Exploring New Territories: The Adoption of Human Rights for the Protection of Indigenous Knowledge and Natural Resources from Biopiracy

Gianda Girelli

Human rights, a fairly recent experiment, have undergone rapid expansion while facing virtually unrivalled opposition and criticism. This article aims to assess the ‘state of health’ of human rights by investigating the system’s evolutionary capabilities to respond to contemporary challenges, specifically in the interests of indigenous peoples in their struggle to protect their traditional knowledge and associated natural resources from biopiracy. This will begin by establishing a working definition of biopiracy and ‘indigenous peoples’, and briefly retracing these communities’ growing participation and recognition at the international level. Specific attention will then be devoted to the regime of intellectual property, which, while recognised as one of the root causes of this problem, is also often proposed as a potential solution. The article reconstructs its cultural foundations and ideological tenets, from which emerge this system’s inherent inability to protect the interests of indigenous peoples, which have a radically different approach to science and the natural world. Subsequently, the human rights framework will be considered: firstly, the article evaluates its ideological similarities with the regime of intellectual property and its consequent limitations, which support criticism that this system, much like intellectual property, is a tool of neo-colonialism. The article then examines the expanding, context-sensitive approach developed by the Inter-American Court of Human Rights in relation to indigenous land rights, arguing for the possibility of extending such interpretation (by continuing on a path led by the Court) to the protection of natural resources as well as related indigenous knowledge, notwithstanding an apparent separation and structural differences between the two.
INTRODUCTION

Human rights as a body is still a young creature. Although its ideological foundations can be
found in the 18th Century,1 this corpus developed in the aftermath of World War II. Self-
proclaimed ‘civilized’ nations, then recovering from the regime of the ‘quintessential savage’,2
began to develop a supra-national system for the protection of the individual and the
advancement of a peaceful international order.3 In less than a century, this field has developed
extensively, extending its reach to areas that were once inconceivable; it has become a
dominant discourse that is fiercely defended and fervently criticised. For some, it has even
reached its end-times – at least as an internationally dominated, quasi-religious movement.4

Amongst the areas of expansion, one of the most interesting has been the recognition and
protection of indigenous peoples, even though their peculiar, alternative conception of order
arguably threatens the current system of international law that is built around nation-states
and individual rights.

Biopiracy stands at the crossroads of several areas into which human rights are expanding,
including science, business, and development. Much has been written and proposed about
this hard-to-define phenomenon, and both international and local organisations around the
world have made (and continue to strive toward) significant advances against biopiracy. In
many cases, intellectual property rights, while recognised as one of the root causes of this
problem, are also proposed as a potential solution, sometimes in coordination with other
instruments. On the contrary, fewer actors value human rights as a valuable tool for
confronting this issue.

This article does not aim to reconstruct or evaluate the many international, regional, and local
mechanisms relevant to this matter, which have already been extensively analysed in the
literature.5 Rather, it considers whether human rights can be a useful instrument (as an
alternative to, or alongside others) for the protection of the traditional knowledge of
indigenous communities and the natural resources to which such knowledge is inherently

---

1 Ilias Bantekas & Lutz Oette, International Human Rights Law and Practice (CUP 2013) 11.
3 Bantekas (n 1) 19.
4 Douwje Lettinga & Lars van Troost (eds), Debating the Endtimes of Human Rights: Activism and Institutions in a Neo-Westphalian World
   (AI 2014) 8.
5 Among others, see Tzen Wong & Graham Dutfield, Intellectual Property and Human Development: Current Trends and Future Scenarios
   (CUP 2011) 143.
tied. Therefore, after framing the issue, attention will be dedicated to the regime of intellectual property, and its dual role in relation to biopiracy. Subsequently, the human rights framework will be considered, specifically pausing on the jurisprudence of the Inter-American Court of Human Rights and its expanding approach in relation to rights to land ownership. Biopiracy is investigated here as a test-case: indeed, by assessing the ability of human rights to protect traditional knowledge from exclusionary interests, the aim is to reach a more general conclusion on whether this system carries any potential to ‘survive’ its ideological limitations and still play a meaningful role in a changing world, or whether this discourse is inherently and fatally limited.

**BIOPIRACY: THE COLONISATION OF KNOWLEDGE**

**Indigenous peoples: an ongoing struggle for autonomy and survival**

Indigenous peoples⁶ are, in many parts of the world, among those most affected by human rights violations. They are often marginalised (lacking representation in the formal state structure) and cornered in a state of poverty. At the same time however, they are also among the groups most fiercely fighting for their survival and autonomy, and whose increased activism and recognition in international arenas have brought to the forefront the problem of defining ‘indigenous’ in such a way as to acknowledge and value unique worldviews and social organisations, do justice to histories of exploitation, and respect the distinctness of each community while at the same time avoiding their depiction as merely victims or folkloristic characters. As a result, a mixed approach is widely employed, which accords primary relevance to self-identification (indigenous peoples’ right to characterise themselves as such)⁷ supported by the presence of some ‘typical’ and recurring features, such as: non-dominant positions in society linked to experiences of marginalisation and exclusion,⁸ historical continuity with the ‘pre-invasion’ period, a strong, vital connection – both spiritual and material – to the land, and voluntary and conscious perpetuation of the community’s cultural

---

⁶ Indigenous peoples constitute approximately 5% of the world population, and the very definition of the term is disputed. Therefore, in addressing indigenous issues some generalisation is unavoidable. However, indigenous peoples often share a similar relationship with lands and resources, and a similar history of marginalisation and abuse.


⁸ Bantekas and Oette, (n 13) 437.
distinctiveness. 9 Also characteristic is a social order built on and around the community, perpetuated through oral transmission of a complex system of customary rules, and an appreciation for restorative justice strictly dependent on harmony within the group.10

As aforementioned, a defining feature of these communities is precisely their being the objects of long-standing marginalisation and violence, a process which began with colonisation. This, together with the very fact that the term ‘indigenous’ is now synonymous with the minority and the marginalised, speaks volumes about the faults of colonialism, exploitation, and forced development.

Despite their being often pushed to the margins of social and political life, indigenous peoples have proven able to organise and effectively advocate for more substantial recognition and participation at the international level.11 The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),12 coupled with growing attention by scholars and practitioners, testifies to their ability to capitalise on human rights discourse, one developed for the protection of a very different ‘archetypal subject’. Notably, the Declaration is subject to several criticisms, mostly related to its soft-law character and to the dynamics surrounding the drafting process,13 and violations against indigenous communities are still being reported on a daily basis.14

Clash of Cultures or instrument of inevitable development?

One of the reasons for this complex relationship between indigenous peoples and human rights is these groups’ communitarian conception of society, which contrasts with the one underlying the development of international human rights law to the point of threatening it. Indeed, the latter is essentially built around nation states, and focused (at least in its original

9 ICTJ (n 4) 8.
13 Barelli (n 11), 969.
conception) on the protection of the individual from the state within a neoliberal economic system. In contrast, among the peculiarities of indigenous peoples are their symbiotic relationship with land and natural resources and the defining role played by traditional knowledge. This integrated and holistic system, refined over centuries, represents more than a mere set of notions about the natural world; it is valued as ‘a means of physical survival and of cultural identity’, incorporating a physical, spiritual and cultural dimension. It is collective and fluid, in constant development, and passed down to the new generations according to specific rules.

This knowledge and its source natural resources are threatened by the phenomenon of ‘biopiracy’; while commonly understood as the ‘misappropriation and monopolisation of long-held medicinal and agricultural knowledge about nature, and the related physical resources,’ the term ‘biopiracy’ has been used somewhat broadly.

Following the growing need for and interest in natural resources and their beneficial effects, researchers and corporations quickly realised that significant time and money could be saved by exploiting indigenous knowledge of the natural world. Consequently, products and processes are appropriated from local communities through various means. They are then patented or subjected to other monopolistic legal instruments without the consent (and often the awareness) of the original ‘owners’, who are typically also denied any benefit resulting from the exploitation of their knowledge.

Biopiracy affects communities virtually everywhere natural resources have been traditionally employed for medicinal, agricultural, cosmetic and other purposes. It often leads to the exclusion of the local community from access to the natural resources they have been relying upon for generations, with consequential loss of biodiversity. Due to the unique relationship

---

16 Wong (n 5) 140.
18 Robinson (n 17) 21.
21 Finger (n 15) 144.
of these populations with their territories, biopiracy threatens their very existence;\textsuperscript{23} it is not simply humiliation, but also ‘the most offensive and dangerous form of expropriation, because it touches on the very core processes of life and survival’.\textsuperscript{24}

\textbf{INTELLECTUAL PROPERTY RIGHTS: CAN THE PROBLEM BE PART OF THE SOLUTION?}

The issue of biopiracy is ultimately rooted in the current system of intellectual property (IP) (which, like human rights, is also constantly expanding in scope),\textsuperscript{25} as sanctified in several international instruments.\textsuperscript{26} In particular, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),\textsuperscript{27} adopted by the World Trade Organisation in 1994, set minimum standards of IP regulation for its members.\textsuperscript{28} This instrument expanded internationally, irrespective of the stage of development of its host countries, bringing into uniformity the high standards of IP employed in the West, including its strong enforcement mechanisms.\textsuperscript{29} Particularly relevant to biopiracy is Article 27, which requires that states ensure the patentability of any product and process recognised to be new,\textsuperscript{30} involving an inventive step, and capable of industrial application.\textsuperscript{31} States are allowed to exclude plants and related processes from patentability, but they must nevertheless envisage some form of protection (through patents, \textit{sui generis} systems, or a combination of the two).\textsuperscript{32} This provision, although introducing a level of flexibility,\textsuperscript{33} in fact requires all member states to establish a system of private property over life forms – traditionally excluded from property by many countries\textsuperscript{34} –

\textsuperscript{24} Isla (n 22) 324.
\textsuperscript{26} Maria Dolores Mino, ‘Traditional Knowledge Under International Human Rights Law: Applying Standards of Communitarian Property Over Ancestral Land to Traditional Knowledge Related Claims’ (2001) ExpressO 1, 7.
\textsuperscript{28} Khor (n 20) 9.
\textsuperscript{29} Helfer (n 25) 984.
\textsuperscript{30} This particularly problematic condition has been interpreted increasingly widely: see Wong (n 5) 11.
\textsuperscript{31} TRIPS (n 22), Article 27(1), 331.
\textsuperscript{32} TRIPS (n 22), Article 27(3)(b), 331.
\textsuperscript{33} This flexibility has been exploited by several states, which have developed \textit{sui generis} systems to prevent biopiracy. See Robinson (n 17) 141.
\textsuperscript{34} Khor (n 20) 77.
while remaining strikingly silent on the issue of protecting and preserving traditional knowledge.\textsuperscript{35}

The IP regime has emerged out of specific social and economic circumstances. It originated in Europe around the 15\textsuperscript{th} Century,\textsuperscript{36} and developed with the primary purpose of protecting and rewarding creativity and scientific development while also allowing authors to enjoy, for a limited period of time, exclusive control over the products of their efforts. IP is based on a peculiar understanding of knowledge as developed by a solo, god-like author, which creates a ‘something’ from a ‘nothing’, and thus deserves to protect the products of his mind from external claims or invasions;\textsuperscript{37} the way in which this protection is accorded is through recognising his proprietary rights over this creation – a property that is by definition private and antagonistic.\textsuperscript{38}

Due to the circumstances of its origins, IP is also founded upon a peculiar understanding of science and knowledge, which tends to justify acts of biopiracy. Indeed, according to classical western perceptions, science is technological, anthropocentric, written, and isolated by other spheres of life such as culture or religion; it is objective and aseptic. From this also follows a ‘reductionist approach’ to biology and nature, thoroughly analysed by Vandana Shiva,\textsuperscript{39} which justifies and even encourages the patenting of life forms. Evidently, this understanding of nature and science clashes with the holistic comprehension many indigenous communities have of the natural world to which they are closely connected. Traditional knowledge is mainly oral, trans-generational, and integrated within a complex social and religious system, regulating its transmission and use in such a way as to ensure its conservation, in turn safeguarding both the community and the environment.\textsuperscript{40} The stark contrast between these two approaches, coupled with the triumph at the global level of a western model of development, causes a misperception of traditional knowledge and any knowledge that has not been ‘claimed’ for profit generally as \textit{terra nullius};\textsuperscript{41} as the territories inhabited by

\textsuperscript{35} Christoph Beat Graper & Martin A. Girsberger, ‘Traditional Knowledge at the International Level: Current Approaches and Proposals for a Bigger Picture that Includes Cultural Diversity’ in Jason Schimd & Hansjörg Seiler (eds), \textit{Recht des ländlichen Raums} (Schulthess 2006) 243, 21.
\textsuperscript{37} Sinjela (n 36) 244.
\textsuperscript{38} Khor (n 20) 57.
\textsuperscript{39} Vandana Shiva, \textit{Biopiracy: The Plunder of Nature and Knowledge} (South End Press 1997) 18-41.
\textsuperscript{40} Marcelin Tonye Mahop, \textit{Intellectual Property, Community Rights and Human Rights. The Biological and Genetic Resources of Developing Countries} (Routledge 2010) 15.
\textsuperscript{41} Shiva (n 39) 10.
indigenous populations were plundered by colonial powers, so too traditional knowledge is conceived as lying ‘buried, unknown, unused and without value’\textsuperscript{42} until a Creator (typically white, male, and from the Global North) discovers it and claims exclusionary rights on it, misinterpreting his ignorance as ‘novelty’.\textsuperscript{43}

**Employing IP for the protection of traditional knowledge**

As a consequence of these structural biases, several authors highlight the imperialistic dynamic underlying IP, which dispossesses indigenous populations of their science and resources, and imposes the ‘conqueror’s way of life’;\textsuperscript{44} building on this interpretation, biopiracy is nothing more than the most recent expression of ideological, cultural, and scientific colonialism.\textsuperscript{45} Surprisingly, however, IP is also regarded by many as a potential solution to the problem of biopiracy, mainly by adopting some of its categorisation, or recalibrating the scope of certain instruments. By way of example, different authors and institutions have considered creating *sui generis* systems, designed specifically for traditional knowledge by exploiting the flexibility provided by TRIPS,\textsuperscript{46} using trademarks or trade secrets,\textsuperscript{47} and modifying TRIPS, to incorporate key provisions of the Convention on Biological Diversity\textsuperscript{48} amongst other measures.

However, these and other sources\textsuperscript{49} also acknowledge the strong limitations of IP in providing protection to indigenous knowledge, which are linked to the ideological foundations of this regime, as outlined above. In particular, the main purpose of IP is to allow for the economic exploitation of resources and ideas,\textsuperscript{50} thus making the system intrinsically unfit to provide adequate recognition of their religious and social significance.\textsuperscript{51} Additionally, this system is based on a dichotomous private-public dynamic, centred around the exclusion of one from

\textsuperscript{42} Shiva (n 39) 73.
\textsuperscript{43} Shiva (n 39) 4.
\textsuperscript{45} Robinson (n 17) 3.
\textsuperscript{46} Among others, Khor (n 20) 64.
\textsuperscript{47} Robinson (n 17) 85.
\textsuperscript{48} Khor (n 20) 41 and 68.
\textsuperscript{49} See Robinson (n 17) 46; Wong (n 5) 155.
\textsuperscript{50} Mino (n 26) 10.
\textsuperscript{51} Mino (n 26) 11.
the other, while indigenous systems defy these categories. Traditional knowledge, while not linked to any individual ‘author’, is also not considered as belonging to the public domain, nor freely available. Rather, it is organised according to a regulated system of communal ownership;\(^\text{52}\) introducing private entitlements. Thus, one of the many risks at hand is the potential of limiting the possibility of circulating the knowledge within the community.\(^\text{53}\) Finally, the content of such knowledge is by definition fluid\(^\text{54}\) and cannot be fixed into any current form, while the very idea of owning a life is irreconcilable with an indigenous understanding of nature and of one’s place in the universe.\(^\text{55}\)

In conclusion, IP rights and traditional knowledge appear to be fundamentally incompatible;\(^\text{56}\) they emerge from contrasting worldviews, and follow different rationales and purposes, such that the adoption of the former for the protection of the latter would inevitably corrupt one, or both, systems.

The discussion will now continue on to focus on another potential instrument: human rights discourse. It will consider whether, despite some intrinsic limitations similar to those characterising IP, this corpus of norms carries the potential for more respectful protection of indigenous knowledge.

**RE-INTERPRETING RIGHTS FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE: CAN HUMAN RIGHTS OVERCOME THEIR OWN LIMITATIONS?**

The regime of human rights has developed in similar cultural and economic circumstances as IP\(^\text{57}\) and thus faces analogous criticisms. For example human rights, at least in their original Western conception, are similar to IP in their being ‘private, individual and autonomous’\(^\text{58}\) devices. This is primarily aimed at the protection of individual civil and political rights\(^\text{59}\) while

---


\(^{53}\) Arezzo (n 52) 406.

\(^{54}\) Arezzo (n 52) 400.


\(^{56}\) Shiva (n 39) 56.


\(^{59}\) Oguamanam (n 57) 290.
arguably underestimating the essentially social character of the human being and the importance of culture as a necessarily collective phenomenon. This bias, perceived in the majority of the international and regional human rights treaties, is not reflective of the way in which many societies were (and in the case of indigenous peoples, are) organised. Consequently in more recent times, a development has been witnessed: on one side, human rights have increasingly expanded into the private sphere, and on the other, stronger emphasis has been placed on social, cultural, economic rights, and collective rights (such as, notably, indigenous peoples’ rights).

Additionally, the same ‘cultural’ critique levelled against IP, of bias against non-Western science, is often voiced against human rights and international law. There are valid accusations of marginalising and undermining traditional customs, and of considering informal justice as undeserving of the quality of ‘law’. This renders many local systems a sort of legal terra nullius, devoid of rules and values and in need of a new set of standards to occupy the normative space, carrying with them a unique, and perhaps, out-of-place understanding of order, civilisation, and development.

Thus the human rights corpus is sometimes criticised for serving this same colonising project of transformation of ‘non-Western’ into ‘Western’, working through the fiction of universalism as an instrument for the imposition of a particular cultural and economic ideology, and the suppression of alternative cosmo-visions, marginalising alternative means and understandings of justice. As IP is a moral concept, so is the modern principle of human rights; in the eyes of some, it is an ideologically charged standard of civilisation brought by the Global North as antibiotics to the ‘sick’ and ‘savages’ of the Global South. In light of these criticisms, can human rights protect indigenous knowledge? Are they able to overcome their intrinsic biases and offer protection to a different culture? Are they able to do so without

---

60 Bantekas & Oette (n 1) 411.
61 Bantekas & Oette (n 1) 468.
62 Bantekas & Oette (n 1) 411.
63 Shiva (n 39) 71.
65 Aoki (n 55), 25.
67 Mutua, Human Rights (n 2), 10.
transforming into an imperialistic tool, or are they too – like the intellectual property regime – fatally constrained by their own origins?

A more sensitive understanding of property: the expansive efforts of the Inter-American Court of Human Rights

Guidance in answering these questions comes from the tracing and analysis of the evolution of the field. The jurisprudence of the Inter-American Court of Human Rights (IACtHR) surrounding biopiracy is particularly telling, especially in the creative manner by which it has dealt with indigenous peoples’ issues.

The Court has not ruled specifically on biopiracy yet; nevertheless, it has developed an innovative approach to land issues, increasingly clarifying states’ obligations towards the protection of indigenous communities. Building mainly (but not solely) upon the American Convention on Human Rights (ACHR), the United Nations Declaration on Indigenous Peoples Rights (UNDRIP), and ILO Convention no. 169; the IACtHR has shaped a culturally-sensitive approach to ‘property’ in its interpretation of Article 21 ACHR, which states that:

Everyone has the right to the use and enjoyment of his property.

The law may subordinate such use and enjoyment to the interest of society.

As the following paragraph aims to demonstrate, this interpretation could easily be brought one step forward, so as to bring traditional knowledge and the related natural resources under the protection of this same provision, and thus clarifying state obligations and granting indigenous communities an additional instrument for advocacy and redress. Such an evolution would also support the argument that human rights, although born out of specific contingencies, can be valuably employed for the promotion of interests that were not central

---

69 UNDRIP (n 12).
71 Mino (n 21), 23.
at the time of the drafting of key instruments, due largely to an inherent adaptability to the context.

The IACtHR issued its first judgment on ancestral lands in 2001, in the case of *Awas Tingni v Nicaragua*. For the first time, the Court inferred from Article 21 ACHR the obligation of the state to protect communal forms of ownership claimed by indigenous peoples on their traditional territories. The Court, also highlighting how property is not qualified as ‘private’ by the Convention, stressed:

The close ties of indigenous people with the land must be recognized and understood as the *fundamental basis* of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy […] and transmit it to future generations.

Through this interpretation, the Court went beyond the archetypal understanding of property as private and individual, integrating it with the holistic conception of ownership adopted by indigenous communities themselves; accordingly, it required the state to develop (and ensure compliance with) effective mechanisms for the delimitation and protection of this communal property, also taking into primary consideration its cultural dimensions as well as the customary norms followed by indigenous communities.

Since 2001 the Court has adopted other similar decisions, in which it reaffirmed and progressively expanded this interpretation, typically in cases in which states had granted private actors the right to exploit ancestral lands and resources, and/or were lacking in an appropriate system for ensuring participation and recognition of indigenous rights. For example, in *Moiwana v Suriname*, the Court qualified this right to communal property, which the state must protect, as a necessary prerequisite for the enjoyment of indigenous peoples’ right to cultural identity and integrity. This principle was reinforced the same year in *Yakye*

---

73 Nagan (n 14), 890.
74 *Awas Tingni* (n 71), 149.
75 Mino (n 26), 24.
77 Lenzerini (n 23), 12.
Axa v Paraguay,\textsuperscript{78} where the Court stressed how preventing these communities from accessing territories they have a special connection to (and the resources therein) can affect their ‘right to cultural identity’, as well as their very survival.\textsuperscript{79}

In its second judgment on ancestral lands against Paraguay, Sawhoyamaxa,\textsuperscript{80} the IACtHR further extended the reach of Article 21 ACHR, by clarifying that ‘traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title’,\textsuperscript{81} and therefore maintained that even when the community loses material possession of ancestral lands, the spiritual and cultural attachment to such territories survives.\textsuperscript{82} Paraguay’s obligations towards indigenous peoples were then once again assessed in the 2010 Xákmok\textsuperscript{83} judgment. In deciding this case, the Court accorded primary relevance to the damages that the lack of ownership on ancestral lands and natural resources causes to the indigenous community’s cultural identity,\textsuperscript{84} also stressing the

\begin{quote}
Insufficiency of the merely ‘productive’ conception of the land when considering the conflicting rights of the indigenous peoples and the private owners of the lands claimed.\textsuperscript{85}
\end{quote}

Applying these same conclusions to the misappropriation of traditional knowledge and the related resources does not appear to be an excessive interpretative leap, especially in light of several provisions of the UNDRIP, and in particular, Article 31, which recognises the indigenous peoples’ rights to:

\begin{quote}
Maintain, control, protect and develop their cultural heritage, traditional knowledge and […] manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora.\textsuperscript{86}
\end{quote}

\textsuperscript{78} I/A Court H.R., \textit{Case of the Yakye Axa Indigenous Community v. Paraguay}, Judgment of February 6, 2006, Series C, No. 125. This judgment also adopts an innovative understanding of the right to life as right to a dignified life (‘digna vida’), thus expanding on its original meaning.
\textsuperscript{79} Yakye Axa (n 78), Par. 147.
\textsuperscript{81} Sawhoyamaxa (n 80), Par.128.
\textsuperscript{82} Sawhoyamaxa (n 80), Par.131.
\textsuperscript{84} Xákmok (n 83), Par. 182.
\textsuperscript{85} Xákmok (n 83), Par. 182.
\textsuperscript{86} UNDRIP (n 12), Article 31(1).
However, the most important judgments on this matter have been passed against Suriname.

In the now famous Saramaka case,87 indigenous communities complained about (among other things) the state’s concessions to private bodies for mining and logging within traditionally indigenous territories,88 made possible by state ownership of natural resources, and by a lack of recognition of legal status to indigenous communities at the domestic level.89 Interestingly, in this case the IACtHR also interpreted the right to property in light of Article 1 of the International Covenant on Economic, Social and Cultural Rights90 recognising the right to self-determination, and Article 27 of the International Covenant on Civil and Political Rights91, which protects the right to cultural identity, concluding that Article 21 of the ACHR encompasses the right of indigenous communities to

Freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied92.

This interpretation ‘radically expands the content of Article 21’93 to include a right to internal self-determination; it also locates a right to communal property beyond the American Convention within international human rights law, based on indigenous peoples’ use and occupation of lands, while also linking self-determination to the very economic and cultural survival of the community.94 Even more importantly with respect to biopiracy, the Court stressed how these rights on ancestral lands would be meaningless without parallel rights on the resources therein.95 Accordingly, it outlined certain safeguards that states must implement when considering restrictions to the property rights of indigenous peoples, specifically requiring governments to ensure effective participation of indigenous communities in the decision-making process – which becomes a duty to obtain free and informed consent in relation to large-scale projects – as well as a right of these communities to receive a reasonable

---

88 Saramaka (n 87), Pars. 4, 142.
89 Saramaka (n 87), Par. 4.
92 Saramaka (n 87), Par. 95.
94 Saramaka (n 87), 96, 120-121.
95 Saramaka (n 87), 122.
benefit from such projects. These conditions, inferred among others by the jurisprudence of the Human Rights Committee\textsuperscript{96}, and by Article 32 of the UNDRIP, are strikingly similar to those required by the Convention on Biological Diversity (CBD).\textsuperscript{98} This latter mechanism, a multilateral agreement currently signed by 168 states\textsuperscript{99} and focused on the conservation and sustainable use of natural resources, is traditionally considered the key international reference in the fight against biopiracy. However, it is also strongly state-centric, as it is built around the principle of national sovereignty over natural resources,\textsuperscript{100} and lacks effective enforcement mechanisms. Therefore, integrating a CBD-based approach with human rights would be highly beneficial, as the latter appears to be more victim-centred, more appreciative of self-determination and autonomy, as well as enjoying stronger enforcement mechanisms.

Finally, in January 2016, the judgment on the \textit{Kaliña and Lokono v Suriname}\textsuperscript{101} case was published, in which the Court reaffirmed the principles already expressed in \textit{Awas Tingny} and \textit{Saramaka},\textsuperscript{102} again drawing upon the right to internal self-determination, and stressed that the protection of ‘incorporeal elements’ derived from natural resources is necessary to ensure the economic, cultural and social survival of indigenous communities.\textsuperscript{103} Also, the Court persisted on this path of innovation by building upon sources such as environmental law, stressing the pivotal role that indigenous peoples can play for the conservation of the environment, through the implementation of traditional, sustainable practices;\textsuperscript{104} in this context, the Court explicitly cited Articles 8 and 10 of the CBD\textsuperscript{105} to reaffirm a duty of the state to implement adequate mechanisms for the respect of indigenous peoples’ rights to life and cultural identity, in particular ensuring effective participation and benefit-sharing.

In conclusion, through its jurisprudence on indigenous peoples’ ancestral lands the IACtHR capitalised on international treaties as well as soft law in order to provide a holistic interpretation of the right to property stated in Article 21 ACHR, which although born as a

\textsuperscript{96} Saramaka (n 87), 122-129.
\textsuperscript{97} Saramaka (n 87), 30.
\textsuperscript{99} For a complete and updated list of parties see: https://www.cbd.int/information/parties.shtml.
\textsuperscript{100} Mahop (n 40), 31.
\textsuperscript{101} I/A Court H.R., Case of the Kaliña and Lokono Peoples v Suriname, Judgment of November 25, 2015, Series C, No. 309.
\textsuperscript{102} Kaliña-Lokono (n 101), Pars. 122-127.
\textsuperscript{103} Kaliña-Lokono (n 101), Par. 129.
\textsuperscript{104} Kaliña-Lokono (n 101), Par. 173.
\textsuperscript{105} Kaliña-Lokono (n 101), Par. 174-177.
fairly ‘standard’ norm currently represents the ‘repository of essential indigenous rights’\footnote{Antkowiak (n 93), 160.} in the American system (incorporating fundamental rights such as self-determination and cultural identity). This interpretation could be expanded further (and reinforced in light of Article 31 UNDRIP) to include the protection of traditional knowledge from misappropriation; such an evolution would allow holding states accountable for failing to implement adequate systems of prevention and punishment of aggressive bio-prospecting.

Land and knowledge clearly present several differences.\footnote{Mino (n 26), 25.} Most notably, one is material and therefore physically ‘appropriable’ and limitable, while the other is not; however, these differences tend to fade (as the Court did in interpreting the concept of property) when adopting the indigenous understanding of the world as a circle of life. This understanding emphasises that land, resources and human beings are inextricably tied together, as resources are to knowledge and spiritual beliefs, to the point that the two are almost inseparable.\footnote{Lenzerini (n 23), 14.}

Following this perspective, the appropriation of one fatally affects the other, thus impinging on internationally recognised rights of indigenous peoples to self-determination and cultural identity, and on their very social and economic survival.\footnote{Lenzerini (n 23), 15.}

Additionally, the approach of the Inter-American Court is significant and laudable, not only because of the substantial conclusions it reached, but also in the process employed. The adoption of a culturally-sensitive approach to human rights, which allowed movement beyond these rights’ original meaning and scope, are strongly linked to the Western, neoliberal culture in which they firstly developed, and are thus limited in their efficacy to address the challenges of the contemporary, neo-Westphalian world. In this way, through a sensitive and holistic interpretation that takes into primary consideration the context in which human rights are applied, the Court has shown that this discourse can ‘survive itself’ and expand for the protection of areas previously unimaginable (such as indigenous knowledge) without simultaneously imposing foreign values and principles.

\footnotesize{106 Antkowiak (n 93), 160.}
\footnotesize{107 Mino (n 26), 25.}
\footnotesize{108 Lenzerini (n 23), 14.}
\footnotesize{109 Lenzerini (n 23), 15.}
CONCLUSIONS: THE IMPORTANCE OF CULTIVATING DIVERSITY

Intellectual property rights and human rights developed within a similar ideological framework, and have experimented with similar expansive dynamics. Consequently, they face analogous criticisms, often accused of being instruments of a neo-imperialistic process of globally imposing a specific conception of development and justice. Although much has been written on their effective or potential interactions and commonalities, these two systems appear to be ultimately grounded on very different purposes: while one aims at facilitating trade and protecting exclusionary interests, the other – at least ideally – works towards the promotion of human dignity and equality. It is because of these conflicting ratios that one system has the potential to protect indigenous knowledge, while the other lacks it.

The issue of biopiracy clearly manifests in these competing interests and worldviews, which also emerge from the many voices and instruments proposed in order to address this phenomenon. Notably, this fragmentation of the potential responses ultimately prejudices advocates and victims at the benefit of the TRIPS pro-patenting approach; a fragmentation arguably also resulting from its strong enforcement mechanisms, which competing instruments such as the CBD lack. For this reason, growing hopes have been placed on human rights as a potential discourse for contestation and redress, and because of the close ties between ancestral lands, biodiversity, and knowledge, the standards developed by bodies such as the IACtHR with regards to land and resources appear to be ‘transferable’ to the protection of traditional knowledge.

Such an approach presents several benefits. For example, human rights instruments and bodies already impose on states precise positive obligations with regards to indigenous peoples, specifically requiring the involvement of these communities in decision-making processes that could affect their interests and are centred on the principles of free, prior informed consent and benefit-sharing. These are very similar obligations to those outlined in the CBD. However, this instrument considers states (and not local communities) as the main actors, while also lacking the stronger monitoring and enforcement mechanisms that the human rights system offers. Additionally, human rights bodies (especially regional courts)

---

110 Among others, Helfer (n 25).
111 Graper (n 35), 21.
112 Mino (n 26), 28.
have already proven to be extremely attentive to issues of cultural identity, and willing to interpret human rights norms in a context-sensitive way; at the same time, they are better equipped to deal with collective (as opposed to individual) entitlements, and can envisage forms of reparation that go beyond the mere economic level, thus better appreciating the social and cultural significance of natural resources. It is also important to consider that indigenous peoples are already actively and strategically employing the language of human rights at both the local and at the international level. Thus, framing the protection of traditional knowledge in human rights terms would allow capitalising on resources and movements that are already operational.

On a more general level, the development of indigenous peoples’ rights shows an intrinsic flexibility of the human rights system. Although flawed both in its original conception and in some of its practical manifestations, this system carries the strong potential to be expanded upon to cover the protection of interests and needs that were not remotely contemplated at its inception, without in this process imposing unfamiliar values. As demonstrated by the redefinition of the right to property operated by the IACtHR, this can occur when human rights are interpreted with sensitivity to the context and the specific needs of the final beneficiaries, capitalising organically upon the different instruments available including treaties, soft law, and the jurisprudence of other bodies.

Indigenous peoples are among the most ‘diverse’ members of the international system. The potential for human rights to adapt to a fast-changing world and still play a meaningful role in human development depends on whether they will be used not only to accommodate, but also to value and cultivate diversity within.113 In other words, human rights have not reached their end times yet. However, ‘in order to ultimately prevail, [they] must be moored in the cultures of all peoples’.114 This requires promoting a holistic and culturally-appropriate interpretation of rights and making more space in the human rights arena (today too often occupied by large, western organisations)115 for local actors and understanding, striving towards achieving a balance between the respect for fundamental principles of dignity and

---

113 Shiva (n 39), 120.
115 Among others, see Lettinga (n 4).
equality on one side, and sensitivity to the social, economic and cultural circumstances on the other. If this is achieved, it may be possible to overcome the ideological limitations of the human rights system while remaining faithful to its core purpose.
**BIBLIOGRAPHY**

**Books & Articles**


Lettinga D & Van Troost L (eds), Debating the Endtimes of Human Rights: Activism and Institutions in a Neo-Westphalian World (Amnesty International 2014)

Mahop M T, Intellectual property, Community Rights and Human Rights. The Biological and Genetic Resources of Developing Countries (Routledge 2010)


Robinson D F, Confronting Biopiracy: Challenges, Cases and International Debates (Earthscan 2010)

Shiva V, Biopiracy: The Plunder of Nature and Knowledge (South End Press 1997)


**International and Regional Instruments**


**Jurisprudence**

Inter-American Court of Human Rights *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs (2001) Series C No 79

Inter-American Court of Human Rights *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs (2005) Series C No 124


Inter-American Court of Human Rights, *Case of the Kaliña and Lokono Peoples v Suriname*. Merits, Reparations and Costs (2015). Seriec C No 309