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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Written statement* submitted by the Indian Movement Tupaj Amaru, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[11 February 2011]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Protection of cultural and intellectual heritage of indigenous and aboriginal peoples

I. Background

1. After over 500 years of irrational exploitation and appropriation of cultural heritage, in particular the traditional knowledge (TK) and cultural expressions, belonging to the ancestral civilizations, the indigenous peoples have the moral duty to protect, develop and preserve the past, present and future manifestations of their cultural values, traditional customs, languages and expressions of folklore, which constitute an integral part of the cultural and intellectual heritage of humanity.

2. As to protection and preservation of cultural and intellectual property owned by indigenous peoples, national legislation and international instruments have developed without taking into account the ancestral heritage and age-old traditions, philosophical conceptions and customary laws that govern the social relations of the aboriginal world.

3. Intellectual property is a western concept which has been changed only within market economy and without regard to the traditional practises and collective rights protecting and ensuring the cultural identity of indigenous peoples and not recognizing the holders of traditional expressions as subjects of the laws.

4. Traditional knowledge and folklore, such as popular legends, songs, tunes, musical instruments, dances, and designs or models were the product of a slow process of creative development and incarnated a spiritual value, the soul and the memory of historical communities.

In contrast with western world, in the indigenous vision, such expressions had spiritual value, reflected the identity and were the living memory of indigenous peoples.

II. Need for international standards for protection against piracy

5. Since the conquest and colonization of indigenous territories, traditional expressions have been exposed to the voracity of market laws and have not been protected by Intellectual Property Rights. By its very nature and the sphere of its application, Intellectual Property law has proved to be insufficient to protect the traditional knowledge and cultural expression which has been transmitted from generation to generation.

6. Under the globalization of market, capital and enterprise were fatal to the survival of indigenous peoples. In this context, the piracy and bio-piracy at national and international level take a great proportion, plundering undertaken with impunity trafficking of cultural and artistic property, of which the true owners had been deprived, representing an irreparable loss to their cultural and spiritual heritage. Many traffickers disguised as anthropologists had illegally violated spiritual and religious principles of indigenous societies.

7. In the light of the revelations and complaints made by indigenous peoples, it was known that in 1976 a number of aboriginal tribes in Australia had protested that certain photographs that had appeared in a book on anthropological studies represented objects which had a secret and sacred significance for those communities

Another example was that of the traditional ceremonies of North American Indians filmed in secret and in violation of their spiritual beliefs, by foreign ethnologists for commercial purposes.

8. In the global world, the large multinational companies exploit the genetic resources and an infinite number of varieties of medicinal plants, discovered by indigenous peoples, without the authorization or consent of their true owners.

9. In accordance with the report prepared by Working Group on Access and Benefit-Sharing (2008), the following (10) pharmaceutical transnational corporations playing a decisive control of global market of pharmaceutical industry: Pfizer (USA), GlaxoSmithKline (UK), Novartis (Switzerland), Sanofi-Aventis (France), Johnson & Johnson (USA), AstraZeneca (UK), Merck & Co (USA); Roche (Switzerland), Abbott (USA) and Amgen (USA).

10. They are now omnipresent everywhere, in particular in indigenous lands and territories, spoiling irrationally their biological and genetic resources, including an infinite number of living organisms and constituting the material and spiritual source of the survival of humanity.

11. The aboriginal and local communities – victims of their wealth – stated the absence of legal protection of cultural heritage, in particular their spiritual values, religious beliefs, identities and living memories.

However, the States failed to establish a binding international instrument or instruments in order to put a stop to national and international piracy.

12. In accordance with same studies, today more than before, artistic property, including symbolic manuscripts and even the human remains of ancestors, continued to be subject to piracy and formed part of private and public collections in Europe and America that were frequently the subject of speculation on the world's antiquities markets

13. In its historical and social dimension, artistic creation was constituted by humanity, its memory and its image of the past, present and future. Owing to the destruction of the cultural and intellectual heritage, in particular TCE and TK that incarnated the view of social, political and religious life, indigenous peoples, who were natives from the Inca and Aymara, Maya and Aztec civilisations had lost their memory, soul and identity.

14. The cultural property owned by indigenous peoples, considered one of the invaluable contributions made to past and present civilizations, was exposed to the attacks of time and the white man of the technological era, and ran the risk of total extinction unless the international community took steps to preserve it.

15. Taking into account these violations of secret sacred values there is an urgent need to adopt the appropriate legal instruments in order to preserve and protect effectively the ancestral intellectual creations of indigenous communities and nations in the world.

The States and international community have the responsibility to ensure the legal protection of traditional knowledge, cultural expressions and genetic resources with purpose to safeguard as a common heritage for humanity.

16. Why was a binding instrument a matter of urgency? In the global world where transnational corporations constituted super States within national States, in a world where was crushed humanity in terms of the appropriation of natural resources in violation of the principle of national sovereignty, a global response was required to the plundering use and unlawful appropriation of cultural expressions and genetic resources

17. As far as the legal protection of cultural heritage in various regions and different countries was concerned, a multitude of relevant definitions existed, different legal systems have different definitions on the subject and material to be protected, and this followed from economic and political interests of each country

18. However, there was an increasing need for an international framework that would harmonize domestic legislations and provide a coherent and universal definition acceptable to the international community and given a legal protection, especially for the tangible and intangible of cultural expressions that was sacred and secret for aboriginal peoples.

III. Intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore

19. The Intergovernmental Committee on Intellectual property and genetic resources and traditional knowledge and folklore had received a mandate by General Assembly of WIPO to elaborate and present an outline international legal framework and achieving the adoption of an international instrument or instruments centred on protecting TK, TCEs and GR.

20. The indigenous representatives stated that after 10 years of discussions and rhetoric statements, the Committee has been unable to achieve tangible results neither the progresses in the sphere of protection of the traditional knowledge, cultural expressions and genetic resources, due to the obstruction of the western developed countries.

21. The absence of significant progress toward the expected consensus on the negotiation of the standard-setting process is the result of the absence of the political will of the States.

However, after long a process of the negotiation and informal meetings, we observed a confrontation between, on the one hand, developing countries of South, which hope an international instrument to protect traditional knowledge and genetic resources and, on the other hand, the systematic opposition made by developed and western and rich countries of North, which did not support a legal instrument to protect the cultural heritage of the indigenous peoples.

22. It is urgent that the Committee include aboriginal communities and indigenous peoples as legal subjects with full powers, with concrete, specific proposals and with substantive contribution to the negotiation process.

Concerning the Traditional Cultural expressions or Folklore, the Observer Tupaj Amaru had proposed the following amendments to several articles of the draft document.

Article 1: subject matter of protection:

The protection of traditional cultural expressions/folklore against any piracy, shall apply to:

1. Verbal expressions, such as folk and legends, folk poetry, popular stories, epic poems riddles, other narrations, words, signs, sacred names and symbols;
2. Musical expressions, such as songs and indigenous instrumental music, music on percussion instruments and woodwinds;
3. Expressions by action, such as dances, plays, ceremonies, ritual expressions and other folkloric interpretations and executions;
4. Tangible expressions, such as art, drawings, paintings, sculptures, pottery, terracotta, mosaic woodwork and jewellery, basket work, needlework, textiles, glasswork, pencil, clothing, handicrafts, and
5. Traditional music instrumental and architectural works.

Article 2: Beneficiaries

The juridical protection of the traditional cultural expressions or expressions of the folklore, while national and universal heritage, is essential to ensure a just benefit to the indigenous peoples, local communities and social groups, holders of this patrimony culture,

- (a) In whom the custody, safeguard and protection of the traditional cultural expressions (ECT) are entrusted, in conformity with the national laws, including the practices of customary laws and the international instrument in matter of intellectual property;
- (b) And who maintain, preserve, develop and use the ECT and expressions of the folklore as being expressions of their authentic, cultural, social and historic identity.

Article 3: Scope of protection

The prohibition will be applied to the following illicit acts stipulated in the present article:

- (a) The reproduction, publication, adaptation, broadcasting, interpretation or execution in the public, translation or interpretation, making available or communicating to the public, putting at the disposal of the public domain, including the static photo of the ECT and expressions of the folklore, without the free and informed consent of their holders.
 - (b) Any use of the expressions of the ECT and of the folklore or adaptation of the same to the detriment of the interests of the indigenous peoples or local communities that are the legitimate owners of this cultural heritage.
 - (c) Any distortion, mutilation or modification or offense and actions with the intention of damaging, offending or hurting the reputation of the community, the identity and cultural integrity of the indigenous peoples or local communities which will be the region where they living.
 - (d) Any acquisition by fraudulent means and violent actions of the intellectual property rights on the ECT or the folklore.
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