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The United Nations Declaration on the Rights of Indigenous Peoples: a Human Rights Framework for Intellectual Property Rights

Dr Mauro Barelli*

1. Introduction

After more than twenty years of negotiations and confrontations in various United Nations (UN) human rights fora, in September 2007 the world's indigenous peoples could celebrate the adoption of the UN Declaration on the Rights of Indigenous Peoples (Declaration), a historic document which reflects the legal regime concerning indigenous rights at the international level.[1]

The question of culture enjoys a prominent position in the Declaration. Indeed it is precisely the cultural distinctiveness of indigenous peoples, coupled with their willingness to preserve it, that makes them particularly different from other sub-State groups.[2] Emphasising the fact that indigenous peoples' culture has both an encompassing and spiritual significance, the concept of 'cultural heritage' has often been used to refer to everything that belongs to the distinct identity of an indigenous people.[3] Cultural heritage is closely connected with the history, culture, and identity of an indigenous people and manifests itself in various domains, including traditional knowledge and practices, literary works, musical expressions, performances, rituals, and social practices;[4] it is transmitted from generation to generation, and is constantly recreated by indigenous peoples in response to changes in their environment and their interaction with nature as well as their history.[5]

This holistic understanding of culture has important implications for the intellectual

* Lecturer, The City Law School, City University London.

[1] UN General Assembly Resolution 61/295 of 13 September 2007.

[2] For an analysis of the concept of 'indigenous peoples' in international law, see B. Kingsbury, ' "Indigenous Peoples" in International Law: a Constructivist Approach to the Asian Controversy' (1998) 92 *American Journal of International Law*, pp. 414-457.

[3] See, in particular, the *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, by Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/1993/28 (28 July 1993). While other terms have been, and can be used, e.g. 'indigenous culture', 'indigenous traditional culture', or 'indigenous cultural and intellectual property', there seems to be widespread agreement on the need to employ a holistic and comprehensive understanding and approach to the questions of culture and intellectual property in relation to indigenous peoples. See, among others, *Background Note to the International Workshop on Traditional Knowledge*, Panama City, 21-23 September 2005, prepared by the Secretariat of the UN Permanent Forum on Indigenous Issues, UN Doc. PFII/2005/WS.TK, para 1.

[4] *Review of the Draft Principles and Guidelines on the Heritage of Indigenous Peoples*, Working paper submitted by Yozo Yokota and the Saami Council, UN Doc. E/CN.4/Sub.2/AC.4/2006/5 (16 June 2006), p. 6.

[5] *Ibid.*

property rights of indigenous peoples. The latters do not consider culture as something that can be possessed, but rather as a heritage to be preserved and respected, most typically in a collective form. For this reason, the existing regime of intellectual property rights appears ill suited to protect adequately the expressions and manifestations of indigenous culture.[6] Against this background, it is not surprising that the misappropriation of indigenous cultural heritage has become a source of increasing concern at the international level.[7]

Taking note of all the above, the Declaration establishes, in Article 31, that indigenous peoples 'have the right to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expressions.' In light of the centrality of the Declaration in the realm of indigenous rights, Article 31 represents the reference point for any credible discussion of the interlink between the cultural and intellectual property rights of indigenous peoples. This chapter seeks to contextualize this important provision within the normative framework of the Declaration. The first part of the chapter will examine the legal and political significance of the Declaration, discussing the circumstances surrounding its drafting and adoption as well as its normative content. The second part of the chapter will focus on the key provisions of the Declaration that are closely connected with indigenous peoples' intellectual property rights, including those on self-determination and land rights. Special attention will be paid to the content of Article 31 of the Declaration, highlighting the progressive character of this provision in relation to the intellectual property rights regime currently in force at the international level.

2. The United Nations Declaration on the Rights of Indigenous Peoples

The adoption of the Declaration marked a crucial moment in the history of the relationship between indigenous peoples and international law. While for centuries indigenous peoples remained invisible to international law and institutions,[8] with the adoption of the Declaration international law turned into an instrument of protection of indigenous rights, seeking to guarantee the very 'survival, dignity and well-being' of these peoples.[9] It is, therefore, not surprising that many welcomed the establishment of this important instrument as a triumph for

[6] Referring to the 'square peg in the round hole' analogy, Batt has observed that one can hardly fit the square peg of indigenous culture heritage into the round hole of the intellectual property rights regime. F. Batt, Ancient Indigenous Deoxyribonucleic Acid (DNA) and Intellectual Property Rights, *The International Journal of Human Rights*, 16 (2012), p. 153.
[7] See, for example, G. Dutfield, The Public and Private Domains: Intellectual Property Rights in Traditional Knowledge, 21 (2000) *Science Communication*, pp. 277-278.
[8] P. Thornberry, *Indigenous Peoples and Human Rights* (MUP 2002) p. 83.
[9] Article 43 of the Declaration.

justice.[10]

That said, the Declaration does not only carry historic and symbolic value but is of enormous practical significance for indigenous peoples. It is the most comprehensive and progressive instrument concerning indigenous rights in international law, as well as the only document of universal scope focusing on these rights.[11] The two International Labour Organisation's conventions protecting the rights of indigenous peoples contain less ambitious provisions than those enshrined in the Declaration, and have been poorly ratified, leaving the majority of the world's indigenous peoples without effective protection.[12] Similarly, the legal regimes developed by generic UN human rights bodies are inevitably limited by the fact that their respective instruments are not designed to protect specifically the full range of claims advanced by indigenous peoples.[13]

In light of the above, it is obvious that indigenous peoples regard the Declaration as a fundamental legal tool for the protection of their rights internationally. Whether the Declaration may also be seen as an authoritative and influential legal document depends, however, on a number of additional considerations. In particular, special attention needs to paid to the legal status of the instrument, which, being adopted by means of a Generally Assembly resolution, does not *per se* produce legally binding obligations. Before tackling this crucial question, the next section will provide an overview of the history of the Declaration, as this has important implications for its overall political and legal force.

2.1 The History of the Declaration

The history of the process leading to the adoption of the Declaration can be divided into three key stages: first, the opening up of the UN system to the claims of indigenous peoples; secondly, the broad identification of the legal regime concerning indigenous rights; and,

[10] See, for example, High Commissioner for Human Rights Hails Adoption of Declaration on Indigenous Rights (13 September 2007) at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6097&LangID=E.

[11] For an overview of the Declaration, see S. Errico, 'The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview' and 'The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview' (2007) 7 *Human Rights Law Review*, pp. 741-759.

[12] ILO Convention No 107 of 1957 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, text and table of ratifications available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107>; and ILO Convention No 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries, text and table of ratifications available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>. ILO Convention No 107 was declared closed for ratification after the establishment, in 1989, of ILO Convention No 169.

[13] This is particularly true with regard to the jurisprudence developed by the Human Rights Committee and Committee on the Elimination of Racial Discrimination within the framework of, respectively, the International Covenant on Civil and Political Rights and International Convention on the Elimination of All Forms of Racial Discrimination. For an overview, see P. Thornberry, *Indigenous Peoples and Human Rights* (MUP 2002).

thirdly, the actual adoption of the document and its affirmation on a global scale. The first significant event within the UN took place in the early 1970s, when the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) appointed Special Rapporteur José Martínez Cobo to undertake a comprehensive study on the situation of indigenous peoples.[14] With this initiative, and for the first time since its establishment, the UN resolved to address the "indigenous question," reversing a tradition of injustice and discrimination against indigenous peoples. Following the completion of this important study, the Working Group on Indigenous Populations (WGIP) was created as a subsidiary body of the Sub-Commission with the task of reviewing normative developments pertaining to the human rights of indigenous peoples.[15]

The completion of Cobo's study and creation of the WGIP indicate that by the mid 1980s the human rights claims of indigenous peoples had received formal recognition within the UN structure. The next step consisted of designing a new legal regime which would concern specifically indigenous rights. Although the WGIP had not been established with the task of producing a document on the rights of indigenous peoples, its five independent members decided in 1985 that 'the time had come to begin the preparation of a draft.'[16] The first draft was completed in 1993 with the decisive contribution of indigenous peoples' representatives. A year later, the document was adopted by the Sub-Commission and sent to the Commission on Human Rights (Commission).[17]

When the draft reached the Commission several States expressed their concerns about its radical content. These objections led the Commission to set up a subsidiary organ, the Working Group on the Draft Declaration (WGDD), for the sole purpose of further elaborating the text of the draft.[18] The establishment of the WGDD represents the beginning of the third, and crucial, stage in the history of the Declaration. Two elements characterised the work of the WGDD. Firstly, the direct and influential participation of indigenous representatives to the sessions of this body, a circumstance which will be further discussed in section 3.1 below; and, secondly, the length of the relevant negotiations. Because of the controversies surrounding important provisions such as those on self-determination and land rights, the WGDD took more

[14] Study of the Problem of Discrimination Against Indigenous Populations, Volume V Conclusions, Proposals and Recommendations, by Jose' R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4.
[15] Economic and Social Council Resolution 1982/34.
[16] Report of the Fourth Session of the WGIP, E/CN.4/Sub.2/1985/22, para. 58.
[17] Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted 26 Aug. 1994, Sub-Commission Res. 1994/45, UN Doc. E/CN.4/1995/2 (1994).
[18] The working group was established in 1995 in accordance with Commission on Human Rights Resolution 1995/32 and Economic and Social Council Resolution 1995/32.

than ten years before agreeing on a final text of the draft and send it to the newly created Human Rights Council (Council). After the adoption by the Council during its first session in June 2006,[19] the text reached the General Assembly, where it was ultimately adopted in September 2007. In total, it took more than twenty years for the Declaration to be produced and adopted.

3. The Legal Value of the Declaration

As noted in section 2 above, the Declaration belongs to what it is normally referred to as soft law. Contrary to hard law instruments such as treaties, soft law instruments are not legally binding.[20] In formalistic terms, this lack of legal force inevitably weakens the overall value of an international document. In this sense, the soft law nature of the Declaration clashes with the positive narrative which portrays the instrument as the reference point for any credible discussion of indigenous peoples' rights under international law. A more careful analysis of the features of the Declaration, however, suggests that this is not necessarily the case.[21]

Under the complexity and dynamism of contemporary international law-making, soft law cannot be simply dismissed as non-law. Instead, its value should be evaluated taking into account two fundamental elements. First, international standards may well emerge as a result of the interplay of different instruments, regardless of their nature.[22] It follows that special attention should be paid to the relationship between soft law and existing hard law. Secondly, the category of soft law includes, among others, inter-State conference declarations, UN General Assembly resolutions, codes of conduct, guidelines and the recommendations of international organisations. It is, therefore, clear that various soft law instruments will have different legal significance, as well as different degrees of effectiveness. This assertion goes far beyond the limited formal aspect of the instrument concerned. More importantly, it refers to,

[19] Draft Declaration on the Rights of Indigenous Peoples, adopted 29 June 2006, H.R.C. Res. 2006/2, U.N. GAOR, Hum. Rts. Council, 1st Sess., U.N. Doc. A/HRC/1/2 (2006).

[20] On soft law generally, see Christine M. Chinkin, The Challenge of Soft Law: Development and Change in International Law, 38 (1989) *International and Comparative Law Quarterly*, p. 850.

[21] For a more detailed discussion of the legal significance of the Declaration, see M. Barelli, 'The Role of Soft Law in the International Legal System: The case of the United Nations Declaration on the Rights of Indigenous Peoples', (2009) 58 *International & Comparative Law Quarterly*, 957-983.

[22] In this regard, it has been aptly observed that soft law and hard law are connected and intertwined to such an extent that sometimes it may be difficult to draw clear-cutting distinctions between the two. For example, soft-law instruments may have a specific normative content that is actually 'harder' than certain 'soft' obligations included in some treaties, and, equally importantly, that non-binding instruments may provide for supervisory mechanisms characteristic of hard law texts. See, D Shelton, Law, 'Non-Law and the Problem of 'Soft Law'' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP, Oxford, 2000) 10.

inter alia, the different contexts within which an instrument is adopted, the circumstances which have led to its establishment, its very normative content and the institutional setting within which it exists. With this in mind, the following two sections will discuss two central features of the Declaration which contributed importantly to enhance its legal status and, consequently, its overall value.

3.1 The Legitimacy of the Declaration

The first point to underline is that under UN practice a declaration is 'a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.'[23] Thus, the principles underlying the Declaration are already vested with special value. That said, it is the combination of three additional elements that enhances significantly the legitimacy of the document.

Firstly, as discussed in section 2.1 above, the drafting process of the Declaration started in 1985 and reached a conclusion only after twenty-two years of fervent negotiations, deadlocks and compromises. As observed by the then Chairperson of the UN Permanent Forum on Indigenous Issues, Ms. Victoria-Tauli Corpuz, this makes the Declaration one of the most extensively discussed and negotiated texts in the history of the UN.[24] The time of gestation certainly reflects the complexity of the issues at stake. However, it also indicates that significant efforts were made to produce a document capable of responding to the claims of indigenous peoples while remaining acceptable to States and in accordance with international law. The result of such a collective effort certainly carries special value.

Secondly, the Declaration's value is further strengthened by the exceptional support it received within the United Nations system. Such a support did not come exclusively from those UN human rights bodies directly involved in the production of the Declaration. The General Assembly, for one, constantly supported the project. After establishing, in 1993, the First Decade of the World Indigenous People (1994-2004), it encouraged the Commission on Human Rights to consider the draft declaration produced by the Sub-Commission with a view to achieving its final adoption within the Decade.[25] However, once realized that this would not be possible, it established the Second Decade of the World Indigenous Peoples (2005-2015)

[23] Memorandum of the Office of Legal Affairs, UN Secretariat, 34 UN ESCOR, Supp. (No. 8), 15, UN Doc. E/CN.4/1/610 (1962).
[24] 'UN Forum Chairperson Decries Delay in Adopting Declaration on Indigenous Rights', 12 December 2006, Available at <http://www.un.org/apps/news/story.asp?NewsID=20959&Cr=indigenous>.
[25] UN General Assembly Resolution 49/214 of 23 December 1994.

and urged 'all parties involved in the process of negotiation to do their utmost to … present for adoption as soon as possible a final draft United Nations declaration on the rights of indigenous peoples.'[26] Similarly, other UN bodies and specialized agencies repeatedly expressed their support for the Declaration, contributing to keep the issue of indigenous peoples at the forefront of the UN human rights agenda.[27] References to the Declaration can also be found in major documents recently adopted under the auspices of the United Nations.[28] States' support was equally remarkable. Large majorities voted in favour of the Declaration both at the Human Rights Council and General Assembly.[29] Moreover, the statements of various governmental representatives during the sessions of the WGDD pointed to the existence of a strong international convergence on the underlying principles of the Declaration.[30]

The third element that enhances the legitimacy of the Declaration is the direct and large participation of indigenous peoples' representatives in the relevant drafting process. It was noted in section 2.1 above that indigenous representatives participated in the sessions of both the WGIP and WGDD. At this point, it should be emphasized that indigenous organizations were allowed to participate in these meetings regardless of their consultative status with the Economic and Social Council (ECOSOC), notably an uncommon circumstance by UN standards.[31] This remarkable outcome is in line with modern calls to enhance 'popular participation' in law-making processes in order to promote the legitimacy and value of the provisions concerned.[32] It is also important to note that States themselves repeatedly acknowledged that indigenous participation was not only vital but also necessary to the

[26] UN General Assembly Resolution 59/174 of 20 December 2004, para. 12.
[27] See the list of documents submitted by UN organisations at each Session of the PFII on the website of the Forum, at <http://www.un.org/esa/socdev/unpfii/index.html>.
[28] Vienna Declaration and Program of Action, UN Doc. A/CONF.157/23 (12 July 1993) paras. 28 and 29; Durban Declaration and Programme of Action, adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, from 31 August to 8 September 2001, para. 206; 2005 World Summit Outcome, included in UN General Assembly Resolution 60/1 of 16 September 2005, para. 105.
[29] At the Human Rights Council, 30 States voted in favour, 4 voted against and 11 abstained. At the General Assembly, 143 States voted in favour, 4 voted against and 11 abstained.
[30] Crucially, this support has not waned following the adoption of the instrument. For example, at the Durban Review Conference in April 2009, 182 States adopted by consensus an outcome document which welcomed the adoption of the Declaration and highlighted the necessity to implement the rights of indigenous peoples at the domestic level. UN Office of the High Commissioner for Human Rights, Outcome document of the Durban Review Conference (24 April 2009) para. 73.
[31] According to Article 71 of the United Nations Charter, 'the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.' Updating the arrangements set out in resolution 1296 (XLIV) of 23 May 1968, ECOSOC Resolution 1996/31 of 25 July 1996 has outlined the eligibility requirements for consultative status as well as the rights and obligations of non-governmental organizations in consultative status with the United Nations.
[32] R. Falk, *Human Rights Horizons: the Pursuit of Justice in a Globalizing World* (Routledge, New York, 2000) 62–63.

production of the Declaration.[33]

3.2 The Normative Content of the Declaration

The discussion conducted in the previous section suggests that the inclusive nature of the Declaration's drafting process, combined with the widespread support that it received internationally, had an important effect on the perceived legitimacy of the document. What remains to be established is whether the provisions of the Declaration lay on a solid legal background, that is to say, whether they are related to existing law or principles of international law, or reflect existing, or emerging international law standards. This is an important question for if the content of the Declaration appeared disconnected from existing norms of, generally, international law, and, specifically, international human rights law, the legitimacy and authoritativeness of the text would be seriously undermined.

At the outset, it should be noted that, as discussed in section 2.1 above, the Declaration is the culmination of a long and complex political and normative process. Over this extended period, the drafters could take into account and merge together the diverse legal standards related to indigenous peoples' rights which had been, and were being, elaborated by different international, regional and national bodies.[34] In a sense, therefore, the Declaration did not create a new legal framework, but simply further elaborated on and crystallized one. Looking more specifically at the content of the document, there is a strong connection between its provisions and existing law. For example, a number of rights enshrined in the Declaration have already been accepted both under general international law, e.g., the right not to be subjected to any act of genocide (Article 7 of the UNDRIP), and the minority rights regime, e.g., the right of a group to practice its own cultural traditions and customs (Article 11), and the right to public participation (Article 18).[35] It is true, however, that some provisions of the Declaration have stretched existing legal standards, including, for example, those concerning self-determination, and, to certain extents, land rights. Nevertheless, these developments have received widespread support by various judicial and quasi-judicial bodies of both international and regional

[33] See, for example, the statements of the representatives of Denmark, Canada, Norway, Chile, Sweden, USA, Colombia and the Russian Federation at the Second Session of the WGDD. 'Report of the Working Group on the Draft Declaration on its Second Session' UN Doc. E/CN.4/ 1997/102 (10 December 1996) paras 23–34.

[34] W. Van Genugten and C. Perez-Bustillo, 'The Emerging International Architecture of Indigenous Rights: the Interaction Between Global, Regional, and National Dimensions' (2004) 11 *International Journal on Minority and Group Rights,* p.379.

[35] See, for example, M. Weller (ed.), *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (OUP 2007).

character.[36] Equally importantly, they are in line with similar provisions found in other international documents dealing, either specifically or incidentally, with indigenous peoples' rights.[37] Thus, there seems to exist a solid relationship between the normative content of the Declaration and the norms, standards, and principles related to indigenous peoples that have recently emerged at the international level. Crucially, this strengthens the perception of the Declaration as an authoritative and legitimate document,[38] with important implications on its overall legal significance.

4. Indigenous Peoples' Rights and the Intellectual Property Regime

The first part of the chapter discussed the political and legal significance of the Declaration, suggesting that the soft law nature of the instrument does not diminish its legal validity and significance. Having clarified this important point, it is now possible to discuss the way in which the Declaration approaches the intellectual property rights of indigenous peoples.

The traditional regime of intellectual property recognises primary importance to the economic aspect of culture, and is premised on the concept of individual rights;[39] indigenous peoples, by contrast, emphasise the collective character as well as spiritual connotations of their cultural manifestations.[40] More generally, it can be said that indigenous culture is 'a holistic concept based on common material and spiritual values',[41] which includes manifestations in, among others, language, spirituality, arts, traditional knowledge, customs, rituals, ceremonies, methods of production, economic activities, and cosmovisions.[42] The different approach to and understanding of culture create important tensions between indigenous peoples' rights and the

[36] In particular, the UN Human Rights Committee, UN Committee on the Elimination of All Forms of Racial Discrimination, Inter-American Commission on Human Rights, Inter-American Court of Human Rights, African Commission on Human and Peoples' Rights. There is extensive coverage of these developments in the indigenous rights literature. For a comprehensive discussion see S. Wiessner, Re-Enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime, 15 (2010) *UCLA Journal of International Law & Foreign Affairs*, pp. 239-288.

[37] In relation to land rights, see, among others, the 1992 Convention on Biological Diversity, Article 8(j), 31 ILM 818 (1992), the 1992 Rio Declaration on Environment and Development, 31 ILM 874 (1992), and ILO Conventions No. 107 and No. 169, supra note 10.

[38] J. Anaya, *Indigenous Peoples in International Law* (OUP 1996) p. 53.

[39] For an overview, see L. Helfer and G. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (CUP, 2011).

[40] As explained by Dodson, 'Western constructs of intellectual property focus on individual knowledge and creativity, rather than communal trans-generational knowledge.' Report of the Secretariat on Indigenous Traditional Knowledge, prepared by Special Rapporteur M. Dodson, UN Doc. E/C.19/2007/10 (21 March 2007) para. 20.

[41] Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, prepared by the UN Expert Mechanism on the Rights of Indigenous Peoples, UN Doc. A/HRC/EMRIP/2012/3 (30 April 2012) para. 52.

[42] *Ibid.*

intellectual property regime. For example, indigenous peoples claim that their traditional knowledge, which is part of their culture and identity, should be subject to their exclusive ownership and control, but this contrasts, to some extents, with the concept of 'public domain' recognized under intellectual property law. Complications of this kind have contributed to create an unsatisfactory situation which often permits the misappropriation of indigenous culture and knowledge. The growing international concern surrounding the phenomenon of bio-piracy offers a good example in this respect.[43]

The severity of the problem has led numerous international bodies to take action in an attempt to remedy the current situation. In the last decade, bodies such as the UN Educational, Scientific and Cultural Organization, the UN Conference on Trade and Development, the World Trade Organization TRIPS Council, and, in particular, the World Intellectual Property Organization, have all conducted work related to indigenous peoples' cultural heritage.[44] Despite all these efforts, a viable legal solution to the problem has yet to be agreed on.[45] Against this background, the Declaration provides a human rights response to the question of indigenous peoples' intellectual property.[46] This means that the intellectual property rights of indigenous peoples are not regarded as a distinct issue but, rather, as part of the broader human rights framework enshrined in the Declaration. The resulting interaction has important implications for the way in which the intellectual property rights of indigenous peoples are read and understood.

Two rights should be singled out by virtue of their centrality to the Declaration's human rights framework, namely the right to self-determination and the right to own and control ancestral lands.[47] Self-determination is a far-reaching and controversial right which is normally

[43] Biopiracy has been described as the 'unauthorized extraction of traditional knowledge or biological resources and/or the patenting of "inventions" that derive from such knowledge or resources without any provision for sharing the benefits with the providers.' See G. Dutfield, The Public and Private Domains: Intellectual Property Rights in Traditional Knowledge, 21: 3 (2000) *Science Communication*, p. 278.

[44] Guideline for the review of the draft principles and guidelines on the heritage of indigenous peoples, Working paper submitted by Yozo Yokota and the Saami Council, UN Doc. E/CN.4/Sub.2/AC.4/2004/5 (17 June 2004), para. 3. In particular, the WIPO is currently working on new interpretations of the right to intellectual property so as to remedy the existing shortcomings of the system. In order to enhance the protection of traditional knowledge and traditional cultural expressions against misappropriation and misuse, the WIPO set up an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), which met for the first time in 2001 with the aim of producing a draft for the establishment of a new legal regime.

[45] For a discussion of some of the proposed solutions see F. Lenzerini, Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of their Traditional Knowledge, at http://www.culturalrights.net/descargas/drets_culturals263.pdf.

[46] For a general discussion on the question of human rights and intellectual property, see L. Helfer and G. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (CUP, 2011).

[47] As stated by the UN Expert Mechanism on the Rights of Indigenous Peoples, 'indigenous peoples' cultures … are an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources.' Study on the role of languages and culture in the promotion and protection of the rights

recognized to all peoples under international law. In the context of this chapter, the enduring controversies related to the meaning and beneficiaries of this right need not be addressed.[48] What is relevant, instead, is the fact that self-determination is strictly connected with the cultural rights of indigenous peoples because, by virtue of this right, indigenous peoples 'freely determine their political status and freely pursue their economic, social and *cultural* development.'[49] This means that the protection of their cultural heritage and identity is embedded in the self-determination discourse.[50] Important consequences follow from this premise. For example, indigenous peoples should have the right, in accordance with their right to self-determination, to allow or deny the use of their traditional knowledge as this may affect the development of their culture and identity.

Land rights are also importantly associated with the question of intellectual property. Indigenous peoples have a distinctive and profound relationship with their lands.[51] This special relationship is at the core of indigenous societies,[52] and encompasses social, cultural, spiritual, economic and political dimensions.[53] The Declaration aims at preserving this distinctive connection by recognizing indigenous peoples' rights to own and control their ancestral lands, including the resources found thereon. Article 25, for example, recognizes the right of indigenous peoples to 'maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.' Following on that, Article 26 establishes that 'indigenous peoples have the right to the lands,

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and identity of indigenous peoples, prepared by the UN Expert Mechanism on the Rights of Indigenous Peoples, UN Doc. A/HRC/EMRIP/2012/3 (30 April 2012), para. 52.

[48] For a discussion see M. Barelli, Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?', (2011) 4 *International Community Law Review*, pp. 413-436.

[49] Emphasis mine. Article 3, UN Declaration on the Rights of Indigenous Peoples.

[50] For example, indigenous peoples' decision to allow or deny the use of their traditional knowledge may be seen as an expression of their right to self-determination for this is related to their identity and culture. On the connection between cultural rights and self-determination see Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, by Mrs. Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/2000/26 (19 June 2000), Annex I, Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, Principle 2), and Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples, prepared by the UN Expert Mechanism on the Rights of Indigenous Peoples, UN Doc. A/HRC/EMRIP/2012/3 (30 April 2012) para. 20.

[51] For example, the Inter-American Court of Human Rights has noted that 'the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.' *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR (Ser. C) No. 79 (2001) para. 149.

[52] As one indigenous representative put it: 'the issue for indigenous peoples is the land; indigenous peoples are one with the land'. Statement by William Means, in *Voices of Indigenous Peoples: Native People Address the United Nations*, ed. A. Ewen (Santa Fe, NM: Clear Light, 1994), p. 60.

[53] Indigenous Peoples and their Relationship to Land', final working paper, prepared by the special rapporteur, Mrs Erica-Irene A. Daes, UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001), para. 12.

territories and resources which they have traditionally owned, occupied or otherwise used or acquired.' Article 26 also enshrines the right of indigenous peoples 'to own, use, develop and control the lands, territories and resources that they possess.' These provisions are particularly relevant because some components of the indigenous cultural heritage, e.g. traditional knowledge, are strictly related to indigenous ancestral lands, and, more specifically, to the resources found thereon.[54] This means that protecting the traditional knowledge of indigenous peoples, and, in turn, their cultural heritage, becomes part of the broader international commitment to protect the spiritual relationship that connects indigenous peoples with their ancestral lands and resources, notably a principle which lies at the core of the Declaration.

A final important point should be made in relation to the human rights framework of the Declaration. Rights such as the right to self-determination and the right to own and control ancestral lands are enjoyed collectively by indigenous peoples. This is particularly important considering that international human rights instruments have been traditionally reluctant to endorse collective rights for sub-State groups.[55] The Declaration, by contrast, seeks a fair balance between the collective and individual rights of indigenous peoples, endorsing a conciliatory vision whereby each individual has individual rights and responsibilities within the context of collective rights.[56] This vision is somewhat close to the indigenous belief according to which the very identity of indigenous peoples 'is shaped by the dynamic balance between and linkage of [their] collective and individual rights'.[57] As will be further discussed in the next section, and in line with its progressive approach to collective rights generally, the Declaration fully endorses also the collective character of indigenous peoples' intellectual property rights,

[54] As noted by Lenzerini, 'plant genetic resources and the traditional knowledge related to them represent two inseparable elements of a unique social (and legal) concept that expresses the spiritual relationship of indigenous groups to their natural resources.' F. Lenzerini, Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of their Traditional Knowledge, p. 15,
at http://www.culturalrights.net/descargas/drets_culturals263.pdf.

[55] For an overview of the individual-collective rights debate under international law, see P. Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 *Human Rights Quarterly*, p. 80.

[56] Article 35, for example, affirms that 'indigenous peoples have the right to determine the responsibilities of individuals to their communities.' At the same time, however, one crucial passage of the preamble importantly recognises 'that indigenous individuals are entitled without discrimination to all human rights recognised in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as people.' Several provisions of the Declaration strengthen the invoked coexistence between individual and collective rights, including Articles 1, 2, 6, 7, 8, 9, 14, 17, 24, 33, 35, 40, and 44.

[57] Explanatory Note on the Collective Rights of Indigenous Peoples, Proposal by Indigenous Representatives, submitted during the Seventh Session of the WGDD, UN Doc. E/CN.4/2002/98, Annex II.

5. The Intellectual Property Rights of Indigenous Peoples in the Declaration

The previous section discussed the intellectual property rights of indigenous peoples in the context of the human rights framework of the Declaration, highlighting that the protection of the cultural and intellectual property rights of indigenous peoples is fundamentally connected with the effective enjoyment of their rights to self-determination and to own and control ancestral lands.[58] That said, the Declaration contains also a set of provisions that deal specifically with the issue of intellectual property. Article 11, for example, establishes that 'indigenous peoples have the right to practise and revitalize their cultural traditions and customs', and recognizes their 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.' Article 12 focuses on the right 'to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies', including the right 'to the use and control of their ceremonial objects.' Article 13 further states that indigenous peoples have the right 'to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.' Finally, Article 24 protects the right of indigenous peoples 'to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.'

The most important provision with respect to intellectual property rights, however, is found in Article 31, which reads:

> 'Indigenous 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.'

By connecting intellectual property with the concepts of cultural heritage, traditional knowledge and traditional cultural expressions, Article 31 links the question of intellectual

[58] Expert Mechanism on the Rights of Indigenous Peoples: Study on the Role of Languages and Culture in the Promotion and Protection of the Rights and Identity of Indigenous Peoples, UN Doc. A/HRC/EMRIP/2012/3, para 52.

property rights with that of cultural rights, promoting the formers' inclusion within the Declaration's human rights framework. Furthermore, this provision fully upholds the collective character of these rights, in accordance with the Declaration's overall acceptance of collective rights that was discussed in the previous section.[59] In light of the above, the protection of the intellectual property of indigenous peoples becomes inseparable from the protection of their broadly defined cultural rights.[60] Furthermore, in the Declaration' architecture the effective protection of indigenous peoples' cultural and intellectual property becomes necessary to the realization of their fundamental rights to self-determination and to own and control their ancestral lands.

By rejecting a purely economical understanding of culture and promoting a holistic approach to the protection of indigenous cultural heritage, Article 31 sets a model for future developments in the area.[61] In this respect, it is important to note that Article 31(2) of the Declaration requires States to take effective measures to recognize and protect the rights affirmed in the first paragraph of the provision. In a similar vein, Article 42 of the Declaration requires that United Nations bodies and specialized agencies promote respect for and full application of the provisions of this instrument.[62] As discussed in the first part of this chapter, the provisions of the Declaration do not produce legally binding obligations. That said, the considerations developed in section 3 above suggested that the Declaration cannot be simply dismissed as non-binding law. By virtue of its drafting history, normative content and widespread international support the Declaration represents a highly influential legal instrument which reflects the current indigenous rights regime at the international level. For this reason,

[59] The close relationship between human rights and cultural heritage has been confirmed by a recent United Nations report prepared by the independent expert in the field of cultural rights, Farida Shaheed. The report noted, among other things, that 'the need to preserve/safeguard cultural heritage is a human rights issue. Cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and communities and their identity and development processes.' The report further observed that 'the misappropriation of cultural heritage would also impair the rights of communities to access and enjoy their own cultural heritage.' Report of the independent expert in the field of cultural rights, Farida Shaheed, UN Doc.A/HRC/17/38 (21 march 2011), paras. 77 and 12.

[60] For a discussion of cultural rights in international law, see P. Macklem, The Law and Politics of International Cultural Rights: A Review Essay of Elsa Stamatopoulou, Cultural Rights in International Law and Francesco Francioni and Martin Scheinin (eds.), Cultural Human Rights, 16:3 (2009) *International Journal on Minority and Group Rights*, pp. 481–501

[61] It should be noted, however, that some States expressed their concerns about the content of this provision during the negotiation stage. See, for example, Report of the Second Session of the WGDD, E/CN.4/1997/102, para. 66, and Report of the Eight Session of the WGDD, UN Doc. E/CN.4/2003/92, paras. 39 and 40. References to the question of intellectual property rights also featured in some governmental statements made on the occasion of the vote on the Declaration at the General Assembly. Available at http://www.un.org/News/Press/docs/2007/ga10612.doc.htm.

[62] Article 42 establishes 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.'

UN human rights treaty bodies have used it as a guide to interpret State parties' obligations under their respective instruments,[63] regional human rights courts and quasi-courts have endorsed it in their judgments,[64] and UN specialized agencies have made it the central instrument around which to develop their own initiatives in the field of indigenous rights.[65] It follows that international bodies and States should pay considerable attention to the Declaration's overall approach to the question of indigenous culture heritage, and use Article 31 as a reference point for their work concerning the intellectual property rights of indigenous peoples.

6. Conclusions

The question of indigenous peoples' intellectual property rights is receiving increasing attention at the international level following widespread concerns about the lack of adequate protection offered by the relevant legal regime. The source of the problem lays in the different ways in which the western-constructed system of intellectual property law and indigenous peoples approach and understand the concepts of cultural and intellectual property. Various international bodies dealing, either incidentally or specifically, with these issues have acknowledged the seriousness of the situation and worked towards the identification of viable legal solutions. The central instrument concerning the rights of indigenous peoples at the international level, i.e. the 2007 United Nations Declaration on the Rights of Indigenous Peoples, provides a human rights answer to this problem. It incorporates intellectual property rights within the wider indigenous human rights framework, linking those rights with, generally, cultural rights and, specifically, the rights to self-determination and to own and

[63] For example, in its Concluding Observations on the fourth, fifth and sixth periodic reports of the United States, the United Nations Committee on the Elimination of Racial Discrimination recommended that the Declaration 'be used as a guide to interpret the State Party's obligations under the Convention relating to Indigenous Peoples.' UN Doc. CERD/C/USA/CO/6 (February 2008) para. 29. In a similar vein, in 2009, the United Nations Committee on the Rights of the Child published a general comment recommending States parties to adopt a rights-based approach to indigenous children based, among others, on the Declaration. Indigenous Children and Their Rights under the Convention, General Comment No. 11, UN Doc. CRC/C/GC/11 (12 February 2009) para. 82.

[64] *People v. Suriname,* Inter-American Court of Human Rights, Series C 172 (2007) para. 131; *Centre for Minority Rights Development (Kenya) v. Kenya*, African Commission on Human and Peoples' Rights, 276/2003 (4 February 2010) para. 204.

[65] Consider, for example, the Policy on Engagement with Indigenous Peoples produced in 2009 by the International Fund for Agricultural Development, the Policy on Indigenous and Tribal Peoples adopted in 2010 by the Food and Agriculture Organization, and the Guidelines on Indigenous Peoples' Issues produced by the UN Development Group. Although not a UN specialize agency, the latter is a UN global development network that collaborates with various UN specialized agencies dealing with, among others, indigenous issues. The policies are available, respectively, at http://www.ifad.org/english/indigenous/documents/ip_policy_e.pdf; http://www.fao.org/docrep/013/i1857e/i1857e00.pdf; and http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf.

control ancestral lands. The Declaration's holistic approach, well illustrated by Article 31, should guide States' and international bodies' attempts to protect the intellectual property rights of indigenous peoples. This is particularly true in light of contemporary developments in the area of intellectual property directed towards the recognition of the important relationship between the latter and human rights. Crucially, the non-legally binding nature of the Declaration does not undermine the instrument's overall value and legal significance. As discussed in this chapter, the drafting history, widespread international support and normative context of the Declaration confer on the document the legitimacy and authoritativeness that are necessary to qualify as an influential legal instrument.