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STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Written statement by the Indian Law Resource Center and the National Indian Youth Council, non-governmental organizations on the Roster

The Secretary-General has received the following communication which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[7 August 1985]

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

I. Introduction

While the Working Group on Indigenous Populations continues to develop international minimum standards for protecting the rights of indigenous peoples, it should take particular note of principle 17 of the Draft Declaration of Principles proposed by the Indian Law Resource Center, Four Directions Council, National Aboriginal and Islander Legal Service, National Indian Youth Council, Inuit Circumpolar Conference, and the International Indian Treaty Council, (E/CN.4/AC.4/1985/WP.4/Add.4, at 4 (1985)). Principle 17 provides that disputes between States and indigenous peoples "must be resolved by mutual agreement or valid treaty." The process of negotiation and agreement is itself an important means to establish and implement the rights of indigenous peoples. The thrust of this principle is to encourage peoples and Member States to resolve their differences on a bilateral basis and thereby to define indigenous rights within the context of their particular circumstances.

Some of the most important developments affecting the fundamental rights of indigenous peoples are the negotiations being carried out in various parts of the world between indigenous representatives and Governments of States. For example, in the United States, negotiations have been undertaken between several Indian nations and

tribes and the United States concerning rights to major areas of land and the associated rights of self-government. Even more urgent are the negotiations between the Indian organization Misurasata and the Government of Nicaragua concerning basic rights to land and autonomy. On another level, important negotiations about fundamental rights are also underway in regard to provisions of the Canadian Constitution.

The progress of these neogitations and others elsewhere in the world are likely to have a concrete effect on the actual realization and enjoyment of fundamental human rights. Furthermore, these negotiations may themselves serve to establish and define human rights standards at least as between the parties.

Principle 17 is based upon the proposition that it is the duty of indigenous communities and Member States to engage in dispute resolution in good faith with respect to their differences. There has been, of course, a long history of negotiations between Indian Governments and the United States, France, the United Kingdom, and some other countries culminating in treaties which have frequently not been successfully implemented. While there have been continuing negotiations in many countries, in many other countries it has not been possible to establish a dialogue between indigenous communities and the Governments of Member States.

It is the essence of principle 17 that disputes between Member States and indigenous nations, peoples, and communities should be resolved by agreement between the parties. If the parties are initially unable to resolve a difference, they should in good faith make efforts to resolve the matter through negotiations. If negotiations fail, they may wish to continue their negotiations with the assistance of a mediator, or the parties may wish to make efforts to establish a process for deciding the matters by an impartial third party.

Because negotiations between indigenous peoples and States have such enormous significance for the development, implementation, and enjoyment of human rights, the international community should be entitled to monitor the progress of dispute resolution efforts and to encourage all parties to pursue such efforts in good faith. Already in the negotiations between the Misurasata and Nicaragua, the Government of Colombia, the Netherlands, Mexico, Sweden, France and Canada, have deisgnated official observers, who are attending the negotiations. The Working Group should be able to hear information as to negotiations occurring in various countries and urge the parties to solve their problems promptly. To monitor voluntary dispute resolution efforts will provide the Working Group with a new technique for fulfilling its mandate, for evolving specific norms, and for assuring that those norms are applied.

II. Dispute resolution

A. Defining dispute resolution

There are several processes by which indigenous communities and Member States may resolve their disputes: negotiations, mediation, conciliation, and arbitration. Negotiation is a process by which the parties communicate with each other to resolve their differences. Mediation is the process whereby an impartial person facilitates communication between the negotiating parties. Conciliation is the process in which an influential third party manages the communication between parties who are negotiating with each other and urges dispute resolution. In arbitration the parties relinquish their right to reach a decision and designate an impartial decision maker for resolving their disputes.

B. Advantages of dispute resolution

The process of dispute resolution has the advantage of permitting the parties to communicate with each other as to their different perspectives and objectives - rather than allowing grievances to fester. Negotiation, mediation, and conciliation permit the parties to control the decision-making process and develop their own solutions without the imposition of an outsider. All forms of dispute resolution avoid the cost, inconvenience, delay, and other burdens usually associated with judicial processes. Also, for indigenous peoples there may be some suspicion about the impartiality and success of judicial and similar decision-making bodies. Dispute resolution permits indigenous communities to avoid permitting non-indigenous decision makers to make determinations about indigenous rights.

As the Indian Law Resource Center observed in its volume, "Resolving Indian Conflicts Out of Court",

> "To a considerable extent all the international non-judicial dispute resolution procedures have been developed because sovereign nations, international businessmen and many other organizations and individuals are extremely reluctant to leave the final judgment up to courts which may be controlled by or unduly influenced by their opponents or competitors in the international community. Most Indian people share that reluctance when it comes to having non-Indian courts decide disputes about Indian rights." (pp.26-27)

The significance of dispute resolution was prominently recognized in the Draft Declaration of Prinicples for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere, which arose from the 1977 International NGO Conference on Discrimination Against Indigenous Populations in the Americas (see E/CN.4/Sub.2/476/Add.5, annex IV (1981)). Article 9 of that Draft Declaration is entitled "Settlement of Disputes" and reads as follows:

> "All States in the Western Hemisphere shall establish through negotiation or other appropriate means a procedure for the binding settlement of disputes, claims, or other matters relating to indigenous nations or groups. Such procedures shall be mutually acceptable to the parties, fundamentally fair, and consistent with international law. All procedures presently in existence which do not have the endorsement of the indigenous nations or groups concerned, shall be ended, and new procedures shall be instituted consistent with this Declaration."

III. Technical Assistance

The Working Group could provide or encourage technical assistance for fostering dispute resolution by educating itself, governments, and indigenous peoples about the meaning and use of negotiation, mediation, conciliation, and arbitration. The Working Group could also encourage those who are experts in such dispute resolution techniques to make available their training and services to governments and indigenous peoples. The Working Group could receive from Governments and indigenous peoples' lists of possible mediators, conciliators, and/or arbitrators. The Working Group might serve as a clearing-house of such lists for the use of governments and indigenous communities.

Providing technical assistance for facilitating dispute resolution might require the expenditure of United Nations funds. The development and maintenance of a list of potential mediators, conciliators, and arbitrators would not involve a significant expense. If the United Nations were to provide education to the parties to encourage the use of dispute resolution mechanisms, a seminar, course, training programme, fellowship, or other approach might require more money. If parties to a dispute were unable to afford the assistance of an impartial mediator, conciliator, or arbitrator, it would be useful to help the parties by bearing some of the costs.

The United Nations could provide technical assistance for facilitating dispute resolution by including such assistance under the United Nations programme for advisory services for human rights. Under these advisory services for human rights the United Nations has already organized training sessions, human rights courses, fellowships, and technical assistance to governments for law reform, constitutional revisions, training for prison and police officials, restoration of a law library, helping to formulate curricula for educational institutions, financial aid to families of human rights victims, and translation of the Universal Declaration of Human Rights into the indigenous languages of Quechua and Aymara. Hence, there exists a significant body of United Nations precedents for the provision of technical assistance to improve human rights. Technical assistance for facilitating dispute resolution would fit within the United Nations advisory services programme.

In addition, when the United Nations trust fund for indigenous populations begins to function, it might be possible to propose an extension of its mandate to include the provision of technical assistance for helping to resolve disputes. Through the trust fund private individuals, foundations, and Governments could help pay for the costs of technical assistance.