THE 2000 REVISION OF THE UNITED NATIONS
DRAFT PRINCIPLES AND GUIDELINES ON THE
PROTECTION OF THE HERITAGE OF
INDIGENOUS PEOPLE

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In 1990, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities charged Dr. Erica-Irene A. Daes with the preparation of a working paper, and in 1992, a study, on the protection of indigenous cultural heritage. In 1995, Dr. Daes presented a thoroughly researched report with elaborate recommendations on the protection of indigenous heritage.

Her resulting draft principles and guidelines for the protection of indigenous heritage were reviewed and revised by a conference of experts, government officials, indigenous peoples’ representatives, and intergovernmental organizations at a United Nations seminar held in Geneva from February 28 to March 1, 2000.

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1. Dr. Erica-Irene Daes is a member of the United Nations Sub-Commission for the Promotion and Protection of Human Rights and has been central to the recognition indigenous rights by the United Nations. As such she received an honorary doctorate degree from the University of Saskatchewan in 1996 for her work on human rights. As the Chairperson of the United Nations Working Group on Indigenous Populations since 1984, one of her many accomplishments was the elaboration of a United Nations Draft Declaration on the Rights of Indigenous Peoples in 1993. See Dr. Erica-Irene A. Daes, Equality of Indigenous Peoples Under the Auspices of the United Nations – Draft Declaration on the Rights of Indigenous Peoples, 7 ST. THOMAS L. REV. 493 (1995); cf. text of Draft Declaration id. at 500.


BACKGROUND

Special Rapporteur Dr. Erica-Irene Daes’ 1995 study on the protection of the heritage of indigenous people and its conclusions and recommendations were guided by three major ideas: (1) the need for a holistic view of the subject-matter, flowing from indigenous peoples’ essential relationship to land and leading to a comprehensive definition of heritage; (2) the principle of locality, deferring to indigenous customs, laws and practices wherever possible; and (3) the principle of effectiveness, leading to principles and guidelines that would provide utmost protection through the dominant legal systems, both national and international.

The concept of “heritage,” as the object of protection, was chosen because the alternatives “cultural property” and “intellectual property” were considered inappropriate in the context of indigenous peoples. First, “property” with its inevitable connotation of individual exclusive right could not adequately reflect indigenous peoples’ view of connectedness with their land and attendant community and individual responsibilities. Second, the distinction between “cultural” and “intellectual” property was seen, from the indigenous perspective, as “not very useful” as it reflected an “artificial” separation of heart and mind. The term “heritage,” in contrast, is “everything that belongs to the distinct identity of a people” and “includes all expressions of the relationship between the people, their land, and the other living beings and spirits which share the land.” It thus allows for the inclusion of things and ideas as disparate and subject to otherwise differential legal regimes as, inter alia, songs, dances, works of art, and ceremonies, scientific knowledge, knowledge about the use of flora and fauna, human remains, and sacred sites.

The principal policy expressed in the 1995 study’s conclusions and recommendations was that of indigenous self-determination: indigenous peoples should be the guardians and interpreters of their heritage which they hold communally: only the group in its entirety, be it a “family, clan, tribe or other kinship group,” should be able to agree to the sharing of its

5. See Daes, supra note 2, at 3, para. 26.
6. See id. at 3, para. 21.
7. Id. at 3, para. 24.
8. Id. at 21, para. 164.
9. See id. at 3, para. 24.

Existing legal protections for indigenous peoples’ artwork, designs and folklore, such as trademark and copyright laws, needed to be strengthened, and the presently inadequate legal protection of indigenous medical and ecological knowledge needed to be ensured. Also, lost or dispersed heritage needed to be recovered and further loss of heritage prevented.

THE 2000 UNITED NATIONS REVIEW SEMINAR

The purpose of the 2000 review seminar was to bring together the various interested parties—representatives of governments, indigenous peoples, specialized intergovernmental organizations and experts—in order to hear the various points of view, explore areas of agreement, and craft language acceptable to all participants. Although certain government representatives emphasized that they did not have the mandate to engage in formal negotiations on a final text, their interventions were constructive and helpful in delineating exactly where the points of agreement lay and where there were items of contention.

In order to help forge agreement, two facilitators were appointed from among the academic experts: Professor Siegfried Wiessner of St. Thomas University School of Law (United States of America) for the discussion of the draft principles, and Professor Marie Battiste of the University of Saskatchewan (Canada) for the discussion of the draft guidelines on the protection of indigenous heritage.

The facilitator of the discussion on draft principles called attention to the critical need to develop effective principles and modes of legal protection of indigenous peoples’ heritage as an essential part of a world public order of human dignity. He also emphasized the importance of finding consensus amongst the various participants and constituencies with a view toward making progress toward this end. Thereupon, the discussion on the

10. Id. at 4, para. 28.
11. See id. at 22, para. 168.
12. See id. at 22, para. 169.
13. See id. at 22, para. 176.
14. See id. at 22-23, paras. 177-180.
16. The indigenous peoples represented came from all of the six continents. See id. at 20-22.
17. ILO, UNESCO and WIPO. See id. at 20.
18. Nine experts were listed, including scholars, indigenous leaders, and representatives of pertinent NGOs. See id. at 19-20.
individual principles was opened, and comments from the floor were invited. The draft principles were debated *seriatim*. At the end of the discussion, the facilitator integrated the various statements into a revised version of the principle at issue. The facilitator of the discussion followed an analogue procedure on the draft guidelines. Guided by the respective facilitators, the plenary then reviewed and revised the committees’ suggestions with a view toward formulating consensus texts of each individual provision discussed. At the end of the meeting, the facilitators combined these revised consensus texts.

As in the earlier draft, the revised principles embody a distinct policy preference for self-determination and control by indigenous peoples over their heritage. A government representative’s concern about the broad nature and potential legal scope of the principle of self-determination was answered, to the apparent satisfaction of the representative, by the clarification that what was at stake in this document was not self-determination in its broadest sense; this declaration focused on self-determination in the cultural and economic sphere.

Importantly, the concept of indigenous peoples’ heritage was delimited very broadly. In accordance with the earlier draft, it includes all artifacts, cultural expressions such as works of art, music, dance and ceremonies; traditional knowledge, including scientific, agricultural, medicinal and other use of flora and fauna; human remains; burial grounds; and sacred sites. This comprehensive approach reflects the indigenous holistic worldview of interconnectedness of all beings and things, material and immaterial. It also provides the backdrop for a coherent policy with respect to the diverse items or elements of indigenous heritage. To achieve consistency, consensus was reached on the suggestion to replace the earlier draft’s terms “culture, arts and sciences” with the term “heritage” throughout the document.


Original Draft Principle 5 stated, “[i]ndigenous peoples’ ownership and custody of their heritage must continue to be collective, permanent and inalienable, as prescribed by the customs, rules and practices of each people.” The cardinal nature of this provision was emphasized. It reflected a typical concept of the relationship of indigenous peoples to their heritage, distinctly different from the Western concept of individual ownership of things, which leaves in the individual owner the power to use, sell, or destroy. There was an objection to the wording “must continue to be” since it sounded patronizing to indigenous peoples; in its stead, the formulation “should be” was accepted.

A government representative suggested looking into the potential conflict between what would be the heritage of indigenous peoples and what would be elements of national heritage. Given the broad definition of “heritage” in this declaration, elements of heritage that would more properly be characterized as objects of individual ownership, such as artifacts made for sale to tourists to ensure economic survival, could, under Draft Principle 5, not legally be alienated. Thus, the term “heritage” should be defined carefully and in a more limited way, in order to avoid unintended consequences.

The other interventions, however, stressed the need to retain the language of “collective, permanent and inalienable ownership.” It was stated that, while the Western legal systems are not based on collective ownership, they recognize and apply the legal notion. The term “heritage” should remain as broadly defined as it is. It was suggested, however, to provide for the atypical case that the heritage of an indigenous people might not be held collectively – according to the peoples’ own customs, rules and practices. Thus, it was agreed that indigenous peoples’ ownership and custody should be “collective, permanent and inalienable” or, alternatively, “as prescribed by the customs, rules and practices of each people.”

The discussion essentially left unchanged prior Draft Principle 6 stating that “[c]ontrol over traditional territories and resources is essential to the continued transmission of indigenous peoples’ heritage to future generations, and its full protection.” Draft Principle 8 was modified slightly. While the original version emphasized indigenous peoples’ “control over all research conducted within their territories, or which uses their people as subjects of study,” the revised version mandates “control over all research conducted on their people and any aspect of their heritage within their territories.”

22. Id. at 12 (Draft Principle 13).
23. Id. (Draft Principle 6).
Two important elements of indigenous heritage warrant special mention. One are indigenous sacred sites, the other one is traditional knowledge. With respect to sacred sites, the original draft provided for protection of such sites only against unauthorized entry or use. Taking into account the experience of The Miami Circle and other related events, the new version of the guidelines also provides for protection against destruction and deterioration.

As to traditional knowledge, other international organizations and treaty regimes have addressed the phenomenon of dispossession and the need for protection. Since they, however, come at the issue from different angles and with potentially different objectives, such as the protection of biodiversity and the sharing of biodiversity-related knowledge, or the limited purposes of intellectual property regimes, they run, in indigenous eyes, the danger of losing the forest for the trees. The holistic approach of the draft principles and guidelines therefore is, to them, of special appeal.

Original Draft Principle 9 stated that “[t]he free and informed consent of the traditional owners should be an essential precondition of any agreements which may be made for the recording, study, use or display of indigenous peoples’ heritage.” A first suggestion was agreed upon to add the term “prior” to “free and informed consent.” So was the addition of language to cover agreements for “access to and use, in any form whatsoever,” of indigenous peoples’ heritage.

Controversy regarding this principle focused on the term “traditional owners.” One suggestion was to replace it with the term “indigenous peoples” – for the sake of consistency throughout the document. Representatives of indigenous organizations insisted that the term “traditional” should be retained. The term “owners” could refer to museums, governments, etc. However, it was pointed out that revised Guideline No. 13 (now Guideline No. 14) would still define “owners” in accordance with indigenous peoples’ own customs, laws and practices, referring to “the whole people, a particular family or clan, an association or community, or individuals who have been specially taught or initiated to be such custodians.” For purposes of construction, this definition, in essence identical to the definition of “traditional owners” in Original No. 13, was seen by some as appearing to

24. See id. at 15 (Draft Guideline 25).
25. See Siegfried Wiessner, Indigenous Peoples. General Report, 10 Y.B. INT’L ENVTL. L. 193 (2000), with reference to pertinent activities by, inter alia, the Commission on Sustainable Development, the Intergovernmental Forum on Forests, the Conference of the Parties to the Biodiversity Convention, the World Intellectual Property Organization (WIPO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Environmental Programme (UNEP), and the United Nations Development Programme (UNDP).

meet the needs of indigenous peoples.

Original Draft Principle 10 provided that “[a]ny agreements which may be made for the recording, study, use or display of indigenous peoples, heritage must be revocable, and ensure that the peoples concerned continue to be the primary beneficiaries of commercial application.” The drafting group on principles agreed that revocability of the agreements might be problematic. If they were to be revocable by both parties, this might not be to the benefit of indigenous peoples. If they were to be revocable by only one of the two parties, i.e. the indigenous peoples, they might be invalid under certain domestic laws (e.g. be deemed “illusory contracts” under common law). The plenary agreed to delete this provision.

Discussion ensued on the issue of designating indigenous peoples as “primary” or as “equitable” beneficiaries of commercial uses of their heritage. It was stated that, in commercial reality, record companies, etc. would not turn over the lion’s share of the profits to indigenous peoples. If affirmative action in favor of indigenous peoples was intended, the term “equitable beneficiaries” might be more appropriate. Finally, agreement was reached on the wording “principal beneficiaries.” Also, the limitation on “commercial application” was dropped in favor of “any use or application.”

A comment was made that the earlier document did not adequately address women’s rights. It implicitly raised the issue of the relationship of a people’s cultural rights vis-à-vis individual human rights. It was agreed to address this issue in a new provision, Draft Principle 11. In relevant part, this provision reads that “[n]othing in this declaration . . . may be . . . construed as violating universal standards of human rights.” Newly crafted Principle 11 also made sure, in analogy to Article 44 of the United Nations Draft Declaration on the Rights of Indigenous Peoples, that “[n]othing in this declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire under national or international law.”

THE NEXT STEP

Special Rapporteur Dr. Erica-Irene Daes presented these revised Draft Principles and Guidelines on the Protection of the Heritage of Indigenous-

27. Id. (Draft Principle 10).
28. Id. at 13 (Draft Principle 11).
29. Id.

30. Id. at 1.