Chapter Three
Power and Human Rights Discourse

This chapter has a dual purpose. It outlines the third substantive discourse which is to be assessed in the case-study chapters, human rights discourse. It also marshalls evidence in support of various theoretical claims that the thesis makes, such as that a Foucaultian genealogical approach can contribute to a persuasive analysis of global governance.

This chapter develops a Foucaultian genealogy to show how human rights standards and instruments influence social movements’ subjectivities and the language of human rights campaigns. It explores the mutually constituting, but uneven, interaction of human rights discourse and political agency. To the extent that global actors are responding to or promoting human rights discourse, they can be seen as ‘embedded’ in and constituted by their changing discursive and cultural context. It argues that the interaction of human rights discourse and political agency involve co-determination, with agents and structures being mutually constituted yet ontologically distinct. As Michel Foucault argues, discourses are ‘practices that systematically form the objects of which they speak’. Social or discursive structures exist because of the actions and practices which constitute and reproduce them. Agents are socially empowered as a consequence of discourses being considered authoritative and legitimate. This also suggests that IPO political identities and subjectivities are constituted within the normative boundaries of the changing international order, and consistent with a movement towards the ‘constitutional’ accommodation of politicised cultural diversity at national and global levels. This provides a basis for explaining rights-related political developments in other fora such as the CBD.

These have been important political dynamics since at least the European colonisation of the ‘New World’. The norm of ‘racial equality’ and other human rights principles are central to contemporary campaigns for the better recognition and protection of indigenous peoples’ knowledge, innovations and practices. Human rights processes have also been constitutive because IPOs have also successfully argued for the replication of participatory human rights deliberative procedures in other fora, such as

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as the CBD, as discussed in Chapter Five.

Ecofeminist discourse and rights based on gender are less politicised concerning traditional knowledge. Rights based on gender equality are implicit in much of the ‘development’ literature on women in development (WID), women and development (WAD), gender and development (GAD), and ecofeminism. The value of gender-specific knowledge is also recognised in various recent international instruments concerned with plant genetic resources, as discussed below. This partly reflects the strength of the heterogeneous global social movement which promotes women’s rights, but this movement has had fewer successes than that promoting indigenous peoples’ rights. The rights of indigenous peoples and women are both more politicised and better represented by IPOs and NGOs in inter-governmental fora than are those of ‘local communities’ or minorities, as will be demonstrated in Chapter Five, using the CBD as an example.

It is important to explore how and why human rights discourse is constitutive and transformative because the growing recognition of the value of traditional and gendered knowledge is a significant policy change, and reflects the success of IPO and NGOs’ human rights based campaigning on traditional knowledge and intellectual and cultural property rights during the 1990s. But at a deeper level it is also a result of longer-term interactions between norms of international law, knowledge/power networks, and social movements. This is explored in section three, where the dynamics leading to the recognition of land rights in several jurisdictions are analysed. The assumed ‘racial’ hierarchies and assimilation policies that were dominant in most ‘post-colonial’ states until the 1970s, are having to give way to a new appreciation of the value of traditional knowledge, innovations and practices. Thus it is apparent that over the long term, human rights discourse is having transformative effects regionally and domestically.5

The first examines the influence of human rights discourse and liberalism on the evolving distribution and exercise of state power within liberal states. The uneven ‘separation’ of legislative, judicial, and executive powers in many democracies has enabled international norms and political developments to have variable domestic effects. The possession and exercise of power is manifest in case-law (judicial power), colonial treaties (executive power) and land rights legislation (electoral, social movement, and legislative power). The extent to which changing international norms and principles are accommodated when these diverse forms of power are exercised domestically is uneven. But the fact that power is held by diverse actors and arms of the state is important because if norms are complied with, this can effect legal and political change. The influence of the judiciary in many jurisdictions concerning the recognition of customary property rights has been significant for example. This can influence

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governments’ negotiating position in international fora and can effectively constrain law and policy options.\textsuperscript{6}

The second section examines the indirect constitutive effects that energy politics and the norm of national sovereignty over natural resources had for indigenous peoples’ land rights, at a time when racial and civil rights were more politicised internationally. It examines the contributions made by academics and popular social movements in the 1960s and 1970s in promoting the recognition of land rights in important jurisdictions in Australia, and nationally in Canada and New Zealand in the 1970s. The relative lack of influence in the 1970s of United Nations activities is also assessed. The restoration of land title and new legitimacy for processes of political settlement in those jurisdictions were necessary precursors to the exercise of indigenous peoples’ knowledges, innovations and practices concerning natural and cultural resource management on traditional lands. International legal and policy instruments recognised the value of traditional resource management in the 1980s and early 1990s. This partially explains why in the FAO in the 1960s and 1970s, it was too early for \textit{in situ} plant genetic resource conservation and the rights of indigenous and local communities to have been recognised in conservation policy either by NGOs (including the IUCN) or international institutions, as explored in the next chapter\textsuperscript{7}. These developments cannot be explained using state-centric realist or structural neo-realist theories. Rather it is necessary to explore the diffuse power exercised by social movements and discourse.

The third section primarily examines the progress of the Draft United Nations Declaration on the Rights of Indigenous Peoples (DUNDRIP) through human rights fora. It argues that various governments are resisting the application of the norm of self-determination to ‘indigenous peoples’ and are debating their right to claim indigeneity. Definitional issues have become important because international law and politics have constitutive spatial effects. This is demonstrated by the increasing number of geographically diverse political communities who are asserting their status in international fora as ‘indigenous peoples’, with associated human rights under evolving human rights law. Estimates suggest that there are 5,000 or so diverse indigenous peoples, comprising more than 300 million people in total. Some governments are resisting the application of human rights standards to indigenous peoples within their jurisdiction. This section speculates that this is largely motivated by state-centric security discourse and concludes with a brief reference to the possibility of a permanent

\textsuperscript{6} Australian cases such as \textit{Mabo v. Queensland} (No.1) (1988) 166 CLR 186 and \textit{Mabo v. Queensland} (No.2) (1992) 175 CLR 1 were significantly influenced by international norms. On the other hand, cases such as \textit{The State of Western Australia v Ward} [2000] FCA 191 suggest that the implications of native title for the governance of plant genetic resources in Australia are extremely limited as native title does not include rights to commercially trade in resources, and native title is subject to extinguishment by legislation or inconsistent rights in other parties.

forum for indigenous peoples being created within the United Nations, which has the potential to be a significant institutional innovation. It is too early to predict whether this forum will work closely with other international institutions considering plant genetic resource issues, however.

The fourth section provides an overview of the contemporary campaign for the recognition of the value of traditional knowledge, and some of the actors involved. The UN's responsiveness is also assessed. This section examines two human rights reports and other human rights processes which have been of variable import in progressing indigenous peoples' rights in relation to biodiversity and traditional knowledge. These are reports written by special rapporteur, Mrs Fatma Zohra Ksentini, on human rights and the environment, and by the chair of the WGIP, Prof. Erica-Irene Daes, on the protection of indigenous peoples' heritage. These have not influenced global governance concerning plant genetic resources in any significant way. International communications and dispute adjudication processes under several international human rights treaties are noted briefly.

The fifth section assesses the relevance of several developments in human rights discourse relevant to women, including the 1995 Beijing Fourth World Conference on Women. It demonstrates the effectiveness of the IPO and NGO campaign about traditional knowledge and intellectual property rights in that fora.

This chapter proceeds with this genealogy even though Foucault did not analyse contemporary human rights discourse in his major works. Foucault's theory of power, and disdain for the notion of executive sovereignty is probably the reason he gave little attention to the human rights discourse of the Enlightenment tradition. That tradition sees human rights as a protective mechanism against state power. Foucault had become disillusioned with Marxism and socialism in the 1970s but that did not lead him to support proposals from within the French Socialist Party for a socialist charter of rights. He saw declarations of rights as easily compiled but ineffective against the exercise of power. He also warned against investing judges and courts with a broader jurisdiction over civil society by extending their role to include human rights issues. Despite this stance, Foucault did participate in various protests in the 1970s against Francisco Franco's dictatorship in Spain, and military conscription in France, and supported gay rights and prison reform.8

This chapter demonstrates that despite Foucault's reservations about human rights discourse, it is possible to use his concepts about archaeologies and genealogies of knowledge/power to analyse human rights as discourse.

Human rights discourse and the separation of powers

Human rights discourse has an extensive and complex genealogy. Natural law and liberalism contributed to the embryonic human rights discourse which influenced the
'Glorious Revolution' in Britain in 1688-89, the Peace of Westphalia in 1648, the American Revolution in 1778-80, and the French Revolution in 1789. Various European Enlightenment philosophers of the late seventeenth and eighteenth centuries, developing earlier Greek-derived natural law, wrote passionately about the political sovereignty of peoples (in a state-centric sense), the separation of powers and rule of law, equality, and individual civil and political rights and responsibilities. Writers such as Immanuel Kant, Charles de Secondat, Baron de Montesquieu, Samuel von Pufendorf, Martin Luther, Thomas Hobbes, Jean-Jacques Rousseau, Thomas Paine, and John Locke were particularly influential within the diverse school of liberal writings. The political process of separating monarchs and their churches from parliamentary law, and guaranteeing limited forms of religious freedom, did not necessarily weaken the effect of Christian discourses more generally, which were still the foundation of colonising evangelism and 'philanthropy' in European colonies. But the recognition of state sovereignty and the assumption that elected state representatives could speak on behalf of territorially-constituted 'nationals' came to be defining features of international relations discourse, and have remained so for most of this century. This discourse tended not to recognise the political identity of minorities, indigenous peoples, and women, however. It was not until the late twentieth century that political theorists began to re-theorise the status of indigenous peoples and minorities within liberal discourses of human rights and within liberal polities, largely as a result of the gains made by indigenous peoples since the 1970s. The United Nations is also recasting its relationships with indigenous peoples, as discussed below.

The recognition of economic, social and cultural rights which are also relevant to contemporary human rights norms, evolved more from the discursive influence of eighteenth- and nineteenth-century philosophers such as Georg Hegel, Jeremy Bentham, Karl Marx and Vladimir Lenin. Marx's writings on historical materialism, class struggle and the division of labour were particularly important for later developments in the discourse of economic and social rights. The social conditions which stimulated these newer conceptions of rights included the industrial revolution and organised revolts against worsening class inequalities in the eighteenth and nineteenth centuries.

But it was not just intellectual product which formed the discursive structure by which political agents were constituted, and within which they interacted during this period. Human rights instruments were also a form of political settlement designed to quell social conflict and resistance, and to constrain the interaction of powerful actors. Political actors in conflict negotiated lists of rights which set the loose boundaries for political debate and compromise. These were the claims of gendered and culturally-specific politicised communities. Political settlements applying rights discourse were also embodied in instruments with a specific cultural form. They were written texts

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carefully crafted during protracted negotiations, then witnessed and promulgated with solemnity. The Magna Carta of 1215, and the settlements of the Habeas Corpus Acts and Bill of Rights of 1689 in England, the US Declaration of Rights of 1774, and the French Declaration of the Rights of Man and the Citizen of 1789, were liberal political mechanisms for resolving conflict and calming social unrest partly inspired by philosophical and political texts produced by, or received well in, fomenting social, political and economic contexts. The effectiveness of political agency was constrained and contoured by the cultural and normative discourses within which the political settlements were negotiated. Meanwhile, trafficking in human labour, the displacement and dispossession of many colonised peoples, disease transmission, and uplifting "modernisation", particularly for compliant elites, proceeded apace in many colonies until well into the nineteenth century. But liberal cultural practices were also carried into the colonies, and some practices, such as the binding nature of negotiated agreements, have become important in contemporary indigenous politics, including for the governance of plant genetic resources.

**Human rights discourse in the colonies**

Treaties between colonising Europeans and indigenous peoples were often negotiated during colonialism as political settlements and/or strategic alliances between some colonised social groupings and the colonising presence, usually to end conflict or affirm jurisdiction over resources. Uniquely indigenous forms of protest occurred in the colonies, but when settlements came to be finalised, they tended to manifest cultural adaptation by emulating European contractual form. Numerous treaties between colonial governments and colonised peoples were designed to appease conflict, and to commit colonised peoples to a predominantly masculine project of nation-state-building (notwithstanding the occasional female colonial monarch or indigenous leader). The norm of self-determination is evident in many of these treaties since they assumed an agreement between sovereign political entities. Many of these treaties also addressed rights to land and natural and cultural resources, compensation, and freedom of movement. In the United States for example, between about 1778 and 1871, treaties were negotiated to appease Indian nations at war with the colonisers. Misunderstandings were inherent in these processes and continue to resonate today with ongoing litigation about, and the re-negotiation of earlier colonial settlements, such as is occurring in Canada, the United States and New Zealand. But the primarily European cultural phenomenon, the declaration of rights, continues to be practised today at innumerable meetings of indigenous peoples, from the local level to the global. This also demonstrates the mutually constituting influence of agency and broader discursive structure.

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1995.

The French Revolution, which involved Jacobins in the bourgeois middle classes claiming rights to parliamentary governance against aristocratic and monarchical elites, was particularly influential in the colonies and led to long-lasting political change. Although the term 'right to self-determination' was not to emerge until the end of the eighteenth century, Jacobins were effectively asserting self-determination claims for bodies politic, as well as liberal rights to liberty and equality for political subjects. Despite the horrors of the Robespierrean/Jacobin dictatorship and reign of terror during the French Revolution, the mobilising discourse effected longer term human rights reforms concerning the evolution of the norm of racial equality and self-determination. For example, by 1792 the French Revolutionary Assemblies had extended full political rights to free blacks, and in 1794 slavery was rendered illegal within the French empire. In the same year Haiti declared its independence from France and became the first newly-independent sovereign state in the New World outside the United States (despite a brief French re-occupation, 1802-04). This embryonic discursive and physical shift towards 'racial equality' and popular sovereignty both in Europe and the colonies inspired British and American abolitionists, many of whom were Quakers. Their campaigning contributed to the outlawing of slavery in Britain in 1807, and in overseas British colonies in 1833. In America, northerners' aspirations for the end of slavery, which were embodied in Abraham Lincoln's 1862 Emancipation Proclamation, were largely opposed by southern slave owners. However, slavery was ended by the Civil War (1861-65).

Thus the political movement of liberal rights effected a discursive rupture, a discontinuity in the legitimacy of slavery, and an emerging recognition that 'peoples' (often defined in transitional democracies by masculinity and property) were entitled to self-determination and parliamentary representation.

**Energy politics, social movements and the restoration of land rights**

In the 1960s and 1970s in Canada, Alaska (United States), Australia and New Zealand, other discursive discontinuities occurred which were as significant for contemporary indigenous peoples' global politics as was the emergence of liberal human rights in Europe. Discursive 'ruptures' led to the statutory recognition of indigenous land rights in important jurisdictions in Australia and the United States, and nationally in Canada and New Zealand. They also stimulated the growth of indigenous peoples' organised international politics. These are important developments for the concerns of the thesis, because without the restoration of rights over customary territories, it is unlikely that indigenous peoples in influential jurisdictions could have become actively involved in natural and cultural resource management. That involvement provides the rationale for these jurisdictions to later influence international law to better recognise the value of traditional knowledge, innovations and practices relevant to sustainable development.

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These developments are also important because they were not determined primarily by anti-racism activities in the UN, which seems counter-intuitive, given the importance of human rights discourse and liberalism to the evolving international system of states and world order. Rather, the growth of social movement politics during this period was grounded in conflicts of political economy, UN-recognised norms of national sovereignty over resources, and degrading environments. The chain of causation is quite complex. Two of the most relevant factors seem to be the dependence of industrialised economies on oil imports, and the political influence of the environmental movement and its discourses of resource depletion. Less constitutive influences were the civil and land rights movement, strengthening norms of racial and gender equality, and a series of landmark court cases.\textsuperscript{12} Again the influence of diffuse power is apparent, with resource politics, social movements, and normative and judicial power being particularly significant.

The political economy of oil was central, particularly in Canada, the United States and Australia. Developments in the United Nations concerning the rights of indigenous peoples were partially stimulated by these developments. Member states of OPEC and OAPEC\textsuperscript{13} had wrested control of the price of oil and other benefit-sharing arrangements from the major oil multinationals in the 1960s and 1970s, and asserted their international legal rights to sovereignty over their natural resources.\textsuperscript{14} In response to the October 1973 Yom Kippur War between Arab and Israeli forces, an oil embargo was instituted against Israel’s allies. Oil production was also cut by between 5 and 25 per cent over several months and the price of oil was unilaterally increased — by more than 70 per cent initially — although it was to reduce later.\textsuperscript{15} In industrialised economies dependent on oil imports, these oil price shocks heightened interest in locating oil resources beyond traditional supply lines. Because of the strength of social movement politics, governments and resource companies were electorally compelled to address indigenous communities’ claims to land and resources in those areas where both minerals exploration activities and indigenous claims occurred. Australia, New Zealand, Canada, the United States and northern Arctic states shared this experience.

The effects of oil politics for indigenous peoples resonated most powerfully first in the American state of Alaska. Unlike longer-established American states where land

\textsuperscript{12} Such as Calder v. Attorney-General of British Columbia (1973) 34 DLR(3d) 145 and Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141. Indigenous peoples’ claims were not upheld but the judgments precipitated changes in Canada and Australia concerning land rights policies.

\textsuperscript{13} The Organisation of Petroleum-Exporting Countries and Organisation of Arab Petroleum Exporting Countries respectively.

\textsuperscript{14} State’s sovereignty over resources within their territory has been a long-standing norm of international law but developing country states reassured it in the 1960s and 1970s to regain control of their oil resources. See for example UNGA Res. 1803 XVII (1962), UNGA Res. 2158 (XXI) (1966), and UNGA Res. 3201 (S-VI) (1974) (Declaration on the Establishment of a New International Economic Order) and UNGA Res. 3281 XXIX (1974) (Charter of Economic Rights and Duties of States), discussed in P.W. Birnie and A.E. Boyle, \textit{International Law and the Environment}, Clarendon Press, Oxford, 1992, pp.112-144.

and resource issues were relatively more settled, conflicting state government and indigenous American land claims over large areas of Alaska escalated when oil was discovered on those lands and under the Beaufort Sea. A negotiated settlement came in the form of the *Alaska Native Claims Settlement Act 1971* which extinguished Aboriginal claims in return for more than US$900 million compensation and more than forty million acres of land. First Nations organisations also insisted on more equitable mineral leasing contracts in Wisconsin, and other jurisdictions in the United States.

In Canada the political economy of energy and the rights of First Nations interacted over proposals to build the James Bay Hydro Electric project and to lay an oil pipeline through the McKenzie Delta-Beaufort Sea area. The 1977 Report of the McKenzie Valley Pipeline Inquiry enabled Canadian First Nations to have extensive input into the deliberations. Following the 1973 *Calder Case* and a broadening rights-based movement the federal government adopted a comprehensive land claims policy and an Office of Native Claims was created to process claims nationally. The *James Bay Northern Quebec Agreement 1975* was the first agreement negotiated under the new policy. Settlement agreements address a broad range of issues including land title, wildlife harvesting rights, participation in land, water, wildlife and environmental management, financial compensation, resource revenue-sharing, and measures to stimulate economic development. Academics began to generate a sizeable literature on common property resource and collaborative management processes as a result of these policies and processes, which also stimulated interest elsewhere.

Similar developments occurred in Australia and New Zealand. The Gurindji's

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nine-year struggle for rights over pastoral lands and for fair wages in the 1960s and a campaign for redress of the Yirrkala grievances about the Nabalco Company's mining on Gove Peninsula in the Northern Territory, including unsuccessful litigation in 1971, generated support for a broader land rights and anti-racism campaign, led by long-established IPOs. The Aboriginal Tent Embassy in Canberra, which was established in front of the old Federal Parliament House in 1972, resurrected several times until 1975, and again from 1992, intermittently focused politicians' and electors' attention on indigenous Australians' self-determination aspirations.

Also in Australia, governments' and developers' interests in uranium and other ores in remote regions resulted in major inquiries such as the Ranger Uranium Environmental Inquiry. That inquiry documented indigenous Australians' links with resource-rich country and gave a highly qualified endorsement to uranium mining proceeding. It recommended strict compliance with other recommendations, such as that Aboriginal land rights be recognised and a national park be created in the Kakadu region of the Northern Territory. This was seen as a reasonable accommodation between competing interests and land uses in the region. Fears that world resources in oil and natural gas might be substantially depleted by the year 2000, and that uranium could make a substantial contribution to energy needs was a relevant consideration for the inquiry. The Ranger Report complemented Justice Woodward's pathbreaking report on land rights in the Northern Territory. As a result of these factors, the Aboriginal Land Rights (Northern Territory) Act (1976) (Cwlth) was passed, creating a claims process for the recognition of indigenous Australians' rights and interests in land in the Northern Territory, including mining royalties, customary use, and the possibility of joint management arrangements over protected areas.

In New Zealand the Treaty of Waitangi Act 1975 was the government's response to Maori protests about Crown non-compliance with the Treaty of Waitangi. The Waitangi Tribunal was established to inquire into and make recommendations on treaty claims, many of which concern natural and cultural resources.

Another powerful influence on energy politics and land rights emanated from scientists and the environmental movement, particularly in industrialised countries in...
the 1970s. They politicised and popularised scientific warnings that the life-sustaining processes of the planet were imperilled. They warned that the carrying limits of the planet were finite and began to argue that indigenous peoples’ land management strategies were more sustainable. Concerns about disrupted ecosystems, excessive population, depleted food supplies, rampant militarism, and the exhaustion of non-renewable resources such as oil, led to diverse publications including *Silent Spring* (1962), *The Limits to Growth* (1972), *This Endangered Planet* (1971), *The Closing Circle* (1972), and *A Blueprint for Survival* (1972). The apocalyptic warnings of this period later proved to be overstated, but they had political resonance nevertheless. The years between 1962 and 1970 have been aptly described as an ‘environmental revolution’. The extraordinary growth of environmental movements in the US, New Zealand and Australia have been profiled by McCormick, Rainbow, and Hutton, Connors and Burgmann respectively.

Indigenous peoples and environmental movements were significantly influenced by mineral exploration and environmental degradation, and these movements were broadly transnationalised in the 1970s. IPOs networked and sought consultative status with the UN in the lead-up to and at the 1972 UN Conference on the Human Environment. The documents produced by that conference did not identify indigenous peoples as a distinct category of stakeholder, however. In 1973 an Arctic Peoples’ conference brought together activists for the Inuit of Greenland and Canada, the Sami of Scandinavia, and Canada’s Dene Indians and Metis. Such circumpolar networking has been an effective political strategy regionally, and in the United Nations. The World Council of Indigenous Peoples was formed in 1975, initiated by George Manuel of the National Indian Brotherhood of Canada. It represented indigenous peoples of the five regions of North, Central and South America, the Nordic region, and Australasia. A 1977 NGO conference in Geneva on discrimination against indigenous populations in the Americas again confirmed the transnational appeal of human rights campaigns, as did the proliferation of academic interest in indigenous peoples’ rights. These heightened UN interest in the issues.

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source of power and influence in relation to issues of importance to IPOs in other fora, including in relation to plant genetic resources.

Oil politics and resistance movements were more important for securing land rights for indigenous peoples than were international human rights norms, per se, in this period. In the 1960s and 1970s the rights of ‘indigenous peoples’, as distinct from race-based rights, had not yet become a significant multilateral issue. The Charter of the United Nations and the 1948 Universal Declaration of Human Rights do refer to the need for states to promote respect for human rights and fundamental freedoms for all irrespective of race, sex, language or religion, as do the two main international human rights covenants of 1966, but assimilationist approaches remained dominant until the 1970s.\(^{33}\) In 1957 the International Labour Organisation (ILO) adopted an assimilationist Convention on Indigenous and Tribal Populations (Convention 107). The UN General Assembly did authorise military and trade sanctions against South Africa in 1962-63, however. The UN General Assembly also adopted a Declaration on the Elimination of All Forms of Racial Discrimination in 1963, and a binding Convention was drafted and adopted in 1965.\(^{34}\) The UN declared 1973 the start of a Decade of Action to Combat Racism and Racial Discrimination, and only after that did the UN system begin to identify indigenous peoples as a distinct major group. For example, in 1971 Special Rapporteur José Martínez Cobo was asked to study discrimination against indigenous populations. The Cobo Report identified land, culture and religion, amongst others, as special areas requiring action.\(^{35}\)

Other international legal developments were relevant but not determinative in the discursive shift on land rights in Western industrialised countries in the 1970s. The International Court of Justice issued an advisory opinion on self-determination in 1971 after South Africa refused to depart from Namibia.\(^{36}\) During the 1960s and 1970s numerous UN resolutions addressed self-determination for Palestinians, for ‘blacks’ in South Africa and the former Southern Rhodesia,\(^{37}\) and for Tibet. In 1975 the International Court of Justice declined to apply the doctrine of terra nullius and recognised tribal peoples’ customary title in the western Sahara case. Again, this

\(^{33}\) International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights.


\(^{35}\) In 1965 a UN study on racial discrimination included a chapter on indigenous peoples and recommended that a more comprehensive UN study be carried out, leading *Study of the Problem of Discrimination Against Indigenous Populations by José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, vol.V: Conclusions, Proposals and Recommendations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4.


occurred after significant work had already begun on indigenous peoples’ rights in Canada, New Zealand and two jurisdictions in Australia. Other international legal developments in the 1960s and 1970s which had some, but not major, implications for indigenous populations included the recognition of cultural rights and values in international cultural heritage treaties. ‘Heritage’ during this period was construed more in physical and movable heritage terms, rather than in association with customary territories. These were followed by broader human rights instruments. International Labour Organisation Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) still has less than twenty adherents however, and its implementation has been of most interest in Latin American states. So by the mid-1970s the UN was only beginning to examine indigenous peoples’ grievances in depth, and already domestic reforms were in train in several industrialised states in response to resource and social movement politics.

Thus representations of the political economy of resources, transnational social movements and international norms about national sovereignty over resources intersected and interacted, becoming constitutive forces domestically for indigenous peoples’ rights and politics in at least four countries in the 1970s. These forces contributed significantly to the later recognition of the value of indigenous peoples’ customary resource management practices by international NGOs and in numerous international environmental treaties in the 1990s. This institutional experience accommodating customary laws and practices of resource management partly explains why these governments, but few in Asia, supported draft resolutions on the recognition of the value of ‘traditional knowledge’ in the lead-up to the Rio Earth

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38 If territories are ‘terra nullius’ they are owned by no-one, and title can be claimed by occupation: Western Sahara Case (Advisory Opinion) (1975) ICJ Reports 12. The South Australian Aboriginal Land Trusts Act 1966 (SA) was the first to grant significant land rights.


The Draft United Nations Declaration on the Rights of Indigenous Peoples

A more contemporary example which demonstrates the mutually constituting nature of international norms and political subjectivity concerns the application of many extant human rights standards to their circumstances, and the development of a new instrument — the Draft United Nations Declaration on the Rights of Indigenous Peoples (DUNDRIP). IPOs have also been attempting to influence the content and implementation of other international instruments and policies, by asserting human rights norms and principles.

The Working Group on Indigenous Populations (WGIP) within the Subcommission on Prevention of Discrimination and Protection of Minorities and its parent body, the Commission on Human Rights (CHR), was the forum in which the DUNDRIP was developed before it moved to inter-governmental negotiations. The UN Economic and Social Council authorised the formation of the five-member WGIP in 1982, to review developments pertaining to indigenous populations’ human rights and fundamental freedoms, and to give special attention to the evolution of standards concerning those rights. The WGIP, which is not an inter-governmental body, activated its standard-setting mandate and agreed to develop a draft Declaration in 1985. IPOs submitted early draft principles, emphasising the centrality of the right to self-determination. The WGIP chair, Erica-Irene Daes, tabled a working paper and draft text for the declaration in 1998. A wide range of participants, both at the WGIP meetings and outside it, discussed and amended that draft over more than a decade of research, consultation, and debate. The draft text for the Declaration, which was completed by the WGIP in 1993 and adopted by the Sub-Commission in August 1994, is the first standard-setting human rights instrument to have been developed with the active

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44 In 1999 the Sub-Commission was renamed the Sub-Commission on the Promotion and Protection of Human Rights.

participation of those intended to benefit from its terms.

The WGIP (emphasising that this is not an inter-governmental body) has been regarded as one of the most transparent, flexible and openly participatory processes within the UN since IPOs, governments, academics, specialised agencies, NGOs and individuals regularly participate in its deliberations, and have been closely involved with the development of the draft Declaration. Attendance of more than 700 people at WGIP meetings, including from United Nations agencies, NGOs, IPOs and governments, has been common. In addition to developing the DUNDRIP, the WGIP has also held broader discussions about a range of agreed issues including health, education, land, the environment and sustainable development. Most indigenous participants have emphasised the importance of their customary territories, heritage and resources, to their cultural survival and development. With the completion of the drafting of the DUNDRIP, the WGIP is reorienting its work to focus on implementation and operational matters, emphasising issues of development and social change concerning indigenous peoples.

The draft Declaration was initially to have been adopted by the UN General Assembly in 1992 — the 500th anniversary of Columbus’ ‘discovery’ of the Americas. But it only moved into inter-governmental debate in 1995, after members of the CHR agreed to establish an open-ended, inter-governmental, inter-sessional working group (CHRWG) to continue discussions on the draft Declaration. IPO requests that the draft Declaration as approved by the Sub-Commission be adopted without significant amendment, were not acceded to. When the text is eventually endorsed by the CHR, it will have to be considered by the UN Economic and Social Council (ECOSOC). It will then proceed to the General Assembly for final adoption, which is expected within the Decade of the World’s Indigenous People, that is, by December 2004.

Progress in the CHRWG negotiations has been slow, considering that most of the draft articles are consistent with extant international law, and a draft text was complete in 1994. A technical review undertaken by the UN Centre for Human Rights in 1994 expressed satisfaction that the draft Declaration had largely met the UN’s requirement that new human rights instruments met specified criteria, including consistency with the established body of international human rights law. Yet by 1997 only Articles 5 and 43 of the draft Declaration had been agreed to by the CHRWG, and no others had been agreed upon by the end of 1999. These two articles reaffirm the right of indigenous individuals to have a nationality, and for male and female indigenous individuals to have their human rights and freedoms recognized equally. Both rights are already

recognised for individuals generally under international law. Compared with the relatively speedy finalisation of trade negotiating rounds and international environmental agreements (taking into account the breadth of the issues covered), this slow progress suggests significant political resistance by some governments.

The linked issues over which there is most contention include the absence of an agreed definition for indigenous people[s] and the scope of the right of self-determination. Definitional issues are of increasing concern for governments as more geographically diverse constituencies of indigenous peoples claim coverage by the term within international institutions, and in domestic and regional political, legal and social processes. The broad diffusion of this identity category is evident in politicalised constituencies in Africa and Asia increasingly claiming indigeneity. Recognition as an IPO can confer legal rights and political influence within the broadening institutionalisation of natural and cultural resource management and human rights processes in diverse regions. It can also lead to better access to inter-governmental, foreign donor and NGO programs, projects and funding, particularly in ‘developing’ countries. Recognition of indigeneity may also lead to the application, or challenges to the non-application, of relevant institutional policies and directives, such as those of the World Bank relevant to indigenous peoples.

Many governments in Asia (broadly defined and including India and Bangladesh), United States, Argentina, Nigeria, Ukraine, Japan, and Mexico, are concerned about definitional issues, both in the DUNDRIP and in parallel discussions about a permanent forum on indigenous issues. China argues that indigenous people are mainly the result of colonial policies pursued by European countries in other regions of the world, particularly in the Americas and Oceania. The Asian Group has also insisted that definitional issues be addressed, although it has said that it would not block discussions on the Draft Declaration (or the proposed Permanent Forum, discussed below) for this reason.

Currently the Draft Declaration does not include a definition of indigenous peoples and refers to personal and community recognition. Definitions from International Labour Organisation Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) and in the benchmark Martinez Cobo report on discrimination against indigenous populations have not been adopted.


WGIP chair, Professor Daes, suggested in 1996 that definitions for minorities and indigenous peoples were neither possible nor useful because of their diversity, and that past attempts to produce definitions had produced greater ambiguity. She suggested a procedural solution of ensuring that the implementation of a declaration on the rights of indigenous peoples was entrusted to a body which was fair-minded and open to the views of indigenous peoples and governments, so that there was room for the reasonable evolution and regional specificity of the concept of 'indigenous' in practice.\textsuperscript{51} However, she did summarise the factors which international organisations and legal experts have considered relevant to the understanding of the concept of 'indigenous'. These include: priority in time with respect to the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist. The Committee on the Elimination of Racial Discrimination has said in a general comment that identification of individuals as members of particular racial or ethnic group or groups shall be based upon self-identification by the individual concerned, unless there was justification for a contrary approach.\textsuperscript{52} It is also noteworthy that several other international instruments do not include definitional articles concerning 'peoples' and 'minorities'.\textsuperscript{53}

The second aspect of the definitional debate which is in some respects more fundamental, relates to whether the right of self-determination can be claimed by indigenous peoples. This debate challenges some of the philosophical and political assumptions which became incorporated in international law after the eighteenth-century debates about the political sovereignty of peoples, as discussed earlier. This debate unsettles notions of territorial peoplehood and sovereignty, and invites new recognition for 'nations' as political and cultural entities within states.

Although treaty bodies have elaborated on the implications of the norm of self-determination, and the rights of indigenous peoples in several 'general comments' and views,\textsuperscript{54} the law in this area remains contested. Under customary international law and

\textsuperscript{52} 'General Recommendation VIII concerning the interpretation and application of article 1, paragraphs 1 and 4, of the Convention (Thirty-eighth session, 1990)', in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Note by the Secretariat, UN Doc. HRI/GEN/1/Rev.2, p.92.
\textsuperscript{53} Such as the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the 1970 'Friendly Relations Declaration', and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UNGA Res. 47/135 (1992).
\textsuperscript{54} See generally: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: Note by the Secretariat, 29 March 1996, UN Doc. HRI/GEN/1/Rev.2. Recent views include: General Recommendation XXIII (51) concerning Indigenous Peoples, UN Doc. CERD/C/51/Misc.13/Rev.4.
the international covenants on civil and political, economic, social and cultural rights, ‘peoples’ are entitled to exercise the right of self-determination and to be recognised as subjects of international law. Claims to self-determination must be made within the terms of the 1970 ‘Friendly Relations Declaration’. Under that Declaration, all peoples are said to have the right to determine freely, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the United Nations Charter. States have a duty to promote friendly relations and co-operation among states and to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned. Rights of self-determination can be exercised in various ways, including by the establishment of a sovereign and independent state; the free association or integration with an independent state; or the emergence into any other political status freely determined by a people. The Declaration is explicit however, in discouraging any action which would dismember or impair the territorial integrity or political unity of sovereign and independent states which respect the principle of equal rights and self-determination of peoples.

The right of self-determination has most often been applied in an external way, to territories that are geographically separate and distinct ethnically and culturally from an administering state. This external aspect implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights, and freedom from colonialism, subjugation, domination and exploitation. But the right of self-determination also has an internal aspect. This involves the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. The implementation of the right requires every state to promote, through joint and separate action, universal respect for and observance of all human rights and fundamental freedoms in accordance with the Charter of the United Nations. It requires that peoples may participate in or influence their governance, and preserve their cultural, ethnic, historical or territorial identity. Relevant standards are provided in various international instruments.

Independent statehood may only be claimed if the national political system is so undemocratic and exclusive as not to represent the whole people, and after all international and diplomatic measures fail to protect the peoples concerned from the state. But it is this ultimate right of independence that challenges territorially defined and state-centred security discourse, and which may result in political instability and threats to regimes that breach human rights standards. It is likely that this is why the right of self-determination remains contested. Some governments, including those of

Argentina, Brazil, Burundi, Chile, France, India, Japan, Mexico, Morocco, Russia, the United States, and the United Kingdom, are objecting with varying degrees of concern to the use of the term ‘peoples’ in the DUNDRIP. These governments would prefer to see weaker terms such as ‘issues’, ‘people’, ‘populations’ or ‘communities’ used. Or, if ‘peoples’ is used, to have it qualified with an explanation, similar to that in ILO Convention 169, that the use of the term ‘peoples’ does not have implications as may attach to the use of the term under international law. In contrast, retention of the word ‘peoples’ has been vigorously asserted by indigenous representatives who have protested at inter-governmental negotiations on this issue by attaching coloured paper with the word ‘peoples’ to their clothing.\(^{57}\)

But the fear that self-determination claims may threaten state integrity is overstated partly because of the limited flexibility of the Friendly Relations Declaration, and because international law continues to construe the right narrowly. Both the International Court of Justice and the League of Nations have rejected claims for self-determination communicated by indigenous peoples.\(^{58}\) In 1990 and 1991 the Human Rights Committee took the view that it was inappropriate for individuals to use the communication procedure under the Optional Protocol to the Covenant on Civil and Political Rights to claim breaches of peoples’ rights to self-determination rights under Article 1 of the Covenant.\(^{59}\)

**A permanent forum for indigenous peoples?**

While the negotiation of the Draft Declaration proceeds at snail’s pace, other institutional reforms are being considered by the UN. Although there are already a range of mechanisms, procedures and programs to protect indigenous peoples’ rights, the 1993 World Conference on Human Rights recommended that the establishment of a permanent forum for indigenous people in the United Nations system should be considered within the framework for the International Decade of the World’s Indigenous People.\(^{60}\) The General Assembly asked that this be a priority consideration

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\(^{61}\) Vienna Declaration and Programme of Action: Note by the Secretariat, 12 July 1993, UN Doc. A/Conf.157/23, para. 32.
when it proclaimed the International Decade of the World’s Indigenous People in December 1993. The theme of the Decade is ‘a new relationship: partnership in action’, and the goal of the Decade is the strengthening of international co-operation for the solution of problems faced by indigenous peoples in such areas as human rights, the environment, development, education and health. The forum’s role and mandate is being considered by another open-ended inter-sessional ad hoc working group within the CHR, established in 1998. It has a participatory mandate and includes indigenous representatives. That working group is considering reports of two workshops about the forum, and deliberations within the usual UN processes, including reports of comments from governments, UN organisations and bodies, specialised agencies, and indigenous peoples’ organisations. The issues that are currently being negotiated include membership, participation and mandate, financial and secretariat implications, the location, name, meetings, procedural rules and reporting structure for the forum, and the duration of the forum and review mechanisms. The relationship of the forum with the WGIP, or whether the WGIP is to be supplanted by the permanent forum, has not yet been agreed.

These proposals and discussions concerning the proposed forum are significant because to date the only working groups examining indigenous peoples’ issues closely have been transitory, subject to renewals of their mandate, and relatively low in the UN human rights hierarchy. If such a forum is established it will be a demonstration of the empowering effect that human rights discourse has for indigenous peoples within states and within global governance. It could be significant for the global governance of plant genetic resources if it works with relevant instruments such as the CBD and the IU, if it adjudicated disputes or monitors implementation of law and policy concerning cultural diversity, sustainable development, and the value of traditional knowledge, innovations and practices.

A profile of the ‘rights-based’ traditional knowledge campaign

United Nations human rights instruments and processes have been important influences shaping the evolution of the politics of traditional knowledge. Many international human rights instruments contain articles relevant to IPOs campaigns, particularly those relating to self-determination, freedom from discrimination, and rights to religion and culture. Many government institutions, IPOs, NGOs and academics have continued to promote international and domestic legal recognition and compensatory mechanisms concerning traditional knowledge. Codes of ethics and guidelines are governance strategies designed to alter subjectivities and to promote equity. The respect for local and traditional knowledge systems which is embodied in the ‘traditional knowledge’

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literature suggests that dominating or appropriating knowledges leads to poor or exploitative governance. A desire for and commitment to a more equitable recognition of the value of diverse types of knowledge relevant to resource management has led a range of professional organisations, NGOs and government agencies to develop codes of ethics for research. The social conditions and discursive context that are most likely to have influenced this development include the growth of the environmental and human rights movements, the restoration of land rights, and increased interest in ethnological perspectives in the biological sciences and development literatures and practices. Indigenous peoples’ and local communities’ resistance to research activities about which they have grievances and which have been popularised by NGOs such as RAFI, and the growth of human rights standards concerned with ‘race’ and indigeneity are also likely to have been determinative.


Even though the rights being asserted are sometimes sui generis (new and unique or as yet unrecognised in the international order) more often they are already recognised in a number of international instruments which are awaiting state ratification or accession, or domestic implementation and state compliance. Most of the IPO declarations are consistent with extant international human rights standards and with draft instruments on human rights and the environment, as demonstrated in Appendix 1.

Several internationally authoritative academics have promoted this rights-based approach. The term ‘traditional resource rights’ (TRR) is most closely associated with Darrell Posey and Graham Dutfield of the Working Group on Traditional Resource Rights based at Oxford University. Posey and Dutfield draw on international legal instruments to justify a ‘bundle of rights’ approach, and the development of sui generis legal and policy instruments and processes to conserve and protect cultural and biological diversity.67 Other academics and activists are also drawing on international human rights law to further the implementation of international environmental law and to better the lives of indigenous peoples, and some regional organisations have developed draft legislation consistent with this approach.68 Various NGOs and research institutions have developed model legislation using this rights-based approach. The Third World Network has developed a proposal for a Rights Regime for the Protection of Indigenous Rights and Biodiversity.69 RAFI has proposed an ‘Intellectual Integrity

66 Others include: the Santa Cruz Declaration, the Leticia Declaration and Plan of Action, the Treaty for Life Forms Patent Free Pacific, the Ukupensi Kuna Yala Declaration, the Heart of the Peoples Declaration on Biodiversity and Biological Ethics, the Jovel Declaration on Indigenous Communities, Indigenous Knowledge and Biodiversity, the Chiapas Declaration: cited in Report of the first meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, 12 April 2000, UN Doc. UNEP/CBD/COP/5/5.


The Research Foundation for Science, Technology and Ecology has developed a model Biodiversity Related Community Intellectual Rights Act. The Organization of African Unity (OAU) has developed Draft Legislation on Community Rights and Access to Biological Resources.

Although the TRR campaign is fundamentally about the recognition of human rights, the main organisations involved are environmental NGOs rather than traditional human rights organisations. IPOs and NGOs that have been actively pursuing IPR and traditional resource rights include the Third World Network, RAFI, GRAIN, WWF International, IUCN, the Global Coalition for Bio-cultural Diversity, International Alliance of Indigenous Tribal Peoples of the Tropical Forests, and Cultural Survival. The Indigenous Peoples' Biodiversity Network (IPBN) has been particularly active. It was formed in Geneva, Switzerland, in October 1993. It has been pivotal in organising workshops to develop common positions amongst IPOs. Participants in the network include the Asian Indigenous Women's Network, the Asociacion de Derecho Ambietal de la Region Inka-Peru, Congreso General Guaymi-Panama, Cultural Conservancy-USA, Cultural Survival-Canada, Sobrevivencia-Paraguay, South and Mesoamerican Indian Information Centre, and Gabriel Muyuy, Indian Senator of the Republic of Colombia.

Governments, IPOs and NGOs differ in the extent to which they advocate law reform consistent with extant IPR regimes. RAFI's opposition to extant IPR regimes and its campaign against 'biopiracy' has been highly influential globally. The United Nations Development Program's (UNDP's) support for RAFI's stand on these issues in the mid-1990s enabled RAFI to raise awareness about IPR issues and particularly patents, globally. In 1994 the UNDP published in English and Spanish RAFI's monograph, Conserving Indigenous Knowledge: Integrating Two Systems of Innovation. The UNDP also funded regional workshops on indigenous knowledge in


70 RAFI, Conserving Indigenous Knowledge: Integrating Two Systems of Innovation, pp.52-4.
South America, South-east Asia and the South Pacific, hosted by local organisations. RAFI was an international consultant to each workshop and provided background material. These workshops issued basic points of agreement or general declarations. The declarations from these workshops denounced biopiracy, said that industrialised countries' IPR regimes, including patents on living organisms, were alien to indigenous peoples' worldviews, and called for measures to protect indigenous peoples from 'biopiracy'. In addition, the UNDP Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights in Fiji, in April 1995, authorised the development of a draft 'Treaty for a Lifeforms Patent-Free Pacific and Related Protocols' for endorsement by a broad range of stakeholders. The later-developed draft treaty denounced the commercial exploitation by public and private sector scientists and researchers of indigenous flora, fauna, human genetic material and traditional knowledge in the South Pacific region. These declarations tended to reflect RAFI and IPO’s concerns and differed from discussions held by IPOs independently.

RAFI was also involved in a campaign to overturn a plant patent granted by the U.S. Patent and Trademark Office (PTO) in 1986 on a variety of *ayahuasca* (*Banisteriopsis caapi*). This campaign demonstrates the strength of the opposition some IPOs have to IPRs over plants of religious significance within indigenous cultures. The Coordinating Body for the Indigenous Organizations of the Amazon Basin (COICA), the Coalition for Amazonian Peoples and their Environment, and lawyers at the Center for International Environmental Law (CEIL) successfully challenged the patent and it was cancelled in 1999. This followed an extensive campaign over several years by IPOs and NGOs. The PTO cancelled the patent because publications about the plant were ‘known and available’ prior to the filing of the patent application. But just as important as the legal grounds for revoking the patent, from a political perspective, were IPO concerns that their culture, customs and sacred symbols had been treated with disrespect. In a separate proceeding at the PTO, the claimants called for far more stringent disclosure requirements to be included in PTO rules. They asked that information required for patent applications should include information about any traditional knowledge used in developing the claimed invention, the geographical origin of the material used, and evidence that the source country and indigenous community had consented to its use.


77 D. Downes, 'USA: Challenge filed to the Ayahuasca Patent', <hurinet-indigenous@mail.comlink.apc.org>, 19 May 1999.

Special rapporteurs’ studies and other human rights processes

IPOs have successfully used extant UN fora to have special studies, reports and draft guidelines developed concerning intellectual and cultural property rights, but to date these have not been very influential as they have not been adopted by governments. Various human rights processes have also focused on the linkages between human rights and the environment, but the effects of these have been relatively weak in other fora. The most important influence occurred when the WGIP requested that indigenous peoples’ issues were addressed at the 1992 United Nations Conference on Environment and Development (UNCED), as this facilitated the recognition of relevant standards in the binding instruments adopted at the conference or opened for signature there.

NGOs and IPOs have furthered their campaign for the better recognition of indigenous peoples, local communities and gender-specific intellectual property and cultural rights in UN fora in various ways. This section gives a brief overview of special rapporteurs’ studies relevant to this campaign. The Working Group on Indigenous Populations (WGIP) within the Commission on Human Rights contributed to having ‘traditional knowledge’ issues raised at UNCED, but a special study on the links between human rights and the environment, and other draft principles and guidelines for the protection of indigenous peoples’ heritage have generated little support within the UN.

The Ksentini report

Many procedural civil and political rights in relation to environmental governance are already recognised in international environmental, human rights, and development instruments. These are applicable to individuals generally, and not just indigenous peoples. Implementation of these rights is seen as a means for securing better environmental governance.79 Contemporary debates in international legal literature about whether human rights approaches to sustainable development should be promoted tend to revolve around the content of human rights standards, rather than whether rights should be extended to non-human species.80 Rights to information, participation, advance informed consent, environmental impact assessment, legal redress, including expanded locus standi to facilitate public interest litigation, and appropriate standards on education, health, and freedom of speech, are some of the rights promoted in an expanding literature on human rights and the environment.81 These are in addition to the rights of indigenous peoples noted above. Many UN instruments and NGO

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publications, projects and work programs evidence commitments to participatory
democratic governance in relation to the environment. Such commitments are evident
increasingly in multilateral agencies, treaty bodies and programs, and domestic
government agencies entering into ‘partnership arrangements’ with non-governmental
organisations and civil society.\textsuperscript{82} Explicit resistance to liberal governance discourse is
shrinking to only a few states.\textsuperscript{83}

Despite the relevance of many existing human rights standards to environmental
issues, and the development of some specific human rights in relation to the
environment by regional organisations and national governments, there is no human
rights instrument focused specifically on the environment. A special rapporteur’s report
on the links between human rights and the environment, produced within the
Commission on Human Rights has made little headway in the UN.\textsuperscript{84}

This report, the so-called ‘Ksentini report’,\textsuperscript{85} was produced after several large
human rights NGOs were effective in having the links between human rights and the
environment raised for discussion within the Sub-Commission on Prevention of
Discrimination and Protection of Minorities within the CHR. In the late 1980s, the
Friends of the Earth, the Sierra Club Legal Defense Fund, and the Association of
Humanitarian Lawyers successfully lobbied to have the Sub-Commission examine the
linkages between human rights and the environment. In response to resolutions adopted
by the Sub-Commission, CHR and ECOSOC, the Sub-Commission appointed a Special
Rapporteur in 1989 to prepare a study on the linkages.

The Ksentini report included an overview of relevant international environ-
mental and human rights law, participatory democracy and the environment, indigenous
peoples, peace and conflict issues, environmental degradation and its impact on
vulnerable groups, analyses of the effects of the environment on the enjoyment of
fundamental rights, and conclusions and recommendations. It also included an annex of
‘Draft Principles on Human Rights and the Environment’. The preamble expresses deep
concern about the severe human rights consequences of environmental harm caused by
poverty, structural adjustment and debt programs and by international trade and
intellectual property regimes. Of particular relevance to plant genetic resource issues,
the draft principles recognise indigenous peoples’ rights to control their lands,
territories and natural resources and to maintain their traditional way of life. The draft

\textsuperscript{82} See generally V. Balaji and M.S. Swaminathan, eds, \textit{Partnerships for Food and Livelihood
Security}, M.S. Swaminathan Research Foundation, Chennai, 1997; T.G. Weiss and L. Gordenker, eds,
\textit{NGOs, the UN, and Global Governance}, Lynne Rienner Publishers, Boulder, 1996.

\textsuperscript{83} Various liberal democratic forms of state have emerged in much of southern Europe, Latin
America, Africa, and eastern and central Europe over the last 30 years and only a few national
governments such as in China and Burma (Myanmar) actively suppress domestic civil society activities.

\textsuperscript{84} Friends of the Earth, Sierra Club Legal Defense Fund, Inc. and the Association of Humanitarian
Lawyers particularly: \textit{Review of Further Developments in Fields with which the Sub-Commission has
been Concerned: Human Rights and the Environment: Final Report prepared by Mrs Fatma Zohra

Declaration of Principles on Human Rights and the Environment’, Sierra Club Legal Defense Fund
Pamphlet.
principles also recognise that all peoples rights to have protection against environmental harm. The principles also recognise a universal right ‘to benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, livelihood and other purposes’.

The Commission invited comment from governments and other international institutions on the report, but the principles have not been approved or moved forward for inter-governmental negotiation. Spain, Romania and many United Nations departments and bodies gave positive comments, but the United Kingdom expressed concern about possible duplication of functions by diverse Commissions (for example the Commission on Sustainable Development). The FAO’s comments on the report were probably the most critical, describing it as ‘too academic in nature and lacking pragmatic policy recommendations that could be implemented at the field level’. The FAO suggested that ‘politic-o-economic and cultural constraints to increased participation, especially by the marginalized segments of society in decision-making processes, should be addressed as a top priority’. The FAO particularly emphasised the needs of women farmers in developing countries.

The reluctance of governments to actively progress and respond to these principles cannot be explained in terms of institutional responsibilities alone, because there is significant unmet need for UN action on domestic human rights violations arising from unsustainable development practices. These concerns have been well canvassed by proponents of a ‘social clause’ in international trade agreements, as discussed in Chapter Six. In summary, the arguments are that customary territories continue to be degraded in many countries, sometimes displacing local communities and requiring their resettlement. Diverse state and non-state actors tend to be involved, including multinational corporations engaged in large-scale development projects, often in collaboration with government agencies. The G77 has successfully resisted the application of human rights and environmental standards to international trade and investment law and policy, however, as discussed in Chapter Six.

The Daes report and WIPO

Another process of global governance which demonstrates the exercise of power based on politicised identities and subjectivities, is the WGIP’s examination of intellectual and cultural property issues. The exercise of power led the World Intellectual Property Organisation (WIPO) to launch a new initiative concerning traditional knowledge issues in the late 1990s. This section argues that the WGIP has had mixed success in

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encouraging other inter-governmental institutions to examine these issues, and it has
been relatively unsuccessful in progressing the implementation of its own 'Daes report'
on heritage protection. NGO and IPO campaigns were relatively more influential,
leading WIPO to become more active on traditional knowledge issues.

In 1990 and 1991 the WGIP discussed protection issues for indigenous peoples’
intellectual and cultural property and the United Nations Secretary-General produced a
‘concise report’ on the issues in 1992, with assistance of the WIPO.\textsuperscript{89} WIPO had
primary governance responsibilities for IPR issues until the adoption of the TRIPS
agreement in 1994, when responsibility became shared with the WTO. WIPO’s 1992
report noted that the issues were complex and largely unresearched, that indigenous
peoples’ concerns needed to be ascertained, and that further research on existing
protection mechanisms was needed.\textsuperscript{90} In 1990 the WGIP adopted a resolution
requesting WGIP Chair, Prof. Daes to prepare a working paper on the ownership and
control of cultural property. Issues such as the repatriation of human remains and
trafficking in indigenous cultural property were addressed more than intellectual
property rights in the working paper that was subsequently produced. The report also
referred to the 1982 UNESCO/WIPO model law on the protection of folklore.\textsuperscript{91} In a
1990 draft art. 6 of the DUNDRIP said that the right to ‘manifest’ cultural identity,
including archaeological sites, artefacts, designs, technology and works of arts, lay with
indigenous peoples. By 1992 more specific references to IPRs had been included within
the DUNDRIP.\textsuperscript{92}

In 1992 Prof. Daes was asked to include intellectual property issues in her study,
and in 1993, she was asked to elaborate draft principles and guidelines for the
protection of indigenous peoples’ heritage.\textsuperscript{93} Prof. Daes’ final report on heritage
protection includes an annexure of principles and guidelines, many of which are
relevant to the governance of plant genetic resources. The principles emphasise self-
determination, collective rights, customary law, and indigenous people’s control of
their heritage and its study. They also deal with definitions, the transmission, restitution
and recovery of heritage, national programmes and legislation, researchers and
scholarly institutions, business and industry, artists, writers and performers, public
information and education, and international organizations. The report has been

\textsuperscript{89} Discrimination against Indigenous Peoples: Economic and Social Relations between Indigenous
\textsuperscript{90} Discrimination Against Indigenous Peoples: Intellectual Property of Indigenous Peoples: Concise
\textsuperscript{91} Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit
\textsuperscript{92} In 1992 operative paragraph 19 stated: ‘Indigenous peoples have the right to special measures for
protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs,
visual and performing arts, medicines and knowledge of the useful properties of fauna and flora.’
\textsuperscript{93} Sub-Commission Res. 1992/35: Discrimination against Indigenous Peoples: Study on the
circulated widely for comment, and a supplementary report prepared. Its recommendations have been discussed at least one technical meeting. In August 1996 the Sub-Commission transmitted the principles and guidelines to the CHR with a recommendation that they be adopted. But neither the CHR nor ECOSOC has adopted the report. Rather Professor Daes was entrusted with a continuing mandate to exchange information with relevant UN agencies and bodies involved in activities concerned with the indigenous peoples’ heritage, and she was asked to promote cooperation, co-ordination and indigenous peoples’ participation in these activities.

The WGIP had little success in encouraging WIPO to maintain an interest in traditional knowledge issues until the late 1990s, when academics’, NGOs’ and IPOs’ global awareness raising about indigenous peoples’ cultural and intellectual property rights was well in train. WIPO is unlikely to have been embarrassed into action without the global activities of power/knowledge networks which have insisted on the importance of IPR issues over the last decade. WIPO had worked with UNESCO on the development of ‘Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions’ but these had not been incorporated in domestic law widely. In 1995 WIPO took the unusual step of requesting that all references to WIPO in Prof. Daes’ draft guidelines on cultural and intellectual property be deleted since WIPO’s activities did not include the protection of the heritage of indigenous peoples. However, in 1998, after several years of highly critical IPO and NGO campaigning about IPRs globally, and under a new Director-General, WIPO initiated a new global program to address the concerns raised in the ‘traditional knowledge’ campaign.

WIPO’s Global Intellectual Property Issues Division is currently exploring the needs and expectations of potential new beneficiaries of intellectual property rights, including indigenous peoples, local communities and holders of traditional knowledge. This program is also addressing issues raised within the CBD and DUNDRIIP processes. Under the program WIPO undertook a series of fact-finding missions and regional consultations. It also held a roundtable on ‘intellectual property and indigenous peoples’ in Geneva in July 1998, and on intellectual property and traditional knowledge

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97 Protection of the heritage of indigenous people, Economic and Social Council resolution 1997/287.
98 WIPO’s ‘Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action’ recommend protection for oral and written individual and collective folklore, and require proper authorisation before folklore can be used commercially outside its cultural context.
in November 1999.\textsuperscript{100} These roundtables were primarily a forum for indigenous peoples and their representatives to share experiences and aspirations concerning intellectual property issues. Professor Daes has also been an active participant. Not all IPOs welcome this development however. Some IPOs argue that the WIPO process is attempting to co-opt IPOs into the established IPR system and that more culturally appropriate approaches need to be developed.\textsuperscript{101}

The WGIP had relatively more success in securing better recognition for the value of traditional knowledge when it requested that the issues be on the agenda at the UN Conference on Environment and Development (UNCED) in 1992. A 1990 WGIP resolution called on UNCED to ensure

that any new conventions which may be adopted regarding biodiversity or conserving renewable resources, provide explicitly for the role of indigenous peoples as resource users and managers, and for the protection of indigenous peoples’ right to control of their own traditional knowledge of ecosystems.

That resolution also sought co-operation with other UN agencies and processes concerning indigenous peoples and environmental rights, an experts meeting on the issues, and invited the WIPO to prepare recommendations concerning the protection of the intellectual property of indigenous peoples, for discussion within the WGIP.\textsuperscript{102} In 1991 the Preparatory Committee for UNCED requested the UNCED Secretariat to take into account the traditional knowledge of indigenous and local communities relevant to environment and development when preparing for the conference.\textsuperscript{103} The Committee referred to the proposed 1993 International Year for the World’s Indigenous People, and relevant provisions in the Platform produced at the Latin American and Caribbean countries’ regional preparatory meeting for UNCED.\textsuperscript{104}

In order to fulfil these requests, in May 1992 a technical conference on the realisation of sustainable and environmentally sound self-development for indigenous


\textsuperscript{104} The ‘Tlatelolco Platform on Environment and Development’ adopted in Mexico City on 7 March 1991, recognised that knowledge of biodiversity, both scientific and grass-roots, was part of the scientific and cultural heritage of every nation, and called for international law to regulate access and equitable benefit-sharing agreements concerning genetic resources: Letter dated 20 March 1991 from the Permanent Representative of Mexico to the United Nations Office at Geneva addressed to the Secretary-General of the United Nations Conference on Environment and Development, 22 March 1991, UN Doc. A/CONF.151/PC/L.30.
peoples was held in Chile. The conference included detailed discussions about the value of traditional ecological knowledge and programs to promote and recognise such knowledge, with Darrel Posey as one of the key participants.\textsuperscript{105} It identified numerous principles and made specific recommendations to promote the realisation of sustainable and environmentally sound self-development. These included ‘[r]ecognition, protection and respect for indigenous knowledge and practices that are essential contributions to the sustainable management of the environment’. They also called on the UN system to take measures for the effective protection of the property rights, including intellectual property rights, of indigenous peoples concerning ‘cultural property, genetic resources, biotechnology and biodiversity’.\textsuperscript{106} There are clear similarities in language in this recommendation and the references in the CBD to traditional knowledge which are discussed in Chapter Five.

In summary, the Daes report has made little headway. WIPO began to address indigenous peoples’ intellectual property rights in the late 1990s and work continues. The Earth Summit resulted in many instruments recognising the value of indigenous and local communities’ traditional knowledge, innovations and practices.\textsuperscript{107} This is far less likely to have occurred had the WGIP and NGOs not sought to have the issues included on the UNCED agenda and discussed during pre-summit conferences. The implications for global governance practices of relevant articles in the CBD are discussed in the Chapter Five.

Human rights communications and scrutiny processes

Another process to be discussed concerning changing political subjectivities, both state and non-state, includes the communication and scrutiny mechanisms available under various human rights treaties\textsuperscript{108} and governance processes. Governments’ compliance with international human rights standards is monitored through states’ reports to treaty committees and the Commission on Human Rights, and through individual communications, and special communications procedures.\textsuperscript{109} Plant genetic resource


\textsuperscript{108} The International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CROC); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

issues, or intellectual property rights for indigenous peoples, have not become a prominent issue using these processes, but they may arise in future. As noted earlier, many IPOs and NGOs frame their campaigns in human rights terms.

If plant genetic resources were to be agitated in this way, it is questionable whether complainants would be satisfied with the process. The effectiveness of these mechanisms is often weak in the short term, because the core UN human rights machinery is under-resourced, cumbersome, politically-charged and overburdened. The Commission on Human Rights has some processes which are more effective than others. These include the system of special rapporteurs and fact-finding missions, urgent procedures, special reports, and working groups. These can enable relatively cheap and independent on-site investigations to be conducted. But reporting procedures are relatively weak as a scrutiny mechanism.

Governments report to treaty bodies on the legislative, judicial, administrative or other measures taken to implement the relevant human rights instrument. Treaty bodies may make suggestions and general recommendations based on an examination of the reports and information they receive from states’ parties, together with any comments that states’ parties make. General comments and recommendations are intended to assist states’ parties in fulfilling their obligations. Treaty bodies report through the Secretary-General to the General Assembly on their activities. Human rights expert, Philip Alston, has examined the chronic problem of late and no reports and the long delays before reports are considered. He has described the existing reporting system as ‘unsustainable’. Other human rights lawyers also acknowledge that in practice the UN’s human rights machinery is in many ways deeply flawed, and in need of significant reform. The Office of the UN High Commissioner for Human Rights is actively seeking UN support for the strengthening of her office, but whether this results in improved compliance with human rights globally remains to be seen.

One of the processes that has been used by IPOs when their cultural rights have been infringed is the communication procedures available under various human rights instruments. Treaty bodies can issue ‘views’ in response to specific complaints.

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110 ECOSOC Res. 1235 (XLII) (1967) provides that violations of human rights can be examined and responded to, and be the subject of annual debate within the Commission on Human Rights.


Committee recommendations, comments and views are not legally binding, even though the deliberations of treaty bodies are conducted 'in a judicial spirit'. Human rights 'views' tend to be cited most often by human rights defenders challenging governments to better protect human rights.

For IPOs, such views have created an archive of standards which link indigenous peoples' cultures to their traditional environments and the livelihoods or economic activities that are essential for the maintenance of those cultures. The Human Rights Committee has expressed its view that the right to enjoy culture need not be confined to traditional practices. The use of modern technology, for example, can be consistent with cultural continuity. The Committee has also said that restrictions on the activities of individual members of a minority which have 'a reasonable and objective justification', and if these activities are necessary for the continued viability and welfare of the minority as a whole, may not infringe their right to culture. The link between land rights and cultural identity and the need to protect indigenous peoples' cultures, histories, languages and ways of life has also been recognised by the Committee on the Elimination of Racial Discrimination. Issuing a General Recommendation in August 1997, the Committee called on states parties to take measures to ensure indigenous peoples' equality and freedom. In particular, the committee called on states to ensure that indigenous peoples:

- were not discriminated against and enjoyed freedom and equality
- were provided with conditions allowing for sustainable economic and social development 'compatible with their cultural characteristics'
- could participate in public life and give their informed consent to decisions which affect their rights and interests, and
- could revitalise their cultural traditions and customs and preserve and practise their languages.

The Committee has called on states to recognise and protect rights to communal lands, territories and resources, or where that or restitution was not possible, to provide just, fair and prompt compensation. It remains to be seen whether human rights processes will be called to adjudicate on traditional knowledge issues concerning plant genetic resources particularly.

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Gender Discourses

Another aspect of human rights discourse which has been influential concerning the global governance of plant genetic resources has been gender equity and, in particular, recognition of the human rights of women. Women in many parts of the developing world, and indigenous women in rural areas in developed countries are often responsible for the maintenance of biodiversity, including seed and tuber management. Few non-indigenous feminist NGOs have been actively promoting traditional knowledge issues, however.

The broader women’s movement has generated increasing UN attention and action since the 1970s. Liberal rights to equality for men and women were recognised in the UN Charter and have been recognised in more than 20 international instruments since. Many of these proscribe discrimination on the basis of sex, promote the participation and integration of women within development activities including environmental and resource management, and promote women’s access to education, safe and equal employment, and to resources.\(^{119}\)

There are various aspects of this discourse that are relevant to the issue of traditional knowledge in food and agriculture. The UN has adopted numerous resolutions, declarations, and plans of action for improving the situation of women, particularly in rural areas, and has urged member states to ensure that women’s unpaid work and contributions to on-farm and off-farm production, including income generated in the informal sector, are visible and recorded in economic surveys and statistics, including national accounts.\(^{120}\) In 1991 the Committee on the Elimination of Discrimination Against Women was of the view that quantification of women’s unremunerated activities, and their inclusion in national accounts, was relevant to compliance with articles 11 and 18 of the CEDAW Convention, and para. 120 of the

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Nairobi Forward-Looking Strategies for the Advancement of Women.\footnote{121} It also said that these statistics should be included in states' reports to the committee. The UNDP’s 1995 Human Development Report provided a conceptual approach for the development of an appropriate accounting system, as has the Australian Rural Industries Research and Development Corporation. The latter has published a two-volume report of a national research project which assessed women’s contribution within the agricultural sector, and which included an economic module on quantitative estimations. Whilst plant genetic resource conservation and improvement was not specifically addressed, the report is an example of the type of research which could be undertaken in developing country contexts, if context-specific work responsibilities are assessed.\footnote{122}

Despite these calls for the compilation of accurate figures, data is not being reliably collected for unpaid contributions to household food production, smallholder agriculture and work on family farms. In 1995 the FAO estimated that women in rural areas in developing countries often work up to 16 hours a day and 60 hours a week in food production and household work for no wage or cash income of any kind.\footnote{123} Contributions by gender to the subsistence sector vary regionally and by country, and tend to be underestimated. On the statistics available however, it is suggested that rural women overall in developing countries are responsible for more than 55 per cent of the food grown and comprise 67 per cent of the agricultural labour force. Women in sub-Saharan Africa may contribute 60-80 per cent of labour in food production for household consumption and sale. In Turkey, women account for 55.3 per cent of unpaid agricultural labour, in Morocco 53.2 per cent, and in Egypt 50.7 per cent.\footnote{124} In Papua New Guinea in 1990, more than 50 per cent of women worked in subsistence agriculture, compared with only 33 per cent of men. In Vanuatu the figure for women could be as high as 84 per cent.\footnote{125} At least one survey from Vanuatu suggests a highly gendered knowledge and application of medicinal plants relevant to reproduction.\footnote{126} A survey of agricultural decision-making in the Philippines has also found significant gender-specific knowledge.\footnote{127} In Australia the Federal Court has upheld the legitimacy

\footnote{122} Australia, Missed Opportunities – Harnessing the Potential of Women in Australian Agriculture, Rural Industries Research and Development Corporation, Department of Primary Industries and Energy, Canberra, 1998 (2 vols).
\footnote{127} V.D. Nazarea-Sandoval, ‘Indigenous decision-making in agriculture: a reflection of gender and socioeconomic status in the Philippines’ in Warren, Stikkerveer, Brokensha and Dechering, eds, The
of restrictions on the hearing of gender-specific customary law native title evidence in appropriate circumstances.\textsuperscript{128}

Women's workloads in many parts of the world tend to be heavier than men's because of women's productive and reproductive responsibilities, and the impact of structural adjustment policies. Cuts to government spending under structural adjustment policies and programs have increased women's involvement in the informal sector.\textsuperscript{129} In the least developed countries, development processes are also increasing the burden on women working in the subsistence sector who are also expected to contribute to the costs of children's education, fees and uniforms, transport costs, shop-bought food, taxes, etc. Trade liberalisation is increasing women's workload in many parts of the world, both by increasing employment opportunities in labour-intensive and usually low-skilled industries, and by increasing the feminisation of agriculture and particularly subsistence agriculture because of predominantly male migration for waged employment.\textsuperscript{130}

Few non-indigenous feminist NGOs have specifically advocated recognition of gender issues within the institutions examined in the case studies in the thesis. One exception is the Associated Country Women of the World (ACWW), an NGO that represents 365 societies and more than nine million rural women in 71 countries. The ACWW agreed to three resolutions relevant to plant genetic resources at at least three ACWW Triennial Conferences. These resolutions sought comprehensive labelling of food products, including details of gene modification and radiation treatment (1998), urged governments to support Farmers' Rights by contributing to the International Fund on Plant Genetic Resources (1995) and urged governments to provide adequate and sustained support to plant genetic resource conservation, both national and international (1992).\textsuperscript{131} Other non-indigenous women's organisations which have been active on traditional knowledge outside the institutions considered in the thesis include UNIFEM, the Once and Future Action Network, the Gender Advisory Board of the UN Commission on Science and Technology for Development and Women in Global Science and Technology. The latter group was responsible for the phrase '... fully recognize the contribution of women as repositories of a large part of traditional knowledge' in a declaration adopted by a 1999 UNESCO World Conference on Science

\textsuperscript{130} Y. Song, 'Feminization of maize agricultural production in Southwest China', \textit{Biotechnology and Development Monitor}, no.37, March 1999, pp.6-9; P. Howard-Borja, 'Some implications of gender relations for plant genetic resources management', \textit{Biotechnology and Development Monitor}, no.37, March 1999, pp.2-5.
\textsuperscript{131} Reports from International Organizations on their Policies, Programmes and Activities on Agricultural Biological Diversity Part III: International Non-Governmental Organizations, UN Doc. CGRFA-8/99/11.3, p.3.
hold in Budapest.132

Indigenous women have also been active on TRR and traditional knowledge. Indigenous women have formed international networks since at least the 1985 Nairobi World Conference on Women. In July 1989 the first indigenous women’s conference was held in Adelaide, Australia, attended by 1,329 people. The Indigenous Women’s Network was formed that year also. Indigenous women from around the world subsequently held a conference in 1991 in Karasjohka, Norway (Samiland). Regional conferences were held for indigenous women from South and Central America in 1991 and 1994, and from Asia in 1993. In 1993 the second International Conference for Indigenous Women of the World was held in Aotearoa, and the World Council of Indigenous Peoples held its first Conference for Indigenous Women in Guatemala. Indigenous women caucused before the Earth Summit in Brazil and at the World Conference of Human Rights in Vienna in 1993. Common themes at these conferences include recognition of the rights of indigenous peoples, land rights and self-determination, control over natural resources, challenges to unsustainable development and military aggression, human rights, unemployment, indigenous culture and identity, education and culture, alienation, alcoholism, violence and suicide, and political representation and organisation.133

Following the Vienna and Beijing world conferences on human rights and women respectively, gender (and not just feminism) has been made a mainstream issue for the United Nations.134 The 1993 World Conference on Human Rights agreed to mainstream human rights, including the rights of women, indigenous peoples and minorities throughout the UN system.135 Despite this, and the strength of the diverse feminist movement, gender is not addressed explicitly as an issue in the IU, as discussed in Chapter Four. It has more of a presence in FAO programs and in the DUNDRIP.

The 1995 Fourth World Conference on Women in Beijing produced a Declaration and Platform for Action. These were adopted by consensus by 189 governments, although with numerous reservations and interpretative statements.136 Equality between men and women around the world was recognised as a basic human right, despite many

132 subscriptions <subscriptions@wigsat.org>, ‘UNESCO/ICSU and biocultural diversity’, subscriptions@wigsat.org, 18 January 2000.
133 V. Taulli-Corpuz and D. Hilhorst, ‘Indigenous women and the Beijing Conference’, email communication from <DEBRA@OLN.comlink.apc.org> to <hmet.women@Germany.EU.net>, 12 September 1995.
136 The conference was held in conformity with General Assembly resolutions 45/129 and 46/98.
states’ resistance to this norm. Another aim agreed to by the Beijing Conference was that the implementation of commitments made at the 1985 Nairobi Conference should be accelerated. The Nairobi ‘Forward-looking Strategies for the Advancement of Women’ was to have been implemented by the year 2000, but this was not achieved. The United Nations agreed to mainstream the Beijing commitments by incorporating a gender perspective into the design, implementation and monitoring of all UN policies and programs at all levels.

The Commission on the Status of Women (CSW) has overall responsibility for monitoring implementation of the Beijing Declaration and Platform for Action and advising the Economic and Social Council (ECOSOC). ECOSOC oversees system-wide co-ordination in the implementation of the Platform. The Beijing Platform lists 12 critical areas of concern. These include armed and other conflict, economic participation, power sharing and decision-making, human rights and environment and development. The Platform identifies strategic objectives and actions to be taken by governments, who bear the primary responsibility for removing obstacles to gender equality and for implementing its strategic objectives in domestic law and policy. But the Beijing Platform also applies to non-state actors including NGOs and the private sector. Governments agreed to a wide range of measures promoting women’s full and equal participation in all spheres of life, protecting women’s human rights and integrating women’s concerns into all aspects of sustainable development.

In the Platform, governments recognised the important role women play in promoting sustainable development as producers, consumers, family carers and educators. The human rights of women and the girl-child are recognised as an inalienable and indivisible part of all human rights and fundamental freedoms. The Platform notes that women, and in particular indigenous women, can have particular

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137 ‘Mission Statement’ in Report of the Fourth World Conference on Women, held in Beijing from 4 to 15 September 1995: including the Agenda, the Beijing Declaration and the Platform of Action, UN Doc. A/CONF.177/20, extracted in The United Nations and the Advancement of Women 1945-1996, United Nations, pp.649-748 at p.652. Reservations and understandings on the Declaration and Platform of Action were expressed by the representatives of Kuwait, Egypt, the Philippines, Malaysia, Iran, Libya, Ecuador, Indonesia, Mauritania, Oman, Malta, Peru, Argentina, Brunei Darussalam, France, Yemen, Sudan, Dominican Republic, Costa Rica, United Arab Emirates, Venezuela, Bahrain, Lebanon, Tunisia, Mali, Benin, Guatemala, India, Algeria, Iraq, Vanuatu, Ethiopia, Morocco, Djibouti, Qatar, Togo, Liberia, Syria, Pakistan, Nigeria, Comoros, Bolivia, Colombia, Bangladesh, Honduras, Jordan, Ghana, Central African Republic, Cambodia, Maldives, South Africa, the United Republic of Tanzania, Panama, El Salvador, Madagascar, Chad, Cameroon, Niger, Gabon, and the observer for Palestine and the Holy See: unic@peg.pegasus.oz.au, ‘UN870: Women’s Conf: WOM/870 19 September 1995’, <hrnet.women@Germany.EU.net>, 21 September 1995.


139 Follow-up to and implementation of the Beijing Declaration and Platform for Action: Report of the Secretary-General, UN Doc. E/CONF.177/20, 1996.


141 Other critical areas include poverty, education, health, violence, armed and other conflict, national and international machineries, mass media, and the girl child.
knowledge of ecological linkages and fragile ecosystem management because their livelihood and daily subsistence depend directly on sustainable ecosystems. The Declaration and Platform promote women's active involvement in environmental decision-making, the integration of gender concerns and perspectives in policies and programs for sustainable development, and the strengthening or establishing of mechanisms at the national, regional and international levels to assess the impact of development and environmental policies on women.

Indigenous women's organisations particularly celebrated the recognition given to traditional knowledge and customary intellectual property rights in the Beijing instruments. In its recommended action 253, the Platform encourages, subject to national legislation and consistent with the CBD, the effective protection and use of the knowledge, innovations and practices of women of indigenous and local communities. It seeks to ensure that such knowledge, innovations and practices are 'respected, maintained, promoted and preserved in an ecologically sustainable manner'. It also recognises the need to 'safeguard the existing intellectual property rights of these women as protected under national and international law' and to 'work actively, where necessary, to find additional ways and means for the effective protection and use of such knowledge, innovations and practices'. The platform also encourages the fair and equitable sharing of benefits arising from the utilisation of such knowledge, innovation and practices.\textsuperscript{142} The qualification, 'subject to national legislation' weakens these commitments, just as a similar qualification does in the CBD.

The inclusion of this recommended action was largely the result of NGO and IPO networking. The Indigenous Women's Caucus claims to have been one of the main lobbyists for the inclusion of this paragraph in the Platform. Marge Friedel of the Canadian Metis Women's Organization and a member of the Indigenous Women's Caucus welcomed this recommended action, saying that the inclusion of intellectual property rights was a new safeguard. Friedel is reported to have said at the time, 'just having traditional indigenous knowledge retained in the document is a step forward .... We forced this whole paragraph in the document'. She attributed the success to indigenous women's learning about international decision making processes. A delegate from the Asian Indigenous Women's Network, Victoria Tauli-Corpus, is reported to have said that this paragraph would be the only one in existing international law that most accurately reflected an indigenous definition of intellectual property rights.\textsuperscript{143}

The realisation of this commitment is unlikely to be achieved, however, unless more specific mechanisms and strategies are put in place and complied with. Some of the options being discussed are noted in Chapters Two and Four, but there is little


\textsuperscript{143} C. Jorgensen, C. (gaglianr@netcom.com), 'Intellectual property rights of indigenous women recognized: September 14, 1995', <beijing-conf@tristram.edu.org>, 17 September 1995.
gender sensitivity in CBD discussions, noted in Chapter Five. IU and CBD parties have been discussing governance options to realise these aims in a non-gender-specific way for several years. As discussed in the last chapter, one aspect of the United Nations' gender equity prescriptions which has particular relevance to plant genetic resource conservation and use is the recommendation that unpaid work be quantified and valued. This has not yet been addressed in FAO costings for Farmers' Rights however. It is therefore unlikely that the action, amongst the hundreds of other recommended actions, is likely to have a significant influence since the FAO has primary carriage of plant genetic resource conservation policy, including Farmers' Rights.

Progress in implementing the Nairobi and Beijing strategies were reviewed at a special ‘Beijing+5’ five-day session of the United Nations General Assembly in June 2000.\textsuperscript{144}

Conclusions

This chapter has provided various examples to demonstrate that changing discourses have had uneven constitutive effects for political subjectivities and agency in contemporary times. The assumed superiority of Europeans, and the dehumanisation inherent in slavery, contrasts markedly with the recognition today, exemplified in the Beijing Platform and the CBD, of the need to give some types of traditional knowledge the same respect as non-traditional forms of knowledge, and to share equitably in the benefits of the utilisation of that knowledge.\textsuperscript{145}

Broad international norms of non-discrimination and ‘racial equality’ have informed IPO campaigns about intellectual and cultural property rights, as have international norms concerning national sovereignty over resources. The growth of international environmental law and the draft Declaration on the Rights of Indigenous Peoples were international responses to diffuse social movements. International norms had powerful constitutive effects, but not in a realist state-power sense. Human rights and environmental norms have been cited politically to improve the equity and quality of governance practices. The power of these norms has not been exercised primarily for the benefit of governments, as realist or neo-realist analyses of normative power might suggest. Rather IPOs and NGOs are seeing and refracting their political identities partly through the lens of the international discourse about states’ and human rights, and sustainable development. These discourses partially constitute the archive from which many social movements’ political claims are drawn, as do domestic circumstances and representations about common histories of suffering or disadvantage.

This demonstrates that discourses embody power, and do contribute to the social structuring of human and institutional behaviour. This is particularly so when actors internalise and comply with the norms and standards that discourses convey. However


\textsuperscript{145} Implementation of Article 8(j), UN Doc. UNEP/CBD/COP/3/CRP.35.
the domestic law models promoted by NGOs, based on human rights discourse, have not been significant during debates about the DUNDRIP as it has a long way to go before it becomes a binding legal instrument which may require domestic implementing legislation. There has been an effective use of inter-governmental institutional agenda-setting processes to ensure that traditional knowledge issues were included in the UNCED agenda, and relevant reports were produced within the WGIP. The UNCED process, and the CBD, have had more significant ongoing implications than have reports produced within the WGIP, however.

This chapter has also argued that while political agency and power is embodied in discourse, these can also be resisted by other actors and political subjects. Resistance to the finalisation of the DUNDRIP is unlikely to prevail, however, for at least two reasons. If faster progress is not made as the finalisation date in 2004 draws near, the result may be the adoption of significant portions of the current text without amendments, or the adoption of alternative text, possibly less beneficial for indigenous peoples, without much debate. If the text is substantially amended, this will render IPOs’ participation and political agency less significant. This could give rise to disillusionment and criticisms of governments responsible for textual amendments, because the DUNDRIP is the first standard-setting human rights instrument to have been developed with the active participation of those intended to benefit from its terms.146

The high level of participation in UN fora has implications for governments domestically and regionally, and for governance by other UN institutions, because indigenous peoples and their advisors have formed networks of like-minded people who are familiar with international inter-governmental agendas, politics and processes, who can maintain contact via the Internet and other communications media. They also tend to come together on an irregular basis at many of the gatherings convened to discuss IPO issues. This may enhance discursive power and political capacity, as the (unrelated) 1999 protests against the proposed ‘Seattle’ round of world trade negotiations demonstrated. If the DUNDRIP is weakened by governments, it is likely that a co-ordinated critical response from IPOs internationally will result. But in any event the prospect of governments’ resistance prevailing is not high, since the draft is largely consistent with extant international law and policy, and this is likely to limit the persuasiveness of governments’ concerns. Issues such as definitions, self-determination, and territorial rights are likely to be amongst the most contentious, but not irreconcilably so.

The DUNDRIP, even when adopted by the UN General Assembly is only considered ‘soft law’ and will not bind states unless it acquires the status of customary international law. It is likely to generate political pressure for states to comply with its terms since it will continue to be the benchmark cited by IPOs domestically, unless it is

146 Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples: Information Received from Non-governmental and Indigenous Organizations; UN Doc.
substantially weakened during inter-governmental negotiations. Accumulations of soft law instruments and widespread compliance by states with those instruments in the belief that they embody binding norms, can also give rise to principles of customary international law which are binding. Compliance with the Declaration may also be further stimulated by an effective review mechanism, such as the proposed permanent forum for indigenous peoples.

The possibility of a new permanent forum within the UN dedicated to indigenous peoples' concerns indicates greater legitimacy and inclusiveness for diverse 'peoples' within inter-governmental institutions. This exemplifies a trend toward global governance and a greater reach for human rights discourse, as more socially and geographically diverse political communities are represented within the UN's institutional processes. Although only states can be members of the UN under the UN Charter, wide-ranging options are being discussed concerning participation by indigenous peoples in the forum. If established, this forum will demonstrate again that human rights discourse, when politicised and adapted for institutional reform, has constitutive and transformative effects over the long term. This is a consequence of diffuse, and not state-centred, power.

This chapter has also argued that the commitments made concerning gender equity and recognition of the value of women's traditional knowledge and customary intellectual property rights in the Beijing instruments are unlikely to be implemented widely in domestic jurisdictions, particularly concerning plant genetic resources. This is because other institutions of global governance, such as the FAO and the CBD, have primary carriage of plant genetic resource issues. Commitments to gender equity in the IU and the CBD are non-existent and weak, respectively, although gender in the CBD was given more attention at COP-5, as discussed in Chapter Five.