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STANDARD-SETTING:

FUTURE PRIORITIES FOR STANDARD-SETTING ACTIVITIES

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

Working paper submitted by Yozo Yokota and the Saami Council

* Pursuant to General Assembly resolution 60/251, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights will be assumed as of 19 June 2006 by the Human Rights Council, which will review them as appropriate.

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. Yozo Yokota to 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.
2. Mr. Yokota and the Saami Council, an organization of indigenous peoples from Fennoscandia and the Kola Peninsula in the Russian Federation, submitted the working paper for the consideration of the Working Group at its twenty-second session (E/CN.4/Sub.2/AC.4/2004/5) and presented an expanded version at the twenty-third session of the Working Group (E/CN.4/Sub.2/AC.4/2005/3).
3. In its resolution 2005/23, the Sub-Commission requested the Working Group to continue to review, if necessary, at its twenty-fourth session, the revised draft principles and guidelines on the heritage of indigenous people. The present working paper presents the draft guidelines on the protection of the cultural heritage of indigenous peoples that were revised to take into account the comments received during the discussions on standard-setting at the Working Group's twenty-third session and that were translated into all working languages to allow for a participatory debate during the twenty-fourth session.

Recommendations to the Working Group

4. **The Working Group is invited to review the annexed draft guidelines and ask OHCHR to produce a final version to be published and disseminated widely. In so doing, the Working Group may wish to keep open the possibility that the guidelines might at a later stage be transformed into an international legally binding instrument, for example, a convention on the protection of indigenous peoples' heritage.**
5. **The Working Group is further invited to consider how a comprehensive protection system can be developed which would integrate the work undertaken by, and also involve, United Nations bodies and organizations such as the Permanent Forum on Indigenous Issues, the World Intellectual Property Organization, 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.**

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 and the International Labour Organization Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries;
- (b) Acknowledge that safeguarding 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, encompassing indigenous peoples' right to sovereignty over natural resources in their territories;
- (e) Recognize States' right to sovereignty over natural resources, as expressed in the Convention on Biological Diversity, but at the same time acknowledge that this right is conditioned by indigenous peoples' human rights, including their land and resource rights and their right to self-determination, encompassing the right to control their cultural heritage associated therewith;
- (f) Recognize that indigenous peoples' customary laws constitute an intrinsic part of their right to self-determination and shall 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 generally view substantial parts of their cultural heritage to be collective in nature;

(j) 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;

(k) At the same time acknowledge that utilization of indigenous peoples' cultural heritage can sometimes contribute to national and international welfare;

(l) In this context, further 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) 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;

(o) Recognize 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 regimes regard to be in the public domain have been placed there without the free, prior and informed consent of the relevant indigenous people;

(p) Acknowledge that conventional intellectual property rights are often inadequate to protect elements of indigenous peoples' cultural heritage;

(q) Recognize that 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 their languages is a prerequisite for indigenous peoples' ability to transmit their cultural heritage to future generations. Protection for indigenous peoples' cultural heritage shall hence recognize the intrinsic link between indigenous cultural heritage and indigenous languages;

(r) Be based on the understanding that indigenous peoples have the right to, and shall be allowed the possibility to, maintain, develop and establish their own educational systems, allowing them to pass their cultural heritage on to future generations;

(s) Recognize the fundamental role of indigenous elders as both custodians of indigenous knowledge and sources of indigenous customary laws;

(t) Underline the important role indigenous women play as custodians of indigenous cultural heritage; and

(u) Acknowledge that, for the Guidelines to become effective tools for the protection of indigenous peoples' cultural heritage, States must take positive measures to implement the provisions contained therein.

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 and/or registering 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, customary norms and practices;
- (d) Contribute to safeguarding 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 as a whole;
- (e) Reward and protect tradition-based creativity and innovation, when so desired by the creators of elements of indigenous peoples' cultural heritage, 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) 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, which may not necessarily include elements of intellectual property rights but do 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 these Guidelines and international law, particularly human rights law; and

(j) Ensure that such protection is understandable, affordable, accessible and not burdensome for either beneficiaries or users who are legally accessing elements of indigenous peoples' cultural heritage, taking into account the linguistic, cultural, social and economic context of the relevant indigenous people.

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 culture of an indigenous people, and developed and maintained by that people, or by indigenous individuals if the creation reflects the traditional literary, artistic or scientific expressions 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 knowledge and practices concerning nature and the universe, including about genetic resources, such as seeds, medicines and plants;
 - (b) Literary works, history and oral traditions and expressions, such as tales, poetry and riddles, aspects of language such as words, signs, names, symbols and other indications;
 - (c) Musical expressions, such as songs and instrumental music;
 - (d) Performances or works such as dances, plays and artistic forms or rituals, whether or not reproduced in material form;
 - (e) Art, in particular drawings, designs, paintings, carvings, sculptures, pottery, mosaics, woodwork, metalwork, jewellery, musical instruments, basket-weaving, handicrafts, needlework, textiles, carpets, costumes and architectural forms; and
 - (f) Social practices, traditional sports, 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 in 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 necessarily 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 of indigenous peoples' cultural heritage shall recognize that their traditional lands and waters can only be adequately preserved if managed by the indigenous peoples themselves.

B. Free, prior and informed consent

5. The fact that indigenous peoples have the right to own, control and manage their cultural heritage, flowing, inter alia, from the right to self-determination and their land and resource rights, implies that elements of their cultural heritage can only be accessed, transmitted, used, registered, displayed and managed by others subject to obtaining the free, prior and informed consent of the relevant indigenous people or, if their customary norms so provide, from individual members of the group.

6. States shall implement the principle of free, prior and informed consent in their domestic 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

7. 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, are already in the so-called "public domain"). Thus, as a general rule, use of elements of indigenous peoples' heritage that conventional intellectual property regimes regard to be in the so-called public domain, and that have been placed there without the free, prior and informed consent of the relevant indigenous people or individuals, shall be discontinued if free, prior and informed consent for their continued use cannot be obtained.

8. Nonetheless, due consideration should be given to the interest of third parties that have 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.

9. States shall seek to curtail the grant, as well as the continued exercise and enforcement of already granted intellectual property rights, to 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.

10. 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

11. 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

12. 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 always 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 never 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 the free, prior and informed consent, such as if misleading information was presented in order to obtain the 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.

13. Notwithstanding paragraph 12 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.

14. 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 by the tourist industry that give a false impression of having originated from an indigenous culture.

F. Compensation and benefit-sharing

15. Protection of indigenous peoples' cultural heritage shall, subject to the requirement to obtain the free, prior and informed consent from the indigenous people concerned in accordance with their customary laws, and also otherwise subject to respect for their rights, reflect the need for an equitable balance between the interests of those who develop, preserve and sustain elements of cultural heritage, and the interest of the general public. 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, where appropriate, the 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.

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

17. Third parties acquiring elements of indigenous peoples' cultural heritage from other than the indigenous peoples themselves shall also be liable to pay compensation, in accordance with paragraphs 15 and 16. 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. It is incumbent upon the acquirer to determine the level of authority held by the transferor.

18. 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.

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

G. Duration of protection

20. Protection for 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.

21. Also, after the expiry of such protection, indigenous peoples and/or individuals concerned shall be entitled to adequate, just and fair compensation for use of elements of their cultural heritage.

H. Formalities and documentation

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

23. 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, as well as any disclosure thereof, shall be subject to the free, prior and informed consent of the indigenous people concerned, or, when so determined by their customary or other laws, by individual members of the group. The records and/or registers shall further 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

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

25. States shall take the necessary measures to recognize indigenous peoples' right to control, manage and, when applicable, own elements of their cultural heritage, and ensure the protection and respect for such rights. Such protection shall be extended to 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 the State borders.

26. 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. This consultation shall also, 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.

27. 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. In particular, indigenous peoples shall always be guaranteed financial resources that allow them to defend their right to their cultural heritage before any dispute-resolution mechanism. When these Guidelines allow the utilization of elements of indigenous peoples' cultural heritage by non-members, indigenous peoples shall have access to prompt, effective and affordable action to obtain just and fair compensation for such usage.

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

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

J. Disclosure and inventories

30. Governments, 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.

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

K. Recovery

32. Whenever practically feasible, indigenous peoples shall be entitled to the restitution of control over and possession of movable elements of their cultural heritage, including from across international borders.

33. Indigenous human remains and associated funerary objects and documentation shall be returned to their descendants, or custodians, as may be appropriate, in a culturally appropriate manner. When the identity of the human remains cannot be established, or there are no descendants, the ancestral remains shall be returned to legitimate representatives of the indigenous people in a culturally appropriate manner. Intrusive research into ancestral remains, including with the objective to identifying their origin, shall only take place with the free, prior and informed consent of the indigenous people concerned.

L. Capacity-building and awareness-raising

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

35. 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. States shall further ensure that the identity of indigenous peoples is understood and respected.

M. Minimum standards

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