

Panel discussion on Intellectual Property and Human Rights

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OPENING STATEMENT BY MR. BRIAN BURDEKIN ON BEHALF OF MRS. MARY ROBINSON, UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

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Excellencies,
Distinguished Participants,
Ladies and Gentlemen,

It is an honor for me to participate in the opening session of this important panel as the representative of the High Commissioner for Human Rights.

This discussion on "Intellectual Property Rights and Human Rights" provides an excellent opportunity for us to focus on one of the major proposals made by the Secretary-General in his reform plan -- namely the involvement of the entire United Nations system in more effectively promoting and protecting human rights. In particular, I believe this initiative constitutes an important step in the process of developing more effective cooperation between the Office of the High Commissioner for Human Rights (OHCHR) and the World Intellectual Property Organization (WIPO).

I am particularly pleased that today's discussion will address the increasingly important relationship between intellectual property and human rights - rights which include cultural heritage, traditional knowledge, the right to health, science and technology, and non-discrimination.

In the brief time available this morning, I would like to touch on three themes - non-discrimination, traditional knowledge and science and technology - themes which, I believe, could serve as a springboard for further developing cooperation between our two organizations.

In referring to the principle of non-discrimination in international intellectual property law, I want to highlight the complementarity of intellectual property rights and international human rights standards. The dominant principle in intellectual property rights of "national treatment" is anchored in the notion of non-discrimination - including on the basis of nationality. More specifically, the Berne Convention for the Protection of Literary and Artistic Works ensures protection of copyright law in foreign States: a measure which promotes recognition of non-discrimination and furthers the universalization of intellectual property rights.

International human rights instruments in fact complement intellectual property law; for example, Article 15 of the International Covenant on Economic, Social and Cultural Rights (paragraph 1(c)) stipulates that everyone has the right:

"To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic protection of which he is the author."

States Parties not only have an obligation to respect this right, they are also to "... undertake to respect the freedom indispensable for scientific research and creative activity" and to "... recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields" (paragraphs 3 and 4 of Article 15).

Article 19 of the International Covenant on Civil and Political Rights prescribes that:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or, through any other media of his choice."

States Parties to both Covenants are obliged to submit periodic reports to the relevant International Committees outlining the legislative, administrative and other steps taken to ensure the enjoyment of, *inter alia*, intellectual property rights and freedom of expression. During the

consideration of these reports, the members of these International Committees can, and do, raise issues of particular concern.

In addition, the Commission on Human Rights' Special Rapporteur on the Right to Freedom of Opinion and Expression has responsibility for investigating and reporting on the implementation of freedom of expression in specific countries. Within the framework of the work of the Special Rapporteur, issues concerning the protection of intellectual property rights may be discussed and brought to international attention.

The rights to intellectual property guaranteed under the two Covenants are further strengthened by the right to non-discrimination. Article 2 of both Covenants requires States Parties to ensure that the rights prescribed apply to all individuals within their territory and subject to their jurisdiction and to ensure that these rights are exercised without discrimination of any kind (including race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status).

This guarantee applies to aliens and citizens alike, and encompasses the protection of intellectual property rights. More specifically, differences in treatment between aliens and nationals or between different categories of aliens can only be limited according to law and must be consistent with other rights stipulated in the Covenant. Furthermore, reference is made in the Convention on the Elimination of All Forms of Racial Discrimination, to the term "discrimination" meaning any distinction, exclusion, restriction or preference based on, *inter alia*, national or ethnic origin in the application of human rights and fundamental freedoms, including cultural rights.

Turning now to intellectual property as it relates to traditional knowledge, I welcome the establishment within WIPO of the new program on Global Intellectual Property Issues, and also the decision to examine the benefits which indigenous peoples and local communities are likely to derive from the intellectual property regime. In this context I would like to take this opportunity to congratulate WIPO on the very successful Roundtable on Intellectual Property and Indigenous Peoples held in July, 1998. I hope that this important dialogue with indigenous peoples will be continued and expanded.

I believe that one of the conclusions which emerged from the Roundtable is that the owners of traditional knowledge are less than adequately protected by the present system. This is certainly the message which has been put most forcefully by indigenous peoples taking part in human rights meetings under the auspices of OHCHR. Indigenous peoples have stated that their arts, crafts, sciences, literature, medicines, music and other creative forms of expression are the subject of research and eventual commercial exploitation by others, but that they themselves have frequently been denied any financial benefit.

The intellectual property rights system leaves the issue of medicinal plant prospecting among indigenous peoples to the law of practice. It is suggested that contractual agreements and codes of conduct respond more adequately to indigenous concerns than intellectual property rights. Contractual arrangements used by corporations usually involve contracts with local universities and non-governmental organizations which do the actual sample collection. Indigenous peoples and local communities are not usually mentioned in these agreements and there is no guarantee that they will even be consulted. In my view, it is particularly important that the intellectual property system ensures that indigenous peoples and local communities are consulted and notified by companies and researchers, and that their own procedures and customs are taken into account and their consent sought.

Together we face a number of challenges as we seek to understand and suggest possible solutions to this relatively neglected but important area of human rights. The question of how the present intellectual property regime can protect collective ownership of rights should be

addressed. We are familiar with a regime which attributes ownership to individual or legal entities such as companies, but indigenous knowledge is often held in trust by a community rather than as the specifically recognized right of one person. A related concern is appropriate recognition for knowledge that is continuously evolving, and is passed from generation to generation, where we do not have a clear dateline for "discovery" but rather a process of learning over time. Recognition of such knowledge, without a specific date of origin, seems to present considerable difficulties. Finally, in this context, I believe it is important to note that very often indigenous knowledge has close links with spiritual or religious beliefs, the spiritual dimension of which is not easily quantifiable.

As many of you know, the international standard on indigenous rights, ILO Convention No. 169 concerning indigenous and tribal peoples, defines important international legal standards for indigenous rights. It does not, however, confer any special protection on indigenous intellectual property rights.

The United Nations Convention on Biological Diversity (CBD) addresses the rights of indigenous and local communities. Article 8(j) stipulates that each contracting party shall, as far as possible, and as appropriate, respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity; promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

In November 1997, the Conference of Parties to the CBD held an open-ended inter-sessional working group on traditional knowledge and biological diversity in Madrid. That workshop produced recommendations concerning, *inter alia*, a program of work related to the implementation of Article 8(j). In May 1998, the decision was taken to establish an open-ended working group to address the implementation of Article 8(j) and related provisions. The draft United Nations Declaration on the Rights of Indigenous Peoples represents an international recognition of the rights of indigenous peoples, including indigenous intellectual property rights. Article 29 provides:

"Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual rights", and that, "They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts."

Although this declaration is still a draft, it includes provisions which are considered as minimum standards in the field of indigenous rights by experts on the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The draft is the result of ten years work in the UN Working Group on Indigenous Populations, in which governments, indigenous peoples and communities, independent experts, non-governmental organizations and UN agencies continue to work in close cooperation.

I take this opportunity to also draw attention to the draft principles and guidelines for the protection of the heritage of indigenous peoples prepared by Mrs. Erica-Irene Daes, Special Rapporteur of the Sub-Commission. The draft principles and guidelines establish a solid foundation for future discussion on these matters. In its decision 1998/103, the Commission on Human Rights requested my Office to organize a seminar on these draft principles and guidelines. This Seminar, which you are cordially invited to attend, will be held here in Geneva, from 8 to 10 March, 1999.

It is essential that all of us in the United Nations system continue to study these issues - with the objective of better understanding the nature of traditional knowledge and the scope of indigenous and local communities' intellectual property rights - in order to identify possible legal as well as practical ways of promoting and protecting indigenous and local intellectual property rights.

Ladies and Gentlemen,

The right to development and intellectual property require balancing the private right of the creator or inventor to protection of his or her intellectual property with the right of the community to enjoy the benefits of such knowledge. Domestic law and international treaties on intellectual property usually protect the creator's private right. In recent years, however, some have questioned the primacy accorded to this right - in the interests of economic development.

The World Conference on Human Rights in 1993 emphasized that everyone had the right to enjoy the benefits of scientific progress and its applications. It noted, in particular, that certain advances in the biomedical and life sciences as well as in information technology, may have potentially adverse consequences for human rights. In this respect, an appropriate normative framework should ensure that the progress of science and technology benefits people without infringing their rights.

However, we are confronted with many challenges in implementing that admonition -- including the problem of guaranteeing the confidentiality of personal medical and other data for the proper protection of privacy. It would therefore appear to be extremely important to promote legislative measures for the protection of personal data in accordance with the Guidelines for the regulation of computerized personal data files. At present, such protection is not guaranteed worldwide.

The benefits of computing - as indeed those of medicine - are beyond doubt. But this does not prevent advances in computing from being used and abused - sometimes to the detriment of human rights and human dignity.

In conclusion, I warmly welcome the initiative taken by WIPO to organize this event and note there are a number of areas in which international intellectual property rights and international human rights law converge, reflecting their complementarity and interdependence. In this sense, the rights are mutually reinforcing and contribute to an enhanced recognition of the universality and indivisibility of human rights.

However, I believe there are clearly important issues of common concern which require continuing, intensive consideration. I am therefore committed to more effective dialogue between our respective institutions, closer collaboration with the various international mechanisms related to State Party reporting, investigative procedures and the exchange of experiences in fora such as the Commission on Human Rights and its Sub-Commission.

I thank you for your attention and wish you success and wisdom in your deliberations.