

# **The cultural heritage of indigenous peoples and its protection: rights and challenges**

Based on presentations of the International Expert Seminar of the Saami Cultural Heritage Week, organized by the Saami Council in Rovaniemi, October 27-28, 2008.

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The presentations of the experts in the Expert Seminar form the material of the document. The purpose of this document is to introduce the main issues the experts brought up in their presentations concerning the cultural heritage of indigenous peoples and its protection. The list of the experts and their presentations referred to can be found at the end of the document.

Due to space limitations, all of the important presentations and topics of the Expert Seminar could not be included here. This document can function as a basis or a starting point for a larger publication which could be more inclusive of all of the presentations and topics of the Expert Seminar.

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## **1 Cultural heritage**

*“Heritage is everything that defines our distinct identities as peoples. It is bestowed on us by our ancestors and endowed to us by nature. It includes our socio-political, cultural and economic systems and institutions; our worldview, belief systems, ethics and moral values; our customary laws and norms. It includes traditional knowledge, which is the creative production of human thought and craftsmanship, language, cultural expressions which are created, acquired and inspired, such as songs, dances, stories, ceremonies, symbols and designs, poetry, artworks; scientific, agricultural, technical and ecological knowledge and the skills required to implement this knowledge and technologies.”* (Trask)

*“Heritage includes human genetic material and ancestral human remains. It includes what we inherited from nature such as the natural features in our territories and landscapes, biodiversity which consists of plants and animals, cultigens, micro-organisms and the various ecosystems which we have nurtured and sustained. It includes our sacred sites, sites of historical significance, burial sites. It also includes all documentation of us in film, photographs, videotapes and audiotapes, scientific and ethnographic research reports, books and papers.”* (Trask)

United Nations Educational, Scientific and Cultural Organization (UNESCO) talks about cultural heritage as follows: *“Having at one time referred exclusively to the monumental remains of cultures, heritage as a concept has gradually come to include new categories such as the intangible, ethnographic or industrial heritage. A noteworthy effort was subsequently made to extend the conceptualization and description of the intangible heritage. This is due to the fact that closer attention is now being paid to humankind, the dramatic arts, languages and traditional music, as well as to the informational, spiritual and philosophical systems upon which creations are based.”* (UNESCO)

According to Mililani Trask, the cultural heritage of indigenous peoples cannot be separated into component parts. The cultural heritage of indigenous peoples should be regarded as a single integrated and interdependent whole. Indigenous peoples do not categorise cultural heritage into different parts (e.g. scientific, spiritual, artistic) or differentiate levels of protection to the different aspect of their heritage. All aspects are equal and require equal respect and protection. Similarly, indige-

nous peoples do not see protection of their rights to their cultures as separate from territorial rights and their right of self-determination (Trask).

Mrs Erica-Irene Daes (1995) has defined the heritage of indigenous peoples in her study “Principles and Guidelines for the Protection of the Heritage of Indigenous People” as follows:

*“11. The heritage of indigenous peoples is comprised of all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory. The heritage of an indigenous people also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage.*

*12. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry, all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape, or audiotape.”*

Les Malezer presented ‘culture’ as meaning the complete identity of a society, ranging from language, to law, to institutions, to property and to governance: “*As indigenous peoples, we want to exercise our right to own, control and develop our distinct lifestyles, worldview and values.*”(Malezer)

## **1. 2 Misappropriation of the cultural heritage of indigenous peoples**

Misappropriation of the heritage of indigenous peoples means that indigenous cultural, genetic or biological resources are appropriated without the free prior and informed consent of the indigenous people whose resource it originally is. Often these resources and the knowledge of indigenous peoples are taken by e.g. corporations without the free, prior and informed consent of the indigenous peoples and without any compensation. The misappropriation of the cultural heritage of indigenous peoples can extend from the misuse of their traditional costumes, art, songs, dance, stories etc. to the patenting of their DNA information.

According to Trask, states and UN agencies now recognize that the knowledge relating to sustainable economic development is encoded in the cultural practices and traditional teachings of indigenous peoples. In this respect, traditional knowledge passed from one generation to another (oral tradition) can be seen as the vehicle for the transmission of critical information relating to the propagation of food and medicinal plants and the wise and sustainable use of the earth’s resources which all people rely on. This understanding on the part of states and UN system has fuelled an international effort to misappropriate the cultural heritage, traditional knowledge and biological resources of indigenous peoples and cultures globally (Trask).

Tourism often misappropriates the cultural heritage of indigenous peoples, e.g. objects or property belonging to non-Western societies are admired or used with little regard for the importance of the people who are the owners, custodians or inheritors of those objects. For example, Saami culture has for decades been used in the marketing of Lapland in many ways. Many individual Saami and Saami organizations see the use of the expressions of their peoples’ heritage as misappropriation of Saami culture and they have opposed it because of its negative effects. The way in which the Finnish travel industry takes advantage of Saami culture is often experienced by the Saami as culturally offensive (Malezer; Nuorgam).

The historical use of the word 'culture', arising from Europe, has perceived non-Western societies as inferior. They were ultimately regarded as exotic civilizations with backward customs and beliefs (Malezer). Trask cited Victoria Tauli-Corpuz, Indigenous Expert and Chair of the UN Permanent Forum on Indigenous Issues: "*The erosion and loss of our heritage, traditional knowledge, cultures and biodiversity has been mainly caused by colonization where Western economic, cultural and political systems were super-imposed over our traditional systems.*" (Tauli-Corpuz, 2003)

### **1.3 How to protect the cultural heritage of indigenous peoples?**

According to James Anaya, there are different aspects on the rights of cultural practices. These aspects include the right to maintain and develop cultural heritage, the right to a respectful treatment from the society and the state, the right to control elements of cultural heritage and the right to redress when elements of cultural heritage have been undermined, misappropriated or taken without consent (Anaya).

Wend Wendland stated that it should be determined what indigenous peoples want to protect when they want to protect cultural heritage. Why do they want to protect their cultural heritage and how? What specific elements do they want to protect? What economic and social goals do they have? What is intellectual property protection? What is legitimate inspiration and what is misappropriation? What intellectual property related objectives do the indigenous peoples wish to achieve? Wendland proposed some possible approaches. These are establishing a form of ownership/control enabling e.g. Saami to trade and disable others to do so, exclusion of third party use, respectful use and remuneration and/or acknowledgement (Wendland).

Further questions to be answered included: is the conventional intellectual property system adequate for the protection of indigenous cultural heritage? Should there be a sui generis system? In the latter case, there are issues that should be defined. These are the subject matter, the scope of protection, the rights holders, exceptions, terms of protection, interaction with conventional intellectual property system etc (Wendland).

Joji Carino elaborated on the meaning of 'protection and promotion'. When used in conjunction with the term 'promotion', protection implies the need to keep alive cultural expressions imperilled by the quickening pace of globalization. 'Promotion' calls for perpetual regeneration of cultural expressions to ensure that they are not confined to museums, "folklorized" or reified. Furthermore, these terms 'protection and promotion' are inseparable. According to Carino, it is also important that there is a functioning role between customary law, national legislation and international standards in the protection of the cultural heritage of indigenous peoples (Carino).

Anaya alerted that there are regimes of immaterial rights that lead to a lack of protection. There are narrow and individualistic concepts about origin and author, there is a demand for expression in a tangible form and time limits for protection. He elaborated on the issue of intellectual property rights vs. human rights. There is a shifting of intellectual property rights to trade law. This means focusing on financial interests rather than on self-determination and cultural survival. There is also the dependence on the state and Western notions of intellectual property. Traditional knowledge represents significant economic value to developing nations and when these states are negotiating trade and intellectual property rights agreements, they may not be representing the interests of the indigenous peoples (Anaya).

The Western notions of intellectual property rights and the issues of originality and authorship are problematic for indigenous peoples. Indigenous works fail to fulfil individualistic notions of prop-

erty rights. Copyright law may not protect works passed down from generation to generation, particularly if it is in oral form. Traditional copyright law does not protect ideas, so folklore would not be protected. Thus there would be no problem if someone created works based on indigenous traditions. There is a need to protect the underlying idea upon which indigenous stories are based, not just a written work that results from the idea (Anaya).

### **1.3.1 Self-determination and free, prior and informed consent**

Trask emphasized that the meaningful participation of indigenous peoples and their free, prior and informed consent in all processes, projects and standard setting activities concerning their own cultural heritage is of utmost importance. For example, the world heritage sites have been drafted without the meaningful participation of indigenous peoples. The global positions of indigenous peoples should be taken into account when talking about indigenous cultural heritage. The statements of indigenous peoples have highlighted the inter-linkages between the preservation of cultural heritage and the preservation and sustainable use of biodiversity and genetic resources. They have stated and clarified their perspectives and cultural view of the interrelatedness between cultural heritage and their right to pursue their own social, cultural and economic development on their lands and territories. Examples of these statements are the Kari-Oca Declaration, the Indigenous Peoples' Earth Charter, the Charter of the Indigenous-Tribal Peoples of Tropical Forests and the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (Trask).

Preservation of cultural heritage is the first priority if indigenous peoples are to ensure their peoples cultural survival. Indigenous peoples continue to resist cultural genocide and ethnocide by their actions to preserve their cultural heritage. These actions are expressions of their collective right to self-determination (Trask).

Indigenous efforts to preserve cultural heritage have been proactive in proposing and implementing mechanisms for the protection of cultural heritage and for their right to meaningful participation in the process, and to give their free, prior and informed consent. Examples include indigenous involvement in fashioning the World Bank Policy on Indigenous Peoples and the development of the Akwe:Kon Voluntary Guidelines for social and environmental impact assessment on projects that are likely to impact sites and resources that are the cultural heritage of indigenous peoples. According to Trask, the interrelationship between cultural heritage and indigenous human rights is the most apparent in the deliberations that led to the adoption of the Declaration on the Rights of Indigenous Peoples. During this process, indigenous peoples repeatedly advanced the position that their human rights were inextricably linked to their territorial, resource and cultural rights and their right of self-determination (Trask).

Also concerning tourism activities, self-determination and free, prior and informed consent are of utmost importance. In her study "Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples" Mrs. Erica-Irene Daes has stated as follows about tourism: "45. *All forms of tourism based on indigenous peoples' heritage must be restricted to activities which have the approval of the peoples and communities concerned, and which are conducted under their supervision and control.*" (Daes 1995)

Indigenous peoples have also consistently stated that the way forward in promoting traditional knowledge is by recognizing their rights and empowering them in the development process, including upholding their right to free, prior and informed consent for all development, conservation and other activities affecting them (Carino).

## 2 General UN instruments relevant for the cultural heritage of indigenous peoples

Anaya laid out the normative framework for the protection of the cultural heritage of indigenous peoples. He introduced examples where confirmations of indigenous peoples' rights and the protection of cultural heritage can be found. He listed the Universal Declaration on Human Rights, art. 27; UNDRIP; International Covenant on Economic, Social and Cultural Rights; Declaration on Principles of International Cultural Cooperation; Convention on the Rights of the Child; Declaration on the Right to Development. UNESCO has seven conventions of relevance: Protection and Promotion of Diversity of Cultural Expressions, Safeguarding of the Intangible Cultural Heritage and Protection of the Underwater Cultural Heritage etc. There is also the UNESCO Declaration on Cultural Diversity as well as ILO Convention 169, art 7. There are also other international instruments, e.g. the Convention on the Elimination of Racial Discrimination, International Covenant on Civil and Political Rights etc. International human rights norms can fill the gap in the protection on cultural heritage (Anaya).

In addition to these mentioned above, Malezer provided some more international instruments that in some way address the topic of 'culture'.

- The Declaration of the Principles of International Cultural Co-operation (1966) stresses the importance of cultural cooperation at an international level and the benefits in terms of increased understanding between peoples.

- The Convention on the Rights of the Child (1989) arts. 29 and 30 state that the education of a child is geared towards developing a respect for his or her cultural values of the country in which the child is living, the country from which he or she may originate and for civilizations different from his or her own. Art. 30: *In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.*

- The Declaration on the Right to Development (1986) art. 1 provides the right to cultural development: *The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*

### 2.1 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights articles 1 and 27 are of relevance for the protection of indigenous cultural heritage (Anaya).

*Art 1.1: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

*Art. 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

The General Comment of the UN Human Rights Committee to article 27 says that culture includes the relationship indigenous peoples may have with land (Anaya).

## 2.2 The International Covenant on Economic, Social and Cultural Rights

Cultural rights are an integral part of human rights, which are universal, indivisible and inter-dependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights (Carino).

The International Covenant on Economic, Social and Cultural Rights, art 15.1:

*The States Parties to the present Covenant recognize the right of everyone:*

*(a) To take part in cultural life;*

*(b) To enjoy the benefits of scientific progress and its applications;*

*(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

*2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*

The General Comment No. 17 from 2005 states that: “*Human rights are fundamental, inalienable and universal entitlements belonging to individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.*” (Anaya)

## 2.3 The Universal Declaration on Human Rights

The Universal Declaration of Human Rights art. 27 is of relevance for the cultural heritage of indigenous peoples.

*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.*

The general human right to property is outlined in the Universal Declaration on Human Rights, art. 17 (Anaya):

*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.*

## 2.4 The Convention of the Elimination of all Forms of Racial Discrimination

Convention on the Elimination of all Forms of Racial Discrimination says that right to property includes those interests that stem from the indigenous peoples’ own traditions and laws, including those related to cultural heritage. This understanding is supported by cases in the Inter-American human rights system, e.g. the *Awas Tingi* case where “property can be defined as those material rights which can be possessed, as well as any that belong to his/her patrimony...” (Anaya)

### 3 The UN Declaration on the Rights of Indigenous Peoples

*“Our desire to ‘protect our cultural heritage’ is a desire to survive as peoples, as a distinct society with identifiable characteristics. We also want to exist with dignity and without racial discrimination against us, or against our lifestyle. The Declaration on the Rights of Indigenous Peoples addresses this need.”* (Malezer)

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) has many provisions relevant for the cultural heritage of indigenous peoples. These provisions include non-discrimination, self-determination, right of indigenous peoples to develop their cultures, right of indigenous peoples to continue their tradition, rights to culture and recognition of the institutions of indigenous peoples. UNDRIP obligates states to take effective measure in order to ensure protection and get redress. It is non-binding but according Anaya this is an incomplete view of the situation as UNDRIP represents legal obligation and it grounds itself in the UN Charter which is a multilateral treaty. UNDRIP promotes legal obligations of states, encapsulates rights and reflects customary international law. It crystallizes already existing rights and puts the general human rights in the context of indigenous peoples (Malezer; Anaya).

An important article in the UNDRIP concerning the protection of the cultural heritage of indigenous peoples is art. 11 (Anaya):

- 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*
- 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*

#### 3.1 Non-discrimination

Malezer examined the UNDRIP in stages, addressing discrimination, self-determination, identity, land or territories, cultural rights, institutions and procedures. Firstly, the UNDRIP requires that there be no discrimination against indigenous peoples. This is laid out in the following paragraphs and articles (Malezer):

Preambular para. 3

*Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,*

Preambular para. 4

*Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,*

Art. 2

*Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.*

Art. 7

*2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.*

Art. 8

*1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.*  
*2. States shall provide effective mechanisms for prevention of, and redress for:*  
*(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;*  
*(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;*  
*(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;*  
*(d) Any form of forced assimilation or integration;*  
*(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.*

Art. 9

*Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.*

Art. 16

*2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.*

### **3.2 Self-determination**

The second major factor arising from the UNDRIP is the affirmation that indigenous peoples are peoples with the full right of self-determination. In that context indigenous peoples have the right to determine their futures and their development. They, as indigenous peoples, want to affirm their cultural identity and feel secure that their identity is not under threat in any way by the states or multinational companies (Malezer):

Preambular para. 10:

*Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,*

Preambular para. 16:

*Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance 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,*

Art. 3

*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

### **3.3 Indigenous peoples have to be seen as indigenous**

The identity of indigenous peoples as peoples secures their right to self-determination. However, for indigenous peoples it is important to be seen as indigenous. This means that indigenous peoples are first peoples with inherent rights which should be taken into account. These are laid out in the following articles (Malezer):

Art. 15

*1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.*

Art. 33

*1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.*

Art. 36

*1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.*

### **3.4 Indigenous peoples and land rights**

Malezer elaborated on indigenous peoples and land rights within the UNDRIP. The identity of indigenous peoples is very much linked to their lands, waters and territories. They have formed a spiritual, religious, environmental and economic link with their territories which cannot be separated into such categories without losing some of the important values and meanings (Malezer).

The territories of indigenous peoples and the resources in their territories have been exploited for economic purposes, particularly throughout the period of European colonisation but also in other geo-political circumstances such as wars and migrating populations. The following paragraph and articles are of relevance here (Malezer):

Preambular para. 11:

*Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,*

Art. 25

*Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*

Art. 29

*1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.*

### **3.5 Culture**

The UNDRIP gives some guide to the components of culture. The purpose of definitions provided in the UNDRIP is not to limit the definition of cultural rights. The purpose is to point out those areas of cultural interest which indigenous peoples consider have been under threat and remain under threat (Malezer):

Art. 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.*

Art. 11

*1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*

Art. 12

*1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.*

Art. 13

*1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.*

Art. 14

*3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.*

Art. 24

*1 Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.*

### **3.6 Recognition of indigenous peoples' own institutions**

An important part of the UNDRIP is the recognition of indigenous peoples' own institutions (their organizations, communities, procedures, systems) as legitimate authorities no less valid than the institutions of states and neighbouring or encroaching societies (Malezer):

Preambular para. 7

*Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,*

Art. 5

*Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.*

Art. 14

*1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.*

Art. 18

*Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

Art. 20

*1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of*

*subsistence and development, and to engage freely in all their traditional and other economic activities.*

Art. 34

*Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.*

### **3.7 Procedures**

The UNDRIP was drafted with full awareness that conflict has and continues to exist between the indigenous peoples and the states which claim territorial sovereignty over the territories of indigenous peoples. That is why a number of articles stress out that mechanisms are required to adjudicate between the conflicts in the interests of indigenous peoples and the interests of the state. Indigenous peoples are aware that, in the past, these conflicts were presided over by the state, and the institutions of the state, whether they were courts or parliamentary inquiries. Therefore, the UNDRIP sets out a requirement that adjudication of disputes has to occur through independent, unbiased and authoritative mechanisms (Malezer).

Thus, in relation to procedures, these articles of the UNDRIP are of relevance (Malezer):

Art. 12

*2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.*

Art. 27

*States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.*

Art. 40

*Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.*

## **4 Other relevant international organizations and instruments**

### **4.1 The World Intellectual Property Organization (WIPO)**

Merle Alexander introduced the World Intellectual Property Organization (WIPO) and how it can be used to protect the cultural heritage of indigenous peoples. WIPO is a specialized UN agency that is mandated to promote the protection of intellectual property through cooperation among states. Main objective of the WIPO activities regarding indigenous knowledge under the WIPO Program and Budget for 1998-99 was *“to identify and explore the intellectual property needs and expectations of... the holders of indigenous knowledge... to promote... the intellectual property system to their social, cultural and economic development”*. (Alexander)

Nine Fact Find Missions (FFMs) were conducted to the Pacific, South and East Africa, South Asia, North America, Central America, West Africa, the Arab countries, South America and the Caribbean. The outcome was the FFM Report. The Report reflects the substantive consultations with indigenous peoples including 1) study of indigenous customary laws and protocols relevant to intellectual property; 2) short term - testing of intellectual property tools for indigenous knowledge protection through pilot projects; 3) long term – development of new intellectual property tools to protect indigenous knowledge (Alexander).

#### **4.1.1 The Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore**

In 2000, WIPO General Assembly established the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC) as an international forum for debate and dialogue concerning the interplay between intellectual property and indigenous knowledge, genetic resources (GR) and traditional cultural expressions (TCEs). After 13 IGC sessions, indigenous peoples have been successful in advocating for the establishment of a voluntary fund for indigenous peoples' participation, Gap Analyses for intellectual IP and TCE protection by the intellectual property regime, a Toolkit for intellectual property and most importantly, the Draft Provisions for Indigenous Knowledge and TCE protection (Alexander).

In IGC 7, in November 2004, the Draft Provisions were tabled. Since IGC 7, there have been two commenting and amending periods. The drafts have not been adopted or endorsed by the IGC. They remain in developmental stasis. Objectives of the draft provisions include (Alexander):

- 1) Recognition of the collective nature of the rights of indigenous peoples to indigenous knowledge and the equality of indigenous knowledge with other scientific forms;
- 2) Prevention of the grant of improper intellectual property rights to unauthorized parties;
- 3) Empowering of indigenous knowledge holders to prevent against misappropriation;
- 4) Repression of the misappropriation of indigenous knowledge and other unfair commercial and non-commercial activities; and
- 5) Ensure prior informed consent.

Substantive provisions of the drafts include (Alexander):

- Indigenous knowledge shall not be misappropriated;
- Enforcement should be guided by respect for the customary practices, norms, laws of indigenous peoples;
- Protection may be implemented through a range of legal measures, including: a special law on indigenous knowledge and laws concerning the interests of indigenous peoples;

- Protection should be applied consistent with the dynamic and evolving nature of traditional knowledge and indigenous customary law;
- The communities who generate, preserve and transmit the knowledge in a traditional and intergenerational context should benefit;
- Legal means should be available to provide remedies for traditional knowledge holders;
- Customary laws are determinative in sharing benefits that arise from the use of indigenous knowledge;
- Prior informed consent should govern any access of indigenous knowledge;
- National/regional authorities should implement the laws to protect indigenous knowledge.

There are some dangers in the IGC. Since 2004 and the last five sessions, the IGC's progress on the development of the Draft provisions has stalled. The debate has settled on a single decision, whether the Draft Provisions should be binding or non-binding. Developed countries, the perceived beneficiaries of the intellectual property regime, generally argue against any change or at the most towards a guideline non-binding voluntary regime prior to a binding treaty. Developing countries, the perceived exploited of intellectual property law, want a binding treaty immediately to prevent further misappropriation. As indigenous peoples are not considered to represent nation states, they are influential, but they are not empowered to make the decision themselves (Alexander).

On one hand, inaction creates an opportunity for indigenous peoples. According to Alexander, they must turn this dangerous inaction into an affirmative indigenous-lead action in their country, with their own laws. In Canada, there is a jurisdictional void on the protection of the aboriginal cultural heritage. Opposition to change without acting domestically creates the opportunity for indigenous peoples to legislate in this void. Indigenous peoples should exercise their customary and inherent sovereignty with regard to their cultural heritage. If and when the IGC does implement or make a decision, it will need tangible and concrete examples of indigenous national laws to apply. On the other hand, inaction and omission are the status quo where indigenous peoples' rights to cultural heritage are infringed and unrecognized. Inaction ensures that the customary laws of indigenous peoples are not enabled by national and international statute. Inaction furthers the commercialization of the knowledge of indigenous peoples, without any recourse but the courts. Inaction requires indigenous peoples to be their own advocates in their domestic context without the assistance of UN member states. At Canadian law, omitting to act is often given the same weight as intent. Not preventing something is as hurtful as a bad act (Alexander).

#### **4.2 The ILO Convention No. 169**

Malezer stated that governments should be pressured to sign the ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries. It then becomes international law. The Convention has relevance for the protection of the cultural heritage of indigenous peoples. Article 7 says that indigenous peoples have the right to decide their own cultural development as it affects their lives, beliefs, institutions and spiritual well-being and their lands (Malezer).

Art. 7

*1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.*

*2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.*

*3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.*

*4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.*

### **4.3 UNESCO**

The many UNESCO declarations, recommendations and conventions require close examination to seek out those elements which affirm the rights of indigenous peoples. However, according to Malezer, there must be awareness that these legal instruments are established to affirm States' rights which the State Members of UNESCO's General Assembly has tried hard to protect. Furthermore, UNESCO functions through international commissions and national committees, where indigenous peoples do not have an easy access to. Trask criticised UNESCO and its World Heritage Convention and the Convention for the Safeguarding of the Intangible Cultural Heritage because they were drafted without the meaningful participation of indigenous peoples. The increasing designation of Protected Areas and World Heritage Sites on indigenous lands are a misappropriation of the cultural heritage of indigenous peoples as the common heritage of all humankind (Malezer; Carino; Trask).

However, indigenous peoples are committed to the position of their rights to self-determination in its full international meaning. Malezer left it to advocates, international lawyers and community representatives of indigenous peoples to examine each of these legal instruments to find value and overcome conflicting messages about the rights of indigenous peoples (Malezer).

In UNESCO terminology, 'protection' refers to the adoption of measures aimed at preservation, safeguarding and enhancement. That is the sense in which the term is used in its various instruments (Carino).

UNESCO possesses a series of standard-setting instruments comprising seven Conventions (Malezer):

- Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)
- Convention for the Safeguarding of the Intangible Cultural Heritage (2003)
- Convention on the Protection of the World Cultural and Natural Heritage (1972)
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property (1970)
- Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954)
- Universal Copyright Convention (1952, Rev. 1971)

UNESCO's recommendations and declarations of relevance for the cultural heritage of indigenous peoples were listed as follows (Carino): Recommendation on the Participation by the People at Large in Cultural Life and their Contribution to it (1976); Recommendation on the Safeguarding of

Traditional Culture and Folklore (1989); Universal Declaration on Cultural Diversity (2003); Universal Declaration on Bioethics and Human Rights (2005).

#### 4.3.1 The Declaration on Cultural Diversity

The Declaration on Cultural Diversity aims to have a significant impact on humanising globalization and making it more culturally sensitive. This is an opportunity for states to reaffirm their conviction that inter-cultural dialogue is the best guarantee of peace and to reject the theory of the inevitable clash of cultures and civilizations. The Declaration supports cultural diversity, cultural rights and the role of culture in development, reaffirmed in article 5: Cultural rights as an enabling environment for cultural diversity (Carino).

##### Art. 5 – Cultural rights as an enabling environment for cultural diversity

*Cultural rights are an integral part of human rights, which are universal, indivisible and inter-dependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.*

The Declaration on Cultural Diversity identifies eight definitions (Malezer):

- Cultural diversity, which refers to the ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.
- Cultural content, which refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities.
- Cultural expressions, which are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.
- Cultural activities, goods and services, which refer to those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.
- Cultural industries, which refer to industries producing and distributing cultural goods or services as defined in “Cultural activities, goods and services.”
- Cultural policies and measures, which refers to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services.
- Protection, which means the adoptions of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions. “Protect” means to adopt such measures.

- Interculturality, which refers to the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect.

### **4.3.2 The Convention on the Protection and Promotion of the Diversity of Cultural Expressions**

The primary objective of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions is to strengthen the five inseparable links of the same chain: creation, production, distribution/dissemination, access and enjoyment of cultural expressions. The Convention focuses primarily on the diversity of cultural expressions, as circulated and shared through cultural activities, goods and services, the most contemporary transmitters of culture. The protection and promotion of the diversity of cultural expressions create conditions for cultures to flourish and to interact freely in a mutually beneficial manner, give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity and identify new arrangements for international cooperation, which is the keystone of the Convention (Carino).

### **4.4 The Convention on Biological Diversity**

Cultural heritage encompasses elements of historical knowledge that have been transmitted through generations and that currently forms the cultural expressions of our everyday life. In relation to the Convention on Biological Diversity (CBD), Jannie Lasimbang stated that cultural heritage may be limited to traditional knowledge, innovations and practices that has been handed down; and biologically important cultural heritage areas such as sacred sites, community conserved areas and bio-cultural heritage sites; and bio-cultural artifacts. There exists increasing acceptance that it should encompass not only certain areas of bio-cultural significance but also the entire landscape or ecosystem within indigenous territories as a whole in line with the intrinsic relationship between culture and biodiversity (Lasimbang).

CBD has a number of important articles that relate to the protection and preservation of indigenous peoples' cultural heritage. These include article 8(j) on traditional knowledge, article 10(c) on customary sustainable use and article 17 on exchange of information. Another article which does not apply directly to protecting indigenous peoples' cultural heritage but which is becoming very critical for indigenous peoples to be engaged in because it may have negative implications is Article 15 on access to genetic resources (Lasimbang).

CBD art. 8 (j) on traditional knowledge:

Each Contracting Party shall, as far as possible and as appropriate:

*Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.*

CBD art. 10 (c) on customary sustainable use:

Each Contracting Party shall, as far as possible and as appropriate:

*Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.*

CBD art. 17 on exchange of information:

*... such exchange of information shall include exchange of results of technical, scientific and socio-economic research, as well as information on training and surveying programmes, specialized knowledge, indigenous and traditional knowledge as such and in combination with the technologies referred to in Article 16, para. 1. It shall where feasible, include repatriation of information.*

There is the Ad-hoc Open Ended Working Group on Article 8(j) and Related Provisions (WG8(j)), Akwe:Kon Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to take place on, lands and waters that are traditionally occupied or used by indigenous and local communities; the draft Guidelines on *sui generis* protection of traditional knowledge, innovations and practices; and the draft ethical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities (Lasimbang).

CBD art. 8(j) talks about conditions concerning preservation, promotion and utilisation of traditional knowledge, including approval and involvement of indigenous peoples which could be taken to encompass the principles of free, prior and informed consent. Thus it is clearly important in terms of recognizing indigenous peoples' rights over their knowledge. The difficult issue remains subjecting these conditions to national legislations. The parties either have to amend national legislations to be more progressive or to also take international obligations when dealing with issues of traditional knowledge (Lasimbang).

There is now a growing demand by many indigenous peoples for the repatriation of cultural artifacts and information that have been stolen from them. The CBD has provisions to act upon these demands. Although also other UN bodies have the mandate to undertake repatriation guidelines, the CBD is an important forum because it is well-attended by indigenous representatives and well-coordinated through the International Indigenous Forum on Biodiversity with an advisory status to the CBD. CBD art. 10 (c) on protecting and encouraging customary use of resources in accordance with traditional cultural practices, though very important and part of the Programme of Work of the WG8(j) has been left behind. This work will now be taken up. It is expected to include traditional occupations of indigenous peoples and trade of resources which has always been common among indigenous communities based on indigenous economic principles but have been unrecognized and restricted by many states. It will also complement work on protecting community conserved areas and biocultural territories (Lasimbang).

Article 15 on access to genetic resources does not have any direct reference to indigenous peoples. Also in past discussions in the Working Group on Access and Benefit Sharing, Parties wanted to separate biological resources from traditional knowledge. However, indigenous peoples have agreed that there is a need to engage in this process because there are several items on the article that are detrimental and unacceptable to indigenous peoples. This makes negotiations on the International Regime on Access and Benefit Sharing extremely difficult. One item is on article 15.1 which assumes state sovereignty over resources, article 15.2 about creating conditions to facilitate access to genetic resources, and article 15.3 which identifies the source of genetic resources solely with Parties and therefore agreements would be made primarily with contracting Parties. Engagement in this process by indigenous representatives will not only have to ensure that rights of indigenous peoples are respected but also to be able to convince Parties to put into place laws and mechanisms that can work for the poorest indigenous communities. The challenge for indigenous representatives is to

maintain unity and understanding of different conditions facing diverse indigenous communities (Lasimbang).

At the local, national and regional level, indigenous peoples have benefited by using the CBD to demand for legislative changes in protecting and respecting rights to biocultural heritage. In Asia where governments have been denying violation of civil and political rights, national implementation of the CBD provides a window for open engagement. Indigenous peoples of Asia managed to hold regional conferences on the CBD in countries like Vietnam (2003) and China (2007) because the protection of cultural heritage for these countries are seen to coincide with the concerns of the government (Lasimbang).

Many communities have also benefited from project support through the United Nations Development Programme (UNDP) and International Fund for Agricultural Development (IFAD) Small Grants Projects in protecting cultural heritage. However, there is also backlash in that some communities have become project-oriented. There is a need for constant reminders in these communities and the donors to also link the work to the wider goals of ensuring recognition and respect for territorial rights and free, prior informed consent of indigenous peoples (Lasimbang).

Many governments are still dragging their feet to enact laws that will protect indigenous peoples' cultural heritage and to conduct legal reviews and reforms to implement the CBD decisions. In particular, the rapid expansion of protected areas in indigenous territories is a direct violation of CBD decisions. In the hierarchy of laws, biodiversity laws are of lower priority. As such, the development of an international regime on access to genetic resources has already overshadowed discussions on protection of traditional knowledge and cultural heritage in WG8(j) at both national and international level (Lasimbang).

Using the CBD to protect cultural heritage at the international level means that indigenous peoples that are engaged in the process have to stretch the interpretation of the articles of the CBD. Unlike e.g. the UNDRIP, in which indigenous peoples were actively engaged in the process of standard setting, involvement of indigenous peoples in the drafting of the CBD prior to the Rio Summit and at the Summit itself was very limited. The key is to take a rights-based approach to these issues and ensure coherence in implementing the decisions of the CBD (Lasimbang).

#### **4.5 The American Declaration of the Rights and Duties of Man**

As part of the normative framework for the protection of the cultural heritage of indigenous peoples, Anaya mentioned the American Declaration on the Rights and Duties of Man. Its article XIII deals with the right to the benefits of culture (Anaya):

*Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.*

*He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.*

### **5 Suggestions and best practices**

Anaya gave some suggestions and possible best practices in his speech. He gave the idea of Communal Intellectual Property Rights. Disputes would be dealt with through customary/tribal law.

Challenges here are e.g. identifying the beneficiaries of protection, whether to vest protection in the community as a whole rather than any individual creator. Also defining the scope of protection is a challenge, as is the question of what are the applicable defenses and exceptions. For example, the WIPO IGC suggests that it must be a product of the community's "creative intellectual activity"; it must be characteristic of the community's cultural and social identity and heritage; and it must be used or developed by the community or an individual therein who has the right or responsibility to use or develop the traditional cultural expressions under customary practices of the community (Anaya).

In Panama, since 2000 there has existed a Special Intellectual Property Regime on Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural identity as their Traditional Knowledge. It creates the Department of Collective Rights and Expressions of Folklore. It covers inventions, designs and innovation, cultural historical elements, music, art and traditional artistic expressions. There is also archiving expressions of folklore and the possibility of co-ownership by several villages of some elements of knowledge. The "Provisions on the Protection, Promotion and Development of Handicraft" prohibit the import of craft products or the activity of those who imitate indigenous and traditional Panamanian articles or clothing (Anaya).

The Philippine Indigenous Peoples Rights Act from 1997 protects community intellectual property rights (Anaya):

1. The past, present and future manifestations of their cultures, such as but not limited to, archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literatures as well as religious and spiritual properties
2. Science and technology including but not limited to, human and other genetic resources, seeds, medicines, health practices, vital medicinal plants, animals, minerals, indigenous knowledge systems, agricultural technologies, knowledge of the properties of flora and fauna, and scientific discoveries; and
3. Language, music, dance, script, histories, oral traditions, conflict resolution mechanisms, peace building processes...

The right of the indigenous peoples to their indigenous knowledge systems and practices and to develop their own science and technologies is provided by Section 34 which states that:

*Indigenous cultural communities/indigenous peoples are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of flora and fauna, oral traditions, literature, designs and visual and performing arts.*

The Indigenous Peoples Rights Act further states that indigenous culture shall not be commercialized or used for tourism and advertisement purposes without the free, prior and informed consent of the indigenous peoples concerned (Anaya).

Carino drew attention to the possible inter-linkages of WIPO IGC, UNDRIP and UNESCO. These would include how best to promote traditional knowledge, innovations and practices, UNDRIP article 31 and if UNESCO's approach towards protection and promotion of cultural heritage and the

maintenance of diversity of cultural expressions would show a way forward. According to Lasimbang, it would be important to link indigenous peoples' efforts in WIPO and in WG8(j) of the CBD on the ethical code of conduct and *sui generis* protection of knowledge. For example, many pharmaceutical companies have violated the rights of indigenous peoples by not acknowledging the ownership of both their medicines and the knowledge related to these resources (Carino; Lasimbang).

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

A Working paper was developed in the UN in 2006 by Yozo Yokota and the Saami Council entitled "Review of the draft principles and guidelines on the heritage of indigenous peoples". This working paper drafts guidelines for the protection of indigenous peoples' cultural heritage and explores the possibility that the guidelines might be transformed into an international legally-binding convention on the protection of indigenous peoples' heritage (Malezer).

Malezer drew attention to the proposals that are contained in the draft guidelines for the states to adjust to the rights of indigenous peoples as is now recognized in international law. To paraphrase, states should (Malezer):

- Establish national legislation which recognizes indigenous people' customary laws concerning the management of their cultural heritage.
- Only following effective consultation with, and participation by, the indigenous peoples concerned and be adopted with the free, prior and informed consent of that people.
- Guarantee that indigenous peoples have financial resources available to effectively maintain, safeguard and protect their cultural heritage.
- Guarantee indigenous peoples can obtain prompt, effective and affordable action to prevent unauthorized acquisition, and obtain full restitution, of their cultural heritage.
- Guarantee financial resources that allow indigenous peoples to defend their right to their cultural heritage before any dispute-resolution mechanism.
- Curtail illegitimate acquisition of intellectual property rights over elements of indigenous peoples' cultural heritage.

National courts and dispute resolution authorities should:

- Recognize and respect the customary laws pertaining to the cultural heritage of indigenous peoples.
- Adapt rules of evidence in legal proceedings to the relevant people's cultures and customary laws.

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