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# Traditional Knowledge and Genetic Resources

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UBI SUMUS, QUO VADIMUS, QUO USQUE TANDEM?

WHERE HAVE WE BEEN, WHERE ARE WE GOING, FOR HOW MUCH LONGER?

## Junta of Valladolid (1550-1551) The Great Debate over the Conquest of the New World

King of Spain Charles V

Power of the encomiendas (slavery in return for protection)  
Status of the Amerindians

Bartolomé de las Casas, friar, Bishop of Chiapas

Indians as possessing rights, rational, helped introduce laws against  
encomienda system

Juan Ginés de Sepúlveda, theologian, humanist, philosopher

Natural law, Indians as barbarians, natural slavery, just war, interests of colonists  
and landowners

## Junta of Valladolid (1550-1551)

### The Great Debate over the Conquest of the New World

de las Casas

Prevention of the innocent from being treated unjustly  
Avoidance of the use of force to punish crimes against nature  
Could be converted to Christianity softly: the “velvet glove”

Sepúlveda

Cannibalism, human sacrifice and inherent traits made the Indians subject to just war, and slavery best route to conversion to Christianity

## Junta of Valladolid (1550-1551)

### The Great Debate over the Conquest of the New World

Ended in a draw

Encomiendas remained restricted

The conquest of the New World continued, unabated

Often overlooked

de las Casas and Sepúlveda drew from the same sources with different conc's  
quot homines tot sententiae – every man had his sentence

Both sought conversion – violence v the velvet glove

International law weak at the local level

Despite words on paper, indigenous peoples still continued to have their  
lands taken, forced into bonded labor, their sacred texts burned and  
traditional practices suppressed

# Universal Declaration of Human Rights (1948)

## Preamble

Inherent dignity, equal and inalienable rights of all, freedom of speech and belief, freedom from fear, protection of human rights by the rule of law, dignity and worth of the human person, equal rights of men and women, promotion of social progress and better standards of life in larger freedom, common understanding of these rights and freedoms

State pledge to secure universal and effective recognition and observance

## Universal Declaration of Human Rights (1948)

### Article 1.

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

### Article 2.

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.

## Universal Declaration of Human Rights (1948)

### Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

### Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

### Article 17.

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

## Universal Declaration of Human Rights (1948)

### Article 18.

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

### Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.



## Universal Declaration of Human Rights (1948)

### Article 22.

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

### Article 27.

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

## Universal Declaration of Human Rights (1948)

### Article 28.

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

### Article 29.

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

## Universal Declaration of Human Rights (1948)

### Article 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

# United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

25 years of negotiations

Built on early recognition that the Universal Declaration was not itself sufficient to protect the rights of self-organized minorities, marginalized through their collective identity, beliefs and political organization (e.g. ILO 169)

Contrary to some assertions, not built on “special rights,” but on the implementation of universal rights in a way that protects their equal rights to dignity, religious beliefs, property and security

Special attention to legal principles that prevent the continuation of conquest, suppression, cultural and economic assimilation and coercive development without consent

## United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

These rights do differ from stakeholder rights

UNDRIP affirms the rights possessed by indigenous peoples are part of the “right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development”

The articulation of these rights are found in:

Charter of the United Nations

International Covenant on Economic, Social and Cultural Rights

International Covenant on Civil and Political Rights

Vienna Declaration and Programme of Action

## United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Comparative matrix of UNDRIP and other key human rights instruments

Indigenous Navigator - Data by Indigenous Peoples

<http://www.indigenousnavigator.org/resources/comparatible-matrix-UNDRIP-7.10..xlsx>

# United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

## *Article 31*

1. Indigenous peoples have the right 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, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

## Relevance of Human Rights to TK and GRs

Reference to human rights are often left out of UN instruments not negotiated under the human rights bodies

States often claim they are not competent to negotiate human rights in these circumstances

However, they are competent and enjoined to recognize, respect, promote and implement them in all of their actions, and lack of competence of a forum cannot be used to circumvent, ignore or supplant human rights obligations



## Relevance of Human Rights to TK and GRs

Ms. Victoria Tauli-Corpuz's presentation and papers

<http://unsr.vtaulicorpuz.org/site/>

Mr. James Anaya

<http://unsr.jamesanaya.org/>

<http://unsr.jamesanaya.org/statements>

Indigenous peoples' rights to genetic resources and traditional knowledge

WIPO Indigenous Panel, 4 February 2013

<http://unsr.jamesanaya.org/statements/statement-indigenous-peoples-rights-to-genetic-resources-and-traditional-knowledge>

WIPO/GRTKF/IC/29/INF/10

## Relevance of Human Rights to TK and GRs Development Agenda

The GA renewed mandate for the IGC

Begins with reference to the Development Agenda, concluded in 2007 two months prior to GA adoption of UNDRIP

No indigenous peoples' or local community participation in the Development Agenda

IP-oriented, technical, not comprehensive, not law

No reference to human rights

## Relevance of Human Rights to TK and GRs Development Agenda

Cluster B: Norm-setting, flexibilities, public policy and public domain

- balance between costs and benefits;
  - participatory process, considering the interests and priorities of all WIPO Member States and the viewpoints of other stakeholders, including accredited inter-governmental organizations (IGOs) and NGOs; and
  - be in line with the principle of neutrality of the WIPO Secretariat
- \* 18. To urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments.

## Relevance of Human Rights to TK and GRs Development Agenda

20. To promote norm-setting activities related to IP that support a robust public domain in WIPO's Member States, including the possibility of preparing guidelines which could assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions.

22. WIPO's norm-setting activities should be supportive of the development goals agreed within the United Nations system, including those contained in the Millennium Declaration.

## Relevance of Human Rights to TK and GRs Development Agenda

Only recommendations for guidelines for determining subject matter that has “fallen into the public domain” – does not necessarily include traditional knowledge

Emphasis on “public domain,” “freedom of expression” and similar expressions without qualification selectively picks from whole of decision, while pursuing links to MDGs will reveal other principles that need to be included – including human rights

## Relevance of Human Rights to TK and GRs Development Agenda

Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge

Focuses on transfer of technology and information, and traditional knowledge ≠ information:

It is part of a cosmovision

It is a traditional knowledge system

Even calling it a traditional knowledge system distorts indigenous meanings

## Relevance of Human Rights to TK and GRs “Balanced and Effective Protection”

Need to have a common understanding of what “balanced” means

“Balanced” is often a term used to balance rights and interests among stakeholders of equal standing by a sovereign that grants and allocates rights

Balancing tests are inappropriate for situations of self-determination and sovereignty  
A number of states recognize that indigenous peoples have  
inherent, pre-existing or imprescriptible rights not granted by the state  
These rights are recognized and respected, not granted  
“Balancing” not achieved through sovereign allocation, but negotiation

# Relevance of Human Rights to TK and GRs

## State of the Current Text

Three Options:

Contracts

Disclosure of Origin

Databases



## Relevance of Human Rights to TK and GRs Contracts

Private instruments

Can put the burden on indigenous peoples and local communities to monitor and enforce their contractual rights

Technical, capacity and economic barriers to effective monitoring and enforcement

Jacobsen v Katzer (2006-2010): Contracts “enforceable copyright conditions”, not alternatives to copyright. Copyright rules

## Relevance of Human Rights to TK and GRs Disclosure of Origin

Puts burden on developers, not indigenous peoples and local communities

Joint submission voices some concern for the burdens this may put on users, without a similar level of concern for the burdens imposed by databases

Mr. Anaya's information document indicates that disclosure in the preferred route, and this has been supported by Indigenous Consultative Forum statements

## Relevance of Human Rights to TK and GRs Databases

Puts burden on indigenous peoples and local communities

Prospective defense particularly burdensome

Joint submission only excludes “secret” traditional knowledge

Customary laws apply to a much broader range of types of knowledge

Still no safeguards for traditional knowledge compiled by states into databases

There can be no conclusion until there is a common understanding of the status of TK contained in databases – i.e. “public domain”

## Relevance of Human Rights to TK and GRs

### Concluding Remarks

Must move on the path to a sui generis regime that substantively recognizes, respects and implements a broad range of rights to traditional knowledge

The following mistakes, among others, must be avoided:

Mistake 1: TK as information

Mistake 2: Protection limited to patent issues

Mistake 3: Protection limited to knowledge loss

Mistake 4: Compensatory claims – compulsory compensation

Mistake 5: Non-interference claims (giving without giving back)

Mistake 6: Giving/Granting rights

Mistake 7: This is only about innovations

## Relevance of Human Rights to TK and GRs Concluding Remarks

We must stop endlessly repeating the Great Debates of Valladolid

A negotiator once told me that the idea of perpetual protection for traditional knowledge is disgusting

If negotiators are here to assimilate indigenous peoples' traditional knowledge into other through the use of unqualified statements related to freedom of expression, balance among stakeholder interests, the common heritage of mankind, fair use, blanket exemptions for certain classes, and an unbalanced concern for third-party rights, that should be declared in good faith so that indigenous peoples can make their decision about this process

## Relevance of Human Rights to TK and GRs

### Concluding Remarks

Indigenous peoples are here in good faith and good will, which means having a fully transparent and participatory process, building on past good practice

Human rights to collective identity, integrity and dignity must be respected

Any use of databases must be based on free, prior and informed consent with effective safeguards put into place

Collective self-determination over rules of ownership and property by the holders of traditional knowledge must be respected

Emic

good mind

guardianship

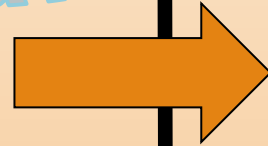
customary law

cosmovision

reciprocity

obligations

relations



Etic

information

economics

intellectual property

common heritage

public domain

secular knowledge

open knowledge

# Project-Focused Approach (TEK)

# Holistic Decision Making (Ecology of TKs)

