

Appendix No. 2 : important existing legal instruments and proposed draft standards dealing with indigenous land rights

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Appendix No. 2: Important existing legal instruments and proposed draft standards dealing with indigenous land rights

A. Indigenous and Tribal Populations Convention
(Extract of ILO Convention No. 107 adopted by the 40th Session of the International Labour Conference, Geneva 5 June 1957)

Article 11:

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

Article 12:

1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.
2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.
3. Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13:

1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.
2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the

part of the members of these populations to secure the ownership or use of the lands belonging to such members.

Article 14:

National agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to –

- (a) the provision of more land for these populations when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these populations already possess.

B. Declaration of the Right to Development
(Extract of UN General Assembly resolution 41/128, 4 December 1986)

Article 1:

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

C. Declaration of Principles

(Extract of Declaration of Principles adopted by the Indigenous Peoples Preparatory Meeting, held at Geneva 27–31 July 1987. In: UN 1987)

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 and people, or its territory, except in accordance with the freely expressed wishes of the nation and people concerned.

4. Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. This includes air space, surface and subsurface rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and the economies based on these resources.
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.
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. Indigenous peoples' right to regain possession and control of sacred sites must always be respected.
8. No State shall participate financially or militarily in the involuntary displacement of indigenous populations, or in the subsequent economic exploitation or military use of their territory.
9. The laws and customs of indigenous nations and peoples must be recognized by States' legislative, administrative and judicial institutions and, in case of conflicts with State laws, shall take precedence.

D. Statement on Self-determination

(Extract of Statement of Self-determination by the Participants at the Indigenous Peoples Preparatory Meeting, Geneva 27–31 July 1987. In: PREPARATORY MEETING 1987)

1. The right to self-determination is fundamental to the enjoyment of all human rights. From the right to self-determination flows the right to permanent sovereignty over land – including aboriginal, ancestral and historical lands – and other natural resources, the right to develop and maintain governing institutions, the rights to life, health and physical integrity, and the rights to culture, way of life and religion.
2. The right to self-determination includes the absolute right of indigenous peoples to exist as communities, tribes, nations or other entities according to their own wishes and to define their own membership.
3. The most fundamental element of the right of self-determination is the freedom of choice on the part of indigenous peoples. The relationships

between indigenous peoples and states must be based on the free and informed consent of indigenous peoples.

4. Self-determination encompasses the freedom of indigenous peoples to determine the extent of and the institutions of their self-governance, their political status and associations with the state(s) in which they are located, and the extent and nature of their participation within the political processes of such state(s).
5. The right to self-determination may be realized in many ways ranging from the choice of full independence to various forms of autonomy, self-government and participation in the political processes of the state.
6. Self-determination is dependent upon the right of each indigenous people to a land and resource base necessary to sustain an appropriate and sufficient economy as well as the right to exercise its authority and jurisdiction over the corresponding territory.

E. Proposed conclusions regarding revision of ILO Convention 107

(Extract of Partial Revision of the Indigenous and Tribal Populations Convention 1957. In: ILO 1988a)

27. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy should be recognised.
28. Governments should take steps necessary to identify the lands which the peoples concerned traditionally use and occupy, and to guarantee effective protection of their rights of ownership and possession.
29. Special measures should be taken to safeguard the control of the peoples concerned over natural resources pertaining to their traditional territories, including flora and fauna, waters and sea ice, and other surface resources.
30. Governments should seek the consent of the peoples concerned . . . before undertaking or permitting any programmes for the exploration or exploitation of mineral and other subsoil resources pertaining to their traditional territories. Fair compensation should be provided for any such activities undertaken within the territories of the said peoples.
31. Subject to Points 32, 33 and 34 below, the peoples concerned should not be removed from their habitual territories.
32. Where the removal of the said peoples is considered necessary as an exceptional measure, such removals should take place only with their free and informed consent. Where their consent cannot be obtained, such removals should take

place only following appropriate procedures established by national laws and regulations, including public inquiries, which provide the opportunity for effective representation of the peoples concerned.

33. In such exceptional cases of removal, these peoples should be provided with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist, and where the peoples concerned prefer to have compensation in money or in kind, they should be so compensated under appropriate guarantees.
34. Persons thus removed should be fully compensated for any resulting loss or injury.
35. Procedures for the transmission of rights of ownership, possession and use of land which are established by the customs of the peoples concerned should be respected, within the framework of national laws and regulations.
36. The consent of the peoples concerned should be sought when considering the adoption of national laws or regulations concerning the capacity of the said peoples to alienate their land or otherwise transmit rights of ownership, possession and use of their land.
37. Persons who are not members of these peoples should be prevented from taking advantage of the customs referred to in Point 35 or of lack of understanding of the laws on the part of the members of these peoples to secure the ownership, possession or use of land belonging to them.
38. Unauthorised intrusion upon, or use of, the lands of the peoples concerned should be considered as an offence, and appropriate penalties for such offences and other appropriate recourse procedures should be established by law.
40. Adequate procedures should be established within the national legal system to resolve land claims by the peoples concerned, including claims arising under treaties.

F. UN Working Group on Indigenous Populations: Draft Principles for a Universal Declaration on Indigenous Rights

(Extract of a working paper by Ms. Erica-Irene A. Daes containing a set of draft preambular paragraphs and principles for insertion into a universal declaration on indigenous rights. In: UN 1988b)

12. The right of ownership and possession of the lands which they have traditionally occupied. The lands may only be taken away from them with their free and informed consent as witnessed by a treaty or agreement.
13. The right to recognition of their own land-tenure systems for the protection and promotion of the use, enjoyment and occupancy of the land.
14. The right to special measures to ensure their control over surface resources pertaining to the territories they have traditionally occupied . . .
15. The right to reclaim land and surface resources . . . when the property has been taken away from them without consent, in particular if such deprivation has been based on theories such as those related to discovery, *terra nullius*, waste lands or idle lands. Compensation, if the parties agree, may take the form of land or resources of quality and legal status at least equal to that of the property previously owned by them.
16. The right to protection against any action or course of conduct which may result in the destruction, deterioration or pollution of their land, air, water, sea ice, wildlife or other resources without free and informed consent of the indigenous peoples affected. The right to just and fair compensation for any such action or course of conduct.
17. The duty of States to seek and obtain their consent, through appropriate mechanisms, before undertaking or permitting any programmes for the exploration or exploitation of mineral and other subsoil resources pertaining to their traditional territories. Just and fair compensation should be provided for any such activities undertaken.