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WORKING GROUP ON THE INTELLECTUAL PROPERTY ASPECTS OF FOLKLORE PROTECTION

(Geneva, January 7-9, 1980)

MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF CREATIONS OF FOLKORE

prepared by the International Bureau of WIPO*

Considering that indigenous folklore represents an essential cultural heritage of the nation,

Considering that folklore creation evolving from this traditional heritage also involves the self-expression of various indigenous communities within the nation,

Considering that commercialization of folklore creation may lead to improper exploitation of the cultural heritage of the nation,

Considering that any distortion of creations of folklore is prejudicial to the cultural interests of the nation,

Creations of indigenous folklore shall be protected by this Law against illicit exploitation and any other prejudicial action.

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* This document has been prepared and is presented under the sole responsibility of the International Bureau of WIPO.

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Section 1

Creations Protected

(1) For the purposes of this Law, the expression "creations of folklore" means all artistic creations produced in the various indigenous communities of the nation, expressing characteristic elements of its traditional culture and civilization, through forms which have been evolved from generation to generation.

(2) Creations of folklore include in particular:

(i) folk tales and folk poetry,

(ii) folk songs and instrumental music,

(iii) folk dances and plays,

(iv) works of folk art, including in particular drawings, paintings, carvings, sculptures, pottery, terra cotta, mosaic, woodwork, metalware, jewellery, needlework, textiles, costumes.

Section 2

Competent National Authorities

(1) For the purposes of this Law, the expression "competent authorities" means:

(i) in the case of creations referred to in Section 1(2)(i) to (iii), the Authors' Society/Organization of...;

(ii) in the case of works of folk art referred to in Section 1(2)(iv), the National Museum of...;

(2) The respective activities of the competent authorities are supervised by the Ministry for...; appeals against the decisions of the competent authorities regarding creations of folklore are admissible within 15 days of the notification of the said decisions to the interested parties and must be addressed to the said Ministry.

(3) The competent authorities shall be advised as regards classification, identification and evaluation of creations of folklore by an expert committee the members of which shall be proposed by the competent authorities and appointed by the supervisory Ministry.

(4) Detailed rules concerning the respective activities shall be laid down in the Statutes of the competent authorities.

Section 3

National Inventory of Creations of Folklore

In cooperation with other organizations dealing with folklore and advised by the expert committee referred to in Section 2(3), the competent authorities:

(i) shall identify the elements of creations of folklore as referred to in Section 1(1), shall describe them, and shall publish the descriptions; they shall also bring such descriptions up to date from time to time, and

(ii) shall maintain a corresponding public national inventory of folklore creations; the mere fact that a creation of folklore does not appear in such inventory does not deprive it of its folklore character.

Section 4

Utilizations Subject to Authorization

Subject to Section 6, the following utilizations of creations of indigenous folklore shall be subject to authorization by the competent authority:

(i) any reproduction or imitation, and any distribution of copies, of creations of indigenous folklore, if made with gainful intent;

(ii) any public performance, any transmission by wireless means or by wire, and any other form of communication to the public, of copies or performances of creations of indigenous folklore, if made with gainful intent.

Section 5

Authorization

(1) Application for authorization shall be submitted to the competent authority in written form, indicating the name, professional activity and address of the applicant, the identification of the creation of indigenous folklore intended to be utilized and the manner and scope of the utilization intended.

(2) The decision of the competent authority shall be communicated to the applicant in written form within 15 days following the receipt of the application; any denial of authorization shall be motivated. If no decision is made within the said time limit, the authorization requested shall be regarded as granted.

(3) The competent authority shall collect, for the authorized utilization of creations of national folklore, fees corresponding to a tariff established by the supervisory Ministry, for the purposes of the promotion of national culture. The competent authority is entitled to cover the costs arising in connection with its activities concerning creations of folklore from such fees.

Section 6

Exceptions

(1) Tangible works of folk art as referred to in Section 1(2)(iv) may be reproduced by traditional handicraft and sold within the indigenous community which developed the characteristic elements of the work, without the authorization referred to in Section 5.

(2) Incidental utilization of creations of folklore shall not be subject to authorization.

Section 7

Identification of the Creation of Folklore Used

In all publications, and in connection with all public performances and other communications to the public, of a creation of folklore, its ethnic and/or geographic origin shall be indicated in an appropriate manner.

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Section 8

Protection Against Distortion of Creations of Folklore

(1) Any person creating the impression that the work produced by him originates from an indigenous community to which he does not belong shall be punishable by a fine not exceeding...or imprisonment not exceeding...or both, provided that, in the case of recidivism, the said amount or term or both may be doubled.

(2) Any person belonging to an indigenous community who offers with gainful intent creations of folklore of a quality lower than the traditional standard shall be punishable by a fine not exceeding...or imprisonment not exceeding...or both, provided that, in the case of recidivism, the said amount or term or both may be doubled.

(3) Any person who, without the authorization of the competent authority, utilizes a creation of indigenous folklore in a manner subject to authorization shall be obliged by the competent authority to cease such utilization; he shall be punishable by a fine not exceeding...or imprisonment not exceeding...or both, provided that, in the case of recidivism, the said amount or term or both may be doubled.

(4) Any authorized person utilizing a creation of indigenous folklore in a manner distorting the same shall be punishable by a fine not exceeding...or imprisonment not exceeding...or both, provided that, in the case of recidivism, the said amount or term or both may be doubled.

Section 9

Penal Procedure

(1) In cases sanctioned by punishment, the Court of...has jurisdiction.

(2) Copies discrediting indigenous folklore, receipts arising from unlawful utilizations of creations of indigenous folklore, and any implements used for such utilizations, shall be subject to seizure.

Section 10

Relation to Copyright and Neighboring Rights

The protection granted under this Law shall in no way be interpreted as limiting or prejudicing either the protection of copyright in literary and artistic works or the protection secured to performers, producers of phonograms or broadcasting organizations, under domestic law or any international agreement to which the State is a party.

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WORKING GROUP ON THE INTELLECTUAL PROPERTY ASPECTS OF FOLKLORE PROTECTION

(Geneva, January 7 to 9, 1980)

COMMENTARY ON THE MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF CREATIONS OF FOLKLORE

prepared by the International Bureau of WIPO*

I

Introductory Observations

1. Countries newly independent after World War Two have more and more recognized folklore as a basis of the cultural identity and a most important means of self-expression of their peoples both within their own communities and in their relationship to the world around them. Folklore became to these countries increasingly important also from the point of view of their political self-assertion: in developing countries folklore is a living, functional tradition, rather than an evolutionary or historical category.

2. The integrity of folklore as a living and functional tradition in developing countries is seriously endangered by the accelerating development of technology especially in the fields of sound - and audiovisual recording, broadcasting, cable television or cinematography. Creations of folklore are not only being commercialized by such means on a worldwide scale without any respect to the cultural or economic interests of the communities which produced them; at the same time they are often also distorted in order to better comply with marketing requirements. In highly developed countries creations of folklore are generally considered as belonging to the public domain. In most countries of western type social stratification, folklore is being regarded merely as an aspect of theoretical anthropology. Such a philosophical approach did not necessitate so far in industrialized countries any legal institution for the protection of the manifold national or other community interests related to the utilization of folklore.

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* This document has been prepared and is presented under the sole responsibility of the International Bureau of WIPO,in completion of document UNESCO/WIPO/WG.1/ FOLK/2 of November 19, 1979.

3. During the last fifteen years or so, however, it became obvious that in order to foster folklore as a source of creative expression, special legal solutions must be found both nationally and at the international level for the protection against improper utilization of creations of folklore. It has been clear from the earliest efforts to this end that legal protection concerning the use of creations of folklore cannot nearly solve in itself all problems involved in maintaining folklore as an essential part of human life. We have to face a complex syndrome, comprising questions of material preservation, as well as sociological, psychological, ethnological, politico-historical and other aspects. All related problems are interdependent and should possibly be handled with due regard to their connections. This does not mean, however, that no special efforts should be made to cope with sufficiently defined urgent needs crystallizing within the whole interdisciplinary riddle of the phenomenon folklore.

4.1 The first attempts to regulate the use of creations of folklore were made in the framework of several copyright laws (Kenya, 1965; Tunisia, 1967; Chile, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Ivory Coast, 1978; regarding only musical folklore in a Bolivian Decree, 1968; in the Annex No. VII of the OAPI Convention, 1977; and in the Tunis Model Law, 1976). All these statutes consider works of folklore as a part of the cultural heritage of the nation (traditional heritage, cultural patrimony; in Chile: "cultural public domain" the use of which is subject to payment). The Mexican Copyright Law of 1956 makes but a general reference also to "the safeguarding of the cultural wealth of the nation."

4.2 The meaning of folklore as covered by these laws is understood, however, in different ways. No definition is given by the Tunisian law. An important copyright-type common element in the definitions according to the other laws in question is that the works considered should have been created by authors of unknown identity but presumably being or having been nationals of the country; this characterization corresponds to the provisions of Article 15 of the Paris Act (1971) of the Berne Convention.

The Annex to the OAPI Agreement mentions creation by communities instead of authorship, more adequately delimitating creations of folklore from works protected by conventional copyright. The Tunis Model Law defines folklore using both of these alternatives.

4.3 According to the statute of Morocco, folklore comprises all unpublished works of this kind; the statute of Algeria does not restrict the scope of folklore to unpublished works. The Senegalese law explicitly understands the notion of folklore as comprising both literary and artistic works. The OAPI Annex and the Tunis Model Law emphasize that folklore comprises scientific works too. Most of the statutes in question recognize the distinct category of "works inspired by folklore" which they consider as a sort of work under copyright; making, however, the total or partial assignment of the rights in such works conditional on the approval of a competent body. The Senegalese statute provides for a special law regulating the relevant protection.

4.4 The works of folklore themselves are substantially protected under the above-mentioned national laws against fixations for profit-making purposes, which are subject to prior authorization. The law of Senegal also requires prior authorization for public performances of folklore with gainful intent.

The Tunis Model Law suggests protection on the lines of the usual rights in works under copyright. The Annex to the OAPI Convention, on the other hand, concentrates on questions of preservation of existing works of folklore and other cultural patrimony, as well as on measures promoting folklore.

4.5 An attempt to protect works of folklore by means of a copyright instrument has also been undertaken at the international level in 1967 at Stockholm, during the revision of the Berne Convention. As an outcome of this effort, Article 15(4) of the Paris Act (1971) of the Berne Convention contains the following provision: "(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the

Union which make such designation under the terms of this provision shall notify the Director General /of WIPO/ by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union."

4.6 The existing provisions of national laws concerning protection of creations of folklore have not been effectively implemented so far and no notification has been deposited with the Director General of WIPO as yet concerning designation of a national authority to protect in other countries of the Berne Union the rights in works of authors of unknown identity. The measures taken so far in the field of copyright did not prove sufficient to control the use of works of folklore: copyright does not seem, by its very nature, to be the right institution for protecting traditional creations of folklore. As a rule, a work of folklore is the result of an impersonal continuity of a slow process of creative development upheld in a given community by consecutive imitation, lacking the decisive mark of personal originality as required by copyright legislation. And, accordingly, traditional creations of a community, such as the so-called folk tales, songs, music, dances, designs or patterns, etc., are much older than the duration of copyright protection granted by States with regard to authors' works.

5.1 Another existing legal means which may effect in many cases also protection of creations of folklore is the protection of the so-called neighboring rights. To protect performers as regards their performances of creations of folklore, or producers of phonograms or broadcasting organizations as far as their fixations or broadcasts of performed works of folklore are concerned, also means an indirect protection of the creation itself in the given form of its performance, recording or broadcast.

5.2 It appears that up to recent times relatively few developing countries realized this auxiliary possibility of protecting folklore in certain cases. By the end of 1978, among the altogether 30 States which had granted specific rights to performers by law, only 12 were developing countries: Argentina, Brazil, Chile, Colombia, Ecuador, El Salvador, Fiji, Iraq, Mexico, Paraguay, Philippines and Uruguay. Considering the new draft copyright laws being prepared for the revision of existing statutes it becomes, however apparent that more and more understanding is being shown by developing countries in this eminently important context and it can be hoped that the number of laws protecting also performers, producers of phonograms and broadcasting organizations will considerably increase in future. Consequently, it can likewise be hoped that the number of adherences to the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and to the Convention of 1971 for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms will also increase, favorably influencing the possibilities of protecting creations of folklore too.

5.3 But even then, the need for legal protection against improper use of creations of folklore would not be fully satisfied: the protection of performers, phonograms and broadcasts of creations of folklore is but an indirect means of safeguarding folklore and cannot help to prevent either unauthorized performances of works of folklore or fixation, reproduction and broadcasting thereof. It appears to be necessary to establish sui generis legal instruments for an adequate protection of traditional intellectual creations of communities.

6.1 In order to help to find an adequate solution and to provide for a basis of relevant discussions, the International Bureau of WIPO prepared draft Model Provisions for National Laws on the Protection of Creations of Folklore. It is proposed to start with endeavoring to provide for an adequate protection of creations of folklore at national level, thereby creating the possibility of reciprocal extension of national protection on a regional or even on an international basis.

6.2 In elaborating sui generis Model Provisions, the International Bureau of WIPO also took into account existing national approaches as already reflected in the respective provisions of the copyright laws of several developing countries. It further considered the legal solutions as proposed in Annex No. VII of the OAPI Convention (1977) and in the Tunis Model Law. It also had in mind aspects of possible implementation of Article 15, subparagraph 4, of the Berne Convention, which provides, under certain conditions, for the protection of works of unknown identity.

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The International Bureau, however, had to face the fact that up to now none of these copyright provisions, national or international, could have been implemented anywhere for an efficient protection of creations of folklore; thus it has taken a different and more pragmatic approach, trying to comply with practical requirements corresponding to the characteristics of traditional creations and the typical ways of their improper exploitation. When establishing more adequate sui generis model provisions, the International Bureau nevertheless left open the way for the eventual application of existing copyright provisions too.

II

Comments on the Model Provisions Contained in document UNESCO/WIPO/WG.1/FOLK/2

7.1 Creations protected (Sec. 1)

The manifold cultural heritage consisting of creations of folklore proves reluctant to being reduced to a single definition universally applicable for all related purposes. Every national law aiming at the protection of creations of folklore against improper utilization of them must appropriately determine the subject of such protection for the special purpose of the law. As regards the coverage of the notion of creations to be protected, the Model Provisions concentrate on two main aspects.

Firstly, the definition should avoid all copyright-type approaches which would narrow the scope of applicability of the law to creations likely to be assimilated to original works of authors; consequently, the Model Provisions do not even use the term "work," typical for copyright protection and make no reference to individual authors whatever, not even in the form of mentioning "works where the identity of the author is unknown." Instead, the Model Provisions take the cultural heritage approach to folklore, and consider their subject as comprising all artistic creations expressing characteristic elements of traditional culture, through forms which have been evolved from generation to generation.

Secondly, the Model Provisions restrict the scope of protection by the law to the limits of its territorial effect, by mentioning creations produced in the various indigenous communities of the nation.

7.2 Corresponding to the pragmatic approach of the Model Provisions, an illustrative enumeration of the most typical kinds of creations of folklore is added to the basic definition. The notion of creations of folklore under the Model Provisions should comprise all reproducible forms of cultural heritage. Unlike the theoretical suggestions of some experts, the provisions in question do not apply to creations inherited from previous generations merely by oral or empirical transmission (immaterial forms of folklore); but also to creations of folk art expressed in tangible form, such as traditional designs and patterns developed and maintained by manual art in a given community, being such designs and patterns especially easily reproduced or exploited.

8. National Inventory of Creations of Folklore (Sec. 3)

Even a special and illustrated definition of creations of folklore as adapted to the purpose of a law protecting such creations against improper exploitation would necessarily prove to be too vague in borderline cases. The definition must also be specified according to the actual needs of a given country. As correctly stated by Prof. J.H. Kwabena Nketia: "It is not enough to define folklore. The items of folklore or specific units of tradition that need legal protection must be identified. In the final analysis, this means extensive recording, transcription, documentation and cataloguing--a task that has (already) begun on a small scale--" (in: African traditions of folklore. Yearbook 1979 of INTERGU, p. 227). Accordingly, the Model Provisions provide for a National Inventory of Creations of Folklore, as well as for describing the characteristics of typical creations of folklore protected by the law. It is important to emphasize that registration in the public national inventory of folklore should not be a condition of the protection of a given creation of folklore covered by the provisions of Section 1. Registration should, however, exclude any possibility of questioning a creation's being protected by the law.

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9.1 Utilizations Subject to Authorization (Sec. 4)

The idea of making certain forms of utilization of traditional creations of folklore subject to authorization is not unfamiliar to creative communities in many countries. In Australia, Peter Banki reported to the Australian Copyright Council on October 3, 1978, that a "permission's mechanism is well established among tribal Aboriginals in the Northern Territory." In 1976, claims were made by certain Australian Aboriginal tribal elders that some photographs contained in a book of anthropoligical studies depicted subjects that have secret and sacred significance to their community and alleged that no proper permission had been given to publish them. As far as Africa is concerned, Prof. J.H. Kwabena Nketia reported in his above-cited work (pp. 225-226) that "because of the close identification of groups with folklore a sense of collective ownership of sets of material and repertoire is often generated among such groups..." and "...members of a community may regard folklore traditions in the public domain as their heritage... Furthermore, in Africa, this sense of ownership is tied up with the notion of "performing rights" which tends to be more of an ethical issue than a purely legal one" and:"Akan oral traditions make references to instances in the past in which some chiefs sought permission from other chiefs to "copy" their instruments of music..." or: "...in Ghana, there are chiefly designs and patterns associated with specific royal houses...as well as patterns with various verbal interpretations that are restricted in respect of...use."

9.2 As a general rule, the Model Provisions would make subject to authorization any reproduction, distribution, public performance or any other form of communication to the public of creations of indigenous folklore, if made with gainful intent. To hinder possible circumventing of the legislator's intention, the Model Provisions would also prohibit any "imitation" of creations of folklore, going beyond mere reproduction but still giving the impression of a traditional creation. The criteria of "gainful intent" covers any making accessible to the public of the creation against payment, even if the main purpose of utilizing the creation is not profit-making; such would be the case, e.g., when the creation of folklore is published for scientific purposes but distributed at a usual selling price.

9.3 The Model Provisions would not hinder indigenous communities in using their traditional cultural heritage in customary ways and in developing it by continuous imitation without gainful intent. The permanent creation of traditional folklore is closely linked with the performance, reproduction, stylistically varying presentation of traditional creations in the originating community. An unrestricted requirement of authorization of the adaptation, arrangement, reproduction or performance of such creations would mean serious hindrance in the way of the natural evolving of folklore and would not become effective in societies where folklore is still an integral part of everyday life.

10. Exceptions (Sec. 6)

Corresponding to the Model Provisions' approach to folklore as living tradition, exceptions have to be made also from the prohibition of uses with gainful intent. Tangible works of folk art embodying traditional designs and patterns may be freely reproduced by handicrafts for sale within the indigenous community which developed the characteristic elements of them. Incidental utilization shall likewise be free, even within the framework of undertaking with gainful intent; thus, for example, the use of folklore as mere illustration in an original work; accidental shooting of creations of folklore in the framework of filming events of the day; or even creating a new, original author's work by using motifs of folklore.

11. Identification of the Creation of Folklore Used (Sec. 7)

One of the main reasons for the urgent need for the protection of creations of folklore consists in the close identification of indigenous communities with their cultural heritage. In order to strengthen the links between the originating group and its widely disseminating creations, the Model Provisions require that in all publications and in connection with all kinds of public use of a creation of folklore (also in cases exempt from authorization) its ethnic and/or geographic origin should be indicated in an appropriate manner. The indication of the geographic origin might be of special importance in cases where the respective ethnic group extends over the territory of more than one country.

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12. Protection Against Distortion of Creations of Folklore (Sec. 8)

Another important aspect of safeguarding the integrity of the body of creations of indigenous folklore irrespective of whether the use of such creations is subject to authorization consists in preventing the distortion thereof. The Model Provisions would make punishable by fine and/or imprisonment four typical ways of distorting folklore. Firstly, the creating of the impression that a work produced by a person originates from an indigenous community to which he does not belong. Secondly, offering by a person belonging to an indigenous community creations of folklore of that community at a lower level of quality than the traditional standard, provided he does it with gainful intent; less skillful imitations of works of folklore in the usual course of community life without the intention of easier profit-making would not be affected by this provision. Thirdly, using a creation of folklore without authorization in a manner subject to authorization. Fourthly, notwithstanding being authorized to use a creation of folklore, using it in a distorting manner.

13. Penal Procedure (Sec. 9)

Provisions are made as regards jurisdiction and seizure.

14.1 Competent National Authorities (Sec. 2) and Authorization (Sec. 5)

The International Bureau did not elaborate any provision concerning ownership regarding creations of folklore. The Model Provisions only provide for competent national authorities administering folklore and authorizing utilization of traditional creations whereby it is understood that they do so on behalf of the owner thereof whoever this be. In many developing countries there still prevails in indigenous communities a strong feeling of ownership of their respective cultural heritage which must not be hurt by simply declaring creations of folklore property of the people of the country or of the nation as such; on the other hand, however, custody of all communities of the nation and safeguard of the whole body of cultural heritage existing in the country should be exercised in a centralized manner, so that it becomes effective both nationally and internationally.

14.2 The Model Provisions suggest as competent authorities regarding creations of folklore existing in immaterial form, the authors' organization supposed to have already been organized in the country concerned and having some applicable administrative experience; as regards creations of traditional folk art expressed in a material form, the National Museum of the country. Both authorities should be supervised by the competent Ministry.

14.3 The competent authorities should be advised as regards classification, identification and evaluation of creations of folklore by an expert committee, whenever necessary or advisable, thus, for example, in connection with identifying and describing the characteristic elements of creations of indigenous folklore, establishing and maintaining the National Inventory of Creations of Folklore, deciding, whether a creation of folklore has been offered of a quality lower than the standard, controlling whether the origin of a creation of folklore used has been correctly indicated, etc. The members of the expert committee should be proposed by the competent authorities and appointed by the supervisory Ministry.

14.4 The Model Provisions also provide for detailed rules of the procedure of authorization, suggesting advisable guarantees both as regards safeguarding the interests related to the integrity of folklore (written application, requirement of exactly describing the intended use and the creation to be used) and promoting normal utilization of folklore as a condition of its becoming known (time limits set for the authorities, obligation to motivate denial; omission of decision amounts to authorization).

14.5 It is proposed that the competent authority should collect according to tariffs to be established by the supervisory Ministry fees for the authorized utilization of creations of folklore; such fees should serve partly for covering the costs arising from the activities related to the administration of the protection of the creations of folklore, and partly for promoting national culture. In this latter mentioned context, it seems to be advisable that a proper share in the fees collected should be granted in an appropriate manner to the indigenous community the traditional creation of which has been utilized. Modalities of employing the fees collected could also be laid down in the statutes of the competent authorities concerning their activities related to folklore (Sec. 2(4)).

15. Relation to Copyright and Neighboring Rights (Sec. 10)

The last section of the Model Provisions makes it clear that the regulation of a sui generis protection of creations of folklore is in no way prejudicial to the protection by copyright whenever it is applicable to creations by members of indigenous communities or to the protection available in the form of neighboring rights, under domestic law or any relevant international agreement.

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