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CURRENT DEVELOPMENTS

INDIGENOUS PEOPLES: AN EMERGING OBJECT OF INTERNATIONAL LAW

The Working Group on Indigenous Populations, an organ of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, ended its fourth annual session last August by distributing seven "draft principles" to governments and nongovernmental organizations (NGOs) for comment as the first step in preparing "a draft declaration on indigenous rights, which may be proclaimed by the General Assembly."¹ For the first time since indigenous organizations took their concerns to the international level in 1977, a formal commitment has been made to the development of new law, probably in time for the "cinquecentennial" in 1992 of the "discovery" of the Americas and a proposed international indigenous year.²

Over the past 4 years, most governments have accepted the inevitability of a declaration, as evidenced by the increase in the number and rank of governmental observer delegations and the decrease in defensive statements. While only Norway, the Netherlands and Denmark expressed more than "interest" in the working group at the 1982 session of the Commission on Human Rights, many affected governments, such as Australia, Canada and the United States, as well as China, Syria, Cyprus, the Gambia and the German Democratic Republic, praised and encouraged its work at the 1985 session. Seven Latin American and Eastern European countries abstained from voting on the working group's first mandate in 1982.³ By contrast, the most recent change in the mandate, strengthening the group's drafting role, was quickly adopted without a vote.⁴

Several governments took advantage of the working group's third and fourth sessions to unveil recent initiatives in promoting indigenous land rights and cultural development. Australia committed itself to observing "five principles" in recognizing indigenous land rights at the third session and reaffirmed them, under fire from aboriginal groups, at the fourth. Canada asserted its willingness to negotiate the terms of Indian self-government at both sessions. Argentina used the fourth session to announce new land-

¹ Report of the Working Group on Indigenous Populations on its Fourth Session, UN Doc. E/CN.4/Sub.2/1985/22, Ann. II. The full text of the draft principles is set out in the text at note 47 *infra*.

² Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, para. 633.

³ Commission on Human Rights Resolution [hereinafter cited as Comm'n Res.] 1982/19 (Mar. 10). Brazil called for the vote and abstained, together with Poland, the USSR, Bulgaria, the Byelorussian SSR, Cuba and the Philippines. Cuba has subsequently taken an interest and now has a member on the working group.

⁴ Comm'n Res. 1985/21 (Mar. 11).

claims and social welfare legislation, and New Zealand to explain proposals to constitutionalize its 1840 treaty with the Maoris.

Development of the Indigenous Concept

The United Nations system first addressed itself formally to indigenous issues in 1949, when the General Assembly invited the Sub-Commission to study the condition of indigenous Americans in the hope that "the material and cultural development of these populations would result in a more profitable utilization of the resources of America to the advantage of the world."⁵ The United States objected strenuously, which resulted not only in the termination of the inquiry, but also in the temporary suspension of the Sub-Commission itself.⁶ However, this initiative was prompted more by the Cold War and the prospective development of the South American interior than by studied concern for the welfare of indigenous communities.

Chiefly responding to reports of labor discrimination in Latin America, the International Labour Organisation adopted Convention No. 107, Indigenous and Tribal Populations, in 1957. The Convention starts from the premise that the "social, economic or cultural situation [of indigenous peoples] hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population" and from "sharing fully in the progress of the national community of which they form part." Emphasizing the "protection and integration" of indigenous peoples, the Convention obliges state parties to develop "co-ordinated and systematic action for their progressive integration," through "collaboration" rather than "force or coercion." Criticism of the Convention as paternalistic has led the ILO Secretariat to schedule a revision; a representative committee of experts was to be appointed by November 1985, and a meeting of experts held in September 1986.

Convention No. 107 nevertheless contains the first, and to date the only, binding standards on indigenous land rights. It does not merely recognize "the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy." It also recognizes their customary laws regarding land use and inheritance, and their right to be compensated in money or in kind for lands appropriated by the national government for development purposes.⁷ Moreover, Convention No. 107 makes the first attempt at defining indigenous populations, referring to "their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation" and their tendency to "live more in conformity with the[ir own] social, economic and cultural institutions."⁸

⁵ GA Res. 275 (III) (May 11, 1949).

⁶ 11 UN ESCOR (397th mtg.) at 191, UN Doc. E/SR (1949).

⁷ Arts. 11-13, Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1981, at 858 (1982).

⁸ *Id.*, Art. 1(b).

International acceptance of a definition has proved elusive and will be discussed further below.

In 1971 the Sub-Commission appointed Mexican Ambassador José R. Martínez Cobo to conduct a thorough study of "discrimination against indigenous populations." The final part of the report, which contains its conclusions and recommendations, though only completed in 1983,⁹ has already been accepted as authoritative. The Sub-Commission called it "a reference work of definitive usefulness"¹⁰ and directed the working group to rely on it in setting standards.¹¹ This part of the report was warmly received by members of the working group as well.

The Martínez Cobo report concludes that existing human rights standards "are not fully applied" to indigenous peoples and, moreover, are "not wholly adequate" to the task. Consequently, a declaration leading to a convention is required.¹² Most important, the special rapporteur was persuaded that "self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future."¹³ "In essence," the report states, self-determination

constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they may live and to set themselves up as sovereign entities. This right may in fact be expressed in various forms of autonomy within the State.¹⁴

In addition, the report concludes that "indigenous peoples have a natural and inalienable right to keep the territories they possess and claim the lands which have been taken from them," and it proposes detailed standards for the reconciliation of land claims.¹⁵

Three international conferences have also drawn attention to indigenous rights. The international NGO Conference on Discrimination against Indigenous Peoples of the Americas, held at Geneva in 1977, was the first to attract indigenous representatives. Its final report emphasized "the right of indigenous peoples and nations to have authority over their own affairs," and it set forth a draft declaration of principles calling for the recognition of indigenous peoples as subjects of international law.¹⁶ The World Conference to Combat Racism and Racial Discrimination, which was held at Geneva in 1978, "endorse[d] the right of indigenous peoples to maintain their traditional structure of economy and culture, including their own lan-

⁹ UN Doc. E/CN.4/Sub.2/1983/21/Add.8.

¹⁰ Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution [hereinafter cited as Sub-Comm'n Res.] 1984/35A, 4th preambular para. (Aug. 30).

¹¹ Sub-Comm'n Res. 1985/22, para. 4(a) (Aug. 29).

¹² UN Doc. E/CN.4/Sub.2/1983/21/Add.8, paras. 624, 625, 628.

¹³ *Id.*, para. 580.

¹⁴ *Id.*, para. 581.

¹⁵ *Id.*, para. 513.

¹⁶ The report of the conference is reprinted in the November 1977 issue of the *American Indian Journal*.

guage, and also recognize[d] the special relationship of indigenous peoples to their land and stresse[d] that their land, land rights and natural resources should not be taken away from them."¹⁷ Finally, a second international NGO meeting, the Conference on Indigenous Peoples and the Land, was convened at Geneva in 1981. That conference called for the establishment of a United Nations working group on indigenous peoples so that "indigenous nations and peoples [could] submit their complaints and make their demands known."¹⁸

Establishment of the Working Group

Following the lead of the two NGO conferences, the Sub-Commission recommended the establishment of a pre-sessional Working Group on Indigenous Populations, and the Commission and ECOSOC approved.¹⁹ The working group first met in August 1982 with members from Norway, Yugoslavia, the Sudan, Panama and Syria.

The original mandate of the working group consisted of two parts: (1) "to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, . . . to analyze such materials, and to submit its conclusions to the Sub-Commission"; and (2) to "give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and differences in the situations and aspirations of indigenous populations throughout the world." No one at the time was quite certain how the second element would be pursued, i.e., whether the working group was to draft an instrument for consideration by the General Assembly, or was simply to develop a body of principles for its own use as a data-gathering body. Governments agreed with Chairman Eide that standard-setting discussions would be premature.

In 1984, however, Australia, Canada and several indigenous organizations expressed concern that the working group was merely compiling data uncritically. The Sub-Commission thereupon "request[ed] the Working Group henceforth to focus its attention on the preparation of standards on the rights of indigenous populations," and accordingly "to consider in 1985, the drafting of a body of principles on indigenous rights based on relevant national legislation, international instruments and other juridical criteria."²⁰ The Commission approved this new emphasis in the working group's charge and urged the group "to intensify its efforts to develop international standards based on a continued and comprehensive review of developments . . . and of the situations and aspirations of indigenous populations throughout the world."²¹

¹⁷ UN Doc. A/CONF.92/40, at 14 (1978).

¹⁸ The report of the conference was published by the World Federation of Democratic Youth (1981).

¹⁹ Sub-Comm'n Res. 2 (XXXIV) (Sept. 8, 1981); Comm'n Res. 1982/19 (Mar. 10); ECOSOC Res. 1982/34 (May 7).

²⁰ Sub-Comm'n Res. 1984/35B (Aug. 27). ²¹ Comm'n Res. 1985/21 (Mar. 11).

A further refinement was made in 1985, when the Sub-Commission

endors[ed] the Plan of Action adopted by the Working Group for its future work . . . as well as its decision to emphasize in its forthcoming sessions the part of its mandate related to standard-setting activities, with the aim of producing, in due course, a draft declaration on indigenous rights which may be proclaimed by the General Assembly.²²

It is now clear that the working group's immediate goal will be a declaration, and that the group will become more like a drafting committee, its data-gathering function serving as an aid to drafting rather than an end in itself.

Regional Scope and Definition

The term "indigenous" has emerged in practice over the years and (like "peoples") has no accepted definition. Its existence, in fact, is an accident of history. During Fourth Committee debates on decolonization 30 years ago, Belgium observed that the Covenant of the League of Nations called on states to protect "indigenous populations."²³ Belgium argued that such groups must be included in the concept of "non-self-governing territories" under the United Nations Charter.²⁴ "Similar problems existed wherever there were underdeveloped ethnic groups," the Belgian representative maintained, "in America as well as in Asia or Africa."²⁵ American states, however, insisted that the Indians had been assimilated and were "an integral part of the nation."²⁶

The matter was never formally resolved. Thus, General Assembly Resolution 1541 (XV) speaks ambiguously of territories that are "geographically separate and distinct ethnically and/or culturally," without specifying whether the separation must be liquid or solid. In practice, however, chapter XI has been accepted as chiefly applicable to overseas colonization.²⁷ Situations involving enclaves or "internal" colonization have continued to be considered, but as problems of "indigenous populations," not of "peoples" or "minorities." Accordingly, the Martínez Cobo study falls under the category of "discrimination" rather than the other side of the Sub-Commission's mandate, "protection of minorities."²⁸

Definition was the first substantive issue debated in the working group. India insisted on distinguishing between cases of recent immigration, such as the Americas, and situations in Asia involving historical coexistence and political integration. The Yugoslav member of the working group, Ivan Toševski, agreed that definition must precede standard setting, a practice

²² Sub-Comm'n Res. 1985/22 (Aug. 29).

²³ Article 22 of the Covenant of the League of Nations uses the terms "peoples not yet able to stand for themselves" and "indigenous population" interchangeably.

²⁴ UN CHARTER, ch. XI.

²⁵ 7 UN GAOR C.4 (253d mtg.) at 22-23, UN Doc. A/C.4/SR.253 (1952).

²⁶ *Id.* at 55.

²⁷ See generally Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73, 84-90 (1983).

²⁸ Similarly, the Sub-Commission's agenda refers to "Discrimination against indigenous populations." See Sub-Comm'n Res. 1984/35B, para. 11 (Aug. 30).

he had applied in his own Working Group on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. Indigenous observers, however, argued that definition would be inappropriate without more broadly representative indigenous participation: a few groups from North America and Australia had no right to speak for Latin American or Asian peoples. While skeptical of the notion of "separate development," Australia and Canada supported the call for indigenous "self-definition."

The working group resolved to defer its consideration of definition, only noting the importance of both "objective" criteria such as "historical continuity" and "subjective" factors including self-identification.²⁹ Yet at the second session in 1983, Asian and Latin governments again urged that attention be given to definition. So Chairman Eide asked the Secretariat to submit a discussion draft based on the Martínez Cobo study. The draft defines as "indigenous" groups "having a historical continuity with pre-invasion and pre-colonial societies, [which] consider themselves distinct from other sectors of the societies now prevailing in those territories."³⁰ Culture, language, ancestry and occupation of the land all constitute evidence of continuity. "An indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of [their] members (acceptance by the group)."

While indigenous populations, so defined, are difficult to distinguish from peoples or colonies (except for the absence of the "blue water" factor), most governments appeared satisfied that adequate limits had been drawn. At the working group's third session in 1984, Australia praised this "flexible" approach based on self-definition and group acceptance, and Eide, now serving as spokesman for the Norwegian Government, relied on the Secretariat's working definition to distinguish indigenous populations from minorities. "Indigenous populations existed in the area prior to [its] settlement by those groups which are presently dominant, and their way of life, [including] their use of resources and thereby also their cultural traditions, is distinct from that of the presently dominant group." Canada observed that groups sharing "communal and spiritual relationships with the land, and reliance on traditional pursuits for subsistence," could be found everywhere in the world; it hoped that none would be "excluded arbitrarily from consideration simply because they are not traditionally identified as indigenous."

The question of definition was also raised, inescapably, during discussion of renewed proposals for a United Nations Voluntary Fund for Indigenous Populations. Indigenous observers argued that financial aid and diplomatic good offices were most needed to increase indigenous representation from Latin America and Asia. Privately, the United States insisted on language that would plainly include the Soviet Union's tribal peoples, while India threatened to block any resolution unless it was limited expressly to "the

²⁹ UN Doc. E/CN.4/Sub.2/1982/33, para. 42.

³⁰ UN Doc. E/CN.4/Sub.2/AC.4/1983/CRP.2. The author was A. Willemsen-Diaz, who also wrote most of the Martínez Cobo report.

Americas, Australia and the Arctic regions." In the end, a compromise was reached that referred to the need "to secure a broad geographical representation"³¹ and to involve indigenous groups "in all parts of the world."³²

The issue of regional scope nonetheless reemerged in 1985 at the working group's fourth session. The United States complained that "unfortunately large areas of the world remain unrepresented" because they are "either unable, or, more importantly, are not permitted to be present." Bangladesh countered that "indigenous" refers only to "those countries where racially distinct people coming from overseas established colonies and subjugated the indigenous populations." "The entire population" of Bangladesh was autochthonous, by comparison, and all had "coexisted" prior to the fomentation of ethnic divisions by British administrators. Indonesia described its own history similarly, and India maintained that "ethnically speaking, most of the existing tribes in India share their origins with the neighbouring non-tribal population." In Indian law, "tribal" referred to "underdeveloped," rather than colonized, groups and entitled them to a "system of positive discrimination."³³

The USSR, India and China have also maintained that there are no "indigenous" peoples in Asia, only minorities, and that, as Soviet Ambassador V. Sofinsky told the Sub-Commission in 1985, "indigenous" situations only arise in the Americas and Australasia where there are "imported" populations of Europeans. This attempt to reassociate indigenoussness with classic colonialism was picked up, interestingly, by Mexico, which told the working group's fourth session that the marginalization of Indians "began with colonialism, and thereafter [continued] with internal colonialism and the expansion of a capitalist agricultural economy." It was virtually impossible, the Mexican observer concluded, to distinguish between indigenous populations and "peoples" entitled to self-determination.

Indigenous groups continue to oppose definition, contending that it is their concern, rather than that of states. They also understand that a superpower confrontation over classification of the Soviet Union's tribal peoples could neutralize the working group. Nevertheless, some have argued repeatedly that "indigenous" populations should be considered "peoples" in the sense of chapter XI of the Charter. "Those peoples we call indigenous are nothing more than colonized peoples who were missed by the great wave of global decolonization following the second world war," the Mikmaq delegation told the first session,³⁴ "particularly where independence was

³¹ Sub-Comm'n Res. 1984/35C, final operative subpara. (d) (Aug. 30).

³² Comm'n Res. 1985/21 (Mar. 11), and 1985/38 (May 30). Although this traditionally has been an issue between the United States, on the one hand, and the USSR and India, on the other, at the working group's fourth session the Holy See pointedly referred to "indigenous peoples of all continents."

³³ For an academic version of India's position, see, e.g., Sinha, *A Special Deal for Tribals in India: A Historical Appraisal*, *TRIBE*, No. 4, 1970, at 1 (published by Tribal Research Institute).

³⁴ A point also raised, inter alia, in UN Docs. E/CN.4/Sub.2/AC.4/1983/CRP.3, and E/CN.4/Sub.2/1985/NGO/9, and in a recent intervention on the question of minorities summarized in UN Doc. E/CN.4/Sub.2/1985/SR.15, paras. 18-23.

granted, not to the original inhabitants of a territory, but to an intrusive and alien group newly arrived." The United States and Brazil countered that Indians participate in national institutions to an extent that constitutes "integrated." The United States emphasized its 1934 Indian Reorganization Act, under which tribes ratified charters of local self-government and elected local officers.³⁵

At the same time, indigenous groups have reacted vigorously to any suggestion that they are simply a special case of "minorities." In consequence, Jules Deschênes, the Sub-Commission's rapporteur on the definition of minorities, deferred to future deliberations of the Working Group on Indigenous Populations and suggested that "we should not attempt to deal with the question of indigenous populations" in discussing the rights or identity of minorities.³⁶ Argentina and Norway, however, still referred to "indigenous and other minorities" at the working group's fourth session, and the British member of the Sub-Commission questioned whether distinguishing indigenous groups from minorities was meaningful in Europe.³⁷

Members of the working group expressed their views on this question for the first time at the fourth session. Yugoslav member Toševski argued that international law recognizes only "peoples" and "minorities"; "indigenous" groups, he said, must be one or the other. The working group was exceeding its authority by developing a new category of collective rights, he continued, and it should probably leave the matter to the working group on minorities, which he chairs. This prompted the Cuban member, Miguel Alfonso Martínez, to remind the working group of its mandate from ECOSOC, which admits of no doubt about the general acceptance of "indigenous" as an evolving, albeit as yet undefined, legal category. The Chinese member, Gu Yijie, recalled the "working definition," which, she observed, bears more relation to "peoples" than "minorities." "Historically speaking," she explained, "the concept of indigenous populations is associated with colonialism and aggression by foreign nations or powers," which result in the dispossession and isolation of those populations. Minorities reflect "different historical backgrounds" and must be treated separately.

Although the terms "indigenous populations" and "indigenous peoples" have sometimes been used interchangeably by observers at the working group, "populations" has generally been used in reports and resolutions to avoid any implicit recognition of the right to self-determination. The term "peoples," however, dominates the Sub-Commission's resolution on the fourth report of the working group.³⁸ The distinction between "indigenous" and "colonized," which stemmed in large part from the efforts of Asian states to distinguish their situations from those of the Americas, is clearly breaking down.

³⁵ For two views of the reorganization program, see Barsh, *When Will Tribes Have a Choice?*, in *RETHINKING INDIAN LAW* 43 (National Lawyers Guild, Committee on Native American Struggles ed., 1982); and Washburn, *A Fifty-Year Perspective on the Indian Reorganization Act*, 86 *AM. ANTHROPOLOGIST* 279 (1984).

³⁶ UN Doc. E/CN.4/Sub.2/1985/31, paras. 32-38.

³⁷ UN Doc. E/CN.4/Sub.2/1985/SR.14. ³⁸ Sub-Comm'n Res. 1985/22 (Aug. 29).

Role of the United Nations

The problem of indigenous populations can be viewed as either discrimination or assimilation, i.e., as lack of equality or forced equality with the population of the administering state. The ILO took the first view in Convention No. 107 and encouraged states to remove all institutional obstacles to the complete integration of indigenous communities. Similarly, the Committee on the Elimination of Racial Discrimination has routinely sought to determine whether indigenous populations are accorded equal access to health, education and employment, and equal rights of land ownership.³⁹ The Human Rights Committee established pursuant to the International Covenant for Civil and Political Rights has dealt with indigenous peoples as "minorities" under Article 27 of the Covenant;⁴⁰ their "members have only been endowed with specific rights designed to secure the existence and survival of the community concerned,"⁴¹ and not with any right of self-determination or autonomy.

At the working group's first session, Brazil continued in this vein by arguing forcefully for the "protection" and gradual "integration" of Indians. At the second session, Brazil suggested that indigenous autonomy was a form of racial discrimination that would invariably lead to oppression and injustice. At the heart of the Brazilian thesis was the belief that individual freedom can be realized only in multi-cultural states where different ethnic groups compete and counteract one another's prejudices through the majoritarian democratic process. "A group that was given an opportunity to participate in the life of [such] a State could not be said to have been denied the right to self-determination." The United States concurred that access to the electoral process in a multi-cultural democracy is all the self-determination that anyone needs.

Indigenous advocacy has gradually overcome this view. While "the just struggle of indigenous peoples is closely tied to the struggle of peasants for land and of workers for better living conditions" throughout the developing world, as Mexico explained at the working group's fourth session, most governments now agree with New Zealand that "policies and programmes which allow people to determine their place in society, and the place of their culture and traditions in that society," are preferable to assimilation. Some form of separate institutional existence for indigenous communities, albeit more or less within the framework of the territorial state, has become a relatively respectable concept. Even Brazil's ambassador was able to concede

³⁹ See, e.g., the Committee's discussion of Brazil, paras. 253-255 of its 1983 report, 38 UN GAOR Supp. (No. 18), UN Doc. A/38/18 (1983), and of Ecuador in paras. 206 and 210 of its 1982 report, 37 UN GAOR Supp. (No. 18), UN Doc. A/37/18 (1982).

⁴⁰ See, e.g., the discussion of Indian self-government in Canada's most recent periodic report, UN Doc. CCPR/C/1/Add.62, at 94 (1983).

⁴¹ UN Doc. CCPR/C/SR.590 (1985) (discussion of draft general comment). Interestingly, however, the Committee noted the use of the phrase "aboriginal peoples" in Canada's Constitution Act 1982, §35 (sched. B of UK Canada Act 1982, ch. 11), and "asked whether [this] did not cast a new light on the applicability of Article 1 of the Covenant." UN Doc. CCPR/C/25/CRP.1/Add.6 (1985).

the principle of indigenous autonomy, short of independence, at the working group's fourth session, and only Argentina was still describing the legislation regarding its Indian groups in terms of "facilitat[ing] their social integration and development."

General agreement has also developed on the need for a special instrument that goes beyond existing legal standards. "Experience has shown that the special problems facing indigenous populations cannot be adequately solved by existing international norms of human rights," Norway told the working group's fourth session. "There is a clear need for a new set of norms in this area," beginning with a declaration, and "possibly followed by a convention." Canada concurred: "We see aboriginal rights as something extra that our aboriginal peoples enjoy flowing from original occupancy"; thus, any new instrument must "go beyond fundamental rights" and focus on "special needs and rights."⁴² Argentina similarly called for "a more systematic implementation of existing human rights instruments, as well as complementary international agreements yet to be made." Australia supported the concern of indigenous observers that special rights not mean lesser rights, and it urged the working group to "harmonize with and build upon fundamental human rights set out in [existing] instruments."

Governmental observers, however, continued to stress that the circumstances and aspirations of indigenous communities "can differ considerably from country to country," as Australia told the Commission in 1982. New Zealand made the same point at the working group's fourth session and warned that "a very careful focus indeed is necessary to translate wider standards into effective local practice." "If it is to be a truly international instrument," Canada agreed, a declaration "must have relevance to all indigenous groups throughout the world," taking account of "differing historical backgrounds and differing relationships with governments." This meant dealing only with "the most fundamental rights," rather than attempting to cover every possible problem. Argentina and Mexico echoed this concern for "differences in national realities."

The working group has come to accept that both governments and indigenous organizations expect "progress," as Chinese member Gu Yijie observed at the fourth session. Kwesi Simpson of Ghana agreed that "[a] general consensus is now emerging that the time has come for concrete action to begin," including "some preliminary draft . . . ideas and concepts that might eventually be incorporated into a Declaration." Although a declaration might eventually lead to a convention, Simpson suggested that the working group "draw inspiration from the influence which the Declaration on the Granting of Independence to Colonial Countries has had on the decolonization process." "Thanks to this Declaration," he said, "millions of people the world over now live in freedom and independence. Similarly I believe that the liberation of and the restoration of basic rights to indigenous populations

⁴² For this reason, the phraseology "indigenous rights" has been preferred over "human rights of indigenous populations" in most recent resolutions, e.g., Sub-Comm'n Res. 1985/22 (Aug. 29).

and peoples will be hastened if we succeed in drawing up an appropriate declaration." A declaration alone, if well crafted and supported by governments, could achieve as much as a binding instrument.

There were words of caution as well. Canada warned that "[o]verly ambitious targets could jeopardize the early acceptance by the international community of a document which must reflect the circumstances and needs of all concerned." Most governments, however, were satisfied with assurances that they would be invited to comment at each step in the drafting process. Indeed, from the outset Asian and Latin American governments have objected more to the fact-finding than the standard-setting side of the working group's mandate. Brazil tried to persuade the Commission in 1982 that governments' efforts would be "more legitimately employed in trying to solve problems of indigenous populations" than in making reports to UN bodies. At the second session of the working group, Chairman Eide promised governments that it would not be allowed to become a "chamber of complaints." "The role of the Working Group is not to pass judgment," he explained, "but to understand the problems of indigenous populations so as to develop standards for their protection."

Some governments nonetheless considered Eide too liberal in admitting the statements of indigenous representatives, and he was not reelected to the Sub-Commission in 1984. Although his Greek successor, Erica-Irene Daes, has been perceived as stricter, at least by indigenous organizations, Bangladesh and Sri Lanka were warning the working group's fourth session to ignore those who were trying to "divert it from its basic purpose" of evolving standards by leveling specific allegations. At the same time, Toševski adamantly opposed standard setting, which some diplomats perceived as a sign of the Eastern European group's unhappiness that less time was being spent on problems of specific countries. After all, most indigenous delegations have come from the Americas. As long as the working group devoted itself to facts rather than universal standards, its sessions embarrassed the West without threatening the East. The balance has now shifted.

The Content of Indigenous Rights

Although the working group planned to devote its third session in 1984 to land rights,⁴³ few governments were prepared to deal with specifics, and only one indigenous organization drew up a concrete proposal.⁴⁴ On the governmental level, Australia announced plans to give aboriginal communities "inalienable freehold title" to traditional and sacred lands, with a veto

⁴³ At the second session in 1983, the working group adopted a "plan of action" calling for a discussion of land rights and definition in 1984, and listing eight other "preliminary priorities" for subsequent sessions, including "autonomy and self-determination." UN Doc. E/CN.4/Sub.2/1983/22, Ann. I. At the third session, it decided to proceed to culture, language, religion and education. UN Doc. E/CN.4/Sub.2/1984/22, Ann. I. The rights to "autonomy, self-government and self-determination," and problems of health and housing are the topics for 1986. UN Doc. E/CN.4/Sub.2/1984/22, Ann. I.

⁴⁴ UN Doc. E/CN.4/Sub.2/AC.4/1984/NGO/1 (Four Directions Council).

over development;⁴⁵ and Canada described its ongoing land claims process, emphasizing its view that settlements must be negotiated, "not imposed unilaterally." An NGO, the Inuit Circumpolar Conference, stressed the importance of recognizing indigenous land tenure systems, but there was no response from governments. In the end, indigenous representatives jointly submitted a proposal that

the Working Group recogniz[e], as did the World Conference to Combat Racism and Racial Discrimination of 1978, "the special relationship of indigenous peoples to their land and . . . that their land, land rights and natural resources should not be taken away from them." Discovery, conquest, and unilateral legislation are not legitimate bases for states to claim or retain the territories or natural resources of indigenous peoples. In no circumstances should indigenous peoples or groups be subjected to adverse discrimination with respect to their rights or claims to land, property, or natural resources.^{45a}

The working group simply annexed this text, without comment, to its report.

Considering it necessary to force substantive debate, indigenous organizations placed two complete draft declarations before the fourth session, one prepared by the World Council of Indigenous Peoples, and the other representing a consensus of six other indigenous NGOs as well as 16 additional indigenous organizations in the Americas and Australasia.⁴⁶ The most provocative provisions of the latter draft referred to land and self-determination:

2. All indigenous nations and peoples have the right to self-determination, by virtue of which they have the right to whatever degree of autonomy or self-government they choose. . . .

3. No State shall assert any jurisdiction over an indigenous nation or people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned.

4. Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. . . .

5. Rights to share and use land, subject to the underlying and inalienable title of the indigenous nation or people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement.

6. Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples.

⁴⁵ At the working group's fourth session, aboriginal observers accused Australia of renegeing on this commitment, on the basis of statements of the Government's responsible minister that questioned the practicability of recognizing an aboriginal veto over mining. Australia assured the working group that the matter was still under review.

^{45a} UN Doc. E/CN.4/Sub.2/AC.4/1984/WP.1.

⁴⁶ The drafts are reproduced in Annexes III and IV of the report of the fourth session, UN Doc. E/CN.4/Sub.2/1985/22. The second draft grew out of a meeting of indigenous organizations at Geneva in July 1985, convened in part to discuss the first.

7. In cases where lands taken in violation of these principles have already been settled, the indigenous nation or people concerned is entitled to immediate restitution, including compensation for the loss of use, without extinction of original title.

In addition, the draft declaration called for the recognition of various cultural rights, including:

12. Indigenous nations and peoples have the right to be educated and conduct business with States in their own languages, and to establish their own educational institutions.

14. The religious practices of indigenous nations and peoples shall be fully respected and protected by the laws of States and by international law. Indigenous nations and peoples shall always enjoy unrestricted access to, and enjoyment of sacred sites in accordance with their own laws and customs, including the right of privacy.

Cultural rights evoked little controversy. Argentina, for example, accepted that indigenous peoples place importance on the "preservation of their cultural identity through the practice of their traditions, and through the use of, and education in their own languages," and made a commitment to include indigenous content in the education of all Argentinians. New Zealand advocated the "promoti[on] of multiculturalism" through the incorporation of indigenous content in all public education, and it announced plans to make Maori an official language as well as an optional language at all educational levels. Canada asserted that the education of indigenous children should be "locally controlled and linguistically and culturally appropriate," as part of a larger policy of "ensuring that indigenous populations have control, and influence, over their own cultural and educational activities." Endorsing "bilingual-bicultural" education, Mexico called for more than "simply declarations of good intentions but real policies and programmes, with the active participation of the indigenous peoples themselves."

The fourth session also paid considerable attention to land. The Government of Argentina candidly described the loss by the Indians of their land and their lack of legal title to what they still occupied, and committed itself to recognizing and restoring ownership to them "in accordance with their own organization and customs." Land would be restored out of public holdings where possible, and out of private holdings if necessary; and in the future, communities would not be relocated without their consent and compensation. Mexico admitted to the same problems, and while emphasizing the need for land reform, it warned against development programs that "result in policies actually recognizable as ethnocide." This comment seemed to anticipate the subsequent efforts of Indonesia, Bangladesh and Sri Lanka to defend their transmigration programs as beneficial to all segments of society through the redistribution of surplus land and labor.

Governmental observers showed more caution about collective political rights. "A guiding principle," observed Norway, "should be that the indigenous peoples should have influence in the decision making process concerning their own affairs." Australia and New Zealand described their policies

of encouraging local and regional consultative meetings. Canada reiterated its previous commitments to "establishing self-government structures at the local level" through negotiations, and its agreement in principle with the proposal for a separate Inuit "public government" in the Arctic. The trend towards more local indigenous control of public funds, "[w]hile falling far short of self-determination," was commended by Canada as a way of giving communities "an ever-increasing control over their own affairs."

Attending a session of the working group for the first time, the Holy See referred to "the right of indigenous peoples to a territorial, cultural, economic as well as political environment in which they can develop their own way of life" as "members of the community of nations." Rome's observer stressed in particular Pope John Paul II's January 1985 statement at Latacunga, where he characterized the right "to be able to determine the form of government of your communities" as a "legitimate aspiration," and his September 1984 speech to Canadian natives at Fort Simpson, in which he emphasized "self-determination in your own lives as native peoples," the right "to develop your lands and economic potential, to educate your children, and to plan your future."

Anticipating Latin American arguments that tribal governments would be backward, the observer for the Holy See added that "to preserve their own identity does not mean wanting to remain rooted passively in the past, or in institutions wholly unsuited for modern times." He was confident that indigenous peoples would be motivated "by the spirit of openmindedness and progress." Mexico continued in this vein by stating that "indigenous cultures are dynamic forces in continuous transformation." "The challenge," Canada concluded, "is to enable indigenous populations to benefit from change but still preserve their essential values." The United States, however, made a point of insisting that a declaration stress the responsibility of indigenous governments to respect the human rights of all persons within their jurisdiction.

As for the members of the working group, Alfonso Martínez and Simpson identified life, land, self-determination and cultural rights as appropriate subjects for a declaration. Gu Yijie conceived of the declaration as three-tiered, beginning with the right to nondiscrimination under existing instruments such as the Convention on the Elimination of All Forms of Racial Discrimination. Next, the "right [of indigenous populations] to the land must be protected" because it "is an imperative for their life." Finally, they must have the right to "appropriate political self-rule," at least to the extent officially recognized for ethnic minorities in China. Significantly, she made a connection between land rights and Article 25 of the Covenant on Economic, Social and Cultural Rights, which refers to "the inherent right of all *peoples* to enjoy and utilize fully and freely their natural wealth and resources" (emphasis added).

After the close of the public session, the working group met privately several times to consider how to proceed. At least one member was prepared to draft a complete declaration to serve as a working document; another remained opposed to drafting anything at all. As a compromise, they con-

sidered only a few relatively "non-controversial" principles and drafted them in a deliberately preliminary manner:⁴⁷

1. The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments, particularly in the Charter of the United Nations and the International Bill of Human Rights.⁴⁸

2. The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.⁴⁹

3. The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty, and security of person.

4. The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect, and have access to [sacred] sites for these purposes.⁵⁰

5. The right to all forms of education, including the right to have access to education in their own languages, and to establish their own educational institutions.

6. The right to preserve their cultural identity and traditions, and to pursue their own cultural development.

7. The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures.⁵¹

Governmental observers from Australia, New Zealand, Canada, the United States, Norway and Argentina praised this progress privately at the subsequent session of the Sub-Commission.⁵²

The Growth of Indigenous Advocacy

Ordinarily, only organizations with consultative status (NGOs) may participate in meetings of the Economic and Social Council and its subsidiary bodies. The Working Group on Indigenous Populations is unique in having opened its doors to indigenous groups regardless of their formal status with ECOSOC. This procedural policy, adopted at the first session of the working group in 1982, has made its annual meeting one of the most popular and

⁴⁷ UN Doc. E/CN.4/Sub.2/1985/22, Ann. II. The Yugoslav member did not attend the drafting meetings.

⁴⁸ Compare the text of the indigenous organizations' proposal: "In addition to these rights, indigenous nations and peoples are entitled to the enjoyment of all the human rights and fundamental freedoms enumerated in the International Bill of Rights and other United Nations instruments. In no case shall they be subjected to adverse discrimination."

⁴⁹ The indigenous proposal read: "Indigenous nations and peoples have, in common with all humanity, the right to life, and to freedom from oppression, discrimination, and aggression."

⁵⁰ Compare the indigenous text, para. 14 at p. 381 *supra*.

⁵¹ Compare Article 7 of the Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, *reprinted in* 5 ILM 352 (1966).

⁵² Owing to delays in issuing the working group's report and lack of time, there was no public debate, but these Governments' views were discussed with each other and with members of the working group.

well-attended human rights activities at Geneva: in 1985 it attracted more than 150 participants, including indigenous representatives of 40 organizations in 18 states. Although at first some governments were reluctant to accept this arrangement, at the fourth session in 1985 many welcomed the initiative taken by indigenous organizations in proposing draft declarations of principles. "During the past decade we have witnessed an increasing will and ability of indigenous groups to coordinate their views and formulate common policies," the Norwegian observer noted. "My government welcomes this development, and holds the view that [this] should be encouraged." Indigenous groups had "taken a serious and constructive approach and have presented concrete proposals for our consideration," the United States said, adding that the proposals "represent an expression of the aspirations of indigenous peoples and a prioritizing of the rights which they hold most important." "Such expressions are useful not only to the Working Group, but also to concerned governments, since they increase our understanding of the unique perspective of indigenous peoples and the actions which they seek from governments and the international community." Even Bangladesh praised the working group's "flexible methods of work," a code phrase for the admission of indigenous observers regardless of NGO status.

On the other hand, for the first time there were allegations of interference with indigenous representatives traveling to Geneva. Three Sri Lankan Veddahs hoping to attend the fourth session reportedly were denied passports, and indigenous NGOs asked the working group, unsuccessfully, to express concern to the Sri Lankan Government. Sri Lanka nonetheless felt obliged to explain and told the working group that there had simply been insufficient time to complete the necessary formalities. Moreover, bringing the Veddahs to Geneva was part of a "reckless" attack; "these innocent people" were to be "exhibit[ed] in a most disgraceful manner before your Working Group." This incident calls into question the working group's ability to assure a truly representative inquiry and highlights the potential future significance of the Voluntary Fund as a means of providing quasi-diplomatic shielding for indigenous representatives from sensitive regions to whom the fund has given travel assistance.

In the meantime, indigenous advocacy is expanding into related fields of human rights law. Interventions on cultural rights were made at the 1985 session of the Commission's Working Group on the Draft Convention on the Rights of the Child, with a view towards adoption of an additional article,⁵³ and in support of the Sub-Commission's special rapporteur on religious intolerance, to emphasize the protection of sacred sites.⁵⁴ At the 1985

⁵³ UN Doc. E/CN.4/1985/WG.1/NGO.1; UN Doc. E/CN.4/1985/WG.1/WP.3.

⁵⁴ See, e.g., UN Docs. E/CN.4/1984/SR.56 (Four Directions Council), and E/CN.4/Sub.2/1984/SR.33 (Four Directions Council). Indigenous groups also participated in the Seminar on the Encouragement of Understanding, Tolerance and Respect in Matters relating to Religion or Belief, held at Geneva in 1984, UN Doc. ST/HR/SER.A/16 (1984).

session of the Sub-Commission, indigenous observers took an active part in debates on genocide, the definition of minorities and the rights of disabled persons.⁵⁵ This activity amounts to more than indigenism. Indigenous organizations are emerging as a kind of regional group with broad interests, which seems likely to enhance both their credibility and the force of their claims to a degree of political responsibility.

RUSSEL LAWRENCE BARSH*

RECOMMENDATION ON MINIMUM INTERNATIONAL LABOR STANDARDS

In 1984, under the chairmanship of Professor Louis J. Emmerij, a working group of the Netherlands National Advisory Council for Development Cooperation drafted a report on minimum international labor standards. The report was approved by the Council late that year and was subsequently presented to the Minister for Development Cooperation.

The report considers the desirability of incorporating certain minimum international labor standards into international agreements on economic cooperation and trade policy that involve developing countries. After reviewing the various arguments for and against such incorporation, the report finds that the debate remains inconclusive. However, supporters and opponents both agree on the need to fight protectionism and promote improved working conditions in developing countries. Therefore, an effort is made to identify a number of labor standards whose violation or nonapplication would strongly imply that the basic need for freely chosen work in humane conditions could not be satisfied; it is those standards that ought to be applied in all countries and all economic sectors.

By applying three different types of criteria (social, legal and economic) to existing ILO Conventions, the so-called minimum package of international labor standards was identified. This package consists of the following standards: freedom of association (No. 87), the right to engage in collective bargaining (No. 98), equal remuneration (No. 100), abolition of forced labor

⁵⁵ See, e.g., UN Docs. E/CN.4/Sub.2/1985/SR.11 (Four Directions Council), E/CN.4/Sub.2/1985/SR.15 (World Council of Indigenous Peoples and Four Directions Council), and E/CN.4/Sub.2/1985/SR.23 (Four Directions Council).

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Most of the statements quoted in the text are taken from government observers' speaking notes and audiotape transcripts, copies of which may be obtained from the author.