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STANDARD-SETTING

**Guideline for the review of the draft principles and guidelines on
the heritage of indigenous peoples**

Working paper submitted by Yozo Yokota and the Saami Council

Summary

At its twenty-first session, the Working Group on Indigenous Populations decided to continue its standard-setting activities by reviewing the draft principles and guidelines on the heritage of indigenous peoples elaborated by Mrs. Erica-Irene Daes, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, in 1995. In its resolution 2003/29, the Sub-Commission invited Mr. Yozo Yokota, member of the Working Group on Indigenous Populations, to prepare a working paper to serve as a guideline for the review. The Working Group has also taken the initiative to build research partnerships with indigenous organizations for the preparation of the working papers on standard-setting for its twenty-second session. The present paper, submitted in accordance with resolution 2003/29, is a collaborative effort between Mr. Yokota and the Saami Council, an organization of indigenous peoples from Fennoscandinavia and the Kola Peninsula in the Russian Federation.

The aim of the working paper is to provide some guidance on, first, recent developments at the international level regarding the protection of indigenous peoples' heritage and, second, the need for a specific international instrument for the protection of heritage. It presents recommendations to assist the Working Group in its review of the draft principles and guidelines at its twenty-second session.

Background

1. In 1995, the Special Rapporteur presented a report and a set of draft principles and guidelines for the protection of the heritage of indigenous peoples to the Sub-Commission (see E/CN.4/Sub.2/1995/26). The report recommended that the General Assembly adopt a declaration of principles and guidelines on the heritage of indigenous peoples. It further recommended that a United Nations technical meeting take place to discuss modalities for future cooperation between relevant United Nations bodies and specialized agencies for the protection of the heritage of indigenous peoples. No action was taken by the Commission on Human Rights in this regard.

2. In 2000, a United Nations seminar on the guidelines was held in Geneva at which more than 45 representatives of Governments, indigenous peoples, specialized agencies, academia and non-governmental organizations (NGOs) participated. Some amendments were introduced into the draft guidelines as a result of the consultation. The outcome of the seminar is documented in E/CN.4/Sub.2/2000/26.

3. Since 2000, bodies such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Convention on Biological Diversity (CBD), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO) TRIPS (Trade-Related Aspects of Intellectual Property Rights) Council and, in particular, the World Intellectual Property Organization (WIPO), have paid considerable attention to issues relating to traditional knowledge, traditional cultural expressions and cultural heritage, which, however, do not take sufficiently into account the draft principles and guidelines.

4. The work dealing with the protection and preservation of traditional knowledge and heritage in some of the United Nations agencies or other bodies mentioned has proceeded very

rapidly, without necessarily taking human rights or other indigenous concerns into account. The aim of this working paper is to guide the discussion with a view to updating, revising and potentially using the guidelines in the light of recent developments.

Recent international developments regarding the protection of traditional heritage

5. Issues relating to genetic resources, traditional knowledge, traditional cultural expressions and cultural heritage have received an increasing amount of attention within the United Nations system in recent years.
6. UNCTAD recently began work on traditional knowledge. In February 2004, UNCTAD, together with the Commonwealth Secretariat, held a Workshop on Elements of National Sui Generis Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework. The aim of the workshop was to identify a range of actions and policies which could be incorporated into systems aimed at the preservation, protection and promotion of traditional knowledge.
7. CBD aims at promoting the conservation of biological diversity, sustainable use of its components and the equitable sharing of benefits arising from the use of genetic resources. It addresses cultural heritage-related issues through its Working Group on article 8 (j) of the Convention, which deals with traditional knowledge from a preservation rather than a protection perspective. The World Summit on Sustainable Development, held in Johannesburg, South Africa, in August 2002, called for the establishment of an international regime on Access and Benefit Sharing (ABS). The Seventh Conference of Parties to CBD created the Working Group on ABS with a mandate to start elaborating such a regime. An ABS regime would have implications for the protection of indigenous peoples' cultural heritage, as will be explained below.
8. UNESCO deals with cultural heritage predominantly from a preservation perspective. For example, UNESCO adopted the Universal Declaration on Cultural Diversity, which calls for, inter alia, the preservation of heritage in all its forms. In the Declaration, UNESCO member States agree to respect and protect traditional knowledge, in particular that of indigenous peoples. In 2003, UNESCO also adopted the Convention for the Safeguarding of the Intangible Cultural Heritage.
9. An organization that approaches cultural heritage from a protectionist rather than a preservationist angle is WTO, and specifically its TRIPS Council, which engages in activities relating to intellectual property rights. The TRIPS Agreement establishes minimum standards for intellectual property rights protection with the aim of establishing common standards to be adopted by all WTO members. Non-compliance with the TRIPS Agreement could result in trade sanctions. Article 27.3 (b), which calls on WTO member States to provide for the protection of plant varieties either through patents or an effective sui generis system, has been particularly controversial within the indigenous context, inter alia because it arguably encourages patents on life forms.
10. WIPO is one of the United Nations organizations that has been the most active in the field of traditional knowledge and traditional cultural expressions, in particular through its Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional

Knowledge and Folklore (IGC), established in 2000. Through the IGC, WIPO explores the extent to which existing intellectual property mechanisms can be used to protect genetic resources, traditional knowledge and traditional cultural expressions. The IGC has also discussed possible elements of a sui generis system for the protection of traditional knowledge and resources. WIPO has recognized that traditional knowledge and cultural expressions have an important human rights component and also decided to conduct a study on the relevance of customary legal systems for the protection of traditional knowledge and cultural expressions. The General Assembly of WIPO adopted a decision in September 2003 urging IGC to accelerate its work, without prejudice to the work pursued in other forums and without excluding any outcome, including the possible development of an international instrument for the protection of genetic resources, traditional knowledge and traditional cultural expressions.

11. Some of the broader policy issues raised at the WIPO meetings include the following:

(a) Current intellectual property laws such as copyright can already protect contemporary expressions of pre-existing materials made by current generations of (traditional and indigenous) society and performances of expressions of folklore are already protected by an international WIPO treaty - Is this sufficient or is some form of additional protection over the pre-existing materials needed?

(b) Which approach best promotes cultural diversity, preserves cultural heritage, stimulates cultural and economic development and meets the needs of indigenous and traditional communities?

(c) How does one apply a possible new system of protection to practitioners and custodians of traditional cultural expressions who live outside their communities of origin, or in respect of traditional knowledge or traditional cultural expressions found in more than one community?

(d) What form should a new system of protection take that also allows artistic freedom and the sharing of knowledge and culture?

(e) How can one operationalize the principle of free, prior and informed consent with these kinds of issues in mind?

12. International Labour Organization Convention No. 169 contains several articles relevant to the protection of indigenous peoples' cultural heritage. Article 4 explicitly stipulates that special measures should be taken to protect the cultures of indigenous peoples; articles 26-31 deal with education and languages; and articles 13-15 deal with land and resource rights.

13. The draft United Nations declaration on the rights of indigenous peoples also deals with the protection of indigenous peoples' cultural heritage. Article 12 stipulates that indigenous peoples have the right to practise and revitalize their cultural traditions and customs and article 14 recognizes indigenous peoples' right to revitalize, use, develop and transmit to future generations their histories, languages and traditions. Article 29 of the draft declaration maintains that indigenous peoples are entitled to full ownership and control over their cultural and intellectual property.

14. Other United Nations mechanisms such as the Working Group on Indigenous Populations and the Permanent Forum on Indigenous Issues have also addressed these issues. Both mechanisms have proposed a number of recommendations pertaining to indigenous peoples' cultural heritage to other United Nations bodies and can be expected to be continuously and increasingly active in this field in the future.

The need for a new international instrument for the protection of indigenous peoples' cultural heritage and the potential use of the guidelines

15. While the above-mentioned international instruments and processes address indigenous peoples' cultural heritage to a certain degree, indigenous representatives have nonetheless argued that they do not adequately protect indigenous cultural heritage, which continues to be abused, misrepresented, and lost or destroyed on a daily basis. In this context, it is important that a United Nations body with the mandate to promote and protect human rights of indigenous peoples addresses these issues to ensure a holistic approach. It is noted here that indigenous organizations participating in the WIPO processes have called on WIPO to cooperate with the Office of the United Nations High Commissioner for Human Rights in this regard.

16. Given the insufficient international protection of indigenous peoples' heritage, the Working Group may wish to revisit the draft principles and guidelines on the heritage of indigenous peoples as they include most of the elements necessary for adequate protection of this heritage and constitute a sound starting point for developing a new international instrument. However, the following elements arising from recent discussions should be taken into account when revisiting the guidelines.

17. In previous discussions on the protection of cultural heritage, some State representatives have called for a definition of what is understood by "cultural heritage". It is argued that if one is to elaborate a legally binding text providing protection for cultural heritage, the parties should be clear as to the exact scope of the protection. On the other hand, indigenous peoples argue that their cultural heritage cannot be divided into different categories, but includes all kinds of creations, documentation, knowledge, innovations, human remains, sacred sites, etc. associated with their culture. The Working Group may wish to discuss whether there is a need to define what is to be understood by "cultural heritage" and, if so, what the elements of such a definition should be.

18. The draft principles and guidelines underscore the importance of protecting indigenous peoples' heritage based on the principle of self-determination, a view also repeatedly expressed by indigenous representatives. Given the increasing recognition of indigenous peoples' right to self-determination, it is indispensable to address issues relating to indigenous peoples' heritage in this context. Some States, on the other hand claim sovereignty not only over natural resources, including genetic resources, but also over traditional knowledge. The Working Group may wish to investigate further the relationship between indigenous peoples' claim to the right to control over their entire cultural heritage and in particular the right to self-determination, on the one hand, and States' claim to sovereignty over natural resources, on the other.

19. Closely linked to self-determination and permanent sovereignty over natural resources is the question of free, prior and informed consent. Indigenous peoples have repeatedly stressed that their natural resources, traditional knowledge and cultural expressions must not be exploited

without their free, prior and informed consent. There appears to be substantial support for this position in international and human rights law (see the working paper presented to the current session of the Working Group by Mrs. Motoc and the Tebtebba Foundation). The Working Group may wish to consider the principle of free, prior and informed consent for the protection of cultural heritage, and also whether the burden of proof should be placed on the indigenous peoples or other actors claiming that they have acquired indigenous knowledge or resources legally.

20. Indigenous customary legal systems also play an important role in the protection of indigenous peoples' cultural heritage, which would include traditional knowledge and traditional cultural expressions/folklore. Indigenous representatives have reiterated that indigenous heritage must be protected in accordance with the concerned peoples' own legal practices and customs. There is an increasing recognition of the relevance of customary law for the protection of genetic resources, traditional knowledge and cultural expressions. This would call for WIPO and other organizations conducting work in this field to undertake a study on the connection between customary law and cultural heritage. The Working Group may wish to discuss the link between indigenous customary legal systems and the protection of indigenous peoples' heritage. In this context, the Working Group may wish to discuss whether rules should be established in order to protect indigenous peoples from the selling of parts of their cultural heritage by their own members, which may be legal according to national legislation but may not be in accordance with indigenous customary legal systems and may have detrimental effects on their societies.

21. As mentioned above, the CBD working group on ABS is scheduled to begin the elaboration of an international regime on access and benefit sharing in the near future. Such a regime will certainly have implications for the protection of indigenous peoples' cultural heritage, since it might give access to indigenous peoples' genetic resources and traditional knowledge to outsiders and thereby limit indigenous peoples' ability to veto such access. The Working Group may wish to investigate the relationship between the principles of free, prior and informed consent and access and benefit sharing. In this context, the Working Group may also wish to consider other mechanisms that would allow for benefit sharing when accessing genetic resources and traditional knowledge of indigenous peoples with their free, prior and informed consent.

22. Indigenous peoples consider themselves to be the owners and/or holders of their traditional knowledge and cultural expressions. Whereas intellectual property rights protect the intellectual property of one or more (however always identifiable) person(s), company(ies) or other legal entities, the collective ownership of traditional knowledge and cultural expressions is a result of peoples' creative adaptation to changes in their surroundings over generations. Thus, the rights to traditional knowledge and cultural expressions are vested in that people. However, most intellectual property rights regimes do not recognize such rights. Indeed, they do not at all recognize ownership rights to knowledge. The Working Group may wish to discuss what legal rights exist in relation to traditional knowledge and cultural expressions, as well as who the holders of such rights are.

23. Several indigenous representatives regard the intellectual property rights regime as an inappropriate system for the protection of their cultural heritage, while others recognize that intellectual property rights mechanisms can sometimes provide protection for at least certain elements of indigenous peoples' cultural heritage. Those who do not agree entirely with an

international intellectual property rights regime for the protection of indigenous peoples' cultural heritage call for the establishment of sui generis systems instead. The Working Group may wish to consider these points of view and study the relevance of sui generis systems for the protection of cultural heritage. Such a sui generis system may not necessarily include intellectual property rights elements and the Working Group may wish to focus on a protection system that does not include intellectual property rights elements.

24. However, the documented practical experience of States and communities is that existing intellectual property rights and sui generis measures are not necessarily mutually exclusive but can provide complementary options. The main options are:

- (a) Making better use of existing intellectual property rights;
- (b) Extending or adapting the conventional systems of intellectual property rights to include sui generis elements that are especially designed to improve the way these systems serve the particular interests of the holders and custodians of traditional cultures;
- (c) Creating a distinct category of rights to traditional knowledge and traditional cultural expressions as such, through sui generis intellectual property systems designed specifically for this subject matter.

25. In the context of ownership of knowledge, the Working Group may also wish to explore the concept of "public domain". Indigenous representatives participating in the WIPO process have stated that they regard the principle of public domain as a major problem of existing intellectual property rights systems. The Working Group may wish to pay particular attention to the issue of developing a protection system that protects elements of indigenous peoples' cultural heritage which existing intellectual property rights (IPR) systems regard as falling within the so-called public domain.

26. Most indigenous peoples do not seek protection for their cultural heritage in order to commercialize it, but rather to prevent outsiders from exploiting it. When discussing effective ways of protecting indigenous cultural heritage, the Working Group may wish to focus in particular on what is referred to as defensive protection of traditional knowledge. Examples of defensive protection tools from the intellectual property rights system are demands for the disclosure of origin and geographical indicators.

27. Indigenous peoples view the ownership of and custodianship over their cultural heritage as predominantly collective in nature. Existing IPR systems, on the other hand, grant rights to identifiable individuals or individual legal entities, which makes these systems inadequate to protect indigenous cultural heritage. The Working Group may wish to discuss the relationship between the collective nature of indigenous peoples' cultural heritage and the individual nature of IPR.

28. Indigenous peoples' cultural heritage is intrinsically connected to their traditional lands, waters and natural resources. The Working Group may wish to focus in particular on the relationship between the protection of indigenous peoples' cultural heritage and their right to land, water and natural resources.

29. From the above, it is clear that the protection of indigenous peoples' cultural heritage is closely linked to the protection of indigenous peoples' rights, especially land and cultural rights, as well as the right to self-determination, which underline the importance of elaborating a rights-based instrument for the protection of this heritage.

Recommendations to the Working Group

30. **This paper shows that there is clear need for an effective international mechanism for the protection of indigenous peoples' cultural heritage, since the processes currently dealing with these issues in the United Nations system either do not adequately address the concerns of indigenous peoples or do not employ a rights-based approach. In order to resolve this problem and complement existing processes with a rights-based approach, the Working Group should take the draft principles and guidelines as a starting point to elaborate practical and concise guidelines for the protection of indigenous peoples' cultural heritage which take into account the elements listed above.**

31. **The Working Group may wish to draft the guidelines in the form of a legal instrument in order to open up the possibility of transforming it into a legally binding instrument, e.g. a convention on the protection of indigenous peoples' cultural heritage.**

32. **The draft principles and guidelines call on the United Nations Secretary-General and the governing bodies of relevant specialized agencies to ensure that the task of coordinating international cooperation in this field is entrusted to appropriate bodies of the United Nations system. Indigenous representatives have also called for greater coordination of activities relating to indigenous peoples' cultural heritage within the United Nations system. In this context, the Working Group could request that a comprehensive protection system be developed which integrates the work undertaken by, and involves, United Nations bodies and organizations such as the Permanent Forum, WIPO, CBD, UNESCO and OHCHR, ensuring, inter alia, a human rights-based approach.**

33. **The Working Group, in coordination with other United Nations bodies, may wish to consider holding a technical seminar to propose modalities that would facilitate cooperation between relevant United Nations bodies and specialized agencies for the protection of indigenous peoples' heritage and the elaboration of an international instrument for this purpose.**
