESC.

104 C.B. Graber and G. Teubner, 'Art and Money: Constitutional Rights in the Private Sphere?' *Oxford Journal of Legal Studies* 18 (1998), 61–73, at 67 (emphasis added).

105 Human Rights Committee, General Comment 23 (50) on Article 27 CCPR, The rights of minorities [Article 27]. CCPR/C/21/Rev.1/Add.5, 8 April 1994, at paragraph 7, document (last visited 22 August 2006) available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument).

ethnic groups and other collectives the right to file a complaint.¹⁰⁶ However, it is clear that this individual minority right encompasses a collective dimension. Hence, Article 27 CCPR provides for individual rights, which can be enjoyed collectively.

The CESCR Committee, in paragraph 32 of Comment No. 17, implicitly addressed the problematic relationship of individual *versus* collective cultural rights in two ways.¹⁰⁷ First, contracting states are invited to recognise not only individual but also collective authorship. Collective authorship is a concept that is common to most municipal copyright acts. It applies to situations where – for example, in the areas of film, theatre or opera – several persons have jointly produced a copyright-protected work. Since it usually provides that such works may be used only under the condition that all authors give their prior consent, this may be a concept that would contribute to a more effective protection of indigenous cultural property in some cases. However, it must be recalled that traditional cultural expressions are usually the product of the contributions of many consecutive generations rather than ‘co-productions’.¹⁰⁸ Second, the CESCR Committee requires contracting states to provide, where appropriate, ‘for the collective administration by indigenous peoples of the benefits derived from their productions’.¹⁰⁹ This second reference may have important implications as a human rights’ basis for proposals suggesting that use be made of the concept of *domaine public payant* for safeguarding traditional cultural heritage.¹¹⁰

In our view, the rights provided by Article 15(1)(c) CESCR encompass, as do most other human rights including freedom of (artistic) expression, a collective/institutional dimension. It is vital to recall that TCE involve rituals and other sacred practices, which are ‘central to a social and symbolic system that links individuals, families and communities in ongoing relationships’.¹¹¹ The production of contemporary TCE presupposes the transfer of traditional cultural heritage from one generation of a certain local community to the next. Anthropologists have shown that acquiring traditional knowledge is often based on a special relationship of trust and close collaboration.¹¹² This special discourse-based social and ritual matrix is taken into account by the institutional aspect of the rights protected by Article 15(1)(c) CESCR in two ways.

106 Kälin and Künzli, *supra* n. 68, at 117 f.

107 Comment No. 17, at paragraph 32.

108 Ficsor, *supra* n. 1, at paragraph 10.68.

109 Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005) on Article 15(1)(c) CESCR, at paragraph 32.

110 See Blakeney, *supra* n. 2, at 123, A. Lucas-Schloetter, ‘Folklore’, in von Lewinski, *supra* n. 16, at 257–377, at 341–2 and 366, and Ficsor, *supra* n. 1, at paragraph 10.69.

111 Coombe, *supra* n. 17, at 599–614, at 601.

112 For references to relevant anthropological scholarship, see Coombe, *supra* n. 17.

First, since the contemporary indigenous creator is essentially the ‘product’ of this discourse, the institutional aspect of Article 15(1)(c) would also include certain limitations that take account of the specific social relationship within an indigenous community.¹¹³ The CESCR Committee in paragraph 35 of Comment No. 17 clarified that the right provided by Article 15(1)(c) CESCR ‘cannot be isolated from the other rights recognised in the Covenant’. The Committee stressed therewith that contracting states must strike a balance between the various rights at issue. ‘In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration.’¹¹⁴ In the specific context of TCE, this balancing exercise translates, in our view, into a requirement to define the rights of contemporary indigenous ‘authors’ in terms of their specific role as ‘initiated custodians’ of the tribe’s or traditional group’s cultural heritage and with a view to protecting the interests of future generations.

Second, an institutional dimension of TCE safeguards may also be found in the obligations provided by Article 15(1)(a) CESCR, which are related to the right to participate in cultural life. The relationship to this obligation has not been spelled out in General Comment No. 17. However, the CESCR Committee stressed that these obligations together with the obligations contained in paragraphs 1(b) and 3 of Article 15 CESCR will be fully explored in separate general comments.¹¹⁵ In our view, the obligation to fulfil, as provided by Article 15(1)(a) CESCR, encompasses a duty of the State Party to promote indigenous cultural heritage as a basis for contemporary indigenous creators to participate in cultural life of the arts and sciences and to perpetuate the transfer of specific cultural knowledge to the next generations.

4. CONCLUSIONS

The protection and promotion of TCEs, a requirement induced by the need to respond to the challenges of a globally interconnected world, is an area of

113 An aboriginal artist in Australia, for example, may not become the ‘author’ of the paintings he creates, since the depicted sacred stories belong not to him but to the tribe or local community of which he is a member. He is merely entrusted to use the sacred symbols and stories for certain precisely defined applications, and this only after having passed through a process of initiation according to the rules of the tribe. Aboriginal law strictly prescribes the content as well as techniques of such paintings, and the community may perceive errors as violating their religious feelings. Graber and Girsberger, *supra* n. 53, at 269, quoting Blakeney, *supra* n. 5, 1 ff. and Wüger, *supra* n. 5, at 185.

114 Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005) on Article 15(1)(c) CESCR, at paragraph 35.

115 *Ibid.*, at paragraph 4.

international law characterised by extreme fragmentation and a pronounced lack of a comprehensive approach. Of the many international fora active in this field, WIPO and UNESCO have proven to be the most important for policy development and lawmaking. However, the work of both fora reveals significant shortcomings. In our view, the fact that it is very difficult to apply modern legal concepts, including IP rights, to societies that are essentially living within archaic patterns of life and values, is a major reason for these shortcomings. A further flaw is caused by the almost non-existent cooperation between the two fora. After earlier attempts to develop jointly a coherent legal setting for TCE protection on the international level, the cooperation between the two organisations was discontinued and is today limited to sending observers to each other's working group meetings. One explanation for this state of political and legal separation may be that WIPO follows an approach of IP rights, which is trying to maximise the private rights of individual rightholders, whereas UNESCO is more concerned with the protection and promotion of cultural diversity as a global public good.

Against this backdrop, we suggest that a human rights approach might contribute to developing a more coherent framework for balancing private property rights and public cultural interests. Although there are no references of human rights in IP treaties, and IP law and human rights law have co-existed as distinct fields of legal education and specialisation for a long time, recent developments show that the 'human rights regime' is expanding into the field of IP and indigenous heritage.¹¹⁶ The strongest proof for this thesis is Comment No. 17 in which the CESCR Committee stresses that the moral and material rights of authors granted by Article 15(1)(c) CESCR may transcend the level of protection provided by current copyright standards. Furthermore, a distinction between individual and collective/institutional aspects of human rights has been proposed as a conceptual blueprint for striking a balance between the rights of individual authors and the cultural policy interests of indigenous communities. This will allow for a new type of division of tasks and coordination between the two key TCE fora moving towards a more holistic perspective: UNESCO, on the one hand, will relate its activities in the field of cultural diversity and cultural heritage to the institutional aspect of the relevant human rights, while WIPO, on the other hand, will reformulate its IP-based *sui generis* protection of authors' rights within an individualist human rights concept of TCE. Most importantly, both fora must learn that their functions with regard to protecting and/or promoting TCE are distinct but complementary.

For the future, we recommend that both the CESCR Committee and the HRC should further and more intensively explore the linkages between

¹¹⁶ Helfer, *supra* n. 87, at paragraph II.A.

Article 15 CESCR and Articles 19 and 27 CCPR. The projected Declaration on Indigenous Peoples may additionally contribute to compensating for the flaws in the existing copyright law. Provided it is adopted by the General Assembly of the United Nations, it would be taken into account when interpreting the human rights framework for TCE protection and promotion.

Finally, this chapter has only begun to study this topic, and further work will be necessary to clarify the issues discussed above.