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DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Written statement submitted by Grand Council of the Crees (of Quebec),
a non-governmental organization on the Roster

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

[9 August 1988]

AN INDIGENOUS VIEWPOINT ON ESSENTIAL ISSUES IN STANDARD-SETTING

Introduction

1. We intend to discuss several issues crucial to understanding the indigenous perspective on standards for the protection of indigenous peoples. We hope that this will contribute to an understanding of our needs, hopes, and aspirations; and that it will prevent misunderstanding and alleviate fear of our objectives.

2. We are engaged in a struggle for our survival as a people. Our collective rights are being denied in many lands, and even in the most wealthy countries of the world, our people are always the poorest of the poor.

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3. That is why the Grand Council of the Crees welcomes the work being done by Dr. Erica-Irene Daes, in preparing a set of draft standards for the consideration of the Sub-Commission. We now have an intelligent and comprehensive set of draft standards for consideration.

Inadequacy of Existing Standards

4. Our present international mechanisms to protect human rights were all implemented as a result of the most serious human rights abuses. The tragic events which occurred, led us to understand that human rights could not be adequately protected at the level of domestic law. Nazi Germany's 400 anti-Jewish ordinances and decrees were legally sound within German domestic law. Apartheid is an accepted legal régime within the Union of South Africa, regardless of the fact that it offends international standards of human rights, and no matter how abhorrent it is to all of us.

5. History has shown us that domestic law is not a reliable standard for protection of human rights. It is a fundamental principle of the United Nations that we attempt to transcend national and municipal law, and bind ourselves to a higher ideal in order to overcome the misguided interests and political motivations that can result in abhorrent domestic legislation.

6. We raise this point because we must be firm in rejecting the arguments made by some States with large indigenous populations, that standards should not conflict with existing domestic law, and should not affect the internal administration of indigenous people by those States. This search for a "lowest common denominator" will not work. It is not an approach consistent with United Nations practice. It would never have eliminated nazism or apartheid.

7. Human Rights abuses against indigenous peoples continue today in spite of existing United Nations protections. These abuses are practised collectively against indigenous peoples. Existing United Nations protections for individuals, such as article 27 of the International Covenant on Civil and Political Rights have proven ineffective, even where supported by parallel legislation in domestic law. Some States have even made public declarations here, contrary to their own constitution, that their "indigenous populations" have no right to claim the protection of existing human rights standards because they are not "peoples" under international law!

8. A set of standards set out only as objectives and recommendations, rather than as firm declarations of rights and obligations, will be defective and ineffectual. In the light of United Nations General Assembly resolution 41/120 of 4 December 1986, "Setting international standards in the field of human rights", we should assure ourselves that the indigenous rights standards will contain in careful parity, both rights for the protection of indigenous peoples and the obligations of States to respect those rights.

Rights Abuses

9. It must be understood that every standard under consideration by the Working Group is based on a serious existing abuse of indigenous rights somewhere in the world. Each proposal is based on a "wrong".

10. Examples of human rights abuses constitute our source material, from which we then derive standards to prevent human rights violations in the future. It is well understood that the Working Group is not a tribunal to hear complaints against Governments. But our people are full of sadness and often fear, because the standards we propose and so urgently need, require that we recall the wrongs and abuses which necessitate this important work.

11. We would therefore ask any Government that disputes the need for these standards, or offers objections based on issues of jurisdiction or pre-eminence of domestic law, to propose constructive alternatives which will provide effective remedies to these abuses.

Collective vs. Individual Rights

12. In the working paper on indigenous draft standards prepared by Dr. Daes (E/CN.4/Sub.2/1988/25), we note with approval that the subjects of the proposed standards are "indigenous peoples". This terminology is accurate, appropriate, and consistent with United Nations usage. We agree with this terminology; and we insist that the designation "peoples" be preserved. It is the word "peoples" which attaches us to all of the existing international human rights instruments, and guarantees the protection of those instruments.

13. Document E/CN.4/Sub.2/AC.4/1988/3/Add.1 contains a communication from the International Labour Office on the seventy-fifth session of the International Labour Conference. At this conference the Government of Canada introduced amendments opposing the use of the word "peoples". The ILO states:

> "The fear was expressed by a number of government delegates that the use of the term 'peoples' without qualifying language might lead to claims of the right to self-determination in the sense of separation from the countries in which these peoples live".

In a statement made to the Working Group on Indigenous Populations during its fifth session, the Government of Canada said:

> "It should be noted that references made to Canada's aboriginal 'peoples' are consistent with the terminology of the Canadian Constitution with respect to Canada's domestic situation. They should not be interpreted as supportive of the notion that Canada's aboriginal groups are 'peoples' in the sense of having the right to self-determination under international law ... Canada considers that 'peoples' in the context of self-determination should not be confused with other entities, such as ethnic, religious, or linguistic minorities or, indeed, indigenous populations."

But if indigenous peoples are not consideration "peoples" under international law, we are denied not only the right to self-determination, but a multitude of other fundamental rights as well. Canada has already used this argument in proceedings before the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.

14. Denial of collective rights destroys a peoples' fundamental means of self-preservation. History provides a grim reminder. The Jewish people in France before the Second World War wanted recognition of their rights as "people", not as individual members of an "ethnic and linguistic minority". The Government was opposed to such recognition. Count Clermont-Tonnerre told the National Assembly:

> "The Jews should be denied everything as a nation, but granted everything as individuals ... It is intolerable that [they] should become a separate political formation or class in the country. Every one of them must individually become a citizen".

Existing Constitutional Recognition

15. Part II of the Canadian "Constitutional Act, 1982" states:

> "35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> "(2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada.
>
> "(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired." [emphasis added]

16. Part I of the Constitution Act is known as the "Canadian Charter of Rights and Freedoms", It deals with individual rights. Indigenous peoples' rights were intentionally placed in a separate section. They are not part of the Charter; the intention is to guarantee the collective rights of the indigenous peoples.

Denial of Existing Protections

17. There is serious consideration being given by indigenous peoples to a total repudiation of the International Labour Organisation's revision of its Convention 107, if the "integrationist" terminology, "populations", is retained in the revised convention. The same issue arises here.

18. Part I of the International Covenant on Economic, Social and Cultural Rights provides several examples:

Article I

> "1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> "2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." [Emphasis added]

These same rights recur in Part I, article I of the International Covenant on Civil and Political Rights.

19. What are the most universally understood and best documented abuses of the rights of indigenous peoples? It is well known that our lands were invaded, our right to govern ourselves was denied, our natural wealth was stolen and squandered, and our means of subsistence was finally destroyed. Yet it is the specific protections for these very abuses found in the above articles that will be denied to us if we are not considered "peoples" subject to these same United Nations instruments. Article I states that it is "by virtue" of the right of self-determination that we have the right to pursue our "economic, social and cultural development".

20. It is undeniable that our economies have been destroyed, our societies have been corrupted, and our cultures have been eliminated. Is this not what these standards were intended to prevent? Our collective identity was readily recognized when we were being attacked, yet when we seek access to fundamental rights, our collective identity becomes a problem.

Article 27

21. It has been suggested by some States that the Working Group should remain within the framework of article 27 of the International Covenant on Civil and Political Rights. The Working Group has carefully and repeatedly examined this question and has determined that indigenous peoples are not "ethnic, religious or linguistic minorities".

22. Our objective is the proclamation of standards which will effectively prevent the further erosion of our societies, our economies, our cultures. The Universal Declaration of Human Rights is "a common standard of achievement for all peoples and all nations". It must be observed "both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction".

Treaty Issues

23. Treaties and the treaty making process may represent the practical means for the implementation and enforcement of good relations between indigenous peoples and States in accordance with the standards to be proclaimed by the United Nations for the protection of indigenous peoples.

Treaties have a long history in the normalization of relations between the peoples of the world. They have certainly brought a measure of peace to this world. We all know, however, that their effect on the welfare of mankind has not always been beneficial, and that as with all agreements, contracts, and oaths, good words do not always produce good deeds.

24. For indigenous peoples, treaties have been a mixed blessing. Historical treaties, and the continuing process of treaty negotiation and ratification with indigenous peoples, represents both de facto and legal recognition of indigenous self-determination. Treaties recognize and confirm indigenous autonomy, prior title, aboriginal rights, and self-government. Where treaties

have been respected, and where the terms of treaties have been fair and equitable, the treaties have become essential and fundamental documents of indigenous peoples. For the Grand Council of the Crees, the Covention de la Baie James et Nord Quebecois has become a kind of "charter", the instrument which recognizes Cree government and Cree self-determination.

Broken Treaties

25. Treaties between indigenous peoples and States have often been repudiated and broken. They were often negotiated unfairly, the parties were almost never on equal terms, and intentions were not always honourable. The terms of treaties between parties with differences in legal sophistication, and military strength, were often deceptive, unenforceable, or rendered moot by development, occupation of territory, environmental destruction, or outright neglect. They usually lack any effective mechanism to assure that the State meets its long-term and continuing obligations to the beneficiaries over time.

26. The resolution of disputes regarding interpretation or implementation of treaties is usually left in the hands of the State authorities, so that the State is both an interested party and the administrator of the treaty. In such instances the State apparatus has virtually unlimited financial resources, and a judicial infrastructure with which it can pursue a lengthy series of negotiations, legal manoeuvres, and litigation. The indigenous party, on the other hand, lacks resources. This inequality is often compounded by the fact that the failure to respect the treaty damages only the indigenous party, rendering the indigenous people without the resources to effectively use the courts or other domestic mechanisms for remedy.

27. Where a treaty has been broken, the passage of time mitigates against reasonable redress. States become habituated to historic claims and grievances. The indigenous people exhaust their resources and their will, and are forced to turn their attention to essential matters of food and shelter. As time passes, lands are sold to third parties, developed, and therefore increase in value. Eventually the original claim is perceived by the State as unreasonably large.

Conflict of Interest

28. If such a dispute is finally heard before a court, the State party is both judge and juror. The laws and jurisprudence under which judgement is rendered are also creations of the State, which may have devised those laws with the disputed question at issue.

29. With these facts in mind, it is easy to understand why certain State parties to indigenous treaties took exception to the treaty study proposal that was approved by the Sub-Commission in its resolution 1987/17. On a substitute resolution initiated in the Commission by Canada, the proposal was reduced to an outline of a treaty study; and the concept of historical consideration of treaties originally proposed in the Martínez Cobo report, was eliminated in favour of an approach which would not "force us to relive 400 years of atrocities against the Indians", as one State explained its objections to the study. Eventually there was a reluctant consensus, in the hope of preventing the politicization of the working group and the entire indigenous issue.

30. The Grand Council is grateful that Dr. Daes has included principles which provide for an international process of oversight in the draft standards she has tabled. International oversight of indigenous treaties is most urgently needed. The potential utility of indigenous treaties, as an implementation mechanism for the standards we propose, will be fatally impaired in the absence of such an international mechanism. If there was another possible solution this problem would have been solved a long long time ago. We do not look to domestic State procedures to solve the problem now. We look to some form of international oversight.