Legal shape-shifting

On the protection of traditional cultural expressions and crossing the boundaries between copyright, cultural heritage and human rights law

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CHAPTER 1
INTRODUCTION, APPROACH AND METHODOLOGY

1.1 An issue of (the) margins

Struggles over resources are not new for indigenous peoples. One of the latest arenas for recognition of their rights is in the context of their *intangibles*, such as traditional knowledge (TK) and traditional cultural expressions (TCEs). Indigenous peoples' TCEs enjoy increasing popularity as commodities in consumer products, sports events and popular culture. With it come fears of counterfeiting, offensive use, damage to or even loss of heritage. For example, concerns are raised about large amounts of fake art souvenirs and merchandise anticipated for the 2018 Commonwealth Games on Australia's Gold Coast.[1] The volume of counterfeit Native American art grows.[2] Such uses of TCEs have not only been deemed unfair, but even sacrilegious.[3]

Other examples are already identified since the late 1990s. These include the unauthorised reproduction of folktales due to a growing market for "exotic Third World Literatures"[4] and plagiarism of traditional oral works from the increasingly recognised rich Mayan culture.[5] Again other concerns exist in the context of traditional designs of textile and similar products in Guatemala, Panama and Peru. Textile designs and motifs appear to be systematically and slavishly copied and imitations reproduced industrially in countries such as Mexico, the US and Japan, for example on T-shirts and other items of apparel.[6] The protection of traditional music is another area of concern, such as the commercialisation of Andean music via the Internet[7] and the use of a song from the Suy Indians in Brazil in advertising.[8] This tends to take place without proper authorisation.[9]

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[1] See concerns as covered by the news: 'Call for Tough Penalties for Fake Aboriginal-style souvenirs during Commonwealth Games' (ABC News, 9 July 2017, available via: http://www.abc.net.au/news/2017-07-09/call-for-tough-penalties-fake-aboriginal-art-commonwealth-games/8691578); 'Fake Indigenous Art and the Commonwealth Games' (Australian Geographic, 14 July 2017, available via: http://www.australiangeographic.com.au/news/2017/07/fake-indigenous-art-and-the-commonwealth-games) and 'Fake Aboriginal art Bill boomerangs back into Parliament' (SBS/National Indigenous Television (NITV), 11 September 2017, available via: http://www.sbs.com.au/nitv/nitv-news/article/2017/09/11/fake-aboriginal-art-bill-boomerangs-back-parliament).

[2] See in the news: 'Fake Indian Art Threatens Native Livelihood' (U.S. News, 7 July 2017, available via: https://www.usnews.com/news/best-states/new-mexico/articles/2017-07-07/senators-search-for-solutions-to-counterfeit-indian-art) and 'U.S. Senators urge crackdown on fake Native American art' (CBC News, 7 July 2017, available via: http://www.cbc.ca/news/canada/north/senators-crackdown-fake-indian-art-1.4195373).

[3] See in the news: '"It's sacrilegious": The lucrative market in fake Native American art' (Yahoo News, 17 August 2017, available via: https://www.yahoo.com/news/sacrilegious-lucrative-market-fake-native-american-art-090005709.html).

[4] WIPO FFM 2001, p. 110 (Fact-Finding Mission to South Asia).

[5] WIPO FFM 2001, p. 136 (Fact-Finding Mission to Central America). This example is specifically from Guatemala.

[6] WIPO FFM 2001, p. 136-137 (Fact-Finding Mission to Central America). See the situation in Guatemala for example described as follows: "The process of copying is generally preceded by one or more visits of outsiders to the local indigenous communities to "learn" the traditional weaving techniques and copy the traditional designs and patterns. Those persons subsequently leave without providing any information on the purpose of their learning, and without seeking prior informed consent or concluding any agreement."); WIPO FFM 2001, p. 172 (Fact-Finding Mission to South America – Mission to Peru).

[7] WIPO FFM 2001, p. 172 (Fact-Finding Mission to South America – Mission to Peru).

[8] Seeger 1991, p. 15.

[9] WIPO FFM 2001, p. 172 (Fact-Finding Mission to South America – Mission to Peru).

These examples testify to issues of a lack of attribution, unfair commercialisation and competition, and perceived offensive use of indigenous heritage. They are also an expression of the difficulties indigenous peoples face with regard to the enjoyment of their human rights more generally. The protection, preservation and promotion of TCEs gives rise to questions of intellectual property, cultural heritage and human rights law. The marginalised position of indigenous peoples in mainstream societies generally endangers the maintenance and transmission of their TCEs. Some initiatives, like the lighting displays of Aboriginal art on the Sydney Opera House created by renowned artists representing communities from all over Australia, are mindful of the need to raise public awareness.[10] This particular initiative highlights the value and beauty of indigenous heritage and celebrates indigenous culture, but it also flags environmental concerns.

Overall, it is generally concluded in statements and reports from country visits of the United Nations Special Rapporteur on the rights of indigenous peoples,[11] as well as reported in accounts by NGOs and the media,[12] that indigenous peoples face serious challenges when it comes to a wide range of issues, including cultural, development and environmental struggles. Indeed, the worldwide media coverage and images of the protests in the United States that started in 2016 against the construction of the Dakota Access Pipeline show growing awareness of the ongoing plight of indigenous peoples within mainstream societies when it comes to respect for their cultures and rights. The growing awareness is also a reflection of changing sentiments towards and growing appreciation of indigenous peoples' struggles, and the need to address these beyond circles of indigenous activism and attention from non-governmental organisations. The impact within society has been far-reaching.[13] Of course, such struggles are not unique to the United States. They are also visible in other regions, including in South and Latin America, Asia and Africa, such as in the context of deforestation, extractive resources and, paradoxically, in the context of 'natural heritage conservation', all leading to forced evictions. Assaults on cultures, or 'culture grabbing', whether in the context of commodification of TCEs and traditional knowledge or extraction of resources and environmental threats, are part of a larger problem: both appear to reflect a general level of disregard for cultural rights, in particular of marginalised communities such as indigenous peoples.

This thesis positions the protection of TCEs within developments in society that signal growing awareness of indigenous peoples' rights. It traces the emergence of TCE protection and its related issues, including unauthorised use, preservation and self-determination, as

[10] See in the news: 'Indigenous art lights up the Sydney Opera House' (CNN, 3 July 2017, available via: http://edition.cnn.com/style/article/sydney-opera-house-indigenous-art/index.html).
[11] See for example Tauli Corpuz 2017, 'Statement at the High-Level Event of the General Assembly to mark the tenth anniversary of the adoption of UNDRIP', available via: http://unsr.vtaulicorpuz.org/site/index.php/en/statements/185-undrip-10.
[12] See for example the series 'The defenders' by the Guardian, which covers the struggles of indigenous and local communities, in particular with regard to their lands, available via: https://www.theguardian.com/environment/series/the-defenders.
[13] Protests have taken place in multiple cities in the United States, with wide societal participation and support. See in the news: 'A million people 'check in' at Standing Rock on Facebook to support Dakota pipeline protesters' (The Guardian, 1 November 2016, available via: https://www.theguardian.com/us-news/2016/oct/31/north-dakota-access-pipeline-protest-mass-facebook-check-in). This news article describes how 1 million people checked-in on Facebook at the location of the protest camp at Standing Rock, North Dakota, in support of and in solidarity with the protestors. The so-called Water Protectors had called for everyone to do so to diffuse police, who allegedly monitored Facebook to target on-site protesters. More generally, this mass check-in also shows people within wider society wanting to show support to the present-day struggles of the indigenous people concerned.

situated on the margins and intersections of copyright law, cultural heritage law and human rights law. The issue is specifically placed against the backdrop of histories of marginalisation and dispossession. As such, the protection of TCEs is presented as a new chapter in the indigenous (heritage) rights movement.

The sections of this chapter explain the various key topics of the thesis. This first section sets out the core of the research in a brief overview of threats and trends, the legal domains involved and the main research question. The second section identifies and explains indigenous peoples, TCEs and the distinctive protection interests at stake as 'key players and concepts'. The third section elaborates on the 'systems perspective' of the thesis and the main issues that follow from the topic's multidimensional nature. The fourth section explains the structure and methodology of the thesis, while the fifth section anticipates the outcome and operationalisation of the overall conclusions of the thesis.

1.1.1 TCEs, threats and trends

Indigenous peoples' expression of the traditions and cultures of their communities in creative forms such as stories, drawings, designs, music and dance goes back a long time. These TCEs are transmitted across generations, form part of their communities' dynamic existence and fulfil vital roles in their source societies for spiritual reasons and identity formation. Despite their importance to their communities, third party use and copies – driven by ignorance, inspiration and, most often, commercialism – threaten TCEs and source communities' interests, be it in economic benefit, integrity or maintenance of traditions.

Such threats include, for example, the use of TCEs such as indigenous pictures on carpets,[14] whereby sacred images would be viewed, and even worse walked on, by third parties. Other threats to indigenous peoples' economic and moral interests have arisen from featuring indigenous music in hit songs[15] and copying indigenous designs to be incorporated in items of fashion[16] and tourist souvenirs.[17] Globalisation and technological developments threaten the maintenance of cultural traditions. Finally, indigenous peoples' rights to their ways of life are under pressure in the context of biodiversity,[18] development projects and extractive industries.[19] These trends and developments show the various problematic dimensions of the

[14] See Haight Farley for an overview and explanation of the Australian case *Milpurrurru v. Indofurn Pty. Ltd.*, (1994), 54 F.C.R. 240, or the 'carpet case', which is one of the most referenced cases to illustrate the issues at stake, Haight Farley 1997, p. 4–7.
[15] See, for an overview of the difficulties facing indigenous music protection, Seeger 1991, available via: https://www.culturalsurvival.org/publications/cultural-survival-quarterly/singing-other-peoples-songs-indigenous-songs-are-often.
[16] See the petition and overview of news articles on New York fashion designer Nanette Lepore's 'aztec' dress, which in reality featured Fijian designs: https://www.change.org/p/nanette-lepore-stop-appropriating-traditional-fijian-tapa-designs-and-motifs-and-calling-it-aztec-or-african-or-any-other-culture-not-its-own-for-that-matter. Lepore later issued an apology. See also the discussion on the alleged appropriation of a Northern Cheyenne/Crow artist's design by the fashion brand KTZ as featured on the Native Appropriations forum: http://nativeappropriations.com/2015/02/new-york-fashion-week-designer-steals-from-crow-artist-bethany-yellowtail.html.
[17] See the outcry from Aboriginal artists in the context of counterfeit products from China as featured in the news: 'Calls for a crackdown on 'knockoff' Aboriginal souvenirs made in China and Bali' (SBS/National Indigenous Television (NITV), 22 August 2016, available via: http://www.sbs.com.au/nitv/article/2016/08/22/calls-crackdown-knockoff-aboriginal-souvenirs-made-china-and-bali).
[18] As addressed in the United Nations Convention on Biological Diversity (CBD), see: https://www.cbd.int/traditional/ and https://www.cbd.int/tk/.
[19] See Lennox 2012, p. 11-21.

(lack of) protection of TCEs, which have spurred use of such powerful terminology as 'new forms of colonisation', marginalisation, exclusion and survival. The examples also show that the protection of indigenous peoples' TCEs is a multi-faceted issue. The fact that it is not a straightforward matter is also obvious at the legal level: it evokes transdisciplinary[20] questions in several distinct legal domains. Various international fora are concerned with aspects of TCE protection, including the World Intellectual Property Organization (WIPO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Permanent Forum of Indigenous Issues (the UNPFII) and the Expert Mechanism on the Rights of Indigenous Peoples.

1.1.2 Transboundary legal protection questions on authorisation, preservation and human rights

Today, indigenous peoples' cultures are considered by many as 'treasuries of the world'. Traditional knowledge and TCEs are increasingly acknowledged and appreciated by outsider audiences. Such recognition has led to interest in obtaining, using and copying aspects of traditional cultures. Thus, TCEs leave their traditional surroundings and are brought into new ones. Source communities challenge such developments, in particular their lack of permission, control and remuneration for third parties' use and appropriation of their TCEs. In light of these concerns, debates about the need for protection in international fora initially unfolded primarily in an intellectual property (IP) sphere, more specifically in the context of copyright law. One reason for this appears to be the similarity between copyright law's exclusive rights and subject matter on the one hand, and indigenous control and consultation claims and TCE manifestations on the other. As a consequence, copyright-oriented questions in relation to TCE receive considerable attention in international law-making, policy development and academic research. WIPO, for example, has been holding discussions on the protection question for a long time.

But indigenous peoples' concerns tend to be broader. Cultural heritage law is another legal domain that engages with TCE-related concerns, namely in the sphere of preservation and intergenerational transmission. For indigenous heritage, these are pressing issues in the face of globalisation, a proliferation of third party use and development projects. In addition to the mostly economics- and trade-related intellectual property law sphere, cultural heritage law pursues other distinctive values and objectives. These are expressed and addressed in the specific safeguarding language and measures of legal and policy instruments. Still, it has been argued that overlapping goals can be seen between the two contexts. Protection of creativity from an economics perspective and the safeguarding of heritage have, for example, been called two sides of the same coin.[21] This duality gives an indication of the interconnections of the legal framework governing the protection of aspects of indigenous culture and knowledge. Indigenous peoples' TCEs can be viewed as a part and an expression of their cultural heritage. For this reason, it is relevant to scrutinise the terminology, concepts and norms of the cultural heritage law system as another part of the (fragmented) legal framework that involves TCE protection. Indigenous communities are, for example, expressly recognised as sources and guardians of intangible cultural heritage in the preamble of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.

The societal position and human rights of indigenous peoples more generally, also receive increasing attention. Their rights, such as rights to self-determination, free, prior and informed

[20] Understood here as: crossing legal boundaries.
[21] Wendland 2009, p. 95.

consent and ways of life, feature prominently in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly of the United Nations in 2007. This was a milestone after years of lengthy debates. For the first time at the international level, indigenous representatives were intensely involved. UNDRIP has proven to be a key text for indigenous peoples: they rely on it to formulate their interests and needs in their struggle for more recognition at the international and national level. It is part of a growing development within the broader context of international law. Indigenous peoples assume roles as actors and negotiators of law instead of mere passive subjects. They claim agency to pursue their own interests internationally, educate themselves and use the international legal language to voice their perspectives on a wide variety of issues.[22]

Central indigenous concerns are raised in the sphere of the environment and sustainable development, but also with regard to the protection of their heritage, knowledge and resources. Indigenous peoples' rights are increasingly stressed in General Comments of the United Nations (UN) human rights treaty bodies, in addition to the strong emphasis in indigenous rights debates and awareness-raising campaigns. Furthermore, indigenous peoples have been recognised as a major stakeholder group in consultations and discussions with regard to the UN Sustainable Development Goals (SGDs), adopted in 2015 as part of the 2030 Sustainable Development Agenda. One can conclude that TCE protection becomes a human rights issue due to its connection to rights such as the right to self-determination, free prior and informed consent and various cultural rights. In fact, due to its fundamental nature, human rights law can be seen as the anchor of the legal framework of this thesis. Indigenous peoples' enjoyment of their human rights is a critical condition for any effective approach to TCE protection.

1.1.3 Answering the research question with a three-way legal and foundational analysis

So, there are three distinct legal domains of key importance for TCE protection. This thesis performs a tripartite legal analysis of TCE protection. The main research question is: ***To what extent can copyright law, cultural heritage law and human rights law inform the protection of traditional cultural expressions, drawing on the standards and principles of the relevant international legal framework?***

Each of the three domains is characterised by specific ways and means of protection, e.g. exclusive private property rights are typical of international intellectual property law, preservation measures characterise cultural heritage law, and safeguards for fundamental principles that inherently belong to every human being are distinctive of human rights law. The primary focus here is on a principle- or rationale-based analysis: why is the system in place, which objectives does it serve and which justifications motivate its norms. These foundations are connected to the reasons that are advanced for TCE protection. The tripartite analysis is complemented by an analysis of protection approaches that are being developed outside of the existing legal framework, pending the resolution of difficulties in existing legal frameworks. WIPO's legal approach of a *sui generis* treaty for TCE protection is one example. The practical approaches that grass-roots organisations and cultural heritage institutions develop are another. These include indigenous labels, licences, protocols and codes of ethics.

[22] See also on this Xanthaki 2007, p. 1–6.

A number of protection interests of indigenous peoples will be identified and used as 'benchmarks' to guide the legal analyses. One important outcome of the analysis of these protection interests is the inevitability, and necessity, of a 'legal diversity' approach to TCE protection. Transdisciplinary bridges must be built to address all sides of the protection issue. TCE protection should not be viewed as an isolated intellectual property topic, cultural heritage issue or human rights problem. Instead, it is at the heart of a legal system whose segments interrelate and interact. As we will see, the identification of central values that the three legal areas share on a principle level forms the foundation for this argument. These shared central values comprise the key ingredients that are necessary for the operationalisation of a coherent approach to TCE protection that draws on the main principles underlying the legal framework.

The legal and societal relevance of the research of this thesis are intertwined: TCE protection evokes not only questions in various legal disciplines, it also concerns, in effect, the position of indigenous peoples within these (mainstream) legal domains and, by extension, within society in general. In this sense, TCE protection is part of indigenous peoples' broader rights struggles on various terrains. The complex and evolving story of TCE protection features several key actors, concepts and legal domains: indigenous peoples, TCEs and a legal system that consists of copyright, cultural heritage and human rights law and 'additional' protection approaches. The rest of this introductory chapter explains those core components of the thesis and the two-way approach that the thesis pursues, namely to map indigenous peoples' distinct interests in TCE protection on the one hand and to analyse the tripartite legal diversity on the other. So, after the main actors, concepts and legal domains have been introduced in sections 1.2 and 1.3, the structure and methodology of the thesis are further clarified in section 1.4.

1.2 Challenges and protection interests

This thesis focuses specifically on the cultural expressions of indigenous peoples. They are the principal instigators of debates on traditional culture and intellectual property at the international level.[23] As such, their expressions of traditional culture have essentially become the TCEs towards which most discussion is directed.[24] These debates have extended to attention for the link between intellectual property law and human rights law. This section dissects the main actors and concepts of the thesis: indigenous peoples, TCEs and protection interests.

1.2.1 Indigenous peoples

A story about the protection of indigenous peoples' TCEs is a story about the rights of indigenous peoples more generally. They are relatively 'new' actors on the international stage. Historically, international law-making has been a matter by and for states. However, indigenous peoples' role in international law has changed from passive objects to active holders of rights. By articulating their concerns and needs, they challenge mainstream structures and understandings, be it in the domain of intellectual property or biological diversity, sustainable development or cultural heritage management. Indeed, existing legal frameworks on creative production, 'creative life' and reasons to protect creativity – such as

[23] See generally: Helfer & Austin 2011; Helfer 2003, p. 47–61; Drahos 1999, p. 349–371.
[24] See, for example, the debates at the Indigenous Panel of The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which is working on an international treaty on TCEs. The Indigenous Panel holds meetings prior to the start of the sessions of the Intergovernmental Committee.

copyright and cultural heritage law – are examples of where indigenous and non-indigenous views potentially diverge and are in tension. One can think of difficulties in recognising collectivity and authorship, duration of protection and public domain issues. Other tensions can arise in the context of designations of universal or world heritage and access restrictions for source communities themselves as a consequence.

The history and context of indigenous peoples' position in international law and mainstream societies, and the increasing recognition of their rights, serves as a backdrop to the TCE discussion. Colonisation, subjugation and marginalisation are relevant to the protection of TCEs in the context of indigenous peoples' rights, including rights to their cultural expressions. To understand the historical background is important in order to recognise the broader issues at stake in the discussion on TCE protection. The existence of broader issues such as the maintenance of traditions and the expression and 'exercise' of cultures within mainstream societies, in turn, gives a further indication of the legal diversity that is necessary to approach the issue.

To define indigenous peoples is not an easy task. For years, literature, international standards and debates mainly followed the definition proposed by the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, José R. Martínez Cobo, in his *Study of the Problem of Discrimination Against Indigenous Peoples*.[25] In 2005, the African Commission's Working Group on Indigenous Peoples and Communities took a different approach, moving beyond the focus on colonialism and temporal priority regarding land use.[26] Key notions in the African Commission's characterisation are criteria of marginalisation, cultural difference and self-identification.[27] Considered more nuanced, this approach has increasingly gained acclaim. Still, it cannot be denied that persistent marginalisation and discrimination often have deep historical roots. But the taking of land, and later resources and intangible expressions of culture, are phenomena that seem to exist outside the passage of time and still occur beyond the age of colonisation. Therefore, where a definition is needed, the thesis concurs with the view of the African Commission's Working Group on Indigenous Peoples and Communities.

1.2.2 Traditional cultural expressions

The concept of TCEs, naturally, needs some form of working definition. However, it is difficult to come up with a clearly delineated scope of protectable subject matter. As the name suggests, TCEs are expressions of culture with a traditional nature in a broad sense. This makes the potential scope of forms that TCEs can take very wide, including for example dance, music and visual designs and arts. There are a number of characteristics that recur in scholarly literature and studies on indigenous peoples' heritage and cultural expressions. These include their holistic and intergenerational nature, their roles in indigenous societies such as for identity building and often an element of spirituality. They indicate both the reasons and the difficulties for protection claims, but also provide us with a basic understanding of what sets TCEs apart from 'general' cultural expressions. In short, this distinctive nature is both what warrants protection and provokes controversy.

[25] Martínez Cobo 1983, p. 49. His approach had a number of characteristics, including a focus on historical continuity of pre-invasion and pre-colonial societies.
[26] Barelli 2010, p. 959; African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 86 and further.
[27] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 93.

Indigenous peoples' heritage is often explained as a part of a holistic, integrated 'whole', consisting of their lands, environments, interactions and relationships.[28] Therefore, it is somewhat artificial and limited to divide that heritage into categories, such as tangible and intangible heritage, or traditional knowledge and traditional cultural expressions. This leads to difficulties under existing legal frameworks, which are often very focused on clear categories and definitions. Other characteristics of TCEs are their collective nature and their societal functions, which makes ownership and individual rights a difficult concept. They tend to be part of the worldview – or cosmovision – of indigenous peoples, play an important role in their ways of life and are passed on through generations.[29] Further, in many cases there is an element of secrecy and sacredness involved for TCEs, which makes third party use without consideration for this sacred nature problematic.

It is precisely these particular characteristics of a collective nature, their roles in indigenous societies and identity building, their intergenerational nature and the element of spirituality that trigger debates about contested use by third parties and the protection that is required. But, due to their specific nature, these characteristics also present challenges to existing legal frameworks for the protection of creative works, cultural heritage and human rights. Many of these characteristics are not necessarily explicitly taken into consideration in the drafting history of existing laws, the objectives of regulation and protection, and the requirements for protection eligibility. However, common understandings of legal certainty usually demand a delineation of some sort, especially in the context of exclusive, property-like control rights. The perception of the notion of TCEs determines to *what* exactly any protection should apply, *to what extent* the material is protected and *how* this should take place.

This thesis does not aim to problematise and unravel the question of definition of TCEs and its myriad side issues, but looks beyond this at foundational questions: what are indigenous peoples' protection interests, and how should the principles and values of the legal framework inform TCE protection? In other words, a legal analysis at a principles-based value level is central. For this, it suffices to assume that TCEs are expressions of culture in a broad sense, that they are traditional, impersonal and collective, transmitted (orally) to future generations, often contain a spiritual or other element of cultural significance for a specific group, and play an important ongoing role for indigenous peoples' identities and ways of life. The characteristics of this working definition immediately indicate the legal transdisciplinarity at play in the case of TCE protection, reflecting copyright, cultural heritage and human rights-related issues in the context of access and use, preservation and self-determination.

1.2.3 Protection interests

Claims and protection interests of indigenous peoples are diverse and wide-ranging. Chapter 2 shows them to include claims for control, benefit-sharing and interests in the integrity of TCEs and the continuation of distinctive cultural traditions and ways of life. This makes it complicated to disentangle what is at stake from a legal perspective, as the issue of TCE protection may change in (legal) form according to the protection questions and arguments at play in concrete situations.[30] It also indicates that the debate on TCEs reflects a broader, overall concern and struggle for indigenous peoples to find a place for their claims and interests in existing, mainstream legal frameworks. In this sense, TCE protection is a

[28] See this extensively explained by Daes 1997, p. 3.
[29] See UNESCO Committee of Experts On The Legal Protection of Folklore 1997, p. 3 summarising these characteristics as impersonal, traditional and oral.
[30] Hence the 'legal shape-shifting' in the title of this thesis and the crossing of legal boundaries.

manifestation of the general needs of indigenous peoples to find their rights recognised and secure legal accommodation for their concerns that reflect their distinct identity and worldview.

The protection interests are put in both a historical and a contemporary perspective by tracing the emergence of protection claims in the various legal areas. Chapter 2 will show that the emergence of the discussion on TCEs in the context of copyright, cultural heritage and human rights law reveals various arguments for protection. In short, these are: an economic and development argument, a heritage argument, a human rights argument and a *hybrid* argument, that is, an argument that harbours a multi-faceted view on TCE protection. Subsequently, Chapter 2 will classify indigenous peoples' protection interests under these arguments. These interests can be distilled from such sources as indigenous peoples' declarations and statements at international fora such as WIPO and the UN, and academic studies, literature and reports. Of course, listing indigenous peoples' very diverse interests like this requires a generalisation, while avoiding essentialist tendencies. However, based on themes and claims that recur in the aforementioned sources, it is possible to make a careful selection. The selection of interests will suffice for the purpose of clarifying the legal fragmentation and assessing the various legal models from a foundational perspective to inform TCE protection.

The legal Chapters, 3 to 5, examine the diversity and complexity of TCE protection interests in order to be able to assess what the various legal domains have to offer in terms of instruments and solutions. They find that a mixed legal framework is logical, inevitable even, to be able to address the full spectrum of protection interests and reasons. Overall, it should be kept in mind that this thesis is a legal study on the phenomenon of the (lack of) protection of TCEs. It is not a study on indigenous peoples or on the concept of culture. Nevertheless, the law is an instrument that relates *and* reacts to social issues and phenomena. In this case, indigenous peoples, their TCEs and their protection interests are key notions, whose specific characteristics influence the course of legal debate and potential solutions. While acknowledging the various sensitivities and side-issues involved in definitional questions, a general, but informed, description of these notions suffices for the legal analysis that is at the core of the thesis.

1.3 A systems perspective

The main features of the legal framework of this thesis, as analysed in Chapters 3, 4 and 5, are copyright law, cultural heritage law and human rights law. These are three legal domains that each either explicitly or implicitly address interests of indigenous peoples in the protection of their TCEs. One can think of copyright law's exclusive rights to authorise use of creative works and moral rights of attribution and integrity. In the context of cultural heritage law, preservation and safeguarding, but also dynamic maintenance, for reasons of identity formation and transmission to future generations, resemble TCE protection interests. Human rights law's fundamental rights to self-determination, freedom of expression and ways of life resonate with indigenous peoples' interests in control, maintenance and development of their own cultures.

So, the three legal domains already engage with specific aspects of the issue of TCE protection, either directly or indirectly. There is a substantial degree of fragmentation in the legal thinking on and approach to the subject of TCE protection. Processes of creative production, creative life and ultimately the protection, preservation and promotion of (traditional) creativity involve multifaceted interests and dimensions. Law responds to these

various facets with distinctive instruments, rules, categories and requirements. As we have seen above, the protection interests and claims regarding indigenous cultural heritage are also very diverse. Add to this the complex historical context of indigenous peoples in international law and the specific characteristics of TCEs, and the picture becomes even more complicated.

At the same time, the legal systems can be viewed as part of a bigger systemic whole. It is possible to uncover common elements of the legal framework in the form of shared central values, namely: dignity and identity, respect, and participation. In addition, approaches to TCE protection are being developed outside of the existing legal framework, for example by WIPO and grass-roots and cultural heritage institutions who prepare their own distinct proposals for protection. These too are part of the system of TCE protection. The central lines of the systems perspective and mapping exercise of the thesis are explained below in three main themes, as derived from the relevant legal frameworks: unauthorised use and exclusive rights, preservation, maintenance and transmission, and heritage and human rights struggles.

1.3.1 Unauthorised use and exclusive rights

From early on, the copyright system has been considered to be the 'obvious' legal framework for TCE protection.[31] With growing interest in indigenous art and cultural expressions, the economic value of TCEs also increased. This led to the copying and counterfeiting of indigenous cultural expressions, similar to what often happens to copyright-protected works generally. Copyright law foregrounds authors' exclusive rights in their creations and works. Copying, adapting or disseminating works in principle requires the author's permission. Of course, this appeals to indigenous peoples' objections to the 'taking' of their intangible cultural expressions without consultation, permission and benefit-sharing.

Copyright law is a form of intellectual property law. This domain has a largely economic focus. To frame the discussion in a copyright context means the focus is on economic control, exploitation rights and benefit-sharing. It is questionable whether this is entirely suitable for all of indigenous peoples' protection interests, which go beyond merely economics-related ones. Of course, there is also the moral rights component of copyright law. However, even despite the 'dual nature' of copyright protection, i.e. consisting of economic and moral rights, indigenous peoples' protection interests still cover other interests that are not taken into account under copyright law's rules and rationales. These include intergenerational transmission, (dynamic) preservation of traditions and the ability to exercise distinctive ways of life. Chapter 3 analyses the suitability of copyright concepts and theories and links this to indigenous peoples' TCE protection interests.

1.3.2 Preservation, maintenance and transmission

Cultural heritage law regulates cultural matters primarily for 'safeguarding' and 'preservation' purposes. This is reminiscent of indigenous peoples' concerns in relation to transmission to future generations. However, indigenous concerns often also include *continuation and development* of their traditional cultural expressions, which suggest a more active approach towards cultural heritage protection. Furthermore, politics play a large role in cultural heritage policy-making due to the function of cultural heritage for the formation of national identities. Essentially, those in charge of decision-making get to determine what is cultural heritage and ought to be protected as such. Apart from national interests in cultural

[31] See for example on the 'discovery' of Aboriginal art and copyright Sherman 1994, p. 113.

heritage, the interests of 'all mankind' can also be at stake. This is, for example, the case in the context of preservation and safeguarding of world heritage or heritage that is considered to be of universal value. This begs the question of where local or community interests can find a place under this system. The international cultural heritage law framework has shown a gradual, and only relatively recent, shift towards recognition and inclusion of indigenous peoples' specific cultural (heritage) concerns, such as the dynamic nature of their heritage.

The first legal international cultural heritage treaties concerned cultural property protection in times of war,[32] with regard to illicit trade, import and export,[33] and world heritage sites.[34] These international conventions may not seem directly relevant for TCEs, as they concern norms and instruments for tangible and natural heritage, but they are useful for the analysis in this thesis nonetheless, to gain a better understanding of the reasons and principles for protection and preservation of cultural heritage. More specifically, they are included in the overview to map both the shift and development of the understanding of the concept of cultural heritage in cultural heritage law and, in particular, of the rationales for cultural heritage protection.

Indeed, international cultural heritage law was primarily concerned with tangible or natural heritage, and foregrounded national or universal heritage interests, up until the adoption of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. These treaties reflect a departure from this prime orientation. The texts highlight the role of the source communities, holders and producers, and the (living) cultural contexts of cultural heritage when it comes to safeguarding and preserving heritage. Indigenous peoples and traditional knowledge and cultural expressions are explicitly mentioned in both Conventions in this respect. Chapter 4 traces the developments in cultural heritage law and theory and links this to TCE protection and indigenous peoples' protection interests.

1.3.3 Heritage and human rights struggles

The analysis of human rights and TCE protection adds the perspective of the fundamental rights system to the thesis. Over the last three decades, indigenous peoples – often vulnerable and marginalised communities – have cooperated and rallied together to make the existing UN system of international law and human rights aware of their concerns and also workable and beneficial for them. In doing so, they have framed their needs and interests within this context to demand that the system also includes and serves their concerns.[35] The indigenous movement challenges and pushes the boundaries of the existing human rights framework. Indigenous peoples' human rights concerns include many references to cultural matters, such as concerns for their cultural practices, heritage objects, traditional knowledge and cultural expressions and, generally, their distinctive ways of life.[36]

Given the relevance of human rights law for various aspects of TCEs – be it their production, expression, protection or promotion – an analysis of selected, in particular cultural and

[32] As dealt with in the 1954 UNESCO The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.
[33] As dealt with in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
[34] As dealt with in the 1972 UNESCO World Heritage Convention.
[35] See on these developments Xanthaki 2007, p. 1–6.
[36] See also Chapter 5 'Indigenous cultural rights' in Xanthaki 2007, p. 196 and further.

indigenous, human rights demonstrates how fundamental human rights principles should inform the protection of TCEs. In fact, it will become clear in Chapter 5 that human rights principles and their interpretation provide a basis for human rights law-informed arguments for TCE protection. In this sense, TCE protection can be seen as part of indigenous peoples' broader struggle for recognition of their (cultural) rights.

Human rights provisions that are directly relevant for TCE protection include Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the right to take part in cultural life, and Article 27 of the International Covenant on Civil and Political Rights (ICCPR) on the rights of minorities to their cultures. Indigenous peoples' specific cultures and ways of life, including their cultural heritage, traditional knowledge and cultural expressions, feature prominently in General Comments of the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee (HRC) on these rights.[37] Other rights that are included in the analysis in Chapter 5 are the specific (cultural) indigenous rights of UNDRIP and International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, rights to self-determination, non-discrimination and freedom of expression, land, property and participation rights, and rights on cultural integrity and dignity. These rights, and their indigenous dimensions and interpretations, are critical for addressing indigenous peoples' interests in the recognition of their rights and dignity and in the integrity, continuation and practice of their cultural heritage, including their traditional cultural expressions.

1.3.4 Beyond existing approaches

Solutions to address (aspects of) the issue of TCE protection are also being developed beyond the existing legal framework. These can be divided into legal approaches and practical approaches. The legal approach that is highlighted in this thesis is the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), which is working on an international treaty for the protection of TCEs. Although it is questionable whether an actual treaty will soon be concluded, it is still relevant to consider, because it is the main formal international legal approach to TCE protection that is underway. The practical approaches that are analysed are indigenous labels, licences, protocols and codes of ethics. These are being developed by grass-roots organisations, cultural heritage institutions and specific sectors themselves.

WIPO's IGC has been working on separate treaties for genetic resources, traditional knowledge and traditional cultural expressions. In other words, it applies a category-based approach that is reminiscent of intellectual property law's categories of patent and copyright law. Indeed, as WIPO has stated in various of its working documents, it addresses the issue of TCE protection by taking an intellectual property-informed approach, that is: "protection against the kinds of illicit uses and misappropriations that IP protection usually addresses".[38] By its own admission, this is only one side of the issue. As such, it needs to be complemented by other legal regimes that address other specific aspects inherent to TCE protection.[39]

[37] See the CESCR's General Comments No. 17 and 21 on Article 15(1)(c) and 15 (1)(a), respectively, and the HRC's General Comment No. 23 on Article 27 ICCPR.
[38] See: WIPO/GRTKF/IC/11/4(c), 26 April 2007, par. 16.
[39] See: WIPO/GRTKF/IC/11/4(c), 26 April 2007, par. 15-17; Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.

The practical protection approaches mainly aim to fill the protection gap and address the insecurities that are the result of the challenges that indigenous heritage and TCEs face under the existing legal framework. The main issues concern in particular the provision of conditions for access and use, but also information for users and education of the public. Circumventing static legal rights and categories, these alternatives draw on dialogue, cooperation, mutual understanding and respect to achieve the protection of TCEs. They have an inherently flexible nature. They are able to address the particularities of specific cases and communities and potential sensitivities of material. The practical solutions perform various extra-legal roles with educational, signalling and explanatory aims, for example in the context of the sensitivities and significance of the heritage concerned. This enables a balance between protection and access and use, in a sustainable and responsible way. Of course, compliance with, and enforcement of, non-binding, non-legal rules is a potential barrier for actual effectiveness. In addition, the strength of these tailored, flexible approaches is also their weakness. It does not provide for an international answer to the transboundary threats to indigenous peoples' heritage.

1.3.5 Mapping the legal diversity

The legal framework involved in TCE protection consists of a diverse mix of norms and rationales. The broad lines that are drawn out of the fragmented legal framework form the basis for transcending legal boundaries to address the following points:

- When taking the history and development of indigenous peoples' rights and their interests in protecting traditional cultural expressions as a starting point, how are these reflected in the rationales and principles of the legal approaches of copyright, cultural heritage and human rights law?
- Are these approaches capable of addressing key issues in the protection debate, centralising indigenous peoples' protection interests?
- Is it possible to identify shared central values to bring coherence to the legal fragmentation and to connect the topic's multidimensional nature to the diverse protection interests and the distinct legal approaches?
- What is the added value of legal and practical protection efforts outside the existing legal framework? Do they share the identified central values?
- And ultimately, what do the legal diversity and shared central values mean for TCE protection approaches? How can these values be operationalised?

Because each part of the legal framework has specific emphases and nuances, this means that the analysis is characterised by three sets of distinctive legal measures and norms. But even more so, the topic and protection question is confronted with three sets of rationales and underlying principles. So, when approaching the issue from a copyright, cultural heritage or human rights law angle, it follows logically that in each instance the discussion is held in a different forum, with different terminology, and different aims and solutions, depending on the choice of perspective. Mapping the legal instruments and their underlying principles provides us with a multidimensional overview to address specific aspects of and interests in TCE protection. Moreover, as we will see in Chapter 7, the analysis on a principles-based level enables us to uncover shared values between the legal domains. This perspective transforms the perceived legal fragmentation into legal diversity in the context of TCE protection and explains that it is not only indispensable but also forms, in fact, an integrated system. This systems perspective can contribute to a more coherent approach to TCE protection.

After the selected legal framework is analysed, attention will then turn to protection initiatives that are undertaken outside of the existing legal regimes. These legal and practical approaches – such as *sui generis* rules and indigenous labels, licences, protocols and codes of ethics – are also influenced by specific circumstances, have distinctive objectives and propose various 'tools' to achieve them. As these approaches are also part of the larger systemic whole, the question arises as to whether they also share the central values that can be distilled from the underlying principles of the existing legal framework. To some extent, practical initiatives may, for example, operationalise these values more effectively or directly as they are more 'hands-on' approaches. In this sense, practical initiatives can serve as both alternatives to existing legal regimes and as inspiration for implementation of fundamental central values in the legal protection approach of WIPO's *sui generis* rules.

In summary, the thesis pays particular attention to a number of specific legal ways or models to assess TCE protection. Each model pursues different objectives, is equipped with a different 'toolbox' of measures and has different outcomes. The overall aim of the legal chapters of the thesis is to map this mix, dissect the legal fragmentation and explain what this means for TCE protection. For this mapping exercise, the focus is on the specific legal features, and especially the underlying principles, of each area. To further a more coherent perspective, the thesis maps the fragmentation to such an extent that shared central values of all legal domains become visible. These values comprise key ingredients that are required for (greater) coherence and protection that responds to indigenous peoples' various protection interests in a practical and effective way. As such, they should inform any TCE protection approach.

1.4 Structure and methodology

This section elaborates on the structure of the thesis, the methodology that is applied and the choices that are made in order to answer the research question. Following a contextual, conceptual and foundational approach, the main aims of the thesis are to:

- explain the background of TCE protection, in particular the historical context of indigenous peoples and indigenous rights in international law;
- set out the multidimensionality of TCE protection by identifying distinct indigenous protection interests;
- analyse the fragmented legal framework that is a result of this multidimensionality, with particular attention for the relevance for TCEs of specific rationales, principles and theories of each area;
- identify shared central values of the legal framework as a whole, when analysed from the perspective of TCE protection;
- scrutinise protection approaches beyond the existing legal framework as alternatives and inspiration for effective operationalisation of these values and protection in practice;
- propose a number of recommendations for further work on the protection of TCEs that draw on the shared central values.

The main methodological approach of this thesis is internal legal research of various areas of international law, notably copyright, cultural heritage and human rights law. These are analysed from the perspective of TCE protection. The research also draws on legal historical research, critical legal analysis, and law and anthropology. This is necessary to be able to understand the impact of historical events on today's international law, the position of

indigenous peoples in mainstream societies and the dominant concepts of what 'culture' is. These issues, as addressed by legal historical, critical legal and legal anthropological researchers, represent an external legal viewpoint. They are particularly pertinent to inform the discussion on TCE protection as an issue of rights pertaining to indigenous peoples' cultures and ways of life. The author is aware of this dimension, but the thesis is not a legal historical, critical legal or anthropological study per se. This can be described as an approach of "passive interdisciplinarity".[40] At the same time, by bringing in findings from outside doctrinal legal research, this thesis transcends an isolated black letter, doctrinal legal approach and internal legal perspective, and operates outside "a social, economic and political vacuum",[41] namely that of 'mainstream' society.

The materials used were gathered through desk research of academic literature, policy documents, official texts and reports of UN agencies, international laws and, where illustrative, case law and local laws. The sources used were mostly, if not all, written in the English language. While this may suggest that TCE protection is predominantly an issue in an Anglo-Saxon context, this is not the case. Between 1998 and 1999, WIPO conducted Fact-Finding Missions on intellectual property and traditional knowledge in 28 countries in various regions of the world. These demonstrate the existence of concerns and interests with regard to the protection of traditional knowledge, including TCEs, throughout the world. Presentations at the indigenous panel of WIPO's Intergovernmental Committee also demonstrate the concerns of indigenous peoples from very diverse regions.[42] The use of English-language sources and literature is a pragmatic choice, but the sources that are used are found to be representative for the international perspective of this thesis.

1.4.1 An information law perspective

This thesis is a work of legal academic research that scrutinises the phenomenon of TCE protection by crossing legal boundaries and with particular attention for the specific (historical) context and position of indigenous peoples in mainstream society and under existing laws. The thesis foregrounds TCEs that are the cultural and artistic works of indigenous peoples. Definitions of TCEs do not necessarily explicitly mention indigenous peoples as sole source communities and holders of TCEs. However, indigenous peoples have been important stakeholders in the discussion from early on. This is probably due in part to the concerns that drive the debate over TCE protection, such as a lack of self-determination and respect for integrity. These are similar to those that mark struggles for their lands, resources, cultures and ways of life more generally. TCE protection can be viewed as part of the broader movement towards empowerment and recognition of indigenous peoples' rights.

Against this background of indigenous peoples' historical struggles, claims and interests, the story of TCE protection is told from three legal perspectives. More specifically, the thesis is a work of *information law*, which is the law relating to the myriad of dimensions and actions that are conceivable with regard to information goods and services. Information law is a broad and complex field of law, which itself harbours distinct but related domains, including intellectual property, communication freedoms and their limits, and human rights such as freedom of expression and the right to respect for one's private life. While it is multi-faceted, it also forms a coherent whole to cover all the multiple aspects of information, which contributes to its typical nature as a comprehensive, interrelated and integrated legal

[40] Brems 2009, p. 85.
[41] Smits 2009, p. 46.
[42] See http://www.wipo.int/tk/en/igc/panels.html.

domain.[43] In the case of TCEs as information, this thesis analyses the law on production and use of the 'information goods' that are (indigenous) artistic and literary works, but also scrutinises the law on their preservation and promotion. So, information law's characteristic of transcending traditional legal domains of research provides the inspiration to take a cross-domain perspective as the main focus of analysis. This characteristic is useful when treating TCEs as a certain 'type of information' and studying the regulation thereof, because it enables us to determine that the legal framework that deals with this 'information' is comprised of copyright, cultural heritage and human rights norms.

While formulating TCEs as a 'type of information' is an abstraction from the day-to-day and 'living' function they have for communities, a certain level of generalisation can help to understand the phenomenon of TCEs for the purposes of analysis of their protection and promotion, despite significant levels of fluidity and change. Abstraction also helps with approaching the issue in a generic way, given the multitude of forms of TCEs, indigenous source communities and protection interests that are potentially involved. More importantly, as this thesis is not a work of indigenous or cultural studies, a general understanding of the 'information' that is the main topic of this information law thesis suffices.

1.4.2 Issues of context and content

This research gives a central place to the context of (claims for) TCE protection. Topics that will be covered in Chapter 2 include indigenous peoples' position in the development of international law, the historical background of the (lack of) protection of TCEs, and the particularities of indigenous production of knowledge and creativity. The perspective and methodology for the contextual part of the thesis is extra-legal and conceptual. In other words, the focus is on obtaining knowledge of the origin, concepts and circumstances informing the legal topic at hand. The chapter will show the strong influence of indigenous peoples' marginalised position both on development of norms in international law and on many current indigenous issues. This history is reflected in indigenous matters and struggles until the present day. Land issues are a prime example of this, but so are concerns about the exploitation and preservation of (genetic) resources, traditional knowledge and TCEs.

To place TCE protection in its proper context, the thesis also considers the emergence of TCE protection as a topic in each of the three legal domains and the specific reasons and arguments that were advanced. For this part of Chapter 2 and the legal framework of Chapters 3, 4 and 5, the methodological focus is mainly legal-dogmatic, or doctrinal. This means research into rules as laid down in legal texts, principles, concepts and doctrines, and their interpretation in commentaries in scholarly literature.[44] This does not mean that this description is a static account of 'black letter law'.[45] As we will see in Chapter 2, as well as in Chapters 3, 4 and 5, developments regarding the topic of indigenous peoples' rights in various legal fields are actually highly dynamic and characterised by shifts in legal concepts, understandings and interpretations. This is a process that is still ongoing. The historical background of indigenous peoples' position and their struggles in international law is used to help understand present debates and difficulties.

[43] See the Research Program 2012-2016 of the Institute for Information Law, University of Amsterdam: http://www.ivir.nl/syscontent/pdfs/80.pdf.
[44] See for these characteristics Vranken 2012, p. 43, accessed via: https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2012/2/ReM_2212-2508_2012_002_002_004.pdf.
[45] See for criticism on legal-dogmatic methodology Vranken 2012, p. 45-47, accessed via: https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2012/2/ReM_2212-2508_2012_002_002_004.pdf.

This thesis provides context to law in domains where debates in law-making and literature focus almost exclusively on the content of substantive-technical legal norms. The discussion that has been going on in intellectual property circles for a few decades is a good example. Much attention has been paid to subject matter, definitions, the requirements of existing legal frameworks for protectable works and the construction of new legal regimes. In cultural heritage law, the orientation towards issues of content shows in the delineation of the concept of 'cultural heritage' and the authority to designate national cultural patrimony and make nominations for lists of intangible cultural heritage. In policy documents and literature on human rights law, much attention is given to the content of rights, that is: the scope and nature of what exactly these rights are, and the interpretation of this content.

However, without knowing the *context* of indigenous peoples' position in mainstream societies and the development of international law, and why and how the production, protection and promotion of their TCEs takes place, it is difficult to understand the full scope and multidimensionality of the topic. Focus on context demonstrates the wider implications of TCE protection beyond content-related legal questions, including also the continuation of traditions and recognition, respect and exercise of distinctive ways of life. More recent cultural heritage conventions have indeed started to recognise the importance of source communities and cultural context for the preservation of (intangible) cultural heritage and cultural diversity.[46] Human rights law, too, seeks to guarantee that indigenous peoples, often as minorities, can enjoy their ways of life by promoting respect and facilitating the circumstances to enjoy their (cultural) human rights.[47] All of this shows that TCE protection requires consideration for both the content and the context of the issue.

1.4.3 Three legal perspectives

The methodology applied to the tripartite legal analysis in Chapters 3, 4 and 5 is internal legal research of various areas of international law. The three areas are first described in general terms with particular attention for their underlying theories and principles. In other words, this part of the research takes a 'foundational' perspective. For each legal area, the question asked is not just: what does the law say? But also: why does it say this, what are the underlying principles and rationales, and how have they developed recently? These foundations are then scrutinised for their relevance for indigenous peoples' TCEs and worldviews. This also indicates an external dimension to the internal view of the law in the form of indigenous peoples' position in mainstream societies and existing legal systems. The method used for this mapping exercise is descriptive. At the same time, the particular approach to this mapping exercise can also be viewed as a manifestation of what Smits has called the starting point of a normative view of law, namely a scholarly discussion that takes place at the level of arguments.[48]

The copyright chapter scrutinises the requirements for, and the main traditions of, copyright law protection in general, and links them to TCEs and indigenous peoples' protection interests. For cultural heritage law, special attention is paid to the distinct dimensions of cultural heritage, their corresponding treaties' main rationales for safeguarding and preservation, and the evolution that is visible in this context. For the domain of human rights

[46] See the 2003 UNESCO Intangible Cultural Heritage Convention and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.
[47] See Article 27 ICCPR.
[48] Smits 2009, p. 55.

law, the focus is on human rights that are especially relevant, essential even, for TCE promotion and protection, with specific emphasis on cultural and indigenous rights.

In summary, although the main reference points and approach are the same for each legal domain, i.e. foundational and principle-based, the concrete strategy differs due to each area's specific focus and working sphere. For copyright law, the focus is on the two main protection traditions and rationales. For cultural heritage law, the analysis is based on the string of treaties established by UNESCO and their development over the years. And for human rights law, specific human rights are central, with special attention for the developments in their interpretation towards recognition of an indigenous dimension.

This thesis proposes to view this legal diversity in a transdisciplinary way, from a systems perspective. This means that the three legal areas should be seen as systems that interact and cannot be viewed separately. Together, the three legal domains can also be seen as forming one multidimensional but holistic system insofar as they concern TCE protection. There are various aspects that are a part of the analysis from a systems perspective: copyright law, cultural heritage law, human rights law, legal approaches beyond the existing legal framework and practical protection initiatives. All have a place in the systemic whole and play their part in the protection of TCEs, be it as an existing legal domain or as an 'alternative' approach.

This systems perspective is particularly useful for the identification of shared central values. Operationalisation of these values contributes to furthering the protection of TCEs in a more comprehensive and coherent way. For this part of the thesis, the theory of Bikhu Parekh's operative public values is used. He has identified and used these in the context of discussions on cultural or traditional practices in multi-cultural society. Freely using his description of these values reflects precisely what this thesis sets out to do. It aims to map values that are treasured by society. They are incorporated in society's laws and direct the public conduct of citizens and states. In addition, these values move beyond mere ideals. Instead, they form a 'shared moral structure' behind copyright law, cultural heritage law and human rights law, in the context of indigenous peoples' TCEs, that ought to be actively taken into account.[49] These values consolidate to what extent the legal tripartite can inform any TCE approach and can be brought together into a relationship of more coherence.

The thesis takes an international, theoretical and 'foundational' viewpoint of the legal areas involved in TCE protection. However, where relevant the thesis includes analysis of case law examples for the interpretation of legal norms and instruments. This is the case in particular for relevant human rights provisions. For this, the thesis analyses for example cases of the Human Rights Committee's individual communications with regard to Article 27 ICCPR on the rights of minorities, and case law before the Inter-American Court of Human Rights on indigenous peoples, property and land. Such decisions are then given a more prominent place, because they reflect guiding principles for the interpretation of human rights with an indigenous dimension according to the international status quo, and are therefore essential for indigenous peoples' effective enjoyment of their human rights, and the rights to their cultures and heritage in particular.

[49] Parekh 2000, p. 269.

1.5 Outcome and operationalisation

The findings of the chapters on the three legal domains are drawn together in Chapter 7. As we will see, it is possible to distil a set of shared central values. These are: dignity and identity, respect, and participation in and democratisation of the discussion. In other words, we can conclude that although the legal framework is fragmented, there are certain values that recur in each separate area. These values can be considered to reflect the very core of the issue of TCE protection.

Chapter 7, and especially the conclusions and recommendations in Chapter 8, will argue that the shared central values that this thesis identifies function as building blocks that allow for a more comprehensive and coherent approach to TCE protection. For these sections, the thesis takes on a normative perspective by arguing that these shared central values should be taken into account in any approach to TCE protection. The outcome of the mapping, explanation and drawing together of the legal fragmentation can function as a guide to understand the role the various domains play and how they can be coordinated to achieve protection results that recognise indigenous rights and protection interests more fully. Of course, the focus on indigenous peoples' interests does not diminish the legitimacy of other interests, which copyright law, for example, inherently addresses through exceptions and limitations and which are safeguarded by (individual) fundamental rights such as freedom of expression.

Apart from the identification of shared central values that should inform any protection approach, the final chapters will draw out a number of other main findings. The first is that crossing the boundaries between various legal areas is not just inevitable, but necessary. Each legal area has its distinct objectives, and uses legal concepts and approaches suited to meet its objectives. None is specifically tailored to TCE protection, but each area has aspects that are necessary to address specific parts of TCE protection concerns. Copyright law targets issues of control and moral rights of authors, while cultural heritage law addresses safeguarding concerns. Fundamental human rights guarantee the enjoyment of rights such as (cultural) self-determination, freedom of expression and ways of life. Any single, isolated approach that follows the terminology, objectives and measures of one of the legal areas will not do justice to the broader range of protection interests and concerns. It is possible that one such single approach could eventually achieve useful results, such as WIPO's intellectual property-inspired *sui generis* endeavours. However, it must be complemented by measures in other policy areas such as cultural heritage law, and by fundamental human rights, in order to achieve TCE protection-related objectives such as preservation and guarantees for self-determination and other fundamental rights that intellectual property-like measures cannot.

Another main finding is that the controversy over the (lack of) protection for TCEs is essentially part of the broader historical and contemporary struggle of indigenous peoples for full and effective enjoyment of their human rights, many of which are directly or indirectly related to their heritage, knowledge and ways of life. This cannot be overlooked when dealing with the issue. The research of this thesis must be viewed against the backdrop of this context, because this means that respect for, and protection and promotion of, indigenous peoples' fundamental rights is first and foremost a condition for effective protection of TCEs.

CHAPTER 2
BACKGROUND, HISTORY AND PROTECTION INTERESTS

2.1 The context of the protection of traditional cultural expressions

The discussion of the issue of TCE protection is rich in elements of history, power and politics. This chapter details these contextual implications of the topic. The first part of this section explains the historical context as the central frame. The focus will then turn to contextual factors such as power and politics, land claims and globalisation and technological developments. All these contextual factors influence TCE protection. The latter two are more contemporary notions, but have played an important role in the origins and emergence of the discussion on the protection of TCEs.

Furthermore, the protection of TCEs is a multi-faceted topic, not least in the context of the protection interests that are at stake. It is therefore essential to consider why protection of TCEs is actually called for, i.e. what the reasons and the claims for TCE protection are. Another question to consider is what kind of activities we are talking about with regard to TCEs, such as cultural appropriation and commercialisation, that give rise to protection concerns. Furthermore, the protection issue must be placed in a historical context, taking account of the groups who make the claims, the (international) fora where these are expressed and the language in which the calls for protection are formulated. Together, these will form the backdrop to the analysis of the normative framework with regard to TCEs in the following legal chapters.

2.1.1 History

The historical background of indigenous peoples' position in international law is *the* frame in which to place the protection of TCEs in order to understand the origins of the issue. This background is still relevant in the discussions today. There have been various historical phases and developments, but there is one set of recurring constants: a situation of dominant and marginalised groups, with the latter facing difficulties under mainstream frameworks and understandings. This historical dimension is demonstrated in the preamble of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognises the historical context of challenges such as "exercising, in particular, their right to development in accordance with their own needs and interests."[50] In other words, the protection of traditional cultural expressions is not a stand-alone topic, suddenly occurring in the international legal sphere and on the international agenda.

Histories of dispossession and indigenous peoples

The historical context that is most often referred to as a backdrop for the protection of traditional knowledge and traditional cultural expressions is that of colonial times. Indeed, use and copying of TCEs and indigenous knowledge without consultation and benefit-sharing, or the taking thereof, has been compared to the taking of tangible material, such as land, that has happened before in a colonial context, or even viewed as a 'new manifestation'.[51] However,

[50] United Nations Declaration on the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf, p. 2.

[51] See Haight Farley's citation of a statement by Suzan Harjo, former head of the National Congress of American Indians: "[t]hey have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our

although the term 'colonialism' is used throughout the literature to describe the historical background of indigenous issues in general, in fact there has not been one single period of dispossession, but rather multiple and diverse occurrences in history which involved confiscation of indigenous peoples' lands.[52] These include conquest, imperialism and colonisation as ways of expansion. As a consequence, relations of dominance and complicated cultural encounters occurred.[53] These processes and developments of expansion and world order consist of various forms and phases. Each has specific characteristics and implications for indigenous peoples.

Firstly, conquest as a means of acquiring (land) property involved the subjugation of a people by the use of force. What is distinctive about this way of expansion is that, according to international law, due to the use of force conquest had to be justified. As such, it is connected to the issue of just or unjust war. From the early nineteenth century, it was not accepted any more as a way to obtain a title over lands.[54] Two sixteenth century European doctrinal traditions addressed the issue of occupying the land of indigenous peoples and the justifiability of the use of force. On the one hand there was the humanist tradition, which went rather far in what was deemed as 'just war'. The scholastic tradition, on the other hand, set more conditions before the use of force was held justifiable. For example, the humanist tradition considered pre-emptive strikes for the purpose of self-defence and the use of force against "less civilised people" permissible, while the scholastic tradition prohibited preventive attacks and war against "barbarians", except when this was intended to protect "innocent victims" from the violence of "barbarians".[55]

Imperialism and empire, other means of expansion, are related and both have been detrimental to indigenous peoples. Imperialism concerns a situation of domination and subordination with regard to two fundamentally unequal nations. A distinction is made between an 'old imperialism', namely the 'Age of Discovery' from the sixteenth to eighteenth century when colonies were 'collected' for commercial reasons, and a 'new imperialism', during the expansion of Europe at the end of the nineteenth century in Asia and Africa. Empire concerns the relationship between states with one state dominating the actual political sovereignty of the other political society, whereas imperialism encompasses the process of founding and upholding an empire.[56] In all situations, the consequences for indigenous peoples often included domination, marginalisation and, in the worst case, massacre.

Lastly, 'colonialism' as a way of expansion is not a one-off phenomenon, but instead differs according to time and place and can take various forms. Those forms include internal colonialism and external colonisation. The latter is still contemporarily relevant with regard to indigenous peoples, while the former is not.[57] Internal colonialism occurs when particular cultural groups are incorporated by the dominant part of society, and applies to states that have indigenous populations who make claims against those states in which they are

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shoes. There's little left that's tangible. Now they're taking what's intangible." Haight Farley 1997, p. 12. See more on this in section 2.1.3 on Land claims and cultural expressions.

[52] That this is also a highly contemporary issue follows from the fact that indigenous peoples are still driven from their ancestral lands for various reasons, including deforestation and agriculture, extractive industries such as mining, and designations of indigenous territories as natural heritage.

[53] These phases are distinguished by Keal 2003, p. 20 and p. 37-50

[54] Keal 2003, p. 37–38.

[55] Keal 2003, p. 87.

[56] Keal 2003, p. 38–39, 41–42.

[57] Keal 2003, p. 47.

located.[58] External colonisation is the "salt-water colonisation in which 'aliens' colonised distant places."[59] Another form is external colonisation by neighbouring states.[60] Colonialism, and the subjugation of indigenous peoples and their cultures, is the context most often referred to with regard to contemporary cultural appropriation. It is precisely this sentiment of subjugation that seems to play a role in the claims against the lack of protection for TCEs.

Developments in international law and indigenous peoples

The development of modern international law has also passed through various phases of dominant doctrines, which in turn has also affected indigenous peoples' position. These started with the early Spanish conquests in the Americas in the late fifteenth and early sixteenth centuries, before moving to the development of state-oriented international law and perceptions of hierarchies of civilisations. With each development came indigenous peoples' dispossession, marginalisation and loss of lands, for example through the so-called *terra nullius* doctrine, the guardianship doctrine or through treaties. However, from the twentieth century, indigenous peoples started to organise themselves at the international level, creating movements for countering these developments and formulating, adopting and implementing indigenous rights.

The Spanish conquests led to theological, (natural) law and philosophical debates in relation to the essence, scope and justification of rights over 'the Indians'. Those debates included a contemporary discourse on the rights of non-adherents to 'true religion' and the interference of the Pope in secular matters. A key document of the latter was Pope Alexander VI's 1493 Bull *Inter Caetera*. This granted the Catholic Monarchs, Ferdinand and Isabella of Spain, sovereignty over discovered lands "370 leagues west of the Cape Verde Islands" and subjected inhabitants to their 'care' and to Catholicism. Indigenous peoples' options were to either accept Spanish terms on religion and authority, or be attacked and overthrown.[61]

Interestingly, one of the key figures in the early debates, the 16th century Spanish theologian Francisco de Vitoria, already seemed uncomfortable with Papal grants of authority as a foundation for conquest and he presented a number of lectures on 'Indian rights'. One of his assertions was, for example, that Indians being 'infidels' did not mean that they could not have '*dominium*', i.e. property.[62] What is more, according to Vitoria, American Indians were classified as "rational human beings".[63] Accordingly, he denied the papal grants as a "sufficient and legitimate basis" for the occupation of Indian lands by the Spanish monarchs.[64] Vitoria was part of what is called the 'Spanish School', a group of theorists that concerned themselves with questions of legitimacy, conquest, subjugation and indigenous peoples.[65] Bartolomé de las Casas was another of those theorists, who was known for being a supporter of the Indians subjugated by the Spanish conquests.[66]

The Reformation also influenced the development of modern international law. More specifically, the theory on the power of treaty-making of the Protestant Grotius, the 'father of

[58] Keal 2003, p. 44, 47.
[59] Keal 2003, p. 43.
[60] Keal 2003, p. 43–44.
[61] See on these early developments, debates and discourse Thornberry 2002, p. 64–65.
[62] Thornberry 2002, p. 66.
[63] Anaya 2004, p. 17.
[64] Anaya 2004, p. 17.
[65] Marks 1990, p. 7.
[66] Marks 1990, p. 18 and from p. 20.

international law', included for example the proposition that natural law rights also applied to those who did not adhere to "true religion".[67] From this perspective, indigenous peoples' rights were not immediately disregarded.

It has been noted that, for centuries, there existed a tradition of universality with regard to international law, which had its basis in natural law. Theoretically at least, international law also recognised territorial rights of indigenous peoples to a certain extent, although in a limited way.[68] However, natural law 'mutated', which meant a change in naturalist thinking: the notion of natural law changed into a two-tiered system of individuals' natural rights and states' natural rights. This occurred together with the rise of the 'modern state' system.[69] The view of natural law being "a universal moral code for humankind" was abandoned. Accepting humanity's division in individuals and states, theorists set out to develop a corpus of law — solely with regard to states — in a category called the "law of nations".[70]

Eighteenth century Swiss diplomat Emmerich de Vattel's two-tiered approach to the rights of the individual on the one hand and "the sovereignty of the total social collective" on the other hand is illustrative of the tensions arising from a strict conceptual division of individuals and states. This means that other forms of the many existing "associational groupings" are not acknowledged or attributed rights.[71] Also, 'nation' and 'states' were used as two coherent concepts. 'Nationhood' focused on "politically conscious groupings that were consolidated by monarchical rule and bound by common cultural, sociological, and ethnic characteristics", while the main organising feature of 'statehood' was 'territory'.[72] These notions were based on European structures and characteristics. As a result, Non-European aboriginal peoples faced difficulties under these concepts,[73] as their structures and characteristics deviated from European ones. This individual/state division is thus limited in scope and finds it difficult to accommodate divergent social structures, or attribute rights to such groups.[74]

As natural law ideas were abandoned, in the course of the nineteenth century positivism became the leading doctrine. It has been observed that, as a consequence, "international law shed its naturalist frame as it changed into a state-centred system."[75] Anaya explains that positivism's central premises functioned as a legitimation for colonialism practices rather than functioning in a liberating way for indigenous peoples.[76] The state was a central concept. As a result, since indigenous peoples did not count as states, they could not take part in or influence international law-making. It was the states who set the rules, which enabled them to safeguard their claims to indigenous lands and at the same time be free from examination of their way of treating indigenous populations according to international law, this being a "domestic policy".[77] In other words, indigenous peoples did not feature under this system at all.

[67] Thornberry 2002, p. 69–70.
[68] Marks 2000, p. 3.
[69] Anaya 2004, p. 19 and Thornberry 2002, p. 69.
[70] See on this mutation Anaya 2004, p. 20. Anaya notes that it was Thomas Hobbes's view of humanity as a dichotomy of individuals and states that underlies theorists' development of the "law of nations".
[71] Anaya 2004, p. 20.
[72] Anaya 2004, p. 21.
[73] Anaya 2004, p. 22.
[74] Anaya 2004, p. 20.
[75] Anaya 2004, p. 15.
[76] Anaya 2004, p. 26.
[77] Anaya 2004, p. 27.

Due to this central notion of the state in international law, indigenous communities and "even those nations deemed not to be sufficiently 'civilised'" were denied as subjects of or having rights under international law.[78] Another means of excluding indigenous peoples from international law, therefore, was a perceived hierarchy of civilisations. International law was reserved for the 'civilised', which was interpreted in a Eurocentric way and understood to comprise those adhering to "European-style government".[79] Thornberry describes how the discourse on 'the uncivilised tribes' was set against "a scramble for fresh colonial possessions in Africa and Asia."[80] So, in practice, neither perceived as states nor as 'sufficiently civilised', indigenous peoples could be completely disregarded under international law.

Connected to this hierarchy of civilisations is the doctrine of *terra nullius* as another way of dispossession of indigenous lands. Since some indigenous peoples were considered to be at the bottom of the hierarchy[81] and perceived as unable to hold a sovereign status and rights under international law,[82] their lands were seen as *terra nullius*, that is "land belonging to no one".[83] 'Discovery' was used as a way to claim those lands.[84] The status of indigenous peoples thus affected the dispossession of their lands. Perceived as 'barbarian' or 'backwards', this status was connected to the concept of *terra nullius* to acquire indigenous territories.[85] This function of the *terra nullius* doctrine has been applied in Australia, and before that in sixteenth century Spain to seize indigenous lands in the Americas.[86] Thornberry, however, nuances the application of the *terra nullius* doctrine, stating that it was not widely used to acquire inhabited territory. He points for example to the 'treaty races'-period by European powers in Africa, instead of declaring all those lands '*territorium nullius'*.[87] Still, indigenous peoples' status and position in this 'hierarchy of civilisations' enabled dispossession.

Another doctrine that presupposed authority over indigenous peoples was the nineteenth century 'guardianship' or 'trusteeship' doctrine.[88] Based on the aforementioned hierarchy that considered indigenous peoples as inferior, there were supposedly certain duties that "the advanced peoples collectively owe to backward races in general."[89] Basically, the aim of trusteeship was to 'civilise' indigenous peoples.[90] This doctrine can already be recognised in Vitoria's writings, where he discusses titles "whereby the aborigines of America could have come into the power of Spain."[91] Although he does not fully acknowledge a theory of guardianship or trusteeship as one of those titles, he suggested that Indians having "an inferior civilization" might make them "unfit to found or administer a lawful state up to the standard required by human and civil claims."[92] As a consequence, there would supposedly be a responsibility for the Spanish to seize control over the lands "just as if the natives were

[78] Marks 2000, p. 3.
[79] Anaya 2004, p. 27. Also: Thornberry 2002, p. 73.
[80] Thornberry 2002, p. 73.
[81] Thornberry 2002, p. 74.
[82] Anaya 2004, p. 29.
[83] Thornberry 2002, p. 74.
[84] Anaya 2004, p. 29.
[85] Marks 1990, p. 28–29.
[86] Marks 1990, p. 28–29.
[87] Thornberry 2002, p. 75.
[88] Anaya 2004, p. 31. Thornberry 2002, p. 76.
[89] Thornberry 2002, p. 76.
[90] Anaya 2004, p. 31.
[91] Marks 1990, p. 12 and from p. 43.
[92] Marks 1990, p. 47.

infants" and "so long as this was clearly for their [the Indians] benefit."[93] This seems to provide a basis to justify colonialism and "paternalistic control."[94] In effect, the doctrine counted more as a justification for colonial ways than as working against them.[95]

Treaties or agreements were another basis for European expansion.[96] Through treaties of cession between colonising powers and indigenous peoples, authority over territories was obtained with 'consent'.[97] Confusion as to the interpretation of the treaties between parties is not uncommon.[98] Over the past decades, colonial treaties have been reassessed in some countries.[99] In 1997, a study was carried out at the UN level in the context of the Sub-Commission on Prevention of Discrimination and Protection of Minorities by Special Rapporteur Alfonso Martinez on 'Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations'.[100] This study mentions such issues as disagreement on the status of treaties. Importantly, indigenous treaty parties have denied, for example, state parties' theory that through the treaties they would have ceded unconditionally their lands and jurisdiction. Diverging interpretations cause conflicts and indigenous perspectives on treaties have gained attention in various countries.[101]

Finally, twentieth-century developments in international law included the beginning of an indigenous peoples' movement to organise themselves on the international level, case law in which the *terra nullius* doctrine was rejected and the appearance of indigenous rights on the international agenda.[102] In effect, it seems that international law is undergoing another 'change': through the field of human rights, the focus is shifting from a state-centred area of law to more attention for individuals and, importantly for indigenous peoples, for groups.[103] It is through this system of rights that indigenous peoples are demanding accommodation of their claims.[104]

Despite the conventional standard of state sovereignty, the effort for a move towards international recognition for indigenous rights is striking.[105] This change is due not least to indigenous peoples' own efforts. Since the development of the UN Working Group on Indigenous Populations in 1982, indigenous peoples have accessed various international fora and strived to ascertain and further their human rights.[106] An important step has been the establishment of the UN Permanent Forum on Indigenous Issues (UNPFII) in 2000. Through this forum, and the appointment of a Special Rapporteur on the rights of indigenous peoples in 2001, indigenous peoples have been able to connect worldwide and form a network to exchange experiences and form alliances.[107] The foregoing developments have contributed to growing awareness of indigenous rights and growing empowerment of indigenous peoples.

[93] Marks 1990, p. 47.
[94] Marks 1990, p. 11–12 and p. 47.
[95] Anaya 2004, p. 34.
[96] Anaya 2004, p. 187–189. Thornberry 2002, p. 78.
[97] Kingsbury 1989, p. 121 and further, on the Treaty of Waitangi between the Maori of New Zealand and the British Crown. See also the contribution of Williams in the same volume, Williams 1989, p. 65.
[98] Thornberry 2002, p. 82.
[99] Hart 1997, p. 144. Schulte-Tenckhoff 1998, p. 239–289.
[100] See for the Study: Martinez 1997, p. 1–42. Schulte-Tenckhoff 1998, p. 241.
[101] See on the outcomes of the study Martinez 1997, p. 15, par. 114-118.
[102] Thornberry 2002, p. 85. With regard to the latter, he states that "the ILO has been a prime mover".
[103] Anaya 2004, p. 3.
[104] Anaya 1991, p. 5.
[105] Anaya 1991, p. 5.
[106] Dahl & Garcia-Alix 2004, p. 7.
[107] Dahl & Garcia-Alix 2004, p. 7.

The influence of history vis-à-vis TCE protection

Despite the foregoing historical context, there are concerns that this only shows a limited view of appropriation and specifically of the situations in which this occurs. While appropriation is abundant in human history, it has been noted that it does not only take place in situations of conquest.[108] More specifically, *cultural* appropriation is stated to take place persistently by artists from a variety of cultures.[109] While this may be true, there is no doubt that in the case of indigenous peoples' TCEs, a sense of injustice and exploitation stemming from eras of dispossession seems strongly connected to the call for protection. Inevitably, this has coloured the discussion. For example, reference is often made to histories of hundreds of years of exploitation and appropriation of TCEs and traditional knowledge.[110] Cultural appropriation is considered as part of an on-going assimilation pressure,[111] or as new manifestations of pillage or plundering activities.[112] Stated differently, current – mostly commercial – practices of cultural appropriation are seen as 'modern' threats to indigenous peoples' cultural expressions, like European colonisation has been to their cultural heritage in the past.[113] Indigenous material or designs are in a sense often (still) perceived to be freely usable. The lack of compensation makes indigenous peoples unequal actors of cultural exchange. They are passive sources rather than active participants.[114] More on cultural appropriation will follow in section 2.2.3.

In his capacity as the former UN Special Rapporteur on the rights of Indigenous Peoples, Anaya has drawn comparisons between the (lack of) protection of traditional knowledge, the public domain and the *terra nullius* doctrine, which was described above. The public domain comprises all works for which the requirements to be eligible for protection through intellectual property rights are not met or for which the protection term has expired.[115] Anaya elaborates the history and development of the concepts of state sovereignty and property and how they relate to the rights of indigenous peoples. The origin of these concepts shows the connection with colonisation histories. They have both been foundations in the classical international legal system that legitimised colonial activities and emphasised the European state model and European-style land use, respectively. This way, indigenous peoples were disregarded under the application of these concepts and neither regarded as states or other entities with sovereign rights, nor as having property rights over their lands. As a consequence, indigenous peoples' lands were considered unoccupied through the application of the *terra nullius* doctrine.[116] Comparing this to the public domain,[117] in both situations it is

[108] Hughes 2012, p. 14.
[109] Young 2008, p. 1.
[110] The Indian Movement Tupac Katari speaks for example of a history of "over 500 years of irrational exploitation and appropriation of traditional cultural expressions (TCE) and traditional knowledge (TK)", after which indigenous communities now have "the moral duty to protect, develop and preserve". Indian Movement Tupac Katari 2005, p. 2.
[111] Tuomi 2000, p. 403.
[112] Haight Farley 1997, p. 11.
[113] Graber 2007, p. 45, footnote 1.
[114] Root 1996, p. 72.
[115] For copyright, this term expires for example fifty years after the death of the author, as stated in Article 7(1) of the Berne Convention, and in some countries even seventy years after the death of the author. A requirement that TCEs struggle with is for example an identifiable author. Also, the protection term seems irrelevant for centuries-old works.
[116] Anaya 2013, p. 2.
[117] Which, together with the first intellectual property regimes, according to Anaya also stems from colonial and early post-colonial times; Anaya 2013, p. 3.

due to the differences between indigenous and non-indigenous cultures that indigenous peoples are excluded from rights to both resources and protection of traditional knowledge.[118]

Another link with land issues is found in the proposition that property loss can be traced back to dispossession of Native title *as such*: land.[119] In Canada for example, First Nations authors have stated with regard to cultural appropriation that the taking of "cultural forms" occurred simultaneously with the occupation of land and the seizing of sacred objects and human remains by amongst others museums and anthropologists.[120] More on land issues will follow later in this section.

As the foregoing shows, indigenous rights have *de facto* been on the international agenda since the early beginnings of international law, one way or another. The underlying basis for persistent difficulties has been, and still is, the place of indigenous peoples in existing, mainstream systems, whether in the context of land and property rights or governance and sovereignty. This is no different for the current discussions on indigenous peoples' cultural heritage, traditional knowledge and TCEs. For this reason, many discussion points and use of terminology in that context seem to reach back to the long historical developments of indigenous rights.

2.1.2 Power and politics

Connected with the historical context are the implications of power relations and geo-politics for the issue of TCE protection. This is also related to the coming into existence and evolution of international law, the formation of a nation states system, and indigenous peoples' role in this process. A history of relations of dominance and power has resulted in the discussion on TCEs also being influenced by established frameworks. These include frameworks relating to the protection of culture or cultural works, as developed in dominant societies. Discussions on the international level have therefore been – and are still – taking place within such (long ago) established structures and institutions.

In academic literature, existing structures of power are connected to European states' perceptions of the "barbaric other" or primitive non-European communities. As we have already seen, this perceived hierarchy of civilisations resulted in European states feeling it to be their task to civilise these 'backward' populations.[121] As a consequence, the 'dominators'[122] held authority over culture and laws, and set the standard as to what counted for enlightenment,[123] by way of not only physical but also cultural conquest. Indeed, in the development of international law and practices with regard to indigenous peoples, they have in the past in fact been called 'children', which later resulted in the so-called doctrine of guardianship.[124]

Intellectual property law, or more specifically copyright law, is one of the principal instruments in mainstream society to regulate the protection of immaterial works of culture.

[118] Anaya 2013, p. 2, 3.
[119] Berman 2004, p. 9.
[120] Root 1996, p. 70.
[121] Mgbeoji 2009, p. 207 and Anaya 2004, p. 31.
[122] Mgbeoji describes this as 'the global North'. Mgbeoji 2009, p. 207.
[123] Mgbeoji 2009, p. 207.
[124] Thornberry 2002, p. 67. Thornberry (p. 62) also cites an indigenous speaker from South America, who states amongst others: "(…) They thought civilization, we lost our cultures, our languages, our religion. They subjected us to their laws, we saw them claiming our land. (…)".

However, it has been argued that "simplistic" translations of specific indigenous circumstances[125] into intellectual property conditions do not take account of indigenous aims and concerns. More importantly, applying these structures to indigenous claims is described as forcing 'colonial juridical categories' on 'postcolonial struggles', which would lead to a revival of cultural aggression as took place in those colonial times.[126] Indigenous claims to protection of their traditional knowledge and cultural expressions likely face problems in finding a place under established legal regimes. Indigenous peoples would have to phrase their interests within such structures, which might obscure their actual situation and needs.[127]

In fact, it has been argued that the law maintains a "narrative authority" over indigenous claims,[128] when indigenous perceptions of 'rights' with regard to creating, using and 'owning' TCEs are not included in the law.[129] Even decolonisation did not mean that European concepts and frameworks were abandoned or reformed in these new states, on the contrary: the newly formed states were based on European state models and methods of constructing nations.[130] However, those new states *did* start to criticise the universality of the categories and classification systems of copyright laws originating in 18th-century Europe.[131] In other words, indigenous challenges and claims with regard to protecting, creating and 'owning' cultural works could lead to re-examination and rethinking of established dominant structures for cultural production and protection of artistic works.[132] As Rosemary Coombe puts it: "To understand First Nations claims, we must venture beyond the European categories that constitute the colonial edifice of the law; only by considering Native claims 'in context' will we be able to expand 'the borders of legal imagination'."[133] Clearly, the protection of TCEs is also a matter of law, linguistics and narrative of the issue and its concepts, with differing formulations, understandings and expectations depending on who has agency over the narrative.

Therefore, the question arises what indigenous peoples' position and possibilities are in existing structures and frameworks such as cultural heritage and copyright laws, for example with regard to the specific features of their traditional knowledge and cultural expressions. Similar tensions regarding existing dominant structures are also visible in the current (political) situation of indigenous peoples in many parts of the world, for example the tension between nation states and indigenous peoples' (political) status. And indigenous peoples' position in the international arena and under international rules is also affected by difficulties stemming from existing understandings and categories. While indigenous peoples are, for example, considered as distinctive populations under international law, they have to rely on nation states for legal recognition of their rights and interests.[134] However, the international system is shaped by those nation states that follow their own specific interests.[135] Indigenous peoples are not considered as nation states according to the international framework, which

[125] Coombe describes these circumstances as "a nexus of ecological, spiritual, cultural, and territorial concerns", which would be "central to any understanding of cultural appropriation". Coombe 1993 (a), p. 272.
[126] Coombe 1993 (a), p. 272.
[127] Pask 1993, p. 64.
[128] Berman 2004, p. 9, 10.
[129] Berman 2004, p. 9.
[130] Domman 2008, p. 9.
[131] Domman 2008, p. 9.
[132] Coombe 1993 (a), p. 269.
[133] Coombe 1993 (a), p. 270.
[134] Tsosie 2012, p. 222.
[135] Tsosie 2012, p. 222.

means they are not able to directly engage in negotiations as "equal political actors".[136] This includes negotiations at the World Intellectual Property Organization (WIPO) and UNESCO, where rules are drafted and adopted regarding intellectual property(-like) and cultural heritage protection. Of course, this affects the compatibility and the success or failure of the application of such rules to indigenous peoples' specific circumstances.

As seen above, there has been some progress in this regard, for example at the UN level with the establishment of the UN Permanent Forum on Indigenous Issues in 2000 and the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in 2007 as subsidiary bodies of the Economic and Social Council, and a Special Rapporteur on the rights of indigenous peoples as appointed by the Human Rights Council, for the first time in 2001 and with a mandate renewal every three years.[137] These are all ways in which indigenous peoples are accessing an important forum at the international level and are establishing their own specific position on a range of issues.[138] Anaya notes a shift in paradigms over the past three decades in the international system's stance on indigenous rights, most notably with the adoption of UNDRIP by the UN General Assembly in 2007, and with regard to sovereignty and property rights.[139] In summary, one of the main issues is a certain disconnect between dominant narratives and indigenous reality, be it with regard to land issues or cultural policies such as copyright or cultural heritage law.

Indeed, dimensions of power and politics also seep through in the use of language for specific concepts and issues. In relation to the use of terminology to describe the issue of TCE protection, one thus has to keep in mind that there are prevailing and existing definitions and distinctions which determine the scope and understanding of various cultural concepts. Academic literature makes, for example, a distinction between such terms as Culture or Art, with capital letters, and 'just' culture or art. With regard to art, in the eighteenth century the concept comprised "industry and skills", whereas from the early nineteenth century it shifted from a utilitarian expression to an abstract notion comprising "an imaginative expression": Art.[140] Meanings of culture are countless, but most often reference is made to the distinction between culture and Culture, meaning respectively 'way of life', "shared skills, beliefs and traditions" or "everyday objects and practices which simply represent an interesting and different response of humanity to its environment" on the one hand, versus "the highest intellectual and artistic achievements of a group" on the other. But, as Prott notes, in both instances the concept is not something static but dynamic; "cultures are changing all the time."[141] These dynamics are also reflected in evolving understandings in anthropology as opposed to previous static understandings of culture.[142] This is important because it not only influences the scope of the concept of culture, but also the protection of cultures and cultural expressions and the measures that are required for this.

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[136] Tsosie 2012, p. 222.
[137] See for more information on these three mechanisms the background documents for the Expert Group Meeting on the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: the role of the Permanent Forum on Indigenous Issues and other indigenous-specific mechanisms (article 42), held in January 2017 at the UN in New York, available via: https://www.un.org/development/desa/indigenouspeoples/meetings-and-workshops/expert-group-meeting-on-the-implementation-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-the-role-of-the-permanent-forum-on-indigenous-issues-and-other-indigenous-specific-mec.html.
[138] Dahl & Garcia-Alix 2004, p. 7.
[139] Anaya 2013, p. 3.
[140] Coombe 1993 (a), p. 255.
[141] Prott 1998, p. 164.
[142] Engle Merry 2001, p. 41–42.

Strikingly, however, in certain instances indigenous peoples *have* phrased their claims in a way that relates to the 'out-dated' static concept of culture in their quest for sovereignty and self-determination and "to make claims in the modern world".[143] So, whereas anthropology and the perception of the concept of culture are catching up with reality, indigenous peoples can be made to feel that the existing legal framework and legal audiences force them to phrase their claims in ill-fitting legal terms.[144] However, various instruments and interpretations of rights and concepts do increasingly take account of culture as something non-static. These include WIPO's latest Draft Articles on the protection of TCEs, the Human Rights Committee's interpretation of the rights of minorities as protected under Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and the understandings of cultural heritage in the 2003 UNESCO Intangible Heritage Convention. The Draft Articles acknowledge the dynamic nature of indigenous cultural expressions, the Human Rights Committee interprets indigenous peoples' cultures to include their 'way of life' and the 2003 Intangible Cultural Heritage Convention recognises the role of communities in the production, safeguarding and development of intangible cultural heritage, respectively.[145] These specific interpretations mean that indigenous peoples do not have to fit their cultures and cultural expressions into static categories to be eligible for the application of the rules and rights, but instead acknowledge their dynamic nature.

2.1.3 Land claims and cultural expressions

The emphasis on land and territory in debates about indigenous issues and the link between cultural rights, ways of life and land are also directly related to historical struggles.[146] Land and territory are often qualified as the basis of indigenous peoples' very existence, culture and identity. A 2003 UNICEF report connects the survival of indigenous children and cultural integrity to rights to land and resources, stressing the inseparable nature of this connection. Loss of land is linked to economic marginalisation and loss of "cultural reference points" with disastrous consequences for indigenous communities, the effects of which are often profoundly felt by indigenous children.[147] For this reason, land issues also come to the fore in matters related to cultural heritage and TCEs, where cultural integrity and survival are often also mentioned as arguments for protection. As there are still indigenous land struggles going on worldwide, indigenous peoples indicate that their fights for maintenance and survival of their cultures are equally continuous.[148]

The cohesion between land and culture shows the complex dimensions of the protection of culture in general and of TCEs in particular. It is about groups in dominant societies, the contrast between a sense of 'us' and 'them', and about a feeling of taking, loss and survival both in the sense of land and of culture. This sense of 'taking' and 'loss' of indigenous land and culture exists in various dimensions: from a tangible to an intangible perspective, it

[143] Engle Merry 2001, p. 42.
[144] Engle Merry 2001, p. 42–43.
[145] See Article 1(f) of WIPO's Draft Articles of 2014, various HRC decisions, such as *Kitok v Sweden* 1985, *Omaniyak v Canada* 1990, *Länsman et al v Finland* 1994 and *Mahuika et al. v. New Zealand* 2000, and the 6th recital of the preamble to the 2003 Intangible Cultural Heritage Convention.
[146] See again various HRC decisions, such as *Kitok v Sweden* 1985, *Omaniyak v Canada* 1990, *Länsman et al v Finland* 1994 and *Mahuika et al. v. New Zealand* 2000, and Stamatopoulou 2007, p. 179, 182–183.
[147] Gibson 2005, p. 39. For the Report, see Innocenti Digest No. 11: Ensuring the Rights of Indigenous Children, UNICEF 2003, available via: http://www.unicef.org/lac/ensuring(2).pdf, p. 8-9: 'The right to life, survival and development'.
[148] See Coleman's citation of Galarruway Yunupingu, G. Yunupingu, 'The Black/White Conflict' in V. Johnson, Copyrites: Aboriginal Art in the Age of Reproductive Technologies, Touring Exhibition 1996 Catalogue, 1996, p. 55 via Coleman 2005, p. 2.

occurs in a context ranging from land, resources, human remains and tangible cultural objects to intangible culture, amongst which TCEs.[149] The link between land claims and the protection of intangible traditional culture is also illustrated by Anaya's comparison of the land-related colonial doctrine of *terra nullius* and the intellectual property doctrine of the public domain that was previously mentioned. These concepts largely render a property relation and protection over indigenous land and cultural expressions as impossible, respectively, and thus as 'free to take'. And both affect the protection of indigenous cultures more broadly.

Another connection between land and culture is sought in collectively held land and resources rights such as Native title, which stem from property rights. Native title was recognised in the landmark decision of the Australian High Court in *Mabo v Queensland* of 1992. Following this decision, the *terra nullius* doctrine was set aside, customary laws and traditions considered as a source of Australian law and Australian common law considered to recognise native title to land, establishing "a new entitlement to land, grounded in the place of Aboriginal and Torres Strait Islander peoples as the original owners of the continent."[150] Art rights are therefore said to be formed out of those collectively held rights.[151] It has been argued that the issue of traditional knowledge and cultural expressions should be addressed in a holistic way and similar to Native title. This would better address the interconnection of land, art and indigenous structures with regard to knowledge, with a focus on self-determination, than copyright law.[152]

An early, much-cited, UN report on the protection of indigenous peoples' heritage also emphasises the cohesion between indigenous land, knowledge and creative expressions. It describes for example how indigenous peoples view all the "products of the human mind and heart", that is "the relationships between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world," as interconnected and originating from the same source: the land itself. All knowledge and creativity is believed to come from the land, and therefore "all of the art and science of a specific people are manifestations of the same underlying relationships, and can be considered as manifestations of the people as a whole".[153] It is precisely this specific nature that presents challenges to existing legal frameworks, scopes and definitions.

2.1.4 Globalisation and technological developments

Globalisation and technological developments are two important factors that influence cultural flows and exchanges. To a certain extent, they are also linked. Technological developments have made TCEs easier to reproduce for third parties. Similarly, globalisation has led to a growing stream of "goods and services, capital, people and ideas" being

[149] See Haight Farley's citation of a statement by Suzan Harjo, former head of the National Congress of American Indians: "[t]hey have stolen our land, water, our dead relatives, the stuff we are buried with, our culture, even our shoes. There's little left that's tangible. Now they're taking what's intangible." Haight Farley 1997, p. 12.
[150] See this overview in the Aboriginal Law Bulletin: *Mabo - "The High Court Decision on Native Title", Extracts from the Commonwealth Government's Discussion Paper – June 1993*, AboriginalLawB 18; (1993) 3(62) Aboriginal Law Bulletin 4, available via: http://www.austlii.edu.au/au/journals/AboriginalLawB/1993/18.html. See also Schreiner 2013, p. 169–170.
[151] Berman 2004, p. 8.
[152] Berman 2004, p. 8–9.
[153] Daes 1997, p. 3.

exchanged.[154] Much of this globalisation is caused or enabled by advancing technological means. Indeed, new technologies have been called quintessential powers of globalisation.[155] The media in particular play a significant part in opening up and interconnecting the world, especially online and social media. However, technological developments and (online) media[156] have also increased the possibilities for indigenous peoples to connect, organise themselves and exchange experiences.[157] In this section, firstly globalisation and its effects on culture are explained. Secondly, technological developments and their consequences for cultural expressions are elaborated on. The connection between both aspects is visible throughout the two parts of the section.

Globalisation

As we have already seen in previous sections, European expansion 'opened up' parts of the world that were previously 'undiscovered'. Now, as exchanges and movements of persons and ideas, and goods and services multiply rapidly, the world continues to increasingly open up and connect. The large amount of attention in the media when, for example, previously 'uncontacted' indigenous peoples in South America are 'discovered,'[158] is a striking example in this regard.

Globalisation and the opening up of the world has led to a growing consumer interest in indigenous art[159] and tourism[160] and industry becoming aware of, for example, "the value of the indigenous traditions, practices and ways of life and of the variety, beauty and novelty of Aboriginal symbols, designs and textiles."[161] This is contrary to historical perceptions of indigenous cultures. Where indigenous cultures were previously perceived as inferior or backward, they are now considered as treasuries of unknown and undiscovered knowledge. Traditional knowledge, genetic resources and cultural expressions have gained growing attention. Indigenous peoples themselves have also increasingly been the focus of attention. They are now considered to be "keepers" of valuable materials, namely: "knowledge of medicinal plants, unique arts and expressive traditions, natural resources (…) and traditional concepts of worldview that often have no counterpart in the language of the dominant societies to which indigenous groups belong."[162]

These tendencies show a shift in perception with regard to indigenous cultures. Previously, and not even that long ago, a sense of "cultural superiority" prevented mass audiences from being interested in native or indigenous cultural forms, as "European high culture" was perceived to stand above other peoples' culture.[163] However, mainstream culture has ventured beyond its mainstream borders to search for "meaning and cultural and aesthetic integrity", which it has found in "other cultural, aesthetic, and spiritual traditions".[164]

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[154] Goonasekera 2003, p. 4.
[155] Graber & Burri-Nenova 2008, p. xi.
[156] See for more on this Chapter 5, section 5.3.4.
[157] Riley 2004, p. ix.
[158] Brazil especially still has many uncontacted tribes, although they face many threats. Read more at: http://www.survivalinternational.org/tribes/uncontacted-brazil.
[159] Lucas-Schloetter 2008, p. 339–340.
[160] Daes 1997, p. 3, 11.
[161] Brascoupé & Endemann 1999, p. 2-3. Tuomi 2000, p. 404.
[162] Riley 2004, p. ix.
[163] Root 1996, p. 73. "The non-Western art that did get taken up tended to be framed within an explicit colonial narrative."
[164] Root 1996, p. 73.

Given the increasing awareness of indigenous culture, in a globalising environment extra consideration for cultural diversity and identity could be warranted. Assimilation of cultures might pose threats to indigenous groups that want to maintain their distinctive cultural identities. James O. Young identifies two types of potential assimilation, caused by cultural appropriation, which could 'overwhelm' indigenous cultures. Firstly, in the case of subject appropriation by outsiders, insiders could begin to see themselves the way others represent them. This could lead to distortion of cultures, with Native artists losing "some of their cultural identity", while "[t]hey and, perhaps, some of their audience will be partially assimilated into the majority culture."[165] Secondly, when content is appropriated, cultures could be overrun by such outsider practices when insiders take over the outsiders' ways of practising their art.[166] As a consequence, some of the distinctiveness of the insider's culture from the majority culture might be lost.[167] However, cultures are generally dynamic and a degree of cultural exchange could be seen as a 'natural' outcome of cultural encounters. The decisive factor of whether something counts as dynamic cultural exchange or cultural appropriation seems to be equality of the exchanging partners, which has mostly been absent in the case of indigenous peoples in a marginalised position.

According to Young, the assimilation argument represents the core peril for minority cultures, namely extinction through assimilation.[168] However, he argues that it is not cultural appropriation by individual artists that would cause this threat to indigenous distinctiveness. Rather, assimilation by way of overly widespread borrowing and appropriation is causing this danger, for example by "corporations such as Disney and Sony that have made culture a commodity."[169] With regard to the appropriation of Aboriginal designs, Aboriginal leader Galarruway Yunupingu has stated for example that the "same old tactics of assimilation" are employed, with outsiders "trying to assimilate our culture into their world because it is fashionable in their eyes and will make money."[170]

Other feared consequences of increasing globalisation include free-riding or wide dissemination of traditional knowledge through acts of appropriation. The latter could result in indigenous cultural expressions becoming globally ubiquitous and losing distinctiveness and, often spiritual, significance.[171] In this sense, globalisation would diminish the meaning that indigenous peoples give to their TCEs, and which is largely dependent on their context. It is this assigning of meaning that is compromised when indigenous knowledge is used outside of the cultural and traditional context from which it originates. Indeed, it is argued that the "struggle over these [indigenous] designs, therefore, is nothing less than the struggle over cultural meaning."[172] Used outside their traditional context and beyond original use, their initial meaning is lost and rewritten.[173] Indigenous peoples lose control or self-determination over their traditional knowledge going all over the world. Indeed, globalisation is said to have the potential danger of threatening indigenous peoples' awareness of their own authenticity.[174]

[165] Young 2008, p. 118–119.
[166] Young 2008, p. 118.
[167] Young 2008, p. 119.
[168] Young 2008, p. 119.
[169] Young 2008, p. 153.
[170] Coleman 2005, p. 2, citing G. Yunupingu, 'The Black/White Conflict' in V. Johnson, Copyrites: Aboriginal Art in the Age of Reproductive Technologies, Touring Exhibition 1996 Catalogue, 1996, p. 55.
[171] Haight Farley 1997, p. 6, 8.
[172] Haight Farley 1997, p. 11.
[173] Haight Farley 1997, p. 11: "Thus the value of an image in ritual is replaced with its exchange value in commodities."
[174] Brown 2005, p. 43.

However, in academic literature it is argued that elements from abroad or other cultures do not necessarily lead to deterioration of cultural identity. Instead, they can also "enrich[ed]" it.[175] Cultures, so it is claimed, are vital and resilient.[176] In a way, this is in accordance with the anthropological understanding of cultures being dynamic, rather than static, as they were perceived in the past. Furthermore, this is connected to the argument that cultures have always exchanged elements, which makes claims of protecting and preserving their purity and unchanged nature difficult ones. Indeed, criticisms include that appropriation is widespread throughout history.[177] It is argued that no culture can claim to be fully original. Due to increasing contact and technological development, cultural fusions and blending inevitably take place.[178] However, Hughes has identified three categories of appropriation of artistic elements, including: "direct, slavish copying of TCE", "use of TCE as an element of or inspiration for new, original works of expression", and "the drawing of more abstract inspiration from TCE". He argues that "whereas the first category may constitute "misappropriation" the third category definitely does not."[179]

The question arises as to what authentic cultural identities actually are: too much focus on the past seems incompatible with indigenous cultures being living cultures. It has been noted that it is precisely a specific trait of indigenous peoples to be able to live in the past yet at the same time continuously interpret and employ their histories in creative ways through use of their traditions.[180] According to Coombe this "is now recognised as the very life and being of a culture, rather than evidence of its death and decline".[181] Atal states that "the processes of attrition and addition" do not eliminate a culture: "A living culture continually renovates itself by discarding the obsolete and admitting the desirable – either invented within or innovated from abroad. Cultures that disallow such processes face the crisis of obsolescence and become moribund."[182] In fact, indigenous peoples themselves have also continuously stressed the living and dynamic nature and the resilience of their cultures and cultural survival in the face of centuries of marginalisation, assimilation attempts and dispossession.

Still, it is noted that cultures in fact can disappear, yet causes for this vary.[183] There are various ways to approach different effects of globalisation. Atal, for example, argues that due to globalisation, 'a globe' has positioned itself in each culture and each culture is interactively represented in the globe as a whole.[184] Transformation of cultures and societies is then inevitable, yet according to Atal such transformation should be effectively managed rather than attempted to be stopped.[185] However, it has also been argued that while for 'modern' societies globalisation does not pose a threat to local cultures, for traditional societies it is less straightforward as to whether local and global cultures can be mutually complementary in a

[175] Atal 2003, p. 170. He gives the example of American identity, by citing Ralph Linton's 1930 article "One Hundred Per Cent American".
[176] Atal 2003, p. 169-170.
[177] Hughes 2012, p. 13–14. However, he identifies three categories of appropriation of artistic elements, including: 1] "direct, slavish copying of TCE", 2] "use of TCE as an element of or inspiration for new, original works of expression", and 3] "the drawing of more abstract inspiration from TCE". He argues that "whereas the first category may constitute "misappropriation" the third category definitely does not."
[178] Atal 2003, p. 173: "We live in a world of pluralities. No culture can escape miscegenation. Hybridity is the strength of living cultures."
[179] Hughes 2012, p. 13-14.
[180] Coombe 1997, p. 85.
[181] Coombe 1997, p. 85.
[182] Atal 2003, p. 176.
[183] Atal 2003, p. 172.
[184] Atal 2003, p. 188.
[185] Atal 2003, p. 188.

beneficial way.[186] In other words, what is necessary is the ability for indigenous peoples to effectively manage the negative and positive aspects of globalisation, such as close control over their cultural heritage and self-administered implementation of 'outsider' cultural traits and innovation, according to customary law and traditions. This would guarantee a balance between both the preservation and the dynamism of local cultures in a globalising environment. More on cultural appropriation will follow in section 2.2 and on protection criticism in section 2.3. The next subsection delves into the consequences of technological developments for the discussion on TCE protection, which is closely linked to globalisation concerns.

Technological developments

Rapidly advancing technology is both connected and contributory to globalisation. Technological developments enable easy reproduction and dissemination of works, which has for example also led to rethinking of copyright law in recent years. Technological developments have also changed communication possibilities, which have globalised due to the Internet. The (online) media also play an important role in dissemination and communication.[187] Importantly, technological possibilities have spurred on digitisation activities in many aspects of society, for example in the context of libraries and archives. In this section, digital appropriation, reproduction and authenticity issues are elaborated on. Opportunities and positive aspects of technological advances are also highlighted.

Digital developments can increase the risk of digital appropriation of TCEs. Reproduction has never been easier, faster and cheaper than now, courtesy of the development of advanced technologies and the Internet. But misappropriation is easier now as well and "the tools for misappropriation currently mainly lie in the hands of the 'predators'."[188] Academic literature mentions the example of tourists who can use mobile devices to document TCEs and easily exploit them. Through increasingly easy and low-cost technical means, third party users are not only able to document the TCEs, but also communicate them to the public on a worldwide scale via the Internet,[189] for example through the means of social media. As a consequence, communities' own opportunities for economic development through TCEs could thereby be diminished.[190] Increasing interest in indigenous knowledge as a result of globalisation, paired with technological developments that add to the speed of the globalising process, create circumstances that could lead to a greater risk of misappropriation of TCEs.[191]

It is not only the risk of misappropriation that increases due to technological developments, but also that of misrepresentation of cultural expressions. Quick and easy reproduction with technical means makes it possible to reproduce immaterial TCEs on all types of commodity. This might result in traditional designs and their source communities being pushed apart, and indigenous peoples getting more and more detached from their own designs. This could also mean that indigenous peoples no longer have a say over their TCEs and how these are used, with the control over their designs being out of their hands. Communities are unable to guard the (proper) use of their TCEs and the way that their designs are reproduced, and thus represented, is beyond their control. For such reproductions, which are likely to be large in

[186] Sahlfeld 2012, p. 277.
[187] See for more on this, again, Chapter 5, section 5.3.4.
[188] Sahlfeld 2012, p. 277.
[189] Sahlfeld 2012, p. 281–282.
[190] Sahlfeld 2012, p. 281-282.
[191] Haight Farley 1997, p. 7.

number due to technological possibilities, they can no longer safeguard the integrity of the work or the reputation of the artist.[192] As Brown phrases it: "The uncontrolled replication of ceremony, music, and graphic arts, which is facilitated by new electronic media, threatens to strip cultural elements of their history and undermine their authenticity."[193]

Issues of reproduction, copies and authenticity are therefore connected in a triangular way. From early on, the information age has been called the 'era of copies' or "the culture of the copy,"[194] due to the easy reproduction of works. One early thinker on the effect of technology on art was Walter Benjamin. In his 1936 essay, "The Work of Art in the Age of Mechanical Reproduction", he describes the phenomenon of mechanical reproduction in relation to works of art.[195] In terms of authenticity, historical testimony and authority, he argues that what is lost when works of art are mechanically reproduced, is the 'aura' of the work. In generalising terms, he states: "the technique of reproduction detaches the reproduced object from the domain of tradition. By making many reproductions it substitutes a plurality of copies for a unique existence."[196] The foregoing seems particularly relevant for TCEs, as appropriation – often through technologically advanced means – is a clear example of indigenous art or designs being taken out of their traditional context. Furthermore, control or authority of (correct) representation is lost, which could lead to diminution of the original (spiritual) meaning of the work, or its 'aura'.

Indeed, Schwartz has argued that "the culture of the copy muddies the waters of authenticity".[197] The act of copying, such as "the duplicating of our own words and artifacts, from the handcopying of manuscripts to the digitizing of art", Schwartz claims to be intrinsically deficient. In fact, he states that "[a]nything unique is at risk of vanishing".[198] Since, as mentioned above, indigenous peoples are viewed as keepers of the 'traditional', it is perhaps not strange that they and their knowledge are turned to in a globalising world. Brown notes how, as "the technologies of the simulacrum proliferate around us", people start looking for originals. In such circumstances, they supposedly almost automatically end up at indigenous communities' knowledge.[199] Seemingly paradoxically, this is a counter reaction to globalisation, which at the same time presents dangers to precisely the 'originals' that are turned to.

The claim that copies present risks for the notion of authority is another aspect in the context of issues regarding copies, authenticity and traditions.[200] With new technologies enabling easy and quick reproduction, actors that usually had control over works or knowledge can be ignored. This way, structures of control, power and authority that were in place for reproduction run the risk of being bypassed or overthrown and, in the end, of becoming obsolete. In this sense, copies would have a destabilising impact.[201] For indigenous peoples, it

[192] Haight Farley 1997, p. 8.
[193] Brown 2003, p. 6. Interestingly, he cites the following indigenous opinion: "As a man from Oregon's Klamath Tribe told an audience of archivists and records-management professionals at a 1999 meeting in Phoenix, Arizona: 'All this information gets shared, gets into peoples' private lives. It's upsetting that the songs of my relatives can be on the Internet. These spiritual songs live in my heart and shouldn't be available to just anyone. It disturbs me very much.'"
[194] Schwartz 1996, p. 377.
[195] Benjamin 1936, p. 217–252
[196] Benjamin 1936, p. 221.
[197] Schwartz 1996, p. 377.
[198] Schwartz 1996, p. 212.
[199] Brown 1998, p. 202.
[200] Benjamin 1936, p. 221.
[201] Brown 2003, p. 92.

is argued that the core issue is technology and its new methods of reproducing content, the distribution of which was previously easier to supervise.[202] As a result, both "traditional authority and the authority of tradition itself" are at risk.[203] The fact that almost all societies are now to a certain extent permeable due to invading and seemingly omnipresent technology and media systems has led to indigenous peoples' wish to exercise control over their art and knowledge.[204] In sum, there seems to be a correlation between authority over cultural knowledge and works, authenticity issues and social (power) structures. Or, as Coleman notes, "[a]uthenticity supports power, just as power creates authenticity."[205]

However, there are again objections raised to authenticity claims in the context of modernisation and technological changes. It is argued that the presupposition that only "pristine objects" that have not been affected by modernisation developments indicate a cultural identity has already been seen as "a norm of imperialist nostalgia" for a longer period.[206] Indeed, Atal argues with regard to Asian societies for example that these are going through combined developments of both globalisation and indigenisation.[207] In the midst of change and globalisation, societies likewise emphasise and uphold their cultural identities.[208] According to Atal, the rise of renewed focus on tradition leads to dismissing or selectively embracing outsider innovations.[209] Points of criticism stress the fact that "hybridity" and "creolization" are actually happening: people in developing countries "grab ideas, objects and technologies from the industrial West and reshape them to suit local needs."[210] In this sense, the mixing of cultures and traditions is not considered problematic. However, Brown notes that it *is* considered problematic by peoples when their *own* culture flows to other places.[211] Most often, indigenous complaints follow from a loss of control over their own traditions and identities, which pass into outsiders' hands.[212] The crux is the element of choice.

Further, apart from the easier reproduction of cultural expressions, digitisation of cultural materials also plays a role in the context of technological advancement. Digitisation developments are visible in many areas, not least in the cultural heritage sector. Inevitably, this is also relevant for indigenous peoples' TCEs. Examples are the digitisation of indigenous knowledge, heritage and cultural expressions by museums, libraries and archives for preservation purposes. This digitisation could lead to problems, for example with regard to customary rules on access and use of the material in question. However, interesting developments include initiatives such as the Mukurtu project, which involves indigenous communities in digitisation, management and sharing of their digital cultural heritage in a 'grassroots' kind of way.[213] Keywords here are participation, respect and trust. So, technological developments also present opportunities in the sense that indigenous peoples can connect and exchange experiences worldwide, and make their traditional knowledge more accessible for their own communities in the form of digitisation initiatives.[214]

[202] Brown 2003, p. 93.
[203] Brown 2003, p. 93.
[204] Brown 2003, p. 93–94.
[205] Coleman 2008, p. 52.
[206] Coombe 1997, p. 85.
[207] Atal 2003, p. 174.
[208] Atal 2003, p. 174.
[209] Atal 2003, p. 175.
[210] Brown 2005, p. 5.
[211] Brown 2003, p. 5.
[212] Brown 2003, p. 5.
[213] See: http://www.mukurtu.org/about/.
[214] See also the following statement of the representative of the Kaska Dena Council at the Sixth Session of WIPO's IGC in 2004: "He added on behalf of the Kaska Dena Council that many of the indigenous concerns

Given the factors set out in this section, the protection of TCEs must be placed in the context of historical developments dating back a long time. More specifically, this backdrop is shaped by the marginalisation and, more recently, the shift towards empowerment of indigenous peoples in mainstream societies and recognition for their specific (human) rights situation. (Re)defining indigenous peoples' place in modern society and the tension between mainstream structures and "normative differences"[215] of 'modern' life and traditional systems seem to be central to this perspective. This invokes questions of sovereignty, self-determination and autonomy, as well as politics, power and property. Historical struggles, international law and legal theory, land claims and post-colonial developments therefore form the contextual backdrop for the discussion of TCE protection.

2.2 TCEs and indigenous peoples: a new chapter in the indigenous rights movement?

The previous section has set the scene and explained the contextual factors and related concerns for TCE protection. This section traces the emergence of the topic on the (international) legal level with three specific focuses: TCE protection in the copyright, cultural heritage and human rights contexts. The emergence of the topic as a legal concern in these contexts is characterised by various attempts, developments and stages of regulation. Below, a brief overview will be given of these various stages that form the course of events surrounding the topic of TCE protection in a (international) legal context. It should be noted that this section focuses on the *context*, as the *content* of the various legal attempts, developments and instruments will be elaborated on in more depth in the next three chapters.

2.2.1 Copyright context

The chronological start of the development of protection for TCEs in an international intellectual property or copyright context is usually identified as the revision of the international Berne Convention for the protection of Literary and Artistic Works in 1967.[216] In this context, the emergence of TCE protection is rooted in historical processes. The revision of the Berne Convention in 1967 was preceded by discussions amongst developing countries. Recently out of the decolonisation process, they felt pressure to join the Berne Convention. However, new Asian and African states challenged the universality of the classifications and structures of the 18th century copyright laws originating in Europe.[217] Taking up roles as actors on the international stage and participating in the process leading up to the revision in Stockholm in 1967, they became actively involved in preparing the programme. Newly independent, they started to represent their interests as developing countries,[218] and indigenous peoples began to make strong claims regarding indigenous knowledge and expressions.[219]

Two of the preparations for Berne's revision were the African Working Session on Copyright in Brazzaville in 1963, organised by UNESCO and the International Office for the Protection

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were specific to control and management of digitized Indigenous Knowledge. That is, where the information was Indigenous controlled and properly obtained with their prior informed consent many of their concerns were met. He stated that the Kaska were currently developing their own Indigenous-controlled and owned Traditional Knowledge Network. This Network preserved Indigenous Knowledge in its orally transmitted form by collecting all such knowledge in digital video format", WIPO/GRTKF/IC/6/14, p. 50.

[215] Tsosie 2012, p. 223.

[216] Lucas-Schloetter 2008, p. 350; Perlman 2011, p. 116.

[217] Domman 2008, p. 9.

[218] Von Lewinski 2002, p. 189–190.

[219] Von Lewinski 2003, p. 747.

of Intellectual Property (BIRPI),[220] and the East Asian Seminar on Copyright in New Delhi in 1967, where a draft Model Copyright Law for Developing Countries was discussed.[221] The Brazzaville Report recommended that provisions be included in the Berne revision that safeguard African interests in respect for their folklore.[222] Furthermore, the Report stressed that folklore is of importance for the cultural and social development of African people, and that it offers economic possibilities.[223] At the East Asian Seminar, the Czechoslovak delegate highlighted that national laws were insufficient for protecting folklore in Africa and that folklore was disseminated to a large extent in industrialised countries.[224] The Model Law that was discussed contained several provisions on folklore, but it was decided that an international approach to protect use of folklore was favourable in order to ensure that developing countries could also benefit from international use of their folklore.[225] What we see here is a primarily economic and development-related argument for folklore protection.

Eventually, after discussions in a Working Committee chaired by Czechoslovakia, the Indian delegation proposed the inclusion of folklore in the list of copyright-protected works.[226] The eventual text of the Stockholm Act, however, did not contain the notion of folklore, but used the term 'unpublished works where the identity of the author is unknown'. The addition of this paragraph 4 to Article 15 of the Berne Convention, providing protection for anonymous, unpublished works,[227] was an early suggestion for a way to bring folklore under the copyright regime. It responds to issues that follow from the requirement of an identifiable author. The main focus in this stage of emergence of the topic seems to be on the economic development of developing countries. As noted by Domman, "[f]olklore was discovered as cultural capital and an economic resource of new nation states."[228] This can be connected to the growing 'discovery' of and interest in indigenous knowledge discussed above. The Stockholm conference for revision of the Berne Convention was the first of its kind to include the interests of developing countries.[229]

Subsequent international developments included Bolivia's request to UNESCO in 1973 to reconsider its Universal Copyright Convention in the light of protection of folklore.[230] As a result, a Committee of Experts on the Legal Protection of Folklore was established to study questions relating to the protection of folklore.[231] The reason that the Intergovernmental Copyright Committee gave for requesting a study on the protection of folklore is particularly interesting. It qualified it as "a cultural problem, which went beyond the specific field of copyright, and hence beyond their sphere of competence."[232] This signals early shifts in understanding of the full spectrum of issues at stake.

[220] Domman 2008, p. 9 and Lucas-Schloetter 2008, p. 350. BIRPI is now called the World Intellectual Property Organization (WIPO).
[221] Perlman 2011, p. 116.
[222] Ntahokaja 1963, p. 2 of Annex B.
[223] Ntahokaja 1963, p. 2 of Annex B.
[224] Domman 2008, p. 10.
[225] Perlman 2011, p. 116.
[226] Domman 2008, p. 10.
[227] Lucas-Schloetter 2008, p. 350.
[228] Domman 2008, p. 10.
[229] Domman 2008, p. 11.
[230] Perlman 2011, p. 117; Domman 2008, p. 13.
[231] The study concerned the various aspects involved in the protection of folklore, UNESCO Committee Of Experts On The Legal Protection Of Folklore 1977.
[232] UNESCO Committee Of Experts On The Legal Protection Of Folklore 1977, p. 1.

The Committee of Experts' 1977 Study of the various aspects involved in the protection of folklore pays specific attention to folklore's 'authenticity', which previous attempts did not mention but future ones would continue to invoke, and 'the community', as opposed to previous focus on only individuals and states.[233] Indeed, not only is there recognition for the exploitation of folklore, but significantly so for preservation of folklore to ensure its continued existence, and in particular for preservation of folklore against the risk of distortion and erosion of its authenticity. This is called a real danger, resulting from commercialisation and taking the folklore out of its context.[234] As to the communal aspects, the Study defines folklore as impersonal, collective and not having a known individual author.[235] Determining the author of works of folklore is identified as a sensitive issue. And while the Study accepts to a certain extent the idea that a community is assigned a moral right exercised by a representative, the conception of a remuneration right that rewards the work of an author, in the case of folklore often unknown, for a community is especially identified as a difficulty.[236] In any case, this Study put important concepts such as community and authenticity on the agenda.

In parallel to these developments, it was decided in 1973 that a Committee of Experts would draft a Model Law on Copyright for Developing Countries at a meeting in Abidjan. Assisted by UNESCO and WIPO, the Secretariats of both organisations finalised the draft, which was considered and adopted by the Committee at a meeting in Tunis in 1976.[237] The law was meant to address developing countries' particular needs, enable access to copyrighted foreign works and guarantee suitable international protection for their own works.[238] As works of national folklore were called "an important part of the cultural heritage, particularly in developing countries, and [is] susceptible of economic exploitation", these works were specifically earmarked to be covered by the Model Law.[239] Because of their specific nature, they were included in a separate section on the protection of such works.[240] In that section, elements such as prevention of improper exploitation and realisation of adequate protection were stressed. Reasons that were mentioned were not only of an economic nature, but also the significance of folklore as a cultural legacy, tied to the character of the people from which it originates, was underlined.[241] This Model Law thus fits within the developments in this legal area that signal a shift, or evolution, in the arguments for and perception of the protection of folklore.

Next, from the 1980s onwards, UNESCO and WIPO collaborated on the copyright aspects of this specific topic, drafting Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. But, with this attempt, WIPO and UNESCO moved beyond copyright structures, working on a *sui generis* approach to the issue.[242] In the introduction of the document, the importance of

[233] Perlman 2011, p. 117. Perlman notes how almost all future legal initiatives would include a certain notion of authenticity.
[234] UNESCO Committee Of Experts On The Legal Protection Of Folklore 1977, p. 13. However, the Study mentions that there are positives to commercialisation and exploitation as well, as this could be a source of income. But the need for prior or retrospective control is emphasised in this regard.
[235] UNESCO Committee Of Experts On The Legal Protection Of Folklore 1977, p. 3.
[236] UNESCO Committee Of Experts On The Legal Protection Of Folklore 1977, p. 15. See also Perlman 2011, p. 117 on this.
[237] UNESCO 1985, p. 2–3.
[238] UNESCO 1985, p. 3.
[239] UNESCO 1985, p. 4, Section 6.
[240] UNESCO 1985, p. 3.
[241] UNESCO 1985, p. 7.
[242] UNESCO and WIPO, Model Provisions 1985. Perlman 2011, p. 118.

folklore for developing countries' cultural and social identities, as a means of self-expression and as a living, functional tradition is stressed. Respect for the economic and cultural interests of the source communities is also emphasised. Commercialisation and distortion are mentioned as dangers to communities' folklore, which are believed to be enhanced by technological developments.[243] While the Model Provisions were intended to form the basis of a draft treaty, no international instrument followed. UNESCO and WIPO decided that an international convention for protection of folklore was "premature" and, apart from "a massive consciousness-raising and information campaign,"[244] the topic disappeared from the international agenda for a considerable amount of time. Finally, after a period of extensive recognition for biodiversity, environmental and indigenous issues, from the 1990s there was a 'revival' of the topic of folklore at WIPO.

As a consequence of these new developments, the context of the discussion had changed considerably.[245] An indigenous movement had arisen and apart from a focus on land rights there was also awareness of cultural issues. The first international, legally-binding convention that was adopted in the sphere of (traditional) knowledge, genetic resources and the like did not concern folklore, but biological diversity. It explicitly acknowledged the interests of indigenous peoples.[246] Developments in the sphere of the environment and biodiversity also influenced the renewed discussions on the protection of folklore, including increasing awareness of folklore's multiple social roles, indigenous peoples' distinctive interests and folklore's holistic nature. Doubts arose whether protection of indigenous societies' specific interests could actually be met within the IP approach of the Model Provisions.[247]

Since 2001, the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore has continued work on the protection of folklore. Since 2002, the concept of folklore has been substituted by the term traditional cultural expressions (TCEs), following criticisms that it would be pejorative and unreflective of the holistic nature of TCEs.[248] In 2005, the 'old' Model Provisions were revised, influenced by the indigenous movement.[249] Indeed, in scholarship *indigenous* TCEs have also been more and more considered to be the prototype of all TCEs and secrecy and sacredness are increasingly seen as a central feature.[250] The most recent Draft Provisions of the Intergovernmental Committee on TCEs date from 2014, but no international, legally-binding instrument has been adopted so far. WIPO's work is thus still ongoing, with IGC meetings on TCEs resuming in February 2017. Later discussion of the Draft Articles in this thesis will refer to the version of 2014.[251]

In summary, the emergence of the protection of TCEs in a copyright context has seen various shifts. From a developing countries issue focused on economic development, the protection process advanced towards more consideration for moral rights issues and awareness of the role of folklore for cultural identity. More recent developments have shown a shift to indigenous issues as the centre of attention, with more recognition of folklore's roles in indigenous communities and awareness of, for example, its spiritual significance. These shifts are also represented in the various documents that have been issued over the decades.

[243] UNESCO & WIPO 1985, p. 3.
[244] Domman 2008, p. 13.
[245] Perlman 2011, p. 119.
[246] Perlman 2011, p. 120.
[247] Perlman 2011, p. 120–121; Posey & Dutfield 1996.
[248] Perlman 2011, p. 125.
[249] Perlman 2011, p. 127.
[250] Perlman 2011, p. 127–128.
[251] Available via: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_6.pdf.

Likewise, the emergence of the protection issue in this legal area has gone through various legal approaches as well, shifting from a copyright approach to a *sui generis* approach, following a change of understanding of the issue and nature of TCEs.

2.2.2 Cultural heritage context

Protection of cultural heritage goes back a long time in history. Indeed, in the context of the law of war recognition for cultural property protection dates back to ancient times.[252] The beginning of the modern notion of the law of war contained the idea of preventing unnecessary distress or damage in the cause of war.[253] Interestingly, the first limitations on the demolition of cultural heritage concerned, amongst others, religious structures and institutions, namely the safeguarding of sacred institutions such as temples and churches.[254] Under the law of war, "appreciation for its [i.e. cultural property's] vital contribution to mankind's identity prompted international recognition of its inviolability."[255] This already shows some of the underlying values that are considered of importance for the protection of cultural heritage, such as the universality principle. This means that all mankind has an interest in the preservation of cultural heritage. Also, the (group) identity principle is already visible here.

Developments in more 'modern' history with regard to international Conventions specifically for the protection of cultural heritage arose after the Second World War. Previously, it was laid down in specific conflict treaties that (European) powers would abstain from demolishing "objects of aesthetic or religious value" in wartime and return them to the countries from which they originated.[256] Directly after the Second World War, the four Geneva Conventions for the protection of the victims of armed conflicts were adopted in 1949. Although none covered cultural heritage specifically, Convention IV was concerned with protection of civilians and their property.[257] These treaties would become the basis of the UNESCO 1954 The Hague Convention for the Protection of Cultural Property,[258] which addressed earlier shortcomings and provided additional rules, this time specifically on cultural property issues.[259]

In the preamble of the 1954 The Hague Convention, it is stated that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world." Furthermore, the preamble declares that "the preservation of the cultural heritage is of great importance for all the peoples of the world". The term 'peoples' would imply the anthropological understanding of the 'cultural property' protected by the Convention. That is "cultural property by virtue of social context", namely "by virtue of the meaning ascribed to it by a society, as distinct from the juridical personification of that society for the formal purposes of

[252] Forrest 2010, p. 64 and Graham 1987, p. 755.
[253] Forrest 2010, p. 64.
[254] Forrest 2010, p. 64.
[255] Graham 1987, p. 755.
[256] Coleman 2005, p. 3; Pask 1993, p. 65; Forrest 2010, p. 67 and further. Examples are: the early Hague Regulations of 1899 and 1907, the 1919 Treaty of Versailles, the 1923 Hague Draft Rules Concerning the Control of Wireless Telegraphy in Times of War and Air Warfare, the 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (the Roerich Pact) and the 1938 League of Nations Preliminary Draft International Convention for the Protection of Historic Buildings and Works of Art in Times of War. These are all extensively discussed in Forrest 2010, from p. 67.
[257] Forrest 2010, p. 76.
[258] Coleman 2005, p. 3.
[259] Forrest 2010, p. 78.

the prevailing international legal order".[260] Furthermore, it has been noted that the reference to 'peoples' and 'mankind' instead of 'states' or 'the international community of states' is a sign of the Convention's "humanitarian character".[261] It would "identify[ing], more accurately, as it does, the ultimate beneficiary of its provisions."[262]

Subsequently, for the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property in 1970, newly decolonised states emphasised that the scope of the concept of cultural property should be extended and that, as a consequence, the list of protectable items should also be expanded.[263] Representing large amounts of cultural heritage, such new actors were the instigators of the development of the protection regime.[264] The background of this Convention, and of the movement of cultural heritage across the world in general, can once again be traced back throughout history. In particular, the history of expansion and colonisation practices colours the context of arguments for cultural heritage protection.[265] Those colonised faced extensive acts of appropriation and foreign collection of their art. Newly decolonised states then demanded the return of the cultural heritage that they had lost during eras of foreign domination.[266]

The cultural heritage, or folklore, of indigenous peoples comes forward in a similar context, in parallel with processes, and consequences, of decolonisation. As Pask notes, the interests of newly decolonised states and how these are reflected in legislation could be looked at as being "at least partly in common with indigenous peoples currently resisting the effects of colonization."[267] Decolonised states asserted their influence in the sphere of definitions and to expand the standard of what would amount to objects of 'cultural value'.[268] Responding to growing international diversity, a definition of cultural heritage would have to be capable of coping with those types of property that decolonised states were now claiming back.[269] By expanding the "traditional catalogue of cultural property", the drafters aimed to go beyond "Western standards of commercial value", which would be of no use for addressing the "indigenous cultural importance of an artifact".[270]

It has been observed that including 'products of archaeological excavations' and 'objects of ethnographical interests' in Article 1 of the Convention reflects the wish of decolonised states to protect their past as a whole from appropriation, regardless of commercial value.[271] What the Convention aimed to deal with was the issue of movement and loss of cultural heritage that a state or community argued to be a manifestation of its culture.[272] The cultural property that the Convention regulates is perceived as inherent to the identity of its source of origin.[273] Confirming this perception, a 1976 UNESCO panel deemed "cultural property [is] a basic

[260] O'Keefe 2006, p. 95.
[261] O'Keefe 2006, p. 95.
[262] O'Keefe 2006, p. 95.
[263] Coleman 2005, p. 3.
[264] Forrest 2010, p. 166.
[265] Forrest 2010, p. 132.
[266] Forrest 2010, p. 133; Graham 1987, p. 771.
[267] Pask 1993, p. 65.
[268] Pask 1993, p. 65; Graham 1987, p. 774.
[269] Graham 1987, p. 774.
[270] Graham 1987, p. 774.
[271] Pask 1993, p. 66.
[272] Forrest 2010, p. 136.
[273] Coleman 2005, p. 3.

element of a people's identity".[274] In other words, these developments show the opening up, or at least the awareness, of alternative conceptions and arguments of existing systems, including alternative voices and actors.

The 1995 Convention on Stolen or Illegally Exported Cultural Objects of the International Institute for the Unification of Private Law (UNIDROIT) was supposed to finalise the international framework for return and restitution of cultural heritage.[275] According to the preamble, the UNIDROIT Convention aimed to address and prevent the damage caused by illicit trade, both to the traded objects and to the cultural property of national, tribal, indigenous or other communities. Interestingly, the preamble mentions various interests that are at stake and face harm from illicit trade, including those of indigenous communities.[276] According to Forrest, this represents a "principled recognition of the differences between national and sub-national interests in cultural property".[277] Again, this development shows a shift to a broader perspective of existing cultural heritage frameworks *and* stakeholders of protection.

Subsequent criticism by indigenous peoples focused on the fact that the list of the 1970 UNESCO Convention only included tangible property, while it should also encompass intellectual property and what were previously deemed 'non-property' cultural expressions such as folklore and traditional knowledge.[278] As we saw above, the first developments with regard to immaterial heritage took place in an intellectual property context. Within the cultural heritage realm, a number of UNESCO Recommendations and Conventions also started to address the safeguarding of traditional culture, folklore and intangible cultural heritage. It has been noted that the origins of a normative framework for the protection of intangible cultural heritage can already be seen in the very establishment of UNESCO, given the fact that this type of heritage is by its very nature a manifestation of culture and plays an important role for furthering cultural diversity.[279] In this sense, greater focus on intangible cultural heritage only seems a logical, or organic, development.

As to UNESCO's instruments, awareness of the lack of copyright protection for folklore increased in the late 1980s.[280] This led to a Recommendation on the Safeguarding of Traditional Culture and Folklore in 1989. The preamble's focus on folklore as an integral part of cultural heritage and *living* culture[281] is interesting from the perspective of shifting concepts and understandings. Cultural heritage rules are often considered to focus on artifacts of the past and their origin cultures as merely historical and passive sources of heritage. In the Recommendation's preamble, instead, the importance of both folklore's historical and *contemporary* role for peoples is stressed. In its section on protection, the Recommendation relies on intellectual property and a number of other rights, including privacy and confidentiality.[282] This is an interesting expansion from the usual primary focus on intellectual property. The Recommendation was not very successful, however, due to its lack of

[274] Coleman 2005, p. 3. Furthermore, as Coleman states, "[i]n 1982, the then chairperson of UNESCO's Inter-governmental Committee for the Return or Restitution of Cultural Property described the loss of cultural property in terms of the loss of being."
[275] Forrest 2010, p. 135.
[276] Forrest 2010, p. 198.
[277] Forrest 2010, p. 198.
[278] Coleman 2005, p. 3.
[279] Forrest 2010, p. 365.
[280] Domman 2008, p. 13.
[281] UNESCO Recommendation 1989, p. 238.
[282] UNESCO Recommendation 1989, p. 242.

incentives for states and its 'soft law' nature.[283] Nevertheless, it still signals the shifts and developments towards inclusion of intangible cultural heritage and recognition of its living nature.

After the Recommendation, the context of UNESCO's Convention for the Safeguarding of Intangible Cultural Heritage, which would follow in 2003, was coloured by increasing focus on indigenous peoples' traditional knowledge in the sphere of environmental issues, genetic diversity and sustainable development.[284] Moves were made towards protection of this knowledge and prevention of its loss.[285] The Intangible Cultural Heritage Convention was adopted in 2003 and it refers to the very broad international context and connects the issue of intangible cultural heritage with the human rights regime, mentioning the Universal Declaration of Human Rights (UDHR) of 1948 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) of 1966.[286] It also acknowledges the important role of indigenous communities in particular in the production, safeguarding and maintenance of intangible cultural heritage, thus contributing to cultural diversity and human creativity.[287] Again, this demonstrates an expansion of perspectives, but also of actors and those who have cultural agency with regard to cultural heritage matters.

As to the definition of what constitutes intangible cultural heritage, it is up to communities or groups themselves to determine what this comprises. Although this is a potentially very broad category, it is limited by the human rights regime in Article 2(1): communities or groups can declare cultural expressions as intangible cultural heritage in the sense of the Convention, but it must be compatible with international human rights law, mutual respect between communities, groups and individual members, and sustainable development.[288] According to Article 1, the Convention aims to safeguard intangible cultural heritage and ensure respect for the intangible cultural heritage of the communities, groups and individuals whom it concerns. The emphasis on communities and groups in this Convention shows a shift towards a broader understanding of cultural heritage and the important role that the communities of origin play for protection, safeguarding and development of such heritage.

This subsection shows that, over the course of the emergence of protection of TCEs – or folklore – in a cultural heritage context, scopes and definitions have broadened. Following decolonisation and emergence of new voices, existing frameworks have been amended or expanded to host new, differing, views of concepts. There has been a shift of ideas that were considered universal but no longer sufficed. Values have developed from commercial or universal to also include consideration for more specific interests, such as those of the source communities of cultural heritage. However, the question still remains whether the current framework and its underlying values is capable of addressing indigenous protection interests and contains relevant elements and principles, or building blocks, for TCE protection. More on this will follow in Chapter 4.

[283] Forrest 2010, p. 364: "A more normative instrument, it was thought, would provide a more effective protective regime."
[284] Forrest 2010, p. 365.
[285] Forrest 2010, p. 365. For example, the 1992 Convention on Biological Diversity.
[286] See par. 1 of the Preamble. According to Forrest 2010, p. 367: "Rights of ethnic, religious and linguistic minorities, and economic, social and cultural rights, are fundamental to the regime to safeguard the intangible cultural heritage."
[287] See par. 6 of the Preamble.
[288] Forrest 2010, p. 367 and 372.

2.2.3 Human rights context

Protection for traditional knowledge in a human rights context emerged near the end of the twentieth century. Here as well, the context is coloured by the decolonisation process. There was already recognition of the vulnerable state of indigenous peoples around the middle of the twentieth century. However, at that time policy was still guided by the goal of assimilation of indigenous peoples into the mainstream, dominant society.[289] The 1957 International Labour Organization's (ILO) Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries echoes this assimilative philosophy of improving indigenous peoples' economic situation and furthering integration into the greater social and political order.[290]

Work on a revision of ILO Convention No. 107 started in 1986, as it was considered outdated due to its integrationist nature.[291] A Meeting of Experts in 1988 referred for example to the findings of a 1983 study of the Problem of Discrimination Against Indigenous Populations.[292] This study underlined the need for attention for indigenous peoples' claims, and policies such as pluralism, self-sufficiency, self-management and ethno-development were highlighted.[293] The preamble of the new ILO Convention No. 169 on Indigenous and Tribal Peoples of 1989 that replaced the outdated No. 107 establishes as its main guiding principle to "remov[e] the assimilationist orientation of the other standards" and "recognis[e] the aspiration of these peoples to exercise control over their own institutions, ways of life and economic development to maintain and develop their identities, languages and religions".[294]

ILO Convention No. 169 was thus adopted following a change in perception of indigenous peoples and their rights. It pays particular attention to indigenous peoples' cultural identities, traditions, property, cultures and values.[295] Folklore and traditional knowledge are not mentioned as such, but Article 23 is worth noting in the context of TCEs.[296] In this Article, "[h]andicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering" must be recognised as important elements for the maintenance of indigenous cultures. However, Stoll and Von Hahn observe that no additional values and protection needs are acknowledged.[297] In any case, this Convention put the need for specific protection of indigenous values and practices on the agenda.[298] Furthermore, it shows the emergence of an international process of recognition of indigenous rights and protection of traditional cultures.[299]

Subsequently, in the first decade of the twenty-first century, the UN Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly in 2007, following years of negotiations. This Declaration, in particular, has been a landmark instrument for the

[289] Stoll & Von Hahn 2008, p. 9 and Anaya 2004, p. 54–55.
[290] Anaya 2004, p. 56 and Stoll & Von Hahn 2008, p. 9.
[291] Anaya 2004, p. 58 and Stoll & Von Hahn 2008, p. 10.
[292] A study by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, José R. Martínez Cobo.
[293] Anaya 2004, p. 58.
[294] ILO Convention No. 169, preamble paragraph 4 and 5, and Anaya 2004, p. 59.
[295] See for example Articles 2(2)(b), 4(1) and 5 of the Convention.
[296] Stoll & Von Hahn 2008, p. 25.
[297] Stoll & Von Hahn 2008, p. 26.
[298] Stoll & Von Hahn 2008, p. 10.
[299] Stoll & Von Hahn 2008, p. 10.

recognition of indigenous rights. It also pays much attention to the specifics of traditional culture.[300] In fact, this is the first human, or indigenous, rights instrument that specifically mentions indigenous peoples' rights to their cultural heritage, traditional knowledge and TCEs. Article 31 states that indigenous peoples have the right to maintain, control, protect and develop their TCEs, as well as the manifestations of their cultures such as oral traditions, literature, designs and visual and performing arts. Also, they have the right to the intellectual property of such TCEs. Therefore, it can be said that the topic of TCE protection in a human rights context fully emerged with this instrument.

'General' human rights instruments and developments in the interpretation of human rights are of course also relevant for indigenous peoples' rights, including rights to their cultures. In fact, Scott and Lenzerini note that the 1966 ICESCR and ICCPR "represent, chronologically, the first binding international instruments making the advancement and enforcement of certain rights of indigenous peoples possible".[301] Attention for the protection of TCEs is for example visible in General Comment No. 21 of the Committee on Economic, Social and Cultural Rights (CESCR) on the right of everyone to take part in cultural life of Article 15(1)(a) ICESCR.[302] This General Comment of 2009 repeatedly stresses indigenous peoples' specific rights, including to participation in cultural life, in an explicit way. In fact, indigenous peoples are mentioned as persons and communities requiring special protection.[303] Furthermore, the General Comment underlines their right to maintain, control, protect and develop their cultural heritage, traditional knowledge, TCEs and manifestations thereof. To this end, states should acknowledge and respect the notion of free, prior and informed consent of indigenous peoples in all matters relating to their specific rights.[304] The Committee also acknowledges, and refers to, UNDRIP when discussing indigenous peoples' interest in the right to take part in cultural life.

General Comment No. 17 of the CESCR on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author[305] confirms that 'any scientific, literary or artistic production' also includes the knowledge, innovations and practices of indigenous peoples. As such, these require effective protection. Furthermore, General Comment No. 23 of the Human Rights Committee (HRC) on the rights of minorities[306] acknowledges indigenous peoples' way of life, as connected to their lands and resources, as falling within the realm of the enjoyment of one's culture. This warrants effective participation in any decision regarding their land or resources. Another 'general' human right of relevance is the right to non-discrimination, which has been underlined by Anaya in the context of property rights. He states that "the requirement that property rights law does not discriminate against the particularities of indigenous peoples' cultures" should lead to extension of legal protection to also include the knowledge that vests in and results from indigenous cultures.[307] In other

[300] See, for example, Articles 11 to 16, covering in short and amongst others: the right to practice and revitalise their cultural traditions and customs; the right to religious and spiritual practices; the right to transmit their cultures to future generations; the right to establish and control educational systems; the right to dignity and diversity of their cultures and traditions; the right to establish their own media in their own languages and of non-discriminatory access to non-indigenous media.
[301] Scott & Lenzerini 2012, p. 72.
[302] Article 15(1)(a) ICESCR.
[303] CESCR General Comment No. 21, p. 9.
[304] CESCR General Comment No. 21, p. 9-10.
[305] Article 15(1)(c) ICESCR.
[306] Article 27 ICCPR.
[307] Anaya 2013, p. 5.

words, there is clearly room to place TCE protection within general human rights developments and evolving interpretations as well.

This subsection shows that a change of perception is also visible with regard to the emergence of TCE protection in a human rights context. Whereas indigenous peoples' rights and interests were first regulated in an assimilative way, growing recognition of indigenous peoples' rights to and interest in self-determination and control over their identities, traditions and cultures is now visible. Indeed, many developments include rights and recognition for cultural matters, UNDRIP being a prime example. And also on a 'general' human rights level, indigenous peoples' cultural interests are increasingly recognised, for example in the General Comments No. 21 and 17 of the CESCR on Article 15(1)(a) and (c) of the ICESCR, and General Comment No. 23 of the HRC on Article 27 ICCPR. In summary, these developments and evolving interpretations lift issues of indigenous peoples' cultural heritage and traditional knowledge and cultural expressions up to a fundamental rights level.

2.3 Traditional cultural expressions explained

To assist with understanding what sets TCEs apart from other cultural works, or literary and artistic works, this section explains TCEs' specific characteristics. This will shed light on the sensitivities that occur in the protection discussion. Topics that will be addressed include ownership issues, their traditional nature and spirituality. Furthermore, the second part of this section explains where the calls for protection stem from, i.e. the third party activities that have given rise to protection claims. Attention will be paid to the concepts of cultural appropriation, cultural misappropriation and misrepresentation, and commercialisation, respectively.

2.3.1 A closer look at traditional cultural expressions

The particular nature of TCEs determines the course of the debates on their protection. Below, specific characteristics and roles of TCEs are briefly listed in order to show which aspects cause so much difficulty and discussion concerning protection issues. The section does not aim to discuss TCEs at length, but to highlight some core characteristics that many TCEs share and that come within the application of the three legal areas that are analysed in the next chapters. In short, these characteristics are: TCEs' traditional nature; the feature of collectiveness; TCEs as identity tools; and the continuous roles and functions of TCEs, or their 'living' nature. This list already reflects tensions and opportunities in relation to characteristics such as copyright law's individual author and originality requirement, cultural heritage law's identity principle and human rights law's emphasis on self-determination and rights to take part in cultural life and to ways of life.

Below, the characteristics are explained in three clusters: the holistic nature of indigenous culture, that is the connectedness of all aspects, including traditional knowledge, art and land; TCEs' specific traits of being impersonal, traditional and oral; and the spiritual aspect that is often invoked in the context of TCE protection. Together, these clusters illustrate the complex picture of TCE protection as a multi-faceted issue.

Holistic

A first characteristic, or perhaps even the overarching trait, of TCEs is that they form a part of indigenous peoples' holistic worldview. According to this world view, indigenous peoples

perceive the world around them as an "integrated whole".[308] Each aspect is considered to be interrelated.[309] All art and science originate from the same source, the land itself, and are expressions of the people in its entirety.[310] Recognition for the importance of land and natural environment is therefore closely connected to the discussion on protection of TCEs, as culture and knowledge would be closely linked to territory.[311] Relationships with all elements of the world, such as "the land, animals, plants, humans, their ancestors and spirits",[312] are valued greatly. Indigenous cultural heritage, for its part, comprises all expressions of this relationship, and it is claimed to be impossible to separate it from the traditional lands of the people in question.[313]

For indigenous peoples, a distinction between cultural and intellectual property and art and science, has therefore been called artificial.[314] The same goes for the distinction between traditional knowledge, traditional cultural expressions and genetic resources, and fitting these into 'Western' categories. Translation of specific traits into such categories can therefore be problematic. To reformulate the relationships that expressions of culture represent so that they fit into European categories of art and culture is one example. Another example is translation of the indigenous system of permission, for example for reproducing a story or design, into a copyright licensing system. Both examples would diminish these social relationships.[315] Once again, this shows a disconnect between indigenous reality and mainstream (legal) systems and frameworks, and between the values that indigenous peoples attach to their TCEs and prevailing economic and market values. More on this will follow in the next subsection, where the nature of indigenous peoples' relationship with their TCEs is discussed.

Impersonal, traditional and oral[316]

The concepts in the heading of this subsection are characteristics of folklore as identified in the UNESCO Aspects Study of 1977. They are discussed together here for several reasons and capture three essential elements of TCEs. Firstly, TCEs are generally understood as communal and traditional in the sense that they often perform particular societal roles in the community in which they are rooted. TCEs are traditional, which means that they have been, and often continue to be, of such importance for a society and its cultural identity that they are transmitted throughout generations. Lastly, many TCEs do not exist in a 'fixed' way, that is, captured in material form. Instead, they tend to exist as oral traditions.

Firstly, starting with the impersonal, or collective, nature of TCEs, it should be noted that the relationship of indigenous peoples with their TCEs differs from mainstream property-based ownership systems. Indeed, styling this relationship in terms of property and ownership does not adequately reflect the position of cultural heritage in indigenous societies. Manifestations

[308] Janke 1998, p. 2.
[309] Von Lewinski 2007, p. 215.
[310] Daes 1997, p. 3.
[311] Janke 1998, p. 8.
[312] Von Lewinski 2007, p. 215.
[313] Daes 1993, p. 39. She notes that it should be the indigenous peoples themselves who decide what constitutes their heritage.
[314] Daes 1997, p. 3.
[315] See for these examples Coombe 1997, p. 92. Elsewhere she has also stated: "The law rips asunder what First Nations people view as integrally related, freezing into categories what Native peoples find flowing in relationships that do not separate texts from ongoing creative production, or ongoing creativity from social relationships, or social relationships from people's relationship to an ecological landscape that binds past and future generations in relations of spiritual significance." Coombe 1998, p. 229.
[316] UNESCO Committee Of Experts On The Legal Protection Of Folklore 1977, p. 3.

of such heritage, for example TCEs, are not seen as commodities, goods or any form of property that has an owner and possesses first and foremost economic value.[317] Instead, as we have already seen, relationships with all elements of the world are often central, expressed in TCEs such as images, designs and stories.[318] Furthermore, the community is at the heart of all things. For lack of a better word, it is the community that 'owns' the TCEs, with owning representing "a bundle of relationships"[319] instead of having an economic meaning. In other words, TCEs, being impersonal or collective can also be described as 'social goods' rather than merely economic ones. This does not diminish economic protection interests that indigenous peoples may have with regard to their TCEs, such as for example benefit-sharing. More on this will follow in section 2.5.

Since it is largely for the benefit of the community that works of art are produced, it can be explained as the community as a whole 'owning' and controlling them through a system with "layers of rights".[320] Although differing per community, in general these customary laws usually constitute heritage as a communal right and linked to the group, a tribe or family.[321] Only the collective can give consent for sharing the heritage, often via specific procedures, and it is always limited in time and revocable.[322] *Sharing* is a crucial word here, as it is never transferred, ceded or sold, except subject to conditions and limitations as to the permitted use.[323] Collectivity and associated circumstances are likely to cause tensions under legal frameworks that are either mainly individual-oriented, targeted at state actors, or both.

Apart from this collectivity and TCEs being 'communally owned', there is often an individual, family, or group in the community who is the main custodian of a specific element of traditional culture.[324] Customary laws determine such custodianships and govern who and in what context they may use or reproduce specific TCEs. These rules are often expression-specific, which means that some artworks or other expressions may be more restricted and secret than others.[325] The privileges of use and reproduction that flow from the custodianship only last while the caretakers "act in the best interests of the community".[326] Furthermore, it comes with responsibilities. The knowledge that the custodian has been awarded must be used in compliance with customary laws and the "gift" of this knowledge must be repaid by acting in accordance with their responsibilities.[327] A breach of customary laws is usually followed by sanctions to repair the relationship that was damaged by the wrongdoing.[328] The foregoing should therefore not be understood as a form of ownership, but rather as the caretakers serving "as trustees for the interests of the community as a whole",[329] "[holding] the knowledge embodied in the work on trust for the rest of the clan".[330]

[317] Daes 1997, p. 3–4.
[318] Coombe 1997, p. 92.
[319] Daes 1997, p. 4.
[320] Haight Farley 1997, p. 32.
[321] Daes 1997, p. 4.
[322] Daes 1997, p. 4; Janke 1998, p. 8–9.
[323] Daes 1997, p. 4.
[324] Daes 1997, p. 4; Janke 1998, p. 8.
[325] Von Lewinski 2007, p. 216; Janke 2003, p. 14.
[326] Daes 1997, p. 4; Janke 1998, p. 8.
[327] Von Lewinski 2007, p. 216.
[328] Von Lewinski 2007, p. 216. This is also noted by Janke with regard to the Aboriginal law and culture, Janke 2003, p. 15.
[329] Daes 1997, p. 4.
[330] Janke 1998, p. 8.

As to TCEs' societal roles, or their traditional nature, they perform various functions in indigenous societies. Firstly, taken together with them being intergenerational and oral, they often play a role in the continuation of indigenous societies. Traditional knowledge, indigenous social structures and culture are reflected and laid down in TCEs such as artworks, stories, songs and dance, and it is therefore considered important that they are transmitted to new generations of indigenous children. This way, information that is needed for the maintenance and development of indigenous societies as a whole can be safeguarded and passed on.[331] This can be summarised as TCEs performing an educational role. In this sense, indigenous art has the function of, metaphorically, being a "historical and sacred text" and can be regarded as a means of communication of "ideas and beliefs and to be "read" as a kind of "visual literacy"."[332]

Secondly, and connected to these roles and functions, TCEs are important for the self-identification and 'survival' of indigenous peoples and their traditions and cultures. As TCEs are described as being "manifestations of the people as a whole", elements of "the people's collective identity" and "everything that belongs to the distinct identity of a people",[333] they play a role in establishing and confirming indigenous identity. Due to their intergenerational nature, they are described as "important aspects of Indigenous cultural knowledge, power and identity" as well.[334] In this sense, the continuous day-to-day practice of TCEs is crucial, whereby TCEs function as agents of living and developing traditions.[335] This contrasts with static perceptions of cultural heritage as something from the past. This function reflects TCEs' more 'mundane' role in indigenous societies' everyday life, which is by no means a less important role. While for non-indigenous, Western societies, traditional knowledge and cultural expressions may seem mysterious and extraordinary, for indigenous peoples they tend to essentially comprise survival means for the continuation of their daily lives.[336] Of course, this continuation depends on whether indigenous peoples themselves choose to pursue this on the basis of a level of (cultural) self-determination and not something that is inflicted on them through some kind of essentialist expectation. Another often-mentioned function of TCEs is their spiritual role. More on this will follow in the next subsection.

Lastly, TCEs usually have the specific trait of an oral existence. The fact that TCEs are transmitted orally to future generations, and are thus not 'fixed', further reflects their living and dynamic nature, making them adaptable to changes and needs of the source community. Anthropological understandings of culture confirm that culture is a dynamic concept, rather than static or fixed, as we saw above in section 2.2.1.

Secrecy and sacredness

TCEs often reflect some sort of spirituality. Of course, this may be more the case for some communities than for others. However, Perlman has noted that specific traits of the TCEs of some indigenous communities are increasingly seen as main elements of TCEs in general, which is the case for secrecy and sacredness in particular.[337] Definitions and lists of characteristics now often include TCEs' role in spirituality and religion.[338] Arguably, this

[331] Daes 1997, p. 1.
[332] Haight Farley 1997, p. 21.
[333] Daes 1997, p. 3.
[334] Janke 1998, p. 2.
[335] Janke 1998, p. 7.
[336] Kono 2009, p. 6–7.
[337] Perlman 2011, p. 127.
[338] Perlman 2011, p. 127–128.

increased focus on secrecy and sacredness in the context of TCE protection has been triggered by the influence of the indigenous peoples' movement in international law generally. As a consequence of this, indigenous culture is considered more and more to be "prototypical for all traditional culture".[339] In any case, consequences of a spiritual role include certain TCEs sometimes only being used or reproduced for certain ceremonies. Furthermore, it may be the case that only initiated persons may view the artworks and under specific circumstances. In other words, when an element of spirituality is involved, access to and use of TCEs may be more restricted and bound to certain customary rules.[340]

2.3.2 Appropriation issues

This section aims to assess *what* exactly is perceived as problematic with regard to TCEs. Which acts are deemed to threaten indigenous peoples' various interests regarding protection of their TCEs? The term that is most often used to describe the practices of outsiders with regard to TCEs is 'cultural appropriation'. Below, this term is complemented by cultural misappropriation, misrepresentation and commercialisation. Of course, all three are interrelated and can overlap. However, in order to unravel the term 'cultural appropriation', it is analysed here in relation to these three concepts.

In academic literature, the contested acts are often described in such terms as "pirating cultural heritage", "the uses and abuses of indigenous art", "the poaching of indigenous culture",[341] "moral, cultural, and economic misappropriation",[342] and "illicit appropriation, misrepresentation, and unauthorized commercialization".[343] These descriptions reflect the negative associations of appropriation of indigenous culture and they will be discussed in the second and third subsection. Firstly, though, the more general notion of cultural appropriation is discussed.

Cultural appropriation

Cultural appropriation can be considered as the overlapping, general notion of the taking of various elements of a culture that is not one's own.[344] The "pluck[ing] [of] images, sound, and practices from their original setting and relocat[e][ing] them elsewhere" has thus been classified under the broad concept of cultural appropriation.[345] Other notions to describe such practices are occupying, seizing or acquiring of folklore by those other than traditional users and communities, who are the source of the cultural expressions.

Cultural appropriation in itself is a rather neutral term. Indeed, cultural appropriation goes back to the earliest human cultural interaction and exchange.[346] Furthermore, the appropriation of traditional culture is not an illegitimate act under current intellectual property laws. A large part, if not most, of traditional culture is unprotected and considered to reside in the public domain. In that sense, no permission is legally required for the use thereof.[347] The source communities do not have to be asked for permission.

[339] Perlman 2011, p. 128.
[340] See for example Janke on Aboriginal artworks, Janke 2003, p. 14. See also Haight Farley 1997, p. 9–10.
[341] Haight Farley 1997, p. 4, 7, 11.
[342] Pilch 2009, p. 3.
[343] Coombe 2009, p. 405.
[344] Scafidi 2005, p. 88.
[345] Brown 2005, p. 44.
[346] Hughes 2012, p. 10.
[347] Bizer e.a. 2011, p. 114.

However, with regard to indigenous peoples, and particularly given the historical context of (de-)colonisation, seizing of traditional land and other historical injustices, cultural appropriation takes on a more negative character. There often exists a sense of loss amongst indigenous cultures in post-colonial societies.[348] The historical context of colonisation is perceived as reflected in contemporary acts of cultural appropriation in the sense of outsiders and 'cultural invaders' taking something, in this case cultural works or expressions. Perhaps this is why the negative feelings amongst indigenous peoples are so strong: they have not historically been *part* of a cultural exchange in an equitable or multilateral way. Rather, throughout history it has, mostly, been 'one-way' taking. Root's observation of "a profound sense of entitlement on the part of the person or institution doing the appropriating"[349] also diminishes the neutral character of the term. She states that appropriators apparently already consider the cultural items they wish to appropriate as belonging to them, while in fact they belong to living cultures. In those circumstances, she notes that the living source community and culture are "[reduced] to the status of objects".[350]

To describe cultural appropriation of TCEs as 'taking' could be problematic, as TCEs comprise intellectual content. As Coleman explains, the taking of physical objects and of intellectual objects amounts to a different 'result'. That is, the taking of intellectual objects, for example TCEs, by a third party does not prevent other persons, such as the source community, from using them.[351] Still, it can be argued that the notion of 'taking' can be used in this context, when it is perceived as unsolicited appropriating, using, or indeed taking of the TCEs out of their (community) context, so without consultation and authorisation. This type of 'free-riding' seems to be a major issue in the discussion of cultural appropriation. 'Taking' is then understood not in a material way, but in the sense or feeling it provokes. While source communities may still be able to use the appropriated TCEs, at the same time TCE manifestations forcibly slip from under their control when appropriated and consequently used by third parties as well. This has also been described as not "exclusion" from the idea, but failure "to recognise rights in the exploitation, or use, of the idea".[352] In this sense, 'taking' becomes a more understandable perception in the context of intangibles: it is not necessarily a problematic action in a material way, but it is morally.

The foregoing negative perceptions of third party taking and use of TCEs is where other, related, issues come forward that are often mentioned in the cultural appropriation debate. Such activities are inherently considered as negative manifestations of cultural appropriation, comprising the categories of cultural misappropriation and misrepresentation. These are discussed in the next subsection.

Cultural misappropriation and misrepresentation

Misappropriation consists of appropriation activities regarding, for example, traditional knowledge or cultural expressions by third parties that are perceived negatively by indigenous peoples. As explained below, misrepresentation is connected to misappropriation and also falls into this 'negative category'.

[348] Robert Paterson and Dennis Karjala mention for example Canada, Australia and the United States, "where a sense of loss through the influences and practices of the dominant non-indigenous society often prevails." Paterson & Karjala 2003, p. 657.
[349] Root 1996, p. 72.
[350] Root 1996, p. 72.
[351] Coleman 2005, p. 17.
[352] Coleman 2005, p. 18.

The main elements that would render cultural appropriation problematic, and thus qualify as misappropriation, are centred around issues of unsolicited taking (out of context) of traditional knowledge and TCEs. Not taking customary traditions and practices into account has also been called 'ignoring the origins'.[353] What makes third party use problematic in particular are lack of consultation of source indigenous communities, research on the original context of the expression, and absence of any attribution to the source communities.[354] Other behaviour that is likely problematic is ignoring original customary laws on the conditions and rules for the use of the TCEs, and not sharing benefits when commercially exploiting indigenous communities' TCEs.[355] Use of TCEs without the knowledge that source communities and artists possess and without consultation, is a major concern for indigenous peoples. Such use could be "inappropriate, derogatory, culturally offensive, or out of context".[356] In this sense, cultural appropriation can be experienced as a lack of respect. More simply, it can also stem from a lack of awareness of the complex, multi-faceted nature of TCEs.

In academic literature, it is argued that indigenous claims about both cultural appropriation and representation are comprised of moral claims.[357] Whereas moral claims about appropriation regard there to be some form of perceived theft,[358] representation claims concern something slightly different. It is not the use per se, which in itself would already be problematic, that is central here. Rather, the issue is indigenous peoples' ability, or indeed right, to decide on and govern what is acceptable with regard to the use of their culture.[359] From this perspective, cultural appropriation and related issues have been qualified as one manifestation of indigenous peoples' (ongoing) sovereignty struggles.[360]

Due to a conceptual and legal disconnect between 'Western' or 'mainstream' societies and indigenous societies, cultural appropriation through representation of another (indigenous) culture or the use of an idea or a style is not considered as illegal or 'theft,'[361] for example under cultural and intellectual property laws. Apart from a legal view, morally this is also not seen as wrong from a 'Western' perspective. Indeed, the use of a style or idea, inspired by or representing cultures other than one's own, is considered fully morally legitimate.[362] However, from a self-determination perspective, cultural misrepresentation challenges indigenous communities' ability to determine, maintain and safeguard what constitutes their cultures, access to their cultures and consequently self-determination and development of their societies as a whole. This (collective) dimension is what (property) law apparently struggles to recognise in the context of traditional knowledge and TCE protection.[363] Therefore, the issue also seems largely concerned with self-determination and sovereignty regarding use of indigenous peoples' cultures, rather than merely with property issues.[364]

Misappropriation and misrepresentation in the sense of taking TCEs out of their traditional context is also perceived as problematic. Such use could (unintentionally) be inappropriate

[353] Pilch 2009, p. 3.
[354] Pilch 2009, p. 3.
[355] Pilch 2009, p. 3.
[356] Janke 1998, p. 19.
[357] Coleman 2005, p. 20–21.
[358] Coleman 2005, p. 21.
[359] Pask 1993, p. 61.
[360] Pask 1993, p. 60.
[361] Coleman 2005, p. 21.
[362] Coleman 2005, p. 21.
[363] Coleman 2005, p. 21–22. Pask 1993, p. 62.
[364] Coleman 2005, p. 21–22.

and offensive. Also, not consulting indigenous peoples and asking permission could turn them and their cultures into merely objects.[365] Not compensating the communities would put them in a position of "objectified, passive sources of inspiration rather than participants in an exchange of ideas."[366] Root uses the term "deterritorialisation" for taking elements of traditional culture out of their original context, using them for self-assigned purposes and thus assigning them a new meaning.[367] In this context, TCEs are detached from customary laws and social rules regarding their use and application, and recoded according to outsider "values and agendas".[368] Other systems of meaning, mainly commercial, are applied. In other words, since contemporary dominant systems of meaning mainly centre around money, any previous meaning is often replaced by an economic, monetary meaning.[369] Coleman describes it as a "dislocation between an image of indigenous life and reality or an indigenous work and its meaning in indigenous life".[370]

Another problem that occurs with regard to misrepresentation is 'indigenous counterfeit'. This is the case when representations of indigenous culture are falsely presented as being of indigenous origin. Passing off appropriated TCEs as authentic raises concerns for indigenous communities' interests in authenticity and cultural integrity. Examples are presenting counterfeits as the style of a specific community or tribe, misleading labelling with regard to authenticity, indigenous cooperation and benefit-sharing, and fraudulent representations.[371] On an individual level, such practices of misrepresentation could also be harmful for the reputation of the indigenous artist. This is even more the case when it concerns poor quality reproductions or use that is completely out of context. Artists might fear their community's perception of such reproductions and reactions from within their community. For example, such harm to their reputation could occur when the artist's community think that they were involved in producing the illegal reproduction. As a consequence, artists might fear the loss of their customary right to produce, for example, designs or images.[372] Following customary rules, an individual artist who has been given permission to reproduce certain imagery might be held responsible for illegal and inappropriate outsider use, even though they were not aware of and had no control over the violations.[373] Customary laws of indigenous peoples often control who makes art, and when, how and for whom.[374] This makes outsider reproduction and representation of indigenous art without authorisation or consultation particularly problematic.

[365] Root 1996, p. 72.
[366] Root 1996, p. 72.
[367] Root 1996, p. 84.
[368] Root 1996, p. 85.
[369] Root 1996, p. 85.
[370] Coleman 2005, p. 24.
[371] Janke 1998, p. 37–39.
[372] Janke 2003, p. 14. In this report, Janke mentions the case of an artist, who experienced illegal reproduction of a design on carpets, expressing such fears. The artist, Banduk Marika, stated: "Even though I know that I am not responsible for the reproduction I am still concerned about the ramifications for me and my work within Yolngu society, and I greatly fear a loss of reputation arising from Yolngu associating me with the reproduction. I fear that my family and others may accuse me of giving permission for the reproduction behind their backs without consulting and seeking permission in them manner required by our law and culture. I fear that this could result in my family and others deciding that I cannot be trusted to use important images such as this one any more. This would not only threaten my artistic and economic livelihood but also my ability to participate fully in Yolngu society and cultural practice."
[373] Janke 2003, p. 15.
[374] Haight Farley 1997, p. 10.

'Appropriation of voice' is another 'variety' of cultural misappropriation and misrepresentation. This is the case for example when indigenous peoples argue that it is not the outsider's 'story to tell', 'painting to paint', and so on. In the early 1990s there was considerable discussion about this issue in Canada. This debate was preceded by a newspaper article titled 'Whose Voice Is It Anyway?', in which cultural appropriation was defined as "the depiction of minorities or cultures other than one's own, either in fiction or non-fiction".[375] On the one hand, the debate was coloured by the viewpoint of the Romantic individual author being threatened by "the tyranny of the State over the individual".[376] On the other hand, an Orientalist point of view was central, presupposing "that a "voice" was both unified and singular and could be possessed by an individual or a collective imagined as having similar abilities to possess its own expressions".[377] According to Coombe, however, what the issue of cultural appropriation comes down to for, for example, First Nations peoples – the indigenous peoples of Canada – is "the inability to name themselves and a continuous history of having their identities defined by others".[378] Again, the main issues seem to be self-determination, self-definition and sovereignty over their own cultures.

The issue of misappropriation and misrepresentation has also been linked to (historical) situations of limited political power, or indeed, no political power at all. Cultures that are represented, and thus defined and determined, by outsiders such as commercial third parties, while the source communities are ignored in society, could cause indigenous peoples and their traditions to be alienated: "The experience of everywhere being seen, but never being heard, of constantly being represented, but never listened to, of being treated like artifacts rather than as peoples, is central to the issue of cultural appropriation."[379] Indigenous peoples may no longer feel connected to their own cultures as these are represented.

Indeed, it has been argued that the 'mortality' of cultures is one of the concerns of indigenous rights proponents.[380] Cultures could for example wither when TCEs are appropriated by outsiders: it blurs "the difference between cultural groups, and destabilizes authority structures within them".[381] Furthermore, when representations by outsiders are inaccurate, insiders may face increasing challenges to their self-understanding and self-identification.[382] This would especially be the case in a minority-majority situation, where the "voices of insiders" could run the risk of being deafened by dominant outsider voices.[383]

It has however been argued that not all appropriation and representation is harmful and distorting, and consequently that not all voice appropriation is objectionable.[384] In this regard, the importance of artistic freedom is stressed.[385] In academic literature a distinction has been made between various types of appropriation and their respective harmfulness, ranging from slavish copying to more abstract inspiration.[386] More on freedom of expression implications

[375] Coombe 1993 (a), p. 249–250.
[376] Coombe 1993 (a), p. 250-253.
[377] Coombe 1993 (a), p. 250–253.
[378] Coombe 1993 (a), p. 267.
[379] Coombe 1997, p. 88.
[380] Coleman 2008, p. 51.
[381] Coleman 2008, p. 51.
[382] Young 1994, p. 416.
[383] Young 1994, p. 416.
[384] Young 1994, p. 421.
[385] Young 1994, p. 421.
[386] Hughes 2012, p. 13. He states that the first may be seen as misappropriation, but the second "definitely does not".

will follow in section 2.4. In any case, misappropriation and misrepresentation often seem to be connected to power, politics, majority-minority situations and ancillary differences of perspective.

Commercialisation

The third category of appropriation is 'unauthorised' or 'unfair' commercialisation. The commercial element was already more or less present in the earlier categories, as third party appropriation of TCEs mostly takes place for commercial reasons. The goal of commercialising TCEs is to exploit them and make profit from the use of this kind of material. Another term that could be used to describe the activities of this category is 'commodification' or 'commoditisation'. What happens in the process of commercialising TCEs is that elements of indigenous culture or TCEs are turned into commodities, so into products to sell.[387] TCEs are then used in extra-traditional manifestations and contexts.[388]

As previously mentioned, globalisation and growing interest in (manifestations of) indigenous cultures play a part in incentives to commercialise TCEs as valuable assets, which has accelerated the need for some form of control.[389] Many industries are interested in bits and pieces of traditional culture, ranging from numerous kinds of product and culture industries to drug and medicine companies. In the United States, for example, it has been argued that commodification of Indian culture is widespread throughout American society and "basically a part" of it. Such commercial uses range from use of Indian names, symbols and designs as trademarks and advertising slogans, to the context of sports and mascots, and to practices of "spiritual enlightenment".[390] Indeed, such "commodified caricatures of Indians" are said to be "big business".[391] In contrast, there are also concerns about oversimplification of the issue and making "sweeping, often unsupported claims" about the number of occurrences, the gravity of misappropriation and the value of TCEs.[392]

What this comes down to is, once again, a case of control and the unfairness resulting from reproduction for commercial gain without authorisation or permission. Indigenous peoples are (often) not remunerated,[393] which is where appropriation and commercialisation give the impression of theft, free-riding and capitalising on indigenous culture and knowledge.[394] A development worth mentioning is the one that has taken place in the context of biodiversity. In this field, there has been a focus on the concepts of access and benefit-sharing. These concepts were first laid down in the Convention on Biological Diversity in 1992, and elaborated on in the (voluntary) Nagoya Protocol of 2010 on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, a supplementary agreement to this Convention. This Protocol pays specific attention to indigenous peoples, starting with noting UNDRIP in the preamble. Traditional knowledge held by indigenous peoples can be accessed only with their prior and informed consent.[395] Fair and equitable benefit-sharing is provided for in Article 5(2) of the Protocol, which states the requirement for measures to ensure that indigenous communities share in the benefits of the utilisation of their

[387] Root 1996, p. 73.
[388] Haight Farley 1997, p. 8.
[389] Guttenplan Grant 2002, p. 294.
[390] Riley 2005, p. 76.
[391] Riley 2005, p. 76.
[392] Hughes 2012, p. 14. However, see for a contrasting view, Carpenter, Katyal & Riley 2010, p. 581.
[393] Haight Farley 1997, p. 8.
[394] See again the Twilight example of Carpenter, Katyal & Riley 2010, p. 581 mentioned in a footnote above.
[395] Article 7 of the Protocol. See also Article 6(2) for genetic resources.

genetic resources. In other words, this regulation is an example of an approach to traditional knowledge protection that addresses control and remuneration issues.

2.4 Criticisms of TCE protection and countervailing interests

The protection of TCEs is not without its criticisms, and countervailing interests are often raised in the process. Indeed, the protection of TCEs inevitably has 'social costs'[396] and is likely to hamper other interests at stake. These 'social costs' could take the form of restriction of access to TCEs, a more limited public domain, which is most often stressed, restriction of the freedom of (artistic) expression and compromising of other countervailing interests. Each of these is explained below.

2.4.1 The public domain, commons and remix

Focus on the public domain is inherent in intellectual property-related discussions. All unprotected works and those no longer protected 'reside' in the public domain. These works can be used by artists or professionals and the public at large, and without them having to ask for permission. It reflects the balance between protection interests and wider societal interests of access to cultural and other material. In this sense, it plays an important role in society by forming what can be seen as a shared 'treasury' or 'collective memory' of works of culture. Protection of TCEs would take them out of the public domain, which becomes more limited as a result.

Whereas the concept of the public domain is deemed to play a positive role in the context of creativity and access to culture in 'Western' societies, this may not be the case for indigenous culture. These communities tend to have their own systems of rights in cultural expressions such as paintings,[397] and customary law and practice with their own specific approaches towards 'public' information,[398] classification of knowledge and procedures for sharing, rights and responsibilities and possessing of such knowledge.[399] This means that there are two systems at play – which are likely to be in tension with each other – with regard to the public availability[400] of information, or the "communal control and authorization of knowledge" and "social ownership."[401] However, only one of these is the dominant system. This means that knowledge that is regulated by non-dominant systems tends to be deemed unprotected and in the public domain. One commentator has even called the denial of claims of control over traditional knowledge under a dominant perspective of the public domain "scientia nullius"[402]: a justification for the expropriation and dispossession of knowledge. This is a wordplay on the *terra nullius* doctrine in the context of indigenous lands.[403]

The challenge, then, is to align public domain and indigenous interests. If we are to take indigenous rights seriously, a 'simple' argument of public domain interests against TCE protection should be considered as insufficient for overriding any protection claims.[404] This is especially the case as indigenous peoples tend to be marginalised communities and existing

[396] Bizer e.a. 2011, p. 115–116.
[397] Frow 1998, p. 42, specifically on rights in Yolngu culture.
[398] Sherman & Wiseman 2006, p. 271.
[399] Tobin 2001, p. 60.
[400] Frow 1998, p. 39.
[401] Frow 1998, p. 40. See Frow 1998, p. 42-45 specifically on Yolngu culture as an example.
[402] Van Caenegem 2002, p. 325, 328, 329.
[403] Van Caenegem 2002, p. 329. See also Tobin 2001, p. 55.
[404] Sherman & Wiseman 2006, p. 272.

legal frameworks have traditionally "fostered the historic expropriation of indigenous property".[405] It could be useful here to take a look over legal boundaries and include the concept of 'indigenous' as developed in human rights law in an attempt to formulate a legitimate delineation and limitation of the public domain in the context of traditional knowledge that goes beyond a merely "technically driven"[406] copyright perspective. Indigenous peoples are distinctly different from other groups in societies; their cultures tend to be under threat; they have a special attachment to their traditional lands; and are subject to subjugation, marginalization, dispossession, exclusion or discrimination due to differing cultures, ways of life and modes of production.[407]

We can generally assume, then, that communities that fulfil these kind of characteristics – especially when their cultures are under threat and they face marginalisation, discrimination and, essentially, cultural exploitation – have not intended to relinquish their control over the use, sharing or possessing[408] of the knowledge that is still maintained, developed and protected by them. This is only the result of applying a 'foreign' legal concept such as the public domain to it. Sharing is not even necessarily the core issue, but the (uncompensated) commodification and obtaining of IP rights are, as is the potential exclusion of source communities themselves from their own heritage. It would be useful to allow 'reconfiguration'[409] of the 'standard' understanding of the concept of the public domain in such a way that it takes account of the classification of knowledge in indigenous communities,[410] "supports and fosters, rather than undermines, Indigenous interests"[411] and respects their own systems of dividing rights of use and divulgation, to knowledge and of collective decision-making .[412] A pluriform, or differentiated,[413] perspective of 'the' public domain concept can help prevent that the dominant understanding hijacks the discussion to such an extent that there is no room for recognition of the legitimate interests and entitlements of indigenous peoples themselves.[414]

'The commons' represent shared resources, which can also include knowledge, art and cultural works. A knowledge or information commons attracted attention in the 1990s, rather suddenly and among a wide variety of scholars.[415] With the rise of the Internet and digital information, a connection was seen between this new information environment and other types of commons, such as natural resources, and related concepts, such as "congestion, free riding, conflict, overuse, and 'pollution'."[416] This "new shared territory of global distributed information" was identified to help address and understand the new, specific circumstances of the circulation of digital information.[417] The notion of *shared* resources is at odds with legal property claims of protection and exclusivity, which encompass the enclosure and privatisation of such resources. Instead, in the case of shared resources, their use would be

[405] Tobin 2001, p. 64. See also Sherman & Wiseman 2006, p. 272, stressing the need for "innovative proposals and a healthy disregard for existing legal tradition".
[406] Tobin 2001, p. 47-48.
[407] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 91–93.
[408] Tobin 2001, p. 64, p. 60.
[409] Sherman & Wiseman 2006, p. 272.
[410] Tobin 2001, p. 60.
[411] Sherman & Wiseman 2006, p. 272.
[412] See generally Frow 1998, p. 52.
[413] Van Caenegem 2002, p. 325.
[414] Tobin 2001, p. 55, 47.
[415] Hess & Ostrom 2007, p. 3, 5.
[416] Hess & Ostrom 2007, p. 4.
[417] Hess & Ostrom 2007, p. 4.

governed by common-pool resource institutions,[418] such as Creative Commons in the case of cultural works as an alternative to copyright's property approach of exclusive rights.

For a knowledge,[419] information or intellectual commons,[420] with the content being intangible, such resources are claimed to be "nonrivalrous" because of their inherent infinity.[421] There are no limits to their use. If one person or group uses such materials, this does not lead to competition with other persons or groups who want to use the same knowledge.[422] The same would go for much of the cultural commons: use of symbols or a ceremony by more than one community is not mutually exclusive.[423] However, indigenous peoples deny this, arguing that their sacred knowledge cannot flow elsewhere without facing damage.[424] This can be seen as a disconnect regarding the perception of concepts such as shared commons and non-rivalry between mainstream and certain indigenous societies. However, a commons approach is not without rules nor equivalent to unconditional access. Hess and Ostrom identify the design principles of robust common-pool resource institutions. These include clearly defined boundaries, rules that match local needs and conditions, the right of community members to devise their own rules respected by external authorities and the availability of a graduated system of sanctions.[425] In this sense, both indigenous peoples' customary laws that govern sharing and access and alternative approaches of labels, licences and protocols can be qualified as a sort of 'TK/TCE common-pool resource governance' for indigenous and local communities' knowledge. In other words, a knowledge commons approach is not at odds with indigenous peoples' customary structures *per se*.

The concept of remix is connected to a shared commons. It draws on borrowing from existing sources to create new works. To enable such remix, the wide availability of public domain materials is necessary.[426] Proponents of this way of borrowing and creating new works are opposed to enclosure of the commons.[427] Threats of shielding information and knowledge from such practices would "[include] computer code as law (…) and new intellectual property legislation (…)".[428]Analogously, protection of TCEs could enclose the commons in a similar way. For indigenous peoples, the concept of the public domain is problematic as it presumes their knowledge to be "a freely available resource".[429] This shows a differing understanding

[418] Hess & Ostrom 2007, p. 7.
[419] Hess & Ostrom 2007, p. 3–4.
[420] Brown 2003, p. 5.
[421] Brown 2003, p. 5.
[422] Brown 2003, p. 5. For the concept of 'non-rivalry' he refers to Lawrence Lessig's qualification. See also Hess & Ostrom 2007, p. 9.
[423] Brown 2003, p. 5.
[424] Brown 2003, p. 5–6.
[425] Hess & Ostrom 2007, p. 7. Other design principles include: "Individuals affected by these rules can usually participate in modifying the rules"; "A system for self-monitoring members' behavior has been established"; "Community members have access to low-cost conflict-resolution mechanisms"; and "Nested enterprises—that is, appropriation, provision, monitoring and sanctioning, conflict resolution, and other governance activities—are organized in a nested structure with multiple layers of activities."
[426] See for example Lessig 2006, p. 16 on '(re)creativity': "By 'remix', I mean a very familiar idea. We begin with some creative work – work which some author produced by mixing bits of culture and his own creativity together. That work is then remixed by others, through the addition of other creative work, or even through simple criticism of that work. This is remix. And in this sense, life is remix. In this sense, culture is remix. Knowledge is remix. Politics is remix. Remix is how we create. Remix is how we recreate. Remix is how we are human, and how we as humans make culture."
[427] Brown 2003, p. 237.
[428] Hess & Ostrom 2007, p. 12–13.
[429] Brown 2003, p. 237.

of the favourability of a wide availability of 'remixable' material, and a differing understanding of how works are or ought to be created.

2.4.2 Freedom of (artistic) expression

When a system of rights limits the use of certain materials, the human right to freedom of expression comes into play. The tension with free (artistic) expression is typical of the nature of intellectual property's exclusive rights. The possibility for others than the rights holder to use the content is limited, which results in a restriction of their freedom of expression. This tension also plays a role in the context of cultural appropriation, the arts and ethics. In this context in particular, a disconnect is visible between the interests of artists and their freedom of artistic expression on the one hand, and the interests of indigenous peoples to not have their art works appropriated by outsiders on the other hand. This section looks more closely at (artistic) freedom of expression in the context of cultural appropriation, both from a moral and a legal point of view.

In the context of cultural appropriation, it has been claimed that "the free expression of one's values and beliefs, even when they are offensive, has a special moral status".[430] Furthermore, creating a work of art is supposedly often "a privileged form of expression", as it is of importance for "an individual's self-realization".[431] This resonates with the self-fulfillment theory underlying the right to freedom of speech.[432] When this freedom "to say and write, or (…) to hear and read" is restricted, humans' personalities and their growth are hindered.[433] Furthermore, acts of appropriation may be offensive to some people, but not morally wrong. Something similar has been noted in legal jurisprudence. It has repeatedly been stressed that freedom of expression does not only apply to ""information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference," but that expressions that "offend, shock or disturb" are protected as well.[434] The rationale behind this conception is that pluralism, tolerance and broadmindedness are important, even foundational, values in democratic society.[435]

The offensiveness of an act of cultural appropriation may also be counterbalanced by the social value of that act, such as its aesthetic value.[436] For example, a work of art or a piece of music that incorporates a sacred cultural element from another culture may be such a great work of art that its aesthetic value and the aesthetic enjoyment of many outweigh the offensiveness that it causes.[437] This could be linked to the right to receive information,[438] enabling citizens to inform themselves, take note of and engage with different ideas and in that sense educate themselves to form their own opinions.

[430] Young 2008, p. 138.
[431] Young 2008, p. 139.
[432] Barendt 2005, p. 13.
[433] Barendt 2005, p. 13.
[434] This was laid down in ECtHR 7 December 1976, Application no. 5493/72 (*Handyside v UK*), par. 49, which has been repeated many times since this decision.
[435] ECtHR 7 December 1976, Application no. 5493/72 (*Handyside v UK*), par. 49.
[436] Young 2008, p. 136.
[437] Young 1994, p. 421; Young 2008, p. 137.
[438] Article 10 of the European Convention on Human Rights states for example: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (…)"

Works of art that are offensive and have little or no aesthetic value could be argued to have no counterbalance, so in that case the artist may have acted wrongfully.[439] What is more, profoundly offensive use of, for example, racial slurs cannot rely on any counterbalancing value as it is considered plainly wrong.[440] Artists whose only intention is to gratuitously offend[441] or appropriate for monetary reasons, may give up their artistic privilege and act wrongfully, respectively.[442] Something similar is reflected in the legal perspective on freedom of expression: offensive speech that is discriminatory or that, for example, denies the Holocaust is never protected.[443] Here, the moral and legal perspectives of freedom of expression are fully synchronised.

To exercise the right to freedom of expression, including by artists, comes with duties and responsibilities. One such responsibility could be, for example, that the source of the content should be acknowledged in case of appropriation from "a disadvantaged minority culture."[444] Furthermore, another responsibility could be that artists need to be as careful and respectful as possible when engaging in cultural appropriation and avoid unnecessary offence.[445] This could apply especially in the case of appropriation from disadvantaged minority cultures, as such communities would often be very sensitive to additional acts that bring harm to their dignity.[446] To act in accordance with certain responsibilities is also legally required. It is laid down in both Article 19(3) ICCPR and Article 10(2) of the European Convention on Human Rights and in jurisprudence that the right to freedom of expression brings with it such responsibilities. The European Court of Human Rights stated for example the following on responsibilities in its *Otto-Preminger* decision:

> "Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."[447]

On the other hand, the Court has stated in this same decision that people who exercise their freedom of religion, either in a majority or minority position, cannot expect to be immune to all criticism. They must tolerate and accept denial or opposition to their religious beliefs and doctrines. At the same time, in situations where the peaceful enjoyment of religion is compromised and where tolerance, a particular feature of democratic societies, is jeopardised, states may be under a responsibility to take measures in light of respect for the religious

[439] Young 2008, p. 137.
[440] Young 2008, p. 136.
[441] See on the obligation to avoid as far as possible expressions that are gratuitously offensive: ECtHR 20 September 1994, Application no. 13470/87 (*Otto-Preminger-Institut v Austria*), par. 49; ECtHR 25 November 1996, Application no. 17419/90 (*Wingrove v The United Kingdom*), par. 52; ECtHR 4 December 2003, Application no. 35071/97 (*Gündüz v Turkey*), par. 37; ECtHR 31 January 2006, Application no. 64016/00 (*Giniewski v France*), par. 43.
[442] Young 2008, p. 140.
[443] See on the latter for example ECtHR 24 June 2003, Application no. 65831/01 (*Garaudy v France*), par. 1: "The Court has held, among other things, that "[t]here is no doubt that, like any other remark directed against the Convention's underlying values ..., the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10" and that there is a "category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17"."
[444] Young 2008, p. 140.
[445] Young 1994, p. 421; Young 2008, p. 140–141.
[446] Young 2008, p. 140–141.
[447] ECtHR 20 September 1994, Application no. 13470/87 (*Otto-Preminger-Institut v Austria*), par. 49.

feelings of believers. Freedom of expression must still be read in light of the European Convention on Human Rights as a whole.[448] In such situations, like for indigenous appropriation overall, the rights and responsibilities of and respect for the position of all parties involved are to be balanced.

2.4.3 General: protection of TCEs and countervailing interests

Following the foregoing discussion of the two specific issues that inform the main points of criticism of TCE protection, this section further elaborates on the notion of 'countervailing interests' that arise in the context of TCE protection. Of course, specific rules for a particular group in society or claims to exclusivity of certain materials will have an effect on other groups and interests. This section addresses such effects and the various interests that are at stake. The countervailing interests potentially affected by TCE protection that are distinguished are those of:

- society as a whole, either international or national;
- other (indigenous) communities;
- interests of individuals outside the community; and
- interests of individuals inside the community.

These countervailing interests are explained in this section, and specifically their manifestations in the context of copyright law, cultural heritage law and human rights law. For visualisation purposes, when summarised in a table, countervailing interests with regard to TCE protection would look as follows:

Other interests at stake ↓ / Legal mechanism →	**Copyright law(-like)**	**Cultural heritage law**	**Human rights law**
Society as a whole (international or national)	Public domain, new creations, innovation, 'standing on the shoulders of giants'.	'Heritage of all mankind', universality principle and cultural internationalism. 'National identity', cultural nationalism.	Universal human rights versus cultural relativism critique; traditional practices that violate universal human rights law.
Other (indigenous) communities	More than one community claim the cultural expressions (control, 'ownership'-like claims).	More than one community claim the cultural expressions (control, identity, assigning of meaning).	More than one community claim the cultural expressions (control, self-determination).
Interests of individuals outside the community	Individual(s) (artists) outside the group that are prevented from using the TCEs, 'voice appropriation'.	Interests of individuals outside the community in access to the heritage in question.	Freedom of (artistic) expression of outside individuals.
Interests of individuals within the community	Individual(s) (artists) inside the group that are limited by 'group rights' or rights of specific persons/care takers to authorise use.	Interests of individuals inside the community in access to the heritage in question.	Rights of 'minorities within minorities', for example women, or individual's right to freedom of (artistic) expression limited by group rights to TCEs.

Table 1 An overview of other interests at stake in TCE protection, sorted by legal area.

Any protection regime or set of rules for TCEs will have to take account of other interests that might be affected or that are otherwise involved in the matter. Balancing interests is a general notion in such areas as intellectual property and human rights law. Cultural heritage law could

[448] ECtHR 20 September 1994, Application no. 13470/87 (*Otto-Preminger-Institut v Austria*), par. 47.

also lead to potentially conflicting interests – for example between nation states, international society as a whole and indigenous societies – and a corresponding need for a balance. These areas of law, comprising the legal tripartite that will be analysed in the rest of the thesis, are discussed in turn below. In addition to these three legal areas where interests are likely to compete, there are two other areas where countervailing interests play a role as well. These are customary laws and geographically determined interests. 'Geographically determined interests' that compete are to some extent also interwoven in the table under 'other (indigenous) communities'. They are elaborated on in a separate subsection a bit further on, because they are a clear example of the difficulties that can arise from protection claims. Customary laws are another example of 'breeding grounds' for countervailing interests, both within and outside indigenous communities.

Copyright law

Copyright law has built-in recognitions of the multiple interests at stake: the rights may give right holders exclusivity over their creation, but there are a number of potential exceptions and limitations to these rights. This means that the rights are not absolute. The European Infosoc Directive,[449] for example, contains a list of exceptions and limitations to copyright that Member States can implement. This list includes such activities as the use of copyright works for educational purposes. However, when applying these exceptions and limitations, again a balance has to be struck in order not to disproportionately affect the interests of the right holder. This takes place through the so-called 'three-step test'. The three-step test is laid down in Article 9(2) of the Berne Convention, and stipulates that exceptions and limitations only apply in certain special cases, which do not thwart normal exploitation of the work, and do not unreasonably harm the right holder's legitimate interests. Article 5(5) of the Infosoc Directive echoes this requirement. Together, copyright law's limitations and exceptions and the three-step test recognise other interests that are at stake in the context of protection and use of the works in question. It is therefore a central feature of copyright law that the interests of right holders and those of other users have to be balanced.

One of the values that underlies copyright protection is stimulation of new creation. This is connected to the importance of the public domain and the value of artistic freedom. Innovation is greatly valued in intellectual property law. Protection of TCEs would then imply social costs,[450] diminishing the possibility of using existing works, to 'stand on the shoulders of giants' and thus the interests of those other than the rights holder and society as a whole. However, the foregoing does not imply that innovation is not valued in indigenous societies. Burfitt and Heathcote identify innovation as an issue that could be part of a valuation model for cultural property, defining it as "the dynamic and evolutionary nature of cultural property (not merely historical or in the past)".[451] This is connected to the increasing recognition of indigenous society's dynamic rather than static nature. Innovation can here be understood as communities' ongoing interaction with their lands, or "place based innovation".[452] The Tulalip Tribes of Washington state, for example, that motivation for indigenous innovations stems from expressing "a deep interrelationship between tribal members, their Creator and

[449] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, available via http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF.
[450] Bizer e.a. 2011, p. 115–116.
[451] Burfitt & Heathcote 2014, p. 384.
[452] Burfitt & Heathcote 2014, p. 386.

their homelands."[453] Innovation and protection of indigenous peoples' TCEs are thus not mutually exclusive objectives, nor do they reflect opposing values.

TCE protection and other interests at stake

The examples mentioned above point to the potentially competing interests of indigenous societies and of society as a whole with regard to TCE protection, as well as individual (artistic) interests outside and inside the community. These interests relate to the values of the public domain, the flow of information and knowledge, and free (artistic) expression.[454] For example, in the case of individual interests outside the community, this regards such issues as 'voice appropriation', which was discussed in section 2.2.3.[455] Also, individuals inside the community can be hampered by copyright-like group rights, or rights of certain persons or caretakers who can authorise use or not.

Cultural heritage law

One example that illustrates competing interests in cultural heritage law is the distinction between the notions of cultural nationalism and cultural internationalism,[456] which will be further developed in Chapter 4. In short, this dichotomy reflects the distinction between national and international interests in cultural heritage (protection). To view cultural property as part of national heritage suggests specific interests for nations in such heritage and a "national character" of that heritage.[457] These interests often result, for example, in national wishes to regulate the export of national heritage or claim repatriation.[458] Many national governments consider objects that reside within their jurisdiction as 'national cultural heritage', and export is limited through national laws which are backed up by international agreements.[459] The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property reflects this perception.[460] On the other hand, cultural property can also be viewed as "components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction."[461] Under this perception, it is presumed that "everyone has an interest in the preservation and enjoyment of cultural property, wherever it is situated, from whatever cultural or geographic source it derives."[462] This universality principle is, for example, stressed in the preamble of the 1954 The Hague Convention for the Protection of Cultural Property. Clearly, these are two very different views of and interests in cultural heritage.

The question then arises how this relates to indigenous cultural heritage. While certain cultural property may, for example, be seen as 'common heritage of all mankind' or if a national state views certain heritage as national heritage, indigenous communities may argue

[453] Tulalip Tribes Of Washington 2003, p. 4.
[454] Young 1994, p. 421.
[455] Young 1994, p. 421.
[456] Merryman 1986 and Merryman 2005 on cultural internationalism. Note that this concerns objects, rather than expressions. Still, the concepts provide an illustration of the potential mix of interests involved in the issue of protecting cultural heritage, be it cultural property or expressions of culture.
[457] Merryman 1986, p. 832.
[458] Merryman 1986, p. 832.
[459] Merryman 1986, p. 832.
[460] Merryman 1986, p. 832–833.
[461] Merryman 1986, p. 831.
[462] Merryman 2005, p. 11.

that it is in fact *their* heritage. In a tourism context, indigenous cultures are for example often presented as something national. Root mentions the example of British Columbia: "[T]he British Columbia tourist office recognizes that Native arts and cultures are one of the province's prime selling points, after scenery, of course, and it comes as no surprise that in tourist advertisements Native cultures appear as an integral part of the natural beauty of the landscape."[463] Furthermore, this leads to "[t]he traditional design forms [are] considered by many non-Natives to be part of the broader, universal, but ultimately white heritage of British Columbia and so available for appropriation. These designs appear all over public buildings in Vancouver and Victoria (and in Seattle, Portland, and Anchorage) as a way of symbolizing the regional character of the area."[464] In other words, a clear tension is visible here with regard to claims to the heritage, interests in deciding on meaning and the identity-building role of cultural heritage.

To a certain extent, the interests or values that are put forward by both 'sides' may be comparable. For example, the importance of safeguarding and preservation of the heritage in question may be advocated for by both the international society and the indigenous people concerned. And preventing export, claiming restitution and stressing the importance of cultural heritage for either the national or a people's identity could be arguments put forward by both national states and indigenous communities. On the other hand, however, exhibiting cultural heritage for the enjoyment or education of the general public may not be compatible with indigenous interests of privacy and restricted access, especially if it concerns ceremonial and spiritual heritage. And to understand cultural heritage as static relics from the past is also incompatible with indigenous peoples' view of the dynamic and living nature of their cultural heritage. So, the various interests that are at stake with regard to cultural heritage clearly have potential for competition and diverging views and arguments.

TCE protection and other interests at stake

Competing interests in a cultural heritage context seem to lie mainly in the sphere of identity-related issues, the assigning of meaning and claims of control. Interests that may compete are then likely to be found between indigenous, national and international societies. These interests can be called cultural 'indigenous community-ism', cultural nationalism and cultural internationalism, respectively. Furthermore, one can also imagine competing interests among indigenous communities relating to the question of who can claim control of the heritage. Again, claims to the heritage in question will likely be styled on the basis of identity and the assigning of meaning. More on competing indigenous interests follows in section 2.5 of this chapter.

With regard to individual interests, the UN independent expert in the field of cultural rights, Farida Shaheed, argues in her Report on cultural heritage that there is, in fact, a human right of access to cultural heritage. She also refers to General Comment No. 21 of the CESCR on Article 15(1)(a) ICESCR, in which the Committee states that: "The obligation to respect [the right] includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group d) To have access to their own cultural and linguistic heritage *and to that of others* [italics added."[465] Of course, interests of individuals claiming access to indigenous heritage can conflict with customary rules of specific communities that determine conditions for use and,

[463] Root 1996, p. 67-68.
[464] Root 1996, p. 67–68.
[465] Shaheed 2011, p. 3, 11, and CESCR General Comment No. 21, p. 12.

indeed, access. It is clear that there are many potentially conflicting interests involved in TCE protection from a cultural heritage perspective.

Human rights law

In human rights law, several rights can compete when they are being exercised. In such cases a balance has to be struck in order to decide which right prevails in the given circumstances. Importantly, Article 5 of the 1993 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, stipulates that all human rights are universal, indivisible and interdependent and interrelated.[466] The European Court of Human Rights has also repeatedly held that there is no right that automatically prevails, often in cases that involve the right to freedom of expression and another right, such as the right to freedom of religion. A case in which the European Court clearly balances the interests involved is *Sunday Times v. the United Kingdom*. The Court held that the public interest in freedom of expression outweighed the "authority and impartiality of the judiciary" as safeguarded by Article 6 ECHR in the context of publication of a newspaper article concerning an ongoing court case. That is: "the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression." The measures that were taken were "not necessary in a democratic society for maintaining the authority of the judiciary".[467] In the case of TCE protection, the enjoyment by indigenous peoples of their human rights such as (cultural) self-determination could limit the freedom of (artistic) expression of another person when this amounts to exclusion of access of others to their heritage. The question then arises of how such competing rights are to be balanced.

Another possibility is competition between the human rights of indigenous peoples among themselves. What can be thought of here is the exercise of the – individual[468] - cultural rights of the majority versus for example women's rights or the right to free expression. A general case law example dealing with individual and collective rights is *Lovelace v. Canada*. Lovelace, a Maliseet Indian woman, lost her rights and status as an Indian following her marriage to a non-Indian man on the basis of the Indian Act. For an Indian man marrying a non-Indian woman, this would not have been the case. After the end of her marriage, Lovelace wished to return to reside on the Reserve, but she was denied this legal right. Lovelace claimed discrimination on the ground of sex and a violation, amongst others, of Article 27 ICCPR which safeguards the rights of minorities, including to their languages and ways of life. The Human Right Committee held that "the right of Sandra Lovelace to access to her native culture and language "in community with the other members" of her group, has in fact been, and continues to be interfered with", and "to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant."[469] In other words, the exercise of (cultural) human rights can clearly give rise to competing interests within indigenous communities.

One of the objections to collective rights is the potential risk they pose for the rights of weaker members or 'minorities within minorities'. However, the current understanding of

[466] The full provision reads: "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."
[467] ECtHR 26 April 1979, Application No. 6538/74 (*The Sunday Times v UK*), par. 65-67.
[468] One can think of rights relating to freedom of religion.
[469] Lovelace v. Canada 1981, par. 15 and 17.

human rights is that they have an individual nature, which reduces the potential threat. While individual human rights may have a collective dimension and, for example, can only be fully enjoyed collectively, they are not actually collective, which reduces the chance of individual human rights being overpowered.[470] On the other hand, rights to TCEs are often argued to be collective rights. This means that, in such circumstances, caution is warranted when analysing the potential friction between individual and collective rights.

TCE protection and other interests at stake

There are various scenarios of potential competing interests in the context of TCE protection from a human rights perspective. Possible areas of friction between indigenous interests in TCE protection and interests of general society include, for example, the tensions following from conceptions of human rights as universally applicable norms and specific traditional cultural practices that, arguably, violate universal human rights law. More on this will follow in Chapter 5, sections 5.2.2 and 5.2.3, but an example of such tensions occurs in the case of protection of traditional cultural practices that are not recognised or considered impermissible under a universal understanding of human rights law, with their Western origin and perspective. In case of the latter, individual interests within a community that are universally agreed upon as being protected, such as for example safeguarded by women's rights or non-discrimination, can be in tension with what the community perceives as their cultural interests, for example regarding heritage or traditional practices. A cultural relativist perspective might accept such rights, but would reject the classification certain cultural practices as violations of those rights.[471]

What could help bring these interests together is to 'improve' universality,[472] for example through 'localising' human rights[473] and looking beyond uniformity,[474] such as by promoting inclusive universality[475] and accommodating diversity through flexibility or transformation of human rights.[476] This means that the concrete aspects and context of specific situations are important to take on board.[477] While a perspective of diversity is something to be celebrated, gross human rights violations should not be tolerated.[478] Something similar is underlined in the realm of intangible cultural heritage. UNESCO's 2003 Intangible Cultural Heritage Convention contains a built-in safeguard in Article 2(1), which states that the identification of intangible cultural heritage to be protected by communities must be compatible with international human rights law and with mutual respect between communities, groups and individual members.[479]

Other individual interests, both inside and outside the community, that may be hampered by TCE protection are tied to the exercise of the right to freedom of expression. And other communities' human rights interests that are at stake include, for example, competing claims

[470] Graber 2007, p. 66–67.
[471] Brems 1997, p. 144.
[472] Brems 2001, p. 511.
[473] De Feyter 2006, p. 5 and further.
[474] Brems 1997, p. 164; Brems & Desmet 2016, p. 1.
[475] Brems 1997, p. 153 and further; generally Brems 2001; Brems 2003, p. 153-161; Brems & Desmet 2016, p. 15.
[476] Brems 1997, p. 146, 154, 158, 159; Brems 2001, p. 495 and further; Brems 2003, p. 155-160.
[477] Brems & Desmet 2016, p. 6-11, p. 15.
[478] See also Brems 2001, p. 338 and p. 322, excluding gross human rights violations that attack the core of human rights from particularities; Brems & Desmet 2016, p. 8-9; De Feyter 2006, p. 9.
[479] Forrest 2010, p. 367 and 372.

of control and self-determination with regard to the heritage in question. Clearly, TCE protection is a complex topic from the perspective of the various interests – and human rights – that can be involved.

Customary laws

The role of customary laws in the production and dissemination of traditional culture in indigenous societies is a specific characteristic in the context of traditional knowledge and TCE protection that relates to the various interests at stake. Indeed, these specific rules govern the interests involved in indigenous art production in their respective source communities. Customary rules and traditional systems of law can, for example, contain specific rules regarding the persons that may reproduce a work of art, the circumstances in which this may take place, or even who may view a work of art. Furthermore, stories, rules and laws of a specific society are often laid down in such works of art.[480] We have already seen that, for example, notions of ownership in indigenous societies differ greatly from dominant understandings. Importing and applying alien ownership systems to TCEs may be incompatible with traditional cultural production of works of art and misrepresent and transform it.[481] This shows the potential competition between interests under customary laws and interests outside indigenous societies and, thus, outside the reach of these rules.

These competing interests are reflected especially in various values and notions that play a significant role in mainstream society vis-à-vis indigenous societies. Ownership is an example of a value that is strongly incorporated in Western legal systems, while this is not necessarily the case in indigenous systems or, at least, its understanding differs significantly.[482] However, authority and innovation of individuals are examples of notions that are also considered important in indigenous societies. This is where customary laws and values that govern cultural production in indigenous societies play a role. Production authority is determined via these customs. Indonesian artists, for example, point to traditions and ancestors' spirits as sources of inspiration, knowledge access and authority.[483] Riley therefore argues that a tiered system of laws — international, national and tribal — should be applied to achieve the best protection for indigenous peoples' cultural property. Tribal law in particular would be crucial, because it is tailored specifically to communities' own cultures and normative framework and reflects each community's particular characteristics.[484] This is connected to indigenous peoples' self-determination and sovereignty interests. To include tribal law in the protection discussion enables them to control and determine how their cultures interact with the increasingly technological world.[485] This could also help bridge the various competing interests in mainstream laws and societies on the one hand and their indigenous counterparts on the other.

The situation in Indonesia illustrates the multiple interests that are involved on the international, national and community level. Aragon, who has conducted a study on the traditional arts in Indonesia with a team of lawyers, anthropologists and musicologists,

[480] Schreiner 2013.
[481] Aragon 2012, p. 402.
[482] Aragon 2012 and Torsen Stech 2014.
[483] Aragon 2012, p. 404. See also on p. 408: "The contrast highlights the different views of production authority between Euro-American lawyers or the Indonesian state and many cultural practitioners."
[484] Riley 2005, p. 73. She further states: "Tribal cultures are not all alike; tribal laws reflect a tribe's economic system, cultural beliefs, and sensitive sacred knowledge in nuanced ways that top-down national and international regimes simply cannot."
[485] Riley 2005, p. 74.

describes an example of the multi-layered interests in Indonesian society.[486] Indonesian authorities, for example, fear that 'their' national cultural property will acquire the status of open access commons and thus be open to foreign IP claims. But the laws that they issue as a result of this fear raise concerns amongst traditional artists as to whether they will still be able to have customary access to their community's heritage.[487] In such a situation, national and indigenous interests compete, as do national laws and customary laws.

Geographically determined competing interests

Competing interests and claims between (indigenous) communities, apart from outsider third parties' interests, tend to be geographically determined. To make it even more complex, state or national interests and claims over the heritage can be involved as well, as we have already seen. Indonesia and Southeast Asia are prime examples here. Aragon notes that, in this region, hundreds of years of migration and blending through, for example, marriages have led to 'untidy' categories of 'the Javanese', 'the Balinese' and many others. As a consequence, not only people but also the arts have spread and intertwined.[488] Culture is not easily captured in lists and categories, and groups can be equally unsteady and span across borders.[489] This can lead to competing claims of identity.[490]

Connected to this is the difficulty that may arise regarding identification of knowledge holders, whether indigenous or local communities. This becomes a complicated task in countries with multi-ethnic societies, that have known centuries of migration and ethnic interchange, including cultural borrowing and exchange, which is common in the Asian region. With the increasing recognition for heritage, traditional knowledge and cultural expressions, claims to specific parts thereof can give rise to disputes, both across borders and between groups.[491]

Aragon has mentioned the example of Indonesian claims that Malaysia had 'stolen' songs, Javanese batik, regional dances and recipes.[492] Indonesian media report many such intellectual and cultural property issues relating to "stolen culture".[493] Aragon argues that these "widespread fears of foreign cultural theft and 'the Malaysian Menace'" are not only a result of "an emerging Indonesian social movement foregrounding national unity based on what are actually local ethnic identities", but also lead to infliction of two types of property model on these arts, either individual or communal.[494] Such property models might not even fit with the reality of art production and relationships in Indonesia, which is described as "collaborative and custodial, rather than proprietary".[495] Such complex (regional) circumstances show the matrix of potentially competing inter-community interests in the context of traditional knowledge and TCEs.

[486] Aragon 2012, p. 411.
[487] Aragon 2012, p. 411: "As a Balinese dancer phrased it, 'The arts of Bali are part of our local cultural tradition … Imagine if our troupe wanted to perform an old work and had to ask permission of the state?'"
[488] Aragon 2012, p. 412.
[489] Aragon 2012, p. 402.
[490] Aragon 2012, p. 402.
[491] See on the foregoing specifics of the Asia-Pacific region Antons 2010, p. 44–46.
[492] Aragon 2012, p. 400.
[493] Aragon 2012, p. 399–400.
[494] Aragon 2012, p. 400.
[495] Aragon 2012, p. 401-402.

Although indigenous communities may have many shared interests and rights struggles amongst themselves, there are also situations that give rise to significant geographical differences, including with regard to the form and degree of TCE protection they strive for. Several circumstances, such as their societal structures, cultures and levels of integration within states, may determine which and how much protection and safeguarding they wish for their TCEs.[496] For example, Aboriginal art is often highly spiritual, which means that a high level of protection, or 'cultural privacy', is required. For Indonesian artists, however, (mis)use of sacred or secret material is apparently not necessarily a concern as such.[497] The desired level of protection may also vary per community depending on the end to which TCEs are used, for example educational or profit-oriented use.[498] These different nuances show the complexity of the various viewpoints, interests and claims that are involved in the debate even on a community level, which further complicates the question of TCE protection from a 'general' perspective.

2.4.4 Conclusion

As shown in this section, the protection of TCEs concerns a multitude of interests of the various stakeholders and varying perspectives of the legal areas involved. This makes the protection question extra complex. The multi-faceted nature of TCEs and the differences between indigenous peoples themselves already complicate the discussion. But as the previous sections show, a mix of national interests and interests of all mankind, individuals and indigenous communities with regard to TCE protection further complicate matters. In addition, the various legal areas each have a different take on the rationales, objectives and interests they address.

As this thesis aims to set out the complexity of the issue, the next section will map protection arguments and interests that have arisen in the emergence of the protection debate in the various legal spheres, as well as those identified in academic literature on the topic of TCE protection and by indigenous peoples themselves, in statements and at international fora. For the three legal chapters that follow, which scrutinise the rationales and principles of each legal area from the perspective of TCE protection, these protection interests are used as a guide for analysis purposes.

2.5 Protection arguments and interests

The stages of emergence of the topic of TCE protection in the three legal areas[499] that were traced in section 2.2 reflect a number of specific arguments to protect indigenous peoples' rights and interests in general, and to protect TCEs in particular. The arguments identified for protection of TCEs can be summarised in three categories: an economic and development argument, a heritage argument and a human rights argument. Each of the protection arguments is primarily informed by one of the three legal regimes that form the legal framework and which will be further elaborated on in the next chapters of the thesis.

The structure of this section is as follows. The first sub-section categorises the protection interests that can be identified, as explained in more detail in sections 2.5.3 to 2.5.6, in the context of the different arguments that were raised for TCE protection during the emergence

[496] Torsen Stech 2014, p. 424.
[497] Jaszi 2009, p. 19–20.
[498] Torsen Stech 2014, p. 424.
[499] Namely: copyright law, cultural heritage law and human rights law.

of the topic on the international legal level. For illustrative purposes, the second section briefly lists other categorisation possibilities that are proposed in academic literature. Sections 2.5.3 to 2.5.6 identify the diversity of indigenous peoples' recurring protection interests, informed by the distinguished protection arguments. Section 2.5.7 closes with concluding thoughts.

2.5.1 Categorisation of indigenous peoples' protection interests

This section shows how indigenous peoples' interests in TCE protection can be categorised under the three arguments. These interests can be identified on the basis of sources such as indigenous peoples' declarations and statements at international institutions, academic studies and literature on the topic. This is detailed in sections 2.5.3 to 2.5.6. The interests that are selected, due to their recurring nature, are:

- economic interests of benefit-sharing;
- interests in control, for example through free, prior and informed consent (FPIC);
- interests in recognition of rights and distinctive cultures, including such features as attribution, distinctive identity, self-determination and sharing;
- moral interests of integrity and dignity;
- interests in protection for spiritual reasons, including secrecy; and
- interests in continuing traditions, including the maintenance and development of TCEs, preservation, practice and intergenerational transmission of culture (in other words, this interest points to a need for dynamic *preservation* and *promotion* of TCEs).

In a schematic overview, the categorisation of these interests under the protection arguments would look as follows:

Economic and development argument	Cultural heritage argument	Human rights argument
Benefit-sharing	**Control** (FPIC)	**Control** (FPIC)
Control (FPIC)	**Recognition** of distinctive cultures, including identity	**Recognition** of rights, such as self-determination
Recognition of economic and attribution claims	**Integrity and dignity**	**Integrity and dignity**
Continuation (sustainability)	**Spirituality**	**Spirituality**
	Continuation, preservation and intergenerational transmission (dynamic)	**Maintenance, practice and development**

Table 2 An overview of TCE protection interests, sorted by the legal arguments put forward in the emergence of the topic in the various legal areas.

Interests informed by each argument: free, prior informed consent, recognition and continuation.

Taken together, these interests reflect the main needs of: self-determination, participation and consultation with regard to (use of) TCEs.

Table 3 A summary of TCE protection interests.

In addition to this diversity of TCE protection arguments and interests, the rationales and principles for the rights or approaches of the various legal areas differ significantly as well. Each legal area targets specific objectives, depending on their specific subject matter and legal angle. As a consequence, the potential of each legal system to address the particular protection interests that indigenous peoples may have varies as well. Furthermore, some

protection interests even reflect opposite positions: protection of dissemination of TCEs for economic and benefit-sharing reasons and protection from any use or dissemination at all, for example for spiritual reasons, appear to be contradictory claims. The existence of such contrasting interests is in line with the wide diversity of indigenous communities in the first place and should give rise to caution in relation to generalising statements.

As the scheme shows, the interest in benefit-sharing is clearly informed by protection of TCEs following an economic and development argument, where traditional knowledge and TCEs are seen as valuable economic resources. Interests of indigenous peoples in maintaining the integrity of their TCEs and their human dignity in general, including for spiritual reasons, relate more to heritage and human rights arguments for TCE protection, including preservation, transmission to future generations and cultural rights. In other words, the issue of TCE protection consists of a diverse mix of arguments and interests.

There are also interests that seem to be commonly covered by each of the protection arguments. These are: prior informed consent, recognition and continuation interests. These interests cross the 'boundaries' of one specific legal approach or argument for TCE protection. Firstly, free, prior and informed consent is an interest that can be linked to all arguments as follows: depending on the specific argument, it encompasses an interest in control and a say over the (economic) use, safeguarding and maintenance and development of TCEs, respectively. Phrased differently, this interest incorporates notions of self-determination and participation with regard to all matters relating to the TCEs in question, be it from an economic, heritage or human rights perspective.

Recognition is also an overlapping interest. Recognition from an economic and development perspective would include recognition of economic claims and attribution to the source as a means of a control mechanism. From a heritage perspective, recognition would encompass the acknowledgement of the connection between specific TCEs and communities' identities for preservation purposes. Recognition from a human rights perspective would comprise acknowledgement of cultural self-determination. This includes the maintenance, development and sharing of TCEs by source communities on their own conditions. Taken together, the interest in recognition in the context of TCEs consists of acknowledgement of indigenous peoples' specific ways of life, worldviews and the implications thereof for the protection of TCEs.

Lastly, continuation is also a protection interest that is informed by each protection argument. When following an economic and development argument to protect TCEs, this would come down to an interest in maintaining and developing TCEs for economic reasons to contribute to sustainable continuation of community traditions. From a cultural heritage perspective, continuation implies safeguarding and preservation of TCEs for future generations, following cultural heritage law's inheritance, identity and living culture principles. According to a human rights argument for protection of TCEs, indigenous peoples' interest in continuation implies their ability to exercise their distinctive cultures and cultural practices as part of their ways of life if they so wish. In summary, the interests that are informed by each protection argument seem to reflect a set of main needs regarding the protection of TCEs, regardless of which argument is followed. These main needs are self-determination, participation and consultation with regard to all aspects of the heritage, traditional knowledge and cultural expressions, such as their (economic) use, safeguarding and development.

The scheme above shows the multi-faceted nature of TCEs. Such a nature is already visible in general cultural works, where cultural and economic interests are often intertwined. It seems especially strong for the particular characteristics of TCEs, where for example interests such as spirituality and intergenerational continuation of traditions are added to the mix. Because of this multi-faceted nature, the diversity of protection arguments and the variety of indigenous peoples' protection interests, it is not surprising that the relevant legal framework is fragmented from a TCE perspective.

2.5.2 Categorisation discourse: approaches in academic literature

There are various ways or methods to categorise the diverse protection concerns, interests and arguments involved in TCE protection. The previous section has explained the approach of this thesis. In the literature, other categorisation options have been proposed as well.[500] In other words, there is an entire discourse on categorisation of the multi-faceted interests that can be at stake when we talk about 'TCE protection'.

Frankel and Richardson, for example, have captured the main concerns of indigenous peoples in New Zealand and Australia under four categories of reasons to seek protection. These are 'cultural privacy', 'cultural publicity', 'cultural property' and 'maintaining guardianship of traditional culture as a whole'.[501] Greaves has 'allocated' the claims of American Indians to a right to culture into five main components. These include a right to perpetuate their traditional culture, a right to dignity and a right to restrict or condition outsiders' use of elements that are particular to their culture.[502] Furthermore, the final report on the fact-finding missions that WIPO's Intergovernmental Committee conducted on national experiences with legal protection of TCEs, has identified two main needs and concerns that traditional knowledge (TK) holders put forward. Roughly stated, these are economic and integrity protection interests.[503] And Frankel and Drahos summarise the aims for legislation on TK as addressing "conservation of TK", "misappropriation of TK", and "the facilitation of commercialisation of TK by TK holders themselves".[504] Another approach follows from the law and economics study of Hendriks, who has comparatively reviewed the protection of TK as reported by national states to WIPO.[505] She has distilled three approaches that national states have applied to the protection of TK, namely an economic empowerment approach, an approach of

[500] See for an extensive overview of the cultural issues that indigenous peoples face and their protection needs in this regard, amongst others with regard to their traditional cultural expressions, Kipuri 2009, p. 52–81, specifically p. 64 onwards.
[501] Frankel & Richardson 2009, p. 278. The sources for this categorisation include the Wai 262-claim, and evidence and arguments in the Bulun Bulun v. R & T Textiles (1998) and Foster v. Mountford and Rigby Ltd (1976) court cases.
[502] Greaves 2002, p. 123.
[503] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002, p. 13: "In general, the traditional knowledge ("TK") holders and their representatives consulted during the FFMs articulated two main sets of needs and concerns: (i) first, some wish to **benefit from the commercialization** of their cultural expressions. They wish for protection of their cultural expressions in order to be **compensated** for their creativity, and to **exclude** non-indigenous or non-traditional competitors from the market. This group may be said to desire **"positive protection"** of their cultural expressions; (ii) second, some are more concerned with the **cultural, social and psychological harm** caused by unauthorized use of their art. They wish to **control**, and even **prevent** altogether, the **use and dissemination** of their cultural expressions." (bold and underline added)
[504] Drahos & Frankel 2012, p. 191.
[505] Hendriks 2014.

preservative protection that focuses on identity and authenticity, and an approach of protecting the cultural integrity of sacred and historical culture.[506]

What all of these approaches, together with the one chosen in this thesis, primarily offer is a main division between distinctive categories of interests with elements of an economic, preservation and 'way of life' nature, respectively. This thesis can be positioned within this discourse by approaching TCE protection from the perspective of three protection arguments derived from the assessment of the emergence of the protection discussion in the three legal areas that will be central in the rest of this study. Each argument is described below, and examples of the various indigenous interests are categorised under these arguments.

Notably, these identified interests, summarised in the scheme above, are necessarily generalised interests. A *functional* selection has been made to represent the multi-faceted nature of the claims, reasons and justifications for protecting TCEs, to be used for the legal analysis in the rest of the thesis. As has been stressed before, because of the large number of indigenous peoples worldwide and their potentially limitless diversity of claims, it is not possible to include all of these in the research in an exhaustive way. Furthermore, this thesis is also not an empirical study or a study into indigenous peoples' protection interests as such. However, it is important to take note of and acknowledge these circumstances. Statements and declarations of indigenous peoples or their representatives that are included below will therefore serve as examples and illustrations of interests that can be considered to follow from generally shared experiences of indigenous peoples, and not as a complete or empirical overview in any sense.

Indigenous peoples' shared experiences are in fact acknowledged in the Mataatua Declaration. This is the outcome document of the First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, that was held in Aotearoa, New Zealand in 1993 and was attended by more than 150 delegates and indigenous representatives from fourteen countries. According to the Declaration: "[…] Indigenous Peoples have a commonality of experiences relating to the exploitation of their cultural and intellectual property".[507] Although protection interests and pressure points may vary by indigenous community and depending on local circumstances, these shared (historical) experiences enable a careful selection of shared examples of protection interests.

2.5.3 Economic and development argument

This argument for TCE protection is the most copyright-like in that it concerns control over the content that is comparable with copyright law's exclusive (economic) rights with regard to reproduction and dissemination to the public. Indigenous peoples' protection interests under this argument include benefit-sharing and prior informed consent. In other words, TCE protection in this sense would enable indigenous peoples to have control and a say over any use of their TCEs, and be compensated for such use by sharing in the benefits.

History and developments of the argument

The economic and development argument has been one of the first to appear in discussions on the protection of TCEs, or folklore. At least, this is primarily the case from an intellectual

[506] Hendriks 2014, from p. 54.
[507] See the Declaration, p. 2: http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/mataatua.pdf/.

property perspective. Even during the first developments with regard to protection of folklore, it was stressed, in the Brazzaville Report of 1963 for example, that folklore offered economic possibilities for African people.[508] Although its potential for social and cultural development was also acknowledged, the approach in this intellectual property context seemed mainly economically oriented and focused on the economic development of developing countries. Later on, influenced by the cooperation with UNESCO, folklore's significance as a people's cultural heritage and as part of their identity came to the forefront as well.

The first binding international convention, however, was not an intellectual property instrument, but concerned biological diversity. Its adoption was preceded by a newly arisen 'indigenous movement' and indigenous peoples' protection interests were therefore acknowledged.[509] Now, in an intellectual property context, WIPO aims to construct an internationally binding instrument for the protection of TCEs as well. Work on such a treaty by the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore commenced in 2001 and is still ongoing at this point. Intellectual property rights have a strong economic dimension, enabling creators to exploit their works. In other words, applying this specific approach to TCE protection inevitably colours arguments for protection as primarily economic ones.

Examples of protection interests informed by the argument

An economic and development argument for legal action to protect TCEs assumes that indigenous peoples have an economic interest in this protection, for example in the sense of benefit-sharing and the requirement of prior informed consent regarding any use of their TCEs. As stated earlier, due to their diversity indigenous peoples do not necessarily share all protection interests the same way. Haight Farley has made a distinction between two strands of control claims, i.e. claims of a 'realist group' and of a 'traditional group'. The realist group would want to control their TCEs to benefit economically from and be compensated for use of their TCEs. The traditional group would want to control their TCEs to prevent harm from unauthorised use and monitor their dissemination by either restricting and conditioning it or by preventing it altogether.[510]

The 1998 *Our Culture: Our Future Repor*t by Janke on *Australian Indigenous Cultural and Intellectual Property Rights* identifies a number of rights with an economic rationale that indigenous peoples in Australia would want to see recognised. An economic interest is for example reflected in the right to "authorise or refuse to authorise the commercial use of Indigenous Cultural and Intellectual Property according to Indigenous customary law", and especially in the right to "benefit commercially from the authorised use of Indigenous Cultural and Intellectual Property, including the right to negotiate terms of such usage".[511] In Jaszi's 2009 study *Traditional Culture: A Step Forward For Protection in Indonesia*, artists also put forward concerns of an economic nature, such as counterfeiting traditional art and misappropriation through unauthorised reproduction and distribution.[512] As these examples show, interests of indigenous peoples in benefit-sharing are clearly informed by an economic

[508] Ntahokaja 1963, p. 2 of Annex B.
[509] Perlman 2011, p. 120.
[510] Haight Farley 1997, p. 13–15.
[511] Janke 1998, p. XX-XXI.
[512] Jaszi 2009, p. 16–17. Although Jaszi notes that these concerns were brought up less than concerns regarding transmission to future generations and connecting to audiences.

development argument: they want control and protection in order to be able to exploit their heritage themselves or for their own benefit.

Another way to phrase economic interests such as benefit-sharing is in terms of economic self-determination and sustainability. This touches upon the (in)ability of indigenous peoples to determine economic development and heritage exploitation themselves. A representative of the Saami people of the North, for example, has argued with regard to indigenous needs that the ability to exercise greater control over their culture could help them financially through marketing their cultural items. This could enhance self-sufficiency and a truly self-determining position.[513] For the situation in Africa, a representative from the Indigenous Information Network has noted that Africa is the economically least developed continent, but that it is very rich in traditional knowledge, cultures and innovation.[514] Control over the use of their traditional creativity and innovation by others[515] could remedy misappropriation, and communities would be able to benefit for example from commercial exploitation of art and music.[516] Finally, a last example is the so-called 'Wai 262' claim on flora, fauna and cultural intellectual property by Māori before the Waitangi Tribunal. In this claim, the right to make decisions about and benefit from application, development, use, and sale of rātou taonga katoa under the Waitangi Treaty is stressed.[517] In sum, economic interests are often made up of such aspects as control, (economic) self-determination and sustainable continuation of traditions. In other words, these interests are often informed by an economic and development argument.

2.5.4 Heritage argument

A heritage argument for the protection of TCEs concerns such aspects as the safeguarding of meanings of the heritage in question, of communities' distinctive identities and of relationships between communities, their lands and cultural expressions. An interest in preservation is therefore central, including the ability to transmit TCEs to future generations. However, importantly, this interest reaches *beyond* static preservation. What is required, is protection to enable *dynamic* continuation of traditional cultural expressions to safeguard indigenous peoples' distinctive identities. This, in turn, contributes to the maintenance of cultural diversity. A heritage argument thus reflects sentiments of safe-keeping, but also of dynamism and continuation of traditions.

History and developments of the argument

As was shown above, cultural heritage protection in the context of the law of war dates back to ancient times.[518] The earliest consideration for protection of cultural heritage in armed conflicts regarded religious structures and institutions such as churches.[519] Furthermore, under the law of war, the importance of cultural property for people's identity, and therefore its immunity, was already recognised.[520] More modern initiatives concerning cultural property

[513] Åhrén 2005, p. 4.
[514] Mulenkei 2012, p. 2-3.
[515] According to Mulenkei, this control would for example be enabled when the knowledge would be recognised as protectable by intellectual property, Mulenkei 2013, p. 2-3.
[516] Mulenkei 2013, p. 2–3.
[517] Wai 262, p. 12, par. 1.2.33. See for the definition par. 1.2.31: "Ngāti Koata define "Me o rātou taonga katoa as including, without being limited to, mātauranga, … Māori cultural images, designs, symbols and associated indigenous, cultural and customary heritage rights in relation to such taonga."
[518] Forrest 2010, p. 64; Graham 1987, p. 755.
[519] Forrest 2010, p. 64.
[520] Graham 1987, p. 755.

arose from the Second World War onwards with a prime dichotomy between two principles, namely: a focus on interests of all mankind in the preservation of cultural heritage on the one hand,[521] and the acknowledgment that cultural heritage is inherent to the identity of the source of origin on the other.[522] In the case of the latter, loss of cultural property would constitute a loss of being.[523] *Intangible* cultural heritage protection and focus on cultural diversity are part of the most recent developments in this area. These developments stress for example the importance of folklore's historical *and* contemporary role for peoples[524] and the important role of indigenous communities for producing, safeguarding and maintaining intangible cultural heritage, which adds to and furthers cultural diversity and human creativity.[525] The historical background of the heritage argument clearly shows a development in perceptions of cultural heritage and reasons to protect this.

Examples of protection interests informed by the argument

Although the development of intangible cultural heritage seems most relevant for arguments to protect TCEs, earlier cultural property instruments can nevertheless reflect principles or values that might be useful as well. Indeed, ancient laws of war already recognised the need to protect religious sites and institutions. This suggests spiritual values behind cultural heritage protection. Furthermore, the various approaches and instruments for cultural heritage protection almost universally acknowledge the importance of culture, cultural heritage and cultural expressions for the identity of peoples. The principle of identity construction is one of the pillars of cultural heritage protection. More on this follows in Chapter 4.

Indigenous peoples' interests in protection of TCEs often also reflect the importance attached to spirituality and identity construction. Multiple statements, studies and presentations by indigenous peoples and their representatives stress the characteristic of their TCEs as identity builders.[526] A representative of the Saami Council, for example, explains that cultural elements are important to the Saami people because the essence of who Saami people are, is captured in art forms such as songs and dress. These evolve over time and therefore form references that state who the people, community and individuals are. Without cultural elements, history and identity would be lost, and the Saami people "will no longer exist as distinct people, separate from majority society."[527] The Indigenous World Association and Indigenous Media Network state in a joint statement that: "Our collective traditional knowledge is the very foundation of our cultures. It is indivisible from our identities and our laws, institutions, value systems and cosmovisions."[528] And according to Indian Movement Tupac Katari, destruction and loss of cultural and intellectual heritage that comprise indigenous worldviews means that indigenous peoples lose their "memory, soul and identity".[529] The foregoing shows the importance that is attached to TCEs as carriers of indigenous stories, worldviews and, ultimately, identity and a sense of being. In this sense, protection of TCEs takes on a cultural heritage dimension of safeguarding and preservation.

[521] See UNESCO's 1954 The Hague Convention for the Protection of Cultural Property.
[522] See UNESCO's 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
[523] Coleman 2005, p. 3.
[524] See UNESCO's 1989 Recommendation on Traditional Culture and Folklore.
[525] See UNESCO's 2003 Intangible Cultural Heritage Convention.
[526] See for example Janke 1998, p. 2.
[527] Åhrén 2005, p. 3.
[528] Indigenous World Association & Indigenous Media Network 2005, p. 2.
[529] Indian Movement Tupac Katari 2005, p. 3.

Another way of phrasing the importance of TCEs for indigenous peoples' identities is by the emphasis on relationships as a central feature. This also reflects interests in TCE protection for reasons of identity, inheritance and continuation. As stated by a representative from the Tulalip Tribes of Washington, the motivation for indigenous creativity and innovation stems more from their representation of an interrelationship between members, Creator and territory than from economic objectives.[530] Something similar has been noted by Daes in her often-cited 1993 *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*. She states: "(...) a song or a 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".[531] Another example is explained in the Key Themes document of the earlier mentioned 'Wai 262' claim. This document states that mātauranga Māori includes amongst other things cultural expressions and art, but "more fundamentally, it incorporated core Māori cultural values". For mātauranga Māori, the main principle of these values is 'whanaungatanga', kinship. This concept holds the key to "the intimate relationships between iwi and hapū and the natural world".[532] And finally, according to the Pauktuutit Women's Association, clothing and patterns, for example, express indigenous culture and identity. Because this heritage has lasted until the present day, it functions as a link to the past and to the traditional skills and role of women in Inuit society. Also, this heritage reflects the relationship between Inuit women and their children.[533] Therefore, misappropriation and loss of this type of heritage, which disturbs community relationships, raises concerns among indigenous peoples and forms an argument for protection of their TCEs to preserve meanings and relationships.

Another part of the heritage argument and the identity interest of indigenous peoples is the preservation of TCEs representing this distinctive identity and their transmission to future generations. This is, for example, a major concern for artists in Indonesia.[534] This concern is increasingly addressed through revitalisation programmes, aiming at promotion of traditional arts.[535] Education, documentation and initiatives involving young people in Indonesia contribute to intergenerational transmission and preservation of the arts. An example is the Çudamani company, which performs versions of traditional music and dance with new pieces that draw on traditions. Another example is the Palito Nyalo ensemble, a performance group that doubles as a "training institute for young artists".[536] Similarly, Bangarra Dance Theatre, Australia's leading indigenous performing arts company, claims to function as both "a creative producer and cultural agent". The performance group works closely with Aboriginal and Torres Strait Island elders in telling ancient and contemporary stories. It states that it "is committed to developing the next generation of Indigenous storytellers through mentoring and training young people", aiming "to inspire them in their role as future custodians of their

[530] Tulalip Tribes Of Washington 2003, p. 4.
[531] Daes 1993, p. 8.
[532] See the 'Key Themes' document of the Wai 262 claim, p. 1, available via: http://www.justice.govt.nz/tribunals/waitangi-tribunal/documents/generic-inquiries/flora-and-fauna/wai-262-key-themes. See for the concepts 'iwi' (tribe) and 'hapū' (clans or descent groups): http://www.teara.govt.nz/en/tribal-organisation/page-1.
[533] Bird 2012, p. 2.
[534] Jaszi 2009, p. 125 from p. 14. On p. 22, it is stated: "These recurrent concerns they expressed could be resolved, in substantial part, if policymakers, educators and business people were to recognize more fully the importance of efforts to transmit, document, and celebrate traditional culture. If traditional arts, and the work of the culture-bearers who maintain them, received more recognition, arts communities would have fewer problems finding audiences (local or national) and less difficulty passing along their knowledge to subsequent generations."
[535] Jaszi 2009, p. 27–28.
[536] Jaszi 2009, p. 9.

culture" and using dance "to connect Aboriginal and Torres Strait Island youths with their cultures."[537] Here, a combination of consultation and continuation interests is visible. The inheritance principle is another pillar of cultural heritage law. More on this follows in Chapter 4. In conclusion, a significant proportion of indigenous peoples' interests in protection of their TCEs are clearly informed by a heritage argument.

2.5.5 Human rights argument

The human rights argument for TCE protection centres around notions of dignity and respect for indigenous peoples' cultures and rights. Recognition of indigenous peoples' rights and their ability to practise their – distinctive – cultures are central. This can be summarised as cultural self-determination and development, which requires promotion and facilitation in addition to protection.

History and development of the argument

In the context of indigenous rights, the first developments had an assimilationist nature and were still coloured by remnants of colonial times and processes of decolonisation, but this changed later on.[538] Increasingly, indigenous peoples' interests in the ability to exercise control over their own institutions, ways of life and economic development and to maintain and develop their cultural identities, traditions and values has been recognised.[539] The UN Declaration on the Rights of Indigenous Peoples of 2007 has been a landmark instrument for further recognising indigenous rights. Taken together, the rights of UNDRIP are relevant for, and contribute to, indigenous peoples' position and recognition of their interests in the discussion on TCE protection. Practice, transmission and protection of their cultures and cultural expressions, according to their own systems and values, play key roles in effective enjoyment of these rights.

Over the years, the Committee on Economic, Social and Cultural Rights (CESCR) and the Human Rights Committee (HRC) have also recognised an indigenous dimension to various general human rights in a number of General Comments. These include such rights as the right to participation in cultural life, the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author, and the rights of minorities.[540] In General Comment No. 21 on the right to take part in cultural life, for example, the CESCR explicitly addresses indigenous peoples' right to collectively ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge, TCEs and manifestations thereof. Indigenous peoples' specific rights are highlighted, and free, prior and informed consent is stressed for all matters that touch upon these rights.[541] General Comment No. 17 of the CESCR, on the right to benefit from the protection of the moral and material interests of one's productions, also recognises indigenous peoples' specific interests under this right.[542] And General Comment No. 23 of the HRC on the rights of minorities, acknowledges indigenous

[537] See the company profile on their website: http://bangarra.com.au/vision.
[538] The 1957 ILO Convention No. 107, for example, still reflected such an assimilative philosophy with regard to indigenous cultures, see Anaya 2004, p. 56; Stoll & Von Hahn 2008, p. 9. However, its successor of 1989, ILO Convention No. 169, has since represented radically different values.
[539] ILO Convention No. 169, preamble paragraph 4 and 5, and Anaya 2004, p. 59.
[540] Articles 15(1)(a) ICESCR, 15(1)(c) ICESCR and 27 ICCPR, respectively.
[541] CESCR General Comment No. 21, par. 36-37.
[542] CESCR General Comment No. 17, par 8-9, 32, 45.

peoples' way of life as a manifestation of culture as meant in this provision.[543] In summary, these rights contain various elements that, when recognising their indigenous dimension, are relevant for various aspects of the protection, production and promotion of TCEs.

Overall, these developments also show that the protection of TCEs from the perspective of indigenous peoples' interests significantly draws on a human rights argument. The maintenance, development *and* protection of their traditional knowledge and cultural heritage is closely connected to indigenous peoples' ability to exercise and enjoy a large number of their fundamental (cultural) rights as protected under special and general human rights instruments. Recognition of these rights has developed significantly over the last decades as a part of indigenous peoples' rights struggles, but this is still ongoing at present.

Examples of protection interests informed by the argument

The importance of the ability for indigenous peoples to decide themselves on sharing and use of their TCEs is a central feature that recurs in indigenous statements and reports. As the Indigenous World Association and Indigenous Media Network state: "Sharing is part of our cultures. We readily contribute our knowledge for the benefit of human kind and global human progress. However, sharing of our knowledge must take place on our own terms and cannot put us at risk of losing our cultures and identities."[544] The preamble of the Mataatua Declaration also stresses the interconnection between sharing by indigenous peoples on the one hand, and protection of the fundamental rights of self-definition and control over the knowledge on the other.[545] These protection interests that draw on a human rights argument clearly seek the connection between TCE protection, self-determination and cultural heritage, dignity and identity.

Promotion of TCEs to ensure that traditions survive is another human rights-related protection interest. This is, for example, a major concern in Indonesia, as was shown by Jaszi's study on traditional arts.[546] By analogy, according to human rights terminology the promotion of human rights entails positive obligations for states. For indigenous peoples' TCEs, this would entail their ability to *practise* their TCEs and to continue to do so, if they wish, being promoted through positive measures. One aspect of this is the crucial role that cultural rights, language and education play for the protection and preservation of TCEs. This is, for example, noted by Yokota and the Saami Council in their working paper for the Working Group on Indigenous Populations.[547] In this sense, facilitation of the circumstances in which indigenous peoples can effectively practise, maintain and develop their ways of life and cultural traditions seems to be one of the many diverse aspects that are of importance for TCE protection.

Given the foregoing, it is not surprising that several statements and studies have emphasised the need for a human rights-based approach to protection of indigenous culture. According to the Kaska Dena Council, which is a representative Society for the Kaska Dena people, at the WIPO Intergovernmental Committee's Sixth Session in 2004, any international regime in the

[543] HRC General Comment No. 23, par. 7.
[544] Indigenous World Association & Indigenous Media Network 2005, p. 3.
[545] "Recognise that Indigenous Peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community."
[546] Jaszi 2009 from p. 14 on "the struggle to maintain inter-generational transfer of knowledge".
[547] Yokota & The Saami Council 2005, p. 6–8.

sphere of traditional knowledge and cultural expressions should acknowledge, respect and guarantee indigenous peoples' collective rights as peoples.[548] Also at this Sixth Session in 2004, a consortium of indigenous representatives and organisations argued for recognition of indigenous peoples' right to development of their cultural and natural resources and of the applicable international law, including human rights law, in the context of the international dimension of the IGC's work.[549] And the Center for International Environmental Law stresses in its study on the gap between indigenous demands and WIPO's framework that a possible binding instrument on the protection of traditional knowledge must recognise indigenous peoples' right to control their natural resources and manage their knowledge and their human right to self-determination. The Center submitted this study to the IGC as an Observer in 2007.[550] Furthermore, Yokota and the Saami Council recommend in their working paper that the protection of indigenous peoples' cultural heritage must: "Promote respect for the dignity and cultural integrity of indigenous peoples who conserve and maintain their cultural heritage, and respect and recognize their rights, particularly human rights, under international and national law."[551] The Report of the 23rd session of the Working Group on Indigenous Populations in 2005 to which they submitted their working paper reiterates this recommendation.[552] In other words, there are clearly various human rights dimensions to the context of indigenous peoples' heritage. These include development, control and self-determination and notions of human dignity and cultural integrity. These dimensions explain the human rights argument for TCE protection.

From a human rights perspective of TCE protection, the core principles of contemporary indigenous rights that Anaya has emphasised in his statement at WIPO in February 2014[553] are also worth recalling here. The first principle covers indigenous peoples' ability to determine and control "the future development of all those aspects of collective human interaction that define and constitute their distinct societies". This principle would relate to indigenous peoples' right to self-determination, associated rights of self-government or autonomy and the right to culture, as laid down in UNDRIP and other human rights instruments.[554] Anaya argues that, in order for indigenous peoples' autonomy and self-government rights to be effective, these must, centrally, include cultural aspects.[555] The second principle is the principle of equality.[556] Anaya observes that, as the *terra nullius* doctrine was rejected as discriminatory, the requirement of non-discrimination for property rights law towards indigenous peoples' specific cultural traits should also entail indigenous peoples having the same option to effectively protect the knowledge produced within their cultures.[557]

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[548] See point 8 of the Council's Opening Intervention at WIPO's IGC in 2004, Kaska Dena Council 2004, p. 2.
[549] See principles 1 and 4 of the submission of this consortium on the 'Objectives, principles and elements of an international instrument, or instruments, on intellectual property in relation to genetic resources and on the protection of traditional knowledge and traditional cultural expressions' at WIPO's IGC in 2004, Assembly Of First Nations Et Al. 2004, p. 2.
[550] The Center for International Environmental Law 2007, p. 5.
[551] Yokota & The Saami Council 2005, p. 5.
[552] Report of the 23rd session of the Working Group on Indigenous Populations (E/CN.4/Sub.2/AC.4/2005/26), p. 12. Available via: http://www.ohchr.org/EN/Issues/IPeoples/Pages/SessionsWGIP.aspx.
[553] In his capacity as UN Special Rapporteur on the Rights of Indigenous Peoples at that time.
[554] Anaya 2014, p. 2.
[555] Anaya 2014, p. 3.
[556] Anaya 2014, p. 2. Referencing Article 2 UNDRIP, Anaya states: "[…] the fact that indigenous peoples must be treated equally in relation to other peoples is clearly relevant to the Intergovernmental Committee's deliberations."
[557] Anaya 2013, p. 5.

To recap, principles of self-determination and equality are pillars of contemporary indigenous rights. TCE protection interests in the sphere of control, cultural self-determination and maintenance of traditional culture appear to draw on these pillars. A human rights argument for TCE protection implies that TCE protection is warranted for various reasons that draw on human rights and principles. These include an interest in free, prior and informed consent. This enables indigenous peoples' (cultural) self-determination regarding all aspects of their cultures, so also with regard to the development, maintenance and protection of their cultural heritage. Human rights-based protection arguments further include protection that meets indigenous peoples' interests in safeguarding their distinctive cultural dignity and integrity. Indigenous peoples' own value systems and institutions play a central role. Spirituality is also often an important aspect. Promotion of TCEs to secure the ability to maintain, develop and continue their cultural heritage and to transmit it to future generations is also often a main interest of indigenous peoples. This is linked to various (cultural) human rights, including self-determination, freedom of expression, participation in cultural life and minority rights. In sum, there are many different aspects to TCE protection that draw on human rights arguments and principles.

2.5.6 The hybrid argument

The final argument for TCE protection discussed here is best described as 'hybrid'. It does not necessarily follow from any one of the legal areas that were assessed for the emergence of the protection issue. Rather, the hybrid argument can be recognised in various aspects of the legal areas in a 'border-crossing way', hence its qualification as hybrid. The interests addressed by this argument can be summarised as 'ethical interests', reflecting the bond between indigenous communities and their TCEs, which is stressed throughout literature and by indigenous peoples' perceptions of their TCEs. These ethical interests include issues such as protecting integrity, attribution and safeguarding spiritual aspects of TCEs. Aspects of these interests are visible throughout the selected legal frameworks in various degrees.

The interest in protection and preservation of the integrity of TCEs and safeguarding them from offensive use reflects elements of each legal framework. It can, for example, be placed under copyright law's moral rights. However, it is also reflected in safeguarding-oriented cultural heritage instruments or cultural and indigenous rights that provide indigenous peoples with rights to control and protect their TCEs.[558] The same applies to the interest in recognition as the source community of the TCEs in question, or attribution.[559] This is also a moral right under copyright law. Furthermore, attribution can also be connected to TCE protection from a cultural heritage perspective due to TCEs' function in relation to their source communities' distinctive identities. Safeguarding is for this reason a typical cultural heritage consideration. And, to a certain extent, the interest in attribution is also reflected in human rights law's principle of (cultural) self-determination. According to this principle, TCE protection would imply sharing and dissemination of indigenous peoples' heritage with the participation, terms and conditions of the community concerned, which may include a requirement of attribution. Finally, the sacred nature of traditional knowledge and TCEs is stressed by indigenous

[558] For example, Article 15(1)(c) ICESCR containing the right to benefit from the protection of the *moral* and material interests resulting from any scientific, literary or artistic production of which he is the author, and Article 31 UNDRIP which stipulates that indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.

[559] Lack of appropriate recognition and (mis)attribution is one of the main concerns put forward by Indonesian artists, see Jaszi 2009, p. 15–16.

peoples worldwide,[560] which gives rise to an interest in and argument for TCE protection for spiritual reasons.

The hybrid nature of arguments to protect TCEs is illustrated by a number of examples in (indigenous) statements and studies on the topic. Firstly, Indian Movement Tupac Katari claims for example that it is in contrast with the 'western world' that indigenous peoples contribute not necessarily economic value to their TCEs, but rather spiritual value.[561] Secondly, the list of cultural norms for sharing and protecting traditional knowledge of the representative of the Tulalip Tribes of Washington can be reiterated here from the perspective of protection interests that draw on a hybrid argument. These norms include aspects of: secrecy, sacredness and privacy considerations; confidentiality; fairness and equity; and empowerment and capacity building.[562] Clearly, these are norms that are fairly ambiguous and thus difficult to catch under one existing legal framework. As such, they precisely reflect the hybrid argument for TCE protection. Lastly, Yokota and the Saami Council recommend in their working paper that protection of the cultural heritage of indigenous peoples takes into account "its relationship to an indigenous people's cultural and social identity and integrity, beliefs, spirituality and values, and constantly evolving character within the people."[563] This statement shows how the hybrid argument for TCE protection seems to capture the essence of the issue: it is not a straight-forward, but an intrinsically complicated and multidimensional legal topic and policy question.

2.5.7 Concluding thoughts on categorisation and protection interests

This section has shown that the protection of TCEs can be categorised in various ways: it can be dissected into a number of legal approaches,[564] various protection arguments[565] and a diversity of protection interests of indigenous peoples.[566] Free, prior informed consent, recognition and continuation can be considered as TCE protection interests that are commonly recognised and covered by each protection argument. Essentially, what TCE protection comes down to, regardless of the approach or argument that is followed, is protection of a diverse range of interests that have one age-old source of tensions in common: the dilemma of circulation and control of knowledge.[567]

Indeed, a lot of what have come forward as discussion points generally appear to relate to control over TCEs as part of indigenous peoples' living cultures and cultural identities. Control can be warranted for various reasons and interests, be it over their economic use, safeguarding and transmission to future generations, or maintenance and development according to cultural and customary systems and laws. This gives an indication of the main concrete needs that indigenous peoples have with regard to protection of their TCEs. These

[560] See the Report of the 23rd session of the Working Group on Indigenous Peoples, which had as its main theme "Indigenous peoples and the international and domestic protection of traditional knowledge", p. 8, available via: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/156/40/PDF/G0515640.pdf?OpenElement. Interestingly, however, in Indonesia misuse of secret-sacred art came forward as a 'non-issue', Jaszi 2009, p. 19–20. This shows the diversity in interests of indigenous peoples worldwide, one of the challenges for a protection design.
[561] Indian Movement Tupac Katari 2005, p. 2.
[562] Hardison 2014, p. 10.
[563] Yokota & The Saami Council 2005, p. 5.
[564] This thesis has selected copyright law, cultural heritage law and human rights law.
[565] An economic and development argument, a cultural heritage argument, a human rights argument and a hybrid argument.
[566] Benefit-sharing, free, prior and informed consent, recognition, integrity and dignity, spirituality (including secrecy) and continuation and preservation.
[567] See also Anderson 2009, p. 89.

can be summarised as a level of (cultural) self-determination, participation and consultation.[568] All three relate to control in one way or another.

Of course, self-determination is a familiar principle in international law, and especially in the context of indigenous peoples' rights. The right to self-determination is expressly recognised in Article 1 of both the ICCPR and the ICESCR, and specifically for indigenous peoples in Article 3 of UNDRIP. When indigenous peoples are able to effectively enjoy a level of self-determination, participation and consultation with regard to their TCEs, this enables communities in different parts of the world to decide on the type and way of their use according to their own circumstances and customary rules. They can, for example, agree to the use if credited, as certain communities in Indonesia wish to, and share in the benefits. Or they can decide to not agree to any use at all, for example when great value is attached to the sacred and secret nature of the expressions, as is often apparent in Aboriginal communities. This is a clear demonstration of the self-determination dimension of the issue. This dimension is also reflected in increasing attention at the international human rights level for indigenous peoples' rights to development and participation with regard to all matters that concern them, often in the context of their resources and lands. The link between human rights and protection of traditional cultural expressions will be explored in Chapter 5.

The foregoing gives a strong indication of the difficulties that arise from a generalised, 'one-size-fits-all' approach to the issue. Protection arguments and rationales of the various legal areas clearly pursue different objectives and have different outcomes, and therefore correspond primarily to particular protection interests. A more abstract approach that focuses on the legal area's shared underlying values from the perspective of TCE protection could circumvent this. This could leave open flexibility for implementation and interpretation according to specific circumstances and interests, yet include the main values that are apparently at stake in general with regard to TCE protection.

2.6 Conclusion

This Chapter has shown that the historical context of indigenous peoples in international law sets the scene when discussing the protection of TCEs. Unauthorised use, without consultation or benefit-sharing, of indigenous heritage, traditional knowledge and cultural expressions clearly fits within the historical pattern of marginalisation of indigenous peoples, their lands and cultures. However, increasing attention and claims for protection from misuse clearly also fit within the scope of the broader indigenous rights movement. This movement challenges mainstream perceptions and understandings, claims rights and pushes boundaries of existing legal frameworks. In this sense, TCE protection can be seen as another stage of the developments regarding recognition of indigenous peoples' rights. Other factors that play a role for contextualisation and understanding of the topic of TCE protection include issues of power and politics with regard to indigenous peoples and their place in society, developments in indigenous peoples' land rights, and consequences of globalisation and technological developments for indigenous peoples.

The emergence of the topic of TCE protection in the three legal areas of copyright law, cultural heritage law and human rights law has been characterised by various shifts. Copyright law's take on the issue has reflected a shift from TCE protection for the purpose of economic development as a central feature, to also recognising the various roles of folklore in

[568] See for emphasis on the principle of self-determination, which includes the maintenance and development of their own cultures and knowledge systems also Janke 1998, p. XX–XXI.

indigenous societies and its spiritual significance. In cultural heritage law, a shift is visible from a narrow definition and scope of cultural heritage to a broadened scope beyond 'western standards of commercial value'. This includes recognition for living cultures and cultural contexts. Human rights law shows a shift from assimilative policies to recognition of indigenous rights such as self-determination and various cultural rights. These shifts seem to share a growing awareness of indigenous peoples' distinctive cultural traits and their consequences, mostly difficulties, for the application of existing legal systems. Indeed, the section that explained the concept of 'TCEs' further clarified that their specific characteristics are determinant for the difficulties in fitting TCEs under existing legal regimes and for indigenous peoples' protection interests.

Calls for protection stem from the perceived threats of misappropriation, misrepresentation and commercialisation of indigenous peoples' heritage, traditional knowledge and cultural expressions. The main issues for indigenous peoples here are unauthorised use without consultation, and perceptions of their heritage as 'free to take' and their cultures as passive sources of content. It has been argued that cultural appropriation and exchange have been a characteristic of human interaction throughout the ages. However, for indigenous peoples specifically, historical injustices and unilateral, 'one-way-taking' add a sensitive dimension to the appropriation debate. Of course, protection of TCEs will likely have social costs for other actors or groups in society. Criticisms that are directed at protection of TCEs occur, for example, in the sphere of a limitation of the public domain and restrictions of (artistic) freedom of expression. In other words, claims of protection from misappropriation and countervailing interests are on opposite sides from this perspective.

The emergence of the topic of TCE protection in the areas of copyright law, cultural heritage law and human rights law features various arguments for the protection of TCEs. Generally, these consist of an economic and development argument, a heritage argument and a human rights argument. The economic argument for TCE protection can be summarised as protection of TCEs for reasons of control over, and sharing in the benefits resulting from, any use of TCEs. The heritage argument implies that TCEs are protected for reasons of safeguarding, identity construction and transmission to future generations. And the human rights argument requires protection of TCEs to guarantee the dignity and respect for indigenous peoples' specific, distinctive cultures. These distinct arguments for TCE protection are of course coloured by each specific legal sphere in which they have emerged. This is a consequence of the multi-faceted nature of the issue, which plays out across various legal areas.

Based on studies and reports, academic literature and statements of indigenous peoples or representatives at international institutions, it is possible to distinguish a number of diverse interests of indigenous peoples in TCE protection.[569] The interests of prior informed consent, recognition and continuation appear to come under each protection argument, and point to a general interest in *control* over TCEs, for various specific reasons. In other words, what the overarching interests in TCE protection ultimately seem to come down to for indigenous peoples, is a mix of self-determination, participation and consultation regarding all matters affecting them and their heritage, be it with regard to economic use, safeguarding or practice

[569] In section 2.5, the following were identified: economic interests of benefit-sharing; interests in control, for example through free, prior and informed consent (FPIC); interests in recognition of rights and distinctive cultures, including such features as attribution, distinctive identity, self-determination and sharing; moral interests of integrity and dignity; interests in protection for spiritual reasons, including secrecy; and interests in continuing traditions, including the maintenance and development of TCEs, preservation, practice and intergenerational transmission of culture.

and continuation of distinctive traditional cultures. This variety of 'matters' reflects again the diverse interests at stake.

In conclusion, given the complexity and multidimensionality of the topic of TCE protection it is not surprising that the relevant legal framework is fragmented, and that there is no single legal regime that has all the answers for the various interests at stake. A number of questions are essential to consider in the protection discussion, for example what the objectives of TCE protection are and what 'type' of protection would be best suited for those objectives. The answers to these questions are closely connected to, or even depend on, the specific indigenous protection interests to be addressed, which are likely to differ from case to case. The next three chapters each analyse one of the legal areas of copyright law, cultural heritage law and human rights law each, and in particular their rationales and underlying values and what these mean for the diverse TCE protection interests identified in this Chapter.

CHAPTER 3
COPYRIGHT LAW AND TRADITIONAL CULTURAL EXPRESSIONS

3.1 Copyright law and TCEs

Copyright law is one of the selected legal systems that are analysed in this thesis for their relevance for (a part of) TCE protection. This chapter describes the issues relating to TCEs from a copyright perspective and assesses how this approach contributes to the story of TCE protection. It will focus mainly on copyright law, as many developments and most of the attention for TCE protection in an intellectual property law sphere have taken this area as a starting point. However, the broader intellectual property context will still be kept in mind. The chapter will show that a copyright perspective, already for many years a dominant view, raises tensions and opportunities for the question of TCE protection, both on a material law level and – importantly – on a foundational, theoretical level. The latter is where this chapter especially aims to contribute to the understanding of the issue in discourse on the topic, together with the foundational analyses of the other two legal systems in Chapters 4 and 5: cultural heritage law and human rights law.

The first section introduces intellectual property law in the context of traditional knowledge and cultural expressions. A number of aspects of the intellectual property system make it a potentially useful means to protect traditional knowledge. This explains the engagement with intellectual property law by both indigenous peoples and legal scholars and policy makers in the first place. One such aspect is that intellectual property law protects immaterial objects. There are similarities between intellectual property subject matter and indigenous heritage: patent law's pharmaceutical inventions and traditional medicinal knowledge, and copyright law's subject matter and traditional cultural expressions, such as music and paintings, comprise similar 'content'. For indigenous peoples, the most attractive aspect of intellectual property law seems to be the exclusive nature of the rights it confers. Third parties typically need to obtain the copyright owner's permission for acts of communication to the public, reproduction and distribution. The section further explains why, for TCEs specifically, copyright law is highlighted in the rest of the chapter.

The second section of the chapter starts with the historical background of the two main international copyright treaties, showing the origins, arguments and development of international rules for copyright law: the Berne Convention and the Universal Copyright Convention. The section then goes on to scrutinise copyright law's main characteristics and requirements and how they (mis)match with TCEs. To express the protection of TCEs in copyright terms and requirements can raise difficulties due to TCEs' particular features. The individual-oriented concept of authorship is a source of tensions for example. Transferability and free tradability of rights in cultural works also tend to sit uneasily with indigenous communities' (collective) heritage. Next, the chapter elaborates on copyright law's focus on protection, together with complementary notions of defensive protection, preservation and promotion. Together, the analysis of these various factors positions TCEs within the copyright landscape.

The third section sets out copyright law's main theories and protection justifications, such as those advanced by the utilitarian tradition and the natural law tradition. A scrutiny of the underlying rationales of copyright protection will contribute to a greater understanding of the interaction between copyright law protection and TCEs from a foundational perspective, beyond the usual focus on material law considerations. This is a step that is not often taken in

discussions on (the unsuitability of) copyright law and TCEs. However, it is a critical perspective if we want to gain clearer knowledge of why exactly indigenous peoples face difficulties under existing frameworks. Central to these difficulties is often a degree of friction between mainstream ideas and worldviews on the one hand, and indigenous ones on the other hand. A lack of recognition of these differences and difficulties leads to the risk of maintaining marginalisation and exclusion. This is essential to keep in mind when considering either the (im)possibilities of adjusting existing frameworks or the development of specific rules.

The fourth section measures the protection of TCEs against these theories, on the basis of indigenous peoples' protection interests that were set out in Chapter 2, in order to answer the question to what extent copyright law at its core connects with what TCE protection is actually about from an indigenous viewpoint. Clearly, tensions are also visible on a foundational level between copyright law's specific theories and corresponding protection justifications, and indigenous peoples' aims and arguments regarding protection of their TCEs. However, there are also components underlying copyright law that do show similarities with indigenous peoples' concerns and provide points of departure for the discussion on the protection of TCEs. Finally, the concluding section will assess the potential and contribution of a copyright law perspective to the overall story of TCE protection. It will become apparent that, despite practical and theoretical tensions, a copyright perspective also offers opportunities. To offset TCE protection against copyright law offers a framework to pinpoint the main issues, and gaps, to be addressed in the context of TCE protection.

3.1.1 Intellectual property law and TCEs

Intellectual property law is an umbrella term for the field of law that covers property rights over multiple types of intangible subject matter. This subject matter is extremely broad and diverse and ranges from patent law's novel inventions to trademark law's distinguishing signs and copyright law's literary and artistic works. Separate rules exist for each subcategory of intangible property. Protection requirements and criteria vary per type of intellectual property, and so do the rights that are granted. What the rights have in common is the ultimate *result* of each type of right: they all provide (temporary) monopolies for right holders over their intellectual property. Furthermore, the focus of each sub-regime is largely economic, guaranteeing control over, and remuneration for, right holders with regard to the exploitation of their immaterial goods and creations.

With a few exceptions, such as the Community trademark and the proposed Unitary patent in the EU, intellectual property rights are national, territorial rights. This means that such rights can only be exercised in a certain territory. International agreements exist that make it possible to file one (international) application for protection in several countries, but the resulting patents or trademarks are a bundle of national rights. The intangible nature of intellectual property subject matter means that this content easily moves across borders and is easy to copy and consume by users worldwide. As far back as the 19th century this triggered an international response as to how to deal with protection of intellectual property on a global level.[570] There are many international treaties and agreements that attempt to (formally) harmonise aspects of intellectual property law to a greater or lesser degree, both procedural issues and substantive requirements for the various intellectual property rights. The main

[570] Seville 2009, p. 1.

reasons for such harmonisation are the elimination of trade obstacles and realisation of a more general level of protection internationally.[571]

The international intellectual property system is made up of a (growing) number of general and specific instruments. The Paris Convention for the Protection of Industrial Property of 1883[572] and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of 1994 are the most important general international intellectual property instruments. TRIPS is a comprehensive multilateral treaty on the protection and enforcement of intellectual property, attempting to establish minimum levels of the former while bringing the latter under common international rules.[573] Its objectives include to foster the promotion of technological innovation and the transfer and dissemination of technology through IP protection and enforcement.[574] It requires that contracting parties establish effective enforcement procedures.[575] The Paris Convention is a general, multilateral treaty on intellectual property, mainly in the sphere of patent, design and trade mark law. Its main function includes harmonising national treatment, the right of priority and substantive trade mark rules.[576]

In addition, there are a number of specialised international instruments per intellectual property area, which illustrate the complexity and multi-faceted nature of the field. For patent law, there is the Patent Cooperation Treaty (PCT) of 1970, which contains rules for international patent search and examination, such as relating to requirements of novelty and an inventive step.[577] For trademarks, the Madrid Agreement of 1891 and Protocol of 1989 form an international system of trademark regulation and registration worldwide. The Trademark Law Treaty (TLT) of 1994 pursues harmonisation of national and regional registration requirements and procedures. And for copyright and neighbouring rights, important treaties include the Berne Convention (BC) for the Protection of Literary and Artistic Works of 1886, the WIPO Copyright Treaty (WCT) of 1996 and the WIPO Performances and Phonograms Treaty (WPPT) of 1996. The Universal Copyright Convention (UCC) of 1952 was established as an alternative to the Berne Convention for international protection following disagreement of certain countries with various articles, such as the BC's explicit absence of formalities. Furthermore, TRIPS also contains rules on geographical indications in Article 22(l), which establish collective rights or "a collective exclusivity for the use of the names of products originating from a specific geographical territory."[578] Lastly, the Convention on Biological Diversity (CBD) is a specialised instrument on the protection of

[571] Seville 2009, p. 1.
[572] Taubman & Leistner 2008, p. 93. According to Taubman and Leistner, relevant elements of the Paris Convention that have been explored for traditional knowledge are "protection of collective and certification marks, protection of armorial bearings, flags, other State emblems, official signs and hallmarks (Article 6ter), the protection of industrial designs, the protection of patents on innovation in a traditional context, and the suppression of unfair competition under Article 10 bis, including false indications that products are traditional or associated with an indigenous or local community as well as a broader doctrine of unfair competition that may provide juridical roots for a conception of misappropriation of TK."
[573] Seville 2009, p. 17.
[574] See Article 7.
[575] See Article 41 for general state obligations regarding enforcement.
[576] Seville 2009, p. 74, 181, 213.
[577] Taubman & Leistner 2008, p. 94: "The PCT system can be useful for the practical recognition of TK as prior art at an early stage in the processing of a typical patent application."
[578] Lucas-Schloetter 2008, p. 407. She also cites the Indigenous Cultural and Intellectual Property Task Force of Australia, stating: "It may be possible for example to use the TRIPS provisions concerning geographical indications to protect Indigenous cultural expressions - sometimes referred to as expressions of 'folklore' - based on their distinctiveness, [since] the distinct nature of Indigenous cultural expressions is intimately connected to the geographical area from which the peoples and their traditions derive." Lucas-Schloetter 2008, p. 358.

genetic resources. Although it is not an intellectual property instrument *proper*, it is the first legally-binding international convention that recognises the concept of indigenous peoples' traditional knowledge.[579] It includes for example the obligation to 'respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles' in Article 8(j) of the Convention.

The foregoing overview shows the intricate ramifications of intellectual property law on the international level. Indigenous peoples' heritage is also a multi-faceted notion. It has been divided into categories such as traditional knowledge, including medicinal and plant knowledge, genetic resources, such as genetic material of plants and animals and associated inventions or plant varieties, and traditional cultural expressions, including dance, music and paintings. To assess the protection of indigenous heritage from an intellectual property perspective seems to imply that this is necessarily a fragmented exercise.[580] In other words, intellectual property law, TCEs and TCE protection are all subject to a substantial degree of intricacy. For the current research on TCEs, the focus will be on copyright law. The rest of this section explains this delimitation. Categorisation issues and the context of indigenous heritage protection and copyright are also elaborated. The nature and object of intellectual *property* protection in general is explained at the end of the section.

3.1.2 Categorisation of IP subject matter vis-à-vis indigenous heritage

The organisation of intellectual property law as introduced above presents potential tensions for TCEs on a more general level. These follow from the actual, inherent structure of the system and the way in which it operates. For example, placing indigenous peoples' TCEs under pre-determined categories of intellectual property law has been considered problematic for more fundamental reasons. Some academics claim it could change, and supposedly even diminish, the specific nature of TCEs. Paradoxically, the preservation of cultural heritage and knowledge of a community may come under threat when it is perceived as intellectual property.[581] TCEs might have to be reshaped and remodelled to fit within the myriad categories of intellectual property law, notably copyright, design, trademark and patent law and the law on geographical indications.[582] This way, intellectual property law's categories might ultimately replace traditional heritage, changing the shape of traditional culture and knowledge accordingly rather than via their usual organic dynamics and evolution.[583] Where the focus in indigenous societies is on creativity flowing from relationships that are constantly moving, intellectual property law would change what is dynamically interrelated into predetermined, inflexible categories.[584] This division of indigenous heritage into various types of intellectual property law also leads to differing standards, requirements and levels of

[579] See extensively on this Coombe 2001, p. 275–285.
[580] See the contributions in Von Lewinski 2008, p. 1–5 on intellectual property law and the protection of traditional knowledge, genetic resources, protection of traditional names and designations and folklore, respectively.
[581] Macmillan 2008, p. 93.
[582] Macmillan 2008, p. 93.
[583] Macmillan 2008, p. 94: "In short, as Peter Fitzpatrick and Richard Joyce argue, the end result is that occidental intellectual property law comes to constitute traditional, or non-Western, culture and heritage. In so doing, it changes the shape of that heritage in ways that are not necessarily the consequence of the reflexive cultural practice that in fact constitutes so-called traditional cultural expressions and knowledge. This seems to be inimical to the very purpose of protecting cultural property."
[584] Coombe 1993 (a), p. 269.

protection for the various aspects of indigenous heritage.[585] In sum, the specific (holistic) character of indigenous heritage may get lost in (legal) translation.

Another aspect is that, disregarding copyright law's moral rights for now, intellectual property law typically regulates economic and trade-related interests via private property rights. To regulate markets and incentivise the creation of commodities are central functions of intellectual property law, at least in its economic capacity. It is often considered at odds with TCEs' specific characteristics, which comprise shared community values, to divide common, living culture "into many separate parcels that can be owned and (in particular) bought and sold."[586] Flowing from this perceived 'unnatural' combination – and subsequent division – of indigenous heritage and intellectual property law, there is therefore the tension between market and commodification-related rights and indigenous heritage, which comprises many non-market interests and values.[587] To express and measure TCE protection in economic intellectual property terminology then seems artificial. This will be further elaborated on below in the analysis of the different main theories and justifications of copyright law. As we will see, the utilitarian theory especially is market- and economics-driven. However, indigenous peoples might well have economic interests regarding the protection of their TCEs as well. Still, the question remains whether copyright law is overall a worthwhile approach for TCE protection, given the nature of the main rationales behind it. These and related tensions will be further assessed in sections 3.1.5 and 3.2.3 on the nature of and focus on protection in copyright law, section 3.2.2 on the requirements for copyright protection and sections 3.3 and 3.4 on the underlying theories of copyright protection vis-à-vis TCE protection.

3.1.3 A focus on copyright law

Due to the multi-faceted nature of indigenous knowledge and culture, ranging from traditional plant and medicinal knowledge and inventions to symbols, designs and works of expressive art, multiple intellectual property rights can come into play in the context of protection. In theory, intellectual property law's 'sub-regimes' and rules are therefore potentially applicable to each of these sub-divisions, for example patent law and copyright law, respectively. This thesis highlights TCEs for further analysis for various reasons. Firstly, this delimitation is a pragmatic decision due to time and space limitations. The second reason is that the main international legal approach taken by WIPO, as well as in discussions in scholarly literature, is to address the protection of the various components of indigenous heritage, such as traditional knowledge and TCEs, in separate treaties. The third reason is that the focus on TCEs provides the opportunity to apply and analyse the chosen three legal frameworks, namely copyright law, cultural heritage law and cultural (and indigenous) human rights law. This is, again, also somewhat related to the first reason of time and space limitations. This does not mean that the main findings of the thesis cannot be applicable more broadly as well.

So, with regard to the existing intellectual property regime, this choice to highlight TCEs narrows the scope down to copyright law. Connected to this choice are two substantive and fundamental reasons to focus on copyright law in the context of TCE protection. The first is a reason of scope due to the subject matter of copyright law vis-à-vis TCEs. The second is a contextual, historical reason relating to copyright law and TCEs and how they emerged into copyright debates and were put on the international copyright agenda. With regard to the former, copyright is especially relevant because the system provides exclusive rights to the

[585] Macmillan 2008, p. 93–94.
[586] Jaszi 2009, p. 73. See also on p. 90.
[587] Carpenter, Katyal & Riley 2009, p. 1046.

makers of 'literary and artistic works'.[588] This is an extremely broad pool of creations and includes, according to Article 2 of the Berne Convention, 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression'. What is sought to be protected in the TCE discussion maps reasonably well onto the results of creative expression that are central to copyright law. In other words, the subject matter of both copyright law and TCEs correspond to each other to a large extent. One of the main differences is the traditional nature of TCEs. In addition, copyright law focuses on the protection of authors' interests through exclusive rights to reproduce and make available their literary and artistic works,[589] and to protect the integrity and attribution of these works.[590] It is therefore not surprising that initiatives and protection debates have looked at this existing field of law for protection of TCEs, as control claims over their heritage for economic and moral reasons are also central to indigenous peoples' interests. Copyright law's subject matter and exclusive and moral rights can be called 'legal substantive' reasons to narrow down the analysis to copyright law in the context of TCE protection.

However, a more fundamental reason lies in the contextual sphere. As we have seen in Chapter 2, international politics played a large part in the emergence of recognition for TCE protection in the copyright sphere. New actors on the international level started to challenge the universality of international intellectual property obligations and rules that they would have to meet. At the same time, they used similar terms and the same fora to address their own issues, including the protection of folklore. In this respect, the discussion on copyright and TCEs that arose seems part of a larger debate on mainstream, Western-oriented legal views and a movement towards growing attention for indigenous issues. Sherman has mentioned the example of Aboriginal art. The discovery of this art, its commodification, increasing popularity and economic value led to both growing instances of appropriation and illicit reproduction, and calls for protection. According to Sherman, "the most obvious method by which this could be achieved was copyright law."[591] More on this dimension follows in the 'Context' subsection below.

On a side-note, as well as copyright law, related rights could also be relevant for TCEs. Article 2(a) of the WIPO Performances and Phonograms Treaty (WPPT) explicitly includes performers of expressions of folklore in the definition of 'performer'. This means that these performers are entitled to the protection of the WPPT, including the moral rights of the performer,[592] the exclusive right to authorise fixation of unfixed performances,[593] and rights

[588] Article 2 of the Berne Convention states: "The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

[589] Article 9 of the Berne Convention lays down the reproduction right, which was later supplemented by the distribution right and the right of communication to the public of Articles 6 and 8 of the 1996 WIPO Copyright Treaty, respectively. Arguably, these rights would together form an "appropriate scope of protection to grant rights owners in the digital environment." Guibault 2003, p. 18.

[590] See Article 6bis BC for the protection of moral rights.

[591] Sherman 1994, p. 113.

[592] Article 5 WPPT.

[593] Article 6(ii) WPPT.

of reproduction, distribution and making available their performances fixed in phonograms.[594] Related rights are available for indigenous performers to act against undesired fixation and circulation of performances of their TCEs,[595] but a principal restriction of performers' rights for the protection of TCEs is that they do not protect the expressions of traditional culture as such, but only a specific performance or interpretation.[596] My focus is on the underlying cultural expressions as such, and therefore on copyright law. Although there is no fully coherent set of international rules with a uniform interpretation in all contracting states for copyright law, it suffices for our purposes that there exists a good degree of agreement internationally on central tenets and concepts.

3.1.4 Indigenous rights and development as a contextual backdrop

To what extent intellectual property law does or should protect TCEs is a question that cannot be viewed in isolation from broader issues surrounding their source communities. Two are highlighted in particular in this section: indigenous peoples' emancipation and rights movement and issues in the sphere of trade and development processes.

International human rights politics and increasing focus on peoples' rights is a major contextual factor of the interplay between copyright law and TCEs. As indigenous peoples' claims to rights with regard to their lands and resources grew, so did claims to protect indigenous knowledge. However, as we have already seen, it is problematic to apply the international intellectual property system one on one to protect the united whole of indigenous resources, knowledge and artistic works. A reason that tends to be raised for this problematic relationship between the protection of indigenous heritage and existing laws is that intellectual property is a "western positive law regime that has been shaped by liberal political traditions,"[597] with a focus on individual owners, rights and trade in these rights, as opposed to indigenous cultures that view land, knowledge and art as an organic whole.[598] As a response to the lack of protection that is a result of this disconnect, both indigenous groups and non-governmental organisations initiated a political campaign to adapt the existing intellectual property system.[599]

Above all, this struggle has shown the broader context of the topic. As Drahos states, intellectual property law has become linked to indigenous issues such as sovereignty, self-determination, biodiversity and sustainable development. In fact, he notes that indigenous rights activists have argued that "peoples' rights have become the language of emancipation" and "western intellectual property regimes the medium of oppression".[600] In a statement from

[594] Articles 7, 8 and 10 WPPT, respectively.
[595] WIPO 2011, p. 16: "In addition, the protection already available, internationally, under the WIPO Performances and Phonograms Treaty (WPPT) may be of great value. Folklore is often accessed and appropriated by third parties through its most recent traditional performance – for instance, when a performance of a traditional chant is recorded, the recording is what enables others to get access to that chant, so it is vital to determine how the recording is used and distributed. Countries that ratify the WPPT must give performers of folklore the right to authorize sound recordings of their performances, and the right to authorize certain dealings with those recordings."
[596] Lucas-Schloetter 2008, p. 398. Other restrictions that Lucas-Schloetter mentions are the scope of the protection (not all TCEs would be covered) and the beneficiary (which is the performer, rather than the source community as a whole). See also Annex I to Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 22–23 for further restrictions on this possibility.
[597] Drahos 1999, p. 364.
[598] Drahos 1999, p. 364
[599] Drahos 1999, p. 364.
[600] Drahos 1999, p. 364.

a regional meeting in 1994 on intellectual property rights and biodiversity of the Coordinator of the Indigenous Organisations of the Amazon Basin (COICA), which is comprised of nine indigenous organisations from nine countries in the Amazon, existing intellectual property regulations were called "colonialist", "racist" and "usurpatory".[601] This is related to the decolonisation period following World War II. As explained in Chapter 2, this context has played a particularly important role in the development of a debate on protection of TCEs at the international level.

The development agenda of the World Trade Organization, the Doha Development Agenda of 2001, provides another contextual factor: the recognition for traditional knowledge and folklore protection in the context of development, trade and the position of developing countries. The Doha Declaration lists 21 subjects in its mandate for negotiations, implementation, analysis and monitoring. One of these directly concerns TCEs: the Council for TRIPS is instructed to examine the relationship between TRIPS, the Convention on Biological Diversity and the protection of traditional knowledge and folklore.

In the Council's 2006 outcome document of this exercise,[602] two main concerns were identified by Members that are proponents of international protection. Firstly, they are concerned about the acquisition of intellectual property rights over traditional knowledge by parties other than the source communities. Secondly, they worry about the use of the traditional knowledge without source communities' authorisation or sharing in the benefits. Both seem to relate to typical (economic) intellectual property considerations.[603] However, the reasons that are put forward for international action as a consequence of the concerns are broader and include not only economic development, but also equity for traditional knowledge holders and sustainability of their cultures.[604]

Other Members have stated that national regimes for traditional knowledge protection should be established first, before international action is undertaken. Reasons advanced are that international regimes require the support of widely implemented national regimes in order to be effective, which is a long process before protection can be realised; protection could be obtained by traditional knowledge holders immediately when (national) existing laws that are already well in force are used; and there is not yet much concrete evidence that national regimes are insufficient.[605] This is countered by the view that, due to the transboundary nature of issues of traditional knowledge protection, the role of national laws can only be supplementary to an international regime and are only effective if such an international mechanism is realised.[606]

[601] Drahos 1999, p. 364.
[602] Its Summary Note on issues raised and points made to the Council by Members regarding the protection of traditional knowledge. See Council For Trade-Related Aspects Of Intellectual Property Rights 2006.
[603] Council For Trade-Related Aspects Of Intellectual Property Rights 2006, p. 3.
[604] Other reasons for international action that have been put forward by Members that are a proponent of this approach are food security, environmental reasons, development, coherence of international and national law and transboundary use of traditional knowledge. Council For Trade-Related Aspects Of Intellectual Property Rights 2006, p. 3, 4, 5. The Members mentioning these reasons are primarily Latin American countries, such as Bolivia, Colombia, Ecuador, Nicaragua, Peru, Venezuela, Honduras, Paraguay and Brazil, but also the African Group, India, Indonesia, China and Thailand.
[605] Council For Trade-Related Aspects Of Intellectual Property Rights 2006, p. 5. Strikingly, the Members asserting this include developed countries such as the United States, New Zealand and Australia.
[606] Council For Trade-Related Aspects Of Intellectual Property Rights 2006, p. 5, as put forward by Members such as the African Group, Bolivia, Brazil, India, China and others.

Focus on traditional knowledge in this context is specifically concerned with issues regarding implementation of an amendment to the TRIPS Agreement to include a disclosure obligation for patent applicants as to the origin of genetic resources and traditional knowledge used in the inventions. According to the proponents of this international approach, this would prove free, prior and informed consent and benefit-sharing, drawing on the Convention on Biological Diversity's stipulations in this regard. To a certain extent, a division is visible between proponents of international and national action. The former includes many Latin American countries, while the latter includes such countries as the United States, New Zealand and Australia. It has also been noted by certain countries that the TRIPS Council should consider ways to realise both defensive and positive protection,[607] that is: protection that prevents third parties from obtaining IP rights and protection that provides positive rights for traditional knowledge holders themselves, respectively. Again, other countries argue that the concerns of indigenous peoples and local communities should be recognised and respected in the development of any international mechanism.[608] Clearly, the topic is very much geographically defined and closely connected to specific political climates as regards indigenous peoples that countries may or may not share. The present debate, ideas and proposals deal with the relationship between TRIPS and the CBD, which have been consolidated by the Director-General of TRIPS in a (short) 2011 report.[609] More specifically, topics that currently feature on the international agenda include how to deal with commercial use of traditional knowledge and genetic material by those other than source communities, especially in the context of patent applications, and how to ensure that TRIPS and the CBD support each other.[610]

3.1.5 Nature and subject of protection: diverging perceptions of ownership, property and 'works'

TCE protection from a copyright law perspective poses a number of difficulties. In a nutshell, intellectual property rights are characterised by the following elements. They comprise primarily positive, 'active' rights. The rights are exclusive, which means that the right holder is the sole party that can, by granting permissions, monetise, control or use the protected works. As such, they differ from 'mere' remuneration claims. In the case of such claims, use does not need authorisation, but compensation must be paid by the user, often organised through a collective management system. They are also absolute rights, in that they are applicable to all. Intellectual property rights are private property rights. To make this system of exclusive rights workable, and to ensure legal certainty, the subject matter of protection must be clearly delineated and clear rules designate the beneficiaries, or the right holders. For copyright law, concepts of ownership, property and 'works' present difficulties for TCEs. How such notions are perceived determines the scope and working sphere of the legal system of copyright law and the potential (in)applicability to TCEs.

With respect to ownership, most copyright laws provide that the rights rest with the author, although typically these can then be transferred.[611] The author is the natural person that has

[607] Council For Trade-Related Aspects Of Intellectual Property Rights 2006, p. 5. Members raising this point include Bolivia, Brazil, China, Ecuador, Venezuela, Pakistan, Thailand, Peru and others.
[608] Council For Trade-Related Aspects Of Intellectual Property Rights 2006, p. 6. This has been stressed by New Zealand and Zimbabwe.
[609] The Report (WT/GC/W/633, 21 April 2011) is available via: https://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm.
[610] See: https://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm.
[611] Transferability and communal property in the context of TCEs is further discussed in section 3.2.2.

created the work in question. This is called the "creator doctrine."[612] The *nature* of the protection gives rise to tensions. Intellectual property takes the shape of private *property* rights, to be exploited by the right owner. This is opposed to, for example, cultural heritage law, which tends to deal with matters of public interest.[613] In fact, in dealing with the question of traditional knowledge and TCE protection, the concept and perception of property seems to be a central difficulty underlying the broader disconnect between the existing legal regime of intellectual property law and traditional immaterial goods.[614] Indigenous communities generally do not conceive of traditional knowledge and expressions of culture as 'property' that is only, or at all, owned, held and used for economic reasons and to generate income or benefits. Property law on the other hand, concerns rules on the "rights of ownership of something having value".[615] The property law rules on both tangible and intangible property contain exclusive rights of ownership, which means having an exclusive say over the use and also the alienation of the property.[616] Of course, the perception of 'value' is a crucial factor, as this extends beyond economic value in the context of heritage.

On the contrary, the perception of 'ownership' in the context of traditional knowledge and folklore means that it is held and used with responsibilities, both for the community and for individuals.[617] In her early and much-cited report, Daes notes that "[f]or indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights."[618] Beyond these relationships, the knowledge or cultural expressions cease to have meaning, and selling actually halts the relationships.[619] Traditional knowledge and expressions of culture are communal, held by caretakers or custodians for the benefit of the community as a whole, and exist mainly outside "the modern marketplace".[620] Indigenous peoples' own legal systems, or customary laws, are critical and determinant for any use, sharing and protection of their heritage. A common characteristic of such systems are rules and procedures for giving consent, usually by the group as a whole, which tends to be temporary and revocable in nature.[621]

As to 'what' to protect, the subject matter of copyright law is literary and artistic works. The Berne Convention determines that these include not just writings, but also choreographies, musical compositions, drawing and painting.[622] These types of cultural creation appear closely related to TCEs. In a sense, TCEs could be understood as the traditional counterpart of copyright law's subject matter. In fact, the Committee on Economic, Social and Cultural Rights (CESCR) has explicitly paid attention to indigenous peoples' knowledge and creative

[612] Goldstein & Hugenholtz 2010, p. 245.
[613] Graber 2009, p. 170.
[614] Battiste & Youngblood Henderson 2000, p. 145.
[615] Battiste & Youngblood Henderson 2000, p. 71.
[616] Battiste & Youngblood Henderson 2000, p. 71.
[617] Battiste & Youngblood Henderson 2000, p. 71; Daes 1997, p. 4; Janke 1998, p. 8; Von Lewinski 2003, p. 216.
[618] Daes 1997, p. 4.
[619] Battiste & Youngblood Henderson 2000, p. 71.
[620] Battiste & Youngblood Henderson 2000, p. 147. As a consequence, Battiste and Henderson state, "[f]or those who live outside the modern marketplace or who do not perceive creativity, either biological or cultural, in patriarchal economic terms, intellectual and cultural property will always be fundamentally problematic. The idea of individualistic, market-driven legal components creating property rights in the creative interaction of human beings with their world leaves little room for respect for or protection of creation that does not divide creativity into transferable segments capable of having value in economic terms."
[621] Battiste & Youngblood Henderson 2000, p. 71.
[622] See Article 2(1) of the Berne Convention for the full list of what is understood by the expression 'literary and artistic works'.

expressions in its General Comment No. 17 on Article 15(1)(c), which contains the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author. It has stated that indigenous peoples' knowledge, innovations and practices are also covered by the notion of 'any scientific, literary or artistic production'.[623] However, the discussions on TCEs show that it is far less straightforward to establish the exact scope of protection.

However, the perception of the content that is ultimately protected also leads to a tension for indigenous heritage: copyright protects literary or artistic *works* of authorship. This means that it is not an idea, or a style, that is protected, but an expression. On top of that, the expression needs to be the result of the author's intellectual efforts and meet certain standards of originality.[624] Although there is no uniform standard of originality in the Berne Convention for example, generally speaking this means that there is a certain 'threshold', albeit a low one, for protection eligibility. With this in mind, Graber's observation regarding modern law and what he calls archaic cultural expressions can be noted here. He states that there is a marked disconnect between TCEs' functions as they are understood by anthropologists and indigenous peoples themselves, and lawyers' perceptions of TCEs as similar to 'works of art and literature'.[625] For TCE protection, the subject matter to be protected seems to extend beyond the notion of a 'work' as created by an autonomous individual's original imagination. Instead, degrees of communality, societal functions and custodianship play significant roles for TCEs.[626] This gives rise to difficulties precisely in the context of originality and individual authorship,[627] and ultimately ownership. As Fiscor has noted: "Many folklore expressions came into being a long time before copyright emerged and they went through a long series of imitations combined with step-by-step minor changes as a result of which they were transformed in an incremental manner (...) The creator is a community and the creative contributions are from consecutive generations."[628]

Despite the difficulties relating intellectual property (concepts) and TCEs, Drahos has observed that indigenous declarations that condemn existing intellectual property regimes do not actually reject intellectual property law in general. Rather, they argue for recognition of *indigenous* intellectual property rights:

> "Indigenous peoples, it seems, are seeking to make intellectual property serve a function beyond that of appropriation of value. They want property to function in a way that allows them to control the use of cultural information which in some deep sense is part of them, to which they are attached, cultural information they do not necessarily want to become the subject of global processes of commodification and appropriation."[629]

In sum, all indigenous peoples have their own specific customary rules, including regarding their intellectual 'property'. This is not to say that the *result* of property rights, i.e. to have an exclusive say over the property in question and acts reserved for the right holder, is

[623] Committee on Economic, Social and Cultural Rights' General Comment No. 17 on Article 15(1)(c) ICESCR, par. 9.
[624] Goldstein & Hugenholtz 2010, p. 189. More on the 'originality' requirement and the difficulties for TCEs follows in section 3.2.2.
[625] Graber 2009, p. 159–160.
[626] Graber 2009, p. 159–160, 161, 167–168.
[627] More on the copyright requirements of 'originality' and 'an identifiable author' follows in section 3.2.2.
[628] Ficsor 2002, p. 10.67.
[629] Drahos 1999, p. 365.

unsuitable. To the contrary, indigenous peoples essentially request the same for their traditional knowledge and TCEs when they claim control, consultation and free, prior and informed consent regarding any use of their heritage. These types of claim are related to self-determination issues. So, while the various copyright aspects and property as such might be difficult concepts, (collective) control over their traditional knowledge and cultural expressions is one of the core protection interests that indigenous peoples have regarding their heritage.

3.2 Instruments and requirements of international copyright law

International copyright law is characterised by having only a limited number of international instruments compared to, for example, cultural heritage law and the string of treaties that UNESCO has developed. This section assesses the history and development of the two principal instruments, the Berne Convention and the Universal Copyright Convention, and the content of the main criteria that are generally outlined for copyright protection. However, the focus of this chapter is not on the instruments or the requirements of copyright law *per se* and their difficulties for TCEs. These have been detailed extensively in academic literature and will only be summarised here. Instead, the main aim of this chapter is to analyse TCE protection from a foundational copyright perspective. So, after a short introduction to the history and development of the main international copyright treaties, a quick overview of the difficulties associated with copyright requirements and a discussion of national approaches and copyright law's focus on protection in the subsequent subsections, the core of the chapter offers a foundational perspective by way of an analysis of the main theories and principles behind copyright law and what these mean for TCE protection in sections 3.3 and 3.4, respectively.

3.2.1 The BC and UCC: history and development

The origins of the development of international copyright treaties can be found in histories of international piracy practices. Copyright law's subject matter is not bothered by national boundaries, which means that people in other countries tend to also appreciate and want to use foreign creative works, such as books, music and other artistic creations. Prior to international copyright protection, pirated copies and translations spread easily and quickly between countries. Whereas countries protected works of their national authors via national copyright laws, for a long time unauthorised copying and exploitation of foreign works was not considered unfair or immoral. During the 19th century, however, development of international copyright treaties was aimed at preventing international piracy.[630] Furthermore, the network of bilateral treaties that had developed prior to this was, although extensive, far from comprehensive and protection was inconsistent and unsystematic.[631]

The Berne Convention (BC), which is currently *the* global copyright treaty with 173 signatories, was intended to address the need for more uniformity and prevention of international piracy.[632] The history of this document is coloured by a division between two viewpoints: 'universalists' on the one hand, who favoured a universal copyright system drawing on "the concept of the author's immutable right of property in his work,"[633] and 'pragmatists on the other hand, who "have been prepared to sacrifice high principle in order to

[630] See on the foregoing generally Ricketson & Ginsburg 2006, p. 19–20.
[631] Ricketson & Ginsburg 2006, p. 42; Seville 2009, p. 8–9.
[632] Ricketson & Ginsburg 2006, p. 20, 42.
[633] Ricketson & Ginsburg 2006, p. 43–44.

gain the widest possible adherence to a particular proposition."[634] The two have resulted in defeat of protection proposals due to unwillingness to compromise and the diminishing of protection measures, respectively.[635] Ultimately, the main underlying philosophy of the Berne Convention seems to be informed by morals, more specifically authors' inherent natural rights that include non-transferable moral rights to their creations.[636] Notably, these are codified in Article 6bis BC, which establishes rights of attribution and integrity. Major features of the BC are the principle of national treatment and minimum safeguards of the Convention;[637] prohibition of formalities;[638] and a term of protection of 50 years after the death of the author.[639] Rights protected by the Convention are, importantly, moral rights,[640] and further: rights of translation;[641] reproduction;[642] communication through performance, broadcasting and public recitation;[643] and adaptation.[644] Moral rights and absence of formalities have long been a pressure point for the US to join, which they eventually did, but only in 1988.

The BC has been described as, for a long time, being almost entirely 'European'.[645] South American states, for example, *were* involved in various stages of the preparatory work, but did not ultimately sign it due to the fact that they found the provisions unsuitable for their specific stages of literary and artistic development.[646] As a parallel system,[647] influenced by and largely modelled on the BC, these states developed the Montevideo Convention in 1889, yet this did not become a truly Pan-American instrument.[648] Subsequently, a series of other agreements, the so-called Pan-American Conventions, came into being before a movement towards a merger with the Berne Convention and a quest for a universal copyright convention. The latter was taken up by UNESCO after the Second World War, with important political support from the US.[649] Although what would become the Universal Copyright Convention (UCC) contained a lower level of protection than the BC, the process towards its adoption was difficult.[650] As Seville describes it: "This was a completely new treaty, the Berne Convention countries having been unwilling to lower the Berne standard of protection to the point where it would have been attractive to American states, or to allow formalities to be made a condition of protection."[651] Ricketson and Ginsburg describe two main issues in particular as a 'double lock' to be opened before it could proceed to adoption. The first was the fear of 'Berne countries' that another international convention with a lower level of protection would undermine and weaken the BC. The second was the emphasis of the US in particular on formalities and protection duration based on publication.[652]

[634] Ricketson & Ginsburg 2006, p. 44.
[635] Ricketson & Ginsburg 2006, p. 44.
[636] See also Olian 1974, p. 83.
[637] Article 5(1) BC.
[638] Article 5(2) BC.
[639] Article 7 BC.
[640] Article 6bis BC.
[641] Article 8 BC.
[642] Article 9 BC.
[643] Article 11, 11bis, 11ter BC.
[644] Article 12, 14 BC.
[645] Ricketson & Ginsburg 2006, p. 1171; Seville 2009, p. 13.
[646] Ricketson & Ginsburg 2006, p. 1171.
[647] Ricketson & Ginsburg 2006, p. 1171.
[648] Seville 2009, p. 13.
[649] As described by Ricketson & Ginsburg 2006, p. 1172–1184.
[650] Ricketson & Ginsburg 2006, p. 1184.
[651] Seville 2009, p. 13–14.
[652] Ricketson & Ginsburg 2006, p. 1185, Article IV(2) UCC.

Eventually, the UCC was adopted in 1952. Its current relevance is limited, despite its 100 signatories, because most of these contracting parties have now joined Berne.[653] The main underlying philosophy is described as drawing on the practice of states granting (temporary) monopoly licences to incentivise the creation of artistic works,[654] the latter of which would benefit society as a whole. Prominent features of the UCC include national treatment;[655] a compromise on formalities, that is: a © notation, together with name and year of first publication would be sufficient for protection of foreign works in states that required formalities such as deposit, registration etc.;[656] a protection duration minimum of 25 years after the death of the author, or, for certain classes of works, shorter, i.e. 25 years from first publication;[657] and a 'Berne Safeguard Clause' to prevent withdrawals from the BC due to the lower standard of protection of the UCC.[658] There is 'only' one right to be protected, namely the right of translation,[659] which is 'even' subject to a compulsory licence imposed by a Member State where a translation of the work has not been published in that country's language seven years after first publication.[660]

3.2.2 Coloured by complexity: copyright characteristics and requirements and TCEs

Despite the early recognition for TCEs in an intellectual property context, copyright law has often been called unsuitable for indigenous peoples' TCEs. Specific characteristics of both TCEs and indigenous societies on the one hand and copyright law's requirements on the other hand seem difficult to combine. This is of course not surprising, given their difference in origins and rationales. Indeed, they reflect different world views,[661] both in space and time. Copyright law is, for example, shaped from a mix of market, society and individual author-oriented perspectives. It dates back 'only' several hundred years, developed over time from printing privileges, through the Enlightenment period and into more modern times. TCEs often stem from spiritual, identity and community values and date back thousands of years and generations. They are regulated by customary laws, which are rules that are deeply connected to the specific traditions and situation of an indigenous community, answering to their needs and regulating all matters relating to social order, conflict resolution and offences.[662] Obviously, these different origins could lead to a disconnect, both in expectations of and rationales for protection of copyright-eligible works on the one hand, and works that are an expression of traditional cultures on the other.[663]

Many studies and reports have paid attention to copyright law's potential for the protection of TCEs. Generally, they all come to the same conclusion: copyright law is not an ideal

[653] See: https://www.copyrightservice.co.uk/copyright/p14_universal_copyright_convention.
[654] Olian 1974, p. 85.
[655] Article II UCC.
[656] Article III UCC, Ricketson & Ginsburg 2006, p. 1186.
[657] Article IV(2) UCC, Ricketson & Ginsburg 2006, p. 1187.
[658] Article XVII, Ricketson & Ginsburg 2006, p. 1189.
[659] Article V(1) UCC.
[660] Article V(2), Ricketson & Ginsburg 2006, p. 1187.
[661] See Oguamanam 2006, p. xiii on the epistemic schism between indigenous and non-indigenous knowledge systems, and the consequences of this difference for an IP (in this case patent) law approach. The book suggests a cross-cultural approach to IP rights. The author states: "Modalities for the protection of knowledge that recognize the importance of cultural integrity and the contexts in which knowledge forms are generated have become imperative. (...) A cross-cultural approach to the protection of knowledge, unlike the conventional intellectual property framework, is an inclusive and not an exclusive enterprise. Such an approach endorses the notion that intellectual property could advance a balanced, as opposed to a narrow, cultural vision."
[662] Human Rights Council Advisory Committee 2012, p. 11.
[663] See also Pask 1993, p. 93.

mechanism. The requirements and aspects that are generally considered as the main obstacles for protection of TCEs under copyright law are: originality, fixation, an identifiable author, transferability and ownership, and duration. A rich body of literature exists on these obstacles. This section therefore only briefly reiterates these most commonly identified obstacles, before moving on to a dimension of copyright law and TCEs that is a less common subject of in-depth research in sections 3.3 and 3.4: an analysis of how copyright theories and rationales fit the needs of indigenous communities to protect TCEs. As already indicated in the introduction, this foundational perspective is essential to understand the tensions between existing legal frameworks and perspectives such as copyright law on the one hand, and the (in)ability to find a place for indigenous peoples' claims and worldviews on the other.

The characteristics and requirements of copyright law that follow below are discussed in most scholarly studies on the topic,[664] including in the present author's research master's thesis, as well as in policy documents, for example from WIPO.[665] They give a good indication of the tensions and perceived disconnect between copyright law, TCEs and indigenous worldviews. Originality and individual authorship are mismatched with collective, age-old TCEs, as are transferability, ownership and the limited duration of copyright protection. The same goes for fixation, or a material form of expression. It gives a good example of the tension between (certain) non-indigenous and indigenous perspectives of the 'existence' of protected immaterial creative works, namely laid down in carriers or only orally.

Originality

For protection of works under copyright law, there is a certain threshold criterion of originality[666] that has to be met. The understanding of this criterion ranges from a requirement for either an "imprint of personality" to, more outdated, "time, labour and effort" of the author.[667] There is thus a certain input required from the author, or in other words: "there must be something of the creator in the final product which can be said to be distinctively his or hers."[668] As the originality requirement is a rather low threshold,[669] the following discussion is fairly theoretical: obviously, the lower the originality threshold, the more easily TCEs qualify too. Still, it *does* cause tensions because originality is required with respect to each specific expression.

Originality is a difficult concept for works that are passed on through generations. Due to continuous use, the creation of traditional works, for example designs, songs or paintings, are often near-copies of existing works.[670] This means that these expressions do not necessarily contain elements that express the personality of the individual author as such, and are not

[664] See, for example, Haight Farley 1997, p. 1–58. Lucas-Schloetter 2008, p. 339–506.
[665] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 1–35.
[666] See extensively on the originality requirement and Aboriginal art Sherman 1994, p. 118–125.
[667] Treiger-Bar-Am 2006, p. 133.
[668] Sherman 1994, p. 119.
[669] See on this low threshold in copyright law as confirmed by the Court of Justice of the European Union (CJEU): Van Gompel 2014, p. 95–143, where he analyses the following line of case law: *Infopaq International v. Danske Dagblades Forening* (case C-5/08, 2009), par. 37; *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* (case C-393/09, 2010); *Football Association Premier League & Others v QC Leisure & Others* (case C-403/08, 2011), par. 97; *Painer v Standard VerlagsGmbH & Others* (case C-145/10, 2011), par. 87; *Football Dataco Ltd & Others v Yahoo!* (case C-604/10, 2012), par. 37); and *SAS Institute Inc. v World Programming Ltd* (case C-406/10, 2012), par. 45.
[670] See for an example from indigenous songs, Mills 1996, p. 65.

therefore original displays of the individual author's own intellectual creation.[671] Here, a disconnect is visible between what is valued under copyright law, namely stimulation of new creations, and what is often valued in indigenous societies, namely accurate depiction and continuation of traditional expressions. In many cases, this has to do with the fact that TCEs contain spiritual elements and serve educational purposes.[672] As Lucas-Schloetter notes for example with regard to music, the performances of the artists tend to reflect group feelings. They form "collective voice[s]", and their goal is therefore to perpetuate the heritage they are entrusted with, rather than to innovate or deviate.[673]

This is not to say that traditional culture is necessarily static, but rather that 'born-traditional' creativity and cultural expressions develop in a (slow) organic way.[674] As a consequence, cultural expressions that have been developed somewhere in the past, treasured and passed down through generations, are often likely to be considered not new or original enough for various types of legal protection,[675] such as copyright. This is connected to the concept of authorship. Original authorship is, generally speaking, not a central feature of indigenous creativity, especially in the case of spiritual works of art.[676] But concepts of authorship and originality under copyright law are closely interlinked. Originality has been called the very crucial element of authorship,[677] despite low originality standards in most, if not all, countries. More on this second obstacle for copyright protection of TCEs, authorship, follows below where the issues with regard to an identifiable author are assessed.

TCEs cannot automatically be considered unoriginal. While it may only be allowed in certain communities, or valued more in some communities than in others, indigenous artists can derive inspiration from centuries-old TCEs and still add original elements. Such works can in fact be protected by copyright law.[678] This means that no general statement on lack of originality can be made. Copyright protection *might* be possible in certain cases where the threshold criterion of originality could be considered to be met, but not in others. In this sense, a distinction can be made between TCEs as such, where authors can be perceived as impersonal, and TCE-inspired works made by individual artists that add original elements.[679] The requirements of originality, fixation and an identifiable author, the latter two of which are assessed below, all seem to be complied with in this case. Still, this presents no solution for the large body of TCEs that is transmitted throughout generations and 'copied' time and time again. Furthermore, as mentioned earlier, innovation does take place and is also valued in indigenous societies.[680] Assessment of the originality requirement can thus have a mixed outcome, depending on the specific expression in question.

This also means that third party copies with slight variations can be protectable by copyright as well. This gives rise to issues of defensive protection, especially if this means that

[671] Lucas-Schloetter 2008, p. 384.
[672] Haight Farley 1997, p. 21.
[673] Lucas-Schloetter 2008, p. 385.
[674] Haight Farley 1997, p. 21; Lucas-Schloetter 2008, p. 384.
[675] Scafidi 2005, p. 21.
[676] Haight Farley 1997, p. 21.
[677] See M.B. Nimmer, Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas, New York: Matthew Bender & Co. 1963, Ch. 1, via: Haight Farley 1997, p. 19, footnote 69.
[678] Lucas-Schloetter 2008, p. 385.
[679] Lucas-Schloetter 2008, p. 385.
[680] See Drahos & Frankel 2012, p. 1–28 for an extensive article on indigenous peoples' traditional knowledge and innovation.

indigenous peoples themselves would violate third party copyright upon expressing their own traditional culture. Something similar is mostly visible in a patent law context, where third party patents potentially obstruct indigenous communities from applying their own traditional knowledge. For now, this section continues with copyright requirements and does not explore this issue further.

Fixation

The fixation requirement is the requirement that expression has a material form or is fixed in a tangible medium.[681] In certain countries it is a prerequisite for copyright protection, for example in the United States, where, strikingly, there is significant recognition for cultural appropriation of indigenous peoples' culture. This presents difficulties for indigenous traditions that often exist only in an intangible way, for example music or dances that are not recorded or choreographed. Article 2(2) of the Berne Convention allows member state legislation, but does not require contracting states to make protection dependent on fixation or expression in some material form. Generalising slightly, it could be said that common law countries, including the United States[682] and the United Kingdom,[683] have a fixation requirement, while civil law countries, such as Peru, Brazil and Sweden,[684] do not.[685] Again, a disconnect is visible here between understandings of copyright protectable works in (certain) mainstream societies, and indigenous reality. It is the very nature of most – if not all – TCEs to exist in an unfixed way within their source community.[686] This criterion therefore limits the potential scope of application for copyright protection with regard to TCEs.[687]

As Susan Scafidi notes, however, cultural products often exist intangibly due to practice and by explicit local choice.[688] The intangible nature of cultural products is probably appreciated, preferred and valued precisely for its elusiveness: they can be transmitted more directly and bring about participation within a community.[689] The unfixed nature of TCEs also makes them flexible and adaptable, rather than being static and stuck in a fixed, tangible medium of expression. Similarly, indigenous cultures in general have shown flexibility and dynamism in their development and towards their surroundings. It is important to realise that the intangibility of TCEs can indeed be an explicit choice. Acknowledging this will not only reflect respect for cultural differences, but will also help to put mainstream understandings of creativity into perspective. Scafidi also stresses that recognising intangibility as a cultural

[681] Goldstein & Hugenholtz 2010, p. 158, 232.
[682] See Section 102 of the US Copyright Act of 1976, 17 U.S.C.
[683] See Article 3(2) of the Copyright, Designs and Patents Act 1988, (Chapter 48), accessed via: http://www.wipo.int/wipolex/en/text.jsp?file_id=309032.
[684] See Article 3 of the Peruvian Copyright Law (Legislative Decree No. 822 of April 23, 1996); Article 7 of the Brazilian Law No. 9.610 of February 19, 1998 (Law on Copyright and Neighboring Rights); Article 1 of the Swedish Act on Copyright in Literary and Artistic Works (1960:729). All are consulted via the WIPO Lex, http://www.wipo.int/wipolex/en/. The English version of the Swedish Act in the WIPO Lex is translated with an automatic translation tool.
[685] Goldstein & Hugenholtz 2010, p. 232; Carpenter & Hetcher 2014, p. 2259.
[686] Scafidi 2005, p. 31.
[687] Lucas-Schloetter 2008, p. 383.
[688] On a side-note, a different manifestation of fixation occurs when third parties fixate unfixed TCEs, an issue which raises questions of its own, such as who has the right to decide upon fixation and why it is often not community members who conduct such acts; see on this Scafidi 2005, p. 34. A related discussion is on digitisation of indigenous cultural heritage by cultural heritage institutions. Although this may take place for preservation purposes, indigenous communities tend to fear that this makes their cultural heritage vulnerable to third party use, fixation and acquisition of intellectual property rights.
[689] Scafidi 2005, p. 32.

choice leads to appreciation of the value of this different 'type of existence' of property, without trying to change it to fit into existing prototypes of creativity.[690]

Authorship

An important aspect of copyright law is who has authorship status and can thus claim the rights that correspond with the creative act of having made a work. For contemporary, individual indigenous artists this seems rather straightforward, but TCEs tend to date back many years. Furthermore, many TCEs are argued to have a collective nature which significantly complicates matters. This collective nature is two-fold. Firstly, TCEs are considered to be held collectively.[691] Whereas individual authorship may exist legally, this collectivity means that social perceptions of authorship can be quite different. Secondly, TCEs can even be created in a collective way, for example by an individual artist under the direction of others or by multiple contributors working together. These aspects of indigenous heritage and creativity give rise to tensions between the actual creation process of TCEs in indigenous communities and the concept of (joint) authorship in copyright law, which will be discussed here.

Individual and joint authorship

The 'traditional' form of authorship in copyright law results from a focus on the acts of creative expression of an individual, producing such 'traditional' copyright products as novels, poems and musical works.[692] Collaborative processes of creativity simply do not seem the original default setting in copyright law, even though many laws recognise 'joint' authorship. Note that national laws contain many approaches to the intricate notion of joint authorship or collaborative works, which is for example not harmonised at the EU level.[693] For a general idea of the problems that the concept of authorship presents for indigenous peoples' TCEs, a basic understanding of 'joint authorship' suffices here. Joint authorship is always about a (significant) creative contribution to one particular work.[694] The strong focus on the individual is in tension with what this thesis has described as traditional creativity in the context of indigenous peoples' TCEs. However, outside traditional knowledge debates copyright law has also increasingly faced challenges to its conceptions of authorship, for example in the case of film productions[695] and increasingly large-scale scientific research projects,[696] where there are many collaborators.

For group authorship, merely contributing ideas, facilitation or general directions is not enough. Instead, copyright law's understanding of joint authorship implies that contributions must meet copyright law standards. In other words, the general rule is that co-authors must make a contribution to the *expression*, or contribute creative expression to the work.[697] Furthermore, there are requirements for these contributions that are country-specific. They

[690] Scafidi 2005, p. 32.
[691] Interesting in this regard are the cases Bulun Bulun v. R & T Textiles (1998) and Milpurrurru v. Infodurn Pty Ltd (1994). In these cases, which concerned Aboriginal artworks, the community as a whole was recognised to a certain extent, despite these being copyright cases.
[692] Goldstein & Hugenholtz 2010, p. 186.
[693] See for an analysis of various of these approaches: Van Eechoud e.a. 2009, p. 235–243.
[694] Again, to nuance this statement: in some countries, a distinction is made between single (unitary) works and multiple (separate) works. See: Van Eechoud e.a. 2009, p. 235–243.
[695] Goldstein & Hugenholtz 2010, p. 244.
[696] Bently & Biron 2014, p. 239–243.
[697] Goldstein & Hugenholtz 2010, p. 248.

must for example be "inseparably connected"[698] and integrated, like in the UK,[699]economically indivisible, so not subject to possible separate exploitation, like in Germany,[700] or there must have been a collaboration towards a common goal or in accordance with a common plan, like in France, Belgium, Portugal and Spain.[701] With this in mind, the social structures of indigenous societies, where individual creators for example do not claim authorship and artistic works are seen as communal, tend to complicate the identification of bearers of the rights according to copyright law's standards on (joint) authorship and ownership of the rights. This is an example of an incoherence between perceptions of copyright law and social practices,[702] and arguably beyond the 'margins' of what copyright originally meant to protect.[703]

Authorship and communal TCEs

To understand the tensions resulting from copyright authorship it is important to recall that the community is central to indigenous societies. It forms "the core of human existence."[704] The focus is not on individuals but rather on the community as a whole.[705] Indigenous communities view folkloric expressions as a part of the collective and thus as being held, controlled and shared by the community. Collective 'property' has been understood as the norm in various indigenous societies.[706] Indigenous art is not seen as owned by the creator of a particular piece, but rather as shared material of the community and as something consistent that is handed down through the generations and is beneficial for the community as a whole.[707] Because it is the community that benefits from indigenous art, it is argued that it should also be the group as a whole that exercises control over it. To this end, customary laws often contain systems with "layers of rights."[708] Many people could be involved in authorisation processes regarding the use of certain designs or artworks.[709] The foregoing shows a number of aspects that make the concept of *authorship* problematic. The nature of TCEs is collective, and the whole community is considered to be the 'owner' or 'holder' of the knowledge. Therefore, a single person does not usually claim authorship of the material that is considered collective. In addition, due to age-old creative processes it is difficult to establish the individual's creative contribution and therefore individual authorship status.[710]

This brings us to the option of *joint authorship* for indigenous peoples' TCEs. The contribution of the joint authors is determinant here. Ideas for example are not enough and there needs to be a certain creative, contributing expression. This is a complicated

[698] Goldstein & Hugenholtz 2010, p. 249.
[699] Bently & Biron 2014, p. 239; Van Eechoud e.a. 2009, p. 236.
[700] Van Eechoud e.a. 2009, p. 236–237.
[701] Van Eechoud e.a. 2009, p. 237.
[702] See for more on this the contribution by Bently & Biron 2014, p. 237–276, who discuss such practices as scientific authorship, conceptual art and literary editors and the differences between authorship from a legal perspective and from the perspective of these social and cultural practices.
[703] This phrase is borrowed from Bently & Biron's contribution in Van Eechoud's edited volume on the work of authorship, Bently & Biron 2014, p. 248.
[704] Gervais 2003, p. 480.
[705] See R. Gana, 'Has Creativity Died in the Third World? Some Implications for the Internationalization of Intellectual Property', Denver Journal of International Law and Policy Vol. 24 1995, p. 132, as cited by Anderson 2004, p. 6, footnote 25.
[706] Gervais 2003, p. 483.
[707] Haight Farley 1997, p. 30.
[708] Haight Farley 1997, p. 32.
[709] Haight Farley 1997, p. 32.
[710] See also Kono 2009, p. 17.

requirement for large group authorship. Simone has described the difficulties of acknowledging and protecting indigenous communal interests under copyright law on the basis of Australian case law. It shows that the disconnect between copyright law's notion of authorship and indigenous conceptions of authorship is a prime example of an existing gap in the system.[711] To determine joint authorship under copyright law, the focus is on the expression and its material form. Originality is used as the measure. This is more difficult in the context of larger groups, the importance attached to spiritual or ritual processes of the creativity rather than the material forms of creation, and the social value of TCEs, which may not 'count' towards originality.[712] However, Simone also argues that the authorial contribution of the community is clearly visible in indigenous art that draws on, for example ritual knowledge, due to control over subject-matter and style and the initiation of artists following customary rules. In essence, the community's role could also be considered as significant due to structures of consultation and approval.[713] This would eliminate this objection for copyright law and communal artistic works.

Some cultural expressions comprise a truly collective creative effort.[714] This is the second aspect of TCEs' collective nature: the creation process and authorship of TCEs is in some cases an actual joint one. Again, this is where the joint authorship test and its requirements play a role. However, Johns warns about assuming the existence of a *general* contrast between Aboriginal cultural practices and individual expressions. She mentions for example ethnographer and theorist of visual arts Eric Michaels, who has described insistence on the collectiveness of Aboriginal art as "some phony appeal to the primitive, or to a recently manufactured tradition." According to him, modern Aboriginal painting is carried out by individuals, and forms a newly invented art form that draws on western technology and aesthetics.[715] Furthermore, Graham and McJohn warn about perceiving individualistic intellectual property law as too strictly incompatible with collective rights for indigenous peoples. They argue that intellectual property law has more often been adjusted to new subject matter and different kinds of production and ownership of groups, and that there already exist multiple fields where intellectual property rights are both created and maintained by collectives, for example in film making.[716]

Nevertheless, copyright law's concept of, initially individual, authorship proves to be difficult for TCEs, which are often considered collective in nature. For joint authorship, indigenous creative processes also run into difficulties due to copyright law's specific requirements for this. Attempting to convert traditional creativity into a form that is compatible with a 'western style' legal context such as copyright law disregards indigenous views on authorship and

[711] Simone 2015, p. 247.
[712] Simone 2015, p. 246.
[713] Simone 2015, p. 248.
[714] Johns 1995, p. 178 mentioning the Walpiri Aborigines of the Northern Territory in Australia. She cites P. Faulstich, ''You Read 'im This Country': Landscape, Self and Art in an Aboriginal Community', in: P. Dark and R. Rose (eds), *Artistic Heritage in a Changing Pacific*, Honolulu: University of Hawaii Press 1993, p. 149: "[I]n producing paintings, individuals lay claim to aspects of the [a]ncestral realm....Painting tends to be a social activity, directly involving several individuals and catching the interests of many others....Designs are discussed, and the layout of the painting is determined through consultation and negotiation...A proper painting is one that well reflects the collective Walpiri vision of reality."
[715] Johns 1995, p. 178–179, citing E. Michaels, 'Postmodernism, Appropriation and Western Desert Acrylics', in: S. Cramer (ed.), *Postmodernism: A Consideration of the Appropriation of Aboriginal Imagery*, Brisbane: Forum Papers, Institute of Modern Art 1988, p. 26. He also states that "Western Desert painting - and perhaps all contemporary canvases labelled Aboriginal - [must be] separated, wrenched from their ethnographic context (for example, nearly all available discourses claiming 'tradition' and 'unique authenticity')."
[716] Graham & McJohn 2005, p. 328–329.

ownership.[717] Riley has called the struggle for recognition of rights to cultural property as an indigenous group a "search to recover collectivity". This reveals the apparent disconnect between dominant legal systems and interests and indigenous societies' worldview, position and needs.[718] It represents a broader issue of which TCEs and indigenous heritage is but one example.

Transferability and ownership

The general understanding of copyright and other intellectual property as transferable property interests is fundamentally different from the perception of TCEs as 'property'. This is closely related to property issues in general and TCEs' specific characteristics that we have already identified earlier. TCEs tend to represent a bundle of relationships, rather than being conceived of as a commodity.[719] They are considered as elements of a people's collective identity, and can never really be permanently transferred or alienated.[720] Sharing is possible. This would be an expression of the relationship between the people and their territory,[721] and it actually creates relationships between givers and receivers of the traditional knowledge or culture.[722] But selling would end the relationship.[723] As relationships continue when an element is shared, customary rules continuously apply. This means that receivers or borrowers of the indigenous heritage must be aware of these rules, repay the gift and accept supervision of the people from whom the knowledge originates.[724] This different understanding of alienation shows the tension between the focus of intellectual property systems on commodification of immaterial innovations or creations, and the general and initial lack thereof in indigenous knowledge, innovation and creativity.[725]

However, indigenous peoples do not oppose commodification *per se*. Some communities might want to exploit their heritage themselves. In this sense, they require protection of TCEs to further their economic interests. This is for example the case in Sherman's Aboriginal art example.[726] So, while indigenous culture and copyright law's orientation towards commodification do not match at first glance, indigenous peoples do not turn away completely from copyright law as a protection option. Instead, they wish for property and copyright law to function according to their worldviews. Indigenous peoples want to be able to control use of their cultural information, but without it automatically becoming subject to worldwide commodification and appropriation,[727] and, consequently, alienation.

A case law example on issues of transferring indigenous knowledge is the Australian copyright case *Yumbulul v. Reserve Bank of Australia* of 1991.[728] This case illustrates the difference between mainstream and indigenous understandings of the possibility to transfer – in this case, to license – rights in creative works. The case concerned a complaint about the reproduction of the design of the Morning Star Pole by Aboriginal artist Terry Yumbulul,

[717] See also Anderson 2004, p. 6.
[718] See also on this: Riley 2000, p. 177–178.
[719] Daes 1997, p. 4.
[720] Daes 1993, p. 8.
[721] Daes 1993, p. 8.
[722] Daes 1997, p. 4.
[723] Battiste & Youngblood Henderson 2000, p. 71.
[724] Battiste & Youngblood Henderson 2000, p. 70.
[725] Drahos 2011, p. 233.
[726] Sherman 1994, p. 113.
[727] Drahos 1999, p. 365.
[728] *Yumbulul v. Reserve Bank of Australia* [1991] FCA 448; 21 IPR 481.

which was reproduced on an Australian $10. The Reserve Bank had obtained a sub-licence from Aboriginal Artists Agency Ltd. The latter, in turn, had obtained an exclusive licence from the artist, Yumbulul, which the artist now challenged. The artist maintained that customary laws also required approval by the elders of his people, who effectively 'owned' the design.[729] In other words, it was not in the artist's power to sign away reproduction rights to third parties. This is recognised by the Court:

> "There was evidence that Mr Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the Bank. […] And it may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin."[730]

In sum, how the idea of transferring rights is perceived depends on the worldviews or (customary) rights systems that are adhered to. The economic exchange of (rights in) immaterial content that is the norm in mainstream societies and the social exchange of TCEs in indigenous communities have different consequences.

Duration

The 'limited' duration of copyright tends to be viewed as another obstacle of copyright law for TCE protection. According to Article 7(1) of the Berne Convention, copyright protection lasts 50 years *post mortem auctoris*. In European countries, this is 70 years after the death of the author.[731] After this period, works fall into the public domain and are freely usable. The WIPO Draft Gap Analysis on the protection of TCEs notes that it is inherent to the copyright system that protection does not last infinitely. This Analysis is a document in which WIPO assesses international obligations for TCE protection, gaps at the international level and whether and how to address these gaps. It reiterates that protection is limited in time to ensure this move into the public domain.[732] As we shall see below, this is connected to the utilitarian tradition of copyright law.

For indigenous peoples, TCEs tend to continue to play a role in their communities despite their ancient origins. Therefore, indigenous peoples retain an interest in controlling use. It is argued that protection of TCEs serves the interests of communities that exist outside of the passage of time, rather than merely benefit an individual author.[733] This is another example where the goals and objectives of intellectual property laws, such as copyright law, diverge from indigenous reality. However, there are also areas of intellectual property law that do (conditionally) offer infinite protection, for example trademark law and geographical indications.

However, when trademark law is described as an option for protection of indigenous peoples' needs, this would "require[s] squeezing indigenous interests into a system designed for

[729] Battiste & Youngblood Henderson 2000, p. 162.
[730] *Yumbulul v. Reserve Bank of Australia* [1991] FCA 448; 21 IPR 481, par. 21.
[731] See recital 12 and Article 1 of Directive 2006/116/EC on the term of protection of copyright and of certain related rights, which harmonises the term of protection of 70 years after the death of the author, or 70 years after the work is lawfully made available.
[732] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 20.
[733] Haight Farley 1997, p. 17.

interests in trade and commerce."[734] Its potentially unlimited duration of protection is subject to conditions. The trademark must be used for trade or commercial purposes, applied to goods or services and employed to distinguish these goods or services in the commercial sphere in order to continue to enjoy protection.[735] Trademarks can therefore only be of limited value for TCE protection, despite their unlimited duration. For copyright there are no such usage conditions, either with respect to actual use in order to hold on to the right or regarding the type of use. But the other side of the coin is thus its time-limited nature. As TCEs continue to be developed, adapted and stay relevant, a maximum number of years' protection of proprietary interests[736] may not be the best option for indigenous communities. However, as suggestions of copyright term extension are already met with fierce criticism and heated debate, something similar could be expected for entirely unlimited protection in the context of TCEs. Again, this indicates tensions between different worldviews.

In sum

Although the focus of this thesis is international law, it should be noted that some countries have dealt explicitly with TCEs in their copyright laws on a national level.[737] They have reported on these laws to WIPO.[738] The level of detail of the reported laws varies. This means that states may either have added new, specific provisions to their existing copyright laws or settled for a mere addition of folklore to the scope of existing provisions, for example the categories of works to be protected. A number of broad approaches and aspects of TCE protection can be distilled from various of the national laws that have been reported to WIPO, based on a quick scan for illustrative purposes only, and not as an in-depth analysis or exhaustive overview of all possible national approaches.[739]

The first approach that can be distilled from the national laws is the choice by various countries to assign to TCEs or folklore a status of 'public property'. Other designations that are used in various laws are 'national works', 'belonging to the national heritage' and 'belonging to the state'. The rights are then assigned to the state for example, and a Board or an authority is in charge of granting permissions and collecting fees. The types of use to be authorised vary from every use for commercial purposes (outside of traditional or customary contexts) to reproductions, communications to the public, adaptations and fixations, and to specific use for (public) performances (for profit). Approaches of Boards or authorities seem to address any problems that may arise regarding identification of beneficiaries and right holders, for example for third parties that wish to use the materials or for the collection of royalties. However, it is questionable whether this is a solution that sits well with the source communities themselves, their rights and their wish to exercise control over their own TCEs.

[734] Frankel 2011, p. 16.
[735] Frankel 2011, p. 4.
[736] Kono 2009, p. 18.
[737] N.B. Zambia, Kenya and Panama are further examples of countries that have reported *specific* laws to WIPO, so not their copyright laws, on TK and TCEs and Indigenous peoples' intellectual property rights, respectively.
[738] See the overview of national laws as reported to WIPO, available via: http://www.wipo.int/tk/en/databases/tklaws/search_result.jsp?searchPage=1&subject=tce.
[739] Due to time limitations most, but not all, reports have been assessed. These have been read 'diagonally', without a specific selection methodology or empirical goal. This means that the broad approaches addressed here are roughly grouped around recurring themes. Nevertheless, it serves the purpose of giving a general idea of the diversity of approaches of national legislators. There is a short document with summarising notes for this section on file with the author.

Secondly, another solution in national laws is the protection of works 'inspired by (expressions of) (national) folklore' and of original works derived from folklore, such as translations, adaptations, 'other transformations or modifications of the works of expressions of folklore,' but also collections. This solution is often included together with the national heritage solution mentioned above. It meets the difficulties of an identifiable author and the concerns and countervailing interests of freedom of expression and 'standing on the shoulders of giants'. This means that (individual) contemporary indigenous artists can acquire copyright over their TCEs, provided that the works meet the usual copyright criteria. However, this also means that the materials are not completely taken out of the public domain through protection. As a consequence, the protection does not necessarily provide protection for the benefit of the source communities only or put all of their interests first, but rather also addresses the interests of (commercial) 're-users' and third party fixers of adaptations of the content.

Other laws specifically protect expressions of folklore from *commercial* acts of reproduction, communication and adaptation. Many laws specifically mention TCEs in the context of exceptions and limitations, including for private use and education. Moral rights are also outlined in many laws, including regulations ensuring protection of integrity, attribution of source communities or geographic places of origin and protection of communities' reputation or image against distortion. Connected to this is the prevention of offensive use. In Kenya, commercial use without permission and wilful misrepresentation and distortion that harms the honour, dignity or cultural interests of the source communities are even considered to be criminal offences.[740] Apart from laws dealing to a greater or lesser extent with the protection of folklore, there are also national laws that do not refer to folklore at all, expressly exclude folklore from their scope or designate it as in the public domain.

Regardless of such national approaches, attempting to convert traditional creativity into a form that is compatible with a 'western style' legal context such as copyright law arguably disregards indigenous views on authorship and ownership[741] and creative production and processes. What this section has mainly shown is a disconnect between 'technical' requirements of a mainstream legal system and works that originate 'outside' this particular determined structure. Sections 3.3 and 3.4 further delve into copyright law from a foundational perspective. They set out the underlying traditions, theories and rationales of copyright law. These will be measured against the identified TCE protection interests to examine potential disconnects that also exist on this underlying, foundational level.

3.2.3 The importance of protection, preservation and promotion

This section elaborates various perspectives on the *protection* of TCEs. Although commonly used, the term 'protection' appears too restrictive to fully cover indigenous peoples' interests. Preservation and promotion are also required in order to address the full spectrum of indigenous concerns with regard to their TCEs. It will become clear that copyright law's protection rationales and theories do not match one-on-one with indigenous needs in this respect.

[740] See Section 20(3) and (4) of Kenya's Copyright Act No. 130 of 2001.
[741] Anderson 2004, p. 6. As one solution, Carpenter et al demonstrate that certain perceptions of cultural property are not inspired by ownership issues, but rather by stewardship concerns, Carpenter, Katyal & Riley 2009, p. 1046.

Various understandings of protection

The persistent use of the term 'protection' in TCE discourse is not necessarily strange, if rather one-dimensional. Of course, protection is typical intellectual property terminology, just as preservation and promotion are typical cultural heritage and human rights notions, respectively. For example, WIPO's work on TCEs focuses on intellectual property protection of right holders' interests from misappropriation and use by third parties of the outcome of communities' creative intellectual processes.[742] Preservation and safeguarding of cultural heritage, and especially of (traditional) ways of life, focus on "preserving the social processes and environments which have produced and continue to create traditional cultural expressions."[743] Protection is said to be distinct from, yet complementary to, safeguarding. The latter would be "more directly concerned with the revitalization, transmission and maintenance of traditional cultural expressions than their legal protection in the intellectual property sense."[744] At least, this is the case when preservation is understood in an active rather than a static sense.

Ruiz Muller has noted that where the concept of 'protection' was previously used rather ambiguously, its actual meaning has recently been more systematically interpreted.[745] He distinguishes three facets of the notion of protection. The first is the classic intellectual property concept of granting exclusive rights to the right holders. The second is a broader perspective, which includes "compensation, social recognition through moral rights, sharing benefits, and maintaining, preserving and controlling access and uses of TK through unfair competition principles." And the third includes defensive aspects of protection to safeguard rights to TCEs.[746] The last is mainly visible in a biodiversity, traditional knowledge and patent law sphere. Put in a simplified way, in order to be eligible for a patent the applicant has to demonstrate the provenance of the traditional knowledge that is used in the invention.[747] If the applicant is unable to do so, no patent will be granted. As these concepts of exclusivity, recognition and defence show, the understanding of 'protection' is varied, just like – or maybe even depending on – the protection *interests*. These are varied as well, as we have seen in Chapter 2.

Defensive protection and TCEs

From the perspective of protection terminology, it has been noted by several scholars that most claims of indigenous peoples are regarding *defensive* protection. In their studies on traditional culture and arts in Indonesia, both Jaszi and Aragon note that prime fears and claims of traditional artists draw on notions of defensive protection.[748] Third party works or inventions that fixate or incorporate TK and TCEs can in fact be protected under intellectual property law. Commercial third parties can thus acquire rights over traditional, indigenous material.[749] Privatisation means that indigenous communities can lose control over, and sometimes even access to, their own traditional knowledge. Another way to approach traditional knowledge and TCE protection under existing intellectual property systems could be to provide defensive protection as opposed to active intellectual property rights.

[742] Wendland 2009, p. 94–95.
[743] Wendland 2009, p. 94.
[744] Wendland 2009, p. 95.
[745] Ruiz Muller 2013, p. 6.
[746] Ruiz Muller 2013, p. 6.
[747] Ruiz Muller 2013, p. 21, endnote 9.
[748] Aragon 2012, p. 411; Jaszi 2009, p. 17.
[749] Graham & McJohn 2005, p. 317.

New Zealand's trademark law is an example of a defensive protection approach. Article 17(1)(c) of the Trade Marks Act provides a ground for opposition to the registration of a trademark on the basis that it would be likely to offend Māori. Frankel notes that this does not provide for a "positive endowment of rights to ownership and control over indigenous signs and symbols, which (…) is what indigenous peoples seek."[750] Rather, it provides for a negative right that results in an inability for third parties to use the sign or symbol. This does still imply a certain, if limited, amount of control for indigenous peoples over a specific part of their cultural heritage, namely signs and symbols.[751] The concept of defensive protection is particularly relevant if we look at both the tensions with technical requirements of copyright law as described above and at the compatibility of copyright law theories with TCEs, which are elaborated on below. If positive intellectual property rights are in tension with the characteristics of TCEs and indigenous peoples, prevention of third party intellectual property rights – such as in the case of trademark law, opposing registration of certain signs and symbols[752] – might be an option to learn from for the protection of TCEs more generally.

Risk of loss of TCEs: preservation

Apart from third party (intellectual property) threats, there is also the risk that traditional knowledge and TCEs are lost following loss of traditions, lands and languages. This could lead to difficulties – or even the inability – to transmit knowledge to future generations. The prevention of such loss is sometimes also described as *preservation*. This is a term that is typically used in the area of cultural heritage. However, when the concept is interpreted too strictly, this leads to a risk of freezing dynamic expressions of culture. Indigenous communities' own views on preservation and development of their cultures, and their interest in preservation as such, should have priority at all times in order to prevent top-down inflicted assumptions of the need for preservation and essentialist perceptions of safeguarding concerns.

It can be a major concern of specific indigenous communities to prevent their heritage being lost and being able to continue their artistic practices in a dynamic way. For example, 'the big three' concerns raised by traditional artists in Jaszi's study on Indonesian traditional arts comprised issues of preservation and promotion. The main needs expressed by artists were to stay relevant for audiences, to be able to transmit their heritage to future generations and to be recognised in mainstream society as a living heritage to be celebrated.[753] These needs and preservation interests seem to reach beyond what an intellectual property approach could achieve. This is essential to flag up here and keep in mind for the rest of the chapter and the thesis as a whole. Risks of counterfeiting and foreign intellectual property rights followed only after this as concerns in Jaszi's study, but most concerns were regarding maintaining and keeping alive traditional arts practices. As the central premise of the study Jaszi maintains: "If there is a role for IP in support of the traditional arts in Indonesia, it is to contribute to the conditions that sustain the everyday processes by which those arts have flourished in the past,

[750] Frankel 2011, p. 19–20.
[751] Frankel 2011, p. 20: "The ability to oppose registration in some instances amounts to a sort of control over some aspects of inappropriate use, which is a step towards what indigenous peoples seek. The control is somewhat limited for two reasons. First, because the control lies primarily in the hands of the registration system rather than the indigenous peoples and, second, because it does not extend as far as the aspiration of having third party users seek indigenous peoples' consent to all uses of indigenous signs and symbols."
[752] See for more on offensive marks, for example in the case of religious or culturally sensitive terms, and grounds for refusal of trademark registration, which could be relevant for indigenous peoples: Kur & Knaak 2008, p. 315 onwards.
[753] Jaszi 2009, p. 12 onwards.

and continue to thrive today."[754] Other than this 'preservation-related function' through ensuring sustainability, preservation of traditional artistic practices *proper* is not a function of intellectual property.[755]

However, although preservation as such is not a function of intellectual property it cannot be denied that intellectual property protection and cultural heritage preservation are still closely related, especially in the context of indigenous heritage. Something similar is argued by Drahos, Kono and Wendland. First, Drahos states that "[i]ndigenous peoples, it seems, are seeking to make intellectual property serve a function beyond that of appropriation of value." Instead, a central purpose of intellectual property for them would be to "function to preserve their way of life."[756] Second, it has been argued that intellectual property law could serve both public interests, such as safeguarding intangible cultural heritage of indigenous peoples for future generations, and common policy objectives of intellectual property and human rights law, such as cultural diversity. To this end, Kono states that intellectual property law should "become a tool rather than an obstacle for the achievement of these common goals."[757] Wendland, then, considers protection of creativity and safeguarding of cultural heritage "two sides of the same coin" as both are ultimately required for preserving, promoting and protecting intangible cultural heritage.[758] Such policy objectives would benefit from a combined approach. Wendland states: "Above all, managing intellectual property issues within intangible cultural heritage documentation programs could shed further light on the relationship between the legal protection of creativity and the safeguarding of intangible cultural heritage, and promote their relationship as one of complementarity and mutual supportiveness."[759]

Promotion of TCEs

A crucial point in the discussion on TCE protection, and in particular in the broader indigenous rights discussion, is the aspect of promotion. Threats to indigenous heritage require promotion of traditional cultures and their creative expressions,[760] to ensure transmission, development and sustainable continuation into the future. The recognition of indigenous peoples' rights in broader society and the ability to continue to carry out and develop ways of life and traditional practices are aspects that also play a central role for the promotion of TCEs. Article 31 of UNDRIP can function as a benchmark, bringing together the important issues for many indigenous peoples in one provision. This provision highlights indigenous peoples' interests in *maintaining, controlling, protecting and developing* their cultural heritage, traditional knowledge and TCEs, as well as the manifestations thereof. It states the same with respect to the intellectual property concerning this cultural heritage, knowledge and cultural expressions. The ability to maintain and develop likely requires

[754] Jaszi 2009, p. 2.
[755] Jaszi 2009, p. 2.
[756] Drahos 1999, p. 365.
[757] Kono 2009, p. 21.
[758] Wendland 2009, p. 95.
[759] Wendland 2009, p. 95.
[760] Tobin 2009, p. 154. Tobin mentions for example the Convention on Biological Diversity (CBD): "The CBD approaches the protection of TK in a more expansive fashion than [WIPO's] IGC. It seeks not only to prevent unapproved access and use of TK but also to promote its wider use with the consent of indigenous and local communities, promote equitable benefit-sharing arising from such use, protect and encourage customary use of resources, and encourage and develop indigenous and traditional technologies. Thus the CBD seeks not only protection against misappropriation and misuse of TK, but also includes positive measures for strengthening of TK systems." See also the editor's introduction to the book, p. 16.

promotion, such as facilitation of circumstances and other affirmative measures, by states. The broader, more general, cultural rights of Article 15 ICESCR and Article 27 ICCPR, which provide rights to take part in cultural life, to benefit from the protection of moral and material interests as an author and the right of persons belonging to minorities to enjoy their own culture respectively, are also worth considering from this perspective. Together, these rights form part of a normative framework of fundamental rights that can structure the protection *and* promotion of TCEs in an overarching way, as we will see in Chapter 5. Such forms of protection and promotion are for example shaped by interpretations and state obligations identified by United Nations human rights bodies in their General Comments and Country Observations.

3.3 Traditions, theories and rationales of copyright law

As we have already seen, legal scholarship has focused largely on the 'technical' inconsistencies between legal requirements for copyright protection and the characteristics of TCEs. Copyright is also studied as an instrument for economic development of source communities. In this section, I take a foundational perspective to assess how traditions, theories and justifications of copyright law can ground TCE protection. To this end, the theoretical framework behind copyright law's system of exclusive rights is analysed in depth. The rest of the chapter then scrutinises the tensions that exist at the deeper level of copyright theory, and to what extent a copyright perspective provides possibilities or insights to inform the protection discussion.

Traditionally, a number of different theories are put forward for the existence and justification of copyright law. Examples include incentive and labour theories.[761] This raises the question of to what extent copyright theories hold true for the specific circumstances, subject matter and characteristics of TCE protection and arguments. This section addresses that question. It describes the two main (doctrinal) traditions at the root of copyright law. These are the utilitarian and the natural law tradition, stemming from the common law and continental legal traditions, respectively.[762] In short, utilitarianism is characterised by efficiency, practicality and welfare for society as a whole, while natural law theories draw on justice and inherent entitlement arguments that focus on the author's position. Concisely put, theories such as the labour theory and the personality theory are creator-centred, justifying authors' rights to their works on the basis of their effort and for expressing their personalities, respectively.[763] Added to this, concepts of distributive justice, misappropriation and unjust enrichment are discussed in this section in connection with justifications for copyright protection. While seemingly a patchwork-like theoretical framework, in practice its aspects are interwoven.

In sum, the theoretical framework of traditions, theories and concepts that underlies arguments for copyright protection is described below in broad terms. Naturally, a system that centralises a utilitarian rationale has different arguments for copyright protection from a system that foregrounds an author's rights rationale. Although it has been argued in scholarly literature that a strong division should not be exaggerated,[764] it makes sense for this thesis to discuss the various rationales separately. This way, a clear and general overview of copyright

[761] Hughes 2012, p. 24 onwards. Munzer & Raustiala 2009, p. 56 onwards.
[762] Senftleben 2004, p. 6.
[763] See for a critical note on the way that these philosophical writings are used in legal scholarship and theories of copyright, Biron 2014, p. 19–44.
[764] Goldstein & Hugenholtz 2010, p. 6.

justifications can be set out as a building block for an analysis of copyright arguments and the diversity of TCE protection interests in the last section of the chapter.

3.3.1 Utilitarian tradition and incentive theories

This section describes the utilitarian tradition of copyright law. Incentive theories are a part of this tradition, and both utilitarian and incentive arguments are related to economic theories. The utilitarian tradition is generally regarded as providing the main argument for copyright laws in countries with a common law tradition.

Utilitarianism

The utilitarian tradition rests upon a philosophy that draws on notions of efficiency, practicality and an emphasis on diffusion of works for welfare reasons. Social utility is the starting point under this tradition, with intellectual property contributing to the improvement of benefits for society.[765] Utilitarian arguments seem first and foremost focused on pragmatic regulation of information markets. Utilitarianism is the main argument for copyright law in common law traditions such as the United States (US). The US Constitution asserts a utilitarian foundation for the power of Congress to enact patent and copyright laws, focused on the progression and promotion of science and useful arts.[766] This shows a functional and practical application of an exclusive rights system.

The Statute of Anne of 1709 forms the foundation for today's English and US copyright laws. It clearly shows a utilitarian approach. Its title is an "Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies". The preamble formulates as its goal the "Encouragement of Learned Men to Compose and Write Useful Books."[767] This clearly indicates its societal focus. In the US, the welfare argument was also made during the enactment of the 1909 Copyright Act. The Congressional Committee stated in a report on the Act that Congress copyright law-making under the Constitution was based on the ground that the welfare of the public be served, and not following a natural right of the author in their work.[768]

Utilitarian arguments and natural law notions need not be completely separate in law. In the US, prior to the Constitution, many states had copyright statutes that referred to natural law considerations, and during the nineteenth century courts would justify copyright with "rightness and justice" arguments.[769] Natural law and labour theories are discussed in the next section, but it can already be noted here that a strict distinction between the two main traditions does not reflect legal reality. Another example of the interplay of the two traditions is the Berne Convention, via which natural law considerations also entered into common law utilitarian copyright systems.

The converse is also true and utilitarian notions have occurred in the history of systems that are mainly based on natural law traditions. In Germany, a country with a civil law copyright system, natural law arguments for authors' rights were not invoked in a strict sense during the development of German copyright law. Instead, in the early stages, arguments of Locke's

[765] Senftleben 2004, p. 6.
[766] Menell 2000, p. 130.
[767] Senftleben 2004, p. 8.
[768] Menell 2000, p. 130.
[769] Senftleben 2004, p. 8.

labour theory actually seemed to be used to benefit publishers. Also, in France, a country with a typical authors' rights tradition, history shows a blend of natural law, almost 'sacred' authors' rights and instrumentalist values.[770] So, notions of common law tradition copyright systems are visible in instruments of civil law countries as well. At the EU level, concepts of the US copyright system are visible in the EU Copyright Directive,[771] and more specifically in Recital 4. Arguments for harmonising the legal framework on copyright and related rights that are mentioned in this recital seem focused on efficiency, pragmatism and benefit for society as a whole. This is strongly linked to the economic, internal market focus of the EU and is thus competence-related. The arguments listed include fostering investment, furthering innovation and increasing the competitiveness of EU industry. Civil law countries' natural law foundations are claimed to be enhanced by these concepts.[772]

It has been noted that the utilitarian argument does not of itself require copyright protection, as is the case under the natural law tradition. It requires additional arguments to justify copyright protection. This way, a balance can be struck between the interests of authors and users. Senftleben identifies four arguments: economic, industrial, cultural and freedom of expression.[773] These arguments again have a practical nature and are focused on benefits for society as a whole and the public's welfare, but not all are economics-oriented. The economic argument concerns market regulation and focus on consumer preferences, thereby improving the public's welfare. Industrial policy objectives justify copyright by its potential to stimulate innovation. This is an objective that features prominently in copyright regulation in an EU context, with a focus on EU competitiveness and innovation. The cultural argument already informed the 1709 Statute of Anne, which sought the 'encouragement of learning'. If intellectual creation is encouraged, the public can benefit from a growing general pool of knowledge. Similarly, for the freedom of expression argument, it is the 'public interest' that is seen as the main beneficiary. Copyright has been described as an 'engine of free expression',[774] and as a stimulation for intellectual and public debate. When an author is able to reap economic benefits from their creation, this means that there is a certain level of independence from funders that might otherwise control or influence their output. The public can therefore profit from censorship-free intellectual works.[775]

Incentives

Another protection justification that is a species of the utilitarian tradition and that relates to economic theory is that intellectual property incentivises the creation and dissemination of creative works. This reflects practical considerations for the existence of a protection system. The public interest will be served when authors create works for which they are incentivised

[770] Senftleben 2004, p. 8–9.
[771] In full: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, also known as the Infosoc Directive.
[772] See extensively on the foregoing examples in this paragraph from the US, Germany and France, as well as the Berne Convention and the EU Copyright Directive: Senftleben 2004, p. 8–10. See also: Goldstein & Hugenholtz 2010, p. 18, where they note a "vigorous natural rights strain [can also be found] in the English literature and cases" and that "[c]opyright's intellectual tradition in the United States is similarly mixed."
[773] Senftleben 2004, p. 14–16.
[774] US Supreme Court, Harper & Row v. Nation Enterprises, 471 US 539 (1985), III B: "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." Senftleben 2004, p. 16. See also Gervais: "This was the stated intention of the framers of the Constitution of the United States." Gervais 2008, p. 6.
[775] Senftleben 2004, p. 14–16.

by being awarded (temporary) exclusive rights. These works then contribute to a pool of knowledge and culture in society.

Arguably, this utilitarian argument is anchored in an economic rationale: incentives through legal protection are required if intellectual works are to be marketed.[776] Economic theories maintain that an incentive-based system of attributing property rights or "individual entitlements" is the most efficient for distributing scarce resources between individuals, and for maximising social welfare.[777] However, works of the mind fall in the category of 'public goods'.[778] They are non-rivalrous and non-excludable.[779] Non-rivalry means that these type of works cannot be exhausted and can be used by multiple people at the same time. The non-excludable characteristic means that once a work circulates it is hard to control who uses it and profits from it.[780] This means that creators could have a hard time realising the works' actual value via sale, and according to economic theory this could lead to a situation where a less than optimal quantity of information is created or circulated.[781] This is where incentives come into play as a remedy.

Indeed, to encourage creators to invest and create nonetheless, and to address the situation that is caused by intangible works' specific characteristics and status as 'public goods', incentives such as temporary exclusive rights are a solution.[782] The copyright system, for example, allows creators to reap the fruits of their labour. This, in turn, enables production of intellectual works, and consequently "maximises the welfare of society".[783] Theoretically, therefore, copyright would be economically justified for creating incentives for authors to produce and at the same time realising access of society to these works.[784] Guibault notes, however, that there is no empirical evidence for the effect of copyright on creative production.[785]

Furthermore, these incentives might produce new difficulties for free market economics and competition as well when they result in creation of new property rights.[786] Establishing monopolies would need economic justifications.[787] According to Joyce et al., copyright law's incentives take such public welfare notions into account: the regulation of this type of monopoly comes with requirements and built-in limitations. So, while it provides incentives for creation and an economic motivation for distribution, the monopoly right is limited both in time and scope.[788] This could be seen as an "economic trade-off" between "encouraging the

[776] Joyce e.a. 2013, p. 55.
[777] Guibault 2002, p. 12–15. Guibault discusses the economic analysis approach by describing the theories of the Chicago School of Economics on economic foundations and objectives of intellectual property law.
[778] Bracha & Syed 2014, p. 237–238. Joyce e.a. 2013, p. 55.
[779] Guibault 2002, p. 13–15 and 78. Bracha & Syed 2014, p. 238.
[780] Bracha and Syed call this the "source of the innovation policy problem". Bracha & Syed 2014, p. 238.
[781] Joyce e.a. 2013, p. 55.
[782] Joyce e.a. 2013, p. 56.
[783] Guibault 2002, p. 14.
[784] Guibault 2002, p. 14.
[785] Guibault 2002, p. 14.
[786] Joyce e.a. 2013, p. 56.
[787] Joyce e.a. 2013, p. 56.
[788] Joyce e.a. 2013, p. 56. The latter is said to include doctrines of originality, the dichotomy between ideas and expressions, and the US fair use doctrine. The exceptions and limitations of the EU InfoSoc Directive are of course other limitations inherent in the copyright system. The maximum term of duration could be qualified as another 'built-in' limitation.

optimal creation and distribution" of works of the mind via monopoly incentives on the one hand, and "providing for their optimal use through limiting doctrines on the other hand."[789]

3.3.2 Natural law tradition, labour, personality and droit d'auteur theories

The second major tradition is the natural law tradition. This tradition can be divided into two branches: a natural rights and labour branch, following John Locke's labour theory, on the one hand and a personality and *droit d'auteur* branch, focusing on the bond between author and work, on the other hand. The argument behind the second tradition can be summarised as drawing on sentiments of "rightness and justice".[790] Another description of 'natural rights' is "inherent entitlement".[791] It is mostly European states that have non-utilitarian foundations for justifying intellectual property protection for intellectual endeavours. These civil law systems focus on the author, as opposed to the utilitarian tradition which stresses the benefits for society.

Natural rights and labour

The natural rights justification for intellectual property is based on Locke's natural rights justification for private property.[792] His theory follows the assumption that a person's entitlement to the fruits of their labour provides an argument for property rights, either intellectual or material.[793] Biron has distinguished three accounts of Locke's labour theory in the context of authorship: the labour-desert theory, the creationist theory and the intellectualist theory. According to her, the first, although often used, has some problematic aspects for strong authorship rights. Biron notes that to the extent that authors rely on their talent, this is something outside their control that does not necessarily require effort. As a result, a labour theory of authorship is difficult to ground in the labour-desert theory as such.[794] A creationist view, with its focus on (intellectual) labour that does not depend on previous labour of others, would lead to theories of authorship that are strongly centred around the creator.[795] That is, for a creationist interpretation of labour creators would have to be perceived as 'genius-like' and not as 'standing on the shoulders of giants'. The third perception of the labour theory, an intellectualist interpretation, focuses on the personhood and self-government of the labourer. According to Locke, people have property in their own person.[796] Taking this proposition further, people would also have property in their person's labour, and even further, the results of that labour.[797] Because the intellectual results, or objects, of labour are so closely "[c]onnected to our nature as persons", it can be argued that they cannot be taken away from the labourer without impeding on his labour, thwarting his self-government.[798] As Biron observes, this perception of a Lockean theory of authorship in fact moves towards personality theories.[799] It shows a close connection between labourer, or author, and work.

[789] Joyce e.a. 2013, p. 56.
[790] Senftleben 2004, p. 11.
[791] Joyce e.a. 2013, p. 56.
[792] Menell 2000, p. 157.
[793] Joyce e.a. 2013, p. 57.
[794] Biron 2014, p. 23.
[795] Biron 2014, p. 23–24.
[796] Menell 2000, p. 157.
[797] Joyce e.a. 2013, p. 57.
[798] Biron 2014, p. 24.
[799] Biron 2014, p. 24.

A focus on the actual creation activity is central under the natural rights and labour theory. An author already obtains a property right through the act of creation alone. This means for example that no registration is required. Arguably, the establishment of author's rights in laws would only confirm in a formal way what is already the case in practice.[800] In other words, the intellectual property right of the labourer is considered "an unalterable result of his creative activity – a natural consequence that is inherent in the 'very nature of things'."[801] This can be summarised as a "rhetoric of natural entitlement",[802] with an author being entitled to control over the work, compensation for sale and a reward for contributing to society through the creation.[803] Another central aspect is the focus on the individual. This contrasts with the utilitarian tradition where interests of the whole community, which are not 'author interests', and the benefits for society are heavily emphasised as a justification for copyright protection. Under the labour theory, the individual 'removes' something from the community when 'mixing' their labour with raw material, which makes it their property. As there is thus no focus on benefits to society, it is called a 'desert' theory. In natural law and labour arguments, the author takes central stage.[804]

Personality and droit d'auteur

The centrality of the author is stressed even more in the so-called personality argument to justify copyright protection. The process of creation is seen as "sacredness",[805] with a work originating in the mind of a Romantic genius-like author. However, the permeation of Romantic authorship in copyright law, and its role in its expansion, has been heavily criticised, even to the extent of being called a myth.[806] According to this viewpoint, doctrines other than this myth have in fact influenced modern day copyright law, doctrines that also offer better explanations for its expansion.[807]

In any case, leaving this criticism aside for now, what is considered a crucial aspect of the personality and *droit d'auteur* theories is the author's "unique form of self-expression" that results from the process of creation and, as a consequence, the bond between the author and the work as a blue-print of their personality.[808] Indeed, this bond forms the basis for the argument for copyright under the personality theory. Property has also been called a "means for self-actualization, for personal expression, and for the dignity of the individual".[809] This is also reflected in copyright law's moral rights, for example as laid down in Article 6bis of the Berne Convention. This article obliges states to put in place legislation that enables authors to claim authorship and protect their work from any form of derogatory action. Essentially, moral rights are the ultimate tools to protect the bond between author and work.

Menell notes that the personhood justification for property stresses the contrast between property that is deeply personal as opposed to property that is less fundamentally connected to one's personality and is replaceable. The strength of the justification follows this distinction.

[800] Senftleben 2004, p. 11.
[801] Senftleben 2004, p. 11.
[802] Joyce e.a. 2013, p. 58.
[803] Joyce e.a. 2013, p. 58.
[804] See on this 'desert theory' and Locke's take on a natural right to property Senftleben 2004, p. 6 and from p. 11.
[805] Senftleben 2004, p. 6.
[806] Lavik 2014, p. 45.
[807] Lavik 2014, p. 47.
[808] Senftleben 2004, p. 6.
[809] Joyce e.a. 2013, p. 59.

When a creation is "closely intertwined with an individual's personal identity", the personhood justification is strongest. However, when "the 'thing' is valued by the individual at its market worth", the justification is most feeble. Interestingly, Menell mentions that an area where the personhood theory has come to the fore in particular, is the debate surrounding the results of developments in biotechnology. For questions about property rights in "body parts, cell lines and other body products", the personhood theory has been central.[810] There is hardly any property more personal than this.

Criticism of the personality theory, however, is directed at its broad scope of application. The Berne Convention, for example, does not distinguish between types of work for the application of moral rights. But in practice, it is argued, the justification suits certain categories of work better than others.[811] Art, for example, is generally considered to be the category to which the personality theory corresponds best. The artist's personality as expressed in the creation process and the bond between the work and the artist as a consequence justify certain rights. However, design products that are made while focusing on consumer interests or taste[812] and the construction of a database[813] are examples where the personality justification is much harder to defend, as there is no personal expression or personality of an individual at stake in the creation of such a work.[814] Another example that Joyce et al. mention of where the personality theory does not fit well is "highly collaborative works, where individual personality is subsumed in a collective effort".[815]

When elaborating actual copyright rules on the basis of the personality justification, the personality theory is somewhat problematic on a conceptual level. The 'amount' of personality per specific work is likely to vary. What does that mean for the level of protection? Should this vary per amount and per work as well? If that is the case, according to what criteria?[816] And, importantly, the connection that is usually sought between the personality theory for copyright and Hegel's writings on personality has in itself been criticised as well. According to Biron, Hegel's personality theory does not seem to focus on a connection between the author's personality and the work expressing this personality. Instead, the author's personality and expression thereof come into play with regard to *control* and *choice* over the use of the work.[817] In any case, the persistent perception of this theory centres around individual authors and the bond with their works.

Moral rights

An essential part of the natural law tradition, which sets it apart from the utilitarian tradition, is its firm protection of authors' moral rights. However, the Berne Convention demands that State Parties provide for a right of attribution and a right of integrity in Article 6bis. So, Member States have to protect moral rights regardless of tradition. That being said, civil law systems are generally held to contain more far-reaching moral rights protection than utilitarianism-based common law systems.[818] Therefore, the concept of moral rights will be briefly introduced in this section. At the outset, it should be stressed that moral rights are

[810] Menell 2000, p. 158–159 on the Personhood Theory.
[811] Joyce e.a. 2013, p. 59.
[812] Senftleben 2004, p. 19.
[813] Joyce e.a. 2013, p. 59.
[814] Joyce e.a. 2013, p. 59.
[815] Joyce e.a. 2013, p. 59.
[816] This conceptual problem is noted by Joyce e.a. 2013, p. 59.
[817] Biron 2014, p. 33.
[818] Goldstein & Hugenholtz 2010, p. 346.

strictly individual and cannot be alienated. In other words, they exist independently of the author's economic rights. These *can* be transferred, but moral rights remain with the author after transfer. This inalienability should protect authors from their own actions with regard to alienation of rights in their works.[819] This consideration reflects the author's central place under this tradition.

The Berne Convention only specifies rights of attribution and integrity in Article 6bis. Other moral rights are the rights of divulgation or disclosure and of withdrawal.[820] The paternity or attribution right is also called an author's "first and foremost" prerogative, and can be used by authors as they wish.[821] Authors can, for example, use a pseudonym or remain completely anonymous. Likewise, however, an author can decide at any given moment to revoke this pseudonym or anonymity. Furthermore, authors can object to the use of their name for works that are not their creation and the other way around, to the use of another name for works that *are*. Even in the case of use of abstracts from a work, for example for quotation or teaching purposes, the author's name must be mentioned as a source, following Article 10(3) of the Berne Convention.[822]

The integrity right of Article 6bis Berne Convention is the right of authors to object to distortion, mutilation, modification or any other derogatory action with regard to the work that might harm their honour or reputation. Another way to describe this right is "the right of respect",[823] or the right of integrity.[824] The WIPO Guide to the Berne Convention notes how the provision is flexibly formulated and leaves ample space for the discretion of courts.[825] This makes sense as the facts, assessment of circumstances involved and balance of interests will vary on a case-by-case basis. However, perhaps due to this flexibility, the exact scope of the integrity right is uncertain in civil law countries.[826]

Finally, two additional moral rights that certain – mostly civil law – countries have included in their copyright laws are a right of divulgation or disclosure and withdrawal from circulation. The first is a right that is connected to economic reproduction, public performance and distribution rights of authors. It enables them to manage if and when a work is first communicated to the public.[827] The right of withdrawal is only granted to authors in a very limited number of countries, and seems little used. This right enables authors to take their work out of circulation, for example when the work does not correspond with the author's views any more.[828]

3.3.3 Notions of fairness

For centuries, legal scholars have pored over justifications for copyright in the natural law and utilitarian traditions. More recently, fairness has been noted as an important aspect of

[819] WIPO 1978, p. 42.
[820] Goldstein & Hugenholtz 2010, p. 349–355.
[821] WIPO 1978, p. 41.
[822] WIPO 1978, p. 41 and 60.
[823] WIPO 1978, p. 42.
[824] Goldstein & Hugenholtz 2010, p. 351.
[825] WIPO 1978, p. 42.
[826] Goldstein & Hugenholtz 2010, p. 351.
[827] Goldstein & Hugenholtz 2010, p. 353.
[828] Goldstein & Hugenholtz 2010, p. 354. Countries granting this moral right include France, Germany, Italy and Spain.

discussions on intellectual property and its justifications.[829] This concept can be divided into a number of notions. To broaden the discussion and the overview of traditions and theories of copyright law given here so far, various of these notions of fairness will be analysed below, namely 'distributive justice' and 'misappropriation', 'misrepresentation' and 'unjust enrichment'. At first sight, these notions of a fairness perspective seem to relate very well to the arguments often raised for protection of TCEs.

Distributive justice

Argument based on distributive justice as a justification for intellectual property – or copyright – protection is a strand of thinking that is based on distributive justice theories. Such theories concern the distribution of resources and burdens of a society according to just principles.[830] Examples from literature are described below, focusing on developments in biotechnology and the protection of biological resources. In this sphere, it has become apparent that "traditional principles and values of the intellectual property system (emphasizing scientific and technological advance through limited, exclusive monopolies) [have come] in conflict with larger social justice, sovereignty and access concerns."[831] The examples illustrate a distributive justice perspective that could justify (defensive) intellectual property protection.

The first example is mentioned by Hughes, who states that fairness arguments in an intellectual property context usually focus on limiting (the impact of) intellectual property rights to further distributive justice.[832] Against this background, he notes that distributive justice has been most visibly displayed in the context of international agreements on the protection and ownership of resources, including the Convention on Biological Diversity and its Nagoya Protocol on Access and Benefit-sharing.[833] These preceded the current work of WIPO's Intergovernmental Committee (IGC) on intellectual property and genetic resources, traditional knowledge and folklore. In the IGC's debate about genetic resources and patenting, issues under discussion include challenges to the validity of patents, such as erroneously granted patents.[834] This is an example of limiting intellectual property rights for fairness and distributive justice purposes.

Other issues that are discussed in the context of genetic resources relate to criteria under which resources may be used, including their patentability, in compliance with access and benefit-sharing notions.[835] Criteria that are proposed include a disclosure requirement for revealing the source of origin of the genetic resources and providing information on the prior informed consent of those who are authorised to give such consent for accessing the genetic resources, in particular indigenous peoples and local communities, and benefit-sharing.[836] In this sense, claims by – mostly – developing countries for a share of the profits that result from patented inventions, drawing on genetic resources and underlying traditional knowledge,

[829] As noted by Hughes 2012, p. 40.
[830] Menell 2000, p. 160.
[831] Menell 2000, p. 160.
[832] Hughes 2012, p. 40.
[833] Hughes 2012, p. 41.
[834] Article 9 of the IGC's Draft Articles on Intellectual Property and Genetic Resources of July 2014.
[835] See http://www.wipo.int/tk/en/genetic/.
[836] See http://www.wipo.int/tk/en/genetic/ and Article 3 of the IGC's Draft Articles on Intellectual Property and Genetic Resources of July 2014.

could count as (similar to) distributive justice claims.[837] The foregoing shows how distributive justice arguments could underlie defensive intellectual property protection through free, prior and informed consent, or at least form an argument for benefit-sharing.

Another example is noted by Menell, namely that of farmers' rights in connection with distributive justice. These rights are recognised in the International Treaty on Plant Genetic Resources for Food and Agriculture of the United Nations Food and Agriculture Organization (FAO), adopted in 2001.[838] Article 9.1 underlines the "enormous contribution" that local and indigenous communities and farmers continue to make to the conservation and development of plant genetic resources, which essentially forms the basis of worldwide food and agriculture production. In Article 9.2, the responsibility for the realisation of farmers' rights in the context of plant genetic resources for food and agriculture is placed with national governments. The article requires that State Parties must take measures to protect and promote farmers' rights. Rights that are listed, include:

- protection of the traditional knowledge underlying plant genetic resources in the context of food and agriculture;
- equitable sharing in the benefits that result from the use of such resources; and
- participation in decision-making on conservation and sustainability issues.

According to Menell, farmers' rights reflect that farmers are considered "innovators entitled to intellectual integrity and access to germplasm and technologies they have developed collectively over many generations."[839] This way, interests of parties that may normally not be aware of or have the skills to maintain intellectual property rights against bigger and more organised parties, are protected.[840] There is clearly a fairness argument visible here. In this context, the Convention on Biological Diversity can again be mentioned as an example. Article 8(j) of this Convention specifically requires State Parties to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities."[841]

In the case of rights in genetic resources, distributive justice performs a more positive function by requiring recognition of farmers' intellectual integrity and respect for, preservation and maintenance of indigenous peoples' knowledge and practices. Requirements to put in place frameworks of access and benefit-sharing and realise the rights of stakeholders, such as farmers and indigenous peoples, could be considered to reflect distributive justice arguments.

[837] See on a description of the foregoing example Hughes 2012, p. 41. According to Hughes, these distributive justice claims are "directly parallel to the distributive justice claims in domestic disputes that individual persons deserve a cut of the proceeds of patented technologies derived from cell lines."
[838] The Treaty is preceded by the International Undertaking on Plant Genetic Resources of the FAO of 1983, which is the instrument that Menell refers to, Menell 2000, p. 160. However, it was decided in 1992 that the FAO Global System on Plant Genetic Resources be strengthened and harmonised with the Convention on Biological Diversity, which was adopted in 1992. To this end, the International Undertaking was revised. See more via: http://www.fao.org/Ag/cgrfa/iu.htm.
[839] Menell 2000, p. 160.
[840] Menell 2000, p. 161.
[841] Menell 2000, p. 161.

Misappropriation, misrepresentation and unjust enrichment

Other copyright arguments or justifications that rely on "simple appeals to 'fairness'" draw on the doctrines of misappropriation,[842] misrepresentation and unjust enrichment. Misappropriation is a common law doctrine.[843] It is related to unfair competition principles. The unfairness stems from someone taking the fruit of another person's skills or labour without remuneration. In the context of misrepresentation, this could be taking the fruit of another person's reputation. The doctrine of unjust enrichment is another 'fairness' argument. It is related to misappropriation, contract law, the law of obligations and the law of restitution, and has its origin in Roman law: the principle that no one should be enriched at the expense of someone else.[844] The immediate afterthought would be: because this is unfair. In Europe, what the different legal systems of the Member States at least share, is this underlying maxim of the law of unjustified enrichment as already acknowledged in Roman law.[845] Therefore, this old and widespread idea has been given attention in the context of the Draft Common Frame of Reference (DCFR) of European Private Law of 2009. This document contains principles, definitions and model rules, based on comparative research into the law of the EU Member States.[846]

The doctrine of misappropriation does not seem to focus on limiting intellectual property rights — rather the opposite. As Joyce et al argue: "Surely, the very fact that someone has cared enough to appropriate the products of another's mind must indicate that those products were worth something, and therefore deserving of legal protection."[847] The argument thus introduces the concept of free-riding, which is frequently mentioned in a copyright context. It is felt as not right and an injustice if someone profits from the results of another person's intellectual endeavours.[848] The same goes for misrepresentation: free-riding on the reputation or name built by an author without authorisation easily evokes sentiments of unfairness. This can be set against the free marketplace of ideas and the notion of 'standing on the shoulders of giants'.

The terms misappropriation and misrepresentation clearly have inherent unfairness implications. The perceived injustice inherent in the taking of the results of someone else's labour would then form the basis for an argument and justification for protection. This seems a view that, at least generally, lies behind the idea of intellectual property protection as a whole. Despite the convincing inherent fairness of the argument, the question of what the boundaries are arises.[849] To prevent boundless exclusive monopoly rights, interests of third parties – both competitors and the public at large – and authors will have to be balanced. This balancing act could contribute to fair, yet appropriate, protection. The free marketplace of

[842] Joyce e.a. 2013, p. 60. This rhetoric is said to rely on both utilitarian and natural law arguments, yet 'invocations of it tend to appear in the guise of simple appeals to 'fairness'.'
[843] See extensively on this doctrine, in particular on the International News Service v. Associated Press case in which it was first introduced, Baird 1983, p. 411–429. See also: Ricketson 1984, p. 1–36.
[844] Smits 2008, p. 2, referring to Roman jurist Pomponius in the Justinian Digest 50, 17, 206: "Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem."
[845] Smits 2008, p. 2.
[846] Smits 2008, p. 4.
[847] Joyce e.a. 2013, p. 60.
[848] Joyce e.a. 2013, p. 60. Or: to 'reap where one has not sown.'
[849] Joyce e.a. 2013, p. 61. As Joyce et al state, there are no internal checks. Without external checks, then, "an intellectual property system based on ideas of misappropriation would protect every product of the mind, for an unlimited period, in the name of 'fairness'."

ideas and the 'giants' metaphor that are often put forward can be used as factors for such a balance.

Unjust enrichment is a doctrine that is closely related to the notion of fairness. It has been instrumental in the development of the doctrine of misappropriation.[850] For here too, 'reaping where one has not sown' is the central feature. The unjust enrichment argument, or the 'reap/sow' principle, has been used to ground prevention of misappropriation or unfair competition.[851] The exclusive nature of copyright protection means that, for the duration of the copyright protection, a third party may not reap what the author or copyright holder has sown.[852] In a way, the temporary copyright protection prevents unjust enrichment from occurring. It is called a "fairly simple justification" for granting intellectual property rights.[853]

There are some important reservations to be made to the unjust enrichment principle as well.[854] A first nuance is that 'reaping without sowing' is something that generally happens in cultural life, and is accepted as such: a 'sower' does not tend to create in isolation. Inspiration from, and exchange of, different cultural and artistic expressions are both pillars of dynamic cultural production. This is sometimes also called the principle of 'standing on the shoulders of giants'. The objection to 'reaping without sowing' is therefore not absolute.[855] A second reservation is connected to the non-absolute nature of the objection against 'reaping without sowing': unjust enrichment cannot in itself be an independent, substantive justification for copyright.[856] The main question is *when* exactly 'reaping without sowing' is 'bad' or 'wrong' and unauthorised use by third parties constitutes unjust enrichment. However, if the answer would be that it is wrong because the sower has a strong claim for exclusivity, this claim and its strength is precisely what the principle should justify in the first place, i.e. copyright protection.[857] For this reason, additional grounds are needed to determine the sower's stronger claim for exclusivity that could overrule reaping by others before the principle of unjust enrichment can apply.[858]

3.4 Protection interests and theories: a mixed bag

Broadly speaking, we seem to have copyright protection for the benefit of society as a whole, according to the utilitarian tradition, and for the benefit of the author, when following the natural law and author's rights tradition. How does the protection of TCEs map onto this overview of copyright law's foundational structure?

Following the general description of the theories and justifications that underlie copyright in the previous section, this section will look more closely at the question of which arguments would be especially relevant for TCEs, and which would not. Copyright law as a legal system to inform TCE protection will be assessed from the perspective of indigenous peoples'

[850] Spence 2002, p. 395–396. Stokes 2012, p. 16.
[851] Stokes 2012, p. 16.
[852] Stokes 2012, p. 17.
[853] Aplin & Davis 2013, p. 3.
[854] Aplin & Davis 2013, p. 3.
[855] Spence 2002, p. 395–396: "We all reap without sowing, and regard ourselves as justified in doing so, even without the consent, implicit or explicit, of those upon whose efforts we build. (…) Imitation – authorised and unauthorised – is a vital part of ongoing artistic discourse. To condemn all reaping without sowing would be to condemn all imitation and to stifle the development of artistic traditions."
[856] Spence 2002, p. 395–396.
[857] Spence 2002, p. 395–396.
[858] Spence 2002, p. 395–396.

protection interests. As we shall see, the theoretical underpinnings and justifications of copyright law also generally pose difficulties for what is at the core of TCE protection due to a difference of perception. Such difficulties include the theory behind practical reasons for regulating the organisation of markets and fostering the creation of cultural works, promoting interests of society at large. This is opposed to other perceived values of TCEs that give rise to protection justifications that extend beyond economic reasons. On the other hand, aspects of copyright theory that otherwise closely approach TCE concerns require substantial extension for TCE compatibility. This is the case for example for the *individual* author's rights tradition that justifies protection due to the bond between author and work, so essentially for reasons of dignity and integrity, vis-à-vis the perceived *collective* bond between communities and heritage in the case of TCEs.

Each sub-section that follows ends with a table that summarises how foundational copyright arguments and theories can inform TCE protection from the perspective of the protection interests of indigenous peoples that were identified in Chapter 2.

3.4.1 Utilitarianism and incentive theories

At first glance, the economic rationale behind the utilitarian tradition and incentive theories does not sit easily with the specific characteristics of TCEs. This section analyses TCE protection in the context of the justifications and arguments of the utilitarianism and incentive theories.

Utilitarianism

Utilitarianism, part of one of the two traditions at the core of copyright law, focuses on economic considerations. However, pragmatism and economic considerations that are geared towards copyright protection for the benefit of all society stand quite far from the primary concerns of indigenous peoples. It is therefore questionable whether this justification is useful to inform the protection of TCEs. It is true that all society may benefit from preservation of TCEs, and from the dissemination and enjoyment of indigenous works. To this end, if protection of TCEs were to result in their wider availability for the public and increased production and dissemination for enjoyment by the public, exclusive rights for indigenous peoples could be informed by utilitarian grounds.

While that may be so, market considerations and benefit for the public would not be adequate to inform a protection system that foregrounds actual indigenous needs. Yes, these also include economic interests such as benefit-sharing, but many protection interests go beyond economic and market arguments, such as interests in safeguarding identities and dignity and respect for cultural distinction and secrecy. Utilitarianism shows some similarity to cultural heritage notions of protection and preservation of cultural heritage for the benefit of all mankind, but whether this corresponds with indigenous needs is equally doubtful. We have seen that sharing as such is not necessarily perceived as the issue for some indigenous communities, but the (mainstream) terms and conditions on which this occurs, are.

It is therefore clear that there are tensions between mainstream property law that is based on utilitarian grounds on the one hand, and the protection of (indigenous) cultural property that reflects protection interests beyond such utilitarian, efficiency notions on the other hand. Whereas property law, including intellectual property law, draws on such grounds as "utility of markets, exclusion, and commodities", cultural property issues comprise many interests

that cannot be expressed in market terminology.[859] As such, protection of indigenous peoples' cultural property likely requires a more nuanced perspective and additional justifications and measures.

However, when we imagine a utilitarian (copyright) foundation that is adjusted to indigenous peoples' concerns, a protection argument that draws on instrumental considerations of protection for the specific, partial interests of indigenous peoples can be relevant. Pragmatism and economic considerations would then have to be geared towards TCE protection for the benefit of these sub-groups of society, such as their benefit-sharing, recognition and (self-determined) development interests. It is, however, clear that this would be rather a stretch from copyright reality.

Incentives

In academic literature, various incentives are distinguished in relation to traditional knowledge and TCE protection, namely incentives to innovate and to commercialise,[860] and incentives to create or innovate, disseminate and preserve.[861] However, the question is to what extent these are useful to inform TCE protection.

It is often argued that indigenous peoples have not needed (legal) *incentives* to create or innovate.[862] Indigenous peoples have produced and developed their specific knowledge and creativity for centuries, adapting and innovating where necessary. Innovation of their living traditions *is* valued in indigenous societies, but what indigenous claims seem to come down to is to control use and copying and to share in the benefits. In other words, indigenous concerns mostly regard the (in)ability to address free-riding without consent or remuneration. Other interests include protection of their identities, dignity and the integrity of their TCEs. This could be summarised as both "control over their cultural products and […] control over their identity".[863] In this sense, protection is to serve objectives other than to incentivise creation or innovation as such.

In short, TCE protection that is informed by an argument of incentives to create or innovate does not quite suit indigenous peoples' protection interests overall. Indigenous peoples primarily need protection to address the other diverse protection interests identified and not necessarily to encourage them to create or innovate. However, while indigenous peoples might not 'need' incentives to create or innovate, the ability to obtain remuneration from use of their knowledge or creative expressions would provide them with the economic means to continue to do so in a sustainable way.

As to incentives to commercialise and disseminate, indigenous peoples may be encouraged to commercialise and circulate their creative works when guaranteed protection. But there are a number of limiting circumstances. As discussed earlier, not all TCEs are 'allowed' to be viewed or enjoyed by outsiders. There could be sacred or secret material that communities might want to keep to themselves.[864] And not all indigenous communities might want to

[859] Carpenter, Katyal & Riley 2009, p. 1046.
[860] Munzer & Raustiala 2009, p. 73–75.
[861] Hughes 2012, p. 25–32.
[862] Munzer & Raustiala 2009, p. 73.
[863] Munzer & Raustiala 2009, p. 73.
[864] Munzer & Raustiala 2009, p. 74.

engage in economic activities with regard to their TCEs,[865] in which case incentives to commercialise and disseminate do not make much sense as an argument to inform TCE protection. In any case, the ability to reap the fruit of their labour can contribute to indigenous peoples' economic sustainability by enabling them to share in benefits and to make use by others conditional on their free, prior and informed consent.

An incentive to preserve and conserve is interesting in the context of TCEs, as preservation is an often-cited objective in TCE discussions. Hughes argues that "preservation of assets" as a justification for property rights in traditional knowledge and TCEs "is not qualitatively different from justifications that are given for the protection of trademarks and geographical indications."[866] He points to John Rawls, who accepted preservation of resources as a justification for property rights.[867] Property rights would give the right holders incentives to conserve their property. For TCEs, preservation would relate to the preservation of "practices, activities, and skills".[868] This means exclusive rights that allow indigenous peoples to halt unauthorised industrial production of certain indigenous works of art and design, and enable them to uphold and continue their local production.[869] This would preserve such practices and skills for future generations. To some extent, defensive protection for indigenous peoples could enable them to preserve their TCEs. However, preservation has a certain static connotation, and it could be argued that cultures will adapt and develop to changing circumstances, regardless of being provided with (defensive) protection. Still, protection of their knowledge and cultural expressions might safeguard or guarantee the conditions for indigenous peoples that enable them to continue to develop, and in that sense dynamically preserve, their heritage.

To conclude, it is often argued that incentives are not 'necessary' for indigenous peoples to create TCEs. While tourism and marketing are increasingly important for indigenous peoples, monetary incentives have not originally been a prime instigator in most, if not all, cases of production of TCEs. Nevertheless, when protection ensures, for example, fair remuneration and benefit-sharing or means of control to address third party mass production, such as free, prior and informed consent, local production can be kept 'alive' if this is an objective of indigenous communities themselves. This way, protection can contribute to continuous cultural development of indigenous peoples and furthering of cultural diversity, while meeting interests of benefit-sharing and consent. This specific perspective draws on a combination of economic development and cultural arguments for TCE protection.

[865] See the earlier mentioned distinction by Haight Farley 1997, p. 13–15, between the 'realist group', which wants to benefit economically from their folklore, and the 'traditional group', which wants to control their TCEs to prevent harm resulting from unauthorised use, and restrict, condition or completely prevent dissemination.
[866] Hughes 2012, p. 29.
[867] Hughes 2012, p. 29, 30. According to Rawls, "the role of the institution of property is to prevent this deterioration [unless a definite agent is given responsibility for maintaining an asset] from occurring."
[868] Hughes 2012, p. 32.
[869] Hughes 2012, p. 32.

Indigenous peoples' protection interests → *Copyright theories* ↓	***Benefit- sharing***	***Recognition***	***Continuation, preservation***
Utilitarianism (if geared towards the benefit of sub-groups of all society)	Economic reward (to foster sustainable indigenous innovation).	Recognition of the interests of a sub-group of all society.	Empower and stimulate indigenous peoples' (self-determined) economic development to continue to produce cultural expressions.
Sustainability argument for economic development			Empower and stimulate indigenous peoples' (self-determined) economic development to continue to produce cultural expressions.

Table 4 A summary of TCE protection from the perspective of utilitarianism and the sustainability argument for economic development.

3.4.2 Natural rights tradition and labour, personality and droit d'auteur theories

The natural rights tradition and labour, personality and *droit d'auteur* theories behind copyright law seem to contain various aspects that could be connected to indigenous viewpoints and protection interests as described in Chapter 2. Arguments of personality and identity and moral rights principles in particular seem to correspond to protection arguments for TCEs as put forward by indigenous peoples, but there are difficulties that come with these arguments as well.

Labour

Following the labour theory, it could be argued that a (property) right to protect TCEs might already be automatically justifiable due to the mere act of creation. As we saw above, the labour itself justifies a property right for reasons of rightness, justice and the 'natural reward' of reaping the fruit of labour. As such, it is a right which has thus already formed through the mere act of creation. The argument would have to be adjusted a little in order to justify rights in TCEs. The argument would then hold that rights that provide indigenous peoples with the ability to control and reap the benefits of their own labour would be an outcome of, and justified by, the 'very nature of *indigenous* things'.[870] Such rights would already be formed through the act of creation of TCEs.

However, the traditional knowledge and TCEs of indigenous peoples are currently often perceived as residing in the public domain. This actually reduces their TK and TCEs to 'raw material' that is free to be taken – and acquire intellectual property rights over – for third parties' labour. The question could be raised why the mere act of creation has not led to natural rights for indigenous peoples over their TCEs and why 'inherent entitlement'[871] is not applicable here as well in the first place. As it is an indigenous community "spend[ing] time and effort" for the creation of indigenous works of art, the natural law argument that draws on "feelings of rightness and justice" seems quite suitable for justifying rights for indigenous peoples that enable them to profit from the fruit of their labour.[872] This would then take TCEs out of the public domain and remove their status of 'raw material'.

[870] Senftleben 2004, p. 6 and 11, paraphrasing Senftleben's formulation of "the very nature of things".
[871] Joyce e.a. 2013, p. 56–57.
[872] Senftleben 2004, p. 11.

However, the labour theory concerns an individual situation and is author-centric. The question therefore is whether the argument – at least in theoretical form – also has potential for the labour in communal indigenous societies. A possibility is to extend Locke's theory, which also acknowledges that "the grass my horse has bit; the turfs my servant has cut" can become one's property by "removing them out of that common state they were in".[873] If labour by those other than the eventual (individual) right holder also counts as "[t]he labour that was [mine]" to establish a property right, one could wonder why the labour that is performed for TCEs in a community or group context could not establish a property right as well. The question of who counts as the eventual right holder is not answered by this, but it might form the basis of an argument to justify indigenous peoples' rights in their TCEs.

Personality and identity

Property has been called a "means for self-actualization, for personal expression, and for the dignity of the individual".[874] These are particularly interesting notions for indigenous peoples' specific circumstances. Indeed, it has been stressed that TCEs are important for indigenous communities precisely for their role in exercising and expressing their identities. In this context, it has been put forward that protection is also required to safeguard indigenous peoples' dignity. This is closely connected to maintenance and safeguarding of their specific (cultural) identities. The bond between TCEs and their source communities is repeatedly emphasised in indigenous statements, studies and academic literature.

The connection between TCEs and indigenous identity therefore seems a strong argument for indigenous peoples to claim protection. When recognition for the protection of TCEs emerged in a copyright context, identity rationales later also came to the fore despite the initial focus on economic arguments. This can be linked to the natural law tradition and the personality argument, which holds that authors' rights in their works are justified because these reflect and are almost an extension of the authors' personality. In fact, in an early document on the policy objectives and core principles of WIPO's ongoing work on TCE protection, WIPO acknowledged as a policy objective that the protection of TCEs should "promote respect for TCEs and folklore, and for the dignity, cultural integrity, and the intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore."[875] The document also acknowledges that for many communities TCEs and traditional knowledge are integral parts of an holistic cultural identity.[876] WIPO has also linked TCEs and TCE protection to indigenous peoples' identities in its core principles for any approach, system or instrument. It has stated for example that the specific nature, characteristics and forms of traditional cultures and cultural expression should be recognised,[877] which is described as follows:

> "Protection should respond to the traditional character of TCEs ;(...) their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; (...)."[878]

[873] Locke 1689 Chapter 5 Of Property. Available via: http://www.constitution.org/jl/2ndtr05.htm.
[874] Joyce e.a. 2013, p. 59.
[875] See WIPO's Overview of Policy Objectives and Core Principles of 2004, WIPO/GRTKF/IC/7/3, Annex I, Policy objectives, I (ii) Promote respect, p. 1.
[876] WIPO/GRTKF/IC/7/3, par. 23, p. 12; Annex I, Policy objectives, I(xiv Complement protection of traditional knowledge), p. 2.
[877] WIPO/GRTKF/IC/7/3, par.14, p. 7.
[878] WIPO/GRTKF/IC/7/3, Annex I, Core principles, p. 3. However, it is followed by a disclaimer that is also worth mentioning here, namely: "Special measures for legal protection should also recognize that in practice

There is, however, a visible contrast with 'mainstream' copyright works. For such works, it has been argued in – already very old – discussions on the topic that in many cases the personality of the author cannot automatically be assumed to be inherent in the work produced. Many copyright works are, for example, said to actually be "design products rather than works of fine art,"[879] and thus less likely to reflect the creator's personality. Therefore, the personality justification does not seem to fit easily with all categories of copyright-protected works.[880] In contrast, however, given the specific nature of TCEs and their place in indigenous societies, it can be argued that TCEs actually *do* reflect the 'group personality' and identities of the indigenous communities where they originate from in most, if not all, cases. As already noted, it has often been repeated in indigenous statements, studies and academic literature that TCEs tend to be an expression of indigenous identity. In this sense, this justification, if extended to the collective, suits TCEs precisely as a category of works that *do* inherently incorporate the community's personality. The importance attached to TCEs for their source communities' identity and to the expressions' integrity are a case in point.

In following this argument, however, there is a crucial discrepancy between the natural law tradition's personality theory and indigenous reality. The personality theory stresses the bond between *individual* 'genius' authors and their works. It is questionable whether that theory could also apply to entire communities or groups and their works, as the indigenous perspective asserts. This disconnect between individual-oriented Western legal systems such as copyright and group-oriented indigenous societies and customary laws is often underlined. Joyce et al. argue that "the personality theory cannot be conveniently applied to […] highly collaborative works, where individual personality is subsumed in a collective effort."[881]

Still, the argument might be maintained in an analogous way. If we accept that indigenous peoples share strong common group identities, their collective efforts might still be seen as reflecting those common identities and establishing a bond between indigenous peoples and their collective TCEs. However, this view on personality or personhood and related group rights raises difficulties, both in scope and justification. Such difficulties include, for example, establishing what would constitute a group that is eligible for collective rights based on personality, and which groups can and cannot be subject to this 'special rule, respectively.[882] In any case, the common ground between the argument and indigenous peoples' protection interests remains clearly visible, at least theoretically.

Moral rights

The moral rights that are a typical feature of the authors' rights tradition are also relevant for forming the basis for an argument for TCE protection, and especially for a number of specific protection interests of indigenous peoples. As we have already seen, moral rights are four-fold. Each category presents objectives that seem closely related to certain indigenous concerns.

TCEs/EoF are not always created within firmly bounded identifiable 'communities' that can be treated as legal persons or unified actors. TCEs/EoF are not necessarily always the expression of distinct local identities; nor are they often truly unique, but rather the products of cross-cultural exchange and influence."

[879] Senftleben 2004, p. 19.

[880] Joyce e.a. 2013, p. 59.

[881] Joyce e.a. 2013, p. 59.

[882] See for a proponent of a group approach to intangible cultural heritage the arguments of Riley 2000, p. 215. And see for a critical view Munzer & Raustiala 2009, p. 68–73.

The 'main set' of moral rights consists of the right of authors to be attributed and the right to safeguard the integrity of one's creative work. First, the attribution right echoes indigenous concerns of being ignored and not recognised as the source of their cultural works. Lack of appropriate recognition and (mis)attribution are two of the main concerns that were put forward by Indonesian artists interviewed in Jaszi's study on traditional arts and copyright law in Indonesia.[883] The right to object to distortion parallels indigenous concerns of abuse and mistreatment of their cultural expressions. This moral right is also called the 'right of respect' or the 'right of integrity' and as such it corresponds with indigenous wishes to safeguard their TCEs from offensive uses which would be harmful to their identities and dignity. Use that is "inappropriate, derogatory, culturally offensive, or out of context" could be interpreted as a lack of respect.[884]

The other two moral rights concern access issues. We can link the moral right of divulgation to indigenous concerns of unauthorised disclosure of their (sacred) cultural expressions. Indeed, it has often been put forward that indigenous peoples wish to decide whether and how their works are used. However, although it is a moral right, the right of disclosure still seems connected to economic considerations: for *moral*, reputational reasons an author is entitled to manage if and when a work is (economically) distributed, for example only when a work is fully edited or completed. For indigenous peoples the reasons to manage disclosure seem to lie more in a sphere of cultural sensitivity, often linked to spirituality, and self-determination. The right of withdrawal seems relevant for indigenous peoples, at least at first glance, because it centralises taking works out of circulation. However, for indigenous peoples this would not be the case for works that no longer reflect their views but rather the opposite: because they *do* reflect cultural sensitivities and circulation is for example perceived as offensive.

Of course, the difficulty here is obvious: moral rights, as part of the authors' rights tradition, are very closely linked to the person of specific, individual authors and their personal bond with their creative works.[885] Therefore, similar objections could be raised here as regards the personality and identity theory when one wants to extend moral rights beyond individuality. When is a group enough of a collective to claim communal moral rights? And, when communal moral rights are accepted for indigenous peoples, why are certain groups privileged as opposed to others?[886] Another challenge would be that, like copyright in general, moral rights are not absolute or unlimited.

So, although the idea of moral rights fits well with (self-determination over) TCEs, moral rights and multiple authorship is an understudied and underdeveloped area of copyright law. Still, moral rights that are based on the relationship between work and person(s), and the harm to the reputation or being of said person(s) that moral rights aim to address, provide starting points to establish protection arguments for TCEs. The fact that moral rights guard values beyond copyright law's economic focus means that they have something in common with a number of indigenous peoples' TCE protection interests. In this sense, moral rights can contribute to the support of arguments for such protection.

[883] Jaszi 2009, p. 15–16.
[884] Janke 1998, p. 19.
[885] Interesting to mention here is the proposed Draft Bill on Indigenous Communal Moral Rights that was circulated in Australia in 2003, although it has ultimately not been passed.
[886] Munzer & Raustiala 2009, p. 68–73.

Indigenous peoples' protection interests → *Copyright theories* ↓	***Benefit-sharing***	***Free, prior informed consent***	***Recognition***	***Integrity and dignity***	***Spirituality (incl. secrecy)***	***Continuation, preservation***
Natural law theories (labour, (group) personality)	Reward argument: reap fruit of labour.	Control over reproduction and dissemination of the community's immaterial works, based on a sense of 'rightness and justice'.	Recognition of the bond between source communities and their works.	Close bond between community and cultural expression.	Close bond between community and cultural expression.	
Moral rights arguments			Attribution.	Objection to distortion, integrity.	Disclosure.	Safeguard integrity.

Table 5 A summary of TCE protection from the perspective of natural law theories and moral rights arguments.

3.4.3 Notions of fairness

Justice and fairness arguments are examined here more closely and therefore 'extracted' from the broader natural law tradition. As we have seen above, natural law tradition arguments to protect authors' rights draw on sentiments of "rightness and justice".[887] These sentiments are very apparent in the discussion on TCE protection. When calls are made for such protection, it is clear that it 'feels right' to have some form of protection in place and that it 'feels unfair' that indigenous peoples' creativity is free to take. However, what such protection would look like, whether existing systems should be applied and how justice should be served in the given circumstances is the next step, which remains far less clear.

Distributive justice

Distributive justice arguments could play a role in informing the protection of indigenous peoples' traditional knowledge and TCEs from a fairness point of view. The main issues include third party use and exploitation of indigenous peoples' resources, without them sharing in benefits, having been consulted or giving consent. This way, their wealth and assets flow away from the source communities in an arguably unfair way. When distributive justice arguments are applied as a basis for TCE protection, intellectual property rights are not limited in order to justly distribute wealth, except in the case of defensive protection, but rather the opposite: creation of new rights is attempted in order to *re*distribute wealth.[888]

These protection rights would likely count as inequalities, namely favouring only one group in society, but this would be defendable if they "improve the lot of the 'worst-off' class in the society."[889] In the context of traditional knowledge and TCEs, indigenous communities tend to be 'worst-off', often being extremely disadvantaged as opposed to large companies. The result of protection could be not only that wealth is transferred from other groups toward this

[887] Senftleben 2004, p. 11.
[888] Hughes 2012, p. 42.
[889] Hughes 2012, p. 43.

worst-off group, but also that wealth is prevented from being transferred *from* them *to* other groups.[890] This is for example the case when indigenous groups would obtain the ability to challenge (unfair) competition from third-party copies.[891]

Furthermore, the farmers' rights example mentioned in section 3.3.3 could be applied analogously to the situation of indigenous peoples. Knowledge and creative expressions of indigenous peoples are also "developed collectively over many generations".[892] The argument for recognition of farmers' entitlement "to intellectual integrity" could then also be applied to rights to protect TCEs.[893] Based on theories of distributive justice, this could help indigenous peoples, like farmers, in strengthening and managing their assets against third parties.[894] This could take, for example, the form of contracts, prior informed consent and benefit-sharing claims for the use of their TCEs. Like in the case of farmers, specific rights for indigenous peoples can take into account their specific circumstances.

The economic development argument that is often put forward to protect traditional knowledge and TCEs is quite similar to the distributive justice theory and the farmers' rights example.[895] During the emergence of the topic of TCE protection in a copyright context much attention has been directed at the economic development of 'young' states. The Composite Study on the Protection of Traditional Knowledge of WIPO's Intergovernmental Committee, for example, maintains the argument that protection of traditional knowledge would promote economic development and lessen poverty.[896] It is also an argument that indigenous peoples mention themselves: protection of TCEs would provide them with economic opportunities.[897] In this sense, distributive justice, or redistribution, and preventing wealth from indigenous knowledge or creativity flowing from communities of origin due to third party copying, could be arguments on which to base the protection of TCEs.

Misappropriation and misrepresentation

Another aspect from a fairness viewpoint is the doctrine of misappropriation. Misappropriation has been a big part of the vocabulary in which discussions on the protection of TCEs have been taking place for many years. The unfairness of free-riding by third parties is a central feature. Indeed, arguments against misappropriation tend to revolve around two features: firstly that TCEs are taken in an unauthorised way without asking source communities for permission, and secondly that no benefits are shared. Objections against

[890] Hughes 2012, p. 45.
[891] Hughes 2012, p. 45.
[892] Menell 2000, p. 160.
[893] Menell 2000, p. 160.
[894] Menell 2000, p. 160–161.
[895] But Munzer and Raustiala put forward that there is no empirical evidence that the protection of traditional knowledge actually does contribute to economic development and relieve poverty, see: Munzer & Raustiala 2009, p. 68.
[896] Secretariat Of The Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2003, p. 15: "A third potential rationale for IP protection of TK concerns economic development and poverty alleviation: if the communities so wished, the formalization and recording of traditional communities' intangible assets would transform them into capital, thus facilitating the establishment of commercial ventures within traditional communities."
[897] See for example Mathias Åhrén from the Saami Council, Experiences from the Nordic Countries, at the WIPO Panel on "Indigenous and Local Communities' Concerns and Experiences in Promoting, Sustaining and Safeguarding their Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources", Geneva June 2005, p. 4.

misrepresentation concern false claims of authenticity or abuse of the name of indigenous groups. This could be called free-riding on their reputation.

However, boundaries and a balance of interests are important in the case of misappropriation as a justification of protection. If there were no check and balance exercise, "an intellectual property system based on ideas of misappropriation would protect every product of the mind, for an unlimited period, in the name of 'fairness'."[898] The same would go for a TCE protection system that is justified by the argument of misappropriation. Rights that are called for in the debate on the protection of TCEs tend to include rights that are unlimited in duration. This shows the need for a well-thought-out system that meets protection needs, but also takes checks and balances into account. For any protection to be realised, there likely have to be trade-offs. Otherwise, there exists a risk of a legal impasse between the (forms of) protection called for on the one hand, and legal possibilities and reality on the other hand.[899] However, indigenous peoples might argue: according to what standards? If copyright-like standards, i.e. limited duration and its inherent limitations and exceptions, would be used for a checks and balances exercise, this likely gives rise to objections as to why 'mainstream' external standards would have to be applied to indigenous communities' specific circumstances. Communities often already have their own customary systems and laws, including checks and balances, in place.

Unjust enrichment

Unjust enrichment is a doctrine that draws on notions of unfairness, and one that could be especially relevant to inform a protection argument for TCEs. It is a doctrine that has certain crucial aspects in common with the discussion and arguments that surround the protection of TCEs, in particular where the unfairness of unauthorised exploitation of indigenous cultures by third parties is underlined. Using traditional knowledge or TCEs without authorisation or benefit-sharing is argued to provide economic benefits to outsiders, while at the same time disadvantaging indigenous peoples. In other words, as phrased by Munzer and Raustiala: "[i]t is unfair for outsiders to retain the full benefit without making an appropriate restitutionary payment to the indigenous peoples."[900]

However, for the 'sowing without reaping' or unjust enrichment doctrine to apply, there need to be additional grounds that determine that the 'sower' has a strong claim that could justify protection and exclusion of others.[901] Applying the same to TCE protection, for indigenous peoples these could be grounds such as (respect for) the connection between their identities, ways of life and their cultural expressions, or their centuries-long bond with, and development of, their heritage. A spiritual element often plays a role as well. Other, normative, grounds could be found in various cultural and indigenous human rights, including the rights to participate in cultural life and to benefit from protection of moral and material interests of authors' works of Article 15 ICESCR and the indigenous rights of ILO Convention No. 169 on Indigenous and Tribal Peoples and UNDRIP. This will be further elaborated on in Chapter 5.

The focus of the doctrine whereby no one may be unjustly enriched to the detriment of another person may seem rather economic at first sight. However, for indigenous peoples the

[898] Joyce e.a. 2013, p. 61.
[899] But the question is: what legal reality would this be? Mainstream, 'western' legal reality?
[900] Munzer & Raustiala 2009, p. 76.
[901] Spence 2002, p. 395–396.

harm of third parties taking their TCEs without permission may not consist *only* of economic harm. Instead, what is also at stake are disadvantages on a more fundamental level, for example of being disregarded as the source community that should be consulted for permission. This still resonates with the underlying rationale of the injustice of third parties enriching themselves via unauthorised 'reaping' of TCEs. Essentially, the doctrine of unjust enrichment then aligns with central aspects of the broader indigenous rights discussion, which dates back to the times of the *terra nullius* principle: a lack of a say, self-determination and ultimately a lack of rights over their resources. In sum, the general idea behind the unjust enrichment doctrine and its sentiments of (un)fairness are notions that can clearly ground protection arguments for TCEs.

Indigenous peoples' protection interests → *Copyright theories* ↓	***Benefit- sharing***	***Recognition***
Fairness theories and arguments	Protection to address distributive justice; misappropriation, free-riding; unjust enrichment.	Protection to address misrepresentation, free-riding, unfair competition.

Table 6 A summary of TCE protection from the perspective of fairness theories and arguments.

3.4.4 Defensive protection

While positive protection via copyright law has been researched and discussed to a large extent over the past decades, the potential of defensive protection for TCEs should not be overlooked. Positive protection has been proven to present difficulties, but defensive protection could perhaps meet at least some of indigenous peoples' interests from an intellectual property perspective, such as control interests and interests in safeguarding TCEs for spiritual reasons. Defensive protection could be grounded in various arguments, such as unjust enrichment, the moral right of divulgation and unfair disclosure of confidential information.

Methods of defensive protection could be two-fold. On the one hand, indigenous communities could decide to communicate their TCEs to the public themselves in order to obstruct third parties' intellectual property rights, or at least ensure documentation of their knowledge or TCEs to show that third party applications are invalid because – in the case of patents – there exists prior art,[902] or – in the case of copyright law – it is a matter of copying an indigenous work.[903] Unjust enrichment, free-riding on the labour and efforts of others, and offensive use could be arguments here. See for the latter, for example, the trademark law of New Zealand, where Article 17(1)(c) of the Trade Marks Act enables Māori to oppose the registration of a trademark that would be likely to offend.

[902] There are also risks to defensively disclosing knowledge, for example in patent cases. If the knowledge of, for example, medicinal properties of plants were made available, third parties can work with this existing prior art knowledge to develop medicines that could be inventive and novel enough to be patented. In other words, "[t]he indigenous group's TK is still prior art with respect to some actual or possible inventions, but it is not prior art that anticipates the new drug." Munzer & Raustiala 2009, p. 82.

[903] See Jaszi 2009, p. 62–63 on the possibility of defeating false foreign IP claims regarding Indonesian traditional arts 'defensively', when there is no domestic protection in Indonesia itself.

On the other hand, indigenous peoples could opt *not* to disclose their TCEs, for example in the case of secret TCEs. Still, if secret material is made public, unfair disclosure of confidential information from the eponymous common law doctrine might be a useful argument.[904] A notable case on this topic occurred in Australia in the 1970s, namely the *Foster v. Mountford & Rigby Limited* case.[905] This was the first case in Australia on secret Aboriginal information, and the first that took "into account Aboriginal customary rights to culturally defined notions of secrecy."[906] In this case, the Pitjantjatjara people in Australia complained about the publication of a book with information on their traditional practices that was argued to have been transmitted to the anthropologist Mountford in confidence. The information included details and pictures of secret ceremonies. A claim for an injunction against the sale of the book was filed. The circumstances of the case played a large role in the decision, and the court recognised "that disclosure of the information had serious and potentially dangerous consequences for community social structures."[907] The injunction was thus found to be appropriate and justified by the court by pointing to the "particular cultural and religious significance of the information."[908]

In sum, defensive protection could offer indigenous peoples a certain amount of control over the (intellectual property) use by third parties of certain elements of their knowledge and cultural heritage. And protection of indigenous peoples' confidential information seems justifiable on grounds of cultural and religious importance. As such, the doctrines of defensive protection and confidential information could be useful to inform TCE protection.

TCEs and 'cultural privacy'

Connected to confidential information issues and indigenous concerns with regard to unauthorised disclosure, notions of privacy could come into play as well. There is arguably an interrelation between privacy, publicity and property interests on the one hand, and arguments against unauthorised disclosure on the other.[909] This reading of privacy seems to bear some resemblance to, and relevance for, the problems of third-party use and disclosure of – or unsolicited 'publicity given to' – TCEs. Concerns of indigenous peoples are extremely varied, but Frankel and Richardson's identification of the specific concerns of indigenous peoples in New Zealand and Australia in relation to protection of their information could be mentioned here, for these include "cultural publicity", "cultural property" and, indeed, "cultural privacy", together with a "general concern of maintaining guardianship of traditional culture".[910]

[904] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 18.
[905] Foster v. Mountford & Rigby Limited, (1976) 29 FLR 233, 14 ALR 71.
[906] Antons 2009, p. 110. Antons' assessment of the larger context of this case is worth underlining here: "It symbolises a shift from assimilation policies based on the notion of Australia as terra nullius at the time of 'discovery' towards a growing understanding of Aboriginal customs and associated rights."
[907] Anderson 2010, p. 22.
[908] Aplin e.a. 2012, p. 18.35.
[909] In the United States, for example, privacy invasion includes, according to the Restatement of the Law on torts of 1977 by the American Law Institute, intrusion upon seclusion, appropriation of name or likeness and publicity given to private life. Hughes 2012, p. 39. See also: http://cyber.law.harvard.edu/privacy/Privacy_R2d_Torts_Sections.htm.
[910] Frankel & Richardson 2009, p. 278. They derive these concerns for example from the WAI 262 claim as voiced by Māori before the Waitangi Tribunal in New Zealand, the evidence brought forward in the Australian copyright cases on Aboriginal art, Bulun Bulun v. R & T Textiles (1998) and Milpurrurru v. Infodurn Pty Ltd (1994), and the arguments in the Foster v. Mountford case (1976), which involved the Pitjantjatjara community with regard to secret practices and disclosure of confidential information.

Indeed, privacy justifications for the protection of traditional knowledge have been aligned with trade secrecy, protection of confidential information and breach of confidence.[911] A privacy justification, at least in particular for private or secret TCEs, would then be grounded on notions of confidentiality and protection of confidential information. An example is the *Foster v. Mountford* case that was mentioned above. Public disclosure of certain elements of indigenous culture are sometimes also campaigned against via a '*right* to cultural privacy' as part of a broader debate on cultural secrecy.[912] However, this comes with typical privacy law problems and is therefore contested as well.

For example, collective or communal 'cultural privacy' interests can cause friction with rights of privacy that are perceived as typically individual.[913] When considered as connected to such issues as dignity and integrity in an abstract way, a 'cultural privacy' argument to inform TCE protection could hold some persuasion. But to specify concrete privacy rights or potential actions for indigenous peoples on these grounds seems difficult. Protection against disclosure of confidential information might be more useful in practice, as the case *Foster v. Mountford* showed, but only for private or secret TCEs. In other words, whereas *notions* of privacy could be considered as an interesting theoretical perspective for an argument for TCE protection, privacy *rights* as such are further beyond the scope of this thesis and left here for now.

Indigenous peoples' protection interests → *Copyright theories* ↓	***Free, prior informed consent***	***Spirituality (incl. secrecy)***
Defensive protection arguments	Control over reproduction and dissemination of the community's immaterial works, based on defensive protection arguments.	Defensive protection: non-disclosure, or: unfair disclosure of confidential information.

Table 7 A summary of TCE protection from the perspective of defensive protection arguments.

3.5 Conclusion: from material difficulties to foundational opportunities

After the foregoing analysis of copyright law's key characteristics and justifications, what can we conclude about its potential to contribute to the protection of TCEs? The short answer is that to protect TCEs under copyright law is at once problematic but also provides opportunities at various levels, such as at the abstract level of the organisation of the system, the more concrete level of protection requirements and the foundational level of theories and justifications.

First, it has been argued that to shoehorn traditional knowledge and TCEs into existing intellectual property categories is artificial. Treating the protection of TCEs under existing systems such as copyright law, would force indigenous peoples to express the nature of their works and formulate their needs in mainstream terminology. This could obscure and diminish their actual protection interests.[914] The use of instruments and terminology of mainstream societies has been argued as resulting in "simplistic" translations[915] of the specific situation of indigenous peoples, which do not take indigenous concerns and needs into consideration.

[911] Hughes 2012, p. 39.
[912] Antons 2009, p. 122.
[913] See Antons 2009, p. 122–125. And see also, particularly extensively on the difficulties involved in this discussion: Brown 2003, p. 27–42.
[914] Pask 1993, p. 64.
[915] Coombe 1993 (a), p. 272.

Indigenous peoples' customary law understandings of 'rights' and use of TCEs are also often in tension with existing laws and legal perspectives.[916]

However, the analysis of this chapter shows that one could also argue the other way around. Discussing the issue of TCE protection from a copyright perspective provides categories and aspects that could help specify and delineate the particularities and issues that are actually at stake in the discussion. Copyright law may show various disconnects between mainstream and indigenous understandings and perceptions of creativity and creative production processes. But it also shows the pressure points as to what the main issues actually are and therefore what would be needed instead to address the fundamental questions relating to protection of indigenous creative works.

Many of copyright law's main aspects and protection requirements can be used to reflect both on the difficulties and on the possibilities that arise on a 'technical' or substantive level of legal definitions and principal rules. While formulating the protection of TCEs under existing copyright elements and requirements is difficult, it also shows immediately where the difficulties, or gaps, lie. These concern, for example, the implications of TCEs' collective nature as opposed to copyright's focus on exclusive rights for the benefit of an individual author, amounting to tensions regarding the understanding of what counts as authorship. The 'limited' duration of copyright protection is also a core difficulty for TCEs, while for copyright law it is an inherent part of the system and of the importance that is attached to the public domain.

At a foundational level, it is possible to identify which copyright theories, arguments and rationales are relevant for the aims of and arguments for TCE protection. Utilitarian and incentive theories are for example not an ideal match, except for perhaps sustainability and preservation arguments, whereas natural rights and personality justifications clearly provide more starting points. The same goes for the various notions of fairness, with their underlying rationales of injustice.

At the same time, many of these theories and justifications are not *entirely* satisfactory. There are indeed certain commonalities with moral rights and personality interests of authors and TCE holders. And fairness arguments also share common ground with justifications for TCE protection. But adaptation of or deviation from the existing copyright system in a substantive way to address TCE protection under copyright law, for example on the technical level of protection requirements, but especially at a justification level, remains somewhat artificial and unlikely.[917] Core elements of authorship, a delineated object of protection, duration and public domain considerations, as well as copyright law's main underlying traditions and theories of utilitarianism and individual natural rights seem to stand too far away from what is actually at stake for indigenous peoples. What is therefore required, is a protection approach that takes account of the full spectrum of indigenous needs and the particularities of TCEs' 'traditional property nature'. Such an approach may very well be in part guided and informed by

[916] Berman 2004, p. 9 states that they are "written out of the law, except as 'facts' that inform the law, but do not compete with it."

[917] This is confirmed and stressed in scholarly literature on the issue. Carpenter et al argue for example for a property model that can bring the competing notions of 'traditional' and cultural property together, see Carpenter, Katyal & Riley 2009, p. 1046. Furthermore, Coombe stresses the importance of looking outside the existing, mainly European-centric, categories to consider indigenous claims, see Coombe 1993 (a), p. 270. And Munzer and Raustiala state on a conclusive note in their study on IP, justifications and protection of traditional knowledge that strong protection "in many respects would require major deviations from existing justifications for property." See Munzer & Raustiala 2009, p. 97.

copyright law's opportunities, that is to the extent these are relevant for certain specific protection interests, but it is clear that other legal areas are, or should be involved, for other specific parts of the issue as well. I advocate careful 'cherry picking', as the other chapters of the thesis will further demonstrate, as a one-size-fits-all approach is unlikely.

Ultimately, what the analysis of the issue from a copyright perspective shows, is indeed its complexity, but also its potential. Copyright law understandings can inform specific aspects of TCE protection. To summarise, three main aspects, or values, can be derived from the foregoing, which are reflected in the interplay between claims for TCE protection and copyright law. These are: indigenous peoples' dignity and identity, drawing on the bond between communities and their heritage and their moral rights-like interests of attribution and integrity; respect for indigenous peoples' heritage, its specific role in their communities and their interests in control over their resources by way of (cultural) self-determination; and participation, continuation and development of indigenous heritage with indigenous peoples' input and on their own terms.

We shall see these values recur in their cultural heritage and human rights capacities in the next chapters on cultural heritage law, human rights law and TCEs from a foundational perspective. Regardless of each legal system's distinct measures and protection (and preservation) theories and principles, this recurrence indicates that it is possible to identify transboundary, shared values at the foundational level.

CHAPTER 4
CULTURAL HERITAGE LAW AND TRADITIONAL CULTURAL EXPRESSIONS

4.1 Cultural heritage law and TCEs

The second legal system that is explored from the perspective of TCE protection in this thesis is cultural heritage law. The central aspects of 'cultural heritage' are explained in section 4.1.2, but for introductory purposes we can already identify two main aspects that give a basic characterisation: symbolism and inheritance.[918] These aspects show that cultural heritage plays an important role for communities' identities and that it holds such value that this must be safeguarded for future generations. Safeguarding cultural heritage to ensure its transmission to future generations is one of the main concerns shared by indigenous groups. This resonates with typical cultural heritage considerations of 'safeguarding' and 'preservation'. Cultural heritage instruments are a part of the international legal framework that is concerned with various aspects of works of culture. This framework also includes intellectual property, as we have seen in Chapter 3, and human rights instruments, as we will see in Chapter 5. Each part of the framework targets specific aspects of culture or cultural works and rights.

This section first outlines the context by explaining the relationship between cultural heritage and TCEs. It introduces central aspects of cultural heritage and their link with TCEs, cultural heritage law's focus on preservation, and the interplay with human rights. Taken together, this section positions (certain parts of) TCE protection as an issue of cultural heritage law. In the second section, the various central themes, instruments and theories of cultural heritage law are explained, ranging from cultural heritage in wartime, the import, export and restitution of cultural heritage, and intangible cultural heritage, to the latest additions of cultural diversity and cultural heritage. The third section looks at specific cultural heritage instruments more closely in order to identify and map their underlying rationales and principles. As we shall see, cultural heritage law is also itself rather fragmented. In the fourth section, TCE protection is analysed from this rationale- and principle-based perspective. Cultural heritage protection measures, objectives and principles are linked with the question of TCE protection.

Like Chapter 3 on copyright law, this chapter will also have a mixed outcome. On the one hand, there are aspects and rationales of the cultural heritage framework that resonate with TCE concerns of indigenous peoples. But on the other hand, aims of cultural heritage protection can in practice work against indigenous peoples' needs and interests. The emphasis on the interests of nation states or all mankind and a focus on preservation are examples of aims that can give rise to tensions for indigenous peoples. The latter could involve regulation, or possibly even limitation, of access to and use of the heritage to the extent that it affects source communities themselves. This could for example be the case with world heritage sites, such as natural heritage and territories.[919] The mixed outcome reinforces the multi-faceted nature of the protection in question, the various interests involved and the diversity of relevant aspects and principles of the legal framework.

4.1.1 A focus on history, concepts and principles

To consider indigenous peoples' TCEs as part of their cultural heritage and an expression thereof, implies that it is relevant to examine the terminology, concepts and norms of the

[918] Blake 2000, p. 83–84.
[919] See extensively on indigenous rights and nature conservation: Desmet 2011.

cultural heritage framework for the current discussion on TCE protection. The concept of cultural heritage has broadened increasingly over the years. Alternative views on cultural heritage that deviate from mainstream, established understandings have been central in these developments. In this sense, it is interesting to assess how indigenous heritage fits, or does not fit, within this system. The focus for this assessment is on historical and conceptual developments and is principle-based.

Historical events and the post-decolonisation period form the backdrop for developments and shifts in cultural heritage law. During this period, new actors emerged who voiced their dissatisfaction regarding limited lists and definitions of cultural heritage objects to be protected. Arguably, existing structures would follow mainstream standards, values and interests. More recently, criticism has targeted cultural heritage instruments' focus on *tangible* cultural heritage. In response, the two most recent UNESCO conventions of 2003 and 2005 have been concerned with intangible cultural heritage and cultural diversity issues. Interestingly, both also pay significant attention to the roles of heritage source communities and the dynamic 'existence' of cultural heritage. This seems to be an indication that the system is increasingly aware of 'non-mainstream' cultural heritage and its particularities, such as that of indigenous peoples. The background, context and developments preceding it are discussed for each legal instrument that is analysed in section 4.3 of this chapter.

Conceptually, 'preservation' and 'safeguarding' are typical aspects of cultural heritage law that date back to early thoughts on the topic in ancient times in the context of war. They also resemble indigenous peoples' concerns for continuation and transmission of their heritage, including their knowledge and cultural expressions, to future generations. However, the dynamic nature of these concerns and the living character of indigenous cultures have to be kept in mind when assessing TCE protection from a cultural heritage law perspective. In this sense, these concerns seem to correspond with general shifts in understanding in the system as a whole.

As TCEs comprise non-material subject-matter, and protection interests include their continuation in a dynamic way, relevant principles and aspects of cultural heritage law are likely to be found in the realm of intangible cultural heritage in particular. Nonetheless, (general) underlying values and principles of the various other cultural heritage categories, areas and instruments can also inform TCE protection, as can the means that are intended to achieve preservation. Therefore, this chapter is not limited to intangible cultural heritage and TCEs, but instead positions TCE protection as an issue of cultural heritage law more generally. To this end, it traces the developments and maps the (principles of the) framework of treaties set out by UNESCO since the Second World War.

4.1.2 Central aspects of cultural heritage and TCEs

There are a number of aspects that are central to the cultural heritage regime as a whole. The various cultural heritage categories, areas and instruments may each have their own focus or reflect specific political or intellectual concerns of the time during which they were adopted,[920] but several aspects are recurring in literature and discussions on the topic of cultural heritage. The following are assessed in a short overview: heritage as a qualifier; preservation; relationships between communities and heritage; power; land; and all mankind

[920] Blake 2000, p. 62.

as a beneficiary. Together, these aspects paint a general picture of the main issues of cultural heritage law.

Heritage as a qualifier

First, it is useful to look at the actual terminology of 'cultural heritage'. Whereas for cultural rights 'culture' can be considered a qualifier, as we will see below in Chapter 5, for cultural heritage law this function can be assigned to 'heritage'. The notion of 'heritage' determines and limits what can be considered cultural heritage for the purpose of cultural heritage law, because not all objects, works or expressions of culture are necessarily heritage items.[921] The term 'culture' itself, at least in its anthropological meaning, has a potentially endless reach and definition.[922]

There are two aspects that give a basic characterisation of cultural heritage: symbolism and inheritance.[923] Both are at the very heart of what determines the actual value of cultural heritage. The characteristic of symbolism means that cultural heritage has a symbolic function, playing a role in the formation of community identities. The characteristic of inheritance means that the heritage in question is valued to such an extent that it is considered important to transmit it to future generations, to maintain a strong community identity and to safeguard it from dilution or even extinction. In other words, it is considered as an inheritance for future generations. Applying the two characteristics takes a functional, or role-based, approach to defining cultural heritage. Both symbolism and inheritance link culture to cultural heritage via the determining factor of identity. Heritage is simultaneously the carrier and builder of identity by way of its symbolism and transmission through generations. This could take place via material objects, intangible expressions of culture or via the link with nature, territories and the environment. In this sense, cultural heritage could still include a myriad of manifestations, provided that they perform the functions of symbolism and inheritance.

A choice is required to determine what is considered as cultural heritage and to decide what ought to be protected and preserved via legislation for future generations as an "inheritance".[924] This complicates the area of cultural heritage and regulation with a strong political and power dimension. The question arises, for example, who exactly gets to choose and decide. The symbolic and identity function of cultural heritage for a culture and its value for a community is also a politically charged one. As we will see below in the subsection on 'Power', this is very likely to cause conflict. Of course, power distribution and indigenous peoples' position is both a historical and a contemporary issue, not only in the context of culture and cultural heritage, but also in a broader sense.

Preservation

Preservation and safeguarding, or protecting heritage from destruction and loss, have been central themes since ancient times when cultural heritage protection was mainly considered in the context of laws of war. Notions of preservation and safeguarding reflect the value and the symbolic and inheritance functions of cultural heritage. It is precisely for these reasons of identity formation, and the symbolic role that cultural heritage plays in this regard, that it is considered crucial to safeguard it as an inheritance for future generations.

[921] Blake 2000, p. 67-68.
[922] Blake 2000, p. 67–68.
[923] Blake 2000, p. 83–84.
[924] Blake 2000, p. 68.

In the context of TCEs, there is a fine line between safeguarding cultural heritage from destruction or disappearance and freezing dynamic and living cultural heritage in time, reducing it to static, archaic representations of what it once was. Indigenous peoples often stress that their cultures are characterised by their living nature. The photo project 'Before They Pass Away' by photographer Jimmy Nelson is an interesting example of this tension. For this documentary photo project Nelson has travelled worldwide photographing indigenous peoples[925]. The title of this project has led to criticism by various indigenous leaders. The criticism concerned the phrase 'passing away'. Indigenous leaders stressed their continued existence, their defence of lands and, indeed, the struggle to survive by indigenous peoples over the centuries *and* long into the future.[926] Transmission to future generations – which requires a certain degree of preservation – is a main concern of indigenous peoples with regard to their knowledge, cultural expressions and cultural heritage.

Relationship between communities and cultural heritage

Another central aspect of cultural heritage – and of reasons to protect it – is the relationship between the communities of origin and their specific heritage. This is also very much connected to the role of cultural heritage in the formation and maintenance of cultural identities that we have already seen. This relationship can also be linked to the next three aspects that will be discussed below: power, land and universality disputes.

Cultural heritage plays a central role for community identity formation. This way, the relationship between communities and their cultural heritage is an obvious one: cultural heritage is both foundational for, and gives meaning to, the existence of communities. This also makes cultural heritage a subject of power struggles. The social function of cultural heritage means that cultural heritage policy could become a highly-politicised subject. This includes both the selection of what actually comprises cultural heritage and decisions on preservation. [927] In other words, the identity formation function is a central manifestation of community relationships with their heritage.

The relationship between communities and their heritage is increasingly acknowledged and emphasised. The study by the Expert Mechanism on the Rights of Indigenous Peoples on cultural heritage refers for example to the Council of Europe Framework Convention on the Value of Cultural Heritage for Society. Article 2 defines cultural heritage as resources transmitted as an inheritance, reflecting dynamic values and traditions and including all environmental aspects that result from the interplay between peoples and places in the course of time.[928] For indigenous peoples, as we will see below, cultural heritage often first and

[925] See: www.beforethey.com. According to the website: "Jimmy's ambition and mission is to make an iconic document of indigenous cultures and to leave a visual heritage for present and future generations. He wants to create an aesthetic photographic and film document that will stand the test of time. His work will be a catalyst for further discussion as to the authenticity and beauty of these fragile disappearing cultures. (…) On his journeys he is continuously witnessing the speed in which these amazing communities are embracing the future. (…) Above all else, it is his fascination for the rapidly vanishing harmony between man and nature takes us to places we thought had disappeared long ago. He asks us, will we manage to save the fragile umbilical cord to our extraordinary primeval past? Or will we cut it with scissors of ignorance and thus potentially finding ourselves alone without a cultural purpose?"

[926] See media coverage of the issue in this article of the Guardian: 'Photographer criticised by indigenous people and Survival International', The Guardian, 29 October 2014, available via: http://www.theguardian.com/global-development/2014/oct/29/jimmy-nelson-indigenous-people-survival-international.

[927] Blake 2000, p. 68 and 74.

[928] Expert Mechanism On The Rights Of Indigenous Peoples 2015a, p. 3.

foremost draws on, is inspired by and is connected to their relationship with their environment, traditional lands and territories.

The relationship between communities and cultural heritage can also give rise to disputes. The question could arise as to which community's relationship with the heritage in question is at stake in given circumstances. Generally, literature distinguishes between two conceptions of cultural heritage: cultural nationalism and cultural internationalism. These two ways of thinking have been largely developed and explored by John Henry Merryman. Cultural internationalism means that there is a general, overall interest in protection and preservation of cultural heritage, regardless of its location or source.[929] In other words, cultural heritage concerns all mankind. In this sense, everyone has a relationship with cultural heritage, for example for general reasons of a shared history of mankind or an overall interest in cultural diversity. Cultural nationalism limits the scope of this relationship to the special interests of nations in the cultural heritage, suggesting a national character of the heritage. This immediately provides for arguments of national export and import control and repatriation claims.[930] The foregoing shows two distinctive, and likely often competitive, relationships between communities and cultural heritage.

Indigenous peoples' claims to heritage, for example against national states, represent another type of conflict. In this case, competing claims of a relationship with the heritage in question concern national interests versus those of indigenous communities. We could call this cultural community-ism, or cultural localism. An example here is the use of indigenous heritage for tourism or marketing purposes by national authorities. National claims of a relationship with the heritage are then also (superficially) related to identity or image, whereas indigenous peoples may oppose such use, exploitation or even usurpation of their heritage and identity on a (mainstream) national level.

Power

Power is another central aspect in the context of cultural heritage.[931] It is, for example, central to the interpretation and meaning that is given to heritage and to the representation of power.[932] The designation of heritage – i.e. what is considered as heritage and valued as such – requires a (political) choice, which is expressed in policy or legislation.[933] This means that those in power get to claim, decide on and choose what is cultural heritage, what values it serves and how it is to be interpreted. As a consequence, there is often a relationship of dominance and exclusion underlying such choices. The societal role of cultural heritage is determinant in the context of power, such as its symbolic function and reflection of national or community identity.

Power is a central factor in the use, development, maintenance and access to cultural heritage, and the circumstances under which this is possible. Ultimately, it is often the results of (unequal) power relations that determine whether heritage is destroyed or survives through preservation policies. The preservation of cultural heritage requires a (political) choice. We have already seen a similar tension in Chapter 2: many issues of contested third party use of TCEs are related to the assignment of meaning. The question that arises is who gets to 'claim'

[929] Merryman 2005, p. 11.
[930] Merryman 1986, p. 831–832.
[931] See Blake 2011, p. 209–210.
[932] Blake 2011, p. 209-210.
[933] Blake 2000, p. 68.

heritage and assign meaning to it. Vertical or horizontal conflicts are conceivable, for example between state and minority groups, between commercial third parties and minority groups, and also between specific minority groups amongst themselves. In other words, power is determinant for who gets to assign meanings to cultural heritage and who gets to claim the carriers or expressions of these meanings, tangible or intangible.

Blake illustrates the way power and politics regarding meanings and values of cultural heritage can give rise to tensions and conflicts as follows:

> "Recognising the importance of intangibles to the concept of cultural heritage, in particular, has some serious implications in political and social terms which extend well beyond the traditionally accepted boundaries of the term. These include, for example, complex areas such as the construction of cultural identity, the significance of destruction of cultural (and religious) monuments as a weapon of war and the existence of cultural rights of minorities and indigenous and tribal peoples which introduce a completely different and at times subversive view of the cultural heritage."[934]

As Blake also notes, these power issues are likely to be especially visible in the context of minority groups such as indigenous peoples. These groups are almost always dependant on the outcome of power relations for the maintenance, development and exercise of their cultural heritage practices or for access to cultural heritage sites. Various human rights, especially indigenous, minority and cultural rights, strive to ensure that this (unequal) power relation is balanced in such a way that minorities and indigenous peoples have rights to their cultures and cultural heritage. One can think for example of Article 27 of the International Covenant on Civil and Political Rights (ICCPR) stating rights of minorities, such as the enjoyment of their own culture, and the multiple cultural rights of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on indigenous peoples' cultural integrity, dignity, diversity and identity,[935] which in many instances include (aspects of) their cultural heritage. This connection suggests that cultural heritage protection can take on a human rights character as well. This is further explained in section 4.1.4 on cultural heritage and human rights law.

Land

The central place that lands, territories and resources can have in the understanding of cultural heritage is connected to the relationship between communities and cultural heritage. This is not necessarily an aspect of cultural heritage in general, although territories and sites are the specific object of protection under the World Heritage Convention of 1972 regarding world and natural heritage sites. However, there are specific situations in which land is a central notion regarding cultural heritage, such as in the context of indigenous peoples. The 2015 study by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) on the promotion and protection of the rights of indigenous peoples with respect to their cultural heritage emphasises the link between indigenous peoples' lands, territories and resources and their cultural heritage. According to the study, indigenous peoples' cultural heritage is both an expression of their self-determination and, crucially, of their relationships – spiritual and

[934] Blake 2000, p. 75.
[935] Articles 5, 8, 9, 11, 12, 13, 14, 15, 16, 31, 33 and 34 UNDRIP.

physical – with their lands, territories and resources. Preservation of heritage is therefore closely intertwined with the protection of traditional lands and territories.[936]

Silverman and Ruggles describe the example of the Aboriginal peoples in Australia, where the relationship between land, cultural heritage and human rights has become increasingly visible through various legal developments. These include the breakthrough 1993 Native Title Act, which has permitted Aboriginal peoples in Australia "to reclaim ancestral lands, thereby enabling them to live their cultural lives to a greater degree than before,[937] and the Australia International Council on Monuments and Sites (ICOMOS) Charter for Places of Cultural Significance, also known as the Burra Charter.[938] The latest revision of the Burra Charter dates from 2013, and it specifically encompasses a best practice standard for managing cultural heritage *places* in Australia. These are referred to in the preamble as places of cultural significance, including natural, Indigenous and historic places with cultural values.[939] The Charter stresses the importance of cultural heritage places for both their past *and* present value, thereby recognising the dynamic and living component of cultural heritage.[940] Silverman and Ruggles argue that this attention for living culture as actually embodied in people means that the Charter implicitly deals with human rights as well.[941] Particularly relevant is the emphasis on use and the participation of people for whom the place has significant associations and meanings, or who have social, spiritual or other cultural responsibilities for the place.[942] A number of Practice Notes to supplement the Burra Charter were launched in 2013. One of these specifically deals with the management of indigenous cultural heritage. This Practice Note contains a guide to indigenous issues that might come up regarding their cultural heritage and the terminology, application and processes of the Burra Charter.[943]

In sum, land can be both a cultural heritage subject in itself and form the basis for cultural heritage, which builds on it and is intertwined with it. While there is thus a subtle difference, in both cases the land ultimately forms a crucial foundation to ground a community's or people's identity. Cultural heritage plays a similar, central role for identity formation. In other words, land, territory and the environment are significantly intertwined with both cultural heritage and identity formation. This is also particularly relevant for indigenous peoples and their traditional knowledge and TCEs, which often express the bond between communities and their territories.

All mankind as beneficiary

Protection and preservation 'for the benefit of all mankind' is a recurrent phrase in the context of cultural heritage. As we saw above, this implies a cultural internationalist approach or the existence of a certain relationship between cultural heritage and the general public, beyond the heritage's source nation or community. The emphasis on a "positive collective responsibility toward a common cultural heritage" is a shift from the United Nations' initial

[936] Expert Mechanism on the Rights of Indigenous Peoples 2015, p. 4.
[937] Silverman & Ruggles 2007, p. 7.
[938] The Charter is available via: http://australia.icomos.org/publications/charters/.
[939] Australia ICOMOS 2013, p. 1.
[940] Australia ICOMOS 2013, p. 1.
[941] Silverman & Ruggles 2007, p. 7.
[942] Article 12 Burra Charter 2013.
[943] Available via: http://australia.icomos.org/wp-content/uploads/Practice-Note_The-Burra-Charter-and-Indigenous-Cultural-Heritage-Management.pdf.

post-World War II agreements, which resulted in the birth of UNESCO.[944] These agreements placed negative duties on specific states regarding preservation of their respective elements of cultural heritage.[945] Obligations would have to be carried out nationally, yet at all times set against the backdrop of a larger community.[946] However, Graham mentions two problems that arose requiring the UN to respond with legal instruments for the safeguarding of a shared, common cultural heritage: the extensive flow of cultural heritage out of, mostly, third world countries due to illicit practices on the one hand, and restitution claims from decolonised states on the other.[947]

The concept of a shared, common cultural heritage again brings with it potential tensions between the interests of various stakeholders and politicises the issue of cultural heritage preservation. Competing interests can arise, for example between the international community and the State of origin, or between indigenous communities of origin and states or the international community. As Blake notes, many of the assumptions on the nature and role of cultural heritage would have to be reconsidered when cultural heritage is perceived through the doctrine of 'cultural heritage of all mankind', as would the content of rights to enjoyment of and control over cultural heritage.[948]

Indeed, to prioritise the interests of all mankind in cultural heritage matters could be perceived as contradicting the nature and role of cultural heritage that was outlined above. Cultural heritage plays a central role for the identity of the specific source community, this way maintaining a close relationship with the particular community or people. To include all mankind in the scope of the preservation issue and to consider cultural heritage as a matter of interest to a much wider, more distant, group seems to be at odds with the symbolic and identity-oriented character of cultural heritage.[949] In other words, the variety of aims, roles and interests at stake when perceiving cultural heritage as international, national and community cultural heritage could 'ask too much' of cultural heritage.[950]

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (ICH Convention) is an example of a cultural heritage instrument that stresses 'the universal will and the common concern to safeguard the intangible cultural heritage of humanity'. However, it has been argued that this Convention does not actually approach the safeguarding of intangible cultural heritage with a principal focus on cultural heritage that is of outstanding value, and therefore of interest for all mankind, but rather the opposite. The starting point of the Convention is the meaning and significance that is attached to cultural heritage by the specific community of origin.[951] To this end, the communities, groups and individuals concerned are given a prominent place throughout the Convention.[952] This includes their participation in the identification and definition of intangible cultural heritage to be safeguarded and in the context of safeguarding measures and management of their intangible

[944] Graham 1987, p. 755–756.
[945] Graham 1987, p. 755.
[946] Graham 1987, p. 756.
[947] Graham 1987, p. 756.
[948] Blake 2000, p. 70. UNESCO's Twitter message on 9 August 2015 gives food for thought in this respect: "We must better transmit indigenous peoples' diversity & ancient knowledge – forces of innovation for the whole world." This touches upon issues of enjoyment and control of indigenous peoples' knowledge. Who gets to decide on such use and dissemination for the benefit of the 'whole world'?
[949] Blake 2000, p. 64.
[950] Blake 2000, p. 64.
[951] Shaheed 2011, p. 4.
[952] See Articles 1(b) and 2(1) of the 2003 ICH Convention.

cultural heritage.[953] The Convention thus reflects shifting understandings, increasing awareness of cultural heritage in a dynamic way and the role of source communities, beyond a national and international approach towards cultural heritage.

Taken as a whole, this approach seems to imply a move beyond state-centeredness in the field of cultural heritage. It touches upon notions of self-determination, definition and identification that are considered of critical importance for indigenous peoples. Despite the inclusion of community participation in the Convention text, however, questions have been raised as to the extent intangible cultural heritage management is actually participatory in practice.[954] Another point of criticism in academic literature is UNESCO's negligence in negotiating with entities other than states, which has been called a flaw in its approach.[955] In 'cultural heritage reality' interactions also take place between communities and between minority and majority groups,[956] so to focus only on nation states in cultural heritage policy-making and talks reflects a limited perspective. These types of issue again show the political implications of cultural heritage, which renders minorities and indigenous peoples as vulnerable stakeholders.[957]

4.1.3 Cultural heritage law: focus on preservation

The cultural heritage regime is characterised by its strong focus on safeguarding and preservation. Whenever the term protection is used in the context of cultural heritage, the underlying rationale seems to be to prevent damage and loss. This is the case over the whole spectrum of the various cultural heritage dimensions, be it in the context of armed conflict, illicit trafficking or intangible cultural heritage. Protection in these cases means prevention of, and safeguarding from, destruction, illegal transmission and extinction, respectively. In other words, regardless of the specific focus, characteristics and objectives of the different cultural heritage areas, the overarching aim to safeguard and preserve cultural heritage complements each of these.

While preservation is also a concern of indigenous peoples, in particular the transmission of heritage from generation to generation, a static view or approach should be avoided. There is a crucial difference between preserving and safeguarding heritage as objects or practices from the *past*, and ensuring the continued existence of dynamic, living cultural heritage practices, knowledge and expressions into the *future*. For the latter, safeguarding of cultural heritage is of course a prerequisite for the ability to carry it into the future in the first place. However, the nuance between static safeguarding and recognition of the dynamic nature of cultural heritage can cause tensions between objectives and worldviews of mainstream society and indigenous peoples, respectively. This duality should be taken into account in any discussion on the protection of TCEs from a cultural heritage perspective.

[953] See Articles 11(b) and 15 of the 2003 ICH Convention. The latter Article reads in full: "Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management."
[954] Aykan 2013, p. 382.
[955] Ruggles & Silverman 2009, p. 10.
[956] Ruggles & Silverman 2009, p. 10.
[957] See Aykan 2013, p. 382.

4.1.4 Cultural heritage and human rights law

Cultural heritage features prominently in the human rights system, especially in the fields of cultural and indigenous rights. The connection between cultural heritage and human rights is increasingly recognised. In her report of 2011, the UN Special Rapporteur on cultural rights examines to what extent the right of access to and enjoyment of cultural heritage are part of international human rights law,[958] and argues that the need to preserve and safeguard cultural heritage is, in fact, a human rights issue with a basis in the international legal human rights framework.[959]

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) on the right to take part in cultural life, and Article 27 ICCPR, on the rights of minorities, are examples of human rights with a cultural heritage dimension, for example regarding access to and enjoyment of one's own cultural heritage. And both International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) and UNDRIP contain multiple indigenous rights provisions that are linked to cultural heritage, including cultural self-determination, cultural integrity, dignity, diversity and identity.[960] Furthermore, UNDRIP specifically contains the right of indigenous peoples to the development, maintenance, protection and control of their cultural heritage.[961] Central aspects of the interplay between cultural heritage and human rights can be summarised as access, enjoyment, practice and participation.

The central role that cultural heritage plays for the identity of individuals and communities also signals the link between cultural heritage and human rights. The central human rights principle of human dignity, especially when paired with identity formation of peoples and communities, is clearly relevant for cultural heritage objectives and rationales. In response to the destruction of the Buddhas of Bamiyan by the Taliban in Afghanistan in 2001, UNESCO declared for example that "cultural heritage is an important component of the *cultural identity* of communities, groups and individuals, and of social cohesion, so that its intentional destruction may have adverse consequences on *human dignity* and *human rights* [italics added]."[962]

Heritage can be considered a vital aspect of human rights precisely because of this emphasis on respect for, and protection of, the identity of individuals and groups.[963] This touches on the very core of human rights. Respect and protection of identities highlights recognition of the worth of each single person or community,[964] which is essentially what is at stake in the protection of human rights. As such, the protection of heritage should be recognised as an important part of human rights protection. Silverman and Ruggles observe, for example, that "the lack of tolerance for the identity of others often leads to the repression of minority cultural expressions."[965] Furthermore, the value of dignity and identity reflects the interconnectedness of themes and concepts that run throughout the fragmented legal

[958] Shaheed 2011, p. 3.
[959] Shaheed 2011, p. 19–20.
[960] Articles 2, 4, 5, 8, 9 and 28 ILO Convention No. 169; Articles 5, 8, 9, 11, 12, 13, 14, 15, 16, 31, 33 and 34 UNDRIP.
[961] See Article 31 UNDRIP.
[962] 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, par. 5 of the preamble.
[963] Silverman & Ruggles 2007, p. 5.
[964] Silverman & Ruggles 2007, p. 5.
[965] Silverman & Ruggles 2007, p. 5.

framework involved in TCE protection. Indeed, cultural heritage and human rights law are not sharply demarcated, but overlap with, complement, conflict with and challenge each other.[966] Evidently, the concepts of dignity and identity also play a large role in indigenous concerns and the discussion on TCEs, and feature prominently in rights concerning indigenous peoples' cultures.

The interplay between cultural heritage and human rights is two-fold. On the one hand, cultural heritage features in rights and objectives of the human rights framework. On the other hand, it is crucial that human rights aspects are integrated in cultural heritage protection practices and approaches. Important aspects in this regard are participation and involvement of cultural communities.[967] These are both points that are also essential for indigenous peoples and their position in mainstream societies in general, and in the context of their cultural heritage in particular.

By including the source communities in cultural heritage identification, management and safeguarding, cultural heritage processes and practices would be 'democratized'.[968] This approach is however challenged by the current *status quo* of states, as the main international law- and policy-makers, cautiously shielding their cultural matters from international interference for sovereignty reasons.[969] As a consequence, minority groups' and indigenous peoples' cultural interests, including in the sphere of cultural heritage, can be overlooked and disadvantaged.

4.1.5 Cultural heritage law on a deeper level: objectives and rationales

One of the main aims of this chapter is to pay specific attention to the underlying rationales, principles and values of the various cultural heritage instruments and policies and what these mean for TCEs. On the one hand, the big, general cultural heritage concepts, such as safeguarding and preservation may be relevant for indigenous peoples' heritage – including TCEs – at first sight. On the other hand, however, specific details and particular characteristics of cultural heritage law, theory and underlying rationales, principles and values may pose challenges in the context of indigenous heritage.[970]

In this sense, a similarity is visible with the copyright system that was discussed earlier. Although they deal with the same issues of protecting and preserving cultural works that are at stake in the context of indigenous peoples' TCEs, both the copyright and the cultural heritage system seem part of a pattern of laws of mainstream society that face difficulties from challenges by 'new' voices and deviating concerns, objectives and subject matter. Cultural heritage can become a highly political topic.[971] Politics therefore determine the objectives and rationales of cultural heritage protection and legislation. This means that minority and marginalised groups, such as indigenous peoples, could face difficulties and potential exclusion if their heritage is not 'selected' to be protected. A balance of the various interests at stake is required. This is also crucial in the other parts of the legal framework, i.e. copyright and human rights law. An example of balance in cultural heritage protection is the distinction that has been made in studies and literature between various degrees of access to

[966] Silverman & Ruggles 2007, p. 6.
[967] Blake 2011, p. 201.
[968] Blake 2011, p. 201.
[969] Blake 2011, p. 201.
[970] Blake 2011, p. 211–214.
[971] Blake 2000, p. 68 and 74; Aykan 2013, p. 382.

and enjoyment of cultural heritage. These take into account the diverse interests of individuals and communities which depend on their relationship with the specific cultural heritage: source communities, local communities, and the general public accessing the cultural heritage of others.[972]

The next sections of this chapter scrutinise cultural heritage theories and the underlying rationales and principles of the instruments of the existing legal cultural heritage framework, in order to assess the tensions and difficulties, but also the opportunities associated with a cultural heritage perspective. The focus is global and the instruments – the main UNESCO Conventions – that are analysed are international. By setting out the general theories and the rationales and principles of these instruments, a framework of various core principles is delineated through which the protection of TCEs can be analysed from a cultural heritage perspective.

4.2 Short introduction to instruments, theories and principles

In this section, various aspects, or contexts, of cultural heritage law are introduced. These follow from the various working spheres and dimensions of cultural heritage that can be distinguished. Over time, the notion of cultural heritage has expanded as a result of wider understanding of concepts and specific (societal) developments in which (legal) cultural heritage issues have been at stake. These include increasing illegal traffic in cultural objects and the emergence of a global indigenous rights movement that has also emphasised cultural heritage concerns, including claims for return and protection of intangible cultural heritage such as traditional knowledge and TCEs.[973]

Such developments are reflected in the following sub-sections, and covered in more detail in the analysis of the context and background of the legal instruments in section 4.3, as instigators of shifts in, and challenges to, existing concepts, scopes and understandings of cultural heritage protection. As such, they clearly show the dynamism and developments that the field and legal instruments of cultural heritage law have undergone. Of course, the global indigenous rights movement is especially relevant, as it positions the protection of indigenous cultural heritage, and by extension TCEs, as a matter of indigenous peoples' rights. With these developments and the expansion of the notion of cultural heritage, cultural heritage protection objectives and theories have also become more detailed and nuanced in addition to the general aims of safeguarding and preservation.

The cultural heritage contexts that are discussed below are: tangible cultural heritage in armed conflict; movement of tangible cultural heritage; intangible cultural heritage; and cultural heritage and cultural diversity. Each context has specific underlying theories, rationales and principles for cultural heritage protection. The following can be identified: identity construction; benefit of all mankind; inheritance and transmission to future generations; cultural context and living culture; and cultural diversity. Cultural heritage law and its international legal framework are clearly very multidimensional.

[972] Shaheed 2011, p. 16–17; Blake 2011, p. 218.
[973] See for a characterisation of cultural heritage developments during the 1960s and 1970s that lead to further elaboration and detailing of an international cultural heritage framework: Nafziger & Paterson 2014, p. 5–6.

4.2.1 Tangible cultural heritage in armed conflict

The origins of the framework concerned with rules on cultural heritage can be traced back in history to the emergence of the conception that cultural heritage ought to be protected in times of war.[974] Cultural heritage has often been the subject of plunder as spoils of war or of strategic destruction as a means of war. The first thoughts and rules on cultural heritage appeared in this context of war and armed conflict. That the vulnerability of cultural heritage in conflict areas remains problematic to the present day is visible from the conflicts in Iraq and Syria, where the Islamic State has destroyed and plundered cultural heritage on a large scale. This has led to an international outcry and calls for protection, making it an example of Merryman's 'cultural property internationalism'. In addition to objectives of just warfare, rules on cultural heritage in the context of the law of war pursue aims of preserving the 'collective heritage' of mankind.

Some main themes that are visible in the history of cultural heritage protection in wartime stem from the opinions of classical thinkers, the founding father of international law Grotius and 18th century thinkers such as Vattel.[975] In their writings on what should be perceived as 'just war' and what rules ought to be followed in times of war, they also paid attention to the fate of the cultural heritage of those who were conquered. To varying degrees, they argue to leave cultural property where it came from, to leave it intact and to spare it for all mankind. In Vattel's writings, Merryman identifies what he calls perhaps the first record of an expression of cultural property internationalism. Vattel argued to spare "those edifices which do honor to human society (…) such as temples, tombs, public buildings, and all works of remarkable beauty", whereas destroying these would only mean "declaring one's self an enemy to mankind."[976]

Other arguments arose in concrete situations of conflict, such as the Napoleonic wars (1803-1815) and the accompanying plunder of cultural works, the War of 1812 between the United States and England and of course the period leading up to and after World War II.[977] Plunder of works in Italy during the Napoleonic wars led to protests from French intellectuals, containing early conceptions of cultural property internationalism.[978] The War of 1812 between the US and England resulted in an early case in 1813 concerning cultural property and rules of the law of war, which again reflected considerations of cultural property internationalism, such as: "The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this or that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species."[979] Making a leap to the aftermath of World War II, Nazi Germany's plunder of cultural property resulted in international action on the topic by the specialised agency that was created at the UN concerned with cultural heritage, UNESCO.[980] Worries and concerns regarding the fate of cultural property in armed conflicts have traditionally gone beyond national or communal interests. This universality principle is a central underlying theory of cultural heritage protection.

[974] Merryman 2005, p. 13.
[975] For these early writings, this section relies on the translated citations as mentioned in Merryman 2005, p. 13–14.
[976] Merryman 2005, p. 14.
[977] Merryman 2005, p. 13–20; O'Keefe 2006. See further section 4.3.1.
[978] Graham 1987, p. 757–758; Merryman 2005, p. 14–15.
[979] See the citation of the judgment in Merryman 2005, p. 16.
[980] See on the foregoing examples in a chronological overview: Merryman 2005, p. 13–20.

There are various theories and protection arguments visible in this area of cultural heritage. The first line of argument is the protection of certain types of cultural heritage with a sacred or religious nature, such as temples and churches.[981] This shows protection of cultural heritage for reasons of, for lack of a better description, 'religious respect'. Later, this line of argument expanded to also include the sparing of historic monuments and works of art. The second line of argument for international action to protect cultural heritage regards the interest of all mankind in its preservation, also described as an approach of 'cultural internationalism', which is reflected in the universality principle.

4.2.2 Movement of tangible cultural heritage

From the context of war and its clear references to cultural property internationalism, we move to cultural heritage in the sphere of (illicit) import, export and restitution, or in short: movement of tangible cultural heritage. At first sight, this topic is clearly located more in the sphere of Merryman's cultural property nationalism. But to a large extent, awareness for cultural heritage from this perspective also follows from situations of conflict and war, when art and cultural property are likely to move around extensively.[982] Generally, two scenarios are identified for theft or trafficking of cultural property. The first is plunder or seizure during armed conflict, occupation in a war situation or in circumstances of colonialism. The second is illicit traffic during times of peace, including for example 'ordinary' theft, illegal excavation or smuggling.[983] Both scenarios are likely to involve a mix of interests from nation states, source communities and the international community as a whole in the prevention of damage or loss of cultural heritage objects.

As described in Chapter 2, the period of colonialism and imperialism has influenced both the circumstances of the cultural heritage movement and transfers and subsequent challenges to these practices and claims for restitution. Increased interest in collecting antiquities is another aspect of the history and origins of this area of the cultural heritage framework. In a way, this is also related to foreign occupation and imperialism: as a consequence, many objects entered art and antiquities markets of colonial states. The study of archaeology developed out of these practices of collecting antiquities. Excavation and removal of cultural heritage for study and analysis purposes again meant more moving around of cultural heritage, albeit for different reasons, namely to collect information about the past.[984] As a result of this illicit collectors' or scientific movement of cultural heritage, states that were rich in monuments and archaeological sites enacted rules on the export of cultural heritage material from their territories.[985] It is often the cultural heritage of weaker communities, such as minorities and indigenous peoples, or of occupied territories and recently independent countries, that has traditionally been the object of (illicit) excavations and seizure.

Theories for this type of cultural heritage protection typically lie in the sphere of protecting the specific interests of nations in holding onto their cultural heritage, for example for reasons of maintaining strong national identities. Illegal trade then negatively affects the source nations from a moral point of view due to the close link between their cultural heritage, history and cultures, and collective identity.[986] The same could be said of other communities

[981] Forrest 2010, p. 64.
[982] Forrest 2010, p. 132.
[983] See on these two circumstances: Veres 2014, p. 94.
[984] Forrest 2010, p. 132–133.
[985] Forrest 2010, p. 133–134.
[986] Veres 2014, p. 95–96.

or groups, such as minorities and indigenous peoples, who also often emphasise that their cultural heritage is crucial for their identities. Other reasons or theories beyond the principle of (national) identity construction to protect cultural heritage against illicit excavation and trafficking are to protect the objects and sites themselves for the information that both the objects and their context harbour, which is of interest to all mankind.[987]

4.2.3 Intangible cultural heritage

Globalisation forms the backdrop for the protection of intangible cultural heritage, which moves the issue beyond 'typical' tangible, movable or immovable cultural heritage. Attention for the consequences and impact of globalisation has occurred simultaneously with the recognition of intangible cultural heritage as an aspect of cultural heritage to be preserved.[988] It is one of the more recent developments in cultural heritage protection to receive attention. The appearance of the topic of intangible cultural heritage has largely been fuelled by shifts of perspective. Whereas the dominant perception of cultural heritage had previously been one of tangible manifestations of culture, subsequently processes and circumstances of creation, or performed culture, gained attention.[989] In other words, this perspective of cultural heritage emphasises the role of people and the assigning of meaning to cultural heritage as crucial aspects of any discourse on cultural heritage-related matters. Furthermore, this attention highlights recognition of the living and dynamic nature of (intangible) cultural heritage, and in particular of the role of cultural heritage in connecting the past to the present, or in the continuation of the past into the present and future.[990]

For indigenous peoples, the fundamental role of intangible cultural heritage for their identities and the need for continuation of these practices are often stressed as crucial for their survival as distinct communities. The context of intangible cultural heritage protection is therefore also very much connected to minority and indigenous concerns and rights.[991] Objectives of intangible cultural heritage protection also seem more communities-oriented than the nationalist and internationalist perceptions of cultural heritage protection mentioned above. Still, a certain amount of cultural internationalism is visible when the loss of intangible cultural heritage is perceived as a loss for international society as a whole, and when intangible cultural heritage's contribution to cultural diversity is valued for the interest of society as a whole in global diversity.

Theories of cultural heritage protection from an intangible cultural heritage perspective include ensuring the survival of intangible cultural heritage for reasons of its role in cultural identity formation, promotion of creativity and furthering global diversity.[992] Recognition of such principles as the centrality of the knowledge and skills of producers, the transmission of this information and the continued practice of traditional culture indicates that the human

[987] See the preamble of the 1995 UNIDROIT Convention, which acknowledges both of these theoretical strands of cultural heritage protection in the context of (illicit) import, export and restitution.
[988] Blake 2002, p. 2.
[989] Blake 2002, p. 6.
[990] This developed into actual attention for intangible cultural heritage at UNESCO, which issued a Recommendation on the Safeguarding of Traditional Culture and Folklore in 1989, following the growing awareness of the impact of industrialisation and mass media on tradition-oriented cultures. Blake 2002, p. 8–9.
[991] See for example on minorities, cultural rights and the protection of intangible cultural heritage Vrdoljak 2005, p. 1–25.
[992] See the *Report on the Preliminary Study on the Advisability of Regulating Internationally, through a new Standard-setting Instrument, the Protection of Traditional Culture and Folklore*, UNESCO Executive Board, UNESCO Doc. 161/EX/15, 16 May 2001, p. 5, par. 21.

context of heritage requires safeguarding under the intangible cultural heritage regime, that is, in addition to the tangible heritage itself.[993] A preference for using 'safeguarding' rather than 'protection' in the specific context of intangible cultural heritage is noteworthy for its implications of positive action rather than merely static protection.[994] This reflects two other principles of regulation in this cultural heritage area, namely fostering both the heritage *and* the context in question. This means that viability and a positive environment for intangible cultural heritage are central.[995] Related to attention for context is the recognition of the role of intangible cultural heritage as a source of cultural diversity and for guaranteeing sustainable development,[996] which is furthered by pluralism and cultural tolerance.[997]

4.2.4 Cultural heritage and cultural diversity

The relevant backdrop for cultural heritage and cultural diversity consists of globalisation, rapid technological development and fears of loss of distinction, identity, traditions and cultural practices due to unification of one global culture leading to global cultural uniformity. Recognition of the importance of cultural diversity occurred roughly around the same time as the increased attention for intangible cultural heritage.[998] The cultures of minorities and indigenous peoples are of specific concern in the context of globalisation and cultural diversity,[999] especially because these have usually been more vulnerable communities to begin with. Another contextual element or concern from a cultural diversity perspective of cultural heritage is the trade aspect of culture. In short, globalisation, homogenisation and commodification are considered to be pressure points for cultural heritage from a cultural diversity point of view.[1000]

The theory behind cultural heritage protection from the perspective of cultural diversity would be that each nation's, people's or community's cultural heritage contributes to cultural diversity, furthers cultural exchange and promotes mutual understanding. So, when applying a cultural diversity principle this heritage ought to be protected because of its contribution to cultural diversity. Globalisation and homogenisation of cultures pose a threat to this diversity. Diversity of cultural heritage fosters creativity, as it forms a source for further creation, production and transmission. Safeguarding cultural heritage requires recognition of the living and dynamic nature of that heritage, and therefore necessitates safeguarding of the very cultural contexts it originates in. Essentially, safeguarding cultural diversity contributes to cultural heritage, and safeguarding cultural heritage contributes to cultural diversity.

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[993] Blake 2002, p. 2.
[994] Blake 2006, p. 23; Forrest 2010, p. 386–387.
[995] Forrest 2010, p. 386. In the 2003 Intangible Cultural Heritage Convention, this is underlined in the definition of safeguarding, see Article 2(3) ICH Convention where safeguarding is defined as: "measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage."
[996] See the second paragraph of the preamble of the 2003 Intangible Cultural Heritage Convention: "Considering the importance of the intangible cultural heritage as a mainspring of cultural diversity and a guarantee of sustainable development, as underscored in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, in the UNESCO Universal Declaration on Cultural Diversity of 2001, and in the Istanbul Declaration of 2002 adopted by the Third Round Table of Ministers of Culture." See also Blake 2006, p. 2.
[997] Forrest 2010, p. 363.
[998] Blake 2002, p. 9.
[999] O'Keefe & Prott (eds) 2011, p. 162.
[1000] O'Keefe & Prott (eds) 2011, p. 162.

4.3 Cultural heritage protection: developments and instruments

This section sets out the instruments of six central working spheres of cultural heritage law. The overview follows chronological developments in the field of cultural heritage and at UNESCO. The following areas are discussed: cultural heritage protection in times of conflict; illicit trafficking, return and restitution; world heritage sites; protection of intangible cultural heritage; and promotion of the diversity of cultural expressions.[1001]

In the subsequent sub-sections, the principal existing international cultural heritage law instruments developed by UNESCO are analysed from a foundational perspective. Focus points for this overview are the context and background of the instruments and the core cultural heritage rationales and principles that can be derived. The treaties' state obligations, means and measures to achieve their specific cultural heritage protection objectives are also identified. A number of central principles can be identified in the instruments. In section 4.4, these principles are used to analyse the protection of TCEs from the perspective of the existing cultural heritage framework. The principles are connected with indigenous peoples' protection interests as identified in Chapter 2. The central cultural heritage principles are:

- the benefit of all mankind, i.e. the universal cultural heritage principle;
- identity construction, i.e. the identity principle;
- transmission to future generations, i.e. the inheritance principle;
- cultural context and living cultures, i.e. the principle of dynamic cultural heritage;
- the cultural diversity principle.

The aim of this overview is to show the developments that the main rationales and principles of the cultural heritage framework have undergone. Rationales and principles that explicitly resonate with indigenous peoples' concerns and needs regarding their heritage are especially visible as the framework developed beyond the universal orientation of the 1954 The Hague Convention and the 1972 World Heritage Convention on the one hand and the statist focus of the 1970 Convention on Illicit Trade on the other hand. The 1995 UNIDROIT Convention explicitly acknowledges indigenous interests in the context of return and restitution and the damage to cultural heritage from illicit trade, while the 2003 Intangible Cultural Heritage Convention and the 2005 Cultural Diversity Convention stress the living nature of cultural heritage and the crucial role of source communities, which requires ensuring their vitality.

For reference purposes, the following table lists the instruments that are introduced and elaborated on in this section:

[1001] The only area of the main UNESCO instruments that is not included here is the specific field covered by the Convention on the protection of the Underwater Cultural Heritage of 2001, precisely because it very much concerns niche issues. These include such issues as the international law of the sea, the jurisdiction of states with regard to heritage located on the continental shelf or exclusive economic zones of states, and the law on finders. See for more: O'Keefe & Prott (eds) 2011, p. 131–134.

Title	Status	Year	Focus
The Hague IV Convention respecting the Laws and Customs of War on Land + Regulations	*Convention*	**1907**	*Tangible cultural heritage in armed conflict*
The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact)	*Treaty (inter-American)*	**1935**	*Tangible cultural heritage in times of war and peace*
UNESCO The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict	*Convention*	**1954**	*Tangible cultural heritage in armed conflict*
Recommendation on International Principles Applicable to Archaeological Excavations	*Recommendation*	**1956**	*Movement of tangible cultural heritage*
Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property	*Recommendation*	**1964**	*Movement of tangible cultural heritage*
UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property	*Convention*	**1970**	*Movement of tangible cultural heritage*
UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects	*Convention*	**1995**	*Return and restitution of cultural heritage*
UNESCO World Heritage Convention	*Convention*	**1972**	*Preservation of tangible world heritage (monuments, buildings, sites)*
UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore	*Recommendation*	**1989**	*Intangible cultural heritage*
UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage	*Convention*	**2003**	*Intangible cultural heritage*
Universal Declaration on Cultural Diversity	*Declaration*	**2001**	*Cultural diversity*
UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions	*Convention*	**2005**	*Cultural diversity*

Table 8 Cultural heritage instruments, status, year and focus.

4.3.1 Cultural heritage in armed conflict

Threats to cultural heritage in times of war and armed conflict provide the context for the emergence of one of the first areas with rules on cultural heritage protection. Early rules and thoughts on cultural heritage protection can be found in writings of thinkers on the subject of just war and military necessity, as we have seen in Chapter 2 and section 4.2.1. Apart from the early international efforts of actually codifying such rules, such as The Hague Regulations respecting the Laws and Customs of War on Land of 1899 and 1907 (The Hague Rules) and the Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (the so-called Roerich Pact) of 1935, the focus here is especially on UNESCO's first effort following World War II: the 1954 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. This Convention partly built on and amended the earlier initiatives.[1002] While perhaps not directly relevant for TCEs at first sight, this area of cultural heritage law is included here because of its substantial contribution to the shaping of the (rationales of the) cultural heritage framework in general. As we shall see, the main underlying principles of the 1954 The Hague Convention are the general foundational cultural heritage principles of cultural heritage as a *concern for all humanity*, to be addressed via safeguarding, and of *respect* for this heritage. The latter, together with dignity and identity,

[1002] Graham 1987, p. 768.

can be seen as overall central values behind the Convention as a whole. These principles have subsequently recurred throughout UNESCO's corpus of cultural heritage law.

Early regulations

To contextualise the cultural heritage theory of protecting cultural heritage for the interest of all mankind in its preservation, early international regulations such as The Hague Rules were preceded by the war between France and Prussia from 1870 to 1871. During this conflict both international scholars and the public expressed their concerns regarding threats from bombardments by the Prussians to the basilica of Saint Denis, and the cities of Strasbourg and Paris.[1003] The threatened heritage was described as "property of humanity as a whole" and buildings "belonging to humanity as a whole, forming so to speak, the common heritage of cultured nations".[1004] So, the context for The Hague Rules was a heightened awareness of cultural internationalist understandings of cultural heritage, that is: the interest of all mankind in preservation of certain cultural heritage took the centre stage.

Rules on both civilian and cultural property can be found in the 1907 Hague IV Convention respecting the Laws and Customs of War on Land and its annexed Regulations.[1005] Hague IV, also known as The Hague Rules,[1006] contains the duty to take all steps required to spare, to the extent possible, buildings serving purposes of religion, art, science and charity, as well as historic monuments and hospitals,[1007] on the condition that they are not in military use. Here, cultural heritage considerations are implicitly visible through the inclusion of 'historic monuments'. Their conservation would serve the interests of the public as a whole for historical or artistic reasons.[1008] Yet, this protection is set against military necessity. Furthermore, the provision places the duty on the besieged party to make the presence of such buildings visible, for example with signs. The effectiveness of such protection can be somewhat debatable.

The Hague Rules also contain a *lex specialis* on cultural property,[1009] stipulating that the property of municipalities and of institutions serving purposes of religion, charity and education, the arts and sciences, is to be treated as private property. [1010] Seizure and destruction of, or wilful damage to, the aforementioned institutions, as well as to historic monuments and works of art and science is forbidden. In other words, The Hague Rules treat cultural property in a broad way. Protection justifications include cultural property being

[1003] Forrest 2010, p. 20.
[1004] Forrest 2010, p. 20, describing the (translated) reactions of the Royal Academy of Ireland, the University of Göttingen and the Institut de France.
[1005] The Regulations can be found on the website of the International Committee of the Red Cross: https://www.icrc.org/ihl/INTRO/195. The Hague IX Convention concerning Bombardment by Naval Forces in Time of War contains several provisions on similar topics.
[1006] O'Keefe 2006, p. 23.
[1007] 'Historic monuments' were added to Article 27 of the 1907 Rules, amending the absence thereof in the 1899 provision. It was suggested by the Greek delegate and, according to the *travaux*, 'greeted with applause and unanimously approved.' See: O'Keefe 2006, p. 27, citing: J.B. Scott (ed.), Proceedings of the Hague Peace Conferences, New York: Oxford University Press 1921, Vol. III, p. 136, 12, 23 and 353-354. Available via: http://www.loc.gov/rr/frd/Military_Law/pdf/Hague-Peace-Conference_1907-V-3.pdf.
[1008] O'Keefe 2006, p. 27–28.
[1009] In Article 56. O'Keefe 2006, p. 31.
[1010] In Article 46. O'Keefe 2006, p. 31.

equated to private property, which must be respected. The universality principle is present in the value that is attached to historic monuments, in which all mankind has an interest.[1011]

Developed in the *interbellum* between the First and Second World Wars, the Roerich Pact of 1935 was among the first instruments to exclusively deal with cultural property.[1012] In the preamble, the Pact describes its aim as "the universal adoption of a flag, already designed and generally known, in order thereby to preserve in any time of danger all nationally and privately owned immovable monuments *which form the cultural treasure of peoples* [italics added]." This 'flag' or sign would have to identify the artistic and scientific institutions and historic monuments deserving of protection. The Pact would ensure respect and protection of *treasures of culture*, both in times of war and peace. This early international development also reflects primarily the universality principle for cultural heritage protection.[1013] International protection efforts would resume only after the Second World War had ended, through a specially designated agency, UNESCO, and in response to the horrific affairs during the war, including cultural devastation.

Context and objectives of the 1954 The Hague Convention

The 1954 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, developed by UNESCO, is part of a broad-ranging humanitarian response to the horrors and destruction during World War II.[1014] This includes the 1949 Geneva Conventions for the protection of the victims of armed conflicts as well. Geneva Convention IV reaffirms the The Hague Rules on civilian property.[1015] It has been argued that the 1949 Geneva Conventions heavily influenced the drafting process of the 1954 The Hague Convention. Therefore, it is also called the 'Red Cross Charter for cultural property', as the Geneva Conventions themselves were developed under the auspices of the International Committee of the Red Cross.[1016] In the context of humanitarian law, it has been argued that respect for a people's dignity can be equated to respect for its culture, whereas intentional damage to cultural property indicates contempt, which often leads to worse acts. Therefore, to protect a people's cultural property and simultaneously respect its dignity has been called a central part of any humanitarian endeavour to protect a people.[1017]

As the 1954 The Hague Convention is thus part of the humanitarian efforts to address horrors and destruction that occurred during the war, and prevent any future repeat of these, the preamble opens with the backdrop of the grave damage done to cultural heritage in preceding wars. The Convention actually displays the first formal legal use in English of the now standardised notion of 'heritage', with its intergenerational nature of trusteeship and inheritance.[1018] Furthermore, in a resolution adopted at the first meeting of the parties to the

[1011] N.B. Note that the overall underlying objective of The Hague Rules is regulating conduct in times of war. Attention for cultural property seems like a concomitant topic.
[1012] The final draft was prepared under the auspices of the Governing Board of the Pan-American Union, and the final Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, i.e. the Roerich Pact, was adopted in Washington in 1935.
[1013] Toman 1996, p. 18; O'Keefe 2006, p. 51–52.
[1014] Toman 1996, p. 21.
[1015] "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."
[1016] Toman 1996, p. 21.
[1017] Sandoz 2002, p. 22.
[1018] O'Keefe 2006, p. 95.

Convention in 1962, the parties repeat and underscore that the aim of the Convention is to protect the cultural heritage of all peoples for future generations.[1019]

Other notions that stand out in the preamble are 'peoples', 'mankind' and 'culture of the world'. Firstly, the use of 'peoples' rather than 'states' is noteworthy because, as mentioned earlier, this can be said to reflect an anthropological understanding of the cultural property that the Convention is concerned with. Cultural property is then considered in a social context, with the meaning that a community or society assigns to it being central. The concept of 'states' would have formal implications under international law, legally personifying the community or society in question. Secondly, the use of 'mankind' instead of 'international community of states' would indicate the humanitarian character of the Convention and the beneficiaries it ultimately caters for.[1020] Finally, 'contribution to the culture of the world' already seems to indicate appreciation for the value of 'cultural diversity', a topic that has subsequently received further attention at UNESCO.

As a whole, the preamble contains two phrases that contain what are called the founding principles for the development of all international heritage law.[1021] The first is that damage to the cultural property of any people should be perceived as damage to all mankind's heritage, because the heritage of all peoples combined contributes to and makes up the culture of the world. The second is that cultural heritage should be protected internationally. In other words, the main underlying principle here is that cultural heritage protection is a concern for all mankind.

Cultural heritage: a general standard of understanding

For the Convention's subject matter,[1022] the drafters looked for a definition that would indicate a general standard of understanding, acceptable to the majority of the states.[1023] It is noteworthy that the drafting Working Group consisted of mainly Western or developed states.[1024] This shows the potential for tensions with other ideas or worldviews on definitions of cultural heritage. The origin or ownership of the cultural property does not play a role in the definition. Instead, the property's value ('great importance to the cultural heritage of every people') is the main and sole criterion.[1025] However, proposed amendments to the definition are worth noting, in particular the one tabled by the UK and the US, namely "to consider only objects of *high* cultural value or importance as cultural property [italics added]."[1026] While the amendment was not adopted, this view on cultural heritage raises questions as to who determines what high cultural value or importance is and to whom, according to what

[1019] *First Meeting of the High Contracting Parties to the Convention for the Protection of Cultural Property in the Event of Conflict, Paris 16-25 July 1962, UNESCO Doc. UNESCO/CUA/120*1962, p. 5, par. 22.
[1020] See on the foregoing: O'Keefe 2006, p. 95.
[1021] O'Keefe & Prott (eds) 2011, p. 16.
[1022] "For the purposes of the present Convention, the term `cultural property' shall cover, irrespective of origin or ownership:
(a) movable or immovable property of great importance to the cultural heritage of every people, such as (…);
(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as (…);
(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), (…)."
[1023] Toman 1996, p. 46–48.
[1024] Namely: Denmark, France, Greece, Israel, Italy, Japan, Norway, Spain, Sweden, Switzerland, the United Kingdom, the United States of America, the USSR and Yugoslavia, as listed in: Toman 1996, p. 48.
[1025] Toman 1996, p. 48.
[1026] Toman 1996, p. 49.

understanding or worldview of cultural heritage, and the criteria that would play a role in this determination.

Measures: safeguarding and respect

The general obligation for states to protect cultural property for the purposes of the Convention is carved up into two elements, namely to take measures for *safeguarding* of and *respect* for such property.[1027] These two elements imply positive and negative measures, respectively. *Safeguarding* comprises an obligation for positive action, i.e. measures to actively and effectively protect the cultural property. *Respect* for the cultural property entails an obligation to abstain from certain activities that could result in damage to or loss of the cultural property.

Overall, these two main measures reflect *respect* as a central underlying value in the context of cultural property protection in times of war and armed conflict. This is an almost universal value in that it is also visible in international human rights declarations, for example the Universal Declaration of Human Rights (UDHR) and UNDRIP, and Conventions, such as the ICCPR, ICESCR and ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Toman describes respect as "a dictate of the universal conscience."[1028] As we shall see later in this thesis, respect can actually be identified as an underlying value shared by all three legal regimes that are analysed. From this perspective, respect can also be qualified more generally as a dictate of the conscience with regard to the legal framework that is concerned with TCE protection.

Other measures: use of an emblem and sanctions

Other measures in the Convention concern the use of an emblem to distinguish the property to be protected.[1029] Where other cultural heritage Conventions work with heritage lists, such as the 1972 World Heritage Convention and the 2003 Intangible Cultural Heritage Convention, this Convention communicates the designation of protected status through visual signs to ensure physical protection, the so-called 'blue shield'.[1030] In a sense, this is somewhat comparable to Creative Commons licences and other labels that contain information on terms and conditions of use in a copyright sphere. Although copyright subject matter is intangible, the communicative function is similar. In this case, the message of the blue shield is simple: to abstain from damaging use and to respect the cultural heritage in question. Sanctions for breaches of the Convention are taken to the criminal level.[1031]

Main principles of the 1954 The Hague Convention and TCEs

The Convention incorporates two core underlying principles in its approach to cultural heritage protection: firstly, the founding principle that cultural heritage is a *concern for all humanity*, and requires safeguarding for this reason, and secondly the principle of *respect* for

[1027] Article 2. The general term of protection is explained in more detail in the two provisions for its specific components, Articles 3 and 4.
[1028] Toman 1996, p. 68.
[1029] Article 6.
[1030] "The Blue Shield is the symbol used to identify cultural sites protected by this Convention." See: http://www.ancbs.org/cms/en/about-us/about-blue-shield.
[1031] Article 28: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention."

cultural heritage. Both could be regarded as the foundational principles of the international cultural heritage framework headed by UNESCO. In this sense, UNESCO's work, and the rationales behind it, should be viewed in light of its purposes and functions, as laid down in its Constitution.[1032] The overall beneficiary of the Convention's protection is all mankind, serving the interest of all humanity in safeguarding the world's diverse cultural heritage from destruction in times of conflict. This universality principle is likely to give rise to tensions with regard to control and the assigning of meaning in the context of cultural heritage like TCEs that is so closely linked to a specific community.

4.3.2 Cultural heritage and illicit trade

The area of cultural heritage and illicit traffic is primarily cultural nationalism-oriented. The topic was discussed directly following the First World War by the League of Nations and worked on by the *Office International des Musées* (OIM) in response to concerns about increasing illegal trade in art and antiquities.[1033] In 1933, the OIM proposed a draft convention on the repatriation of cultural property objects that were stolen, lost or unlawfully alienated or exported. With the outbreak of the Second World War, and UNESCO – established in 1946 – focusing on cultural property protection in armed conflict during its early years, it was not until the latter half of the 1960s that illicit traffic returned to the agenda.[1034] Preceded by two Recommendations, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was eventually adopted in 1970. Although this area of cultural heritage concerns tangible cultural heritage objects, it is still relevant for TCE protection precisely for its express recognition of the importance that is ascribed to cultural heritage for the source communities. In the case of TCEs, this would be the importance for indigenous communities rather than for national states. 'Cultural community-ism' and respect are two principles that clearly resonate with indigenous peoples' interests in protection and safeguarding of their heritage.

Preliminary developments: 1956 and 1964 Recommendations

As already mentioned, the 1970 Convention was preceded by the two recommendations of UNESCO's General Conferences of 1956 and 1964. The preamble of the 1956 Recommendation on International Principles Applicable to Archaeological Excavation[1035] states that the preservation of monuments and works of the past is most certainly ensured through the respect and affection that is felt for them by the peoples themselves. In other words, it is the bond between the heritage and source communities that is determinant. The preamble also shows both nationalist attitudes and international interests. It is stated that while states are more directly concerned with the archaeological discoveries on their

[1032] "1. The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.
2. To realize this purpose the Organization will:
(…)
(c) Maintain, increase and diffuse knowledge:
By assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions."
[1033] Forrest 2010, p. 134; O'Keefe & Prott (eds) 2011, p. 64.
[1034] O'Keefe & Prott (eds) 2011, p. 64.
[1035] Preamble of the 1956 Recommendation, available via: http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html.

territories, the international community as a whole benefits from such finds. Some cultural diversity considerations are visible as well. It is acknowledged that the history of mankind consists of the diverse knowledge of all civilisation, and it is for the benefit of all that archaeological remains are studied, preserved and brought in safe conditions.

The 1964 Recommendation specifically concerns the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property. The preamble of this recommendation recognises the function of heritage for communities and societies, deeming it a basic element of civilisation and national culture.[1036] However, exchange of, and familiarity with, cultural heritage is also emphasised as leading to understanding and mutual appreciation between nations. This would serve the universal interest. The preamble further emphasises that states must protect the cultural heritage on their territories against dangers arising from illegal practices. The principle of respect is again underlined, placing moral obligations on states to respect their own and other states' cultural heritage to prevent such dangers. States should act to create citizen interest in, and respect for, cultural heritage of all nations through education, press and media dissemination and communication. Respect for and recognition of cultural heritage – either of other communities, peoples or nations – would start with knowledge, information and education. This is also crucial for many indigenous issues, including their lands, knowledge and cultural expressions. Ignorance and prejudice have the potential to harm indigenous heritage in many ways, be it natural, tangible or intangible cultural heritage.

Context and objectives of the 1970 Convention

With trade in art and antiquities having a largely international character, i.e. certain states on the supply side and others on the demand side, illegal practices would have to be addressed with an international instrument.[1037] A specific characteristic of this international market is the divide between states with high demand and low supply, which include rich and developed countries such as the United States, the United Kingdom, France and Switzerland, and the supply states. The latter have rich sources of cultural heritage but are weak in terms of resources for excavation or regulation, being developing, poor and often decolonised states.[1038] The initiative for the Convention came from Mexico and Peru, and was supported by other states in South and Central America.[1039]

After the OIM's initial proposal of a draft convention in 1933 it took decades before the attention for protection of movable cultural heritage against illicit trafficking was reignited on the international level. When it did, it was at the height of decolonisation processes. During this period, independent states started endeavours to recover their lost cultural heritage objects, many of which were located in museums of formerly colonising states,[1040] as well as to prevent future loss, often including state ownership and export regulations.[1041] The specific situation of indigenous peoples and their claims for restitution of indigenous material and human remains can be added to these contextual developments.[1042] In this sense, the

[1036] Preamble of the 1964 Recommendation, available via: http://portal.unesco.org/en/ev.php-URL_ID=13083&URL_DO=DO_TOPIC&URL_SECTION=201.html.
[1037] Forrest 2010, p. 133.
[1038] See on this distinction Forrest 2010, p. 137.
[1039] Forrest 2010, p. 166.
[1040] Prott 2011, p. 2. See also Stamatoudi 2011, p. 31.
[1041] Forrest 2010, p. 133.
[1042] See the fourth development that Nafziger and Paterson distinguish in the late 1960s and 1970s spurring the activities for an effective cultural heritage framework. Nafziger & Paterson 2014, p. 5–6.

Convention has been called "very much a child of its time."[1043] It has been noted that three main issues that are often involved in cultural heritage coincide in the context of restitution and return of cultural heritage: conquest, colonisation and commerce.[1044] However, a striking feature of the Convention is its non-retroactivity. This means that the Convention does not apply to the events that occurred in a State before the Convention entered into force.

Here, the context of (de)colonisation comes into play again: the height of restitution claims regarding cultural property seized and exported under colonial rule occurred during the late 1960s.[1045] The Convention would be useless regarding such cultural heritage objects, a fact which could reinforce and maintain the weaker positions and marginalised status of decolonised countries and indigenous communities, respectively, vis-à-vis dominant rich and developed states. To deal with cultural objects that were transferred from countries before 1970, the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation was set up in 1978. Prott notes, however, that this advisory body – its recommendations are not legally binding, but it provides a "framework for discussion and negotiation"[1046] – has been little used.[1047] Still, she observes that the impact of both the Convention and the Committee on the diverse ways by which returns have taken place cannot be denied, ranging from bilateral negotiation, and mediation to exchange and gift.[1048] On the other hand, having to depend on goodwill, or perhaps even sentiments of guilt, for returns due to an absence of binding legal rules to invoke is of course not a very strong position for source countries and communities for return of their cultural objects.

The central principle of (the preamble of) the Convention is the consideration of cultural property as a basic element of civilization and national culture. This shows the Convention's nationalist stance. Another principle that the preamble emphasises is the consideration of the General Conference that the true value of cultural property can only be appreciated when contextualised with all possible information regarding its origin, history and traditional setting. The emphasis on information is of central importance. It underscores the value of cultural heritage from a contextual and place-bound perspective. Illegal trafficking and theft can damage cultural property and preclude access to such information.[1049] States must therefore take action against such dangers, and especially adhere to the moral obligation to respect its own and other nations' cultural heritage. The preamble also calls upon cultural heritage institutions to manage their collections under universal principles of morality.

The purposes that the Convention puts forward reflect two strands of thought.[1050] The first is that illicit traffic in cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin and that international cooperation is a key means to protect each country's cultural property against the dangers resulting from such traffic. The second is that State parties must oppose such practices with the means at their disposal, and particularly by removing their causes, ending the current practices and assisting in reparations. The general purpose of the Convention is therefore to provide the means to

[1043] Macmillan 2012, p. 100.
[1044] Nafziger & Paterson 2014, p. 13.
[1045] O'Keefe 2000, p. 14.
[1046] See the portal of the Committee at: http://portal.unesco.org/culture/en/ev.php-URL_ID=35283&URL_DO=DO_TOPIC&URL_SECTION=201.html.
[1047] Prott 2011, p. 4.
[1048] Prott 2011, p. 5.
[1049] O'Keefe 2000, p. 33.
[1050] Article 2; O'Keefe 2000, p. 40.

address these dangers, specifically that states must consider the import, export or transfer of ownership of cultural property that is contrary to the Convention as being illicit.[1051]

Cultural heritage: categories of tangible cultural property

The Convention is concerned with the protection of *tangible* cultural property against illicit trade. This was later subject to criticism due to the limited scope of the cultural heritage concept it conveys. The designation of cultural property for the purposes of the Convention is left to each specific State, but it does include a list of categories.[1052] The definition provision shows a dual character: subjective (the designation by states) and objective (being of importance and fitting within the categories).[1053] During the drafting process, there was some discussion about the proposed scope of the Convention, i.e. not limited to cultural property of "great importance alone" like the 1964 Recommendation, [1054] and its categories of cultural property to be covered.[1055]

In State comments during the drafting process, France challenged the proposed scope, stating that this would be extremely broad and thus unpractical. It held that the subject matter of the Convention should only be cultural property "of importance."[1056] However, the Secretariat did not accept a limitation.[1057] As to the categories, Japan and the United States found these too wide, encompassing and vague. One document to cover all these various categories would not be workable. The US stated that these various categories might give rise to different questions, needing different approaches and solutions.[1058] As we have seen earlier, indigenous peoples *do* stress holistic approaches to their heritage. In any case, the Secretariat did not accept the Japanese and US limitations to the definition either.[1059] So, the current dual element definitional provision shows a compromise,[1060] with some states finding a general definition too inclusive and other states considering an enumerated list too limited.[1061] Later criticism targeted the tangible nature of the cultural heritage subject matter of the Convention, again due to scope issues. This time it was perceived as too narrow, with attention moving towards safeguarding of intangible cultural heritage as well.

[1051] Article 3.
[1052] The list in Article 1 includes, amongst others, property relating to history (b), products of archaeological excavations (c), elements of artistic or historical monuments or archaeological sites which have been dismembered (d) and objects of ethnological interest (f).
[1053] O'Keefe 2000, p. 35.
[1054] UNESCO Doc. SHC/MD/3, p. 5.
[1055] According to draft Article 1, UNESCO Doc./SHC/MD/3, Annex, p. 1-2:
For the purposes of this Convention, the term "cultural property" means:
(a) The product of archaeological excavations or discoveries;
(b) elements of historical monuments or archaeological sites which have been dismembered;
(c) property of artistic interest which is more than fifty years old;
(d) rare manuscripts and art books;
(e) property which is important for history, including the history of technology;
(f) objects of ethnological interest;
(g) rare paleontological and mineral specimens; rare specimens of flora and fauna;
(h) scientific collections and important collections of books and archives, including photographic and musical archives.
[1056] UNESCO Doc. SHC/MD/5, Annex I, p. 7; Annex II, p. 1-2.
[1057] UNESCO Doc. SHC/MD/5, Annex II, p. 1-2.
[1058] UNESCO Doc. SHC/MD/5, Annex II, p. 1.
[1059] UNESCO Doc. SHC/MD/5, Annex II, p. 2.
[1060] Forrest 2010, p. 170.
[1061] Stamatoudi 2011, p. 37.

Measures against illicit trade

The obligations of the Convention contain a number of measures that states must take to combat illicit traffic in cultural property. States must, for example, set up national cultural heritage services.[1062] These services must perform functions such as the maintenance of a national inventory of the protected property through a list of important public and private cultural property, and taking educational measures to stimulate and develop respect for the cultural heritage of all states. State Parties themselves must also take educational measures[1063] with the aim of restricting illegalities through education, information and vigilance. This includes encouraging journalists and professionals from the cultural sector to report on illicit trade and educate the public on the issue.[1064] Education should also contribute to raising public awareness of the value of cultural property and the dangers that cultural heritage faces from theft, clandestine excavations and illicit exports.[1065] Such measures could also be useful in closing the gap between indigenous peoples' (intangible) heritage concerns and the (uninformed) public's understanding of the issues at stake.

A crucial obligation of the Convention is for states to introduce export certificates for the authorisation of export of the cultural property in question.[1066] The obligation is threefold: a certificate must be introduced, export without such a certificate must be prohibited, and this prohibition must be made publicly known in an appropriate way.[1067] Upon request of the State Party of origin, State Parties must take appropriate steps for the recovery and return of such illegally imported cultural property.[1068] States are obliged to impose penalties or administrative sanctions on infringers of the prohibitions of export without a certificate and illegal import under the specific circumstances already mentioned.[1069] They must further take the necessary measures under their national legislation to prevent museums from obtaining cultural property from another state that has been illegally exported after the Convention entered into force.[1070]

States are also under a specific obligation to respect the cultural heritage of territories of which they are responsible for the international relations, in other words dependent territories.[1071] While nowadays this is a less relevant notion, O'Keefe's commentary on the provision in the light of integrated territories translates this provision to the current situation of indigenous peoples, for example in Canada, Australia and the United States where there is legislation regarding export, import and returns of indigenous material.[1072]

Main principles of the 1970 Convention and TCEs

The Convention shows a strong territorial and nationalist stance, foregrounding the interests of nations in safeguarding their cultural heritage. Looking more closely, the underlying principles and objectives are twofold. Indeed, cultural heritage is stressed as a basic element

[1062] Article 5.
[1063] Article 10(a).
[1064] O'Keefe 2006, p. 78.
[1065] Article 10(b).
[1066] Article 6.
[1067] Article 6(a), (b) and (c); Stamatoudi 2011, p. 44–45.
[1068] Article 7(b)(ii).
[1069] Article 8.
[1070] Article 7(a).
[1071] O'Keefe 2000, p. 83.
[1072] O'Keefe 2000, p. 83–84.

for civilization and national culture. This would justify prevention of the taking of objects from places where they 'belong'. But the importance of safeguarding the information derived from the cultural heritage is also underlined, something that can be considered as benefiting all mankind. Both aspects are under threat from illegal trade, import and export, and justify protection against such threats. The principle of respect is again stressed, as well as the need to educate people on the value of and harm to cultural heritage resulting from illicit traffic. International cooperation to achieve the goals of the Convention is a key notion. For indigenous peoples' (intangible) TCEs, import and export measures are likely to be unsuitable. However, the general thought behind such measures, education and museum practices of *respectful* conduct towards heritage is very relevant for TCE protection.

4.3.3 Cultural heritage, restitution and return

Restitution and return of cultural property is inevitably connected to the topic of illicit traffic of such material. This section looks at the notions of restitution and return, UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation and the 1995 UNIDROIT (the International Institute for the Unification of Private Law) Convention. In short, restitution applies when the prohibition of theft and pillage of a binding law has been breached, with the aim of reinstating the situation as it was before this breach. Return applies to cases where no international norm has been clearly violated, for example in the case of colonialisation or past situations of occupation. Repatriation plays a role in the situation of territorial changes in states, for example secession or breaking up of states, usually as part of peace agreements after conflicts.[1073] Whereas restitution and return of (intangible) TCEs does not seem feasible, the context and underlying rationales and principles of this area are still very relevant. One can think of recognition of the role of the heritage in question for the source communities, their identity, vitality and the cultural context of origin.

Context of the 1995 UNIDROIT Convention

The context of the issue of restitution and return has both a historical and a modern-day component of plunder, spoils, dangers of illicit traffic and "modern pirates."[1074] In recognising that the function of cultural heritage goes beyond decoration or constituting mere ornaments, one can see that cultural heritage is vital for the role it plays for nations' cultural history, is still relevant today as a collective memory and serves each nation's self-knowledge and identity.[1075] For this reason, it has been argued that the people of these nations would have a right to recover the cultural assets that are so central to their very being. While acknowledging the universal interests involved with their cultural objects, for example for purposes of study and knowledge, the people of the countries that have been deprived of their cultural heritage would ask for the return of at least those objects that "best represent their culture, which they feel are the most vital and whose absence causes them the greatest anguish."[1076]

UNESCO responded to this aspect of illicit trade through the establishment of an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation in 1978. This Committee fills a

[1073] See for a distinction between restitution, return and repatriation of cultural heritage Forrest 2010, p. 140–145.
[1074] See a plea of Director-General M'Bow of UNESCO in 1978 for the return of irreplaceable cultural heritage to its creators and place of origin. See the plea integrally in: Askerud & Clément 1997, p. 47.
[1075] See M'Bow's plea integrally in: Askerud & Clément 1997, p. 47.
[1076] See M'Bow's plea integrally in: Askerud & Clément 1997, p. 48.

gap, as not all UNESCO Member States have become parties to the 1970 Convention[1077] and situations may occur where cultural property was exported illicitly before the Convention entered into force.[1078] In other words, it also specifically concerns cases that fall outside the scope of the 1970 Convention, but where there is a movement of cultural heritage from its source country that is suspicious.[1079] This often occurs in the context of colonial practices and occupation that happened in the past. In fact, the Intergovernmental Committee was initially established for this purpose, before starting to deal more generally with illicit trade cases.[1080]

As the 1970 Convention is concerned with the public law side of illicit trade in cultural property, i.e. action on a state-to-state basis, it was felt necessary to have it supplemented by a private law component.[1081] In particular, the rights and protection of a *bona fide*, or good faith, purchaser were left underexposed. UNESCO then turned to UNIDROIT for studying – and subsequently drafting an international Convention for – this private law angle of cultural property.[1082] The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was adopted in 1995, completing the international framework on return and restitution of cultural heritage.[1083] During the negotiations, participating states formed various 'sub groups' with specific interests. The largest group consisted of countries most affected by cultural heritage loss and damage from illicit trade such as Latin American and African countries, while the smallest group consisted of states having sensitive material to preserve such as Canada and Australia, aiming to protect both indigenous and colonial objects.[1084] In addition to the state action that the 1970 Convention regulates, the 1995 Convention provides for the possibility for claimants to bring a case directly before a foreign court for restitution of stolen property.[1085] A requirement here is that the Convention only covers *international* cases and not, for example, domestic thefts.[1086]

In 2008, the International Conference on the Return of Cultural Objects to their Countries of Origin was held in Athens, Greece.[1087] This gathering was organised by UNESCO and its Member States in light of the framework of the activities of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in

[1077] The 1970 Convention has 131 State Parties (http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/), UNESCO has 195 Member States (http://en.unesco.org/countries/member-states).
[1078] Askerud & Clément 1997, p. 50.
[1079] Stamatoudi 2011, p. 58.
[1080] Stamatoudi 2011, p. 58. See Resolution 20C4/7.6/5 adopted at the UNESCO General Conference Twentieth Session in Paris in 1978, available via: http://unesdoc.unesco.org/images/0011/001140/114032e.pdf#page=92, p. 92-93; and Resolution 4.128 adopted at the UNESCO General Conference Nineteenth Session in Nairobi in 1976, available via: http://unesdoc.unesco.org/images/0011/001140/114038E.pdf, p. 48.
[1081] O'Keefe 2000, p. 19, as recommended by Prott and O'Keefe in their 1982 report on the National Legal Control of Illicit Traffic in Cultural Property, commissioned by UNESCO, UNESCO Doc. CLT/83/WS/16, Paris: UNESCO 1983.
[1082] See the preparatory work of studies, drafts and meetings on the website of UNIDROIT: http://www.unidroit.org/preparatory-work-cp.
[1083] Forrest 2010, p. 135.
[1084] O'Keefe & Prott (eds) 2011, p. 110–111.
[1085] O'Keefe 2000, p. 19; Askerud & Clément 1997, p. 18. See Article 8(1) of the Convention: 'A claim under Chapter II [Restitution of Stolen Cultural Objects] and a request under Chapter III [Return of Illegally Exported Objects] may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States [brackets added].'
[1086] Stamatoudi 2011, p. 69.
[1087] The Conference was intended to raise awareness, reflect on and exchange knowledge on the issue of the return of cultural property and attended by high profile experts working in the field of return of cultural property.

case of Illicit Appropriation.[1088] The conclusions of the conference shed light on the reasons and underlying principles of return of cultural property generally. They repeat that cultural heritage is a vital, even inalienable, part of a people's identity and of community, playing a role in and connecting their past, present and future. Further, public awareness of issues related to cultural property return, especially for younger generations, is considered essential. The conclusions also emphasise that there are categories of cultural property where the cultural context from which they originate plays a central role in their identification.[1089] This context gives these types of cultural property their very meaning and value.[1090] Here, again, we see principles of cultural heritage protection (in this case return) that draw on the role of cultural heritage in the identity formation of nations or peoples, and on its contextual value. The absence of cultural heritage – through historical looting and plunder or contemporary illicit trade – would interfere with these values, and would therefore require remedy through return. We have seen that similar principles play a role in the protection of cultural heritage against illicit trade.

Objectives, scope and definitions

Interestingly, given the focus of the Convention on *return* of cultural heritage, the preamble opens with emphasis on the importance of the principle of cultural *exchange* – or the ambassadorial role of cultural heritage – for fostering mutual understanding and dissemination of culture for the benefit and progress of all. But, as the preamble immediately adds in the second paragraph, *illicit trade* in cultural objects gives rise to concerns due to the dangers of irreparable damage to the objects themselves, the cultural heritage of specific communities, and the cultural heritage of all peoples. Other dangers arise from, for example, plunder of archaeological sites and subsequent loss of irreplaceable archaeological, historical and scientific information. According to the preamble, the Convention has a dual objective: on the one hand to contribute to combating illicit trade in cultural objects by laying down minimum rules for restitution and return, and on the other to serve the interest of all by improving the preservation and protection of cultural heritage.

The Convention covers claims with an *international* character for the restitution of stolen cultural objects and the return of cultural objects that were illegally exported from the territory of a State Party to the Convention.[1091] It contains a dual definition clause.[1092] The Convention states that cultural objects are those which are of importance, either on religious or secular grounds, for archaeology, prehistory, history, literature, art or science. Furthermore, the object in question has to belong to one of the categories that are listed in the Annex to the Convention.[1093] Here, the UNIDROIT Convention diverges from the 1970 Convention, which

[1088] See: http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/related-events/athens-international-conference-on-the-return-of-cultural-property-to-its-country-of-origin/.
[1089] The conclusions mention the following categories: unique and exceptional artworks and monuments, ritual objects, national symbols, ancestral remains, dismembered pieces of outstanding works of art.
[1090] Conclusions of the Athens International Conference on the Return of Cultural Objects to their Countries of Origin, co-organised by the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation and the Hellenic Ministry of Culture, 2008, available via: http://www.unesco.org/culture/laws/pdf/Conclusions_Athens_en.pdf.
[1091] Article 1(a) and (b).
[1092] Article 2.
[1093] (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;

it was meant to complement. However, the UNIDROIT Convention was also intended to address some uncertainties and controversies of the 1970 Convention, and have the potential to act on a separate basis.[1094] Therefore, to accommodate concerns of either a too wide, general definition or a too restricted definition, this combination provision was agreed on.[1095]

Measures: restitution and return

Elements that stand out in the context of restitution of stolen cultural objects are the obligation to return *all* stolen objects and the time limitations on claims that can be brought.[1096] These limitations include a term of three years after the claimant became aware of the location of the object and identity of the possessor and fifty years after the time of the theft. The latter limitation is not applicable to objects that are an integral part of an identified monument or archaeological site, or belong to a public collection.[1097] This provision is a compromise between states in favour of, and states against, inalienability of certain categories of cultural property.[1098] It has some cultural nationalism shining through it. The exception to the 50-year time limitation for restitution also applies to sacred or communally important objects of tribal or indigenous communities in Contracting States, which belong to them and are used as part of their traditions or rituals.[1099] These objects are equated with public collections. This seems to resonate with indigenous peoples' claims of essentially indefinite protection of their heritage, which causes so many issues under intellectual property law.

As to return of illegally exported cultural objects, Contracting States may request that courts in other Contracting States order such returns.[1100] These requests can only be made by the deprived states.[1101] There are, however, a number of exceptions to the rules on return. For example, they do not apply where the object was exported during the lifetime of the person who created it or within a period of 50 years following the death of that person.[1102] Here, the free market for recently created art works is left outside the scope of the Convention.[1103] This provision contains yet another exception to this exception, serving the interests of tribal and indigenous communities in their cultural property, by exempting cultural objects that were

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(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
(f) objects of ethnological interest;
(g) property of artistic interest, such as:
    (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
    (ii) original works of statuary art and sculpture in any material;
    (iii) original engravings, prints and lithographs;
    (iv) original artistic assemblages and montages in any material;
(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments.

[1094] Forrest 2010, p. 199–200.
[1095] Stamatoudi 2011, p. 72–73.
[1096] Article 3(1) and 3(3).
[1097] Article 3(4).
[1098] Forrest 2010, p. 205.
[1099] Article 3(8).
[1100] Article 5.
[1101] Stamatoudi 2011, p. 94.
[1102] Article 7(1)(a) and (b).
[1103] Forrest 2010, p. 214–215.

made by a member or members of a tribal or indigenous community for traditional or ritual use by that community.[1104] It is noteworthy that the interests of indigenous peoples are included in this Convention, as opposed to the previous UNESCO Conventions that focused primarily on universal and national interests in the cultural heritage. This is one of the shifts that are visible in the ongoing development of the international cultural heritage framework.

Main principles of the 1995 UNIDROIT Convention and TCEs

This Convention is striking in that it refers in its preambular principles not only to national interests and the interest of all, but also specifically recognises other interests as well, such as the risk of damage that the cultural heritage of tribal, indigenous or other communities faces from illicit trade. In this sense, the UNIDROIT Convention shows a more nuanced understanding of the interests involved in cultural heritage protection by moving beyond the statist approach of the 1970 Convention,[1105] and also the universal approach of the 1954 The Hague Convention. In other words, the interests that this Convention aims to address are layered, emphasising principles of cultural exchange and the safeguarding of cultural heritage generally, yet also protection of the interests of nations *and* specific communities, and overall serving the interest of all in the preservation and protection of cultural heritage by way of harmonisation of minimum rules regarding restitution and return of cultural objects. Protection of cultural heritage via the rules of the Convention thus shows a multi-faceted set of underlying principles, of which 'cultural community-ism' is especially relevant for TCEs.

4.3.4 Cultural heritage as world heritage

After the 1970 Convention the next big development concerning cultural heritage law at the international level was the 1972 World Heritage Convention. Whereas the 1970 Convention was primarily concerned with a nationalist approach to cultural heritage focusing on sovereignty and property rights,[1106] the 1972 World Heritage Convention heralded a new era with cultural heritage becoming part of an international movement that emphasised the "collective and public character" of heritage. The interests of the international community in cultural heritage took centre stage.[1107] At first sight, the subject matter of this Convention seems far removed from TCEs. However, shifts in criteria and understandings of protected world heritage increasingly acknowledge living cultures and intangible manifestations. Still, the strong universality principle for cultural heritage protection of this Convention can compromise indigenous peoples' interests in the maintenance, development and safeguarding of their own heritage.

Context and objectives of the 1972 World Heritage Convention

A number of events are generally believed to have prompted the development of international rules on world heritage, including the flooding following the building of the Aswan High Dam in Egypt in 1960 and the flooding of Venice and Florence, Italy, in 1966.[1108] Both

[1104] Article 7(2).
[1105] Macmillan 2012, p. 101. State Parties to the Convention express in the preamble that they are: "DEEPLY CONCERNED by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information."
[1106] Francioni 2008, p. 3.
[1107] Francioni 2008, p. 3–5. See also Meyer 1976, p. 45–46.
[1108] Meyer 1976, p. 45; O'Keefe & Prott (eds) 2011, p. 77; Forrest 2010, p. 226–227; Francioni 2008, p. 12–13.

incidents posed severe threats and caused damage to much valuable cultural heritage. Led by UNESCO, international campaigns were initiated to save this heritage. Other examples of the 1970s were the international safeguarding campaigns of the archaeological remains in Carthage, Tunisia, and the temples of Borobudur, Indonesia.[1109] These examples and campaigns indicate international concern and interest in cultural heritage considered as important and valuable to all mankind. Other contextual aspects are the developments that took place in environmental law. Against this backdrop, two institutions started to work on an International Convention for world heritage: UNESCO and the International Union for Conservation of Nature (IUCN), a membership Union of government and civil society organisations founded in 1948 and based in Gland, Switzerland.[1110] The focus of the former was on 'Monuments, Groups of Buildings and Sites of Universal Value', i.e. cultural heritage, while the latter was primarily concerned with natural heritage.[1111] These preliminary developments show the strong international character of the regulation by this Convention of what, as the name also indicates, is deemed *world* heritage.

The preamble of the World Heritage Convention describes the context and motivation for international action as the increasing threat of destruction of cultural and natural heritage. These threats could come not only from 'usual' causes such as decay, but also from changes in social and economic circumstances that affect cultural heritage with increasing threats of damage and destruction. The result of such damage or destruction would be that the heritage of all nations of the world is detrimentally impoverished. This is the first central principle of the Convention.[1112] The second central principle is the need for international protection, because protection on the national level would often be insufficient.[1113] The notion of 'world heritage' also stands out in the preamble. This was not included as such in UNESCO Conventions before,[1114] except to a certain extent in the 1954 The Hague Convention.[1115] The preamble emphasises that safeguarding unique and irreplaceable property is important 'for all peoples of the world', 'to whatever people it may belong'. It further refers to 'outstanding interest' or 'outstanding universal value' in the context of world heritage. This qualification has been explained as referring to cultural heritage that, due to its distinctive or specific character, has the quality of triggering universal attraction for all humanity, being important for both present and future generations.[1116] Finally, the preamble justifies international action by referring to 'the magnitude and gravity of the new dangers threatening' the world heritage.

In sum, the preamble reflects a sense of urgency and extensively elaborates on the universality principle. Protection of world heritage would serve the interests of all mankind as a beneficiary and address the need for international action. Specific consideration for the interests of source communities has been left out of the equation in the context of world

[1109] Forrest 2010, p. 226–227; Francioni 2008, p. 12–13; Meyer 1976, p. 45.
[1110] See: https://www.iucn.org/.
[1111] Meyer 1976, p. 47.
[1112] Francioni 2008, p. 15.
[1113] As reasons the Convention mentions the scale of the resources which the protection requires and the insufficient economic, scientific, and technological resources of the country where the property to be protected is located.
[1114] Forrest 2010, p. 228.
[1115] Francioni 2008, p. 15. The second and third paragraphs of the preamble of the 1954 The Hague Convention already considered that 'damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world' and that 'the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.'
[1116] Francioni 2008, p. 18–19.

heritage safeguarding. This means that these interests run the risk of being disregarded, if not significantly harmed, by policies based on this Convention.

Definitions and scope

The Convention contains two definitions to determine the scope of world heritage, one for cultural heritage and one for natural heritage. The definition of cultural heritage consists of three layers.[1117] The first is the division of cultural heritage into three sections: monuments, buildings and sites. The second layer is the enumeration of the content of each section, which does have some overlap, including for example under monuments 'elements or structures of an archaeological nature' and under sites 'areas including archaeological sites.'[1118] The three sections together form an integral whole. One shortcoming that has been identified is the "European-inspired monumentalist vision" of cultural heritage due to its focus on the physical, tangible dimension.[1119] The third layer narrows down the definition with the requirement of 'outstanding universal value'. In this sense, the criterion acts as a qualifier and limitation of the scope of application of the Convention.[1120]

The definition of natural heritage consists of three categories: 'natural features consisting of physical and biological formations or groups of such formations', 'geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants' and 'natural sites or precisely delineated natural areas'.[1121] Again, each category has to be of outstanding universal value. The criterion of 'outstanding universal value' is not defined in the Convention itself, but in the Operational Guidelines for the implementation of the World Heritage Convention that the World Heritage Committee has established on the basis of Article 11(5) of the Convention.[1122]

From the start, both the World Heritage List itself and the criteria for inclusion of heritage on it have been criticised as being imbalanced, lacking representation from a diverse range of heritage sources and cultures, and foregrounding a European 'monumentalist view' over recognition of other, less tangible or materialistic values attached to cultural heritage.[1123] This is especially visible in the criteria of 'masterpiece' and 'an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history'.[1124] However, notable changes to the criteria for outstanding universal value occurred after their revision was recommended in the 1994 Report of the UNESCO Expert Meeting on the 'Global Strategy' and Thematic Studies for a representative World Heritage List.[1125] These changes shaped the shift to an understanding of cultural heritage beyond the static, monumental and artistic, including awareness for living cultures and cultural interaction. In other words, there was a move towards a more anthropological understanding. The most recent criteria are listed in the Operational Guidelines of 2016, which have merged the criteria for both cultural and natural heritage in one list of ten

[1117] Article 1.
[1118] Forrest 2010, p. 231.
[1119] Yusuf 2008, p. 29.
[1120] Yusuf 2008, p. 27–28.
[1121] Article 2.
[1122] Yusuf 2008, p. 30. See par. III.7 of the Report (WHC-94/CONF.003/INF.6, Paris, 13 October 1994), which is available via: http://whc.unesco.org/archive/global94.htm.
[1123] Yusuf 2008, p. 33.
[1124] Criteria (i) and (iv), available via: http://whc.unesco.org/en/guidelines/, par. 77.
[1125] Yusuf 2008, p. 33, 36.

criteria.[1126] Still visible is 'masterpiece', but also interchange of human values and association with events, living traditions, ideas, beliefs and artistic and literary works. This is notable because it reflects a more recent shift towards attention for inclusiveness in the context of cultural heritage scope and understandings. Such inclusiveness is important to pave the way for more responsive and democratised processes and management of cultural heritage preservation.

Measures: national and international protection

National protection duties of State Parties include the identification and delineation of the cultural and natural heritage on its territory.[1127] States must not only ensure this identification, but also the protection, conservation, presentation and transmission to future generations of this heritage.[1128] States must take certain effective and active measures for the protection, conservation and presentation of the heritage on their territory. The Convention proposes, for example, measures relating to the interests of the community, such as "to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes."[1129] Other measures include setting up national services for the protection, conservation and presentation of the cultural and natural heritage and legal, scientific, technical, administrative and financial measures for the identification, protection, conservation, presentation and rehabilitation of the heritage.[1130]

The international protection of world heritage is a large component of the Convention and justified precisely because it concerns 'world' heritage, touching upon the interests of all humanity. The Convention sees it as the duty of the international community as a whole to co-operate.[1131] International protection means that a system of international cooperation and assistance is established in order to support the State Parties in their tasks of conservation and identification of their *world* cultural and natural heritage.[1132] State Parties are also obliged to abstain from deliberate measures that might damage the cultural and natural heritage on the territory of other State Parties.[1133] This reflects the central cultural heritage principle of respect that also underlies the 1954 UNESCO Convention on the protection of cultural property in the event of armed conflict. This is a negative obligation to abstain from certain activities.

Other measures: the World Heritage List, awareness raising and education

The Convention determines that a World Heritage Committee be established, composed of fifteen State Parties to the Convention.[1134] One of its main tasks is to establish, keep up to date

[1126] See paragraph 77 point i-vi for cultural heritage and point vii-x for natural heritage, of the Operational Guidelines for the Implementation of the World Heritage Convention, WHC.16/01 26 October 2016, available via: http://whc.unesco.org/en/guidelines/. Another condition for outstanding universal value that the Operational Guidelines include, is that of integrity and/or authenticity. See paragraph 78 and 79-95 of the Operational Guidelines for the Implementation of the Wold Heritage Convention.
[1127] Article 3.
[1128] Article 4.
[1129] Article 5(a).
[1130] Article 5(b) and (d).
[1131] Article 6(1).
[1132] Article 7.
[1133] Article 6(3).
[1134] Articles 8-10.

and publish the World Heritage List, which is a list of cultural and natural heritage, which it considers as having outstanding universal value.[1135] States provide inventories of their heritage and the Committee makes a decision, but the State must provide consent for eventual inclusion.[1136] The Committee also maintains a list of World Heritage in Danger.[1137] However, the fact that cultural or natural heritage is not included in any of these lists does not mean that it does not have an outstanding universal value for purposes other than inclusion in the lists.[1138] In other words, such cultural and natural heritage still requires protection. Source communities, such as for example indigenous and local communities that have lived on certain territories for generations, are entirely absent in the Convention when it comes to the process of designating protected status. When such territories are designated as protected world heritage, this could mean that these communities are forcibly evicted and restricted from accessing their territories. However, based on various international human rights provisions, one can argue that the communities should actually be involved in the decision-making processes.

Finally, State Parties are also encouraged to take measures to strengthen appreciation and respect by their peoples of the cultural and natural heritage.[1139] Educational and information programmes are highlighted. The 1970 Illicit Trade Convention contained a similar provision. Again, this obligation touches upon awareness-raising, with education, information and knowledge as key for achieving objectives of respect for, and ultimately safeguarding of, cultural heritage. Like the World Heritage Convention, however, explicit attention for source communities' interests in protection of their heritage is also absent from this Convention. Often, these interests seem precisely most in need of awareness-raising and respect from (corporate) third party uses.

Main principles of the 1972 World Heritage Convention and TCEs

The World Heritage Convention's main principle is the protection of cultural heritage as an inheritance benefitting all mankind. In other words, protection is meant to prevent loss, which would impoverish the heritage of all nations of the world, and thus serves the interest of all humanity. The cultural heritage as understood by this Convention is to be considered as 'world heritage', so as having a collective and universal dimension. Indeed, the characteristic of 'outstanding universal value' determines whether the heritage in question is considered as world heritage. The criteria for the interpretation of this notion have been the subject of criticism and debate from early on, leading to a shift from a European 'monumentalist' view to a more inclusive or representative understanding of the scope and application of the concept of 'cultural heritage', as covered by the Convention.[1140] The system of Operational Guidelines provides for the possibility to flexibly amend the criteria according to changing understandings if needed.[1141]

Another central reason for international action follows from the concerns for this type of heritage due to threats such as decay and especially changing social and economic conditions which create an even bigger risk of damage or destruction. As the heritage in question has a

[1135] Article 11(2).
[1136] Article 11(1) and 11(3).
[1137] Article 11(4). This is a list 'of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which assistance has been requested under this Convention.'
[1138] Article 12.
[1139] Article 27.
[1140] Yusuf 2008, p. 33–36.
[1141] Forrest 2010, p. 233.

collective, universal character, all mankind is impoverished by its damage or destruction. Following this principle, international action should remedy such threats and damage. Other than that, the Convention also shows a very state-oriented view, in that it is up to the State Parties to identify the cultural and natural heritage of outstanding universal value on their territories. No community interests or values attached to it are included in this determination.

In sum, unlike the shifts in understanding of the criterion of 'outstanding value' towards a more anthropological approach, the universality principle of the Convention is not appropriate for community-oriented TCEs. Rather, this principle reflects the dominant role and approach of States and the international community in designation, safeguarding and management of world heritage vis-à-vis indigenous peoples, whose relationships and access to their own heritage, such as their territories, might be compromised as a result. In this sense, the universality principle illustrates precisely the tensions that follow from this cultural heritage perspective and approach.

4.3.5 Towards protection of intangible cultural heritage

The preparations for and adoption of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (ICH) signalled a new direction in the existing international cultural heritage framework. The 2003 ICH Convention is the first legally binding international instrument dealing with the issue of intangible cultural heritage, as all the UNESCO Conventions before it concerned tangible or material cultural heritage. It is preceded only by the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, which targeted intangible cultural heritage specifically following concerns about the effect of industrialisation and mass media on more tradition-oriented culture.[1142] It goes without saying that for the protection of TCEs, with their intangible nature, the rationales, underlying principles and measures of this cultural heritage area are worth particularly close scrutiny.

Copyright and folklore: preliminary developments to the 2003 Convention

As observed in Chapter 2, the focus of the 1970 Illicit Trade Convention on tangible cultural heritage gave rise to criticism. Concerns were also voiced during the process leading up to the 1972 World Heritage Convention about the overly narrow scope of that Convention.[1143] The activities regarding intangible cultural heritage therefore originate in this period. Attention for the intangible aspects of cultural heritage arose after the 1972 World Heritage Convention in particular,[1144] and not only in an international cultural heritage context, but also in a copyright context. Interests that were at stake in discussions on intangible cultural heritage included those of communities in protection of (intangible) aspects of their cultures from commercial exploitation by third parties without benefit-sharing. The interests of indigenous peoples in using copyright law for this purpose in order to protect their heritage, and their difficulties in meeting copyright law's requirements, were an especially important contextual issue. Other concerns that were raised in this period regarded the preservation of traditions that were dying

[1142] See Section D (Preservation of Folklore) of the Recommendation, available via: http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html. See also Ruggles & Silverman 2009, p. 8.
[1143] Lenzerini 2011, p. 104.
[1144] Forrest 2010, p. 363–364.

out.[1145] Two strands of developments have therefore been noted in the context of action regarding intangible cultural heritage.[1146] The first is the copyright aspect and the second is a more political strand, which focused on nationalistic sentiments in social and cultural policies.

Discussions in a copyright context included attention for folklore in light of revision of the Berne Convention in Stockholm in 1967 and other developments as described in Chapters 2 and 3. The developments in the first strand reflect the intersection of two legal approaches to folklore, or intangible cultural heritage. Institutions on both a copyright level and a cultural heritage level apparently feel called upon to address concerns regarding the lack of protection and the safeguarding of such heritage. These concerns also show a *dual nature*: on the one hand regarding the economic exploitation of intangible cultural heritage and protection against such unauthorised activities, and on the other hand the preservation and continued existence of folklore, or intangible cultural heritage, including TCEs.[1147] In fact, UNESCO and WIPO have agreed since 1978 on a "dual track approach" to the matter, whereby UNESCO would take an interdisciplinary approach to the topic of folklore and WIPO would consider the protection thereof from a more intellectual property-oriented viewpoint.[1148]

The second strand has been called more a "nationalistic one, oriented to social and cultural policy."[1149] This includes concerns regarding intangible cultural heritage on a national level, specifically. This strand has been especially visible in Asian states, such as Japan, which had established government initiatives after World War II for recognition and support of the traditions reflected in its national cultural heritage.[1150] Modernisation developments formed the backdrop for these concerns.[1151]

Generally, there has been a shift in perspective of cultural heritage. As we have also seen in the revised criteria of the Operational Guidelines for determining the outstanding universal value of world heritage there has been the tendency for a broader understanding of cultural heritage. This understanding also specifically takes the anthropological component of cultural heritage into account. This anthropological dimension, i.e. living culture and intangibles such as know-how and human relations and interactions, has been brought into the spotlight in cultural heritage discourse and policy, regardless of a connection with manifestations of material culture.[1152]

A Recommendation on folklore as a first step

A Recommendation on the Safeguarding of Traditional Culture and Folklore was adopted by UNESCO in 1989 as a first step towards a convention on intangible cultural heritage.[1153]

[1145] See generally on the context of the developments regarding intangible cultural heritage O'Keefe & Prott (eds) 2011, p. 148–149.
[1146] Kurin 2004, p. 67–68; Forrest 2010, p. 364–365; Lenzerini 2011, p. 104.
[1147] See section 2.2.1 on the emergence of the protection of TCEs in a copyright context for more detail.
[1148] Blake 2006, p. 10.
[1149] Kurin 2004, p. 67.
[1150] Kurin 2004, p. 67.
[1151] O'Keefe & Prott (eds) 2011, p. 148.
[1152] Blake 2006, p. 8; O'Keefe & Prott (eds) 2011, p. 149.
[1153] Other pre-2003 Convention developments include UNESCO's 1993 'Living Human Treasures' programme, with its focus on the actual bearers of the heritage and the essential notion of conservation and transmission to future generations and the 1998 'Masterpieces of the Oral and Intangible Heritage of Humanity' programme, with its focus not only on paying tribute to such masterpieces, but also on establishing a depository and collective memory of peoples. For safeguarding 'living treasures', see point 1(iii) of the Guidelines for the Establishment of National 'Living Treasures' Systems, available via:

Cultural heritage theories and principles that are reflected in the preamble of the 1989 Recommendation include the universal interest of all humanity, the ambassadorial role of folklore, and its contribution to cultural diversity and each people's or group's identity. The preamble further recognises folklore's social, economic, cultural and political importance, as well as both its historical role *and* place in contemporary culture of people. This has been argued as reflecting the need to not only safeguard the traditions or folklore, but importantly also the communities themselves.[1154] Folklore's role as a part of living culture is underlined. The preamble also underscores the fragility of folklore, especially in oral form, and the need to recognise the dangers it faces from various factors. The latter is a general, open description, making it flexibly applicable to any changing circumstances in the future.[1155]

The general principles have been praised, but the definition used has been criticised as narrow and outdated.[1156] The definition of the Recommendation does acknowledge that folklore originates in specific cultural communities, plays an important role for their cultural and social identities and is often transmitted orally.[1157] But the scope has been deemed overly narrow, leaving out a reference to the contexts of creation and maintenance of the heritage,[1158] only implicitly including traditional knowledge manifestations, and excluding indigenous peoples in total.[1159] In other words, it reflects still some static or fixed tendencies, and seems to mention only the outcome or 'products' of folklore.[1160]

The substantive text of the Recommendation has also been criticised. The provisions on identification and conservation measures of folklore do pay attention to the groups whose identities the folklore expresses. However, the actual proposed measures of inventories and archives are criticised as mostly benefiting scientists or researchers rather than the actual producers of the folklore.[1161] The question is asked, for example, whether the holders of the traditions actually value or desire documentation of intangible, orally transmitted heritage.[1162] The notion of free, prior and informed consent is also absent in the Recommendation, which is criticised especially in the light of dissemination of folklore. The Recommendation in fact calls for this cultural heritage 'to be widely disseminated so that the value of folklore and the need to preserve it can be recognized.'[1163] While the Recommendation continues by stating that the integrity of the traditions should be safeguarded from any distortion during the dissemination, the absence of any notion of interests in secrecy for spiritual or other reasons is criticised.[1164]

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http://www.unesco.org/culture/ich/doc/src/00031-EN.pdf. For selection criteria for 'masterpieces', see the 'Report by the Director-General on the precise criteria for the selection of cultural spaces or forms of cultural expression that deserve to be proclaimed by UNESCO to be masterpieces of the oral and intangible heritage of humanity', CL/3553 Annex, 2000, point 1(a) and (b), available via: http://unesdoc.unesco.org/images/0015/001541/154155E.pdf. See further Blake 2002, p. 45-46.

[1154] Blake 2002, p. 33.

[1155] Blake 2002, p. 33.

[1156] Vrdoljak 2005, p. 21; Blake 2002, p. 33.

[1157] The definition reads: "Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts."

[1158] For example, social, cultural, intellectual, but also spiritual; Vrdoljak 2005, p. 21; Blake 2002, p. 33.

[1159] Vrdoljak 2005, p. 21; Blake 2002, p. 33-34.

[1160] Vrdoljak 2005, p. 21.

[1161] Vrdoljak 2005, p. 21; Blake 2002, p. 34.

[1162] Blake 2002, p. 34.

[1163] Vrdoljak 2005, p. 21.

[1164] Blake 2002, p. 35.

As to protection of folklore, reference is made to the protection that already exists for intellectual productions. According to the Recommendation, a form of protection for folklore inspired by such protection is 'indispensable' "as a means of promoting further development, maintenance and dissemination of those expressions".[1165] However, it leaves further intellectual property aspects of folklore protection aside. The Recommendation notes that intellectual property concerns only one aspect of folklore protection and that therefore "the need for separate action in a range of areas to safeguard folklore is urgent".[1166] Based on the research of this thesis, we can draw a similar conclusion for the protection of TCEs. Due to their multi-faceted nature, a fragmented legal approach is inevitable and even necessary to address the full spectrum of needs and interests at stake. Other rights that are, and should continue to be, protected according to the Recommendation include the privacy and confidentiality of the informant as the transmitter of tradition. Blake argues that this principle is especially important in the context of traditional knowledge.[1167]

Finally, the Istanbul Declaration on Cultural Diversity was adopted in 2002 at a Round Table of ministers of Culture on 'Intangible Cultural Heritage, Mirror of Cultural Diversity?' The Declaration, which acknowledges the fundamental role of intangible cultural heritage for cultural identity, its living nature and the need for an approach of democratic participation of all stakeholders, expressed a preference for an international Convention.[1168] In other words, the developments towards an intangible cultural heritage treaty show that work on cultural heritage has increasingly paid attention to an inclusive understanding of the cultural heritage concept. This concerns an inclusive view of both the subject matter, with calls for a holistic view of the heritage, including the context of creation and maintenance, and of the stakeholders involved, with arguments for effective, democratic participation by the actors or 'bearers' of the heritage, including indigenous peoples.

Context, objectives and definitions of the 2003 ICH Convention

The preamble places the Convention within the broader international context, including human rights and UNESCO's previous work on traditional culture, folklore and cultural diversity.[1169] Attention for human rights not only indicates the weight attached to human rights questions in the context of intangible cultural heritage deliberations, but was also intended to remind the State Parties of their human rights obligations, in particular regarding minority rights, economic, social and cultural rights, and non-discrimination and equality.[1170] As Blake notes, intangible cultural heritage is unique in that it depends for survival on ways of life and the economic viability of their very source communities, as opposed to other areas of cultural heritage where this is less the case.[1171] For tangible heritage, this may to some extent be the case for the maintenance of objects or buildings. However, for the actual 'active' existence and continuation of cultural heritage, this correlation is stronger for (orally transmitted) living intangible cultural heritage, such as traditions, which tend to be intrinsic parts of ways of life.

[1165] See Section F of the Recommendation.
[1166] Section F(a) of the Recommendation.
[1167] Blake 2002, p. 36.
[1168] See points 1, 2, 3 and 7(viii) of the Declaration, respectively. Istanbul Declaration 2002, available via: http://portal.unesco.org/en/ev.php-URL_ID=6209&URL_DO=DO_TOPIC&URL_SECTION=201.html.
[1169] Forrest 2010, p. 367. The preamble mentions explicitly the UDHR, ICESCR and ICCPR, as well as UNESCO's 1989 Recommendation on traditional Cultural and Folklore and 2001 Universal Declaration on Cultural Diversity.
[1170] Blake 2006, p. 25.
[1171] Blake 2006, p. 25.

The preamble also refers to the principle of cultural diversity and the contribution of intangible cultural heritage to sustainable development. It further recognises threats of deterioration, disappearance and destruction of intangible cultural heritage resulting from globalisation and social changes, despite the opportunities these also provide. The universality principle is again raised as an argument to internationally protect intangible cultural heritage, drawing on the universal will and common concern to safeguard all humanity's intangible cultural heritage. However, Blake warns that the strong local interest in safeguarding intangible cultural heritage must be sufficiently taken into account in this universalist approach, which requires a balanced perspective.[1172] Connected to this is the recognition of the indispensable role of communities, especially indigenous communities, in producing and safeguarding intangible cultural heritage and contributing to cultural diversity and human wealth. This community approach breaks with the previous national or international focus of cultural heritage instruments, yet the instrument remains largely internationalist. It refers for inspiration to the 'success' of the existing normative framework, for example, especially the 1972 World Heritage Convention.

The purposes of the Convention are:

- to safeguard and ensure respect of intangible cultural heritage of the communities, groups and individuals concerned;
- to raise awareness of the importance of intangible cultural heritage;
- to ensure mutual appreciation; and
- to provide for international cooperation.

The use of the term 'communities' was not uncontested. States feared that it would lead to an understanding of awarding 'rights as a community', whereas collective rights are a sensitive topic in the traditional understandings of, for example, human rights law. The use of the term 'to ensure respect' also shows an indication of the close relationship of the topic with human rights.[1173] International cooperation on the topic is considered crucial, as many states that are rich in intangible cultural heritage tend to have a shortage of resources available for independently safeguarding this. This approach is justified by stressing the universal value of intangible cultural heritage and the need to safeguard it for this reason.[1174]

Intangible cultural heritage is a topic that gives rise to many definitional challenges. An international instrument requires a balance between inclusiveness in terms of definition and practical workability in terms of legal regulation. The Convention contains an extensive definitional provision.[1175] The definition lists a very wide range of 'intangible cultural heritage' and its material expressions[1176] and depends on the recognition as such by the communities, groups or individuals concerned. This means that self-identification is central. The *context* of intangible cultural heritage is also given a central place, such as the environment, territories and essentially the ways of life of communities. This reflects the broader importance of safeguarding intangible cultural heritage and its human rights implications, namely to safeguard the identities and continuation of the communities

[1172] Blake 2006, p. 26–27.
[1173] Blake 2006, p. 29. She asks the question: "[h]ow far does ensuring respect for intangible cultural heritage actually implies ensuring respect for the way of life and cultural rights of the community or group concerned?"
[1174] Blake 2006, p. 30.
[1175] Article 2.
[1176] Article 2(1); Blake 2006, p. 34.

concerned as well.[1177] Human rights grounds also provide the basis for an important limitation to the definition. Intangible cultural heritage is only considered protectable under the Convention when it is "compatible with existing international human rights instruments, as well as with requirements of mutual respect among communities, groups and individuals, and of sustainable development."[1178] The broad definition is further concretised by listing a number of domains in which the intangible cultural heritage is manifested.[1179]

Measures: national inventories, education and awareness raising

Safeguarding measures that states are obliged to take regarding the intangible cultural heritage on their territory[1180] must ensure the *viability* of this heritage.[1181] Such measures include, first and foremost, identification of this heritage.[1182] The participation of communities, groups and NGOs is explicitly mentioned here. For this identification purpose, State Parties must establish and maintain inventories of the intangible cultural heritage on their territories.[1183] Inventories have been criticised, not only because translating dynamic, intangible cultural heritage into mere inventory entries on paper seems contradictory, but also because its added value for the actual safeguarding purpose of ensuring the vitality of intangible cultural heritage is disputed.[1184] In the discipline of anthropology, for example, it is well established that documentation only plays a small role in the preservation of culture.[1185] A disconnect is visible here between cultural and legal reality as to the safeguarding of (intangible) cultures.

The Convention also suggests that State Parties 'endeavour to' take other measures, for example adopting general policies to promote the function of intangible cultural heritage. Other measures are of legal, technical, administrative and financial nature to ensure, for example, access to the heritage, while respecting customary practices governing such access, and setting up documentation institutions, which facilitate this access.[1186] The duty to take measures to ensure access has been called a right of access, but customary rules that might restrict access for certain aspects of intangible cultural heritage, for example on the basis of sex and status, should be respected under this general rule.[1187] This does evoke questions of tension with other human rights, for example non-discrimination on the basis of sex.[1188] The reference to 'access' in combination with documentation institutions has been interpreted as signalling that the documenting is not merely a scientific or official exercise, but something

[1177] Blake 2006, p. 35.
[1178] Article 2(1).
[1179] Article 2(2) (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
(b) performing arts;
(c) social practices, rituals and festive events;
(d) knowledge and practices concerning nature and the universe;
(e) traditional craftsmanship.
[1180] Article 11(1).
[1181] Article 2(3): ""Safeguarding" means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage."
[1182] Article 11(b) and 2(3).
[1183] Article 12.
[1184] Kurin 2004, p. 72.
[1185] Brown 2005, p. 48.
[1186] Article 13(a), 13(d), 13(d)(ii) and (iii).
[1187] Article 13(d)(ii); Blake 2006, p. 72.
[1188] These kinds of tensions are not uncommon in the realm of cultural human rights.

'active' that the communities themselves should be involved in.[1189] This would indeed fit with the Convention's commitment to include communities in the identification and management of the heritage concerned,[1190] if not to at least ensure respect for customary governance of access.

The State obligation under the Convention to take measures for education, awareness raising and capacity building is formulated in an encouraging rather than stringently obliging fashion.[1191] We have seen education, information and knowledge before as crucial notions in the protection of cultural heritage. In this case, the wording of the provision seems to suggest that such measures are also intended, and expected, to contribute to the promotion, production and continuation of the heritage, for example by specifically including young people. These considerations reflect promotion measures which are especially important for the heritage, including traditional knowledge and cultural expressions, of minorities and indigenous peoples in light of cultural rights such as Article 27 ICCPR, which states the (cultural) rights of minorities.

The duty of states to 'endeavour' to ensure the involvement and participation of the communities and groups that create and maintain the heritage in both its safeguarding activities *and* the management of intangible cultural heritage is also a core principle of the Convention that is especially important for minorities and indigenous peoples.[1192] While not phrased in a strictly obligatory sense, this is not only principally so, but – perhaps even more – practically required. Identification, and especially management, would be very difficult without such participation.[1193] What is more, human rights bodies of the UN have explicitly recognised participation rights of indigenous peoples in matters that affect their rights, which is also stated in various indigenous rights texts. This is further elaborated on in Chapter 5 on human rights law and TCEs.

Measures: safeguarding at the international level

The central measures for the safeguarding of intangible cultural heritage at the international level are first and foremost modelled on the 1972 World Heritage Convention. They concentrate on the establishment and maintenance of a Representative List of the Intangible Cultural Heritage of Humanity and a List of Intangible Cultural Heritage in Need of Urgent Safeguarding by the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage,[1194] respectively.[1195] The establishment of the Representative List has two aims: to "ensure better visibility of the intangible cultural heritage and awareness of its significance" and to "encourage dialogue which respects cultural diversity".[1196] As indicated earlier, the value of a list as a measure for the actual encouragement of the cultural vitality of intangible cultural heritage has been questioned.[1197] States make the proposals for inclusion, but the inventories at the national level must involve participation of communities or groups concerned.[1198] International cooperation and assistance is another focal point of the

[1189] Article 13(d)(iii); Blake 2006, p. 72.
[1190] See Article 15.
[1191] Article 14.
[1192] Article 15.
[1193] Blake 2006, p. 77.
[1194] Established by Article 5.
[1195] Articles 16 and 17.
[1196] Article 16.
[1197] Kurin 2004, p. 72.
[1198] As determined in Article 15.

Convention, reflecting the internationalist, universal heritage principle. The safeguarding of intangible cultural heritage is considered to be of general interest to humanity, inspiring international cooperation.[1199]

According to the Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Heritage of 2016,[1200] criteria for the urgent safeguarding list include that the element is in such grave danger that it "cannot be expected to survive without immediate safeguarding".[1201] A safeguarding plan must be elaborated by State Parties, enabling the community concerned "to continue the practice and transmission of the element".[1202] The element must be included in the national inventory,[1203] and it must be nominated following the widest possible participation of the community" or group concerned and with their *free, prior and informed consent*.[1204] For the Representative List the last two criteria are the same.[1205] The inscription must contribute to ensuring visibility and awareness of the significance of the intangible cultural heritage and to the encouragement of dialogue, thereby reflecting cultural diversity worldwide and testifying to human creativity.[1206]

Main principles of the 2003 Intangible Cultural Heritage Convention and TCEs

This Convention still shows a clear internationalist theory of universal cultural heritage as both a reason, and a justification, for protection. In other words, it still reflects the principle of cultural heritage protection for the benefit of all mankind. However, it also shows a clear divergence from previous dominant cultural heritage theories in that it expressly acknowledges the relevant communities and groups as both sources of *and* a condition for the survival and safeguarding of intangible cultural heritage. This changes the approach and perspective of the cultural heritage framework, making it more inclusive and moving beyond primarily national state or international interests. It requires both participation of these source communities and specifically addressing their heritage issues with the necessary measures. This cultural heritage theory accepts that intangible cultural heritage stems from and depends on its specific context and circumstances of creation. In other words, living cultures and cultural contexts are equally as important for safeguarding cultural heritage and contributing to cultural diversity, as treating cultural heritage as an inheritance to be transmitted to future generations. Important in this regard is the emphasis on human rights and the obligations of State Parties as central aspects of intangible cultural heritage questions, especially economic, social and cultural rights as well as minority and indigenous rights. In other words, protection and respect of the ways of life and sustainable development of source communities is an underlying principle of the protection of intangible cultural heritage. Needless to say, these considerations are also of importance in the context of TCEs.

4.3.6 Cultural heritage and cultural diversity

Although not strictly speaking a cultural heritage law instrument, applying a narrow view to the understanding of 'cultural heritage law instruments', the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is nevertheless included

[1199] Article 19.
[1200] The Operational Directives of 2016 are available via: http://www.unesco.org/culture/ich/en/directives.
[1201] Directive I.1 (U.2)(b).
[1202] Directive I.1(U.3).
[1203] Directive I.1(U.5).
[1204] Directive I.1 (U.4).
[1205] Directive I.2(R.4) and (R.5).
[1206] Directive I.2(R.2).

in the overview of this section for its underlying principles and theories. These are also relevant from a cultural heritage law perspective. As the title suggests, the principle of cultural diversity is central. This principle has also recurred in the underlying theories of the various cultural heritage instruments analysed in this Chapter. The Convention provides relevant starting points for TCE protection from a broader perspective. This relevance includes its emphasis on cultural contexts and living cultures as sources of culturally diverse expressions, which touches especially on the concerns for the heritage and cultural expressions of minorities and indigenous peoples.

However, the Convention only contains rights of states, and not of other entities, such as the media, journalists and, indeed, indigenous peoples.[1207] Furthermore, the Convention also clearly shows a focus on the interrelationship between culture and trade, referring to cultural diversity in terms of *goods and services*, the importance of intellectual property rights for *sustaining* creative actors, *exploitation* possibilities for cultural heritage as *development resources*, and describing traditional knowledge as a source of intangible and material *wealth*.[1208] This colours the rationales of protecting cultural diversity and the measures that the Convention suggests. However, it may be less suitable for indigenous peoples whose interests regarding their cultures do not focus primarily on market considerations and exploitation of culture.[1209] In this respect, protection of cultural diversity needs additional means.[1210]

Context and preliminary developments

Both the reasons for convening a Convention on cultural diversity in the first place and the objectives of the actual Convention show a dual nature: recognition of cultural expressions as both objects of trade and as carriers of cultural value.[1211] On the one hand, concerns spurring the work on cultural diversity issues were cultural, e.g. safeguarding of cultural diversity in the face of globalisation, such as ensuring the continued existence of the cultures of minorities and indigenous peoples. On the other hand, concerns were of a trade-related nature, namely regarding the imbalance between massive global economic powers and national governments wishing to protect their cultures against the impact of "modernization" and "Westernization".[1212]

Given these different perceptions, the convening of a Convention on the topic was also understood in two ways: on the one hand, some countries "saw the Convention as the next step in the long battle to promote cultural development and intercultural dialogue", while other countries "came to the intergovernmental meetings on the new Convention expecting to negotiate a trade treaty, a culture-friendly trade treaty."[1213] The outcome document of UNESCO's 1999 symposium 'Culture: A Form of Merchandise Like No Other?' also underlines this dual nature, by concluding that the action plan adopted at the conference: "no longer poses the question but asserts that 'cultural goods and services should be fully

[1207] Craufurd Smith 2007, p. 26, 37.
[1208] See Aylwin and Coombe for criticism on this focus on development and exploitation of culture, rather than on ways of life and culture's role for meaning and identity of people. Aylwin & Coombe 2006, p. 48.
[1209] O'Keefe & Prott (eds) 2011, p. 164; Aylwin & Coombe 2006, p. 49.
[1210] Aylwin & Coombe 2006, p. 49.
[1211] Graber 2006, p. 553.
[1212] O'Keefe & Prott (eds) 2011, p. 162.
[1213] Obuljen 2006, p. 19.

recognized and treated as being not like other forms of merchandise'."[1214] This was later repeated in the 2001 UNESCO Universal Declaration on Cultural Diversity and the preamble of the 2005 Convention on the Protection and the Promotion of the Diversity of Cultural Expressions.

UNESCO's 1995 Our Creative Diversity report is generally seen as the starting point for the events and movement towards adoption of the actual 2005 Convention. The report was submitted by the World Commission on Culture and Development as a highlight in the activities of UNESCO's Decade for Culture and Development. In other words, while cultural diversity is a recurring principle in UNESCO's cultural heritage instruments, the work on the 2005 Convention emerged from a different perspective, namely that of culture and *development*. Indeed, the report reflects a new approach in this regard: from a main focus on preservation towards foregrounding cultural growth and strengthening creative chances.[1215] Openness and participation in cultural life are, for example, key words. Two functions of maintaining diverse cultures have been identified: their value as sources of inspiration for artists and other creators, and their role for development of better lives.[1216] A main conclusion of the report has been summarised as "cultural diversity [being] as important as biological diversity in enriching human life."[1217]

Before a Convention, UNESCO's first activity was the 2001 Universal Declaration on Cultural Diversity. In its preamble, the Declaration states that culture should be understood "as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs." This shows recognition of a less static and less 'European-oriented' understanding of culture, accepting a more anthropological view. As we shall see in Chapter 5, 'way of life' especially resonates with the Human Rights Committee's interpretation of Article 27 ICCPR and minorities' right to enjoy their own cultures.

The Declaration shows a broad understanding of cultural diversity, calling it as necessary for humankind as biodiversity is for nature, the common heritage of humanity and an inheritance for future generations.[1218] Furthermore, the Declaration pays significant attention to the human rights aspects of cultural diversity, especially cultural rights. Firstly, the inseparability of cultural diversity and human rights is emphasised, especially in the context of respect for human dignity. The rights of minorities and indigenous peoples, in particular, are highlighted. However, as a disclaimer, cultural diversity may not be called upon to infringe or limit human

[1214] Final Document Culture: A Form of Merchandise Like No Other?, CLT/CIC/BCI/CMM/DOC.FIN.E, June 1999, available via: http://unesdoc.unesco.org/images/0012/001228/122892Eo.pdf, p. 7. See also Obuljen, summarising the shared understanding as: "culture was not only a matter for the economy or an economic concept. It cannot be treated like any other merchandise; it should be subject to special treatment." Obuljen 2006, p. 26.
[1215] Obuljen 2006, p. 24; Our Creative Diversity, Report of the World Commission on Culture and Development 1995, from p. 232, Chapter 9 'Rethinking Cultural Policies'.
[1216] O'Keefe & Prott (eds) 2011, p. 162.
[1217] O'Keefe & Prott (eds) 2011, p. 162.
[1218] Article 1 – Cultural diversity: the common heritage of humanity:
"Culture takes diverse forms across time and space. This diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind. As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations."

rights.[1219] Secondly, the implementation of the cultural rights of Article 27 UDHR on minority rights and Articles 13 and 15 of the ICESCR, containing rights to education and to take part in cultural life, is considered indispensable in order for creative diversity to flourish.[1220] The Declaration further deems 'access' a central notion to guarantee effective cultural diversity, stressing amongst other things freedom of expression and media pluralism as essential components in this regard.[1221]

The Declaration also emphasises the connection between cultural heritage and cultural diversity. It recognises cultural heritage as an important source for creation, so in order to enable creativity in all its diversity, this heritage ought to be preserved and transmitted inter-generationally.[1222] So, here we have a first indication of the cultural heritage dimension of UNESCO's work on cultural diversity. Somewhat connected to this is the recognition of the unique character of cultural goods and services, which was one of the instigators of an instrument on cultural diversity issues in the first place. Since they function as 'vectors of identity, values and meaning', cultural goods and services would require different treatment from 'mere commodities or consumer goods'.[1223] Finally, the Declaration notes that there are imbalances at the global level in flows and exchange of cultural goods, which need to be addressed through international cooperation to ensure in an inclusive way that *all* countries establish cultural industries.[1224]

Objectives and definitions of the 2005 Cultural Diversity Convention

The Convention opens with a long list of preambular considerations, outlining the context and objectives of regulating the topic of diversity of cultural expressions. The preamble firstly details a number of key characteristics of cultural diversity. It states that cultural diversity is a defining characteristic of humanity, a common heritage of all mankind, essential for sustainable development, indispensable for peace and security and essential for the realisation of human rights and fundamental freedoms. Essentially, this seems to reflect a universalist approach in that it justifies protection of cultural diversity on these rather elevated and ambitious grounds, ultimately benefiting all mankind. Furthermore, the preamble stresses culture as an important element of development policies and eradication of poverty. Traditional knowledge, and in particular the knowledge systems of indigenous peoples, is singled out as a source of intangible and material wealth. The positive contribution of traditional knowledge to sustainable development is underlined, as well as the need for its adequate protection and promotion. Generally, the preamble stresses the need for measures to protect the diversity of cultural expressions, especially in circumstances where these are threatened with loss or serious harm. One could imagine that the cultural expressions of minorities and indigenous peoples especially fall within this category.

Cultural diversity is also linked to freedom of expression, cultural exchange, diversity in the media and pluralism of ideas in the preamble, especially emphasising traditional cultural

[1219] Article 4.
[1220] Article 5: "All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms."
[1221] Article 6.
[1222] Article 7.
[1223] Article 8.
[1224] Article 10.

expressions. Linguistic diversity and the role of education are highlighted for the protection and promotion of cultural diversity. The importance of the vitality of cultures, cultural interaction and creativity for the dynamic nature of cultural expressions is underlined. Indigenous peoples' and minorities' freedom to create, disseminate and distribute their TCEs, and have access to these, is highlighted. This would specifically benefit them for their own development. Intellectual property rights are emphasised for the sustainability of cultural creators. This signals the rather persistent economic and trade aspect of cultural diversity that pervades the Convention. In sum, the preamble reflects that (the protection of) cultural diversity is a complex and multi-faceted concept and principle that involves multiple legal frameworks. In this sense, it is similar to the topic of TCE protection.[1225]

Matching the long preamble, the Convention's objectives are equally extensive and multi-faceted.[1226] In short, the purposes of the Convention are:

- to protect and promote the diversity of cultural expressions;
- to create the conditions for cultures to flourish;
- to encourage dialogue among cultures;
- to foster interculturality;
- to promote respect for the diversity of cultural expressions and raise awareness of its value;
- to reaffirm the importance of the link between culture and development;
- to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;
- to reaffirm the sovereign rights of States with regard to the diversity of cultural expressions on their territory;
- to strengthen international cooperation and solidarity.

Firstly, the objective of the Convention is the protection and promotion of the *diversity of cultural expressions*, not of culture or cultural diversity in general.[1227] This is an attempt to narrow the scope of the Convention.[1228] Other objectives include creation of conditions for cultures to flourish and interact, recognising the living and dynamic nature of culture. This anthropological understanding of the concept of culture is in line with the development of the cultural heritage framework as a whole, as is also visible in, for example, the 2003 Intangible Cultural Heritage Convention. Intercultural dialogue and interaction, promotion of respect for the diversity of cultural expressions and raising awareness of its value are further objectives. Furthermore, the reaffirmation of the essential link between culture and development is an objective, as well as recognition of the specific nature of cultural activities, goods and services, i.e. as carriers of identity, values and meanings.

[1225] Neuwirth's commentary to the preamble is worth noting here, showing the complexity involved with the principle of cultural diversity. The gist of his statement is familiar from the perspective of TCE protection. Neuwirth states that the preamble: "[…] reflects the fragmented character of the institutional framework as well as the various international legal instruments governing the issue of cultural diversity only. This is reflected in the various references to the concepts of cultural heritage, intangible cultural heritage and traditional knowledge as well as intellectual property rights, which are of great significance for the objectives formulated in the Convention of Cultural Expressions." Neuwirth 2012, p. 52.
[1226] Article 1.
[1227] Article 1(a).
[1228] Neuwirth 2012, p. 53.

The Convention's guiding principles are equally extensive, although not all feature in the rest of the substantive text as such.[1229] Given the concerns that spurred the development of the Convention mentioned earlier, the explicit mention of indigenous peoples under the principle of equal dignity of and respect for all cultures is noteworthy.[1230] This is especially so as states tend to fear consequences for their sovereignty from indigenous peoples' rights from an international law perspective. However, indigenous rights are not included in the substantive measures and rights of the Convention, which can be seen as a 'weakness' of its effectiveness for these often-marginalised communities. Despite the Convention's inclusive guiding principles, its rights and measures seem both primarily State- and economics-oriented, as well as phrased in an encouraging rather than a strictly obligatory way.

What stands out in the Convention's definition of 'cultural diversity' is the move beyond 'static' cultural heritage and the emphasis on creation, production and dissemination.[1231] Again, this is in line with the general development of the cultural heritage framework as a whole. The definition of the term 'protection' also reflects this, by including preservation, safeguarding and *enhancement* of cultural diversity in its examples of protection measures.[1232] What further stands out is the absence in the definitions of the acknowledgement of the dual nature of activities, goods and services,[1233] whereas the preamble and the 2001 Universal Declaration do stress this. This dual nature has been considered to be a crucial aspect in cultural diversity discourse and literature.

Measures to protect and promote the diversity of cultural expressions

The Convention does not include obligatory measures,[1234] but merely suggestions that State Parties *may* adopt with the aim of furthering the diversity of cultural expressions.[1235] The measures for State Parties to promote and protect cultural expressions, specifically, are formulated even less stringently, encouraging states to 'endeavour' to take, for example, such promotion measures as creating in their territory an environment which encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions. Indigenous peoples and people belonging to minorities are

[1229] Article 2. They include: the principle of respect for human rights and fundamental freedoms (notable is the accompanying limitation, i.e. that "[n]o one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof."); the principle of sovereignty; the principle of equal dignity of and respect for all cultures; the principle of international solidarity and cooperation; the principle of the complementarity of economic and cultural aspects of development; the principle of sustainable development; the principle of equitable access; and the principle of openness and balance.

[1230] "The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples." But on the other hand, O'Keefe & Prott (eds) 2011, p. 164 observe: "The references in the Convention [to the rights of persons belonging to minorities and to indigenous peoples] fall a long way short of the declaration of principle in the Declaration."

[1231] Article 4(1).

[1232] Article 4(7).

[1233] Article 4(4).

[1234] See also Article 5. With the Convention dealing with cultural matters, the State Parties retain their sovereign right to formulate and implement their cultural policies, including measures to promote the diversity of cultural expressions and to strengthen international cooperation to accomplish the Convention's objectives. The Charter of the United Nations, international law principles and human rights instruments have to be taken into account in this regard.

[1235] Article 6(1). These may include: regulatory measures, measures aimed at furthering domestic cultural activities, providing public financial assistance, nurturing and supporting artists and others involved in the creation of cultural expressions, and measures aimed at media pluralism.

highlighted here as examples of groups warranting specific attention, but they are not awarded strong rights as such.[1236] State Parties may also determine that there are special circumstances where cultural expressions on their territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding. They may take all appropriate measures for this.[1237] One can imagine that minority and indigenous cultural expressions fall within this category, warranting extra consideration and safeguarding measures.[1238] The provision, however, does not specify which circumstances it alludes to, or what measures could be taken. This is left to the discretion of State Parties themselves.

Measures that State Parties shall undertake are related to education and awareness-raising. In this context, they must encourage and promote understanding of the importance of the diversity of cultural expressions.[1239] Measures that states must endeavour to undertake include the encouragement of creativity and strengthening production skills, by taking measures such as the establishment of educational, training and exchange programmes in the field of cultural industries.[1240] This emphasises the living nature of culture and the importance of furthering this for the diversity of cultural expressions.

The lack of obligatory measures and explicit rights, for example for indigenous peoples, in the context of cultural diversity, and the use of weak language such as 'endeavour' should not come as a surprise. It is connected to the objective of the Convention mentioned earlier, "to reaffirm the sovereign rights of States with regard to the diversity of cultural expressions on their territory". Issues of cultural rights and indigenous rights tend to be sensitive topics in international law-making vis-à-vis national sovereignty and politics.

The Convention's 'international' measures to further cultural diversity, among others by way of cooperation for development, collaborative arrangements and preferential treatment for developing countries, are mainly based on production, distribution and market considerations.[1241] These measures for cooperation with developing countries are also phrased in a more prescriptive fashion,[1242] in that states *shall* encourage the development of partnerships and facilitate cultural exchanges. The primarily commercial focus on economic exploitation has been criticised in the literature, especially for contradicting "the deeply held traditions of some communities."[1243] This resonates with indigenous peoples' protection interests regarding their TCEs, which range beyond economic ones, and the distinction made by Haight Farley between 'realist' and 'traditional' groups — whereas the former require protection to economically benefit from their folklore, the latter have other objectives, such as integrity and secrecy.[1244] It also resonates with the multidimensionality of TCEs and what this thesis has called (inevitable) legal fragmentation from a TCE perspective.

[1236] Article 7(1)(a).
[1237] Article 8(1) and (2).
[1238] Compare General Comment No. 21 on the right to take part in cultural life (Article 15(1)(a) ICESCR) of the CESCR, in which the Committee identifies minorities and indigenous peoples as communities requiring special protection, par. 32-33 and 36-37.
[1239] Article 10(a).
[1240] Article 10(c).
[1241] Articles 12-17.
[1242] Craufurd Smith 2007, p. 37.
[1243] O'Keefe & Prott (eds) 2011, p. 164.
[1244] Haight Farley 1997, p. 13–15.

Main principles of the 2005 Cultural Diversity Convention and TCEs

The central principle is, of course, that of cultural diversity. There are also broader principles visible, such as recognition of cultural contexts and living cultures as sources of culturally diverse expressions. Cultural expressions therefore not only warrant protection and safeguarding, but, importantly, also promotion. This reflects the shift in perspective from cultural heritage as a passive source to the living nature of cultural heritage and the role of diverse modes of artistic creation, production, dissemination, distribution and enjoyment for manifesting cultural diversity. Promotion measures include for States to endeavour to create in their territory an environment which encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions.[1245] Minorities and indigenous peoples are highlighted here, which is interesting from the perspective of cultural heritage law and TCE protection. Other than that, the Convention seems to mainly rely on an economic approach, especially in the context of developing countries. Intellectual property rights and measures such as exploitation and dissemination would contribute to the diversity of cultural expressions based on a sustainability approach. While indigenous peoples' protection interests for their TCEs are broader than merely economic, sustainability has actually come up for some communities as an argument for TCE protection. Finally, the universality principle is again present: the preamble stresses that cultural diversity 'forms a common heritage of humanity', the preservation and safeguarding of which 'benefits all'.

4.4 The shifts in cultural heritage law: protection theories and principles

As section 4.3 has shown, there is an elaborate international legal framework in place that deals with various cultural heritage aspects. What does this mean for indigenous heritage? To a certain extent, the main principles of cultural heritage protection that were identified in this chapter overlap with indigenous peoples' concerns and interests in protection of their TCEs, as distinguished in Chapter 2. In this sense, the cultural heritage protection theories and principles that have been identified can guide a multi-faceted approach to TCE protection from the perspective of indigenous peoples' protection interests. There are also principles that could cause tensions. In this section, cultural heritage theories and principles are therefore tested against the protection interests of indigenous peoples regarding their TCEs as distinguished in Chapter 2. The following theories and principles are analysed:

- the benefit of all mankind, i.e. the universal cultural heritage principle;
- identity construction, i.e. the identity principle;
- transmission to future generations, i.e. the inheritance principle;
- cultural context and living cultures, i.e. the principle of dynamic cultural heritage;
- the cultural diversity principle.

Most of these are also apparent in indigenous peoples' concerns with regard to their heritage, traditional knowledge and TCEs. In fact, the most recent additions to the international legal cultural heritage framework of UNESCO, such as intangible cultural heritage and the diversity of cultural expressions, explicitly recognise the interests and rights of indigenous peoples in their heritage, including traditional knowledge and expressions, either in the convention texts themselves or in the preliminary developments leading up to these texts.

[1245] Article 7(a).

Two things stand out. The first is that the protection interest of integrity, that is to safeguard their heritage from damage, offensive use or destruction, which is an often-mentioned concern in the context of indigenous peoples' TCEs, can be considered to permeate the principles and the cultural heritage law framework as a whole. Essentially, protecting the integrity of cultural heritage is a central cultural heritage consideration. It features in the rationales for protection of cultural property in situations of armed conflict,[1246] protection of both cultural heritage objects themselves and, for example, their original sites from illegal (archaeological) excavations[1247] and protection of world heritage sites.[1248] Intangible cultural heritage and cultural diversity efforts[1249] address integrity concerns regarding the source communities themselves, their cultures and their (intangible) cultural heritage in a more dynamic way, stressing the need for their vitality and sustainability. Further, the spirituality interest of indigenous peoples is taken together with their integrity interest for the following analysis, as the cultural heritage framework does not tend to focus on spiritual cultural heritage in a separate way. Reasons to protect spiritual heritage are, for example, intertwined with broader identity, universality or inheritance principles, or with the purpose of protecting its integrity in general.[1250]

The second point is that the protection interest in benefit-sharing is left out of the analysis below, as this is not a cultural heritage consideration. For this reason, one could conclude that the cultural heritage framework as such can already be deemed insufficient for all concerns that are raised by indigenous peoples in the context of TCE protection. These also include concerns regarding unauthorised third party use and commercial exploitation of their heritage without permission and interests in benefit-sharing following such use. This is not a rationale that cultural heritage theories tend to cover or cultural heritage instruments respond to.[1251] The exception here is the 2005 Cultural Diversity Convention. This Convention does focus to a large extent on exploitation, dissemination and distribution possibilities for cultural expressions as a means to contribute to cultural diversity, especially in the context of developing countries. It highlights intellectual property rights as important for the sustainability of creators. However, this approach of highlighting the economic value of cultural expressions has been criticised in the context of indigenous peoples, whose cultural expressions serve many other values, such as social values, as well.[1252] Furthermore, the Convention focuses on States as main agents bearing cultural distinction and rights. The protection of cultural diversity is just as, if not more, likely to be connected to minorities or indigenous peoples rather than occurring in an inter-state way. However, minorities and indigenous peoples are not awarded strong cultural rights as such in this Convention, which has sparked criticism of its trade protectionist tendencies.[1253]

[1246] The 1954 Convention.
[1247] The 1970 Illicit Trade Convention.
[1248] The 1972 World Heritage Convention.
[1249] The 2003 ICH Convention and the 2005 Cultural Diversity Convention.
[1250] See the first line of argument for cultural heritage protection in armed conflict that was identified in section 4.2.1: the protection of certain types of cultural heritage with a sacred or religious nature, such as temples and churches, which touches upon protection of cultural heritage for reasons of 'religious respect'.
[1251] On the other hand, protection of intangible cultural heritage modelled on the intellectual property system has also, for example, been called limited, as it would primarily focus on intangible cultural heritage's commercial exploitation and misuse, and would not be able to respond to its wider social and cultural context, preservation measures and support of continued practice and transmission to future generations. See the study of Blake 2002, p. 89–91.
[1252] Aylwin & Coombe 2006, p. 48–51; O'Keefe & Prott (eds) 2011, p. 164.
[1253] Craufurd Smith 2007, p. 54; Aylwin & Coombe 2006, p. 50–51.

Each analytical subsection is closed with a summarising table. Before the analysis of TCE protection from this foundational cultural heritage law perspective, the next subsection will first briefly assess the main recurring protection measures for cultural heritage that follow from the instruments assessed in section 4.3, and what these could contribute to TCE protection.

4.4.1 Cultural heritage measures and TCEs

The various cultural heritage instruments show multiple approaches and measures for the protection and safeguarding of cultural heritage. While each instrument has its own specific focus and tailored measures, there are a number of measures that recur and can be singled out. These are: safeguarding and respect as positive and negative measures; raising awareness in the form of emblems, lists and designations; and raising awareness in the form of education, information and knowledge. In this section, these will be assessed from a TCE perspective, before moving on to an analysis of TCE protection based on the foundational cultural heritage principles that can be distilled from the main cultural heritage developments and conventions of the legal international cultural heritage framework.

Safeguarding and respect – Positive and negative measures

The most common measures include those that ensure safeguarding and respect of cultural heritage. These can be subdivided into positive measures, i.e. actively undertaking action, and negative measures, which means refraining from certain activities. An example of positive measures is the safeguarding of cultural heritage through setting up national heritage services and institutions.[1254] For indigenous heritage, this could take the form of setting up *indigenous* heritage services, museums, archives and institutions which are specifically dedicated to indigenous heritage. This way, indigenous heritage can be safeguarded with communities' participation, and catering for their specific needs and concerns. An example is the Mukurtu initiative, which was briefly mentioned in Chapter 2. This 'grassroots' initiative applies a 'community-driven' approach to the management, preservation, digitisation, sharing and exchanging of their digital cultural heritage with the involvement of the indigenous communities concerned. In this sense, it is an empowerment approach to indigenous heritage practices.[1255]

Safeguarding indigenous heritage would also require 'promotion' of indigenous heritage through positive measures that create a favourable environment for the recognition of, respect for, and enhancement of their intangible cultural heritage in society,[1256] and the creation, production, dissemination and distribution of their cultural expressions.[1257] Examples could be setting up youth programmes, and perhaps even budgetary measures, that recognise and 'celebrate' indigenous heritage as a part of culturally diverse societies. Ultimately, actively involving younger generations through education and initiatives celebrating cultural heritage contributes to transmission of that heritage and preservation of the arts. Examples that were

[1254] See the 1964 Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property; the 1970 Illicit Trade Convention, and the 1972 World Heritage Convention.
[1255] See: http://www.mukurtu.org/about/.
[1256] Article 14(a) of the 2003 Intangible Cultural Heritage Convention. See generally on safeguarding measures for the promotion of intangible cultural heritage Article 13 of the Convention.
[1257] Article 7 of the 2005 Cultural Diversity Convention.

mentioned in Chapter 2 include the Indonesian Palito Nyalo ensemble[1258] and the Australian Bangarra Dance Theatre,[1259] which carry out such educational activities.

Negative measures follow the principle of respect,[1260] and include abstaining from impairing, damaging or wilfully destroying the cultural heritage in question. While this seems mainly focused on tangible or natural heritage, the principle can very well be used analogously for indigenous heritage. In this sense, one can imagine restrictive or assimilative policies or regulation of states with regard to cultural minorities and indigenous peoples. Incidentally, this would also be contrary to cultural rights such as Article 27 ICCPR on the rights of minorities.

Raising awareness I – Emblems, lists and designations

Cultural heritage measures often involve identification, inventories, lists and emblems.[1261] Such measures do exactly what they say: they identify, compile and designate valuable cultural heritage that ought to be safeguarded and respected. This would, however, not necessarily help protect or safeguard the actual underlying knowledge and cultural heritage from being damaged, as such. The same goes for TCEs: to inventory indigenous peoples' knowledge and cultural expressions for protection does not automatically prevent copies and (mis)use. Adding labels or Creative Commons-like communications to the public in such compilations might help: these could add information and specify their value and why certain use or access would compromise the heritage.

Still, a direct contribution from lists or inventories to the safeguarding of indigenous peoples' heritage as such is rather hard to imagine. These measures have been criticised in the context of intangible cultural heritage. Lists or inventories seem to be practices that draw on archaic, collector-like presumptions of saving threatened cultures by outsider recording. Living, dynamic cultures need more than being a 'number' on a list. Lists and inventory practices can help in identifying the problem areas that need addressing in the form of more proactive, facilitation measures. Being recorded in an inventory alone would not do that. Obviously, for secret indigenous material, this option of inventories is even more problematic. So, while inventories, lists and documentation may prove adequate safeguarding measures for certain types of cultural heritage, this is likely not the case for indigenous heritage and other *living* cultural heritage, and more would thus be required.

What is crucial in any case of designations, lists and inventories in the context of indigenous heritage is, as we have seen with regard to the 2003 Intangible Cultural Heritage Convention, participation of the communities concerned.[1262] And, importantly, this has to be meaningful and effective participation.[1263] Indigenous initiatives and heritage services should be encouraged. This type of capacity-building can assist in indigenous peoples' maintenance,

[1258] Jaszi 2009, p. 9.
[1259] According to the company profile on their website: http://bangarra.com.au/vision.
[1260] See Article 4 of the 1954 The Hague Convention and Article 56 of The Hague Rules.
[1261] Article 16 of the 1954 The Hague Convention; Article 5(b) of the 1970 Illicit Trade Convention; Articles 3, 4 and 11 of the 1972 World Heritage Convention; Articles 2(3), 11(b), 12, 16 and 17 of the 2003 Intangible Cultural Heritage Convention.
[1262] Article 11(b) and Article 15 of the 2003 Intangible Cultural Heritage Convention.
[1263] See point 3) of the 2002 Istanbul Declaration on Cultural Diversity: "The safeguarding and transmission of the intangible heritage is essentially based on the will and effective intervention of the actors involved in this heritage. In order to ensure the sustainability of this process, governments have a duty to take measures facilitating the **democratic participation of all stakeholders**."

development and safeguarding of their own cultural heritage. See for an example the Mukurtu initiative that was mentioned earlier. In other words, lists need to be acted on and serve a purpose, not just be an end in themselves.

Raising awareness II – Education, information and knowledge

Many of the instruments and developments that were described above refer to mutual understanding and respect for cultural heritage. Measures that are repeatedly suggested are training and educational measures to raise awareness among the public about the value and importance of cultural heritage, be it in the context of illicit trade, world heritage or cultural diversity.[1264] Although not included in the more 'hard core' obligations for States, but rather formulated in 'encouraging' terminology, these seem measures that could 'tackle' the issue of threats and dangers to cultural heritage at its root and beyond an 'enforcement approach'. For comparison, one can think, for example, of campaigns targeting holidaymakers that raise awareness about the illegalities of counterfeit products and products of endangered species.

Informing the public and raising awareness of damage to their heritage also seems crucial for indigenous peoples and many of their issues, including their lands, knowledge and cultural expressions. Ignorance and prejudice have the potential to harm indigenous heritage in many ways, whether it is natural, tangible or intangible cultural heritage. Strengthening appreciation and respect[1265] through education, information and vigilance,[1266] can contribute to the safeguarding of indigenous heritage in a preventive way. Education, information and knowledge of indigenous heritage, its living nature and the values that source communities attach to it can then be employed as strategic measures to battle ignorant or insensitive, and ultimately damaging or offensive, (mis)use of TCEs.

4.4.2 Protection for the benefit of all mankind vis-à-vis source communities

Issues of cultural heritage, such as preservation and safeguarding, are embedded in power and politics. In this sense, decisions on cultural heritage regulation and management touch upon the question of who gets to *control* the heritage in question and, in essence, assign meaning to it. This is often based on identity claims. Two strands of thinking are identified in this regard, namely cultural nationalism and cultural internationalism. In these instances, interests and claims to the heritage occur at a national and international level, respectively. These views are particularly visible in the nationalist 1970 Convention on the one hand, and in the internationalist 1954 The Hague Convention and 1972 World Heritage Convention on the other. In the context of indigenous heritage, of which TCEs are a part, another strand plays a role, namely cultural community-ism or cultural localism. This touches upon indigenous peoples' interests in *control*, such as via free, prior and informed consent regarding all matters that concern them, and self-determination.

Benefit of all mankind

The principle of preserving and protecting cultural heritage for the benefit of all mankind can be mainly derived from the 1954 The Hague Convention and the 1972 World Heritage Convention. The underlying theory here holds that cultural heritage should be protected due

[1264] Article 10 of the 1970 Convention; Article 27 of the 1972 World Heritage Convention; Article 10 of the 2005 Cultural Diversity Convention.
[1265] The terminology used in Article 27 of the 1972 World Heritage Convention.
[1266] The terminology used in Article 10 of the 1970 Illicit Trade Convention.

to its universal value for all peoples and societies of the world. While the initiative of the 1972 World Heritage Convention and the preservation of valuable world heritage is of course commendable, the question arises of how indigenous peoples' interests in their heritage, so often connected to their lands, are taken into account in the context of 'universal' heritage. In fact, the Convention could have certain 'adverse affects'.[1267] It has been challenged in an indigenous rights context due to the lack of both a procedural safeguard for indigenous peoples' participation in the nomination and management of world heritage, and indigenous peoples' free, prior and informed consent in this process.[1268] Participation is a key notion in order to balance the interests at stake. *De facto* dispossession of indigenous peoples' heritage for preservation reasons in the interest of all mankind has to be prevented. Also, for the 2003 Intangible Cultural Heritage Convention, Blake already noted in her preliminary study of 2002 that including a universality statement in the yet-to-be drafted Convention would require a balance "by reference to the priority of the cultural and other interests of the holders."[1269] The 2003 Intangible Cultural Heritage Convention does refer in many places to the centrality of the communities of origin, but includes a universality principle as well.

When applying the theory of universality of cultural heritage to TCEs, there seem to be some similarities with the interest of all in a common public domain of intangibles. Indeed, this theory could pose a danger of indigenous peoples' knowledge and TCEs being considered in the public domain, overriding indigenous peoples' say and control over their use and exploitation.[1270] There is, however, a conceptual hurdle between the notion of 'universal heritage of humanity' and the specific nature of much intangible cultural heritage. Such heritage often has strong local ties to the exercise, use, production and transmission of this particular cultural heritage. Furthermore, heritage often plays a role primarily in the identity construction of these specific local communities.[1271] So, local communities, including indigenous peoples, have been critical of the notion of 'common heritage of all mankind', especially as this is used elsewhere in international law in the context of economic exploitation of "common space areas". It has been argued that using this notion in the context of heritage could lead to "further appropriation or 'colonization' of their heritage."[1272]

Of course, it also ultimately benefits all mankind when indigenous peoples' heritage is preserved through the protection of TCEs, and in this sense universality is a strong argument to raise awareness and bring about safeguarding obligations for states.[1273] However, the prime beneficiaries of this preservation should be indigenous peoples themselves, especially considering the often living and dynamic nature of their heritage. Rather than taking the universal interest of all mankind as a starting point, this would require input and participation from indigenous peoples and safeguarding measures specifically tailored to their needs and interests, especially their interest in free, prior and informed consent. As Blake stresses, use of the notion of universal heritage warrants caution in the context of intangible cultural heritage, in particular traditional knowledge.[1274] The 2003 Intangible Cultural Heritage Convention seems to provide for certain starting points in this regard with its references to the importance

[1267] See the examples noted by Meyer 1976, p. 63.
[1268] Expert Mechanism On The Rights Of Indigenous Peoples 2015a, p. 11.
[1269] Blake 2002, p. 46.
[1270] Blake 2002, p. 75.
[1271] Blake 2000, p. 64; Blake 2002, p. 12.
[1272] Blake 2002, p. 13. See further on 'universal heritage' and cultural heritage as the 'common heritage of mankind': Blake 2000, p. 69–72.
[1273] Blake 2002, p. 75.
[1274] Blake 2002, p. 12–13, 75. On p. 13 she lists the benefits of a universalist approach to intangible cultural heritage.

of source communities, their participation and recognition of the crucial element of their vitality for the safeguarding of intangible cultural heritage.[1275] In sum, the universality principle should not be a principle that overrides other interests.

Indigenous peoples' TCE protection interests → *Cultural heritage theories and principles* ↓	***Free, prior, informed consent***
The universality principle	- The benefit of all mankind versus participation and cultural self-determination. - Source communities should be central. - National claims and the universal interest should be subordinate notions.

Table 9 A summary of TCE protection from the perspective of the universality principle.

4.4.3 Roles in identity construction, cultural contexts and living cultures

As identified in Chapter 2, indigenous peoples' protection interests regarding their TCEs include protecting the integrity and dignity of their cultures and cultural expressions from derogatory use. This interest often has a spiritual side to it. These are interests that are likely to resonate primarily, but not only, with what Haight Farley has called the 'traditional group' of indigenous peoples. This group wants to control its heritage to prevent harm from unauthorised use, and restrict, condition or prevent dissemination as such.[1276] In a cultural heritage context, this could be translated into an interest of indigenous communities in safeguarding their heritage, including TCEs, to protect the integrity and dignity of their cultures and cultural expressions from damage, ensure their preservation and guarantee transmission to future generations. The cultural heritage principles and theories that resonate with these protection interests are the role of cultural heritage in identity construction and the value attached to cultural heritage within specific cultural contexts, as well as recognition of its living nature, and thus its continuing role and value as a dynamic inheritance for the source communities concerned.

Identity construction

The theory that cultural heritage plays an important role in the identity formation of nations and communities is one that certainly touches upon concerns that are raised in the TCE debate as well. Claims of indigenous peoples for the protection of their heritage, including their TCEs, often relate to this specific and fundamental role of their heritage. A related theory is the protection of cultural heritage because it is a basic element of civilisation and national culture, such as is recognised in the 1970 UNESCO Convention. Of course, this Convention is concerned with material cultural heritage objects, while TCEs have an intangible nature, but the identity principle is relevant nonetheless. In essence, the principle is reflected in indigenous peoples' very arguments for protecting TCEs, because they are claimed to be basic elements of their identities and within their communities. Protection of TCEs that is informed by this argument would serve indigenous peoples' interests in protecting the integrity and dignity of their cultures and cultural expressions.

[1275] See Article 15, which states: "Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management."
[1276] Haight Farley 1997, p. 13–15.

Another argument that could be considered in this regard is Merryman's 'retentionism'.[1277] According to Merryman, national culturalism – which we can understand as special interests of nations in their cultural heritage, suggesting a national character of the heritage – is not sufficient justification for all forms of retention, for example through export prohibition measures by the state of origin. He criticises such protection measures, calling them 'retentionist' or hoarding of material that should be freely disseminated. He objects to cultural nationalism, and consequently to the protection of cultural heritage because it would have a specific national character. However, it is possible to distinguish between two circumstances. On the one hand, there are cultural heritage items of which the source cultures that determine their significance are 'still alive'. This means that such cultures are still practised and dynamically valued and the cultural heritage still plays an active role in society, for example religiously or ceremonially. And on the other hand, there is the case where cultural heritage is seen as something from the past to be treasured, but where the underlying culture is no longer 'active'. Here, the cultural heritage is valued for its role of relic and by way of inheritance. In the latter case, cultural nationalist retention would be objectionable, according to Merryman.[1278]

In the context of Merryman's argument, retention or hoarding of material that should be freely disseminated concerns material objects and measures and claims of nation states. However, we can still apply it to indigenous peoples' intangible TCEs, but then in the context of 'hoarding' of intangible material, i.e. TCEs, that should – arguably – be 'freely disseminated in the public domain'. Following Merryman's reasoning, the protection of TCEs would not comprise objectionable 'retention', if the expressions are part of indigenous cultures that are still alive, practised and dynamically valued, and where the TCEs still play an active role in indigenous society. According to central protection arguments of indigenous peoples, this would almost always be the case.

Cultural context and living culture

The principle that the true value of cultural heritage lies in its context and traditional setting, which follows from the 1970 Illicit Trade Convention, also touches upon integrity and dignity concerns. Although this Convention is concerned with safeguarding material objects, this principle relates to indigenous peoples' protection interests regarding their TCEs as well. Indigenous peoples often stress that TCEs lose their meaning or value in a harmful way when leaving traditional contexts through third party use. In this sense, indigenous peoples object to and call for protection against third party use that, arguably, does not take specific circumstances or customary rules regarding the material into account, which would harm its original meaning. This is even more so for TCEs that have significant spiritual value. A similar concern can also be read in the preamble of the 1995 UNIDROIT Convention which, although related to tangible material, expresses deep concern for the irreparable damage to the cultural heritage of tribal and indigenous communities resulting from illicit trade in cultural objects.

In a way, the foregoing also relates to the theory behind cultural heritage protection – and specifically return and restitution – that the absence of cultural heritage morally affects or

[1277] As noted by Forrest in the context of Merryman's concept of cultural nationalism that was explained above. Forrest 2010, p. 157–158.
[1278] Forrest 2010, p. 157–158.

causes *anguish* or *harm* to the source community.[1279] Indigenous peoples have for example objected to TCEs 'leaving' their source communities through third party use, claiming that this harms the dignity of their cultures and their survival as distinctive groups. The foregoing is also clearly related to the principle of respect for the cultural heritage of other nations, or in this case of other indigenous communities, which we have seen come back multiple times in the framework above. Respect for the traditional setting, the meaning and the role that TCEs play in indigenous communities is central in many concerns of indigenous peoples in protection of their cultural dignity. Furthermore, safeguarding the cultural context itself is fundamental for safeguarding cultural heritage. This implies the need for promotion of TCEs.

Indigenous peoples' TCE protection interests → *Cultural heritage theories and principles* ↓	***Recognition***	***Integrity, dignity and spirituality (incl. secrecy)***	***Continuation, preservation***
The identity principle	TCEs should be protected to recognise the importance of TCEs for identity formation.	TCEs should be protected to safeguard the identity and dignity of source communities.	TCEs should be protected to ensure their continued role in identity construction.
Cultural contexts and living cultures (dynamic cultural heritage principle)	TCEs should be protected to recognise their dynamic nature and cultural contexts.	The cultural contexts of TCEs should be protected.	The maintenance of the cultural context and living culture underlying TCEs should be preserved

Table 10 A summary of TCE protection from the perspective of the identity and dynamic cultural heritage principles.

4.4.4 Preserving cultural diversity, inheritances, cultural contexts and living cultures

The shifts that are visible in the cultural heritage law framework can also be seen as, and have indeed been instigated by, calls from developing countries and indigenous peoples for recognition of their rights to develop and manage their heritage.[1280] Whereas the international legal cultural heritage framework has traditionally concerned primarily material heritage, tangible objects and national and international interests,[1281] scopes and stakeholders have broadened and new voices have been made heard. These shifts have occurred in particular in the context of intangible cultural heritage and the diversity of cultural expressions, including attention for the living nature of (intangible) cultural heritage, its dynamic development and the importance of vitality of source communities. The latter also resonates with the interests that indigenous peoples tend to have in continuation and preservation of their traditional knowledge and cultural expressions, and transmission to future generations. The cultural heritage principles and theories that are of relevance for indigenous peoples' protection interests of this category, are: the cultural diversity principle, transmission to future generations, i.e. the inheritance principle, and cultural context and living culture, i.e. the principle of dynamic cultural heritage.

[1279] Veres 2014, p. 96; Plea of Director-General M'Bow of UNESCO, integrally in: Askerud & Clément 1997, p. 48.
[1280] In Chapter 5, the normative basis for indigenous peoples' rights with regard to this aspect of TCE protection will be explored, see for example Article 31 UNDRIP.
[1281] See the 1954 The Hague Convention, the 1970 Illicit Trade Convention and the 1972 World Heritage Convention, respectively.

Cultural diversity

According to this theory, the heritage of all the various cultures contribute to the culture of the world and protection of this heritage to maintain cultural diversity is therefore justified. Concerns of indigenous peoples and minorities and their distinctive cultures in mainstream society and in the face of globalisation were some of the central issues brought up prior to the 2005 Cultural Diversity Convention.[1282] In fact, this Convention recognises traditional knowledge and traditional cultural expressions in several places for their contribution to cultural diversity.[1283]

Informed by the cultural diversity principle, an argument for TCE protection would be that it would be justifiable to protect TCEs in order to prevent loss through homogenisation of cultures as a consequence of globalisation. This way, cultural diversity could be maintained. Concerns are often expressed about the risks that indigenous peoples face from their cultural heritage, including their TCEs, being overrun and appropriated in a globalised world. This is confirmed by the preamble to the 2005 Cultural Diversity Convention, which recognises "the need to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where cultural expressions may be threatened by the possibility of extinction or serious impairment."

Indigenous interests that would be addressed by the protection of TCEs from this cultural diversity perspective include recognition of and respect for indigenous peoples' rights to their distinctive cultural expressions in the light of globalisation. Furthermore, Article 4 of UNESCO's 2001 Universal Declaration on Cultural Diversity explicitly recognises indigenous peoples' rights in the context of defending cultural diversity as an ethical imperative that is inseparable from respect for human dignity.[1284] TCE protection that is informed by the cultural diversity principle recognises indigenous peoples' (fundamental) rights, the important role that TCEs play for indigenous peoples' identity and justifies their claims for maintaining their TCEs' dignity and integrity, again in the light of threats from globalisation. In the main, applying the rationales of cultural diversity to TCE protection and promotion would ensure indigenous peoples' specific interests in recognition of their rights, and continuation and practice of their traditions.

Transmission to future generations

Cultural heritage as an inheritance for future generations is a central theory and principle of cultural heritage law as a whole. Because cultural heritage constitutes a valuable inheritance, it requires protection and safeguarding. However, although this seems an instinctive

[1282] O'Keefe & Prott (eds) 2011, p. 162.
[1283] For example, in recital 8 which recognises "the importance of traditional knowledge as a source of intangible material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion."
[1284] "The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope." Point 14 of the Main lines of an action plan for the implementation of the UNESCO Declaration on Cultural Diversity therefore requires respect and protection of traditional knowledge of indigenous peoples, and recognition of the contribution of such knowledge: "Respecting and protecting traditional knowledge, in particular that of indigenous peoples; recognizing the contribution of traditional knowledge, particularly with regard to environmental protection and the management of natural resources, and fostering synergies between modern science and local knowledge."

understanding,[1285] to view the inheritance principles as a justification for the preservation or safeguarding of cultural heritage as a valuable resource from the *past* obscures what is really at stake. This is not only the case in the context of indigenous peoples, but also in the protection objectives of safeguarding intangible cultural heritage and cultural diversity generally. Instead, dynamism, vitality and sustainability of traditions and communities are key notions in this context.

So, on the one hand, the inheritance theory of cultural heritage is one that very clearly relates to one of indigenous peoples' main concerns, namely the transmission of their heritage, knowledge and TCEs to future generations. But on the other hand, recognition of the interests of source communities in the vitality of their cultures is crucial. This requires recognition of and respect for the living nature of their cultures, which indigenous peoples often vigorously emphasise, and an approach beyond static understandings of 'preservation'. An example of new themes and approaches to intangible cultural heritage management is mentioned by Alivizatou on the basis of her fieldwork in the National Museum of New Zealand Te Papa Tongarewa and the National Museum of the American Indian. She found that in their practices intangible cultural heritage extends "beyond ideas of preservation, inventories and other safeguarding measures. What seems to be of importance is creative engagement with the past in a present; a past that is manifested in cultural practices and revived traditions that reflect contemporary identities."[1286] These are notions that are also likely to play an important role in any TCE protection approach, which should go beyond static understandings and operate at the level of the contemporary roles and functions of TCEs and according to their source communities' present needs.

A condition is therefore that transmission of TCEs to future generations has to be understood in an *active* way, rather than viewed in a static way. The 2003 Intangible Cultural Heritage Convention and the 2005 Cultural Diversity Convention provide for starting points in this regard, at least at the level of principles. Both conventions have marked a shift in cultural heritage thinking by centralising the value attached to cultural heritage by the *relevant communities* and emphasising the vitality of these source communities as a prerequisite for safeguarding intangible cultural heritage and maintaining cultural diversity. An approach of active promotion of the vitality and continuation of cultural practices with a strong focus on intangible cultural heritage as a "living process"[1287] would be more suitable for guiding TCE protection than static inventories.[1288] The focus is then on bringing practices of the past into the present, drawing on notions of "erasure, impermanence and renewal."[1289]

Cultural context and living culture

The theory that the maintenance and safeguarding of cultural contexts and living cultures plays a role in cultural heritage preservation, and vice versa, has come up in the context of intangible cultural heritage especially. This theory validates cultural heritage protection and taking positive measures to safeguard the context of the cultural heritage, because the context is what ultimately determines the production and the value of cultural heritage. This means

[1285] Blake 2000, p. 69.
[1286] Alivizatou 2012, p. 18.
[1287] Alivizatou 2012, p. 18–19: "The challenge for UNESCO will be to engage in new ways of thinking and working around intangible heritage as a living process that is not comprised of forgotten or abandoned practices but reflective of contemporary complex and changing identities."
[1288] Kurin 2004, p. 72, Alivizatou 2012, p. 18.
[1289] See also the explanation of Alivizatou of the understandings of 'preservation' and 'heritage' in contemporary heritage work in New Zealand and the United States, Alivizatou 2012, p. 18.

that the cultural communities themselves are central and need safeguarding *together* with the intangible traditions or material manifestations of the cultures they create and maintain. In this sense, recognising and centralising the relevant communities is essential.

The cultural context and living culture principle that grounds cultural heritage protection in the context of intangible cultural heritage and cultural diversity thus represents the necessity of 'safeguarding' the source communities themselves. Consequently, it is a particularly important principle for TCE protection. Indigenous peoples have raised the ability to continue, practise and transmit their heritage, knowledge and TCEs to future generations as central concerns. Protecting, preserving and safeguarding the contexts of TCEs recognises that TCEs are part of a living culture. This could serve the objective of preventing the loss of indigenous heritage, traditional knowledge and TCEs. As Blake has observed with regard to traditional knowledge in the context of drafting a convention on intangible cultural heritage – the later 2003 ICH Convention: "If indigenous and local societies are to continue to create and develop their knowledge, they themselves and their way of life must be sustained, over and above being simply documented and recorded."[1290] The same applies to TCEs. Clearly, this moves beyond cultural heritage law's static tendencies and has a strong human rights link as well. Real and effective enjoyment of their human rights enables not only the development and maintenance of indigenous peoples' heritage and TCEs, but also their expression and underlying ways of life. The human rights dimension of TCE protection will be analysed in Chapter 5.

Indigenous peoples' TCE protection interests → *Cultural heritage theories and principles* ↓	***Recognition***	***Integrity, dignity and spirituality (incl. secrecy)***	***Continuation, preservation***
The cultural diversity principle	TCEs should be protected in recognition of their cultural distinctiveness.	TCEs should be protected to safeguard their cultural distinctiveness.	TCEs should be protected to maintain their cultural distinctiveness.
The inheritance principle	TCEs should be protected in recognition of their function as inheritances.	TCEs should be protected to safeguard them as inheritances.	TCEs should be protected to maintain them as inheritances.
Cultural contexts and living cultures (dynamic cultural heritage principle)	The importance of cultural contexts for TCEs should be recognised.	The cultural contexts of TCEs should be protected.	The maintenance of cultural contexts and living cultures behind TCEs should be preserved

Table 11 A summary of TCE protection from the perspective of the cultural diversity, inheritance and dynamic cultural heritage principles.

4.4.5 A cultural heritage law analysis of TCE protection

The various cultural heritage instruments cover specific areas and aspects of cultural heritage protection and have been designed against the backdrop of specific contextual and societal changes and developments. Most of these have not traditionally taken indigenous peoples' heritage and specific situations into account. Cultural heritage can become a very politicised topic when it is seen as strongly tied to national identity and symbolism. Therefore, it is not strange that the cultural heritage of indigenous peoples – communities that often make up marginalised groups within mainstream societies – can face pressure under the general

[1290] Blake 2002, p. 49.

cultural heritage framework. Originally, this framework tended to be either predominantly focused on national (identity) interests in cultural heritage or as showing a universality principle behind cultural heritage protection, invoking the interest of all humanity in the safeguarding of cultural heritage as a reason and justification for protection. The specific interests of distinct (minority) groups can of course face pressure from such national and international interests.

However, the most recent additions to the cultural heritage law framework — intangible cultural heritage and cultural diversity — indicate a divergence from the centralisation of national and universal interests in cultural heritage protection. The source communities, holders and producers, as well as the contexts of the cultural heritage, are specifically recognised and acknowledged here for effective safeguarding. The preamble to the 2003 Intangible Cultural Heritage Convention even explicitly recognises the important role of indigenous communities in the production, safeguarding, maintenance and recreation of the intangible cultural heritage, thereby contributing to furthering cultural diversity and human creativity.[1291]

In summary, when taking TCE protection arguments and interests as a starting point for analysis it becomes apparent that a cultural heritage perspective of TCE protection comes with tensions *and* opportunities. Cultural heritage law's developments and shifts can guide TCE protection in that (at least in theory) its scope and rationales have become increasingly inclusive. 'Classic' notions of safeguarding and respect for cultural heritage, the inheritance principle and the integrity and dignity of cultural heritage are complemented by the principle of dynamic cultural heritage, the cultural diversity principle and specific recognition of source communities. These provide more common ground with TCE concerns than previous static conceptions of cultural heritage. The main difficulties include the rather prevalent universality principle, competing national and international interests and the effectiveness of actual protection measures, such as inventories and lists. Participatory and 'grassroots' preservation initiatives seem particularly promising for a more democratic and inclusive approach.

4.5 Conclusion: from static cultural heritage law to inclusiveness

Cultural heritage law is an example of a framework that has seen a shift over time, moving beyond static, mainstream and existing views to include other, non-mainstream voices, values and concerns. This is one of the central findings of the description and analysis of cultural heritage law as a perspective for the study of TCE protection. It is precisely because of cultural heritage law's realignment that concerns of indigenous peoples can now, to a certain extent, be observed in cultural heritage law theories and principles, in addition to the general principles of safeguarding inheritances and identity construction that were already present.

The development visible in both the understanding of the concept of cultural heritage protection and the international cultural heritage law framework has arisen from specific contexts, threats and concerns. At a later stage, in particular, policy developments start to address concerns that either come directly from, or are directly relevant for, indigenous peoples with regard to their cultural heritage, traditional knowledge and TCEs. The exercise of studying TCE protection from a cultural heritage perspective is therefore a worthwhile one, because it can guide the development of rationales and directions that an approach could take

[1291] However, the 2003 Convention also reflects the universality principle. Paragraph 5 of the preamble reads: '**Being aware** of the universal will and the common concern to safeguard the intangible cultural heritage of humanity.'

to formulate TCE protection that is responsive and inclusive with regard to protection interests in this specific context.

Unlike the difficulties associated with copyright law as described in the previous chapter, technical issues such as the collective nature of cultural heritage and the duration of protection are absent when assessing TCE protection from a foundational, cultural heritage perspective. Cultural heritage, as characterised by symbolism and inheritance, is inherently collective and safeguarding by definition has a character of longevity. Instead, central issues concern power, agency and, essentially, the assigning of meaning to the heritage in question. This is particularly visible in the context of national claims to cultural heritage and the universality principle, which could lead to indigenous interests being caught in the middle.

Cross-overs with copyright law and human rights law are visible in the context of TCEs and cultural heritage, especially regarding intangible cultural heritage and cultural diversity issues. The latter has, for example, been referred to as inseparable from respect for human dignity and as implying a commitment to human rights and fundamental freedoms.[1292] This confirms the fragmentation of the legal framework that is relevant for TCEs. As we have seen, the cultural heritage framework is not a 'complete' one for TCE protection, because the economic side that could serve indigenous peoples' benefit-sharing interests is absent. Moreover, as has already been noted, copyright law also comprises only one, specific perspective of indigenous peoples' (intangible) cultural heritage concerns. In other words, both the copyright and cultural heritage law frameworks have a particular focus. In the next chapter, we will see yet another perspective of indigenous peoples' heritage and TCEs: human rights law.

In conclusion, the designation, safeguarding and management of cultural heritage touches upon aspects of self-determination. Participation of the source communities in question is consequently required. Both self-determination and participation are also important principles in human rights law. They are scrutinised in more depth in the next chapter. Indigenous peoples' specific interests in their *living* cultural heritage should be recognised. To this end, safeguarding should entail both preservation, with an eye for the sustainability of the heritage in question, and promotion, ensuring the continued development and transmission of cultural heritage. Central principles that summarise the foregoing are dignity and identity of the source communities, respect for the specific nature of the heritage in question and democratisation of policies and procedures regarding this heritage.

[1292] Article 4 of UNESCO's 2001 Universal Declaration on Cultural Diversity.

CHAPTER 5
HUMAN RIGHTS LAW AND TRADITIONAL CULTURAL EXPRESSIONS

5.1 Human rights law and TCEs

The third and final legal framework that will be analysed in the context of TCE protection is human rights law. It has so far become clear in this thesis that TCE concerns comprise more than third party copies and use without permission and remuneration. They also include moral considerations and heritage issues. This chapter explores the issue of TCE protection from a cultural and indigenous rights perspective. These specific sets of human rights are worth considering in order to form a fundamental normative basis for the current discussions on TCE protection.

The first section considers the backdrop for the question: How can we conceive of TCE protection as a cultural and indigenous rights issue? It explains the context of human rights law and TCEs. This includes the emergence of TCE protection in the sphere of human rights law and the relationship between the two topics. The section also explains the focus on cultural and indigenous rights in the rest of the chapter and describes the human rights obligations to 'respect, protect and fulfil'. Together, this introductory section positions TCE protection in a human rights context and as a human rights matter.

In the second section, the international human rights framework and the concepts of cultural and indigenous rights are introduced. The perception of the adjectives 'cultural' and 'indigenous' determines which rights are included and how these rights are understood. Another associated issue that will be briefly considered is group rights. Such rights – and difficulties – tend to be a recurring issue in cultural and indigenous rights discourse. Developments and interpretations in this area can be extended to guide discussions on (effective) TCE protection, where collectiveness is also one of the main difficulties.

The third section explores the cultural and indigenous rights of general and specific human rights instruments. For this thesis, a functional approach is applied to identify and highlight the following cultural and indigenous rights: self-determination; non-discrimination; freedom of expression; property and land rights; participation rights; minority rights; and rights related to cultural integrity and dignity. These rights are scrutinised to identify their underlying principles in order to analyse TCE protection from a foundational human rights perspective. From the analysis of these rights, it is possible to deduce four main principles that capture the essence of indigenous peoples' (cultural) human rights struggles: self-determination, non-discrimination, participation and dignity.

The fourth section of the chapter assesses TCE protection from this principle-based perspective. The four principles identified are used as a guide to scrutinise indigenous peoples' interests in TCE protection from a human rights perspective. The final section concludes that TCE protection has a clear basis in cultural and indigenous rights and that the legal framework of human rights law is essential to guide and shape this protection.

5.1.1 The context of human rights and TCEs

To start off the contextual discussion of human rights and TCEs, it should first be noted that there is a certain level of overlap and interaction between human rights and intellectual property law, spurred precisely by attention for TCEs and indigenous peoples' struggles.

Issues that arise from the mutual relevance and connections between the two areas have received increasing scrutiny on the international level.[1293] Developments and discussions regarding indigenous peoples' knowledge are of course particularly relevant for this thesis. Discussions on this topic are considered to have been prime instigators for enquiries into the relationship between human rights and intellectual property.[1294] This discourse has involved the human rights framework in the matter of indigenous peoples' traditional knowledge, TCEs and intellectual property, and vice versa.

Traditionally, the areas of intellectual property and human rights law have dealt with their specific topics and objectives in rather separate ways. This separation seems to be mainly determined by the particular contexts and circumstances of the topics with which each field has been concerned. For human rights law, for example, the period after the Second World War was characterised by the laying down of a firm system of legal norms for the protection of fundamental rights, including monitoring bodies. This has become the multi-layered system of rights, including civil and political rights and economic, social and cultural rights, that is in place today.[1295] Austin and Helfer note that the rights of the category of economic, social and cultural rights – including creators' rights – "were the least well developed and the least prescriptive."[1296] However, whereas the human rights system has previously been characterised as consisting of several 'generations' of rights, it has increasingly been stressed that the various rights are in fact equal and indivisible.[1297]

Intellectual property developments on the international level after the Second World War were concerned with setting up an international trade environment.[1298] The nineteenth century had seen a development from bilateral to multilateral international intellectual property treaties on the international level, with the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic works of 1886 at the forefront.[1299] In the twentieth century, the numbers of international intellectual property regimes, associated bodies and international organisations increased. WIPO was established in 1967 as one of the main actors.[1300] After the Second World War, developing countries became parties to the Paris and Berne Conventions,[1301] international activity regarding international intellectual property saw intellectual property law's subject matter and

[1293] See generally Torremans 2008, p. xxv: "(…) over the last couple of years these two disciplines had to learn to live together." And Chapter 1 in this volume, D. Gervais, 'Intellectual Property and Human Rights: Learning to Live Together'.
[1294] Helfer & Austin 2011, p. 34 and from p. 48.
[1295] The system as a whole, or the Bill of Human Rights, consists of the Universal Declaration of Human Rights of 1948 (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both of 1966.
[1296] Helfer & Austin 2011, p. 33.
[1297] This viewpoint is established in Article 5 of the 1993 Vienna Declaration: *"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."* Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna, 25 June 1993.
[1298] Helfer & Austin 2011, p. 33.
[1299] Drahos 1999, p. 353.
[1300] Drahos 1999, p. 353–354.
[1301] Drahos 1999, p. 354.

rights expand,[1302] and a connection was sought and established between intellectual property and trade.[1303]

So, in both areas work was mainly carried out on their own specific issues, without the legal spheres viewing each other as being of relevance, either negatively as a threat, or positively as providing opportunities.[1304] The main players concerned with the development of each field did not traditionally 'cross boundaries'.[1305] However, this changed due to increasing attention for indigenous peoples' rights, which were previously largely neglected.[1306] Arguably, the developments regarding indigenous rights contributed to indicating where intellectual property law would be normatively lacking from a human rights point of view as a result.[1307]

Consequently, UN human rights institutions have tried to address the gap between intellectual property protection and unprotected indigenous traditional knowledge and TCEs. Such attempts include enacting an indigenous peoples' rights instrument – the later United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) – and developing Principles and Guidelines for the Protection of the Heritage of Indigenous People.[1308] However, both documents seemed to doubt the actual chances of an intellectual property protection approach succeeding as a solution to address indigenous peoples' rights to their traditional knowledge. This follows for example from issues of scope of the indigenous heritage rights presented vis-à-vis intellectual property.[1309] In the same vein, Helfer has noted that one of the effects of considering indigenous culture from a human rights perspective is that "intellectual property rules are seen as one of the problems facing indigenous communities and – only perhaps – as part of a solution to those problems."[1310] A similar conclusion can also be drawn from the findings in Chapter 3 on copyright law. The perceived fragmentation of the legal framework concerned with TCEs and the recurrent thought that protection of indigenous peoples' TCEs seems to involve intellectual property-related concerns and 'something more' only further confirms this perspective.

After signalling an overlapping space, developments with regard to indigenous rights on the one hand and indigenous knowledge and cultural expressions on the other still largely went their own respective ways. In a human rights context, developments at the UN level continued with the establishment of the Working Group on Indigenous Populations in 1982, the United Nations Permanent Forum on Indigenous Issues (UNPFII) in 2000, appointment of the first UN Special Rapporteur on Indigenous Rights in 2001 and adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007. The last of these, however, includes a specific provision on indigenous intellectual property issues.[1311] In an intellectual property context, developments at the WIPO level included establishment of an Intergovernmental Committee in 2000 concerned with the topic of traditional knowledge, genetic resources and traditional cultural expressions. This body was intended to work towards an international instrument in this specific forum.

[1302] Helfer & Austin 2011, p. 33. For example via periodic revisions to the Paris, Berne and other conventions.
[1303] Helfer & Austin 2011, p. 33.
[1304] Helfer & Austin 2011, p. 34; Helfer 2003, p. 51.
[1305] Helfer & Austin 2011, p. 34.
[1306] Helfer 2003, p. 51–52.
[1307] Helfer 2003, p. 52.
[1308] See Daes 1995, p. 9-15.
[1309] Helfer 2003, p. 54.
[1310] Helfer 2003, p. 54.
[1311] See Article 31 UNDRIP.

However, both areas seem to increasingly turn to each other's concepts and experts. At the WIPO level, for example, concerns and claims that are raised at the Intergovernmental Committee's Indigenous panel seem to reflect human rights issues and concepts beyond intellectual property-related concerns as well. These also include concerns that are related to recognition of indigenous peoples' rights, dignity and self-determination. Survival and the ability of continued practice are also stressed.[1312] Furthermore, experts such as the (former) UN Special Rapporteur on the rights of indigenous peoples, James Anaya, have been invited to speak at WIPO's Indigenous Panel sessions on topics such as indigenous peoples' rights to genetic resources and traditional knowledge.[1313] And WIPO itself has acknowledged in its Draft Gap Analysis with regard to the protection of TCEs of 2008 that cultural and human rights are non-intellectual property mechanisms that could address indigenous needs that cannot be met within the intellectual property system.[1314] It notes that there exists a certain *conceptual divide* "between the aspirations and perspectives of indigenous peoples and the conventional IP system", calling these "fundamental differences."[1315] UNDRIP is subsequently identified as being "a source that reflects the aspirations of indigenous peoples in this regard."[1316] This is a striking observation that touches upon the core of this research on a fragmented legal framework from a TCE perspective.

At the UN level, the Working Group on Indigenous Populations paid attention to indigenous peoples' heritage during its 23rd session in 2005 with its principal theme of "Indigenous peoples and the international and domestic protection of traditional knowledge."[1317] UNDRIP of 2007 specifically includes intellectual property interests of indigenous peoples in Article 31. Furthermore, peoples' rights have been increasingly invoked to ground arguments of indigenous peoples worldwide to (re)claim or protect not only traditional lands, but also traditional resources and knowledge.[1318] From these developments one can detect the broader implications of claims for TCE and traditional knowledge protection beyond being merely intellectual property issues. These implications include such issues as sovereignty, self-determination and protection of culture.[1319] More specifically with regard to cultural expressions, it is claimed that cultural rights play a particularly important role for indigenous peoples' "right to their collective creativity."[1320] As the next sections of this Chapter show, United Nations human rights treaty bodies have positioned traditional knowledge and TCE (intellectual property) issues firmly within the ambit of various human rights. This seems to

[1312] See section 2.4.3 of Chapter 2, and statements at WIPO's Intergovernmental Committee (IGC) of the Saami Council, the Kaska Dena Council and the joint statement of Yokota and the Saami Council mentioned there.
[1313] Anaya 2013, p. 5. He addressed for example overlapping issues and concepts between WIPO's IGC's work and indigenous concerns such as state sovereignty, property and the relation with indigenous rights. He concludes that for reasons comparable to those for the abolition of the *terra nullius* doctrine, namely the right to non-discrimination, indigenous peoples should similarly be able to enjoy effective legal protection of their cultures' knowledge and creative expressions, for example through extending existing legal protection.
[1314] In this document the Secretariat of WIPO's IGC studied the possibilities and gaps on the international level with regard to the protection of TCEs. Annex I, Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 1–35.
[1315] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11. Other mechanisms that WIPO mentions are: "laws relating to blasphemy, [cultural and other human rights,] dignity, cultural heritage preservation, defamation, rights of publicity, and privacy."
[1316] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.
[1317] The report is available via: http://www.iwgia.org/images/stories/int-processes-eng/working-group-ind-popu/docs/WGIPreport23session.pdf
[1318] Drahos 1999, p. 364.
[1319] Drahos 1999, p. 364.
[1320] Scott & Lenzerini 2012, p. 76.

confirm that indigenous peoples' TCE protection is a matter of human rights law and vice versa.

5.1.2 Focus on cultural and indigenous rights

Cultural and indigenous rights cover various topics and concepts that are essential for TCE protection. These rights include such rights as the right to take part in cultural life,[1321] the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author,[1322] the rights of minorities to their languages, cultures and ways of life,[1323] the right to freedom of expression[1324] and the rights of UNDRIP on a multitude of cultural and indigenous issues.[1325] All these rights concern aspects or circumstances that are also relevant for the maintenance, protection and development of TCEs. From this multi-faceted perspective, human rights law plays an important role in guiding the very diverse issues at stake in the TCE protection discussion.

The notion of 'cultural' in cultural rights can be conceived of in a narrow or broad way. Narrowly understood, cultural rights have to do with actual *cultural* issues and concerns specifically. Broadly understood, rights that are somehow related to culture would also be seen as cultural rights.[1326] The same could be said for the term 'indigenous' in indigenous rights. Some rights explicitly concern *indigenous* issues, which would be solely considered indigenous rights under a narrow view. Others that are related to, relevant for, or even essential for indigenous peoples in a more abstract or general way could also be called indigenous rights when this term is conceived of more broadly.[1327] And a mix is also conceivable, where one would speak of 'cultural indigenous rights'.[1328]

However, after a short general introduction to the human rights system in the next section, the focus of this chapter will be on cultural and indigenous rights in a functional way. That is, rather than applying a broad or narrow view, the relevance of various human rights for aspects of TCE protection will be the guiding criterion. The values behind these rights provide the most relevant starting points for examining the protection of TCEs as a specific issue of indigenous peoples' rights (struggles) from a human rights perspective. One can think of rationales such as integrity, dignity, recognition and identity as reasons behind cultural and indigenous rights. A closer examination of the various cultural and indigenous rights selected will provide more insight into this. This will subsequently form an important basis for the protection question and arguments regarding TCEs.

[1321] Article 15(1)(a) ICESCR.
[1322] Article 15(1)(c) ICESCR.
[1323] Article 27 ICCPR.
[1324] Article 19(2) ICCPR.
[1325] These include for example the right to self-determination (Article 3), the right to their own cultural institutions (Article 5), the right against forced assimilation or destruction of their cultures (Article 8), the right to their cultural traditions and customs (Article 11), the right to restitution or just, fair and equitable compensation (Article 28) and the right to their cultural heritage, TK and TCEs, as well as the right to maintain, control, protect and develop their intellectual property over their heritage (Article 31).
[1326] See for example Donders' distinction in Donders 2002, p. 73, 76 and 103, but more on this follows in a later section.
[1327] See Stavenhagen 1994, p. 13–14 and Anaya 2004, p. 97, but more on this later.
[1328] See for example Xanthaki 2007, p. 196.

As already repeatedly stressed, indigenous peoples' concerns with regard to their traditional knowledge (TK) and TCEs are broad and multiple. It has become clear that needs go beyond the framework of intellectual property protection. Even WIPO has signalled this. It has also become clear that many TK and TCE concerns overlap with, or are closely related to, other indigenous issues that are raised with a need to be addressed via the human rights framework at the UN level, such as land and resources rights. Many of these issues revolve around 'typical' indigenous struggles of being excluded from and disregarded in mainstream (legal) structures. This broader situation, and often marginalisation, of indigenous peoples therefore colours the context of human rights and TCEs. Xanthaki refers, for example, to UN monitoring bodies, working group statements and UN Special Rapporteur reports as she argues that:

> "[p]atterns of cultural violence include the seizure of traditional lands, the expropriation and the commercial use of indigenous cultural objects without permission from indigenous communities; the misinterpretation of indigenous histories, mythologies and cultures; the suppression of indigenous languages and religions; the denial of indigenous education; even the forcible removal of indigenous peoples from their families and the denial of their identity."[1329]

These examples clearly show the link between aspects of indigenous culture – such as lands, cultural heritage, language and cultural identity – and (cultural) human rights for respecting, protecting and fulfilling these aspects of indigenous peoples' cultures and ways of life. One can think of the rights mentioned earlier, such as participation in cultural life and minority rights, but also the right to (cultural) self-determination and language and education rights.

5.1.3 Human rights obligations and TCEs: respect, protect, fulfil

As we saw earlier in the copyright chapter, intellectual property laws such as copyright law are very much oriented towards protection. For cultural heritage regulation, one of the main focuses is duties to ensure safeguarding and preservation of cultural heritage. Human rights law, then, places a set of obligations on states to: respect, protect and fulfil the enjoyment of human rights. Together, these should guarantee effective human rights in practice. This is the main goal that all international human rights treaties have in common.[1330] It could also be a more 'all-round' package for the diversity of indigenous peoples' interests at stake in TCE protection than merely protection or preservation alone.

Generally, a distinction is made between negative and positive obligations for states to guarantee the effective exercise of human rights in practice. Negative obligations can be summarised as the duty for states to abstain from interference with human rights. However, more is often required to ensure the effective enjoyment of human rights, such as positive, or affirmative, measures.[1331] Both are essential for the full realisation of human rights in practice. McGonagle has observed that whereas the drafting history of the European Convention on Human Rights shows a main focus on the identification of rights and freedoms imposing obligations on states "not to do things", the final text also explicitly includes positive state obligations regarding certain rights. Over the course of time, the European Court

[1329] Xanthaki 2007, p. 196–197.
[1330] McGonagle 2015a, p. 10.
[1331] McGonagle 2015a, p. 10.

of Human Rights has further identified and expanded positive obligations for states that are implied by the text of the Convention.[1332]

The origins of the trio of obligations that set the standard for states' duties and compliance in the context of international human rights treaties, e.g. to respect, protect and fulfil, date back to the 1980s. The tripartite of obligations was developed in this period by both Asbjørn Eide in reports on the right to adequate food as a human right, prepared in his capacity as expert rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and political philosopher Henry Shue. In his book of 1980, Shue holds that there are three types of state duties that correlate to *every* basic right: duties to *avoid* depriving; duties to *protect* from deprivation; and duties to *aid* the deprived. He applies these duties in two examples: to the right to physical security and the right to subsistence. He argues that this dismisses the common perception that some rights are negative rights, and others are positive rights. The only division to be made is between state duties.[1333] Eide first proposed four 'layers' of state obligations in 1983, e.g. to respect, protect, ensure and promote,[1334] before bringing this back to the well-known trio of obligations to respect, protect and fulfil in 1987.[1335] Related to these three, he also distinguishes between additional conduct and result obligations. An obligation of conduct implies undertaking or abstaining from certain action, whereas an obligation of result means that states should avoid or achieve a certain result.[1336] In an update of his 1987 study in 1999, Eide further explained his proposed framework of obligations, now in four levels: to respect, protect, facilitate opportunities and fulfil.[1337] The last two are often grouped together.[1338]

Further details on state obligations can be found in General Comments No. 31 of the Human Rights Committee on the Nature of the General Legal Obligation imposed on States Parties to the ICCPR and No. 3 of the Committee on Economic, Social and Cultural Rights on the Nature of States Parties' Obligations under the ICESCR. Both General Comments focus on the formulation of Article 2 of the respective Covenants on the right to non-discrimination. The distinction between the two is usually summarised as obligations for realisation of the rights of the ICCPR with immediate effect and obligations for progressive realisation of the rights of the ICESCR.[1339] However, the CESCR notes that Article 2 also contains obligations of immediate effect, such as the obligation of "undertaking to guarantee that the relevant rights will be exercised without discrimination" and the general obligation "to take steps" as such, which "must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."[1340]

General Comments on various other rights by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights also elaborate on state obligations

[1332] McGonagle 2015a, p. 10–11.
[1333] Shue 1980, p. 52–64.
[1334] In his report The Right to Adequate Food as a Human Right, E/CN.4/Sub.2/1983/25 (1983), via De Schutter 2014, p. 280.
[1335] Eide 1987, p. 14–15, par. 66-69.
[1336] Eide 1987, p. 15, 71.
[1337] Eide 1999, p. 15–16, 52.
[1338] See Eide's explanation at the website of the Food and Agricultural Organization (FAO): "At the *tertiary* level, the state has the obligation to facilitate opportunities by which the rights listed can be enjoyed or, when the other obligations are insufficiently met, to provide such opportunities and thus *fulfil* the rights." Available via: http://www.fao.org/docrep/w9990e/w9990e03.htm.
[1339] HRC General Comment No. 31, par. 5; CESCR General Comment No. 3, par. 1.
[1340] CESCR General Comment No. 3, par. 1-2.

regarding the effectiveness of the specific rights in question. For example, the Human Rights Committee stresses in General Comment No. 6 on the right to life of Article 6 ICCPR that positive measures are also required because the right must be broadly understood.[1341] The Committee also emphasises positive measures in General Comment No. 23 on the rights of minorities of Article 27 ICCPR. Whereas the right is formulated in a typical negative way ('shall not be denied'), the Committee has recognised the need for positive measures as well,[1342] for example regarding the enjoyment of cultural rights by indigenous peoples and their effective participation in decisions affecting them.[1343] The Committee on Economic, Social and Cultural Rights' General Comments No. 17 on Article 15(1)(c) ICESCR also elaborates at length on the state obligations that follow from the provision. These include general ones, i.e. to progressively, yet fully, realise the right of everyone to benefit from the protection of the moral and material benefits resulting from any scientific, literary or artistic production of which they are the author,[1344] as well as specific obligations,[1345] related obligations,[1346] international obligations,[1347] and core obligations.[1348] In other words, these General Comments confirm Shue's argument that there are no positive or negative rights as such, but positive and negative state duties per right to achieve full and effective enjoyment.

Typically, both Committees also underline state parties' obligations under the Covenants in their Concluding Observations following the review of State Reports. These Concluding Observations usually include recommendations by the Committees for ways and measures by which states can comply with these obligations and implement the rights of the treaties. As we will see in the substantive analysis of cultural and indigenous rights in section 5.3, state obligations can also include measures to ensure TCE protection. There are not only aspects or circumstances at stake that require *protection* in the context of indigenous peoples' (cultural) rights, but also *respect* and *fulfilment*, or *promotion* and *facilitation*. One can think of the protection interests in the sphere of self-determination, transmission of cultural heritage to future generations, continuation of traditions and exercise of ways of life. In other words, for full and effective enjoyment of indigenous peoples' rights concerning such issues, protection and promotion of TCEs is likely to play an important role as well.

5.2 International human rights law, cultural rights and indigenous rights

This section first outlines the background and contours of the international human rights framework, before moving on to a closer inspection of cultural and indigenous rights. The last sub-section addresses the tension between group rights and individual rights, which is a recurring struggle in the context of indigenous rights in general and for TCE protection specifically, as we have also seen in a copyright context.

[1341] HRC General Comment No. 6, par. 5. It highlights, as examples, measures against arbitrary killings by state security forces, measures to both prevent and effectively investigate disappearances of individuals and measures against infant mortality, malnutrition and epidemics, HRC General Comment No. 6, par. 3, 4 and 5.
[1342] HRC General Comment No. 23, par. 6.1 and 6.2.
[1343] HRC General Comment No. 23, par. 7.
[1344] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 25-29.
[1345] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 30-34.
[1346] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 35.
[1347] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 36-38.
[1348] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 39-40.

5.2.1 International human rights law

The development of an international system of human rights was set in motion during and after the Second World War.[1349] However, this has not been an uncontested development. As international law has conventionally been concerned with relations between *sovereign* states, any interference in the relationships between states and citizens would affect states' sovereignty and their individual affairs governed by national laws.[1350] Before the attention for international human rights grew in the period after 1945, international law did not usually engage in matters of states' conduct regarding individual citizens within their territories.[1351]

The case of minorities has been an exception.[1352] Smith describes this as an example of "recognized rights of individuals against the deprivation of human dignity", providing a "comprehensive set of rights".[1353] It is a pre-existing type of protection for individuals versus states dating back to 19th-century Europe, and minority rights have been a forerunner of the international framework of universal human rights protection that was initiated after the Second World War.[1354] This exception tended to take the form of treaties.[1355] These often followed the reshaping of borders and national territories after wars between states, and could either be bilateral or multilateral.[1356] Nowak describes the members of these minority communities as citizens of the state they are located in, yet their protection as a concern of "the state of origin they associate with for ethnic, linguistic, religious and/or cultural reasons."[1357] Minority protection in the period before the two world wars has been linked to the rise of nationalism in that time. The recognition by individuals of national groups for "the uniqueness of their national, cultural, and social identity" and its specific characteristics grew, and concepts of nationality arose.[1358] As time passed, distinctions between ethnic groups were based on these specific characteristics and identities: "Those groups which possessed different characteristics from the majority of the population came to be regarded as 'minorities' and were, in general, proud of their distinctive cultural heritage."[1359]

The exceptions to international law's intervention in the treatment of individuals, such as in the case of treaties regarding minority rights and protection, have been described as "spasmodic, limited in scope, and largely political rather than idealistic in motivation."[1360] As observed by Thornberry, attempts by the League of Nations, an intergovernmental organisation established after the First World War,[1361] to widen the protection of minorities through *collective* rights that went beyond rules against discrimination, to include positive measures on states as well, were rejected.[1362] So, collective rights were already considered, yet rejected, at an international level at this point in the development of rights for specific groups. As we will see, they have remained problematic.

[1349] For a discussion on the origins of human rights prior to this, see: Smith 2012, p. 5 and further. And Nowak 2003, p. 16 and further.
[1350] Nowak 2003, p. 16 and from p. 33.
[1351] Craven 1995, p. 6.
[1352] Craven 1995, p. 6; Thornberry 1993, p. 25–54; Smith 2012, p. 15 and further; Nowak 2003, p. 18.
[1353] Smith 2012, p. 15.
[1354] Nowak 2003, p. 18; Smith 2012, p. 15.
[1355] Thornberry 1993, p. 25–52; Smith 2012, p. 16.
[1356] Nowak 2003, p. 18.
[1357] Nowak 2003, p. 18.
[1358] Smith 2012, p. 16.
[1359] Smith 2012, p. 16.
[1360] Craven 1995, p. 6.
[1361] Smith 2016, p. 17.
[1362] Thornberry 1993, p. 38–39.

After the mass atrocities during the Second World War, it was felt that a "new world order" was required, one that was grounded in the conviction of protecting fundamental rights and freedoms,[1363] and would be able to "save succeeding generations from the scourge of further wars, but also reaffirm peoples' faith in human rights and the dignity of the human person."[1364] This led to a shift from "minority and sectoral protection" to global efforts to create "basic rights for all, without distinction."[1365] The UN has been a leading organisation, but gross human rights violations in the past decades have shown that national sovereignty and human rights remain in tension.[1366] In other words, as Nowak has stated, "the development of the international protection of human rights is an ongoing battle against national sovereignty."[1367]

The distinction between states on the one hand and rights for individuals on the other hand is a main feature of the international human rights framework. This is a central human rights characteristic whereby indigenous peoples face problems under the existing framework, following from their collective nature. However, there are shifts visible with regard to the understanding of human rights, from solely classically individual rights to peoples', solidarity or collective rights. Previously thought of as 'three generations,'[1368] the human rights system is now considered to consist of three specific 'areas' of human rights, which are equally important, intertwined and part of the human rights framework as a whole. These changing perceptions tie in with indigenous peoples' difficulties as collectives, with collective interests, under mainstream human rights understandings and frameworks.

The three areas that are distinguished are described by scholars as classical rights, welfare rights and peoples' rights[1369] or "collective rights of peoples (of the South)."[1370] The three areas are sometimes also called human rights dimensions. Another classification is to distinguish between civil and political rights, economic, social and cultural rights, and solidarity or collective rights, respectively.[1371] In this sense, the three clusters of rights could be understood to follow from three corresponding underlying theories or philosophies, namely: liberalism, with its focus on non-interference with citizens' civil rights and active participation in democracy via citizens' political rights; socialism, which centres around state obligations to ensure citizens' social, economic and cultural rights; and universalism, or 'all human rights for all'.[1372] The latter could be understood in two different ways – in a broad way as meaning that all human rights are equally important and necessary, and in a narrower way as meaning that human rights are universal for all human beings irrespective of their gender, religion, ethnicity and so on.[1373] In any case, human rights across the various areas or categories are argued to be interrelated and concerned with three core topics, namely "integrity, freedom, and equality of all human beings."[1374]

[1363] Craven 1995, p. 6.
[1364] Nowak 2003, p. 23.
[1365] Smith 2012, p. 23.
[1366] Nowak 2003, p. 23.
[1367] Nowak 2003, p. 17.
[1368] Drahos 1999, p. 361.
[1369] Drahos 1999, p. 361.
[1370] Nowak 2003, p. 24.
[1371] Nowak 2003, p. 23.
[1372] Nowak 2003, p. 13–14.
[1373] Nowak 2003, p. 14.
[1374] Eide 1995, p. 22. See also Article 5 of the Vienna Declaration and Programme of Action of 1993.

These three areas of human rights are also pertinent for indigenous peoples' struggles and rights movement, and for TCE protection. As we will see in the next sections, it is a mixture of rights from all areas that together make up a normative framework of human rights to inform TCE protection. It is, in particular, the controversial area of solidarity or collective rights that is central to many indigenous rights concerns. In this specific context, one could argue that recognition of collective solidarity rights could more realistically ensure actual effective, universal human rights enjoyment for all, as opposed to the previously narrower, mainstream understanding of individual human rights.[1375] According to Nowak, the basis for this conception of solidarity rights can be found in Article 28 UDHR, according to which "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." Core rights are the right to self-determination, to freely dispose of natural resources, and to self-determination regarding economic, social and cultural development.[1376]

5.2.2 Cultural rights

Cultural rights are part of the area of human rights that further consists of social and economic rights. It has repeatedly been argued that it is one of the human rights categories that has received the least attention. Cultural rights have, for example, been described as "the Cinderella of the human rights family."[1377] In academic literature, a number of reasons have been suggested for this lack of attention, such as conceptual, terminological and political reasons. These range from cultural relativism issues, the difficult concept of 'culture' and cultural rights being perceived as a "luxury" rather than core fundamental rights, to political issues of cultural rights *and* wrongs – that is, cultural traditions and practices that violate other human rights.[1378] Other reasons include governments' fears about threats to their "'nation' state and territorial integrity"[1379] or "national unity."[1380] Furthermore, cultural rights have been called "slippery and difficult" due to their unclear content and scope.[1381]

This section addresses such issues of terminology and scope. First the concept of culture is assessed, as well as the various views on the category of cultural rights. Furthermore, the question of whether there actually is a right to culture is scrutinised and criticisms of cultural rights are set out.

What is culture?

The central aspects and the very nature of cultural rights rely heavily on determining the meaning of 'culture' in the context of rights. This elusive and almost 'mysterious' term needs some clarification, if only because it is extensively used in legal literature and policy making. The relationship between 'culture' and law has received considerable attention from anthropologists and law and anthropology scholars. Apparently, this attention has emerged in particular since "the dramatic increase in recent decades in negotiations among various kinds of social groups, at various levels, phrased in a language of "rights"."[1382] 'Culture' has been

[1375] See also Nowak 2003, p. 24–25.
[1376] Nowak 2003, p. 24–25.
[1377] Nieć 1998, p. 176, citing G. Filibek. See also section 2 of Chapter IV, Cultural Rights and Collective Rights as "the Cinderella of the human rights family", in Donders 2002, p. 65–93.
[1378] Stamatopoulou 2007, p. 25–26.
[1379] Stamatopoulou 2007, p. 5.
[1380] Donders 2002, p. 68.
[1381] Donders 2002, p. 65.
[1382] Cowan 2006, p. 9.

an increasingly-used term in contributions to this rights dialogue, and in particular culture as an object of rights (claims).[1383] In other words, the understanding of 'culture', be it anthropological or otherwise, is an important factor in determining content and scope of 'cultural rights' or any legal claims to culture.

Today, anthropologists no longer view culture as static, fixed and bounded, but as flexible, unfixed and unbounded.[1384] In other words, "cultures are changing all the time",[1385] and so does its meaning as a concept. However, it has been observed that indigenous peoples have tended to use older conceptions of culture from mainstream society in attempts to secure sovereignty and self-determination.[1386] Engle Merry notes that it could also be a move of resistance when indigenous groups argue their (legal) claims and needs using phrases of mainstream society as claims to their 'authentic tradition'.[1387]At the same time, making claims in out-dated static concepts of culture shows a disconnect between indigenous peoples' legal struggles and dynamic reality, as now also acknowledged by anthropological understandings. Indigenous peoples may feel forced to phrase their needs in ill-fitting terms. Such terminology may serve the demands of static legal reality and claims, but likely does not resonate with actual dynamic reality.[1388] Something similar is visible in the context of TCEs and copyright law, where the concept of, for example, (joint) authorship does not match indigenous practices and norms of creation. However, human rights treaty bodies do increasingly acknowledge dynamism as a feature of cultural rights and minority rights.[1389] And in cultural heritage law we have also seen shifts to dynamic understandings of cultural heritage in Chapter 4.

As to its actual scope or content, 'culture' seems to be a hybrid and adaptable to the perspective from which one uses the term. One could think of writers who "may define culture as though it consisted entirely of written texts or high culture", scientists who "may think of mold when they hear the term" and social scientists who "are inclined to interpret culture as mass or popular culture."[1390] Most relevant for the present discussion on TCEs would be understanding the term 'culture' in an anthropological way, meaning "traditional culture or what we might call a way of life."[1391]

Since lawyers and policy makers have also started to engage in cultural legal issues and made attempts to define the concept of 'culture', this brings us to the topic of the interplay between the terms *culture* and *rights*. The concept of culture was, for example, a central agenda point at the first international conference on cultural rights that was organised by UNESCO in 1968. But while culture was defined in a broad way, the right to culture, which was discussed due to its absence from the Bill of Human Rights, was interpreted more narrowly.[1392] Culture was defined as follows: "… the totality of ways by which men create designs for living…Culture

[1383] Cowan 2006, p. 9.
[1384] Engle Merry 1998, p. 577; Engle Merry 2001, p. 41-42.
[1385] Prott 1998, p. 164.
[1386] Engle Merry 1998, p. 585.
[1387] Engle Merry 1998, p. 602–603: "(...) even though it means adopting aspects of the dominant society, [since] it restructures the position that the subordinate occupies within the hegemonic structure created by dominant societies."
[1388] Engle Merry 2001, p. 42-43: "Many of these claims rely upon earlier views of culture, probably because these resonate with the legal audience to which they are addressed."
[1389] Such as in their General Comments on Article 15(1)(a) ICESCR (CESCR, General Comment No. 21) and Article 27 ICCPR (HRC, General Comment No. 23).
[1390] Nafziger, Kirkwood Paterson & Dundes Renteln 2014, p. 125.
[1391] Nafziger, Kirkwood Paterson & Dundes Renteln 2014, p. 125.
[1392] Donders 2002, p. 69.

is everything which enables man to be operative and active in his world, and use all forms of expression more and more freely to establish communication among men."[1393] The right of individuals to culture, however, was argued to touch more upon topics such as those mentioned in Article 15 ICESCR – access, knowledge and art.[1394] Over time, the understanding of the scope and content of culture has moved beyond the focus on arts and literature and broadened towards "culture as a process", now also including "distinctive features, ways of thinking and the organisation of peoples' lives."[1395] Scholars have argued that linguistic rights also fall under this notion, and that culture should not only be regarded as a product but also as "an expression of the identity of an individual or community."[1396] In other words, the understanding of 'cultural rights' follows the same shift as 'culture' as such: from static to dynamic.

In academic literature, a tripartite distinction of culture (and rights) has been made. The first is "culture as capital",[1397] or in a "material sense",[1398] which would be the "accumulated material heritage of humankind."[1399] The second is "culture as creativity",[1400] or "a process of artistic and scientific creation",[1401] where the focus is on creator(s) of culture[1402] and policy is mainly directed towards the rights of these creators.[1403] The third is "culture as a total way of life",[1404] or the "sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups."[1405] For TCEs, their specific aspects and values seem to be represented in all three categories. In this sense, TCEs are better reflected in more multi-faceted understandings of culture, such as a description of culture as "a coherent self-contained system of values, and symbols as well as a set of practices" of a specific group, carried out and transmitted over time, which is of importance for behaviour and social relationships in daily life.[1406] UNESCO's 2001 Universal Declaration on Cultural Diversity also recognises the multidimensionality of culture, describing it as: "the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[1407] This immediately shows the broad range and diversity of cultural rights and their interconnection with many other human rights, but also the diverse protection interests that are at stake in the context of TCE protection.

Culture as a qualifier of rights and narrow versus broad views

The follow-up question is: what would be a cultural *right*? The varying views on the concept of culture also connect directly to the various views of 'cultural *rights'*, because this term can also be understood in several ways. 'Culture' is the key concept here. In other words, as Prott states, the crux lies in 'cultural' as the qualifier of rights. It is not only the interpretation of

[1393] Donders 2002, p. 69.
[1394] Donders 2002, p. 70.
[1395] Donders 2002, p. 70.
[1396] Donders 2002, p. 70.
[1397] Stavenhagen 1998, p. 4.
[1398] Stamatopoulou 2007, p. 109.
[1399] Stavenhagen 1998, p. 4; Stavenhagen 1995, p. 65; Eide 1995, p. 230; Stamatopoulou 2007, p. 109.
[1400] Stavenhagen 1998, p. 4–5.
[1401] Stavenhagen 1998, p. 4–5; Stavenhagen 1995, p. 65; Eide 1995, p. 230; Stamatopoulou 2007, p. 109.
[1402] Stamatopoulou 2007, p. 109.
[1403] Stavenhagen 1998, p. 5; Stavenhagen 1995, p. 66.
[1404] Stavenhagen 1998, p. 5.
[1405] Stavenhagen 1998, p. 5; Stavenhagen 1995, p. 66–67; Eide 1995, p. 230; Stamatopoulou 2007, p. 109.
[1406] Stavenhagen 1998, p. 5; Stavenhagen 1995, p. 66.
[1407] UNESCO Universal Declaration on Cultural Diversity, point 5 of the consideration, October 2001.

'culture' that is relevant, but also the interpretation of the ways in which 'cultural' affects and alters the notion of 'rights' when combined.[1408]

Various scholars have identified, distinguished and classified cultural rights. Prott suggests three ways in which 'cultural' determines the scope and content: "rights to creativity", "rights to a culture" and rights "enhancing or enabling the survival of cultures".[1409] Another distinction that she has made is between "general cultural rights", "rights related to (the protection of) a specific culture", and "rights related to cultural resources of universal importance as part of the cultural heritage of humankind".[1410] Donders' distinction is illustrative as well: she describes cultural rights as a "general category of human rights that relate to the protection of a distinctive culture", including both "rights that explicitly refer to culture" and "other human rights that protect aspects of culture."[1411] This distinction could also be described as a "narrow group" and a "broad group" of cultural rights, or "rights that explicitly refer to 'culture'" and the rights including "other civil, political, social and economic rights that have a link with culture" respectively.[1412]

Yupsanis also elaborates on narrow and broad categorisations of cultural rights. He bases the former on Article 27 UDHR and Article 15 ICESCR on the right to take part in cultural life and similar provisions in regional instruments.[1413] The broad category is based on Article 27 ICCPR on minority rights, and covers "the protection of three fundamental elements of those groups' identity: culture, religion, and language."[1414] Furthermore, he states that, when following UNESCO's conception of the notion of 'culture', rights to education, language, religion, freedom of expression and freedom of assembly and association are included with cultural rights according to this broad view.[1415] Another approach is taken by Wilhelm, who uses the notion of inequality to define cultural rights. According to this view, cultural rights are developed due to two inequalities, namely "between individuals in, for example, access to cultural institutions, the educational system, or cultural goods, and the inequality between different ethnic, linguistic and religious communities with regard to the possibility of their expressing their cultural identity."[1416] Donders states that most cultural rights follow from the first inequality, while the second has underlain the recognition and development over the past years of minorities' and indigenous peoples' rights.[1417]

The last classification of cultural rights in this overview is Nieć's description of the work that has been done on the construction of a 'catalogue' of cultural rights, based on the normative framework offered by Article 15 ICESCR.[1418] She stresses the importance of taking into account international human rights law's foundational principles in this exercise, amongst

[1408] Prott 1998, p. 161.
[1409] Prott 1998, p. 165.
[1410] Prott 1988, p. 101; Donders 2002, p. 74–75.
[1411] Donders 2002, p. 76.
[1412] Donders 2002, p. 74.
[1413] Yupsanis 2010, p. 218–219.
[1414] Yupsanis 2010, p. 220. "It is precisely these core elements that are considered to constitute a fundamental part of the body of cultural rights in the broad sense."
[1415] Yupsanis 2010, p. 220–224.
[1416] Donders 2002, p. 75, and M. Wilhelm, 'L'Entendue des Droits a l'Identité a la Lumière des Droits Autochtones', in: P. Meyer-Bisch (ed.), *Les Droits Culturels, une catégorie sous-développéé de droits de l'homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l'homme*, Editions Universitaires Fribourg Suisse, 1993, p. 224-225.
[1417] Donders 2002, p. 75.
[1418] Nieć 1998, p. 181–182.

which are dignity and equality.[1419] For an example of a catalogue she mentions the Council of Europe's *Reflections on Cultural Rights Synthesis Report*, which includes "the right to choose (and belong to) one or several culture(s) and the freedom to express it (them); the right of access to culture; the right to enjoy the benefits of culture, including the protection of such benefits."[1420] These are rights that resonate in particular with many indigenous peoples' concerns regarding the protection of their TCEs.

When perceiving TCE protection as an example and a part of the broader struggle of indigenous peoples for their (cultural) rights, it becomes clear that the multi-faceted nature of this issue means that a similar approach is required. For the understanding of culture and of cultural rights, then, a multi-faceted perspective implies that a broad view is appropriate and that multiple dimensions of rights come into play in the context of TCEs and indigenous peoples' distinctive protection interests. These include such rights as Prott's creativity rights, rights to a culture and rights that increase or empower the survival of cultures;[1421] Wilhelm's cultural rights that should address the inequality between different communities as to the expression of their cultural identity,[1422] which are especially relevant for indigenous peoples; and the catalogue of rights identified by Nieć, such as rights to choose and belong to, express, access and enjoy the (protection of) benefits of cultures.[1423] Viewed in a holistic way, protection of TCEs, including expression, control, maintenance and development, encompasses all these various dimensions.

Section 5.3 features the categorisation that is applied in this thesis, whereby the normative content and framework of a selection of cultural rights and indigenous rights are set out. The choice of categorisation is made with the specific purpose of this chapter in mind, i.e. to scrutinise the protection of TCEs from a cultural and indigenous rights perspective. In other words, rather than applying a broad or a narrow view to the category of cultural rights, the selection or categorisation of the rights will be made in a functional way, with TCE protection as a guiding notion and starting point. This means that not every right potentially relevant for indigenous peoples' cultural issues is included, but specifically those that relate directly, or more indirectly, to TCE issues such as control, property and participation in cultural life. As such, the categorisation will also be made in a realistic way: the selection that is made is believed to suffice for the overall aim of this thesis, namely to distil relevant principles for TCE protection from three legal perspectives in order to identify shared central values that should play a role in any TCE protection approach.

Is there a right to culture and other criticisms of cultural rights

Various points of criticism are raised in academic literature in connection with cultural rights. This shows that it is a fairly controversial category of rights. In summary, this criticism questions whether there even is a right to culture and what the scope of any such cultural right would be. Other points of criticism include a critical view on cultural rights from a liberal

[1419] Nieć 1998, p. 182.
[1420] Nieć 1998, p. 182. Council of Europe, 'Reflections on Cultural Rights. Synthesis Report' (CDCC), CDCC (95) 11 rev., Strasbourg 1995.
[1421] Prott 1998, p. 165.
[1422] Donders 2002, p. 75, and M. Wilhelm, 'L'Entendue des Droits a l'Identité a la Lumière des Droits Autochtones', in: P. Meyer-Bisch (ed.), Les Droits Culturels, une catégorie sous-développéé de droits de l'homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l'homme, Editions Universitaires Fribourg Suisse, 1993, p. 224-225.
[1423] Nieć 1998, p. 181–182.

perspective, the consequences of *de facto* cultural interactions and exchanges for granting specific rights and equality arguments.

First, the question has been raised as to whether there actually is a (human) right to culture. Indeed, Macmillan argues that there are various examples of rights or interests that may deserve protection, but for which, according to her, phrasing them as human rights "seems overblown (and dangerous)."[1424] The examples she mentions include intellectual property and rights in indigenous peoples' TCEs and knowledge. She argues that there does not seem to be an "overriding reason why the protection of culture, or of traditional culture and expressions, should *depend* upon them being characterised as human rights [italics added]."[1425] In fact, according to Macmillan, the already frail "symbolic and moral significance of the concept of human rights" would only be damaged further if even more is loaded "onto its bandwagon", this time cultural rights.[1426]

Connected with this question of a right to culture are issues of scope. Stamatopoulou has observed that not every custom or rite is a *right*. There would be "an additional challenge in the definition of cultural rights to capture aspects of human life that are of fundamental character so as to warrant their elevation to human rights, in other words not to trivialize cultural human rights."[1427] In 1984, Alston had already expressed similar concerns about the proliferation of 'new' human rights, in particular the "haphazard, almost anarchic manner in which this expansion is being achieved."[1428] As a result, he has argued for a degree of quality control in the form of procedural safeguards to ensure careful reflection and coordination of the proclamation of the existence of 'new' human rights.[1429] Still, we will see further in this chapter that existing human rights and treaty bodies' interpretations already provide a normative basis for TCE protection, one on which TCE protection arguments can draw. This is the case precisely because TCE protection seems to be connected to many other fundamental rights such as self-determination, freedom of expression and participation rights. As such, a 'new' human right to TCE protection does not even seem to be necessary.

Other points of criticism of granting rights in, and for, specific cultures, draw on a liberal viewpoint and the fact that cultures worldwide have interacted with each other from their very beginnings.[1430] Indeed, this criticism is connected to the controversy of a right to culture for minorities from a liberal point of view, with its focus on the individual and individual rights and disregarding the fact that group membership is a part of, or determines, an individual's identity.[1431] In particular, Waldron's concept of the 'cosmopolitan citizen' and his commentary on minorities' cultural rights in light of Article 27 ICCPR is well-known in this regard. He states that human rights discourse has increasingly faced claims that specific cultures, communities and ethnic traditions have rights to exist and to protection from deterioration, assimilation and obsolescence.[1432] However, according to Waldron, arguments for the protection and preservation of minority cultures would be overturned if it is shown that a cosmopolitan life with cultural influences from all over the world is a viable alternative. If this were to be found equally fulfilling, there would no longer be a point to make of humans'

[1424] Macmillan 2008, p. 74.
[1425] Macmillan 2008, p. 74.
[1426] Macmillan 2008, p. 88, 73.
[1427] Stamatopoulou 2007, p. 113.
[1428] Alston 1984, p. 607.
[1429] Alston 1984, p. 608.
[1430] Stamatopoulou 2007, p. 165.
[1431] Tsosie 2002, p. 341–343.
[1432] Waldron 1992, p. 754 and from p. 757.

need to belong to, and be rooted in, a particular community to lead a fulfilling life, requiring the protection and preservation of said group. This would mean that such minority cultures need not be given special support or subsidies from the wider society.[1433] Furthermore, it has been argued that preservation of cultures would quickly enter the domain of inauthenticity, because cultures are not shielded from each other in the modern world.[1434] Supposedly, individuals' lives would not be shaped or given meaning by only single cultures or communities.[1435]

However, what stands out in the context of minority cultures, or at least cultures that are not part of the mainstream culture in a society, is the arguably *one-directional* form that cultural interaction takes. This also seems to be at the very core of the TCE protection issue. This becomes problematic when it leads to overpowering, exploiting and ultimately discarding such minority cultures against their will. It then seems to come down to the perception of what constitutes a *need* to belong to a particular community and the survival of that community, and who gets to decide whether such a need exists. Indigenous peoples have stressed, for example, that they have struggled to survive and will continue to struggle for their (cultural) existence. It is true that globalising developments such as the Internet, technological innovation and easier ways of travelling, and thus *de facto* moving between cultures, may indeed have an effect on said cultures and cultural differences. But, as Nafziger et al. state, "individuals have not, however, discarded their cherished cultural heritages."[1436] Indigenous peoples speaking up for protecting and safeguarding their TCEs from widespread and out-of-context exploitation is a key example. Arguably, this fear of cultural dilution indicates a need to be part of a distinct cultural community in order to lead a meaningful life, at least for certain communities who express this need. In this sense, it provides an argument for protecting these cultures with the required means. Meaningful and effective protection of TCEs could be a part of such means.

Another related point is the difficulty that the equality and non-discrimination principles may pose for cultural rights. For example, positive measures or action to ensure the enjoyment of cultural rights by certain groups could be viewed as running counter to these principles. However, as Donders states: "[t]he difference lies in the distinction between the norm and the implementation."[1437] As long as every individual or group can invoke certain cultural rights, different treatment or measures for certain groups to implement these rights does not mean that the equality principle is breached.[1438] In the case of TCEs, for example, the right of Article 15(1)(c) ICESCR for everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author might require specific measures for implementation with regard to indigenous peoples' traditional knowledge and TCEs.[1439] In the overview of rights below we shall see an increasingly recognised indigenous dimension of otherwise universal human rights. In other

[1433] Waldron 1992, p. 758, 762.
[1434] Waldron 1992, p. 763.
[1435] Waldron 1992, p. 778.
[1436] Nafziger, Kirkwood Paterson & Dundes Renteln 2014, p. 129.
[1437] In Donders' example of this tension, the right in question is the right to cultural identity, Donders 2002, p. 15.
[1438] See also Brems 2003, p. 154; Brems & Desmet 2016, p. 1.
[1439] As we will see below, the Committee on Economic, Social and Cultural Rights even specifically highlights indigenous peoples' works in its General Comment No. 17 on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author.

words, these peoples enjoy the same rights, but it is recognised that their realisation requires different measures. Context matters. This is discussed in more detail in section 5.3.

5.2.3 Indigenous rights

As we have seen in Chapter 2, rights for indigenous peoples have a long history that is intertwined with the development of international law. In academic literature this has been divided into various periods and stages.[1440] Scott and Lenzerini note how the indigenous rights movement developed alongside the evolution of international human rights in general, but that they did not both progress according to similar patterns. One of the main reasons for this has been human rights' focus on individual rights and the difficulties of acceptance of group or collective rights, which means that "for a long time indigenous peoples continued to be marginalised by legal rules which developed without taking into account their diversity."[1441]

This section addresses the development of indigenous rights and the way these have challenged the existing framework and institutions of human rights. This includes the opening up of the state-oriented UN system to indigenous representatives. It further explains the various viewpoints on defining indigenous peoples and briefly assesses the approach of a narrow and broad view that was discussed in the cultural rights section in the context of indigenous rights. Finally, the section considers selected criticisms of indigenous rights.

Indigenous rights developments

International Labour Organization (ILO) Convention No. 107, adopted in 1957, was the first document in international law that comprised a broad set of standards on indigenous rights.[1442] In its work, the ILO is primarily concerned with social justice.[1443] Convention No. 107 contained provisions regarding both protection and integration of indigenous peoples, but the balance leaned firmly towards the latter approach of integrating indigenous peoples in societies and economies, such that it "is wholly at odds with contemporary norms of indigenous peoples' rights."[1444] Thornberry mentions the example of Article 4, regarding protective measures that ought to be taken in applying the integration provisions of the Convention. In Thornberry's words:

> "The underlying proposition is that while due account shall be taken of indigenous cultures in the push to integration, indigenous societies are destined to disappear in the fullness of time. Their cultures are not accorded intrinsic value, but appear as obstacles to the development process. The concept of offering appropriate substitutes for ancient religious or social formations is extraordinary; it is as if to say that 'we (the developed world?) do not care for your religion very much, so why not have another?'. This is unlikely to form the basis for respect for indigenous cultures as enduring entities with a distinctive world-view. On the contrary, it is to impose another, monolithic world view by government fiat, sanctioned by a culturally hegemonic international law."[1445]

[1440] See Scott & Lenzerini 2012, p. 69; Thornberry 1993, p. 25 and further; Castellino 2010, p. 396–421; Lerner 1993, p. 77–101.
[1441] Scott & Lenzerini 2012, p. 69.
[1442] Morgan 2011, p. 7–8. In the 1920s and 1930s, the ILO had already been active with regard to work on the labour conditions of indigenous and tribal workers, see Thornberry 2002, p. 320–322.
[1443] Thornberry 2002, p. 323.
[1444] Morgan 2011, p. 8.
[1445] Thornberry 2002, p. 331.

Progressive developments on the rights of indigenous peoples led to the need for a new standard that would take other viewpoints into account, beyond the assimilationist approach of ILO Convention No. 107.[1446] A new Convention was to guide this shift in approach and ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries replaced Convention No. 107 in 1989. The preamble to this new standard strongly rejects the 'old-fashioned' approach of ILO Convention No. 107.[1447] It further emphasises indigenous peoples' aspirations of self-control, governance and development.[1448]

Aside from the 1957 developments at the ILO level, the early 1970s are generally considered as the start of the indigenous rights movement and advocacy at the international (UN) human rights level. Indeed, what has been called a "major breakthrough" occurred in 1970, namely the request by the Economic and Social Council to the Sub-Commission on Prevention of Discrimination and Protection of Minorities to conduct a Study on the Problem of Discrimination Against Indigenous Populations.[1449] This has been described as a "watershed moment in the relationship between indigenous peoples and international law",[1450] "a key to the development of relations between the United Nations and indigenous peoples",[1451] and the "first significant development in Indigenous advocacy."[1452] This breakthrough was preceded by the Economic and Social Council's grant of special rights of participation to NGOs and expansion of the mandate of the Commission on Human Rights to also examine cases submitted by individuals and NGOs, amongst growing calls to address indigenous peoples' struggles.[1453]

Another key moment was the year 1982, when the Economic and Social Council established the Working Group on Indigenous Populations (WGIP), a sub-body of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[1454] According to Barelli, this "represented the first visible sign of the new era."[1455] Breaking with precedents and tradition, representatives of indigenous peoples and organisations were allowed to participate in the debates of the Working Group, even without being awarded consultative status with the Economic and Social Council.[1456] The need was felt to include the best experts in standard-setting work regarding indigenous peoples, and these experts were considered to be indigenous peoples themselves.[1457] The opening up of the human rights system meant that indigenous representatives had become actors amongst state representatives and human rights experts at the UN level, making their voices heard and acting to determine their own futures.[1458] In 1985, the Working Group was asked by the Sub-Commission to draft a declaration on indigenous rights to be adopted by the General Assembly, which was the start of the process leading to the adoption of UNDRIP in 2007.[1459]

[1446] Stamatopoulou 1994, p. 66; Morgan 2011, p. 8.
[1447] Consideration 4 of ILO Convention No. 169.
[1448] Considerations 5 to 7 of ILO Convention No. 169.
[1449] It was eventually carried out by Special Rapporteur at that time, Jose R. Martinez Cobo, and took thirteen years to finalise. Stamatopoulou 1994, p. 67; See: Martínez Cobo 1983.
[1450] Barelli 2010, p. 953–954.
[1451] Stamatopoulou 1994, p. 67.
[1452] Davis 2007, p. 55.
[1453] Stamatopoulou 1994, p. 67.
[1454] Stamatopoulou 1994, p. 68.
[1455] Barelli 2010, p. 954.
[1456] Stamatopoulou 1994, p. 68; Eide 2006, p. 161, who was Chairman of the Working Group at that time, taking this particular decision.
[1457] Eide 2006, p. 161.
[1458] Stamatopoulou 1994, p. 61.
[1459] Eide 2006, p. 162.

The year 1993 was the 'International Year of the World's Indigenous People.' The World Conference on Human Rights, held in Vienna in June 1993, paid significant attention to indigenous peoples' issues.[1460] The Vienna Declaration, adopted by the Conference, emphasises the importance of the full and free participation of indigenous peoples in society, and especially in all matters that affect them. It also emphasises the need for states to take positive steps to guarantee recognition of the distinctiveness of indigenous peoples' identities, cultures and social organisation.[1461] The year 1993 was also the year in which the Draft Declaration on the Rights of Indigenous Peoples was completed by the Working Group on Indigenous Populations.[1462]

With indigenous representatives now participating, the Draft Declaration reflected the views of indigenous peoples' representatives and the experts of the Working Group. The draft's radical stance on various issues caused concern among a number of states.[1463] Topics such as indigenous peoples' self-determination and collective land rights especially were considered to be in tension with the principle of state sovereignty and the prevailing concept of individual human rights, respectively.[1464] UNDRIP was eventually adopted after more than ten years of further work on the actual text and the declaration has been called a "milestone of indigenous empowerment."[1465] The declaration is non-binding, but 144 states voted for adoption, eleven abstained,[1466] and the four opposing countries, namely the United States, Australia, New Zealand and Canada, have subsequently also endorsed it.[1467] Therefore, the support for UNDRIP has been described as "virtually universal."[1468] It is also referenced extensively by monitoring UN human rights bodies. As such, the declaration can be considered as an authoritative text that contains a standard of indigenous rights that is widely agreed upon.

Recognition of indigenous peoples' interests and role in sustainable development is one of the most recent steps in the indigenous rights movement. The Sustainable Development Goals (SDGs) "recognize that ending poverty must go hand-in-hand with strategies that build economic growth and addresses a range of social needs including education, health, social protection, and job opportunities, while tackling climate change and environmental protection."[1469] Importantly, indigenous peoples have been recognised as a major stakeholder group in consultations and discussions.[1470] They are also explicitly included in the SDGs as

[1460] Stamatopoulou 1994, p. 58–59.
[1461] See Article I.20 of the 1993 Vienna Declaration. See especially: "(...)States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization." See further Articles II.B.28-32 which are specifically on indigenous peoples, with Article 31 again emphasising full and free participation of indigenous peoples. This attention of the World Conference for indigenous issues has been described as "*historic steps* to protect and promote the rights of (…) indigenous peoples [italics added]", see: http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx.
[1462] Stamatopoulou 1994, p. 80.
[1463] Barelli 2010, p. 954, 956–957.
[1464] Barelli 2010, p. 956–957.
[1465] Wiessner 2011, p. 130.
[1466] Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.
[1467] See: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.
[1468] Wiessner 2011, p. 129.
[1469] http://www.un.org/sustainabledevelopment/development-agenda/.
[1470] See: A/RES/66/288, par. 43. See specifically on participation par 49. See also E/C.19/2016/2, par 11 and https://sustainabledevelopment.un.org/mgos.

vulnerable communities that should be empowered,[1471] in two targets[1472] and in the review mechanism, to which they should be able to contribute at the national level.[1473] In light of indigenous peoples' heritage and TCEs, cultural needs should not be overlooked. Like the SDGs focus on 'leaving no one behind', TCE protection is also largely about recognition of indigenous peoples' (often) marginalised position in society, including recognition of their rights and distinct cultures.

To sum up, the aforementioned developments reflect a number of key stages in the indigenous rights process. The first is the opening up of the UN structure and organisation to indigenous peoples' claims. This stage includes the establishment of the Working Group on Indigenous Populations, which allowed the participation of indigenous peoples and organisations. The second stage consists of broadly distinguishing the normative framework applicable to indigenous rights, such as the standards reflected in the 1989 ILO Convention No. 169 and the 1993 Draft Declaration on the Rights of Indigenous Peoples of the Working Group. The third stage comprises the establishment of the concrete content of the indigenous rights regime and its global acknowledgement, namely the adoption of UNDRIP.[1474] A recent stage is the explicit inclusion of indigenous peoples and their (cultural) struggles in one of the most pressing and large-scale international areas of action: sustainable development. These shifts provide a context and confirmation of the need to scrutinise TCE protection from a human rights perspective. As we will see further in this chapter, it is possible to recognise indigenous peoples' concerns, including with regard to their TCEs, in the fundamental norms of the human rights framework. This is also specifically the case for the general human rights system and its universal norms, despite the fact that this is developed by states. As noted by Stamatopoulou, indigenous peoples have in fact embraced the norms of the Universal Declaration of Human Rights, measured governments' conduct and practices against these norms and claimed violations. They do not challenge the values of the Universal Declaration, but have recognised that which they strive for in them and wish to apply them to their own circumstances.[1475]

Definitions of 'indigenous peoples'

As with cultural rights, in the case of indigenous rights it is also the adjective 'indigenous' that is determinant for the scope of the rights. However, in this context the adjective also plays a role in indicating the potential right holders. The definition of 'indigenous peoples' gave rise to significant discussion and resistance during the drafting of UNDRIP. Indigenous peoples objected to the need for a definition at all, while the Working Group on Indigenous Populations advocated for a flexible approach that would also be applicable to situations beyond 'traditional' understandings of indigenous peoples in settler societies, derived from colonial times. Such circumstances occur, for example, in the context of various Asian and African countries, which are inhabited by many different indigenous peoples.[1476] Several states, however, objected to this approach and called for the inclusion of a definition.[1477] These states required a definition mainly with the aim of denying that there were indigenous peoples within their territory, thereby undermining the process of the Draft Declaration.[1478]

[1471] A/RES/70/1, par. 23.
[1472] A/RES/70/1, 2.3 and 4.5
[1473] A/RES/70/1, par. 79.
[1474] See on these stages: Barelli 2010, p. 953.
[1475] See also Stamatopoulou 1994, p. 69–70.
[1476] Stamatopoulou 1994, p. 71.
[1477] Barelli 2010, p. 958; Stamatopoulou 1994, p. 71–72.
[1478] Stamatopoulou 1994, p. 72.

Kingsbury has described this as a 'positivist approach'. This implies the need for a clearly circumscribed definition of the legal category of indigenous peoples to determine who can hold a certain status, appeal to rights or face certain responsibilities. In other words, the definition then determines the scope of application of the rules.[1479]

The 2003 Report of the African Commission's Working Group on Indigenous Peoples and communities has been instrumental in shaping the understanding of the term indigenous peoples beyond "ideas of colonial subjugation and priority in time with respect to the occupation and use of a specific territory."[1480] Indeed, as the Commission states:

> ""Indigenous peoples" has come to have connotations and meanings that are much wider than the question of "who came first". It is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject to discrimination and contempt and whose very existence is under threat of extinction."[1481]

Some main characteristics that the African Commission's Working Group identifies include:

- distinct difference from other groups in society;
- cultures that are under threat – some even on the brink of extinction;
- a special attachment to and dependence on access and rights to traditional land and natural resources for distinctive existence and cultural survival as a group;
- subject to subjugation, marginalization, dispossession, exclusion or discrimination due to differing cultures, ways of life and modes of production.[1482]

We have already seen the last characteristic earlier in the context of the *terra nullius* doctrine and also in the difficulties resulting from a copyright law approach to the protection of TCEs.

The African Commission's Working Group criticises the persistent use of aboriginality as a determining definitional factor, and urges that more importance be attached to self-identification and contemporary perspectives beyond aboriginality and decolonisation.[1483] This is the approach of one of the most used definitions of indigenous peoples by Jose R. Martínez Cobo, then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Although also emphasising self-definition, Martínez Cobo centralises historical continuity in his 1983 study: "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 the societies now prevailing in those territories, or parts of them."[1484] The Working Group argues instead for a modern approach to the understanding of indigeneity by focusing exclusively on the three core aspects of marginalisation, cultural difference and self-identification.[1485] According to this view, the term 'indigenous peoples' is a more inclusive

[1479] Kingsbury 1998, p. 414.
[1480] Barelli 2010, p. 959; African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 86 and further.
[1481] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 87.
[1482] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 91–93.
[1483] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 91–92.
[1484] Martínez Cobo 1983, p. 50.
[1485] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 93. The Working Group notes that the chairperson of the UN Working Group on Indigenous Populations, Erica Irene

notion. Key characteristics include considerable difference from mainstream society, threats to their specific cultures, discrimination, domination and exploitation. The Working Group emphasises the need for a broader, more modern view beyond constant focus on aboriginality and decolonization.[1486] This enables wider application of the notion of indigenous peoples, and therefore of indigenous rights, beyond situations of "local peoples still subject to the political domination of the descendants of colonial settlers as in the Americas and in Australia."[1487]

UNDRIP eventually included the notion of self-identification rather than a definition clause. Article 33(1) UNDRIP confirms that indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. Article 1(2) of ILO Convention No. 169 also emphasises indigenous peoples' self-identification, calling it a fundamental criterion for determining to which groups the rights of the Convention apply. Self-identification, as opposed to a top-down, fixed definition clause, could be seen as an ultimate manifestation of the right to self-determination of indigenous peoples.[1488] Indigenous peoples themselves have been aware of the consequences of using the term 'peoples' rather than groups or communities. As indigenous peoples obtained knowledge of modern international law and terminology, they became conscious of the fact that the right to self-determination was reserved for 'peoples'.[1489] This debate on self-determination also sparked the shift in terminology from "indigenous populations" to "indigenous peoples" from the 1980s.[1490]

Indigenous rights and narrow versus broad views

The same approach of distinguishing between a narrow and broad group of cultural rights,[1491] as described in the previous sub-section, could also be applied to indigenous rights. ILO Convention No. 169 on Indigenous and Tribal Peoples and UNDRIP specifically concern – as their names suggest – rights of indigenous peoples. These rights comprise a narrow group of indigenous rights. 'General' human rights of the ICCPR and ICESCR could also be viewed as 'indigenous rights' where they are relevant for indigenous interests. An example is the right to take part in cultural life established in Article 15 ICESCR. The Committee on Economic, Social and Cultural Rights explicitly mentions indigenous peoples as "persons and communities requiring special protection" in its General Comment No. 21 on that provision. These more 'general' rights would make up a broad group of indigenous rights. Furthermore, Article 15 could be viewed not only as a cultural right, but also as an indigenous right. In this sense, it would fall into the 'hybrid' category and could be viewed as an indigenous cultural right, or a cultural indigenous right, depending on the perspective one takes.

Daes, also favours this approach, giving four criteria to identify indigenous peoples: "1. The occupation and use of a specific territory; 2. The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; 3. Self-identification, as well as recognition by other groups, as a distinct collectivity; 4. An experience of subjugation, marginalisation, dispossession, exclusion or discrimination."

[1486] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 89, 91–92.

[1487] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 91–92.

[1488] Asia Pacific Forum Of National Human Rights Institutions & Office Of The United Nations High Commissioner For Human Rights 2013, p. 7. They state that, despite ongoing debates, this is nowadays widely recognised.

[1489] Stamatopoulou 1994, p. 73.

[1490] Tennant 1994, p. 4–5.

[1491] Donders 2002, p. 74.

Scholars have also made various distinctions between indigenous rights within the broader human rights system. Stavenhagen describes, for example, a "core of basic universal rights" and a "periphery of human rights specific to distinctive categories of the population."[1492] These categories would typically include groups that have traditionally faced discrimination, marginalisation or oppression within society, amongst which indigenous peoples.[1493] Anaya speaks of "international norms […] developed in the specific context of indigenous peoples" on the one hand and "broadly applicable human rights" on the other. The latter, he notes, "are in themselves relevant to indigenous peoples' efforts to survive and flourish under conditions of equality".[1494] This would then again be the 'broad' category of indigenous rights. Rights that one can think of in this sense are, for example, the rights to non-discrimination and freedom of expression. Both are essential for creating circumstances in which it is possible to be part of, hold and express a particular culture or cultural identity. This is especially the case for minorities or indigenous peoples.

Criticisms of indigenous rights

Indigenous rights have been the target of various forms of criticism. To summarise, these points of criticism mainly focus on the justification for 'special' rights for certain groups, tensions between group rights and individual rights, and universalism and cultural relativism arguments. Similar criticism is voiced in an intellectual property sphere in the context of protection of indigenous peoples' heritage, including their traditional knowledge and TCEs.

The first point of criticism that is often raised is why certain groups should be awarded special protection of their cultures, which could even include positive measures and public resources. In other words, such criticism argues against differential treatment of minorities and indigenous peoples. However, the perspective that the African Commission's Working Group of Experts on Indigenous Populations/Communities offers can be repeated here for an argument against such criticism. According to the Working Group, it is in fact a misunderstanding that the protection of indigenous peoples' rights would amount to 'special' rights for certain ethnic groups vis-à-vis the rights of all other groups that exist in a given state. 'Special' rights are not what such protection is about.[1495] Instead, the Working Group highlights that discrimination against certain marginalised groups due to their specific cultures, ways of life and marginalised status is the main issue. Calls for the protection of indigenous peoples' rights would legitimately aspire to reduce such discrimination, of which other groups are not targets.[1496]

The tensions between group rights and individual rights also play a large role in the criticism of indigenous peoples' rights, especially when indigenous rights take on a *collective* form. However, it has also been argued that a strict focus on individual freedoms and entitlements in human rights law does not seem to resonate with reality, and would even contravene the very objective of human rights law to encourage every human's full development.[1497] As Wiessner observes:

[1492] Stavenhagen 1994, p. 14.
[1493] Stavenhagen 1994, p. 14.
[1494] Anaya 2004, p. 97.
[1495] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 88.
[1496] African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 88.
[1497] Wiessner 2011, p. 124.

> "Membership of a group is of fundamental importance to individuals, to their pursuit of self-realization, a key human need. (…) In order to respond holistically to human needs and aspirations, law thus needs to strive to protect both the individuals and the groups they form or are born into – communities of destiny or communities of choice. The vulnerability of individuals created the need for individual human rights; the vulnerability of groups, particularly cultures, creates the need for their protection."[1498]

On the other hand, the liberalist, 'cosmopolitan citizen' point of view that was discussed in section 5.2.2 contradicts such a need to be part of a community, and thus the (collective) protection of communities or cultures through cultural rights. Yet, the advancement towards understanding human rights also in a collective way or as solidarity rights shows that there is in fact (growing) recognition of the collective element in human rights law.

Universalism and cultural relativism are also criticisms that recur in the debate surrounding indigenous rights. One can think, for example, of criticism of special rights for certain groups from a universalist perspective. Put simply, this point of view advocates the same rights for everyone. The other way around, criticism of the universal character of the existing international human rights system without taking due note of cultural particularities is also conceivable. As a way to address the enormous diversity in the world in the context of universally agreed on human rights norms, commentators have argued for example for 'localising' human rights[1499] and looking beyond uniformity[1500] by promoting inclusive universality of human rights.[1501]

To express indigenous issues in existing legal terminology and frameworks does not necessarily have to be a negative thing. Legal principles and terminology are in fact employed by indigenous peoples at the international level for the benefit of formulating their own pursuits and aspirations. In this sense, the universality of existing human rights norms is not challenged in view of relativist critiques. Rather, existing structures are made relevant for, and applicable to, their own circumstances, for example by challenging states' behaviour in light of their human rights obligations.[1502] As we shall see below, treaty monitoring bodies have increasingly recognised what can be called an 'indigenous dimension' of universal human rights, such as the right to freedom of expression and participation in cultural life.[1503] This could be viewed as comparable to arguments of localising human rights and a step towards inclusive universality, namely including indigenous interests in the interpretation of universal human rights.

These three forms of criticism of rights for indigenous peoples, i.e. 'special rights', group rights and universal norms, are particularly acute in the case of TCE protection. The protection of TCEs faces difficulties under existing legal frameworks. Therefore, calls are made for 'special rights', that are collective in nature, and in a sense challenge existing legal

[1498] Wiessner 2011, p. 124–125.
[1499] By interpreting global norms taking account of the needs identified by local community organizations, De Feyter 2006, p. 4.
[1500] Brems 1997, p. 164; Brems & Desmet 2016, p. 1.
[1501] Brems 1997, p. 153 and further; generally Brems 2001; Brems 2003, p. 153-161; Brems & Desmet 2016, p. 15.
[1502] Stamatopoulou 1994, p. 69–70. See also Brems 2003, p. 148-149: the foundational principles of human rights are not challenged, but their content, interpretation and application; Brems & Desmet 2016, p. 6.
[1503] As Brems has stated (translated from Dutch): "The history of human rights can be read as a history of progressive inclusion in the rights protection system as a consequence of a number of successful campaigns." Brems 2003, p. 145.

norms such as copyright law. Just as indigenous peoples face difficulties in the context of universal human rights protection precisely due to their distinctive ways of life, they also run into difficulties in the context of TCE protection due to their specific modes of production[1504]: both are collective and deviate from mainstream understandings. In an attempt to deflect these difficulties, this chapter searches for opportunities and support in the human rights framework to inform TCE protection.

5.2.4 The tension between group rights and individual rights

An important issue in the debate surrounding cultural and indigenous rights is the collective nature of these rights. Just as the community tends to be central in indigenous societies, so is the notion of collectiveness in indigenous claims and in the exercise of their rights, such as the right to self-determination.[1505] Xanthaki notes how "[i]ndigenous people view the recognition of their collective rights as a token of respect towards their identity and communities as well as the only way for their survival and development."[1506]

The human rights system has for a long time, and to a large extent, focused on the human rights of *individuals*. As a result, rights for specific cultures and groups are criticised. Sources of concern and criticism are liberal thought[1507] and the Enlightenment perspective of free individuals.[1508] Voskuil notes that "[l]iberal thought focuses on the individual, whose essential attributes are non-historical and universal."[1509] This directly contradicts indigenous peoples' particular characteristics of time- and place-bound communities that have continuously existed throughout the ages and share common (cultural) interests specific to that group. These interests comprise holding collective cultural heritage, including traditional knowledge and TCEs, shared languages and performing traditional activities, such as hunting. Traditional lands are of central importance and their cultural characteristics bind indigenous communities together. The overarching objective of each indigenous people has been described as: "existence as *this* indigenous people with its very *own* cultural identity. Interests may change, but this overall aim of each people is fixed, the typical token and *idée d'oeuvre* of the indigenous peoples."[1510]

An argument often raised against collective rights is the potential danger that group rights may pose for individual rights. Eide points, for example, to the challenges that individual cultural rights may face from collective cultural rights when dominant segments within society hold on to their power based on cultural traditions, which negatively affects individuals.[1511] Cultural practices that are discriminatory towards women are often mentioned as an example.[1512] States are in fact under an obligation to take action against such practices,

[1504] See the comment on discrimination against indigenous peoples due to their specific cultures and modes of production, which justifies protection of their rights, by the African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 88.
[1505] Xanthaki 2007, p. 13; Vrdoljak 2007, p. 41.
[1506] Xanthaki 2007, p. 13.
[1507] Xanthaki 2007, p. 15–16.
[1508] Voskuil 2009, p. 228.
[1509] Voskuil 2009, p. 228, footnote 42.
[1510] Voskuil 2009, p. 233–234.
[1511] Eide 1995, p. 238–239.
[1512] See also the well-known example of the Lovelace case. The Human Rights Committee found that a law according to which an Indian woman lost her Indian status upon marriage to a non-Indian, which prevented her from living on a reserve, whereas this was not the case for Indian men marrying a non-Indian person, violated Article 27 ICCPR**.** Sandra Lovelace v. Canada, Communication No. 24/1977 (30 July 1981), CCPR/C/13/D/24/1977 (1981).

as stated in Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women[1513] (CEDAW).[1514] The Study of the Human Rights Council's Advisory Committee on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind, highlights the potential negative impact of traditional values on vulnerable groups:

> "Special procedures mandate holders, treaty bodies and OHCHR have published many works that emphasize the importance of ensuring that "traditions", "attitudes" and "customary practices" are not elevated above universal human rights standards. They highlighted the fact that such terms are often used to justify the marginalization of minority groups and gender-based inequalities, discrimination and violence, and that there is a need to situate these terms within a human rights context."[1515]

In academic literature, several views are put forward with regard to group rights. In his edited volume on group rights, Jones distinguishes between the following opinions: "groups cannot hold rights"; "certain groups can hold rights"; and "individuals can hold certain rights only simultaneously with other individuals, and these rights constitute groups rights."[1516] During negotiations for UNDRIP similar observations could be heard from various states. Whereas certain states denied the existence of collective rights as such, others proposed the solution of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities – i.e. individuals can enjoy human rights individually, which may then be exercised individually or in community with other individuals.[1517]

Eventually, both ILO Convention No. 169 and UNDRIP recognised the collective rights of indigenous peoples, i.e. '*certain* groups can hold rights'. The question then, is what justifies this approach. Voskuil argues that the aforementioned ultimate aim of indigenous peoples, i.e. 'to exist' as a specific people with a particular culture, characterises them as a collective subject of rights. This way, their continued existence can be assured: means and aim, i.e. collective rights, are alike.[1518] In other words, it can be argued that, for effective enjoyment of their human rights, matching their lifestyle, interests and worldview, collective rights are essential for indigenous peoples. The African human rights system is an example of a regional framework that does recognise the collective nature of both groups' issues and rights. These rights are also laid down in the African Charter on Human and *Peoples'* Rights. A reflection of regional particularities, this explicit recognition makes the African system unique.[1519]

[1513] "States Parties shall take all appropriate measures:
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;
(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases."

[1514] See extensively on this tension Xanthaki's section 'Conflicts Between Collective and Individual Rights: The Case of Indigenous Women's Rights', Xanthaki 2011, p. 419 and further.

[1515] Human Rights Council Advisory Committee 2012, p. 12.

[1516] Jones 2009, p. xi.

[1517] Xanthaki 2011, p. 414–415. See Article 3(1) of the Declaration, adopted in 1992.

[1518] Voskuil 2009, p. 235–236.

[1519] As the African Commission's Working Group of Experts on Indigenous Populations/Communities states in its 2005 Report: "The main human rights issues at stake for those groups have, to a large extent, a collective nature such as the right to existence, to land, to culture and identity etc – rights which are protected by the articles in the African Charter on Human and Peoples' Rights such as Articles 19, 20, 21 and 22." African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 86.

5.3 Cultural rights, indigenous rights and guiding principles

Following an introduction to the background of the international human rights framework and an explanation of the contours of cultural and indigenous rights, this section scrutinises substantive human rights norms. The focus will be on the rights that are laid down in the UDHR, ICCPR and ICESCR, ILO Convention No. 169 and UNDRIP that are especially relevant for indigenous peoples' culture and cultural expressions. The analysis of the rights that are set out in these instruments will be supplemented by an analysis of a selection of rights from other specialised instruments on genocide, discrimination and rights of the child.[1520] These instruments reflect underlying principles that are directly relevant to cultural and indigenous issues, e.g. the existence, non-discrimination, continuation and transmission of distinct cultures.

The rights that are discussed below can be viewed as indigenous and cultural rights in a narrow *and* a broad sense, i.e. rights that concern cultural and indigenous matters in explicit and related ways, respectively. The guiding factor that binds together the rights that are highlighted in this chapter is the relevance of these rights for TCEs, more specifically for their production, protection, expression and transmission. The aim is not to give an exhaustive overview of all potentially applicable cultural and indigenous rights. With this in mind, the following rights are assessed: the right to self-determination; the right to non-discrimination; the right to freedom of expression; property and land rights; participation rights; minority rights; and rights on cultural integrity and dignity.

This approach has been chosen in order to identify principles and values behind the cultural and indigenous rights which have the potential to further the TCE discussion. These principles and values serve as a basis to conduct an analysis of TCE protection from a human rights perspective that is manageable in scope. In other words, to explain the necessity of a cultural and indigenous rights perspective for TCE protection, this chapter goes one step further and identifies a number of central underlying principles of the rights that are discussed. As we will see, the rights that are assessed are grounded in the following set of principles: self-determination; non-discrimination; dignity; and participation, practice and existence of distinct cultures. Property and land, tied to culture, appear as central features under each principle.

These rights and core principles clearly illustrate that a cultural and indigenous rights perspective is a valuable addition to the perception and discussion of the issues of TCE protection. The section starts with an introduction to the human rights system with the UDHR as a linchpin, the two sister Covenants – the ICCPR and the ICESCR – as the general binding human rights framework, and ILO Convention No. 169 and UNDRIP as specialised indigenous rights instruments. Together with the assessment of the substantive rights and the identification of the underlying principles, the rest of this chapter aims to give a coherent, integrated overview of some human rights highlights that are of relevance for indigenous peoples, their cultural issues and, ultimately, TCEs.

[1520] The Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Rights of the Child (CRC).

5.3.1 Short introduction to the international human rights system

The founding document of the UN, the UN Charter of 1945, establishes that it is committed to achieving international co-operation in the promotion and encouragement of respect for human rights.[1521] The starting point of the development of an international human rights system is the Universal Declaration of Human Rights (UDHR).[1522] The drafters had the monumental task of designing a text "that would provide universal guarantees of a panoply of human rights for everyone without distinction everywhere."[1523] The Declaration is described as establishing a constitution to the human rights regime.[1524] It was adopted on 10 December 1948 by the United Nations General Assembly. Arguments tend to be raised in relation to the predominantly 'Western' approach and nature of the UDHR. Only one member of the Drafting Committee formed by the UN Commission on Human Rights came from the African continent, namely Egypt, and no indigenous peoples or minorities' representatives were involved in the drafting process.[1525] Still, the Drafting Committee did consist of participants from various parts of the world, such as China, Chile, Egypt, India, Lebanon and Yugoslavia.[1526] Furthermore, Eide and Alfredsson claim that the broad wording, general principles, and the standard-setting and implementation process that followed take the edge off these arguments.[1527] These aspects are also relevant for putting into perspective criticisms in the context of cultural relativism and universalist human rights viewpoints. According to Eide and Alfredsson: "The Declaration, because of the cleverness and foresight of the drafters, continues to be a classic instrument and a possible bridge, currently and in the future, between different points of view."[1528]

There are four 'foundational blocks' listed in the first two Articles of the UDHR: dignity, liberty, equality and brotherhood. We could consider these as the 'moral compass' of the Declaration. Respect for the "freedom and dignity of everyone"[1529] is a central principle that would influence future human rights discourse. The equality principle is of similar importance, being visible throughout the human rights corpus. In fact, apart from the centrality of the principle of the inherent dignity of every human being, non-discrimination has been considered a central principle of the Declaration from its early draft.[1530] As a Declaration, the UDHR sets out moral rather than legal obligations,[1531] aiming to set the tone for, and contribute to, the creation of a fully developed international bill of human rights.[1532]

Indeed, the UDHR has also had, and still has, significant political impact. It has been argued, for example, that the Declaration in its totality has continually inspired and directed UN human rights standard setting.[1533] A key example of this role in guiding human rights policies is the influence and use of the Declaration's text for the drafting of international instruments,

[1521] Article 1(3) UN Charter. See also the preamble, in which the Charter reaffirms faith in fundamental human rights.
[1522] See on the drafting process Glendon 2001.
[1523] McGonagle 2015b, p. 7.
[1524] Drahos 1999, p. 358.
[1525] Eide & Alfredsson 1992, p. 11.
[1526] Eide & Alfredsson 1992, p. 11.
[1527] Eide & Alfredsson 1992, p. 11.
[1528] Eide & Alfredsson 1992, p. 12–13.
[1529] Eide & Alfredsson 1992, p. 5.
[1530] Glendon 2001, p. 67.
[1531] Although many of its provisions have obtained a binding status as customary international law, McGonagle 2015b, p. 8.
[1532] McGonagle 2015b p. 8.
[1533] Eide & Alfredsson 1992, p. 6.

including the binding norms of the ICCPR and ICESCR. As Eide and Alfredsson note, this role is also apparent in other standard standard-setting processes within the UN, such as the work on UNDRIP by the UN Working Group on Indigenous Populations.[1534] In other words, the UDHR is the "moral backbone" of most of the binding international instruments of today, and of the specific measures to legally implement its norms, yet it also has a certain level of independence from the implementation processes.[1535]

The ICCPR and ICESCR are two instruments resulting from these implementation processes, and the other two main elements that, together with the UDHR, form the general international human rights framework. In fact, the decision to develop these specific instruments was made during the drafting of the UDHR in order to turn the Declaration's norms into legally binding obligations.[1536] They have been called 'sister' Covenants, which could be read as them being similar, yet distinct. They are complementary to the UDHR, each contributing to the human rights system with their respective specific focus points, and together forming the foundations of the normative framework of the international human rights regime.[1537] The UDHR is a "standard of reference", and a very influential one. The two Covenants build on its norms, expand and define them, and contain the legal obligations to which states must bind themselves.[1538] The UDHR's influence is very visible in the preambles of both instruments. Again, human dignity is one of the central principles, as well as equality and non-discrimination.[1539] Apart from these 'general' Covenants, the international human rights framework today consists of both general binding instruments and binding instruments with specific focuses – either specific topics[1540] or specific groups.[1541]

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries and UNDRIP are two examples of instruments with a focus on specific groups, which are specifically relevant. They are the two main international instruments on indigenous rights and many provisions concern cultural matters. ILO Convention No. 169 as a whole has "[t]he safeguarding of the continued existence of indigenous communities [as] a primordial objective."[1542] The Convention explicitly incorporates collective rights, repeatedly using the phrase "these peoples shall have the right".[1543] And multiple provisions contain a non-discrimination clause and participation and consultation rights for indigenous peoples.

UNDRIP was adopted by a General Assembly Resolution in 2007. UNDRIP is an extensive document covering areas of prime interest for indigenous peoples such as land rights and cultural rights, with many provisions on culture, cultural identity, integrity and flourishing. UNDRIP is the most comprehensive document to date to guarantee the existence of

[1534] Eide & Alfredsson 1992, p. 6.
[1535] Morsink 1999, p. 20.
[1536] Alston & Goodman 2013, p. 277.
[1537] Alston & Goodman 2013, p. 277.
[1538] Craven 1995, p. 7.
[1539] As the Commission on Human Rights stated during its 8th session in 1952: "The preamble of each covenant serves as an introduction to the articles which follow. It sets forth general principles relating to the inherent dignity of the human person, portrays the ideal of the free man in accordance with the Universal Declaration of Human Rights (…)." As mentioned in Bossuyt, p. 3.
[1540] For example the UN Convention on the Elimination of All Racial Discrimination and the UN Convention on the Prevention and Punishment of the Crime of Genocide.
[1541] For example the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women.
[1542] Thornberry 2002, p. 345.
[1543] Thornberry 2002, p. 345–346.

indigenous peoples within states. However, it should be noted that it is a declaration and not a treaty, which means that it has a non-legally binding character. Still, Saul et al. wonder whether UNDRIP will nevertheless have a significant normative effect, for example in case law, due to its large support[1544] and intent "as a restatement of existing international law affecting indigenous peoples, rather than creating new law."[1545] As we shall see below, the Inter-American Court of Human Rights in fact referenced UNDRIP in an important case on indigenous peoples' participation rights.[1546]

In the next sub-sections we move on to the substantive rights analysis. It comprises the narrow category of rights relating directly to culture, e.g. Articles 27 UDHR, 15 ICESCR and 27 ICCPR, and the cultural rights of ILO Convention No. 169 and UNDRIP. It further comprises indigenous rights in a broad sense, e.g. rights that are particularly relevant to indigenous peoples' specific situation and struggles, including self-determination, non-discrimination, property and land, participation and cultural integrity and dignity. Freedom of expression can be considered a hybrid form, situated between cultural rights and rights that are essential for, for example, participation and self-determination.

To show their relevance, the analysis of these rights will be informed, guided and illustrated by the interpretations of the various human rights bodies in Concluding Observations,[1547] General Comments and jurisprudence, scholarly literature and the *travaux préparatoires* of international instruments. Where relevant, regional provisions and case law will be included, but the main focus is international law. Ultimately, the analysis of instruments and rights clearly outlines a framework of various fundamental principles: self-determination, non-discrimination, dignity and participation, practice and existence. These principles are used to assess TCE protection from a human rights perspective in section 5.4. At first sight, the designations used for these principles seemingly overlap with a number of the substantive rights analysed in this section. However, on a 'principle level' they are also underlying principles of the other rights analysed below, shaping the overall objectives these rights set out to serve. As such, when used as designations for the principles underlying the selected human rights framework, they in fact transcend a 'rights status'.

5.3.2 Self-determination

The right, and principle, of self-determination has an almost revered status.[1548] It is integrated in the principal, binding international human rights treaties. Furthermore, it is considered a "world order principle", a principle of customary international law, and applicable to all human beings universally and equally.[1549] It is a right that is atypical in its wording in the sense that it applies to all 'peoples', breaking with the strictly individual conception of human rights that is often stressed. The collective dimension is understood as going beyond states as main actors.

[1544] A large majority of 144 states voted for adoption, whereas 11 abstained and 4 voted against.
[1545] Saul, Kinley & Mowbray 2014, p. 85.
[1546] Inter-American Court of Human Rights 28 November 2007 (*Saramaka People v. Suriname*), par. 131.
[1547] The Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Elimination of Racial Discrimination (CERD). For this, use will be made of the compilations on indigenous peoples and United Nations Human Rights Treaty Bodies jurisprudence (Volume I – VI, 1993-2014), compiled and edited by Fergus Mackay for the Forest Peoples Programme.
[1548] Anaya 2000, p. 3.
[1549] Anaya 2000, p. 3, 5.

There are various scenarios of self-determination claims in international discourse, including claims of indigenous peoples against the dominant states in which they live, be it in the sphere of political or administrative autonomy, participation in decision-making and control over lands and natural resources.[1550] Self-determination for indigenous peoples is a controversial right.[1551] States are particularly fearful of secession,[1552] the external form of self-determination. However, the principle of self-determination has also been called one of the pillars on which the contemporary indigenous rights regime draws, in order to ensure that indigenous peoples can maintain and develop their community bonds and institutions. To this end, indigenous peoples should be able to determine and control "the future development of all those aspects of collective human interaction that define and constitute their distinct societies".[1553]

The bottom line of the right to self-determination is the right to autonomy and control. This does not necessarily imply secession, but can also take the form of internal self-determination for groups within existing states and participation and input in decision-making procedures, and generally in matters that concern them. It includes the "right of diverse groups to exist and develop freely according to their distinctive characteristics."[1554] This requires a substantial degree of self-government, autonomy and participation regarding their own specific affairs. This can also be described as a relational approach to self-determination between states and indigenous peoples, or understanding self-determination in a *democratic* way[1555] or as a *participatory process*.[1556] It is in this sense that self-determination is especially relevant for indigenous peoples within mainstream societies, with regard to control over their lands, resources and traditional cultural heritage and, for this thesis in particular, their traditional cultural expressions.

Self-determination as a framework right

Self-determination is discussed here first, in particular due to its capacity as a framework right.[1557] Anaya identifies a number of categories of norms that elaborate the requirements of self-determination and that guarantee ongoing self-determination for indigenous peoples: non-discrimination, cultural integrity, lands and resources, social welfare and development, and self-government.[1558] Self-determination can also be seen as a 'prerequisite' for the enjoyment of all other human rights and freedoms,[1559] including cultural rights.[1560] This capacity is particularly visible in the references to Article 1 of the ICCPR and ICESCR in Concluding Observations of the HRC and CESCR, where self-determination is connected to various other

[1550] As identified by Anaya 2000, p. 6–8. It is also in this sense, in particular in the context of participation and exploitation of natural resources, that the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have invoked the right to self-determination with regard to indigenous peoples in their Concluding Observations in past years.
[1551] See the contributions in Aikio & Scheinin (eds) 2000 for various pressure points and angles regarding self-determination and indigenous peoples.
[1552] Desmet 2011, p. 205.
[1553] Anaya 2014, p. 2.
[1554] Anaya 2000, p. 12, 18.
[1555] Thornberry 2000, p. 52.
[1556] Thornberry 2000, p. 51; Daes 2000, p. 82.
[1557] Desmet 2011, p. 206.
[1558] Anaya 2004, p. 129–156.
[1559] Moses 2000, p. 155.
[1560] Vrdoljak 2007, p. 74.

rights.[1561] Participation, consultation and free, prior and informed consent of indigenous peoples in matters that affect them and their rights are increasingly recognised in these Concluding Observations, which the HRC and CESCR urge states to take into account.

This characteristic of self-determination as a framework right is also visible in UNDRIP. Self-determination is included as a specific right of *all indigenous peoples* in Article 3.[1562] Self-determination and governance are further visible throughout the rest of the Declaration. It refers to matters of self-determination in many other provisions, for example on topics such as educational systems,[1563] land and resources[1564] and cultural heritage.[1565] This way, the element of self-determination in the sphere of cultural rights and matters has been confirmed in these rights of the Declaration.[1566] The explicit right to self-determination for indigenous peoples in UNDRIP is unique in the sense that ILO Convention No. 169 does not contain an explicit self-determination right in its substantive provisions.[1567]

Self-determination, natural resources and cultural rights

The right to self-determination of *all* peoples of Article 1(1) ICCPR and ICESCR reaches beyond political implications, secession and statehood and comprises peoples' free pursuit of economic, social and cultural development as well.[1568] This has been called "one of the most important roots of modern international human rights protection", which is "closely associated with the system for the protection of minorities."[1569] For the right to self-determination, the emphasis in the *travaux préparatoires* on its collective dimension is therefore particularly relevant.[1570] Due to the right's fundamental nature, the *travaux* emphasise that denying the right would mean that neither peoples nor individuals would be free.[1571] Article 1 ICCPR and ICESCR comes into play to address peoples' concerns regarding their distinctive cultural characteristics and expressions, because it "provides for such relative autonomy from external interference, as well as internal safeguards for a people vis-à-vis culturally repressive practices of their own governments."[1572]

Article 1(2) of both Covenants specifically address the freedom of peoples to dispose of their natural wealth and resources. The provision holds that peoples may not be deprived. This paragraph is of particular importance for indigenous peoples and an "elaboration and explanation of the practical meaning of the rights and freedoms arising out of the right of self-determination."[1573] It plays a role in many difficulties that indigenous peoples face with

[1561] In the context of indigenous peoples, the right to self-determination is particularly referred to regarding lands; natural resources; mega projects such as mining, dams and logging; the environment; participation in decision making processes; and cultural rights of minorities.
[1562] The right repeats Articles 1 ICCPR and ICESCR, but with the addition of 'indigenous' to 'all peoples', as it is stated in those rights.
[1563] Article 14 UNDRIP.
[1564] Article 26 UNDRIP.
[1565] Article 31 UNDRIP.
[1566] Vrdoljak 2007, p. 76.
[1567] In its preamble, it does however recognise: "[T]he aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the states in which they live."
[1568] Nowak 2005, p. 24.
[1569] Nowak 2005, p. 6.
[1570] As mentioned in Bossuyt, p. 7.
[1571] As mentioned Bossuyt, p. 20–21.
[1572] Saul, Kinley & Mowbray 2014, p. 61.
[1573] Moses 2000, p. 160.

regard to their lands and resources from, for example, extractive industries, and is therefore often invoked by the HRC and CESCR in its Concluding Observations. It is strongly linked to Article 27 ICCPR on the rights of minorities to their ways of life and Article 15(1)(a) ICESCR on the right to participate in cultural life, because indigenous peoples' means of subsistence, economic activities and ways of life often depend on their lands, natural wealth and resources.

The HRC has acknowledged in the *Mahuika* case that indigenous peoples' economic activities may also be very closely linked to traditional cultural practices, which are often primarily tied to their traditional territories. The Committee held that economic activities can be culturally significant in that they form an essential part of a minority's culture, in this case the use and control of fisheries.[1574] Informed by the right to self-determination, obstructions to the economic dimension of indigenous peoples' ways of life could then be considered as violations of indigenous peoples' cultural rights as recognised in Article 27 ICCPR. In this sense, land and resources rights and (continuation of) ways of life in the context of indigenous peoples are tied together by the cultural dimension of the principle of self-determination.

In sum, the HRC and CESCR have increasingly recognised the rights of indigenous peoples under Article 1 in their Concluding Observations. Both Committees have extensively and explicitly stressed indigenous peoples' right to self-determination,[1575] and invoked Articles 1 ICCPR and ICESCR in the context of state or third party exploitation of natural resources that negatively affect indigenous peoples' rights and way of life, such as deforestation, land reform, mining and oil-related activities, indigenous land rights, forced evictions, and also in the context of their own cultures.[1576] In those instances, participation rights, consultation and the concept of free, prior and informed consent play a large role. Consultation procedures to obtain indigenous peoples' free, prior and informed consent are seen as essential components of the right to self-determination.[1577]

The collective dimension of the right to self-determination

Despite the collective dimension of the right to self-determination, the centrality of the individual in procedure on violations is a difficulty. The First Optional Protocol to the ICCPR contains the procedures for communication of violations to the HRC, but it specifically emphasises that individuals that claim to be victims of violations must be the ones to submit such communications.[1578] However, the HRC is not willing to consider claims of individual members of indigenous peoples regarding Article 1 under the First Optional Protocol to the ICCPR due to the provision's collective nature. In *Ominayak v. Canada* the HRC therefore addressed the complaint that was brought as a violation of the right to self-determination as an Article 27 case instead. This case concerned a claim by the leader and representative of the Lubicon Lake Band, and concerned the expropriation of land for the benefit of private

[1574] Mahuika et al. v. New Zealand 2000, par 9.3, 9.5.
[1575] See generally: HRC Concluding Observations Colombia 1992, par. 391; New Zealand 1995, par. 175; Canada 1999, par. 7-8; Mexico 1999, par. 19; Australia 2000, par. 506. Anaya 2000, p. 8 and footnote 10.
[1576] See a general selection: HRC Concluding Observations United States of America 2006, par. 37; Brazil 2006, par. 6; Canada 2006, par. 9; Norway 2006, par. 5; Chile 2007, par. 19; Panama 2008, par. 21; Sweden 2009, par. 20; Cambodia 2009, par. 15-16; Mexico 2010, par. 22. CESCR Concluding Observations Norway 2005, par. 26; Mexico 2006, par. 10; Colombia 2010, par. 9; Argentina 2011, par. 8-10; Ecuador 2012, par. 9; New Zealand 2012, par. 11.
[1577] Expert Mechanism On The Rights Of Indigenous Peoples 2011, p. 26.
[1578] See for the Optional Protocol, which entered into force in 1976: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx., Article 2.

corporate interests regarding oil and gas exploitation. According to the HRC, the way of life and culture of the Band were threatened, and so the rights of minorities were violated as long as this continued.[1579] In *Mahuika et al. v. New Zealand*[1580] and *Diergaardt et al. v. Namibia*, the HRC held however that Article 1 could play a role in the interpretation of other rights.[1581] In this sense, (cultural) self-determination would have a subsidiary, interpretive role regarding other Convention rights.[1582]

Self-determination and TCEs

The principle of self-determination is one of the pillars on which the contemporary indigenous rights regime draws, in order to ensure that indigenous peoples can maintain and develop their community bonds and institutions. To this end, indigenous peoples should be able to determine and control "the future development of all those aspects of collective human interaction that define and constitute their distinct societies."[1583] The discussion on TCE protection should be viewed against the backdrop of the collective and cultural dimensions and the link of self-determination with lands and natural resources,[1584] as well as the extensive provisions in UNDRIP on the various aspects of (cultural) self-determination.[1585] From this perspective, self-determination rationales clearly play a role for cultural heritage matters, including the protection of TCEs, as well.

Effective exercise of communities' rights to self-determination, participation and ways of life is essential to truly determine their own (cultural) development. This includes freely pursuing the maintenance, control, protection and development of their cultural heritage, including their traditional knowledge and TCEs, according to their own customary rules, procedures and traditional institutions. What is more, the right to self-determination also implies consultation, participation and free, prior and informed consent guarantees and procedures regarding all matters, policy- and decision making that affect indigenous peoples' ways of life, rights and resources. In this sense, self-determination is clearly a principle that should inform and even anchor the protection of TCEs, as well as the design of this protection and any procedural aspects involved.

5.3.3 Equality and non-discrimination

Equality, particularly in connection with cultural distinctiveness, is another principle and right that is of central importance for cultural and indigenous issues.[1586] The principle holds that it is unjust to treat persons differently based on the distinctive characteristics of that person or of the groups to which that person belongs.[1587] In fact, the discrimination against indigenous peoples, and in particular the study by Cobo of the Problem of Discrimination Against

[1579] Ominayak v. Canada 1990, par. 32.2 and 33.
[1580] Mahuika et al v. New Zealand 2000, par. 9.2.
[1581] For example those of Articles 25, 26 and 27 ICCPR. Mahuika et al. v. New Zealand, par. 9.2. Diergaardt et al. v. Namibia 2000, par. 10.3. In par. 10.6 the HRC further repeats that "the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples." See also Saul, Kinley & Mowbray 2014, p. 23.
[1582] Saul, Kinley & Mowbray 2014, p. 61.
[1583] Anaya 2014, p. 2.
[1584] As reflected in the clusters of rights of Articles 1, 25 and 27 ICCPR, and Articles 1 and 15(1)(a) ICESCR.
[1585] Including over cultural heritage, autonomy over land and development-related matters and participation in decision-making that affects indigenous peoples.
[1586] Anaya 2014, p. 2.
[1587] Skogly 1992, p. 57.

Indigenous Peoples of 1983, was the start of UN activity in the field of indigenous rights,[1588] which led to the adoption of UNDRIP in 2007.

The contemporary international human rights system in general also draws extensively on this principle, and all human rights, including those of indigenous peoples, should be read together with the right to non-discrimination.[1589] This demonstrates that, like self-determination, non-discrimination is also a framework right. The UDHR contains a right to non-discrimination in Article 2 and a right to equality before the law in Article 7. The history of the equality principle, or "without distinction of any kind", of Article 2 UDHR is particularly relevant for indigenous peoples. The second paragraph of Article 2[1590] was actually adopted "over the objections of colonial powers", leaving "no room for doubt that "Everyone" includes persons under colonial rule, foreign occupation, or otherwise deprived of self-government."[1591]

The accessory character of non-discrimination

In the ICCPR and the ICESCR, the central non-discrimination principle can be found in Article 2 of both Covenants. According to the *travaux*, Article 2(1) ICCPR intends to ensure that *everyone* can truly and effectively have the opportunity to enjoy the rights and freedoms of the Covenant.[1592] This non-discrimination clause has an accessory character. This means that "a violation of Art. 2 can occur only in conjunction with the concrete exercise (but not necessarily violation) of one of the substantive rights ensured by the Covenant."[1593] In other words, because the provision is applicable to all ICCPR rights as an "umbrella clause", it has a function in "the systematic interpretation of the Covenant."[1594] In a sense, it is a guiding principle for the full enjoyment and exercise of other rights. Non-discrimination is a central principle that can therefore also be connected to, for example, the right to protection of the moral and material interests of one's works. From this perspective, it is particularly important for a human rights analysis of, and argument for, TCE protection. Article 26 of the ICCPR contains another specific equality principle, namely equality before the law in the form of a prohibition of any form of discrimination with regard to equal protection of the law. The law should prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground. Unlike the provision of Article 2, this is an independent guarantee of equality.[1595]

For the ICESCR, the principles of non-discrimination and equality as following from Article 2(2) ICESCR are understood as the central theme to the Covenant as a whole.[1596] More specifically, through explicit reference to the provisions of the Covenant, the non-discrimination provision of the ICESCR has a "partially subordinate" or accessory character "prohibiting discrimination only in so far as it relates to matters covered by those rights",[1597]

[1588] Anaya 2004, p. 130.
[1589] Anaya 2014, p. 2.
[1590] "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. *Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty* [italics added]."
[1591] Glendon 2001, p. 172–174 and p. 178–179.
[1592] As mentioned in Bossuyt, p. 51.
[1593] Nowak 2005, p. 29.
[1594] Nowak 2005, p. 29.
[1595] CESCR General Comment No. 20, par. 5.
[1596] Craven 1995, p. 154. See also p. 192-193.
[1597] Craven 1995, p. 177–178.

similar to Article 2(1) ICCPR. Like Article 2(1) ICCPR, the obligations resulting from Article 2(2) ICESCR would not be based on the concept of 'progressive realisation' that applies to the obligations of the ICESCR as a whole,[1598] but have an immediate nature.[1599] Eliminating substantive discrimination[1600] and affirmative action could therefore be required, specifically for example in the case of minorities and indigenous peoples.[1601]

Non-discrimination and indigenous peoples: land rights and cultural characteristics

The ICERD of 1965 is a specialised non-discrimination instrument. Although there is no direct mention of minorities or indigenous peoples, its main mandate, i.e. to fight discrimination based on race, makes it a document that plays an important role in the current indigenous rights regime.[1602] Its scope of application is also broader than merely 'race' in a narrow sense[1603] and the preamble emphasises such principles as equality and human dignity. In General Recommendation No. 23 on indigenous peoples, the Committee on the Elimination of Racial Discrimination (CERD) emphasises that it has always closely monitored the situation of indigenous peoples, such as in the review of state reports.[1604] The Committee further notes that indigenous peoples have been, and still are, discriminated against. This has resulted in land loss and significant risks to the safeguarding of their cultures and historical identities.[1605]

The CERD is particularly active with regard to non-discrimination against indigenous peoples in its Concluding Observations on state reports and recommendations.[1606] It has stressed, for example, that indigenous peoples' rights to their lands, as well as their economic, social and cultural rights should be guaranteed, whereas discrimination and marginalisation of indigenous peoples often means that this is not the case.[1607] The Committee highlights that the non-discrimination principle means that the cultural characteristics of ethnic groups should be

[1598] As laid down in Article 2(1) ICESCR.
[1599] See CESCR General Comment No. 3, par. 1-2; The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, par. 22; Saul, Kinley & Mowbray 2014, p. 203.
[1600] Saul, Kinley & Mowbray 2014, p. 181; CESCR General Comment No. 20, par. 8(b).
[1601] Craven 1995, p. 188 and further; Saul, Kinley & Mowbray 2014, p. 208 and further; CESCR General Comment No. 20, par. 8(b).
[1602] Castellino 2010, p. 413.
[1603] Thornberry 2002, p. 204. 'Racial discrimination' is defined in Article 1(1) as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."
[1604] CERD General Recommendation No. 23, par. 1.
[1605] CERD General Recommendation No. 23, par. 3. In paragraph 4, the Committee urges states to:
(a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation; (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity; (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics; (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent; (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.
[1606] See for example CERD General Recommendation No. 23 on the rights of indigenous people and CERD General Recommendation No. 21 on the right to self-determination.
[1607] CERD Concluding Observations Costa Rica 2007, par. 12, 13, 15; Congo 2009, par. 14; Democratic Republic of Congo 2007, par. 18, 19; Namibia 2008, par. 18; New Zealand 2012, par. 12; Colombia 2010, par. 25.

taken into consideration,[1608] and urges states to protect their cultural identities.[1609] The HRC and CESCR also pay significant attention to the discrimination against indigenous peoples in multiple regards, ranging from land rights to cultural rights and women's rights. The latter would amount to so-called cumulative discrimination, in other words: discrimination on multiple prohibited grounds.[1610] This confirms that the right to non-discrimination can be considered as a so-called 'framework right', both depending on and contributing to the effective guarantee of other rights. This is illustrated by the CESCR in its General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights:

> "Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination."[1611]

Equality and non-discrimination and TCEs

According to the equality and non-discrimination principle, indigenous peoples should be free from discrimination and marginalisation in the enjoyment of their rights, including rights of ownership over their lands, economic, social and cultural rights, and regarding their cultural characteristics and identities. This is confirmed in Article 2 UNDRIP, containing the right to non-discrimination for indigenous peoples in the exercise of their rights, in particular discrimination based on their indigenous origin or identity. In its framework capacity, non-discrimination and equality is a central principle underlying the enjoyment of most, if not all, cultural and indigenous rights. These rights establish a fundamental normative framework for the protection, development, expression and maintenance of TCEs, be it (cultural) self-determination, freedom of expression or participation in cultural life, which will be described below. Under the framework principle of equality and non-discrimination, this means that indigenous peoples should be able to enjoy and exercise these rights without discrimination.[1612]

This perspective should inform the protection of TCEs in such a way that non-discrimination and equality mean that indigenous peoples' specific cultural characteristics, for example regarding their ways of artistic production and collectivity,[1613] should not automatically result in a lack of protection of their rights in their cultural heritage, including their traditional knowledge and TCEs, based for example on Article 15(1)(c) ICESCR[1614] and Article 31

[1608] CERD Concluding Observations Laos 2005, par. 17; Ethiopia 2007, par. 22; Namibia 2008, par. 24.
[1609] CERD Concluding Observations Indonesia 2007, par. 16; Democratic Republic of Congo 2007, par. 14; Namibia 2008, par. 24.
[1610] CESCR General Comment No. 20 on Non-Discrimination in Economic, Social and Cultural Rights (art.2, para. 2).
[1611] CESCR General Comment No. 20, par. 1.
[1612] See the statement above of the CESCR that "[d]iscrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population." CESCR General Comment No. 20, par. 1.
[1613] See the comment on discrimination against indigenous peoples due to their specific cultures and modes of production by the African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 88.
[1614] The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author.

UNDRIP.[1615] In a sense, it is due to these specific characteristics that indigenous peoples' TCEs are supposedly 'free to take' under existing intellectual property rules. Anaya has also stressed that equality is a central notion in the context of the protection of indigenous peoples' traditional knowledge compared to the protection of 'general' intellectual property. He has called equality one of the core principles of contemporary indigenous rights.[1616] To this end, he stresses the instrumental role of the non-discrimination principle in abolishing the *terra nullius* doctrine, which enabled indigenous peoples to hold property over their lands.[1617] In the same vein, the non-discrimination principle could challenge the public domain concept and the lack of protection for indigenous peoples' traditional knowledge.[1618]

The CERD's attention for the 'Wai 262' report of 2011 by the Waitaingi Tribunal in New Zealand is illustrative in the context of equality and non-discrimination, TCEs and intellectual property. This tribunal investigates claims on the basis of the Waitangi Treaty – the treaty between the Māori people of New Zealand and the British Crown. The 'Wai 262' claim specifically dealt with flora, fauna and cultural intellectual property. In 2013, the CERD welcomed the recommendation by the Waitangi Tribunal to change law, policy and practice regarding traditional knowledge, genetic and biological resources.[1619] This would guarantee that Māori intellectual and cultural property is protected, remedying existing inequalities before the law. Against this backdrop, TCE protection can draw on non-discrimination arguments in the sense that indigenous peoples' specific cultural characteristics should not stand in the way of the effective enjoyment of their rights, including protection of their collective (intellectual) property, cultural self-determination, participation in cultural life and ways of life. Special measures could be required to remedy this, which do not necessarily have to be at the level and means of intellectual property rights.[1620] Measures that are inspired by cultural heritage law and policy, as explained in Chapter 4, are also possibilities, including indigenous heritage services, education and awareness-raising measures, as is the assistance of licensing practices or the creation of Creative Commons-like licensing schemes.[1621]

5.3.4 Freedom of expression

The right to freedom of expression is crucial for TCE protection and promotion because of its enabling, or framework, character. This means that effective enjoyment of the right to freedom of expression contributes to the realisation of other rights, for example rights to participation – political, procedural and cultural – minority and cultural rights. The right to freedom of expression further plays an instrumental role in the context of the importance that is attached to cultural diversity and for the functioning of the media. Taken together, the enabling character of freedom of expression, the notion of cultural diversity and the role of the media are also essential for expressions of traditional culture. This is not only the case for their expression and communication, but the media for example also enables the empowerment of the source communities and contributes to ensure cultural diversity.

[1615] The right of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage.
[1616] Anaya 2014, p. 2.
[1617] Anaya 2013, p. 2–3; Anaya 2014, p. 4–5.
[1618] Anaya 2013, p. 5; Anaya 2014, p. 5.
[1619] CERD Concluding Observations New Zealand 2013, par. 14.
[1620] See for example CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 10.
[1621] See for work on indigenous Creative Commons licences in New Zealand: http://creativecommons.org.nz/.

Freedom of expression theories

There are various rationales for the protection of freedom of expression. It is a right that is protected in the UDHR, ICCPR and in regional instruments such as the European Convention on Human Rights as a liberty from state interference, either in the form of suppression or regulation.[1622] A well-known set of arguments to justify a free speech principle is set out by Barendt:

- The argument related to the importance of open discussion, discovering truth and the marketplace of ideas;
- The argument of free speech for individuals' self-development, fulfilment and human dignity;
- The argument related to effective participation of citizens in the working of democracy; and
- The argument on suspicion of government, which is a negative argument that focuses on the harmful side of regulation, as opposed to the previous three that highlight various values of free speech.[1623]

McGonagle has identified further justifications, such as "societal stability and progress; tolerance and understanding /conflict prevention or resolution, and the enablement of other human rights."[1624] Each of the foregoing arguments values the principle of free expression for certain characteristics or qualities, which would justify protection according to the argument in question. In addition, there are generally also other fundamental rights or values that the many arguments for free speech protection seem to invoke, such as dignity, equal respect and concern, and pluralism.[1625]

For indigenous peoples, these general theories are very relevant as well. First, a point of criticism that is raised with regard to the argument of open discussion, discovering truth and the marketplace of ideas is the fact that the marketplace, in practice, is not open to all who wish to disseminate ideas.[1626] This is connected to power relations: marginalised groups in societies are likely to be excluded from participation in the 'marketplace', especially in the context of regimes that are oppressive towards minorities and indigenous peoples and monopolised control of the media.[1627] However, the right to freedom of expression is important precisely in such circumstances, for example for the self-representation of indigenous peoples to counter prejudiced and stereotypical 'truths'.

Secondly, the self-fulfilment theory is understood in an individual way, i.e. "[a] right to express beliefs and political attitudes instantiates or reflects what it is to be human."[1628] However, we could also apply this analogously to indigenous peoples and TCEs. Self-development and fulfilment, which seem related to participation in cultural life, can be considered to have a collective dimension as well. This is particularly the case when exercised within minorities or indigenous communities. Applying the self-fulfilment reasoning to TCEs, the argument would then go: a right to express traditional culture instantiates or reflects what

[1622] Barendt 2005, p. 1.
[1623] Barendt 2005, p. 6–23.
[1624] McGonagle 2015b, p. 4.
[1625] Barendt 2005, p. 6.
[1626] Barendt 2005, p. 12.
[1627] See also Baker 1978, p. 965, 966.
[1628] Barendt 2005, p. 13.

it is to form or exist as an indigenous community, or at least to be a part of such a community, if one insists on an individual interpretation.

Indeed, through this self-fulfilment, freedom of expression has been understood as closely linked to the autonomy and dignity of every human in the form of fostering individuals' self-realisation and self-determination. Speech is therefore not protected as a means to a collective good, but as an end: because of the value of speech to the individual. This justification is the so-called liberty theory.[1629] In this sense, speech is protected because it is so closely connected to the 'self', or to the source rather than the content of the speech.[1630] To carry out acts of speech is to perform acts of self-definition or expression, which is important for self-fulfilment or self-realisation.[1631] Baker has deemed individual self-fulfilment, or self-realisation, a key value of freedom of speech.[1632] Participation in societal decision-making and culture building, or self-determination, is another.[1633] He has further made a distinction between communicative, expressive speech, self-expressive speech and creative speech. According to him, the latter types of speech promote the two key values more. He explains:

> "[C]ommunications not specifically intended to communicate propositions or attitudes of the speaker – such as story telling merely meant to entertain the listener, or singing intended merely to show the accomplishments of the singer, or group singing or a ritual performed with words that possibly is intended to maintain group identity or to develop group solidarity – may both contribute to self-fulfilment and affect the culture."[1634]

Of course, this statement rings particularly true for TCEs: it has been repeatedly argued in scholarly literature and statements by indigenous representatives that indigenous heritage, including TCEs, contributes to the group identities of indigenous communities. The link between expressive and creative speech and group identity is also what links freedom of expression to dignity, especially in the context of culturally distinctive groups such as indigenous communities. Furthermore, just as the right to self-determination is acknowledged as a collective right of indigenous peoples, this theory can also be extended to indigenous communities: to engage in acts of traditional cultural expressions is to perform not only acts of indigenous individuals' self-definition or expression, but also community definition or expression. Likewise, this enables not only the self-fulfilment or self-realisation of indigenous individuals, but also community-fulfilment or community-realisation. From this theoretical perspective, the protection of the right to freedom of expression, including its corresponding state obligations, plays an important role for the protection of *traditional cultural* expressions.

The democratic theory of free speech is related to participation rights of indigenous peoples. Not only should everyone be able to participate in public debate under this theory, but everyone should also have equal rights to participate in society in a broader sense through free speech. This is related to other human rights of assembly and association and also religion and minority rights. This theory is therefore especially relevant for minorities and indigenous peoples, to make their voices heard in mainstream society and not be silenced or overpowered by the majority. This is explained as follows by Barendt: "The right of *all people* to equal

[1629] Baker 1978, p. 966.
[1630] Baker 1978, p. 993.
[1631] Baker 1978, p. 994.
[1632] Baker 1989, p. 48.
[1633] Baker 1989, p. 48, 54.
[1634] Baker 1989, p. 54.

respect and concern, which underlies their right to engage in public discourse, has close links to the arguments for free speech from dignity and self-fulfillment [italics added].”[1635]

In the case of indigenous peoples, the two arguments of self-fulfilment and participation in democracy can also be linked to the fourth argument for freedom of expression, i.e. suspicion of government. This relevance is demonstrated by histories of suppression of indigenous peoples, including their (cultural) expressions, by governments in dominant societies. Such suppression took place, for example, for reasons of overthrowing indigenous peoples or establishing national identities, thereby forcing assimilation onto indigenous communities and prohibiting their traditional languages or cultural expressions. The HRC, CESCR and CERD have also paid attention to difficulties for indigenous peoples in maintaining their languages and cultures in their Concluding Observations, urging states to take revitalisation or preservation measures.[1636]

The ability of indigenous peoples to express and exercise their cultures and languages is connected to recognition of indigenous peoples, and their cultural characteristics, within society. Indeed, this seems a precondition for effective enjoyment of their rights. The Committees have also urged states to do so.[1637] The arguments under the suspicion of government theory are related to notions such as hate speech, dignity, equality and pluralism: protection of indigenous peoples’ enjoyment of their right to freedom of expression provides them with the ‘tools’ to counter hate speech, to uphold and exercise their distinctive cultures, to participate in public debate on an equal footing within wider society and to safeguard their ways of life within a pluralist society. In the context of pluralism, the importance of indigenous peoples’ freedom of (traditional cultural) expression can be summarised as follows: “Freedom of speech reflects and reinforces pluralism, ensuring that different types of life are validated and promoting the self-esteem of those who follow a particular lifestyle.”[1638]

The enabling nature of the right to freedom of expression

Connected to the foregoing is the characteristic of the right to freedom of expression as an ‘enabling’ right,[1639] contributing to the enjoyment of other rights,[1640] or as a ‘touchstone’[1641] or ‘instrumental’, which highlights its dynamic interaction with other rights.[1642] As Barendt has for example noted: “Freedom of speech is also closely linked to other fundamental freedoms which reflect this aspect of what it is to be human [self-fulfillment]: freedoms of religion, thought, and conscience.”[1643] For indigenous peoples, this means that freedom of speech is closely linked to participation in matters that affect them, cultural life and minority rights. In other words: freedom of expression contributes to the exercise and enjoyment of rights that comprise what it means to be an indigenous community within mainstream society,

[1635] Barendt 2005, p. 20. See further on these theories, Barendt 2005 from p. 19.
[1636] See for example: CERD Indonesia 2007, par. 16; CERD Costa Rica 2007, par. 20; CESCR Australia 2009, par. 33; HRC El Salvador 2010, par. 18; CESCR New Zealand 2012, par. 26. See generally on indigenous languages and the role of electronic media, Browne 1996, p. 165 and further. On p. 166, he states, for example: “Many languages appeared to be losing a battle with time until indigenous language radio materialized.”
[1637] See for example the Concluding Observations: Democratic Republic of Congo 2007, par. 14; CESCR Kenya 2008, par. 3; HRC Tanzania 2009, par. 26.
[1638] Barendt 2005, p. 34.
[1639] McGonagle 2015b, p. 32.
[1640] Donders 2015, p. 90.
[1641] Bossuyt, p. 376; Nowak 2005, p. 438.
[1642] McGonagle 2011, p. 114.
[1643] Barendt 2005, p. 13.

or a member of such a community. There are various principles and rights that are identified as necessary adjuncts of the effective freedom of expression of minorities, two central ones being non-discrimination/equality and participation.[1644]

The right to freedom of expression is laid down in Article 19 UDHR and Article 19(2) ICCPR. There are various aspects to this right: to seek, receive and impart information and ideas. The notions of 'information' and the 'media' through which these are expressed, are both broad-ranging notions and the provision came to read as applying to information and ideas of all kinds. This applies to *every* idea or opinion, news or information item and work of art, and so on, that can be communicated, including less favoured or less desirable content.[1645] The form and media of communication by which the right to freedom of expression may be exercised are understood in a comprehensive way: regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[1646] It is clear that both the substance and form of communication of indigenous peoples' TCEs fall under the scope of application of this broad provision. Article 19 ICCPR provides the possibility of limitations to the right to freedom of expression in paragraph 3. According to the third subparagraph, the exercise of free expression comes with duties and responsibilities,[1647] and may be restricted in the specific cases mentioned in the provision.[1648]

In summary, freedom of expression is essentially a type of framework right. As *travaux préparatoires* and commentaries have indicated, it is regarded as a "fundamental human right" and a "touchstone" for all other rights and freedoms of the UDHR[1649] and ICCPR,[1650] respectively, and a "cornerstone of democratic society".[1651] This approach has also been confirmed in the HRC's General Comment No. 34 on Article 19 ICCPR, where it has underlined the interplay and even necessity of interaction between freedom of expression and other human rights. The Committee highlights, for example, the central role of freedom of expression for principles such as transparency and accountability, which are requirements for promoting and protecting various other rights.[1652] It also emphasises that other provisions of the Covenant, notably 18, 17, 25 and 27,[1653] are provisions that contain guarantees for freedom of opinion and expression.[1654] Freedom of expression is called a basis for, and "integral" in, the full enjoyment of a variety of other rights.[1655]

[1644] McGonagle 2011, p. 118.
[1645] Nowak 2005, p. 443–444.
[1646] Bossuyt, p. 383; Nowak 2005, p. 445.
[1647] Compare also the limitation clause of Article 10(2) of the European Convention on Human Rights. The European Court of Human Rights often refers to the duties and responsibilities of journalists and the media in freedom of expression cases, see for an overview of case law T. McGonagle (ed.) and D. Voorhoof (et al.), *Freedom of Expression, the Media and Journalists. Case-law of the European Court of Human Rights*, IRIS Themes, Vol. III, Strasbourg: European Audiovisual Observatory December 2016.
[1648] Insofar as these restrictions are "provided by law and are necessary: (a) For respect of the rights and reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals." Article 20 ICCPR contains further restrictions to the right to freedom of expression in the context of prohibitions of war propaganda and 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. In this sense, Article 20 is 'the odd one out' in Part III of the Convention, as it does not contain a civil or political right as such, but a prohibition clause.
[1649] Hannikainen & Myntti 1992, p. 276.
[1650] Bossuyt, p. 376; Nowak 2005, p. 438.
[1651] Hannikainen & Myntti 1992, p. 278.
[1652] HRC General Comment No. 34, par. 3.
[1653] Which contain the rights to freedom of thought, conscience and religion; privacy; participation in public affairs, to vote and access to public service; and minority rights.
[1654] HRC General Comment No. 34, par. 4.
[1655] HRC General Comment No. 34, par. 4.

Indigenous peoples and freedom of expression, participation and minority rights

For indigenous peoples' exercise and enjoyment of their rights, this framework character of the right to freedom of expression is crucial, especially the connection between Article 19 and Articles 25 and 27 ICCPR. These rights, in connection with freedom of expression, correspond to the arguments for participation in democracy and self-fulfilment. These are highly relevant for the protection of (cultural) expressions of minorities and indigenous peoples in mainstream societies. The Committee's singling out of Article 27 ICCPR in the section on a right of access to information in General Comment No. 34 is particularly interesting for indigenous affairs. The Committee stresses that "a State party's decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities."[1656] We have already seen that indigenous peoples' right to free, prior and informed consent, consultation and participation in matters that affect them is continually stressed, especially in the context of land and resources. More on this will follow below in the section on participation.

Furthermore, in its individual communication in the case *Mavlonov and Sa'di v. Uzbekistan*, the HRC further connected Articles 19(2) and 27 ICCPR. The case concerned a newspaper in Tajik, a minority language. Its educational articles and other materials targeted Tajik-language students and young people, contributing to their education, tolerance and intellectual and cultural development. The newspaper's application for re-registration was denied.[1657] As a result, the HRC found a violation of the right of the editor to publish and impart information in print under Article 19(2). The Committee also found a violation of the right of the second applicant, a reader and member of Uzbekistan's Tajik minority, to receive information and ideas in print.[1658] Interestingly, the Committee found a separate violation of Article 27 *juncto* Article 2 ICCPR. The refusal of re-registration would substantially deny the complainants' right to enjoy their cultural rights,[1659] impairing both the editor and the readers' ability to use the minority language press "as means of airing issues of significance and importance to the Tajik minority community in Uzbekistan", which the Committee deems "an essential element of the Tajik minority's culture."[1660]

This case signals the acknowledgement of the connection between the right to *express* a specific culture or a specific language and to receive that expression and the right to *enjoy* cultural rights, as protected under Article 27 ICCPR. This reasoning is therefore important in a more general way beyond the example of a newspaper in this case. It is also significant for other minority (media) manifestations of 'speech', or cultural expressions, such as radio broadcasts, music and performed culture. In this sense, it is likely to apply to the various forms of TCEs that exist, which means that the protection and promotion of TCEs is situated at the crossroads of protection of freedom of expression and protection of cultural rights.

[1656] HRC General Comment No. 34, par. 18.
[1657] Mavlonov and Sa'di v. Uzbekistan 2009, par. 2.1-2.2, 2.6.
[1658] Mavlonov and Sa'di v. Uzbekistan 2009, par. 8.4.
[1659] Mavlonov and Sa'di v. Uzbekistan 2009, par. 8.7. The HRC refers to its decision in *Lansmänn et al. v. Finland* 1994, par. 9.5.
[1660] Mavlonov and Sa'di v. Uzbekistan 2009, par. 8.7.

Cultural diversity, the media and freedom of expression

The *Mavlonov and Sa'di v. Uzbekistan* case ties in nicely with this subsection on cultural diversity, the media and freedom of expression. This is a 'conceptual cocktail' that is particularly relevant in the context of minorities and indigenous peoples. The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which was discussed in the previous chapter on cultural heritage and TCEs, shows its 'human rights face' in the context of freedom of (cultural) expression, the role of the media and cultural pluralism. The Convention not only specifically highlights indigenous peoples' knowledge systems and cultural expressions as contributing to sustainable development and cultural diversity, [1661] but also highlights freedom of expression and the media as means that enable cultural expressions to flourish within societies.[1662]

In other words, freedom of expression and the media play an essential role in safeguarding the diversity of cultural expressions. In particular, they play a crucial role for minorities and indigenous communities. The media contribute to the creation of frameworks for community spaces, identity construction and the provision of cultural context.[1663] More specifically, the media, both 'traditional' and increasingly digital, are an important tool for communicating *and* receiving their expressions, views and opinions, amongst which their TCEs. This way, their expressions of traditional culture can be brought to life and reach their full potential for their specific source communities. This is something the Cultural Diversity Convention also underlines. The HRC's General Comment No. 34 on Article 19 ICCPR further emphasises the rights of media users to receive a broad spectrum of information and ideas, highlighting members of ethnic and linguistic minorities.[1664]

Community (social) media and indigenous participation

The media have powerful and influential roles in society in that "they select, push, frame and manage (editorial) content."[1665] Participation and recognition are therefore key notions for media representation of minorities[1666] and indigenous peoples, and for their expressions to flourish. The ways in which minorities and indigenous peoples engage with the media and express their traditional cultures, views and opinions, and their goals for doing so, vary. McGonagle has distinguished between various media types and their key features, such as mainstream and minority media, which form separate public spheres. Each type has its own, as well as overlapping, potential for minority expressions. Both mainstream and minority media can contribute to the elimination of discrimination and promote equality, diverse ways of life and cultures, and provide participation opportunities, both in general and their own affairs, respectively. Minority media can specifically contribute to language promotion and community information exchange, whereas mainstream media can help further tolerance and combat stereotyping.[1667] Community media is a sub-type of minority media. Whereas mainstream media would provide for inter-community communication, community media provide for intra-community communication. Community media also have their own specific features, such as serving the specific community concerned, allowing individual participation

[1661] See paragraphs 8 and 15 of the preamble to the Convention and Articles 2(3) and 7(1)(a) of the Convention.
[1662] See paragraph 12 of the preamble to the Convention.
[1663] Silverstone & Georgiou 2006, p. 434, 436.
[1664] HRC General Comment No. 34, par. 14.
[1665] McGonagle 2015b, p. 4.
[1666] Silverstone & Georgiou 2006, p. 436–437.
[1667] See for these characteristics in an overview McGonagle 2011, p. 140.

and having an independent status.[1668] For minority communities, this can mean such important matters as autonomy in production and broadcasting processes, a positive effect on community cohesion and more democratic intra-community communication.[1669] New (social) media only strengthen such aspects. In this sense, technological advance presents many opportunities for indigenous communities and the promotion of their TCEs, not just threats to their protection due to the extent and nature of dissemination and associated difficulties, which have been highlighted elsewhere in this thesis.

Use and establishment of autonomous or alternative[1670] (online) community media is essential for indigenous peoples, for example to direct their concerns to policy-makers,[1671] to break stereotypical representations,[1672] to (re)establish identities and more generally as an empowering way for marginalised communities to participate in society and politics and make their 'voices' heard vis-à-vis government controlled media.[1673] Such activities have also been described as indigenous peoples creating their own indigenous public spheres[1674] or counter-public spheres,[1675] which turns them from passive recipients that rely on mainstream media for representation into producers of their own media for self-representation and community-building purposes.[1676] Hanusch has described the culture of indigenous journalism as a related approach with various similar functions, such as empowerment, providing a counter-narrative to mainstream media reports, language revitalisation, reporting in a culturally appropriate way and as a watchdog.[1677]

In relation to empowering use of online media technologies for indigenous communities in the United States specifically, Srinivasan notes their potential for exchange of information, preservation of histories, generation of (diasporic) identities and sharing of resources for furthering collective social and political matters.[1678] He also describes examples of community visual media use more generally, such as the Inuit of the Arctic's use of film-making, the Kayapo people of Brazil's use of video documentation and the Warlpiri people of Australia's use of television. To summarise, these uses serve purposes of self-representation, advancement of political and cultural community agendas and (cultural) self-determination, respectively.[1679]

Coming back to online media use, Srinivasan distinguishes between what can be described as a network feature and a database or archival feature of online technologies. In its network function, online media use is about mobilisation, connecting, generating support for causes, exchanging and sharing of information and resources and cultural activism, without intermediaries imposing editorial control.[1680] In a way, it is primarily about resistance and empowerment. Summarised, the network function of online media contributes to sharing, identity, communication and publicity.[1681] In its database or archival function, online media

[1668] McGonagle 2011, p. 142.
[1669] McGonagle 2011, p. 142.
[1670] Dahal & Aram 2013, p. 11.
[1671] McCallum, Waller & Meadows 2012, p. 103.
[1672] Hanusch 2014, p. 953.
[1673] See also Dahal & Aram 2013, p. 3–4.
[1674] McCallum, Waller & Meadows 2012, p. 103; Srinivasan 2006, p. 501; Hanusch 2014, p. 952.
[1675] Dahal & Aram 2013, p. 11.
[1676] McCallum, Waller & Meadows 2012, p. 103; Dahal & Aram 2013, p. 10–12.
[1677] Hanusch 2014, p. 954–955.
[1678] Srinivasan 2006, p. 498.
[1679] Srinivasan 2006, p. 499–501.
[1680] Srinivasan 2006, p. 503–504. See also Hanusch 2014, p. 952.
[1681] Srinivasan 2006, p. 504.

use provides for preservation and classification opportunities for communities' creations and knowledge according to their own priorities, representations and cultural discourse.[1682] In this sense, they are not only creators, but also the designers and directors of their own media and information systems. They can establish their own online cultural heritage archives and institutions with their own classifications as opposed to top-down determined, mainstream classifications of heritage database systems.[1683] These functions and the creation of own indigenous public spheres and media and information systems can also contribute to a greater degree of control over TCE dissemination, preservation and promotion in a culturally appropriate environment and according to own customs and traditions.

Of course, apart from the important role that community media play, it is also important to engage in mainstream media and have indigenous spokespeople.[1684] 'Who gets to speak' determines the construction of knowledge and public opinion about topics in society, including indigenous peoples' issues.[1685] Furthermore, responsibilities of journalists and their conduct with regard to reporting on indigenous issues is another pressing issue.[1686] This can be linked to O'Neill's 'ethics for communication'. She has argued that a right to communicate could be secured in addition to a right to self-expression by pairing such a right with "duties on those who control the means of communication."[1687] From this perspective, "[m]edia freedom would comprise a less extensive, conditional freedom to publish or broadcast" compared to an individual's right to freedom of self-expression.[1688] For example, a requirement for the media would be "to aim for accuracy when making truth-claims", whereas this would not be the case for the right to self-expression.[1689] This is also related to indigenous protocols and codes of ethics or conduct that will be described in Chapter 6 as practical solutions for the protection of indigenous peoples' TCEs: media and journalistic protocols could be applied to safeguard the cultural integrity of indigenous peoples when reporting on indigenous issues. Without such protocols or codes, it is unlikely that there is a level playing field with regard to the reporting of indigenous issues, potentially resulting in marginalisation and negative stereotypical portrayals in mainstream media.[1690] This is also important in the context of protection, preservation and promotion of TCEs by taking into account customs, traditions and cultural sensitivities with regard to their dissemination in mainstream media.

Electronic media and indigenous peoples

The characteristics and opportunities of (community) media use are reflected in the goals or programming purposes that Browne has identified with regard to electronic media and minorities[1691] and indigenous peoples.[1692] According to Browne, three goals or purposes stand out from his overviews: improving and increasing the self-esteem or sense of pride of a community by contributing to a better self-image; preserving, revitalising or increasing the use of minority languages; and challenging negative stereotypes of minorities and indigenous

[1682] Srinivasan 2006, p. 505.
[1683] Srinivasan 2006, p. 505.
[1684] McCallum, Waller & Meadows 2012, p. 106.
[1685] See on discourse analysis of media reporting on indigenous issues in the Northern Territory in Australia Mesikämmen 2016, p. 721–737.
[1686] McCallum, Waller & Meadows 2012, p. 106–107.
[1687] O'Neill 2009, p. 168–169.
[1688] O'Neill 2009, p. 169.
[1689] O'Neill 2009, p. 169.
[1690] McCallum, Waller & Meadows 2012, p. 106–107; Hanusch 2014, p. 952–953.
[1691] See the full overview in Browne 2005, p. 31, 114–118.
[1692] See the full overview in Browne 1996, p. 58–71.

peoples held by the majority or featured in mainstream media.[1693] In other words: "[t]elling one's own story and celebrating one's own culture in one's own way",[1694] and in one's own language, are central priorities. The goal of encouraging, promoting and providing an outlet for the works of minority and indigenous artists is especially noteworthy with regard to TCEs.[1695] However, electronic media can also function as a double-edged sword regarding TCEs. On the one hand, they can contribute positively to recognition for indigenous artists, revitalising threatened culture or the creation of new forms of expression. On the other hand, this exposure may not be preferred by all members of a community. Browne mentions the example of new forms of musical expression which have faced criticism, especially from older members of more traditional communities, which "stems from a fear that the indigenous forms will be transformed beyond recognition, will lose power, meaning, and respectability."[1696] Another reason for criticism is that 'borrowed forms' of cultural expressions by majority culture might prevail over the indigenous forms themselves as "one more triumph by the majority over the minority."[1697]

This is similar to fears of TCE appropriation that have been discussed previously in this thesis in the context of third party outsiders. A challenge is visible for minority and indigenous communities between preserving and safeguarding their ancient, often sacred, traditions and cultural expressions on the one hand, and maintaining a vital and dynamic artistic life within their communities on the other hand. We have already seen, however, that cultures are not static, but continuously in development. For minority and indigenous use of the media, the need therefore exists "to mirror the past, the present, and the future"[1698] in producing and programming content.

Indigenous representation, children and the media

A specific dimension of media and indigenous peoples is the representation of indigenous peoples in the (mainstream) media. Participation in the media is of central importance for the (self-)representation and empowerment of minorities and indigenous peoples within wider society.[1699] As we have already seen, challenging existing views and negative stereotypes are also goals or purposes in Browne's overviews. Furthermore, the issue of (negative) representation, stereotyping and denigrating portrayals of indigenous peoples in the media also appears in Concluding Observations from the CERD. State parties are urged to take measures to prevent stigmatisation in the media; to promote understanding and tolerance; to encourage codes of ethics for the media respecting the dignity, identity and cultural diversity of indigenous peoples; and to launch education and awareness-raising campaigns to counter this type of discrimination.[1700]

In a sense, racial discrimination in the media is also connected to the problems of racist hate speech. In its General Recommendation No. 35 on combating racist hate speech, the CERD

[1693] Browne 1996, p. 59; Browne 2005, p. 115.
[1694] Browne 2005, p. 31. On p. 116 he describes these three goals as addressing "the desire of ethnic minorities to show that their cultures are significant and display many positive characteristics – qualities that often are not featured in mainstream media accounts of ethnic minority life."
[1695] Browne 1996, p. 59; Browne 2005, p. 116.
[1696] Browne 1996, p. 68–69.
[1697] Browne 1996, p. 68-69.
[1698] Browne 1996, p. 70.
[1699] McGonagle 2015b, p. 5.
[1700] See the CERD Concluding Observations on Nicaragua 2008, par. 27; Ecuador 2008, par. 22; Peru 2014, par. 24.

underlines the role of the media in promoting "responsibility in the dissemination of ideas and opinions."[1701] Representation of indigenous peoples in the media "should be based on principles of respect, fairness and the avoidance of stereotyping."[1702] Furthermore, unnecessary references "to race, ethnicity, religion and other group characteristics in a manner that may promote intolerance" should be avoided.[1703] The CERD points to media pluralism and indigenous ownership of media, including in their own language, to foster local empowerment and speech.[1704] Indeed, the CERD emphasises that freedom of expression is, amongst other things, a tool for vulnerable groups to shift the balance of power and break down racial stereotypes.[1705] Again, this corresponds to the goals and purposes of indigenous use of electronic media identified by Browne. The CERD further stresses the important role of education in addressing the "root causes of hate speech" and eliminating racial discrimination.[1706] We have already seen in Chapter 4 that education and awareness-raising also feature prominently in measures to safeguard cultural heritage.

Another specific dimension of the media and indigenous peoples is the particular nexus between freedom of expression, the media and indigenous children. According to Article 13 of the Convention on the Rights of the Child (CRC), children have the right to freedom of expression, including the freedom to seek, receive and impart information and ideas. Freedom of expression for children is valued for reasons of democracy, participation and inclusion, which are especially important for marginalised groups, including children. In this sense, it is connected to the recognition of, and respect for, human dignity. Furthermore, freedom of expression is also essential for the development of children.[1707] In addition to Article 13, Article 17 CRC specifies the function of the mass media and urges states to ensure that children have access to information and material from diverse sources, "especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health." Article 17 also highlights the role of the media regarding children in general, and the case of minority and indigenous children in particular.[1708] In practice, the Committee on the Rights of the Child has, for example, expressed its concerns that "indigenous children and children of afro descendants do not receive sufficient information relevant to their needs."[1709] The right to information of Article 17 has further been called instrumental for children's expression of their views.[1710] One can imagine that information that contributes to a minority or indigenous child's social or spiritual well-being includes the traditional knowledge and TCEs of the child's community of origin.

Freedom of expression and TCEs

Freedom of expression enables indigenous peoples to 'exist' in a culturally distinctive way in broader society. Freedom of expression and the media are crucial instruments to ensure

[1701] CERD General Recommendation No. 35, par. 39.
[1702] CERD General Recommendation No. 35, par. 40.
[1703] CERD General Recommendation No. 35, par. 40.
[1704] CERD General Recommendation No. 35, par. 41.
[1705] CERD General Recommendation No. 35, par. 29.
[1706] CERD General Recommendation No. 35, par. 30-38.
[1707] See on the foregoing points of underlying reasons and values, Smith's discussion of statements by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the HRC and various scholars, Smith 2015, p. 147.
[1708] Smith 2015, p. 157. According to Article 17(d), states must "[e]ncourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous."
[1709] See the Committee on the Rights of the Child Concluding Observations on Venezuela 2007, par. 41.
[1710] Smith 2015, p. 158.

cultural diversity, as well as to combat negative prejudices and stereotypes that maintain the marginalisation of indigenous peoples. Freedom of expression is also an important tool for the effective enjoyment of participation rights, for example in public affairs and in decision-making processes regarding matters that affect indigenous peoples' rights and ways of life. Essentially, freedom of expression and the media can significantly contribute to the empowerment of indigenous peoples and readjusting the balance of power in society.

In other words, freedom of expression is an indispensable 'enabler' of other rights, including many cultural and indigenous rights and self-determination rights, as well as political and participation rights. For TCEs specifically, freedom of expression and information breathe life into them, helping them to fulfil their potential and function for their source community, such as their communicative and educational functions. Both mass and indigenous media play an important role here, as well as education and language rights. This is especially relevant for the safeguarding and transmission of TCEs to future generations.[1711] TCEs can be given a stage through the media, raising public awareness, appreciation and celebration of indigenous cultures.

Based on these considerations, concrete measures that promote the right to freedom of expression also contribute to protection, preservation and promotion of TCEs. These measures could take the form of specific attention for, and support of, participation of indigenous peoples in media policy and mainstream media, and encouragement and assistance of the establishment and use by indigenous peoples of their own (online) media outlets. Vice versa, protection of TCEs contributes to effective enjoyment of the right to freedom of expression, which is connected to effective enjoyment of their cultural rights, whereas restrictive measures of language use and cultural expressions would violate the right to freedom of expression.

5.3.5 Property and land

Drawing on centuries of historical struggles and dispossession, property issues in the context of indigenous peoples are most clearly visible with regard to rights to land and resources. However, due to their linkage to intellectual property, we have also seen the discussion on property issues for indigenous peoples in the context of TCE protection in previous chapters. Central difficulties in the context of indigenous peoples and property are the disparities between mainstream conceptions of property and ownership and indigenous peoples' cultural and communal characteristics and relationships with their lands and resources.[1712] These disparities occur not only in the context of land title, but also in the context of their immaterial resources such as traditional knowledge and TCEs.

The right to property, its framework character and reversed enabling nature

The right to property is a right that is recognised in the UDHR, notably in Article 17 UDHR. The formulation of this right is striking in the sense that it guarantees the right of everyone "to own property alone *as well as in association with others* [italics added]." This means the UDHR clearly leaves room for the possibility of collective property. The sister covenants, ICCPR and ICESCR, do not contain a right to property. However, the UDHR, including its right to property, is generally considered to have achieved the status of customary

[1711] As noted above, the connection between mass media and indigenous children is emphasised in Article 17 CRC.
[1712] Desmet 2011, p. 212.

international law.[1713] The two indigenous rights instruments, ILO Convention No. 169 and UNDRIP, do contain several explicit provisions on indigenous peoples and property. Most of these concern indigenous land rights. Furthermore, many Concluding Observations of the HRC and CESCR still pay significant attention to property and ownership rights in the context of indigenous peoples.

The right to property does have a place in Article 1 of Protocol No. 1 of the European Convention of Human Rights (ECHR).[1714] The European system has been particularly well-developed in extensive case-law on the right to property.[1715] The Court has given a wide interpretation to the term 'possessions', holding that it "covers both immovable and movable property, including immaterial rights, such as contractual rights with economic value, various economic interests, and goodwill."[1716] Likewise, the Inter-American Court of Human Rights (IACtHR) has also defined 'property' broadly: ""Property" can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."[1717]

The right to property again seems a type of framework right. It relates to, and interacts with, many other rights or even contributes to their realisation. It is due to this framework function that the right to property is especially relevant in this overview of indigenous and cultural rights. As Van Banning has observed, human rights conventions adopted after the UDHR mostly do not contain general rights on the protection of property. Rather, they provide "for property protection in interaction with other rights, whereby property was sometimes strengthened, and sometimes limited by other rights."[1718] The ICERD, for example, does not contain a separate right to property as such, but it does colour the right to property. Article 5(d)(v) prescribes that states must eliminate racial discrimination and guarantee equality before the law with regard to the right to own property. The same goes for (most) property provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons.[1719] This way, the right to non-discrimination can reinforce the right to property.[1720] This can be described as the 'reverse form' of an enabling character of rights, in this case the right to property: the realisation and protection of other rights can enable (a form of) enjoyment of the right to property or the protection of property. The HRC, CESCR and CERD, for example, also refer extensively to common property, possession and ownership of lands for indigenous peoples and economic activities in the context of rights to

[1713] Desmet 2011, p. 214.
[1714] "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."
[1715] See for a thorough overview and analysis Desmet 2011, p. 217–257.
[1716] Krause 1995, p. 150.
[1717] Inter-American Court of Human Rights 31 August 2001 (*Mayagna [Sumo] Awas Tingni Community v. Nicaragua*), par. 144. See more generally on the IACtHR: Desmet 2011, p. 259 and further.
[1718] Van Banning 2002, p. 48. See Article 2 UDHR on the prohibition of discrimination regarding property status: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
[1719] Krause 1995, p. 148. Articles 16(1)(h), 13, and 13 of the Conventions, respectively.
[1720] Van Banning 2002, p. 49.

self-determination, non-discrimination and cultural rights, for example Article 27 ICCPR, in their Concluding Observations.

Property, land and cultural rights

Indigenous peoples' often marginalised status means that their rights to their lands and natural resources do not tend to be recognised and respected. This means that they face discrimination on the grounds of their ethnic origin and cultural characteristics in the enjoyment of their property rights. The leading decision in the *Awas Tingni v. Nicaragua* case of the Inter-American Court of Human Rights contains important considerations with regard to the right to property and indigenous peoples' specific situation. The Court confirmed that the right to property of Article 21 of the American Convention of Human Rights also protects the rights of indigenous peoples to communal property regarding their ancestral lands, which originate in their customary practices, ways of life, use and occupation.[1721] It was the first judgment of this Court regarding indigenous peoples and it set an important precedent. It is appropriate that it concerned one of the most vital aspects of indigenous peoples' existence: land.[1722] The Court places positive obligations on the state because of its lack of recognition of communal property in this case.[1723] In multiple Concluding Observations, the CERD, HRC and CESCR have reminded Nicaragua of its obligation to take action to comply with this judgment.[1724]

Another dimension in which the right to property, especially to their lands, is particularly relevant for indigenous peoples is in conjunction with the cultural rights of Article 27 ICCPR, e.g. the rights to enjoy their own culture, to profess and practise their own religion, or to use their own language. Indigenous peoples depend on their land for cultural integrity[1725] and their ways of life. Article 27 ICCPR does not as such contain a right of indigenous peoples to land. However, as Gilbert has observed: "the HRC has developed a jurisprudence which protects activities that form an essential part of an Indigenous culture, and activities relating to the use of the land have often been recognised as constituting such essential cultural elements."[1726] The Committee may not (be able to) recognise property rights as such, due to lack of the right in the Covenant, but it does acknowledge common rights to economic activities, such as land use for herding, hunting and fishing, as protected under Article 27 ICCPR.[1727]

In summary, despite the fact that the UN Conventions do not contain a right to (communal) property as such, the UN Committees have still urged states to recognise indigenous peoples' ownership and land rights in many Concluding Observations, often related to rights to self-

[1721] Inter-American Court of Human Rights 31 August 2001 (*Mayagna (Sumo) Awas Tingni Community v. Nicaragua*), par. 148-151, specifically on indigenous peoples' conception of 'property': par. 149.
[1722] Grossman 2001, p. 8.
[1723] Inter-American Court of Human Rights 31 August 2001 (*Mayagna [Sumo] Awas Tingni Community v. Nicaragua*), par. 148-151. According to the Court, Nicaragua must delimit, demarcate and title the territory belonging to the indigenous people and, in the meantime, refrain from activities that affect "the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities." See: Van Banning 2002, p. 114.
[1724] See, for example, CERD Concluding Observations Nicaragua 2008, par. 21; CESCR Concluding Observations Nicaragua 2008, par. 11; HRC Concluding Observations Nicaragua 2008, par. 21.
[1725] Desmet 2011, p. 257.
[1726] Gilbert 2010, p. 7.
[1727] Ominayak v. Canada 1990, par. 32.2; Mahuika et al. v. New Zealand 2000, par. 9.3, 9.5; Kitok v. Sweden 1985, par. 9.2; Länsman et al. v. Finland 1994, par. 9.2.

determination, non-discrimination and minority rights.[1728] Many of the Observations concern issues of access, traditional economic activities, traditional livelihood and ways of life, title and demarcation of indigenous lands and forced evictions. The various framework dimensions of (common) property, land, cultural rights and non-discrimination are well-captured by Anaya's statement that:

> "Inasmuch as property is a human right, the fundamental norm of non-discrimination requires recognition of the forms of property that arise from the traditional customary land tenure of indigenous peoples, in addition to the property regimes created by the dominant society."[1729]

Indigenous peoples and intellectual property

In addition to property issues in the context of indigenous lands and resources, *intellectual* property issues are also recognised in Concluding Observations of the CERD and CESCR. In the Concluding Observations of the CERD of 2013 regarding New Zealand, the Committee refers to the aforementioned 'Wai 262' decision of the Waitangi Tribunal. This decision concerns, amongst other things, the intellectual and cultural property rights of Māori. The Tribunal has recommended legal changes in order to protect traditional knowledge, genetic and biological resources.[1730] In this context, the reference to intellectual property rights should again be read in conjunction with, and coloured by, a non-discrimination dimension. In other words, states are obliged to eliminate discrimination and guarantee the right of everyone to equality before the law and the enjoyment of rights such as the right to own property alone as well as in association with others, effective protection and remedies.[1731] Changes to law, policy and practice, such as in this case to ensure the full protection of Māori's intellectual property rights over their traditional knowledge and resources,[1732] are examples of a means to achieve this goal. This way, specific Māori intellectual and cultural property can also find a place for protection under mainstream, existing (intellectual property) law.

In Concluding Observations, the CESCR has also observed such issues as non-recognition of the collective authorship of indigenous peoples and lack of protection of indigenous peoples' intellectual property, including their traditional knowledge and cultural heritage, under states' copyright or other legislation.[1733] The same goes for their collective right to derive benefits from the products they create.[1734] The Committee therefore urges states to develop intellectual property regimes to protect indigenous peoples' collective rights,[1735] including "to their works

[1728] See a general selection: CERD Concluding Observations Guatemala 2006, par. 17; Guyana 2006, par. 16; Mexico 2006, par. 15; Namibia 2008, par. 18; Russian Federation 2008, par. 24; CESCR Concluding Observations Argentina 2011, par. 8-9; Australia 2009, par. 32; Bolivia 2008, par. 23; Brazil 2009, par. 9; Cambodia 2009, par. 15-16; Finland 2008, par. 11, 20; Paraguay 2008, par. 18, 29; Philippines 2008, par. 16; Sweden 2008, par. 15; HRC Concluding Observations Argentina 2010, par. 25; Brazil 2005, par. 6; Chile 2007, par. 19; Kenya 2012, par. 24; New Zealand 2010, par. 19; Thailand 2005, par. 24.
[1729] Anaya 2004, p. 142: "Several U.N. and OAS studies and declarations have highlighted that among the most troublesome manifestations of historical discrimination against indigenous peoples has been the lack of recognition of indigenous modalities of property."
[1730] CERD Concluding Observations New Zealand 2013, par. 14.
[1731] Articles 2, 5 and 6 ICERD.
[1732] CERD Concluding Observations New Zealand 2013, par. 14.
[1733] See CESCR Concluding Observations Mexico 2006, par. 27; Bolivia 2008, par. 24; Australia 2009, par. 33 and 33(e); Russian Federation 2011, par. 34; Argentina 2011, par. 25.
[1734] CESCR Concluding Observations Bolivia 2008, par. 24; Argentina 2011, par. 25.
[1735] See CESCR Concluding Observations Mexico 2006, par. 46; Bolivia 2008, par. 37; Australia 2009, par. 33(e); Russian Federation 2011, par. 34.

which are an expression of their traditional culture and knowledge",[1736] and "to prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties."[1737] In these Observations the Committee refers to Article 15(1)(a) and (c) ICESCR.[1738] While the Covenant does not contain property rights as such in these provisions, the Committee seems to nonetheless interpret them as providing for rights, including collective rights of indigenous peoples, to intellectual property protection of traditional knowledge and cultural heritage. Article 31 UNDRIP specifically underlines indigenous peoples' right to the intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions.

Property and TCEs

As this section has shown, indigenous peoples' collective ownership over their lands and resources is recognised in international human rights law. The analysis has also shown that indigenous peoples' claims to property rights over their traditional lands, resources, economic activities and ways of life are coloured, and strengthened, by such human rights as self-determination, non-discrimination, participation in cultural life and minority rights. It is precisely this array of rights on which various aspects of TCE protection can draw.

We can extend the role that various other human rights play for indigenous peoples' property protection claims to their *immaterial* resources. In fact, the UN Committees have pointed to lack of recognition of indigenous peoples' collective authorship under national copyright legislation, lack of protection of their intellectual property, as well as an absence of their collective right to derive benefits from the products they create. The reasoning for indigenous peoples' collective ownership over their lands and resources could be applied to their intellectual property as well. Also, here, (cultural) self-determination, non-discrimination, participation in cultural life and minority rights provide for circumstances and requirements that warrant recognition of indigenous peoples' collective rights with regard to their intellectual property. For example, the HRC has acknowledged common rights to economic activities as protected under Article 27 ICCPR.[1739] The same could apply to TCEs: based on the Covenants it may not be possible to recognise a property right for TCEs, but it is possible to discern common rights to cultural activities that together contribute to the protection, preservation and promotion of TCEs nonetheless, such as the rights of minorities, the right to participate in cultural life and the right to benefit from the protection of the moral and material interests of one's works.

TCEs tend to be expressions of their cultures, traditional livelihoods and ways of life. From the perspective of the right to property's framework character, the lack of protection of indigenous peoples' traditional knowledge and cultural expressions due to their specific characteristics could be seen as preventing indigenous peoples from fully enjoying their right to participate in cultural life, to benefit from the protection of their moral and material interests resulting from their traditional activities and to the protection of their ways of life.

[1736] CESCR Concluding Observations Russian Federation 2011, par. 34.
[1737] CESCR Concluding Observations Mexico 2006, par. 46.
[1738] On the right to participate in cultural life and the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author, respectively.
[1739] Ominayak v. Canada 1990, par. 32.2; Mahuika et al. V. New Zealand 2000, par. 9.3, 9.5; Kitok v. Sweden 1985, par. 9.2; Länsman et al. v. Finland 1994, par. 9.2.

5.3.6 Participation

Participation rights feature prominently in indigenous rights discourse. Indigenous peoples need a say in matters that affect them, in particular control over land and natural resources. Participation is central in these instances, which deal for example with land use and extractive industries. In this sense, it is an essential component of the right to self-determination. The HRC has also recognised it as an important component of Article 27 ICCPR on minority rights. Another dimension is participation, not in political life, but in *cultural* life. This right is explicitly recognised in Article 15(1)(a) ICESCR.

Participation has various dimensions in human rights law. For this thesis, two are especially relevant: procedural participation and cultural participation, i.e. participation in cultural life. Both are of importance for indigenous peoples and their rights in general, and for the protection of their heritage, knowledge and cultural expressions in particular. The normative starting point is that indigenous peoples should be involved in matters that affect them. 'Procedurally', this is realised by means of consultation and free, prior and informed consent. 'Culturally', the right to take part in cultural life is the central norm.

Procedural participation

Participation in a procedural way is reflected in procedural rights such as participation in public affairs and decision making, consultation and free, prior and informed consent (FPIC). In the context of indigenous peoples, these rights are particularly visible in decision making processes concerning the use of land, territories and natural resources, which affect indigenous peoples' rights. As the Expert Mechanism on the Rights of Indigenous Peoples has explained: "Decision-making rights and participation by indigenous peoples in decisions that affect them is necessary to enable them to protect, *inter alia*, their cultures, including their lands, territories and resources."[1740]

Like a number of the previous rights, the participation right is also a type of framework right that influences the effective exercise and enjoyment of other rights.[1741] This way, the right to participation and the duty of states to obtain consent takes on a role beyond a procedural right, and also becomes a means to substantively ensure indigenous peoples' rights.[1742] One can think for example of the development of policies in the context of education and the media. This clearly requires the participation of and cooperation by the indigenous peoples concerned to exercise their corresponding rights effectively, such as rights to education, freedom of expression and participation in cultural life.

Policy-making on education, which is vital for the transmission of language and traditional culture including TCEs, requires a significant degree of indigenous participation to ensure effective rights to their own educational systems.[1743] And as we have seen in the section on the right to freedom of expression, participation in the media is of central importance for the (self-)representation and empowerment of minorities and indigenous peoples within wider society.[1744] The media also plays a crucial role in the ability to express and transmit TCEs, for example in the sense of ensuring that indigenous children have access to information and

[1740] Expert Mechanism On The Rights Of Indigenous Peoples 2011, p. 22.
[1741] Expert Mechanism On The Rights Of Indigenous Peoples 2011, p. 25.
[1742] Expert Mechanism On The Rights Of Indigenous Peoples 2011, p. 26.
[1743] See Article 27(1) and (3) ILO Convention No. 169; Article 14 UNDRIP.
[1744] McGonagle 2015b, p. 5.

material from diverse sources, "especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."[1745] Such information is likely to include traditional cultural information and heritage from their own communities, such as TCEs. Media policy-making therefore also requires the input and involvement of indigenous peoples.

Conceptually, a distinction is made between participation and consultation. Consultation is a right specifically for indigenous peoples, whereas participation is a right of every citizen.[1746] States' duties of consultation have been interpreted as a condition to effectively ensure the participation of indigenous peoples.[1747] Consultation is a norm that is firmly established as a state obligation in international law and recognised explicitly and extensively by the UN Committees in their Concluding Observations.[1748] The consultation of indigenous peoples in order to obtain their free, prior and informed consent has been qualified as an essential component of the right to self-determination.[1749] Free, prior and informed consent can be understood as: free, meaning no coercion, intimidation or manipulation into making a decision; prior, meaning before the start of the activity or measure concerned; informed, meaning that indigenous peoples have been given all necessary information on the matter, which is unbiased, accurate and understandable; and consent, which means agreement, disagreement or dependent on terms and conditions.[1750]

[1745] Article 17 CRC. See also Article 16 UNDRIP.
[1746] Desmet 2011, p. 314.
[1747] Inter-American Court of Human Rights 28 November 2007 (*Saramaka People v. Suriname*); Inter-American Court of Human Rights 27 June 2012 (*Kichwa Indigenous People of Sarayaku v. Ecuador*); Desmet 2011, p. 316.
[1748] Desmet 2011, p. 314, 316. See: Concluding Observations CERD Ecuador 1993, par. 136; Argentina 1997, par. 19, 24; Colombia 1999, par. 16; Argentina 2001, par. 10; Ecuador 2003, par. 16; Suriname 2004, par. 13, 14, 19; Sweden 2004, par. 12; Argentina 2004, par. 16, 19; Nigeria 2005, par. 19; Laos 2005, par. 18; Guatemala 2006, par. 19; Botswana 2005, par. 12, 16; Guyana 2006, par. 14, 16, 17; Mexico 2006, par. 12; Canada 2007, par. 15, 25; Indonesia 2007, par. 17; Democratic Republic of Congo 2007, par. 18; Fiji 2008, par. 10; USA 2008, par. 29; Ecuador 2009, par. 16; Sweden 2008, par. 19; Namibia 2008, par. 18; Congo 2009, par. 14; Finland 2009, par. 14; Suriname 2009, par. 14, 17, 18; Colombia 2009, par. 18, 20-24; Chile 2009, par. 16, 22; Peru 2009, par. 9, 14-15; Argentina 2010, par. 26; Cambodia 2010, par. 16; Cameroon 2010, par. 18(b); Guatemala 2010, par. 11(a)(b)(c), 13; Panama 2010, par. 11, 14; Australia 2010, par. 16, 18, 20-21; Bolivia 2011, par. 18, 20; Norway 2011, par. 18-19; Rwanda 2011, par. 16(d), 17; Paraguay 2011, par. 14; Canada 2012, par. 19-20; Laos 2012, par. 17-28; Vietnam 2012, par. 13; Fiji 2012, par. 14; Ecuador 2012, par. 17; Algeria 2013, par. 15; New Zealand 2013, par. 18; Russian Federation 2013, par. 20(d), 20(g)(d); Chile 2013, par. 12, 13(c); Sweden 2013, par. 12, 13(c); Sweden 2013, par. 17; Venezuela 2013, par. 19; Honduras 2014, par. 20; Cameroon 2014, par. 16; El Salvador 2014, par. 16, 18, 20; Peru 2014, par. 14. Concluding Observations HRC Finland 1998, par. 5; Norway 1999, par. 10; Venezuela 2001, par. 28; Suriname 2004, par. 21; Colombia 2004, par. 20; Thailand 2005, par. 24; Norway 2006, par. 5; Canada 2006, par. 9, 22; Chile 2007, par. 19(c); Costa Rica 2007, par. 5; Panama 2007, par. 21(c); Botswana 2008, par. 24; Nicaragua 2008, par. 21; Australia 2009, par. 13, 14, 16; Sweden 2009, par. 20; Tanzania 2009, par. 26; Mexico 2010, par. 22; New Zealand 2010, par. 19-20; Colombia 2010, par. 25; El Salvador 2010, par. 18; Guatemala 2012, par. 27; Paraguay 2013, par. 27; Peru 2013, par. 24; Bolivia 2013, par. 25; USA 2014, par. 25; Chile 2014, par. 10. Concluding Observations CESCR Panama 1995, par. 70, 79(ii); Mexico 1999, par. 25; Colombia 2001, par. 33; Ecuador 2004, par. 12, 35; Canada 2006, par. 38, 45; Mexico 2006, par. 10, 28; Finland 2008, par. 20; India 2008, par. 31, 71, 84; Nicaragua 2008, par. 11(c); Australia 2009, par. 15, 27, 32; Cambodia 2009, par. 16, 30; Democratic Republic of Congo 2009; Colombia 2010; Argentina 2011, par. 9, 10; Ethiopia 2012, par. 24; Peru 2012, par. 23; Ecuador 2012, par. 9, 10; Rwanda 2013, par. 23; Gabon 2013, par. 6; El Salvador 2014, par. 27; Indonesia 2014, par. 27, 39; Guatemala 2014, par. 7.
[1749] Expert Mechanism On The Rights Of Indigenous Peoples 2011, p. 26.
[1750] Expert Mechanism On The Rights Of Indigenous Peoples 2011, p. 27.

Self-determination, participation and minority rights

The combination of Articles 1, 25 and 27 ICCPR[1751] – paired with principles and provisions of ILO No. 169 and UNDRIP described below – play a specific role for the rights of indigenous peoples. These provisions cover principles of self-determination, participation in public affairs on issues and decisions that affect the minority or indigenous people in question, and the right to enjoy a particular culture, including *ways of life*.

The HRC has held in General Comment No. 23 on Article 27 ICCPR that "effective participation in decisions relating to land and resources may be integral to protecting the right to a 'way of life' under Article 27 ICCPR."[1752] This can be connected to the various communications of the HRC, such as the *Ominayak* and *Mahuika* cases,[1753] but also the *Länsman* case.[1754] In these cases, the Committee assessed whether various (development) activities violated Article 27, namely gas and oil exploration that threatened communities' way of life and culture, regulations that affected economic activities such as fishing which are an essential element of a communities' culture, and the quarrying of stone which affected the communities' way of life of reindeer husbandry. In this respect, the Committee emphasises the importance of the ability for members of minority communities to effectively participate in decisions that affect them[1755] and their cultures and ways of life.

It should be stressed here that the Committee held in the *Diergaardt* case that the rights of Article 25 on participation in public affairs are individual rights.[1756] This presents difficulties for indigenous peoples, as formulated clearly in the concurring opinion of Martin Scheinin:

> "In paragraph 10.8, the Committee, in my opinion unnecessarily, emphasizes the individual nature of rights of participation under article 25. In my view, there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation."[1757]

Clearly, the right to determine and control "the future development of all those aspects of collective human interaction that define and constitute their distinct societies",[1758] the right to participate in public affairs and the right to enjoy specific cultures and ways of life all draw on a manifestation of the principle of (procedural) participation.

[1751] Containing the rights to self-determination, participation in public affairs and the rights of minority cultures, respectively.
[1752] Vrdoljak 2007, p. 61 and HRC General Comment No. 23 par. 3(2) and par. 7.
[1753] Ominayak v. Canada 1990, par. 33 and Mahuika et al. v. New Zealand 2000, par. 9.1-10.
[1754] Länsman et al. v. Finland 1994, par. 9.1-9.8.
[1755] Länsman et al. v. Finland 1994, par. 9.5, Mahuika et al. v. New Zealand 2000, par. 9.5, 9.6, 9.8.
[1756] Diergaardt et al. v. Namibia 2000, par. 10.8. See also Marshall v. Canada 1991 on Article 25 ICCPR and the participation of indigenous representatives.
[1757] Diergaardt et al. v. Namibia 2000, Individual opinion by Martin Scheinin (concurring).
[1758] Anaya 2014, p. 2.

Indigenous standards of participation, consultation and FPIC

ILO Convention No. 169 extensively covers various indigenous rights on self-determination, autonomy, participation, consultation and cooperation, both generally[1759] and on specific topics.[1760] The rights of participation and consultation in ILO Convention No. 169 have been described as "the basic pillars" of the Convention.[1761] The Convention holds that states have the responsibility to develop protection measures for indigenous peoples' rights and to guarantee respect for their integrity. To this end, the peoples concerned ought to participate in the development of such action plans.[1762] This shows the weight that is attached to indigenous peoples' participation and equality, taking into account their integrity, identity and way of life in any measure. This consideration also reflects recognition of the dignity and practice and existence of distinctive cultures.

Governments are also obliged to consult the indigenous peoples that are affected by legislative or administrative measures, in particular through their own representative institutions.[1763]And indigenous peoples have the right to political participation in that they must be enabled to participate in elective institutions and administrative or other relevant bodies during all stages of the decision-making processes of policies or programmes that concern them.[1764] The development of peoples' own institutions and initiatives is to be facilitated.[1765] The consultations following from the Convention must be carried out "in good faith" and "with the objective of achieving agreement or consent to the proposed measures."[1766] This means that this general participation right is not a right of indigenous peoples to agree or disagree, or a veto. The Convention merely requires that it is the objective of the consultations carried out by states to achieve consent, not to obtain it per se.[1767] There is one 'strict' free, prior and informed consent requirement in the Convention with regard to a specific topic, namely in the case of relocation.[1768]

Participation and cooperation are also prominent in many provisions of UNDRIP, which contains rights of self-government and participation, procedural rights, rights to consultation,

[1759] Articles 2(1), 6(1) and (2) ILO Convention No. 169.
[1760] Articles 7(1), (2) and (3), 15 (1) and (2), 16(2), 17(2), 22(2) and (3), 23(1), 27(3), 28(1) ILO Convention No. 169, on such topics as: the development process; improvement of life and work conditions and health and education levels; studies on the impact of development activities; use, management and conservation of their natural resources; programmes for exploration and exploitation of the natural resources of their lands; relocation; capacity to alienate their lands or transmit rights outside their own communities; provision, organisation and operation of special training programmes; strengthening and promotion of handicrafts, rural and community-based industries, and subsistence economy and traditional activities, such as hunting and fishing; establishment of minimum education standards; and measures to achieve the objective of indigenous children learning to read and write in their own indigenous language.
[1761] Desmet 2011, p. 311.
[1762] Article 2. As examples of such measures, paragraph 2(a), (b) and (c) require equal enjoyment of the rights and opportunities of national law; promotion of indigenous peoples' economic, social and cultural rights with respect for their social and cultural identity, their customs and traditions and their institutions; and elimination of any social and economic gaps between indigenous peoples and the wider community, taking into account their specific aspirations and way of life.
[1763] Article 6(1).
[1764] Article 6(1)(b).
[1765] Article 6(1)(c).
[1766] Article 6(2).
[1767] Desmet 2011, p. 314.
[1768] Article 16(2).

rights to economic self-determination and rights to development.[1769] These provisions include an indigenous right of procedural participation in decision-making regarding all matters and measures that affect their rights, with representatives chosen according to their own procedures.[1770] This procedural right is often at stake in the context of land and natural resources issues that face indigenous peoples and their territories in many parts of the world. Procedural participation must also be established by both the organs and specialised agencies of the UN system and other intergovernmental organisations through 'ways and means of ensuring participation of indigenous peoples on issues affecting them.'[1771]

UNDRIP also contains more specific provisions that determine that the development of measures by states regarding certain topics and objectives must take place in conjunction with the indigenous peoples concerned.[1772] This is also the case for measures on the protection of the right of indigenous peoples to maintain, control, protect and develop their heritage.[1773] In other words, the Declaration clearly upholds a standard of participation that is relevant for indigenous peoples in the context of TCE protection: they must be able to participate at UN, WIPO and national level in the development of protection measures and other issues that affect their heritage.

According to UNDRIP, indigenous peoples have a right to free, prior and informed consent in four specific cases. In the first two cases they have an absolute right to free, prior and informed consent, namely regarding relocation and the storage of hazardous materials on their lands, which is firmly formulated without conditions.[1774] In the third case, the right to free, prior and informed consent is formulated more weakly regarding the approval of projects affecting indigenous peoples' lands, territories and other resources.[1775] This provision requires that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions" in order to obtain the consent.[1776] The same goes for the – fourth – broad 'catch-all' free, prior and informed consent provision of UNDRIP, which requires free, prior and informed consent "before adopting and implementing legislative or administrative measures that may affect them."[1777] In other words, for project development and generally in the case of measures that affect the indigenous peoples concerned, the right is not very strongly formulated.[1778]

The Inter-American Court of Human Rights established a right to free, prior and informed consent in the *Saramaka People v. Suriname* case of 2007. The case concerns the grant of concessions by the state to third parties for the exploration and extraction of natural resources

[1769] Articles 3, 4, 5, 10, 11(2), 12(2), 14(1), 15(2), 17(2), 18, 19, 20(1), 22(2), 23, 26(3), 27, 28(1), 29(2), 30(1), 31(2), 32(2), 36(2), 38 and 41 UNDRIP; Morgan 2011, p. 20–21; Saul, Kinley & Mowbray 2014, p. 84–86.
[1770] Article 18.
[1771] Article 41.
[1772] One can think of: education; protection of indigenous children from economic exploitation; combating discrimination and promoting tolerance; redress with regard to property taken without FPIC; protection of indigenous children and women from violence and discrimination; processes regarding recognition and adjudication of land, territory and resources rights of indigenous peoples; measures regarding the recognition and protection of the effective exercise of their rights to their heritage, including intellectual property over that heritage; contacts, relations and cooperation with their own members or other peoples across borders; and measures to achieve the ends of the Declaration.
[1773] Article 31(2).
[1774] Articles 10 and 29(2) UNDRIP. Desmet 2011, p. 318.
[1775] Article 32(2) UNDRIP.
[1776] Desmet 2011, p. 319.
[1777] Article 19 UNDRIP.
[1778] Desmet 2011, p. 319.

on the territory of the Saramaka people, such as logging and mining activities. Allegedly, this would affect the Saramaka people's traditional territories and resources, and the traditional activities on which they rely for their subsistence.[1779] The Court held that there must be certain safeguards with regard to restriction of the Saramaka people's right to property. The state must guarantee that the Saramaka people effectively participate in any decisions and development plans according to their customs and traditions, and benefit from the implementation of such plans.[1780] In fact, the Court refers to Article 32 UNDRIP which provides for the right to free, prior and informed consent in the case of projects, such as the development of resources, that affect indigenous peoples' territories.[1781] The Court stresses the duty of the state to actively consult the Saramaka people in the early stages of the development plans. These consultations must take place in good faith, through culturally appropriate procedures, with the objective of achieving agreement and according to their own customs and traditions. Their own decision-making methods must be taken into account.[1782] In the case of large-scale development projects that would majorly impact Saramaka territory, the Court further held that the state not only has a consultation duty in such circumstances, but that the safeguard of effective participation also requires that it obtain their free, prior and informed consent.[1783]

In the *Sarayaku v. Ecuador* judgment, the Court confirms many of the conclusions of its *Saramaka* judgment, and establishes the steps and requirements for the consultation process in a detailed manner.[1784] However, it side-steps the crucial question of *consent*, i.e. whether the present case amounts to a large-scale development project that majorly impacts the Sarayaku territory so that free, prior and informed consent is required.[1785] Rather, throughout the judgment, the Court speaks of "prior, free and informed consultation". Still, both the *Saramaka* and *Sarayaku* judgments could be important precedents regarding the standards for appropriate consultation processes and the circumstances of consent, not only for the Organization of American States, but also for indigenous peoples elsewhere in the world.

However, the specific free, prior and informed consent standards of ILO Convention No. 169 have only been ratified by 22 countries, mostly in Latin America. Furthermore, the free, prior and informed consent standards of UNDRIP, including the broad 'catch-all' provision, are not legally binding. The HRC's decision of 2009 in *Ángela Poma Poma v. Peru* is therefore of great importance for indigenous peoples, in particular where the Committee has held that participation in decision-making processes on measures that may substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community must be effective. In this sense, the HRC holds that participation requires not mere consultation, but the free, prior and informed consent of the community members.[1786]

[1779] Inter-American Court of Human Rights 28 November 2007 (*Saramaka People v. Suriname*), par. 124, 126.
[1780] Inter-American Court of Human Rights 28 November 2007 (*Saramaka People v. Suriname*), par. 129, 130.
[1781] Inter-American Court of Human Rights 28 November 2007 (*Saramaka People v. Suriname*), par. 131. Article 32(2) reads: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."
[1782] Inter-American Court of Human Rights 28 November 2007 (*Saramaka People v. Suriname*), par. 133.
[1783] Inter-American Court of Human Rights 28 November 2007 (*Saramaka People v. Suriname*), par. 134-136, par. 137.
[1784] Inter-American Court of Human Rights 27 June 2012 (*Kichwa Indigenous People of Sarayaku v. Ecuador*), par. 159-211.
[1785] Compare: Inter-American Court of Human Rights 28 November 2007 (*Saramaka People v. Suriname*), par. 134, 137.
[1786] Ángela Poma Poma v. Peru 2009, par. 7.6.

The UN Committees further refer extensively to indigenous peoples' free, prior and informed *consent* in their Concluding Observations[1787] regarding a wide variety of topics.[1788] In this sense, free, prior and informed consent is linked to indigenous peoples' rights to their lands and resources, the right to self-determination of Articles 1 ICCPR and ICESCR, the cultural rights of minorities of Article 27 ICCPR and the cultural rights of Article 15 ICESCR. Free, prior and informed consent is the ultimate exercise of self-determination and goes beyond mere participation in procedures. It means that indigenous peoples determine the *outcome* of procedures, which includes *not* giving consent or placing terms and conditions on their consent.[1789]

Participation in cultural life

The cultural dimension of participation, i.e. participation in cultural life, is particularly relevant for the protection and promotion of TCEs. Article 15 ICESCR on the right to take part in cultural life is a central cultural rights provision, which is also of specific importance for minorities and indigenous peoples. It draws on principles of participation in, and continuation and practice of, their cultures. Furthermore, it touches upon issues of (cultural) self-determination and dignity associated with their specific ways of life and cultural practices.

The right to take part in cultural life

Article 15(1)(a) stresses *everyone's* right to take part in cultural life, which may mean that of the individual or of the collective.[1790] The central (active and dynamic) concept of participation implies that importance is attached to principles of practice and 'existence' of cultures. The CESCR has recognised three elements of 'taking part' in General Comment No.

[1787] See: Concluding Observations CERD Cambodia 1998, par. 19; Australia 2000, par. 9; USA 2001, par. 400; Costa Rica 2002, par. 13; Botswana 2002, par. 304; Ecuador 2003, par. 16; Bolivia 2003, par. 13; Argentina 2004, par. 18; Laos 2005, par. 18; Australia 2005, par. 11, 16; Guatemala 2006, par. 17, 19; Botswana 2006, par. 12(d); Guyana 2006, par. 14, 17; India 2007, par. 19, 20; Ethiopia 2007, par. 22; Indonesia 2007, par. 17; Ecuador 2008, par. 16; Russian Federation 2008, par. 24; Suriname 2009, par. 14; Colombia 2009, par. 20; Philippines 2009, par. 24, 25; Chile 2009, par. 22, 23; Peru 2009, par. 9, 14; Argentina 2010, par. 26; Cambodia 2010, par. 16; Cameroon 2010, par. 18(b)(c); Guatemala 2010, par. 11(a)(f); Panama 2010, par. 14; Bolivia 2011, par. 20; Paraguay 2011, par. 14; Canada 2012, par. 20; Laos 2012, par. 17; Mexico 2012, par. 17; Vietnam 2012, par. 15; Fiji 2012, par. 14; Ecuador 2012, par. 17; Finland 2012, par. 13; Thailand 2012, par. 16; Belize 2012, par. 10; New Zealand 2013, par. 18; Chile 2013, par. 13(c); Sweden 2013, par. 17; Honduras 2014, par. 20; Cameroon 2014, par. 16; El Salvador 2014, par. 18; Peru 2014, par. 14; USA 2014, par. 24(a).
Concluding Observations HRC Canada 2006, par. 22; Panama 2008, par. 21; Nicaragua 2008, par. 21; Philippines 2008, par. 6; Colombia 2010, par. 25; El Salvador 2010, par. 18; Togo 2011, par. 21; Kenya 2012, par. 24; Peru 2013, par. 24; Belize 2013, par. 25; Bolivia 2013, par. 25; USA 2014, par. 25; Chile 2014, par. 10(c).
Concluding Observations CESCR Colombia 2001, par. 12, 33; Brazil 2003, par. 58; Ecuador 2004, par. 12, 35; Mexico 2006, par. 28; Nicaragua 2008, par. 11; Colombia 2010; Russian Federation 2011, par. 7(b); Argentina 2011, par. 9; New Zealand 2012, par. 11; Peru 2012, par. 23; Tanzania 2012, par. 22, 29; Ecuador 2012, par. 9; Gabon 2013, par. 6; El Salvador 2014, par. 27; Indonesia 2014, par. 27, 28(a), 38(c); Finland 2014, par. 9(b); Guatemala 2014, par. 7; Nepal 2014, par. 9(d); Vietnam 2014, par. 29(a).

[1788] Such as: (lack of) recognition of traditional forms of land tenure and ownership; mining; mega-projects; oil exploration; natural resource exploitation projects; infrastructure; waste dumps and sewage-treatment plants; eviction; construction; tourism; dams; nature conservation, national parks and reserves; data collection; urbanization; and generally "all matters or decisions that affect them."

[1789] Expert Mechanism On The Rights Of Indigenous Peoples 2011, p. 26–27.

[1790] "[i]n other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.

21 of 2009: participation in, access to and contribution to, cultural life.[1791] For 'cultural life', the CESCR states that culture should be understood as "a broad, inclusive concept encompassing all manifestations of human existence", thereby stressing in particular its living, dynamic and interactive nature. The formulation *ways of life*[1792] is emphasised.[1793] Minorities and indigenous peoples are recognised as vulnerable communities requiring special protection.[1794] The CESCR has also repeatedly stressed in Concluding Observations on state reports that cultures understood as *ways of life* ought to be protected and promoted, including those of minorities and indigenous communities. According to the Committee, governments must protect those cultures to ensure effective exercise of the right to take part in cultural life.[1795]

For indigenous peoples, General Comment No. 21 highlights in particular the cultural values underlying their communal (cultural) life. Such values include the emphasis on the collective when enjoying their culture and the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. According to the Committee, state parties should take measures to guarantee that the exercise of the right to take part in cultural life takes account of these specific cultural values. These values would be essential for indigenous peoples' existence and development. Furthermore, indigenous peoples' collective rights to maintain, control, protect and develop their cultural heritage, traditional knowledge and TCEs are underlined, and the importance of the principle of free, prior and informed consent is stressed.[1796] In this sense, indigenous peoples' rights in their heritage are connected to safeguarding the enjoyment of their rights to their particular ways of life. So, the Committee's interpretation in its General Comment highlights that principles of participation, non-discrimination and rights in their particular cultures are essential for minorities and indigenous peoples.

The Committee has also underlined in General Comment No. 21 that *procedural* participation rights of minorities and indigenous peoples are components of state obligations under Article 15(1)(a) ICESCR. In complying with their obligation to fulfil the right to take part in cultural life, for example, the Committee holds that states must establish legislation and effective mechanisms to enable "individuals, in association with others, or within a community or group, to participate effectively in decision-making processes."[1797] Furthermore, the Committee lists a number of minimum core obligations with immediate effect to create and

[1791] CESCR General Comment No. 21, par. 15.
[1792] This understanding of culture as a way of life was first visible in the CESCR's report of its seventh session in 1993, during which a general discussion was held on the right to take part in cultural life. CESCR, Report on the Seventh Session, E/1993/22 - E/C.12/1992/2, par. 213: "It was stated that culture meant a way of life. Its elements would be language, nonverbal communication, oral and written literature, song, religion or belief systems which included rites and ceremonies, material culture, including methods of production or technology, livelihood, the natural and man-made environment, food, clothing, shelter, the arts, customs and traditions, plus a world view representing the totality of a person's encounter with the external forces affecting his life and that of his community. Culture mirrored and shaped the economic, social and political life of a community." See also: Saul, Kinley & Mowbray 2014, p. 1180–1181.
[1793] CESCR General Comment No. 21 on Article 15(1)(a), par. 11, 12, 13. In par. 13, the Committee reiterates almost literally the formulation that it also used in par. 213 of the Report on the Seventh Session of 1993.
[1794] CESCR General Comment No. 21 on Article 15(1)(a), par. 32-33, 36-37.
[1795] See for example CESCR Concluding Observations Democratic Republic of Congo 2009; Finland 2008, par. 20; India 2008, par. 44; Sweden 2008, par. 15; Venezuela 2001, par. 12; Peru 1997, par. 26; and Mexico 1994, par. 11. These observations refer to the exploitation of forest resources; logging; development measures and projects in areas inhabited by various communities and tribes; unresolved land rights; mining; forced evictions; and resources for the preservation of way of life, respectively. Yupsanis 2010, p. 216.
[1796] CESCR General Comment No. 21 on Article 15(1)(a) ICESCR, par. 36-37.
[1797] CESCR General Comment No. 21 on Article 15(1)(a), par. 54(a).

promote an environment in which persons can participate in cultural life. One of these is the obligation for states to guarantee participation of members of minorities and indigenous peoples in the design and implementation of laws and policies affecting them. States should obtain their free, prior and informed consent especially in the case of preservation of their cultural resources, related to their way of life and cultural expression, when these are at risk.[1798]

The right to benefit from the protection of the interests from one's productions

Article 15(1)(c) contains a specific element of the right to participation. It provides for the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author. According to the CESCR's General Comment No. 17, this is "a human right, which derives from the inherent dignity and worth of all persons."[1799] The General Comment further explains the difference between the very nature of this human right and intellectual property regimes. The latter would be mainly concerned with protecting business and corporate interests and investments, while the former would safeguard the personal link between authors and creations or *between peoples, communities or groups and their collective heritage*.[1800] In this sense, it clearly provides a basis for a right to participate in all matters related to the use, control and protection of (collective) cultural works.

A crucial point the Committee makes for the discussion on TCEs is that, despite the individualistic formulation of Article 15(1)(c) ICESCR, this right *can*, "under certain circumstances", also be enjoyed by groups or communities. In this respect, the Committee refers to the section of the General Comment on indigenous peoples. This is a deviation from the similar provision of Article 27(2) UDHR, which is considered an individual right. Furthermore, "any scientific, literary or artistic production" also includes the knowledge, innovations and practices of indigenous peoples.[1801] As to the protection that authors or groups ought to be able to benefit from, the Committee stresses that this must be effective, but "need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions".[1802]

This statement seems to imply that the Committee does not require protection via the intellectual property regime specifically. This is notable for the discussion on TCE protection, as we have seen that the specifics of TCEs could mean that the general intellectual property system does not necessarily reflect the moral and material interests of indigenous peoples in protection of their TCEs as a whole. Indeed, WIPO itself noted this in its Draft Gap Analysis of 2008. The Analysis identifies a *conceptual divide* "between the aspirations and perspectives of indigenous peoples and the conventional intellectual property system."[1803] For these "fundamental differences", non-IP mechanisms such as cultural and other human rights are proposed to meet indigenous needs that cannot be met within the intellectual property

[1798] CESCR General Comment No. 21 on Article 15(1)(a), par. 55(e).
[1799] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 1.
[1800] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 2.
[1801] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 8-9.
[1802] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 10.
[1803] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.

system. UNDRIP is highlighted as a source reflecting indigenous peoples' aspirations in this regard.[1804]

According to the Committee, Article 15(1)(c) ICESCR imposes obligations on state parties to respect, protect and fulfil the rights in the provision.[1805] The Committee highlights indigenous peoples under the obligation to protect: "States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge."[1806] State parties should take the *preferences* of indigenous peoples into account when adopting measures. In particular, free, prior informed consent and oral or other customary forms of transmission should be respected.[1807] Finally, indigenous authors are mentioned specifically in the section on violations of the obligation to protect. This includes cases where states fail to guarantee adequate compensation by "third parties for any unreasonable prejudice suffered as a consequence of the unauthorized use of their scientific, literary and artistic productions."[1808] The collective rights of indigenous peoples to their traditional knowledge and cultural heritage under Article 15 have also been stressed by the CESCR in various Concluding Observations.[1809]

All in all, the multifaceted provision of Article 15 ICESCR clearly draws on a wide variety of principles, most central of which is participation in and continuation and practice of distinctive cultures. Respect for the inherent dignity and integrity of specific ways of life and cultural practices of minority and indigenous cultures is also highlighted. Other principles that are visible are equality and self-determination concerning indigenous peoples' collective cultural heritage, and participation and free, prior and informed consent in the adoption of measures to ensure protection of indigenous peoples' interests regarding their productions.

Participation and TCEs

This section has shown the importance attached to participation rights of indigenous peoples, both in a procedural and in a cultural context. Effective participation of indigenous peoples,[1810] in an equal way, and free, prior and informed consent regarding decisions affecting their rights[1811] have been underlined by the HRC and the CERD in General Comment No. 23 on Article 27 ICCPR and General Recommendation No. 23 on indigenous peoples, respectively.

[1804] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.
[1805] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 28: "The obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to fulfil requires States parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c)."
[1806] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 32.
[1807] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 32: "Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties."
[1808] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 45.
[1809] See CESCR Concluding Observations Mexico 2006, par. 27; Bolivia 2008, par. 24; Australia 2009, par. 33 and 33(e); Russian Federation 2011, par. 34; Argentina 2011, par. 25.
[1810] HRC General Comment No. 23, par. 7.
[1811] CERD General Recommendation No. 23, par. 4(d).

In a procedural context, participation rights guarantee involvement of indigenous peoples in decision-making procedures regarding all matters that affect their rights or their ways of life. This includes not only decisions and procedures regarding indigenous peoples' lands and resources, but also the protection of their heritage, including their TCEs. With regard to the participation right in a cultural context, the CESCR has specifically designated indigenous peoples as communities requiring special protection to ensure their full enjoyment of the right to take part in cultural life. The Committee stresses that states should take measures which take indigenous peoples' values of cultural life into account, such as the central place of their communities, lands and cultural heritage. States should also respect the principle of free, prior and informed consent regarding all matters affecting indigenous peoples' specific rights.[1812]

Notions of (cultural) self-determination, participation, and existence and continuation of specific ways of life are also visible in TCE protection discussions and claims. In a way, participation is connected to the claims of control over, and participation in all decisions on, the use of their works that authors have under copyright law. It is a similar type of control that indigenous peoples wish to exercise over their traditional cultural heritage, including their traditional knowledge and TCEs, which are so closely connected to, and often a reflection of, their ways of life in general. From this perspective, participation by way of free, prior and informed consent is also crucial in the context of protection of indigenous peoples' heritage, traditional knowledge and TCEs, from amongst others, unauthorised third party use.

Furthermore, procedural participation rights such as consultation and cooperation of indigenous peoples in the design and implementation of protection rules for their TCEs[1813] could remedy difficulties for indigenous peoples' specific characteristics arising from 'top-down' approaches to their issues. Such difficulties are for example visible, and well-documented in literature, in the case of applying general intellectual property rules to the protection of TCEs. As the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) notes: "Many indigenous peoples remain vulnerable to top-down State interventions that take little or no account of their rights and circumstances. In many instances, this is an underlying cause for land dispossession, conflict, human rights violations, displacement and the loss of sustainable livelihoods."[1814] Likewise, the absence of participation could very well be one of the underlying causes of the persistent lack of protection for indigenous peoples' cultural heritage and intangible resources, such as their TCEs.

5.3.7 Minority rights

Article 27 ICCPR provides for rights of minorities, such as the enjoyment of their own culture. In fact, the ICCPR deviates here from the largely individualistic line of the UDHR, which did not contain specific minority rights. The drafting history shows that while Article 2(1) ICCPR was acknowledged to provide for a general clause against discrimination, further

[1812] CESCR General Comment No. 21, par. 36-37.
[1813] In General Comment No. 21, par. 55(e), the CESCR specifically stresses participation of indigenous peoples in the design and implementation of laws and policies affecting them as a core obligation of states. States should, for example, obtain their free, prior and informed consent in the case of preservation of indigenous peoples' cultural resources, which are related to their way of life and cultural expression.
In General Comment No. 17, par. 32, the CESCR has emphasised that states should take indigenous peoples' preferences into account, and in particular respect their free, prior informed consent, in the context of the right to benefit from the protection of the moral and material interests from one's productions
[1814] Expert Mechanism On The Rights Of Indigenous Peoples 2011, p. 25.

norms were felt to be required to specifically address minority issues, in particular to ensure their equal status.[1815] These minority rights would find a place in Article 27 ICCPR.

According to the HRC's General Comment No. 23 on Article 27 ICCPR, the normative content of Article 27 ICCPR is understood as "simply" the rights of individuals, in community with group members, belonging to minorities that exist in a state party to enjoy their own culture, to practise their religion and speak their language.[1816] According to the Committee, the phrase that these rights "shall not be denied"[1817] means that the state party is therefore under a positive obligation to ensure that the existence and exercise of the rights are protected against denial or violation, not only by acts of the state but also those of third parties.[1818] In other words, the Committee recognises both positive state obligations and a certain horizontal effect of those obligations.[1819]

The Committee further holds that the individual rights are understood to be largely dependent on exercise within groups, and therefore on the possibility for groups to exercise and preserve their culture, language or religion. State parties must thus "protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group."[1820] This further emphasises the group dimension of these cultural rights, which also requires positive measures by states. Examples of such measures could include promotion by means of specialised policy making, campaigns and public awareness raising, to encourage and empower minority cultures.

The foregoing is directly relevant to indigenous peoples. In fact, Comment No. 23 explicitly recognises that 'culture' can manifest itself in "a particular way of life, associated with the use of land resources, especially in the case of indigenous peoples", including fishing, hunting or other land-related activities, drawing largely on the use of lands and resources.[1821] This has also been confirmed in the decisions of the HRC in the *Ominayak*, *Länsman* and *Mahuika* cases. To be able to enjoy these cultural rights, again further positive measures may be required,[1822] for example in the case of development-related decisions affecting indigenous peoples as mentioned above. These might include measures "to prevent actions that adversely affect the lands and resources traditionally used by indigenous peoples."[1823] Activities of commercial entities, legislation by states and projects of extractive industries could all

[1815] McGonagle 2011, p. 49. See the consideration of the Commission on Human Rights in Bossuyt, p. 493.
[1816] HRC General Comment No. 23 on Article 27, p. 2, par. 5.2.
[1817] This has been criticised as an extremely weak formulation, which has been 'fixed' by the Human Rights Committee in comments and decisions, see McGonagle 2011, p. 50. The travaux préparatoires show the following considerations from the Commission on Human Rights, as mentioned in Bossuyt, p. 496: "There was also some discussion on the extent of the obligations of States towards minorities. A proposal that 'the State shall ensure to national minorities the right' was rejected [E/CN.4/SR.369, p. 4 (PL), p. 9 (UkSSR)]. It was argued that, under such a text which imposed a positive obligation on States, minority consciousness could be artificially awakened or stimulated [E/CN.4/SR.368, p. 9 (RCH), p. 16 (F); E/CN.4/SR.369, p. 5 (GB), p. 11 (AUS); E/CN.4/SR.370, p. 5 (RCH)]. The formula 'the persons belonging to such minorities shall not be denied the right', which was adopted, seemed to imply that the obligations of States would be limited to permitting the free exercise of the rights of minorities [E/CN.4/SR.369, p. 12 (USA)]."
[1818] HRC General Comment No. 23 on Article 27, p. 3, par. 6.1.
[1819] McGonagle 2011, p. 51.
[1820] HRC General Comment No. 23 on Article 27, p. 3, par. 6.2.
[1821] HRC General Comment No. 23 on Article 27, p. 3, par. 7.
[1822] HRC General Comment No. 23 on Article 27, p. 3, par. 7.
[1823] Anaya 2014, p. 3.

negatively affect indigenous peoples' cultural integrity and way of life and threaten the survival of their distinct cultures.[1824]

Article 27 ICCPR as a framework right and recognition of indigenous peoples

In a way, Article 27 ICCPR can also be seen as a framework right. It is linked to rights of indigenous peoples such as self-determination, non-discrimination, natural resources, participation in politics and matters that affect them, and cultural rights. The UN Committees also refer to Article 27 in this way in their Concluding Observations on topics that concern the position and rights of indigenous peoples in wider society.

Another important component of the rights of minorities, which the UN Committees have stressed in numerous Concluding Observations, is recognition of the existence of indigenous peoples by state parties. The Committee urges states to do so, because non-recognition plays a central role in marginalisation and discrimination of indigenous peoples[1825] and their inability to exercise their traditional rights.[1826] In addition to this recognition, states should also take measures to protect, preserve and promote their cultural heritage and ways of life, recognise their land rights and ensure that indigenous children receive information and education in their own languages and on their own cultures.[1827] Essentially, recognition of indigenous peoples and their cultural characteristics seems the prime prerequisite for indigenous peoples to enjoy their rights under Article 27 ICCPR, as well as their rights under the UN human rights treaties more generally.

Evidently, principles underlying these minority rights include self-determination, participation, and exercise and practice of traditional and cultural activities. In other words, relevant principles of these rights of minority cultures could be summarised as control over the continued existence and practice, and thus continuation of distinctive minority cultures. This is most clearly brought together in the Committees' urging of states to recognise the existence of indigenous peoples and take measures to protect, preserve and promote their cultural heritage and ways of life.

Minority rights and TCEs

TCEs are clearly an example of manifestations of particular ways of life. Development and enjoyment of cultures under Article 27 ICCPR, especially in conjunction with the right to (cultural) self-determination, therefore implies a need for protection, preservation and promotion measures regarding indigenous peoples' TCEs. Whereas Article 27 ICCPR relies on such principles as existence and continuation of distinctive minority cultures, including the exercise and practice of their traditional and cultural activities, protection, preservation and promotion of their heritage as a central tool to guarantee this. Recognition of the existence of indigenous peoples by states is a crucial first step.

[1824] Ominayak v. Canada 1991, Länsman et al. v. Finland 1994, Mahuika et al. v. New Zealand 2000, Diergaardt et al. v. Namibia 2000. In Lovelace v. Canada 1981 and Kitok v. Sweden 1985, the cultural integrity of indigenous individuals under Article 27 was in question. The HRC did not find a violation in all of these cases.

[1825] HRC Concluding Observations Rwanda 2009, par. 2; HRC Concluding Observations El Salvador 2010, par. 18; CERD Concluding Observations Laos 2005, par. 17; CERD Concluding Observations Democratic Republic of Congo 2007, par. 14; CERD Concluding Observations El Salvador 2006, par. 7; CERD Concluding Observations Botswana 2006, par. 9.

[1826] HRC Concluding Observations Denmark 2008, par. 13; HRC Concluding Observations Tanzania 2009, par. 26.

[1827] HRC Concluding Observations Japan 2008, par. 32; CESCR Concluding Observations Kenya 2008, par. 35.

5.3.8 Cultural integrity, dignity and identity

Claims of indigenous peoples often include notions of dignity, integrity and identity.[1828] It is possible to discern various dimensions or roles of dignity. McGonagle has distinguished the following roles: a foundational role, as a basis for other rights (used for claiming violations of rights); a role as a value, in particular as an operative public value (for aspirational or incentive purposes, such as promotion of values that the whole society should share); or a role as a principle (securing a place next to other fundamental principles).[1829]

Rights to cultural integrity and to maintain and develop own cultural identities are rights that draw on non-discrimination, self-determination and dignity principles.[1830] Here, dignity is visible as a principle next to other fundamental principles. There are further explicit provisions in indigenous rights instruments on various matters relating to integrity, for example of indigenous peoples' cultural institutions. Other than that, rights to cultural integrity and the maintenance and development of distinctive cultural identities are 'filled in' by other general rights. The effective exercise and enjoyment of rights to self-determination, non-discrimination, land rights, cultural rights and *existence* rights all guarantee the cultural integrity and dignity of minorities and indigenous peoples and the survival of their distinctive cultures in one way or another. Here, dignity is visible as a foundation for other rights.

In the UDHR, dignity is both a foundation for other rights and a fundamental principle of the Declaration in general. Article 1 in particular is a crucial provision to ground claims to cultural integrity and dignity, especially in connection with the right to life.[1831] It stresses the dignity and equality of all human beings. This is important for the rights and distinctive existence of minorities and indigenous peoples. As Castellino notes, despite the absence of explicit minority rights in the UDHR, "in emphasising the notion of equality of individuals and protection against the threats to life, it [the UDHR] addressed two implicit issues of direct concern to minorities: discrimination and the threat of extinction."[1832] The individuality of the norms is, however, a difficulty.

This is where Article 27 ICCPR and Article 15(1)(a) ICESCR come into play. A collective dimension is recognised for both of these rights. As analysed in the previous subsection, Article 27 ICCPR on the rights of minorities, especially regarding their cultures, is a broadly applicable cultural integrity norm. Essentially, it covers the protection of the *way of life* of indigenous peoples, for example from interference and threats from extractive industries and other natural resources exploitation.[1833] Hence, it is a cultural integrity norm through and through, containing the conditions to guarantee the survival of indigenous peoples' distinct cultures, including their cultural identities and characteristics.[1834] The scope of application of Article 15(1)(a) on the right to take part in cultural life is just as broad as Article 27 ICCPR, covering the protection and promotion of ways of life, in order to ensure effective rights to take part in cultural life. The central concept of participation implies active practice and

[1828] See Wiessner 2011, p. 127–129, explaining the importance indigenous peoples attach to preservation of their cultures and the integrity of their 'cosmovision'.
[1829] McGonagle 2007, p. 3.
[1830] Anaya 2004, p. 131.
[1831] Article 3 UDHR.
[1832] Castellino 2010, p. 409.
[1833] See HRC General Comment No. 23, par. 3.2 and 7, and the various Article 27 cases of the HRC: Lovelace v. Canada 1981 and Kitok v. Sweden 1985, Ominayak v. Canada 1991, Länsman et al. v. Finland 1994, Mahuika et al. v. New Zealand 2000, Diergaardt et al. v. Namibia 2000.
[1834] See generally Anaya 2004, p. 134–137.

continuation of cultures. The CESCR has identified three ways of 'taking part' in cultural life, e.g. participation in, access to and contribution to cultural life.[1835] The right thus essentially protects the existence and survival of distinctive cultures.

ILO Convention No. 169 contains various principles and norms that address the integrity, dignity, diversity and identity of indigenous peoples and their cultures, institutions, values and practices, and languages.[1836] These clearly point to respect for the inherent dignity and integrity of indigenous peoples' distinctive cultures and their social and cultural identity. One of the Convention's main principles is reflected in the recognition of indigenous peoples' aspirations "to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."[1837] This clearly summarises the principle of cultural self-determination that tends to be one of the main objectives of indigenous peoples to safeguard their cultural integrity and dignity. As such, (cultural) self-determination can be viewed as a cultural integrity and dignity principle.

For UNDRIP, protection and celebration of indigenous cultures are considered "critical to an understanding of [it]."[1838] There are a number of rights guaranteed in UNDRIP that protect the "flourishing" of indigenous peoples,[1839] including their cultural vitality and sustainability.[1840] These rights include rights to maintain and strengthen their (cultural) institutions and an extensive provision on protection against ethnocide.[1841] They also include the right for indigenous peoples and individuals to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned, and to practice and develop traditions and customs and spirituality and religion.[1842] Other (cultural) integrity and dignity provisions comprise rights of indigenous peoples to transmit their histories, languages and traditions to future generations and to establish and control their own educational systems.[1843] UNDRIP also ensures specific rights to the dignity and diversity of indigenous peoples' cultures and the right for indigenous peoples to establish their own media in their own languages.[1844] Lastly, the Declaration also contains a type of (cultural) integrity and dignity provision in the context of cultural heritage, traditional knowledge and TCEs and in the context of identity.[1845]

[1835] CESCR General Comment No. 21, par. 15.
[1836] Articles 2, 4, 5 and 28 ILO Convention No. 169.
[1837] Paragraph 5 of the preamble.
[1838] Morgan 2011, p. 22.
[1839] Morgan 2011, p. 23.
[1840] Articles 5, 8, 9, 11, 12, 13, 14, 15, 16, 31, 33 and 34; Stamatopoulou 1994, p. 75: "Twelve of the forty five [later forty six] articles of the draft Declaration on the Rights of Indigenous Peoples refer to the right of indigenous peoples to assert their cultural identity and practice their traditions, including their religions, languages, and arts and the traditional right to maintain and develop their cultural structures and institutions." Morgan 2011, p. 23–24.
[1841] Articles 5 and 8 UNDRIP.
[1842] Articles 9, 11 and 12 UNDRIP. Paragraphs 2 of both Article 11 and 12 contain state obligations for effective mechanisms, for example restitution, developed in cooperation with indigenous peoples themselves regarding their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs, and access and/or repatriation of ceremonial objects and human remains in the possession of these states.
[1843] Articles 13 and 14 UNDRIP.
[1844] Articles 15 and 16 UNDRIP.
[1845] Articles 31 and 33 UNDRIP.

In other words, to a large extent these (cultural) integrity and dignity rights relate to cultural self-determination,[1846] or the 'hybrid' category of indigenous cultural rights or cultural indigenous rights. The recurrent use of terminology such as 'control' further strengthens indigenous peoples' autonomy over cultural affairs.[1847] Principles of dignity, (cultural) self-determination, participation in cultural life and continued practice and existence are very clear here.

Non-discrimination, existence and cultural integrity, dignity and identity

The principle of non-discrimination is another central aspect, or prerequisite, for rights to cultural integrity, dignity and identity. In General Recommendation No. 23 on indigenous peoples, the CERD stresses their distinct cultures, ways of life, identity, dignity, cultural traditions and languages. The Committee connects these aspects, which can be understood as aspects of cultural integrity, to the right to non-discrimination on grounds of specific cultural characteristics.[1848] In this sense, the CERD emphasises that indigenous peoples should be able to freely determine, develop and maintain their identities within broader society according to their own cultural traditions and connected to their way of life, without interference or discrimination, thereby safeguarding their cultures' integrity and dignity.[1849] CERD's General Recommendation No. 21 on the Right to self-determination already established more generally that, based on the right to non-discrimination, states must take the rights of members of ethnic or linguistic groups into consideration, especially their right to lead lives of dignity, preserve their cultures and undertake activities to preserve their identities.[1850]

The existence of the groups as such and the existence of cultures are also indispensable elements of rights to cultural integrity, dignity and identity. In this sense, the Convention on the Prevention and Punishment of the Crime of Genocide gives guidance. Arguably, the underlying principles of the Genocide Convention are the most important principles for the (cultural) existence of minorities and indigenous peoples. The (in)ability to continue their lifestyles, carry out traditional practices and transmit these traditions and knowledge to future generations in order to keep their traditions and cultures 'alive' tends to be a pressing concern.[1851] While the text of the Convention focuses on "the physical existence of groups",[1852] ethnocide, or "cultural genocide" as a form of genocide was given attention in the drafting process. With loss of traditional culture and knowledge as a main concern, for example when circumstances prevent transmission to future generations or when the use of languages are prohibited or heritage is destroyed, prohibition of ethnocide is extremely relevant. UNDRIP contains an explicit provision prohibiting forced assimilation or destruction of indigenous peoples' culture in Article 8.

[1846] Saul, Kinley & Mowbray 2014, p. 86.
[1847] Vrdoljak 2007, p. 76.
[1848] CERD General Recommendation No. 23, par. 4
[1849] See generally Anaya 2004, p. 131.
[1850] CERD General Recommendation No. 21, par. 5.
[1851] Jaszi's study on traditional arts in Indonesia shows the transmission of their art to future generations as one of the key concerns. Jaszi 2009, p. 14 and further.
[1852] McGonagle 2011, p. 45. With Article II of the Convention defining genocide as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

In this sense, connections have been sought between cultural rights and the right to life. An example is Donders' reference to the final Statement of the Conference on cultural rights organised by UNESCO in July 1968, where it was stated that cultural rights were important because culture enabled persons "… to maintain and perpetuate life."[1853] Similarly, when the Genocide Convention is perceived as containing the right of groups to exist through the prohibition of "the destruction of national, ethnic, racial and religious groups",[1854] this should be considered as the most fundamental cultural right.[1855] McGonagle also holds that "[t]he absolute baseline for minority rights protection is a guarantee for minorities' existence and first and foremost their physical existence."[1856] However, he also argues that the right to existence would imply more than merely a physical dimension, for example also including land and resources rights and recognition of the cultural and spiritual aspects of minorities' existence.[1857] It is this dimension that also plays a role in the protection, preservation and promotion of indigenous peoples' TCEs from the perspective of the right to (cultural) existence.

Cultural integrity and dignity and TCEs

The protection of TCEs is both an example of, and a condition for, the protection of indigenous peoples' cultural integrity and dignity. Indigenous peoples' ability to control, protect, safeguard, maintain and develop their cultural heritage, including their traditional knowledge and TCEs, is important for the continuation of their specific, distinct cultural life, if they wish to pursue this. Their cultural heritage is closely interwoven with their identities, and the protection thereof would enable them to safeguard their cultural integrity, dignity and distinctive existence.

Essential preconditions are (cultural) self-determination, including participation and land rights, non-discrimination and guarantees for continued (cultural) existence, including education, language and recognition of the existence of indigenous peoples by states. In other words, the rights (related) to cultural integrity, dignity and identity of indigenous peoples together form an important argument for TCE protection.

5.4 TCEs and cultural and indigenous rights: objectives, principles and underlying values

Section 5.3 has woven a web of arguments for TCE protection that draw on fundamental human rights principles. When conducting the assessment of TCE protection from a cultural and indigenous rights perspective, it becomes clear that many of the objectives, values and principles of the human rights framework provide a basis for TCE protection.

Following from the analysis of the international human rights framework with a focus on cultural and indigenous rights, we have seen a number of principles that recur throughout the legal framework. Four central principles can be deduced, namely: self-determination, non-discrimination, participation (including practice, continuation and existence of distinct cultures) and dignity. In short, together these principles safeguard the participation, equality,

[1853] Donders 2002, p. 69.
[1854] Stavenhagen 1995, p. 64.
[1855] Stavenhagen 1995, p. 64; Donders 2002, p. 69.
[1856] McGonagle 2011, p. 44.
[1857] McGonagle 2011, p. 46.

existence and integrity of indigenous peoples, especially in light of a historical context of oppression and marginalisation.[1858]

RIGHTS OF THE NORMATIVE FRAMEWORK
Self-determination
Non-discrimination
Freedom of expression
Property and land
Participation
Minority rights
Cultural integrity, dignity and identity

Table 12 Rights that have been analysed in section 5.3.

PRINCIPLES
Self-determination
Non-discrimination
Participation
Dignity

Table 13 Principles that can be derived from the rights analysis of section 5.3.

In this section, the protection of TCEs will be assessed according to these principles. Each sub-section ends with a table that summarises how cultural and indigenous rights principles can inform TCE protection from the perspective of indigenous peoples' protection interests that were identified in Chapter 2.

First, however, a short recap highlights the main points of the normative framework of cultural and indigenous rights. After that, the interplay between TCEs and the four identified human rights principles is scrutinised.

Recap: the normative framework of cultural and indigenous rights

As noted in section 5.2.2, culture as a qualifier of rights means that cultural rights norms can be viewed and grouped in various ways, with 'cultural' being determinant for the scope and content of the rights. A distinction can be made, for example, between rights to creativity, rights to a culture and rights that promote the survival of cultures.[1859] Or cultural rights can be divided into general cultural rights, rights related to a specific culture and rights regarding cultural heritage that is universally important. [1860] Another distinction that is made is between a 'narrow group' and a 'broad group' of cultural rights. The former includes rights explicitly referring to culture, while the latter also includes other human rights touching upon cultural aspects.[1861] The same 'narrow' and 'broad' approach can be applied to indigenous rights.

[1858] See also Xanthaki 2007, p. 25–26, on the dual nature of underlying reasons for indigenous rights protection, both for identity reasons and especially as a means to end oppression and disrespect.
[1859] Prott 1998, p. 165.
[1860] See for these distinctions and their respective examples Prott 1998, p. 165.
[1861] See for this distinction Donders 2002, p. 74 and 76.

In effect, in section 5.3 a mix of such approaches was applied to identify cultural rights. The common denominator has been the relevance for the protection and promotion of indigenous peoples' TCEs. For this, both a narrow and a broad view were applied. Following a narrow view, cultural rights were identified that are listed explicitly as such in the International Bill of Rights as well as in ILO Convention 169 and UNDRIP. However, following a broad view, rights of self-determination, freedom of expression, land rights and participation rights could also be identified as cultural rights to the extent that they all concern cultural matters in some way. Examples are indigenous peoples' ability to freely determine their cultural development and cultural institutions and respect for the importance of indigenous peoples' relationships with their lands for reasons of cultural and spiritual values.[1862]

Using 'indigenous' as a qualifier of rights means that certain rights (instruments) such as the ILO Convention No. 169 and UNDRIP are, as a 'narrow group', the 'obvious' part of the normative framework of indigenous peoples' rights. But, 'general' human rights of the ICCPR and ICESCR could be viewed as 'indigenous rights' as well where they are relevant for, and applicable to, indigenous interests. These comprise a 'broad group'. The normative framework is therefore also comprised of these general human rights norms of the UDHR, ICCPR and ICESCR as applicable to indigenous peoples. This is informed by the indigenous dimensions of these rights as apparent in interpretations of UN human rights treaty bodies in General Comments, decisions on individual complaints and country observations. The norms of UNDRIP are of a non-binding nature, but they are nevertheless a crucial feature of the normative framework. They have significant ability to influence the understandings and (indigenous) interpretations of human rights in general.[1863]

According to a broad view, the norms of physical (and cultural) existence and non-discrimination of the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Elimination of All Forms of Racial Discrimination can also be added to the normative framework of cultural and indigenous rights. Cultural rights have been connected to the right to life. The right of groups to exist as covered by the Genocide Convention has for example been deemed "one of the most fundamental cultural rights."[1864] Non-discrimination is also a central principle that could be connected to cultural rights as it provides for protection against discrimination on the basis of cultural characteristics.

5.4.1 Self-determination

Self-determination is a principle that is of overall importance specifically for indigenous peoples. It is central to many of their concerns, be it in the form of autonomy and governance, economic self-determination or cultural self-determination. From lands and education to resources and culture: the ability to exercise control and their right to self-determination over all these elements is vital to their existence as a distinct people. Indeed, the collective right to self-determination is even deemed a "prerequisite to their full enjoyment of all human rights, including cultural rights."[1865] This reflects its framework character.

[1862] This mix of self-determination, land and resources issues and culture has for example also been particularly visible in the General Comments, country observations and decisions on individual complaints by the HRC and CESCR that were mentioned above, as well as in case law of the Inter-American Court of Human Rights.
[1863] Anaya 2008, p. 24, par. 85 and 86.
[1864] Donders 2002, p. 69, footnote 24.
[1865] Vrdoljak 2007, p. 74.

Self-determination as laid down in Article 1 of the ICCPR and ICESCR has been deemed a collective right. As a consequence, the HRC does not consider individual claims of violations of Article 1 by members of indigenous peoples in procedures under the First Optional Protocol to the ICCPR.[1866] However, the HRC has recognised that Article 1 can have a subsidiary, interpretive function regarding other Covenant rights such as Article 27 ICCPR on rights of minorities.[1867] In this sense, self-determination is closely related to the *ways of life* of indigenous peoples' specific cultures as protected under Article 27 ICCPR. UNDRIP also contains a general right and many other provisions that relate to economic and cultural self-determination.[1868] For these cultural provisions, the recurrent use of terminology such as 'control' would strengthen indigenous peoples' autonomy over cultural affairs.[1869]

The principle of self-determination is considered one of the pillars of the contemporary indigenous rights regime. According to this principle, indigenous peoples can freely determine and develop their community bonds and institutions. This requires that indigenous peoples can control "the future development of all those aspects of collective human interaction that define and constitute their distinct societies".[1870] Self-determination also plays a large role in connection with participation, procedural rights and consultation and the ability to exercise control in the form of free, prior and informed consent with regard to land and natural resources issues.[1871]

The rationales of the self-determination principle could be equally relevant when applying them to indigenous peoples' 'cultural resources', such as their cultural heritage, TK and TCEs, in an analogous way. TCEs could very well be placed under the umbrella term of *'all those aspects'* that indigenous peoples ought to have a right to self-determination over, as they are very much connected to indigenous peoples' identities and communal, social and spiritual relationships. From this perspective, consultation and consent for any third party are of central importance. Self-determination has in fact been called instrumental for the protection of indigenous peoples' genetic resources and TK.[1872] When accepting that indigenous peoples have rights of autonomy and self-governance over all matters that are relevant to them, this can ground the conclusion that these rights extend to their cultural heritage as well, such as their genetic resources, traditional knowledge and TCEs, because these are "integral elements of indigenous peoples' societies and cultures."[1873] In other words, they should be able to exercise control over all aspects of their heritage, including development, use and regulation.

Thus assuming that indigenous peoples have a right to self-determination over all their land and resources 'property', or their tangible heritage, the argumentation is then extended to other elements of indigenous peoples' heritage such as traditional knowledge and TCEs. This right to autonomy and self-government over their intangible cultural heritage is also laid down

[1866] See Ominayak v. Canada 1990, which the HRC decided to treat as an Article 27 case and found a violation of the rights of minorities.
[1867] See Mahuika et al v. New Zealand 2000, par. 9.2; Diergaardt et al. v. Namibia 2000, par. 10.3. In par. 10.6 the HRC further repeats that "the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples." See also Saul, Kinley & Mowbray 2014, p. 61.
[1868] Saul, Kinley & Mowbray 2014, p. 86.
[1869] Vrdoljak 2007, p. 76.
[1870] Anaya 2014, p. 2.
[1871] See also Articles 1(2) ICCPR and ICESCR, Article 25 ICESCR, Article 47 ICCPR and Article 26(2) UNDRIP.
[1872] Anaya 2013, p. 3–6; Anaya 2014, p. 2–3 and 5–6.
[1873] Anaya 2013, p. 5–6.

in Article 31 UNDRIP. This provision encompasses the right to maintain, *control*, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations thereof, and the right to the intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions. In other words, self-determination should be a guiding principle for any protection regime regarding TCEs, both in a procedural and cultural way. Importantly, the procedural participation of indigenous peoples in all legislative and policy processes on their heritage should be ensured, in particular their active involvement in heritage management and participation in deliberations at national and international levels, such as at WIPO. Indigenous peoples should actively participate and their perspectives be taken into account; mere attendance at such processes alone is not adequate.[1874]

Indigenous peoples' TCE protection interests → *Human rights principles* ↓	***Benefit-sharing***	***Free, prior informed consent***	***Recognition***	***Integrity and dignity***	***Spirituality (incl. secrecy)***	***Continuation, preservation***
Self-determination	Self-determined control over and profit from (economic) exploitation.	Self-determined autonomy and control over matters that concern them.	Recognition of rights to self-determined ways of life and development.	Self-determined cultural autonomy and control.	Self-determined spiritual autonomy and control.	Self-determined existence, development and cultural maintenance.

Table 14 A summary of TCE protection from the perspective of the self-determination principle.

5.4.2 Non-discrimination

Non-discrimination and equality are key human rights principles. They feature centrally in the international human rights system and especially in the indigenous rights framework and the ICERD. Non-discrimination paired with cultural distinctiveness is of course a fundamentally important principle for cultural and indigenous issues, such as the topic of TCE protection. In fact, equality is stressed as one of the core principles of contemporary indigenous rights,[1875] or the very foundation underlying minority and indigenous rights.[1876]

Non-discrimination is relevant for the discussion on TCE protection in several respects. Arguments for protection of TCEs tend to be closely linked to protection of indigenous communities' specific identities and recognition of their existence as distinct entities in society in a non-discriminatory way. This can be connected to cultural self-determination, participation in cultural life and minority rights, and the development of their cultures and traditions according to their own customs and rules. Indeed, the non-discrimination principle is essential for acknowledgment of and respect for distinctive cultural characteristics and ways of life. However, indigenous peoples are often excluded from protection of their TCEs, for example under existing intellectual property regulations, precisely due to their ways of life and distinctive modes of production, which are collective and deviate from mainstream understandings.

[1874] See in this sense Anaya 2013, p. 5–6.
[1875] Anaya 2014, p. 2.
[1876] Castellino 2010, p. 420.

In this sense, Anaya has compared the public domain to the *terra nullius* doctrine when he discussed indigenous peoples' rights to genetic resources and traditional knowledge at WIPO.[1877] Historical understandings of sovereignty and property excluded indigenous peoples in such a way that they were neither considered as states nor as having property rights over their lands. Similarly, contemporary understandings of intellectual property would exclude indigenous peoples from equal protection of their rights to their intangible heritage based on their cultural characteristics. Following these rationales in light of the non-discrimination principle, one could argue that due to both the concepts of the *terra nullius* doctrine and the public domain, indigenous peoples fail to be protected from discrimination arising from the differences between indigenous and non-indigenous cultures and understandings of 'property'.[1878] The *terra nullius* doctrine was in fact widely abandoned on discriminatory grounds.

Where existing legal regimes or protection frameworks such as intellectual property law do not consider protection of indigenous peoples' productions due to their, and their TCEs', specific characteristics, the non-discrimination principle would require that states eliminate discrimination. This argument is strengthened when reading the right to benefit from the protection of the moral and material interests of one's works protected under Article 15(1)(c) ICESCR[1879] together with the non-discrimination provision in Article 2(2) ICESCR and its accessory character.[1880] To this end, states should guarantee the right of everyone to equality before the law and the enjoyment of their rights, effective protection and remedies.[1881] Special measures could address such inequality,[1882] for example by changing law, policy and practice regarding indigenous peoples' traditional knowledge like the Waitangi Tribunal has recommended in New Zealand.[1883]

In conclusion, TCE protection informed by the non-discrimination principle should enable indigenous peoples to effectively, and collectively, enjoy protection of their 'intellectual property' consisting of their heritage, knowledge and TCEs,[1884] like 'regular' authors do for their creative works. Indigenous peoples' specific cultural characteristics should not exclude them from any form of protection in advance. Their right to benefit from the protection of the moral and material interests of their scientific, literary and artistic productions does not have to take the form of intellectual property rights, but it must be effective.[1885] Once again, the conceptual divide "between the aspirations and perspectives of indigenous peoples and the conventional intellectual property system",[1886] as noted by WIPO, can be repeated here. For these "fundamental differences", other mechanisms outside IP are proposed to meet indigenous needs that cannot be met within the intellectual property system. These mechanisms include cultural and other human rights, such as UNDRIP as a source reflecting

[1877] Anaya 2014, p. 2.
[1878] Anaya 2014, p. 4-5; Anaya 2013, p. 2-3.
[1879] Which the CESCR has held explicitly include indigenous peoples' knowledge, innovations and practices, ICESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 8-9.
[1880] Craven 1995, p. 177–178.
[1881] Articles 2, 5 and 6 ICERD.
[1882] See the comment on discrimination of indigenous peoples due to their specific cultures and modes of production, which justifies protection of their rights, by the African Commission's Working Group Of Experts On Indigenous Populations/Communities 2005, p. 88.
[1883] CERD Concluding Observations New Zealand 2013, par. 14.
[1884] Article 31 UNDRIP.
[1885] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 10.
[1886] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.

indigenous peoples' aspirations.[1887] Cultural heritage law, as assessed in Chapter 4, is another mechanism that can address these 'fundamental differences' for TCE protection in this thesis.

In any case, indigenous preferences must be taken into account when taking measures to protect their productions.[1888] Measures and regulations that ensure effective protection possibilities for indigenous peoples' TCEs according to their own customs should at least meet specific source communities' distinctive protection interests, for example in benefit-sharing, attribution or safeguarding the integrity of their works. This can take, for example, the form of farmers rights-like or biodiversity-like rights. In the context of conservation and sustainable use of biodiversity, Article 8(j) of the Convention on Biological Diversity contains the obligation to "respect, preserve and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles", promote their wider application with the *approval* and *involvement* of the holders and encourage access and benefit-sharing. Another option would be a system of (indigenous) Creative Commons-like licences or protocols that address attribution and integrity rights comparable to copyright law's moral rights, see further Chapter 6. And drawing on cultural heritage law, measures to safeguard integrity could take the form of protection, preservation and promotion through education policies and the establishment and support of indigenous heritage services and management.

Indigenous peoples' TCE protection interests → *Human rights principles* ↓	***Benefit-sharing***	***Recognition***
Non-discrimination	Equal protection opportunities for non-material resources, including TCEs.	Indigenous peoples' rights and cultural distinctiveness should be recognised.

Table 15 A summary of TCE protection from the perspective of the non-discrimination principle.

5.4.3 Participation: practice, continuation and existence

The cultural and indigenous rights that were discussed above clearly point to the fundamental principle of participation from the perspective of practice, continuation and existence of indigenous peoples and their distinctive cultures. In this sense, this principle can be seen as an ultimate guarantor of a place for indigenous peoples in wider (dominant) society. Various dimensions are relevant in this regard, such as: participation and consultation in decision-making processes and matters that affect indigenous peoples' rights and ways of life; participation in cultural life; rights of minorities; protection of the moral and material interests resulting from any scientific, literary or artistic production; and respect for the integrity of indigenous peoples' cultures, traditions and customs. All concern aspects that are a part of the protection *and* promotion of TCEs. The right to freedom of expression and the right to self-determination are both enablers of indigenous peoples' participation, their cultural practices, expressions and development. In other words, the principle of participation is indispensable for multiple aspects of TCE protection, including the development and expression of TCEs.

Participation in a procedural sense is closely related to self-determination, and many provisions in ILO Convention No. 169 and UNDRIP require the procedural participation or consultation of indigenous peoples regarding various topics. Generally, participation and

[1887] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.
[1888] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 32.

consultation rights are recognised in decision-making processes and matters that affect indigenous peoples' rights and ways of life, for example in the case of exploitation of territories and resources by extractive industries. However, one can imagine that participation and consultation of indigenous peoples is equally important regarding their *non-material* resources, such as TCEs. In this sense, indigenous peoples should participate and be consulted in any decision-making process regarding their TCEs, for example their use or the design of protection rules.

As to participation in cultural life, Article 15(1)(a) ICESCR on the right to take part in cultural life provides a clear basis for TCE protection and promotion. The right to take part in cultural life includes that of both the individual and the collective.[1889] 'Culture' in the sense of 'cultural life' is defined as "a broad, inclusive concept encompassing all manifestations of human existence", with particular attention for its living, dynamic and interactive nature.[1890] Importantly, in General Comment No. 21 on this provision, the CESCR highlights indigenous peoples' rights in their cultural heritage, traditional knowledge and TCEs, thereby also referring to the importance of the principle of free, prior and informed consent.[1891] In other words, indigenous peoples' collective right to take part in cultural life includes the protection of their TCEs.

Another dimension of participation occurs specifically in the context of one's literary, artistic or scientific productions, namely participation decisions, and terms and conditions for the use and control of such productions. Article 15(1)(c) ICESCR safeguards the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author. This provision clearly provides a basis for the protection of indigenous peoples' scientific, literary or artistic productions. This right seems to be concerned with notions of inherent dignity and safeguarding the personal link between authors and creations or *between peoples, communities or groups and their collective heritage*.[1892] This is a crucial argument for the protection of TCEs and the tension between the copyright system and TCE protection that was shown in Chapter 3.

According to the CESCR's General Comment No. 17 on Article 15(1)(c) ICESCR, "any scientific, literary or artistic production" includes the knowledge, innovations and practices of indigenous peoples.[1893] The CESCR has further confirmed that states have obligations regarding indigenous peoples' scientific, literary or artistic productions. Repeating the well-known range of obligations, the CESCR outlines state obligations to respect, protect and fulfil. Under the obligation to protect, the CESCR notes that states must take measures to protect indigenous peoples' productions, which form part of their cultural heritage and TK. According to the CESCR, free, prior and informed consent must be respected, and a violation of this obligation to protect would be for example lack of adequate compensation by third parties following their unauthorised use of indigenous peoples' productions.[1894]

Article 27 ICCPR safeguards minority rights, including enjoying their own culture, practising their religion and speaking their language. This provision also provides relevant

[1889] "[i]n other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such. CESCR General Comment No. 21 on Article 15(1)(a), par. 9.
[1890] CESCR General Comment No. 21 on Article 15(1)(a), par. 10-13.
[1891] CESCR General Comment No. 21 on Article 15(1)(a) ICESCR, par. 36-37.
[1892] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 1-2.
[1893] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 8-9.
[1894] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 32 and 45.

considerations regarding TCE protection. According to the HRC's General Comment No. 23, state parties have positive obligations regarding the existence and exercise of minority rights.[1895] State parties must "protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group."[1896] This could be read as a basis for the protection and promotion of indigenous peoples' ability to exercise and practise their traditional and cultural activities, i.e. to enjoy and develop their culture including TCEs.

ILO Convention 169 and UNDRIP contain many provisions with an indigenous dimension of participation, including on issues of cultural self-determination, respect for cultural integrity, traditions and customs, and continued practice.[1897] All these rights that provide for the ability of indigenous peoples to continuously practise their cultures and traditions facilitate an environment for TCE production. In other words, these provisions clearly enumerate aspects that are directly relevant – even required – for the practice, transmission and ultimately the existence of their cultures. This is particularly visible in Articles 11 and 31 UNDRIP on the rights of indigenous peoples to practise and revitalise their cultural traditions and customs and to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, respectively. Rights to practise, maintain, control and protect their traditions and cultural heritage are clearly relevant to inform and shape the protection and promotion of TCEs.

Another dimension of participation that is crucial for the practice, continuation and existence of indigenous cultures is reflected in the fundamental underlying principle of the Genocide Convention and the prohibition of ethnocide as laid down in detail in Article 8 UNDRIP. Summarised, this principle consists of the notion of continuation of lifestyles, traditions and cultural practices. Survival and existence as culturally distinct groups is at the heart of minorities' and indigenous peoples' concerns. *Physical* existence is the starting point for minority and indigenous rights protection, but respect for, and protection and promotion of, cultural heritage and traditional culture and knowledge clearly reflect the *cultural* dimension of minorities' and indigenous peoples' existence.[1898] In this sense, the right to 'culturally exist' provides a rationale for TCE protection and promotion. Such protection and promotion, for example through assistance of communities in youth education programmes and in active heritage management by communities themselves,[1899] also guarantee the right to take part in cultural life and protection of culturally distinctive ways of life.

[1895] HRC General Comment No. 23 on Article 27, p. 3, par. 6.1.
[1896] HRC General Comment No. 23 on Article 27, p. 3, par. 6.2.
[1897] For example: rights to the integrity of indigenous peoples' cultures, institutions, customs and languages; Articles 2, 4, 5, 8, 9 and 28 ILO Convention No. 169. And: the right to cultural self-determination; protection against forced assimilation or destruction of their culture; the right to practise and revitalize their cultural traditions and customs, including designs and performing arts an literature; the right to the dignity and diversity of their cultures; the right to establish their own media in their own languages; and, particularly relevant for TCEs, the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations thereof, and the right to the intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions; Articles 3, 8, 11, 13, 15, 16 and 31 UNDRIP.
[1898] McGonagle 2011, p. 44 and 46.
[1899] See the examples of the Palito Nyalo ensemble, a performance group that doubles as a "training institute for young artists", Jaszi 2009, p. 9, the Bangarra Dance Theatre, Australia's leading indigenous performing arts company, claims to function as both "a creative producer and cultural agent", http://bangarra.com.au/vision, and the Mukurtu initiative which involves indigenous communities in their own digitisation, management and sharing of their digital cultural heritage, http://www.mukurtu.org/about/ , mentioned in Chapter 2. The latter is

In sum, it is possible to draw arguments for TCE protection from the principle and dimensions of participation that underlie the cultural and indigenous rights of the framework analysed in this thesis. The main concern here seems to be continued cultural existence according to their own vision, if indigenous communities strive for this. Specifically for TCEs, the core issue would be the protection and promotion of TCEs to enable indigenous peoples to continue with these practices and transmit them to future generations according to their own terms and conditions, following indigenous worldviews and customary rules of sharing, using and creating.[1900]

Indigenous peoples' TCE protection interests → *Human rights principles* ↓	***Benefit-sharing***	***Free, prior informed consent***	***Recognition***	***Integrity and dignity***	***Continuation, preservation***
Participation, including practice, continuation and existence of distinct cultures	Indigenous peoples should be able to participate in and control, manage and develop their cultural heritage.	Indigenous peoples should be able to participate in and control, manage and develop their cultural heritage.	Participation guarantees recognition of indigenous peoples. Recognition, including of their cultural distinctiveness, is intertwined with their existence.	Cultural and procedural participation rights are tied to indigenous peoples' integrity and dignity in the context of their cultural heritage and ways of life.	Participation of indigenous peoples in all (cultural) matters that concern them is required for the continuation and preservation of their heritage. Freedom of expression and the media perform an enabling function.

Table 16 A summary of TCE protection from the perspective of the participation principle.

5.4.4 Dignity

Dignity is one of the central principles of the international human rights framework. In fact, it has been described as "a basis for other rights." [1901] It features prominently in the preambles of both the 'general' human rights instruments and instruments on specific topics, such as for example the ICERD. Interestingly, while it is usually a staple value or objective in preambles, dignity is also taken up as a substantive provision in the UDHR, namely in Article 1, as well as in Article 15 UNDRIP. The latter underlines indigenous peoples' collective interests in recognition of their inherent dignity and the diversity of their cultures, traditions, histories and aspirations.[1902] The main theme of ILO Convention No. 169 – to remove previous assimilationist orientations, and to recognise "the aspiration of these peoples to exercise control over their own institutions, ways of life and economic development to maintain and develop their identities, languages and religions" – is illustrative here as well.[1903] It clearly reflects the ingredients of recognition and respect for indigenous peoples' dignity.

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further elaborated on in Chapter 6 on legal and practical approaches to TCE protection outside of the existing legal framework.

[1900] Transmission to future generations and circumstances to maintain traditional cultures are indeed main concerns with regard to indigenous heritage, including TK and TCEs. See for example Jaszi 2009, from p. 14, 22.

[1901] McGonagle 2007, p. 2.

[1902] Article 15 UNDRIP.

[1903] Paragraphs 4 and 5 ILO Convention No. 169.

Coming back to the roles that McGonagle assigns to dignity, it is possible to argue that TCE protection clearly contributes to indigenous peoples' dignity when perceiving dignity as a foundation for other rights, a value for aspirational or incentive purposes and a fundamental principle.[1904] TCE protection can help ensure the (dynamic) preservation of indigenous peoples' cultural integrity, and thereby the protection and promotion of their very (cultural) existence and sustainability as distinctive groups with specific characteristics. In this sense, dignity, paired with cultural integrity and principles of self-determination, non-discrimination, participation in cultural life and rights of minorities, is essential for the right of an ethnic or cultural group such as indigenous peoples to exist. This right would most fundamentally consist of a right to physical existence. However, land, resources and cultural and spiritual characteristics are equally important for the actual, and meaningful, existence of minorities.[1905]

Protecting TCEs against unsolicited dissemination, use that is out of context and potentially diluting and copying by 'outsider' third parties without consent and without due account of their cultural significance resonates with arguments to safeguard the inherent dignity of indigenous communities.[1906] The connection between indigenous peoples' dignity and identity and their heritage, traditional knowledge and TCEs is stressed throughout academic literature on the topic, as well as in studies, statements and reports at the UN level.[1907] The discussion on TCE protection is but a part – yet also a clear example – of the broader indigenous struggle for recognition and respect for their inherent dignity, identity and distinct culture, including heritage and cultural practices such as TCEs.

Indigenous peoples' TCE protection interests → *Human rights principles* ↓	***Recognition***	***Integrity and dignity***	***Spirituality (incl. secrecy)***	***Continuation, preservation***
Dignity	Indigenous peoples' rights and culturally distinctive existence should be recognised: dignity is inherent in such recognition.	TCE protection should contribute to safeguard the cultural integrity, dignity and distinctive existence of indigenous peoples.	TCE protection should contribute to safeguard the (spiritual) cultural integrity, dignity and distinctive existence of indigenous peoples.	TCE protection should contribute to safeguard the cultural integrity, dignity and distinctive existence of indigenous peoples.

Table 17 A summary of TCE protection from the perspective of the dignity principle.

[1904] McGonagle 2007, p. 3.
[1905] McGonagle 2011, p. 46.
[1906] Compare also copyright's moral rights, which recognise amongst others an author's right of attribution and a right to object to distortion of the work. See Article 6bis(1) of the Berne Convention.
[1907] The Report of the 23rd session of the Working Group on Indigenous Populations of 2005 recommends for example that the protection of indigenous peoples' cultural heritage "[P]romote[s] respect for the dignity and cultural integrity of indigenous peoples who conserve and maintain their cultural heritage, and respect[s] and recognize[s] their rights, particularly human rights, under international and national law." Report of the 23rd session of the Working Group on Indigenous Populations (E/CN.4/Sub.2/AC.4/2005/26), p. 12. Available via: http://www.ohchr.org/EN/Issues/IPeoples/Pages/SessionsWGIP.aspx. This reiterates the recommendation from the working paper of Yokota and the Saami Council which they submitted to the Working Group. Yokota and the Saami Council 2005, *Working Paper on the substantive proposals on the draft principles and guidelines on the heritage of indigenous peoples* (E/CN.4/Sub.2/AC.4/2005/3), p. 5. Available via: http://www.ohchr.org/EN/Issues/IPeoples/Pages/SessionsWGIP.aspx.

5.5 Conclusion: from assimilationist exclusion to inclusive principle-based protection arguments

Human rights law has seen a progressive – and ongoing – development from assimilationist exclusion of indigenous peoples to inclusion of their specific (cultural) issues and interests in standard-setting and interpretation of existing norms. As a specific manifestation of indigenous peoples' struggles, TCE protection has a clear basis in cultural and indigenous rights, their interpretation and application to indigenous peoples and needs, and their underlying principles that were highlighted in this chapter. In the assessment of TCE protection from a cultural and indigenous rights perspective, it becomes clear that many of the terms, concepts and values of the human rights framework are reflected in TCE protection arguments and interests.

TCE protection arguments both draw on similarities to land issues and are closely connected to economic and cultural matters. From this perspective, (cultural) self-determination is of utmost importance in the context of TCEs. In particular, when combined with cultural rights and participation rights, indigenous peoples should be able to exercise control over, participate in and be consulted regarding all aspects of their heritage, including maintenance, protection and development. Participation, consultation and free, prior and informed consent are key concepts in this regard, for example with regard to any use, management policies or deliberation processes on legal protection. This not only enables benefit-sharing and attribution, but also recognition of indigenous peoples' rights, specific identities, cultural and spiritual traditions. TCE protection should therefore be informed by self-determination. In its function as a framework right and principle, self-determination contributes to guaranteeing the survival and continuation of indigenous peoples' distinctive cultures and ways of life, including their TCEs.

TCE protection can also be considered as a matter relating to non-discrimination against indigenous peoples. In this sense, the concept of equal (protection) opportunities and the comparison of the public domain to the *terra nullius* doctrine are important notions. Based on these notions, TCE protection should be guided by the principle of non-discrimination. This enables indigenous peoples to effectively protect their (intangible) heritage, knowledge and TCEs, and not be excluded in advance from any protection due to their distinctive cultural characteristics, origins and identities. This means that states should find a place for TCE protection in their legislative systems, either existing ones or specifically designated for indigenous peoples' TCEs.[1908]

Directed by principles of participation in cultural life and minority rights, including practice and existence, TCE protection and promotion provides indigenous peoples with the ability to continue with these practices and transmit them to future generations. As such, TCE protection and promotion is either part of, or can contribute to, measures to ensure the effective enjoyment by indigenous peoples of their right to participation in cultural life and their rights to their ways of life. States should take indigenous peoples' own values, terms and conditions into account in any measures that they undertake to guarantee indigenous peoples' rights under Article 15 ICESCR and 27 ICCPR. Indigenous worldviews, collectivity and customary rules of sharing, using and creating TCEs are examples. State measures should also address any interference with or denial of their rights, either by state practices or unauthorised

[1908] Compare Anaya 2014, p. 4-5; Anaya 2013, p. 2-3; African Commission's Working Group of Experts on Indigenous Populations/Communities 2005, p. 88; CERD Concluding Observations New Zealand 2013, par. 14; CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 10.

third party activities. One can think of the granting of intellectual property rights to third parties or the designation of national or world heritage, which obstruct indigenous peoples from practising and access to their own cultures and cultural heritage.

TCE protection can also be very well understood as a specific manifestation of safeguarding indigenous peoples' dignity. Through use of TCEs by third parties, the expressions tend to be taken out of context and copied without consultation and therefore often without due account of their cultural or spiritual role and significance. From this perspective, it could be argued that protection of TCEs should draw on the principle of dignity to safeguard the cultural integrity and distinctive existence of indigenous communities. Scholars and indigenous representatives have stated that there is believed to be a clear connection between indigenous peoples' dignity and identity and their heritage. In this sense, dignity plays various roles in TCE protection. In its foundational role, dignity functions as a basis for rights to protect TCEs and claims that these rights have been violated. Dignity also plays an important role as a value for TCE protection that should be made operative by encouraging respect of society as a whole for the connection between indigenous peoples' dignity and their heritage. Lastly, it should in any case inform potential regimes of TCE protection as a principle to take into account in rule- and policy-making on the topic.[1909]

In conclusion, TCE protection can clearly be formulated and understood as an issue of cultural and indigenous rights. As already mentioned, WIPO itself has acknowledged in its Draft Gap Analysis of 2008, in which the Secretariat of the IGC studied the possibilities and gaps on the international level with regard to the protection of TCEs, that there is a conceptual divide "between the aspirations and perspectives of indigenous peoples and the conventional IP system."[1910] For these "fundamental differences", non-IP mechanisms such as cultural and other human rights are suggested to meet indigenous needs that cannot be met within the IP system.[1911] This chapter has shown that approaching the issue of TCE protection from a human rights perspective helps to contextualise protection concerns as a part of broader (human rights) struggles for indigenous peoples. It has teased out a number of specific human rights dimensions of TCE protection. Human rights law clearly provides for fundamental rights bases and obligations for various aspects of TCE protection that should be duly noted in any protection approach.

[1909] See on these roles of dignity McGonagle 2007, p. 3.
[1910] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.
[1911] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.

CHAPTER 6
BEYOND THE EXISTING LEGAL TRIPARTITE: LEGAL AND PRACTICAL SOLUTIONS

6.1 Introduction

Looking beyond the existing legal framework that has been analysed in Chapters 3, 4 and 5, this chapter discusses two strands of initiatives that are being developed separately from the existing legal framework. This chapter gives an overview of the different approaches to complete the 'mapping exercise' of TCE protection that this thesis has set out to carry out. The section on WIPO's work explains how the main formally legal, international initiative of WIPO aims to address TCEs' specific characteristics in legal rules. What objectives is this initiative driven by? How effective is it in this approach? The section on practical initiatives shows that, to some extent, these are better at incorporating what is actually at stake and needed, adapting more directly to specific circumstances and providing for 'workable' approaches. The 'playing field' of the issue in practice clearly also includes 'alternative' approaches. Once the map has been completed, Chapter 7 will include these approaches in the final analysis of TCE protection from a principle-based perspective and draws together all the approaches set out.

The two strands of initiatives consist of legal and practical approaches.[1912] The first strand discussed is the legal work that WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has been undertaking since 2001 on international treaties for each category. As of yet, no treaty has been adopted. The second strand comprises practical initiatives that are being developed locally or on a sector-specific level 'in the meantime', that is while there are still no suitable legal solutions. Such initiatives consist of the design of labels, indigenous-driven licences and cultural institutions, and industry protocols and codes of ethics, developed either by indigenous peoples themselves, by cultural institutions or in cooperation. They aim to find workable solutions outside of the legal sphere that give indigenous peoples and the sectors or institutions concerned 'something to work with', with indigenous peoples' customary laws and traditions, participation and control as a starting point. So, these initiatives mainly seem a response to the *top-down* nature of existing rules, whereas the legal approach seems a response to the *mainstream* nature of existing rules.

What the approaches have in common is the intention to find solutions for tensions and fill gaps that arise from the existing legal systems vis-à-vis the protection of indigenous heritage, such as TCEs. From a systems perspective, however, the approaches that are developed separately from the existing legal framework can still be perceived as interacting with the existing or mainstream legal system. They may comprise 'stand-alone', independent approaches, but they do not exist in isolation. Viewed this way, they are also part of the bigger systemic whole that is of relevance for TCE protection. This 'whole' consists of normative standards, institutional actors and (alternative) policy and practice across the different areas of law that have been central in this thesis. However, it should be noted that practical initiatives tend to function at a local-specific level, whereas the analysis of the existing legal framework in the previous chapters has been approached from an international normative perspective.

[1912] See generally Wendland 2009, p. 77–99.

Another main difference between the two strands is that WIPO's approach is an initiative of international public law, whereas the practical initiatives tend to be self-regulatory. Still, they are discussed here precisely because they can still be very instructive for public international law initiatives. Previous chapters have shown that TCE protection is a multi-faceted issue, that indigenous peoples' protection interests are diverse and that the existing legal framework responds to these different aspects in a fragmented way. A one-dimensional approach is therefore largely insufficient. As we will see in the next section, WIPO's approach follows the 'classic' copyright-like duality of economic and moral rights. This suggests that additional action is still needed. The practical approaches that are discussed in section 6.3 tend to be able to react in a more *ad hoc* manner to what is necessary in the given situation and for the specific community concerned. Labels, protocols and codes of ethics can help to safeguard cultural integrity by guiding culturally appropriate behaviour in specific circumstances. Licences offer opportunities for access for third parties and benefit-sharing if desired by the specific community concerned.

6.2 WIPO's sui generis efforts

Although a number of values that underpin the copyright system fit well with indigenous peoples' interests in protection, the reality is that in practice there tends to be a lack of protection for (most) indigenous heritage under intellectual property law. Reform of the international system as a whole is unlikely. This would not only be a tedious process that likely faces much opposition from countries with dominant copyright industries, but we have seen in Chapter 3 that conceptual[1913] and theoretical gaps in the existing framework remain persistent. To address the protection of various sub-areas of indigenous heritage, WIPO has been working on a *sui generis* protection framework for traditional knowledge, genetic resources and TCEs. *Sui generis* means that the rules that are designed are independent from existing intellectual property rules.[1914] In this section, we first look at some key moments in WIPO's development of specific binding legal rules.[1915] The objectives and guiding principles of WIPO's approach are scrutinised and the content of the specialised rules is subsequently analysed.

6.2.1 The development of *sui generis* rules

WIPO has been active in the development of international *sui generis* rules for TCE protection since 1978.[1916] The Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established in 2000 to develop TCE-specific rules and it is still active today. Before that, WIPO was already involved in 'folklore' protection, amongst others in conjunction with UNESCO. However, a draft treaty based on their joint Model Provisions of 1982, one of the first *sui generis* attempts and moves beyond copyright law, was not pursued further due to issues with reliable sources

[1913] See also Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 1–35; Torsen Stech 2014, p. 420–421.
[1914] But WIPO's initiative still seems strongly related to intellectual property law. WIPO also says itself that it addresses the IP-side of the protection question due to its mandate. This IP-like structure and approach can attract criticism.
[1915] Such as: WIPO's 1998-1999 Fact-Finding Missions (FFMs), whose findings have also recurred in later WIPO policy documents; WIPO's 2002 questionnaire and final report on national experiences with the legal protection of expressions of folklore; WIPO's 2008 Draft Gap Analysis; and WIPO's latest sui generis Draft Articles of 2014.
[1916] WIPO/GRTKF/IC/1/3, par. 30.

of identification of folklore and questions surrounding folklore shared by multiple countries.[1917]

The topic of folklore protection resurfaced at WIPO in the wake of the WIPO Diplomatic Conference of 1996. The plan to negotiate a *sui generis* treaty on the protection of databases seems to have spurred the calls of developing countries for an instrument on the protection of folklore, as the former would mainly benefit industrialised countries.[1918] Although the WIPO Performances and Phonograms Treaty (WPPT) of 1996 does make a small, but explicit, reference to expressions of folklore,[1919] instead of a specific folklore instrument at this stage, an international forum on protection issues for folklore was convened by WIPO and UNESCO in Phuket in 1997. The so-called Phuket Plan of Action was adopted. It stated that there was no international standard protection for folklore and set a very ambitious goal.[1920] A Committee of Experts, both in *conservation* and *protection*, should draft a new international agreement on the *sui generis* protection of folklore. The draft was to be discussed at a Diplomatic Conference in the second half of 1998.[1921] This goal was not reached.

WIPO's next step was to conduct a range of 'Fact-Finding Missions' (FFMs) on intellectual property and traditional knowledge in 1998 and 1999. The final report acknowledges that the goal and scope of the studies were concerned with the *intellectual property* dimension of knowledge holders' needs and expectations.[1922] This makes sense given WIPO's mandate. However, it also raises the question how fit this approach of an 'intellectual property(-like)' framework can be for TCE protection. It is clear that there are other dimensions and protection objectives of TCE protection that fall outside the ambit of intellectual property law, as this thesis has also shown.[1923] This makes any isolated approach insufficient. The multidimensional issue of TCE protection needs a legally diverse approach that takes the various dimensions into account, yet one that is also coherent. This perspective acknowledges that TCE protection is part of a broader struggle of indigenous peoples for empowerment and recognition of their rights, cultures and ways of life, as Chapter 5 of this thesis highlights and elaborates. WIPO likely lacks the necessary expertise in the areas of cultural heritage and human rights law to address these dimensions of TCE protection. This would also be outside their mandate. Besides, these legal areas have their own specialised UN agencies in UNESCO and the United Nations Permanent Forum on Indigenous Issues (UNPFII), respectively.

Coming back to WIPO's efforts, developments continued in an intellectual property sphere. Again, there were calls for the inclusion of indigenous concerns in 2000, as during the WIPO Diplomatic Conference of 1996. This time, the inclusion of aspects of genetic resources was pushed forward in the context of the Diplomatic Conference for the Adoption of the Patent Law Treaty.[1924] Yet again, though, indigenous peoples' concerns and knowledge were left out of 'regular' scopes and negotiations: instead, the current Intergovernmental Committee was

[1917] Ficsor 2005 (WIPO/CR/KRT/05/8), p. 3.
[1918] Von Lewinski 2008, p. 537.
[1919] Article 2(a) WPPT.
[1920] Phuket Plan of Action 1997, p. 7.
[1921] Von Lewinski 2008, p. 538. Phuket Plan of Action 1997, p. 235.
[1922] WIPO FFM 2001, p. 209.
[1923] See also WIPO's awareness of this in its Draft Gap Analysis on the gaps on the international level with regard to the protection of TCEs, Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.
[1924] This is a treaty that aims for procedural harmonisation of national and regional patent applications, see: http://www.wipo.int/treaties/en/ip/plt/.

established as a forum in which to discuss indigenous matters further.[1925] It is clear that growing awareness and tensions have led to calls for action. It is also clear that indigenous concerns have repeatedly been kept outside existing intellectual property systems and negotiations.

Year	***Event***
1967	Berne Revision Stockholm, inclusion of folklore under discussion.
1978-1982	Work by WIPO and UNESCO on *sui generis* options. Their draft treaty (1984) was not pursued further.
1996	Folklore protection resurfaced in the wake of the WIPO Diplomatic Conference and database protection treaty to be discussed there.
1997	International forum organised by WIPO and UNESCO. A draft agreement was to be discussed in 1998. Goal not reached.
1998-1999	Fact-Finding Missions on IP and TK.
2000	Calls for folklore protection occurred in the wake of the Diplomatic Conference for the Adoption of the Patent Law Treaty.
2000	IGC on IP, Genetic Resources (GR), TK & Folklore established to work on separate *sui generis* treaties.

Table **1 Tabular overview and historical timeline of folklore/TCE protection via sui generis rules at WIPO.**

Fact-Finding and gaps

WIPO has so far spent many years conducting exploratory activities such as the collection of data and the work on studies and reports on the issue of TCE protection. Their so-called 'Fact-Finding Missions on Intellectual Property and Traditional Knowledge',[1926] conducted in 1998 and 1999, and the IGC's questionnaire and subsequent 2002 'Final Report on National Experiences with the Legal Protection of Expressions of Folklore'[1927] were some of the earliest efforts. For the FFMs, 28 countries in various regions of the world were visited.[1928]

The FFMs show some of the recurring difficulties, which include definitional issues, the collectiveness of the heritage, the role of customary laws and opportunities and challenges of documentation, as shown in the following overview:

[1925] See on this Von Lewinski 2003, p. 749; Von Lewinski 2008, p. 538. See also WIPO/GRTKF/IC/1/3, par. 26-28 for the decision that work on genetic resources, as well as traditional knowledge and expressions of folklore, was to be continued in a distinct body at WIPO. See par. 31 on the establishment of the IGC.
[1926] WIPO 2001.
[1927] WIPO/GRTKF/IC/2/7, Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002.
[1928] These were: the South Pacific; Eastern and Southern Africa; South Asia; North America; Central America; West Africa; the Arab Countries; South America – Mission to Peru; South America – Mission to Bolivia; and the Caribbean Region.

Difficulties to be addressed	*FFM Region*
Definitions	South Pacific; Eastern and Southern Africa; Central America; West Africa; Arab Countries; Caribbean Region.
Collectiveness of the heritage	South Pacific; Central America; South America – Peru; Arab Countries.
Customary laws	South Pacific; Eastern and Southern Africa; North America; West Africa; Caribbean Region.
Documentation concerns, incl. intellectual property issues	North America; South Asia; Eastern and Southern Africa; Arab Countries.
Participation, incl. in WIPO's activities	South Pacific; North America.
Defensive measures, incl. trade secrets and certification marks	North America; Arab Countries; Central America.
Cooperation, incl. dialogue, exchange of information and contact with users	Caribbean Region; Eastern and Southern Africa.
Empowerment, incl. facilitation and capacity-building	Eastern and Southern Africa; South America - Peru; Caribbean region.
Unauthorised use	South America – Bolivia.

Table 2 Difficulties arising in the WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), per geographical region that was visited.

Various of these difficulties also appeared later in WIPO's 2008 Draft Gap Analysis on the Protection of Traditional Cultural Expressions. One commentator has qualified this Analysis as "[o]ne of WIPO's best contributions to the discussion", which "should be studied by anyone who enters into this discourse."[1929] Further, the FFMs also show local or regional particularities. This is noteworthy, because this only emphasises the great diversity of issues and concerns at stake and, consequently, the mammoth task laid out for WIPO. In this section, these categories of recurring difficulties are elaborated and placed into context.

Definitions and collectiveness

A recurrent difficulty in the study into the intellectual property needs and expectations of traditional knowledge holders is the definition or description of traditional knowledge in an IP context.[1930] It is also one of the core difficulties that generates the most vehement debate to this day. This makes sense as the definition of what to protect, or the definition of the protection's subject matter, is also of central importance for the functioning of general intellectual property laws. To determine what the (temporary) exclusive rights cover, an understanding of the subject matter must be sufficiently delineated to prevent legal uncertainties. However, as Drahos has noted with regard to the protection of indigenous peoples' knowledge assets: one single, universal, agreed upon definition is unlikely. He suggests that an "inclusive cluster approach" that generally describes the subject matter in conjunction with an enumeration of examples could be an alternative.[1931] Likewise, Torsen Stech expects that a similar approach to the Berne Convention could work, that is "a rather broad brushstroke approach" and an illustrative list.[1932] Overall, as Drahos notes, "[t]he time is probably right for a simple, open-ended and pragmatic approach to be taken."[1933] In sum, building in flexibility is a way to, at least to a certain extent, circumvent recurring obstacles and focus on workability in order to start making some progress regarding TCE protection.

[1929] Torsen Stech 2014, p. 419–420.
[1930] See WIPO 2001 for the FFMs to the South Pacific, p. 81; Eastern and Southern Africa, p. 97; Central America, p. 142; Arab Countries, p. 169, specifically on the definition of folkloric musical works vis-à-vis derivative musical works; Caribbean Region, p. 204, on a commonly agreed definition.
[1931] Drahos 2004, p. 31.
[1932] Torsen Stech 2014, p. 424.
[1933] Drahos 2004, p. 31.

Collectiveness is another recurring theme in the FFMs, which is repeated in the Draft Gap Analysis. Various FFMs identify this 'intellectual property need and expectation of TK holders', for example in connection with possibilities for collective acquisition, management and enforcement of rights,[1934] the protection of collectively owned rights,[1935] and recognition of collective creativity and property.[1936] Inspiration from, or even establishment of, collective management is suggested as a possible avenue to explore.[1937] In WIPO's 2002 final report on national experiences, Member States confirm that it is necessary to find legal solutions that can answer to the needs of communities for recognition of their collective rights to their collective knowledge.[1938] Concrete proposals include the establishment of national societies, institutions or competent authorities that administer and enforce indigenous communities' rights.[1939] It is doubtful whether indigenous communities would find this an appropriate option. Their effective involvement and participation is a must in any case. The 2008 Draft Gap Analysis also includes recognition of communal rights and interests in the potential options for addressing identified gaps.[1940] We have indeed seen collectiveness as a central obstacle in copyright law, and in human rights law the collective dimension of human rights has not always been readily accepted either. Whereas recognition for a collective dimension of human rights is increasing, it is an important factor to take on board for any form of TCE protection that is to legitimately take note of indigenous particularities.

Customary laws, documentation and participation

The FFMs pay significant attention to customary systems and their relationship with intellectual property laws.[1941] The mission to North America especially extensively addresses customary laws and protocols which protect non-material subject matter in a *local* context. These are identified for five areas of subject matter: traditional songs, traditional dances, traditional designs, traditional names and traditional medicine.[1942] These laws and protocols address topics of (exclusive rights for) creation, performance and transfer, but also dispute settlement and enforcement. Generally, the question that is raised is how the situation is to be navigated when both modern intellectual property rights and customary laws apply. The mission speaks for example of a 'cultural conflict situation' and notes suggestions of local customary protocols to supplement the existing intellectual property framework.[1943] Other FFMs speak of a need to examine IP-like protection that is based on customary law and to study the relationship between both legal systems.[1944]

[1934] WIPO 2001, p. 81, FFM to the South Pacific.
[1935] WIPO 2001, p. 142, FFM to Central America.
[1936] WIPO 2001, p. 178, FFM to South America - Mission to Peru.
[1937] WIPO 2001, p. 81, 142, 169, FFMs to the South Pacific, Central America and the Arab Countries, respectively.
[1938] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002, p. 49.
[1939] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002, p. 49.
[1940] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 27.
[1941] WIPO 2001, p. 81, 97, 129, 156, 204, for the FFMs to the South Pacific, Eastern and Southern Africa, North America, West Africa and the Caribbean Region, respectively.
[1942] WIPO 2001, p. 124–126.
[1943] WIPO 2001, p. 126. One Cree Elder is quoted, saying: "Our drums do not speak a language other than our language. Our traditional knowledge should not be protected only by a system from the outside. It should also be connected with the ways by which our nations have protected and respected our traditions."
[1944] WIPO 2001, p. 156 and 204, 97, FFMs to West Africa and the Caribbean Region, and Eastern and Southern Africa, respectively.

WIPO's 2002 Final Report on its questionnaire on national experiences examines "customary intellectual property systems" under the proposals for modifications to existing IP and *sui generis* standards. The report notes how these "highly sophisticated and effective systems" are considered to have flown under the radar of the formal intellectual property framework. Recognition of these regimes has been deemed "a third approach" to address the IP needs of traditional knowledge holders. Suggestions to apply this in practice include the recognition and use of traditional forms of ownership to determine the 'author' of a TCE, "or at least who is an owner and entitled to exercise control over it." The Report notes a response to the questionnaire that held that for changes to existing regimes to be suitable, these should be more culturally sensitive.[1945] Cultural sensitivity ties in with values of dignity and identity, respect and participation: recognition of an indigenous dimension of rights, concepts and interpretations with regard to the maintenance, control, protection and development of TCEs unites these three values.

Customary law is another factor that recurs in human rights law, notably in ILO Convention No. 169[1946] and UNDRIP.[1947] The issue of customary laws reflects a dimension of (cultural) self-determination that no approach to TCE protection can ignore. Furthermore, it can help to address central difficulties that arise from the application of existing laws to indigenous peoples' situation, such as in the case of protection of their heritage. Drahos mentions two ways to work with this in practice. One possibility would be to explore how customary law and practice can form a basis for an international protection system of traditional knowledge, as suggested in the FFMs. However, this would likely take a long time as it involves an assessment of the working of customary laws on an international level, so throughout various states. According to Drahos, a more mid-term approach would be to take a practical perspective and pursue the development of (customary) protocols that determine the way that third parties may use the materials concerned.[1948] These protocols would apply for example to uses in specific sectors, such as in film-making or the music industry.[1949] WIPO's Draft Gap Analysis also acknowledges the usefulness and practical role of initiatives such as protocols, codes of conduct and contracts.[1950] More on this will follow in the next section on grass-roots, local and professional initiatives such as labels, licensing, protocols and codes of ethics.

Another recurring theme in the FFMs is documentation.[1951] The FFM to North America illustrates that documentation serves many diverse policy objectives. These are:

- intellectual property protection of traditional knowledge;

[1945] See Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002, p. 48, par. 143(ii).
[1946] Article 8 ILO Convention No 169 determines that indigenous peoples' specific customs and customary laws must be taken into account in the application of national laws and regulations to the respective communities.
[1947] Article 5 UNDRIP lays down the rights of indigenous peoples to maintain and strengthen, amongst other things, their legal institutions. Article 12 UNDRIP guarantees the right for indigenous peoples to manifest, practise, develop and teach their customs. Article 34 holds that indigenous peoples have the right to promote, develop and maintain their institutional structures, distinctive customs and juridical systems or customs (with a limitation of human rights compatibility).
[1948] Drahos 2004, p. 34.
[1949] See for an overview of indigenous protocols developed in Australia: http://www.artslaw.com.au/art-law/entry/indigenous-protocols/.
[1950] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 32.
[1951] Documentation-related issues are acknowledged by TK holders across the various regions, see WIPO 2001, p. 97, 112, 129, 156, 169, 204 for the FFMs to Eastern and Southern Africa, South Asia, North America, West Africa, the Arab Countries and the Caribbean Region, respectively.

- preservation of traditional knowledge-systems;
- documentation serving the teaching and transmission of traditional knowledge;
- documentation in order to conserve cultural diversity and integrity; and
- documentation of sustainable environmental practices to preserve the environment.[1952]

The FFM also highlights a number of priority issues that could arise from documentation and may have intellectual property implications. These include the commercial exploitation of the data resulting from the documentation; forms that community-based authorisation and decision-making processes can take when it comes to the shape, extent and procedures involved in documentation efforts; intellectual property rights in initial material; and rights, access and use of the documentation data.[1953]

Indeed, questions surrounding documentation that are also generally raised in other FFMs include the implications for intellectual property protection of documented traditional knowledge and the disclosure of such data in the digital environment. Many aspects of documentation are related to patent and industrial design protection,[1954] especially in the sphere of prior art searches and eligibility for protection.[1955] Publication affects the ability to acquire a design right or a patent. In this sense, documentation could contribute to a strategy of defensive protection and preventing third parties from acquiring intellectual property rights over indigenous knowledge that is already made public. At the same time, however, documentation of indigenous knowledge often raises concerns for indigenous peoples as well. Documentation and recording indeed makes their (sacred) knowledge known to the public. WIPO's Draft Gap Analysis acknowledges that recording and digitisation can have unintentional consequences such as increased vulnerability to unauthorised outsider use and exploitation. Effective management of intellectual property rights during documentation processes[1956] should address these concerns and "reduce reluctance of TK holders to transmit TK."[1957] WIPO's final report of its questionnaire on national experiences echoes this concern, and notes how the importance of indigenous peoples' prior consent and full participation in any documentation initiative has been stressed.[1958]

The identification, documentation, classification and registration of TCEs, and the establishment of inventories[1959] is reminiscent of the 2003 UNESCO Intangible Cultural Heritage Convention's approach. As we have seen in Chapter 4, the creation of inventories has been criticised in that it is not clear how inventories contribute to the overall aim of *dynamically* safeguarding intangible cultural heritage. Furthermore, documentation is often claimed to 'freeze' traditional creativity.[1960] To counter such concerns, indigenous peoples' free, prior and informed consent and their involvement in any inventory-making and the setting of requirements for inclusion is repeatedly stressed. The same criticism of the 2003

[1952] WIPO 2001, p. 118.
[1953] WIPO 2001, p. 119.
[1954] This seems to play a role especially in South Asia, WIPO 2001, p. 112.
[1955] WIPO 2001, p. 112 and 97, FFMs to South Asia and Eastern and Southern Africa, respectively.
[1956] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 33.
[1957] WIPO 2001, p. 112, FFM to South Asia.
[1958] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002, p. 52.
[1959] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002, p. 49.
[1960] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002, p. 52.

ICH Convention that was discussed in Chapter 4 applies here: inventories or databases can probably only play a secondary, informative or facilitative role for TCE protection. They can contribute to clarity and legal certainty but only work on the 'outskirts' of the issue of TCE protection and not actually achieve TCE protection themselves.

Another aspect of the interplay between intellectual property rights and documentation concerns archives, institutes and documentation centres that hold indigenous material and have the intention to digitise this or have already done so. More specifically, the FFMs to South Asia and the Arab Countries mention the need to develop licensing agreements and contracts with archives and other documentation centres and institutions.[1961] This seems to reflect a movement towards (re)allocation of rights and agency, from mainstream heritage institutions (back) to indigenous peoples themselves. As we will see below in the section on alternative protection approaches, such institutions are potential allies of indigenous peoples who want to do the "right thing"[1962] and are open to dialogue and cooperation.

Participation is another of the needs of traditional knowledge holders that is repeatedly identified in WIPO's FFMs, such as in the FFMs to the South Pacific and North America. It is perhaps not surprising that these two regions specifically address participation, as these have traditionally been two of the regions with vocal and active indigenous rights lobbies. The FFM to the South Pacific specifically stresses that TK holders, including indigenous peoples, should participate in WIPO's action, such as "conceptualization and planning activities."[1963] In the FFM to North America, full and effective participation of indigenous peoples in relation to intellectual property and traditional knowledge is underlined.[1964] This is also the case in current understandings and interpretations of human rights by the various UN human rights bodies, as elaborated in Chapter 5.

Generally, relevant provisions to consider for a human rights framework for the right to participation, in relation to a TCE protection system, include Articles 2(1), 7(1) and 15(1) ILO Convention No. 169,[1965] Articles 18, 19 and 31(2) UNDRIP[1966] and Article 15(1)(c) ICESCR.[1967] All of these provisions confirm that indigenous peoples should be involved in procedures and decision-making processes on matters that affect them. This establishes participation as a broad standard for indigenous issues. It seems that, despite the good intentions of having an indigenous panel at WIPO, there is room for improvement when it

[1961] WIPO 2001, p. 112 and 169, FFMs to the South Pacific and the Arab Countries.
[1962] Drahos 2004, p. 35.
[1963] WIPO 2001, p. 81.
[1964] WIPO 2001, p. 129.
[1965] These provisions contain an obligation for states to take action to protect indigenous peoples' rights with their participation; indigenous peoples' right to participate in the formulation, implementation and evaluation of national and regional development activities that might affect them directly; and the right of indigenous peoples to participate in the use, management and conservation of their natural resources.
[1966] These provisions contain the 'overall right' of indigenous peoples to participate in decision-making in matters that would affect their rights and to maintain and develop their own decision-making institutions; the obligation of states to consult and cooperate with indigenous peoples via their own representative institutions to obtain free, prior and informed consent before adopting and implementing legal or administrative measures that could affect these peoples; and the obligation for states to take effective measures in conjunction with indigenous peoples to recognise and protect these peoples' rights to their heritage as guaranteed in Article 31(1).
[1967] This provision contains the right of everyone to benefit from the protection of the moral and material interests that result from their scientific, artistic or literary production. According to the CESCR in General Comment No. 17, this includes indigenous peoples' knowledge, innovations and practices (par. 8-9). Although not mentioning participation as such, the CESCR further held that states must take the preferences of indigenous peoples into account when adopting measures that protect their knowledge, innovations and practices, respecting for example free, prior and informed consent and oral or other customary forms of transmission (par. 32).

comes to participation of indigenous peoples in the *actual* negotiations, procedures and decision-making. However, this is not only the case at WIPO, but also at UNESCO and the UN, as concerns raised at the fifteenth session of the UN Permanent Forum on Indigenous Issues in May 2016 show.[1968] On many levels, international structures and procedures are still reserved to state-actors only. In any case, the foregoing confirms the perception of participation as a central value.

Defence, cooperation, empowerment and unauthorised use

Multiple FFMs identify defensive measures for the protection of TCEs, in various dimensions. The suggestion to study and test trade secrets is a specific topic that stands out. This suggestion refers to traditional knowledge subject matter that is kept secret by communities, such as know-how in the context of traditional ecological knowledge, natural resource management[1969] and technical know-how involved in traditional medicine and handicrafts.[1970] The certification marks that the North American FFM brings to attention comprise another dimension of defensive measures. Both trade secrets and certification marks primarily concern the economic side of TCEs. Participants raised the need for enhanced use of such marks to certify their cultural expressions and assistance in operationalising this, for example by reducing trademark registration costs.[1971]

Related to these defensive certification measures to counter 'passing off' are acknowledgment of the source of creations and innovations based on traditional knowledge, and the anti-piracy measures against unauthorised copies and use of TCEs that the FFM to Central America explicitly underlines. This is linked to such causes for concern as the disregard for moral rights of recognition and attribution, a lack of control and economic benefits, and a lack of respect for spiritual values by unauthorised commercial copies, which is argued to threaten survival of the original traditions.[1972] These concerns combine various of the protection interests distinguished in this thesis.

Other than defensive measures, various FFMs emphasise the development of forms of cooperation between traditional knowledge holders and users.[1973] The cooperative measures of dialogue, exchange of information and contact between traditional knowledge holders and users,[1974] the private sector, governments, NGOs and other stakeholders[1975] could lead to greater clarity on topics such as beneficiaries, best practice protocols and contracts, the establishment and sharing of intellectual property benefits and solutions or use of traditional knowledge that is currently in the public domain.[1976] The FFM to Eastern and Southern Africa, for example, notes concern and criticism of governments that only wish to protect traditional knowledge for their own benefit and of the private sector and governmental

[1968] See 'Representatives of Indigenous Peoples Call for Greater Participation in United Nations Bodies, as Permanent Forum Concludes Week One', 13 May 2016, http://www.un.org/press/en/2016/hr5302.doc.htm; see also http://www.telesurtv.net/english/news/Indigenous-From-100-Countries-Demand-Equality-But-Ignored-by-UN-20160519-0022.html; and Permanent Forum On Indigenous Issues 2016, p. 9–11.
[1969] These examples are mentioned in the FFM to North America, WIPO 2001, p. 129.
[1970] These examples are mentioned in the FFM to the Arab Countries, WIPO 2001, p. 169.
[1971] WIPO 2001, p. 123.
[1972] WIPO 2001, p. 135
[1973] WIPO 2001, p. 204, FFM to the Caribbean Region.
[1974] WIPO 2001, p. 194–195, 204, FFM to the Caribbean Region.
[1975] WIPO 2001, p. 88, 97, FFM to Eastern and Southern Africa.
[1976] WIPO 2001, p. 88, 97–194, 195, 204, FFMs to Eastern and Southern Africa and the Caribbean Region.

research institutes that exploit and commercialise productions based on traditional knowledge without benefit-sharing.[1977]

Another issue that is raised cross-regionally, is the relationship between the protection of indigenous heritage, knowledge and TCEs, and cultural heritage. The Arab Countries wish for more clarity on the role of the cultural heritage conventions, specifically.[1978] For North America, repatriation and access to cultural heritage is an issue that is raised. As indigenous peoples stated in that FFM:

> "our artifacts are made to be used, not to sit in museums. The conservation of cultural heritage is not for "preservation," but for continued use. Indigenous peoples don't want to get the artifacts back in order to "own" them, but to use them."[1979]

Traditional knowledge holders from the United States emphasise that there is a parallel between the 1990 Native American Graves Protection and Repatriation Act (NAGPRA) and the possibility to apply for grants to help repatriate Native American cultural property on the one hand, and the need for similar grants and assistance for their intellectual property and knowledge protection on the other hand.[1980] NAGPRA grants enable the costly process of consultation, documentation and repatriation of human remains and other items in collections between museums and source Indian tribes and Native Hawaiian organisations.[1981] In the context of indigenous intellectual property and knowledge, one can imagine that similar processes of dialogue, cooperation and documentation can ultimately contribute to protection, preservation and self-determined control of their intangible heritage by source communities. Related to this is the observation in the FFM to Bolivia that the realisation of intellectual property protection of traditional knowledge and cultural expressions at the national and international level is a means to an end, i.e. to conserve indigenous communities' cultural heritage.[1982] In sum, what we see here is a confirmation of the approach of this thesis, that is: it is worthwhile to assess the multiple legal domains that are of relevance for the very diverse aspects of TCE protection.

In addition to defensive and cooperative measures, various FFMs identify positive, 'enabler' protection measures and calls for empowerment, facilitation and capacity-building. One aspect is, for example, advice on intellectual property and assistance in the 'art' of contracts, such as negotiation, drafting and enforcement.[1983] The FFMs to Peru and the Caribbean Region also highlight the development and testing of best contractual practices.[1984] What stands out in the FFM to Peru is the scepticism of respondents regarding uncertain future

[1977] WIPO 2001, p. 88.
[1978] WIPO 2001, p. 169.
[1979] WIPO 2001, p. 127.
[1980] WIPO 2001, p. 127–128.
[1981] See for background information on the grants: https://www.nps.gov/nagpra/grants/NAGPRA-GrantsRetroFinal.pdf. See the example on p. 7 of the Museum of Northern Arizona's 2006 Consultation/Documentation Grant to increase their consultations with the Hopi Tribe, Navajo Nation, Zuni Tribe, and the Western Apache tribes. The museum and tribes cooperated to develop and operationalise a plan of culturally appropriate guidelines on care, handling and housing and enact policies and procedures on access to sensitive tribal collections. They also established a Native American Advisory Committee for cooperation on NAGPRA issues. The Committee further advised the museum on the building of a new collection centre, whose design elements incorporate the worldviews of the Native people of the region. All of this has contributed to strengthened relationships.
[1982] WIPO 2001, p. 188.
[1983] WIPO 2001, p. 97, FFM to Eastern and Southern Africa.
[1984] WIPO 2001, p. 178, 204.

benefit-sharing clauses in contracts. Rather, they suggested including clauses in agreements with regard to:

> "technical and scientific training aimed at reducing technological dependence, establishment of fiduciary funds for the development of the communities providing the TK or the material, up-front payments and milestone payments not linked to product development by the licensee."[1985]

Something similar is brought forward in the FFM to West Africa, where promotion of the use of technology transfer arrangements as a possible mechanism for benefit-sharing is underlined.[1986] Other forms of empowerment, facilitation and capacity-building called for by the FFM to Central America are awareness-raising, information and training, and strengthening the abilities of indigenous and local communities to acquire, manage and enforce intellectual property rights. What is lacking are resources and expertise.[1987]

The FFM to South America, mission to Bolivia, raises the familiar topic of protection against unauthorised use, but also location and repatriation of stolen sacred textiles, adequate remuneration of artisan's labour and protection against free copying of techniques, patterns and designs.[1988] But, the FFM to South America, mission to Peru, makes a side note to this in that any form of traditional knowledge protection should not prevent sharing and other transmission.[1989] As the FFM states:

> "indigenous peoples were reluctant to remain isolated. They have a fundamental willingness to share and exchange their knowledge. (…) Sharing TK was regarded as essential, but so was recognition of origin and ownership, respect for inherent traditions and sharing economic benefits. TK should not be exploited or commercialized indiscriminately."[1990]

In other words, dynamic protection is a must according to this FFM, so that indigenous peoples can continue their use and development and "prevent the chain of transmission of traditional knowledge from breaking."[1991] The foregoing statement in the mission to Peru combines most, if not all, of the various indigenous interests that this thesis has distinguished into one call for what is basically a layered protection structure. However, one-size-fits-all perspectives also come with difficulties and the diversity of interests of different communities should be acknowledged in order to prevent essentialist assumptions, that is: that all indigenous communities are alike and want the same thing. This merits the conclusion that any isolated and one-dimensional approach is insufficient.

Locality-specific issues

The FFMs also show the locality-specific nature of various issues. For example, documentation in South Asia is primarily concerned with determination of prior art and patenting. In North America, objectives of documentation include environmental preservation

[1985] WIPO 2001, p. 176.
[1986] WIPO 2001, p. 156.
[1987] WIPO 2001, p. 141–142.
[1988] WIPO 2001, p. 189. See also the FFM to North America for concerns of passing off copies as Native American products overseas, p. 123.
[1989] WIPO 2001, p. 178.
[1990] WIPO 2001, p. 172.
[1991] WIPO 2001, p. 172.

and cultural diversity. In both regions, the outcomes of the FFMs include an argument for making intellectual property rights mutually supportive with traditional knowledge policy objectives. But these policy objectives differ. For South Asia, objectives include biodiversity and traditional knowledge conservation and equitable benefit-sharing.[1992] For North America objectives of repatriation of cultural heritage, recognition of customary law and the integrity of knowledge systems are emphasised.[1993]

Another location-specific topic is capacity building in the context of benefit-sharing. As identified above, the FFM to West Africa contains a suggestion for promotion of technology transfer arrangements and community development projects as potential models for benefit-sharing.[1994] Similarly, the FFM to Peru highlights capacity-building and empowerment in the context of contractual clauses and traditional knowledge licences. Instead of uncertain future benefit-sharing, some respondents to the FFM recommended, for example, technical and scientific training that could help in decreasing existing technological dependence.[1995] This shows the regional or local preferences of the concrete elaboration and consequences of traditional knowledge and TCE protection. Such preferences are likely to be highly diverse, depending on communities' specific circumstances.

Local or regional preference is related to the diversity of TCE protection interests amongst indigenous peoples, as we have also seen in Chapter 2. The FFM to West Africa suggests exploring an effective regional approach.[1996] In 2010, the African Regional Intellectual Property Organization adopted the Swakopmund Protocol, a *sui generis* approach to the protection of traditional knowledge and TCEs. However, the 2002 final report on WIPO's questionnaire on national experiences had earlier shown that the majority of the countries investigated found an international agreement necessary.[1997] This is what WIPO is currently working on.

Claims, rights and regulatory difficulties: towards a sui generis regime

Overall, WIPO's efforts and studies such as their FFMs give a good idea of the needs, concerns and perceived main threats that are at stake for indigenous heritage protection. They also reconfirm the various protection interests and the relevance of a diverse set of legal questions and domains – e.g. copyright law, cultural heritage law and human rights law – as identified and analysed in Chapter 2 and Chapters 3, 4 and 5, respectively. At the same time, this data – although only the tip of the proverbial iceberg of studies and research into the topic – also shows the enormous diversity and scope of the issue. This brings with it many difficulties and sets a mammoth task for WIPO in its protection efforts. The next section will now turn to these efforts, and more specifically the latest Draft Articles of 2014 for the *sui generis* TCE protection.[1998]

[1992] WIPO 2001, p. 112.
[1993] WIPO 2001, p. 129.
[1994] WIPO 2001, p. 148, 156, FFM to West Africa.
[1995] WIPO 2001, p. 176, FFM to South America - Mission to Peru.
[1996] WIPO 2001, p. 155–156.
[1997] 61%, 39 responses as opposed to 6%, 4 responses, saying no; Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002, p. 47.
[1998] As noted in Chapter 2: WIPO's work is still ongoing, with IGC meetings on TCEs resuming in February 2017. Later discussion of the Draft Articles in this thesis will refer to the version of 2014, available via: http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_6.pdf.

6.2.2 Objectives and principles: multidimensional and cross-cutting

This section assesses the overall aims of WIPO that a treaty on TCE protection should serve. The Revised Objectives and Principles that WIPO has formulated for both the work on and rules for the protection of TCEs, for example, are a clear testimony to the variety of protection interests at stake.[1999] The preamble and principles of the concrete Draft Articles for an international treaty that WIPO is currently working on[2000] also reflect the significant degree of complexity and the multi-faceted nature of the topic, which, as we have seen in previous chapters, indeed ranges from IP-related questions to cultural heritage considerations and human rights dimensions.

Revised Objectives

The overarching Revised Objectives and Principles, proposed by WIPO's Secretariat, reflect WIPO's foundational work and research into the experiences with TCE protection at the international, regional and national levels, which spans various decades.[2001] WIPO has expressly acknowledged that the focus of the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is primarily an intellectual property perspective. As such, it would be a part of policies that target "*the promotion and protection of creativity and innovation community development and the stimulation and promotion of the creative industries as part of sustainable economic development*." However, WIPO recognises that TCE protection involves other essential policy areas. These include cultural heritage safeguarding and preservation, freedom of expression, interests of indigenous peoples, customary laws, public domain issues and promotion of cultural diversity.[2002] This observation provides an essential touchstone for any TCE protection approach and for the recommendations of this thesis in particular.[2003]

The objectives for WIPO's ongoing work on TCE protection apparently aim to embody this multi-faceted perspective.[2004] There are thirteen objectives, which cover the main aspects of indigenous heritage issues in general. They range from the promotion of respect to the empowerment of communities. Other objectives stress the need to prevent the misappropriation of TCEs and to contribute to safeguarding traditional cultures and cultural diversity. The objectives demonstrate the difficult position and enormous task of WIPO to navigate and reconcile countervailing interests. For example, the objective to promote intellectual and artistic freedom, research and other fair practices addresses freedom of expression concerns. However, a requirement of mutually agreed equitable terms that are subject to indigenous peoples' prior, informed consent and involvement is added to this as a balance. This is favourable for indigenous interests, but can again contribute to restricting free expression. Overall, values of dignity and identity and of respect shine through in the objectives. However, apart from empowerment, there is a general absence of any further value

[1999] The most recent version, i.e. The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, is from 21 September 2010, WIPO/GRTKF/IC/17/4.
[2000] See Annex I of the thesis for the Draft Articles of 2017.
[2001] WIPO/GRTKF/IC/11/4(c), 26 April 2007, par. 3: "This review has covered comprehensive analyses of existing national and regional legal mechanisms, panel presentations on diverse national experiences, common elements of protection of TCEs/EoF, case studies, ongoing surveys of the international policy and legal environment as well as key principles and objectives of the protection of TCEs/EoF that received support in the Committee's earlier sessions."
[2002] WIPO/GRTKF/IC/11/4(c), 26 April 2007, par. 14.
[2003] See Chapter 8 of this thesis.
[2004] WIPO/GRTKF/IC/17/4, Annex p. 1, 3-6.

of participation for indigenous peoples. This is problematic from an indigenous rights perspective.

According to WIPO, these policy objectives "could set common general directions for protection and provide a consistent policy framework."[2005] The measures that can, or are to be taken for TCE protection depend on the objectives to be achieved that are set out in the first place.[2006] The wide-ranging objectives highlight the inherent fragmentation, or diversity, of the topic and, consequently, the need for a multidimensional response to the protection question. However, WIPO's concrete measures of designing an international treaty are primarily intellectual property-focused, which makes its extensive policy objectives seem rather odd, exhaustive and ambitious as these measures can probably not achieve all objectives that are set out as such.

This sweeping list of objectives also raises the question of whether WIPO's measures are able to provide a *consistent* policy framework on their own. An international instrument from a world intellectual property institution can perhaps contribute to a specific part. Yet for general consistency of TCE protection measures across the board, there are other international institutions, fora and expertise out there to contribute to the other parts of the list that WIPO cannot address, at least not directly. However, the objectives do not include any mention of the need for cooperation with such entities. A significant degree of cooperation cannot be ignored for any consistent and effective approach to TCE protection. This is another important observation to flag here and keep in mind whilst advancing towards the recommendations later in the thesis.

General Guiding Principles

Nine General Guiding Principles accompany WIPO's overarching Objectives.[2007] They include awareness of communities' needs, but also respect for and compatibility with other agreements and instruments at the international and regional level. Another principle is respect for the rights of indigenous peoples and other communities and related obligations. Another principle underlines flexibility and comprehensiveness. Flexibility is necessary to respond to the diversity of beneficiaries and interests. In contrast, comprehensiveness, when understood as all-inclusiveness, can quickly turn to static tendencies and a one-size-fits-all perspective. This should be avoided in any approach. Cultural heritage and human rights principles that draw on respect have also been recurrent in the previous chapters of this thesis, including the multi-faceted protection interests at stake and the human rights that must be taken into account in the context of TCE protection. The question arises how WIPO's work follows through with regard to these principles.

According to the Secretariat, these General Guiding Principles "could ensure consistency, balance and effectiveness"[2008] of the actual substantive protection provisions, the latest Draft Articles of which will be analysed below.[2009] It is clear that the aim is to take a considered, informed and balanced approach. Values of dignity, identity and respect shine through in the notice that is taken of indigenous communities' aspirations and expectations, the specific nature and characteristics of TCEs and customary use and transmission. Explicit recognition

[2005] WIPO/GRTKF/IC/11/4(c), 26 April 2007, par. 11(i).
[2006] Girsberger 2008, p. 144.
[2007] WIPO/GRTKF/IC/17/4, Annex, p. 1, 7-10.
[2008] WIPO/GRTKF/IC/11/4(c), 26 April 2007, par. 11(ii).
[2009] See Annex I of the thesis for the Draft Articles of 2017.

of the participation of indigenous peoples is again absent. However, we have seen that it is a fundamental part of a truly inclusive and legitimate approach to decision-making and procedures in all matters that affect indigenous peoples.

Preambular principles and objectives of the current Draft Articles

Like the overarching Revised Objectives and Principles that guide WIPO's work, the principles of the preamble of the current Draft Articles are also broad and partly outside intellectual property law's usual scope. Some of the principles move towards the domain of cultural heritage law and safeguarding, reflecting the working sphere of UNESCO's 2003 and 2005 Conventions on intangible cultural heritage and cultural diversity, respectively. These principles highlight the need for recognition of the environment in which TCEs are created and maintained and their contribution to the diversity of cultural expressions.[2010] Other principles in the preamble lean towards human rights law, drawing on respect and dignity,[2011] and a contribution to sustainable development in an economic, cultural, environmental and social context.[2012] Clearly, an intellectual property-like approach is complementary to these broader heritage objectives and vice versa.

An important principle of the preamble, if not the ultimate starting point for TCE protection, is recognition of the importance of increasing "certainty, transparency, mutual respect and understanding in relations" between (indigenous) communities and users.[2013] This is something that leans more towards education and awareness-raising measures than legal rules. However, it can contribute significantly to addressing current tensions, disconnects and misunderstandings between what is perceived as (in)appropriate, harmful and harmless in mainstream society and legal frameworks on the one hand, and in indigenous source communities on the other hand. Potential solutions start by bringing viewpoints together.

The objectives of the first alternative for Article 1 of the Draft Articles, which follow the list of preambular principles, lie more in an intellectual property sphere. They are clearly inspired by WIPO's mandate and expertise, and rationales and objectives that are typical of intellectual property law. The first objective is to provide communities with means to:

- prevent misappropriation, misuse and derogatory or offensive use of their TCEs;
- control the ways in which their TCEs are used outside the traditional or customary context;
- promote either equitable compensation for or sharing of the benefits from[2014] use of their TCEs with their prior informed consent or approval and involvement; and
- encourage (tradition-based) creation and innovation.[2015]

Another objective is to aid in the prevention of third parties obtaining intellectual property rights.[2016]

[2010] WIPO Draft Articles 2017, preamble, par. 6 and 7.
[2011] WIPO Draft Articles 2017, preamble, par. 4.
[2012] WIPO Draft Articles 2017, preamble, par. 2.
[2013] WIPO Draft Articles 2017, preamble, par. 8. These users include: academic, commercial, governmental, educational and other users.
[2014] NB. Both options are provisional due to the draft status of the document.
[2015] WIPO Draft Articles 2017, Article 1.1(a)-(d).
[2016] WIPO Draft Articles 2017, Article 1.2.

The second alternative for Article 1 adds three objectives to the first and fourth listed above. The first is to promote intellectual and artistic freedom, research [or other fair] practices and cultural exchange.[2017] The second is to secure rights already acquired by third parties and to provide for legal certainty and a rich and accessible public domain.[2018] This touches upon various sensitivities. Although this text is still between square brackets, and thus provisional due to the draft status of the document, we have seen that the public domain is a concept that might be central to intellectual property law but one with which indigenous peoples have considerable difficulties.[2019] The third added objective is to help prevent incorrect grants of intellectual property rights over TCEs.[2020]

The third and fourth alternatives for Article 1 on policy objectives state in more general terms that the objective of the instrument is "to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law",[2021] and "to prevent misappropriation, misuse, or offensive use of, and to protect", TCEs.[2022] Both alternatives also list the recognition of indigenous peoples' rights as an (provisional) objective.

It is a striking move that the principles and preamble of the Draft Articles position WIPO's efforts and the Draft Articles within the broader ambit of indigenous peoples' traditional knowledge and cultural expressions issues. This avoids viewing the topic as one-dimensional. Cultural heritage considerations and human rights concerns are indeed prominent features as well. Still, the concrete objectives of the latest Draft Articles mainly narrow down the scope of action to intellectual property-related topics such as prevention of derogatory use, control of use and economic benefit, likely due to WIPO's mandate and expertise.[2023] However, as WIPO has also acknowledged elsewhere, this is only one part of TCE protection, and needs to be complemented by measures in other policy areas that serve additional, specific parts involved, such as the cultural heritage and human rights frameworks. It would be useful if this was reiterated in the treaty text principles, together with a vow to cooperate with other institutions to also achieve objectives outside the IP sphere and to avoid inconsistent and contradictory approaches.

6.2.3 Content of the specialised rules: an analysis[2024]

There are a few initial things to note about the substantive provisions of the proposed Draft Articles. First, the provisions are, as their name suggests, drafts. This means that there are still many brackets and alternatives included in the text. Second, as a result of the copyright influence, the instrument specifically and primarily regards protection against

[2017] WIPO Draft Articles 2017, Article 1, Alt 2, par. (c).
[2018] WIPO Draft Articles 2017, Article 1, Alt 2, par. (d).
[2019] It has been likened to the *terra nullius* doctrine that was used to acquire indigenous peoples' lands.
[2020] WIPO Draft Articles 2017, Article 1, Alt 2, par. (e).
[2021] WIPO Draft Articles 2017, Article 1, Alt 3.
[2022] WIPO Draft Articles 2017, Article 1, Alt 4.
[2023] This is different from the overarching Revised Objectives and Guiding Principles for the protection of traditional cultural expressions discussed above.
[2024] Note that the latest Draft Articles of June 2017 are still very provisional. They contain many bracketed elements, such as indigenous 'peoples', use of 'and/or' and undetermined obligations, such as 'should/shall' and 'ensure/encourage'. This section will work with these bracketed texts regardless. It is still possible to draw out core elements and remarkable details to be assessed in light of the findings of the contextual and foundational legal research of Chapters 2-5.

misappropriation.[2025] This also sets it apart from its cultural heritage law counterparts, such as the 2003 Intangible Cultural Heritage Convention, which also deals with intangible subject matter, yet focuses on different concerns, i.e. protection understood as safeguarding. Furthermore, the outline of the document as a whole seems to draw on the usual aspects that can be found in the structure of copyright laws. It covers such aspects as subject matter, beneficiaries, eligibility or scope of protection, exceptions and limitations and term of protection. The elaboration of the provisions, however, deviates from copyright law at points that have already often been identified as copyright law 'hurdles' for TCE protection, as we have seen in Chapter 3. These include difficulties of authorship and collective beneficiaries, and potentially unlimited protection. In a way, a copyright-like structure seems to be adapted, rebuilt or filling in identified gaps.

This section analyses the content of the Draft Articles according to their main themes. These can be linked to the aspects and requirements of copyright law that have been analysed in Chapter 3 in the context of TCE protection. The first section on subject matter is obviously reminiscent of the subject matter and protective objects of copyright law and requirements of originality and fixation. The section on beneficiaries likely aims to address copyright law's authorship and ownership issues in the context of TCEs due to their (often) collective and intergenerational nature. The scope of protection adjusts, where necessary, to meet difficulties with the nature of the rights in copyright law. Finally, the section on exceptions, limitations and duration can be set against the duration and non-unlimited protection in copyright law.

Subject matter: TCEs and protection criteria

As to the subject matter that is covered, WIPO acknowledged in its FFM report that its description of the subject matter "naturally" reflects its intellectual property focus.[2026] The first alternative for the description of the subject matter in the current Draft Articles is rather vague and provisional. It comprises a mixed bag of categories that are explained in detail with examples of concrete TCEs.[2027] This comes across as a fairly ambiguous and exhaustive

[2025] WIPO/GRTKF/IC/11/4(c), 26 April 2007, par. 16: "The draft provisions in the Annex concern most directly the protection of TCEs/EoF in a legal sense, that is, protection against the kinds of illicit uses and misappropriations that IP protection usually addresses, while taking into account the particular nature and characteristics of traditional creativity and cultural expression, including its communal quality, and the preference many have expressed to avoid distinct new property rights. This has been the approach of the Committee, in keeping with the mandate of WIPO, since the inception of its work." See also Article 1 of the Draft Articles 2017.

[2026] WIPO 2001, p. 25.

[2027] According to the use of terms in Article 2, Alt 1, of the Draft Articles 2017: "Traditional cultural expression means any form of [artistic and literary], [other creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions[1], materials[2], music and sound[3], verbal[4] and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms],that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving."

1) [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]

2) [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]

3) [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]

exercise. In comparison, the Berne Convention adopts a categories-based approach of 'media' or genres of cultural expressions, rather than strict definitions.[2028] Berne's more abstract approach seems more favourable than a detailed enumeration of concrete examples, as it provides more leeway for *ad hoc* balances and flexibility on a regional or communal case-by-case basis. Furthermore, the specific nature and function of TCEs to be protected, as reflected in the eligibility criteria below, seem to be determinations of protectable expressions that are based more on overriding characteristics, than on attempts to capture their specific manifestations in a detailed way.

So, for any move forward towards protection of TCEs something similar[2029] might have to be accepted and a certain case-to-case flexibility for further elaboration allowed, in line with indigenous peoples' own wide diversity and their specific cultural expressions, customary laws and protection interests. Rather than a top-down decision on what to protect, in this scenario it would be for indigenous peoples themselves to decide what is to be protected in the specific circumstances concerned.[2030] Alternative 2 for the use of terms somewhat meets a more flexible approach, using an open description of TCEs comprising "the various forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries."[2031] What the description of the subject matter of alternative 1 does show is why TCE protection has so often been linked to copyright law's literary and artistic works, as there is some overlap between the (messy) overview and the Berne Convention's genres.

Before the subject matter is eligible for protection, it has to meet certain criteria. The first alternative for the provision on eligibility criteria is very short and general: the instrument applies to TCEs.[2032] What we can gather from this is that TCEs are eligible for protection if they meet the specifics that the previous provision on use of terms has set out. The second alternative[2033] is more elaborate:

- creation, expression and maintenance of TCEs must be a collective endeavour;
- the TCEs must be a distinctive feature of the identity and cultural heritage of the communities concerned;
- there is intergenerational transmission;
- the TCEs must exist for at least 50 years;
- the TCEs must be the outcome of creative intellectual activity.[2034]

These criteria comprise an attempt to limit a potentially endless 'pool' of TCEs to be protected. What the criteria seem to ensure is protection of those TCEs that are actually still 'in use', of value for communities and that perform important roles. To some extent, this is comparable to the non-use clauses in trade mark law: protection follows the existing need for

4) [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

[2028] WIPO 2001, p. 25.
[2029] See also Drahos 2004, p. 31 and Torsen Stech 2014, p. 424.
[2030] See also Sherman & Wiseman 2006, p. 273–274; Torsen Stech 2014, p. 425.
[2031] WIPO Draft Articles 2017, Article 2, Alt 2.
[2032] WIPO Draft Articles 2017, Article 3, Alt 1.
[2033] Note that all eligibility criteria are still formulated in a bracketed way and with an 'and/or' construction.
[2034] WIPO Draft Articles 2017, Article 3, Alt 2, (a)-(e).

it, be it use of the trade mark[2035] or, in the case of TCEs, use by and the role and value of TCEs for their source communities. The third alternative combines the first and second. It states that the instrument applies to TCEs and that eligibility criteria include that they are distinctively associated with beneficiaries' cultural heritage, collective in nature and transmitted in an intergenerational way. It explicitly aims to avoid a static demarcation by adding that the expressions may also be dynamic and have an evolving nature.[2036]

Taken together, the conditions for subject matter protection eligibility are reminiscent of cultural heritage law's inheritance and identity principles, as well as the recognition of dynamic and living cultures. This gives a degree of legitimacy to the protection in the context of criticisms that such protection limits the public domain. It serves the clear purpose of preservation and protection of cultural heritage subject matter with a 'living' nature and lasting significance for the source communities in the face of a disconnect with mainstream legal systems, globalisation and heritage 'excavation' by third parties. This way, the purpose of TCE protection extends beyond what mainstream intellectual property laws offer or aim to achieve. To raise the argument of a mainstream intellectual property concept such as the public domain as a counter-argument for TCE protection seems somewhat inappropriate from this perspective.

The criteria that TCEs must have been used for a term as determined by each Member State of the treaty-to-be, but not less than 50 years, and that the TCEs must be the result of creative intellectual activity raise some questions.[2037] Which (mainstream) standards are applied to determine this? It is probably for this reason that these pieces of provisional draft text are still fully between square brackets, and their inclusion thus uncertain on the whole. These criteria are likely meant to delimit the scope of TCEs that are covered, yet caution is warranted. It is probably necessary to prevent over-inclusion, but arbitrariness and government decisions of top-down exclusion from protection, for example for political reasons, must be avoided as well. Safeguards are required to mitigate such risks. One can think of the establishment of local or national indigenous advisory bodies or indigenous heritage and knowledge management bodies to enter into dialogue and be involved in decision-making.

Beneficiaries and administration of rights: communities, states, agencies

The determination of the beneficiaries of any form of TCE protection is a recurring difficulty. The Draft Articles deviate from intellectual property law's customary initial allocation of rights to individuals. Instead, the Draft Articles assign beneficiary status to the "indigenous peoples and local communities who hold, express, create, maintain, use, and develop traditional cultural expressions."[2038] We see here again the aspect of 'active engagement' by the communities with the subject matter to qualify for beneficiary status. Furthermore, this provision acknowledges the notion of collectiveness. From a copyright law perspective, collectiveness is one of the main difficulties. So here we see an adaptation or the rebuilding of an existing structure of rights such as intellectual property rights that takes indigenous concerns into account.

[2035] See, for example, Article 10(1), 12(1) and 13 of the European Trade Mark Harmonization Directive (European Parliament and Council Directive 2008/95/EC, Oct. 22, 2008) on non-use, revocation and (partial) cancellation of trade mark protection.
[2036] WIPO Draft Articles 2017, Article 3, Alt 3.
[2037] Article 1(d)(e) Draft Articles 2014.
[2038] WIPO Draft Articles 2017, Article 4, Alt 1. See also Von Lewinski 2005, p. 113. Note that the term 'peoples' is still between brackets in the entire instrument. This is probably the case due to the political implications of the term.

Collectiveness is a notion that is generally accepted in the cultural heritage framework, where cultural heritage is inherently perceived as a 'collective good', or at least as being of common importance for a collective of people. We see this, for example, reflected in principles and rationales of cultural heritage protection for (national) identity purposes or even for the benefit of all mankind. So, in a way, this provision of the Draft Articles reflects considerations of cultural heritage law too. However, the *national* heritage approach is sensitive amongst certain indigenous groups. This is also visible in debates about determination of the beneficiaries, for example in the Fact-Finding Missions discussed in an earlier section. In the FFM to Eastern and Southern Africa concerns were raised about the competing interests of various stakeholders. Traditional knowledge holders expressed their fear that governmental support of protection of traditional knowledge served only to benefit the states themselves, and not the traditional knowledge holders.[2039] The Arab Countries, however, were most clear about where to vest the property rights in cultural heritage and folklore: the state.[2040] Another issue is allocation of beneficiary status when the knowledge in question is common to more than one community, country or region even. This is a region-specific complication of the determination of beneficiaries that was identified in the FFM to the South Pacific region.[2041]

Previous versions of the Draft Articles also included "other cultural communities"[2042] to provide for the possibility that all nationals are beneficiaries when the folklore in question is considered to belong to all people of a specific country.[2043] In such circumstances, it should be recognised that the state could be the beneficiary of the protection or at least exercise the relevant rights, as Egypt put forward at the IGC's seventh session in 2004.[2044] This position was shared by the African Group.[2045] However, as the beneficiary provision indeed determines the allocation, benefits and exercise of the rights of the instrument, tensions and conflicts between state delegations and indigenous representatives in WIPO discussions are not surprising.[2046] Furthermore, human rights law requires participation of indigenous peoples in matters that affect their rights or cultures and effective enjoyment of rights to their cultural heritage.[2047] In this sense, a primarily 'national heritage' approach to the determination of beneficiaries of traditional knowledge or TCE protection seems questionable for the interests and rights of source communities in self-determination over and participation in matters regarding their cultural heritage.

Proposed alternatives for the beneficiary provision in the current Draft Articles do leave space for determining other beneficiaries on a national level, or: "as may be determined under national law".[2048] However, unlike previous versions, Member States no longer have the possibility to act "for the interests of an indigenous or local community" as beneficiary if the constitution or national law of that state so requires.[2049] They may however designate a

[2039] WIPO 2001, p. 88.
[2040] WIPO 2001, p. 162.
[2041] WIPO 2001, p. 71.
[2042] WIPO/GRTKF/IC/7/3, Annex I, Summary of Draft Policy Objectives and Core Principles for the Protection of Traditional Cultural Expressions/Folklore, 20 August 2004, par. B.3.
[2043] See Von Lewinski 2005, p. 114, mentioning Egypt and Morocco, WIPO/GRTKF/IC/7/15, Report of the seventh session, 10 June 2005, par. 69 and 85.
[2044] WIPO/GRTKF/IC/7/15, Report of the seventh session, 10 June 2005, par. 69.
[2045] WIPO/GRTKF/IC/7/15, Report of the seventh session, 10 June 2005, par. 69, 85.
[2046] Von Lewinski 2005, p. 114–115.
[2047] For example Articles 27 ICCPR and 15 ICESCR.
[2048] WIPO Draft Articles 2017, Article 4, Alt 2-4.
[2049] WIPO Draft Articles 2014, Article 2(2).

national authority.[2050] For the administration of rights/interests, such a competent authority must operate in close consultation[2051] or with the explicit consent of the beneficiaries.[2052]

Note that mere consultation obligations are likely to be insufficient to meet standards of indigenous participation as currently recognised and elaborated in human rights law. The administration should further be in accordance with knowledge holders' customary protocols, understandings, laws and practices. Indeed, while this may all lead to flexibility for specific situations and while designated authorities may contribute to clarity and legal certainty for third party users, one important factor must not be compromised: the starting point should be that source communities are the initial beneficiaries. Any system of beneficiaries or representation must guarantee compliance with communities' cultural and indigenous rights and prevent 'indigenous knowledge and heritage grabbing'. The localisation of communities, their participation and any form of assistance should all serve this aim. In sum, national governmental involvement and authorities should take a back seat and only come forward at the request of, or in the case of absence of, any source community.

Unsurprisingly, administration by state agencies and what essentially amounts to allocation of competence outside indigenous communities can give rise to tensions. The representative of the Saami Council, for example, dismissed the proposals for the possibility of an authority to grant authorisation, "allegedly acting on behalf of the indigenous peoples", at the IGC's seventh session. The argument seems mainly one of trust issues:

> "It was known from experience that State authorities which were supposed to represent indigenous peoples did not always have the indigenous peoples' interests as their main concern. Indeed, the interests of the State were often quite contrary to the interests of indigenous people. Thus, only indigenous peoples themselves could approve access to their TCEs, in accordance with their own customary laws and practices."[2053]

In conclusion, agencies can be beneficial to assist communities in negotiations or to generally share their expertise, as well as to help third party users identify the relevant communities. But the division of competence in exercising rights and the collection of benefits should not be detrimental to indigenous communities. Their interests and status as beneficiaries should come first, agencies should follow their preferences, taking into account their customary practices and laws. Safeguards such as full participation and free, prior informed consent are crucial at all times. A careful balance has to be struck between empowerment and 'overpowerment' of the source communities by any state agency.

Scope of protection: a distinction between 'types' of TCEs

The scope of the protection seems to have been largely inspired by copyright law, in particular the division between economic and moral rights. The Draft Articles propose three alternatives for delineating the scope of protection.[2054] Alternative 1 is the shortest provision, with two rather general paragraphs. Alternative 2 and 3 both establish a layered system of protection, with the latter being most detailed.

[2050] WIPO Draft Articles 2017, Article 6.
[2051] WIPO Draft Articles 2017, Article 6, Alt 1.
[2052] WIPO Draft Articles 2017, Article 6, Alt 2.
[2053] WIPO/GRTKF/IC/7/15, Report of the seventh session, 10 June 2005, par. 95.
[2054] WIPO Draft Articles 2017, Article 5.

Alternative 1 expresses the scope of protection through state obligations to "safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions" and excludes TCEs that are "widely known or used outside the community of the beneficiaries (...) [for a reasonable time], in the public domain, or protected by an intellectual property right."[2055] This short, not too detailed option provides flexibility for local needs. However, the limitation clause, while meeting countervailing interests and typical intellectual property concerns, should only be applied or operationalised with the close cooperation and participation of communities. Otherwise, this will likely lead to tensions, as it covers precisely the aspects of use and general intellectual property law that are problematic for indigenous source communities, such as the public domain concept and third party intellectual property rights. The consequence is also clear-cut: no protection. This reflects persistent difficulties between mainstream (intellectual property) understandings and indigenous interests and viewpoints, which are hard to reconcile. As we will see in section 6.3, there are practical initiatives that address precisely these concerns, such as contract-based rules, labels, licences and protocols on the extent, forms and conditions of use, for example with researchers or cultural institutions. While these initiatives do not provide for legal rights as such, they do work around the strict 'no protection' consequence, taking indigenous concerns and specifics into account. Such alternative options are also inherently flexible, because they can be developed for specific situations and in dialogue with the relevant communities.

Alternative 2 is also phrased fairly general, but in a tiered manner. It makes a distinction between secret and/or sacred TCEs,[2056] subject matter that is still held, maintained, and used in a collective context, but made publicly accessible without the beneficiaries' authorisation,[2057] and subject matter that falls outside of those two categories.[2058] As to the first category, "Member States should/shall protect the economic and moral rights and interests of the beneficiaries in accordance with national law and, where applicable, customary laws." Exclusive rights of authorisation of use are highlighted. For the second category, "Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, to protect against false, misleading, or offensive uses." Member States must also guarantee an attribution right and ensure appropriate use of TCEs. In cases where TCEs have been made available to the public without beneficiary authorisation and subjected to commercial exploitation, Member States should/shall makes sure to facilitate remuneration. For the last category, Member States should/shall do their best to protect the integrity of the TCEs, in consultation with the beneficiaries. So, in this tiered provision, TCE protection is scaled back from an exclusive authorisation right, to rights of attribution and remuneration and, lastly, to an integrity claim.

For Alternative 3, Option 1, the protection rules are also structured around 'types' of TCEs and vary accordingly. The three types of subject matter are:

1) sacred, secret or otherwise known only or closely held by indigenous peoples;[2059]
2) still held, maintained, used and/or developed by indigenous peoples, publicly available but neither widely known, sacred nor secret;[2060]

[2055] WIIPO Draft Articles 2017, Article 5, Alt 1, par. 2.
[2056] WIPO Draft Articles 2017, Article 5, Alt 2, par. 1.
[2057] WIPO Draft Articles 2017, Article 5, Alt 2, par. 2.
[2058] WIPO Draft Articles 2017, Article 5, Alt 2, par. 3.
[2059] WIPO Draft Articles 2017, Article 5, Alt 3, Option 1, par. 1.
[2060] WIPO Draft Articles 2017, Article 5, Alt 3, Option 1, par. 2.

3) publicly available, widely known [and in the public domain].[2061]

This distinction helps to narrow down specific needs per type of subject matter, formulate rights accordingly and match these to user obligations.[2062] However, it should be kept in mind that a tiered system that is imposed top-down is undesirable: ideally, the formulation of these rules should be conducted in close cooperation with indigenous communities themselves. Article 31(2) UNDRIP contains an obligation for states to do so.

In any case, under the current proposed rules, classification of materials as the first type of subject matter results in collective exclusive rights for beneficiaries and obligations for third party users. Ignoring the square brackets in the provisional text and the nuances that may follow from them in more final texts for now, the rights envisaged come down to rights to:

- create, maintain, control and develop the TCEs;
- prevent unauthorised disclosure, fixation and use of the secret protected TCEs;
- authorise or deny access and use based on prior and informed consent or approval and involvement and mutually agreed terms;
- protect against false or misleading use that suggest endorsement or linkage;
- prevent or prohibit distorting or mutilating use or modification, or use that is offensive, derogatory or diminishes the cultural significance of the TCEs to the beneficiaries.

The first of these rights is related to continuation and exercise of ways of life. It is formulated similarly to Article 31 UNDRIP. A question that arises here is whether this would have to be regulated in an intellectual property-like way. Although it could indirectly contribute to continuation of cultures and traditions in a sustainable way, intellectual property(-like) rules usually do not have this as their main objective. Furthermore, one would think that the subject matter should already exist in order to be protected under a TCE protection regime that draws on the IP system.

The right to authorise or deny access and use is a fully-fledged, exclusive, property-style right. In other words, although this protection fits some of indigenous peoples' main concerns, it will likely lead to criticism too, for example for limiting the public domain. Protection against false or misleading use that falsely suggests a link with indigenous communities seems to draw on trademark law, certification marks and geographical indications. This is a completely different right from the property-like right in that it provides defensive protection. And prevention and prohibition of distortion or offensive use draws on copyright law's moral rights. Again, this is a different, but complementary, right to a property-like right.

Users are encouraged to:

- ensure attribution;
- engage in fair and equitable benefit-sharing, use with prior informed consent and enter into agreements to this end;
- use the subject matter in ways that respect cultural norms and practices and moral rights of the beneficiaries.

[2061] WIPO Draft Articles 2017, Article 5, Alt 3, Option 1, par. 3.
[2062] Although still provisionally formulated as either 'ensure' or 'encourage' users to do something.

Attribution essentially mimics the moral right of attribution of copyright law. Free-riding and a lack of attribution is a recurring concern of source communities in the protection discourse. The second type of encouraged user conduct appears to blend a remuneration claim and a permission claim, respectively. In copyright law, it is usually either one or the other. The third type of user conduct seems to mix cultural heritage principles, indigenous customary norms and copyright law's moral rights. This raises the question of how this normative mix is given shape in practice. What is also striking is the fact that users are not under any obligations, but subject to 'encouraged user conduct'. This is a far less strong legal formulation, which can cause enforcement difficulties.

For the second type of subject matter – which is still held, maintained, used and/or developed by indigenous peoples, is publicly available but not widely known, sacred nor secret – there is no right to deny access. The scope of protection is formulated only through 'encouraged user conduct', namely of:

- attribution;
- fair and equitable benefit-sharing, based on prior informed consent or mutual agreements;
- respectful use; and
- refraining from false or misleading uses.

These types of conduct are the same as for the first type of subject matter, except that users refraining from false or misleading uses is added. One could wonder why this is not also part of the previous category of subject matter. An explanation may be that for that category users are encouraged to enter into agreements, and thus into dialogue, with source communities. This way, false or misleading uses can be prevented beforehand. Still, it is perhaps a slightly unclear division resulting in a jumble of rights and user conduct when these differ as such per category. Also, the absence of a right to deny access suggests that there is a certain 'duty to deal' by indigenous communities. However, the addition of a requirement for prior informed consent suggests that such consent can also be withheld. Respectful use is again a more moral rights and cultural heritage-oriented obligation.

For the third type, the 'encouraged user conduct' is similar, but with no direct benefit-sharing on the basis of agreements with communities. Rather, users are encouraged to deposit user fees into funds established by Member States where applicable. This remains further unspecified.

In a strange move, the third alternative is also proposed in another form, called Option 2. The first paragraph is similar to Alternative 2, except that it does not provide exclusive rights of authorisation for beneficiaries, but only requires that Member States safeguard their economic and moral interests. The second paragraph is comparable with the second paragraph of Alternative 1, excluding TCEs from protection in case they are widely known, used outside source communities (for a reasonable period of time), in the public domain or already protected by IP. Confusingly, this option also lists a number of uses that any protection does not extend to. These uses are comparable to the exceptions and limitations of Article 7 of the Draft Articles. Perhaps this second option for an alternative, which is already part of three suggestions for the provision on the scope of protection, has inadvertently been included in the current Draft Articles, as it does not contain anything substantially different that other alternatives do not already cover. It merely adds some additional confusion.

It is clear that WIPO opts for an exclusive property rights-like approach in paragraph 1 of both the second and third (Option 1) alternative for the scope of protection provision. It is fairly similar to copyright law, at least for the category of subject matter that is sacred or secret. Control is one of indigenous peoples' main protection interests. It is understandable that this is a prominent claim in light of histories of dispossession and the specific value of TCEs. Protection of their sacred and secret material in particular, often occupies a central place in many indigenous concerns and protection interests. And based on WIPO's perspective and preparatory work, it is also understandable that WIPO has taken the main concern of control as the starting and centre point of the protection regime that it is developing. But the question remains whether an intellectual property-like approach is feasible. Mainstream legal understandings have difficulty incorporating such control claims, amongst other things due to their collective nature and claims for potentially unlimited duration of protection. Even when these are translated into *sui generis* regulation, such rules still have to operate within the wider legal system. It is hard to foresee how this will work in practice, but it seems likely that it brings with it difficulties similar to the conceptual problems that arise from the application of mainstream copyright law to the topic. Such difficulties include protection of style, inspiration and freedom of (artistic) expression, and the concept of the public domain.

In conclusion, WIPO's proposed protection system as a whole generally answers to indigenous peoples' 'copyright-like' protection interests, such as benefit-sharing, remuneration for use, attribution and integrity. But as indicated, it is hard to see how this will play out in practice in its application and enforcement in concrete cases. Furthermore, WIPO's approach will likely have to be complemented by cultural heritage and human rights measures, such as self-determination, (dynamic) preservation and promotion of (the environment of) TCEs and indigenous peoples' rights generally to also answer to their interests in transmission and continuation of their cultural traditions and ways of life, if they so desire. An intellectual property(-like) approach cannot cover these aspects.

Exceptions and limitations: checks and balances

Copyright law does not establish absolute rights. Apart from limitations in the system itself, such as the term of protection, it also recognises several exceptions and limitations to the exclusive rights of the right holders. The Draft Articles contain a number of proposals that are similar to copyright law's system of exceptions and limitations, but in certain places tailored to indigenous concerns.[2063] Various options for the provision on exceptions and limitations are obviously influenced by the so-called three-step test of the Berne Convention.[2064] According to this test, reproduction of works is exempted from copyright law under three conditions, namely: only in certain special cases; if it does not conflict with a normal exploitation of the work; and if it does not unreasonably prejudice authors' legitimate interests.[2065]

Alternative 1 and 3 for the exceptions and limitations provision are fairly general, merely stating that Member States may adopt exceptions and limitations in special cases to protect the public interest and taking account of the legitimate interests of third parties, respectively. These exceptions and limitations must not unreasonably prejudice the legitimate interests of beneficiaries. Alternative 2 is more detailed and holds that Member States may adopt exceptions ad limitations, "as may be determined under national legislation including

[2063] WIPO Draft Articles 2017, Article 7, Alt 1-4.
[2064] WIPO Draft Articles 2017, Article 7, Alt 1 and 4.
[2065] Article 9(2) Berne Convention.

incorporated customary law." Paragraph 1 states that acts permitted under existing intellectual property exceptions and limitations in national law shall/should not be prohibited by TCE protection. Paragraph 2 lists exceptions and limitations such as for education, research, archives, libraries and museums and inspired works. Paragraph 4, in particular, stands out. It states that exceptions and limitations shall/should be provided for incidental use or for cases when users did not have "knowledge or reasonable grounds to know" that the TCE in question is protected. One can imagine that the second part of the paragraph can create scenarios of tension between user and source community interests and raise questions of a fair balance. The interests of source communities seem to be bypassed, firstly because they have not been asked for permission for the use, and secondly if there is no mechanism in place for them to come forward and ask for compensation afterwards.

Alternative 4 for the exceptions and limitations provision is most detailed. According to this alternative, the exceptions and limitations to be adopted by Member States[2066] must be adopted in consultation or with the involvement of beneficiaries. This is to be determined in a final text. Of course, from an indigenous rights perspective, mere consultation or involvement would not be sufficient. The exceptions and limitations must further:

- acknowledge the beneficiaries;
- not be offensive or derogatory;
- be compatible with fair use;
- not conflict with normal use by the beneficiaries themselves; and
- not unreasonably prejudice the legitimate interests of the beneficiaries when balanced against third parties' legitimate interests.[2067]

When irreparable harm is to be reasonably expected in the case of sacred and secret TCEs, Member States [may]/[should]/[shall] not put exceptions and limitations into place.[2068] How this is measured or established, is not elaborated. Certain specific exceptions are also distinguished. They would cater for uses in the context of education, the activities of research and cultural institutions and for the creation of an original work 'inspired by, based on or borrowed' from TCEs.[2069] The latter somewhat mitigate freedom of expression concerns. However, indigenous peoples' perception is probably that there is a fine line between free riding and inspiration.

This fourth alternative further enumerates a number of 'minimum' exceptions. These include uses that [should]/[shall] be permitted regardless of whether national laws have already permitted these uses based on the first paragraph. These uses are:

- use of TCEs in cultural institutions for non-commercial, cultural heritage and other purposes (such as preservation and research);
- the creation of an original work inspired by, based on or borrowed from TCEs;
- use of TCEs legally derived from sources other than the beneficiaries; and
- use of TCEs known through lawful means outside of the beneficiaries' community.[2070]

[2066] The exact nature of the rule is still provisionally phrased as Member States 'may/should/shall' adopt etc.
[2067] WIPO Draft Articles 2017, Article 7.1, Alt 4. Together, these requirements – especially the last three – are clearly a variation on the Berne Convention's so-called three-step-test for copyright limitations and exceptions, see Article 9(2) BC.
[2068] WIPO Draft Articles 2017, Article 7, Alt 4, par. 2.
[2069] WIPO Draft Articles 2017, Article 7, Alt 4, par. 3.
[2070] WIPO Draft Articles 2017, Article 7, Alt 4, par. 4.

There are some pitfalls regarding perceptions and worldviews of the mainstream legal framework on the one hand, and uses permitted under indigenous peoples' own customary laws on the other. These provisions are likely meant to meet public domain and user interests. The main task here seems to be to try and get the diverse viewpoints together, almost to regulate respect and mutual understanding between users' and indigenous communities' distinct interests. While the absence of prior and informed consent in the specific and minimum exceptions makes sense from a copyright-like perspective, it is also noteworthy. It prevents the stifling of creative production and freedom of expression. However, free riding should be avoided. Furthermore, to promote awareness of cultural sensitivities and significance, some form of dialogue between indigenous communities, cultural institutions and interested users would be desirable. However, such an approach may be too much in the sphere of cultural heritage law to feature in an intellectual property approach.

Duration: an indigenous dimension

As to the duration of the protection, the Draft Articles contain three options.[2071] According to the first option, it is up to Member States to determine the appropriate term of protection of TCEs. They may for example determine that protection remains in place for as long as TCEs meet the eligibility criteria and in consultation with beneficiaries. Member States may also establish indefinite protection of TCEs against distortion, mutilation or other modification and infringement that is committed with the aim of causing harm to the TCE or to the reputation or image of the source community. The second option states that Member States shall protect TCEs as long as the beneficiaries of the protection comply with the scope of protection of the Draft Articles.[2072] The third option is the most open and only states that Member States may determine that the term of protection of TCEs is limited, at least regarding the economic rights. *A contrario*, it seems that they may thus also determine that the term is unlimited, and that moral rights are given unlimited protection.

All three options for the term of protection do contain a certain precondition or limitation to perpetual protection, probably to meet precisely these public domain concerns and the strongly prevailing 'limited' duration of copyright protection. The protection is linked to the fulfilment of the eligibility criteria that award TCE protection in the first place, such as their secret or sacred nature or that they are still held, maintained, used and developed by their source communities.[2073] This is consistent with what Von Lewinski has described as the argument that "the determination of the duration of protection should always follow the purpose of protection."[2074] As this purpose, in the case of TCE protection, mainly entails ensuring that source communities have control over their living cultural heritage and thus their ways of life,[2075] protection should be applicable as long as this type of protection is needed. This implies that as long as the eligibility criteria or the criteria for the scope of protection are met, TCEs are awarded protection.

Indeed, Article 11 of the Draft Articles of 2017 elaborates the transitional measures and determines that the instrument should/shall apply to all TCEs which, when it enters into force, fulfil the instrument's criteria. However, alternative 1 for the second paragraph states that rights acquired by third parties before the instrument entered into effect should/shall be

[2071] WIPO Draft Articles 2017, Article 8.
[2072] Or the criteria of eligibility and scope of protection as set out in Article 3 of the Draft Articles 2017.
[2073] Article 3.1 and 3.3 Draft Articles 2014.
[2074] Von Lewinski 2005, p. 121.
[2075] Von Lewinski 2005, p. 121.

safeguarded by state parties, whereas alternative 2 provides a 'date of expiry' for acts with regard to TCEs that began before the instrument entered into force and are not permitted or otherwise regulated. These should/shall be brought into conformity with the instrument within a reasonable time frame. This second option suggests an intermediate solution to retroactivity[2076] with regard to 'general' TCEs. For TCEs with special significance for the beneficiaries that have been brought outside of their control, they are awarded the right to recover such TCEs. How this works out in practice remains to be seen.

6.2.4 Focus of protection: outcome rather than process

The main focus of the protection of the Draft Articles is on subject matter or '*outcome*', not the process of creativity. This is different from, for example, the focus of UNESCO's 2003 Intangible Cultural Heritage and 2005 Cultural Diversity Conventions. In other words, the WIPO *sui generis* approach is outcome-based, like intellectual property law generally (e.g. copyright law's literary and artistic works). This way, a particular angle or side of the issue and specific protection interests, such as sharing in the benefits of the subject matter's economic use or prevention of derogatory use of the 'outcome', are central. This is a rather one-dimensional perspective,[2077] something WIPO acknowledges as well.[2078]

It is unlikely that WIPO's Draft Articles on their own can answer to both human rights notions of effective enjoyment of rights to ways of life, and cultural heritage aspects of dynamic inheritance. The promotion of cultural contexts plays a crucial role in both contexts, indispensable for the creation and maintenance of cultural heritage. This is where both the human rights dimension and the cultural heritage dimension of TCE protection come into play. These dimensions include in particular the rights to maintenance and development of ways of life and cultural traditions[2079] and the attention of the various UNESCO conventions for cultural context and living culture,[2080] respectively.

When the protection question spans not only the protection of the 'outcome' or subject matter but also other dimensions, an 'all-hands-on-deck' perspective seems more effective than a 'one-size-fits-all' approach. These other dimensions include matters of inheritance,

[2076] See WIPO/GRTKF/IC/9/4, Annex, p. 40, point (iii) (Commentary on the provision on transitional measures).
[2077] See also Leach 2005, p. 37: "Preservation of materials is one (important) thing, but it seems to me that of more basic importance is the preservation of the social conditions of creativity itself. Laws that take such property relations as their baseline inhibit the utilization of indigenously appropriate mechanisms for the control, distribution, and protection of indigenous resources. In other words, it is not just the material expressions (object outcomes of creative work), but the actual form of social relations, which must be considered in a discussion of protection or attribution."
[2078] WIPO/GRTKF/IC/11/4(c), 26 April 2007, par. 16: "The draft provisions in the Annex concern most directly the protection of TCEs/EoF in a legal sense, that is, protection against the kinds of illicit uses and misappropriations that IP protection usually addresses (...). (...) (a)n holistic approach to protection of TCEs/EoF within this broader international context entails recognizing and complementing legal instruments and policy approaches in cognate policy areas, such as the UNESCO International Convention on the Safeguarding of Intangible Cultural Heritage, 2003 and the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, 2005, and work in other fora such the United Nations Permanent Forum on Indigenous Issues and the Working Group on Indigenous Populations of the Human Rights Council."
[2079] As amongst others reflected in Article 11 UNDRIP and Article 27 ICCPR. Article 11 UNDRIP contains the right of indigenous peoples to practise and revitalise their cultural traditions and customs, including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. Article 27 ICCPR contains the rights of minorities to their own religions, languages and cultures.
[2080] See especially the 2003 Intangible Cultural Heritage Convention and the 2005 Cultural Diversity Convention.

safeguarding cultural context, enabling ways of life and protecting cultural integrity and identities. Arguably, 'all-hands-on-deck' is the inevitable approach in light of the diversity of protection interests at stake. Here, we can start to see the true implications, as well as the benefits, of a fragmented legal framework. There are a number of institutions involved, with specific expertise and legal focus areas. This means that, together, they can address the spectrum of different factors that are at play in the case of TCE protection. Of course, a precondition to take full advantage of this strength is coherent and effective cooperation between the institutions and their approaches. Other possibilities for multi-faceted protection are the 'grass-roots' initiatives that are discussed in section 6.3. These are inherently flexible and multidimensional.

6.2.5 An international approach?

The Draft Articles are being developed at WIPO, the *world intellectual property* organisation. This is an institution that is specialised in international intellectual property issues, and thus approaches the topic of TCE protection mainly in an intellectual property context and from an intellectual property perspective. The question is, then, to what extent we can truly call the proposed TCE protection instrument *sui generis*.[2081] As Von Lewinski has argued, it is due to WIPO's competence in intellectual property in a broad sense[2082] that the discourse on traditional knowledge and TCEs in this forum has also mainly stuck to notions of conventional intellectual property law.[2083] The analysis of the Draft Articles in the previous section also shows that this intellectual property context seems to influence the scope and tools for protection that are set out, despite the broader guiding principles. Again, this indicates that WIPO's endeavours cover but one side of the broader issue, as the Organisation itself has acknowledged as well.[2084]

Another dimension of this international approach is that the work of WIPO's Intergovernmental Committee on *sui generis* rules is part of the global development discourse at WIPO.[2085] According to Forsyth, under this discourse "global intellectual property rights are positioned […] as an essential policy tool to transform creativity and innovation into sustainable development."[2086] She argues that discourse, such as in this case the dominant discourse of development, has significantly contributed to the current hegemony of global intellectual property rights in the sphere of knowledge and creative productions and innovation.[2087] These global norms are likely to overpower other viewpoints, such as locally driven norms and institutions regarding rules for this.[2088] WIPO's technical assistance has been called a "major vector" of this discourse.[2089] This is problematic, as local factors and societal values (used to) determine the knowledge to be protected and the forms of such protection.[2090]

[2081] Wong & Fernandini 2011, p. 175, 206.
[2082] See Article 2(viii), 3 and 4 of the Convention Establishing the World Intellectual Property Organization read together: "intellectual property" shall include the rights relating to (…) and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields." Von Lewinski 2014, p. 216.
[2083] Von Lewinski 2014, p. 216.
[2084] Christen 2012, p. 320–322. See also WIPO/GRTKF/IC/11/4(c), 26 April 2007, par. 15-17.
[2085] See Recommendation 18 of the 45 Adopted Recommendations under the WIPO Development Agenda.
[2086] Forsyth 2016, p. 4.
[2087] Forsyth 2016, p. 13.
[2088] Forsyth 2016, p. 14.
[2089] Forsyth 2016, p. 14.
[2090] Forsyth 2016, p. 14.

The Fact-Finding Missions also show this on a regional-specific level. Whereas the South Asia FFM indicates many knowledge protection concerns from a defensive protection and biodiversity perspective, the North America FFM shows, amongst other things, concerns of repatriation of cultural heritage and protection of the integrity of knowledge systems. A global response could overpower such specific viewpoints and otherwise marginalise "local systems that also regulate the production and use of knowledge and other valuable intangibles which may be better adapted to promoting innovation or creativity in the country concerned."[2091] Forsyth observes that there is also criticism on a deeper level of the values and assumptions behind global intellectual property rights and their place within neoliberal capitalist ideology. Scholars challenge "the basis of the "imperial narrative of progress and advancement; a narrative which posits some societies as having achieved its promise and as others still en route towards it.""[2092]

This criticism thus raises the recurrent question of whether an international intellectual property-like and development approach is appropriate for the specific circumstances of indigenous heritage. On the other hand, it is true that there is often an international dimension to indigenous peoples' concerns, driven by global flows of information, the Internet, (social and/or) mass media, and other perceived "intrusions of the Information Society",[2093] and foreign third party industries' activities of 'heritage excavation'. This is illustrated by use of terminology that goes so far as describing the challenges that are faced as survival, stealing and the "same old tactics of assimilation", with outsiders "trying to assimilate our culture into their world because it is fashionable in their eyes and will make money."[2094] In this sense, global benchmarks, with enough flexibility for local interpretations and implementations, are clearly warranted for putting agreed-upon minimum safeguards into place that are compliant with human rights interpretations and obligations as well. This can also address sentiments of mistrust of indigenous communities towards states and national governments when it comes to regulating issues that affect their cultural heritage.

Another related pressing question is whether international provisions are *necessary* when there are already national initiatives and laws for a topic so location- and context-specific. Forsyth mentions the difficulties of ownership, allocating rights and determining beneficiaries, which most initiatives, including WIPO's *sui generis* rules, seem to "gloss over".[2095] This determination can be very locality-specific. In that sense, WIPO's lack of detailed rules could be an advantage, as this allows for flexibility at a local level. On the other hand, as indicated above, the 'hegemonic power' of global intellectual property rights discourse can already be perceived as problematic in itself. The FFMs have already determined that many communities have their own customary laws and systems regarding knowledge protection. Such systems usually operate in the same regulatory space as global intellectual property rights,[2096] while their understandings of 'property' differ significantly.[2097]

[2091] Forsyth 2016, p. 4.
[2092] Forsyth 2016, p. 10, citing S. Pahuja, Decolonising International Law, Cambridge: Cambridge University Press 2011, p. 212.
[2093] Brown 2005, p. 48.
[2094] Coleman 2005, p. 2, citing G. Yunupingu, 'The Black/White Conflict' in V. Johnson, *Copyrites: Aboriginal Art in the Age of Reproductive Technologies*, Touring Exhibition 1996 Catalogue, Sydney: National Indigenous Arts Advocacy Association and Macquarie University 1996, p. 55.
[2095] Forsyth 2013, p. 1–2; Forsyth 2016, p. 15.
[2096] Forsyth 2016, p. 7.
[2097] Forsyth 2013, p. 7.

It is clear that flexibility is therefore a must for international action.[2098] And, importantly, the fundamental human rights principle of participation must be taken into account at all times.

Process

The *processes* of WIPO's current standard-setting efforts show recurring difficulties for indigenous peoples in the context of policy- and law-making. There is an indigenous panel[2099] and WIPO seems to strive to incorporate indigenous views on the matter. However, procedures and negotiations are predominantly state-oriented. Indeed, in typical international law-making fashion, government delegations negotiate and adopt rules. Without proper representation, such rules will in effect be *imposed* on indigenous peoples. The international process as is seems to come down to a 'legal contest' between states lobbying inside the negotiation rooms and indigenous peoples, representatives and organisations advocating outside them.

To safeguard its legitimacy WIPO should avoid top-down tendencies as much as possible in its approach to the issue and strive for the highest level of participation of indigenous peoples themselves. Sherman and Wiseman rightly question top-down protection decisions by state agencies or international agencies, especially given the histories of such institutions making decisions with dramatic outcomes for indigenous peoples. Rather, they argue that it should be indigenous peoples themselves that pose protection questions and highlight their own issues, as well as provide, or at least actively contribute to, answers and solutions. This way, they get to set the rules to regulate and protect their own cultures and manifestations thereof.[2100] There are also clear human rights obligations to this end. Article 31(2) UNDRIP and CESCR General Comment No. 17 prescribe that states must adopt effective measures *in conjunction* with indigenous peoples and take indigenous peoples' preferences into account when adopting measures,[2101] respectively. Currently, full and effective participation of indigenous peoples and legitimacy issues as to whose interests negotiations actually serve remain major concerns in international law-making on the topic.[2102]

6.3 Grass-roots, local and practical initiatives

Apart from the institutionalised approach to TCE protection of WIPO's Draft Articles, there are various initiatives and proposals on a practical level for approaches to protect TCEs. These are being developed separately and independently from existing legal regimes and bodies. Instead, systems of labels or licences are being driven by – or, at least, together with – indigenous peoples or representatives themselves. Protocols and codes of ethics are being created in a sector-specific way at the level of cultural heritage institutions or cultural industries. These approaches are alternatives to WIPO's initiatives in the sense that they organise access and use in a practical, flexible and tailor-made way rather than through static legal rights that prove difficult to agree on at the international level. At the same time, they can function as inspiration for WIPO's approach by showing how legal norms could be

[2098] See also Christen 2012, p. 322.
[2099] See http://www.wipo.int/tk/en/igc/panels.html: "Presentations delivered by a panel of representatives of indigenous and local communities at the beginning of sessions of the WIPO Intergovernmental Committee. These presentations are a rich source of information on the experiences, concerns and aspirations of indigenous and local communities concerning the protection, promotion and preservation of traditional knowledge, traditional cultural expressions and genetic resources."
[2100] Sherman & Wiseman 2006, p. 273–275.
[2101] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 32.
[2102] See also Anderson & Christen 2013, p. 107–108.

elaborated and made workable and effective in practice. It would be a waste if (inter)national legislators and implementers do not profit from the knowledge and experience of grass-roots initiatives on how to achieve TCE protection effectively in practice.

In this section, the purposes of the practical initiatives and their place in the systemic whole of TCE protection will first be briefly explained. The next subsections describe characteristics and examples of the practical approaches of labels, licences, protocols and codes of ethics. These are the forms that practical initiatives take that recur in academic literature or are already visible at various levels. In this section, these practical initiatives are understood in the dual way as mentioned earlier: both as alternatives and as inspiration for legal norms such as those WIPO is developing. With the assessment of the practical initiatives in light of the identified shared central values in the next chapter, they are further given a place in the system. This strengthens a coherent approach to the topic, be it through legal means or practical initiatives.

6.3.1 Purposes and place in the system

Practical initiatives can serve various purposes. When they are indigenous-driven, they can contribute to the (re)claiming of control and legal presence of indigenous peoples. Ideally, such approaches are able to either highlight or combine the highly diverse interests of indigenous peoples with regard to the protection of their TCEs. They can also draw on existing legal principles and incorporate the aspects of the various approaches of the fragmented legal framework that do work well. And, importantly, such initiatives can be shaped in a context-specific way. What is ultimately required, is both design and operationalisation of such practical indigenous-driven approaches with full participation of the indigenous communities concerned, taking communities' own customary rules and knowledge systems into account. All in all, such approaches can, for example, be employed to:

- negotiate economic remuneration and/or benefit-sharing;
- focus on what can and/or cannot be done in the context of TCEs, i.e. to steer use and conduct;
- guarantee moral interests, i.e. prevent derogatory use or stipulate attribution;
- raise awareness and educate the public about the value of TCEs;
- document and safeguard TCEs for reasons of inheritance and cultural continuity of the communities concerned.

These purposes incorporate the core protection interests identified, but the list can go on, depending on specific needs, circumstances and content. In this sense, practical initiatives are highly flexible and adaptable. They are independent of fixed, mainstream legal understandings, boundaries, stubborn legal requirements and definitions. Copyright law, for example, is notoriously stubborn about accepting community rights to works of traditional culture, in particular pecuniary rights,[2103] when there is no clear right holder to claim the financial benefits, or the rights themselves for that matter. The particularities of this legal area cannot grasp the specific (socially determined) dimensions of indigenous creativity and knowledge. Copyright law's *moral* rights do, however, resonate with a number of indigenous concerns. Cultural heritage law does not target economic interests at all, and thus cannot accommodate protection for economic needs. Instead, this area pertains to safeguarding

[2103] Perlman 2011, p. 117, citing the UNESCO Committee of Experts on the Legal Protection of Folklore, Study of the various aspects involved in the protection of folklore, UNESCO/FOLK/I/3, p. 15.

questions and (living) cultural contexts. Human rights law sets out the fundamental rights parameters for TCE protection, but does not provide direct tools to respond to indigenous peoples' interests, for example in control, benefit-sharing and protection of integrity, in an *ad hoc* fashion.

Highlighting the legal constructions that do work and combining them in practical approaches like labels and codes of ethics can contribute to the 'building of bridges'. Both existing legal domains and practical initiatives are part of a systemic whole of TCE protection norms that interact with and influence each other. Their interconnection on the basis of shared central values, which are elaborated on in the next chapter, can contribute to greater coherence for practical operationalisation of TCE protection. Through use of such practical, extra-legal or soft law options, either in a combined, complementary or cumulative way, it is possible to take advantage of the legal diversity at play. This can lead to interoperability and convergence of the aspects of the legal framework that 'work', such as copyright law's *droit d'auteur* rationales and moral rights, cultural heritage principles and fundamental (indigenous and cultural) human rights norms and interpretations that together cover the broad spectrum of indigenous peoples' various, specific (sets of) needs.

Furthermore, one of the core distinctions in policy suggestions is between protection, safeguarding[2104] and promotion. This distinction is also visible in the diverse protection interests and in the separate approaches of the existing legal framework. 'On the ground' solutions, and grass-roots and bottom-up initiatives can respond in a more *ad hoc* and, if needed, combined fashion to the direct concerns and needs in any given specific circumstances, be it protection against misuse, safeguarding or promotion of enabling circumstances for TCEs, and communities, to thrive and flourish. More importantly, they are capable of reflecting customary systems and laws on knowledge production and protection, and thereby capturing the differences and nuances that exist amongst communities.[2105] And for such approaches to work, close participation of the indigenous source communities concerned is an inherent condition. These approaches again form a specific part or angle to the issue. They can either replace or complement other, (international) legal endeavours such as those of WIPO's Intergovernmental Committee in a *practical* way,[2106] i.e. by building bridges between communities, users, cultural heritage institutions and cultural industries, be it on the basis of labels, licences or indigenous protocols, as described in the next sub-sections.

6.3.2 Labels

Label systems are a manifestation of (alternative or complementary) non-legal approaches to the protection of indigenous heritage. Labels are examples of practical certifying measures or tools that could be economically empowering for indigenous peoples by enabling them to distinguish their own TCEs from (often cheaper) third-party copies. WIPO's FFMs, in particular the mission to North America, indicated a need for improved use by indigenous peoples and other traditional knowledge holders of certification possibilities to certify the authenticity of their products.[2107] In this sense, labels enable indigenous peoples to claim back some economic power in the market place.

[2104] Wendland 2009, p. 78, 94–95; Christen 2012, p. 320–324.
[2105] Riley 2005, p. 86 and further, 92 and further.
[2106] Wendland 2009, p. 87; Christen 2012, p. 321–322.
[2107] WIPO 2001, p. 122–123.

This type of label system is either incorporated in, an implementation of, or sits very closely to, a legal solution. Australia and New Zealand,[2108] for example, both had programmes under trademark law. In Australia, this comprised a 'Label of Authenticity' and a 'Collaboration' mark. In New Zealand the programme consisted of a 'Toi Iho' Māori Made Mark, the 'Toi Iho' Mainly Māori Mark and the 'Toi Iho' Māori Coproduction Mark.[2109] Both programmes have been discontinued. In Australia, it seems that a 'one-size-fits-all' approach and a 'top-down' mentality caused the programme to fail. As Anderson explains:

> "What happened to the Labels remains an important lesson in assuming pan-Aboriginality: the presumed singularity of Aboriginal culture breaks apart in the reality of distinct contextual artistic practice. It also points to the complicated political aims and ambitions of indigenous organisations based in capital cities vis-à-vis the needs of indigenous communities based in more regional and remote areas."[2110]

She identifies three core problems that we can take on board as lessons for future approaches. The first is the term 'authenticity', which raises problems and sensitivities relating to a historical, dominant perspective of identifying, categorising and constructing 'Aboriginality'. For this reason, Anderson notes, many Aboriginal artists using non-traditional styles and mediums would not be part of a national system of Aboriginal labels.[2111] The second problem relates to the fact that the system proposed an overarching, nation-wide scheme of application whereas certain communities already had their own systems.[2112] The label would not be able to address the needs of all indigenous groups.[2113] The third problem relates to funding and agency and who was to decide, manage and enforce the labels.[2114] For any such system to work, legitimate, fair representation of the managing body is crucial.

Drahos has compared the failure of this system to the highly successful global Fair Trade Label for clues for any improvement in the context of indigenous labelling and certification possibilities.[2115] He argues that "it pays to think big" and that potential state parties to an international TK and TCE treaty should use it for developing a co-ordinated labelling and certification approach. According to him, labelling initiatives are likely to fail in case of poor financing, too little attention for global markets and an isolated approach, like the Australian Indigenous Labels.[2116] However, as we saw in the Australian example, unwillingness within communities because of their own existing systems and a perceived lack of sufficient representation were other factors that caused the system to fail. Drahos' suggestion, however promising, would require a mammoth effort of co-ordination and cooperation to ensure inclusiveness, legitimacy and appropriate representativeness given the high diversity of indigenous communities and traditional knowledge producers worldwide, their own specific knowledge protection systems and their specific needs and interests.

[2108] See on the New Zealand Mark also Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2003, p. 51.
[2109] Wong & Fernandini 2011, p. 190–191.
[2110] Anderson 2009, p. 205.
[2111] Anderson 2009, p. 206.
[2112] Anderson 2009, p. 206: "Within communities themselves, there was concern that the Labels were being imposed by bureaucrats in the eastern cities, without involvement or input from the diverse northern Australian indigenous communities."
[2113] Drahos 2004, p. 32.
[2114] Anderson 2009, p. 207.
[2115] Drahos 2004, p. 32.
[2116] Drahos 2004, p. 33.

Geographical indications

Geographical indications are a legal, intellectual property form of labelling, part of the umbrella system of intellectual property law. To some extent, this type of protection can also be recognised in a modified form in WIPO's Draft Articles, namely under the collective right of protection against false or misleading uses of TCEs that suggest endorsement or linkage,[2117] and under user obligations of attribution and of refraining from such misleading use.[2118] Sherman and Wiseman have also proposed the protection of indigenous creations through a system that draws on the protection of geographical indications for various reasons. These include the possibility of incorporating indigenous peoples' own laws, definitions and scope of protection into such a system, like other collectives do in a similar way with their internal rules that determine when and how names of products can be used.[2119] Another reason would be that geographical indications recognise collective rights, which resonates with indigenous peoples' community-orientation.[2120] However, keeping Anderson's three lessons from the Australian label system in mind, pan-indigenous solutions come with various challenges.

Geographical indications and similar labels do not offer protection against copying or offensive use as such, only against the designation of the TCEs in question as from, or linked to, an original source. In the United States, the Indian Arts and Crafts Act reflects a similar rationale as a 'truths-in-advertising law'.[2121] Labels and similar tools provide protection against misrepresentation and passing off, which could cause both economic and moral harm, for example in the case of derogatory use that violates the integrity of the original indigenous cultural work. Australian Aboriginal artists have, for example, campaigned against knock-off artwork and souvenirs made in China.[2122] In sum, geographical indications can meet specific needs and concerns, but are, again, one part of a broader issue.

Practical example: the Local Contexts project

Another type of labelling is initiated in the Local Contexts project.[2123] This is a technology-based project developed by Jane Anderson and Kim Christen Withey.[2124] The project is a grassroots effort and aims to fill a 'void' in practical options for indigenous peoples in the problems they face in protecting their knowledge systems. Specifically, it targets the management of material that is already in circulation, both in digital and non-digital ways, such as documentation and collections of cultural heritage institutions. It ties in with Article 31 UNDRIP by focusing on indigenous peoples' intellectual property needs regarding the

[2117] Article 3.1(a)(iv) Draft Articles 2014.
[2118] Article 3.1(b)(i), Article 3.2(a) and (d) and Article 3.3(a) and (c) Draft Articles 2014.
[2119] Sherman & Wiseman 2006, p. 276. They mention the Parma Ham Consortium.
[2120] Sherman & Wiseman 2006, p. 276.
[2121] See https://www.doi.gov/iacb/act: "It is illegal to offer or display for sale, or sell any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian Tribe or Indian arts and crafts organization, resident within the United States."
[2122] See: 'Calls for a crackdown on 'knockoff' Aboriginal souvenirs made in China and Bali' (SBS/National Indigenous Television (NITV), 22 August 2016, available via: http://www.sbs.com.au/nitv/article/2016/08/22/calls-crackdown-knockoff-aboriginal-souvenirs-made-china-and-bali).
[2123] http://www.localcontexts.org.
[2124] Jane Anderson is Assistant Professor of Anthropology and Museum Studies at New York University. Kim Christen Withey is an Associate Professor and the Director of the Digital Technology and Culture program, Director of Digital Projects at the Plateau Center, Native American Programs and the co-Director of the Center for Digital Scholarship and Curation at Washington State University.

management, maintenance and preservation of their digital cultural heritage.[2125] It has gained international support, receiving funding from, amongst others, the World Intellectual Property Organization, Traditional Knowledge Division.[2126]

The project aims to complement existing law[2127] by constructing Traditional Knowledge Licences and Labels through an informative web-based platform.[2128] The labels of this project are designed to work specifically for material that is already in the public domain or that is under copyright, for example held by a third party photographer, and the management of such material.[2129] The labels pursue a non-legal, educational strategy.[2130] In line with their educational purpose, they communicate "community-determined interpretations of what constitutes "fair" and equitable use at their core."[2131] They are not legally binding, but voluntary guidelines facilitating "a new set of social norms concerning the use of cultural knowledge."[2132] Whereas indigenous knowledge in the public domain may for example seem freely usable, for indigenous peoples this is often not the case for their cultural heritage, for which there may be certain (cultural) restrictions. The labels are "designed to identify and clarify which material has community-specific, gendered and high-level restrictions."[2133]

The labels can supply missing pieces of information that could determine who the custodians are, what conditions of use apply and how permissions can be obtained from the relevant knowledge holders, in other words: "correct[ing] the public historical record."[2134] Ideally, the labels are added by institutions in close collaboration and dialogue with the specific communities, as they can best provide previously absent information about cultural conditions for access and use.[2135] Anderson and Christen mention the example of a 'Community Use Only Men-Restricted Label (TK CO+MR)' for a public domain sound-recording at the website of Smithsonian Folkways Recordings,[2136] which enables non-indigenous musicians to make a decision about the use.[2137] Again, these labels do not necessarily protect the underlying knowledge or cultural expressions from copying, for example in the case of materials already in the public domain. The labels are not legally enforceable. They do, however, aim to protect against misuse or derogatory handling of the material by setting out conditions for *fair and equitable* access and use. They do so by informing the public and helping them to decide about appropriate ways of use.[2138]

In short, labels, such as those of the Local Contexts project, can inform the uninformed public, create awareness and mutual understanding. This comes close to 'regulating respect' and contributes to ensuring the dignity of indigenous peoples' cultures and heritage.

[2125] Anderson & Christen 2013, p. 106.
[2126] http://www.localcontexts.org/about/.
[2127] Torsen Stech 2014, p. 433.
[2128] Anderson & Christen 2013, p. 105 and further.
[2129] Anderson & Christen 2013, p. 113.
[2130] Torsen Stech 2014, p. 434; http://www.localcontexts.org/tk-labels/.
[2131] Anderson & Christen 2013, p. 117; Christen 2012, p. 337.
[2132] Anderson & Christen 2013, p. 118.
[2133] See: http://www.localcontexts.org/tk-labels/.
[2134] Idem.
[2135] Anderson & Christen 2013, p. 118. "Labels, by definition and out of necessity, require mutual dialogue and conversation in order to develop the most appropriate labeling options."
[2136] The non-profit record label of the Smithsonian Institution, see http://www.folkways.si.edu/folkways-recordings/smithsonian: "We are dedicated to supporting cultural diversity and increased understanding among peoples through the documentation, preservation, and dissemination of sound."
[2137] Anderson & Christen 2013, p. 117.
[2138] Anderson & Christen 2013, p. 117.

Indirectly, this can contribute to the protection of TCEs against misappropriation and derogatory uses. Labels are useful to enlighten the public "about what, for Indigenous peoples and communities, constitutes the *fair and equitable* use of their traditional knowledge and cultural heritage materials."[2139] There are also cultural heritage rationales visible in this context. As we have seen in Chapter 4, cultural heritage measures include awareness-raising, for example through emblems, which to a certain extent seem similar to labels, geographical indications or quality and certification marks. All of these share a communicative nature. Other prominent measures of awareness-raising include education, information and knowledge building.[2140] This can create mutual understanding and respect for cultural heritage, and contribute to public awareness of the value and importance of (indigenous) cultural heritage and their proper handling and use. Ignorance and lack of awareness can be battled through information and education.

6.3.3 Licences as illustrated by the Mukurtu and Local Contexts initiatives

Licences are a form of private law-making. This already implies that they are flexible and that their rules depend on the input of the party offering the licence. Licences are a practical approach to rule-making as opposed to WIPO's Draft Articles' legal rights and obligations, although the Draft Articles do contain rights of free, prior and informed consent and involvement[2141] and user obligations to enter into agreements.[2142] This section will use the licences proposed by the Mukurtu and Local Contexts projects as an illustration. Both are web-based projects that support indigenous communities in the management of access, use and sharing of their digital, recorded cultural heritage. Although it is not clear whether these projects still offer a separate licence function or whether these are integrated in the projects' TK Labels that offer symbols similar to the Creative Commons licences,[2143] this section will use the explanation of the TK Licences, as described by Directors Anderson and Christen Withey in various articles, to illustrate the role that licences might play for traditional knowledge and TCE protection.

Mukurtu started with custom-building a digital archive for the Warumungu community of Central Australia, using their existing cultural protocols for the *digital* movements of their materials and knowledge.[2144] The initiative then developed to also offer traditional knowledge licence options, currently TK labels, following concerns about the protection of indigenous cultural heritage and intellectual property material already in the public domain or commercially circulating:

> "Mukurtu's interest in creating these flexible licenses was to align the already-existing international legal structure with the needs of these communities. Much like Creative Commons saw a gap in existing copyright law and sought to fill it with a more flexible and user-driven system, Mukurtu aims to cater to the needs of indigenous communities who have been left out of progressive legal frameworks (like Creative Commons)

[2139] Anderson & Christen 2013, p. 117.
[2140] Article 10 of the 1970 Convention; Article 27 of the 1972 World Heritage Convention; Article 10 of the 2005 Cultural Diversity Convention.
[2141] Article 3.1(a)(iii) Draft Articles 2014.
[2142] Article 3.1(b)(ii) and Article 3.2(b) Draft Articles 2014.
[2143] Both web-platforms currently (June 2016) only list TK Labels and Cultural Protocols, see: http://www.localcontexts.org/tk-labels/ and http://mukurtu.org/learn/.
[2144] Christen 2012, p. 331.

> because their specific needs do not fall neatly into either individual or communal, commercial or private, public domain or share-alike frameworks."[2145]

A closer look at the licences for documentation and recording

The licences of the Mukurtu and Local Contexts project have been designed to work worldwide to manage the material that is the subject of communities' *own* documentation and recording projects as well as material that is already, or is to be, recorded or documented *by third parties*. In the case of the latter, or when material is in copyright, indigenous peoples do not have the intellectual property rights themselves, but they can still enter into negotiations for licensing agreements.

The project consists of four specific licence options: attribution; non-commercial-use of cultural materials; commercial-use of community owned material; and outreach, a licence solely for use in educational, learning and other sharing environments.[2146] When the material in question concerns copyright-protected material, the licences can only be used or applied by, or in cooperation with, the original copyright holder.[2147] When a prospective commercial user comes across, for example, the TK Licence "Community Attribution" and "Commercial" (A+C), this means that thry must attribute the community concerned[2148] and enter into negotiations for an agreement on use, integrity of the material when used commercially and return of benefits to the community.[2149] This way, indigenous interests in benefit-sharing and integrity of their material are met. Another licence is the "Outreach Licence" (TK O). Under this licence, a prospective educator may use the material in question, but must also engage in dialogue with the community concerned about any reciprocal benefits for the community. As Anderson and Christen explain:

> "This license is not necessarily about generating revenue, but rather about facilitating the fair and equitable exchange of educational and personnel resources that can be so difficult for Indigenous communities to access. This license also recognizes the significant amount of Indigenous materials that are utilized in educational and other learning contexts often without permission or proper acknowledgement. The aim of the Outreach License is to help establish a means for sharing with reasonable and respectful expectations of exchange in knowledge and resources."[2150]

Licences and TCE protection concerns

Community-crafted licences like this project proposes can address various concerns that often arise in the context of (digital) documentation of indigenous heritage.[2151] The most frequently raised concerns are that the documentation of indigenous heritage materials could lead to misuse or unwanted disclosure of traditional knowledge or TCEs and that third party documenters or recorders obtain the intellectual property rights rather than the source

[2145] Christen 2012, p. 338.
[2146] Anderson & Christen 2013, p. 114.
[2147] Anderson & Christen 2013, p. 114.
[2148] And other than under copyright law and Creative Commons 'alongside that of the copyright owner', Anderson & Christen 2013, p. 114.
[2149] Anderson & Christen 2013, p. 114–115.
[2150] Anderson & Christen 2013, p. 115.
[2151] See these concerns also in WIPO's FFMs, as described in section 6.5.1.

communities.[2152] Licences return control over their heritage to the source communities, enabling them to determine appropriate use, terms and conditions and return.

Licensing initiatives like the ones described above show that a diverse mix of legal 'tools' is not a bad thing for TCE protection per se. In fact, it can be a strength when effectively combining aspects of copyright law, cultural heritage law and human rights law in targeted, specific and indigenous-crafted licences. Licences can also cover all bases of the values and principles identified throughout the previous legal chapters of this thesis, while working towards openness, access and use for third parties at the same time. Essentially, they take the dignity and identity of the specific source communities concerned as a starting point. They also clearly contribute to 'regulating respect' for indigenous communities, their heritage and appropriate use. And they are a prototype of participatory, indigenous approaches to TCE protection. Ultimately, they form coherent and holistic 'indigenous-made' control mechanisms, meeting prominent indigenous interests in (cultural) self-determination and prior, informed consent, and regulating use and access on their own terms.

6.3.4 Protocols and codes of ethics

A number of WIPO's Fact-Finding Missions expressed a need to explore indigenous and local communities' own cultural customary systems, protocols and laws as a basis in the context of knowledge production and protection. It has also been argued in scholarly literature that any appropriate (*sui generis*) regime for the protection of traditional knowledge must be grounded in indigenous epistemological narratives of ways of knowing, which tie in with "the ways of protection, transmission, legitimization and evaluation of knowledge."[2153] As Oguamanam states:

> "Western IPRs' inability to address the epistemic dichotomy between Western and indigenous ways of knowing is at the root of its failure to meet indigenous peoples' yearnings and aspirations for the preservation of their knowledge and its cultural integrity. This is the basis of the "crisis of legitimacy in the intellectual property system.""[2154]

According to Drahos, however, exploring the option of "customary laws operating as laws across states" would be a long-term option, which is likely to take a long time. As a medium-term solution for practical results, he proposes the use of protocols that explicate allowed third party uses of the materials in question.[2155] Protocols could fill the empty space between recognition of customary laws in existing legal systems and attempts to apply mainstream laws to indigenous peoples, disregarding their own views and understandings. One interpretation of protocols, at least for the situation in Australia, is:

> "that they exist in place of formal legal recognition of community custom. They stem from the failure inherent in Anglo-Australian jurisprudence to respect indigenous law.

[2152] See WIPO Background Brief No. 9, 'Documentation of Traditional Knowledge and Traditional Cultural Expressions, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_9.pdf .
[2153] Oguamanam 2004, p. 136–137.
[2154] Oguamanam 2004, p. 137, citing Rosemary J. Coombe, 'The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law', *St. Thomas Law Review*, Vol. 14 2001, p. 285.
[2155] Drahos 2004, p. 34.

> Thus protocols can be characterised as the only avenue left for affected communities to post their views."[2156]

Protocols are prescriptive,[2157] and stem from specific contexts or circumstances. Although protocols are usually case-specific and *ad hoc* solutions, they are not necessarily completely neutral, stand-alone mechanisms. Protocols can still be "informed by and respond to formal legal failings or inadequacies."[2158] A useful characteristic for TCEs is that protocols can direct certain types of behaviour that individual users or institutions are assumed to follow.[2159] They can "emphasiz[e] or normaliz[e] particular forms of cultural engagement."[2160] This means that protocols can instigate change, for example with regard to existing mainstream understandings of indigenous cultural material such as TCEs, their use and access, beyond dominant perceptions such as those derived from intellectual property law. This way, protocols can influence actions and reactions towards TCEs, or provide tools for "negotiating new kinds of equitable relationships."[2161]

Further, protocols can enhance or consolidate certain systems of value, but they can also contribute to changing cultural values and norms.[2162] In this sense, protocols can be instrumental in "reposition[ing] certain agendas" and "changing attitudes and perspectives about how certain industries deal with Indigenous knowledge and with Indigenous individuals and communities."[2163] Protocols can also work to contribute to awareness-raising, education and growing mutual understanding and respect. These are safeguarding and protection measures that we have also seen in cultural heritage law. In other words, protocols can have communicative roles for TCEs as to their value, as well as signalling functions and explanatory aims as to the threats they face and reasons to protect them, respectively. This way, protocols can offer a change in perspective for the public at large or for specific institutions in their approach to TCEs.

Protocols' presumed nature as voluntary codes of practice is often raised as an objection to their potential.[2164] However, this does not mean that there are no actors at all that are willing to follow these without them being formally binding. Rather, the motivations to follow protocols are different from mere compliance. As Drahos observes, there are likely to be "reputation-sensitive actors such as large museums, scientific organizations and large corporations that do not want damaging publicity."[2165] Furthermore, Bowrey indicates that, in the context of guidelines for media and arts institutions in Australia, funding for projects and work on indigenous subject matter usually come with expectations of consultation and compliance with such guidelines. A poor reputation in this regard has consequences for future assistance, funding and projects. In this sense, "[b]ureaucracy is an efficient and powerful disseminator of standards."[2166] And regardless of such bureaucratic pressure, cultural heritage

[2156] Bowrey 2006, p. 83.
[2157] Bowrey 2006, p. 84.
[2158] Anderson & Younging 2010, p. 6.
[2159] Bowrey 2006, p. 84.
[2160] Bowrey 2006, p. 84.
[2161] Anderson & Younging 2010, p. 4.
[2162] Anderson & Younging 2010, p. 7.
[2163] Bowrey 2006, p. 84; Anderson & Younging 2010, p. 8.
[2164] Drahos 2004, p. 34; Bowrey 2006, p. 84.
[2165] Drahos 2004, p. 84.
[2166] Bowrey 2006, p. 84.

institutions and professional associations can also emerge as 'natural allies' that "want to do the right thing"[2167] anyway.

Another objection to protocols as a protection solution could be the potential proliferation of different instruments and protocols. At the same time, any institutionalisation, homogenisation and harmonisation of custom-based initiatives, such as that achieved by the Creative Commons movement globally, might lead to the legal clarity and certainty desired by lawyers. However, it also brings with it a degree of "top-down global legalism".[2168] This means that such initiatives run the risk of being detached from specific community contexts, which was precisely their initial strength, and again move towards the realm of positive law.[2169]

WIPO's Creative Heritage initiative has explored and elaborated protocols and codes of ethics. To this end, it has carried out empirical research in the context of cultural institutions' practices and protocols. This includes surveys of existing resources and practices, case studies on the basis of these surveys and setting up a searchable database. This database includes existing codes, guidelines, practices and standard agreements with regard to recording, digitisation and dissemination of intangible cultural heritage.[2170] Categories of this database include resources that are developed by and/or for:

- collection-holding and museum institutions;
- researchers and field-workers;
- commercial and other users;
- indigenous and local community organisations;
- professional societies, such as codes and statements of ethics; and
- miscellaneous institutes, museums and archives, such as standard agreements, consent forms, licences and undertakings.

The diversity of categories shows that there is generally a fair level of awareness of indigenous concerns and sensitivities regarding the handling of intangible cultural heritage among cultural heritage institutions and cultural industries.[2171] It also shows that, regardless of the absence of binding legal rules on TCE protection, there is willingness to enter into dialogue and find ways for respectful conduct and clarity as to use of TCEs. Cultural institutional or cultural industry responsibility is the starting point.[2172] Indeed, what shines through from a brief sample of professional societies' codes and statements of ethics,[2173]

[2167] Drahos 2004, p. 34.
[2168] Bowrey 2006, p. 94.
[2169] See on this Bowrey 2006, p. 94.
[2170] See http://www.wipo.int/tk/en/databases/creative_heritage/.
[2171] See for another overview: Torsen & Anderson 2010, p. 67 and further. On p. 68 they state, for example: "What is evident in these emerging practices and policies is the intention to create new and better ways of responding to the needs of tradition-bearers." See for practices and protocols of various cultural industry sectors in the Australian context: http://www.terrijanke.com.au/#!resources/dlugg.
[2172] See also Wong & Fernandini 2011, p. 208.
[2173] Museum Association Code of Ethics for Museums in the UK, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/museum_assn_code.pdf; Society for Applied Anthropology (SFAA) Statement of Professional and Ethical Responsibilities, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/sfaa_ethical_responsibilities.pdf; International Council of Museums (ICOM) Code of Ethics, http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf, in particular par. 6, p. 10-11.

resources by indigenous and local community organisations[2174] and resources for commercial and other users[2175] are recurring guidelines, notions and principles of:

- contact and dialogue;
- consultation and/or consent;
- indigenous control and self-determination;
- integrity;
- secrecy and confidentiality;
- attribution;
- proper returns;
- continuing cultures;
- mutual respect, including respect for human dignity and worth;
- respectful communication with indigenous peoples;
- respectful use and care for the material; and
- relationships of trust.

Like licences and labels, protocols can provide education, information and explanations about conduct and use of indigenous material by third parties that is currently missing. While these protocols and codes of ethics may be not legally enforceable, "they do establish industry standards that may, over time, be pointed to as a standard of conduct setting the course for legal rights."[2176] At the risk of sounding repetitive: indigenous peoples' input is crucial. As Wong and Fernandini explain:

> "Indigenous protocols have been developed in some contexts to sensitize the public (including those working in particular sectors such as visual arts and filmmaking) to appropriate ways of approaching indigenous cultural material and working with indigenous communities. For example, the Australia Council for the Arts has produced and recently revised its protocol guides, covering different spheres of cultural endeavour, to help the Australian public better understand issues in accessing and using indigenous cultural material. Close consultations with indigenous peoples are essential in processes to elaborate such protocols."[2177]

[2174] First Archivist Circle Protocols for Native American Archival Materials, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/protocols_native_american.pdf; AIATIS Audiovisual Archive Collections Management Policy Manual – Code of Ethics, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/aiatsis_policy_ethics.pdf.

[2175] Australian Broadcasting Corporation Cultural Protocols for Indigenous Reporting in the Media, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/abc_cultural_protocol.pdf, see on p. 6 for example: *"An underlying principle of these protocols is an assumption that journalists are willing to undertake work, which accurately and fairly represents their subjects."*; Five Indigenous Protocol Guides of the Australia Council's Aboriginal and Torres Strait Islander Arts Board on: Writing Cultures – Protocols for Producing Indigenous Australian Literature, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/atsia_writing_culture.pdf; Performing Cultures (Drama/Dance) – Protocols for Producing Indigenous Australian Performing Arts, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/performing_cultures.pdf; Visual Cultures – Protocols for Producing Indigenous Australian Visual Arts and Crafts, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/visual_cultures.pdf; Song Cultures – Protocols for Producing Indigenous Australian Music, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/aus_song_cultures.pdf; New Media Cultures – Protocols for Producing Indigenous Australian New Media, http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/atsia_indig_media.pdf.

[2176] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2003, p. 75.

[2177] Wong & Fernandini 2011, p. 208.

6.4 Concluding thoughts on TCE protection and legal and practical solutions

This chapter's look beyond the existing legal framework shows that perceived gaps and dissatisfaction with the practical usefulness of existing laws for indigenous issues has given rise to legal *sui generis* and practical *ad hoc* initiatives. Although different in execution, the approaches share the same aim: the intention to find solutions for tensions and fill gaps that arise from the existing legal systems vis-à-vis the protection of indigenous heritage, such as TCEs.

The 'legal strand' of these initiatives is comprised of the formally legal, international initiative of WIPO that aims to address TCEs' specific characteristics in legal rules that 'stand alone' from existing IP laws. As it has itself indicated, it is concerned with the intellectual property aspects of TCE protection. It has acknowledged that not all indigenous needs can be addressed with this approach. This makes the approach a fairly 'one dimensional' endeavour, regardless of their good intentions and their awareness of the broader reach of the protection question as reflected in their Objectives and General Guiding Principles. Cultural heritage and human rights norms must be factored in. Two of the most important norms are participation and free, prior informed consent in decision-making processes, standard-setting, heritage management and substantive (exclusive) rights. A one-size-fits-all-like approach is also unfeasible due to both the various legal norms and principles at play and the diversity of the protection interests involved. From this perspective, WIPO's work can lay down an abstract groundwork of agreed-upon standards in the sphere of indigenous intellectual property, but with the necessary flexibility for national and local-specific situations. Such an IP approach further needs to be complemented by other legal areas of expertise. This is where the practical initiatives discussed in this chapter can be useful, either as guides for legal approaches or as ancillary practical solutions. Due to their flexibility and on-the-ground characteristics, these can embed the useful traits of each legal area as necessary in given circumstances in a more holistic way.

Indeed, the practical initiatives are in certain places better at incorporating what is actually at stake and needed, because they are in a position to adapt more readily to specific circumstances, circumvent political structures and compromises, and provide for 'workable' approaches. Their bottom-up approach and attention for indigenous peoples' own customary laws, traditions and participation means that they can, for example, communicate norms on cultural sensitivity, direct behaviour and forge alliances with cultural heritage institutions. These features of practical approaches to TCE protection can provide lessons for legal action in that indigenous peoples' input and worldviews are absolutely necessary and that, really, perceptions and understandings – or mind-set – are determinant for existing (legal) difficulties, and consequently for the success-rate of any protection approach. When perceptions and understandings are too static, the protection discussion goes nowhere. The practical approaches can also function as alternatives to legal action in showing that necessary measures for TCE protection (interests) extend beyond exclusive (IP) rights. Rather, measures of education and information and the realisation of customary law-inspired licences and protocols can also clearly contribute to existing protection needs through recognition of source communities and giving them a place in the discourse.

CHAPTER 7
SYNTHESIS: WHAT HAVE WE LEARNED?

7.1 Introduction: from fragmentation to value-based convergence

The protection of traditional cultural expressions is a complex topic. Many core aspects are multidimensional. These aspects include the concept of TCEs, indigenous peoples' protection interests, and the rationales and objectives of the legal instruments. As a result, legal engagement with TCE protection is also inherently multidimensional. To disentangle the complexity, this thesis has scrutinised the legal fragmentation as well as the challenges to and shifts in legal understandings and concepts involved in TCE protection. Histories of dispossession, marginalisation and increasing empowerment of source communities play a large role here. Specific issues in the context of the existing legal framework occur at the level of terminology, categorisation and principle. These issues are at the heart of both difficulties and opportunities for TCE protection. This is illustrated in particular by the (calls for) shifts and opening up of legal categories and systems to indigenous peoples.

For all three legal areas, which together make up a complex system, there are various aspects of the existing systems that are challenged in the context of TCEs. These aspects include diverging understandings of the production and protection of cultural works, the concept of cultural heritage and the collective dimension of human rights. These challenges are spurred by indigenous peoples' overall movement for increased empowerment and recognition of their rights, notably at the UN level. The protection of TCEs is both a part and an example of indigenous peoples' broader struggles for recognition of their rights. It also reflects their challenges to the scope, interpretation and application of existing legal systems. The shifts in existing systems (either already taking place or still required) have various dimensions. These dimensions include: the concepts and scope (what is protected); the rationales (why is this protected); and the right holders, addressees and beneficiaries (who benefit from the protection). Each dimension affects the (im)possibilities and positions of indigenous peoples with regard to their rights under existing legal frameworks. These (im)possibilities and positions are shaped by societal circumstances, as we have seen in the historical and contextual analysis of how indigenous rights and cultures came to be considered in the three legal domains.

This introduction traces back through the central topics of this thesis. The aim is to arrive at the core of the issue of TCE protection in the form of central values, which we have already seen emerging throughout the chapters. The template for this exercise will be as follows. Firstly, we will start in this section with recalling the protection interests and claims that were identified in Chapter 2. These have served as a guide in the analyses of the legal approaches to TCE protection. This is why the next step will be to provide a short recap of the selection of legal domains and how their underlying principles reflect the diversity of protection interests and objectives of TCE protection. Next, the main principles per legal domain and the role they can play for TCE protection interests, or not, are reiterated.

From the outcomes of the analyses of the legal chapters it is possible to identify a set of shared central values that together form a 'shared moral structure' underlying all three legal systems. These are essential for any approach to protect TCEs. The shared central values bring together the legal diversity that exists in the context of TCE protection. Viewing the legal systems as a complex, yet integrated, whole as explained in Chapter 1 helps to synthesise the outcome of the legal analyses. Together with the shared central values, this

perspective enables a useful generalisation by bringing together the various principles in an overarching way. The result of this exercise provides a basis for the normative conclusion that these shared central values should be taken into account in any protection effort for TCEs. This does not only answer to indigenous peoples' diverse needs, but it is also necessary to, for example, comply with state obligations under human rights law. Furthermore, a transdisciplinary view of the legal diversity can encourage dialogue between the various areas and enhance their interoperability with regard to TCE protection.

The second section of this chapter scrutinises these central values in more depth. The third section explores the two strands of approaches to TCE protection outside the existing legal framework, as analysed in Chapter 6, from the perspective of the shared central values identified. The first strand is the legal approach of WIPO's *sui generis*[2178] endeavours. The second strand consists of various practical protection, bottom-up, approaches. These include grass-roots, indigenous-driven labels and licences, as well as cultural industry- and heritage institution-specific protocols for behaviour with regard to indigenous peoples' TCEs. It is interesting to see whether and how these reflect the central values explained earlier. State obligations are reassessed in the fourth section in order to highlight the interconnections between intellectual property protection, cultural heritage law and human rights law.

The chapter closes with concluding thoughts on the overview of TCE protection, with its features of legal diversity, that this thesis has mapped out. With this overview in place, the thesis not only aims to advance the theoretical understanding of the TCE protection discourse as a reference point, but also function as a ground on which to base some guiding recommendations for any future (policy-making) action on the topic in Chapter 8. But first, this section continues with a 'throwback' to the main aspects of TCE protection that this thesis has set out.

7.1.1 The multidimensionality of indigenous protection interests

It is possible to distinguish between and categorise indigenous peoples' protection interests in order to uncover and make explicit the diversity of protection needs and objectives at stake in the context of TCE protection. Scholars have suggested various approaches for categorisation.[2179] This thesis has adopted a functional approach to distinguish between interests for legal analysis purposes. Without giving in to essentialist tendencies, we can acknowledge the diversity of both indigenous groups and their protection interests, keep in mind the dynamic nature of indigenous cultures and traditions, and at the same time adopt a functional approach to generally identify shared or similar protection interests. For our purposes, i.e. to establish a workable, practical measuring tool, the following protection interests are distinguished:

- economic interests of benefit-sharing;
- interests in control, for example through free, prior and informed consent (FPIC);

[2178] *Sui generis* means that they are 'stand-alone rules', independent of existing intellectual property provisions such as copyright law's norms.

[2179] Frankel & Richardson 2009, p. 278; Greaves 2002, p. 123; Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2002, p. 13; Drahos & Frankel 2012, p. 191; Hendriks 2014, p. 54 and further. See further generally on indigenous peoples' difficulties, concerns and needs regarding protection of their TK and TCEs, amongst others Kipuri 2009, p. 64 and further; Haight Farley 1997, p. 13–15; Janke 1998, p. XX-XXI.

- interests in recognition of rights and distinctive cultures, including such features as attribution, distinctive identity, self-determination and sharing;
- moral interests of integrity and dignity;
- interests in protection for spiritual reasons, including secrecy; and
- interests in continuing traditions, including the maintenance and development of TCEs, and preservation, practice and intergenerational transmission of culture.

These map onto three lines of argument for protection:

Economic and development argument	*Cultural heritage argument*	*Human rights argument*
Benefit-sharing	**Control** (FPIC)	**Control** (FPIC)
Control (FPIC)	**Recognition** of distinctive cultures, including identity	**Recognition** of rights, such as self-determination
Recognition of economic claims	**Integrity and dignity**	**Integrity and dignity**
Continuation (sustainability)	**Spirituality**	**Spirituality**
	Continuation, preservation and intergenerational transmission (dynamic)	**Maintenance, practice and development**

Table 18 Tabular overview of TCE protection interests and arguments.

In addition to the diverse mix of indigenous peoples' protection interests, the rationales and central principles of the existing legal frameworks are also diverse. The analysis of TCE protection from a principle-based perspective in the legal chapters has dissected what is actually at stake and, consequently, which concrete issues should be tackled by any protection approach. The identification of shared central values can help to bring legal perspectives together, as a one-dimensional approach is insufficient.

7.1.2 The legal framework: TCE relevance and underlying principles

Three legal areas have been central in this thesis due to their particular relevance for (specific aspects of) TCE protection: copyright law, cultural heritage law and human rights law. Each legal area shows awareness of and engagement with aspects of (the protection of) indigenous peoples' knowledge and heritage. The legal perspectives have a specific focus. Perspectives are, for example, trade-oriented, cultural heritage and preservation-related, or reflective of fundamental human rights issues such as self-determination. The distinctive legal areas reflect the diversity of the protection interests at stake. This confirms the multi-faceted nature of the issue.

The involvement of diverse legal areas and international fora also follows from indigenous peoples' position in society and the struggle for recognition of their rights more generally. TCEs – and indigenous peoples and their cultures in general – were not initially taken into account in the development of the three legal fields. When indigenous peoples' struggle for recognition of their rights, and more specifically for the protection of their heritage, commenced, their claims and awareness-raising were voiced through various existing fora and legal structures. The indigenous dimension is a crucial factor at all legal levels of this struggle. This dimension is mostly influenced by the historical context, but it also has an important contemporary and ongoing component of indigenous peoples' empowerment. It determines the context and content of the claims and challenges to existing legal frameworks.

In addition to an assessment of the normative standards of the legal framework, the legal chapters of this thesis have primarily taken a principle and theory-based approach to analyse the relationship between each legal area and TCE protection. These principles and theories are of course shaped by their specific legal context and focus. However, the legal instruments are also part of a system of normative standards, institutions and actors, both on 'mainstream' and alternative and grass-roots levels. The strands of this complex systemic whole interrelate and interact, in particular when the system is confronted with a topic as multidimensional and specific as TCE protection. Taking such a systematic perspective facilitates the task of deducing a set of shared central values from the overview of principles and theories of the legal framework in a transdisciplinary way. To operationalise any approach to TCE protection, these values should be taken into account to effectively meet indigenous peoples' concerns and their fundamental rights. This section briefly recalls the emergence of TCE protection and the main principles and theories of the three legal domains as a prelude to the identification of the shared central values of the legal framework in section 7.2.

Copyright law and TCEs

'Young', decolonised states first voiced claims of *control*, *benefit-sharing* and *protection from misappropriation* by 'dominant third parties' in the international trade environment of international intellectual property law. The topic of what was initially called folklore protection was introduced almost as a 'trade-off': developing countries adopted 'universal' (Western) intellectual property standards but gained some protection for traditional cultural works. Generally, the preparatory stages for the revision of the Berne Convention at the diplomatic conference in 1967 resulted in the inclusion of folklore protection on the international (copyright) agenda.

Later, the topic of TCE protection emerged in the 1990s in the wake of the rise of an indigenous movement, which was not only concerned with land struggles, but also with cultural and traditional knowledge issues. With this development, the topic gained an extra dimension beyond economic concerns, but the core challenge remained the application of existing copyright structures and concepts, and the resulting lack of protection. Overall, the fact that initial awareness was raised in a copyright context and the specific issues of control and benefit-sharing are the main factors for copyright law's involvement in TCE protection.

Copyright principles

The main copyright traditions are based on utilitarian and incentive theories on the one hand, and natural rights, personality and *droit d'auteur* theories on the other. Legal rules that rely on the first theories mainly reflect principles of practicality, efficiency and benefit to society as a whole in the circulation of cultural works. For the second, legislation draws on principles of "rightness and justice,"[2180] with a focus on the actual creation and a central place for the individual author. Moral rights are a particular feature of the second tradition. They comprise non-economic rights that cover such principles as attribution and integrity. Outside of these two main traditions, there are other principles that play a role in the rationales of intellectual property law. One of these is 'simply' fairness, which is reflected in principles of distributive justice, misappropriation, misrepresentation and unjust enrichment. These cover aspects of just distribution of resources and burdens, 'free riding' and unfair competition. Not all

[2180] Senftleben 2004, p. 11.

principles, theories and rationales of this theoretically mixed copyright picture are suitable for a protection approach that addresses indigenous peoples' TCE concerns.

Generally, indigenous peoples' TCE protection interests in control and free, prior and informed consent regarding their heritage are most clearly reflected in copyright law's exclusive rights. Objections to third party practices that utilise indigenous peoples' heritage without permission and a share in the benefits recur in literature and indigenous claims. On a theoretical level, the most suitable copyright theories that correspond with indigenous peoples' circumstances and claims are the personality and *droit d'auteur* theories. The principles of these theories match both the bond which source communities emphasise exists with their cultural expressions, and their protection interests on a moral level. Moral rights of attribution and integrity, or the right of respect, meet concerns of 'free riding' without asking permission, recognition of indigenous peoples as the source and potential distortion through third party use. The principle of distributive justice and the mechanism of defensive protection can be indirectly linked to indigenous peoples' sustainability and, with this, to their ability to continue their traditions. In other words, certain parts of copyright law match with indigenous peoples' TCE protection interests, at least theoretically. In practice, copyright law's duration, the public domain and the authorship concept in particular cause tensions.

Cultural heritage law and TCEs

'Young' states also challenged the concepts and scope of the existing instruments and approaches of international cultural heritage law. In this instance, claims emerged for *identity*, *recognition* and *respect* purposes vis-à-vis developed states, traditionally dominant in international cultural heritage preservation practices and standard-setting. Decolonised states influenced existing definitions and the expansion of standards that determined an object of 'cultural value'.[2181] For the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, for example, there was a push for the catalogue of cultural property to be expanded. It was argued to go beyond "Western standards of commercial value", which would be of no use for measuring the "indigenous cultural importance of an artifact".[2182] To a certain extent, the interests of decolonised states in this regard and the way cultural heritage legislation accommodates these, or not, have been considered similar to indigenous peoples' struggles.[2183]

More specifically, criticism of the tangible nature of the cultural heritage listed in the 1970 UNESCO Convention and the overly narrow scope of the 1972 World Heritage Convention also has an indigenous dimension. Immaterial property, folklore and traditional knowledge, in short intangible cultural heritage, were left out of these instruments.[2184] However, a number of indigenous peoples' TCE protection interests are clearly reflected in an intangible cultural heritage context: both the safeguarding of aspects of this heritage from *commercial exploitation* by third parties without benefit-sharing and the *preservation* of traditions that run the risk of dying out have played a role in increasing attention for intangible (indigenous) cultural heritage.[2185]

[2181] Pask 1993, p. 65; Graham 1987, p. 774.
[2182] Graham 1987, p. 774.
[2183] Pask 1993, p. 65; Graham 1987, p. 774.
[2184] Coleman 2005, p. 3; Lenzerini 2011, p. 104; Forrest 2010, p. 363–364.
[2185] See generally O'Keefe & Prott (eds) 2011, p. 148–149.

Overall, developments in cultural heritage law over the years show an opening up of the system and broadening of scope towards acknowledgment of an anthropological understanding of cultural heritage. Living cultures and intangibles such as know-how, and human relations and interactions, regardless of their connection with manifestations of material culture,[2186] are now considered for protection. This reflects the TCE protection interests of indigenous peoples in cultural integrity and (dynamic) continuation of their ways of life and traditions. In other words, cultural heritage law has obtained a clear indigenous dimension.

Cultural heritage principles

Cultural heritage law and its various segments are characterised by a number of key principles. These are the principles of inheritance, identity, universality, cultural context and living cultures, and cultural diversity. The inheritance principle is a central, perhaps the 'original', principle of cultural heritage law as a whole. This principle emphasises the safeguarding of cultural heritage to enable its transmission to future generations. The identity principle is another central principle. It entails the safeguarding of and respect for cultural heritage because of its role in identity construction. This is visible in the context of protecting cultural heritage in conflict situations and from illicit trade. The universality principle, or protection of cultural heritage for the benefit of all mankind, is a dominant cultural heritage principle. This principle holds that the interest of all mankind requires the safeguarding of humanity's 'shared cultural heritage'. In practice, interests of all mankind can clash with national as well as local, communal or indigenous interests in the heritage concerned. The cultural context and living cultures principle and the cultural diversity principle have emerged with the shift to inclusion of intangible cultural heritage in cultural heritage protection. This shift is characterised by an increasingly anthropological understanding of the concept of cultural heritage. These principles are reflected in the theory that, in order for cultural heritage to be safeguarded, the sustainability and circumstances of the source communities and context of that heritage must be safeguarded, and cultural diversity realised.

Indigenous peoples' interests and reasons for TCE protection correspond with various of these principles, whereas others pose potential challenges. In a similar way to safeguarding of cultural heritage for identity-formation reasons, indigenous peoples advocate protection of their TCEs for the role they play for their identities. And whereas cultural heritage rules generally target the preservation of the integrity of cultural heritage, indigenous peoples also tend to aim for this, often for spiritual reasons. The inheritance principle is reflected in indigenous peoples' interests in continuation of their traditions. A dynamic understanding of this principle is crucial, so the living cultures of the source communities concerned should be taken into account and their cultural contexts safeguarded. Cultural diversity plays an important role here, for example in the context of threats that indigenous peoples face from globalisation and technological developments. The production and the value of cultural heritage depend on the sustainability of the cultural context of that heritage. In this sense, cultural communities themselves need safeguarding as well, together with the intangible or material heritage they create and maintain as manifestations of their cultures as such.

The universality principle challenges indigenous peoples' interests in control, free prior and informed consent and recognition of their rights. The World Heritage Convention is a case in point. It draws heavily on this principle. There is increasing concern about 'heritage

[2186] Blake 2006, p. 8; O'Keefe & Prott (eds) 2011, p. 149.

grabbing', where territories are designated as world heritage sites or national parks for conservation purposes.[2187] In many cases, indigenous peoples' territories, rights and participation are disregarded to the extent of prohibition of traditional lifestyles or even forced relocation. In sum, whereas indigenous TCE concerns relate to certain specific parts of cultural heritage law and general cultural heritage principles, at least theoretically, others potentially work precisely against indigenous peoples' interests.

Human rights law and TCEs

In a human rights context, attention for indigenous peoples, their rights and cultures has shifted from disregard to assimilation[2188] and finally to a recognition of their rights that takes into account their specific circumstances and, often, marginalised position in society.[2189] Cultural and indigenous rights[2190] are integral to the development, management and protection of indigenous peoples' heritage, knowledge and cultural expressions. Many of these rights concern their ways of life and their cultural aspects, but also their self-determination and participation.

The relevance of this fundamental rights framework for TCE protection flows from indigenous peoples' interests in the control, maintenance and development of, and their participation in, their ways of life and traditions. That is, they should have the ability to determine whether and how this takes place by themselves. This includes the maintenance, development and expression of TCEs and the preservation, practice and possibility of intergenerational transmission of cultural heritage more generally. Effective enjoyment of their human rights is a major requirement to secure this level of cultural self-determination. An important precondition is participation in all matters that affect the indigenous communities concerned, such as decision-making. This also includes the design of rules and policies on matters such as cultural heritage designations and TCE protection. In sum, TCE protection from an indigenous and cultural rights perspective reflects interests of indigenous peoples in *control* over the development and management of their cultures, *recognition* of their rights as such and affirmation of their (human and cultural) *dignity*.

Indigenous peoples' rights to protection of their heritage, knowledge, TCEs and intellectual property has been stressed by various UN human rights treaty bodies, such as the CCPR, CESCR and CERD, on multiple occasions. They have acknowledged an indigenous dimension in their interpretations of various human rights, which require specific measures for the effective enjoyment of these rights by indigenous peoples. These rights cover various aspects that play a role in TCE protection, including their development, protection, preservation and expression. Overall, this has informed the conclusion that the various aspects of TCE protection have a basis in human rights law.

[2187] See amongst others: Expert Mechanism On The Rights Of Indigenous Peoples 2015, p. 14–15; Permanent Forum On Indigenous Issues 2016, p. 9–11.
[2188] The approach of ILO Convention No. 107.
[2189] The approach of ILO Convention No. 169 and UNDRIP.
[2190] Chapter 5 on human rights has selected and analysed the following rights: self-determination; equality and non-discrimination; freedom of expression; property and land rights; participation rights; minority rights; rights to cultural integrity and dignity.

Human rights principles

The analysis of the most relevant cultural and indigenous rights in the context of TCE protection yields four principles: self-determination, non-discrimination, participation and dignity. All these human rights principles should guide TCE protection. Human rights law is 'hierarchically above' the other two legal domains of copyright law and cultural heritage law. This means that the fundamental rights basis for TCE protection should be acknowledged in these legal and policy domains as well.

The principle of *self-determination* is vital to indigenous peoples' very existence as distinct peoples. It is a multidimensional principle: it shapes different rights and circumstances, be it in the context of autonomy and self-governance, economic self-determination or cultural self-determination. Furthermore, it is connected to procedural and participation rights, such as consultation and, more importantly, free, prior and informed consent. *Non-discrimination* is another essential foundation of minority and indigenous rights. This principle plays a fundamental role with regard to cultural distinctiveness. It can be viewed as a principle with an accessory character, in conjunction with which all indigenous rights should be read. *Participation* is the principle behind the requirement of indigenous peoples' involvement in matters that concern them. It has various dimensions. The principle could help secure a place for indigenous peoples in wider society, both procedurally (by way of political representation and input in decision-making processes) and culturally (through their culturally distinctive existence and ways of life). Respect for *dignity*, perceived as inherent to all human beings, is a central principle of the international human rights law framework as a whole. As we have seen in Chapter 5, McGonagle has distinguished a number of roles of dignity. These include a role as a principle, securing a place next to other fundamental principles.[2191] Indigenous peoples' rights to cultural integrity and to maintain and develop their own cultural identities and ways of life are rights that draw on self-determination, non-discrimination, participation and dignity principles. From this perspective, dignity should apply to indigenous communities as it does to individual human beings: the dignity that is inherent to culturally distinctive communities like indigenous peoples should be perceived as a fundamental principle that should shape legal norms and policies with regard to indigenous rights.

It is possible to discern the diverse TCE protection interests of indigenous peoples in these principles. What is more, these fundamental principles validate indigenous peoples' claims and confirm the need for TCE protection as a component of the realisation of various human rights. '*Cultural heritage self-determination*', for example, fits in with what are generally perceived as self-determination issues. The control, development and management of TCEs could be seen as an aspect of indigenous peoples' ways of life that they should be able to freely determine themselves. This resonates with all of the interests of indigenous peoples distinguished in this thesis, but in particular with their interests in control over their TCEs and, if they wish, continuation and (dynamic) preservation of their traditions. Non-discrimination is important for TCE protection in the acknowledgement of an indigenous dimension of, for example, the right to property and the right to benefit from the protection of the moral and material interests of one's scientific, literary or artistic productions. This should safeguard opportunities for benefit-sharing for indigenous peoples and recognition of their rights and cultural distinctiveness more generally as connected to their ways of life.

[2191] McGonagle 2007, p. 3.

The two main dimensions of the participation principle are vital to the realisation of various indigenous TCE protection interests, and vice versa. These dimensions are a procedural dimension, in the sense of consultation and free, prior and informed consent, and a cultural dimension, in the sense of practice, existence and continuation of cultural traditions. The former plays an important role in responding to interests in benefit-sharing, control or free, prior and informed consent and recognition of their rights. Conversely, TCE protection that foregrounds indigenous peoples' input and usage conditions contributes to the realisation of indigenous peoples' rights to participation and self-determination. The second dimension plays an overarching role for all protection interests. Cultural participation of indigenous peoples requires the protection of TCEs in order to guarantee their control, management and development of cultural heritage. On the other hand, effective protection of indigenous peoples' TCEs can contribute to the recognition of their cultural distinctiveness and safeguarding of the (spiritual) integrity of their heritage. This furthers their ability of cultural participation.

The principle of dignity is inherent to the acknowledgement of the role that TCEs play for indigenous peoples' identities and for maintaining the integrity of their cultures and cultural expressions. Protection of their heritage and TCEs is an essential aspect of maintaining their distinctive existence and their ability to continue their ways of life, if so desired. Vice versa, the dignity principle would also require circumstances and measures to be realised that guarantee the enjoyment of indigenous peoples' specific ways of life, including the protection of their heritage. The same goes for the other principles. TCE protection and human rights principles are interdependent. TCE protection is required for realisation of the effective enjoyment of various human rights. At the same time, arguments for protection as such can be based on various human rights.

7.1.3 From disparate rules to principles and shared central values: a systems perspective

If we look beyond the perceived fragmentation on the level of rules and focus on the underlying principles, it is possible to uncover shared central values. This transforms our legal perspective from fragmentation to value-based convergence and confirms the legal framework as a complex systemic whole. A value-based perspective of copyright law, cultural heritage law and human rights law shows that they are actually significantly intertwined in the context of the protection of indigenous peoples' heritage and cultural expressions.

Viewing TCE protection from the perspective of these values converges the discussion in a holistic way and contributes to legal interoperability and cross-fertilisation of the various approaches and means of the legal framework when it comes to TCEs. The systemic perspective described in the introduction of the thesis provides the basis for this: all three legal systems interact and interrelate. This explains the possibility of identifying central values that are shared in a transdisciplinary way. These values, in turn, clarify the appeal of each part of the system for TCE protection. The three shared values that can be distilled from the legal chapters' principle-based analyses are: dignity and identity; respect; and participation and democratisation of the discourse.[2192]

The next section examines the legal diversity from a systemic perspective, shaped by these three identified shared values. To highlight these values in the protection discussion, aspects of the various legal responses are drawn together that are essential for any holistic regulation

[2192] For the latter see also Vadi & De Witte 2015, p. 9–10.

of the multi-faceted issue of TCE protection. This way, the contours and main principles of TCE protection become clearer. The values do, however, require translation and implementation to affirm them in legal reality, hence their qualification in this thesis as 'operative values'.[2193] Once operationalised, these values can guide both the elaboration of norms that address various parts of the TCE protection question and the measures to be taken. A crucial precondition for a coherent approach to this elaboration is that any body, or collective of institutions, that takes up this task takes the whole width of the system into account, driven by the shared central values.

7.2 Shared central values of the existing legal framework and TCEs

So, what are these central values and how can they be useful? For value operationalisation, we can turn to what Bhikhu Parekh calls "society's operative public values."[2194] He suggests this approach in the context of discussions on cultural or traditional practices in a multicultural society. These values can provide a starting point and a context for such discussions, and contribute to a dialogue and potential consensus as an outcome.[2195] Also, for this thesis, the identified values can offer guidance and a premise to start from for the application, interpretation and design of rights and rules on TCE protection.

Parekh explains that society's operative public values are values, because they are treasured by society, aspired to be adhered to and used to measure its members' behaviour. These values are public because they are incorporated in society's public institutions and practices and direct the public conduct of citizens. And the public values are operative because they move beyond mere ideals. Instead, they are actively taken into account and form a "lived social and moral reality." They comprise the "primary moral structure" of a society's public life.[2196] Parekh also notes that these values are not static, but change parallel to changes in society, and are not rigid, but open to interpretation.[2197]

It is useful to apply this approach to the central values distinguished for the legal framework of this thesis. They form a 'shared moral structure' behind copyright law, cultural heritage law and human rights law generally. However, taking a value-based approach to TCE protection one step further, the operationalisation of these general values must be interpreted with an indigenous dimension in mind. This ensures the effectiveness of the approach in the context of protection of indigenous peoples' TCEs. This is comparable to the human rights system, in which an indigenous dimension is acknowledged in the interpretation of various general human rights to guarantee their effective enjoyment.[2198]

The first of this thesis' operative values is *dignity* in conjunction with *identity*. As a foundational purpose of international human rights and a guide in grounding these rights and shaping the environment in society in which they have to be substantiated, McGonagle has also considered dignity to be an operative public value.[2199] For our purposes, dignity and identity are also designated as guides for the interpretation and application of rules regarding the protection of indigenous peoples' heritage, such as their TCEs. These values suggest that

[2193] Freely using Parekh's theory of "society's operative public values", Parekh 2000, p. 267.
[2194] Parekh 2000, p. 267.
[2195] Parekh 2000, p. 267.
[2196] Parekh 2000, p. 269.
[2197] Parekh 2000, p. 269.
[2198] See General Comments of various UN human rights treaty bodies.
[2199] McGonagle 2007, p. 3.

the role that TCEs play in the identity formation of their source communities and the important part that identity plays for human dignity should be acknowledged.

In this sense, indigenous peoples' dignity and identity, or in short: an indigenous dimension, should be taken into account in any approach to TCE protection. This means that various problematic perspectives that are visible in the TCE protection discussion should be remedied by operationalisation of the values of dignity and identity. These issues include: a static view of indigenous heritage as mere commodities in the public domain; ownership issues; dismissal of protection of indigenous peoples' knowledge and heritage on the ground that they do not fit existing rationales and categories and are in the public domain; and a lack of cultural self-determination of indigenous peoples generally. Instead, the values of dignity and identity demand an indigenous dimension to be taken into account to ground the multiple human rights that are at stake in the context of their heritage – amongst others self-determination, freedom of expression and participation – and to create a place of understanding in society in which TCE protection can be operationalised.

Another operative value is *respect*. Respect is perhaps the most general value that can underlie any legal system. In our case, it has different nuances per legal area. It is for example inherent to the moral rights of copyright law in the sense that these provide rights for authors to demand respectful conduct with regard to their works. They can do so by claiming attribution and objecting to any distortion, mutilation or modification that compromises their honour or reputation. In cultural heritage instruments, respect for other countries' or communities' heritage is a central theme for safeguarding purposes. And in human rights law, respect for the human rights of every person is a central benchmark to scrutinise the conduct of states.

Overall, and based on the system as a whole, the value of respect can be summarised as a demand for any TCE protection approach to take the specific characteristics and context of TCEs into account. Making this value operative means that protection rules should foreground respect for indigenous peoples' ways of life, world views and customs. This may mean that attribution is a baseline, that risks of distortion are remedied by a strong focus on consultation and that collectiveness is recognised. Furthermore, following the approach of various cultural heritage conventions, stimulation of awareness-raising and dialogue between society and source communities can play an important role as an incubator of understanding and, consequently, respect for indigenous peoples' positions and ways of life.

Participation and democratisation of the discourse is another set of operative values. They appeal to the dynamic nature of laws, as living instruments, to accommodate changes in society. In this sense, participation also concerns legitimacy issues. In cultural heritage law, the indispensable role of indigenous source communities in the safeguarding and dynamic production of cultural heritage is starting to emerge. Although this emphasis still occurs only sparingly, it raises awareness for the absolute necessity of the participation of source communities in the design and application of safeguarding measures with regard to their heritage. In human rights law, participation is an actual right, which states should ensure effective enjoyment of. In an intellectual property context any indigenous dimension, however, is generally lagging behind. WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is working on rules based on state negotiations. There is an indigenous panel during the sessions of the Intergovernmental Committee in which viewpoints can be presented, but the adoption of any

instrument is ultimately up to state parties. Late 2016 saw reports of funding issues at WIPO,[2200] which further endangers any indigenous participation or representation.

However, for any effective TCE protection approach, the indigenous dimension and perspective are indispensable. This can prevent misunderstandings about what is actually at stake, which tends to be shaped by a persistent mainstream intellectual property perspective. However, this one-dimensional perspective is unlikely to grasp the broader implications of the issue, with all the consequences this entails. What is more, indigenous peoples' participation cannot only debunk prejudices and explain more clearly the actual pressure points to be addressed, they also have a right to participate in decision-making on rules that affect them.[2201] In other words, effective TCE protection clearly requires operationalisation of these values for credibility and legitimacy purposes, for example by putting into place safeguards for indigenous participation in decision-making procedures and eventually in the management of protection and preservation policies. This likely requires efficient coordination and representation efforts, but given the fact that UNDRIP did manage to be adopted with significant indigenous input,[2202] it is not unattainable.

McGonagle has identified "pluralism, tolerance and broadmindedness" as other examples of operative public values, as the European Court of Human Rights has systematically repeated these as prerequisites of democratic society.[2203] We have seen that, in the same vein, respect for indigenous peoples' distinctive ways of life and rights and participation of indigenous peoples are values that are continually stressed by UN treaty bodies in their General Recommendations and Concluding Observations. This affirms that respect and participation can be considered to function as operative values both for the recommendations in this thesis and generally as values of high importance for any approach to TCE protection.

Each of the three values can also be linked to the various distinct protection interests of indigenous peoples. Dignity and identity are inherent to indigenous peoples' ways of life, cultural heritage and the concerns for continuation, preservation and (cultural) existence that communities may have. The value of respect can be recognised across the board: it motivates calls for recognition of indigenous peoples' rights and acknowledgment of their distinctive viewpoints and ways of life, including with regard to the protection of their heritage and cultural expressions. Participation and democratisation relate to indigenous concerns of control, benefit-sharing, (procedural) participation, free, prior and informed consent and continuation, preservation and (cultural) existence, or (cultural) self-determination. The values and their presence and specific form in the distinct legal areas are set out in more detail below.

7.2.1 Dignity and identity

Dignity and identity form a central line of values behind all three legal frameworks. For copyright law, these values are visible under the author's rights tradition, and in particular in the context of the bond between the author and the work and the author's moral rights that are specific features of this tradition. The Berne Convention requires that authors have rights of

[2200] See: http://www.ip-watch.org/2016/12/06/will-voice-indigenous-peoples-disappear-wipo-discussions-protect-knowledge/.
[2201] See Articles 2, 6(1), 6(1)(b) ILO Convention No. 169 and Article 18 UNDRIP and section 5.3.6 of this thesis.
[2202] See section 5.2.3 of this thesis.
[2203] McGonagle 2007, p. 3.

attribution and to object to distortion, mutilation or other modifications that damage their honour or reputation.[2204] The features of the various moral rights draw heavily on the dignity and specific identity, or persona, of the author in relation to their intellectual work. These values suggest that the rights of authors to their work are to be protected, based on moral considerations such as the dignity and identity of authors as creators of the works. For TCEs, similar arguments tend to be raised. This does require a step from the strict individual nature of copyright law's moral rights to group interests. This is an example where the compatibility of indigenous-specific characteristics such as collectiveness and mainstream legal understandings and perspectives is difficult. All the same, for TCE protection to be effective we can still deduce the values of dignity and identity at an abstract copyright level as essential for guaranteeing an indigenous dimension of any protection approach.

For cultural heritage law, dignity and identity are central values that have motivated cultural heritage protection from its earliest origins in the context of war and conflict. This has remained so throughout the shifts and developments in cultural heritage discourse towards recognition of cultural context and dynamic, living heritage and cultures. Most illustratively, this line of argument is visible in the reasoning behind the prosecution in the first case before the International Criminal Court that deals with the destruction of cultural heritage. Ahmad al-Faqi al-Mahdi is to stand trial for the demolition of ancient mausoleums and a mosque in Timbuktu in 2012. His arrest warrant was issued for war crimes of intentionally directing destructive attacks against historic monuments and buildings dedicated to religion.[2205]

Particularly interesting is the prosecutor's emphasis on the identity element of cultural heritage destruction at a pre-trial hearing. She stated that the heritage destroyed was not only historically and religiously important, but also reflected the image and identity of Timbuktu. Consequently, the collective identity of the people of Timbuktu had been erased through the destruction of the mausoleums. She cited Mali's Minister of Culture, who stated in 2013: "an attack on the lifeblood of our souls, on the very quintessence of our cultural values. Their purpose was to destroy our past, […], our identity, and, indeed, our dignity."[2206] And an expert of the International Bar Association commented on the case as follows: "destruction of cultural heritage is not a second-rate crime. It's part of an atrocity to erase a people."[2207]

The cultural heritage perspective of the value of dignity and identity indicates the interaction with the human rights framework. The destruction of cultural heritage is considered to be an assault on the dignity and identity of peoples. It thus infringes their human rights such as provided for in Article 27 ICCPR and 15(1)(a) ICESCR. Indeed, dignity is a central value of human rights law from the very conception of the international human rights law framework. The identity of minorities and indigenous peoples is also inherent to multiple cultural and indigenous rights. These rights guarantee that minorities and indigenous peoples can lead a culturally distinctive existence, based on their own traditions and practices.

[2204] See Article 6bis(1) of the Berne Convention.
[2205] See for a summary fact-sheet of the case: https://www.icc-cpi.int/iccdocs/PIDS/publications/AlMahdiEng.pdf.
[2206] See for the pre-trial hearing statements of 1 March 2016: 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi', ICC Press Release, 1 March 2016, available via: https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16.
[2207] 'ICC's first cultural destruction trial to open in The Hague', The Guardian, 28 February 2016, available via: http://www.theguardian.com/law/2016/feb/28/iccs-first-cultural-destruction-trial-to-open-in-the-hague.

Taken together, these reasons and contexts also explain why dignity and identity play a large role in the arguments for TCE protection. The bond between communities and their living heritage is continuously stressed. Control over this heritage is important for the maintenance of community identities, the relationship of the source communities with their heritage and, consequently, the intrinsic value of the heritage in question. This intrinsic value would run the risk of being diminished by unauthorised appropriation and reduction of the cultural material to mere commodities. It is not only the unjust 'taking' of the material without consultation or consent that would pose this risk, misrepresentation or negative stereotypes often, or even *especially*, do so as well.

TCEs, as part of indigenous peoples' heritage, are often considered instrumental for the formation of their identities. Indeed, indigenous peoples' knowledge and cultural expressions form part of their dynamic, living heritage, part of their culturally distinctive existence. This is connected to human rights that guarantee ways of life and to exist in a culturally distinctive way, with own languages, cultural traditions and practices. And, of course, a level of self-determination and control over (cultural) destinies and development is crucial, including a say over immaterial resources, cultural heritage, knowledge and cultural expressions. States should not only respect these rights, but also protect and fulfil them. This can include protection of indigenous peoples' heritage, or supporting and empowering indigenous peoples to do so themselves. It can also include protection against harmful representations and stereotypes. In sum, these are all aspects that guarantee the safeguarding of distinctive identities and inherent dignity of TCE source communities.

7.2.2 Respect

The value of respect underlies all three legal systems generally, yet in a fundamental way. Respect for another person's or group's property, cultural heritage, identity and ways of life is a basic condition for the effective enjoyment of persons' or communities' rights. It is also a value that is difficult to regulate or construct legal rules for. Like dignity, it usually takes on a role as a principle or objective in preambular considerations rather than as a substantive provision in legal texts. Through targeted measures, policies and programmes, for example in the context of awareness-raising and capacity-building as various cultural heritage conventions prescribe, it is still possible to operationalise levels of the value of respect that are desired for effective TCE protection. Furthermore, as an issue that faces multiple difficulties under existing legal concepts and frameworks, TCE protection could benefit from dialogue and interpretations of legal rules and concepts that respect diverging viewpoints and understandings. In this sense, it is obvious that respect should be a central value in the context of use and effective protection of indigenous peoples' resources, heritage, knowledge and TCEs.

Each mainstream legal regime discussed in this thesis comprises core principles and arguments that encompass the value of respect. The place of indigenous peoples' cultural heritage under these existing legal structures and understandings of concepts is a central issue. Whereas, for example, use of material that has entered the public domain is accepted under copyright law's rules and is legal in mainstream society, for indigenous communities such use can be perceived as objectionable and misappropriation. A discrepancy is visible between efficiency and economic considerations on the one hand, and other factors such as cultural and spiritual relationships and integrity on the other hand. Guided by the value of respect, and drawing on copyright law's moral rights to object to distortion and derogatory acts, it is possible to argue for regulating some middle ground of respectful conduct towards indigenous

peoples' heritage. This addresses at least some of their central concerns of a non-economic nature.

Respect for cultural heritage, for example in situations of war and conflict, goes back to ancient times. It is one of the central principles of the 1954 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. One of the main obligations of this convention is for states to abstain from activities that could damage cultural property and from direct hostility towards it.[2208] Respect is also a central principle and obligation of the 1970 Illicit Trade Convention. Measures that national heritage services and states themselves must take include educational measures to stimulate and develop respect for the cultural heritage of all states and to restrict illegalities by education, information and vigilance, respectively. Raising public awareness of the damage that cultural heritage faces from illicit trade is another measure.[2209] Something similar is laid down in the 1972 World Heritage Convention.[2210] In other words, bringing about more general respect for other peoples' heritage is used as a tool to safeguard cultural heritage. Vice versa, education and awareness-raising contribute to operationalisation of the value of respect.

For many years, the main approach to cultural heritage protection has been to devise instruments to safeguard and preserve *artefacts*. But this has changed with shifts towards acknowledgement of the living nature of, in particular indigenous, intangible heritage and the increasing attention for the importance of cultural diversity. Still, the principle of respect has remained. The 2003 UNESCO Intangible Cultural Heritage Convention has as one of its purposes to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned.[2211] Protection and respect of the ways of life and sustainable development of source communities is a central principle in the context of intangible cultural heritage protection. The principle of respect is also reflected in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The promotion of respect for the diversity of cultural expressions and to raise awareness of its value is one of the objectives of this convention.[2212] Furthermore, one of the guiding principles of the convention to protect and promote the diversity of all cultural expressions is the principle of equal dignity of and respect for all cultures. The cultures of persons belonging to minorities and indigenous peoples especially are highlighted.[2213]

In human rights law, (respect for) culturally distinctive ways of life are protected under Article 27 ICCPR and Article 15(1)(a) ICESCR. In this sense, TCE protection is partly concerned with ensuring dynamic and continuous development of the ways of life of cultural groups, such as minorities and indigenous peoples. The value of respect is also tied to each of the central human rights principles that were identified in Chapter 5: self-determination, non-discrimination, participation and dignity. To operationalise this value, self-determination implies that autonomy and self-development should be respected, while non-discrimination implies that equality must be ensured. Participation entails that hearing the voice of those whom decisions concern should be respected and the ability of persons to participate in the cultures of their choice safeguarded. Dignity implies that ways of life and culturally distinct identities should be respected.

[2208] See Article 4 of the 1954 The Hague Convention.
[2209] See Article 5 and Article 10(a) and (b).
[2210] See Articles 1 and 2 juncto Article 27 of the Convention.
[2211] See Article 1(b) of the Convention.
[2212] See Article 1(e) of the Convention.
[2213] See Article 2(3) of the Convention.

7.2.3 Participation and democratisation of the discourse

Participation of indigenous peoples and democratisation of the discourse on TCE protection requires a move beyond mere *application of rules to* indigenous peoples and towards *involvement of indigenous peoples in* the design and implementation of rules that affect them, for example their cultural and land and resources-related affairs.[2214] Democratisation of the discourse can also be viewed as an organic development that cannot be ignored given the current climate and trends where indigenous communities actively raise their voices and demand to be heard. In a way, one could also view this development as a remedy for first the blatantly ignoring, even annihilating, of indigenous peoples in the history of international law and subsequently the assimilation approach towards indigenous peoples, such as is visible in ILO Convention No. 107. At the heart of participation lies recognition of indigenous peoples' distinctive existence and their corresponding rights.

Central lines in all areas point in the direction of a certain, or at least growing, acknowledgment and participation of indigenous peoples. It is inevitable that existing legal systems, in their capacity of living instruments, have to respond to changes in society and accompanying challenges from diverging viewpoints and understandings. For copyright law *proper*, 'new voices' have only marginally, if at all, made their way into international copyright law-making structures. The response to early calls for TCE protection in a copyright context were attempts to include folklore in the existing copyright treaties such as the Berne Convention. In other words, the value of participation is only visible in a limited way and copyright law has remained fairly closed off and rigid towards any inclusion of new voices, or participation as such, within existing structures. This is the result of the highly politicised topic that is international copyright law-making, which largely remains a domain of states. This is an indication that the international copyright system as such does not provide space for the incorporation of indigenous voices. International copyright law has proved to be practically a no-go area for regulating protection of TCEs with the involvement of indigenous communities themselves. The next step on this level was to design international *sui generis* treaties for traditional knowledge, genetic resources and TCEs within the international intellectual property structure of WIPO, with the specific objective of meeting the actual needs of communities.[2215] The value of participation at this level is further analysed in section 7.4.1.

[2214] See the controversies surrounding a new bill in Finland that would by-pass indigenous peoples in decisions regarding the management of state owned lands, thereby failing to safeguard indigenous peoples' rights to their traditional lands, resources and livelihoods. Central in the controversy is the lack of involvement of indigenous peoples in the processes surrounding the new bill and the lack of consultation to obtain indigenous peoples' free, prior and informed consent in matters that affect them. See news items on the bill at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16897&LangID=E (17 December 2015) and http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18510&LangID=E (22 March 2016).

[2215] WIPO/GRTKF/IC/17/4, Annex, p. 3, I.(iii): "The protection of traditional cultural expressions, or expressions of folklore, should aim to: be guided by the aspirations and expectations expressed directly by indigenous peoples
and communities and by traditional and other cultural communities (…)."
See also the *Core principle of responsiveness to aspirations and expectations of relevant communities* of WIPO/GRTKF/IC/7/3, Annex I, Core principles, p. 2-3: "Protection should reflect the aspirations and expectations of indigenous peoples and traditional and other cultural communities; in particular, it should recognize and apply indigenous and customary laws and protocols as far as possible, promote complementary use of positive and defensive protection, address cultural and economic aspects of development, address insulting, derogatory and offensive acts, **enable full and effective participation by these communities**, and recognize the inseparable quality of traditional knowledge and TCEs/EoF for many communities. (…) [bold added]"

In the legal cultural heritage framework, awareness of a more dynamic understanding of the concept of culture and, consequently, of the notion of cultural heritage and its protection has gradually grown. Criticisms of overly narrow conceptions and definitions spurred the widening of categories and rationales of cultural heritage protection, for example beyond tangible heritage and static safeguarding for the benefit of all mankind. The importance of living intangible cultural heritage, cultural diversity, cultural contexts and the role of communities in cultural heritage production and safeguarding has increasingly drawn attention. This perspective on cultural heritage law highlights the ways of life and sustainability of the source communities concerned. In other words, the existence and conceptions of 'other actors' and voices have been increasingly acknowledged in this legal context, up to (at least, in theory) inclusion in the selection of the intangible cultural heritage to be protected and the management of this cultural heritage protection. It is not clear how participatory policies that are based on the 2003 UNESCO Intangible Cultural Heritage Convention are in practice.[2216] Grass-roots and indigenous-driven protocols and Codes of Ethics for the functioning of cultural heritage institutions can play a guiding role in the context of participation and indigenous peoples' (intangible) cultural heritage and for a more democratic and inclusive approach.

For the human rights framework, the momentum building around attention for indigenous peoples' rights and participation led to an unprecedented opening up of the UN system.[2217] Representatives of indigenous peoples were allowed to talk and participate in sessions of the UN Working Group on Indigenous Populations without needing consultative status. The number of participating representatives increased to one thousand per year. This set the scene for continued active involvement in the next development of the Working Group: drafting an indigenous rights declaration. With indigenous voices clearly present, representatives participated as full, active advocates and direct drafters in the three sub-groups concerned with the drafting.[2218] The draft text represented indigenous viewpoints to such an extent that some states were concerned about its radical nature, for example regarding issues of self-determination and property rights to land and resources.[2219] The participatory approach to indigenous matters thus originates in the human rights law structure. Importantly, participation increasingly becomes a basis value, or even a 'framework right' in itself, in human rights law as well. Participation, consultation and free, prior and informed consent are notions that feature more and more prominently in the interpretation of existing rights, especially in their indigenous dimension, and in the practice of human rights tribunals.[2220]

The CESCR has, for example, emphasised participation in General Comment No. 21 and General Comment No. 17 on Articles 15(1)(a) and (c) ICESCR. In General Comment No. 21, the Committee highlights that it is a core obligation under the provision to stimulate and allow persons belonging to indigenous peoples to participate in the design and implementation of policies that affect them. States should especially obtain their free, prior and informed consent in the context of the preservation of their resources, which are related to their ways of life and

[2216] Aykan 2013, p. 382.
[2217] See on this history the account of one of the principal actors involved, Augusto Willemsen-Diaz, Willemsen-Diaz 2009, p. 16–31.
[2218] Willemsen-Diaz 2009, p. 28.
[2219] Barelli 2010, p. 954, 956–957; Willemsen-Diaz 2009, p. 28.
[2220] See, for example, HRC Länsman et al. v. Finland 1994, par. 9.5; HRC Mahuika et al. v. New Zealand 2000, par. 9.5, 9.6, 9.8; HRC Ángela Poma Poma v. Peru 2009, par. 7.6; Inter-American Court of Human Rights 28 November 2007 (*Saramaka People v. Suriname*), par. 129, 130, 131, 133, 134-136, 137; Inter-American Court of Human Rights 27 June 2012 (*Kichwa Indigenous People of Sarayaku v. Ecuador*), par. 159-211.

cultural expressions.[2221] In General Comment No. 17, the Committee states that the failure to provide adequate opportunities for authors or groups of authors to actively and informedly participate in decision-making processes that affect their right to benefit from the protection of the moral and material interests of their productions is a violation of states' obligation to fulfil under Article 15(1)(c).[2222] In other words, an informed and inclusive balance of interests should be the goal of a TCE protection regime.

Criticisms of state-centredness

In recent years, criticism has been directed at the UN's state-orientation, despite the initial opening up of the system in the specific context of the UNDRIP drafting process at the UN Working Group on Indigenous Populations. Calls are made for greater participation of indigenous peoples in United Nations bodies.[2223] Participation was a recurring theme at the fifteenth session of the UN Permanent Forum on Indigenous Issues in May 2016.

If we look at the cultural heritage framework, this has cautiously incorporated a more inclusive approach in the UNESCO Conventions of 2003 and 2005 on intangible cultural heritage and cultural diversity, respectively. These Conventions more or less prescribe involvement – or at least recognition of the roles of – source communities. Clearly, prior conceptions and understandings of what cultural heritage protection is to entail were not immune to new voices and values in cultural heritage discourse. However, UNESCO's practices have also been criticised in a 2016 study conducted for the UN Permanent Forum on Indigenous Issues' fifteenth session. In this *Study on how States exploit weak procedural rules in international organizations to devalue the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights law*, UNESCO's approach in the context of the inscription on the World Heritage List of world heritage by the World Heritage Committee has been condemned for its state-centeredness and ignoring indigenous peoples' participation rights.[2224]

As for the copyright law system, it is striking that it has resisted opening up to indigenous peoples' heritage and perspective for so long. Apart from some attention for the protection of folklore via an anonymous works construction, this is the only legal area assessed in this thesis that has otherwise remained mostly static in its response to TCE protection. In a way, it is the (most) stubborn legal sibling of this story. UN treaty bodies such as the CESCR and CERD have however flagged the lack of protection under existing copyright laws as disregarding indigenous peoples' rights. The strong correlation between copyright law's public domain value and the fundamental freedom of expression could be a reason for the difficult relationship between copyright law and TCEs and indigenous views. Another reason could be, more simply, the strong political and industry lobbies that are involved in international intellectual property law making for economic reasons. WIPO has started developing a *sui generis* approach, which includes discussions of the topic in an indigenous panel. However, like UNESCO, WIPO has been criticised for state-centred procedures that diminish indigenous peoples' rights.[2225]

[2221] CESCR General Comment No. 21, par. 55(e).
[2222] CESCR General Comment No. 17, par. 46.
[2223] See 'Representatives of Indigenous Peoples Call for Greater Participation in United Nations Bodies, as Permanent Forum Concludes Week One', 13 May 2016, http://www.un.org/press/en/2016/hr5302.doc.htm.
[2224] Permanent Forum On Indigenous Issues 2016, p. 9–11.
[2225] Permanent Forum On Indigenous Issues 2016, p. 11–12.

All in all, attempts to move beyond state (agency) approaches and to include alternative viewpoints in understandings of legal concepts and dimensions and interpretations of existing rights are visible. But it is clear that the value of participation, recognised and confirmed in many instances, (still) has to be more effectively operationalised across all levels, from WIPO to UNESCO and the United Nations generally. It seems that this is one of the main difficulties that indigenous peoples currently face, be it in the context of land struggles, sustainable development and environment issues or, indeed, cultural heritage matters such as TCEs. For TCE protection as a specific part of indigenous peoples' rights struggles, the highly timely discussion on indigenous participation and democratisation of the discourse has to be continued and acknowledged as well.

7.3 Shared central values, legal and practical solutions and TCEs

This section assesses the 'look beyond' the existing legal framework, consisting of the initiatives and approaches to TCE protection explored in Chapter 6, in light of the shared central values. The section considers to what extent these initiatives reflect the shared central values, given that they are also part of the 'systemic whole' of normative standards, institutions and actors, both 'mainstream' and alternative and grass-roots, that interrelate and interact. Are they perhaps better at implementing and operationalising these values? In other words, what is their added value and what can we learn from them?

7.3.1 Connecting the shared central values and a *sui generis* approach

This section connects the suggestion for a *sui generis* TCE protection regime with the diversity of the legal framework that already exists. As established at the beginning of this chapter, the legal framework of this thesis shares three central values: dignity and identity, respect and participation. But how does WIPO's work follow or operationalise these shared central values? This section tests to what extent the *sui generis* approach operationalises the shared values and whether there is room for improvement. The legal initiative of WIPO's *sui generis* provisions aims at the realisation of intellectual property-like rules with an indigenous dimension. Rather than starting from scratch, grounding new, TCE-specific rules in existing normative values that capture indigenous concerns and rights could be an effective and strategic way to progress towards TCE protection with attention for values of dignity, identity and respect in the form of foregrounding an indigenous dimension. However, the fact that these developments take place on the level of international (intellectual property) law-making forebodes difficulties in the context of the participation value.

Dignity and identity

As we have seen, dignity and identity are central values in the various legal frameworks. This suggests that TCEs ought to be protected because of the role heritage plays in identity formation. Identity is an essential part of human dignity. Arguably, this is the case in particular for minorities and marginalised groups in society, which indigenous peoples often are. For such groups, maintaining a strong collective identity is an important tool of empowerment and survival within mainstream society, confirming their inherent human worth and dignity as distinctive cultural communities.

In a sense, dignity and identity are already reflected in WIPO's efforts to initiate the development of TCE-specific *sui generis* protection rules in the first place. WIPO essentially acknowledges the particular nature of indigenous heritage through this. This is also very clear

in the elaborate objectives and preamble of the Draft Articles, which pay attention to the specific reasons why TCE protection is warranted. On a more operational level, the very detailed and layered protection structure of the Draft Articles also seems to reflect the value of dignity and identity.[2226] The first option for the proposed scope of protection distinguishes between various types of subject matter to determine the specific protection conditions. More concretely, beneficiaries' exclusive and collective rights and users' obligations guarantee, for example, protection against distortion or mutilation, attribution of source and use that is respectful of cultural norms and practices. The specific nature of TCEs and the identity of indigenous peoples, and therefore their dignity as beneficiaries, are clearly taken on board here. Option 2 of the proposed scope of protection does not operationalise these values in a very detailed way. It simply demands of states that they safeguard the moral and material interests of the beneficiaries in TCEs. In sum, dignity and identity clearly give direction to WIPO's efforts. This is a good thing, as the indigenous dimension of the issue is an indispensable starting point to guarantee that any rights regime is practical and effective. This dimension should therefore also be a leading principle in practice and in implementations to ensure that rights are not merely theoretical and void of any practical meaning.

Respect

For TCE protection, this value suggests that mutual understanding and respect are a set of parameters that should be operationalised by any protection effort. Respect for indigenous peoples' ways of life is consistently stressed by human rights treaty bodies in their General Comments and Concluding Observations. Indigenous peoples' heritage, such as their knowledge and TCEs, is often a significant part of their way of life. Therefore, respect for their heritage contributes to the effective enjoyment of indigenous peoples' rights, be it their intellectual property rights, safeguarding of their cultural heritage or exercise of their cultural and indigenous rights, such as rights to their ways of life. As respect is difficult to regulate, it is interesting to see whether and how WIPO handles this in its Draft Articles. The draft document seems to come fairly close.

The Draft Articles contain various phrases that point to the value of respect in the sense of respectful use, such as user obligations of attribution and use with respect for cultural norms,[2227] the requirement that use under exceptions and limitations is not offensive or derogatory,[2228] rights to authorise or deny access on 'mutually agreed terms',[2229] conditions of consultation with the beneficiaries, prior informed consent or approval and involvement,[2230] and attention for customary protocols, understandings, laws and practices.[2231] This could contribute to dialogue and contact between beneficiaries and users, which is a first step towards respectful conduct and use of TCEs. The Fact Finding Missions (FFMs) also highlighted the need for cooperation, dialogue, exchange of information and contact between knowledge holders, users, governments, NGOs and other stakeholders. It should be noted here that this is not necessarily achieved solely by exclusive rights. Instead, the approach of the Nagoya Protocol to the Convention on Biological Diversity, notably Article 8(j) on traditional knowledge, is another avenue to operationalise the value of respect. One of the obligations of

[2226] Article 3 Draft Articles 2014 – Option 1.
[2227] Article 3 of the Draft Articles.
[2228] Article 5 of the Draft Articles.
[2229] Article 3.1(a)(iii).
[2230] Article 3.1(a)(iii), 3.1(b)(ii) and 3.2(b) on the scope of protection; Article 4.1 on the administration of rights/interests; Article 5.1, 5.3, 5.4(b) and 5.5 on exceptions and limitations; Article 6.1 on term of protection/safeguarding; Article 8.4 on sanctions, remedies and exercise of rights/interests.
[2231] Article 4.1 on the administration of rights/interests.

the Protocol is that states must take legislative, administrative or policy measures to ensure that the benefits resulting from the use of genetic resources held by indigenous or local communities are shared in a fair and equitable way and on mutually agreed terms.[2232] And generally, in the implementation of these obligations, states must take due account of indigenous peoples' customary laws, community protocols and procedures.[2233] What is visible here, beyond exclusive rights, is an approach of ensuring respectful conduct.

Such respectful conduct requires awareness. As Torsen Stech also notes, there seems to be a "gap in the public's understanding of the issue" of TCEs.[2234] This is reflected, for example, in the disconnect between and lack of awareness of the importance of indigenous heritage for source communities and the sensitivities of use of material that is perceived to be in the public domain. It is therefore crucial that the general public, and third party users in particular, are informed and educated. The question is whether a legal text alone can address this. For further operationalisation of the value of respect, WIPO can draw inspiration from various cultural heritage conventions. The 1970 Illicit Trade Convention requires states to take educational measures to stimulate and develop respect for the cultural heritage of all states and to restrict illegalities by education, information and vigilance. States should also raise awareness of the damage that cultural heritage faces from illicit trade.[2235] The 1972 World Heritage Convention echoes such obligations.[2236] The cultivation of respect for (other peoples') heritage is employed as a means to contribute to safeguarding of cultural heritage. This seems to be missing in the current Draft Articles. This is probably due to their intellectual property-inspired nature, but it could be a valuable addition nonetheless to operationalise the value of respect within this text as well.

Participation and democratisation of the discourse

WIPO has made significant efforts to map the actual concerns of stakeholder communities, for example by conducting extensive FFMs on the intellectual property needs and expectations of traditional knowledge holders.[2237] After an Intergovernmental Committee decision in 2004 that followed a proposal from New Zealand,[2238] an indigenous panel is being convened prior to each session of the Committee, where members of indigenous communities can voice their concerns and viewpoints.[2239] There are, however, a few remarks to be made here. Firstly, from the start, the main perspective of the Intergovernmental Committee's work has been an intellectual property view of the topic. This means that existing intellectual property views inevitably continue to filter through in discussions. As intellectual property debates at the international policy level are characterised by notoriously fierce industry lobbies, without proper opportunities to participate this can overshadow indigenous peoples' voices from being heard. Indigenous communities likely have less resources for counter-campaigns and can thus face difficulties going up against strong industry lobbies.

Secondly, while the participation efforts of WIPO are well-intended, the actual treaty negotiations remain processes between states, whose interests can diverge from those of indigenous communities residing in these states. So, while WIPO may aim to address the

[2232] Article 5(2) of the Nagoya Protocol.
[2233] Article 12 of the Nagoya Protocol.
[2234] Torsen Stech 2014, p. 432.
[2235] See Article 5 and Article 10(a) and (b).
[2236] See Article 1 and 2 juncto Article 27 of the Convention.
[2237] WIPO 2001.
[2238] WIPO/GRTKF/IC/7/14.
[2239] WIPO/GRTKF/7/15, par. 63. See also The Center For International Environmental Law 2007, p. 11–12.

intellectual property needs of indigenous and local communities and undertake efforts towards indigenous participation,[2240] this does not mean that this will be realised in practice or in a way that guarantees effectiveness rather than mere formalities. The state-centredness of WIPO processes is illustrated by the report of the IGC's Fifth Session of 2003 on the participation of indigenous and local communities.[2241] The report notes that members identified a number of guiding principles with regard to funding models for indigenous participation at the IGC's Fourth Session in 2002.[2242] These include that the selection process of funded communities must involve a certain role for governments.[2243] Other principles are that the funding and inclusion should not negatively impact WIPO's technical cooperation work or funding of government delegations,[2244] should not create a precedent for other WIPO committees[2245] and should not diminish the Committee's intergovernmental nature.[2246] These principles indicate that negotiations between Member States tend to be perceived as the prime orientation of the WIPO process. It is therefore not surprising that participation and funding of indigenous representatives remain topics that attract debate at the international level.

Operationalising the value of participation means that the participation of indigenous communities themselves, listening to their viewpoints and incorporating these accordingly should be the starting point of any protection effort. Article 31(2) UNDRIP also prescribes that states must take measures for effective protection of indigenous heritage *in conjunction* with indigenous peoples. The CESCR has also stressed in General Comment No. 17 on Article 15(1)(c) ICESCR[2247] that states must take the *preferences* of indigenous peoples into account when adopting measures.[2248] This is especially crucial in national implementations, where national and local indigenous needs and interests can be taken into account. Despite state-centred negotiations at WIPO, the crucial factor of indigenous peoples' right to participation in matters and decisions that affect them cannot be overlooked. Indeed, states are already under international law obligations to take this into account.[2249] An obvious risk of drawing on existing systems is that this could still shape a regime according to mainstream perspectives, rather than truly accommodating indigenous voices and viewpoints. The shared central value of *participation*, when operationalised, can address this concern.

[2240] See also: http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf, p. 2.
[2241] WIPO/GRTKF/IC/5/11.
[2242] WIPO/GRTKF/IC/5/11, par. 26.
[2243] WIPO/GRTKF/IC/5/11, par. 26(d); WIPO/GRTKF/IC/4/15, par. 23 (the Delegation of Algeria on behalf of the African Group), par. 42 (the Delegation of China), par. 56 (the Delegation of Morocco).
[2244] WIPO/GRTKF/IC/5/11, par. 26(c); WIPO/GRTKF/IC/4/15, par. 22 (the Delegation of Barbados on behalf of the Group of Latin American and Caribbean Countries (GRULAC)), par. 23 (the Delegation of Algeria on behalf of the African Group), par. 27 (the Delegation of United States of America), par. 28 (the Delegation of Romania, on behalf of the Central European and Baltic States).
[2245] WIPO/GRTKF/IC/5/11, par. 26(e); WIPO/GRTKF/IC/4/15, par. 22 (the Delegation of Barbados on behalf of the Group of Latin American and Caribbean Countries (GRULAC)), par. 24 (the Delegation of Denmark on behalf of the European Community and its Member States), par. 27 (the Delegation of United States of America).
[2246] WIPO/GRTKF/IC/5/11, par. 26(f); WIPO/GRTKF/IC/4/15, par. 22 (the Delegation of Barbados on behalf of the Group of Latin American and Caribbean Countries (GRULAC)).
[2247] The right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
[2248] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 32: "Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties."
[2249] As repeatedly stressed by the various UN human rights bodies in General Comments and Concluding Observations. See the section on the right to participation in Chapter 5.

All in all, given the risks of third party cross-border use, there are advantages to the topic being pursued in an international forum like WIPO,[2250] such as the many studies conducted and resources devoted to the issue, but there are various downsides as well. The first is an obvious one, which is that the topic is tackled from a one-dimensional perspective, heavily drawing on intellectual property structures. This is acknowledged by WIPO. The second is that existing international legal structures and frameworks are largely state-oriented. While WIPO works at including indigenous viewpoints via an indigenous panel, studies and information sessions, thereby contributing to the democratisation of the discourse, a 2016 study for the Permanent Forum on Indigenous Issues signals that Member States "have undertaken action within WIPO to diminish indigenous peoples' human rights."[2251] The study finds that procedural rules enable this and that indigenous peoples are excluded from the existing WIPO framework. Clearly, while the value of participation and democratisation may be recognised through an indigenous panel, the level of operationalisation needs to be improved. However, this is not merely a 'WIPO-problem' or TCE-related, but a wider and more deeply rooted indigenous rights issue.

To sum up

Overall, a *sui generis* model can meet specific indigenous concerns that are difficult to address through 'regular' copyright and cultural heritage law. Yet, there are two main issues to be resolved: what would be an achievable instrument and what would be effective? This depends on factors of workability, practicality and legal certainty on the one hand, and the diverse interests of local communities, states and tensions with the intellectual property framework on the other hand. One thing is clear: a one-size-fits-all approach is not sufficient or feasible. It seems best to therefore include a substantial degree of flexibility and abstraction, which covers a general baseline yet allows for further elaboration on a national or local scale, with a considerable level of inclusion and participation of the indigenous communities concerned.

A *sui generis* model such as the one WIPO proposes must be complemented by other thematic approaches and initiatives to also encompass mechanisms or tools for the protection of aspects of TCEs that are outside its expertise, or indeed mandate, such as cultural heritage mechanisms or cultural protocols. This way, any system for TCE protection will also come closer to covering the full spectrum of indigenous needs and concerns in a comprehensive and holistic way. Of course, the proposed *sui generis* protection can indirectly contribute to this, but other specific, non-IP measures that are outside WIPO's working sphere are indispensable to address indigenous needs that cannot be met in an intellectual property-like way. WIPO

[2250] For example in the fashion industry or in the context of counterfeit tourist souvenirs. For the latter, see for example: 'Calls for a crackdown on 'knockoff' Aboriginal souvenirs made in China and Bali' (SBS/National Indigenous Television (NITV), 22 August 2016, available via: http://www.sbs.com.au/nitv/article/2016/08/22/calls-crackdown-knockoff-aboriginal-souvenirs-made-china-and-bali).

[2251] The study states as examples that: "WIPO member States are arguing that they should be "beneficiaries of protection" rather than establishing indigenous-controlled institutions when the proprietors of knowledge are not known. Furthermore, States have pursued broad recognition of the notion of indigenous knowledge being in the "public domain" or "common heritage", thereby denying the status of such information as indigenous knowledge. In addition, States have attempted to remove references to customary law in the context of recognition of harm and benefits, despite the fact that both the United Nations Declaration and the Indigenous and Tribal Peoples Convention, 1989, provide for culture and cultural rights to be protected by existing or sui generis indigenous peoples' laws and practices. Unfortunately, States and the corresponding interests of pharmaceutical companies, multinational corporations and others have been primarily focused upon their own interests throughout those discussions." Permanent Forum On Indigenous Issues 2016, p. 11–12.

itself has pointed, for example, to cultural and other human rights and UNDRIP as a reference for indigenous peoples' aspirations.[2252] This confirms the legal tripartite approach undertaken in this thesis and the necessity of input from each of the various legal domains for TCE protection, when viewed from the perspective of indigenous peoples' diverse protection needs.

In conclusion, given the diversity of interests and aspects to be covered, a one-dimensional approach is bound to be ineffective. WIPO has also acknowledged this, as follows from the principle of flexibility and comprehensiveness of its guiding document of Revised Objectives and Principles. The IGC states that to achieve effective and appropriate protection, a wide variety of legal mechanisms could be required. A 'one-size-fits-all' or 'universal' protection template cannot adequately protect TCEs in a comprehensive way given national priorities, the diversity of legal and cultural environments and needs of local communities worldwide.[2253] A mix of legal instruments, or a legal 'toolbox', can also be a strength in this regard. It allows for the protection of TCEs in a multi-angled, targeted way, responding to the needs and interests at stake in particular circumstances. At least, this is the case as long as the various 'tools' do not diminish or hinder each other. So, this requires both flexibility and effective cooperation, dialogue and sharing of information and best practices of the various bodies concerned with (indigenous) heritage and human rights. But as each contributes to a specific part,[2254] together this could lead to comprehensive TCE protection.

One can imagine that, alongside WIPO, other UN bodies would take up the parts that are missing in WIPO's approach. The UN Permanent Forum on Indigenous Issues would be a place to discuss further the indigenous rights implications of TCE protection. In this context, indigenous heritage has indeed received attention already, including specifically in UNDRIP. At UNESCO, specific attention for indigenous heritage outside of the (persistent) sphere of states, national heritage and agencies seems to be warranted. Dignity and identity, respect and participation of indigenous peoples remain overarching parameters to be taken into account.[2255] As WIPO and UNESCO are specialised agencies of the UN, this perspective provides the groundwork for the recommendation in the next chapter that argues for cooperation within a shared framework, or at least towards a shared, common goal. This framework, involving WIPO, UNESCO and other UN bodies, could contribute to more holistic protection of indigenous peoples' heritage with coordinated approaches based on their focal expertise. This could create greater coherence across the board instead of isolated approaches to specific parts of the issue.

[2252] See the IGC's Draft Gap Analysis, Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11. Here, the Secretariat of the IGC studied the possibilities and gaps on the international level with regard to the protection of TCEs. It identifies a conceptual divide "between the aspirations and perspectives of indigenous peoples and the conventional IP system." For these "fundamental differences", non-IP mechanisms such as cultural and other human rights are suggested to meet indigenous needs that cannot be met within the IP system. UNDRIP is highlighted as a source reflecting indigenous peoples' aspirations in this regard.

[2253] WIPO/GRTKF/IC/17/4, 21 September 2010, p. 9 (d).

[2254] Be it safeguarding intangible cultural heritage (Article 1, 11-15 2003 UNESCO Intangible Cultural Heritage Convention); ensuring the diversity of cultural expressions (Article 1, 5-8 2005 UNESCO Cultural Diversity Convention); guaranteeing indigenous peoples' rights, such as self-determination and cultural rights, including to their ways of life, heritage and TCEs (Articles 3, 11, 31 UNDRIP, Article 27 ICCPR and Article 15 ICESCR); protecting TCEs from misappropriation (Article 3 Draft Articles 2014); or establishing benefit-sharing (Article 3 Draft Articles 2014).

[2255] See section 6.2.

7.3.2 Connecting the shared central values and (practical) solutions

The flexibility that is required for more universal, overarching approaches such as WIPO's *sui generis* regime is already inherent in the very nature of the community-specific, indigenous-driven alternatives that have been identified in section 6.3. These are not bound to existing definitions or understandings, or even the need to formulate those in a way that is universally agreed on or satisfactory. Alternative approaches can be produced on a local or community basis, responding to specific circumstances, interests and immediate concerns. Although they are fully independent from existing, mainstream legal definitions and understandings, they are still part of the systemic whole of rules, (legal) institutions and initiatives. They may thus 'instinctively' reflect these values, which would attest to their status of true operational values of this thesis that are aspired to be adhered to. This section puts this theory to the test.

Dignity and identity

The dignity, or inherent worth, of indigenous peoples and the role that their heritage plays for their identity formation is the very starting point of the development of practical approaches to TCE protection. It is precisely because mainstream legal systems, norms and understandings either cannot meet or diverge from specific indigenous circumstances and knowledge systems that these alternatives are turned to.

The practical initiatives and their specific tools and measures aim to contribute to the prevention of unintentional harm, inform the public on the value and importance of the materials for their source communities and bridge any gaps in public understanding of the issue.[2256] This way, they operationalise the values of dignity and identity. Communities' inherent dignity and identities face threats due to their often marginalised and vulnerable position in society. The fact that labels, licences and protocols draw on customary systems and laws means that they specifically take indigenous viewpoints, or an indigenous dimension, as benchmarks for protection. They can operate in a 'tailor-made', contextual and local way. Furthermore, attribution, appropriate conditions of use and contact and dialogue between source communities, users and cultural heritage institutions are measures of the alternative approaches that are indeed informed by the values of dignity and identity of the holders and producers of the heritage.

In other words, dignity and identity seem to inspire and shape the alternative protection approaches to TCE protection. Conversely, when these alternative approaches are in force, they operationalise the values of dignity and identity.

Respect

The practical approaches to TCE protection come close to operationalisation of the value of respect because of the dialogue, negotiations and educational approach that are at the heart of the various initiatives. Of course, as (most of) these are not binding, but voluntary agreements and guiding norms, they could be regarded as weak and ineffective. However, their strength lies in their normative persuasion of users or cultural institutions and industries 'to do the right thing'. For a topic so specific, sensitive and broad-ranging as TCE protection, information and education are key. This is where these approaches prove their specific value as opposed to top-down, exclusivity and prohibition-based legal rules.

[2256] Torsen Stech 2014, p. 432.

Through labels, protocols and codes of ethics, the value of respect can be operationalised by providing missing information, explaining the value or sensitivity of particular materials and facilitating dialogue and respectful communication, negotiations and agreements. These approaches can fill the legal void that calls for respect face and which tends to be so difficult to regulate. In sum, with the cooperation of willing actors and 'natural allies' such as cultural heritage institutions and professional societies, practical protection approaches can clearly contribute to operationalisation of the value of respect.

Participation and democratisation of the discourse

Protection approaches such as those described above circumvent various risks or pitfalls of a *sui generis* approach such as that developed by WIPO. The first is that dominant, legal perspectives such as that of the intellectual property regime are avoided, because the practical initiatives are largely, if not completely, developed outside existing legal structures. They can of course be informed by the existing legal framework, but indigenous viewpoints, cultural protocols and customary norms are guiding and central. This way, these protection approaches inherently operationalise the value of indigenous participation in their strategies and measures.

Because existing legal structures and, importantly, the involvement of international institutions or national governments are absent, political compromises are also avoided. The strength of practical initiatives is that they can be tailor-made in an ad hoc fashion, developed bottom-up and made effective through negotiations, mutual understanding and agreement with source communities' (customary) input. However, pan-indigenous overarching approaches will likely face difficulties, as the Australian labels example illustrates. Legitimate, fair representation, or democratisation of (alterative) discourse, is therefore a pressing requirement for any initiative to work, even from a bottom-up approach. For international initiatives, due to the international 'traffic' of TCEs, another necessary requirement is coordination. However, this is likely to require substantial financial resources as well.[2257]

To sum up

The practical protection approaches mainly aim to fill a 'practical protection' gap in existing legal frameworks. To this end, they tend to strive for addressing the insecurities that are the result of the challenges that indigenous heritage and TCE protection, but also especially access and use, face under this existing legal framework. Avoiding static legal scopes and categories, these initiatives clearly foreground dialogue, cooperation and mutual understanding to achieve the protection of TCEs. In other words: they are the epitome of relations of dignity, respect and democratic discourse in the context of indigenous heritage and related resources. They have an inherently flexible nature. As such, they are able to address the particularities of specific cases and communities and potential sensitivities of material. The practical solutions perform various extra-legal roles with educational, signalling and explanatory aims. This enables a balance between protection and access and use, in a sustainable and responsible way.

[2257] Drahos 2004, p. 33.

7.4 State obligations and legal interconnections

States are under a number of obligations to ensure the full and effective enjoyment of human rights. The trinity of obligations consists of obligations to respect, protect and fulfil human rights. These obligations also show the cross-connections between the various legal areas that are relevant for TCE protection in their own respective ways. To attain full and effective enjoyment of various human rights and comply with these obligations, states must take measures, for example to ensure indigenous peoples' participation, protect their (intellectual) property and cultural heritage, and guarantee the ability of indigenous peoples to (dynamically) continue their ways of life. In various general comments and recommendations, UN human rights treaty bodies have stressed requirements for states, such as to comply with their obligations and have set out necessary steps and measures.[2258] The same goes for multiple Concluding Observations by the various treaty bodies.

These obligations and their elucidation by the UN human rights treaty bodies also reflect thematic and conceptual interconnections between the three legal areas of this thesis' legal framework. This again affirms that the legal areas are both interacting systems and part of a larger system in a holistic way in the context of TCEs. The obligations and their explanation can further help to set out contours for the protection of TCEs.

7.4.1 Obligations in an intellectual property and trade context

Intellectual property protection and the right to benefit from the protection of the material and moral interests of one's scientific, literary or artistic production are aspects of the rights protected under Article 15 ICESCR. The CESCR has explicitly recognised an indigenous dimension of these rights. In General Comment No. 21 on the right to take part in cultural life of Article 15(1)(a) ICESCR, for example, the Committee has identified indigenous peoples as vulnerable groups that require special protection under this right. The CESCR highlights their specific (cultural) traits such as the communal dimension and the role of traditional lands as fundamental values of indigenous cultural life.[2259] Moreover, the CESCR has highlighted indigenous peoples' heritage, traditional knowledge, TCEs and the manifestations thereof. In this General Comment, the Committee states that indigenous peoples have the right to collectively maintain, control, protect and develop their heritage. It refers to Articles 11-13 UNDRIP, but it could just as well have referenced Article 31 UNDRIP, of which it integrally repeats a part of paragraph 1. This Article also states the right of indigenous peoples to maintain, control, protect and develop their intellectual property over such cultural heritage. The CESCR also emphasises that states should respect the principle of free, prior and informed consent of indigenous peoples with regard to all matters that concern their rights.[2260]

The CESCR also delves into state obligations with regard to indigenous peoples' cultural productions in this General Comment. More precisely, the Committee specifies that the combined obligation to respect and protect the right to take part in cultural life comprises the obligation to respect and protect the cultural heritage of all groups and communities, especially disadvantaged and marginalised groups, in the context of economic development and environmental measures. This obligation is at stake especially in the context of

[2258] See for example: the CESCR's General Comment No. 21 on Article 15(1)(a) ICESCR and 17 on Article 15(1)(c) ICESCR; the HRC's General Comment No 23 on Article 27 ICCPR and the CERD's General Comment No. 23 on the rights of indigenous peoples.
[2259] CESCR General Comment No. 21, par. 36.
[2260] CESCR General Comment No. 21, par. 37.

globalisation and "undue privatization of goods and services." According to the Committee, states are under the explicit obligation to respect and protect the cultural productions of indigenous peoples, such as their traditional knowledge, folklore and other forms of expression. These productions must be protected from "illegal or unjust exploitation of their lands, territories and resources by States or private or transnational enterprises and corporations."[2261] This confirms the main finding of Chapter 5 of this thesis that TCE protection has a basis in human rights law and corresponding obligations.

In General Comment No. 17, the CESCR has also recognised an indigenous dimension of the right of Article 15(1)(c) ICESCR. The Committee specifically incorporates this dimension in states' obligations under the provision. The right that this provision protects is described as a human right that stems from the "inherent dignity and worth of all persons."[2262] Under the obligation to protect, states must take measures to effectively protect indigenous peoples' interests in their productions. In adopting these measures states should take into account their preferences, while in implementing these measures states should respect both the principle of free, prior and informed consent of the authors concerned and the oral forms of transmission of the productions.[2263] The Committee suggests various measures as well, such as recognition, registration and protection of indigenous peoples' individual or collective authorship under national intellectual property rights systems. These measures should prevent unauthorised third party use of indigenous productions. States should also, where appropriate, arrange collective administration by indigenous peoples with regard to the benefits of their productions.[2264]

In Concluding Observations, the CESCR has also referred to Article 15(1)(a) and (c) ICESCR in the context of intellectual property and indigenous peoples. The Committee has determined that indigenous peoples have collective rights to their traditional knowledge and cultural heritage under these provisions.[2265] It reprimands states in the context of various related issues, such as:

- non-recognition of indigenous peoples' collective authorship;
- lack of protection of their intellectual property, which includes their traditional knowledge and cultural heritage, under national copyright or other laws;
- indigenous peoples' right to derive benefits from their productions.[2266]

The Committee urges states to take measures to comply with their protection obligations under this right. According to the Committee, these include the development of intellectual property rights that are suitable for indigenous peoples' collective rights,[2267] such as rights to their works that reflect their traditional culture and knowledge,[2268] and the prevention of

[2261] CESCR General Comment No. 21, par. 50(b) and (c).
[2262] CESCR General Comment No. 17, par. 1.
[2263] CESCR General Comment No. 17, par. 32.
[2264] CESCR General Comment No. 17, par. 32.
[2265] See CESCR Concluding Observations Mexico 2006, par. 27; Bolivia 2008, par. 24; Australia 2009, par. 33 and 33(e); Russian Federation 2011, par. 34; Argentina 2011, par. 25.
[2266] See CESCR Concluding Observations Mexico 2006, par. 27; Bolivia 2008, par. 24; Australia 2009, par. 33 and 33(e); Russian Federation 2011, par. 34; Argentina 2011, par. 25.
[2267] See CESCR Concluding Observations Mexico 2006, par. 46; Bolivia 2008, par. 37; Australia 2009, par. 33(e); Russian Federation 2011, par. 34.
[2268] CESCR Concluding Observations Russian Federation 2011, par. 34.

unauthorised third party use.[2269] The foregoing clearly reflects principles of self-determination, non-discrimination, participation and dignity.

However, we have seen that the same Committee has also recognised that the protection of these rights does not have to take the form of intellectual property rights, as long as the protection offered is effective and suitable.[2270] One can think again of the approach of the CBD and the Nagoya Protocol on access and benefit-sharing on mutually agreed terms, taking into account customary laws, community protocols and procedures.[2271] In that sense, the seemingly persistent emphasis on existing national copyright or other laws is rather curious. It is realistic to say that regulating the issue of TCE protection under existing copyright laws can never be sufficient in itself and incorporate the diversity of all issues at stake. This is not only due to the system's inherent limitations for TCE protection, but also due to the diverse protection interests. In other words, for states to comply with the obligations in this context, a more 'mixed' approach is likely to be required in order for it to be effective and suitable. Drawing on the example of biodiversity, this could also take the form of entitlements to free, prior and informed consent and benefit-sharing that ultimately target 'conservation' and 'sustainable use' of TCEs.[2272] This would address self-determination interests, integrity concerns and sustainable continuation of indigenous peoples' ways of life. Or, in sum, this would guarantee the rights of indigenous peoples to take part in cultural life and to the protection of the moral and material interests of their productions.

7.4.2 Obligations with regard to cultural heritage

Indigenous peoples' heritage faces threats from multiple sides. A few examples are:

- globalisation, from a cultural diversity point of view;
- technological development;[2273]
- land grabbing and its cultural equivalent of heritage grabbing.

Indigenous peoples' ability to (dynamically) continue their ways of life and means of subsistence are likely to be compromised along the way. However, Article 27 ICCPR and 15(1)(a) ICESCR clearly provide for rights of indigenous peoples to their ways of life.[2274] Heritage plays a large role in the context of indigenous peoples' ways of life and, as a consequence, so does the protection of this heritage, which includes traditional knowledge and TCEs.

The cultural heritage dimension of Article 15(1)(a) ICESCR is reflected in state obligations to respect, protect and fulfil this right. These obligations clearly comprise principles that are also at stake in cultural heritage law itself. In General Comment No. 21, the CESCR stresses that the obligation to respect the right to take part in cultural life includes the possibility for, in particular, members of minorities to have access to their own culture, heritage and other forms

[2269] CESCR Concluding Observations Mexico 2006, par. 46.
[2270] See, as mentioned already elsewhere in this thesis, CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 10: it "need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions".
[2271] See Articles 5(2), 6(2), 7 and 12 of the Nagoya Protocol.
[2272] See Article 8(j) CBD and the objective and Articles 5(2), 6(2), 7 and 12 of the Nagoya Protocol.
[2273] See generally Burri-Nenova 2008, p. 205–236.
[2274] See HRC General Comment No. 23 and CESCR General Comment No. 21, as well as multiple Concluding Observations of UN treaty bodies.

of expression, as well as to freely exercise their traditional cultural identities and practices. The Committee highlights indigenous peoples in particular and holds that states are under an obligation to respect their rights to their cultural heritage. Land and resources rights play a particularly important role for indigenous peoples' cultural life,[2275] and thus for their heritage. This dimension cannot be ignored in the context of state obligations under this right.

According to the CESCR, obligations to respect and protect freedoms, cultural heritage and identity under this right are interrelated. The prevention of third party infringements is central under these obligations.[2276] To this end, states must take certain measures. These measures must guarantee respect for all cultural heritage, for example in times of war, and of all groups and communities, in order to ensure transmission to future generations. The Committee mentions, for example, preservation and restoration measures.[2277] The Committee also identifies measures for the obligation to *promote* the right to take part in cultural life, which is a specific component of the obligation to fulfil this right.[2278] One can think of education and awareness-raising measures, to foster dialogue, mutual respect and understanding with regard to the value of cultural heritage. Various cultural heritage instruments also contain provisions for such measures.

Another component of the obligation to fulfil is to *facilitate* the right of everyone to take part in cultural life. This requires positive measures, such as the adoption of policies for the protection and promotion of cultural diversity and policies to make sure that people who belong to diverse cultural communities can exercise their cultural practices and way of life.[2279] For minorities and other communities specifically, this obligation to facilitate includes support measures or programmes to help them preserve their cultures.[2280] Other facilitation measures must create conditions for relationships between various cultural groups that are based on mutual respect, understanding and tolerance and the design of awareness-raising campaigns. Education and media are prime channels to do so, in order to take away prejudices based on cultural identity.[2281] We have also seen this important role of the media in the analysis of the right to freedom of expression in Chapter 5.

States must also *provide* all that is necessary for the fulfilment of the right of Article 15(1)(a) ICESCR where individuals and communities cannot realise effective enjoyment themselves. This is another component of the obligation to fulfil. For TCEs and indigenous peoples various 'provide' measures stand out. These are the design of legislation and mechanisms for effective participation in decision-making processes and setting up programmes for the preservation of cultural heritage.[2282] Clearly, these are positive measures that are necessary to realise the rights of marginalised and vulnerable groups such as indigenous peoples and to contribute to their cultural existence on their own terms and conditions.

This is reflected in what the CESCR calls 'core obligations' under Article 15(1)(a) ICESCR. According to these obligations, states must at least create and promote an *environment* in which individuals, in association with others, or within a community or group, can participate

[2275] CESCR General Comment No. 21, par. 49(d).
[2276] CESCR General Comment No. 21, par. 50.
[2277] CESCR General Comment No. 21, par. 50(a) and (b).
[2278] CESCR General Comment No. 21, par. 53.
[2279] CESCR General Comment No. 21, par. 52(a) and (b).
[2280] CESCR General Comment No. 21, par. 52(f).
[2281] CESCR General Comment No. 21, par. 52(h) and (i).
[2282] CESCR General Comment No. 21, par. 54(a) and (b).

in the culture of their choice.[2283] Indigenous peoples are highlighted under this core obligation. States must ensure that members of indigenous communities can participate in the creation and implementation of laws and policies that affect them. In particular, states must obtain their free, prior and informed consent in the case of risks to the preservation of their cultural resources, especially those that are connected to their ways of life and cultural expressions.[2284] This is also stressed in Article 31 UNDRIP, which contains the right of indigenous peoples to maintain, control, protect and develop their cultural heritage and calls for states to take effective measures for the enjoyment of these rights *together* with indigenous peoples in the second paragraph of the provision.

The rights of minorities to their culture, language, religion and ways of life are explicitly protected under Article 27 ICCPR. The HRC states in its General Comment No. 23 on Article 27 that the individual rights of Article 27 are dependent on the ability of the group as a whole to maintain its culture, language or religion. Therefore, positive state measures can be required for the protection of minorities' identities and the right to develop, maintain and enjoy their cultures, languages and religions.[2285] The HRC also notes that cultures can manifest themselves in multiple forms, such as indigenous peoples' particular ways of life that draw on the use of lands and resources, including traditional activities. The enjoyment of these rights may also require positive legal protection measures, as well as measures to ensure the participation of community members in decisions that affect them.[2286] For indigenous peoples, their cultural heritage is often a part of their way of life. In this sense, cultural heritage such as traditional knowledge and TCEs can just as well be considered manifestations of cultures and particular ways of life. The enjoyment of these rights could therefore equally warrant positive legal measures of protection, as well as measures that enable indigenous peoples to participate in any decision-making.

All in all, it is clear that not only are protection, preservation and promotion measures needed for indigenous heritage, but also that indigenous participation, consultation and free, prior and informed consent are indispensable elements of any policy, regulation and management of indigenous peoples' heritage. The 2003 UNESCO Convention on intangible cultural heritage is an example of an instrument that has incorporated this dimension by stressing the participation of the relevant communities in the identification of the intangible heritage to be protected and in the safeguarding activities and management of such heritage.[2287] The question is how states implement this in laws and policies in practice. In any case, based on the foregoing, they are under obligations to do so.

7.4.3 Obligations and an indigenous dimension of human rights

As we have seen, various General Comments and Concluding Observations of the UN treaty bodies stress an indigenous dimension of human rights, principles and obligations. Generally, states must implement human rights and comply with the trilogy of obligations to respect, protect and fulfil them in order to render them effective. For indigenous peoples, often vulnerable groups, the true and effective enjoyment of their rights likely requires measures that specifically and effectively target their circumstances. Such measures can take the form of legal measures, but also of support, education and awareness-raising mechanisms, policies

[2283] CESCR General Comment No. 21, par. 55.
[2284] CESCR General Comment No. 21, par. 55(e).
[2285] HRC General Comment No. 23, par. 6.
[2286] HRC General Comment No. 23, par. 7.
[2287] See Articles 11(b) and 15 of the 2003 UNESCO Intangible Cultural Heritage Convention.

and programmes. This diversity of measures is consistent with the variety of protection interests of indigenous peoples regarding their TCEs and also with the different approaches of the existing legal framework. Indigenous participation and involvement is continually stressed.

TCE protection from the perspective of an indigenous dimension of human rights offers a particularly useful view on the measures to be taken for the effective enjoyment of indigenous peoples' corresponding rights. As we have seen extensively in Chapter 5, human rights law provides a basis for fundamental aspects of TCE protection, ranging from the right to self-determination to the right to freedom of expression, and from the right to take part in cultural life to the rights of minorities. State obligations and measures that they must take under these rights provide the contours of what this protection is to entail and indicate requirements of implementation via the other two legal domains. This is an indispensable perspective from which to approach the issue of TCE protection. Article 31 UNDRIP unites the human rights contours of TCE protection most clearly. This provision safeguards the right of indigenous peoples to *maintain, control, protect* and *develop* their cultural heritage, traditional knowledge and TCEs, as well as their intellectual property over such heritage. We can add the right to *express* and *transmit* their heritage and TCEs to this list. In short, this right requires respect, protection and fulfilment as such, but other rights that enable this right do too. These enabling rights include self-determination, freedom of expression, participation in cultural life and minority rights. The multidimensional issue of TCE protection needs a multi-faceted approach, both within human rights law and other legal areas.

7.5 Concluding thoughts on TCE protection and shared central values

The analysis of the protection interests and the diverse legal frameworks involved highlights the truly multidimensional nature of the topic of TCE protection. There are a multitude of actors, the stakes are high and the claims diverge. Yet at the same time, there seems to be a common moral texture that is made up of shared central values and which underlies, anchors and essentially feeds into legal responses to the various aspects of TCE protection. This texture can be deduced from the three legal frameworks that have been analysed in this thesis. It is comprised of three shared central values: dignity and identity, respect and participation and democratisation of the discourse.

Being aware of this common moral texture of shared central values can actually provide a clearer sense of direction for both policy makers and researchers who get lost in the legal tangles of copyright law, cultural heritage law and human rights law from a TCE perspective. It contributes to a growing realisation that this legal mix or 'toolbox' is not necessarily a bad thing. That is, as long as certain parameters, such as these shared central values, are kept in mind.

Operative values

When we turn again to Parekh's public operative values, he explains that they are operative in nature "because they are not abstract ideals but are generally observed and constitute a lived social and moral reality."[2288] This thesis' operative values are not lived (enough) yet. We do see these values appear throughout WIPO's texts, in UNESCO Convention preambles, in UN human rights treaty bodies' practices and interpretations and, especially, in the motivations

[2288] Parekh 2000, p. 269.

for practical alternative protection approaches. But much of indigenous peoples' rights discourse runs the risk of being merely 'rights on paper'. This is especially the case in procedures and state-dominated environments, both nationally and internationally. For these values to be operationalised, therefore, indigenous peoples and their rights need stronger empowerment and support.

Parekh also notes that society's public operative values are not static, but change in response to society's circumstances and self-understanding.[2289] We have seen in the norms of this thesis' legal framework, particularly in the cultural heritage and human rights chapters, that indigenous dimensions of existing regulations and rights are increasingly recognised. Likewise, the shared central values that are identified are general in nature as such, but they must take on an indigenous dimension in the context of TCE protection. As a consequence, for these values to be operationalised – and in turn operationalise effective protection of TCEs – protection approaches must also take indigenous viewpoints as a starting point.

'Fragmentation' and inclusion

A diverse legal response to TCE protection can be a strength by forming an interlinked protection chain that is able to address the very diverse needs and interests at stake through each area's specific expertise, measures and support or review system. A condition for this would be that the relevant international organisations cooperate in a coherent and mutually enhancing way. That this is likely to be a rather tedious process is another matter.

The shared central values identified surely provide for at least a starting point for moving towards a degree of common ground. They confirm that all three legal domains, and their main institutions and operative bodies, are actually part of a larger systemic whole of relevant norms for TCE protection. In the case of WIPO, UNESCO and the United Nations Permanent Forum of Indigenous Issues, they are in fact already part of the same overarching international structure: they are all specialised agencies or fora of the United Nations. The shared central values can strengthen a coherent, transdisciplinary perspective of the matter.

In sum, what has become clear from both this chapter and this thesis as a whole is a need for inclusive and integrated action, taking the shared values of dignity and identity, respect and participation as starting points regardless of the concrete approach to TCE protection, be it legal, *sui generis* or practical. A main challenge, and necessity even, is to include indigenous voices and viewpoints. This contributes to democratisation of the discourse and provides an indispensable perspective to assess existing frameworks and find new solutions.

[2289] Parekh 2000, p. 269.

CHAPTER 8
CONCLUSIONS AND RECOMMENDATIONS

8.1 Introduction: closing the circle

In this final chapter, we will trace the findings of the previous chapters to answer the main research question. This will be done through a two-in-one approach of 'summarising conclusions'. The order of discussion follows logically from the structure of this thesis and the analysis of the topic of TCE protection, which has covered central aspects such as the variety of interests in protection at stake, the legal diversity involved and the state obligations at play. The conclusions that can be drawn from the analysis of all these aspects help to close the circle towards an informed and consolidated perspective of TCE protection. The chapter ends with a set of recommendations for the way forward.

There are a number of observations to be made first about these central aspects. These observations are also prominently visible in the conclusions that follow and play a guiding role in the recommendations. Firstly, to pursue one single legal approach, as holding all the answers for the diverse interests at stake in TCE protection, is unfeasible and insufficient. Crossing legal boundaries is inevitable to address the full spectrum of problems and concerns at stake. The distinct protection interests that have been identified transcend any one single direction of protection. However, to cross legal boundaries does require a significant degree of coordination and cooperation of all stakeholders and relevant (international) bodies involved, or at least a meeting place or structure to do so. Shared, common goals that multiple agencies work towards are not uncommon at the international level. Sustainable development, in the form of the 2015 Sustainable Development Goals (SDGs), and indigenous issues, via an Inter-Agency Support Group (IASG), are two prime examples. These are existing systems that could be put to good use to further TCE protection.

Secondly, although fragmented from the perspective of TCE protection, the relevant legal framework is actually an interrelated, complex systemic whole. The overview of and interconnections between the various sets of legal principles enable the identification of shared central values. From this perspective, the distinct legal approaches can be characterised as comprehensive legal diversity inherent to the system they are part of, rather than fragmentation. Informed by these values it then becomes possible to argue that, regardless of the specific approach, TCE protection should aim to safeguard the dignity and distinctive identities of indigenous peoples, guarantee respect for their rights that are at stake and enable the participation of indigenous peoples. Thirdly, we cannot ignore the fundamental rights dimension of TCE protection. From this perspective, TCE protection should be acknowledged as part of indigenous peoples' broader human rights struggles. This means that TCE protection should also be assessed from the perspective of state obligations to guarantee the effective enjoyment of those human rights that play a central role for TCEs.

The next sections set out the central aspects of TCE protection in the order introduced here, namely the protection interests, the legal tripartite and the state obligations. At the end of the chapter, we will then have an overview in place to close the circle of what the thesis set out to do: to analyse the legal tripartite of copyright law, cultural heritage law and human rights law, with a focus on their underlying principles, in order to reach informed and balanced conclusions on the extent to which all of this can inform TCE protection. Based on the conclusions, the chapter ends with a set of recommendations.

8.2 Protection interests and approach: less is not more

Two of the main problems flagged in the context of TCE protection are a lack of consultation and benefit-sharing from third party use. Other concerns include offensive use, damage to integrity and identity, and loss of traditions. In addition, such problems also reflect difficulties that indigenous peoples experience regarding recognition of their rights and dignity, the circumstances and continuation of traditions, and their ways of life. In tracing the emergence of TCE protection in the areas of copyright law, cultural heritage law and human rights law, three main arguments stand out: an economic argument, a cultural heritage argument and a human rights argument. This mix of concerns and arguments shows that the issues at stake in TCE protection are wide-ranging in scope. An analysis of academic literature, studies and indigenous statements confirms this and has resulted in the identification of a number of protection interests of indigenous peoples that can be categorised under the three main protection arguments. These interests are:

- economic interests of benefit-sharing;
- interests in control, for example through free, prior and informed consent (FPIC);
- interests in recognition of rights and distinctive cultures, including such features as attribution, distinctive identity, self-determination and sharing;
- moral interests of integrity and dignity;
- interests in protection for spiritual reasons, including secrecy; and
- interests in continuing traditions, including the maintenance and development of TCEs, preservation, practice and intergenerational transmission of culture.

To make a distinction between different protection interests is useful, because it helps law- and policy-makers, and anyone else working on the topic, understand the various stakeholder interests at play and the different sides to the issue of TCE protection. Each of these sides likely requires a distinct protection approach. So, the overview of protection interests leads to the first main finding of the thesis, which is that TCE protection requires a multidimensional approach due to the varying protection interests at stake and the diversity of knowledge holders involved. The issue of TCE protection crosses the boundaries between various legal areas, which is a typical example of the law as an integrated whole, despite being fragmented from a TCE perspective. The topic of TCE protection comprises copyright-like characteristics of an author's control and moral rights, issues that are similar to cultural heritage concerns of safeguarding, and fundamental human rights-related matters, such as those safeguarded by cultural and indigenous rights, for example self-determination. When recognising TCE protection within the broader ambit of indigenous peoples' heritage, knowledge and cultural issues, which indeed also prominently include cultural heritage and human rights law implications, this means that a one-dimensional approach, such as, for example, WIPO's intellectual property-inspired *sui generis* rules, is unable to cover these very diverse aspects and is consequently insufficient.

Indeed, as WIPO has indicated, and the objectives of WIPO's latest Draft Articles for TCE protection show, this approach is narrowed down to an intellectual property-like scope. Such an approach thus requires complementary measures in other areas of law and policy. WIPO itself has acknowledged that indigenous peoples' needs that cannot be met within an intellectual property framework could perhaps be addressed with non-IP instruments. These include mechanisms such as cultural and other human rights, laws that safeguard dignity, and

cultural heritage laws that deal with preservation, but also blasphemy and privacy laws.[2290] In other words, while on the whole WIPO's approach generally answers to indigenous peoples' intellectual property-like interests, this thesis has demonstrated that such an approach will have to be complemented by cultural heritage and human rights law measures to address other interests in transmission and dynamic and self-determined continuation of their cultural traditions and way of life, if so desired. This requires measures for the expression, dynamic preservation and promotion of (the environment) of TCEs and the effective enjoyment of indigenous peoples' rights generally. An intellectual property(-like) approach cannot cover these aspects.

Another conclusion that can be drawn from the protection interests is that TCE protection covers both outcomes of creative processes or subject matter, and the circumstances of such creation and the related creative processes themselves. As a consequence, it is unlikely that provisions that focus on the protection of outcomes or subject matter can on their own answer to (human rights) notions of promotion and facilitation of ways of life, freedom of expression, participation in cultural life and protection of cultural integrity and identities, or (cultural heritage) aspects of safeguarding cultural contexts and dynamic inheritances. The production, expression and enabling environment of TCEs depend precisely on measures and approaches that move beyond a focus on content and also address issues of empowerment, education and freedom to express cultures and maintain and pass on these expressions. This again supports the three-area approach and the systems perspective of TCE protection as developed in this thesis.

In sum, a mix of instruments and measures is important in order to be able to address the full spectrum of legal issues at stake in the case of TCE protection. In some circumstances, a defensive or moral rights-like approach may be appropriate, whereas in others a more active safeguarding approach of education and awareness-raising may be needed. There are various conditions to this finding, which include that the various 'tools' must not counteract each other and that flexibility and effective cooperation are required, including dialogue, sharing of information and best practices of the various international (UN) agencies concerned with (indigenous) heritage and human rights. Indigenous peoples' participation should be ensured throughout.[2291] Regardless of potential practical difficulties, taken together, the approaches lead to a comprehensive picture of TCE protection, as each contributes to a specific part of the very diverse needs and interests at stake.

8.3 TCE protection: a legal tripartite and one set of shared central values

The legal framework of this thesis has been approached from a foundational perspective. In order to analyse the interface between three specific legal domains and the diversity of TCE protection interests, each legal domain has been dissected to its very core. This way, the main underlying theories and principles could be highlighted as an analytical framework and explanation of the domains' appeal for TCE protection. For copyright law, the general notion of an author's control or autonomy, the bond between the author and a work that is a main principle in natural law and the author's rights tradition, together with the moral rights principles of attribution and integrity, comprise the relevant principle framework for TCEs. For cultural heritage law, this principle framework is composed of the identity, inheritance and living cultures, and cultural contexts principles. And the main relevant underlying

[2290] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore 2008, p. 11.
[2291] See for an elaboration on these conditions the recommendations in section 8.6.

principles of human rights law are self-determination, non-discrimination, participation and dignity.

Having established the diversity of protection interests and the mix of legal principles, the specific interests and arguments that can be served by that legal domain's protection principles depends on the legal approach one chooses to assess TCE protection. For instance, from a copyright principles perspective, one can argue that TCEs should be protected because of the bond between the community and the traditional cultural expressions; that the communities should be attributed; and that they should be able to prevent mutilation of their TCEs. From a cultural heritage principles perspective, TCEs should be safeguarded due to their identity formation function; as an inheritance to be transmitted to future generations; and as part of indigenous peoples' living cultures that contribute to cultural diversity. And from the perspective of human rights principles, TCEs should be protected as a matter of indigenous peoples' (cultural) self-determination and to ensure effective protection possibilities for indigenous peoples' TCEs in a non-discriminatory way. TCEs should also be protected to enable indigenous peoples' participation, both in decision-making and in cultural life, and to benefit from the protection of the moral and material interests resulting from their productions. Lastly, TCE protection is required to contribute to the continuation and exercise of indigenous peoples' ways of life, if so desired, and to ensure the protection of their inherent cultural dignity.

However, from this mix of principles it is possible to highlight, in broad terms, what is in fact a set of shared central values. We can view these central values as a 'shared moral structure' that actually indicates a level of coherence of the legal framework on a value-based level. The shared central values are: dignity and identity, respect and participation and democratisation of the discourse. These are values that all sets of principles refer back to and which enable us to further capture what is actually at stake in the protection of TCEs as a whole, from a moral, foundational perspective. From this mix of arguments and principles, we can argue that TCE protection should contribute to:

- safeguarding the inherent dignity and identity of peoples, which is reflected in their heritage;
- guaranteeing respect for individuals' or groups' property, cultural heritage and human rights, but also for their autonomy and self-development, their equality and their distinctive voices, ways of life and identities; and
- ensuring that indigenous peoples can participate in decision-making on all matters that affect their rights and ways of life and make their voices and worldviews heard, and that their participation and viewpoints are actually and effectively taken into account.

In summary, from this perspective, TCE protection – targeting both the content or subject-matter, and the context and environment of TCEs – should aim to safeguard the dignity and distinctive identities of indigenous peoples, guarantee respect for their rights that are at stake and enable the participation of indigenous peoples in all stages of the process to democratise discourse and policy on heritage and TCE matters that affect them.

8.4 State obligations and a human rights law basis: connecting the three legal domains

It has become clear that the (lack of) protection of TCEs is essentially part of the broader historical and contemporary struggle of indigenous peoples for full and effective enjoyment of their human rights. Many of indigenous peoples' human rights struggles concern their

heritage, knowledge and ways of life. Having found that there is a clear basis for TCE protection drawing on various human rights, this means that state obligations to respect, protect and fulfil these rights come into play. States must guarantee the effective enjoyment of indigenous peoples' rights that are fundamental for the protection, promotion and safeguarding of their TCEs. Moreover, these state obligations connect the three legal domains that have been central in this thesis.

The obligation to respect in the context of TCEs means that states must abstain from interference with rights that are essential for indigenous peoples' production, expression and protection of their cultural expressions. One can think of rights to self-determination, freedom of expression, property and participation, but also minority rights to ways of life and indigenous rights of cultural development and maintenance of their traditions and heritage. These rights together form a framework that guarantees production, protection and transmission of TCEs. The required lack of interference would mean that indigenous communities retain control over their TCEs themselves, can safeguard their dignity and identity accordingly, and can ensure continued practice, ways of life and transmission to future generations, if so desired. In this sense, compliance with the obligation of respect ties cultural heritage rationales and human rights law together.

The obligation to protect requires positive state action to guarantee the effectiveness of human rights, including protection from third party infringements. In the context of TCE protection, the rights to take part in cultural life and to benefit from the protection of the moral and material interests of one's productions, of Articles 15(1)(a) and (c) of the ICESCR, respectively, are illustrative. In General Comment No. 21, the CESCR has held that states are under the explicit obligation to respect and protect the cultural productions of indigenous peoples, such as their traditional knowledge, folklore and other forms of expression. These productions must be protected from "illegal or unjust exploitation of their lands, territories and resources by States or private or transnational enterprises and corporations".[2292] In General Comment No. 17, the CESCR has held that: "States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge".[2293] In adopting measures, states must take the preferences of indigenous peoples into account, including their free, prior and informed consent.[2294] Such protection must be effective, but not necessarily "reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions".[2295]

For the obligation to protect, we can also draw inspiration from a cultural heritage approach of education and awareness-raising about the value of indigenous heritage to prevent infringements,[2296] and from a practical and bottom-up approach of 'indigenous made' labels and licences that inform users about appropriate use. States' compliance with positive protection obligations can also take place through the encouragement of or assistance in the development of such approaches, which go beyond legal prohibitions or exclusive rights. This

[2292] CESCR General Comment No. 21 on Article 15(1)(a) ICESCR, par. 50(b) and (c).
[2293] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 32.
[2294] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 32.
[2295] CESCR General Comment No. 17 on Article 15(1)(c) ICESCR, par. 10.
[2296] Compare Article 10 of the 1970 Convention; Article 27 of the 1972 World Heritage Convention; Article 10 of the 2005 Cultural Diversity Convention.

way, the obligation to protect connects copyright law's autonomy of authors and their economic rights, cultural heritage law's measures of educating the public about the value of heritage, and human rights to self-determination and to take part in cultural life and benefit from the protection of the moral and material interests of one's productions.

The obligation to fulfil means that states must aid, promote and facilitate the effective realisation of human rights where right holders cannot do so themselves. One can imagine that this is likely to be the case for the (often) marginalised communities of indigenous peoples. The fulfilment of human rights can require compliance with obligations of conduct or result. Whereas conduct requires positive state action, result can also require a state to be passive, or to refrain from certain actions and respect the human right in question. This depends on the circumstances, context and right in question.[2297] The protection and production of TCEs could require either non-interference with indigenous peoples' human rights by states or positive action, as long as the result is that indigenous peoples can exercise, for example, their right to their ways of life, to develop and manage their heritage or to freedom of expression, as discussed above under the obligations of respect and protection. It is however likely, given that indigenous peoples are often vulnerable communities, that conduct by states is required to create the circumstances and to facilitate for these marginalised groups the effective enjoyment of their human rights in order to fulfil them. One can think of setting up indigenous heritage services, with their full participation, support programmes for indigenous media outlets or language revival projects. In this sense, the fulfilment obligation connects the domains of cultural heritage law – i.e. preservation and safeguarding – with human rights law, more specifically in the context of (cultural) self-determination, ways of life, participation and freedom of expression.

8.5 Answer to the research question

We can conclude from the main findings set out above that we actually *need* a range of diverse legal perspectives, and the possibilities that this brings, for a comprehensive approach to TCE protection. Furthermore, we must see the issue in its broader light. It is part of indigenous peoples' more general struggle for their resources and (fundamental) rights, which are directly or indirectly linked to their heritage, knowledge and ways of life.

To consolidate these findings, and to answer the research question, this is where both the shared central values, deduced from the principles of the three legal domains, and the (positive) state obligations come into play again. The operationalisation of these values and compliance with (positive) state obligations are co-dependent and can mutually enhance each other. For the values to be operationalised, they need to be implemented by states in their approaches to TCE protection and their corresponding compliance with the various human rights obligations. And to give direction to and elaborate existing (positive) state obligations regarding human rights that play a role for TCE protection – whether those obligations are specified in human rights treaties or not – the shared central values can be instrumental. For all three obligations, i.e. to abstain from interference, undertake positive action and facilitate and promote effective enjoyment of indigenous peoples' human rights, the shared central values require that:

- indigenous peoples' cultural dignity and distinctive identities are kept in mind at all times;

[2297] Bulto 2013, p. 103–104.

- their existence as distinct communities is respected and their rights recognised;
- their participation in decision-making on all matters that affect them, their rights and their ways of life is the starting point and guaranteed throughout processes and policy developments for TCE protection.

The summarising conclusions provide the various elements that are needed to answer the research question: ***To what extent can copyright law, cultural heritage law and human rights law inform the protection of traditional cultural expressions, drawing on the standards and principles of the relevant international legal framework?***

The legal framework's multidimensionality is precisely its strength. As the issue of TCE protection has the potential to change in (legal) form, all three legal domains are needed to address the various, specific protection questions and interests at stake. They are all characterised by protection rationales and principles that answer to (aspects of) the protection question in their own specific ways. However, the shared central values, which can be derived from the underlying principle framework as a whole, can be viewed as the building blocks that construct bridges between specific approaches. They are instrumental in allowing for convergence of the systems or adaptation of each of the three domains in the context of indigenous heritage, and essential as a guide for a comprehensive yet coherent approach to the issue. Importantly, human rights law provides for the fundamental reinforcement of TCE protection by forming a basis for such protection through various rights. In this sense, it is the prime system amongst the three legal domains. State obligations under this system again underline the observed, necessary, connections between the different legal regimes. In complying with the obligations arising from these fundamental rights, states should again be guided by the shared central values. Not only because this makes for a coherent approach, but also because this is what TCE protection comes down to in its bare essentials: it is tied up with indigenous peoples' very cultural dignity and identity; it cannot be viewed separately from respect for (and recognition of) indigenous peoples' human rights, and it must involve their participation every step of the way.

In sum, the existing legal framework can inform TCE protection through its normative principles, its foundation of human rights and related state obligations and its shared central values. But most importantly, it can inform TCE protection in a more abstract way by acknowledging the strengths that arise from the perspective of legal diversity. The next section continues with recommendations that contain a set of general preconditions to support these findings.

8.6 Recommendations: closing the circle

How can we translate the conclusions into both a sound theoretical and conceptual approach to TCE protection, and concrete action? To operationalise the conclusions, this section sets out three recommendations as preconditions for any approach to TCE protection, drawing on the preceding chapters and the shared central values identified. The recommendations cover both theory and conceptual models, the necessary mind-set and suggestions for concrete action to benefit from the legal diversity for TCE protection. They target theorists, international institutions, policy makers and states.

1) A transdisciplinary perspective to legal approaches should be adopted and their shared central values implemented by any institution, or consortium of institutions, that takes up the task of addressing the protection of indigenous peoples' heritage, including their TCEs.

This recommendation is based on the theoretical exercise of combining protection interests with the legal means available, with particular recognition for the underlying principles of these legal means. This theoretical perspective is useful to respond to TCE protection in a more balanced, and ultimately coherent and efficient, way. Constructing, and crossing, transdisciplinary bridges between the different disciplines of the legal system involved is required to address all sides of the protection issue. TCE protection should not be viewed as an isolated intellectual property topic, cultural heritage issue or human rights problem.

This recommendation also finds a basis in the hybrid argument for TCE protection,[2298] which essentially captures the overlapping, holistic nature of the protection question, and of the protection needs and interests in particular. The argument highlights the 'ethical' dimension of these interests, reflecting the interrelationship between indigenous communities, their TCEs, identities and ways of life. This argument draws on various aspects of the legal areas in a 'border-crossing way', such as copyright law's moral rights, cultural heritage law's various safeguarding principles and cultural and indigenous rights that guarantee indigenous peoples' rights to (cultural) control, self-determination and protection of their TCEs. Effective coordination of these aspects is necessary for coherent application of the diverse legal principles that are at stake in the context of TCE protection. In other words, a systemic perspective of the legal framework is required.

The identified shared central values of the legal framework can provide the starting point to converge and mainstream perspectives and standards for the protection of indigenous heritage. Working with such values forms a conceptual model to ensure coherence and effective protection. The values confirm that all legal domains, and their main institutions and bodies, are actually part of a larger systemic whole of relevant norms for TCE protection. In fact, it is at the heart of a legal system whose segments interrelate and interact. In practice, the identification of shared central values from three relevant legal domains is helpful as a guide to move the discussion towards a degree of common ground. These values strengthen a coherent, transdisciplinary legal perspective on the matter. For operationalisation of these values, the second recommendation sets out the precondition of inclusive and integrated action within the relevant fora and the third recommendation gives two avenues for achieving such an integrated approach.

2) Inclusive and integrated action is needed.

Whether we choose legal or practical action to approach TCE protection, requirements are the same: to break the cycle of marginalisation and exclusion that is visible in international law's approach to indigenous rights and issues. Participation and democratisation are key notions in this regard. Mainstream voices and understandings must be complemented by, or even give way to, indigenous perspectives. This recommendation stresses the need for concrete action to create proper policy. It thus targets international institutions and states. Such action should be inclusive and integrated, taking the shared values of dignity and identity, respect and participation and democratisation as starting points, regardless of the chosen approach to TCE protection, whether legal, *sui generis* or practical.

[2298] See Chapter 2, section 2.5.6.

To use the context of sustainable development as an example, in particular the notion of 'development with culture and identity', members of the Inter-Agency Support Group on Indigenous Issues have warned about the dangers of a single model of development, and emphasised the importance of raising critical questions and listening to alternative visions.[2299] More specifically, to support indigenous visions of development, participatory and consultative processes have been called paramount for translating indigenous peoples' rights into actual policy proposals.[2300] A cultural diversity perspective and facilitation of intercultural dialogues are important tools to understand and represent local contexts in the design and implementation of development measures.[2301] This is captured in the notion of 'development with culture and identity' mentioned above, which draws on Articles 3 and 23 UNDRIP on the rights to self-determination and development in accordance with indigenous peoples' own aspirations, needs and interests.[2302] Article 41 UNDRIP is also applicable in this context: it requires that the organs and specialised agencies of the UN system work towards the full realisation of the rights safeguarded by UNDRIP and that ways and measures to ensure indigenous participation on matters that affect them be established.

The same goes for TCE protection policies designed by UN agencies such as WIPO, but also by states. To understand the full spectrum of needs and interests, and develop culturally sensitive and adequate policies rather than top-down imposed rules, indigenous peoples should feature more prominently in all stages of the policy design of said agencies in the context of protection of indigenous peoples' heritage, knowledge and TCEs. It is essential, and long overdue, that indigenous peoples gain agency within agencies. The UN Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples are especially well-positioned to work across various domains and bring stakeholders together in an inclusive and integrated way, perform coordinating roles and keep a critical eye on processes. In the context of state policy-making, monitoring bodies such as the HRC, CERD and CESCR play a valuable role by pushing for standards of indigenous participation to be upheld. Indeed, states are under an obligation in human rights law to ensure the participation and consultation of indigenous peoples in decision-making processes and matters that affect their rights and ways of life.

In sum, a main challenge – and necessity even – is to include indigenous voices and viewpoints. In other words, adequate TCE protection is also (largely) a matter of narrative: dominant paradigms, whether of development or intellectual property, may view indigenous peoples' worldviews and heritage protection claims as obstacles to development[2303] and the public domain, respectively. On the other hand, indigenous narratives of issues that affect them, such as sustainable development,[2304] but also TCE protection, contribute to democratisation of discourse and policy, and provide an indispensable perspective to assess existing frameworks and find new solutions. UN agencies have deemed it useful to have a recognised indigenous entity to engage with during negotiations.[2305] Beyond merely practical reasons, engagement with such entities in negotiations also contributes to the operationalisation of the value of 'participation and democratisation of the discourse'.

[2299] E/C.19/2009/11, par. 11.
[2300] E/C.19/2009/11, par. 12.
[2301] E/C.19/2009/11, par. 13.
[2302] E/C.19/2009/11, par. 9.
[2303] E/C.19/2009/CRP.4 11 March 2009, p. 22
[2304] E/C.19/2016/2, par. 27.
[2305] E/C.19/2013/4, par. 19.

Another option for the operationalisation of participation and democratisation of the TCE discourse and finding effective and responsive solutions, is for 'practical initiatives' described in Chapter 6 to provide guidance. This can for example take place in the context of partnerships that are built between cultural heritage institutions and indigenous communities in developing cultural protocols, and label and licence systems, especially given the challenges for successful international treaty-making. State obligations come into play again here, because these can also take the form of encouraging and supporting the creation of such initiatives, or taking positive measures to facilitate the enjoyment of rights of participation. The bottom line in operationalising the value of participation and democratisation of the discourse is that (historically informed) perceptions of indigenous peoples as 'objects of international law'[2306] and on the periphery of the legal order[2307] should make way for recognition of their legitimate claims to their (cultural) rights as being a full part and at the centre of (legal) debates, including in the context of their heritage, knowledge and TCEs. This is one of the main guarantees for reaching balanced solutions.

3) Cooperation between (international) institutions is crucial for consistency and effectiveness of any approach to TCE protection.

This recommendation stresses the need for a certain mind-set and gives two suggestions for concrete action. From this perspective, legal diversity should be viewed as a strength: it provides for an interlinked protection chain that can take on the multi-faceted issue that is TCE protection in an integrated way. WIPO, UNESCO, the HRC, CESCR and CERD, and the United Nations Permanent Forum on Indigenous Issues, are in fact already part of the same overarching international structure: they are all specialised agencies, monitoring bodies and fora of the United Nations. This practical fact, together with the outcomes of the legal analysis of this thesis, prompt an argument for the establishment of a coordinated, umbrella action plan and meeting place for TCE protection specifically, to foster cooperation within a shared framework, or at least work towards a shared common goal.

Within their shared UN structure, this could be a promising step forwards. Participants should include, naturally, experts from the agencies, bodies and fora just mentioned, but one can also think of 'outsider' experts from the Convention on Biological Diversity, (successful) practical approaches and grass-roots organisations, scholars and cultural heritage institutions. Of course, indigenous participation is the bottom line. The shared central values of the existing legal framework can strengthen a coherent, transdisciplinary legal perspective on the matter. Taking this framework as a whole into account, which involves WIPO, UNESCO and UN human and indigenous rights structures, and with a coordinated approach that makes good use of their specific expertise, contributes to more holistic protection of indigenous peoples' heritage. This creates greater coherence across the board instead of isolated approaches to specific parts of the issue. There are various avenues that already exist that could potentially be used to achieve this, where work is carried out jointly and towards common goals. Two of these avenues are highlighted here: a) including the topic of TCE protection in the work that the UN's Inter-Agency Support Group on Indigenous Peoples' Issues (IASG) is undertaking; and b) simultaneously exploring the work on the UN's Sustainable Development Goals (SDGs) as an additional promising avenue.

[2306] See Chapter 2 of this thesis.
[2307] See on democratisation in the context of culture and economic interests in (economic) international law Vadi & De Witte (eds) 2015, p. 9.

a) The first avenue is the inclusion of TCE protection (more explicitly) in the work of the Inter-Agency Support Group on Indigenous Peoples' Issues (IASG), which is already in action at the UN level. This Support Group met for the first time in 2002 and was established to support and promote the mandate of the UN Permanent Forum on Indigenous Issues (UNPFII).[2308] It is permanently co-chaired by UNPFII. The members of the IASG share a *common commitment*: "to work within their respective mandates with, and for the benefit of, indigenous peoples".[2309] Via the UNPFII, they can exchange information about ongoing programmes and projects in the UN system, expand resources and knowledge and intensify inter-agency cooperation on indigenous issues.[2310] The IASG is described as playing "a key role in ensuring coordination of mutual efforts concerning indigenous peoples".[2311] This is a promising approach and its advantages should be used for furthering the multi-faceted, legal diversity issue that is TCE protection. Multiple UN agencies can play a valuable role for *specific parts* of the issue, as demonstrated in the legal tripartite analysis of this thesis.

The Chair of the Support Group rotates and members include the International Labour Organization (ILO), the Secretariat for the Convention on Biological Diversity (CBD), UNESCO, the Food and Agriculture Organisation of the United Nations (FAO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), UN Women and WIPO. During a short intervention in the IASG's session of 2009, the OHCHR described the IASG within the UN system as a "model of good practice", especially due to its rotating chair.[2312] During this same session, the Secretariat of the CBD – the host of that session – qualified the IASG as "a committed active body supporting indigenous peoples' rights and aspirations" and "a growing and mutually supportive 'family'".[2313] The IASG has stressed the importance of improved communication between its various member agencies on indigenous peoples' issues.[2314] TCE protection could well be such an issue that warrants joint UN action. As such, this avenue fits with what this thesis has identified: the inter-agency nature reflects the systems perspective of the thesis.

The fact that the IASG is already in action is a big advantage. Furthermore, it already includes WIPO and UNESCO as members, and has the UNPFII as permanent co-chair, i.e.: this overarching Support Group includes expert agencies from all three legal frameworks of this thesis. It also works with a rotating chair. This means that it is possible to pay attention to specific sub-topics. For explicit action on TCE protection, it would be useful for a specific session on this topic to be hosted by WIPO, UNESCO and UNPFII together, to address the protection of TCEs from a transboundary legal systems perspective *en route* to an effective approach to the protection question, taking into account the shared central values identified in this thesis: dignity and identity, respect and participation and democratisation of the

[2308] See also: https://www.un.org/development/desa/indigenouspeoples/about-us/inter-agency-support-group.html: the main objectives of the UN Inter-agency support group are:
(i) to provide an opportunity for the exchange of information in regards to their work on indigenous issues;
(ii) strengthen inter-agency cooperation to promote the human rights and well-being of indigenous peoples including the dissemination and implementation of the UN Declaration on the Rights of Indigenous Peoples;
(iii) analyze, disseminate and contribute to the implementation of the recommendations of the Forum;
(iv) interact with the Forum and its members to provide and seek information, advice and substantive inputs; and
(v) advise in the mainstreaming of indigenous peoples issues within the UN system, and strengthen mutual collaboration.
[2309] E/CN.19/2002/2, par. 7.
[2310] E/CN.19/2002/2, par. 7.
[2311] E/C.19/2013/4, par. 1.
[2312] E/C.19/2009/11, par. 5.
[2313] E/C.19.2009/11, par. 5.
[2314] E/C.19/2009/11, par. 26.

discourse. This could take the form of a day of thematic discussion, during which exchange of views is stimulated and existing approaches explored for operationalisation purposes. Alternatively, the IASG could convene, for example, a small working group on the topic of indigenous heritage and TCE protection. The IASG has previously worked with joint initiatives on specific topics, such as inviting UNESCO and the secretariat of the UNPFII to establish a working group of interested members to work on a joint paper on the notion of development with identity for indigenous peoples mentioned above.[2315] Importantly, given the UNPFII's role as permanent co-chair, this avenue also confirms that the human rights structure is the overarching normative structure that must guide any TCE protection approach. As confirmed in this thesis, human rights law contains a clear, fundamental basis for diverse aspects of TCE protection in various rights.

In 2005, at the 23rd session of the Working Group on Indigenous Populations with the principal theme "Indigenous peoples and the international and domestic protection of traditional knowledge", the UNPFII had already noted:

> "It is clear that there is much to do to ensure that the protection and promotion of traditional knowledge is adequately and holistically addressed throughout the vast amount of activity in international system on this issue. The Permanent Forum believes that *through a strategic inter-agency effort, the international system can enhance the various mandates of the agencies to achieve better outcomes* [italics added]."[2316]

Furthermore, in response to the outcome of the World Conference on Indigenous Peoples of 2014,[2317] and in consultation with indigenous peoples, Member States and UN system entities, the IASG has developed a so-called system-wide action plan for ensuring a coherent approach to achieving the aims of the Declaration on the Rights of Indigenous Peoples.[2318] Not only does this initiative correspond to this thesis' systems perspective, its strength is already reflected in the name: for the achievement of indigenous peoples' rights, the whole interacting and interrelating system that is of relevance at the UN level should be taken into account and work together towards this common goal. This action plan was finalised in 2015 and launched at the fifteenth session of the UNPFII in May 2016.

It is useful to build on the momentum of this action plan for coherent protection of TCEs within the UN system and how it addresses issues with regard to indigenous peoples' cultural heritage. Its main goal is to ensure coherence in activities that set out to achieve UNDRIP's ends and protection of indigenous peoples' cultural heritage, including their TCEs, and the intellectual property over these intangible resources is in fact an objective of UNDRIP.[2319] A 2017 report on an update of the implementation of the action plan includes updates on activities of UN agencies, including the Secretariat of the CBD, UNESCO and WIPO. These activities include awareness-raising, capacity-building, education, provision of information resources, practical tools, training, empowerment and participation opportunities.[2320] However, these are individual initiatives that, logically, draw on the agencies' respective

[2315] E/C.19/2007/2, par. 23-33.
[2316] E/CN.4/Sub.2/AC.4/2005/CRP.4, par. 8.
[2317] A/RES/69/2, par. 31, A/RES/70/232, par. 5.
[2318] E/C.19/2016/5.
[2319] Article 31 UNDRIP safeguards the right of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions and the right to maintain, control, protect and develop their intellectual property over such heritage.
[2320] E/C.19/2017/2, par. 16, 19, 22, 30, 32, 43, 45, 47, 56, 60, 63, 73, 76, 81, 84.

mandates and expertise. As the ultimate goal of the action plan is a coherent approach to achieve UNDRIP's ends, and in light of the shared commitment of IASG agencies, joint initiatives are especially useful at this point in the long-running discussions on the protection of indigenous heritage. As the Update report concludes: "As stated by former UN Secretary-General Ban Ki-moon at the launch of the action plan, it is essential that we work as one to realise the full rights of indigenous peoples".[2321] To stimulate joint efforts and initiatives, UNPFII can put this statement into action to realise indigenous peoples' rights to (cultural) self-determination and to their cultural heritage by convening an inter-agency working group on the matter of indigenous cultural heritage and TCE protection.

b) The second avenue concerns the UN's Sustainable Development Goals, which are examples of common goals that are worked on at the international level. This section explains why it could be very useful for TCE protection approaches to either be inspired by or even join forces with the action undertaken for realisation of the UN's SDGs. The protection of TCEs can, for example, be included as part of a cultural dimension of the implementation of the 2030 Agenda's SDGs, in addition to the three dimensions that are currently recognised: economic, social and environmental.[2322]

As a cultural dimension is somewhat lacking in the SDGs, this gap can be filled by attention for protection of the cultural heritage of vulnerable cultural groups in societies, including indigenous peoples. Like minority rights protection needs to comprise more than safeguards of physical existence and should also include land and resources rights and recognition of the cultural and spiritual aspects of minorities' existence,[2323] human development cannot do without a cultural component: "development divorced from its human or cultural context is growth without a soul".[2324] This can be shaped by the protection, preservation and promotion of traditional knowledge and TCEs, as part of indigenous peoples' cultural heritage. By taking up this issue, the action undertaken for the SDGs can contribute to operationalisation of our values and, consequently, to furthering TCE protection.

Conversely, TCE protection can contribute to sustainable development of indigenous peoples according to their own self-determined (cultural) development needs, or: development with culture and identity, a term advanced by the UN Permanent Forum on Indigenous Issues that references a concept proposed by indigenous peoples themselves.[2325] This notion draws especially on Articles 3 and 23 UNDRIP, which set out rights to self-determination and to development in accordance with indigenous peoples' own aspirations, needs and interests, respectively. Protection of indigenous peoples' heritage, resources, knowledge and cultural expressions can be addressed within this understanding of sustainable development, which particularly requires levels of self-determination and development in accordance with indigenous peoples' own aspirations, needs and interests. A cultural dimension of sustainable development, including action regarding intangible cultural heritage, traditional knowledge and TCEs, is in line with a more culturally sensitive perception of development and

[2321] See: https://www.un.org/press/en/2016/sgsm17740.doc.htm; E/C.19/2017/2, par. 85.
[2322] A/RES/70/1, par. 2 and https://sustainabledevelopment.un.org/.
[2323] See Chapter 5, section 5.3.8; McGonagle 2011, p. 44, 46.
[2324] Tauli Corpuz 2010 (E/C.19/2010/CRP.4), p. 7, citing the summary version of the 1996 report *Our Creative Diversity: Report of the World Commission on Culture and Development*, Paris: UNESCO 1996, available via: http://unesdoc.unesco.org/images/0010/001055/105586e.pdf, p. 48.
[2325] E/C.19/2009/11, par. 9. See also Tauli Corpuz 2010 (E/C.19/2010/CRP.4).

indigenous peoples' own concepts of well-being vis-à-vis dominant understandings of development.[2326]

The 'pros' for this avenue are that there is a lot of attention for the SDGs, they are widely supported, there is much political 'goodwill' and many efforts and resources are directed towards the topic. Furthermore, the 2030 Agenda is accepted by all countries, applicable to all and the scope and significance is unprecedented.[2327] There is also a strong focus on human rights principles and standards,[2328] as well as emphasis on the need for action geared towards guarantees for human dignity,[2329] equality and non-discrimination,[2330] (mutual) respect,[2331] cultural diversity[2332] and empowerment.[2333] We can clearly see our shared central values reflected, which the 2030 Agenda emphasises in the context of sustainable development. As such, the status and mainstreaming of the SDGs can be a vector for the operationalisation of our shared central values, especially in the context of implementing TCE protection approaches.

Furthermore, it is possible, necessary even, to place TCE protection within various of the SDGs by way of a (currently lacking) cultural dimension of sustainable development, such as cultural well-being (Goal 3), the cultural dimension of life on land (Goal 15) and the intangible cultural heritage aspect of sustainable cities and communities (Goal 11). Lastly, the economic interest of indigenous peoples is already recognised in the SDGs in the context of genetic resources and traditional knowledge with specific attention for fair and equitable benefit-sharing arising from the utilisation of genetic resources and associated traditional knowledge (Goal 2 target 5, Goal 15 target 6). So, the framework is there, the parameters are set out and the political goodwill is established with the 2030 Agenda and, before that, the "The Future We Want" Resolution in 2012 that paved the way for the formulation of the SDGs to follow-up on the Millennium Development Goals (MDGs) of 2000.[2334] It is supported by all countries and the process towards its adoption in 2015 has been deemed the most inclusive to date in UN history.[2335]

There are, however, also some 'cons' to this avenue. TCE protection can get lost in amongst the many pressing issues of the SDGs, which could obscure priorities of indigenous peoples that are not explicitly referred to in the text of the 2030 Agenda,[2336] such as, for example, cultural issues. Indeed, it is unclear how much priority will be given to cultural topics, for which the history of cultural rights within the wider human rights system is not a very promising example. Such recognition will likely have to 'grow'. The recognition that is already given to cultural heritage in both the 2012 "The Future We Want" Resolution and the 2030 Agenda further appears to be tangible heritage-oriented.[2337] Reference is made to

[2326] See also the second recommendation above on inclusive and integrated action and why adequate TCE protection is also (largely) a matter of 'narrative' and dominant paradigms, whether of development or intellectual property. See further Tauli Corpuz 2010 (E/C.19/2010/CRP.4), p. 20-22.
[2327] A/RES/70/1, par. 5.
[2328] E/C.19/2016/2, par. 13.
[2329] A/RES/70/1, Preamble under 'People'; Declaration par. 4, 8, 14.
[2330] A/RES/70/1, Preamble under 'People'; Declaration par. 3, 8, 13, 14, 20, 27, 35; Goal 5; Goal 10; Goal 4, target 7.
[2331] A/RES/70/1, par. 8, 9, 10, 19, 29, 35, 36, 37, 74(e).
[2332] A/RES/70/1, par. 8, 36; Goal 4, target 7.
[2333] A/RES/70/1, Preamble; Par. 8, 20, 27; Goal 5, target 5b and 5c.
[2334] A/RES/66/288.
[2335] A.RES/70/1, par. 5; E/C.19/2016/2, par. 11.
[2336] See also E/C.19/2016/2, par. 25.
[2337] A/RES/66/288, par. 134; A/RES/70/1. 2015 SDGs Goal 11, target 4.

"strengthen efforts to protect the world's cultural and natural heritage", leaving intangible cultural heritage unaddressed, at least in an explicit way. A narrow view of this target means that, for TCE protection to take advantage of the common goals set out in the SDGs for UN agencies and other stakeholders, this focus must broaden. Another difficulty is that certain Goals and targets can in fact contravene indigenous peoples' rights, for example in the context of energy, major development projects and indigenous peoples' rights to their lands, territories and resources.[2338] It is important that an indigenous perspective, or narrative, of the 2030 Agenda be framed, one that is consistent with their worldview, needs and rights and that ensures that implementation of the SDGs does not contravene these.[2339] Furthermore, what is required first and foremost in order to take advantage of the 2030 Agenda framework is acknowledgement of a cultural dimension to development, and the place of indigenous peoples' heritage, traditional knowledge and TCEs in this context. This perspective underlines the argument that such heritage should be protected.

To sum up, the first avenue of the IASG on Indigenous Issues provides for the 'institutional bottom line' to operationalise a systemic perspective of TCE protection and benefit from the legal diversity it offers. The second avenue of the SDGs provides for a practical working sphere that has gained much political goodwill and resources and has become one of the latest frontiers of the indigenous rights debate. However, due to the scope of the Sustainable Development agenda, there is a risk that TCE protection might get overlooked among the multiple pressing issues it addresses, whereas the IASG undertakes thematic and delineated work on indigenous issues specifically. This means that the latter avenue could probably provide more short-term and direct attention for the topic of TCE protection, as opposed to more long-term, embedded and indirect work on the topic in the action undertaken for the realisation of the SDGs.

In conclusion, there are three themes that are central to these recommendations in the context of TCE protection:

1) Firstly, participation is absolutely essential. In the present case, the opportunity for indigenous peoples to take part in international institutions, existing legal frameworks and associated decision-making processes is required. This concept should not be a hollow-phrased paper tiger.

2) Secondly, any action as to protection efforts should strive for democratisation. The ability of indigenous peoples to make their voices heard is indispensable in a dynamic and modern-day approach of legal action with regard to their heritage.[2340] Relevant protection and decision-making processes of existing or *sui generis* legal systems should be made accessible to indigenous peoples and their heritage.

3) Thirdly, for any approach to be effective, a significant effort should be made for coordination and cooperation amongst legal perspectives, agencies and stakeholders in the context of indigenous peoples' cultural heritage. That is, the complex elements of TCE protection – such as stakeholders (and their interests), relevant legal frameworks, practical solutions by institutions (whether grass-roots or existing cultural heritage institutions) and the activities of international agencies – should be organised and brought into a relationship in such a way that ensures they work together effectively.

[2338] E/C.19/2016/2, par. 26.
[2339] E/C.19/2016/2, par. 27.
[2340] See in the context of development E/C.19/2009/11, par. 12 and 13.

All in all, there are signals that we are moving towards increasing awareness of indigenous rights, a move which is especially visible in the sphere of environmental and development issues. However, the work is far from over. Rather, just after the tenth anniversary of the adoption of UNDRIP in 2007, true implementation efforts for indigenous rights have only just started. Indigenous heritage issues, including the protection of their traditional knowledge and TCEs, cannot be left unaddressed. From this perspective, the TCE protection discussion can be viewed as a manifestation of what an indigenous commentator has called 'the Indigenous century',[2341] touching upon issues of sovereignty and sustainability. As cultures and inheritances tend to play vital roles for indigenous peoples' identities and societies, the growing awareness of indigenous rights should include specific recognition for the importance of such cultural matters. In the present information age, ignorance about the cultural significance and sensitivities of indigenous heritage is no longer acceptable and short-sighted perceptions of such heritage as being free to take are outdated. This thesis has set out the parameters of a multidimensional legal perspective to approach the challenges that the protection of indigenous peoples' heritage faces. With all this in place, the thesis aspires to create more awareness of the diversity of the concerns at stake and contribute to recognition of indigenous peoples' rights, viewpoints and participation with regard to their heritage. It offers a broader outlook on the issue of TCE protection, both legally and informed by historical and contemporary patterns and struggles. These are important factors to take into account in moving forward.

[2341] See 'Indigenous sovereignty is on the rise. Can it shape the course of history?', Opinion by Julian Brave NoiseCat, The Guardian, 30 May 2017, available via: https://www.theguardian.com/commentisfree/2017/may/30/indigenous-sovereignty-growth-history-australia.

SUMMARY

Background and developments of the discussion

For several decades, the protection of traditional cultural expressions (TCEs) has caused debate. The core of protection claims touches upon control and a say over the material, both with regard to its use, preservation, maintenance and development. Central concerns that arise from the absence of protection are unauthorised reproduction, commercialisation and offensive use or damage to the integrity of the heritage, for example in the context of the production of consumer products, sports events and popular culture. More on the diversity of protection interests follows below. To find a place under existing legal regimes for the protection, preservation and promotion of traditional cultural heritage is central in protection discussions. This is further coloured and influenced by historical and contemporary power relations and (cultural) difficulties for indigenous peoples in dominant societies. The protection issue, which this thesis analyses from an information law perspective, is embedded in a larger political debate, in which land, environment and sustainability are other central and related themes.

Early on, the discussion on TCE protection mainly took place in an intellectual property (IP) context, in particular copyright law. In this case, the origin of the attention for the topic – and the objective that was envisioned for the protection – can be mainly found in the sphere of economic development and sharing of benefits resulting from the use of the material. However, the specific, often spiritual, character of TCEs has been increasingly recognised as a reason for protection in an IP context. A copyright approach to TCE protection comes with several challenges and difficulties that recur in the discussion. These include the originality requirement and the term of protection under copyright law. The World Intellectual Property Organization (WIPO) is the most active at the international level in working towards a solution for TCE protection in the IP sphere. Since 2000, a special designated committee of WIPO has been working on developing *sui generis* rules, or: rules that are independent of existing IP laws.

Recognition for the protection of immaterial heritage, sometimes also called folklore, has also gradually emerged in the context of cultural heritage law. The first international cultural heritage conventions of 1954 and 1970 developed by the United Nations Educational, Scientific and Cultural Organization (UNESCO) concern the protection of material heritage in conflict situations and against illicit trade. These conventions foreground the interests of all mankind and of national states, respectively. Later conventions of 2003 and 2005, targeting the protection of immaterial heritage and the diversity of cultural expressions, show a shift towards a broader group of stakeholders and protection arguments. The concept of 'cultural heritage' is interpreted more broadly: from static objects of the past to 'living' and dynamic traditions that still play contemporary roles. The sustainability and participation of source communities and the importance of dynamic preservation gain more prominence. It is also in this context that indigenous peoples' TCEs and traditional knowledge receive attention: dynamic preservation and protection of cultural diversity in light of globalisation are particularly acute issues.

In a human rights context, the rights of indigenous peoples have increasingly gained recognition. Where early indigenous treaties had an assimilationist character, the cultural rights of indigenous peoples are more and more acknowledged, including in particular rights

in the context of heritage, identities and ways of life. The adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007 by the UN General Assembly has been a landmark development. This declaration pays substantial attention to traditional cultures of indigenous peoples and is the first human rights instrument that explicitly safeguards rights to the development, maintenance and protection of heritage, traditional knowledge and cultural expressions. Indigenous peoples – and their cultures, language and cultural expressions – are also increasingly recognised as vulnerable groups by UN treaty[2342] monitoring bodies in the interpretation of 'general' human rights, such as the right to take part in cultural life, freedom of expression and minority rights. This gives rise to the necessity of specific measures that guarantee the effective enjoyment of indigenous peoples' human rights. In short, a shift is visible in a human rights context with regard to indigenous peoples and their TCEs, namely from assimilation to recognition of self-determination and control over identity, traditions and cultures. From this perspective, the protection of cultural heritage, traditional knowledge and cultural expressions of indigenous peoples becomes a matter of fundamental rights too.

The foregoing shows that various shifts have taken, and are still taking, place with regard to the relevant legal framework, scope and interpretation of legal concepts. One can think of reasons for protection, delineation of the cultural heritage concept and the stakeholders, relevant actors and institutions involved. Taken together, this thesis aims to answer the following research question: ***To what extent can copyright law, cultural heritage law and human rights law inform the protection of traditional cultural expressions, drawing on the standards and principles of the relevant international legal framework?***

Approach

This thesis does not intend to design a model law in order to fill the absence of protection for TCEs. Instead, it has the aim to:

- analyse the protection issue from a historical perspective;
- explain the diversity of protection interests;
- map the relevant legal framework;
- indicate the shifts of, and challenges for, existing legal concepts and rationales;
- distil shared central values from the overview of legal principles that should inform the protection of TCEs.

This way, the thesis aims to contribute to the ongoing discussion by offering a new perspective to approach TCE protection, namely by looking over legal boundaries and indicating the strength of legal diversity. The protection interests and rights of indigenous peoples are the point of departure.

Protection interests, a system perspective and shared central values

At first sight, the relevant legal framework seems to consist of separate, fragmented legal regimes. Each domain approaches (aspects of) the protection of TCEs in its own way, with specific measures, protection rationales and legal principles. Such approaches include for example a system of exclusive rights of reproduction and making available for economic

[2342] E.g., the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

(development) reasons or to protect the moral interests of right holders in attribution and integrity. Another approach draws on preservation measures for cultural heritage. The living nature of cultures, rather than 'freezing' cultural traditions in time, and participation of source communities should be foregrounded. Yet another way to approach the protection of TCEs is by foregrounding the (cultural) human rights of indigenous peoples. Recognising rights such as self-determination, non-discrimination, the right to take part in cultural life, freedom of expression and cultural and language rights of minorities contribute to the creation of circumstances that enable or further the protection of TCEs. More specifically, they provide for capabilities for control over and development, expression and preservation of such material. Conversely, measures for TCEs in different areas such as promoting (IP-like) access and benefit-sharing agreements and cultural heritage-related education and awareness raising– for example in a museum, tourism and media environment –can contribute to realisation of such fundamental rights.

When we foreground indigenous peoples' protection interests, as noted in indigenous peoples' declarations and statements at international fora such as WIPO and the UN and in academic studies, literature and reports, it becomes clear that it is inherent to the multi-faceted issue of TCE protection that the relevant legal framework is a complex one. TCE protection is neither an *isolated* intellectual property issue, cultural heritage question nor human rights problem, but a multi-sided matter. It can change in (legal) form according to the protection questions and arguments that are at stake in concrete situations. The protection interests that are distinguished for the analyses in this thesis, and to which each legal regime is measured, are:

- economic interests of benefit-sharing;
- interests in control;
- interests in recognition of rights and distinctive cultures, including such features as attribution, distinctive identity, self-determination and sharing;
- moral interests of integrity and dignity;
- interests in protection for spiritual reasons, including secrecy; and
- interests in continuing traditions, including the maintenance and development of TCEs, preservation, practice and intergenerational transmission of culture.

Some protection interests require measures against reproduction or privatisation by third parties, for example through either positive or defensive rights, whereas other interests require an approach of preservation measures or 'negative measures' of respect. Yet other protection interests place the protection discussion in a broader (political) context by focusing on self-determination, freedom of expression, non-discrimination and the possibility to continue specific ways of life.

An analysis of the different legal domains, and in particular from the perspective of their underlying principles, shows that there are common red 'value threads' visible within this principle framework. The relevant legal framework is diverse, both with regard to concrete measures and normative status. It consists of private law norms of intellectual property law and public law norms of cultural heritage and human rights law. However, analysis at a deeper level shows that we can identify an underlying normative principle framework that reflects shared central values: dignity and identity; respect; and participation and democratisation of the discourse. Dignity, respect and taking diverse viewpoints and worldviews into account are recurrent values in the three legal domains analysed, whether we deal with issues of recognition of the bond between authors and their works and protection of the integrity of a work and attribution of the author; the link between heritage and identity,

respect for (other communities') heritage and the importance that is attached to transmission to future generations; or with self-determination, non-discrimination and participation in decision-making processes and cultural life. This means that such values are not only 'instinctively' present in arguments for TCE protection and indigenous protection interests, but can be backed up with the principle framework of the existing relevant legal framework.

State obligations and cross connections

The finding that the legal framework is a – admittedly complex – whole and forms a system that interacts and interconnects in the context of the multi-faceted issue of TCE protection is further clarified when the protection question is assessed from a human rights perspective. This is particularly the case in the context of state obligations that follow from the relevant human rights analysed.

Generally, three types of state obligations are distinguished under the human rights system to ensure the full and effective enjoyment of human rights: to respect, protect and fulfil human rights. These obligations consist of negative obligations, to abstain from actions that infringe human rights, and positive obligations, to actively commit to the realisation of human rights. The obligations and measures that follow from the human rights that this thesis analyses (self-determination, non-discrimination, freedom of expression, property and land, participation, minority rights and rights pertaining to cultural integrity, dignity and identity) take on different dimensions that underline the diversity of the legal framework. They comprise obligations in an intellectual property and trade context, obligations with regard to cultural heritage and obligations that reflect an indigenous dimension of human rights.

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has specified obligations in an intellectual property and trade context in General Comment No. 21 on Article 15(1)(a) International Covenant on Economic, Social and Cultural Rights (ICESCR), General Comment No. 17 on Article 15(1)(c) ICESCR and various concluding observations with regard to country reports. Article 15(1)(a) ICESCR safeguards rights to take part in cultural life and Article 15(1)(c) ICESCR contains the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the author. The obligations that the Committee specifies clearly show the interconnections between the different approaches and legal regimes that play a role for the protection of indigenous heritage, like they do for the realisation of human rights as well. These vary from private law measures, such as exclusive rights, including protection against unauthorised use by third parties and recognition of (collective) rights to heritage, to the obligation to protect and respect the heritage of marginalised groups in the context of globalisation and development. These obligations underline the human rights of indigenous peoples to self-determination and to take part in cultural life.

The CESCR and the United Nations Human Rights Committee (HRC) have also specifically underlined obligations that are relevant in a cultural heritage context, namely in General Comment No. 21 and No. 23 on Article 15(1)(a) ICESCR and Article 27 International Covenant on Civil and Political Rights (ICCPR), respectively, as well as in various concluding observations with regard to country reports and cases before the HRC. Article 27 ICCPR guarantees the rights of minorities, such as cultural, linguistic and religious rights. In General Comment No. 21, the CESCR specifies various cultural heritage obligations in the context of the right to take part in cultural life, namely to protect and respect rights in the sphere of cultural heritage, including the prevention of violations by third parties, and to take

measures accordingly. One can think of measures to guarantee respect the cultural heritage of all groups and communities, to ensure the transmission to future generations, and measures of preservation and restauration of cultural heritage. States are also under the obligation to realise human rights, like these rights that are relevant in the context of cultural heritage. This includes to promote and facilitate the rights, and to provide all that is necessary to effectively enjoy those rights. Measures for this can for example be taken in the sphere of education and awareness raising; setting up support programs for minorities and other communities to preserve their heritage; furthering understanding, respect and tolerance between groups, for example through education and the media; and measures that improve the participation of relevant communities in policy and decision-making.

In General Comment No. 23, the HRC has interpreted the obligations under Article 27 ICCPR in such a way that they include, among other things, positive measures to protect the identities of minorities and the right to develop, maintain and exercise their cultures, languages and religions. 'Cultures' as protected under this right also include indigenous peoples' ways of life and their traditional activities. Measures that are required under the state obligations are both protection measures and measures that ensure indigenous peoples' participation rights in decisions and matters that affect them. According to this interpretation, it is also possible to understand indigenous peoples' heritage and traditional knowledge and cultural expressions as falling under 'culture' as protected under this provision. This is in fact closely linked to traditional ways of life and activities. From this perspective, state obligations can be considered in such a way as comprising positive measures to protect such heritage. Taken together, obligations in a cultural heritage context, as interpreted by the UN Committees, oblige states to ensure indigenous peoples' ways of life and their access to and transmission of their cultural heritage. In addition, participation of the relevant communities plays an important role for effectively preservation of their heritage. Therefore, these obligations show cross connections between cultural heritage measures and human rights of indigenous peoples such as the right to self-determination, the right to take part in cultural life and cultural and participation rights generally.

In a human rights context, it becomes clear that a certain 'indigenous dimension' can be distinguished for human rights, which is connected to their often vulnerable and marginalised position. This means that the interpretation and realisation of such rights for indigenous peoples requires a specific approach. State obligations are instrumental in this regard. UN Committees acknowledge the position and difficulties of indigenous peoples to truly and effectively enjoy their rights and explicitly instruct states to realise these rights. This requires measures that specifically take indigenous peoples' circumstances into account. This is also the case for the rights that this thesis analyses as relevant for TCE protection. Measures to respect, protect and fulfil these various (cultural) rights of indigenous peoples mainly lie in the sphere of their participation, protection of their (intellectual) property and cultural heritage and ensuring the possibility for indigenous peoples to exercise their ways of life. For TCEs, the contours of such measures can be distilled from Article 31 UNDRIP. This provision reflects that the protection question requires a multi-faceted answer. Depending on specific or local circumstances, a variety of approaches can be necessary, such as:

- (intellectual property-like) control over indigenous heritage for access and benefit-sharing purposes;
- cultural heritage-related maintaining and developing of heritage;
- guarantees for effective enjoyment of human rights – such as the right to self-determination, freedom of expression, participation and cultural rights;

- extra-legal measures can also play an important role, such as raising awareness, creating respect and setting up support- and revitalisation-programs.

Taken together, these state obligations and their explanation by the UN Committees underline that common thematic and conceptual lines are visible between the various legal domains. This confirms the viewpoint that the relevant legal framework may consist of separate 'fragmented' parts, yet that it also forms a holistic system in which the 'sub-systems' interact and interlink. All three areas approach (aspects) of the issue in their own respective ways, whereas they simultaneously are part of a larger whole that makes up the issue of TCE protection. This way, state obligations and their elaboration contribute to outlining the contours for effective and multi-faceted protection.

Answer to the research question

If we add the finding that TCE protection is neither an *isolated* intellectual property issue, cultural heritage question nor human rights problem to the multidimensionality of the protection interests, we can argue that diversity is precisely the strength of the relevant legal framework. Moreover, it is necessarily diverse for a protection issue that can change in (legal) form. A multitude of legal perspectives, and the possibilities and measures that they offer, is required for a comprehensive approach to TCE protection. In other words: it is worthwhile to look over, and cross, legal boundaries. In addition to this, the protection issues must be placed in a broader context. It is part of a larger whole of difficulties that indigenous peoples face with regard to their resources – natural, cultural or intangible – and recognition of their (fundamental) rights. This is connected to control over and maintaining and developing their heritage, traditional knowledge and ways of life. These findings are united in the identifying of shared central values of the three legal domains: dignity and identity; respect; and participation and democratisation of the discourse.

The various conclusions that can be drawn from the analyses of this thesis provide the necessary elements to answer the research question: ***To what extent can copyright law, cultural heritage law and human rights law inform the protection of traditional cultural expressions, drawing on the standards and principles of the relevant international legal framework?*** First, it is important to acknowledge the multidimensionality of the issue. This means that the diversity of the relevant legal framework for the protection question is not only a natural outcome, but is in fact a necessity. This also means that it is possible to distinguish a set of different legal rationales and principles that are relevant for (aspects of) the protection issue. However, from this principle framework we can in fact distil a number of shared central values. We can view these values as indispensable bridges between the different legal approaches. They can steer convergence of the various systems or urge adaptations of the different domains in the context of indigenous heritage. In this sense, they are an essential guide for a comprehensive, yet coherent, approach to the issue. What is clear is that the human rights system forms an important foundation for the contours of TCE protection and that state obligations again confirm the observed, necessary, connections between the various legal domains. To summarise: the relevant legal framework can inform the protection of TCEs with its strength that lies in diversity and in the foundation offered by human rights law (and its related state obligations). The shared central values are an essential guide in this perspective.

Recommendations

The thesis finally elaborates three recommendations as preconditions and to translate the conclusions to both a sound theoretical and conceptual approach to TCE protection and concrete (holistic) action. The recommendations are informed by the shared central values of the legal framework and cover both theoretical and conceptual approaches, the necessary mind-set and suggestions for concrete action to benefit from the legal diversity for TCE protection.

The first recommendation is for any institution, or consortium of institutions, that takes up the protection of indigenous peoples' heritage, including their TCEs, to adopt a transdisciplinary perspective as to the diverse legal approaches and to implement their shared central values. This means that dignity and identity, respect, and participation and democratisation of the discourse are central as the required conceptual approach to ensure coherence and effective protection.

The second recommendation contains a central precondition: inclusive and integrated action in cooperative fora is a requirement. To break the cycle of marginalisation and exclusion that is visible in the approach of indigenous rights and issues in international law, mainstream understandings must be complemented by, or even give way to, indigenous perspectives. This recommendation is thus concerned with the procedural side of concrete action and policy-making by states and international organisations. This is also particularly important in the context of TCE protection as developed by UN agencies such as WIPO. Instead of top-down applying or drafting of rules and policy that affect indigenous peoples' heritage and development, they should be more prominently involved. From this perspective, TCE protection is also very much an issue of narrative. Dominant paradigms, such as in the context of development and sustainability or intellectual property, may view indigenous worldviews and claims for protection of their heritage as potential obstacles for development and the public domain, respectively. However, when indigenous peoples' arguments and understandings with regard to issues that affect their ways of life and heritage are given more consideration, this enables democratisation of discourse and decision-making. This offers an important perspective for the assessment of existing legal frameworks and finding new solutions. It is therefore important that (historically based) perceptions of indigenous peoples as 'objects of international law' and in the margin of the legal order give way to recognition of their legitimate claims for (cultural) rights as issues that are a full part and at the centre of legal debates, including issues with regard to their heritage, traditional knowledge and cultural expressions.

The third recommendation underlines that cooperation between international organisations is crucial for consistency and effectiveness of protection approaches. As such, this recommendation elaborates the necessary 'mind-set' for concrete, integrated action, namely to view the legal diversity and interconnections between the various protection approaches as the strength of the relevant legal framework. The (standard-setting) organisations and agencies that are active at the international level in the context of intellectual property, cultural heritage and human rights issues of indigenous peoples, e.g. WIPO, UNESCO, the committees of the central UN human rights conventions and the UN Permanent Forum on Indigenous Issues, are in fact all part of the same international structure. They are specialised organisations, monitoring bodies and fora of the UN. A coordinated, umbrella action plan and meeting place to foster cooperation within a shared framework and work towards a shared common goal – TCE protection – is particularly valuable, if not indispensable. To cross legal boundaries is

inherent to indigenous peoples' issues. The difficulties and obstacles they face are diverse and widespread.

The thesis gives two examples of possible 'avenues' for this where cooperation is already visible. The first option is to include the protection of TCEs more explicitly in the work that the Inter-Agency Support Group on Indigenous Peoples' Issues (IASG) carries out within the UN. The IASG first met in 2002 and was established to support and promote the mandate of the UN Permanent Forum on Indigenous Issues, which is the permanent co-chair of the Support Group. Members of the IASG, which include the International Labour Organization (ILO), the Secretariat of the Convention on Biological Diversity (CBD), UNESCO, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and WIPO, share the common commitment to work with and for the benefit of indigenous peoples within their mandates. Members can exchange information about ongoing programs and projects within the UN structure through the Permanent Forum. As such, the IASG plays an important role in ensuring coordination of efforts. This seems to be a promising way to approach TCE protection, making use of the legal diversity involved. As we have seen, various UN agencies play a role for specific aspects of the protection issue.

The second possible avenue for cooperation is a global and very current example of shared goals that are being worked on at the international level, namely the realisation of the Sustainable Development Goals (SDGs). It can be particularly useful for approaches to TCE protection to gain inspiration from these shared goals, if not to actually join forces with the concrete action that is already undertaken. Three dimensions are distinguished for implementation of the SDGs: an economic, social and environmental dimension. This recommendation argues that a cultural dimension can be added to these for the purpose of protection, preservation and promotion of heritage, traditional knowledge and cultural expressions of vulnerable groups. It has been argued that development cannot do without a cultural component, which can be viewed as the 'soul' of development and growth.

The SDGs have gained much awareness and are (politically) widely supported. In addition, there is a strong focus on human rights and indigenous peoples are recognised as major stakeholder groups in international consultations and debates. Attention for a cultural dimension will likely have to grow. So, a first requirement for this venue to be workable for TCE protection is recognition of a cultural dimension of development, and secondly the place that indigenous heritage, traditional knowledge and cultural expressions occupy within this dimension. A cultural dimension of development, including action with regard to intangible heritage, traditional knowledge and expressions, would also guarantee a culturally sensitive perception of development that takes differences and local (indigenous) viewpoints as to well-being into account vis-à-vis 'dominant' understandings of development.

In sum, the IASG can be viewed as the 'institutional support' for a systems perspective and operationalization of legal diversity in the context of TCE protection. The SDGs, in turn, can be perceived as a practical working sphere for such a perspective, which have gained much political goodwill and resources and have become one of the latest frontiers of the indigenous rights debate. There are three themes that are central to these recommendations:

- participation of indigenous peoples is essential;
- protection efforts for indigenous heritage should strive for democratisation of the discourse, including the ability for indigenous peoples to make their voices heard, and access to protection processes of existing or *sui generis* legal systems;

- legal perspectives, agencies and stakeholders involved should make significant efforts for coordination and cooperation in the context of indigenous heritage to guarantee the effectiveness of any protection approach.

To conclude, awareness of the rights of indigenous peoples seems to slowly increase, but ten years after the adoption of UNDRIP there is still a long way to go with regard to implementation efforts. Issues of protection, preservation and promotion of the heritage and traditional knowledge and cultural expressions of indigenous peoples cannot be left unaddressed. From this perspective, the discussion on TCE protection is but one manifestation of what an indigenous commentator has called 'the Indigenous century', in which issues of sovereignty and sustainability are central. This thesis hopes to contribute to creating more awareness of the various concerns at play in the context of indigenous heritage and recognition of the rights, viewpoints and participation of indigenous peoples with regard to their heritage. It offers a broader outlook on the protection issue, both legally and as to the historical and contemporary patterns and struggles that it is a part of. These are important aspects to take into account in moving forward.

NEDERLANDSE SAMENVATTING

Aanleiding en ontwikkelingen in de discussie

De bescherming van de traditionele culturele uitingen van inheemse volken geeft al decennialang aanleiding tot discussie. De kern van de claims voor bescherming raakt aan controle en zeggenschap over het materiaal, zowel wat betreft het gebruik als het behoud, het in stand houden en de ontwikkeling ervan. Centrale zorgen die onder andere voortvloeien uit de afwezigheid van bescherming zijn ongeoorloofde reproductie, commercialisering en aantasting van de integriteit van het erfgoed, bijvoorbeeld in de context van de productie van consumentenwaren, sportevenementen en popcultuur. Over de diversiteit aan beschermingsbehoeften volgt later meer. Het vinden van een plaats voor de bescherming, preservering en promotie van traditioneel cultureel erfgoed onder bestaande juridische regimes staat centraal in de beschermingsdiscussie. Deze wordt verder gekleurd en beïnvloed door historische en hedendaagse machtsverhoudingen en (culturele) moeilijkheden voor inheemse volken in dominante samenlevingen. Het beschermingsvraagstuk, in dit proefschrift beschouwd vanuit een informatierechtelijk perspectief, is ingebed in een grotere politieke discussie, waarin land, milieu en duurzaamheid andere grote en gerelateerde thema's zijn.

In eerste instantie vond de beschermingsdiscussie met name plaats op het gebied van het intellectuele eigendomsrecht (IE), in het bijzonder het auteursrecht. In dit geval ligt de oorsprong van de aandacht – en het doel dat beoogd wordt om met de bescherming te bereiken – veelal in de sfeer van economische ontwikkeling en het delen in de voordelen die behaald worden bij het gebruik van het materiaal. Later is ook het bijzondere – vaak spirituele – karakter van traditionele culturele uitingen erkend als reden voor IE-bescherming. Er zijn echter diverse uitdagingen en moeilijkheden voor een auteursrecht-aanpak voor de bescherming van traditionele culturele uitingen die steeds terugkomen in de discussie. Deze moeilijkheden bestaan onder meer uit het originaliteitsvereiste en de beschermingsduur onder het auteursrecht. Wat een oplossing voor de bescherming van traditionele culturele uitingen in een IE sfeer betreft, is de World Intellectual Property Organization (WIPO) al lange tijd de meest actieve internationale actor. Sinds 2000 werkt een speciaal comité van WIPO aan zogenoemde *sui generis* regels, ofwel: regels die losstaan van bestaande IE-regelgeving.

Ook in de context van cultureel erfgoed is geleidelijk aandacht ontstaan voor de bescherming van immateriële vormen van erfgoed, of 'folklore'. De eerste internationale cultureel erfgoedverdragen van de Organisatie der Verenigde Naties voor Onderwijs, Wetenschap en Cultuur (UNESCO) uit 1954 en 1970 hebben betrekking op de bescherming van *materieel* erfgoed in conflictsituaties en tegen illegale handel. Deze verdragen stellen respectievelijk het belang van de gehele mensheid en van nationale staten voorop. Met latere verdragen uit 2003 en 2005, die betrekking hebben op immaterieel erfgoed en culturele diversiteit, is een verschuiving zichtbaar naar een bredere groep belanghebbenden en beschermingsargumenten. Het begrip 'cultureel erfgoed' wordt breder uitgelegd: van statische objecten uit het verleden naar 'levende', bewegende tradities die in het heden nog een rol spelen. De duurzaamheid en inspraak van de gemeenschappen van herkomst en het belang van dynamische preservering komen hierbij in de belangstelling te staan. Het is in deze context dat de traditionele culturele uitingen en traditionele kennis van inheemse volken de aandacht trekken: dynamische preservering en bescherming van culturele diversiteit in het licht van globalisering leveren in dit opzicht bijzonder acute problematiek op.

In een mensenrechtencontext hebben de rechten van inheemse volken geleidelijk aan meer aandacht gekregen. Waar eerste verdragen over inheemse rechten nog een karakter van assimilatie hadden, is steeds meer erkenning ontstaan voor de culturele rechten van inheemse volken, waaronder in het bijzonder ook op het gebied van hun erfgoed, identiteit en leefwijzen. Het aannemen door de Algemene Vergadering van de VN in 2007 van de VN Verklaring over de Rechten van Inheemse Volken is een mijlpaal in de ontwikkeling en erkenning van inheemse rechten. Deze verklaring besteedt veel aandacht aan de traditionele cultuur van inheemse volken en is het eerste mensenrechteninstrument dat specifieke rechten bevat met betrekking tot de ontwikkeling, preservering en bescherming van erfgoed, traditionele kennis en culturele uitingen. Ook in de interpretatie van 'algemene' mensenrechten, zoals het recht op deelname aan het culturele leven, vrijheid van meningsuiting en rechten van minderheden, worden inheemse volken – en hun culturen, taal en culturele uitingen – door de toezichthoudende comités van verschillende VN-mensenrechtenverdragen[2343] uitgelicht als kwetsbare groepen. Dit geeft aanleiding tot de noodzaak voor specifieke maatregelen die de effectiviteit van inheemse rechten garanderen. Kortgezegd is er een verschuiving zichtbaar als het gaat om aandacht voor inheemse volken en hun traditionele culturele uitingen in een mensenrechtencontext, namelijk van assimilatie naar erkenning van zelfbeschikking en controle over identiteit, tradities en culturen. In dit opzicht is de bescherming van cultureel erfgoed, traditionele kennis en culturele uitingen van inheemse volken tevens een fundamentele rechtenkwestie.

Het voorgaande laat zien dat er verschillende verschuivingen hebben plaatsgevonden, en nog steeds plaatsvinden, met betrekking tot het relevante juridische kader, de opvatting van juridische begrippen en de reikwijdte hiervan. Het gaat hierbij bijvoorbeeld om de redenen voor bescherming, de afbakening van het cultureel erfgoedbegrip en de betrokken belanghebbenden, relevante actoren en instanties. Alles bij elkaar genomen beoogt dit proefschrift de volgende onderzoeksvraag te beantwoorden: **In hoeverre kunnen auteursrecht, cultureel erfgoedbepalingen en de rechten van de mens de bescherming van traditionele culturele uitingen vormen, vertrekkend vanuit de normen en principes van het relevante internationale juridische kader?**

Aanpak

De ambitie van dit proefschrift is niet om een modelwet te ontwerpen om de afwezigheid van bescherming voor traditionele culturele uitingen op te vullen. In plaats daarvan beoogt het om:

- de beschermingskwestie in een historisch perspectief te plaatsen;
- de diversiteit aan beschermingsbelangen te duiden;
- het relevante juridische kader in kaart te brengen;
- verschuivingen van, en uitdagingen voor, bestaande juridische concepten en grondgedachtes aan te wijzen;
- gedeelde centrale waarden uit het geheel van juridische principes te destilleren die de bescherming van traditionele culturele uitingen zouden moeten vormen.

Op deze manier draagt het bij aan de bestaande discussie met een nieuw perspectief om de bescherming van traditionele culturele uitingen te analyseren, namelijk door over juridische

[2343] E.g., het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten (IVESCR), het Internationaal Verdrag inzake Burgerrechten en Politieke Rechten (IVBPR) en het Internationaal Verdrag inzake de uitbanning van alle vormen van rassendiscriminatie.

grenzen heen te kijken en de kracht van juridische diversiteit aan te tonen. De beschermingsbelangen en rechten van inheemse volken zijn hierbij het uitgangspunt.

Beschermingsbelangen, een systeemperspectief en gedeelde centrale waarden

Op het eerste gezicht lijkt het relevante juridische kader te bestaan uit losstaande, gefragmenteerde rechtsgebieden. Elk gebied benadert (aspecten van) de bescherming van traditionele culturele uitingen op een eigen manier, met eigen maatregelen, grondgedachtes voor bescherming en juridische principes. Deze benadering bestaat bijvoorbeeld uit exclusieve rechten van reproductie en openbaarmaking uit economisch (ontwikkelings-)oogpunt of ter bescherming van de morele belangen van rechthebbenden in bronvermelding en integriteit. Een andere benadering bestaat uit preserveringsmaatregelen voor cultureel erfgoed. Voorop hierbij staan het levende karakter van cultuur, in plaats van het 'bevriezen' van culturele tradities, en participatie van de brongemeenschappen van het erfgoed. Weer een andere manier om de bescherming van traditionele culturele uitingen te benaderen is door de (culturele) mensenrechten van inheemse volken voorop te stellen. Het realiseren van rechten als zelfbeschikking, non-discriminatie, deelname aan het culturele leven, vrijheid van meningsuiting en rechten op cultuur en taal van minderheden draagt bij aan het creëren van omstandigheden voor de bescherming van traditionele culturele uitingen. Meer specifiek bieden ze handvatten voor de controle over en de ontwikkeling, expressie en preservering van dergelijk materiaal. Omgekeerd kunnen maatregelen voor traditioneel cultureel erfgoed op verschillende gebieden, zoals het stimuleren van (IE-achtige) afspraken voor toegang en verdeling van de behaalde voordelen en cultureel erfgoed-gerelateerde educatie en bewustmakingsprogramma's – bijvoorbeeld in een museum, erfgoed, toerisme en media-omgeving – bijdragen aan de realisering van dergelijke fundamentele rechten.

Wanneer we de beschermingsbelangen van inheemse volken voorop stellen, zoals weergegeven in verklaringen en statements van inheemse volken in internationale fora zoals WIPO en de Verenigde Naties (VN) en in wetenschappelijke studies, literatuur en rapporten, wordt duidelijk dat de complexiteit van het relevante juridische kader inherent is aan de veelzijdige kwestie van bescherming van traditionele culturele uitingen. De bescherming van traditionele culturele uitingen is niet óf een *geïsoleerde* intellectueel eigendomskwestie, cultureel erfgoedvraagstuk of mensenrechtenprobleem, maar is een veelzijdig fenomeen. Het verwisselt van (juridische) gedaante al naar gelang de beschermingsvraag en argumenten die in concrete situaties centraal staan. De beschermingsbelangen die voor de analyse in dit proefschrift worden onderscheiden, en waaraan elk juridisch regime wordt getoetst, zijn:

- economische belangen in het delen in behaalde voordelen;
- controle;
- belangen in de sfeer van erkenning van rechten en onderscheidende culturen, waaronder naamsvermelding, kenmerkende identiteit, zelfbeschikking en zeggenschap over delen;
- morele belangen, zoals integriteit en waardigheid;
- spirituele beschermingsbelangen, waaronder geheimhouding;
- belangen in het voortzetten van tradities, waaronder instandhouding en ontwikkeling van traditionele culturele uitingen, preservering en doorgifte aan volgende generaties.

Sommige beschermingsbelangen vereisen maatregelen tegen reproducties of privatisering door derden, bijvoorbeeld door positieve of door defensieve rechten, waar andere beschermingsbelangen preservering en 'negatieve maatregelen' van respect behoeven. Weer

andere beschermingsbehoeften plaatsen de bescherming van traditionele culturele uitingen in een breder (politiek) perspectief door in te zetten op zelfbeschikking, vrijheid van meningsuiting, non-discriminatie en de mogelijkheid om bepaalde manieren van leven voort te zetten.

Een analyse van de verschillende juridische gebieden, en in het bijzonder vanuit het perspectief van de onderliggende principes per domein, laat zien dat er gemeenschappelijke rode 'waarde draden' door dit principe-kader lopen. Het relevante juridische kader is divers, zowel wat betreft concrete maatregelen als normatieve status. Het bestaat uit privaatrechtelijke intellectueel eigendomsnormen vis-à-vis publiekrechtelijke cultureel erfgoedregels en mensenrechten. Echter, analyse op een dieperliggend principe-niveau laat zien dat we een onderliggend normatief principe-kader kunnen identificeren dat gedeelde centrale waarden reflecteert: waardigheid en identiteit; respect; en participatie en democratisering van het discours. Waardigheid, respect en het in acht nemen van een diversiteit aan zienswijzen zijn waarden die steeds terugkomen in de drie bestudeerde rechtsgebieden, of het nu gaat om erkenning van de band tussen auteurs en hun werk en het belang van bescherming van integriteit van een werk en naamsvermelding van de auteur; het verband tussen erfgoed en identiteit, respect voor cultureel erfgoed (van andere gemeenschappen) en de waarde die gehecht wordt aan doorgifte aan volgende generaties; of om zelfbeschikking, non-discriminatie en deelname in besluitvorming en aan het culturele leven. Dit betekent dat dergelijke waarden niet alleen 'gevoelsmatig' aanwezig zijn in argumenten voor bescherming van traditionele culturele uitingen en in inheemse beschermingsbehoeften, maar dat zij kunnen worden onderbouwd door het al bestaande principe-kader van de relevante juridische domeinen.

Staatsverplichtingen en dwarsverbanden

De bevinding dat het juridische kader een – weliswaar complex – geheel vormt en in feite een systeem is dat interacteert en onderling verbonden is wat betreft de veelzijdige kwestie van bescherming van traditionele culturele uitingen wordt verder verduidelijkt wanneer de beschermingsvraag vanuit een mensenrechtenperspectief wordt beschouwd. Dit is in het bijzonder het geval in de context van staatsverplichtingen die voortvloeien uit de bestudeerde mensenrechten.

Voor staatsverplichtingen onder het mensenrechtenregime worden over het algemeen drie types onderscheiden om volledige en effectieve mensenrechten te garanderen: respect voor, bescherming van en het realiseren van mensenrechten. Deze verplichtingen bestaan uit negatieve verplichtingen, om af te zien van handelingen die mensenrechten schenden, en positieve verplichtingen, om zich in te spannen om juist actief mensenrechten te realiseren. De verplichtingen en maatregelen die voortvloeien uit de in dit proefschrift bestudeerde fundamentele rechten (zelfbeschikking, non-discriminatie, vrijheid van meningsuiting, eigendom en land, participatierechten, de rechten van minderheden en rechten op culturele integriteit, menselijke waardigheid en identiteit) nemen verschillende dimensies aan die de diversiteit van het juridische kader onderstrepen. Zo betreft het verplichtingen in een intellectueel eigendoms- en handelscontext, cultureel erfgoed-gerelateerde verplichtingen en verplichtingen die een inheemse dimensie vereisen voor de opvatting van de inhoud van de betreffende mensenrechten.

Verplichtingen in een intellectueel eigendoms- en handelscontext zijn nader toegelicht in Algemeen Commentaar Nr. 21 op Artikel 15(1)(a) International Verdrag inzake

Economische, Sociale en Culturele Rechten (IVESCR), Algemeen Commentaar Nr. 17 op Artikel 15(1)(c) IVESCR en verschillende afsluitende opmerkingen met betrekking tot landenrapporten van het VN-comité voor economische, sociale en culturele rechten (CESCR). In Artikel 15(1)(a) en (c) IVESCR zijn rechten neergelegd om deel te nemen aan het culturele leven respectievelijk om de voordelen te genieten van bescherming van de geestelijke en stoffelijke belangen die voortvloeien uit de creatie van een wetenschappelijk, artistiek of literair werk. In de verplichtingen die het Comité onderscheidt, is duidelijk een vervlechting zichtbaar van de verschillende benaderingen en juridische regimes die, net als bij de realisering van fundamentele rechten, een rol spelen bij de bescherming van inheems erfgoed. Deze variëren van privaatrechtelijke middelen zoals exclusieve rechten, waaronder bescherming tegen ongeautoriseerd gebruik door derden en erkenning van (collectieve) rechten op erfgoed, tot de verplichting om het erfgoed van uitgesloten groepen te beschermen en te respecteren in de context van globalisering en ontwikkeling. Deze verplichtingen onderstrepen de fundamentele rechten van inheemse volken op zelfbeschikking en deelname aan het culturele leven.

Het CESCR en het VN-Mensenrechtencomité (MRC) hebben ook specifiek verplichtingen onderstreept die relevant zijn in een cultureel erfgoed-context, namelijk in Algemeen Commentaar Nr. 21 en Nr. 23 inzake Artikel 15(1)(a) IVESCR, respectievelijk Artikel 27 Internationaal Verdrag inzake Burgerrechten en Politieke Rechten (IVBPR), alsmede in diverse afsluitende opmerkingen met betrekking tot landenrapporten en in zaken voor het MRC. Artikel 27 IVBPR garandeert de rechten van minderheden, zoals rechten op cultuur, taal en religie. In Algemeen Commentaar Nr. 21 specificeert het CESCR diverse cultureel erfgoed-verplichtingen nader in de context van het recht om deel te nemen aan het culturele leven, namelijk om rechten in de sfeer van cultureel erfgoed te respecteren, waaronder het voorkomen van schendingen door derden, en daartoe maatregelen te nemen. Men kan hierbij denken aan het garanderen van respect voor cultureel erfgoed van alle groepen en gemeenschappen, maatregelen om doorgifte aan volgende generaties te verzekeren, en preservering en restauratie van cultureel erfgoed. Staten zijn ook verplicht om mensenrechten te *realiseren*, wat ook geldt voor dergelijke rechten in de context van cultureel erfgoed. Hieronder vallen het promoten en faciliteren van de rechten, en het voorzien van al wat nodig is om effectief deze rechten te kunnen uitoefenen. Maatregelen hiervoor kunnen worden gezocht in de hoek van educatie en bewustmaking; het opzetten van supportprogramma's voor minderheden en andere gemeenschappen om hun erfgoed te preserveren; het verbeteren van begrip, respect en tolerantie tussen groepen, bijvoorbeeld door inzet van onderwijs en de media; en maatregelen die participatie van de relevante gemeenschappen in regelgeving en beleidsvorming verbeteren.

In Algemeen Commentaar Nr. 23 heeft het MRC de verplichtingen onder Artikel 27 IVBPR zo uitgelegd dat deze onder andere positieve maatregelen inhouden om de identiteit van minderheden en het recht op het ontwikkelen, in stand houden en kunnen uitoefenen van hun culturen, talen en religies te beschermen. De manier van leven van inheemse volken en hun traditionele activiteiten vallen ook onder 'cultuur' als beschermd onder dit recht. Vereiste maatregelen onder de staatsverplichtingen betreffen zowel bescherming als het verzekeren van de participatierechten van inheemse volken in beslissingen die hen aangaan. Volgens deze opvatting zou men ook het erfgoed en de traditionele kennis en culturele uitingen van inheemse volken kunnen verstaan onder 'cultuur' als beschermd onder dit artikel. Dit is immers sterk gelinkt aan traditionele manieren van leven en activiteiten. Staatsverplichtingen onder dit recht zouden als zodanig kunnen worden uitgelegd als inhoudende positieve maatregelen voor de bescherming van dergelijk erfgoed. Samengevat leggen de

verplichtingen in een cultureel erfgoedcontext, zoals toegelicht door de VN-comités, aan staten op om de manier van leven van inheemse volken en toegang tot en doorgifte van hun cultureel erfgoed te verzekeren. Maar ook participatie van de betreffende gemeenschappen speelt een belangrijke rol als het gaat om effectieve preservering van erfgoed. In dit opzicht laten de verplichtingen dwarsverbanden zien tussen cultureel erfgoed maatregelen en fundamentele rechten van inheemse volken op zelfbeschikking, deelname aan het culturele leven, cultuur en participatie.

In een mensenrechtencontext wordt duidelijk dat voor fundamentele rechten een 'inheemse dimensie' kan worden onderscheiden die samenhangt met de vaak kwetsbare en gemarginaliseerde positie van inheemse volken. Dit betekent dat de interpretatie en de realisering van de rechten voor inheemse volken specifieke invulling behoeft. De verplichtingen van staten geven hier gestalte aan. VN-comités erkennen de positie en de moeilijkheden van inheemse volken om daadwerkelijk en effectief hun rechten uit te oefenen en dragen staten expliciet op om deze te realiseren. Dit vereist maatregelen die de omstandigheden van inheemse volken uitdrukkelijk in acht nemen. Dit geldt ook voor de rechten die in dit proefschrift zijn geanalyseerd als relevant voor de bescherming van traditionele culturele uitingen. Maatregelen om deze diverse (culturele) rechten van inheemse volken te respecteren, te beschermen en te realiseren bevinden zich met name op het gebied van participatie, bescherming van hun (intellectuele) eigendom en culturele erfgoed en het verzekeren van de mogelijkheid dat inheemse volken hun manieren van leven kunnen uitoefenen. Voor traditionele culturele uitingen komen de contouren van dergelijke maatregelen samen in Artikel 31 van de VN Verklaring over de Rechten van Inheemse Volken. Dit artikel geeft aan dat de beschermingsvraag een multidimensionaal antwoord vereist. Afhankelijk van specifieke of lokale omstandigheden kunnen diverse benaderingen nodig zijn, zoals:

- (intellectueel eigendom-achtige) controle over inheems erfgoed voor toegang tot en delen in de voordelen die het gebruik van het materiaal oplevert;
- het cultureel erfgoed-gerelateerd in stand houden en ontwikkelen van erfgoed;
- het verzekeren van effectieve uitoefening van fundamentele rechten – zoals het recht op zelfbeschikking, vrijheid van meningsuiting, participatie en culturele rechten;
- buiten-juridische maatregelen kunnen ook een belangrijke rol spelen, zoals het creëren van bewustzijn, respect en support- en revitalisatie-programma's.

Samengenomen onderstrepen deze staatsverplichtingen en de toelichting ervan door de VN-comités dat er gemeenschappelijke thematische en conceptuele lijnen zichtbaar zijn tussen de verschillende juridische domeinen. Dit bevestigt de zienswijze dat het relevante juridische kader weliswaar uit afzonderlijke 'gefragmenteerde' delen bestaat, maar ook een holistisch systeem vormt waarin de 'deelsystemen' interacteren en onderling verbonden zijn. Alle drie de gebieden benaderen (delen van) het probleem op hun eigen manier, onderwijl deel uitmakend van een groter geheel als het gaat om de bescherming van traditionele culturele uitingen. Op deze manier dragen de staatsverplichtingen en uitleg daarvan bij aan het schetsen van contouren voor effectieve en veelzijdige bescherming.

Antwoord op de hoofdvraag

Als we bij elkaar optellen dat de bescherming van traditionele culturele uitingen niet óf een *geïsoleerde* intellectueel eigendomskwestie, cultureel erfgoedvraagstuk of mensenrechtenprobleem is en dat, daarmee samenhangend, de beschermingsbehoeften erg

veelzijdig zijn, dan kunnen we stellen dat diversiteit de kracht is van het relevante juridische kader. Sterker nog, het is noodzakelijkerwijs divers voor een beschermingskwestie die van (juridische) gedaante kan verwisselen. Een verscheidenheid aan juridische perspectieven, en de mogelijkheden en maatregelen die ze bieden, is nodig voor een veelomvattende benadering van de bescherming van traditionele culturele uitingen. Met andere woorden: het loont om over juridische grenzen te kijken en te treden. Daarbij moet het beschermingsvraagstuk in een breder perspectief worden geplaatst. Het maakt deel uit van een groter geheel van moeilijkheden van inheemse volken als het gaat om hun rijkdommen – natuurlijk, cultureel of immaterieel – en erkenning van hun (fundamentele) rechten. Dit is gelinkt aan controle over en behoud en ontwikkeling van hun erfgoed, traditionele kennis en manieren van leven. De voorgaande bevindingen komen samen in het identificeren van gedeelde centrale waarden van de drie rechtsgebieden: waardigheid en identiteit; respect; en participatie en democratisering van het discours.

De verschillende conclusies die de analyses in dit proefschrift opleveren, bieden ook gelijk de elementen die nodig zijn voor het beantwoorden van de hoofdvraag: **In hoeverre kunnen auteursrecht, cultureel erfgoedbepalingen en de rechten van de mens de bescherming van traditionele culturele uitingen vormen, vertrekkend vanuit de normen en principes van het relevante internationale juridische kader?** Ten eerste is het van belang om de veelzijdigheid van de kwestie te onderkennen. Dit betekent dat de diversiteit van het juridische kader dat relevant is voor de beschermingsvraag niet alleen vanzelfsprekend, maar ook noodzakelijk is. Dit betekent ook dat er een geheel van verschillende juridische grondgedachtes en principes kan worden onderscheiden die aansluiten bij (aspecten) van het beschermingsvraagstuk. Echter, uit dit principe-kader kan een aantal gedeelde centrale waarden worden gedestilleerd. Deze kunnen we zien als onmisbare bruggen tussen de verschillende juridische manieren van aanpak. Ze kunnen convergentie van de verschillende systemen sturen of aanpassingen in de verschillende domeinen aansporen in de context van inheems erfgoed. Op die manier zijn ze een essentiële gids voor een veelomvattende, maar coherente, benadering van het vraagstuk. Vaststaat dat het mensenrechtensysteem als belangrijk fundament geldt voor de contouren van bescherming van traditionele culturele uitingen en dat staatsverplichtingen de geobserveerde, noodzakelijke, verbanden tussen de verschillende juridische gebieden nogmaals benadrukken. Het voorgaande in een notendop: het relevante juridische kader kan de bescherming van traditionele culturele uitingen vormen vanuit de kracht van haar diversiteit en van het fundament dat het mensenrechtensysteem (en de bijbehorende staatsverplichtingen) biedt. De gedeelde centrale waarden zijn een essentiële gids hierin.

Aanbevelingen

Om de conclusies te vertalen naar zowel een theoretisch en conceptueel onderbouwde zienswijze op de bescherming van traditionele culturele uitingen als concrete (holistische) actie, zet het proefschrift tot slot drie aanbevelingen uiteen als eerste vereisten voor elke benadering. De aanbevelingen nemen de gedeelde centrale waarden van het juridische kader als startpunt en gids en beslaan zowel theoretische als conceptuele benaderingen, de benodigde mind-set en een aanzet voor concrete actie die profiteert van de juridische diversiteit voor de bescherming van traditionele culturele uitingen.

De eerste aanbeveling is voor elke organisatie, of samenwerkingsverband van organisaties, die de beschermingskwestie van het erfgoed van inheemse volken, waaronder hun traditionele culturele uitingen, op zich neemt om een transdisciplinair perspectief in acht te nemen met

betrekking tot de diverse juridische benaderingen en hun gedeelde centrale waarden te implementeren. Dat betekent dat waardigheid en identiteit respect en participatie en democratisering van het discours voorop dienen te staan als benodigde conceptuele benadering voor coherentie en effectieve bescherming.

De tweede aanbeveling stelt een centrale voorwaarde: inclusieve en geïntegreerde actie in samenwerkende fora is een vereiste. Om de cyclus van marginalisatie en uitsluiting te doorbreken die zichtbaar is in de benadering van inheemse rechten en kwesties in internationaal recht dienen *mainstream* opvattingen aangevuld te worden met, zo niet plaats te maken voor, inheemse perspectieven. Deze aanbeveling ziet dus op de procedurele fase van concrete actie en beleidsvorming door staten en internationale organisaties. Dit geldt in het bijzonder ook voor de regels ter bescherming van traditionele culturele uitingen zoals deze ontwikkeld worden door VN-instanties zoals WIPO. In plaats van het *top-down* toepassen of opstellen van regels en beleid die hun erfgoed en ontwikkeling betreffen, zouden inheemse volken prominenter betrokken moeten worden. In dit opzicht is adequate bescherming voor traditionele culturele uitingen ook een kwestie van taal. Dominante modellen en opvattingen, bijvoorbeeld in de context van ontwikkeling en duurzaamheid of intellectueel eigendom, zien inheemse zienswijzen en claims voor bescherming van hun erfgoed mogelijk als obstakels voor respectievelijk ontwikkeling en het publieke domein. Echter, als er ruimte wordt gegeven aan inheemse argumenten en denkbeelden met betrekking tot kwesties die effect hebben op hun leefwijzen en erfgoed wordt democratisering van discours en beleid mogelijk. Dit biedt een belangrijk perspectief dat kan bijdragen aan de analyse van bestaande juridische kaders en het vinden van nieuwe oplossingen. Het is daarom van belang dat de (historisch bepaalde) perceptie van inheemse volken als ‘onderwerpen van internationaal recht’ en in de marge van de rechtsorde plaats maakt voor erkenning van hun legitieme claims voor (culturele) rechten als kwesties die een volwaardig onderdeel zijn van juridische debatten, waaronder dus vraagstukken met betrekking tot hun erfgoed en traditionele kennis en culturele uitingen.

De derde aanbeveling onderstreept dat samenwerking tussen internationale organisaties cruciaal is voor de consistentie en effectiviteit van beschermingsmaatregelen. Deze aanbeveling zet als het ware de benodigde ‘mind-set’ uiteen voor concrete, geïntegreerde actie, namelijk om de juridische diversiteit en de onderlinge verbondenheid tussen de beschermingsbenaderingen als de kracht van het relevante juridische kader te zien. De (normbepalende) organisaties en instanties die internationaal actief zijn op het gebied van intellectueel eigendoms-, cultureel erfgoed- en mensenrechtenkwesties van inheemse volken, e.g. WIPO, UNESCO, de comités van de centrale mensenrechtenverdragen en het VN Permanent Forum voor Inheemse Kwesties, maken bovendien alle deel uit van dezelfde internationale structuur. Het zijn stuk voor stuk gespecialiseerde organisaties, toezichthoudende comités en fora van de Verenigde Naties. Een overkoepelende structuur en plek voor kennisuitwisseling en gezamenlijk werk aan een gemeenschappelijk doel – de bescherming van traditionele culturele uitingen – is dan ook bijzonder waardevol, zo niet onmisbaar. Het overschrijden van juridische grenzen is inherent in de problematiek rond de rechten van inheemse volken. Moeilijkheden en obstakels zijn divers en wijdverbreid.

Het proefschrift geeft twee voorbeelden van mogelijke ‘wegen’ hiervoor waar al samenwerking zichtbaar is. De eerste mogelijkheid is om de bescherming van traditionele culturele uitingen explicieter een plaats te geven in het werk dat de *Inter-Agency Support Group on Indigenous Peoples’ Issues* (IASG) uitvoert binnen de VN. De IASG kwam voor het eerst bijeen in 2002 en was opgezet om het mandaat van het VN Permanent Forum voor

Inheemse Kwesties, vaste co-voorzitter bij bijeenkomsten van de Support Group, te ondersteunen en promoten. De leden van de IASG, waaronder de Internationale Arbeidsorganisatie (IAO), het Secretariaat van het Verdrag inzake Biologische Diversiteit (CBD), UNESCO, het kantoor van de VN-Hoge Commissaris voor de Mensenrechten (OHCHR) en WIPO, delen de gemeenschappelijke overtuiging om zich binnen hun mandaat met, en ten behoeve van, inheemse volken in te zetten. Via het Permanent Forum kunnen de leden informatie uitwisselen over lopende programma's en projecten binnen de VN-structuur. Als zodanig speelt de IASG een belangrijke rol in het verzekeren van coördinatie van inspanningen. Dit lijkt een veelbelovende manier om de bescherming van traditionele culturele uitingen te benaderen, gebruikmakend van de betrokken juridische diversiteit. Zoals gezien spelen verschillende VN instanties een rol voor specifieke aspecten van de beschermingskwestie.

De tweede mogelijke weg voor samenwerking is een mondiaal en zeer actueel voorbeeld van gemeenschappelijke doelen waaraan internationaal gewerkt wordt, namelijk het realiseren van de Werelddoelen duurzame ontwikkeling (ofwel *Sustainable Development Goals*, hierna: SDG's). Het kan zeer nuttig zijn voor beschermingsbenaderingen voor traditionele culturele uitingen om inspiratie uit dit gezamenlijke werk te halen, zo niet om daadwerkelijk de krachten te bundelen met de concrete actie die al plaatsvindt. Voor implementatie van de SDG's worden drie dimensies onderscheiden: een economische, sociale en milieu-gerelateerde dimensie. Ten behoeve van de bescherming, preservering en promotie van erfgoed, traditionele kennis en culturele uitingen van kwetsbare groepen kan hieraan volgens deze aanbeveling een culturele dimensie worden toegevoegd. Er wordt wel beargumenteerd dat ontwikkeling niet zonder cultureel component kan, als ware het de 'ziel' van ontwikkeling en groei.

De SDG's krijgen veel aandacht en worden (politiek) breed gesteund. Er ligt bovendien een sterke nadruk op mensenrechten en inheemse volken worden beschouwd als *major stakeholder* groepen in internationaal overleg en debat. Waarschijnlijk zal aandacht voor een culturele dimensie moeten groeien. Een eerste vereiste voor de werkbaarheid van deze weg voor bescherming van traditionele culturele uitingen is dus dat een culturele dimensie van ontwikkeling moet worden erkend, en daarna de plek hierin voor het erfgoed en de traditionele kennis en culturele uitingen van inheemse volken. Een culturele dimensie van ontwikkeling, inclusief actie met betrekking tot immaterieel erfgoed, traditionele kennis en uitingen, zorgt voor een cultuur-bewuste perceptie van ontwikkeling met oog voor verschillen en lokale (inheemse) opvattingen van welzijn vis-à-vis 'dominante' uitleg en denkbeelden van ontwikkeling.

Samengevat kan de IASG als 'institutionele ondersteuning' worden beschouwd van een systeemperspectief en operationalisering van juridische diversiteit als het gaat om bescherming van traditionele culturele uitingen. De SDG's op hun beurt kunnen als 'praktische werkomgeving' voor een dergelijk perspectief worden gezien, waarvoor veel politieke *goodwill* bestaat en middelen worden aangewend en die bovendien als een van de laatste 'frontlinies' voor inheemse rechten gelden. Er zijn drie thema's die als rode draad door de aanbevelingen lopen:

- participatie van inheemse volken is essentieel;
- inspanningen voor de bescherming van inheems erfgoed zouden moeten streven naar democratisering van het discours, zoals het vergroten van mogelijkheden voor

inheemse volken om hun stem en opvattingen te doen gelden en van toegang tot procedures van de bestaande of *sui generis* juridische systemen;
- om effectiviteit van beschermingsbenaderingen te garanderen zouden betrokken juridische perspectieven, instanties en belanghebbenden zich zoveel mogelijk moeten inspannen voor coördinatie en samenwerking in de context van inheems erfgoed.

Tot slot, bewustzijn van de rechten van inheemse volken lijkt langzaamaan te groeien, maar tien jaar na het aannemen van de VN Verklaring in 2007 is er nog een lange weg te gaan met betrekking tot implementatie. Aanpak van de problematiek rond de bescherming, preservering en promotie van het erfgoed en de traditionele kennis en culturele uitingen van inheemse volken kan hierbij niet achterwege blijven. In dit opzicht is de beschermingsdiscussie van traditionele culturele uiting slechts één manifestatie van wat een inheemse commentator 'de Inheemse eeuw' heeft genoemd, waarbij kwesties van soevereiniteit en duurzaamheid een grote rol spelen. Dit proefschrift hoopt bij te dragen aan het creëren van meer bewustzijn van de diverse zorgen die spelen in de context van inheems erfgoed en erkenning van de rechten, opvattingen en participatie van inheemse volken met betrekking tot dit erfgoed. Het biedt hiertoe een breder perspectief voor de bescherming van traditionele culturele uitingen, zowel juridisch gezien als wat betreft de historische en hedendaagse patronen en moeilijkheden waarvan het vraagstuk deel uitmaakt. Het in acht nemen van deze aspecten is van groot belang om stappen voorwaarts te maken in de beschermingsdiscussie.

Annex I – Latest Draft Articles of 2017

(WIPO/GRTKF/IC/34/8, Annex)

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Thirty-Fourth Session
Geneva, June 12 to 16, 2017

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS:
DRAFT ARTICLES

[PRINCIPLES/PREAMBLE/INTRODUCTION]

[1. [Recognizing]/[to recognize] that the cultural heritage of Indigenous [Peoples], [local communities] [and nations] / beneficiaries has intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values.

2. [Being]/[to be] guided by the aspirations [and expectations] expressed directly by Indigenous [Peoples], [local communities] [and nations] / beneficiaries, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such [peoples], communities [and nations] / beneficiaries.

3. [Acknowledging]/[to acknowledge] that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit Indigenous [Peoples], [local communities] [and nations] / beneficiaries, as well as all humanity.

4. [Recognizing]/[to recognize] the importance of promoting respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the Indigenous [Peoples], [local communities] [and nations] / beneficiaries that preserve and maintain expressions of these cultures and folklore.

5. [Respecting]/[to respect] the continuing customary use, development, exchange and transmission of traditional cultural expressions by, within and between communities.

6. [Contributing]/[to contribute] to the promotion and protection of the diversity of traditional cultural expressions, [and the rights of beneficiaries over their traditional cultural expressions].

7. [Recognizing]/[to recognize] the importance of protection, preservation and safeguarding the environment in which traditional cultural expressions are generated and maintained, for the direct benefit of Indigenous [Peoples], [local communities] [and nations] / beneficiaries, and for the benefit of humanity in general.

8. [Recognizing]/[to recognize] the importance of enhancing certainty, transparency, mutual respect and understanding in relations between Indigenous [Peoples], [local communities] [and nations] / beneficiaries, on the one hand, and academic, commercial, governmental, educational and other users of traditional cultural expressions, on the other.]

9. [[Acknowledging]/[to acknowledge] that the protection of traditional cultural expressions should contribute toward the promotion of innovation and to the transfer and dissemination of knowledge to the mutual advantage of holders and users of traditional cultural expressions and in a manner conducive to social and economic welfare and to a balance of rights and obligations.]

10. [[Recognizing]/[to recognize] the value of a vibrant public domain and the body of knowledge that is available for all to use, and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain.]

11. [To promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange [based on mutually agreed terms which are fair and equitable [and subject to the free prior informed consent and approval and involvement of] Indigenous [Peoples], [local communities] and [nations/beneficiaries.]]

12. [To [secure/recognize] rights [already acquired by third parties] and [secure/provide for] legal certainty [and a rich and accessible public domain].]

13. [Nothing in this [instrument] may be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future.]

[ARTICLE 1

POLICY OBJECTIVES

Alt 1

This instrument should aim to:

1.1 Provide beneficiaries with the means to:

(a) prevent the misappropriation and misuse/offensive and derogatory use/unauthorized use of their traditional cultural expressions;

(b) control ways in which their traditional cultural expressions are used beyond the traditional and customary context, as necessary;

(c) promote the equitable compensation/sharing of benefits arising from their use with free prior informed consent or approval and involvement/fair and equitable compensation, as necessary; and

(d) encourage and protect tradition-based creation and innovation.

Option

(d) encourage and protect creation and innovation.

1.2 Aid in the prevention of the erroneous grant or assertion of intellectual property rights over traditional cultural expressions.

Alt 2

This instrument should aim to:

(a) [prevent the [misuse]/[unlawful appropriation] of protected traditional cultural expressions];

(b) encourage creation and innovation;

(c) promote/facilitate intellectual and artistic freedom, research [or other fair] practices and cultural exchange;

(d) secure/recognize rights already acquired by third parties and secure/provide for legal certainty and a rich and accessible public domain; and

(e) [aid in the prevention of the erroneous grant [or assertion] of intellectual property rights over traditional cultural expressions.]

Alt 3

The objective of this instrument is to support the appropriate use and protection of traditional cultural expressions within the intellectual property system, in accordance with national law, [and to recognize][recognizing] the rights of [beneficiaries] [indigenous [peoples] and local communities].

Alt 4

The objective of this instrument is to prevent misappropriation, misuse, or offensive use of, and to protect, traditional cultural expressions, and to recognize the rights of indigenous [peoples] and local communities.]

[ARTICLE 2

USE OF TERMS

For the purposes of this instrument:

Traditional cultural expression means any form of [artistic and literary], [*other* creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions[2344], materials[2345], music and sound[2346], verbal[2347] and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may

[2344] [Such as dance, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports/sports and traditional games, puppet performances, and other performances, whether fixed or unfixed.]
[2345] [Such as material expressions of art, handicrafts, ceremonial masks or dress, handmade carpets, architecture, and tangible spiritual forms, and sacred places.]
[2346] [Such as songs, rhythms, and instrumental music, the songs which are the expression of rituals.]
[2347] [Such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names and symbols.]

subsist in written/codified, oral or other forms],that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving.

Alternative

Traditional cultural expressions comprise the various dynamic forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries.

[Public domain refers, for the purposes of this instrument, to tangible and intangible materials that, by their nature, are not or may not be protected by established intellectual property rights or related forms of protection by the legislation in the country where the use of such material is carried out. This could, for example, be the case where the subject matter in question does not fill the prerequisite for intellectual property protection at the national level or, as the case may be, where the term of any previous protection has expired.]

Alternative

Public domain means the public domain as defined by national law**.**

[Publicly available means [subject matter]/[traditional knowledge] that has lost its distinctive association with any indigenous community and that as such has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.]

[["Use"]/["Utilization"] means

(a) where the traditional cultural expression is included in a product:

(i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or

(ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context.

(b) where the traditional cultural expression is included in a process:

(i) making use of the process beyond the traditional context; or

(ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or

(c) the use of traditional cultural expression in research and development leading to profit-making or commercial purposes.]]

[ARTICLE 3

[ELIGIBILITY CRITERIA FOR [PROTECTION]/[SAFEGUARDING]]/[SUBJECT MATTER OF [THE INSTRUMENT]/[PROTECTION]]

Alt 1

This instrument applies to traditional cultural expressions.

Alt 2

The subject matter of [protection]/[this instrument] is traditional cultural expressions:

(a) that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities;

(b) that are the unique product of, and directly linked with, the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities;

(c) that are transmitted from generation to generation, whether consecutively or not;

(d) that have been used for a term as has been determined by each [Member State]/ [Contracting Party] but not less than 50 years/or a period of five generation; and

(e) that are the result of creative and literary or artistic intellectual activity.

Alt 3

This instrument applies to traditional cultural expressions. In order to be eligible for protection under this instrument, traditional cultural expressions must be distinctively associated with the cultural heritage of beneficiaries as defined in Article 4, and be created, generated, developed, maintained, and shared collectively, as well as transmitted from generation to generation, and which may be dynamic and evolving.]

[ARTICLE 4

BENEFICIARIES OF [PROTECTION]/[SAFEGUARDING]

Alt 1

Beneficiaries of this instrument are indigenous [peoples] and local communities who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions.

Alt 2

The beneficiaries of this instrument are indigenous [peoples], local communities, [and]/[and where there is no notion of indigenous [peoples]], other beneficiaries as may be determined under national law.

Alt 3

The beneficiaries of this instrument are indigenous [peoples], local communities, and other beneficiaries as may be determined under national law.

Alt 4

The beneficiaries of this instrument are indigenous [peoples], as well as local communities and other beneficiaries, as may be determined by national law, [who hold, express, create, maintain, use, and develop [protected] traditional cultural expressions].]

[ARTICLE 5

SCOPE OF [PROTECTION]/[SAFEGUARDING]

Alt 1

5.1 [Member States]/[Contracting Parties] [should]/[shall] safeguard the economic and moral interests of the beneficiaries concerning their [protected] traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.

Alt 2

5.1 Member States should/shall protect the economic and moral rights and interests of beneficiaries in secret and/or sacred traditional cultural expressions as defined in this instrument, as appropriate and in accordance with national law, and where applicable, customary laws. In particular, beneficiaries shall enjoy the exclusive rights of authorizing the use of such traditional cultural expressions.

5.2 Where the subject matter is still held, maintained, and used in a collective context, but made publicly accessible without the authorization of the beneficiaries, Member States should/shall provide administrative, legislative, and/or policy measures, as appropriate, to protect against false, misleading, or offensive uses of such traditional cultural expressions, to provide a right to attribution, and to provide for appropriate usages of their traditional cultural expressions. In addition, where such traditional cultural expressions have been made available to the public without the authorization of the beneficiaries and are commercially exploited, Member States should/shall use best endeavors to facilitate remuneration, as appropriate.

5.3 Where the subject matter is not protected under 5.1 or 5.2 Member States should/shall use best endeavors to protect the integrity of the subject matter in consultation with beneficiaries where applicable.

Alt 3

Option1

5.1 Where the protected traditional cultural expression is [sacred], [secret] or [otherwise known only] [closely held] within indigenous [peoples] or local communities, Member States should/shall:

(a) provide legal, policy and/or administrative measures, as appropriate and in accordance with national law that allow beneficiaries to:

i. [create,] maintain, control and develop said protected traditional cultural expressions;

ii. [discourage] prevent the unauthorized disclosure and fixation and prevent the unlawful use of secret protected traditional cultural expressions;

iii. [authorize or deny the access to and use/[utilization] of said protected traditional cultural expressions based on free prior and informed consent or approval and involvement and mutually agreed terms;]

iv. protect against any [false or misleading] uses of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries; and

v. [prevent] prohibit use or modification which distorts or mutilates a protected traditional cultural expression or that otherwise diminishes its cultural significance to the beneficiary.

(b) encourage users [to]:

i. attribute said protected traditional cultural expressions to the beneficiaries;

ii. use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions]; and

iii. use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions.

5.2 [Where the protected traditional cultural expression is still [held], [maintained], used [and]/[or] developed by indigenous [peoples] or local communities, and is/are publicly available [but neither widely known, [sacred], nor [secret]], Member States should/shall encourage that users]/[provide legal, policy and/or administrative measures, as appropriate and in accordance with national law to encourage users [to]]:

(a) attribute and acknowledge the beneficiaries as the source of the protected traditional cultural expressions, unless the beneficiaries decide otherwise, or the protected

traditional cultural expressions is not attributable to a specific indigenous people or local community[; and][.]

(b) use best efforts to enter into an agreement with the beneficiaries to establish terms of use of the protected traditional cultural expressions;

(c) [use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiaries as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions[; and][.]]

(d) [refrain from any [false or misleading uses] of protected traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries.]

5.3 [Where the protected traditional cultural expressions is/are [publicly available, widely known [and in the public domain]] [not covered under Paragraphs 1 or 2], [and]/or protected under national law, Member States should/shall encourage users of said protected traditional cultural expressions [to], in accordance with national law:

(a) attribute said protected traditional cultural expressions to the beneficiaries;

(b) use/utilize the knowledge in a manner that respects the cultural norms and practices of the beneficiary [as well as the [inalienable, indivisible and imprescriptible] nature of the moral rights associated with the protected traditional cultural expressions;

(c) [protect against any [false or misleading] uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries[;]] [and]

(d) where applicable, deposit any user fee into the fund constituted by such Member State.]

Option 2

5.1 Member States should/shall safeguard the economic and moral interests of the beneficiaries concerning their protected traditional cultural expressions, as defined in this [instrument], as appropriate and in accordance with national law, in a reasonable and balanced manner.

5.2 Protection under this instrument does not extend to traditional cultural expressions that are widely known or used outside the community of the beneficiaries as defined in this [instrument], [for a reasonable period of time], in the public domain, or protected by an intellectual property right.

5.3 Protection/safeguarding under this instrument(s) does not extend to uses of protected traditional cultural expressions: (1) for archival, uses by museums, preservation, research and scholarly uses, and cultural exchanges; and (2) to create literary, artistic, and creative works that are inspired by, borrowed from, derived from, or adapted from protected traditional cultural expressions.]

[ARTICLE 6

ADMINISTRATION OF [RIGHTS]/[INTERESTS]

Alt 1

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, to administer, in close consultation with the beneficiaries, where applicable, the rights/interests provided for by this instrument.

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]

Alt 2

6.1 [Member States]/[Contracting Parties] may establish or designate a competent authority, in accordance with national law, with the explicit consent of/in conjunction with the beneficiaries, to administer the rights/interests provided for by this [instrument].

6.2 [The identity of any authority established or designated under Paragraph 1 [should]/[shall] be communicated to the International Bureau of the World Intellectual Property Organization.]]

[ARTICLE 7

EXCEPTIONS AND LIMITATIONS

Alt 1

In complying with the obligations set forth in this instrument, Member States may in special cases, adopt justifiable exceptions and limitations necessary to protect the public interest, provided such exceptions and limitations shall not unreasonably conflict with the interests of beneficiaries, [and the customary law of indigenous [peoples] and local communities,] nor unduly prejudice the implementation of this instrument.

Alt 2

In implementing this instrument, Member States may adopt exceptions and limitations as may be determined under national legislation including incorporated customary law.

1. To the extent that any act would be permitted under national law for works protected by copyright, signs and symbols protected by trademark law, or subject matter otherwise protected by intellectual property law, such acts [shall/should] not be prohibited by the protection of TCEs.

2. Regardless of whether such acts are already permitted under paragraph (1), Member States [shall/should] [may] have exceptions[, such as] for:

    (a) learning teaching and research;

(b) preservation, display, research, and presentation in archives, libraries, museums or other cultural institutions;
(c) the creation of literary, artistic, or creative works inspired by, based on, or borrowed from traditional cultural expressions.

3. A Member State may provide for exceptions and limitations other than those permitted under paragraph (2).

4. A Member State shall/should provide for exceptions and limitations in cases of incidental use/utilization/inclusion of a protected traditional cultural expression in another work or another subject matter, or in cases where the user had no knowledge or reasonable grounds to know that the traditional cultural expression is protected.

Alt 3

In [complying with the obligations set forth in]/[implementing] this instrument, Member States may in special cases, adopt exceptions and limitations, provided such exceptions and limitations shall not unreasonably prejudice the legitimate interests of beneficiaries, taking account of the legitimate interests of third parties.

Alt 4

General Exceptions

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations and exceptions under national law [in consultation with the beneficiaries] [with the involvement of beneficiaries][, provided that the use of [protected] traditional cultural expressions:

(a) [acknowledges the beneficiaries, where possible;]

(b) [is not offensive or derogatory to the beneficiaries;]

(c) [is compatible with fair use/dealing/practice;]

(d) [does not conflict with the normal utilization of the traditional cultural expressions by the beneficiaries; and]

(e) [does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties.]]

Alternative

7.1 [[Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions under national law [, provided that [those limitations or exceptions]:

(a) are limited to certain special cases;

(b) [do not [conflict] with the normal [utilization] of the traditional cultural expressions by the beneficiaries;]

(c) [do not unreasonably prejudice the legitimate interests of the beneficiaries;]

(d) [ensure that the [use] of traditional cultural expressions:

i. is not offensive or derogatory to the beneficiaries;

ii. acknowledges the beneficiaries, where possible;] and

iii. [is compatible with fair practice.]]]

[End of Alternative]

7.2 [When there is reasonable apprehension of irreparable harm related to [sacred] and [secret] traditional cultural expressions, [Member States]/[Contracting Parties] [may]/[should]/[shall] not establish exceptions and limitations.]

Specific Exceptions

7.3 [[Subject to the limitations in Paragraph 1,]/[In addition,] [Member States]/[Contracting Parties] [may]/[should]/[shall] adopt appropriate limitations or exceptions, in accordance with national law or, as appropriate, of the [holders]/[owners] of the original work:

(a) [for learning, teaching and research, in accordance with nationally established protocols, except when it results in profit-making or commercial purposes;]

(b) [for preservation, [display], research and presentation in archives, libraries, museums or other cultural institutions recognized by national law, for non-commercial cultural heritage or other purposes in the public interest;]

(c) [for the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

[This provision [should]/[shall] not apply to [protected] traditional cultural expressions described in Article 5.1.]]

7.4 [Regardless of whether such acts are already permitted under Paragraph 1, the following [should]/[shall] be permitted:

(a) [the use of traditional cultural expressions in cultural institutions recognized under the appropriate national law, archives, libraries and museums, for non-commercial cultural heritage or other purposes in the public interest, including for preservation, [display], research and presentation;]

(b) the creation of an original work [of authorship] inspired by, based on or borrowed from traditional cultural expressions;]

(c) [the use/utilization of a traditional cultural expression [legally] derived from sources other than the beneficiaries; and]

(d) [the use/utilization of a traditional cultural expression known [through lawful means] outside of the beneficiaries' community.]]

7.5 [[Except for the protection of secret traditional cultural expressions against disclosure], to the extent that any act would be permitted under the national law, for works protected by [intellectual property rights [including]]/[copyright, or signs and symbols protected by trademark, or inventions protected by patents or utility models and designs protected by industrial design rights, such act [should]/[shall] not be prohibited by the protection of traditional cultural expressions].]

[ARTICLE 8]

[TERM OF [PROTECTION]/[SAFEGUARDING]

Option 1

8.1 [Member States]/[Contracting Parties] may determine the appropriate term of protection/rights of traditional cultural expressions in accordance with [this [instrument]/[[which may] [should]/[shall] last as long as the traditional cultural expressions fulfill/satisfy the [criteria of eligibility for protection] according to this [instrument], and in consultation with beneficiaries.]]

8.2 [Member States]/[Contracting Parties] may determine that the protection granted to traditional cultural expressions against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong, [should]/[shall] last indefinitely.

Option 2

8.1 [Member States]/[Contracting Parties] shall protect the subject matter identified in this [instrument] as long as the beneficiaries of protection continue to enjoy the scope of protection in Article 3.

Option 3

8.1 [[Member States]/[Contracting Parties] may determine that the term of protection of traditional cultural expressions, at least as regards their economic aspects, [should]/[shall] be limited.]]

[ARTICLE 9]

FORMALITIES

Option 1

9.1 [As a general principle,] [Member States]/[Contracting Parties] [should]/[shall] not subject the protection of traditional cultural expressions to any formality.

Option 2

9.1 [[Member States]/[Contracting Parties] [may] require formalities for the protection of traditional cultural expressions.]

9.2 Notwithstanding Paragraph 1, a [Member State]/[Contracting Party] may not subject the protection of secret traditional cultural expressions to any formality.

[ARTICLE 10

[SANCTIONS, REMEDIES AND EXERCISE OF [RIGHTS]/[INTERESTS]]

Alt 1

Member States shall put in place appropriate, effective, dissuasive, and proportionate legal and/or administrative measures, to address violations of the rights contained in this instrument.

Alt 2

10.1 Member States shall, [in conjunction with indigenous [peoples],] put in place accessible, appropriate, effective, [dissuasive,] and proportionate legal and/or administrative measures to address violations of the rights contained in this instrument. Indigenous [peoples] should have the right to initiate enforcement on their own behalf and shall not be required to demonstrate proof of economic harm.

10.2 If a violation of the rights protected by this instrument is determined pursuant to paragraph 10.1, the sanctions shall include civil and criminal enforcement measures as appropriate. Remedies may include restorative justice measures, [such as repatriation,] according to the nature and effect of the infringement.

Alt 3

Member States should undertake to adopt appropriate, effective and proportionate legal and/or administrative measures, in accordance with their legal systems, to ensure the application of this instrument.

Alt 4

Member States/Contracting Parties should/shall provide, in accordance with national law, the necessary legal, policy or administrative measures to prevent willful or negligent harm to the interests of the beneficiaries.]

[ARTICLE 11]

[TRANSITIONAL MEASURES

11.1 This [instrument] [should]/[shall] apply to all traditional cultural expressions which, at the time of the [instrument] coming into effect/force, fulfill the criteria set out in this [instrument].

11.2 *Option 1* [[Member States]/[Contracting Parties] [should]/[shall] secure the rights acquired by third parties under national law prior to the entry into effect/force of this [instrument]].

11.2 *Option 2* Continuing acts in respect of traditional cultural expressions that had commenced prior to the coming into effect/force of this [instrument] and which would not be permitted or which would be otherwise regulated by the [instrument], [[should]/[shall] be brought into conformity with the [instrument] within a reasonable period of time after its entry into effect/force, subject to Paragraph 3]/[[should]/[shall] be allowed to continue].

11.3 With respect to traditional cultural expressions that have special significance for the beneficiaries and which have been taken outside of the control of such beneficiaries, these beneficiaries [should]/[shall] have the right to recover such traditional cultural expressions.]

[ARTICLE 12]

[RELATIONSHIP WITH [OTHER] INTERNATIONAL AGREEMENTS

12.1 [Member States]/[Contracting Parties] [should]/[shall] implement this [instrument] in a manner [mutually supportive] of [other] [existing] international agreements.]

[12.2 Nothing in this instrument may/shall be construed as diminishing or extinguishing the rights that indigenous [peoples] or local communities have now or may acquire in the future, as well as the rights of indigenous [peoples] enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

12.3 In case of legal conflict, the rights of the indigenous [peoples] included in the aforementioned Declaration shall prevail and all interpretations shall be guided by the provisions of said Declaration.]

[ARTICLE 13]

[NATIONAL TREATMENT

Each [Member State]/[Contracting Party] [should]/[shall] accord to beneficiaries that are nationals of other [Member States]/[Contracting Parties] treatment no less favourable than that it accords to beneficiaries that are its own nationals with regard to the protection provided for under this [instrument].]

[ALTERNATIVES TO ARTICLES 8, 9, 10, 11 and 13
NO SUCH PROVISIONS]

[ARTICLE 14]

[TRANSBOUNDARY COOPERATION

In instances where [protected] traditional cultural expressions are located in territories of different [Member States]/[Contracting Parties], those [Member States]/[Contracting Parties] [should]/[shall] co-operate in addressing instances of transboundary [protected] traditional cultural expressions.], with the involvement of indigenous [peoples] and local communities concerned, where applicable, with a view to implementing this [instrument].]

ARTICLE 15

[CAPACITY BUILDING AND AWARENESS RAISING

15.1 [Member States]/[Contracting Parties] [should]/[shall] cooperate in the capacity building and strengthening of human resources, in particular, those of the beneficiaries, and the development of institutional capacities, to effectively implement the [instrument].

15.2 [Member States]/[Contracting Parties] [should]/[shall] provide the necessary resources for indigenous [peoples] and local communities and join forces with them to develop capacity-building projects within indigenous [peoples] and local communities, focused on the development of appropriate mechanisms and methodologies, such as new electronic and didactical material which are culturally adequate, and have been developed with the full participation and effective participation of indigenous [peoples] and local communities and their organizations.

15.3 [In this context, [Member States]/[Contracting Parties] [should]/[shall] provide for the full participation of the beneficiaries and other relevant stakeholders, including non-government organizations and the private sector.]

15.4 [Member States]/[Contracting Parties] [should]/[shall] take measures to raise awareness of the [instrument,] and in particular educate users and holders of traditional cultural expressions of their obligations under this instrument.]

[End of Annex and of document]

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