

**Keynote address by the UN Special Rapporteur on the Rights of Indigenous Peoples,
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Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and
Folklore**

Indigenous Panel:

Intellectual property and genetic resources: What is at stake for indigenous peoples?

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I am grateful to have the opportunity to address the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore once more in my capacity as the United Nations Special Rapporteur on the Rights of Indigenous Peoples.

The background document to this panel invites me and my fellow panelists to address a number of questions of relevance to this session of the Intergovernmental Committee. Some of these questions are of a rather technical nature. Others pertain more generally to the relationship between indigenous peoples' human rights and the regulation of access to genetic resources and traditional knowledge and the fair and equitable sharing of their utilization. Of these categories, the latter most clearly relates to my mandate as Special Rapporteur. In this presentation to the Committee, I will therefore focus on the questions that most obviously relate to the human rights of indigenous peoples, including rights to self-determination, self-government, autonomy, culture, health, equality and property. I will conclude the presentation by relating these human rights to the document entitled, Consolidated Document Relating to Intellectual Property and Genetic Resources (Document WIPO/GRTKF/IC/26/4), on which I have been invited to comment.

Mr. Chairperson, please allow me to start off this presentation by outlining three core general principles that underpin the contemporary regime of indigenous peoples' human rights.

When the United Nations and the world community at large began to address the particular situation of indigenous peoples in earnest at the international level in the early 1980s, certain core principles that still serve as the foundation for the specific rights of indigenous peoples were quickly recognized or established. These principles should be allowed to frame all discussions that pertain to indigenous peoples and their rights internationally, including the deliberations within this Intergovernmental Committee.

When the world community started to pay genuine attention to indigenous peoples, it became highlighted that, generally speaking, indigenous peoples constitute distinct societies with their own distinct cultures, and they have struggled to maintain and preserve all those characteristics that define them as different. As a consequence, the indigenous rights discourse in recent decades has focused on allowing indigenous peoples to realize their aspirations to preserve and develop their own distinct societies, so that these can continuously co-exist with the majority societies that have developed around them. This focus within the

indigenous rights discourse recognizes that indigenous peoples' rights have always had a clear collective dimension based on indigenous peoples' own bonds of community and institutions of social interaction and control.

The focus on supporting indigenous peoples' aspirations to maintain and develop these community bonds and institutions has necessarily led to the first core principle of the contemporary indigenous rights regime: that indigenous peoples should be able to exercise meaningful control over the future development of all those aspects of collective human interaction that define and constitute their distinct societies. This principle embraces the right of indigenous peoples to self-determination, related rights of self-government or autonomy, and the right to culture, as expressed in the United Nations Declaration on the Rights of Indigenous Peoples and several other international sources of authority.

Second, but intrinsically connected to the first principle, indigenous peoples' cultures and societies are deeply rooted in the lands, waters and natural resources that they have traditionally used. Indeed, this is the key feature in the understanding of which groups constitute indigenous peoples. As a consequence, from the outset, the international concern for indigenous peoples has had a particular focus on rights over lands and natural resources, as it became increasingly understood that continued access to and control over lands and resources constitute a prerequisite for indigenous peoples' ability to preserve and develop their distinct societies and cultures.

A third general principle that underpins the contemporary indigenous peoples' rights regime is the principle of equality. The contemporary human rights system rests heavily on this principle. All human rights, and not least indigenous peoples' human rights, must be understood in light of the right to non-discrimination. Article 2 of the United Nations Declaration on the Rights of Indigenous Peoples provides that "*[i]ndigenous peoples and individuals are free and equal to all other peoples and individuals*". As I will elaborate upon shortly, the fact that indigenous peoples must be treated equally in relation to other peoples is clearly relevant to the Intergovernmental Committee's deliberations.

The principles I have just outlined constitute pillars upon which the contemporary indigenous peoples' rights regime rests. Today, these principles serve as a foundation for a well-developed set of rights of indigenous peoples that are of direct relevance to the deliberations of the Intergovernmental Committee, including on the definition of norms that govern access to genetic resources and traditional knowledge and the fair and equitable sharing of their utilization.

As already mentioned, the contemporary indigenous rights regime finds expression in a number of international sources of authority, among these most prominently is the United Nations Declaration on the Rights of Indigenous Peoples. As I stated in my report to the United Nations General Assembly in 2012 (A/67/301), no international standard-setting process, including those of the World Intellectual Property Organization and this Committee, should lead to an instrument that goes below or undermines the standards articulated in Declaration and other established sources of authority, but rather should reinforce those standards and the fundamental rights they protect.

Of particular relevance to the Committee's work is the right to self-determination. For considerable time, progress at the international level on understanding what should be the precise content and scope of indigenous peoples' right to self-determination and related

autonomy and self-government arrangements was held back by assertions, in my view unfounded, that accommodation of such arrangements could spur secessionist movements or otherwise disrupt the territorial integrity or political unity of states. Such concerns, however, have diminished and are now rarely heard, as at the national level States increasingly have introduced or strengthened autonomy and self-government arrangements for indigenous peoples residing within their borders, in line with the general international consensus that indigenous peoples should be allowed to govern their own societies.

Reinforcing trends at the domestic level and reflecting the contemporary international consensus are articles 3 and 4 of the Declaration on the Rights of Indigenous Peoples. These provisions provide that “[i]ndigenous peoples have the right to self-determination”, and that “[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs”. Moreover, Article 31 of the Declaration explicitly provides that indigenous peoples’ autonomy and self-government arrangements encompass a right to manage and control genetic resources and traditional knowledge. This provision proclaims that “[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, [including] traditional knowledge, the manifestations of their sciences, technologies and cultures, ... genetic resources, seeds, medicines, knowledge of the properties of the fauna and flora”, etc.

As I shall elaborate upon momentarily, genetic resources traditionally used by indigenous peoples and traditional knowledge generated by them constitute fundamental building blocks in indigenous peoples’ cultures and societies. Reasonably, any meaningful right to autonomy and self-government of indigenous peoples must embrace core elements of their cultures. We thus can see that autonomy and self-government arrangements often encompass indigenous peoples’ management of their cultural heritage, including genetic resources traditionally used and traditional knowledge generated by them. These arrangements take various forms depending on domestic circumstances and other contexts.

Please allow me now to direct the Intergovernmental Committee’s attention to the right to culture. As mentioned earlier in this presentation, indigenous peoples’ cultures are deeply rooted in the lands, waters and natural resources they have traditionally used and continue to use. The linkage between the survival of indigenous peoples’ cultures and natural resources is now well understood, as reflected in the Declaration on the Rights of Indigenous Peoples and several other international sources of authority. For instance, the United Nations Human Rights Committee, in its authoritative interpretation of the right to culture contained in article 27 of the International Covenant on Civil and Political Rights, has repeatedly emphasized that indigenous peoples’ traditional livelihoods and other culturally rooted uses of lands and natural resources constitute particular important elements of their cultures. Therefore, as the Human Right Committee has affirmed, states must take positive measures to prevent actions that adversely affect the lands and resources traditionally used by indigenous peoples.

In this regard, one cannot distinguish between genetic and other natural resources. If a genetic resource has been traditionally used by an indigenous people, it is an integral part of that people’s culture and the knowledge associated with that traditional use is protected by the right to culture. Indigenous peoples typically view what others have divided into two categories, “genetic resources” and “traditional knowledge”, as an integrated whole. According to their perspectives, it is not possible to separate knowledge about how to use a

genetic material from the genetic material itself, and vice versa. As a consequence, since it is their cultures that are subject to protection – and that means their cultures as defined by them – indigenous peoples’ traditional knowledge is protected under the right to culture as well.

In this context, one may in passing note that although WIPO and the Convention on Biological Diversity formally treat genetic resources and traditional knowledge as two separate categories, both have indirectly acknowledged the inherent logic of indigenous peoples’ world views. The “List of Terms” contained in the Consolidated Document, which cites article 2 of the Convention on Biological Diversity, recognizes that it is existence of knowledge about properties a genetic material possesses that renders the “genetic material” a “genetic resource”. Therefore, in a sense, according to this body as well, genetic resources and traditional knowledge cannot be separated from one another.

While an important aspect of indigenous peoples’ distinctive cultures, traditional knowledge about genetic resources emerges in response to needs. The traditional knowledge – and genetic resources – that are of greatest importance to indigenous peoples are those that fulfill their most basic needs. Indigenous peoples’ knowledge about the flora and fauna in the environment that they inhabit are in many cases critical to their capacity to feed themselves, to remain healthy and to cure diseases. In other words, indigenous peoples’ knowledge about how to find food and nutrition as well as their traditional medicines ensures their health. And the right to health is a fundamental human right. Consequently, a major part of indigenous peoples’ genetic resources and traditional knowledge are protected also under the right to health.

Further reinforcing protection of genetic resources traditionally used by indigenous peoples and associated traditional knowledge is the principle of equality, which I emphasized earlier. The international legal system historically justified the colonization of lands and natural resources of peoples in the Americas, Africa, Asia and Oceania. The *terra nullius* and similar doctrines professed that “backward” or “pagan” peoples could hold no or only limited rights over lands and natural resources. But the creation of the contemporary international human rights system fundamentally shifted international law’s posture towards indigenous peoples’ land and natural resource rights. As mentioned, the contemporary human rights system rests heavily on the principle of equality, including on the principle of equal rights of peoples. The incorporation of the right to non-discrimination into the international legal system played an important role for the promotion of decolonization. More recently it has been acknowledged that the principle of equality must also have bearing on the rights of indigenous peoples such that the *terra nullius* doctrine has been held invalid, given its inherently discriminatory nature.

The right to equality has particular implications for the exercise of another widely recognized human right that is relevant here, the right to property. All must have an equal possibility to acquire property, and none must be arbitrarily deprived of property legitimately acquired. Consequently, today a rich jurisprudence from regional and domestic courts, UN treaty bodies and other sources affirms that indigenous peoples’ traditional use of lands and natural resources establishes property rights over those lands and resources. This right to property is reaffirmed by Article 26 of the UN Declaration on the Rights of Indigenous Peoples, which provides that “[i]ndigenous peoples have the right to own ... and control the lands, territories and resources that they possess by reason of traditional ... occupation or use...”. This right embraces all forms of natural resources traditionally used by indigenous peoples. There is no logical reason to, and no international legal source suggests that one

should, distinguish genetic resources from other natural resources in this regard. On the contrary, the general right to property over lands and natural resources that indigenous peoples possess necessarily applies to genetic resources as well.

The same basic equality rationale that resulted in the rejection of the *terra nullius* doctrine also provides a basis for reformation of the notion of the public domain, as it applies to traditional knowledge generated by indigenous peoples. It is a fundamental underlying principle within intellectual property law that, as a general rule, rights to human creativity vest with those who have authored or invented the creativity. This principle – understood in light of the right to equality – provides that indigenous peoples are the rightful holders of traditional knowledge generated by them.

Before concluding this presentation with some remarks directed towards the Consolidated Document, please allow me to say a few words on the relationship between indigenous peoples' rights, as just outlined, and the principle of state sovereignty.

Many states maintain that they hold sovereign rights over genetic resources found within their territories, a position that finds support in article 3 of the Convention on Biological Diversity and in the Nagoya Protocol. Certainly, as a matter of international law every state has the right to claim sovereignty over natural resources found within its borders, *in their relationship with other states and other foreign entities* such as multinational corporations. International law is clear on that. But international law is equally clear that State sovereignty is not absolute and may be limited by international standards that States themselves agree upon. For instance by agreeing to international human rights norms, States accept to apply certain minimum standards that limit the exercise of their sovereignty in relation to the populations residing within the State, including to indigenous peoples. In other words, once States become subject to human rights norms, they cannot legitimately invoke the principle of State sovereignty to maintain control over natural resources or knowledge in violation of those human rights norms. While States may invoke the principle of sovereignty in their relationship with other States and other foreign entities, this principle cannot validly function to justify resisting application of the human rights norms relating to indigenous peoples that I have just laid out.

In this presentation, I have aspired to outline indigenous peoples' underlying rights over genetic resources and traditional knowledge in a manner that I hope is helpful to the Intergovernmental Committee's deliberations. Allow me to now specifically address the entitled "Consolidated Document Relating to Intellectual Property and Genetic Resources" (WIPO/GRTKF/IC/26/4), which I understand to be the principal document subject to negotiation at this session.

Clearly, the draft instrument remains a work in progress. I wish you the best in the finalization of the instrument, as well as with the parallel instruments on traditional knowledge and traditional cultural expressions. It is important, not only for indigenous peoples but for all peoples, that these negotiations are brought to a successful end. In my view, the holders of genetic resources, traditional knowledge and traditional cultural expressions – both indigenous and non-indigenous peoples – must be allowed to control access to such resources and knowledge. They must further be entitled to a fair and equitable share in benefits resulting from their utilization. Given that the Consolidated Document is a work in progress, I shall refrain from commenting on it in detail. Still, I would like to offer

some brief comments of a rather general nature with regard to core issues reflected in the draft instrument.

I understand that the Intergovernmental Committee is not considering rights over genetic resources as such, as doing so falls outside WIPO's mandate since genetic resources are not the result of human creativity, but rather products of nature. As far as I gather, what the Committee is contemplating is an instrument that (1) requires domestic intellectual property systems in general and patent systems in particular to support compliance with access and benefit sharing regimes through the introduction of disclosure requirements; and/or (2) calls on the establishment of defensive protection mechanisms, such as databases, for the purposes of preventing erroneous granting of patents or other intellectual property rights, or other similar behavior with regard to the properties of genetic resources.

The Committee's work in this regard is of course highly relevant to indigenous peoples. As discussed, "genetic resources" are genetic material of actual or potential value. What "transforms" a "genetic material" into a "genetic resource" is knowledge of that the material possesses certain properties that render it valuable to human beings. Such knowledge is often considered "traditional" when generated by an indigenous people. In such instances the genetic resource and the traditional knowledge form integral parts of a society that fall within indigenous peoples' ambit of self-determination and self-governance. Moreover, the resource and the knowledge are integral to an indigenous culture which the State is under a duty to protect. That is particularly so with regard to resources and knowledge that are important to the well-being and health of the indigenous people. Finally, the rights to equality and property compel recognition that indigenous peoples hold proprietary rights over such resources and knowledge.

The just outlined principles and rights of indigenous peoples establish certain minimum requirements with regard to the formulation of the provisions in the Consolidated Document.

As to the beneficiaries of the instrument, since the objective is to require domestic patent systems to support compliance with access and benefit sharing regimes or to put in place defensive protection mechanisms, the beneficiaries of the instrument must – by definition – be those that benefit from such mechanisms, that is, holders of rights over genetic resources and traditional knowledge. These rights holders include indigenous peoples, and therefore they must be listed among potential beneficiaries.

With regard to disclosure requirements, since the objective is to support compliance with access and benefit sharing regimes, domestic disclosure requirements regulation must identify as source and origin of genetic resources and traditional knowledge those that have the right to grant access to the resources and knowledge. That may be States of origin, but also indigenous peoples. As a consequence, disclosure requirements provisions must not only refer to States of origin, but must also require that indigenous peoples that have traditionally used genetic resources and generated traditional knowledge be identified.

Further, I note that one of the disclosure requirements provisions under consideration suggests that all traditional knowledge in the public domain be excluded from such requirements. I presume that eventually this provision – if it remains in the instrument – will be made consistent with the provision on scope of protection in the draft instrument on protection of traditional knowledge that is also under consideration by this Committee.

Nonetheless, at this point I wish to underscore that, in my view, as far as traditional knowledge is concerned, one of the most important purposes of this Committee is precisely to prevent misappropriations of traditional knowledge that conventional intellectual property law considers to be in the public domain. To exclude this entire category of subject matter from protection would, in my opinion, render the work of the Intergovernmental Committee considerably less relevant.

Finally, as to the defensive protection provisions, in my view establishment of databases or similar mechanisms to prevent the granting of erroneous patents or other forms of misappropriation of genetic resources and traditional knowledge might be useful. That said, the registering of indigenous peoples' genetic resources or traditional knowledge might not always be culturally appropriate, as indigenous peoples' customary laws may forbid the disclosure of, for instance, secret or sacred knowledge to non-members, even if access to the database is restricted to patent officers. Therefore, indigenous peoples' genetic resources and traditional knowledge should only be registered in databases provided that the relevant indigenous authority consents to the registering.

Ladies and gentlemen, I would like to conclude by again expressing my gratitude for the opportunity to participate in this panel and address this body. I wish you all the best for a successful session.

Thank you all for your kind attention.