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Abstract

As aspects of decolonisation, indigenous and other colonised peoples' historical claims for cultural survival, and for distinct identity, remain unresolved issues in modern international law. Following the salt-water doctrine¹ which resulted in the loss of solidarity between the indigenous peoples in the enclave colonies and their counterparts in the third world, these claims have been pursued, for the most part, by the former within a narrow political rubric of human rights and self-determination. This contribution examines the complicity of the colonial nation-state, both as a concept, and an actor in marginalising the indigenous peoples of the enclave territories, and in empowering their counterparts in far-flung places. It notes that since the mid-20th century, however, the United Nations has provided a platform for indigenous peoples to challenge the circumscribing stranglehold of the nation-state as the ultimate arbiter of their claims. The protection of traditional knowledge of both the indigenous peoples in enclave territories and their non-Western counterparts elsewhere provides a rallying point in this endeavour.

Protecting indigenous knowledge in international law: solidarity beyond the nation-state

Chidi Oguamanam

Introduction

As aspects of decolonisation, indigenous and other colonised peoples' historical claims for cultural survival, and for distinct identity, remain unresolved issues in modern international law. Following the salt-water doctrine¹ which resulted in the loss of solidarity between the indigenous peoples in the enclave colonies and their counterparts in the third world, these claims have been pursued, for the most part, by the former within a narrow political rubric of human rights and self-determination. This contribution examines the complicity of the colonial nation-state, both as a concept, and an actor in marginalising the indigenous peoples of the enclave territories, and in empowering their counterparts in far-flung places. It notes that since the mid-20th century, however, the United Nations has provided a platform for indigenous peoples to challenge the circumscribing stranglehold of the nation-state as the ultimate arbiter of their claims. The protection of traditional knowledge of both the indigenous peoples in enclave territories and their non-Western counterparts elsewhere provides a rallying point in this endeavour.

I argue that the focus which the decolonisation campaign initially placed on the political right to self-determination has witnessed a paradigm shift toward a negotiated and relational approach. Within that

framework, the protection of indigenous knowledge, as an aspect of indigenous self-determination, takes centre stage. Indigenous and other non-Western practitioners of *local* knowledge across the globe have a related worldview and an epistemic tradition based on the sanctity of the ecological order. Hence, the protection of indigenous knowledge provides for them a point of solidarity. Consequently, the struggle for the protection of indigenous knowledge has forged and produced global alliances. To a large degree, this rapprochement undermines the dichotomy in the colonial experiences between the so-called third and fourth worlds in which the nation-state, as a concept, played complicit roles of both empowering and weakening non-Western others.

This piece is divided into three main sections. Drawing especially from the United Nations process, the first section examines the role and complicity of the international law concept of the nation-state in foisting different and often conflicted colonial experiences among indigenous peoples in the enclave colonies and colonised peoples elsewhere. It finds that by not extending its decolonisation initiative to the enclave colonies, the United Nations created a dichotomy in international law's treatment of indigenous peoples and their colonised counterparts in the third world. This resulted in loss of solidarity as a result of changed priorities amongst colonised peoples. The next section puts in perspective the United Nations' policy of accommodating non-state actors in its deliberative processes. I argue that this policy mitigates the influence of nation-states in circumscribing indigenous aspirations, in that it paved the way for some degree of indigenous activism and political participation in municipal and international processes. Building on the theme of indigenous participation, I also explore the shift in the concept of self-determination from an overtly political approach to an emphasis on the protection of indigenous knowledge.

Again drawing on the United Nations framework, in the final section I examine relevant legal developments in the protection of indigenous knowledge. I explore aspects of international environmental law and the ongoing negotiation for a new jurisprudence of knowledge protection, or intellectual property rights, to accommodate indigenous epistemic narratives. It is observed that given their identical worldview,

and epistemic tradition, protection of indigenous knowledge is a point of solidarity for indigenous peoples and informal knowledge holders across the world. Knowledge protection provides the platform through which they now challenge the organising framework of the colonial nation-state that has historically undermined their collective aspirations.

The nation-state and indigenous exclusion

Peter Fitzpatrick and Eve Darian-Smith offer an attractive view of postcolonialism. According to them, in addition to many other perspectives, postcolonialism involves critical exploration of the West's relation to its 'other' (1999: 1). The latter refers to non-Western and/or indigenous peoples. Historically, colonialism provided the pivotal plank on which the foundation of the West's relation to its non-Western and indigenous others was laid. The central pillar in the colonial structure was the concept of the nation-state or the Westphalian state. In the colonial project, the nation-state was deployed as an instrument of isolation and discrimination against indigenous and non-Western peoples. In the enclave territories, as in other far-flung places, it was used to achieve contradictory objectives. While it constituted one of the bases for the denial of status and power to indigenous peoples in the colonies within, it was deployed emblematically to accord recognition and independence to the non-Western peoples in the far-flung colonies.

The collapse of papal political hegemony (1618–48) fostered the preeminence of the nation-state as the yardstick for political organisation and the recognition of diverse associational groupings of non-Western peoples. That development marked an evolutionary and conceptual shift from natural law as the universal moral code applicable to all peoples, into the 'bifurcated regime comprised of the natural rights of individuals and the natural rights of states' (Anaya 1996: 13 quoting Damerow 1978: 29).² In configuring the concept of the nation-state, Hobbes and Vattel, for instance, gave it a primacy analogous to individual holders of rights (Tuck 1991). Indeed, Vattel's positivist elucidation of the nation-state supported the idea of an exclusive body of

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laws that applied solely to states in their interaction with one another. Thus, individual rights and state (or collective) sovereignty, in their often conflicted framework, formed the foundation of Western liberal political philosophy (Anaya 1996).

Strikingly, Anthony Anghie (1996: 332) argues that contrary to the conventional view that sovereignty was developed in the West and then exported, the 'sovereignty doctrine acquired its character through the colonial encounter'. Colonialism provided the West with a template for the appraisal of its political culture in comparison to alternative ones. Writing in a different context, John Arras (1997: 75) observes that '[a]t the heart of our own self-conception ... lies a conception of the Other'.³ We define ourselves against alternatives. Indeed, colonialism was crucial in elaborating the character of the nation-state. State sovereignty was premised on the features of exclusive jurisdiction, territorial integrity, hierarchical and centralised authority (Anaya 1996) and the principle of non-interference in the domestic affairs of one another. The state was the model of all human and political associations and the framework for political privileges in international law. In the colonial encounter, because the peculiar cultural associations and socio-political groupings prevalent amongst indigenous and non-Western others did not conform to Westphalian statehood, they were not entitled to its inherent privileges. Colonialism presented a reflective platform upon which the doctrine of sovereignty was articulated in contradistinction to tribal, kinship and other confederate structures with overlapping spheres of territorial control among indigenous and non-Western peoples. Generally, indigenous political associations were lacking in all the key features of statehood, or so it was thought.⁴

In the late 19th and early 20th centuries, international law had shifted into an overarching positivist thrust (Westlake 1894, Lauterpacht 1952, Hyde 1945, Lindley 1926). It was narrowly construed as law between nations. Hence, indigenous and other non-Western peoples were not considered subjects of international law. Their only basis of international encounter or recognition was through the circumscribing agency of the colonial state. Somehow, all this changed in the second half of

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the 20th century. That period saw the wilting of the overbearing influence of the nation-state, and the Eurocentric character of international law. Perhaps the most prominent of the developments that impelled the redirection of international law from its extreme positivist appeal and the overbearing power of the nation-state, was the horrors of the Nazi Holocaust with its consequential influence on the world order. That experience prompted a reconsideration of the hitherto unquestioned powers of the nation-state regarding the treatment of its citizens (Wiessner 1999).

Following World War II, the United Nations enunciated a vision of world peace which incorporates basic human rights and values. Although based on the state-centric notion of international law, the United Nations Charter speaks to the 'rights that [naturally] accrue to peoples prior to the organization of the nation-states' (Nunes 1995: 528) that are parties to the Charter. The United Nations' emphasis on human rights and values as accruing to peoples naturally, without reference to the nation-state, and irrespective of political association, signalled a switch, or perhaps more appropriately, a return to a naturalist approach in international law. It also heralded some measure of surveillance over the exercise of sovereign authority by the nation-state. As part of this regime, the United Nations Charter entrenched the participation of non-state actors in its deliberative processes. It sanctioned the affiliation of Non-Governmental Organisations (NGOs) with its Economic and Social Council as a way of enhancing its human rights and policy programs (Anaya 1996). For over half a century of its existence, the United Nations has empowered NGOs and other interest groups in fostering its mandate. The participation of these non-state actors in the United Nations process helps in counterbalancing the role of the nation-state as once the sovereign arbiter or indispensable agency for indigenous interests in the global constitutive processes.

Ironically, the same United Nations that gave hope to indigenous and non-Western peoples by placing the oppressive nation-state under various forms of surveillance was to entrench a division amongst colonised peoples. In doing this, the United Nations relied on the

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instrumentality of the nation-state. The United Nations' decolonisation process paved the way for the admission of newer actors in the international process. In order to join the United Nations, nationhood was a prerequisite. Among the competing notions of 'nation', the preferred one for joining the new global comity of nations is the Eurocentric Westphalian model of multi-ethnic states arising from colonialism and conquest. This does not recognise other *unofficial* or indigenous socio-cultural or political associations devoid of colonial tinkering as meriting the status nationhood required for admission into the United Nations. Constituted into tribal units and other unique socio-political and cultural arrangements, many indigenous and non-Western peoples identified under the second notion of nation. However, by setting up governmental and bureaucratic structures of statehood in far-flung colonial outposts in Africa, Latin America, the Caribbean, Asia, the Pacific and elsewhere, colonialism arbitrarily reconstructed the traditional political associations there, and transformed them into contrived forms of the Westphalian state.⁵ The rest of the indigenous communities, especially in North America, the Australian continent, and in the Arctic regions, largely remained, and were so recognised, as tribal communities within the colonial states.

In its 1961 Declaration on the Granting of Independence to Countries and Peoples in General, the United Nations limited its charter of decolonisation to overseas territories as opposed to the 'internal Indian collectives' in the 'enclave territories' in what is known as the salt-water doctrine. By virtue of decolonisation, the nation-state was used as an instrument for the empowerment and disempowerment of non-Western and indigenous peoples respectively. Many colonised states in Africa, the Caribbean, Latin America and Asia attained independence and joined the United Nations, particularly in the second half of the 20th century. However, indigenous peoples of the enclave territories were limited, mainly through the agency of the colonial state, for their contact with the new international community of nations. They did not have the benefit of independence from the colonising European powers. This dichotomy, between the treatment of indigenous

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and other non-Western peoples, known also as the blue-water doctrine, remains pivotal in shaping the relationship between colonised peoples all over the world, especially in regard to their engagement with the process of international interaction.

The salt-water doctrine has impacted indigenous and non-Western peoples' perception of international law in a number of ways. It engendered a loss of solidarity amongst colonised peoples, a state of affairs that has, until the late 20th century, remained largely unmitigated. The doctrine shifted the responsibility for the decolonisation struggle, for the most part, to the peoples of the enclave territories. By so doing, it signified a misconception that independence from colonial rule was only an end in itself, particularly for those that benefited from the salt-water doctrine. The situation whereby only the peoples of the enclave territories championed their decolonisation process resulted in a narrow articulation of their demands, particularly by initially limiting them to the contracted political rubric of self-determination and the protection of human rights as the framework under which their demands would be met.

Because of the salt-water doctrine, international law adopts a rather narrow view of indigenous peoples. That approach defines them to the exclusion of other colonised peoples outside the enclave territories. Perhaps the most authoritative instrument yet regarding indigenous peoples, the International Labor Organization (ILO) Convention No 169 of 1989, defines indigenous peoples as descendants of populations that inhabited a country at the time of conquest, colonisation and the establishment of extant state borders. James Anaya calls them 'living descendants of pre-invasion inhabitants of lands now dominated by others ... that find themselves engulfed by settler societies born of forces of empire and conquest' (1996: 3). Martinez Cobo, the first UN Special Rapporteur on the Issue of Discrimination Against Indigenous People defines indigenous *communities, peoples* and *nations* as 'those having historical continuity with pre-invasion, and pre-colonial societies ... [and] form at present non-dominant sections of the society ...' (Cobo 1986: para 379). Stephen Brush comments that 'indigenous peoples'

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refers to peoples ‘in regions with a colonial history that has left a predominant national culture and autochthonous cultures ...’. According to him, the term ‘is not suited to large parts of Asia and Africa where a single hybrid or Creole culture (e.g. European-Native) is not dominant’ (1996: 5).

Most of the definitions of indigenous peoples are critiqued for being either over inclusive or under inclusive (Wiessner 1999: 110–5). The term is generally perceived as imprecise, and the measure of indigenosity described as scientifically inexact (Kingsbury 1992, Barnes Gray & Kingsbury 1995, Ellen et al 2000). Often, prudence is urged in the attempt to define indigenous peoples, giving regard to its potential to marginalise them (de Koning 1999). Despite the reservations and controversy over the definition of ‘indigenous peoples’, it is clear that as a concept, the term refers mainly to the aboriginal peoples of the American and Australian continents, New Zealand, Polynesia, and the Arctic regions. They are isolated from the rest of the colonised peoples, mainly because they are not organised into an exclusive conventional nation-state recognised in international law. In the light of this, the definition of indigenous peoples, albeit contested, tends to exclude most other colonised peoples and territories where settler withdrawal ushered in political independence and a form of decolonisation.⁶ This dichotomy is referred to in some quarters as that of the third and fourth world peoples, terms that correlate to non-Western colonised peoples and their counterparts in the enclave territories (Wilmer 1993).

For the most part, *indigeneity* derives, rightly or wrongly, from the failure to extend political independence to the enclave colonies, or the failure of settlers to withdraw therefrom. The indigenous peoples of the enclave territories were saddled by the burden of history to sustain the decolonisation struggle. Here again, the United Nations under its Charter became a veritable platform and instrument for the promotion of the indigenous struggle. In consolidating its naturalist approach to international law, and the subtle, but crucial, attempt to tamper the overbearing influence of the nation-state in relation to its citizens, the United Nations initiated three key instruments, known collectively as the International Bill of Rights. These are the Universal Declaration of

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Human Rights of 1948 (UDHR), and the basic human rights treaties of 1966, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). As a total package, these treaties guarantee religious freedoms, the right to self-determination for peoples, and minority rights, including the right to the enjoyment of their cultural heritage (Wiessner 1999).

The United Nations and indigenous empowerment

Because the United Nations supports some degree of openness to non-state actors, indigenous peoples sought relief through its human rights system, over the discredited agency of the colonial nation-state. For instance, an indigenous Canadian woman who lost her Indian status as a consequence of her 1970 marriage to a person without 'status' (who happens to be an American), challenged Canada's *Indian Act* at the United Nations Human Rights Committee under the optional protocol on the ICCPR. In its 1981 view, the Committee found for Lovelace and noted that Canada was in breach of the ICCPR. Consequently, Ms Sandra Lovelace, and her children from her failed marriage to a Californian, had their Indian status restored. Subsequently, the Act was revised, so that native Canadian women who married non-natives or peoples without status would no longer lose their status, nor would their children. It needs to be mentioned that discrimination on the basis of status is a colonial and not indigenous creation. Lovelace and similar cases at the Human Rights Committee of the UN are symbolic of a new era of indigenous empowerment outside the circumscribing confines of the colonial state.⁷

At a collective level, indigenous peoples of the enclave territories used, and continue to use the instruments of the United Nations to pressure their European colonisers for justice and fairness. In the Americas, Canada, Australia, New Zealand and the Arctic regions, they continue to demand accountability from their national governments and to task them to comply with the International Bill of Rights. Through

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international networks of NGOs, their alliances transcend the boundaries of colonial states.⁸ Indigenous peoples have, through intense lobbying, won the sympathy of many states of the European Union⁹ within the heartland and capitals of the conquering nations (Wiessner 1999). Overall, indigenous decolonisation initiatives have yielded results at national and global levels. Some examples are now emblematic of this trend.

At the national levels, developments in Canada, the United States, Australia, New Zealand, and many others trace the outcomes. In Canada, a plethora of judicial decisions, including the famous *Delgamuukw* case, and political initiatives, particularly the constitutional reforms of 1982 and the creation, in 1999, of the virtually first nations territory of Nunavut is emblematic of decolonisation. Perhaps more than Nunavut, the *Nisga'a Final Agreement Act* of 1998 that set up the structure of an exclusively Nisga'a territorial self-rule in the Province of British Columbia on the basis of Nisga'a precolonial tradition is an ideal form of indigenous self-government.

The US federal government adopts an official policy of Indian self-determination in a framework of government-to-government rapport between it and Indian nations (Wiessner 1999). In Australia, the 1992 *Mabo* decision not only abolished the colonial legacy of declaring Aboriginal land as *terra nullius*. *Mabo* is the basis of a progressive jurisprudence and a burgeoning national philosophy on the subject of Aboriginal self-determination. In New Zealand, even though deriving from a colonial history, the *Treaty of Waitangi Act* 1975 and the Waitangi Tribunal represent the new fabric and foundation of modern New Zealand's response to the Maori quest for justice (Gnz 2002). In the rest of the Americas, constitutional reforms in Brazil, Bolivia, Ecuador, Peru, Mexico, Nicaragua, Chile, Paraguay and Guatemala point to a new indigenous renaissance of sorts.¹⁰ In Japan, a landmark judicial decision has broken the myth of the monolithic state: the Ainu are now recognised as indigenous and as having a distinct cultural identity in that country.¹¹ In the European Arctic regions of Norway, Finland, Sweden and Russia, the story is not different. With the exception of Russia, the other countries have established responsive structures to

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address the Saami or Lapland peoples' quest for separate identity, self-determination and other peculiarly indigenous claims.¹²

The foregoing highlights of the strides in indigenous emancipation made at various national levels are an integral part of developments at the international level. State practice is a major source of international law. Indeed, the latter exists, for the most part, to influence the practice of states. Apart from exclusively indigenous issues-based treaties, such as the ILO Convention 169 of 1989, some developments are symbolic of the international response to indigenous demands. Isolated from the rest of the colonised peoples by the salt-water doctrine, indigenous peoples focused on how international law could address peculiarly indigenous issues. Although the United Nations human rights framework under the International Bill of Rights, adopts a near holistic view of rights, problems facing indigenous peoples have required a shift in focus in order to meet peculiarly indigenous claims (Barsh 1996).

Under the auspices of its Economic and Social Council, the United Nations charged its Sub-commission on the Prevention of Discrimination and Protection of Minorities in 1971 to conduct a Study on the Problem of Discrimination Against Indigenous Populations (Anaya 1996, Daes 1998). The Cobo Report, as it came to be known, became a reference document on indigenous issues. Accepting the Report's recommendation, the United Nations Human Rights Commission, in 1982, established the United Nations Working Group on Indigenous Populations (UNWGIP). This body was mandated to review issues concerning indigenous peoples globally, in order to evolve a common international standard for tackling them. In addition, it was to study the treaties between indigenous peoples and the colonial states and to investigate the concept of indigenous cultural and intellectual property rights (Barsh 1996, Anaya 1996, Daes 1998).

At the completion of its work in 1993, the UNWGIP issued a Draft Declaration on the Rights of Indigenous Peoples, mainly to meet its substantive standard setting mandate. The Draft comprehensively incorporates indigenous claims, including, but not limited to, the core categories of cultural protection in all its ramifications, rights to economic and social welfare, self-determination, political empowerment,

ancestral lands and territories, and treaty commitments by colonial powers (Kingsbury 2001). Ten years later, the Draft remains stalled within the United Nations bureaucracy, thus falling short of the expectation that it could be adopted as a United Nations General Assembly Declaration. Meanwhile, pending the review of the Draft, the United Nations, in April 2001, established a Permanent Forum on Indigenous Issues, being a subsidiary body of the Economic and Social Council (Carrey & Wiessner 2001). The Forum serves as an advisory body of the Council, with special interest in indigenous issues in relation to the Council's mandate in the areas of economic and social development, culture and the environment, education and human rights. The establishment of the Forum represents a significant event in the indigenous struggle for decolonisation at the international level.

The preceding overview raises some pertinent issues in relation to the developments regarding the treatment of indigenous matters at the international level. First, with regard to the UNWGIP, and the resulting Declaration, the Group has to its credit the status of being 'one of the largest regular human rights meetings organized by the United Nations' (Berger 1996: 209, Moses 2000). The Declaration resulted from a process of unique partnership between experts and indigenous peoples in a participatory and democratic exchange. The UNWGIP secured, as far as it was practicable, an optimum participation of indigenous peoples from all over the world (Daes 1998). In a no-holds-barred scenario, indigenous nations and peoples proposed the Draft as a charter calling on, and challenging colonial states to recognise indigenous rights. Second, unlike an *inter-national*¹³ treaty instrument, such as the ILO Convention 169, 1989, which nullifies the inherent indigenous right to self-determination in international law,¹⁴ the United Nations Draft reiterated, without qualification, indigenous claims to self-determination. Third, the mandates of the Permanent Forum, and the enlarged mandate of the UNWGIP, which incorporated the question of indigenous cultural and intellectual property rights, have marked a remarkable shift from the political emphasis on the decolonisation struggle hitherto explored within the confines of the narrow concept of self-determination and human rights.

Re-thinking self-determination: knowledge as a site of solidarity

Most of the strides made in the decolonisation struggle at national levels, highlighted above, derive largely from the political emphasis on self-determination. In a number of those cases, indigenous autonomy and some form of self-government and human rights had been the pivotal battle cry and rallying point for indigenous emancipation. Because under the charter of decolonisation, self-determination is associated with claims to sovereignty with potential for end-state scenario, indigenous assertions of that right provoke anxiety in the colonial and even postcolonial states. However, indigenous peoples were able to defy the anxiety of the colonial nations by reasserting their right to self-determination in the Draft Declaration on the Rights of Indigenous Peoples. This was mainly because indigenous peoples' participation in the work of the UNWGIP was, for the most part, unfettered by the colonial states. However, one of the major reasons for which the Declaration remains stalled at the United Nations, is the lingering controversy over self-determination and the unwillingness of member states to risk the potential of state disintegration arising from the exercise of the right to self-determination.

Nonetheless, the suspicion that self-determination has the potential to result in end-state scenario appears to be unfounded. This is because of the progressive application of the concept of self-determination in relational terms, and as an aspect of the indigenous claim to cultural identity, economic and epistemic empowerment (Daes 2001). Surely, self-determination transcends and encompasses narrow political contexts. Understandably, its direct political appeal enjoyed priority in the early phase of the decolonisation campaign. Without doubt, indigenous peoples in the enclave territories, as a matter of priority, deserved a fair political deal in terms of attaining self-rule or forms of political autonomy, in keeping with the logic of the United Nations decolonisation agenda. Examples from some countries, including Canada, Australia, New Zealand, Denmark, Finland, Nicaragua, Panama and the United States (Daes 2001), indicate that indigenous peoples enjoy some degree of political autonomy. Such developments

represent forms of internal, as opposed to external self-determination (Bryant 1992: 277). The plasticity of self-determination transcends its original political attractiveness, or the extreme end-state consequence, especially in reference to the enclave territories where secession from colonial state is not a priority.

Articulating the amorphous or open-ended nature of the concept of self-determination, Benedict Kingsbury writes that '[s]elf-determination has long been a conceptual morass in international law, partly because its application and meaning have not been formulated fully in agreed texts, partly because the specific international law practice of self-determination does not measure up very well to some of the established textual formulations' (Kingsbury 2001: 217, Kingsbury 1992: 392, Tomuschat 1993). As a battle cry for colonised peoples, self-determination poses an interpretational quandary. It is in a state of flux and subject to continuing negotiation with the post/colonial state.

From the original emphasis on the right to political participation and autonomy, self-determination has now assumed a negotiated relational approach to regaining denied rights. For the most part, it is now explored in the context of a cultural, social, economic and developmental relationship between indigenous peoples and colonial powers (Daes 2001). Article 3 of the United Nations Draft Declaration on the Rights of Indigenous Peoples provides that '[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.¹⁵ This marks the new relational approach in the exercise of the right of self-determination, and in this way associates the concept with a wide range of indigenous aspirations that may be realised through negotiation. Again along these lines, Kingsbury points out that 'self-determination and other [indigenous] rights are not sharply distinct; depending on the facts of a particular case, the realization of other rights should be regarded as realizing purposes underlying self-determination' (1992: 392–3). Daes argues that '[a] foundational aspect and true meaning of self-determination is the respect for the land, without which indigenous peoples cannot fully enjoy their cultural freedom and cultural integrity' (2001: 264).

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The hitherto political focus of self-determination, especially in relation to the indigenous peoples of the enclave territories, was created by the dichotomy of the salt-water thesis, which produced a historical gulf and loss of solidarity between colonised peoples all over the world. However, the contemporary trend that associates self-determination with economic development, and the restoration of the socio-cultural and epistemic traditions of indigenous peoples has begun to facilitate a new rapprochement amongst all colonised peoples whose worldviews and epistemic traditions stand distinct from the dominant Western paradigm.

The indigenous epistemic worldview is based on ecological sanctity. It perceives the relationship among phenomena as fundamentally holistic. This outlook encompasses natural and metaphysical experience in the practice of cultures/traditions and the interpretation of the world (Battiste & Henderson 2000, Battiste 2000, Cajete 1999). Thus, basic indigenous claims such as ancestral land rights, cultural preservation, and treaty rights, have their significance in the context of indigenous epistemology and values. The realisation of these rights is part of the justification for the indigenous quest for self-determination which materialises, in part, by means of an unfettered practice of indigenous knowledge. In its generation and transmission, culture has a symbiotic relationship with knowledge and vice versa (Quinn 2001). Thus, the protection of indigenous knowledge, because of its liberating and self-defining ideals, is perhaps the most crucial aspect of self-determination for indigenous and non-Western peoples all over the world. Again, according to Fitzgerald and Darian-Smith, in the contemporary era, the protection of indigenous knowledge forms part of the 'seeming promiscuity of concerns' that jostles under the postcolonial umbrella (Fitzpatrick & Darian-Smith 1999: 1).

Despite variations in details and contexts, indigenous and non-Western peoples' reconcilable epistemic worldview, which centres on ecology, naturally means that the environment and its biological diversity constitute the practical platform for the generation of indigenous knowledge. Biodiversity is the philosophical touchstone for the discourse on bioresources. Over three-quarter of global biological

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resources are located in gene-rich non-Western locations within the natural custody of formerly colonised peoples. These peoples constitute about 75 per cent of the global population (Patel 1996: 310). On the other hand, the United Nations estimates that there are approximately 300 million 'indigenous peoples' worldwide (Van de Fliert 1994: 3) who represent about 4 per cent of global population (Gray 1991: 61). However, the term 'indigenous knowledge' is not necessarily limited to the narrow and inchoate category recognised as 'indigenous' in international law. In the discourse on indigenous knowledge in international law, there is a blurred distinction between indigenous peoples of the enclave territories and other non-Western peoples in far-flung places. There is a tendency to emphasise the related nature of their worldview and its correlation with their epistemology.

Because conventional Western scientific knowledge is always represented as an ontologically privileged comparator (Ellen et al 2000), other local knowledge forms are depicted as having a paradigmatic or epistemic unity of sorts. By contrasting indigenous knowledge forms with modern technological knowledge, Surrendra Patel argues that '[i]n this sense, the reference [to indigenous knowledge] should no longer be simply to narrow groups of aboriginal tribes' (1996: 308) but to a broader category whose informal knowledge forms are distinguished from so-called modern knowledge.

It is hardly surprising then that often there is a blurred distinction between indigenous and traditional knowledge; or other categories of non-Western knowledge forms. Coming close to making such a distinction only for analytical, and indeed, literal purposes, the World Intellectual Property Organization (WIPO) notes that '[i]ndigenous knowledge fits into the traditional knowledge category, but traditional knowledge is not necessarily indigenous' (2001a: 26, Oguamanam 2004a: 34). Traditional knowledge has a wider ambit than indigenous knowledge, especially where the latter is used in relation to a strict or limited category of indigenous peoples of the enclave territories.

Lending support to the futility of the distinction between traditional and indigenous knowledge, Michael Blakeney notes that in the debate

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over the protection of traditional knowledge, the implied beneficiaries are traditional peoples who are invariably referred to as ‘indigenous peoples’. In his view, the definitional issue related to the delineation of the content of traditional or indigenous knowledge is to define or identify the groups of communities who are entitled to make claims for those rights accruing to their knowledge (Blakeney 2000). For Ellen and Harris, *traditional* (knowledge), as a common description of anthropological order, derives its meaning from modernity–traditional dualism and it is preferable to *indigenous* (knowledge) which carries, in their view, ‘conflicting, ambiguous and strong moral load’ (Ellen et al 2000: 3). It is quite clear here that indigenous knowledge is not necessarily a reference to a knowledge form that is limited and peculiar to indigenous peoples, narrowly defined.

The protection of indigenous knowledge as an aspect of indigenous self-determination presents a site for the restoration of the solidarity of indigenous and other non-Western colonised peoples compromised by the salt-water theory. Again, the United Nations, more than the colonial states, plays a facilitating role in bringing this about. Some key international legal developments in the early 1990s help to illustrate this point. Those will be reviewed subsequently. In the meantime, a brief sketch of how the United Nations human rights regime fosters this phenomenon would be in order. That will provide an authoritative normative backdrop for subsequent review of the relevant legal developments.

The United Nations normative framework

Article 27 of the Universal Declaration of Human Rights, 1948, provides that ‘[e]very one has the right to freely participate in the *cultural* life of *the community* and to enjoy the arts and to share in the scientific advancements and its benefits’.¹⁶ This Article deploys science as a synonym for knowledge, as well as a cultural process. It provides an authoritative protection for knowledge in relation to both indigenous peoples and other generators of, and sites for the generation of knowledge (communities), both within and outside the colonial state.

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Indigenous peoples have, however, argued that their understanding of community is a distinct indigenous community, not the colonial state (Torres 1991: 154, O'Brien 1985: 53). They seek a definition of a *community* in which they would have an unfettered right to cultural enjoyment and identity, both within an exclusively indigenous community and in the colonial state. A creative construction of the right to self-determination under the International Bill of Rights¹⁷ is amenable to this thinking. Applied to indigenous peoples, Article 27 of the UDHR provides protection for their knowledge forms as an aspect of the right to self-determination.

Similarly, Article 27 of the ICCPR serves as the basis for addressing indigenous issues, and indirectly indigenous knowledge, in the context of culture. It provides: '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 practice their religion, or to use their own language'. This Article makes no direct reference to indigenous knowledge as such. Nonetheless, its reference to the right to enjoyment of culture, practice/profession of religion and use of language implicate components of indigenous knowledge and worldview. The Article speaks to minorities. However, the United Nations Human Rights Committee adopts an expansive understanding of the provision and extends its guarantees to indigenous peoples (Kingsbury 2001) even though, in principle, indigenous peoples resist being classified as minorities.

Thus, in the new international order epitomised by the United Nations, knowledge protection in relation to both indigenous and other communities remains part of that regime. This is amply accommodated in the open-ended construction of the right to self-determination by indigenous peoples, and under the guiding philosophy and the holistic approach to rights adopted in the International Bill of Rights.

The regime of international environmental law

Since the early 1990s, there has been a discernible pattern in the evolution of international law toward the protection of indigenous knowledge. The emergent regime adopts an expansive outlook on indigenous knowledge that encompasses non-Western peoples and their epistemic models. This is evident in the Rio set of international environmental agreements.

Modern international environmental law crystallised in the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, dubbed the ‘Earth Summit’ (Birnie & Boyle 2002). Before then, the 1972 United Nations Conference on the Human Environment, in Stockholm, laid the foundation, or marked the genesis, of the nascent international legal order on the environment (Brunée 1998; Pallemarts 1993). The Rio Earth Summit produced significant environmental instruments in the form of both soft and hard international law.¹⁸

With regard to the former, the ‘Rio Declaration’ sets out an international consensus on environmental management and stewardship. Of all its 27 principles, principle 22 deals specifically with indigenous knowledge. This principle, now the received wisdom in international environmental instruments, relates indigenous knowledge or traditional practices to *other communities*. It acknowledges that:

Indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Next on the soft law front is Agenda 21. It articulates international consensus on global environmental policy framework and action for sustainable development in the 21st century. Section III of Agenda 21 identifies major groups that play crucial roles in sustainable development. It makes a case for strengthening them. They include women, children, youths, and workers. Chapter 26, titled ‘Recognizing and

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Strengthening the Role of Indigenous Peoples and their Communities' is dedicated to indigenous peoples which it considers part of the broad, as opposed to exclusive site for gaining valuable knowledge of environmental protection practices. Agenda 21 aims at empowering indigenous peoples through the encouragement of deliberate policies which recognise 'indigenous values, *traditional* knowledge, and resource management policies with a view to promoting environmentally sound and sustainable development' (emphasis added).¹⁹ The principles enunciated in both the Rio Declaration and Agenda 21 constitutes the kernel of the international soft law regime on the environment and the protection of indigenous knowledge.

Perhaps, in the context of substantive legal protection of indigenous knowledge, the most important international instrument yet is the Convention on Biological Diversity (CBD), also a product of the Rio Earth Summit. Directed at the conservation of biological diversity, the CBD makes far-reaching provisions on indigenous knowledge. It realises the pivotal role ecology, especially biodiversity, plays in the generation of indigenous knowledge and practices. Its principal objectives include 'conservation of biological diversity, sustainable use of its components and the fair and equitable sharing of the benefits ...' (Article 1). The CBD recognises the role of indigenous knowledge in the achievement of its objectives. It identifies, for instance, the 'close and traditional dependence of many *indigenous and local communities* embodying traditional lifestyles on biological resources' (para 12, preamble) and their desire to share benefits from those resources, including the use of their knowledge in exploiting such resources.

Clearly, the most important provision of the CBD, generally, and one which has particular resonance in indigenous knowledge, is Article 8(j). It reads in part: Parties shall '... respect, preserve and maintain knowledge, innovations and practices of indigenous and *local communities embodying traditional lifestyles* relevant for the conservation of biological diversity ...'. Because of its nature as a guideline, modalities for the implementation of Article 8(j) form a major preoccupation of the CBD. It is perhaps because of this provision that the CBD has seized the moral high ground and constitutes to date, the

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central framework of law and regulatory schemes for exploring the protection of indigenous knowledge at the global level. It is the springboard for the evolution of national and regional regulatory initiatives for the protection of indigenous knowledge.²⁰

Again, consistent with the Rio Declaration and Agenda 21, the CBD, perhaps more than any other instrument, directly associates indigenous knowledge with the knowledge of other ‘local communities embodying traditional lifestyles’. This affirms that the distinctions made between the narrow category recognised as indigenous peoples and their other non-Western counterparts becomes blurred in the discourse about knowledge. It also hints at the futility of the distinction between indigenous and traditional knowledge.

Specific instruments, like the ILO Convention No 169, or regional initiatives such as the Organization of American States Draft Declaration on the Rights of Indigenous Peoples, target delineated or presumed indigenous categories. In many other cases, including the Draft United Nations Declaration on the Rights of Indigenous Peoples and the Rio set of agreements, there is a deliberate tendency to avoid the controversy over the definition of indigenous peoples. Apart from the fact that the Rio instruments are not exclusively indigenous treaties, they are indicative of the fact that the discourse about indigenous knowledge encompasses other holders of local or non-Western knowledge forms. Some of these instruments, we have seen, adopt the term ‘local communities’ or make reference to peoples steeped in ‘traditional lifestyles’.

Noami Roht-Ariazza argues that ‘local communities’ overlaps with ‘indigenous peoples’ (1996: 964). However, she points out that the former is introduced into official international discourse in order to avoid endless debate of which people qualify as indigenous or tribal. ‘Local communities’ is a term which includes several categories of peoples who maintain a close link with the ecosystem and, with minimum intervention, derive a large part of their livelihood directly from the natural world (Patel 1996: 307). This fits most indigenous peoples and other inhabitants of the bioresource-rich parts of the world, indigenous or otherwise.

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From the onset of modern international environmental law, with specific reference to the Rio sets of agreements, indigenous peoples of both the enclave territories and their 'local community' counterparts immersed in traditional lifestyles, have been treated as one perhaps because of their related epistemic traditions. They have also been active participants in negotiating relevant covenants that impact on their interests. They found unity in their epistemic philosophy and worldview beyond the politically circumscribing margins of the colonial nation-states. Principle 22 of the Rio Declaration on the role of indigenous and local communities and their knowledge base for sustainable ecological order remains a fundamental feature of the legal and regulatory regimes now emerging to protect indigenous knowledge.

Distinct interests, but common focus

The trend in knowledge protection demonstrated in the last subsection is scattered through a litany of instruments. As we have seen, they include legally binding treaties and other less consequential sources of international law. Indigenous knowledge is constantly on the agenda of international studies, forums, conferences, declarations and other regime-building initiatives that approach the subject from different perspectives. Because of the diversity in their approaches, these regimes often use indigenous and traditional knowledge interchangeably. Wiessner and Battiste (2000: 388) remark that international organisations and treaty regimes tend to address the phenomenon of dispossession and the need for protection of traditional knowledge 'from different angles and with potentially different objectives'. The identified objectives include 'the protection of biodiversity and biodiversity-related knowledge [agricultural/medicinal knowledge of plant resources], or the limited purposes of intellectual property ...'. I will return to intellectual property in the next subsection.

The road to these common entry points of divergent emphasis for knowledge protection was paved by the new solidarity among colonised non-Western peoples, indigenous or otherwise. By turning to the protection of their knowledge, non-Western peoples have less than

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deliberately shirked the salt-water dichotomy that impeded their collective historical aspiration for cultural preservation and survival. Their reconcilable epistemic orientations have necessitated a near common interest in the forging of alliances for the protection of their knowledge. Save for regionally specific instruments, it is not practical to talk about indigenous or traditional knowledge that draws a strict distinction between peoples of the *third* and *fourth* worlds. This does not, however, apply to variations in regime structures and the specifics of local knowledge among constituent indigenous and non-Western nationalities. Absent historical and political differences, the distinction between indigenous peoples of the enclave territories and their counterparts elsewhere in the developing countries is essentially overarched by the common interests they share in the context of the discourse about the protection of non-Western knowledge forms.

However, a leading Canadian legal scholar, Rosemary Coombe, identifies different objectives and motivations as they apply to categories of claimants to indigenous knowledge. She writes:

Peoples who are already internationally recognized as indigenous appear to be more interested in making claims with respect to indigenous knowledge subservient to their larger claims to self-determination ... whereas others whose claims to indigeneity are nascent and largely unacknowledged and those who must make their claims as communities who embody "traditional life styles" ... [look on to CBD provisions for knowledge protection] to provide them with sources of social legitimation, political leverage and alternative sources of income (2001: 277).

As previously noted, many so-called developing countries of the third world benefited from the United Nations decolonisation process. However, in the postcolonial era, there are still many communities in those regions that make claims to indigeneity as narrowly interpreted in international law.²¹ This indicates that contrary to the popular view, European colonisation and invasion are not necessarily the exclusive criteria for indigeneity or self-determination (Bryant 1992: 278). Coombe's remarks do not seem to be limited to such isolated and largely unrecognised claimants to inchoate indigeneity. Referring to the whole third

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world, she argues that local knowledge holders there, and development NGOs, approach the knowledge protection project from the perspective of protection of livelihood, and as a source of alternative income (2001: 277–8).

Compared to the officially recognised indigenous peoples in the colonies within, clearly, the missing motive here is self-determination. Despite the perceived differences in motives, it is instructive, for the present purpose, that the strict political divide between indigenous peoples and other local communities of the third world ceases to be sustainable at the level of discourse about knowledge protection. Yet both indigenous peoples and ‘local communities’ may have different interests and emphases, as Coombe notes, which are often dictated by the political contexts in which they operate. In one context, protecting indigenous knowledge may be an aspect of self-determination and survival. In another, it may be a question of economic empowerment, protection of livelihood or political leverage. These may not be neatly separable as they could be unconsciously invoked with varying emphases in accordance with prevailing contingencies. In many non-Western societies, understanding relationships from which all knowledge forms are generated is an integral part of a peoples’ identity and worldview, be they indigenous or not. It is, perhaps, on this premise that indigenous and non-Western peoples have partnered at the global scale to influence major regimes for the protection of indigenous knowledge since the 1990s.

Indigenous and local communities continue to affirm their trans-continental solidarity. They may have distinct interests, but they have sustained a common focus on the sanctity of their identity and worldview. Recently, their lobby influenced a treaty provision on farmer’s rights in the International Treaty on Plant Genetic Resources for Food and Agriculture.²² Today, it is usual in international policy-making and regime building fora for representatives of indigenous peoples and their counterparts elsewhere to form an alliance based on unity of purpose in challenging the colonial state and its agents.²³ Nowhere is this more evident than in the ongoing campaign against the crisis of legitimacy rocking the conventional intellectual property system.

Indigenous knowledge: challenging intellectual property

As the primary device for rewarding knowledge and conferring rights over it, intellectual property is a crucial site in the protection of indigenous knowledge. I have already indicated that as a supplementary mandate, the UNWGIP was charged to study the concept of indigenous cultural and intellectual property rights. The Draft Declaration on the Rights of Indigenous Peoples makes ample provisions on the entitlement of indigenous peoples to the intellectual property accruing to their knowledge.²⁴ Similarly, the CBD recognises the role of intellectual property rights in fostering its objectives (Article 16(5)).

In 1990, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities tasked the renowned indigenous scholar and activist, Erica-Irene Daes, to prepare a working paper on the cultural and intellectual property rights of indigenous peoples (Wiessner 2001, Daes 1998). This issue required in-depth study outside the UNWGIP. Her work yielded the 1995 Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples. After a prolonged review/revision, the document still awaits the input of the United Nations Commission on Human Rights (Daes 2000). A major aspect of the significance of this document is its holistic approach to indigenous heritage and knowledge,²⁵ as opposed to the bifurcated reductionist approach of conventional intellectual property rights and other treaty regimes.²⁶ Endorsing the holistic approach and rejecting the variegated view of traditional knowledge, Wiessner and Battiste describe the latter approach as running ‘in the indigenous eyes the danger of losing the forest for the tress’ (Wiessner & Battiste 2000: 388). The Guideline is only one of several initiatives in the protection of indigenous knowledge that calls into question the inadequacy/legitimacy of conventional intellectual property rights in relation to the protection of indigenous knowledge forms.

A number of informal and formal regime-building initiatives at the instance of indigenous peoples and non-Western peoples from all over the globe have put Western intellectual property rights in the spotlight. A few developments in this regard are worth highlighting. Indigenous nations of Mataatua, New Zealand, convened the first ever international

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conference on the cultural and intellectual property rights of indigenous peoples in 1993. The resulting Mataatua Declaration associates the protection of indigenous knowledge with the right to self-determination, and notes that the conventional intellectual property is inadequate and unsuitable to the protection of indigenous cultural and intellectual property.

Since 1993, the Mataatua Declaration has become a reference material on the subject of indigenous knowledge and intellectual property rights. Subsequent fora have reaffirmed the sentiments expressed in that Declaration. They include:

- (a) the November 1993 Conference on Indigenous Intellectual Property Rights, which issued the Julayinbul Statement on Intellectual Property Rights (Blakeney 1999);
- (b) the 1994 Coordinating Body of Indigenous Peoples of the Amazon Basin, which issued the COICA Statement on Intellectual Property and Biodiversity;
- (c) the 1995 UN Development Programme (UNDP)-sponsored South Pacific Regional Consultation on Indigenous Peoples and Intellectual Property, which issued a Final Statement on Indigenous Peoples and Intellectual Property Rights;
- (d) the 1998 International Congress of Ethnobiology, which issued the Belem Declaration;
- (e) the 1999 Indigenous Peoples Seattle Declaration on the Occasion on the Third Ministerial Meeting of the World Trade Organization (WTO);
- (f) and subsequent restatements of indigenous positions on intellectual property rights, especially their opposition to the patenting of genetic materials in the continuing negotiations for the amendment of the Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement since the 2001 Fourth Ministerial Meeting of the WTO at Doha;²⁷ and lastly,
- (g) the Geneva 2003 Global Forum of Indigenous Peoples and Information Society (GFIPIS), sponsored by the United Nations Permanent Forum on Indigenous Issues.

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In challenging conventional intellectual property rights, indigenous and non-Western peoples have risen above the colonial states. Many of those states champion a global intellectual property regime that reifies only Western epistemology, often at the expense of indigenous knowledge.²⁸ Conventional intellectual property is perceived as a vehicle of exclusion, appropriation and commoditisation of indigenous knowledge (Arun Agrawal 1999). Thus, it is a target of persistent pressure from indigenous peoples and their counterparts in the non-Western world who challenge its legitimacy in relation to indigenous knowledge and worldview.

In putting intellectual property on the front burner of indigenous resistance, indigenous peoples have forged strategic alliances, in the words of Coombe, ‘between indigenous NGOs, North-South alliances of farmers’, peasants’ groups, traditional healers associations, environmental NGOs, development institutions and activists ...’. Continuing, she notes that ‘[t]hese new coalitions form the core of a new and vibrant political movement organized around group opposition to existing intellectual property laws ... These new networks of advocates and activists’ have coalesced into formidable and organised ‘pressure on governments and United Nations bodies ... insist[ing] upon new understanding of justice, equity, and accountability in ...the international exercise of justification for’ intellectual property rights (Coombe 2001: 278, Oguamanam 2004a).

As a consequence of these, many intergovernmental bodies, including but not limited to the UNDP, the UN Conference on Trade and Development (UNCTAD), the Food and Agriculture Organization of the UN (FAO), CBD, WIPO/UNESCO, have, at present, a coordinated and elaborate program for a responsive vision of a knowledge protection regime that accounts for indigenous knowledge. It is outside the scope of this work to detail the relevant activities of these bodies. But elsewhere the details about the emerging cross-cultural approach to intellectual property rights as a response to the crisis of legitimacy in the conventional intellectual property system has been discussed (Oguamanam 2004a: 34–59). Suffice here to sketch developments in the last two bodies for purposes of the point under discussion.

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Through its Working Group on Article 8(j),²⁹ the CBD maintains a liaison with WIPO in an ongoing policy discussion with regard to the protection of indigenous knowledge. WIPO's Global Intellectual Property Issues Program which was launched in 1997, among other things, seeks to address conceptual issues with regard to recognition/protection of traditional and cultural knowledge. WIPO identifies such knowledge forms as emerging topical subjects in contemporary intellectual property discourse (see Oguamanam 2004a, WIPO 1998–9). In 1998–9, WIPO conducted global fact-finding missions on the intellectual property needs and expectations of traditional knowledge holders (WIPO 2001a). Similarly, the 1982 WIPO-UNESCO Model Provisions on National Laws on the Expression of Folklore Against Illicit Exploitation is currently undergoing revision. This is in response to its perceived inadequacies with regard to aspects of indigenous knowledge forms. In addition, there are gaps in the document which does not account for the new forms of commercial exploitation of traditional knowledge that have occurred since 1982 when the Model was introduced. Hence, the need for its reappraisal to identify its deficiencies in terms of accounting for some local knowledge forms.³⁰

The campaign for the protection of indigenous knowledge is waged with a reasonable degree of participation of indigenous and local peoples globally. The WIPO and CBD processes continue to make deliberate efforts to elicit indigenous peoples' contribution in reappraising the jurisprudence of mainstream intellectual property. In the main, this has resulted in indigenous peoples being vocal forces in contesting the legitimacy of conventional intellectual property and in articulating a plural vision of intellectual property rights. Consequently, today there is strong pressure for a paradigm shift in the traditional conception of intellectual property. There is a realisation that modalities for knowledge protection often correlate with the epistemic regime in which knowledge is generated and transmitted (Oguamanam 2004b). While conventional intellectual property favours individualistic thrust of Western scientific and industrial experience, it is inadequate for 'the protection of indigenous intellectual property, which is the collective

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inheritance of indigenous peoples, nations and tribes [all over the world] and the legacy of future generations' (GFIPIS 2003: para 23).

In solidarity, indigenous and other non-Western peoples have insisted that each epistemic community and tradition have protocols for knowledge protection, which are not necessarily conventional intellectual property rights. They make a case for an intellectual property jurisprudence that is inward looking in terms of the peculiarities of indigenous and local communities' knowledge. Indigenous and local communities have, by their newly found solidarity, challenged the legitimacy of conventional intellectual property rights, and opened a discussion on an alternative vision of knowledge protection. They have done this as part of their quest for concretising a comprehensive view of self-determination. In doing this, they have challenged the circumscribing stranglehold of the nation-states with whom they have no unity of purpose.

Conclusion

Using the concept of the nation-state as the basis of rights and privileges in international law, colonialism isolated indigenous political arrangements. It thus disempowered the indigenous peoples of the enclave colonies from benefiting from the United Nations supervised decolonisation process. This was the effect of the salt-water doctrine. Ironically, the same United Nations, by empowering non-state actors in its new vision of global order, became a veritable instrument for an indigenous renaissance of sorts. After the initial political emphasis on self-determination, indigenous peoples have adopted a more progressive approach to that concept, emphasising its relational application in terms of negotiated outcomes on issues basic to the survival of their socio-cultural interests. Thus, the protection of indigenous knowledge is central to a new concept of self-determination. Because of the similar epistemic worldviews of indigenous peoples and other colonised peoples in the global south, the effort to protect their knowledge now represents a new site for global solidarity among these peoples. Knowledge protection is the new battle cry for the self-determination and

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cultural survival of indigenous peoples and their counterparts all over the world. On that premise, they have challenged the colonial nation-state(s), not only as a concept but also as actors, and hitherto, the ultimate arbiters and determinants of indigenous claims in the global constitutive process.

Thus, the world's marginalised peoples seem to have found a common interest and understanding based on their shared worldview and knowledge. This awareness stands in contradistinction to the prevailing political circumstances that hitherto thrived in keeping them apart on the bases of historical differences in the course of de/colonisation. Collectively, indigenous and local peoples have forged a connection between their knowledge, right to self-determination and cultural survival (Daes 2001, Halewood 1999). In coming to this point of solidarity, indigenous and local communities all over the world found the international arena attractive. They distrusted the colonial state (with which they have little or no unity of purpose) to protect their interests. Because the United Nations system is favourably disposed toward the participation of non-state actors, indigenous peoples, in solidarity with other colonised peoples, have worked hard to influence international developments in areas of common interests. This is so even when those interests, like the protection of indigenous knowledge, may be at cross-purposes with the colonial states.

Notes

- 1 Some European powers, notably Belgium and France, favoured an expansive interpretation of Chapter XI of the UN Charter (obligating colonial powers to grant independence to 'territories whose peoples have not yet attained full measure of self-government') in order to include indigenous peoples in the enclave territories. The Soviet Bloc and Latin American States opposed this move on the basis that such interpretation was capable of threatening the existing global order. This restrictive interpretation that excluded the enclave territories from the UN decolonisation process became known as the salt- or blue-water doctrine.
- 2 According to Anaya, this transformation is 'the most important intellectual development in the seventeenth century subsequent to Grotius'.

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- 3 Arras made this observation in his discourse on narrative approaches to bioethics. His views are relevant in the present context.
- 4 Strictly applied, this view may not be true in relation to Africa which had always had strong states with features akin to the Westphalian model. See Okafor 2000, Diop 1987.
- 5 For instance, at the 1885 Berlin Conference, European colonial powers arbitrarily balkanised precolonial African nations into colonial states with reckless disregard to historical, traditional and the socio-cultural and political heritage of its peoples. This singular act is pivotal to the crisis of political instability in postcolonial Africa. See Mgbeoji 2003, Betts 1972.
- 6 As if to lend credence to this notion many countries, especially in Asia and Africa, are either ambiguous or in outright denial with regard to the question of indigeneity in their territories.
- 7 Canada has a peculiar record at the Human Rights Committees' statistical survey of individual complaints under the optional protocol on ICCPR. At 110, Canada has the second highest number of total complaints. Apart from the ICCPR, individual complaints can also be brought under the optional protocols to the following instruments: Convention on the Elimination of Discrimination Against Women, Article 22 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, Article 14 of the International Convention on the Elimination of All forms of Racial Discrimination. For insight into the program of work and procedure of the Human Rights Committee, see online: <<http://www.unhchr.ch/html/menu2/8/oppro.htm>> (accessed 31 October 2004).
- 8 Lydia Van de Fliert 1994: 197–201 provides a list of frontline indigenous associations.
- 9 European states that consistently showed sympathy to the indigenous cause included Belgium, France, Denmark, Norway and the Netherlands.
- 10 Wiessner 1999 provides an insightful review of developments in these states.
- 11 In 1997, the Sapporo district court held that for failing to take into consideration the impact of its dam project (through which it expropriated Ainu ancestral land) on indigenous Ainu, the regional government was in violation of Ainu minority and indigenous rights under Article 27 of the ICCPR.
- 12 This includes the establishment of a parliament for the Saami. See Wiessner 1999: 94, Beach 1994.

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- 13 Treaty between colonial and postcolonial nations of the Westphalian state model.
- 14 See Article 3 which provides that '[t]he use of term "peoples" in this convention shall not be construed as having implications as regards rights which attach to the term in international law'.
- 15 See Articles 1 of both the ICESCR and the ICCPR, which read: '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'.
- 16 See also Article 15 of the ICESCR.
- 17 ICESCR and ICCPR, Articles 1.
- 18 The soft law instruments are the Rio Declaration, Agenda 21, and the Non-Legally Binding Authoritative Statement of Principles for the Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (The Forest Principles). Hard law instruments from Rio are: The Convention on Biological Diversity and the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.
- 19 See Chapter 26.3(a)(iii). Chapter 23 sets out generally a number of objectives or measures to empower indigenous peoples and communities.
- 20 Many countries and a number of regional bodies have initiated CBD-friendly genetic resources access, benefit sharing and indigenous knowledge protection regimes. For a list of the countries and perspectives on those regimes, see Kate & Laird 1999: 4, Mugabe et al 1997: 115, 143.
- 21 For example, the pastoral Maasai of Kenya, the !Kung of the Kalahari Desert of Botswana, Angola and Namibia, the Pygmies of the Congo, the Tuareg of Mali and Niger, the Nuba of Sudan, among others.
- 22 One of the highlights of the FAO Treaty is Article 9.3 which protects farmers' rights by providing, inter alia, that 'nothing in this article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagation material ...'.
- 23 For instance, while serving as a member of the CBD Ad Hoc Technical Expert Group on Genetic Use Restriction Technologies, I found that both indigenous peoples of North America and other third world governmental and non-state representatives spoke with one voice in opposition to genetic

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seed sterility, a matter they believed was capable of undermining their traditional lifestyle and agricultural practices. Similar experience is usual in various international fora.

- 24 See, for example, Article 29; see also Articles 4, 5, 7, 13, 25, 27 and 30 of the ILO Convention, (providing for the preservation of indigenous cultural identity). Intellectual property is a device for protecting cultural knowledge. Halewood has rightly argued that this convention does not foreclose the protection of indigenous intellectual property rights (1999: 970).
- 25 For example, the Draft defines indigenous heritage (capable of protection) as ‘everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples ... [including] all those things which international law regards as the creative production of human thought and craftsmanship ...’
- 26 Conventional intellectual property approaches indigenous knowledge from segmented disciplinary regimes such as ethnobiology, ethnomedicine, ethnopharmacy and many other ‘ethno’ prefixes. It also evaluates them on the basis of their fitness into regimes such as patents, trademarks, and copyrights, mainly for their commercial exploitation. Among treaty or legal regimes that bifurcate indigenous knowledge are those on the protection of biodiversity, access to genetic resources and benefit sharing and on indigenous cultural property.
- 27 Article 27 of the TRIPs Agreement which makes provisions, inter alia, for patents on inventions is the portion of the agreement that has closest connection to indigenous knowledge. Because it sanctions patenting of life forms, including plants, indigenous peoples have seized every opportunity in the lingering process for the review of the TRIPs Agreement to restate their opposition to the patentability of life forms. Their opposition resonated in the 3rd and 4th Ministerial Meeting for the Review of the TRIPs Agreement in Seattle and Doha respectively. By virtue of the Doha Declaration adopted in November 2001, the protection of traditional knowledge and folklore is one of the implementation issues in the review of the TRIPs Agreement. See text of the Doha Declaration, WTO document: WT/MIN/01/Dec/1.
- 28 The 1994 TRIPs Agreement epitomises this.
- 29 Established by decision IV/9 of the Conference of Parties to the CBD, 1994 charged with exploring the modalities on how to implement Article 8(j) and other related provisions of the CBD.

- 30 An Inter-Governmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was set up by WIPO General Assembly to provide a forum for WIPO members to deliberate on the enumerated issues. As part of its deliberations, the IGC embarked on a survey of existing forms of intellectual property protections with regard to their nature and in/adequacy in protecting indigenous knowledge. In this process, the WIPO/UNESCO Model has come under the IGC searchlight. See WIPO 2001b.

References

- Agenda 21 and the Rio Declaration on Environment and Development reprinted in 1992 31 ILM 874
- Agreements on Trade-Related Aspects of Intellectual Property Rights reprinted in 1994 33 ILM 1194
- Anaya J 1996 *Indigenous Peoples in International Law* OUP New York
- Anghie A 1996 'Francisco Vitoria and the Colonial Origins of International Law' *Social & Legal Studies* 5: 321
- Arras J D 1997 'Nice Story, But so What? Narrative and Justification in Ethics' in Nelson 1997: 65–88
- Arun Agrawal 1999 'On Power and Indigenous Knowledge' in Posey 1999: 177
- Barnes R H, Gray A and Kingsbury B 1995 *Indigenous Peoples of Asia* Association of Asian Studies Ann Arbor
- Barsh R L 1996 'Indigenous Peoples: An Emerging Objects of International Law' *American Journal of International Law* 80/2: 369
- Battiste M ed 2000 *Reclaiming Indigenous Voices and Vision* University of British Columbia Press
- Battiste M and Henderson J 2000 *Protecting Indigenous Knowledge and Heritage: A Global Challenge* Purich Publications Saskatoon
- Beach H 1994 'The Saami of Lapland' in Minority Rights Group 1994
- Berger J 1996 'The United Nations Draft Declaration on the Rights of Indigenous Peoples' *St Thomas Law Review* 9: 209
- Betts R F ed 1972 *The "Scramble" For Africa: Causes and Dimensions of Empire* Heath Lexington

Protecting indigenous knowledge in international law

- Birnie P W and Boyle A E 2002 *International Law and the Environment* OUP Oxford (2nd ed)
- Blakeney M 1999 'Ethnobiological Knowledge and Intellectual Property Rights of Indigenous Peoples in Australia' in Blakeney 1999: 94
- ed 1999 *Intellectual Property Aspects of Ethnobiology* Sweet and Maxwell London
- 2000 'The Protection of Traditional Knowledge Under Intellectual Property Law' *European Intellectual Property Review* 20/6: 251
- Brunée J 1998 *Acid Rain and Ozone Layer Depletion: International Law and Regulations* Transnational Publishers Dobbs Ferry
- Brush S 1996 'Whose Knowledge, Whose Genes, Whose Rights?' in Brush and Stabinsky 1996
- Brush S and Stabinsky D eds 1996 *Valuing Local Knowledge: Indigenous Knowledge and Intellectual Property Rights* Island Press Washington DC
- Bryant M 1992 'Aboriginal Self-Determination: The Status of Canada's Aboriginal Peoples in International Law' *Saskatchewan Law Review* 56: 267
- Cajete G 1999 *Native Science: Natural Law of Interdependence* Clear Light Publishers Santa Fe New Mexico
- Carrey J and Wiessner S 2001 'A New United Nations Subsidiary Organ: The Permanent Forum on Indigenous Issues' *ASIL Insight* 17 April 2001 online: <<http://www.asil.org/insights/insigh67.htm>> (accessed 31 October 2004)
- Cobo M 'Study of the Problem of Discrimination Against Indigenous Population' UN Doc E/CN.4 sub 2/1986/7Add 4
- COICA Statement on Intellectual Property Rights and Biodiversity, online at Oxford University Computing Services: <<http://users.ox.ac.uk/~wgtrr/coica.htm>> (accessed 31 October 2004)
- Convention on Biological Diversity reprinted in 1992 31 ILM 818
- Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa reprinted in 1994 ILM 1332
- Coombe R 2001 'The Recognition of Indigenous Peoples' and Local Community Knowledge in International Law' *St Thomas Law Review* 14/2: 275
- Daes Erica-Irene 1997 *Protection of Heritage of Indigenous Peoples* UN Study Series #10 New York and Geneva as Revised by the UN Seminar, February/March 2000

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- 1998 'The United Nations and Indigenous Peoples: From 1969 to 1994' online University of Tromsø Centre for Sámi Studies <<http://www.uit.no/ssweb/dok/series/n02/en/102daes.htm>> (accessed 31 October 2004)
- 2000 'Human Rights of Indigenous Peoples: Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples' *St Thomas Law Review* 13/1: 391–404
- 2001 'The Concept of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples' *St Thomas Law Review* 14/2: 259
- Damerow H 1978 'A Critical Analysis of the Foundation of International Law Declaration of Belem, online Oxford University Computing Services: <<http://users.ox.ac.uk/~wgtrr/belem.htm>> (accessed 31 October 2004)
- Declaration on the Granting of Independence to Countries and Peoples in General 1961 UN Res 1514(XV)
- Deloria Vine ed 1985 *American Indian Policy in the Twentieth Century* Oklahoma University Press Norman
- Diop C A 1987 *Postcolonial Black Africa: A Comparative Study of Political and Social Systems in Europe and Black Africa, From Antiquity to the Formation of Modern States* Trans H J Salemsen Lawrence Hill Books Chicago Illinois
- Draft Principles and for the Protection of the Heritage of Indigenous Peoples 2000 UN Doc E/CN 4/Sub 2/2000/26 reprinted in *St Thomas Law Review* 13/1: 405
- Ellen R, Harris H and Parkes P eds 2000 *Indigenous Environmental Knowledge and Its Transformations: Critical Anthropological Perspectives* Harwood Academic Publishers Amsterdam
- Emmerich de Vattel (1714–1769) 1916 *The Law of Nations, or the Principles of Natural Law 1758 ed* Trans C Fenwick Carnegie Endowment for International Peace Washington DC
- Final Statement on UNDP Consultation on Indigenous Peoples and Intellectual Property Rights, online Oxford University Computing Services: <<http://users.ox.ac.uk/~wgtrr/suva.htm>> (accessed 31 October 2004)
- Fitzpatrick P and Darian-Smith E eds 1999 *Laws of the Postcolonial* University of Michigan Press Ann Arbor

Protecting indigenous knowledge in international law

- Framework Convention on Climate Change reprinted in 1992 31 ILM 289
- GFIPIS, Official Report of the 8–11 December 2003 Global Forum of Indigenous Peoples and Information Society (GFIPIS) Geneva Declaration and Program of Action, available online: Permanent Forum on Indigenous Issues <http://www.un.org/esa/socdev/pfii/wsis_gfipis.htm> (accessed 31 October 2004)
- Gnzm S E Rt Hon 2002 ‘Maori and the New Zealand Legal System’ *Australian Law Journal* 76: 620
- Gray A 1991 ‘The Impact of Biodiversity on Indigenous Peoples’ in Shiva et al 1991: 60
- Halewood M 1999 ‘Indigenous in International Law: A Preface to *Sui Generis* Intellectual Property Protection’ *McGill Law Journal* 44: 953
- Hyde C C 1945 *International Law As Chiefly Interpreted and Applied by the United States* Little, Brown & Co Boston
- Indigenous Peoples’ Seattle Declaration, online: <<http://www.ldb.org/indi99.htm>> (accessed 31 October 2004)
- Inter-American Draft Declaration on the Rights of Indigenous Peoples reprinted in 1997 *International Journal of Cultural Property* 6/2: 364
- International Covenant on Civil and Political Rights reprinted in 1967 6 ILM 368
- International Covenant on Economic, Social and Cultural Rights reprinted in 1967 6 ILM 360
- International Labour Organization Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries reprinted in 1989 28 ILM 1382
- International Treaty on Plant Genetic Resources for Food and Agriculture, available online: <<http://www.fao.org/ag/cgrfa/itpgr.htm>> (accessed 31 October 2004)
- Julayinbul Statement on Intellectual Property Rights, online: <<http://www.oiprc.ox.ac.uk/EJWP1199.htm>> (accessed 9 September 2003)
- Kate K and Laird S A 1999 *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-Sharing* Earthscan London
- Kingsbury B 1992 ‘Self-Determination and “Indigenous Peoples”’ *Am Soc Int’l L Rev* 86: 383

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- 2001 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' *Journal of International Law and Politics* 34/1: 189
- Koning de Martine 1999 'Biodiversity Prospecting and Equitable Remuneration of Ethnobiological Knowledge: Reconciling Industry and Indigenous Rights' in Blakeney 1999: 25
- Lauterpacht H ed 1948–1952 *Lassa Oppenheim International Law: A Treatise* Longmans Green Co London and New York (7th ed)
- Lindley M F 1926 *The Acquisition and Government of Backward Territory in International Law* Longman London
- Mataatua Declaration Cultural and Intellectual Property Rights of Indigenous Peoples, online Oxford University Computing Services: <<http://users.ox.ac.uk/~wgtrr/mataatua.htm>> (accessed 31 October 2004)
- Mgbeoji I 2003 *Collective Insecurity: The Liberian Crisis, Unilateralism, & Global Order* University of British Columbia Press Vancouver
- Minority Rights Group ed 1994 *Polar Peoples, Self-Determination and Development* Minority Rights Publication London
- Moses T 2000 'Invoking International Law' in Battiste 2000
- Mugabe J et al eds 1997 *Access to Genetic Resources: Strategies for Benefit Sharing* ACT Press Nairobi
- Nelson H L ed 1997 *Stories and their Limits: Narrative Approaches to Bioethics* Routledge New York
- Non-Legally Binding Authoritative Statement of Principles for the Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (The Forest Principles) 1992 31 ILM 881
- Nunes K 1995 "'We Can Do ... Better": Rights of Singular Peoples and United Nations Draft Declaration on the Rights of Indigenous Peoples' *St Thomas Law Review* 7: 521
- O'Brien S 'Federal Indian Policies and International Protection of Human Rights' in Deloria Vine 1985: 53
- Oguamanam C 2004a 'The Protection of Indigenous Knowledge: Towards a Cross-Cultural Dialogue on Intellectual Property Rights' *Australian Intellectual Property Journal* 15/1: 34

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

Van de Fliert L ed 1994 *Indigenous Peoples and International Organizations* Spokesman Nottingham

Westlake J 1894 *Chapters on the Principles of International Law* CUP Cambridge England

Wiessner S 1999 'Rights and Status of Indigenous Peoples: A Global and Comparative International Legal Analysis' *Harvard Human Rights Journal* 2: 57

— 2001 'Defending Indigenous Heritage: An Introduction' *St Thomas Law Review* 14/1: 271

Wiessner S and Battiste M 2000 'The 2000 Revision of the United Nations Draft Principles and Guidelines on the Protection of the Heritage of Indigenous Peoples' *St Thomas Law Review* 13/1: 383

Wilmer F 1993 *The Indigenous Peoples in World Politics: From Time Immemorial* Sage Publications Inc Newbury Park California

World Intellectual Property Organization 1989–9 Main Program II 'Global Intellectual Property Issues' WIPO Doc A/34/2/WO/PBC/1/2

— 2001a *Fact Finding Missions on Intellectual Property and Traditional Knowledge* 1998–1999 WIPO Geneva

— 2001b 'Questionnaire on National Experiences With Legal Protection of Expressions of Folklore' Doc WIPO/GRTFK/IC2/7

Cases

Delgamuukw v British Columbia (1997) 3 SCR 1010

Mabo v Queensland [No 2] (1992) 175 CLR 1