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STANDARD-SETTING

**Review of the draft principles and guidelines on the
the heritage of indigenous peoples**

**Expanded working paper submitted by Yozo Yokota and the Saami Council on the
substantive proposals on the draft principles and guidelines
on the heritage of indigenous peoples**

Introduction

1. At its twenty-first session, the Working Group on Indigenous Populations (the Working Group) decided to continue its standard-setting activities by reviewing the draft principles and guidelines for the protection of 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 (see E/CN.4/Sub.2/1995/26). In its resolution 2003/29, the Sub-Commission invited Mr. Yokotato prepare a working paper that would serve as a guideline for the review of the draft principles and guidelines by the Working Group under its agenda item on standard-setting (E/CN.4/Sub.2/AC.4/2004/5). The present document contains substantive proposals on the draft principles and guidelines on the cultural heritage of indigenous peoples, for consideration by the Working Group at its twenty-third session.

Background

2. In accordance with resolution 2003/29, Mr. Yokota and the Saami Council, an organization of the indigenous peoples from Fennoscandinavia and the Kola Peninsula in the Russian Federation, submitted the working paper for the consideration of the Working Group at its twenty-second session. The Working Group also took the initiative to forge research partnerships with indigenous organizations for the preparation of the working papers on standard-setting for its twenty-second session.

3. The Working Group considered and endorsed the working paper. It noted that while several international instruments and processes addressed indigenous peoples' cultural heritage, those instruments and processes did not, or would not adequately protect indigenous peoples' cultural heritage, which continued to be abused, misrepresented, lost or destroyed on a daily basis. The Working Group therefore mandated Mr. Yokota and the Saami Council to submit a document containing draft guidelines on the heritage of indigenous peoples, for the Working Group's consideration at its twenty-third session. In so doing, the Working Group decided to not only revisit the draft principles and guidelines for the protection of the heritage of indigenous peoples, but to also consider the elements outlined in the report of the Working Group on its twenty-second session (see E/CN.4/Sub.2/2004/28, paras. 119-123).

4. As outlined in document E/CN.4/Sub.2/AC.4/2004/5, at least 11 United Nations organizations and conferences are conducting work relevant to indigenous peoples' cultural heritage. Since the Working Group's twenty-second session, these activities have continued and intensified. For example, the Ad hoc Open-ended Working Group on Access and Benefit-Sharing of the Convention on Biological Diversity held its third session in Bangkok from 14 to 18 February 2005, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization (WIPO) held its seventh session in Geneva from 1 to 5 November 2004 and the Permanent Forum on Indigenous Issues held an international workshop on Methodologies regarding Free, Prior and Informed consent and Indigenous Peoples in New York from 17 to 19 January 2005 (see E/C.19/2005/3). These processes have all made useful contributions to the protection of indigenous peoples' cultural heritage. Nevertheless, the work carried out has also further underlined the urgent need to complement these processes with an international standard that takes a human rights-based approach to the protection of indigenous peoples' cultural heritage.

5. The annex to the present document contains a set of draft guidelines on the protection of the heritage of indigenous peoples, for the consideration of the Working Group at its twenty-third session.

Recommendations to the Working Group

6. **The Working Group is invited to use the annexed draft guidelines as a starting point to elaborate practical and concise guidelines for the protection of indigenous peoples' heritage. In so doing, the Working Group may wish to keep open the possibility that the guidelines may at a later stage be transformed into an international legally binding instrument, for example, a convention on the protection of indigenous peoples' heritage.**

7. **The Working Group is further invited to consider whether a comprehensive protection system should be developed which would integrate the work undertaken by, and involve, United Nations bodies and organizations such as the Permanent Forum on Indigenous Issues, WIPO, the Secretariat for the Convention on Biological Diversity and the Office of the United Nations High Commissioner on Human Rights, ensuring, inter alia, a human rights-based approach to the issue of protection for indigenous peoples' heritage.**

Annex

DRAFT GUIDELINES ON THE PROTECTION OF THE CULTURAL HERITAGE OF INDIGENOUS PEOPLES

I. THE UNDERLYING CRITERIA OF THE GUIDELINES

Protection of the cultural heritage of indigenous peoples shall:

- (a) Comply with basic human rights and fundamental freedoms, in particular with those rights and freedoms contained in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169);
- (b) Acknowledge that the safeguarding of the cultural heritage of indigenous peoples contributes to the preservation of cultural diversity, to the benefit of all humankind;
- (c) Recognize that only indigenous peoples themselves can adequately safeguard, maintain, manage, develop and recreate their cultural heritage, thus helping to enrich cultural diversity and human creativity;
- (d) Be based on the right to self-determination of all peoples, including indigenous peoples, which includes indigenous peoples' right to sovereignty over the natural resources in their territories;
- (e) Acknowledge that the right of States to sovereignty over natural resources, as expressed in the Convention on Biological Diversity, is conditioned by the right of indigenous peoples to freely dispose of their natural wealth and resources, including their right to own and control cultural heritage associated therewith;
- (f) Recognize that indigenous peoples' customary laws constitute an intrinsic part of their right to self-determination and thus ensure that customary uses, practices and norms guide the legal protection of indigenous peoples' cultural heritage to the greatest extent possible, for example on questions of ownership rights, management of rights and communal decision-making;
- (g) Recognize further that indigenous peoples' cultural heritage is intrinsically linked and connected to their traditional territories, lands, waters and natural resources. Indigenous peoples' control over traditional territories and resources is thus essential to the protection of their cultural heritage and its transmission to future generations;
- (h) Underscore that indigenous individuals shall not be denied the right, in community with each other, to enjoy their own culture and to use their own language;
- (i) Acknowledge the fact that indigenous peoples view substantial parts of their cultural heritage to be collective in nature;

- (j) Respond to the traditional context and the intergenerational character of the development, preservation and transmission of indigenous peoples' cultural heritage, its relationship to an indigenous people's cultural and social identity and integrity, beliefs, spirituality and values, and constantly evolving character within the people;
- (k) Acknowledge that many indigenous peoples do not seek protection for their cultural heritage in order to commercialize it, but rather to prevent outsiders from exploiting it;
- (l) At the same time, recognize that the human right to property applies equally to indigenous peoples and individuals as to other peoples and individuals, including the right to benefit from the protection of the moral and material interests resulting from their scientific, literary or artistic productions;
- (m) Consequently recognize that indigenous peoples' communal land use and creativity can give rise to property rights;
- (n) Accept that the so-called "public domain" is not a concept accepted by indigenous peoples, and that most elements of indigenous peoples' property that conventional intellectual property laws regard as being in the so-called "public domain" have been placed there without the free, prior and informed consent of the relevant indigenous peoples;
- (o) Acknowledge that conventional intellectual property rights are often inadequate to protect elements of indigenous peoples' cultural heritage;
- (p) At the same time acknowledge that utilization of indigenous peoples' cultural heritage can sometimes contribute to national and international welfare; and
- (q) Underline the important role indigenous women play as custodians of indigenous cultural heritage.

II. THE OBJECTIVES OF THE GUIDELINES

Protection of the cultural heritage of indigenous peoples shall:

- (a) 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;
- (b) In view of indigenous peoples' right to self-determination and right to lands, territories and resources traditionally owned or otherwise occupied and used, be governed by, and give full effect to, the principle of free, prior and informed consent for any description of, access to, or acquisition of elements of, indigenous peoples' cultural heritage;
- (c) Protect indigenous peoples' cultural heritage in compliance with the relevant indigenous peoples' own customs and customary laws and practices;

- (d) Contribute to the safeguarding of indigenous peoples' cultural heritage and the customary means for its development, preservation and transmission to future generations, and promote the conservation of their cultural heritage, for the direct benefit of indigenous peoples and for the indirect benefit of mankind;
- (e) Reward and protect tradition-based creativity and innovation when so desired by the creators of elements of indigenous peoples' cultural heritage and in accordance with their customary norms pertaining to such elements;
- (f) Underline the intrinsic value of indigenous peoples' cultural heritage, including its social, cultural, spiritual, intellectual, scientific, ecological, technological, commercial and educational value;
- (g) Enrich existing international agreements, recommendations and resolutions pertaining to cultural and natural heritage, realizing that these need to be effectively supplemented, for example, with a human rights-based approach, in order to provide adequate protection for indigenous peoples' cultural heritage;
- (h) In particular, address particular attention to the issue of developing a system of protection for elements of indigenous peoples' cultural heritage which existing intellectual property rights systems regard as falling within the so-called "public domain", predominantly by creating a distinct category of rights for elements of indigenous peoples' cultural heritage, possibly through sui generis systems that do not necessarily include elements of intellectual property rights but recognize the relevant customary laws of the indigenous peoples concerned;
- (i) Respect the specific circumstances and legal systems of each country, allowing for the effective participation of the indigenous peoples concerned, and provide sufficient flexibility for national authorities to determine the appropriate means of implementing protection, in accordance with international law, particularly human rights law; and
- (j) Ensure that such protection is understandable, affordable, accessible and not burdensome for the beneficiaries, taking into account the linguistic, cultural, social and economic context of indigenous peoples.

III. CORE AND SPECIFIC SUBSTANTIVE PRINCIPLES

A. Scope of the subject matter

For the purposes of these Guidelines:

1. "Indigenous cultural heritage" means both tangible and intangible creations, manifestations and production consisting of characteristic elements of the cultural heritage developed and maintained by an indigenous people, or indigenous individuals if the creation reflects the traditional literary, artistic or scientific expectation of the people. Such creations, manifestations and productions include the practices, representations, expressions – as well as the instruments, objects, artefacts, sites and cultural spaces associated therewith – that

indigenous peoples and individuals recognize as part of their cultural heritage. It further includes the knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, as well as knowledge that is embodied in the traditional lifestyle of an indigenous people, or is contained in codified knowledge systems passed between generations. Cultural heritage, transmitted from generation to generation, is constantly recreated by indigenous peoples in response to changes in their environment and their interaction with nature and their history, and provides them with a sense of identity and continuity.

2. "Cultural heritage" as outlined in paragraph 1 manifests itself, inter alia, in the following domains:

- (a) Traditional lands, waters - including historical, sacred and spiritual sites - natural resources, including genetic resources, such as seeds, medicines and plants;
- (b) Traditional knowledge and practices concerning nature and the universe;
- (c) Literary works and oral traditions and expressions, such as tales, poetry and riddles, aspects of language such as words, signs, names, symbols and other indications;
- (d) Musical expressions, such as songs and instrumental music;
- (e) Performances or works such as dances, plays and artistic forms or rituals, whether or not reproduced in material form;
- (f) Art, in particular drawings, designs, paintings, carvings, sculptures, pottery, mosaics, woodwork, metalwork, jewellery, musical instruments, basket weaving, handicrafts, needlework, textiles, carpets, costumes, architectural forms; and
- (g) Social practices, rituals and festive events.

3. Protection for indigenous peoples' cultural heritage shall recognize that elements of indigenous peoples' cultural heritage are often combinations of many of the elements listed under paragraph 2, and that for most indigenous peoples, their knowledge, resources and cultural expressions form an indivisible part of their holistic identity. Protection shall recognize that in practice, elements of indigenous peoples' cultural heritage are not always created within firmly structured identifiable communities that can be treated as legal persons or unified actors. Nor need elements of indigenous peoples' cultural heritage be truly unique, but rather the products of cross-cultural exchange and influence. This does not imply that such elements are not eligible for protection.

4. Since indigenous peoples' cultural heritage is intrinsically connected to their traditional lands and waters, protection for indigenous cultural heritage shall also include measures to preserve and safeguard the environment that indigenous peoples traditionally inhabit. Protection for indigenous peoples' cultural heritage shall recognize that indigenous traditional lands and waters can only be adequately preserved if managed by the indigenous peoples themselves.

5. Substantial parts of indigenous peoples' cultural heritage, and in particular their knowledge systems, are contained in, or dependent on, the continued existence of their mother tongue. Continued existence of indigenous languages is a prerequisite for indigenous peoples'

ability to transmit their cultural heritage to future generations. Protection for indigenous peoples' cultural heritage shall recognize the intrinsic link between indigenous cultural heritage and indigenous languages.

6. Indigenous peoples have the right, and shall be allowed the possibility to maintain, develop and establish their own educational systems, which allow them to pass their cultural heritage on to future generations.

B. Free, prior and informed consent

7. The fact that indigenous peoples have the right to own, control and manage their cultural heritage, flowing, for example, from the right to self-determination and their land and resource rights, implies that elements of their cultural heritage shall only be accessed, transmitted, used, displayed and managed by others subject to securing the free, prior and informed consent of the relevant indigenous peoples or individuals.

8. States shall implement the principle of free, prior and informed consent in their legal system. In particular, legal systems or mechanisms for obtaining free, prior and informed consent shall respect the relevant customary laws of the indigenous peoples concerned, ensure legality and clarity, and shall not create burdens for indigenous peoples and individuals or authorized users of elements of indigenous peoples' cultural heritage.

C. The public domain

9. The principle of free, prior and informed consent also applies to elements of indigenous peoples' cultural heritage that are already readily available to the general public (that is, already in the so-called "public domain"). Thus, as a general rule, use of elements of indigenous peoples' heritage that conventional intellectual property laws regard as being in the so-called public domain that had been placed there without the free, prior and informed consent of the relevant indigenous peoples or individuals shall be discontinued if free, prior and informed consent for their continued use cannot be obtained.

10. Nonetheless, due consideration should be given to the interest of third parties that had acquired such elements in good faith. Continued use of elements of indigenous peoples' cultural heritage already readily available to the general public in a manner that is fair and equitable, paying particular attention to the rights and interests of those from whom the elements originated, might thus be excluded from the obligation to obtain free, prior and informed consent.

11. States shall seek to curtail the grant, as well as the continued exercise and enforcement of already granted intellectual property rights over elements of indigenous peoples' cultural heritage, and derivatives thereof, already readily available to the general public if free, prior and informed consent for the grant or continued exercise of those intellectual property rights cannot be obtained.

12. Users of elements of indigenous peoples' cultural heritage beyond its traditional context shall make every endeavour to identify the source and origin of the elements and seek to return them to the people concerned. Pending such return, the user shall, in any continued use,

acknowledge the source of the elements in a manner that respects the indigenous people and acknowledges the cultural value of their cultural heritage.

D. Elements of indigenous peoples' cultural heritage particularly eligible for protection

13. Protection shall, in particular, be extended to elements of indigenous peoples' cultural heritage that are:

- (a) Generated, preserved and transmitted in a traditional and intergenerational context;
- (b) Distinctively associated with an indigenous people who preserves and transmits them between generations; and
- (c) Integral to the cultural identity of the indigenous people holding the elements of their cultural heritage through a form of custodianship, guardianship, collective ownership or cultural responsibility, that is to say with a sense of obligation to preserve, use and transmit the knowledge appropriately.

E. Derogatory, culturally or otherwise offensive use of elements of indigenous culture

14. The use of elements of indigenous peoples' cultural heritage, including elements already readily available to the general public, that are insulting, derogatory or otherwise culturally offensive to the people from whom the elements originate shall be discontinued. This shall apply in particular to the use of elements of indigenous peoples' cultural heritage of a sacred character. Moreover, use of an element of indigenous peoples' cultural heritage, including elements already readily available to the general public, is not acceptable if:

- (a) It has been acquired by theft, bribery, coercion, fraud, trespass, deception, misrepresentation, or other illicit or dishonest means;
- (b) It has been acquired in violation of standards for obtaining free, prior and informed consent, for example, if misleading information was presented in order to obtain consent; or
- (c) A product is marketed with the false or misleading representation that the product is produced or provided with the involvement or endorsement of the originator of the cultural heritage, or that the commercial exploitation of the product benefits the originators.

15. States shall in particular prevent practices in the tourist industry that are offensive or derogatory to indigenous peoples. States shall also prevent the use of elements in the tourist industry that give a false impression of originating from an indigenous culture.

16. Notwithstanding paragraph 14 above, no use of an element of indigenous peoples' cultural heritage within that group should be regarded as a distortion if the community from which the element originates identifies itself with that use and modification resulting from such use.

F. Compensation and benefit-sharing

17. Protection of indigenous peoples' cultural heritage shall, in addition to the requirement to obtain free, prior and informed consent from the indigenous people concerned in accordance with their customary laws, reflect the need for an equitable balance between the rights and interests of those who develop, preserve and sustain elements of cultural heritage, and the interest of the general public. In particular, in case of continued utilization by others of elements of indigenous peoples' cultural heritage already readily available to the general public, the indigenous people or individual concerned shall be entitled to just and fair compensation for the utilization of their cultural heritage. Such compensation shall to the largest extent possible be appropriate to the cultural and social context and the needs and aspirations of the indigenous people concerned.

18. Equitable benefit-sharing should also be ensured whenever elements of indigenous peoples' cultural heritage have been accessed and are used for non-commercial purposes.

19. Third parties acquiring elements of indigenous peoples' cultural heritage from other than the indigenous peoples themselves shall be liable to pay compensation, in accordance with paragraph 17. The same applies to acquisition from indigenous individuals not authorized, under the relevant indigenous people's customary or other law, to transfer the element of the cultural heritage. In addition, it is incumbent upon the acquirer to determine the level of authority held by the transferor.

20. Business and industry shall refrain from offering incentives to individuals to claim ownership or custodianship over elements of an indigenous people's cultural heritage, in violation of the collective nature of the cultural heritage and/or in violation of the relevant people's customary laws pertaining to such elements.

21. States shall ensure respect for the principles of legality, transparency and mutual respect and understanding in these kinds of relations between indigenous peoples, on one hand, and academic, commercial, educational, governmental and other users of elements of indigenous peoples' cultural heritage, on the other.

G. Duration of protection

22. Protection of elements of indigenous peoples' cultural heritage should last at least as long as the element remains distinctively associated with the indigenous people concerned and continues to be regarded by them as integral to their collective cultural identity.

23. After the expiry of such protection, indigenous peoples and/or individuals concerned shall be entitled to adequate compensation for the use of elements of their cultural heritage.

H. Formalities and documentation

24. Eligibility for protection of elements of indigenous peoples' cultural heritage shall not require any formalities.

25. In the interest of transparency, legality and the conservation of indigenous peoples' cultural heritage, elements of such heritage could be registered and/or recorded. Such registration and/or recording, and any disclosure thereof, shall be subject to free, prior and

informed consent and the records and/or registers shall preferably be managed by the indigenous peoples themselves. When this is not practically feasible, the registers or records should be managed in cooperation with the relevant indigenous people.

I. National legislation, implementation and preventive protection

26. National legislation pertaining to indigenous peoples' cultural heritage shall recognize indigenous peoples' customary laws concerning the management of their cultural heritage. National courts and authorities shall recognize and respect the customary laws pertaining to the cultural heritage of indigenous peoples.

27. States shall take the necessary measures to ensure the protection of indigenous peoples' cultural heritage. This includes both the cultural heritage of indigenous peoples residing within the State, as well as elements of cultural heritage that originate from indigenous peoples residing outside State borders.

28. National legislation and other regulations affecting indigenous peoples' cultural heritage shall only be adopted following effective consultation with, and participation by the indigenous peoples concerned living within the State and, where appropriate, include affected indigenous peoples residing in neighbouring States. If the legislation involves issues fundamental to the preservation of the culture of the indigenous people, it shall only be adopted with the free, prior and informed consent of that people. Such consultations and participation shall be carried out with, and consent obtained from, persons authorized to represent the indigenous people under that people's customary or other legal norms.

29. States shall, preferably through recognizing indigenous peoples' right to control and benefit from their natural resources, including genetic resources, traditional knowledge and traditional cultural expressions, guarantee that indigenous peoples have financial resources available that effectively allow them to maintain, safeguard and protect their cultural heritage. States shall, inter alia, guarantee that indigenous peoples can obtain prompt, effective and affordable judicial and/or administrative action in a language they understand to prevent and obtain full restitution for the unauthorized acquisition, use or documentation of their cultural heritage. When these Guidelines allow the utilization of elements of indigenous peoples' cultural heritage by others, indigenous peoples shall have access to prompt, effective and affordable action to obtain just and fair compensation for such usage.

30. Rules of evidence in legal proceedings with regard to indigenous peoples' cultural heritage shall be adapted to the relevant peoples' cultures and customary laws pertaining to the element of the cultural heritage in dispute.

31. For an effective protection of indigenous peoples' cultural heritage, States shall focus in particular on defensive protection mechanisms to curtail illegitimate acquisition of intellectual property rights over elements of indigenous peoples' cultural heritage.

J. Disclosure and inventories

32. Researchers, scholarly institutions and museums shall not publish information obtained from indigenous peoples or the results of research conducted on flora, fauna, microbes or materials discovered through the assistance of indigenous peoples without obtaining their free,

prior and informed consent to the citation or publication. Any benefit generated by such information shall be shared equitably.

33. Researchers, scholarly institutions and museums shall provide to indigenous peoples comprehensive inventories of the elements of their cultural heritage which they may have in their custody, including any elements loaned to other institutions, and describe the manner in which each element was acquired.

K. Recovery

34. Whenever possible, indigenous peoples shall be entitled to restitution of control and possession of moveable elements of their cultural heritage, including from across international borders.

35. Indigenous human remains and associated funerary objects and documentation shall be returned to their descendants in a culturally appropriate manner.

L. Capacity-building and awareness-raising

36. States shall, through capacity-building activities, assist indigenous peoples to maintain, control, safeguard and protect their cultural heritage, for example, by fostering the creation or strengthening of institutions for training in the management of their cultural heritage.

37. States shall further ensure recognition of, and respect for, indigenous peoples' cultural heritage through educational, awareness-raising and information programmes aimed at the general public, in particular young people.

M. Minimal standards

38. Nothing in these Guidelines may be construed as diminishing or extinguishing existing or future rights indigenous peoples and individuals may have or acquire under national or international law; neither may they be construed as violating universal standards of human rights.
