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SELF-DETERMINATION, SELF-GOVERNMENT AND AUTONOMY:
SOURCES OF LAW AND RECOMMENDATIONS

In accordance with its Plan of Action, the Working Group this session begins to tackle the most difficult and controversial issue in its mandate--the scope of self-determination, self-government or autonomy to be guaranted for indigenous peoples. Here, more than anywhere else, it will be essential to demonstrate a firm legal foundation for the standards the Working Group may propose. We can identify at least three relevant sources of law, which merit careful examination: (1) the principle of self-determination of peoples, as found in the Charter and Covenants; (2) the emerging concept of popular participation, particularly as expressed in the 1986 UN Declaration on the Right to Development; and (3) treaties.

Self-determination. As we have explained at previous sessions of the Working Group, and in statements to the Sub-Commission and Commission, General Assembly resolution 1541 applies the right of self-determination to any group which is geographically and culturally distinct from the State administering its territory. Indigenous peoples are typically concentrated in distinct and often isolated geographic regions; they are not only culturally distinct, but their wish to remain so is commonly the basis of their conflict with the State. The fact that indigenous territories are often surrounded by the territory of the administering State, rather than separated from it by ocean, does not render the principle of self-determination inapplicable: the purpose of self-determination is to prevent the people in one place from exploiting the people in another place, and this is equally relevant whether they are neighbours or divided by sea. (We must also bear in mind that many indigenous peoples live on islands, or constitute the vast majority of the population of the administering State itself--hence they constitute non-self-governing territories by even the strictest and most conservative definition.)

In our view, the exercise of self-determination has two aspects: (1) the right to participate meaningfully in the initial establishment of the State and construction of its constitution, and (2) a continuing right to an effective voice in State government once it has been established. Although usually located within existing States, indigenous peoples clearly never participated in the process of State-building, and they are excluded as a result from the architecture of State administration. Since their aspirations were not taken into account in the design of the national constitution, they remain structurally

disenfranchised--that is, they cannot gain meaningful influence over their lives even if they are permitted to participate freely in existing State institutions without discrimination. Since they differ so markedly from the politically-dominant population, value conflicts and exploitation are almost inevitable, as long as indigenous peoples merely have a voice in, but no control over any State institutions. Even in the most open democracy, they become little more than a permanent and powerless dissenting minority. This is why so many indigenous peoples insist upon restructuring the State to recognize and respect their own institutions to some degree. We see this, not as disrupting the State, but as rebuilding it, in the form it might well have taken had indigenous peoples been included in the negotiation of its original constitutional design.

Development. The process of economic and social change can increase or decrease differences in the relative power of groups within the State. As a matter of experience, it tends to benefit those groups which already have the greatest access to institutions of State power--simply resulting in greater inequality. Hence the 1986 U.N. Declaration on the Right to Development (G.A. res. 41/128) affirms the right of all groups in society to an equal voice in, and control over, their own development, as well as a fair share of the benefits. This again suggests that, in the case of geographically and culturally distinct indigenous communities, State institutions be restructured as to share control of the process of development--so that, in the conception of the 1986 Declaration, the result is indeed development and not exploitation.

Thus far we have treated the matter as if the objective is to restructure existing States rather than create new ones. This does not arise from any belief that indigenous peoples, in the exercise of self-determination, have any less of a right to complete independence than other peoples, as a matter of law. In the current state of affairs, however, we find that while some indigenous peoples have retained sufficient territory and resources to maintain or achieve some degree of self-sufficiency, most have been so displaced and restricted as to require, for their future survival, either substantial restitution, or some kind of ongoing economic partnership with the State. Hence while the draft declaration you are preparing must not prejudice the right of any indigenous people to seek complete independence, where it would have that right under international law, it must also provide guidance for what we believe would tend to be the more common case: a negotiated degree of permanent autonomy in partnership with an existing State.

Treaties. Many indigenous peoples initially established their relationship with the States administering them by treaty. The contemporary significance of these treaties is extremely problematical. On the one hand, the very existence of treaties acknowledges the fact that these indigenous peoples were at one time considered states. On the other, most of these treaties are extremely restrictive, even exploitative or punitive. We refer the Working Group to our preliminary study of North American indigenous treaties, in WP.4/Add.2.

While those African and Asian peoples decolonised since 1945 generally repudiated the treaties made while they were still under colonial domination, indigenous peoples often find that their treaties, however restrictive, are the strongest legal basis they have to assert political and economic rights municipally. The practical significance of treaties is therefore not so much that they are strong, but that they are at least given some limited respect by municipal courts.

In any event, indigenous treaties warrant thorough study, as the Martinez Cobo report recommended--far more thorough study than the Working Group, as a practical matter, can reasonably undertake. For one thing, the sheer bulk of material to be covered is intimidating; we have been able to identify more than 500 indigenous treaties in North America alone thus far. The circumstances under which these treaties were made, their terms, and their enforcement vary greatly, moreover. They range from mutual defence pacts to acts of outright confiscation. Hence while the Working Group should explicitly reject the racist contention that these treaties deserve less respect because they were made with "savages," it must also recognise that simply enforcing the letter of every indigenous treaty would prove to be a mixed blessing for indigenous peoples. Indigenous peoples need the opportunity to repudiate, or renegotiate, selected provisions of treaties.

In view of the complexity and sensitivity of these questions, we urge the Working Group to recommend the appointment, by the Sub-Commission, of a special rapporteur to survey indigenous treaties, assess their status under contemporary international law, and make recommendations for the recognition of treaty rights in the draft declaration.

To summarize, then, (1) many, if not all indigenous peoples fall within the principle of self-determination, but the exercise of this right need not be construed solely in terms of independence--it can and should include the peaceful restructuring of State constitutions and institutions. All apart from self-determination, moreover, (2) indigenous peoples have the right to control their own development in accordance with the emerging new legal conception of development reflected in G.A. res. 41/128--and this control must be seen as an essential way of making development more effective, rather than frustrating it. Lastly, (3) indigenous treaties may add to these rights, but should never be used by States as an excuse for arguing that they have already been given up.

This brings us to the ~~operative~~ text for our draft declaration. Our objective should not be to dictate any particular kind of relationship between indigenous peoples and States, but rather to encourage States to respect each indigenous people's own wishes in this regard. Since indigenous peoples own circumstances and aspirations differ, we must promote a <u>process</u> rather than any particular result--a process that will enable indigenous peoples to freely determine their own relationships with States. The draft declaration accordingly should guarantee the right of each indigenous people:

--to control its own development;

--without prejudice to any right it may have to complete independence, to determine its own relationship with the State through negotiated agreements which are genuinely representative and democratically-approved;

--to be represented adequately in national decisionmaking bodies, as well as enjoying the opportunity to govern itself to the extent it chooses;

--to share on an equal basis in the financial resources of the State as a whole, as well as enjoying the greatest possible freedom in controlling its own lands and natural resources; and,

--where treaties or similar agreements have previously been made, to renegotiate its relationship with the State in line with its contemporary rights and realities.