

## SPECIAL RIGHTS FOR THE DEVELOPMENT OF INDIGENOUS PEOPLES (IPs) IN AFRICA: ANY NEED IN A DEMOCRATIC SOCIETY WITH FUNCTIONAL HUMAN RIGHTS DOCUMENT? \*

### Abstract

*Indigenous Peoples (IPs) have been subjected to a series of humiliation, discrimination and in some cases dis-membership of a state. This is germane, but not peculiar, to the developing states with special reference to Africa. Globalization and efforts to link human, cultural and social rights to the IPs remain blurred and continue to generate academic curiosity. Despite the United Nations General Assembly's (UNGA) and the International Labour Organisation's (ILO) positions on the need to accord some special rights to the under-privileged IPs based on their culture, religion and economic/mode of production, they remain a second fiddle in their various states. For them to have access to their resources, issues of prior informed consent, indigenous knowledge and access and benefit sharing dicta need to be observed religiously by states and business corporations in harnessing the resources of the IPs in the form of natural resources that they are in control of because they are found on their lands. The rivalry between the UN Convention on Biological Diversity (CBD) and Intellectual Property Rights (IPRs) through World Intellectual Property Rights (WIPRs) regime is the bane of the IPs' development.*

**Key words:** Indigenous Peoples (IPs); Indigenous Peoples Rights (IPRs); Special rights; International Labour Organisation (ILO); Nagoya Protocol; Africa.

### 1. Introduction

...When the trees are gone, the dear forever lost and the forests are just memories, we will weep. Not for the land that is bare and dead. But for us, our children and their children. When there are no more tears to fall, we will weep with our own blood.<sup>1</sup>

Every culture represents a unique and irreplaceable body of values since each people's traditions and forms of expression are its most effective means of demonstrating its presence in the world. The assertion of cultural identity therefore contributes to the liberation of peoples. Conversely, any form of domination constitutes a denial or an impairment of that identity.<sup>2</sup> Over 370 million individuals worldwide are indigenous and they are mostly found in developing countries. They are found in more than 70 countries worldwide.<sup>3</sup> They represent more than 5,000 distinct peoples<sup>4</sup> and approximately 5%<sup>5</sup> of the world's population. They are among the poorest of the poor, being 15% of the world's poor<sup>6</sup>, despite the fact that they inhabit lands rich in natural resources but are deprived of basic social, cultural and economic, political rights and fundamental freedoms, including rights to their lands, territories and resources which

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<sup>1</sup> Statemedant made by Salak Dima said to Bengwayan M. A when they met in the Palanan Wilderness Area, in the Philippines in June 2001, adapted from Bengwayan M. A, Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia

<sup>2</sup> The Mexico City Declaration on Cultural Policies, World Conference on Cultural Policies: Final Report. (Paris, UNESCO, 1982).

<sup>3</sup> Handbook for ILO Tripartite Constituents, Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169) p.2 (hereinafter known as Handbook for ILO Tripartite Constituents)

<sup>4</sup> Indigenous peoples, transnational corporations and other business enterprises, International Work Group for Indigenous Affairs (IWGIA), Briefing Note, January 2012. Available at [www.iwgia.org](http://www.iwgia.org). Accessed on 19th March, 2013

<sup>5</sup> Handbook for ILO Tripartite Constituents. *loc.cit*

<sup>6</sup> *ibid*

they have developed through the ages.<sup>7</sup> Indigenous peoples are found in all the regions of the world, from the Arctic to the tropical forest.

The histories of IPs have been marked by discrimination, marginalization, ethnocide or even genocide.<sup>8</sup> Innumerable studies, as well as IPs testimonies, have documented serious human rights violations resulting from the activities of multinational corporations (MNCs) on IPs' lands. The damage takes various forms such as loss of, or damage to indigenous lands, indigenous subsistence economies, and the health, language and cultural resources. Their traditional songs and designs are being commercialized for the tourist industry, and their traditional knowledge of crops and medicinal plants is being appropriated by MNCs, often without any recompense, a phenomenon which has come to be known as 'biopiracy'.<sup>9</sup>

An important underlying factor however is that the whole world has much to gain from recognizing and protecting the knowledge and cultures of indigenous and tribal peoples. This article looks into the IPs and what they stand for; it considers the relationship between them and their attachment to their lands. It goes further to determine whether the efforts by the United Nations (UN) and various governments in many states to protect this heritage from exploitation and extinction put the people involved in a special class with special rights and concludes on whether or not they enjoy any special rights for their protection. It is also the intention of this paper to give a critique of the need for special rights despite the availability of functional constitution and various law enforcement agents that guarantee individual rights. The next discussion is defining who are the IPs and of what relevance is the need to focus on their plights.

## **2. IPs as a Concept**

The United Nations (UN) defines IPs as:

Indigenous communities, peoples and nations are those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>10</sup>

The concept of IPs is traceable to the 1920s when the ILO started to examine the plight of native populations in the colonies. With the efforts of the ILO, by 1957, the UN adopted Indigenous and Tribal Population Convention No. 107. By 1989, in line with its Convention 169,<sup>11</sup> ILO defines IPs as:

- a. tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and

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<sup>7</sup>Indigenous peoples, transnational corporations and other business enterprises, *loc.cit*

<sup>8</sup> Handbook for ILO Tripartite Constituents, *loc.cit*

<sup>9</sup> M.A Bengwayan, *loc.cit*.

<sup>10</sup> United Nations adopted the definition put forward by José Martínez-Cobo, the Special Rapporteur to the Subcommission on the Prevention of Discrimination and Protection of Minorities. He gave the definition in his report, entitled *Study of the Problem of Discrimination Against Indigenous Populations*.

<sup>11</sup> International Labour Organization (ILO) Convention 169, Article 1

whose status is regulated wholly or partially by their own custom or traditions or by special laws or regulations;

b. peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 1 of the Convention (169) also indicates that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

Based on the definitions above, we can define IPs, in line with Arnold, as peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their social, economic, cultural and political institutions.<sup>12</sup>

IPs can also be identified as<sup>13</sup> cultural groups, found in every inhabited climate zone and continent of the world, who formerly or currently inhabit a given region or parts of a region and are:

- before its subsequent colonization or annexation; *or*
- alongside other cultural groups during the formation of a nation-state; *or*
- independently or largely isolated from the influence of the claimed governance by a nation-state,
- and have maintained at least in part their distinct linguistic, cultural and social/organizational characteristics, and in doing so remain differentiated in some degree from the surrounding populations and dominant culture of the nation-state.
- and are peoples who are self-identified as indigenous, and/or those recognized as such by other groups.
- presently or historically reliant upon subsistence-based production (based on pastoral, horticultural and/or hunting and gathering techniques), and have a predominantly non-urbanized society.
- may be either settled in a given locality/region or exhibit a nomadic lifestyle across a large territory.

It should however be noted that these characteristics are not conclusive in classifying a group as indigenous or not.<sup>14</sup>

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<sup>12</sup> B. Arnold, *Intellectual property guide: indigenous cultural expression, knowledge and copyright*. [Online]. Available: [http://web.law.duke.edu/cspd/pdf/ip\\_indigenous-traditionalknowledge.pdf](http://web.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf) accessed 19th March, 2013.

<sup>13</sup> Indigenous peoples, [http://www.factualworld.com/article/Indigenous\\_peoples#cite\\_note-5](http://www.factualworld.com/article/Indigenous_peoples#cite_note-5) accessed on 5<sup>th</sup> November 2013

<sup>14</sup> *ibid*

IPs exercise concerns over issues that include cultural and linguistic preservation, land rights, ownership and exploitation of natural resources, political determination and autonomy, environmental degradation and incursion, poverty, health and discrimination.<sup>15</sup>

The term ‘IPs’ is not aimed at achieving rights and positions over and above other ethnic groups or members of the national community, neither is it directed at nurturing tribalism or ethnic strife and violence. It is however meant to be an instrument of true democratization and good governance whereby the most marginalised groups/peoples within a state can gain recognition and a voice.<sup>16</sup> It is a term by which those groups who suffer from specific forms of discrimination and marginalisation because of their way of life and mode of production can voice the human rights abuses they suffer as a group/ community. If genuinely understood in this way, it is a term by which the groups concerned can seek to achieve dialogue with the governments of their countries regarding protection of their fundamental individual and collective human rights, and regarding their recognition as peoples who have a right to choose their own destiny.<sup>17</sup> This is not an issue of minority versus majority that sometimes breed instability and conflict in any form of government as currently on-going in some African states such as South Sudan, Nigeria, Uganda, Democratic Republic of Congo (DRC), Mali and Libya.

### **3. IPs Distinguished from Minorities**

The main difference between IPs and minorities in international law is that indigenous rights are collective rights whereas minority rights are individual in nature. The specific rights of persons belonging to national or ethnic, religious or linguistic minorities include the right to enjoy their own culture, to practice their own religion, to use their own language, to establish their own associations, to participate in national affairs, etc. These rights may be exercised by persons belonging to minorities individually as well as in community with other members of their group.<sup>18</sup> Though collective in nature, indigenous rights also recognize the foundation of individual human rights.

Some of the most central elements in the indigenous rights regime are the collective rights to land, territory and natural resources. The UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (the Minority Declaration) contains no such rights, whereas land and natural resource rights are core elements of ILO Convention 169<sup>19</sup> and the UN Declaration on the Rights of Indigenous Peoples.<sup>20</sup> Collective rights to land and natural resources are one of the most crucial demands of indigenous peoples. They are so closely related to their survival as peoples, for them to be able to exercise other fundamental collective rights to determine their own future, to continue and develop their mode of production and way of life on their own terms and to exercise their own culture. The types of human rights protection which minority groups seek are individual human rights protection, just like other individuals the world over. Examples of these groups are the San/Batwa (South Africa, Botswana and Namibia), Pygmies (Cameroon, Democratic Republic of Congo and Republic of Congo), Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana and Somali, Awer/Boni, Ogiek, Sengwer or Yaaku (all in Kenya), Ogoni (Nigeria), Barabaig (Tanzania),

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<sup>15</sup> *ibid*

<sup>16</sup> Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission’s work on indigenous peoples in Africa, African Commission on Human and Peoples’ Rights (ACHPR), [www.achpr.org](http://www.achpr.org)

<sup>17</sup> *ibid*

<sup>18</sup> *ibid*

<sup>19</sup> Indigenous and Tribal Peoples Convention, 1989(No.169), Arts. 13-19

<sup>20</sup> UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly in 2007 (Arts. 25-30)

Touaregs (Libya, Mali, Niger, Nigeria), Hadzabe/Hadza (Tanzania) etc. These groups seek recognition as peoples, and protection of their cultures and particular ways of life. A major issue that makes the term indigenous rights more acceptable to these groups than minority rights is the fact that indigenous rights protect collective rights and access to traditional land and the natural resources (land rights) upon which the upholding of the peoples' way of life depends.

#### **4. Indigenous Peoples and African Viewpoints on Land**

In traditional African setting, there is a complex relationship between man and the land that nourishes him. Land is seen as sacred, guided by ancestral spirits and therefore held in very high esteem. Ancestral worship can hardly be divorced from land. According to Danquah, 'an absolute sale of land by an Akan (in Ghana) was therefore not simply a question of alienating reality; notoriously, it was a case of selling a spiritual heritage...a veritable betrayal of ancestral trust, an undoing of the hope of posterity.'<sup>21</sup> In Lagos, in 1912, a Lagos chief told the West African Land Committee that '...land belongs to a vast family of which many are dead, few are living and countless numbers are unborn.'<sup>22</sup> This concept has been universally confirmed repeatedly throughout both Sudanese and Bantu Africa. It has also been confirmed as the norm in Uganda by the then Prime Minister of Toro.<sup>23</sup> The notion of individual ownership was unknown to native land law. Land belonged to the village, the community or the family and never to the individual. The chief or headman or family head held the land as trustee for other members of the community or family. Before a grant of land can be made to a stranger, the elders of the community or family must be consulted and their consent gotten in all cases.<sup>24</sup>

Alienation of land crept in by contact with Europeans. In Gold Coast, around 1894 the Gold Coast Africans resisted the attempt of the colonial government to vest 'Waste lands, Forest lands and Minerals in the Queen' because according to them it would violate native law and custom and would be equated to illegal seizure of the country. They however appealed to the British Government through the Secretary of States for the colonies who agreed with them that 'native law shall remain and prevail ...with regard to devolution of land'.<sup>25</sup> Severally, the Supreme Court of Nigeria has held that the land in Benin is vested in the Oba and the people.<sup>26</sup> Walker and Ostrove have concluded and referred to the African land rights as *sui generis* in the sense that they have unique qualities that are not fully explicable in terms of ordinary Western jurisprudential analysis or common law concepts.<sup>27</sup> Before them, in 1981, in the case of *Aranse v. Aranse*,<sup>28</sup> the Supreme Court held that title to land under Bini customary Law is not freehold, yet it is not leasehold but is *sui generis*.

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<sup>21</sup> J.B. Danquah, *Gold Coast: Akan Laws and Customs*, London, George Routledge, 1928, p.212

<sup>22</sup> T.O. Elias, *The Nature of African Customary Law*, Manchester University Press, 1956, p.162

<sup>23</sup> *ibid*

<sup>24</sup> See the Nigerian cases of *Amudu Tijani v. Secretary of Southern Nigeria* (1921) AC 399 and *Sunmonu v. Disu Raphael* (1927) AC 881; the Swaziland Protectorate case of *Sobhuza II v. Miller* (1926) AC 518. In Nigeria, the Land Use Act of 1978 brought about the radical change in the concept of land ownership.

<sup>25</sup> Lynch H.R., 'Introduction to third edition of J.M. Sarbah', *Fanti Customary Law*, pp.x-xii. Cited by Shyllon F., 'The Right to a Cultural Past: African Viewpoints in Cultural Rights and Wrongs', 1998, Institute of Art and Law & UNESCO, 103-119 at 106

<sup>26</sup> *Atti Gold v. Osaseren* (1970) 1 All NLRV125; *Okeaya v. Aguebor* (1970) 1 All NLR 1

<sup>27</sup> P. Walker & C. Ostrove, 'The Aboriginal Right to Cultural Property', *U.B.C.L REV.*, Special Issue, 1995, pp.45-61 quoted by Shyllon F., 'The Right to a Cultural Past: African Viewpoints in Cultural Rights and Wrongs', *op.cit* at 107.

<sup>28</sup> *Aranse v. Aranse* (1981) NSCC 101 at 117

What appears sacrosanct in Africa is equally applicable in some western states such as Canada. The Canadian Supreme Court had held in *Sparrow v. The Queen*<sup>29</sup> that

fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of ...the *sui generis* nature of Aboriginal rights.<sup>30</sup>

The High Court of Australia had also held that the common law of Australia recognizes a form of native title in cases where it is not yet extinguished. This reflects the entitlement of indigenous peoples, in accordance with their particular laws and customs, to their traditional lands, subject to the effect of some particular Crown leases. The land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland.<sup>31</sup>

African Philosophy has it that colonialism made the African man acquire a new way of explaining and interpreting existence. This new view places the self and individual above the community and emphasizes the materialistic aspects of life as fundamental. The western culture moves from the individual to society whereas the African culture moves from society to the individual.<sup>32</sup> In Africa, the self operates within in the midst of the family, community and it operates to bring about common good and not the good of self alone. This idea of communal values does not in any way mean the rejection of or repression of individual values, hopes, aspirations, achievements, and rights. Rather, it is to bring together individual talents, quality, strengths and assets for the good of the whole. Since man is a social being, an individual will be better developed within his community through extended family structure which is largely supportive and sustaining.<sup>33</sup> Balancing individualism and communalism will avoid amassing wealth for self alone and making consideration for the community and others.<sup>34</sup>

From the foregoing, it can be deduced that the rights jurisprudence of the western legal system where an individual can have absolute inheritance of land is alien to African customary land tenure which is more of the agitation of the IPs at the global level. This necessitates mechanisms that would adequately protect their land rights which is about their human rights because they depend entirely on land for their material, spiritual and mental well-being.

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<sup>29</sup>*Sparrow v. The Queen* (1990) 1SCR 1075

<sup>30</sup> Fishing rights and Land rights are similar under African customary law. See Blyden E.W., African Life and Customs, London, C.M. Phillips, 1908, pp.32, where he wrote that the people had collective ownership of all the land and water and had free access at all times to the land and water to cultivate the land for food and clothing, to hunt and to fish.

<sup>31</sup> F. Shyllon, 'The Right to a Cultural Past: African Viewpoints' *op.cit.*; see also Wright S.E., 'Aboriginal Cultural Heritage in Australia', *U.B.C.L. Rev.*, Special Issue, 1995, pp.45-61; Blyden I, *op.cit.* p.33; Johnson S., The History of the Yorubas from the Earliest Times to the Beginning of the British Protectorate, London, Routledge, 1921, p. 96

<sup>32</sup> E.O. Oduwole "Anyiam-Osigwe on Culture and Economic Development in Africa", in *The Development Philosophy of Emmanuel Onyechere Osigwe Anyiam-Osigwe*, 2010, Ibadan, Hope Publications. P11

<sup>33</sup> E.O. Anyiam-Osigwe *Advancing the cause for A Holistic Approach to Human Existence Development*, Lagos, Proceedings of the second session of the Emmanuel Onyechere Osigwe Anyiam-Osigwe Memorial Lecture Series, 2000

<sup>34</sup> E.O. Oduwole "Anyiam-Osigwe on Culture and Economic Development in Africa", *op.cit.*

## 5. IPs Protection under Existing International Instruments

### 5.1 IPs and Intellectual Property Rights (IPRs)

To start with, the difference between indigenous knowledge (IK) and traditional knowledge (TK) is paramount so as to be able to know what needs to be protected for IPs. Derr defines TK as ‘a broad term referring to knowledge systems, encompassing a wide variety of areas, held by traditional groups or communities or to knowledge acquired in a non-systemic way’.<sup>35</sup> TK ‘is drawn from global experience and combines western scientific discoveries, economic preferences and philosophies with those of other widespread cultures’.<sup>36</sup> Examples of TK include knowledge about the use of specific plants and parts of the plants, identification of medicinal properties in plants, and harvesting practices.<sup>37</sup> It is transferrable from one generation to the other for the development of the communities where such knowledge is discovered. In most cases, the head of the family is always the custodian of such knowledge for the sustainability of the family, clan, or a larger community. It has many attributes of IK. The term IK refers to the knowledge held by the indigenous peoples.<sup>38</sup> It is the local knowledge that is unique to a culture or society passed from generation to generation, usually by word of mouth and cultural rituals. It has been the basis for agriculture, food preparation, health care, education, conservation and the wide range of other activities that sustain societies in many parts of the world. It can variously be termed local knowledge, folk knowledge, people’s knowledge, traditional wisdom or traditional science.<sup>39</sup> This knowledge encompasses indigenous names and designations, and folklore that encompass myths, beliefs, superstition, oral history, totem, ‘taboos and rituals related to species’.<sup>40</sup> IK includes intangible heritage consisting of ‘natural resources and cultural practices’.<sup>41</sup> The Intellectual Property Rights (IPRs) of IPs include sciences, technology and cultural manifestations, including human and genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literature, designs and visual and performing arts, which the UN Special Rapporteur describes as their cultural heritage.<sup>42</sup> These fall within the category referred to as collective cultural rights.<sup>43</sup>

According to Daes,<sup>44</sup> a song or story is not a commodity or a form of property ‘but one of the manifestations of an ancient and continuing relationship between people and their territory’. Daes says that it is more appropriate and simpler to refer to the collective cultural heritage of

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<sup>35</sup> D. Derr, [n. d.]. Welcome to traditional knowledge online. *IP Mall: Pierce law*, Franklin Pierce Law Center. [Online]. Available:<http://www.traditionalknowledge.info/> Accessed 15 June 2010.

<sup>36</sup> J. Mugabe, P. Kameri-Mbote, & D. Mutta, 2001-5. *Traditional knowledge, generic resources and intellectual property protection: Towards a new international regime*. [Online]. Available: <http://www.ielrc.org/content/w0105.pdf>. Accessed 10 October 2008.

<sup>37</sup> J. Mugabe, 1998. *Intellectual property protection and traditional knowledge: an exploration in international policy discourse*. [Online]. Available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/mugabe.pdf>. Accessed 9 September 2009.

<sup>38</sup> C.A. Masango, Indigenous traditional knowledge protection: prospects in South Africa’s intellectual property framework?, <http://sajlis.journals.ac.za>, P.74

<sup>39</sup> J. Fien, 2006. *Curriculum Themes: indigenous knowledge and sustainability*. [Online]. Available: [http://www.unesco.org/education/tlsf/TLSF/theme\\_c/c\\_mod11.htm](http://www.unesco.org/education/tlsf/TLSF/theme_c/c_mod11.htm). Accessed [2010, June 15].

<sup>40</sup> C.A., Masango loc.cit

<sup>41</sup> I. M. Makwaeba, loc.cit

<sup>42</sup> United Nations, E/CN.4/Sub.2/1993/28

<sup>43</sup> See Stavenhagen R., ‘Indigenous Rights: Some Conceptual Problems’, in E. Jelin and E. Hershberg (eds.), *Constructing Democracy: Human Rights, Citizenship and Society in Latin America*, Boulder, Westview Press, 1996.

<sup>44</sup> E.I. Daes, (1996) *Supplementary Report of the Special Rapporteur on the Protection of Heritage of Indigenous Peoples*, UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 48th Session, E/CN.4Sub.2/1996/22.

each indigenous people rather than to make distinctions between indigenous peoples' 'cultural property' and 'intellectual property'. Any attempt 'to try to subdivide the heritage of IPs into separate legal categories such as "cultural", "artistic" or "intellectual" or into separate elements such as songs, stories, science or sacred sites', would be inappropriate. 'All elements of heritage should be managed and protected as a single, interrelated and integrated whole.' In her observation, Daes concludes that:

... heritage includes all expressions of the relationship between the people, their land and the other living beings and spirits which share the land, and is the basis for maintaining social, economic and diplomatic relationships— through sharing – with other peoples. All of the aspects of heritage are interrelated and cannot be separated from the traditional territory of the people concerned. What tangible and intangible items constitute the heritage of a particular indigenous people must be decided by the people themselves.<sup>45</sup>

In line with the Anglo-Saxon dictum, copyright is focused legally on individualistic commercial concepts, rather than notions of communal ownership or the cultural integrity of a work which indigenous heritage recognizes and so is not suitable for protecting indigenous heritage. This is concretised recently with the institutionalization of ultra-capitalism through World Trade Organisation (WTO) as an international regime. With this development, the concept of bio-piracy crawls to the lexicon of TK and IK where the multinational pharmaceutical companies continue to claim ownership of Africa traditional knowledge through patenting without prior informed consent (PIC) of the original owners as demonstrated in the work of Jay McGown.<sup>46</sup> The capitalist world even ignores the basic concept of benefit and access and sharing benefits (ASB) formula that is appropriate for the benefit of the original owner of the knowledge eventually stolen.

Janke<sup>47</sup> also points out that Indigenous cultures, stories, information and knowledge are passed from generation to generation by oral means whereas copyright covers work that must be original, which have been reduced to material form and have an identifiable author. An added problem for traditional art forms is that copyright lasts for the author's life plus 50 years: therefore, because Indigenous stories are passed on through generations, they do not qualify for copyright protection. As Janke says, "many works of Indigenous arts and cultural expressions have been in existence since time immemorial and those that are newly created today will remain significant beyond this period."<sup>48</sup> Pat Mamajun Torres had the following concerns about the 50 year cut-off date:

Copyright exists in Australian law, material that is put into books, is only copyrighted for 50 years after you are dead. So your children and your grandchildren will not own the copyright of your work. So it does not take in the life, cultural and traditional realities of Aboriginal people. It is okay if you are making a book that is made up about any kind of story, but if it is a

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<sup>45</sup> *ibid*

<sup>46</sup> J. McGown (2006). *Out of Africa: Mysteries of Access and Benefit Sharing*. Washington & Richmond: Edmond Institute & African Centre for Biosafety.

<sup>47</sup> T. Janke, "Protecting Australian Indigenous Arts and Cultural Expression: A Matter of Legislative Reform or Cultural Policy?", *Culture and Policy*, vol.17, no.3, 1996, p.14

<sup>48</sup> *Ibid*; see also A. Heiss, *Australian Copyright vs Indigenous Intellectual and Cultural Property Rights: a discussion paper, Australian Society of Authors, 2010*, [www.asauthors.org](http://www.asauthors.org)

Dreaming story and it is your tradition and your culture, having a 50year life on your works is really acting against us'.<sup>49</sup>

The General Agreement on Tariffs and Trade (GATT), now WTO and, the Trade-Related Aspects of Intellectual Property Rights agreement (TRIPS) put both indigenous peoples and developing nations at a disadvantage by imposing an intellectual property rights regime that does not take into account the diversity of cultures.<sup>50</sup> In trying to assuage the crises embedded in the WIPO arrangements, the United Nations Convention on Biological Diversity was established in 1992 to address the perceived lapses of GATT/WTO.

## **5.2 United Nations Convention on Biological Diversity (CBD) versus World Intellectual Property Organisation (WIPO)**

The CBD is a highly important international instrument which puts into consideration the importance of traditional knowledge and local/indigenous communities to the preservation of global biodiversity. The above notwithstanding, it does not provide any explicit legal means to recognize, protect and compensate indigenous peoples. CBD<sup>51</sup> gives minimal recognition to indigenous peoples' rights. It does not protect indigenous peoples from the drive by multinational companies to patent plant and animal materials – resources that are generally found in the bio diverse territories of indigenous peoples – for their potential medicinal and agricultural value, without the knowledge or consent of the peoples who have protected and nurtured such resources.<sup>52</sup> The language of Article 8j is too lax in law as it only encourages states and does not give them a duty to protect the rights of IPs and to develop national legislation to respect, preserve and maintain the knowledge, innovations and practices of traditional people unlike the well-tailored WIPO that receives attention below.<sup>53</sup>

The World Intellectual Property Organization (WIPO) is a UN specialized agency that promotes the protection of intellectual property worldwide. WIPO defines intellectual property as literary, artistic and scientific works, inventions in all fields of human endeavour, scientific discoveries, and all other intellectual activity in the industrial, scientific, literary or artistic fields.<sup>54</sup> Indigenous intellectual property includes the information, practices, beliefs and philosophy that are unique to each indigenous culture.<sup>55</sup> Once traditional knowledge is removed from an indigenous community, the community loses control over the way in which that knowledge is used. In most cases, this system of knowledge evolved over many centuries and

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<sup>49</sup> Report of Strategies for the Further Development of the National Aboriginal and Torres Strait Islander Arts and Cultural Industry, Arts Training North Territory, 1994, pp.273-274

<sup>50</sup> M. A. Bengwayan, Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia, Minority Rights Group International, [www.minorityrights.org](http://www.minorityrights.org)

<sup>51</sup> UN Convention on Biological Diversity (CBD), 1992, Article 8j

<sup>52</sup> M. A. Bengwayan, Intellectual and Cultural Property Rights of Indigenous and Tribal Peoples in Asia, loc. cit

<sup>53</sup> Article 8j states that- "Each Contracting Party shall, as far as possible and as appropriate... (j) *Subject to its national legislation*, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote wider application with the approval and involvement of holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovation and practices." Words and expressions such as "subject to," "as far as possible," "relevant," "promote," or "encourage" (in italics above) are very lax from a legal perspective; see D. Craig, "Biological Resources, Intellectual Property Rights and International Human Rights: Impacts on Indigenous and Local Communities" in P. Phillips and C. Onwuekwe, eds., *Accessing and Sharing the Benefits of the Genomics Revolution* (Dordrecht: Springer, 2007) at 99.

<sup>54</sup> Leaflet No. 12: WIPO and Indigenous Peoples, <http://www.ohchr.org/Documents/Publications/GuideIPleaflet12en.pdf> accessed on 5th November, 2013

<sup>55</sup> *ibid*

is unique to the indigenous peoples' customs, traditions, land and resources.<sup>56</sup> The United Nations Educational, Scientific and Cultural Organization (UNESCO) and WIPO established the Model Treaty on the Protection of Expressions of Folklore against Illicit Exploitation. The Model Treaty recognizes indigenous peoples as the traditional owners of artistic heritage, including folklore, music and dance, created within indigenous territories and passed down through the generations.<sup>57</sup>

WIPO has a Global Intellectual Property Issues Division, which is responsible for issues related to indigenous peoples. The Global Issues Division is primarily a research unit that conducts studies and practical activities to better understand the relationships between intellectual property and access to, and benefit-sharing in, genetic resources; the protection of traditional knowledge; and the protection of “expressions of folklore”. The Global Issues Division is working with the Secretariat of the Convention on Biological Diversity, United Nations Environmental Protection (UNEP) and other agencies to examine the role of intellectual property in the preservation, conservation and dissemination of global biological diversity. As discussed above, the activities of WIPO are antithetical to the objectives of CBD. For instance, the Nagoya Protocol on Access to Genetic resources and the fair and equitable sharing of benefits arising from their utilization to the CBD has not received proper attention by the MNCs and their home states. Article 5 (1-2) of the Protocol calls for fair and equitable benefit sharing while Article 6 (1-2) specifically states that:

In the exercise of sovereign rights over natural resources, and subject to domestic access and benefit sharing legislation or regulatory requirements, access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources, that is, the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, unless otherwise determined by that Party.

In accordance with domestic law, each party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources. The principle of *terra nullius* as adopted by the colonialists is being re-introduced to Africa for the MNCs to exploit the natural resources of the continent with little or no benefit for the IPs. despite the Indigenous and Tribal Peoples Convention.

### **5.3 The Indigenous and Tribal Peoples Convention<sup>58</sup>**

The first attempt to protect Indigenous People's rights by ILO in 1957 was the Indigenous and Tribal Populations Convention 107. The ILO Convention 169 which has been ratified by states members since its adoption in 1989, which states that indigenous peoples shall have the right to retain their own customs and institutions where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.<sup>59</sup> This implies that indigenous customs cannot be justified if they violate universal human rights. Indigenous peoples' rights are articulations of human rights as is applicable to

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<sup>56</sup> *ibid*

<sup>57</sup> *ibid*

<sup>58</sup> Indigenous and Tribal Peoples Convention, 1989(No.169)

<sup>59</sup> R. Stavenhagen., ‘Cultural Rights: A Social Science Perspective’, in *Cultural Rights and Wrongs*, 1998, London, Institute of Art and Law & UNESCO pp.1-20 at 17

indigenous peoples and do not constitute special rights as against some conservative studies of human rights position. The human rights enjoyed by all are only contextualized to fit into the situation of indigenous peoples while also taking into account the collective aspects of these rights.<sup>60</sup> For example, as indicated by Amusan<sup>61</sup> indigenous children have the same right to education as other children in the society but their distinct languages, histories, knowledge, values and aspirations should be reflected in education programmes and services. The same is articulated by the ILO and the African Charter, Article 17 (1&3).<sup>62</sup> The Convention has made provisions for special measures to ensure that there is effective equality between indigenous peoples and all other sectors of a given society. The Convention<sup>63</sup> states that:

Indigenous and tribal people shall enjoy the full measure of human rights and fundamental freedoms, without hindrance or discrimination.  
The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

The requirement for special measures does not mean that the Convention requires that indigenous peoples be given special privileges *vis-a-vis* the rest of the population, but that their plight and peculiarities should be addressed to bring about equality and to be at par with other people in the state of consideration. The ILO Convention is an instrument for good governance and a tool for conflict resolution and reconciliation of diverse interests. The Convention makes provision for indigenous peoples rights to consultation, participation and benefit sharing which if respected in the development process will prevent exploitative relationships and conflicts.<sup>64</sup> In situations where indigenous peoples' rights and aspirations for development processes are respected, they can become full partners in the development process, thereby increasing their contribution to national economies. Realizing this will be in tune with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007. This instrument constitutes the most recent and fullest expression of the aspirations of indigenous peoples and comes into force after twenty years of negotiation. Though without the binding force of a treaty, all UN member states are expected to act in good faith by upholding its provisions. UNDRIP provides for demilitarization of indigenous lands<sup>65</sup> and the protection of traditional knowledge and expressly affirms indigenous peoples' rights to self-determination which are not provided for in the ILO Convention 169, thereby complimenting the provisions of the ILO Convention.<sup>66</sup> At this juncture, the aim of the Convention in protecting collective rights as pertaining to indigenous peoples can be likened to the advocacy for looking inwards and making use of elements that are peculiar to African realities instead of wholly making use of foreign development paradigms in trying to bring about a solution to Africa's socio-political and economic problems.<sup>67</sup> There are several criticisms of the concept of IPs exist some of which are that -

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<sup>60</sup>See also Article 46 of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

<sup>61</sup> L. Amusan, 'Libya's Implosion and its Impacts on Children', in *Journal of International Women's Studies*, 2013, p. 71.

<sup>62</sup> Handbook for ILO Tripartite Constituents, *op.cit.*, p.3, see also The African Charter on Human and Peoples Rights, Article 17 for more explanation on this.

<sup>63</sup> Indigenous and Tribal Peoples Convention, 1989(No.169), Article 3(1)

<sup>64</sup> Handbook for ILO Tripartite Constituents, *op.cit.*, p.9

<sup>65</sup> UNDRIP Preamble, para.12

<sup>66</sup> Handbook for ILO Tripartite Constituents, *op.cit.*, p.10

<sup>67</sup> Osigwe Anyiam-Osigwe, *The Mindset Factor in Creative Transformation: All Minds at Work: All hands on Deck*, Lagos: Osigwe Anyiam-Osigwe Foundation, 2005 p.38

- Peoples have invaded or colonized each other's lands since before recorded history and so the division into indigenous and non-indigenous is a matter of judgment.
- Lumping indigenous peoples into one group ignores the vast amounts of diversity among them and at the same time imposes a uniform identity on them, which may not be historically accurate.

Yet the concept of IPs brings to the fore the fact that every culture is unique and needs to be protected and prevented from becoming extinct.

## **6. Conclusion**

Indigenous people are not laying claim to any new or special class of right. It is a misconception to think that indigenous peoples have special rights because of their particular culture and mode of production. Yet their positioning in the state has led to a situation whereby they have been victims of discrimination which other groups in the state are not subjected to. Indigenous peoples and communities suffer from a number of particular human rights violations that are often of a collective nature. Indigenous peoples' rights only provide an avenue whereby these marginalized groups of people will be able to alleviate the discrimination they suffer and enjoy equality with other groups in the state. They do not by any means seek the external aspects of the right to self-determination which is statehood or secession from existing states. They do not in any way pose a threat to national development; rather they can significantly contribute to it. For any development of the IPs, there is need for actualization of the Nagoya Protocol that enhances the development of the discriminated peoples based on their mode of production and ways of life. The principle of PIC, ABS and communality as against individualism should be the focus of any relationship with the peoples for any meaningful development.