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COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of  
Discrimination and Protection  
of Minorities  
Working Group on Indigenous Populations  
Eighth session  
23 July-3 August 1990  
Item 4 of the provisional agenda

STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS  
CONCERNING THE RIGHTS OF INDIGENOUS POPULATIONS

Information received from non-governmental organizations

Addendum

The present document contains information submitted by the Indian Law  
Resource Center and the National Indian Youth Council.

THE INDIAN LAW RESOURCE CENTER

1. The draft universal declaration on indigenous rights contained in document E/CN.4/Sub.2/1989/36 of 25 August 1989 prepared by the Chairman of the Working Group on Indigenous Populations, Madame Erica-Irene A. Daes, is another encouraging and productive step forward in the process of elaborating a declaration which can be adopted eventually by the General Assembly of the United Nations. The draft universal declaration incorporates, in general, the concerns and proposals that have been set forth over the years by indigenous representatives, non-governmental organizations, Governments and human rights experts. We reiterate our support for the decision to prepare a declaration of rights rather than a more general declaration of principles.
2. We also support and commend the decision to declare explicitly certain rights as collective rights or rights of collectivities as well as to declare rights which belong to individuals. It is in the area of collective rights that the declaration will make its greatest contribution, but individual rights of indigenous persons are equally important.
3. In our view, it is best to declare universal rights for indigenous peoples in broad, ringing and enduring terms. More specific and detailed provisions for implementing, protecting and enforcing these rights is the proper function of a covenant or convention on indigenous rights.
4. On the other hand, we must be aware that the text of the draft should cover all important items before it is finalized and submitted to the Sub-Commission, the Commission on Human Rights, Economic and Social Council and the General Assembly. In the process to come, we must expect that the text is more likely to suffer from subtraction and that further additions to the text will be unlikely. Therefore, a comprehensive declaration of standards should be prepared. Specific recommendations concerning the draft universal declaration follow.
5. We recommend adding an additional preambular paragraph to introduce the principle of the "right to be left alone". The additional paragraph would be as follows, "Believing that States and others should respect the desire and needs of those indigenous peoples who wish to be left alone,".
6. Preambular paragraph 9 states "that indigenous peoples would be free to manage their own affairs to the greatest possible extent." We would suggest removing the phrase, "to the greatest possible extent". In our view this phrase adds no significant meaning to the statement and could serve to negate or qualify the right in question without any particular reason. It unnecessarily limits the statement.
7. Preambular paragraph 10 contains the sole reference to the right to self-determination. The right to self-determination of indigenous peoples should also be set forth in the substantive part of the declaration, perhaps in article 23. It should be made clear that the right to self-determination has only one meaning under international law, for indigenous and non-indigenous peoples alike. (See para. 10 below, for further discussion concerning self-determination).

8. Among indigenous peoples the right to the return of human remains now held in museums and other repositories is of overriding and immediate concern on religious and humanitarian grounds. We recommend that the right to the return of human remains be added to draft article 8 by changing the final period to a comma and adding the following language, "and the right to the return of human remains." We would note that there are virtually no cases in which a proper and scientific reason can be adduced for failing to return human remains for proper burial. We feel it would be unnecessary to carve out any exceptions in regard to this right. The use of the word "return" clearly implies that human remains are to be returned to present day indigenous people who have an established prior connection to the human remains in question.

9. In regard to part III relating to resources, we feel that the declaration must clearly establish the right of indigenous peoples to both surface and subsurface resources pertaining to their lands and territories. We cannot understand or accept the proposition that States should acquire the right to and ownership of those oil, coal and similar resources which originally belonged to indigenous people, merely by the fact of settlement of a particular country. The declaration should provide that indigenous peoples have a veto power over any development of the surface or subsurface resources proposed or initiated by the State or by private companies. Requirements of consultation and compensation, as set forth in draft article 17, are not sufficient protections. The consent of indigenous peoples must be required before resource and other exploration are undertaken on indigenous lands and territories. Indigenous peoples must, in addition, have the right to develop those resources themselves for their own benefit without the approval or consent of the State. We feel that the moral and appropriate approach is to recognize that indigenous people continue to own all of the resources pertaining to their land and waters.

10. In regard to draft article 23, we feel that the concept of self-determination is of such great, overriding importance that it should be observed and declared in this declaration. We suggest the following revised language for draft article 23: "The right to self-determination, including at minimum the collective right to autonomy in matters relating to their own affairs, including education, information, culture, religion, health, housing, social welfare, civil and criminal jurisdiction, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions." This language would somewhat clarify and enhance the meaning of the term "autonomy" in regard to the indigenous peoples' right to exercise ordinary governmental functions within their territories. In the version we propose, the matters to be included in the term "autonomy" are not limited to internal and local affairs but include all affairs of the indigenous people.

11. It is essential that this declaration be understood to be a universal declaration of standards which will apply to all indigenous peoples regardless of their specific characteristics and circumstances. Certain indigenous peoples may have additional and more extensive rights according to their particular characteristics and circumstances, including their particular history, their location, their economies and many other practical factors such as population, land base and political organization. Indigenous peoples under these circumstances may have, and legally should be recognized as having additional rights, particularly the right of self-determination and economic rights which go beyond the minimum standards of the universal declaration.

12. The right of indigenous peoples to self-determination is equal to the right of non-indigenous peoples to self-determination. We should resist efforts to re-define or to dilute for indigenous peoples a right that has already been recognized for all others. The declaration must carefully avoid establishing a category of second-class rights for indigenous peoples.

13. Politically and practically, we think that it will be important for the acceptance of the draft declaration on the part of indigenous peoples that there be as much latitude as possible for indigenous peoples to argue for and develop rights going beyond the declaration. This will help to overcome criticism on the part of indigenous groups who feel that the declaration does not go far enough to meet their particular needs and circumstances, or that it establishes a limitation or barrier against fulfillment of their fundamental rights.

14. In regard to draft article 26, we recommend a redrafting which will clarify the intended rights while remaining within the same basic scope. The recommended new text would be: "The right to travel freely and to maintain contact and co-operation, including cultural and social exchanges and trade, with indigenous people across State boundaries." We feel that transnational contacts need not be limited to merely traditional contacts and that it should be clear that travel back and forth across the borders is essential. Such free crossing and re-crossing of borders has been recognized by treaties, for example, in a treaty between the United States and Great Britain regarding the border between the United States and Canada. Changing the term "kith and kin" to "indigenous people" would clarify the meaning and also avoid unnecessarily limiting the contacts to one's own family or immediate relations.

#### Conclusion

15. We hope that these comments and recommendations be received as constructive contributions. We welcome questions and criticisms, and we look forward to further discussion and analysis of the draft universal declaration on the rights of indigenous peoples.

THE NATIONAL INDIAN YOUTH COUNCIL

1. The National Indian Youth Council (NIYC) is encouraged by the progress in the drafting of a universal declaration on the rights of indigenous peoples for adoption by the United Nations General Assembly. The first revised text of the draft declaration, contained in document E/CN.4/Sub.2/1989/36 is a further productive step towards globally operative standards to uphold the survival of indigenous communities.

2. NIYC's comments are directed at supporting a critical conceptual aspect of the draft declaration: the emphasis on the collective or group nature of indigenous rights. The following discussion in this respect is from a paper by Professor Robert Clinton of the University of Iowa College of Law presented at a workshop on the draft declaration held at the Iowa College of Law on 19 March 1990. The following excerpts from Professor Clinton's paper, "The Rights of Indigenous Peoples as Collective Group Rights" have been adopted by NIYC for use here with his permission.

3. To American and many western observers ... notions of group or collective rights do not sit well with Euro-American notions of liberty and individual freedom. Tensions between Native Americans and other indigenous and tribal peoples and western commentators on the legitimacy of affording protection to such group rights of autonomy emerge, ... from an important difference in perspective about the jurisprudential origins of notion of human rights and liberty.

Human rights and the State: a difference in perspective

4. Many American and European notions of liberty and of the relation of individuals and the State emerged from secular natural law jurisprudence which flourished in Europe during the seventeenth, eighteenth, and early nineteenth centuries. These notions have significantly influenced not only western legal development, but, through colonialism and other processes of western legal penetration, the legal institutions and conceptions of many non-western States as well. In the natural law tradition, all organized society, including the State, represents a compact among the people by which the people delegate some of their sovereign prerogatives and autonomy to the State in exchange for the peace, security, and personal well-being established by the organized society. Thus, conceptually, western thought imagines that the individual antedates the State. Under this view, the individual could exist in a state of nature divorced from organized society, an idea ultimately reflecting Biblical creation stories of the Garden of Eden and which clearly was heightened by Eurocentric perceptions that emerged from contact with North American Indian tribes, whom their early Euro-American "discoverers" wrongly believed were in a disorganized state of nature unshackled by the fetters of organized governments or society. Since western thought begins with the isolated individual separated from organized society, it therefore focuses extensively on questions centering on the relationship of the individual to the State. Rights are thought of as limitations on organized society and government, areas of personal autonomy and prerogative not delegated by the social compact to the sovereign. ... [T]he basic and most dominant western themes about rights pit the individual against the State and presume that the individual rights emerge from the limited nature of the social compact and the restraints imposed by notions of popular consent. Indeed, western legal

thought remains formed primarily by social compact theories of the relationship of the individual and the State. This conception, of course, leaves little room for other group affiliations or group, collective, or societal rights - a problem that sometimes leads to absurd results or absolute injustices. ...

5. [Indigenous peoples] and many non-westerners often have a very different view of the nature of their rights and legal relationships. Deriving their legal vision from their tribal associations, tribal traditions, and the natural ecology with which they often seem more familiar than many western political philosophers, native peoples see humans as inherently social beings. As social beings, people never exist isolated from others in some mythic, disorganized state of nature. Rather human beings are born into a closely linked and integrated network of family, kinship, social and political relations. One's clan, kinship and family identities are part of one's personal identity and one's rights and responsibilities exist only within the framework of this familial and social network. Non-western thinkers therefore naturally think of their rights as part of a group. Certain rights exist within each social group and other rights and responsibilities are attendant to their relations with members of other groups within the web of associations that forms the tribe or the State. For them, the tribe or State is merely composed of interlinked group associations and affiliations. ... Thus, the right an individual has to autonomy is not a right against organized society, as it is western thought, but a right one has because of one's membership in the family, kinship and associational webs of the society. To [indigenous peoples], many other non-westerners, and some western thinkers interested in the ideas of community and fraternity, then, group and individual rights are not antithetical concepts, they are complementary concepts. Group rights go hand in hand with group membership and, indeed, individual rights are unthinkable except in contemplation of the relationship of those rights to the larger political group. ...

6. In this respect, the debate over individual versus group rights, which one often hears whenever the rights of native and indigenous peoples are raised, really represents ... a clash over views about the nature of organized society. The debate is really over whether Eurocentric definitions of government and rights should be adopted in preference to a broader, more inclusive and [arguably] more social and communitarian, conception of society and the rights, roles, and relations held by individuals and groups within society. Indeed, ... if western legal thinkers would listen respectfully to the claims for group protection of culture, autonomy, religious freedom, rather than attacking such notions from their own jurisprudential perspective, a much richer conception of human rights and the relation of the individual to society might emerge.

#### Group rights in western legal traditions

7. While the dominant themes in western legal thought cannot easily be accommodated with notions of group rights, that has not stopped western legal traditions from recognizing separate legal protections for various groups and for their members as members of those groups. Such features not infrequently have been found in the governance of culturally pluralistic western communities. The pluralistic origins of such group protection might derive from the existence of significant numbers of indigenous peoples, such as the New Zealand constitutional assurance of fixed number of Parliamentary seats

assigned to the Maoris, or it might derive from pluralistic linguistic or cultural traditions within the nation state, such as canton protection of national and linguistic groups that comprise the nation of Switzerland or the more recent protection of bilingualism and culturally appropriate educational facilities that have emerged to recognize the group aspirations of the Francophone communities in Canada. In each of these cases, and many others, western legal traditions have developed special legal protections that can best be explained as group rights, but which are often advanced, like the right to free exercise of religions, as if they were individual rights. The concern with preserving French and French culture in Quebec and Canada, for example, does not constitute a separate individual guarantee to all Canadians of their individual right to speak and learn in either English or French; it is, rather, an effort to assure the Francophone community, as a group, of their rights to linguistic, educational, and cultural autonomy. One cannot easily exercise one's individual right to speak French if there are no other French speakers around with whom to converse. The right is a group, collective, or societal right of the French community. ...

8. Indian tribes and other indigenous peoples also have legitimate claims to group rights. In the United States, for example, the tribes of the south eastern states ceded large portions of their land in exchange for explicit treaty promises made under the solemn authority of the United States that they could remove to an area outside of state or federal governance and once there exclusively govern themselves under their laws, rather than being included in any [U.S.] state or federal territory. The United States broke these express treaty promises at the turn of the century when the state of Oklahoma, which included the former Indian territory to which these tribes had removed seventy years before, was admitted to the United States as a pluralistic, non-Indian state. Similarly, most tribes agreed to cede lands, end hostilities, or otherwise remove to those Indian islands that we call Indian reservations based on explicit or implicit guarantees that these islands would provide group sanctuary where the tribes could continue some of their culture, way of life, and political autonomy free from the dominant colonial society which rapidly was encroaching on and eroding important components of that culture, such as the decimation of the buffalo herds during the late nineteenth century upon which many of the American plains tribes depended. All of these rights involved demands by Indian for and cessions by the United States of rights of group autonomy, not individual freedoms. ...

9. While other nations containing indigenous peoples had different historical experiences, many of the vestigial problems created by colonialism have common roots and common themes. Expropriation of the land and resources of indigenous peoples for the benefit of the dominant colonial society recurs in most sagas of colonial contact between indigenous populations and the colonial power. Collective internment sometimes was practised. Actual genocide or cultural genocide, which the draft universal declaration creatively labels ethnocide, was not uncommon, emerging from western notions of the nation-state and efforts to create the cultural homogeneity that it required either through forced assimilation or extermination. In short, western colonial societies regularly reacted to Indians and other indigenous peoples because of their group affiliations and dealt with such groups, as groups, to accomplish western interests. It is truly ironic that when

indigenous peoples demand vindication of those group rights, sometimes only the very same rights western Governments promised in treaties or agreements with the affected indigenous groups, western legal theory now questions the validity or existence of such group rights claims.

10. Unlike [certain other group] rights, however, tribal group rights, the rights of indigenous peoples, generally find few, if any, structural protection in the political structures of the nations in which such indigenous populations are found. While many Indian tribes and other indigenous peoples were promised such structural protection, such as the promises of potential statehood made in 1778 by the United States to the Delaware and the later abortive discussions of statehood or other organized legal protection for the Indian tribes of the Indian territory in the United States, very few of these promises ever reach fruition. Indeed, the New Zealand legal guarantee of two Maori seats in the New Zealand Parliament is the only major structural assurance of representation in the dominant society ... and that guarantee not only constitutes far less than a voting majority but also was originally intended to diminish the voting power of Maori who otherwise might have been entitled to larger numbers of representatives based on their then existing percentage of the population.

11. Since indigenous peoples have no structural political guarantees that the nation in which they find themselves located will respect their group rights to land, culture, religion and political autonomy, special legal protection that limits the power of the State is critically important. Some such protection might emerge from domestic constitutional or other limitations on the exercise of national power. Since majorities, however, rarely vote to limit their political autonomy in favour of indigenous, sometimes disenfranchised, minorities, international protection of such group rights also is terribly important. ... The political processes do not work for [indigenous peoples] and resort to legal protection, such as the group rights of the universal declaration of indigenous rights, is critical if their legitimate group rights claims are to be protected in any form from national encroachment.

#### Conclusion

12. Thus, the draft universal declaration of indigenous rights should be seen as a constructive challenge to nations organized on western models of sovereignty. It constructively challenges the jurisprudential assumptions upon which many base their conceptions of rights and the relation of individuals to States. It requires them to reconsider such notions and to take broader account of communitarian values and group identifications and associations. It also challenges them to honour legitimate claims to autonomy, separate development, and self-determination made by indigenous peoples, some of which in fact were acceded to and promised by western colonial Governments in now forgotten treaties and agreements in the distant mists of the historical saga of colonial contact between indigenous peoples and the dominant colonial society. Finally, and most important, the universal declaration challenges nations containing indigenous populations to satisfy an emergent international set of minimum standards of human decency that many indigenous populations would recognize as simply the result of respectful behaviour between various groups in a larger society. The peoples whom



Euro-Americans discovered and considered savages in a state of nature had certain insights into social and human organization which western societies are only beginning to understand. In so far as the draft universal declaration of indigenous rights provides long overdue legal protections for the group rights of indigenous peoples, the Convention affords the basis for emergence of a broader dialogue on such questions between nations and their indigenous [populations]. Perhaps after almost 500 years of colonial contact, Euro-American and other nations modelled on western legal traditions finally may understand the flaw in western political thought about which indigenous peoples have been complaining for so long. Group rights are every bit as important to human dignity and well being as individual rights.

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