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COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-first session
Item 13 of the provisional agenda

DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Analytical compilation of observations and comments received pursuant to Sub-Commission resolution 1988/18

Addendum

The present document contains information received from the Governments of Japan, Norway and the Ukrainian Soviet Socialist Republic.

GE.89-12410/0810B

JAPAN

[Original: English]
[14 July 1989]

A. Style of the declaration

1. In this declaration, rights are stated in the form of an enumeration: "The right to ...". However, this style cannot be found in previous declarations drafted and adopted by the United Nations or the specialized agencies.

2. In this form, the draft is merely a catalogue of rights and there is no indication of the conditions necessary for them, the way to exercise them, the obligations corresponding to them, and so on. This difficulty would make it impossible to enforce the declaration even if it were made. The draft declaration should therefore be redrafted in the normal style of declarations.

B. Need to recognize the legal character of the declaration

3. The draft declaration should be made in the recognition that declarations made by the United Nations or the specialized agencies have no legal binding force. Therefore, it is not appropriate to include provisions such as those in this draft declaration which define the obligations of States and require Governments to take effective measures to enforce the declaration.

C. Vagueness of the expression "Indigenous populations"

4. It is impractical to make this draft declaration without defining the term "indigenous populations" objectively; a subjective definition would lead to confusion.

D. Obscure expressions

5. Essentially, an instrument regulating issues internationally should be drafted in strictly selected terms, so that the subject, object, scope, conditions, force and so on of the instrument can be clearly understood. However, in this draft declaration, the expression of rights is couched in terms whose meanings are ambiguous, and it is therefore inappropriate as a draft to be used as a basis of international law.

6. In addition, when words are quoted from the existing body of international law, care should be taken not to twist their meaning in those instruments.

E. Introduction of the new concept and scope of the rights

7. Collective rights: Four kinds of "collective rights" are provided for in this draft declaration. However, there are no precedents for such rights in international instruments drafted and adopted by the United Nations; and it is impossible to claim that such concepts have ever been established in international law. The Sub-Commission should therefore refrain from introducing such new kinds of concepts.

8. Other rights: Additionally, the rights which can be adopted in the catalogue of the declaration on human rights made at the human rights forum, are the fundamental rights of individuals. Therefore, by broadening the scope of the rights proclaimed, the Commission on Human Rights and the Sub-Commission would be overstepping their mandate.

F. Consistency with existing international human rights law

9. As provided in General Assembly resolution 41/120 of 4 December 1986, on "Setting international standards in the field of human rights", newly developed international instruments on human rights should be consistent with the existing body of international human rights law. Therefore it is necessary to check the consistency of the rights and obligations listed in the draft declaration with existing international human rights law.

G. Relationship with the principles of liberty and equality

10. In this draft declaration, there are many provisions which would affect each country's institutional basis. However, if the institutions are based upon the principles of liberty and equality between the people, the relationship between those principles and the draft declaration should be made clear. Also, the declaration should be made flexible to ensure its harmonization with existing legal systems based on the principles of liberty and equality.

H. The Sub-Commission's method of work for standard setting

11. The fact that only one person is in charge of drafting international instruments causes many difficulties for the standard-setting activities of the Sub-Commission.

12. In the ILO and UNESCO, international instruments are drafted by several experts, on the basis of rules of procedure for standard-setting activities, with views exchanged between member Governments and experts.

13. Usually, before drafting an international instrument, research is undertaken on regulating issues internationally from the technical and legal points of view. However, in the Sub-Commission there is a tendency to ignore such research.

14. While some draft international instruments attach the relevant research material, (for example, the second protocol drafted by Mr. Bossuyt), this draft gives only the text (E/CN.4/2/1988/25), without indicating the research material. So no one can understand why and on what legal basis the rights were drafted.

15. In the light of these comments, the Japanese Government requests the Special Rapporteur responsible for drafting:

(a) To submit the research material from the technical and legal point of view on regulating the rights of indigenous populations internationally;

(b) To submit a precise explanation of each article in the text, including the preamble.

NORWAY

[Original: ENGLISH]
[10 May 1989]

A. General Comments

1. Norway fully supports the standard-setting activities of the Working Group on Indigenous Populations and in particular its work towards a draft universal declaration on indigenous rights. It welcomes the progress made by the Working Group at its sixth session in carrying out this part of the mandate by the submission of a draft declaration on indigenous rights prepared by the Chairman of the Working Group, Mrs. Erica-Irene Daes.

2. The Norwegian Government originally supported the initiative of drafting a universal declaration. It is pleased to have participated in this process and to have this opportunity to comment on the present text which, in its view, lays a good foundation for further endeavours to reach agreement on a universal declaration in this field. Such a declaration would represent an important step forward in promoting indigenous rights. Furthermore, it should be borne in mind that mutual acceptance and understanding must be fostered between non-indigenous and indigenous peoples inhabiting the same territory.

3. With reference to Sub-Commission resolution 1988/18, of 1 September 1988, Norway anticipates that a text revised on the basis of the observation and suggestions received will be presented to the Working Group's seventh session. Accordingly, it hopes to have the opportunity to provide additional comments and propsoals relating to the revised text on that occasion.

4. Generally speaking, Norway agrees with the approach employed in the draft. In its view, it is not necessary to define the term "indigenous peoples" in a declaration of this kind. It also agrees with the use of the term "peoples" throughout the declaration.

5. The use of the term "collective right", however, does not seem to be uniform throughout the text, which could create misunderstandings. Moreover, it seems unnecessary to qualify certain rights as collective; whether a right is collective or not is normally implied by the definition itself. Norway therefore proposes that the word "collective" be deleted in connection with certain rights and would urge that the term "the right" be used consistently throughout the text.

6. In this connection, it should also be pointed out that the emphasis in the draft on the rights of "indigenous peoples" rather than on the individual human rights of the persons concerned does not imply that the latter should be given any less attention.

7. The phrase "the right to" is used without further specifying the kind of right in question. Although this may be appropriate in a declaration, it involves an element of risk and should be carefully considered. The consequence of such an approach may be that crucial legal and political questions are not adequately dealt with. If the underlying unresolved issues are not dealt with concurrently, there is a danger of ending up with a text which is perceived differently by Governments and indigenous peoples' organizations.

8. Generally speaking, the declaration would probably be enhanced if greater emphasis were placed on consideration of environmental protection in relation to the special needs of indigenous peoples as regards their traditional means of exploiting natural resources.

B. Specific comments

Part II

9. Part II of the draft declaration contains a number of rights which detail various aspects of indigenous peoples' rights to maintain and develop their ethnic characteristics and cultural identity. With reference to the comments made above regarding the characterizing of several of these rights as collective, Norway supports the principle that these peoples should have the right to maintain and develop their unique characteristics and identity.

Article 5

10. The present wording of article 5 of the draft could, however, create certain difficulties. The provision establishes the principle of a collective right to protection against ethnocide. The principle is self-evident, but the wording seems to be too broad. The authorities must protect populations against "any act", regardless of the form such conduct takes, and "aim" and "effect" are equated. It is difficult to predict whether an act may result in depriving an indigenous people of their ethnic characteristics or identity. According to the text, all forms of deprival are included. The present wording could imply a conflict in relation to freedom of the press and expression for the population in general, as well as a problem as regards sanctions.

11. As far as the problem of sanctions is concerned, it would be almost impossible for the authorities to comply with the provision. "Prevention of any act" presupposes the knowledge that a particular act is imminent, and "aim or effect" presupposes an opportunity to consider the aim or potential effects of a given act in advance - regardless whether or not these are deliberate.

12. The provision might apply to allegations that a person was critical of the attitudes, traditions, customs, etc. of indigenous peoples, even if the nature of those attitudes, etc. was such that others could take offence, e.g. at the treatment of women or children, methods of punishment, religious practices, etc. The same would apply to the ability of the authorities to influence indigenous peoples when their conduct was at variance with the general conception of justice and ethical standards or other public interests. The introduction of a principle which would prohibit all manifestations in terms of words or actions which might conceivably have certain effects may in itself be regarded as such an extensive infringement of the rights of the rest of the population that it must be considered most carefully.

13. Norway would therefore favour amending article 5 to restrict its application to State action, but only to such action as is taken for the purpose of depriving the population in question of its ethnic characteristics or identity.

Article 6

14. The use of the term "manifestation" in article 6 is unclear, and it is conceivable that the right referred to could come into conflict with the rights of other groups or individuals. Therefore the provision needs to be further clarified and specified, inter alia, in order to make it clear whether the intention is to accord an exclusive right in the areas referred to. The same applies to article 8.

Article 7

15. The term "resources available" in article 7 is somewhat imprecise. It should preferably be explicitly stated that it is the State which determines the resources to be earmarked for this purpose and any priority to be accorded to particular spheres of interest and groups.

Article 9

16. Article 9 needs to be further clarified or its application restricted; it would not be realistic to expect that Governments will be able to consent to indigenous peoples being accorded an unconditional right in all situations to use their own language for administrative and judicial purposes.

17. In 1988, the Norwegian Parliament (the Storting) amended the Constitution of 1814 by inserting a new article stating that it was incumbent on the authorities of the State to create conditions enabling the Sami population to preserve and develop their own language, culture and way of life. Articles 9 and 10 of the draft declaration contain important principles in this respect. Nevertheless, difficulties are foreseen as regards the present wording of these articles, particularly in view of the diversity of languages and cultures which exist in various countries. It should therefore be stated in articles 9 and 10 that these rights are to be applied as far as practicable.

Article 10

18. As regards the right to education in their own language as set out in article 10, the educational level envisioned needs to be specified. It may not be practicable to offer traditional basic education up to university level in minority languages, or to offer all forms of specialized education in an indigenous people's own language. The term "children" could probably be construed in the light of article 1 of the draft convention on the rights of the child. Furthermore, the provision implies the establishment of a separate educational system for each indigenous population. What level the system should go to and what parts of the country it should cover are unresolved issues. However, the fundamental question whether or not there should be separate educational systems at all should also be considered carefully.

Part III

19. As concerns part III of the text, flexible language which covers the various situations of indigenous peoples with regard to land, including their national, social and legal systems, is essential if universal acceptance of the draft declaration is to be achieved. This flexibility must, however, be accompanied by effective protection of rights within the various systems. Norway would also stress the importance of protecting both the environment and subsistence rights in connection with the land.

20. In Norway, title to land and the right of use of land in the areas inhabited by the Sami population are in principle governed by the same legislation as applies elsewhere in the country. Right of ownership has generally been recognized with regard to land which has been intensively used for economic purposes, whereas less intensive economic activities have formed the basis for right of use only.

Article 12

21. In the light of the above, Norway would propose that the word "use" be inserted in connection with "ownership and possession" in the first sentence of article 12 of the draft.

22. The wording of the article seems, furthermore, to give indigenous peoples the right to veto any decision to take away their lands, even by means of expropriation: "only ... with their free and informed consent". This is not, however, in keeping with article 15, which deals precisely with compensation when property has been taken away without their consent. Thus, the above-mentioned factors need to be clarified. The distinction between "lands" and "property" may be difficult to draw, however, and large-scale hydroelectric projects may result in indigenous peoples being deprived of their lands. Norway agrees that the right of indigenous peoples to lands they have traditionally occupied should be adequately protected. However, it should at the same time be possible in a limited number of special cases to take over such lands without the consent of indigenous peoples when weighty social considerations so require.

23. Furthermore, the term "traditionally occupied" is not defined. This could create problems in that certain indigenous groups may maintain that they have traditionally occupied all or most of a particular State's territory.

Article 13

24. Recognition of indigenous peoples' "own land-tenure systems", in accordance with article 13, raises several questions that should be clarified. A study of such systems will probably be necessary to clarify the substance and implications of the various systems.

Article 14

25. As regards the substance of article 14, it is crucial that "control" be defined more closely. The same applies to "waters". Furthermore, it is the view of Norway that right and responsibility should be linked together. This can be done, for example, by adding a new sentence at the end of article 14 reading as follows:

> "In exercising such control, the peoples concerned shall be responsible for the ecologically sound management of the natural resources and the environment."

Article 15

26. Article 15 deals with the right to reclaim land. Normally, this poses a considerable problem, particularly if the land is privately owned. It seems, however, that this consideration has been taken into account, inasmuch as

there is a right "to seek" compensation and nothing is mentioned about the outcome. Reference is also made to the comments concerning article 12.

Article 16

27. Article 16 is similar to article 5 in the sense that it sets out the right to protection against any action that may have certain consequences for indigenous peoples. The objectives concerning e.g. compensation for pollution will probably be extremely difficult to implement in practice, particularly when it is a question of long-distance pollution. However, the principle itself is commendable. The article also sets out a right of veto whose wording corresponds to that found in article 12.

Article 17

28. The phrase "to seek and obtain their consent" used in article 17 has been construed by several Governments as a clear veto formulation. The provision also regulates the exploitation of subsoil resources. Therefore there can scarcely be any doubt that a new wording and further qualification are called for. In the draft revision of ILO Convention No. 107, Norway has proposed the following (art. 14.2): "Governments should in good faith seek the consent of the peoples concerned, through appropriate mechanisms, before undertaking or permitting ...".

Part V

29. Norway would stress the importance of the rights set out in part V of the draft declaration. It would, however, recommend that certain points be clarified.

Article 19

30. The social and economic problems of indigenous peoples can hardly be viewed separately from those of the rest of the population. Therefore, a wording which strikes a better balance between the various groups seems to be called for in article 19.

Article 21

31. The term "their State" as used in article 21 could cause misunderstandings. The article would benefit by using e.g. the term "the State". Furthermore, the scope and significance of the phrase "... and to have their specific character duly reflected in the legal system and in political institutions" needs clarification. If the wording is interpreted to mean that the legal systems of indigenous populations are to influence the national legal systems, article 21 is very far-reaching. Moreover, this could lead to insoluble problems in countries which have several indigenous populations with extremely diverse "specific characters". It would be important to find a formulation that could be acceptable to most Governments. An appreciably flexible formulation and/or further qualification would probably be necessary.

Article 22

32. The right to participate at State level, as set out in article 22, is basically reasonable, but the wording of the provision seems to be too absolute. The question of which matters and issues are encompassed by the expression "which may affect" is debatable. Moreover, the article should be worded in more general terms in order to allow for solutions other than "through representatives chosen by themselves".

Article 23

33. Article 23 is very far-reaching and it is most likely that a number of Governments will have difficulty with this provision. Therefore, it should be made less comprehensive. The relationship with the ordinary activities of the State, such as health and social welfare institutions, the educational system, etc., also needs to be clarified. The phrase "the collective right to autonomy" will probably also create difficulties for the various Governments. As regards article 23, it should also be noted that "internal taxation" is not a relevant question for the Sami population in Norway. In this connection it should be pointed out that not only would it be difficult to gain acceptance for the right to internal taxation, but such an arrangement might also prove to be a "mixed blessing" for the indigenous population if the Government were thereby able to disclaim economic responsibility for the costs of self-management.

Article 24

34. Article 24 must be viewed in connection with article 23.

Article 25

35. In article 25, a reference to national legislation must be inserted in addition to the reference to "internationally recognized human rights and fundamental freedoms".

UKRAINIAN SOVIET SOCIALIST REPUBLIC

[Original: RUSSIAN]
[4 July 1989]

1. As a whole the draft declaration gives the impression of a well-thought-out document setting forth in detail the basic rights of indigenous peoples.

2. At the same time, an analysis of the text reveals the need to correct a number of points and to make some changes and additions.

3. Thus it is not clear what criterion lies behind the very term "indigenous people". It would seem to imply peoples or ethnic groups which at one time constituted the basic population of this or that country or territory, but later found themselves in the position of a national (ethnic) minority in their own land, a minority without statehood. However, the text of the document shows that the authors themselves have no consistent idea of who possesses the rights proclaimed in the draft. In our view, therefore, the text should include a definition of the term "indigenous people".

4. In our opinion, it is improper to use the terms "people" and "group" as synonyms (second and third preambular paragraphs). There are indeed specific groups of individuals who behave with some autonomy in social relations. However, they do not embody those deep objective ties that are characteristic of a people, but as a rule themselves live within a people. On the other hand, "groups" can be taken to mean sections of a particular people who live surrounded by another people or in another State. In such cases it is just as improper to call them groups. For the purposes of the proposed draft, they should be placed in the category of "indigenous people".

5. The preamble contains many good provisions to the effect that the rights of indigenous peoples must be protected, that mankind recognizes its responsibility for what happens to them, etc. However, no reasons are put forward to explain why all this is needed. It is perhaps necessary to stress that the States Members of the United Nations will be adopting this Declaration for objective reasons. And the first such reason is a recognition of the fact that we all live in a single interdependent world, that all our problems are bound up in a single tight knot, and that until a just solution is found to all the problems dividing mankind, we shall not succeed in freeing ourselves from the shackles of outmoded ways of thought and creating a comprehensive system of international security in which nobody will feel himself injured or treated unfairly. The second reason is a recognition of the fact that the culture, way of life, traditions and so on of all peoples inhabiting our planet - from the biggest to the smallest - are the achievement and common property of all human civilization. For these reasons, it seems to us necessary to insert the following two paragraphs before the last preambular paragraph:

> "Recognizing that protection and strengthening of the rights of indigenous peoples, of their culture and of their way of life represents a substantial contribution to the development of world civilization and further encouragement for the existing variety of its forms,
>
> "Stressing that further activity along these lines will make it possible to resolve one of the vital problems dividing mankind and will promote the idea of establishing a new, secure and non-violent world".

The text will then continue as it stands. There is room for improvement in part I, paragraph 1, in part II, paragraphs 3 and 4, and in other passages where there is a confusion between human rights and rights of peoples.

6. A serious shortcoming of the draft declaration is the absence of any reference among the other indigenous rights to such a basic right as the right of peoples to self-determination, which, furthermore, is one of the basic principles of international law. It is understandable that many persons may be sceptical about asserting such a right for peoples when the problem is to secure their elementary survival. However, it should be borne in mind that the right of peoples to self-determination does not automatically imply just the right of peoples to form their own State. Nowadays it has become a complex principle concerning the most various alternatives developed through the practical experience of living in a society, including the right to autonomy, which is well represented in the draft. The right of peoples to self-determination is thus the primary right, from which many others derive.

7. Another shortcoming of the document, in our view, is the fact that it does not touch upon an important question from the legal standpoint, namely, that observance of the rights of indigenous peoples cannot be used as an excuse for wilful limitation of the basic rights of other groups of the population living in the same territory.

8. There are certain objections to be made to the structure of the proposed draft. The rights put forward in it seem to follow no system and there seems little logical basis for the division into parts. It would perhaps be a good idea to follow the course proposed by the authors of the Declaration of the Rights of Peoples (the Algiers Declaration of 1976), namely, to put all rights of a general nature (right to existence, equality, etc.) in the first part, the various political rights connected with the right to self-determination and autonomy in the second, all rights connected with culture in the third, economic rights in the fourth, those connected with the environment in the fifth and State guarantees and obligations in the sixth.

9. As far as the individual indigenous rights set forth in the draft are concerned, they are for the most part quite well formulated. If States adopt this declaration and are guided by it, that will ensure reasonably high standards with regard to protection of the rights of those smaller peoples referred to in the declaration as indigenous peoples.