



**Economic and Social
Council**

Distr.
GENERAL

E/CN.4/Sub.2/AC.4/1988/5
26 May 1988

Original: ENGLISH

WGIP 88/UN/1

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Working Group on Indigenous Populations

Sixth session
1-5 August 1988

Items 4 and 5 of the provisional agenda

REVIEW OF DEVELOPMENTS PERTAINING TO THE PROMOTION AND PROTECTION OF
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS POPULATIONS

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

Information received from non-governmental organizations

	<u>Page</u>
Introduction	2
Four Directions Council	3
Inuit Circumpolar Conference	6
International Commission of Jurists	13

Introduction

1. In resolution 1982/34 of 7 May 1982, the Economic and Social Council authorized the Sub-Commission to establish annually a working group on indigenous populations to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually, and to give special attention to the evolution of standards concerning the rights of indigenous populations.
2. In resolution 1988/44 of 8 March 1988, the Commission on Human Rights, on the recommendation of the Sub-Commission, by its resolution 1987/8, encouraged Governments and indigenous organizations and communities, as well as other interested parties, to review and comment upon the preliminary draft principles contained in annex II to the report of the Working Group on its fifth session (E/CN.4/Sub.2/1987/22).
3. In resolution 1987/16, the Sub-Commission requested the Secretary-General to transmit the Working Group's report and its annexes to Governments, specialized agencies, organizations of indigenous peoples and other non-governmental organizations, for comments and suggestions, calling their attention in particular to annex II to the report.
4. In accordance with this resolution, appropriate communications requesting information, comments and suggestions were addressed by the Secretary-General to Governments and the organizations referred to.
5. The present document contains replies received from non-governmental organizations up to 10 May 1988. Additional replies, if any, will be included in addenda to this document.

FOUR DIRECTIONS COUNCIL

[7 March 1988]
[Original: English]

AUTONOMY AND DEVELOPMENT

1. The significance of autonomy

United Nations law and policy in the field of development should be guided by three principal instruments:

(1) The International Covenant on Economic, Social and Cultural Rights calls for the progressive improvement of economic and social conditions for all sectors of society, without discrimination.

(2) The United Nations Declaration on Social Progress and Development urges States to give priority to relatively underdeveloped regions.

(3) The United Nations Declaration on the Right to Development reaffirms the importance of non-discrimination, and recognizes that economic and social progress depend on the extent to which the people affected participate in setting goals and planning changes.

Indigenous communities are not only relatively underdeveloped, even in industrialized countries, but culturally distinct. For the development of indigenous societies to be accelerated, the methods and goals of economic and social programmes must be culturally relevant. In our view, this can only be achieved by respecting existing social and economic institutions in indigenous communities, and giving them the resources to direct their own development.

2. Contemporary examples of autonomy

Indigenous communities in both the United States and Canada enjoy a limited degree of autonomy under national legislation, and these two examples offer some useful comparative experience.

Indigenous communities in the United States ("Indian tribes" in United States law) were first encouraged to "organize for the purposes of self-government" by the Indian Reorganization Act of 1934. In broad outline, the 1934 Act specifically allowed the tribes:

- to adopt a written constitution, subject to the approval of the Secretary of the Interior, and to amend the constitution, also subject to approval;
- to "veto" any use or disposal of community land proposed by the Secretary of the Interior;
- to be consulted regarding financial aid and programmes for the community; and
- to hire lawyers, subject to the approval of the Secretary.

More than 200 tribes adopted constitutions, most of which provide for tribal legislative authority over public order, the management of land and other natural resources, the administration of social and economic programmes, taxation, and the establishment of tribally-owned business enterprises. As a condition of giving approval to these constitutions, the national Government generally reserved the power to veto tribal legislation. The exercise of this veto is not subject to court review.

The scope of Indian tribes' legal authority has varied somewhat since 1934 as a result of court decisions and changes in national policy. The Supreme Court has generally accepted the view that Indian tribes retain "residual sovereignty" and therefore have the right to "govern themselves" without interference, subject only to explicit limitations in national laws. Since 1978, however, the Court has begun to refer to certain "implied limitations" on tribal self-government, among which is lack of authority to punish non-Indians for criminal behaviour.

Other restrictions are legislative. In 1953, Congress allowed several of the States which make up the United States to assume concurrent jurisdiction over the Indian communities within their boundaries. A 1968 law restricts tribal governments' authority to punish serious crimes. Laws passed in the 1880s and 1930s, giving the Secretary of the Interior broad discretionary powers over Indian lands and other natural resources are still in effect.

On the whole, Indians living in Indian communities are subject to national and tribal laws. Non-Indians living in the same communities are also subject to State laws, as well as different national laws.

The practical significance of tribal self-government was somewhat limited until the 1960s, when the United States began to provide the tribes with direct financial aid for administration and development. In 1975, the Indian Self-Determination and Education Assistance Act initiated a policy of sub-contracting the administration of national social and economic programmes for Indians, such as the operation of schools and clinics, directly with tribal governments. As a result, tribes today administer a wide range of community services for themselves, involving roughly one fifth of all United States spending for Indians.

The Canadian system of indigenous self-government is similar, but arguably at a somewhat earlier stage of evolution. Although "Indian bands" were encouraged to elect "chiefs" and "councillors" as early as the 1880s, it was only after 1950, and as a result of a revision of Canada's Indian Act, that these "Indian band councils" were allowed to adopt local legislation and assume some degree of internal administration. Under the current Indian Act, band councils can manage social and health programmes and engage in some degree of internal economic planning, subject to the approval, by the Minister of Indian Affairs, of all local legislation and spending.

Canada's provincial governments continue to exercise criminal and civil jurisdiction in Indian communities, so Indians living in Indian communities are subject to three sets of laws - national, provincial, and Indian band laws.

In 1986, Canada announced a new "Indian self-government" policy, under which Indian bands are encouraged to assume wider responsibility for community-level programmes, and the Minister may agree, by contract, to

provide bands with more financial aid and give up some of his supervisory powers over them. Only a few of Canada's more than 600 Indian bands have made such agreements thus far.

Canadian Indians had hoped for a constitutional amendment that would recognize their right to roughly the same degree of exclusive, internal self-government as the provinces. Although this proposal was endorsed by a 1983 special Parliamentary report, it was rejected at a March 1987 meeting with national and provincial ministers.

3. Strengthening existing arrangements

It would be fair on the whole to describe indigenous governments in the United States and Canada today as "administrative enclaves". Even where they enjoy fairly wide-ranging responsibilities, their powers are circumscribed by national laws, their activities are supervised by national ministers, and they remain largely dependent on year-to-year financial aid arrangements for all social and economic programmes. To this extent they function more as subordinate elements of the national system of Indian administration, than as autonomous constituents of a federal State.

A number of improvements in these arrangements are being sought by indigenous leadership, with the aim of making indigenous government in North America more stable and effective, and improving their ability to work in partnership with the national, State or provincial governments:

- administrative supervision of indigenous governments should be reduced or eliminated so that they are truly autonomous and publicly accountable within their own spheres of responsibility;
- there should be a clearer division of territorial and subject-matter responsibility between indigenous governments and the national, State or provincial governments to avoid conflicting programmes;
- indigenous governments should be guaranteed an equitable share of national financial resources for social and economic development, so that they are able to put their own programmes into actual practice;
- to the extent that indigenous governments remain subject to some degree of national control or supervision, they must enjoy some appropriate form of direct representation in the national Government;
- indigenous governments' political and administrative relations with the national, State or provincial governments should as far as possible be established through intergovernmental agreements.

We believe that establishing a meaningful degree of autonomy for indigenous peoples, strengthened by respect for the foregoing five principles, will not only accelerate the development of indigenous communities, but also help fulfil States' responsibilities regarding non-discrimination, popular participation, and priority for the least advantaged under the International Covenant on Economic, Social and Cultural Rights and relevant United Nations declarations.

INUIT CIRCUMPOLAR CONFERENCE

[18 March 1988]
[Original: English]

I. Objectives and scope of the standard-setting exercise

We believe it is essential that the objectives and scope of WGIP's standard-setting activities be of a broad and comprehensive nature. It is only in this way that the full range of fundamental rights of indigenous peoples can eventually attain adequate legal protection. Further, the present and future needs and concerns of indigenous peoples must also be thoroughly considered.

In regard to the objectives and scope of the Draft Principles, it is not sufficient to simply confirm that existing international standards apply to indigenous peoples. Nor is it adequate to adapt such standards to meet particular indigenous requirements. What is necessary is to ensure that the Draft Principles will also create new standards. These new norms should govern the conduct of Governments and others, whose actions may adversely affect indigenous peoples, their territories and resources.

A second major concern relates to the matter of individual and collective rights. Both elements continue to be highly significant to aboriginal peoples. In particular, adequate recognition of the collective rights of indigenous peoples is crucial to the survival and further development of distinct aboriginal societies or nations.

Since many existing international instruments focus mainly on the human rights of individuals, at least one Government (Canada) anticipates that the draft instrument being prepared by WGIP will concentrate on individual and not collective rights. We feel that the Draft Principles should make clear that the indigenous rights elaborated are both of an individual and collective nature.

It may be useful to add a preamble to the Draft Principles in order to appropriately describe the objectives and scope. In addition, a preamble could specify that Governments and other persons are expected to respect the spirit and intent as well as the letter of the Draft Principles.

Since the proposed declaration of principles is not likely to have legal effect, the preamble might also indicate that the eventual goal of the standard-setting exercise is to provide a solid basis for the possible formulation of an international covenant on the rights of indigenous peoples.

II. Types of principles worth considering

In General Assembly resolution 41/120 of 4 December 1986 (see Annex III of the 1987 Report of WGIP on its fifth session), certain guidelines are emphasized in developing international instruments in the field of human rights. In paragraph 4 of the resolution, it is indicated that international instruments should:

"(c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;

(d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems".

The Draft Declaration being prepared by WGIP elaborates the fundamental rights of indigenous peoples. However, it is also necessary to specify (where applicable) the corresponding obligations or duties of Governments and other persons. This added measure would enhance the practical effectiveness of the indigenous rights outlined in the draft instrument. It would also provide greater certainty as to what standard of conduct is expected in a given case from national Governments or others.

With reference to certain key rights, such as self-government, lands and resources, it may be useful to include principles that encourage mutually acceptable arrangements being worked out between indigenous peoples and national Governments (through equitable and democratic mechanisms or processes). However, recognition of basic indigenous rights in the Draft Principles should not be dependent upon the negotiation of specific agreements.

Another type of principle currently lacking in the draft instrument relates to the provision of implementation mechanisms, both at the national and international levels. Enjoyment or exercise of indigenous rights would likely become more of a reality, if indigenous peoples were guaranteed access to effective supervisory or monitoring bodies concerned with proper implementation.

Each State should be encouraged to respect indigenous rights by ensuring full recognition of these rights in its own Constitution and other domestic legislation. This process of recognition within each country should directly involve the indigenous peoples affected.

III. Specific comments on the Draft Principles

In terms of the actual format used, the ICC supports the views put forward in 1987 by the Indian Law Resource Centre (Washington, D.C.). In particular, the WGIP should consider the use of an introductory paragraph providing that "indigenous peoples, nations, communities and individuals shall have the following rights ...". This statement could then be followed by a comprehensive and separate declaration of specific rights.

The Draft Principles should be formulated in full sentences (not phrases), along the lines used in the Universal Declaration of Human Rights and other international instruments. Similarly, numbered articles could replace the simple use of numbers (e.g. article 1, etc.).

Principle 1. As indicated earlier, it must be made clear that the rights of indigenous peoples are not limited to the rights in existing international instruments or an adaptation of such existing rights.

Principle 2. It should be made clear that indigenous peoples have a right to be treated as adult human beings with full legal capacity. Any trust relationship that exists with Governments must be redefined to ensure full government accountability to the indigenous beneficiaries.

It should also be stated that the right to equality of indigenous peoples entails the right to be treated differently. In order to achieve equality with others, indigenous peoples in many instances must not be viewed in exactly the same way as non-indigenous peoples.

In regard to discrimination, it might be useful to specify "adverse" discrimination. Also, a positive reference to affirmative action policies and programmes would further clarify the intention. Moreover, the right to be free of discrimination should also include a corresponding obligation on the part of Governments and other persons to not discriminate.

Principle 3. "The collective right to exist" should be changed to "the right to exist collectively as distinct peoples, nations, tribes, bands or other communities". A corresponding obligation on the part of government to respect and accommodate such right is also required. Accommodation may be achieved through policies and laws adopted with the approval and collaboration of indigenous peoples.

The right to be protected against genocide and the right to life, physical integrity, liberty and security of the person should probably be stated as a separate principle. It is uncertain what "physical integrity" is intended to add to the proposed provision. A prohibition against forced relocations and other coercive measures should be added.

Principle 4. This principle appears to be too narrowly drafted. Further, cultural rights are already included in Principles 11-14.

It would be advantageous to include in Principle 5 the right referred to in Principle 4. Principle 4 could then be used to elaborate the indigenous right to self-government, as well as the right of indigenous peoples to determine their own institutions and to determine their own membership. A corresponding obligation of national Governments should also be added, in respect to negotiating suitable arrangements pertaining to lands, resources, jurisdiction and financial aspects.

Principle 5. This principle should be expanded to require Governments to take efforts to ensure that history books and other educational materials provide a fair, accurate and informative portrayal of indigenous societies and cultures.

It is not only a question of "depriving" indigenous peoples of their ethnic characteristics or identity. Acts which "undermine" indigenous cultural identity should also be capable of redress.

Principle 6. "The right to participate in the economic, political and social life" of the country should be extended to include participation in its "institutions". Further, there should be a corresponding obligation of Governments to specifically include indigenous peoples in these economic, political and other institutions. In many instances, different rules may be required to accommodate indigenous rights and interests.

Indigenous participation should not be limited to national institutions but should also include those at the international level. In this regard, the extent to which indigenous peoples should be considered as subjects (not just objects) of international law should also be carefully considered.

Also, the right to have the "specific character" of indigenous peoples reflected in the legal system and "political" institutions appears to require further elaboration and refinement. First, it is unclear why only "political" institutions are included. Second, it would be beneficial to specify that the judicial system of a country shall accommodate the justice system of indigenous peoples and shall fully consider the usages, customs and perspectives of such peoples. Where possible, the local system of justice should be controlled by the indigenous peoples themselves.

Principle 7. The duty or obligation of Governments to provide financial assistance should be extended to a wide range of matters pertaining to indigenous peoples. As presently drafted, it is uncertain what the "maintenance of their identity and their development" would include. Would Principle 7 provide financial assistance for various forms of economic, cultural, social and political development?

A process involving indigenous peoples and Governments could be contemplated in the Draft Principles, in order to allow for the proper financial arrangements to be worked out.

Principle 8. Specific government measures to improve the socio-economic conditions of indigenous peoples should not only entail their consent, but also their direct involvement. In addition, these measures should wherever possible be progressively under the responsibility and control of the indigenous peoples concerned.

Principle 9. The importance of subsistence or harvesting activities to indigenous peoples needs to be elaborated in the Draft Principles. It must be recognized that activities such as hunting, fishing, trapping and gathering are of vital cultural significance and continue to make a substantial contribution to the economies of indigenous peoples, providing food, raw materials and income. Technical and financial assistance from Governments for subsistence economies and other forms of economic development should also be expressly contemplated.

It is uncertain what the effect is of "the right to be secure in the enjoyment of their own traditional means of subsistence". A clearer alternative might be to provide that "indigenous peoples have the right to freely pursue their own means of subsistence". It should also be added that "in no case may Governments and other persons, directly or indirectly, deprive indigenous peoples of their own means of subsistence".

Principle 10. It would be useful to first provide in broad terms for the "right to an adequate standard of living" and the right "to enjoyment of the highest attainable standard of physical and mental health" (see articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights).

Participation in and control over health, housing and other social and economic programmes is an important part of self-government. However, care should be taken to expressly provide for the overall right to self-government in more comprehensive terms.

In regard to health, the following provision might be considered:
"Health services shall, to the extent possible, be community based. The services shall be planned and administered in co-operation with the indigenous

peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional healing practices. Where possible, health services shall be progressively under the responsibility and control of the indigenous peoples concerned."

Principle 11. The term "beliefs" should be added to the phrase "religious traditions and ceremonies". It should also be made clear that freedom of religion or belief is a fundamental individual and collective right.

The right of access to sites for religious purposes should be further elaborated. Grave sites should be fully protected from interference by outsiders. In addition, equitable procedures to facilitate the bringing and review of complaints of serious violations of religious rights and freedoms should be developed by Governments and indigenous peoples. In this way, any conflicting uses by other persons could be peacefully resolved.

Principle 12. It is important to ensure that indigenous peoples have the right to control all aspects of the education of their children, through direct parental and community involvement and through institutions of self-government. Such right includes the right to determine curriculum, especially cultural content, and language of instruction. The right to culturally-appropriate adult education programmes should also be highlighted.

A corresponding government obligation to provide financial and other support should be specified, consistent with the principle of free education (at least at primary and secondary levels).

Principle 13. In view of the importance of cultural rights, the various key aspects pertaining to indigenous cultures should be specifically described. This may include material or physical culture, cultural and historical artifacts and remains, oral and written histories, literature and works of art, spiritual and cultural ceremonies, dance and other forms of artistic expression, and subsistence activities (see 1987 comments by the Indian Law Resource Centre).

The right of indigenous peoples to both their own "customs" and "traditions" should be provided. Where national laws are applied to indigenous peoples, Governments should take into account the relevant customary laws and practices of the peoples concerned. In addition, the Draft Principles should encourage equitable procedures involving indigenous peoples to be established in order to resolve conflicts between customary and national laws. In this regard, consideration should be given by Governments to customary laws and practices as far as possible.

With respect to archaeological and other cultural property, specific principles should be provided so as to ensure that indigenous peoples are not deprived of the use and enjoyment of their own cultural property. Government assistance to establish indigenous-operated museums within the communities or regions of indigenous peoples should also be contemplated. Rules regarding archaeological digs and other field research and access to archaeological sites are also required (see Declaration of Principles adopted by the Indigenous Peoples Preparatory Meeting, held at Geneva on 27-31 July 1987).

Principle 14. This principle should be reworded to more directly provide for the right of indigenous peoples to various forms of communication and information. In addition, it should be specified that indigenous peoples have the right to maintain relations with peoples in other regions and countries, for cultural, scientific, educational, economic and religious purposes.

IV. Additional principles not yet addressed

In relation to the ongoing standard-setting process of the WGIP, the ICC would urge that additional principles pertaining to indigenous peoples be considered.

Certain key issues, such as the indigenous right to self-government, have already been referred to in this letter. Other matters of importance to indigenous peoples are briefly described below. Many of these concerns are reflected in the Declaration of Principles adopted by the Indigenous Peoples Preparatory Meeting, held at Geneva on 27-31 July 1987.

Self-Determination. It has been concluded by a Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities that "self-determination is a prerequisite and a pre-condition for the implementation and preservation of all other human rights and fundamental freedoms, including the right to cultural life" (see study entitled "The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments", E/CN.4/Sub.2/404/Rev.1 at p. 111, para. 641).

The study makes clear that the right to self-determination was not included in international instruments to encourage secessionist movements. Moreover, there is considerable doubt world wide whether the right to self-determination includes the right to secede in non-colonial situations. In view of its overall importance to the effective realization of all human rights, the right to self-determination should be appropriately expressed in the Draft Principles.

Sovereignty. The Draft Principles should reflect the fact that the fundamental rights of indigenous peoples are inherent in nature. These rights are not dependent for their existence on any government law, order or other instrument. Further, these rights limit the sovereignty of national Governments.

As distinct and original peoples, indigenous peoples have historically been considered and dealt with as "nations-within-nations". Treaties have been and continue to be signed between national Governments and indigenous peoples. These elements are particular characteristics of the sovereignty of indigenous peoples that should be properly described in the Draft Principles.

Land and resources. It is curious that the Draft Principles do not yet provide for indigenous rights to land and resources. It is from our relationship to the land that we, as Inuit, derive our identity. The survival and ongoing development of our culture depends on the safeguarding of our rights to land and the resources in and on our traditional land and marine areas.

The indigenous right to land must be recognized in the Draft Principles as a collective and inalienable right.

In order to reach equitable arrangements with Governments in regard to the sharing of lands and resources, appropriate processes of discussion or negotiation should be established.

Indigenous "peoples" or "nations". Indigenous peoples are not mere "populations" or "citizens". Nor should we be viewed as "minorities" under international law. We are distinct peoples or nations. In order to defend our rights and interests, we must increasingly be considered as subjects under international law. Indigenous peoples must have the right to participate in national and international institutions.

Development. Indigenous peoples should be involved at all stages in the formulation and implementation of plans for development in regions they use or occupy. Developmental projects are often a major source of conflict impacting upon indigenous peoples, their communities and regions. The right to participate in environmental and social impact assessment processes should also be included.

Also, the "right to development" is an emerging human right increasingly being supported by the United Nations. This right should not only focus on people in developing countries but should be applied specifically to indigenous peoples world wide.

Environment. In view of the profound relationship of indigenous peoples with land and renewable resources, the "right to a safe and healthy environment" takes on a particular importance. Therefore, the Draft Principles should include this emerging human right in favour of indigenous peoples.

Elders. The role of Elders as keepers and transmitters of customs, traditions and spiritual values should be reflected in the Draft Principles. In light of their lifelong experiences and cultural knowledge, Elders have a unique role to play in educational and political processes within indigenous societies.

Sexual equality. The rights referred to in the Draft Principles must be guaranteed equally to indigenous men and women. (A similar provision is found in article 3 of the International Covenant on Economic, Social and Cultural Rights).

Treaties. The significance of treaties and treaty-making should be highlighted in the Draft Principles. Treaty-making is a distinct element of the relationship between indigenous peoples and national Governments. Mechanisms are needed to resolve issues arising from problems concerning the interpretation and implementation of treaties. Governments should be obliged to respect the spirit and intent, as well as the letter, of treaties.

Militarization affecting traditional lands. Military-related activities are a growing problem for indigenous societies and their communities, resources and regions. For example, military uses of land, air and marine areas may conflict with the harvesting activities of indigenous peoples. Prior consultation and involvement of the indigenous peoples affected should be assured in regard to military actions, when Governments engage in policy-making and decision-making.

In addition, the relationship between human rights, peace and development should be recognized in the Draft Principles. The emerging human rights of peace and development should be described as individual and collective rights. The right of indigenous peoples to live in peace creates a corresponding duty on nation-States to resolve international disputes by peaceful means and to implement effective arms control and disarmament measures.

It should also be indicated in the Draft Principles that the vast resources diverted for military purposes should increasingly be used for the economic and social development of indigenous peoples and their regions.

INTERNATIONAL COMMISSION OF JURISTS

{15 April 1988}
{Original: English}

The ICJ would like to commend the Working Group on Indigenous Populations which has become one of the most visible and useful of the United Nations human rights bodies. The attendance at its sessions of hundreds of indigenous people from the world over who provide information on recent developments and assist it in the important task of preparing a draft declaration on indigenous rights is testimony to its vitality.

In particular, the International Commission of Jurists wishes to praise the work already completed on the draft declaration and the decision to authorize the Chairman of the Working Group, Madame Erica-Irene Daës, to prepare a complete set of principles to be considered at the Working Group's next session. We believe that after centuries of mistreatment of indigenous peoples, all should be done to ensure that the first set of principles covering indigenous rights be ready for consideration by the General Assembly in 1992, the year which we hope will be proclaimed the International Year of Indigenous Rights.