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COMMISSION ON HUMAN RIGHTS

Subcommission on Prevention
of Discrimination and
Protection of Minorities
Working Group on Indigenous Populations
Fourteenth session
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Item 9(a) of the provisional agenda

OTHER MATTERS: MEETINGS AND SEMINARS

Report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims

(Whitehorse, Canada, 24-28 March 1996)

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Working paper prepared by Mrs. Erica Irene Daes, Chairperson-Rapporteur of the Working Group on Indigenous Populations

Note

It may be noted that, for reasons of brevity, this paper can not deal with all activities undertaken by the different organizations composing the United Nations system. However, because the Working Group on Indigenous Populations will focus its deliberations at its fourteenth session on health issues it was considered useful to include reference to relevant activities of the World Health Organization (WHO). Likewise, it was considered purposeful to include a summary of the important activities of the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

1. Introduction

The United Nations system first addressed itself formally to indigenous issues in 1949, when the General Assembly of the United Nations Organization, by its resolution 275(111) of 11 May 1949, invited the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter Sub-Commission) to study the situation 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.

The United States objected, which not only led to the termination of this particular study, but also to the temporary suspension of the entire Sub-Commission! In any event it is fair to consider that the initiative for the above-mentioned study was related more to the Cold War, and to the interests of the exploitation of the South American interior, than by any genuine concern for the welfare of indigenous persons and communities themselves.

2. The Martínez Cobo study and the Working Group on Indigenous Populations

One of the most important United Nations system's activity, was the adoption of a resolution by the Economic and Social Council[1] (hereinafter ECOSOC), by which the Council authorized the Sub-Commission to undertake a study on the "Problem of Discrimination against Indigenous Populations". Mr. José Martínez Cobo was appointed as Special Rapporteur and was entrusted with the elaboration of this important and complex study.[2]

The aforesaid Sub-Commission welcomed the 5 volumes final report of Martínez Cobo as "a reference work of definitive usefulness". It was a forceful and eloquent appeal to the international community to respond decisively to the painful discrimination experienced by indigenous peoples, who continue to be one of the largest and weakest sectors of humankind.

In 1982, the ECOSOC authorized the Sub-Commission to establish the "Working

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ECOSOC resolution 1589 of 21 May 1971.

Study on "The Problem of Discrimination against Indigenous Populations", UN Doc. E/CN.4/Sub.2/1986/7/Adds. 1-4 (1986)

Group on Indigenous Populations".[3] The Working Group soon became the focal point for indigenous rights issues within the United Nations system, attracting approximately 700 participants in 1995 of which an estimated 400 were indigenous people.

The Working Group is composed of five members of the Sub-Commission, who serve in their personal capacity as independent experts. It meets annually and has two mandates: the evolution of standards concerning the rights of indigenous peoples and the review of developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples.

In addition to the review of developments and the evolution of standards, the Working Group has over the years considered a number of other issues relating to indigenous needs, rights and aspirations, such as the study on treaties, agreements and other constructive arrangements between States and indigenous peoples, the study on indigenous heritage, the possible establishment of a permanent forum for indigenous people within the United Nations system, the question of criteria which might be applied when considering the concept of indigenous peoples and the International Year and the International Decade of the World's Indigenous People.

3. The Voluntary Fund for Indigenous Populations

The United Nations Voluntary Fund for Indigenous Populations was established pursuant to General Assembly resolution 40/131 of 13 December 1985, with the purpose of providing financial assistance to representatives of indigenous communities and organizations, who wish to participate in the deliberations of the Working Group on Indigenous Populations. The General Assembly foresaw funding by means of voluntary contributions from Governments, non-governmental organizations and other private or public entities.

The Voluntary Fund is administered by the Secretary-General in accordance with the Financial Regulations and Rules of the United Nations and other provisions relevant to this Fund. In this task the Secretary-General is advised by a Board of Trustees composed of five persons with relevant experience on indigenous issues and serving in their personal capacity. The Members of the Board are appointed by the Secretary-General for a three-year renewable term in consultation with the Chairman of the Sub-Commission.At least one of the Members of the Board shall be a representative of a widely recognized organizations of indigenous peoples. Currently, four of the five Members are indigenous people.

In 1995, the Voluntary Fund, on the recommendation of the Board of Trustees and the subsequent approval of the Secretary-General, assisted 53 organizations of indigenous peoples to send a representative to attend the thirteenth session of the Working Group on Indigenous Populations.

Recently, in accordance with General Assembly resolution 50/156 of 21 December of 3 March 1995, the scope of the above-mentioned Fund was extended in order to assist representatives of organizations of indigenous people, who have been authorized by the Committee on Non-Governmental Organizations to participate at the Working Group of the Commission on Human Rights, established to elaborate further a "draft declaration on the rights of indigenous peoples".

ECOSOC resolution 1982/34, UN. ESCOR (1982).

4. The United Nations draft Declaration on the Rights of Indigenous Peoples

The draft United Nations Declaration on the Rights of Indigenous Peoples (hereinafter Draft Declaration) constitutes the most important development concerning the protection of the basic rights and fundamental freedoms of indigenous peoples.

On the basis of a preliminary draft body of principles[4] and two relevant revised working papers[5], prepared by the Chairperson-Rapporteur, Erica-Irene A. Daes[6] and after years of careful deliberations with the active participation of representatives of indigenous organizations and observer governments, the Working Group concluded its final drafting, and agreed upon a draft Declaration[7], which was duly submitted to its parent body, the Sub-Commission.

According to resolution 1994/45, the Sub-Commission decided:

a) To adopt the Draft Declaration agreed upon by members of the Working Group on Indigenous Populations;

b) To submit the Draft Declaration to the Commission on Human Rights at its fiftieth session, which began in February 1995, with the request that it should consider the Draft Declaration as expeditiously as possible;

c) To request the Secretary-General to transmit the text of the Draft Declaration to indigenous peoples and organizations, governments and intergovernmental organizations, and

d) To recommend that the Commission on Human Rights and ECOSOC should take effective measures to ensure that representatives of indigenous peoples are able to participate in the consideration of the Draft Declaration by these two bodies, regardless of their consultative status with ECOSOC.

The above-mentioned recommendation (d) constitutes a significant step, because its endorsement by the Commission on Human Rights and ECOSOC will allow, for the first time in the fifty-year history of the United Nations, indigenous communities and even indigenous persons to participate actively and directly in the elaboration of a United Nations draft instrument, regardless of their consultative status with ECOSOC.[8]

See the report of the Working Group on Indigenous Populations on its fifth session, UN. Doc. E/CN.4/Sub.2/1987/22, Annex II.

E/CN.4/Sub.2/1992/28 and E/CN.4/Sub.2/1993/26.

. See Sub-Commission resolution 1992/33 of 27 August 1992 and Commission on Human Rights resolution 1993/31.

UN ESCOR, Comm. on H.R., 11 sess., Annex I, UN.Doc. E/CN.4/Sub.2/1993

See E.I.A. Daes, "Equality of Indigenous Peoples Under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples", in St. Thomas Law Review, St. Thomas University, School of Law, Miami, Florida, Vol.7, Summer 1995, pp. 493-499.

The Draft Declaration does have a certain logical order, which may help explain its overall philosophy and approach. The preamble contains a number of important general principles, part I is a statement of the fundamental principles of equality and non-discrimination with regard to indigenous peoples collectively as peoples, and individually as human beings. In this context, specific reference is made to self-determination, not because it is a right of indigenousness, but as a right of all peoples from which indigenous peoples cannot be excluded.[9]

Part II of the Draft Declaration recognizes the rights of indigenous peoples to their physical existence and cultural identity. Parts III, IV and V of the Draft Declaration focus on issues of special concern to indigenous peoples in the exercise of their rights to equality, self-determination and collective identity. Part VI deals with land, natural resources, cultural and intellectual property and other economic rights as well as the right to the protection of the environment and ecological security. Part VII provides some general guidelines for those situations in which indigenous peoples exercise their political rights through forms of autonomy[10] or internal self-government within existing States.

Further, of great importance are the provisions related to the creation by the United Nations of a body at the highest level with special competence in the field of implementation of the Draft Declaration and with the direct participation of indigenous peoples.

Through resolution 1995/32 of 3 March 1995, the Commission on Human Rights decided, with the endorsement of ECOSOC, to establish an open-ended inter-sessional Working Group of the Commission on Human Rights with the sole purpose of elaborating a draft declaration, considering the draft as adopted by the Sub-Commission. A special procedure was established to facilitate the participation of organizations of indigenous peoples at this inter-governmental level. The first session of this Working Group took place in Geneva from 20 November - 1 December 1995, during which participants decided to review the draft declaration part by part, in order to identify where there was general consensus and which articles would require further elaboration.[11]

It appears that the social and cultural stipulations of the draft seem, on the part of the Governments that is, to be the most acceptable, while the rights to self-determination, land and natural resources are more controversial. The indigenous peoples on the other hand call for the adoption of the draft declaration as elaborated by the Working Group on Indigenous Populations and subsequently adopted by the Sub-Commission.

5. Seminars on Indigenous peoples rights

G. Alfredsson, The Right to Self-Determination and Indigenous Peoples, in Modern Law of Self-Determination, C. Tomuschat, ed. 1993, J. Anaya, A Contemporary Definition of the International Norm of Self-Determination, 3 Transnational Law and Contemporary Problems, 13, 131, 1993, see also E.I.A. Daes, Some Considerations on the Right of Indigenous Peoples to Self-Determination, 3 Transnational Law and Contemporary Problems, 13, 2 ff., 1993.

In connection with the content of the concept of "autonomy" and the "right to autonomy", see H. Hannum, Autonomy, Sovereignty and Self-determination, pp. 458-477 (1990).

See the report of this Working Group, Doc. E/CN.4/1996/84.

One of the most important seminars organized by the United Nations was that on "The effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States".[12] The seminar was chaired by an expert nominated by the Senegalese Government, Mr. Ndary Touze. An indigenous expert, with long experience in indigenous issues and deep knowledge of the existing relevant international norms and procedures, Mr. Ted Moses of the Grand Council of the Crees (Quebec), was elected as Rapporteur of the Seminar. The election of Mr. Moses, who is an indigenous person, as Rapporteur of an international body, has been considered as a semantic development in the field of international law.

Among the conclusions and recommendations of the seminar are the findings that indigenous peoples have been, and still are, the victims of racism and racial discrimination; that relations between States and indigenous peoples should be based upon free and informed consent and co-operation, not merely consultation and participation; and that indigenous peoples should be recognized as proper subjects of international law with their own collective rights.[13]

Two other expert seminars of great significance have also been held: the Expert seminar to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples which met in Greenland in September 1991 and the United Technical Conference on Practical Experience in the realization of sustainable and environmentally sound self-development of indigenous peoples which met in Chile in May 1992. The documents of the meetings are respectively E/CN.4/1992/42 and E/CN.4/Sub.2/1992/31.

6. Studies:

a) Study on the protection of the heritage of indigenous peoples

Based on a working paper prepared by the Special Rapporteur, Ms. Erica-Irene A. Daes, on the question of the ownership and control of the cultural property of indigenous peoples and a concise note of the Secretary-General on the extent to which indigenous peoples can utilize existing international standards and mechanisms for the protection of their intellectual property, the Sub-Commission expressed its conviction, in its resolution 1992/35 of 27 August 1992, that

> "there is a relationship, in the laws or philosophies of indigenous peoples, between cultural property and intellectual property, and that the protection of both is essential to the indigenous peoples' cultural and economic survival and development".

Following recommendations from the Sub-Commission and the Commission on Human Rights, the Economic and Social Council, in its decision 1992/256 of 20 July 1992, approved the appointment of Ms. Erica-Irene A. Daes as Special Rapporteur with a mandate of undertaking a study on the protection of the cultural and intellectual property of indigenous peoples.

After having submitted her study in 1993, the Sub-Commission endorsed the conclusions and recommendations contained in the study and requested the Special Rapporteur, in its resolution 1993/44 of 26 August 1993, to expand her study with

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The seminar was held in Geneva from 16-20 January 1989.

See the report of the Seminar in Doc. E/CN.4/1989/22, also UN publication HR/PUB/89/5.

a view to elaborating draft principles and guidelines for the protection of the heritage of indigenous peoples. The mandate for an expanded study was endorsed by the Commission on Human Rights in its resolution 1994/105 of 4 March 1994.

In 1995, the above-mentioned Special Rapporteur prepared a final report which contains reviews and responses to comments made by a number of Governments, specialized agencies and indigenous non-governmental organizations on her study and a presentation of a revised draft of the principles and guidelines for consideration and action by the Sub-Commission.[14]

b) The Study on treaties, agreements and other constructive arrangements between States and indigenous populations

In Volume V of the Cobo report, entitled Conclusions, Proposals and Recommendations, the Special Rapporteur stressed the importance for indigenous peoples in various countries of the world of the treaties concluded with present Nation-States, or with the countries acting as colonial administrating powers at the time. He concluded that a thorough and careful study should be undertaken of various areas covered by the provisions in such treaties, the official legal force of such provisions at present, the observance, or lack of observance, of such provisions and the consequences of all these factors for the indigenous peoples concerned.

The Special Rapporteur therefore recommended that a thorough study of these issues should be undertaken in light of the prevailing principles and norms in this field and the opinions and data to be provided by the various entities involved, primarily the Governments and indigenous peoples that have signed and ratified these treaties. This recommendation was taken up by the Working Group on Indigenous Populations at its fifth session. Consequently, the Economic and Social Council, on the recommendation of the Sub-Commission and the Commission on Human Rights, adopted resolution 1989/77 of 24 May 1989, by which it authorized the appointment of Mr. Miguel Alfonso Martínez as Special Rapporteur with a mandate of undertaking a Study on treaties, agreements and other constructive arrangements between States and indigenous populations.

In 1992, the Special Rapporteur submitted its first progress report followed in 1995 by his second progress report. In resolution 1995/118 of the Sub-Commission, the Special Rapporteur is requested to submit a third progress report to the fourteenth session of the Working Group on Indigenous Populations and the forty-eighth session of the Sub-Commission and a final report to both bodies at their fifteenth and forty-ninth sessions respectively which will take place in the summer of 1997.

7. Other Activities

a) The Department of Public Information

The Department of Public Information has published a number of Newsletters in all official languages of the United Nations, related in particular to the

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Final Report of the Special Rapporteur, Ms. Erica-Irene A. Daes, Doc. E/CN.4/Sub.2/1995/26 and Annex containing the Principles and Guidelines for the Protection of the Heritage of Indigenous People.

International Year of the World's Indigenous People (1993), and the International Decade of the World's Indigenous People (1995-2004). One of the most important booklets, which was disseminated in hundreds of copies, was the one entitled: "Seeds of a New Partnership-Indigenous Peoples and the United Nations"[15]

b) Missions of the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes

The above-mentioned Chairperson-Rapporteur, who has been the Chairperson holds the Chair of the Working Group on Indigenous Populations for fourteen years, visits countries and in particular indigenous communities in which indigenous peoples live, in order to gain first-hand data and information, as well as to provide information and documentation on United Nations activities in the field of indigenous peoples rights. She also identifies relevant issues, which is necessary when undertaking a standard-setting exercise, and has constructive consultations with Governments and indigenous peoples which, in certain cases, help the reconciliation process between them.

These missions have included, among others, visits to the Grand Council of the Crees in Quebec, Canada, Australia, New Zealand, the Nordic Countries, in particular Sami Land, the United States of America, Panama, Guatemala and Brazil, in particular Amazonia.

8. A permanent forum for indigenous peoples in the United Nations system

The World Conference on Human Rights, in its Vienna Declaration and Programme of Action, recommended that the General Assembly establish a permanent forum for indigenous people within the United Nations system. In its resolution 48/163 of 21 December 1993, the General Assembly requested the Commission on Human Rights to give "priority consideration" to this issue. In response to this request, the Commission, through its resolution 1994/28 of 4 March 1994, requested the Working Group on Indigenous Populations to give this matter consideration at its twelfth session and submit "suggestions for alternatives".

On the basis of the discussion which took place during the twelfth session of the Working, which included a comprehensive note prepared by the Chairperson-Rapporteur of the Working Group and a paper submitted by the Government of Denmark, the Chairperson-Rapporteur of the Working Group developed some informal guidelines for the establishment of a permanent forum which were presented, as an annex, to the Report of the Working Group on Indigenous Populations on its twelfth session.[16]

According to a recommendation of the Working Group to hold further consultations, the Sub-Commission in its resolution 1994/50 of 26 August 1994 recommended that the Centre for Human Rights organize a workshop on the possible establishment of a permanent forum for indigenous people with the participation of representatives of Governments, indigenous organizations and independent experts. This recommendation was endorsed by the General Assembly in resolution 49/214 of 23 December 1994.

The Workshop was held in Copenhagen, Denmark from 26-28 June 1995. The

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United Nations Publication-Sales No. E.94.I.16.

Consideration of a Permanent Forum for Indigenous Peoples; Note by the Chairperson Rapporteur, Ms. Erica-Irene A. Daes, Doc. E/CN.4/Sub.2/AC.4/1994/13 of 22 June 1994.

Workshop was attended by two independent experts: Mrs. Erica-Irene A. Daes, Chairperson-Rapporteur of the Working Group on Indigenous Populations and Mr. Rodolfo Stavenhagen, Professor at El Colegio de Mexico, as well as representatives of 21 States and 21 indigenous organizations. The following elements were discussed at this meeting:

(a) Scope of a permanent forum;
(b) United Nations body to which proposed forum would report and its relationship with the United Nations;
(c) Mandate and terms of reference;
(d) Activities that might be undertaken by the forum;
(e) Membership;
(f) Participation of indigenous people;
(g) Relationship with the Working Group on Indigenous Populations;
(h) Financial and secretariat implications; and
(i) Other matters such as location[17]

Subsequently, the General Assembly in its resolution 50/157 of 21 December 1995, recommends that the Secretary-General, drawing on the expertise of the Commission on Human Rights as well as the Commission for Sustainable Development and other relevant bodies, undertake a review, in close consultation with Governments and taking into account the views of indigenous people, of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people, and report to the General Assembly at its fifty-first session. In the same resolution, it also recommends that the Commission on Human Rights, drawing on the results of the review and the Copenhagen Workshop, consider the convening of a second workshop on the possible establishment of a permanent forum for indigenous people with the participation of independent experts as well as representatives of Governments, organizations of indigenous people, United Nations bodies and specialized agencies and non-governmental organizations concerned.

9. The International Year of the World's Indigenous People

The General Assembly, in resolution 45/164 of 18 December 1990, proclaimed 1993 as the International Year of the World's Indigenous People with a view to strengthening international cooperation for the solution of problems faced by indigenous communities in areas such as human rights, the environment, development, education and health. The theme of the International Year was: "Indigenous people: a new partnership".

Subsequently, a programme of activities was developed, for which a total of three Technical Meetings were convened, and adopted by the General Assembly as annex to resolution 46/128. The Assembly recommended that indigenous people should play an important role in the planning, implementation and evaluation of projects. The Centre for Human Rights was assisted throughout 1993 by 3 indigenous people working as United Nations staff members.

In its resolution 45/164, the General Assembly authorized the Secretary-General to accept and administer voluntary contributions from Governments and non-governmental organizations for the purpose of funding programme activities for the International Year. During the Year, the Centre for Human Rights provided 37

Consideration of a Permanent Forum for Indigenous People; Report of the Workshop held in accordance with Commission resolution 1995/30, Doc E/CN.4/Sub.2/AC.4/1995/7 of 12 July 1995.

grants to indigenous people in different parts of the world with projects in the areas of development, human rights, health, etc.

Although it is clear that one year is not sufficient to achieve significant improvements in conditions in the areas of development, the environment, health and human rights for peoples who have endured decades and even centuries of exploitation and marginalization, it also clear that the International Year has generated a number of important and positive changes. The international community is better informed, international and national programmes were developed that continue to date, coordination within the United Nations system has grown, and indigenous peoples have learned more about the functioning of the United Nations system. It can be said that the International Year played a critical role in alerting the wider public and preparing the United Nations for the International Decade of the World's Indigenous People.

10.<u>The International Decade of the World's Indigenous People</u>

The World Conference on Human Rights, held in Vienna in June 1993, called for the proclamation of an international decade of the world's indigenous people. This recommendation was adopted by the General Assembly in resolution 48/163 of 21 December 1993, in which it proclaims the International Decade of the World's Indigenous People, commencing on 10 December 1994.

The General Assembly decided that the goal of the Decade should be the strengthening of international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, education and health and that the Assistant Secretary-General for Human Rights, Mr. I. Fall, is appointed as Coordinator. The theme of the Decade is: "<u>Indigenous people: partnership in action</u>". At its last session in December last year, the General Assembly adopted a comprehensive programme of activities for the Decade (resolution 50/157).

11.<u>Specialized Agencies of the United Nations System</u>:

a) <u>The International Labour Organisation (ILO)</u>

Already, in 1953, ILO published a Study on Indigenous Peoples and in 1957 adopted Convention No. 107 and Recommendation No. 104 on the Protection of Indigenous and Tribal Populations. These were the first international instruments specifically elaborated and adopted to protect the rights of peoples, whose ways of life and existence were then threatened by dominating cultures.

In June 1989, after four years of preparatory work, the International Labour Conference adopted a revised version of the above-mentioned Convention No. 107/1957, the, by now, well-known ILO Convention 169/1989 on Indigenous and Tribal Peoples. This convention, *inter-alia,* constitutes a basis for ILO implementation and technical assistance activities for indigenous peoples. Further, ILO has organized a number of very constructive meetings and seminars in which indigenous matters were discussed.

b) <u>The World Health Organization</u>

In may 1994, the forty-seventh World Health Assembly adopted resolution WHA 47.27, in which it called upon the Director-General, *inter-alia*, to increase cooperation between the World Health Organization (hereinafter WHO) and other United Nations organizations to help meet the health needs of indigenous people, provide Member States with technical support, to assist governments and indigenous people

in addressing indigenous health needs in a culturally effective manner, to consider the contribution WHO might make to promoting respect for, and maintenance of, indigenous knowledge, and to ensure that relevant research projects undertaken by WHO and other United Nations organizations were conducted in consultation with, and for the benefit of, indigenous people and communities, such projects being undertaken by indigenous people themselves where appropriate. A further resolution in May 1995 (res. WHA 48.24) requested the Director-General to report to the forty-ninth World Health Assembly on implementation of the objectives of the International Decade of the World's Indigenous People.

In addition, the Pan American Health Organization has initiated several activities to improve the health condition and well being of the indigenous people of the region. Based on the outcome of a workshop held in Winnipeg, Canada, in April 1993, and subsequent sub-regional workshops held in Santa Cruz, Bolivia and Quetzaltenango, Guatemala in 1994, a Plan of Action for the Region of the Americas for 1995-1998 was developed. On the basis of this plan technical and financial support has been identified for indigenous people in Bolivia, Chile, Colombia, Ecuador, Honduras, Nicaragua and Panama.

The WHO has also decided actively to participate to the deliberations of the forthcoming fourteenth session of the United Nations Working Group on Indigenous Populations, at which the main theme of the agenda will be "Indigenous Health".

c) United Nations Educational, Scientific and Cultural Organisation

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has organized a number of international meetings and conferences related to the protection of indigenous peoples, living in every part of the globe. It is sufficient to mention that the international meeting held in San José, Costa Rica, in 1981 organized by UNESCO on Ethnocide and Ethnic Development in Latin America, concerned directly the indigenous peoples in the region.

Also, UNESCO, in close cooperation with the Foundation of the Nobel Prize Winner and Goodwill Ambassador of the International Year of the World's Indigenous Peoples, Mrs Rigoberta Menchu Tum, organized the important Conference on the Indigenous Initiative for Peace, in Paris from 13-17 February 1995.

Working paper prepared by Dr. Ken Coates, Professor of History, University of Waikato-Hamilton, New Zealand

In Yakutia (central Siberia in Russia), politicians worry about finding a compromise between the government's development priorities and the cultural and economic needs of the Small Peoples of the North. Thousands of miles away, in the Amazon River basin, the Yanomami seek to defend their land and their lifeways from the incursions of miners and developers. The Tainui people of the Waikato District of New Zealand, in contrast, discuss how they plan to invest the NZ$170 million they received through their October 1995 settlement with the national government. The First Nations of the Yukon and the Inuvialuit of the Mackenzie River basin no longer face the uncertainties of asserting a land claim, but instead are coping with the very different challenges of implementing a settlement agreement. And so it goes around the globe. In countries as diverse as Indonesia and Sweden, Thailand and Nicaragua, Australia and Botswana, indigenous peoples struggle to assert their right to traditional territories and, using this claim as their base, seek settlements from national and regional governments that will give them the resources, land and administrative controls necessary for self-

determination and cultural survival.

The international land claims process is awash in contradictions and tensions, between the development ambitions of settler populations and the traditional values of First Peoples, between the limited fiscal resources of national governments and the pressing social, financial and cultural needs of indigenous societies, and between the sustained vigilance of international organisations and supporters and the often hostile opposition of local non-indigenous people to potential disruptive land claims and settlements. There is, as well, conflict inherent in the attempt to merge indigenous culture and contemporary legal systems, for settlements seek not only to resolve outstanding legal entitlements but also to bridge the cultural gap between indigenous and settler societies. The conflicts over land, the guardianship of the environment, land claims settlements, legal debates, and the survival of indigenous societies has emerged over the past forty years as one of the most powerful and influential movements on the world stage. Each country and region seeks to resolve indigenous land claims within a specific national legal, financial and social context, but the impetus to deal with indigenous rights arises from broad, international pressures and concerns. The land claims process, then, represents a classic struggle between the international and the local, and an effort to bring regional realities into line with international sensibilities.

The Emergence of Indigenous Land Rights: Each country currently seeking to address indigenous land claims and rights tends to see the matter within the context of its national history. In Canada, for instance, legal scholars point to the Royal Proclamation of 1763 and subsequent government actions and legislation as the foundation for the government's commitment to settle unresolved First Nations claims. Australia long held that the national legal doctrine of *terra nullis* obviated the need for special attention to indigenous land claims, but had this position turned on its head with the 1992 Mabo decision. New Zealand has the Treaty of Waitangi, the United States its history of signing treaties before settlement and development, Scandinavia its historic pattern of seeking to incorporate the Sami into the nation-state, the former Soviet Union a lengthy attempt at Russification and communal organisation of the Small Peoples of the North, and Brazil a long period of neglect of the indigenous peoples of the interior. Similar patterns can be seen in other countries. As land claims emerged as a matter of national political importance, each nation has turned to its past and to its legal system as a source for both an explanation for participation (or non-participation) and for a solution to a difficult and sensitive political matter.

The emphasis on local developments, however, misses an essential point: indigenous land claims are founded on a major shift in international legal and social thinking. While national conditions and realities matter, and matter a great deal, much of the impetus for settling indigenous demands rests with a fundamental, post-World War II shift in the conception of First Peoples, their future and their rights. Before World War II, few countries paid much heed to the idea that indigenous societies had special rights or privileges. In countries with sizeable settler populations, indigenous peoples had either been pushed aside, often onto legal reserves or into remote regions, or efforts had been made to incorporate them into the nation. Such legal rights as existed under the laws of the state stood in abeyance, over-ridden by discriminatory legislation or ignored by governments intent on economic development and incorporation.

In the decade after World War II, the situation changed dramatically. The decades-old belief in the importance of assimilating indigenous people was stripped away in the face of aboriginal resistance and determination. Indigenous peoples, initially regionally and nationally and then through an international

network of contacts and organisations, pressed openly and with considerable success for attention to their needs and aspirations. Non-indigenous supporters, from churches and environmental organisations to groups set up specifically to advance First Peoples' interests, lined up behind the indigenous protesters. The United Nations, through its International Declaration on Human Rights and subsequent specific initiatives dealing with indigenous peoples, provided a vital international forum for the debate over the future of indigenous societies. The conjunction of growing national and international awareness of indigenous issues, rights and claims ensured that a matter previously relegated to the political backburner in countries around the world now moved closer to centre-stage.

The changing international political scene developed in an interconnected fashion with shifting societal attitudes toward indigenous peoples. In the first half of the 20th century, most people (to the extent that they considered indigenous societies) viewed the First Peoples as “dying” cultures, struggling in the unavoidable face of development and modernisation. Few, save for a handful of humanitarians, social activists and academics, saw much of value in the traditions and lifeways of people who, by objective, material standards, lived what was readily defined as a “primitive” lifestyle. However, growing concern about the sustainability of western, industrial societies, coupled with increasing interest in indigenous spirituality, environmental knowledge, and cultural wisdom, altered this social equation. Peoples once relegated to the margins of human thought, considered only as a living remnant of a collapsing world order, were increasingly viewed with admiration and respect. Outsiders sought now to learn from indigenous peoples, and to gain access to the wisdom of the ages contained within the language, world-views and environmental sensitivities of traditional societies. On top of this, non-indigenous peoples were challenged by the evident economic poverty and social distress evident in indigenous communities in contact with settler populations. The combination of concern and respect proved to be a potent international force for change, intersecting with a growing awareness of the legal, political and moral rights of indigenous peoples to a more equitable share of the land, resources and administrative powers of the modern states within which they resided. There were limits, however. As other movements (women's rights and environmental) discovered, resistance developed when the indigenous rights campaigns appeared to be gathering strength.

Although the pressure to address First Peoples' rights emerged from broad social and political forces, the resolution of indigenous land claims and rights will, appropriately, rest within specific regional and national cultures. The Canadian solution of First Nations claims will be markedly different from Brazil's resolution of Yanomami rights and aspirations. Australian Aborigines will, of necessity, find a resolution of their legal and moral claims through the Australian judicial and political systems. And efforts by the Ainu to find a measure of social and cultural justice will focus on the Japanese system. In each instance, the international community (through the United Nations, Indigenous Rights International, church groups and other interested parties) will keep a watching brief on national developments and will, on occasion, intercede in an attempt to press the issue forward. Throughout this process, however, it is vital to remember that behind the national and regional desire to settle land claims rests an ideology and infrastructure of international pressure that has, since World War II, given the indigenous land claims movement much of its authority, power and determination.

Economic Aspects: In the 19th century, the expansion of settler societies from Europe saw the incorporation of vast tracts of indigenous land into newcomer jurisdictions and the mass dislocation of indigenous peoples. On all continents, the new arrivals used various methods to push the inhabitants aside. In some

quarters, military conflicts and wars of extermination cleared the way for settlement; in others, formal treaties were signed with the First Peoples (and then often ignored), legally opening large areas for agricultural development. In still other areas, the indigenous people were simply neglected or shunted aside, not deemed worthy either of careful attention or military action. In rapid fashion, many of the world's undeveloped temperate zones fell to the logger, farmer, rancher and settler.

Following World War II, the rapid expansion of the industrial economies of the western world created tremendous demand for raw materials -- timber, minerals and hydro-electric power. While the first priority was on developing readily accessible resources, high prices and seemingly insatiable demand made resources in isolated districts commercial viable. In remote districts from Alaska to Brazil and Scandinavia to the outback of Australia, developers moved into hitherto little-known land. The indigenous peoples in these areas, spared by distance and isolation from direct incorporation into settler societies, found themselves facing the direct incursions of industrial development in their traditional territories. For national governments and non-indigenous peoples -- particularly before indigenous rights developed a strong following -- the trade-off between dislocating a small number of hunter-gatherers and adding to the nation's prosperity was easily resolved. In many states, some of the wealth thus generated was, indirectly, returned to the indigenous peoples, now suffering through serious dislocations and often a loss of livelihood, in the form of transfer payments and government programs.

The economic imperative has maintained its strength since the end of World War II. In the 1970s, the Canadian government faced a major choice between permitting the construction of a pipeline down the Mackenzie River Valley and the lifeways of the Dene people. The pipeline project was stopped, although as much for economic reasons as for concern for the Dene. To the west, in Alaska, the determination of the U.S.A. and Alaskan governments to proceed with the construction of an oil pipeline from the North Slope to Valdez was the prime impetus behind the Alaska Native Claims Settlement Act, a legislative effort to clear the way for development by settling outstanding aboriginal claims. The Sami in Scandinavia found their traditional ways of life threatened by major hydroelectric projects and forestry developments -- a classic conflict between indigenous requirements and national economic aspirations. In Brazil, where the struggle of the Yanomami for cultural survival has attracted considerable international attention over the past twenty years, the debate was sparked by the incursions of gold miners, highway developers and loggers into traditional territories. In more recent years, the expansion of resource developments (largely, but not exclusively, logging) in Thailand and Malaysia have brought economic decisions and priorities into conflict with long-isolated indigenous peoples and unique eco-systems. Indonesia, in a replay of 19th Century situations, has extended its agricultural and settlement frontier into Irian Jaya, thus bringing settler developments into the homelands of indigenous societies that, for many decades, voluntarily restricted contact with the industrial world.

Economic expansion, often the source of conflict between indigenous and non-indigenous peoples, has also long served as the starting point for negotiations over land claims. Governments, particularly in the developed world, have been anxious to resolve any existing indigenous claims, particularly legal ones, before proceeding with major projects. For many years in British Columbia, Canada, supporters of land claims negotiations claimed that over $1 billion/year in economic activity was lost to the province due to the uncertainty surrounding aboriginal land rights. And the Canadian government, for years, made no secret of the fact that economic uncertainty was the prime motivation for federal efforts

to resolve northern Canadian land claims. International pressure, mobilised in support of indigenous societies threatened by development projects, has been exerted on governments in Brazil, Thailand and elsewhere in attempt to secure appropriate settlements before serious dislocations attended major development initiatives. The global campaign targeted at the governments in the Amazon basin is perhaps the best example of a concerted international effort using the prospect of boycotts and international disapproval as a means of gaining a land claims settlement for an indigenous group.

Where land claims settlements have been reached, particularly in Canada, Alaska and northern Australia, the passage of time reveals that economic development is compatible with viable land claims deals. In the case of the James Bay Agreement in northern Quebec, for example, the land claims settlement cleared the way for a massive hydro-electric project. The agreement provides the James Bay Cree and Inuit with the financial and administrative means to respond to the economic and social changes affecting their communities, and also included a major trapping initiative designed to support a continuation of traditional harvesting activities. Similarly, land claims agreements across the Canadian North, Alaska and the Northern Territory, Australia provided governments and developers with the kind of certainty that they sought as a condition of entering into agreements, while also giving indigenous groups the resources they required to sustain their communities and to respond to changing circumstances. In several areas, local business leaders (initial opponents of the claims process) became cautious supporters of the land claims process, recognising that settlements would contribute significantly to local and regional economic development. In the case of the Northern Territory, for example, royalty payments to Aboriginal groups arising out of the Aboriginal Land Rights (Northern Territory) Act significantly increased the amount of money remaining in the area due to mining activity.

An unexpected symbiotic relationship has developed between economic development and indigenous land rights. The prospect of major resource and industrial projects in remote regions has often spurred indigenous groups and their supporters to protest and demand settlements. Governments have, in turn, responded to the demands for land claims agreements, at least in part, to eliminate the uncertainty surrounding development and to stay the hand of national and international protesters. Ironically, then, as the experience of existing settlements indicates, the resolution of land claims has not prevented economic development, including such major projects as the Alyeska Pipeline in Alaska, from proceeding and has actually contributed significantly to regional economic improvement.

International Organisations: That indigenous rights have advanced as far as they have on the international agenda is due, in large measure, to the activities of international support groups. Indigenous peoples have long had their advocates, initially within the confines of Christian churches and among peoples interested in exotic and “primitive” peoples. These groups often took a fatalistic approach to the future of indigenous peoples, assuming that they would either vanish in the face of the settlement frontier or, somewhat more optimistically, be absorbed into a more “civilised” society. At times, these groups supported indigenous peoples in their demands for attention to their land rights; anthropologists, for example, played a major role in establishing a large preserve for Aboriginal peoples in the Northern Territory's Top End. Although interest often originated with the assumption that these were “dying races,” supporters nonetheless pressured governments to protect the indigenous peoples from the negative effects of settler societies (particularly the introduction of alcohol and interracial marriage) and demanded that steps be taken to ease the process of assimilation.

After World War II, the focus and direction of international organisations shifted toward support for the preservation of indigenous societies and indigenous land and legal rights. The global impetus came largely from the formation of the United Nations, a pivotal development in the growth of an international consciousness, and the passage of the International Convention on Human Rights, which established the fundamental importance of self-determination and lay waste to the assumptions of cultural colonialism and superiority. A United Nations study on treaties with indigenous peoples and the creation of the United Nations Working Group on Indigenous Populations provided indigenous societies with a vital political forum for presenting their case to the international media and helped raise the profile of indigenous issues. The drafting a declaration on indigenous rights, now working its way through the UN system, was a further step in this direction. Through the UN meetings, indigenous groups found considerable national and international support for their cause, founded primarily on the new international ethic of human and cultural rights; meetings of the Working Group brought together dozens of indigenous representatives and a similarly large number of church, environmental, social justice, humanitarian, peace and legal groups anxious to support the indigenous agenda. The global campaign for respect for the dignity of different cultures provided an important support mechanism for indigenous groups seeking attention to their long-standing grievances and complaints.

The 1960s and 1970s saw a proliferation of organisations and groups dedicated to the support of indigenous land claims and rights. Indigenous peoples, themselves, created international associations designed to coordinate actions, provide mutual support, and expand understanding of developments in other parts of the indigenous world. Through such organisations as the Inuit Circumpolar Committee, International Indian Treaty Council and World Council of Indigenous Peoples, First Peoples established international networks, shared information and ideas, lobbied governments and other international organisations, provided logistical support and educational initiatives, and otherwise sought strength in unity, shared experience and common cause. Indigenous peoples, who would have properly been counted among the most locally-centred of all societies in the decades before World War II, quickly became foremost citizens of the global community, capitalising on indigenous contacts, media connections, and pooled resources in a way that few other groups accomplished.

Through this same period, a number of support groups emerged, formed largely by non-indigenous peoples but sharing a common commitment to the resolution of indigenous land claims and securing greater attention to indigenous cultural rights. These groups came in many sizes and shapes, from small regional and national associations to well-financed international organisations. They originated in the churches, most of which moved sharply away from their assimilationist agendas in the 1960s and established themselves in solidarity with the indigenous peoples' aspirations for cultural survival, among academics, and in political organisations (particularly of the left, anti-colonial movements). The larger groups, like International Work Group for Indigenous Affairs, Survival International, Cultural Survival, Centre for World Indigenous Studies, and the Fourth World Documentation Project play a vital role in collecting information, keeping government and support agencies informed of developments, working closely with the media to cover stories of urgent importance to indigenous peoples, and lobbying nationally and internationally to seek a successful resolution of indigenous claims.

Indigenous peoples also found common cause with other organisations on a case by case basis. Environmental groups maintained a strong watching brief on indigenous movements over the past quarter-century, working to prevent major resource developments and counting on indigenous peoples to use the land and power gained

through land claims settlements to advance a conservationist agenda. Many other international organisations, from Amnesty International to numerous third-world development agencies, have linked with indigenous groups, responding to human rights abuses, conditions of poverty, and social and cultural unrest. Once as politically isolated from the international community as they were physically remote, indigenous peoples have found ready support from dozens of international organisations and have developed exceptional abilities for capitalising on the political and media acumen of these groups to further their cause.

Issues that only thirty or forty years ago would not have reached beyond the immediate locale, and would have scarcely made a dent on the international consciousness are now, through the indigenous organisations and networks with affiliated groups, quickly brought to the world's attention. While the effort is far from uniformly successful in achieving the desired result, indigenous peoples have learned the simple lesson that isolation (which often proved essential to their cultural survival) is politically risky in the contemporary world. The ability to mobilise international organisations, though a recent development, has assumed a pivotal role in the struggle of indigenous peoples to secure just settlements to their land claims and appropriate attention to their rights as First Peoples.

Legal Aspects: While much of the debate about indigenous rights has been waged over matters of social justice and public morality, a great deal of the struggle has focused on legal approaches. The development of international protocols on indigenous rights, a feature arising from the establishment of the United Nations and the growth of international organisations generally, have provided indigenous groups with access to the World Court, the United Nations and the court of international public opinion. To date, however, such appeals have been successful only in pressuring governments to conform to the spreading consensus on the need to address the rights and aspirations of indigenous peoples, and have not had much effect in giving First Peoples resource to national legal institutions and processes.

In several countries, most noticeably those associated with the British Empire, 18th and 19th century legislative and governmental actions have provided indigenous groups with legal foundation for petitioning for attention to their claims. (Importantly, indigenous groups in these and other countries do not have an opportunity to establish their claims under their laws and customs; rather, they are compelled to work within the legal and legislative framework established by the settler states.) That New Zealanders have accepted the need to deal with Maori aspirations and demands is due, in large measure, to the existence of the 1840 Treaty of Waitangi, a document negotiated between British officials and Maori leaders and which laid the foundation for a bicultural nation. The Treaty of Waitangi was largely ignored subsequent to its signing; the re-birth of indigenous rights in the 1960s and 1970s convinced the New Zealand government of the need to honour its own legal agreements. Thus, the Treaty of Waitangi Commission was established and a lengthy process of appeals and claims launched. Across the Tasman Sea in Australia, the government long clung to the argument of *terra nullis*, which held that no title existed to the land of Australia before the coming of the European settlers. The partial over-turning of this position in the Mabo decision of 1992 (slightly revised in a subsequent court ruling) convinced the government of the need to honour its obligations before the law. Similarly in Canada, outstanding obligations under the Royal Proclamation of 1763 and subsequent British and Canadian legislation forms the foundation for Canadian actions regarding indigenous land claims in the North and in British Columbia.

Through the 1970s (beginning with the 1973 Calder case in Canada , which saw the Nisga'a lose their main argument but gain a partial admission that the

government had a legal obligation to negotiate treaties) and into the 1980s, comparative liberal courts and governments in Canada, Australia and New Zealand pushed forward the cause of indigenous peoples. A series of decisions on land and resource rights advanced the First Peoples agenda, while giving indirect support to indigenous peoples in countries without similar historical legal obligations. The process, while not without its victories for indigenous groups, proved to be extremely time-consuming and costly. The "winner take all" potential of the legal process, best exemplified in the unexpected American court decision concerning fishing rights in Washington State, added to concerns among indigenous and non-indigenous people alike about the suitability of the courts as a means of resolving complex cultural and historical debates. In what was a potential turning point in the recourse to the courts, the case of the Gitskan-We'etsheweten was denied by Chief Justice Alan MacEachern of the British Columbia Supreme Court. In an ethnographically controversial final decision, MacEachern also urged the governments of Canada and British Columbia to seek a negotiated solution to the land claims issue, suggesting that the court system was not the appropriate venue for resolving such disputes. The Mabo decision, the legal implications of which are not completely clear, has generated a similar sentiment in Australia.

National legal structures, as indigenous groups have repeatedly discovered, are charged with implementing and protecting the laws of the national state and are not established to pursue abstract notions of social nd cultural justice. Passionate pleas for support for indigenous positions have often been set aside on technical and legal grounds, as the courts are required to do. As yet, most international legal avenues lack the potency and impact necessary to force national governments into compliance with their decisions. In a few countries, long-established legal doctrines or legislative initiatives provide indigenous peoples with an opening through which they can pursue their case in a national and legal forum. The experience in this regard has been far from even, with occasional indigenous victories more than off-set by difficulties of implementing court decisions, the high financial and personal costs of pursuing a court challenge, and the inherent uncertainty of the legal process. The court option remains, for a small number of indigenous peoples, a last recourse, should negotiations with governments fail; in most parts of the world, however, the national court system holds little opportunity for success, given the limited historical attention to the rights of indigenous peoples.

The Contemporary Situations: Issues such as indigenous land claims and rights lend themselves to a "scorecard" approach to reportage. How does one country compare to the other? Certainly, individual countries approach indigenous claims with at least one eye occasionally glancing at the international scene, either anxious for approval or wary of criticism. That international pressure can be mobilised at the political, non-governmental, or economic level in support of indigenous rights adds to the imperative to settle or, somewhat more cynically, to appear to be interested in negotiating a resolution to indigenous claims. There is, then, a great deal of action on the international scene, as indigenous groups, national governments, and support agencies seek a resolution of indigenous claims.

The liberal democracies, buttressed by an ideological and political predilection towards equity and fairness, have made significant strides towards resolving the issue. Beginning in the early 1970s, there have been land claims settlements in the United States (the Alaska Native Claims Settlement Act, 1971), Canada (the James Bay Agreement, 1976, the Inuvialuit Final Agreement, 1984, Council for Yukon Indians Agreement, 1993, Nisga'a, 1996 and other groups), Australia (the Aboriginal Land Title (Northern Territory) Act, 1976), and New Zealand (Tainui/Waikato Settlement Deed, 1995). These agreements came, in the main, after

lengthy and costly negotiations, and are now at various stages of implementation. Settlements have tended to build one upon the other; the initial difficulties with the Alaska agreement convinced other indigenous groups to avoid settlements of that type (organised around Native corporations); they have, as well, come first in remote and territorial regions, areas with predominant federal government control and with comparatively few third party interests. A major exception to the trend is the Waikato/Tainui Settlement Deed, signed in October 1995, which covers the densely-settled Waikato farming district on New Zealand's North Island.

While social, cultural and economic conditions for indigenous peoples in the western democracies are far from ideal -- the social pathologies of cultural dislocation and ethnic tension continue to exact a stiff price on the First Peoples in these countries -- the governments have established a legal, legislative and financial record of attempting to address the difficulties. The Canadian government, for example, sponsored a long and detailed Royal Commission investigation into the state of aboriginal societies in the country; the final report is expected shortly. Governments in Scandinavia have sought ways to provide the Sami with greater access to and influence over the political system. The New Zealand government has pursued a relatively aggressive biculturalism policy and has put considerable effort into the Treaty of Waitangi Commission. And the Australian government (recently removed from office in a national election) sought various administrative and legislative means to address the matter of unresolved indigenous land title and to provide support for aboriginal culture, language and social initiatives. While the situation is far from ideal, only the most cynical would deny that these governments (and others) are attempting to address the needs and aspirations of indigenous peoples. (The Ainu in Japan face rather different conditions. The Japanese government has historically provided little assistance to the Ainu, as they struggle to maintain their language and culture in one of the world's most homogeneous countries.)

In the developing world, conditions are far less propitious. In fact, while international organisations retain a watching brief on developments in Canada, Australia, New Zealand, Scandinavia and other liberal democracies, concern has increasingly focused on the small and threatened indigenous populations in other countries. The conditions bear stark resemblance to 19th century conditions in the liberal democracies: the imperatives of the industrial frontier push resource developers into hitherto little-known districts. As loggers move into new territories in Malaysia, Indonesia, and Brazil, and as mining operators seek to develop new properties in Papua New Guinea, the Amazon basin, and Siberia, their activities run up against the movements and ecological needs of indigenous populations, most attempting to preserve culture and language in the face of the many demands and incursions of the contemporary world.

In these settings, the imperatives of international protest, inter-governmental pressure, and indigenous organisations have achieved fewer results. Concerted and well-organised campaigns did enjoy some success in convincing the governments of the Amazon basin, principally Brazil, to set aside sizeable tracts of land for the exclusive use of indigenous peoples. Subsequent controls on non-indigenous activities proved less than ideal, however, leading to continued destruction of indigenous territory and considerable social and cultural dislocation. In many other parts of the developing world -- Malaysia, Thailand, India, Central America -- indigenous groups have been less successful in attracting international attention and in pressuring national governments to address their specific concerns and difficulties. Rather, the priority assigned to economic development has encouraged the construction of major infrastructure projects, the opening of forests to loggers, and the encouragement of mining

operations in hitherto isolated districts, often at considerable cost to indigenous peoples.

The Future of Indigenous Land Rights: Thirty years ago, indigenous rights and claims scarcely registered on the international political map. The mobilisation and internationalisation of indigenous peoples and the campaign to support their demands for social and economic justice and a positive resolution of land claims, a process which began in earnest in the 1960s and gathered momentum over the next two decades, vaulted the indigenous rights questions onto the world stage. Indigenous organisations, nationally-based and internationally-connected, worked with environmental groups, human rights groups and development agencies to draw attention to the cultural vulnerability and political isolation of First Peoples around the world. Public support increased steadily through this period, revealing a profound and widespread concern for the fate of indigenous societies in the face of continued industrial expansion, political incorporation, missionization and cultural domination. To a degree that would have seemed impossible only thirty years ago, indigenous rights emerged as a major political force on the international stage.

Where, one might legitimately ask, does the indigenous rights and land claims initiative go from here? There is some evidence from the western democracies that the balance may be tipping away from continued support for indigenous aspirations. Even as major land claims settlements are being finalised in Canada, New Zealand and Australia, a backlash is emerging, with the protests focusing on the continued entrenchment of “special status” for indigenous peoples, concern about the communities's capacity to handle self-government, and worry about the financial implications of major land claims agreements. As well, the continuation of radical political actions, particularly in Canada and New Zealand, have diverted attention away from the moderate indigenous leaders and given sustenance to those who would shut down the land claims negotiations. More than two decades of negotiations, public debates, and political controversies have not brought the widespread acceptance of the indigenous case that advocates had long hoped would follow. The situation in the developing world is even less optimistic. Here, the imperatives of resource development, spurred by the increasingly global pressures to locate and exploit marketable raw materials for the industrial world, clash against the aspirations of First Peoples and run counter to efforts to secure a successful resolution of indigenous claims. Given the steady increase in world demand for resources, a reduction in the pressure on indigenous lands and societies is unlikely.

The indigenous issue remains, as it has long been, a peculiar example of cultural politics. On one hand, indigenous groups have the opportunity to mobilise local and, perhaps even more importantly, international support for their stand to protect their lands and culture. On the other, these same groups have enjoyed little success in convincing governments and members of the dominant societies of the sustainability and significance of their culture and lifeways. Even in the western democracies, it is the indigenous appeal for distributive justice, their claim to special attention due to social and economic difficulties, more than their ability to convince non-indigenous peoples of the legitimacy of their culture that accounts for their gains at the negotiating table and in the political arena.

The situation seems, at times, to be distressingly simple. Indigenous peoples seek administrative powers, control of traditional land and, where the land is no longer available, financial compensation. But they seek these not as ends in and of themselves, but rather as a set of tools that they can use to strengthen and preserve their culture. For indigenous societies from the Arctic to the Amazon

basin, from the Australian outback to the west coast of Canada, the end goal is to be recognised as distinct cultures, valued as peoples, and given sufficient resources to ensure the basic right of self-determination and cultural survival.

The issue rarely plays out as simply from the opposite side of the table. Non-indigenous peoples, struggling with a different set of priorities and only occasionally sharing or understanding the aspirations of the First People, respond to the issue as a matter of distributive justice -- seeking to repay indigenous populations for lands confiscated and social dislocations caused -- and not as a matter of cultural survival; others simply wish to grant indigenous peoples the financial and administrative resources necessary to have them assume full responsibility for the full range of social, cultural and personal crises facing their communities. (This observation does not, obviously, apply to non-indigenous individuals and groups working directly in support of the indigenous cause; their interest in and support for indigenous cultural survival is patently evident.) The liberal impulse, which has generated sincere efforts to address economic and social inequalities and which lies at the root of most of the major land claims settlements, is only rarely connected to the belief that indigenous cultures are viable and valued elements of the human community.

There is, then, considerable evidence that international pressure and the actions of indigenous organisations can convince national and regional governments to address the political demands of indigenous peoples. There is much less evidence that non-indigenous peoples and governments are seeking a lasting accommodation between cultures; in fact, it could be argued that the emphasis on legal and constitutional rights -- often times the strongest political tool at the indigenous peoples' disposal -- shifts attention away from cultural accommodations and the prospects for compacts between dominant and minority cultures.

For thirty years, indigenous groups and their supporters have worked on the national and international level to gain attention for indigenous land claims and rights. Compared to that earlier period, when indigenous aspirations found little political favour, the current situation is far more favourable. Major land claims agreements in Australia, the United States, New Zealand and Canada, and significant political accommodations in Greenland, and Scandinavia represent the most promising developments. At the other end of the spectrum, indigenous groups in the developing world struggle to grab the international spotlight, sometimes with notable success, and to convince national governments of the need to address the pressing requirements of societies in jeopardy. Here, as in many other areas where the developed world has sought to extend its socio-political agenda to the rest of the world, results have been more mixed. Efforts in the Amazon basin, for example, to accommodate the needs of indigenous societies continue, although gains have often proven transitory. And in many other corners of the world, the press of development continues to encroach on indigenous societies.

At mid-century, only a few observers around the world worried about the fate of indigenous societies. Industrial expansion would, most assumed, either overwhelm or incorporate “primitive” peoples who could accommodate themselves to the inevitably of “progress.” As the end of the millennium approaches, that basic attitude has shifted dramatically. In many parts of the world, but particularly in the industrial states, the dismissive assumptions of the past have been placed with genuine sadness and concern about the fate of indigenous societies. Knowledge once ridiculed as irrelevant in the modern world is now viewed with considerable respect, even awe, in many quarters. And the sight of centuries-old cultures withering in the face of unchecked resource development and industrial expansion is increasingly

viewed as a scar on the modern world, an indication that untrammelled growth carries very real and dramatic social and cultural costs.

The challenge rests not with public concern or social sensibilities. Evidence from many corners of the globe makes it abundantly clear that dominant societies can be mobilised to support indigenous rights and reveals that solutions can be found to the challenges facing indigenous peoples. The difficulties lies in transforming social concern into lasting political and administrative action. Resolving the problems of indigenous-newcomer encounter requires money, and a willingness to share fiscal resources, to allocate lands to exclusive indigenous control, and to share administrative power with First Peoples. It is here, in the nuts and bolts of land claims negotiations and self-government discussions, that the philosophical and cultural meets the pragmatic, legal and administrative. The real test of public and political resolve occurs as final settlements approach, for to accommodate indigenous aspirations invariably means a diminution of economic, social and administrative options for the remainder of the population.

Accommodating the aspirations and needs of indigenous peoples ideally proceeds through two stages: a public acceptance of land claims and, for the deal to have lasting significance, a willingness on the part of the dominant society to accept, tolerate and celebrate the cultural distinctiveness and survival of the First Peoples. For thirty years the first struggle has been waged. If the effort has been less than a complete success, it has nonetheless been greeted with considerable achievements on the national and international level. But the effort continues at two different levels: convincing recalcitrant governments of the need to respect indigenous aspirations and, more generally, ensuring that technical agreements become the foundation for a lasting social, cultural and political accommodation between indigenous and non-indigenous peoples.

When, and if, a cultural compact between indigenous and non-indigenous societies is achieved, then the global struggle for indigenous rights -- a contest that had its roots in the desire to ensure the survival of the diverse and vital indigenous cultures of the world -- will have achieved its main goal. The evidence from the late 20th century is that the struggle is far from over, and that the threat to the viability of indigenous cultures in many corners of the globe remains desperate and serious. The challenge facing indigenous groups, national governments, and international organisations is to ensure that the struggle for social and cultural justice is not overwhelmed by political and economic considerations, and to maintain the emphasis on the importance for all peoples of the cultural survival of indigenous societies. The task, ultimately, is to transform the broad philosophical support for indigenous cultures into pragmatic legal and administrative agreements; it is a challenge of fundamental global importance, and one that merits great attention from political leaders, social activists and observers around the world.

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Introductory note

The following notes are intended to offer, very briefly, an initial view of the status of the legal transfer of land to the indigenous peoples of the Amazonian countries (Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela) and of the legal instruments available to these States and to the indigenous peoples themselves for the adoption and implementation of the governmental acts which define

such rights. With only this perhaps somewhat capriciously stated purpose in mind, the author has divided the topic up around the following five points:

- A brief presentation of the status of the legal transfer of land in the Amazonian countries;

- Some thoughts on the possibilities offered to the indigenous peoples by the constitutions of the Amazonian countries for claiming and exercising their special rights;

- A very brief overview of the substantive legislation on recognition of indigenous land rights;

- An equally brief outline of the types of legal procedure used in the Amazonian countries to improve the legal transfer of land to the indigenous peoples, in an attempt to show their advantages and limitations;

- For reasons of time and space there is no discussion of the legal situation with regard to natural resources, but this topic is the subject of two notes which seemed essential in view of the seriousness of the current problems of the indigenous peoples in this matter;

- And, lastly, it was thought necessary to mention the question of the internal government or self-government of the indigenous peoples and communities, which is indisputably linked to their possibilities of survival and progress and to the protection of their ownership of their lands;

The text as a whole is based on research carried out by the author for the interim secretariat, which has its headquarters in Lima, of the Treaty of Amazonian Cooperation concluded in early 1995.

Status of the recognition of the right to land

The figures relating to this issue are contained in the table in annex 2 and provide the basis for the following comments:

With the exception of Surinam, which only recently secured its independence from the colonial Power and is feeling the effects of the consequent political difficulties and adjustments, the other Treaty countries have made more or less intensive and continued efforts with respect to the legal transfer of land to the indigenous peoples. It should be pointed out that in most of the countries these efforts were begun in the 1960s pursuant to the provisions enacted and programmes adopted to promote the agrarian reform introduced during the "Alliance for Progress".

Since the initiation of these programmes in the early 1960s, a period of about 30 years, the area of land legally transferred or recognized as belonging to the indigenous peoples of the Amazon Basin totals, according to the available information, roughly 1,042,929 km2 (104,292,972 hectares, with 485,135 indigenous beneficiaries, representing 53.03 per cent of the indigenous population of the region. This percentage also means that, of the total indigenous population of Amazonia, 429,556 persons (46.97 per cent of the total) are still awaiting the legal transfer of their traditional lands.

It should be pointed out that, with respect to the area of land legally transferred to the countries' respective indigenous populations, Brazil occupies first place with 71,870,085 hectares, representing 68.95 per cent of all awards of

land to indigenous peoples in Amazonia. Brazil is followed in second place by Colombia with a total of 20,690,610 hectares, representing 19.84 per cent of the land legally transferred. This means that these two countries, which together account for only 38.89 per cent of the population enjoying legal exercise of their land rights and 25.8 per cent of the total Amazonian population, have provided 88.75 per cent of the land awarded so far to the indigenous peoples of Amazonia. The remaining 11.25 per cent of the transferred land consists of awards made by the other Amazonian countries, with the exception of Surinam mentioned above. These five countries (Peru, Ecuador, Bolivia, Venezuela and Guyana) have transferred respectively 3,901,103, 3,459,916, 2,532,500, 1,305,843 and 532,015 hectares, representing in the same order 3.74, 3.32, 2.43, 1.25 and 0.51 per cent.

With regard to the absolute numbers of recipients of the legally transferred land by country, Peru, Brazil, Ecuador, Colombia and Guyana, in that order, have transferred land to 133,536, 131,381, 79,500, 56,263 and 41,339 persons; in terms of percentages of indigenous populations this means 62.10, 80.53, 58.15 and 73.43 per cent respectively. Venezuela and Bolivia, in that order, have figures of 18.91 and 15.25 per cent, significantly lower than the figures for the five countries mentioned initially.

One striking aspect of the analysis of the figures contained in the table in annex 2 is the disparity of land areas and population numbers which emerges from a comparison of the figures for the various countries. Brazil, for example, in order to resolve the land situation of 131,381 of its indigenous Amazonian people, has transferred 71,870,980 hectares to them, an average of 547 hectares per person, whereas Peru, in order to meet the requirements of an indigenous population of 133,536, 2,155 more than in the case of Brazil, has transferred a total of 3,901,103 hectares, an average of 29 hectares per person. The figures for registered transfers in Guyana give an average of a little under 13 hectares per person; the average in Bolivia is 105, in Colombia 357, in Ecuador 44, and in Venezuela 69.

The wide differences between the countries no doubt have reasonable explanations closely linked with the quantity and quality of the land available for transfer in each country, with the degree to which the economic model is adapted to traditional patterns of food supply or is based on the Western patterns adopted by the indigenous peoples under the influence of settlers from outside, and with the diversity of legal procedures used by the States to transfer land ownership to the indigenous peoples. But, aside from all these possible explanations, the magnitude of the differences in the areas of land transferred and the emergence of these same differences in cases whose handling would seem to indicate the adoption of roughly similar forms or models of transfer point to the use, by the countries in general and even within a single country, of widely divergent criteria in the determination of the strategies and plans for the conveyancing of indigenous lands; these differences seem to have no other explanation than the lack of clearly defined policies and action strategies, agreed with the indigenous peoples themselves, which would safeguard the indigenous land transfer plans and programmes against the hazards of administrative changes in the public bodies dealing with indigenous affairs.

Problems are certainly apparent from the available information, which shows that almost 50 per cent of the indigenous Amazonian peoples still do not have the legal conveyance documents which would help them to assert their ownership of the land and exercise their rights of use and exploitation without interference by outside sectors of society or sectors hostile to their interests. The problem is a serious one in view of the established fact that the legal transfers completed so far represent the investment of over 30 years' work, whereas the processes of

occupation and displacement carried out by non-indigenous persons on much of the traditional indigenous land are certainly moving much faster than the procedures in many public agencies. It is also serious because, except for Colombia and Brazil, where the proportion of the indigenous Amazonian population without land awards does not exceed 20 per cent in Colombia and 23 per cent in Brazil, the countries have large numbers of people whose claims have not been dealt with, including three countries warranting priority attention: Surinam (100%), Bolivia (84.75%) and Venezuela (81.09%). Nor does it seem inappropriate to note at this juncture that very many of the indigenous people who have so far not received attention, according to the data available in the countries, seem to live in areas severely affected by the advances of outside settlers and the exploitation of forestry, mineral and other resources - a circumstance which renders them defenceless against the constant threat of displacement and dispossession.

Serious consideration must also be given to the factors which restrict the possibilities of use of the land already transferred. There are several such factors, including the small area of many of the land transfers, which seriously constrains the possibilities of biological and cultural reproduction of the indigenous groups to which the land has been transferred. This is true of many of the land awards made in the Amazonian regions of Peru and Venezuela. But even in a country such as Colombia, where the State can point to very high figures for legally transferred land, there are still found, in the Amazonian departments of Caqueta and Putumayo, reserves of indigenous land with areas which amount to nothing more than smallholdings, insufficient even for the type of economic use imposed by the settlement model.

A second factor which limits the land rights accorded so far to the indigenous Amazonian peoples is the occupation of much of the land by non-indigenous people, some of whom settled there before the transfer of the land, and by others who arrived thereafter. And it has been established that there are some factors which favour the irregular occupation of land transferred to the indigenous peoples: the lack of accurate physical delimitation of much of the land awarded in the titles; the lack of fences or public notices stating that ownership or occupation of the land has been granted to indigenous persons; and the general lack of arrangements for legal hearings and support of the claims of indigenous persons by the local and regional agencies of the political-administrative authorities in whose jurisdiction the land is located.

Indigenous peoples and constitutions: progress and failures

The countries' constitutional provisions on indigenous peoples are neither unified or uniform. However, there are two main tendencies in the Amazonian region. The tendency in some countries, such as Bolivia, Brazil, Colombia and Peru, which have adopted to a greater or lesser extent regulations defining a new model of the relationship between society at large and the indigenous peoples, under which the latter are accorded the status of societies which are culturally different from other sectors of society and are guaranteed a number of basic conditions for the maintenance of these differences which form the basis of their identity. The second tendency is found in the other countries - Ecuador, Guyana, Surinam and Venezuela - which have either not adopted legislation stipulating different treatment for a sector of society, as appears to be the case in Surinam, or have adopted legislation which, while recognizing the existence of the indigenous communities, contains provisions including some kind of measures for the gradual incorporation of these groups into the society at large. This is the conclusion to be drawn from the constitutions of Ecuador, Guyana and Venezuela.

The common principles of the constitutions of the countries of the first tendency are: acceptance of the nation's cultural and ethnic diversity; recognition of the validity of and national interest in protection of the cultural heritage of the indigenous peoples as part of the country's heritage; recognition of the right of these peoples to obtain title to their traditional lands and to use and exploit them; and establishment of their legal capacity to manage their own lands with some degree of autonomy.

Some initiatives have been taken by the indigenous communities of Ecuador and Venezuela, without obvious results so far, to secure constitutional reforms which would accord them similar rights to the ones recognized in the countries mentioned above.

The Constitution of Guyana contains only a provision according the Amerindian communities the right to land, but the so-called Act of the Conference of Independence of Guyana of 1965, which, as the text which gave birth to the independent State, forms part of Guyana's fundamental statute, approved a decision of the Government which acknowledged its responsibility to grant the Amerindians under national jurisdiction legal ownership of the reserved areas where any tribe or community of Amerindians (the terms used in the legislation itself) lives or has settled, together with other legal rights, such as the right of transit. Surinam has no specific legislation recognizing or guaranteeing special indigenous rights, but in the Agreement on National Conciliation and Development signed in August 1992 by the Government and the insurgency movement the Government made a commitment, as yet unfulfilled, to enact legislation on recognition of the land rights of the Amerindian communities and to ensure that Surinam acceded to ILO Convention No. 169, of 1989, on indigenous peoples.

Indigenous peoples and land in ordinary law

The Latin American countries are relatively uniform in their acceptance of some kind of legal responsibility to guarantee the indigenous peoples the right to some form of peaceful occupation and use of land. But this uniformity is indeed relative in that in the countries in general, and even within one country, there are two basic modalities of granting title to land, depending on whether the beneficiaries are recognized as a social group differentiated from the rest of society, whether the granting of title is seen as a means of safeguarding their survival in the long term, or whether the beneficiaries - individuals or groups -are regarded merely as possessors of a traditional interest.

Under the first modality of granting land the transfer decision has a long-term effect. This type of transfer may take various forms, depending on whether the title conveys full ownership, whether the State grants a right of perpetual use while itself retaining ultimate ownership, whether it merely accords a right of usufruct for an unspecified period, i.e. a right which may be revoked at any time at the wish of the State, or whether the award is simply declaratory because the State lacks the full legal capacity to override the modalities and restrictions imposed by the Civil Code.

Under the second modality the awards confer on the beneficiaries the same powers as ordinary titles conveyed between individuals or titles granted to individuals by the State. The new owners or title-holders may freely dispose of the property, encumber it to meet contractual obligations, or even lose it if they leave it abandoned for the legal period which entitles a new occupant to obtain positive prescription in his favour. In other words, land transferred under this modality is alienable and liable to encumbrance and prescription. Under this modality the land is usually granted in full ownership. But in some cases the award is merely

of temporary usufruct with the expectation of subsequent transfer of ownership, subject to the satisfaction of various requirements (often the economic exploitation of the property).

With many variations between countries and even within a single country, the Latin American States have been awarding forest land and natural farming land to the indigenous occupants in accordance with one of these two main modalities. The choice of the type of transfer is determined, from the strictly legal standpoint, by whether the State has a legal regime which can serve as a framework for the legal functioning and administration of ownership and the management and use of the land by the indigenous peoples. In the absence of such a regime or of the possibility of using in its stead the traditional methods of indigenous land management, the titles of ownership will necessarily remain subject to the regime of alienation, encumbrance and other ownership restrictions and of inheritance and other matters which governs ownership in civil law.

It might be pointed out that in the first phase of the development of "modern indigenous land legislation" (the legislation enacted in the past 30 years) the usual method of granting land to peasants who came to the region as settlers was by means of titles issued in accordance with the civil law. Some proportion - difficult to measure - of the land awarded thus far was transferred by this method. And it is still used in some cases. In Venezuela it is the only legally acceptable means of transferring land to the indigenous peoples. Ecuador has a wide range of legal modalities for granting land: individual titles, communes, cooperatives, centres, associations of centres, ethnic territories, etc. With the exception of the last modality, which is discussed later, the others lack, to a greater or lesser degree, a sound and clear regime placing them outside the scope of ordinary civil law. In Bolivia the granting of land to indigenous peoples in accordance with the modalities of civil law continued until the end of the 1980s. And in Colombia awards of this kind are still found, in the form of the so-called indigenous reserves and a few of the so-called communal enterprises (empresas comunitarias).

Land transfers under civil law have had advantages and disadvantages. The advantages include the balance established between the indigenous beneficiaries and a country’s other owners in access to credit services with the use of titles as collateral; there is also the point that titles which confer on their holders the capacity to dispose of the property foster a greater sense of responsibility for care of the property; and, similarly, the granting of titles without restrictions on disposal avoids the risk of condemning individuals or groups in perpetuity to one form of ownership, which could turn out to be discriminatory or even unconstitutional.

The disadvantages include the frequent dishonest dealings with indigenous persons in the sale of land granted to them by the State with negotiable titles, owing to their unawareness of the land’s monetary value. There is also the severe undermining of traditional indigenous inheritance laws through the imposition of the procedures provided in civil law. And there is the risk of subdivision of the land faced by the co-owners of a property transferred in accordance with civil law, and the possibility that one or more of them may decide to dispose of his or their part by sale or to mortgage it. Another disadvantage is the risk of competition between co-owners to acquire larger bits of the common property. And of course there is the very high cost to the owners of land transferred in this way and of the settlement of disputes between neighbours, which falls within the competence of the ordinary civil-law authorities.

The alternative method of transferring land to indigenous peoples - on a

collective basis and subject to non-civil-law regimes - has been in use for some years in Brazil, Colombia and Peru. More recently, land has been transferred in this way in Bolivia and Ecuador and, with some important differences, in Guyana. Historically, there is nothing new in this method. It was essentially the method used by the Spanish Crown for the legal recognition of the lands of the native inhabitants. Following independence, many of the existing holdings of this kind were abolished by the republican Governments, but a good number of them survived in the Andean countries owing to their owners' resistance to the disposal measures. The decision of Brazil, Colombia and Peru to establish new areas for exclusive occupation and exploitation by their indigenous inhabitants, especially Amazonian peoples, was based, in part at least, on the principles of the old colonial system. For our purposes it does not matter what these new areas are called: they are lands placed by the law outside the scope of the private regime of free disposition.

But the collective indigenous lands intended to be held in perpetuity do not have in all the countries either the same characteristics or equal scope in economic, administrative and political matters. In Brazil, for example, the State transfers land to the indigenous peoples but retains ultimate ownership of it as "property of the Union" in accordance with article 20 of the Constitution, whereas in Peru agricultural or grazing land is transferred in full ownership and forest land "with rights of use", and in Colombia all types of land are transferred in full ownership, with no rights of ownership retained by the State and no distinctions made between areas on the basis of their actual or potential use.

Legal concerns have been expressed in Brazil about the implications, long-term effects and risks of retention of ownership of indigenous lands by the State of the Union. Some Brazilian lawyers think that this measure may provide some degree of security for the indigenous peoples and help them to hold on to their properties. There has also been some questioning of the Peruvian method of making distinctions between the types of right which may be accorded to the indigenous peoples, depending on whether the grant is of farming or forest land. The doubters wonder whether the decision not to transfer full ownership of forest land may be designed to allow the State the option of revoking such transfers in the future and using the land for some other purpose. This concern about the Peruvian model has been intensified by the most recent constitutional provision adopted by Peru, in 1993, which abolished the status of indigenous land as property which cannot be alienated or subject to distraint. With regard to this decision some indigenous groups have pointed to the danger of the resumption of the assimilation of indigenous land to land subject to the modalities of unfettered management and disposal provided in civil law.

The method of transferring indigenous lands on a general collective basis has advantages and possible disadvantages. Among the advantages is the fact that the indigenous peoples and communities themselves have always sought legal recognition of their traditionally occupied land as a whole, free of the risk of legal technicalities which may lead to its loss and with some degree of autonomy in its management; this method of transfer meets these conditions. Another advantage is that this form of transfer is suitable for the type of land which, in accordance with ILO Conventions No. 107 of 1957 and No. 169 of 1989, should be granted to the indigenous peoples of the countries parties to these Conventions; a further advantage is the benefit which this method can bring to the proper management of the environment and natural resources.

The potential disadvantages of this method include: the difficulties of the indigenous peoples or communities in obtaining bank loans with their land as collateral; the possibility that outside persons or entities, taking advantage of the powers conferred on the indigenous peoples in respect of the management of their

land, may make fraudulent or unfair deals with them and gain undue benefit; the danger that, since the indigenous beneficiaries live in a vast territory and have a degree of autonomy in the management of their internal affairs, the agencies responsible for the provision of services and the State, regional and local authorities may be prompted to neglect their responsibility to serve these peoples and communities. A detailed study of the potential drawbacks leads to the conclusion that, quite apart from these drawbacks, what is lacking in this collective model of land transfer is supplementary measures of support for the communities themselves in the proper management of their land.

A special case of collective indigenous land tenure is found in Bolivia and Ecuador where, in the absence of a special legal regime establishing for indigenous lands a management system separate from the civil law, the Governments have created these areas by means of exceptional administrative acts. A detailed review of these cases prompts the conclusion that these measures have full legal validity in both States since both have ratified ILO Convention No. 107 of 1957 and this international instrument has become law in both countries. Moreover, the decisions of the Bolivian Government have recently received double legal confirmation through Bolivia's accession to the new ILO Convention on indigenous peoples (No. 169 of 1989) and the approval of the recent constitutional reform incorporating in the Constitution article 171 on recognition of the communal land rights of the indigenous peoples.

Legal access to land: methods and procedures

As a general rule, the procedures for the award or legal transfer of land to indigenous peoples are consistent with the substantive legislation which defines or establishes this right. The countries which have introduced for indigenous lands a legal management arrangement separate from the civil law also have a specific procedure for the transfer of land to communities. And in the countries where the transfer is effected in accordance with the procedures of civil law, with all the possibilities of disposal, encumbrance and prescription, the legal transfer procedures are usually the same as the ones used for the transfer to individuals of uncultivated common land (baldías) or State land. For example, Peru, Brazil, Colombia and Guyana have legal procedures for processing indigenous claims which are entirely different from the procedures followed for the transfer of State land to other peasants; but Bolivia, Guatemala, Nicaragua, Ecuador and Venezuela, for example, generally have the same types of procedure for indigenous and non-indigenous persons, although the first three States have constitutional provisions, and even substantive legal ones in the case of Guatemala, requiring them to transfer collective land titles to the indigenous peoples.

The two systems have the following common features:

- The procedures are very lengthy, involving endless formalities, numerous administrative and technical agencies and top-level decision-making authorities which have to review the cases, and many different means of recourse available to individuals which can lead to hearings, referrals, reviews, reversals and ultimate rejections;

- The participation of the indigenous peoples in the existing procedures is almost or even totally non-existent, especially at the stages of study, review and final decision. The reasons for this lie partly in the legislation itself, which does not envisage such participation, and in the length and complexity of the procedures;

- Because they are lengthy and complex and partly because of the low level of participation of the communities concerned, the procedures are costly. This factor has become a very serious constraint on progress in the granting of titles in several countries of Latin America.

In the case of the civil-law transfer procedures, the situation in Bolivia, Ecuador, Honduras and Venezuela warrants special mention. And attention must be drawn to several problems:

The existence of common procedures for the processing of indigenous and non-indigenous applications limits or prevents the gathering of information on and the study of the situation of indigenous communities and, for the same reason, acts as a constraint on the formulation of proposals for land awards tailored to their characteristics and needs. In the countries in which this type of procedure has been used, the areas granted to indigenous peoples resemble the family plots granted to peasants.

Another factor to be borne in mind is that when the legal transfer of indigenous land is governed by the general rules for granting of rural State land, the indigenous beneficiaries are necessarily subject to the same requirements and restrictions as are imposed on all other recipients: amount of land, forest clearance, charges and taxes, and other obligations such as the commitment to use the land, etc.

And the last point on the requirement that land transfers to indigenous peoples must comply with the ordinary procedures relates to the inconsistencies which this arrangement often creates: in Bolivia, with the interference of several public agencies invested with the authority to review the administration of the procedures; in Venezuela, with the inability of IAN to transfer land in full ownership unless the land has been made available to it by the Ministry of Agriculture and Livestock for the purposes of agrarian reform; and in Ecuador and Venezuela, where it is impossible to transfer land located in areas under special administration.

The special procedures introduced to date, in countries such as Brazil, Colombia and Peru, for the transfer of land to indigenous communities have advantages and drawbacks in comparison with the ordinary procedures:

One advantage, once a special method for the legal transfer of land to indigenous peoples has been introduced, is that the various kinds of research undertaken in order to determine the viability of the transfer arrangements can, since it is specific, provide more solid grounds for and a greater likelihood of tailoring of the final decisions to the requirements and situations of the peoples in question. This also secures closer indigenous involvement at all stages of the process. And there is the additional advantage that the existence of a special procedure enables the indigenous peoples to take legal action against rejections or other decisions harmful to their interests, and once the procedure is concluded to seek reviews which may involve clarifications, amendments, adjustment of boundaries or areas, etc.

The drawbacks, in addition to the problems common to this type of procedure and to ordinary procedures (lengthiness of the process, excessive formalities, high costs, non-participation of indigenous applicants, etc.), include one which is closely linked to the defects in the substantive legislation on recognition of the rights: the lack of a machinery to ensure that the legal conveyance of the land does represent the real transfer of an actual piece of land, for it often happens that indigenous land is occupied by non-indigenous third parties (settlers, landowners,

exploiters of natural resources). In Bolivia, Brazil, Colombia and Peru part of the land legally conveyed to the indigenous peoples suffers this kind of occupation, and although some corrective action has been taken, the efforts are beset by great administrative, economic and political difficulties.

Land and natural resources

An issue closely connected with the legal transfer of land to indigenous peoples is that of the recognition of the rights of ownership, use, enjoyment and management of the natural resources of the areas in question. This is a matter in which the indigenous peoples of the Amazonian countries have made enormous efforts for clarification and legal regulation, but even a superficial presentation of this topic would require considerable space and time. It is therefore not something which can be dealt with in these notes, and the author has necessarily reduced his contribution to two brief points in order to draw attention to the vital importance of arrangements introduced in the future to resolve the evident current conflicts on this issue between the indigenous peoples and the States.

The first point is to emphasize the real long-term effects of the threat to the indigenous peoples of Latin America inherent in the current policy of most of the States of facilitating the exploitation of mineral resources without any regard to the disastrous impact on the economic, social and cultural life of the indigenous peoples which occupy much of the territory made available under contracts and concessions. One particularly worrying point is that very few of the countries have initiated the study and adoption of legal, technical and administrative measures for monitoring the activities of these mining companies in order to ensure that they respect the rights of the people and communities of the areas where they are operating, guarantee the stability of the environment and natural resources, and answer for any failure in the discharge of these responsibilities.

The second point is to highlight the evident contradiction between, on the one hand, the public declarations of political will made by most of the States, and even the will embodied in law, to ensure the full assertion of the rights of the indigenous peoples to the land and provide them with every guarantee of their survival and, on the other hand, the rejection of this position represented in practice by the administrative decisions and, to some extent, by the actual legislation on the ownership, use and management of the renewable natural resources of the indigenous lands. The fact is that the majority of the States, even those which have already granted the indigenous peoples title to their land, have failed to determine whether the indigenous peoples are indeed the owners or at least have an exclusive right to use of the resources of the land which belongs to them or over which they hold rights in law. This failure represents in practice a virtual denial of the right to the land, for ownership of the land without any real possibility of using its resources amounts to nothing more than a pro-forma or paper guarantee.

Indigenous land and self-government

Since the indigenous peoples have had their own forms of government in the past and since the management of the land granted to them so requires, this topic is about control of territory and must be treated as such. Two closely related issues are considered here: one is the scope of the power of the communities to establish their own forms of internal government and the recognition of the acts of such government by the legal order and the national authorities; the other is the

recognized legal capacity of the indigenous communities and their governmental machinery to act as juridical persons in their relations with other sectors of society. The legal definition of powers and competences on both sides guarantees to some extent, in the view of the indigenous organizations themselves and of the experts, that the communities which own the land will be able to manage it properly.

The countries have differing legislation in this matter. Colombia, Peru and Guyana have made progress in their recognition of the right of the indigenous peoples to have their own forms of government and they have delegated to them many of the tasks of land management. The constitutions of Colombia and Peru even confer on the indigenous or native authorities the exercise of jurisdictional functions within a legally established framework. And in Guyana and Colombia there is a possibility that the territories of the Amerindian or indigenous communities, depending on the case, may acquire the status of political-administrative entities. Although Bolivia and Brazil have not yet had any experience of legally recognized self-government by indigenous communities, the most recent constitutions of both countries leave this possibility open. Bolivia's Popular Participation Act includes very clear legislation along these lines.

Ecuador's legislation does not clearly recognize the capacity of the communities to act as subjects of law in the management of their affairs. However, in order to fill this lacuna the communities, in accordance with the modality of legal title to the land granted to them, have made use of the powers conferred on them by this form of ownership in order to manage their own territory: cooperatives, communes, centres, associations of centres, etc. But none of the communities possesses any legal powers beyond the management of land. For their part, the indigenous peoples occupying the so-called ethnic territories, a form of land tenure not covered in detail in the legislation, do not at present have any legal means of deciding matters of internal government and relations with other sectors.

Venezuela and Surinam have neither enacted legislation on the legal functioning of these groups nor adopted constitutional provisions allowing unfettered use of this option; nor does their legislation speak of any other types of land tenure or other forms of organization which would allow such groups to exercise their rights as communities.

Working paper prepared by Ms. Donna Gasgonia, Executive Director of the Foundation for the Philippine Environment

Executive Summary

Indigenous peoples have generally occupied the same territories since time immemorial and intend to continue this occupation in perpetuity until and unless there is divine intervention. With this long term perspective, or rather, longest term perspective, indigenous peoples adhere to values that consider land as "sacred" and not a mere commodity. For them, occupation is not accidental or dependent on human strength, whether physical or economic. Occupation is pre-determined by a divine being. Consequently, continuous occupation depends on satisfying the conditions or expectations of the divine being which almost always involves stewardship, biodiversity and sustainable development.

Most of the developing countries in Asia, like the Philippines, were former colonies of European nations and the United States of America. As former colonies,

the governments established inherited European and US laws that considered land as a commodity. Here lies the root of potential conflict in the treatment of ancestral domains by the State.

Indigenous peoples strove to develop their ancestral domains. Published articles about them tend to romanticize their efforts towards environment conservation to justify what is perceived to be their general apathy to economic goals. Yet there are indigenous peoples who have demonstrated their capability to pursue economic development while protecting and conserving the environment. Can they become development models merging economic and environmental goals for others?

I. Main Issues for Consideration

The present governments of developing countries in Asia are mostly molded from former colonial governments. Laws and policies on land reflect the interests of the colonial masters on this vast resource. Customary laws, on the other hand, stress the relationship of original occupants over what is considered sacred ground. There appear three points of clarification regarding the points of view of the State and the indigenous peoples on land. These are: (a) treatment of land as a commodity, (b) ownership of land, and (c) evidence of ownership. These can be reflected in the following table:

State	Indigenous People
Land is a commodity. It can be sold.	Land is a legacy from the Divine Being. It can only be transferred by succession but responsibility over it always remains with the indigenous community.
Land is owned by persons or entities. It can be used and abused by its owner.	Human beings are stewards of the land. We cannot abuse it.
Ownership of land is evidenced by an official document, the title to the land.	Stewardship of land is evidenced by human interventions towards development, such as, planted crops, protected natural forests, actual occupation.

1. Land is a commodity/Land is a legacy

The sale of land is an objective activity that is based on economic gain. Whoever offers the best value for the land gets the land. The fundamental element is the value given to the land and the ability of the "buyer" to pay for that value.

Land as a legacy designates the person or group who will have responsibility over it. The factors that led to the designation are solely determined by the Divine Being. Traditional stories mention male and female entities whose interaction produce the indigenous people. The male and female entities are somehow incorporated into the land where the indigenous people find themselves. Because of this, they must not leave the land unless there is divine intervention. Thus, the responsibility over the land is passed on from generation to generation.

2. Humans are the owners of the land/Humans are the stewards of the land

Civil societies often enumerate several rights by virtue of ownership. These rights include the right to use, transfer and abuse. Strictly speaking, the owner of the land has the right to abuse the land so long as the adjacent areas or neighbours are not adversely affected.

The concept of stewardship presumes diligence and precludes abuse of the land. As soon as the steward fails to meet the diligence required, other members of the group can designate another steward. The original steward can also voluntarily waive stewardship over the land and allow for a replacement.

3. Title as evidence of ownership/resource development as evidence of stewardship

The State, according to the Regalian doctrine or "by order of the Crown", owns and controls the land and all natural resources. Citizens or subjects must show that their ownership emanated from the State or the Crown. Initially, the documents effecting the transfer of land ownership from the Crown to its subjects were in the form of Royal Decrees and evolved into land titles where the original "giver" is the State. Possession of the land is not necessary to prove ownership. It is proven by the possession of the document, such as the land title, and a clear indication on the document of who the owner is.

Stewardship is acknowledged by other members of the group through physical indicators. The steward must show continuous development and prudent resource use to maintain possession of the land. Prudent resource use in many upland areas includes the fallow period for farmlots. Possession and constructive occupation evidence the existence of stewardship responsibilities over traditional territories.

II. Experiences from the Region

In the Philippines, vast tracts of ancestral lands were lost to concessions and agreements made by the State in favour of non-indigenous peoples. Historically, the first land-grabbers were the colonizers--people from Spain and the US. The present Philippines government succeeded colonial governments. It inherited colonial government policies and programs. This is probably true for most of the developing countries in Asia but with different colonial masters.

The main orientation of these policies and programs remain embodied in the present government policies and programs. Land, foresty and mining laws are the best examples of policies that cater to outside interests over and above the interests of the actual and traditional occupants. The subsisting peace and order problem in Mindanao, the second largest island in the Philippines, attests to the conflict brought about by the wanton disregard of the prior rights of occupants. Faced with this situation, the struggles of indigenous peoples have always been portrayed as violent.

A closer study would show that indigenous poeples have also initiated and pursued peaceful actions that resolved the seeming contradiction in the treatment of land. At the same time, historical records also show that most ancestral lands were never really penetrated by the colonizers and have remained intact in the hands of the indigenous people. It is only after World War II that the encroachment of some ancestral lands started.

Setting aside the issue of the war as a crucial factor in the encroachment that occurred from the 1950's, the fact that the colonial masters failed to assert dominion over many ancestral lands is important. It gives due recognition to the role that culture plays in maintaining the identity, and hence, the very existence of the indigenous community. Thus, the loss of cultural integrity, diminishing cultural pride and the progressive assault of alien culture would result in the loss of ancestral lands, even by peaceful means.

Mangyans of Mindoro, Philippines

At the micro level, the experience of the Mangyans of Mindoro reflects the plight of indigenous peoples in terms of ancestral land encroachment. There are several Mangyan sub-groups. The Iraya of the north have lost some 90% of their ancestral lands. Only a few elders proudly speak Iraya. Further south are the Buhid. They have a contiguous area that ignores municipal and provincial boundaries laid down by the national government. The Buhid continue to speak Buhid. Their elders also write Buhid script. Their neighbours, the Hanunuo also claim contiguous ancestral lands extending beyond municipal and provincial boundaries. They too speak Hanunuo and use the Hanunuo script.

In 1982, the Buhid initiated negotiations with the local officers of the Department of Environment and Natural Resources. They sought recognition of their capability as the best stewards of the land that they traditionally possessed. Using forestry laws and policies as reference, the Buhid and the DENR sealed a stewardship agreement that declared exclusive use and responsibility by the Buhid over almost twenty thousand hectares of ancestral land which are officially classified as forest land. The same agreement contained statements of recognition that the land covered by the agreement is considered as Buhid ancestral domain and that this domain extends beyond the boundaries of the land under stewardship.

The Buhid strongly emphasized the need to use customary law and processes in the planning and implementation of the activities that led to the stewardship agreement. Central to this is the Buhid identity that is linked to their land. Buhid systems for farming and other resource use were maintained.

The Buhid considered their dependence on the land for sustenance as the essence of Buhid identity. By making their traditional agro-forestry farms productive, they were able to finance their delegations and meetings. At the same time, they negotiated with pride and dignity knowing that the local government officials were aware that they were successfully marketing farm produce. It reached a point when sales were so good that they were able to put up a warehouse on the highway and buy a vehicle to transport their products.

Other Asian countries

In other parts of Asia, government control is stronger. In some, the indigenous peoples were able to devise ways to gain legal recognition of their traditional resource extraction activities. In others, the State maintained its full authority over the forests.

Communities in West Bengal, India[18]

Mark Poffenberger and Chhatrapati Singh, "The Legal Framework for Joint Management of Forest Lands in India", Legal Frameworks for Forest Management in Asia. Honollulu: East-West Center, 1993, pp.3-18, S.B. Roy, "Forest Protection Committees in West Bengal, India", Ibid, pp.19-30.

In India, the communities work closely with the forestry official who lords over forest lands. About 300 million resource users have been displaced because nearly 23% of India's land area was placed under state management. This did not deter the communities in West Bengal where over 1,700 forest protection committees worked with their forestry official to protect 237,000 hectares of natural sal forest. They worked out a scheme to divide the forest products and rehabilitate the project area.

The forest protection committees significantly incorporated all the families living in the vicinity of the forest, from low-income to well-to-do. The government initially involved the low-income families only. They soon realized that the middle and upper-income families were in a position to destroy the forest that would render the efforts of the low-income families useless.

State Control of Java's Forests[19]

The Java forests have been primarily known for teak. The East India Company figured prominently in the early stages of teak extraction for shipbuilding, followed by the Dutch colonial state. The government monopolized the teak industry, including forest labour. Private usufruct and ownership rights to teak were "denied" under the Dutch colonial state. During the Japanese occupation, state policy was to cut with no reforestation. After the war, initial attempts to give stewardship status to peasants were not successful because teak remained a resource under state ownership and control. Today, forest-based families remain heavily dependent on the government. In the same light, these families compete for forest resources in violation of the state's efforts to control access to forests.

III. Possible Arrangements and Obstacles

Some lessons can be learned from the Asian regional experiences in accessing the resources within traditional territories. Although there were different levels of recognition in terms of occupation and use of the ancestral land, there were similar processes that took place.

Using the Buhid example, the indigenous people carefully studied their position relative to outsiders, particularly, the government. An objective assessment of their strengths and weaknesses is a fundamental element in formulating strategies to achieve their goals. It can never be over-emphasized that they worked for peaceful cooperation rather than forced concessions.

By accepting that traditional values about land are not recognized by the government, the Buhid made "recognition" a pre-condition to any agreements that may be forged with the government. Thus, in the petition sent to the DENR, they asserted their right to their ancestral domain and insisted on the recognition of that right as the first item for discussion. Achieving this, the Buhid set to negotiate for the exclusive use of the natural resources, especially, land, within their ancestral domain.

The Buhid identified the social forestry program of the DENR as a potential program responsive to their needs. This is premised on the knowledge that the government has officially classified a huge block of their ancestral domain as forest lands. Ironically, this classification worked to their advantage. Since the

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Nancy Lee Peluso, "A History of State Forest Management IN Java", Keepers of the Forest. Connecticut; Kumarian Press, 1990, pp. 27-55.

State cannot issue titles over forest lands, outsiders were not able to secure titles to displace the indigenous people living there.

The government's social forestry program originally contained terms and conditions that did not conform to Buhid customs. This did not stop the Buhid in analyzing the program. They also identified positive aspects of the program.[20]

Original Version---terms and conditions adverse to Buhid customs

FIRST	There was preference for individual responsibilities over plots of land determined and divided by the DENR.
SECOND	Group applications are automatically considered on a per person ratio of 2 to 3 hectares not exceeding a total area of 1,000 hectares.
THIRD	Renewal of the agreement depended mostly on the DENR.
FOURTH	The stewardship contract conclusively declared State ownership of the land without reference to the rights of indigenous peoples to their ancestral domains.
FIFTH	It risked the implication that the stewarship contract holder has rights only to the area covered by the agreement and waived all rights to areas outside it.

Some positive aspects---

FIRST	ISF commits the DENR to recognize the exclusive right of the steward over a defined territory.	The DENR cannot recognize any other person, association, or entity for the purpose of issuing resource-use permits and licenses.
SECOND	It offers tenure for 25 years renewable for another 25 years or a total of 50 years exclusive tenure.	The 25-year period will give the Buhid a respite from the daily encroachment by outsiders.
THIRD	An official document is issued by the DENR.	The document identifies the steward and enumerates responsibilities.
FOURTH	A map of the defined territory is prepared with actual monuments placed on the ground.	The map and the monuments provide actual reference points in the assertion of ancestral domain boundaries.

After years of negotiation and revised government policies, a stewardship agreement was finally signed in 1992. The agreement at first allowed the Buhid

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Donna Z. Gasgonia, “The Buhid Mangyan Communities of Bongabong, Oriental Mindoro; exercising the right to self-determination”, Second ASEAN Regional Conference on Environmental Education, Compilation of Papers. Los Baños, Philippines; SEARCA, 1995, pp. 488-498.

to focus on their farmlots. Within six months, they had prepared an extensive development plan that integrated watershed development, forest protection and agro-forestry. By 1994, the Buhid completed a one-year workplan that cost PhP 1.4 million (US $ 53,800 at PhP26/US $).

They performed better than professional groups implementing similar projects so that the DENR-ADB has considered a subsequent phase which is much bigger in scope. The Buhid estimated a five-year workplan to cost around PhP 7 million (US $269,000) that would generate more than PhP 90 million (US $ 3.46 million) after ten years. This shows that it is not only cost efficient for the government and funding institutions to enter into partnership with the Buhid but it is also a wise investment. All this stemmed from the recognition of the traditional stewardship of the Buhid over their ancestral domain and their sole right to use and develop the land and its resources.

Obstacles and Questions

The social forestry program addresses the problem of increasing migration into the uplands. Through the program, the government offers tenurial security for a period of 25 years, renewable for another 25 years to upland dwellers. The tenurial security is in exchange for them to develop the land and prevent further clearings by migrants. Indigenous people constitute at least half of the total population of upland dwellers in the Philippines.

Stewardship is the concept behind social forestry. The state retains ownership and control but recognizes the important role of upland dwellers in checking migration from the lowlands. It also saves on the cost of forest protection and developing by transferring this to the stewards. In return, the stewards are given tenurial security for 50 years and are able to introduce improvements for a longer term.

The obstacles to stewardship is the narrow interpretation that looks at the term and not at the development that resulted. There is a tendency to stress that the stewardship is only for a mximum of 50 years and therefore the stewards will lose their improvements after that time. Yet, as an overseer, the government can choose to emphasize the resulting development and therefore consider the stewardship as a mere entry point for official cooperation with the stewards. After or even before the term, new and better forms of agreement can be devised to address sustainable development that recognizes the partnership.

Another obstacle is the reluctance of the government to make a clear pronouncement about the full recognition of ancestral domains. There is fear that such a pronouncement would trigger peace and order problems. There is a general apprehension among non-indigenous people that full recognition would radically disturb existing land use systems that would cause nationwide chaos. There is also a bias based on a myth that indigenous people are not capable of managing huge tracts of land and to allow them to do so would result in economic collapse as well as environmental degradation.

Some questions that can be raised are:

. What are the developmental objectives of both the state and the indigenous peoples?

. What are the points of conflict? Determine if the basic issues can be reconciled.

. What are the points of agreement? Are cooperative efforts along these points feasible in the short or long term?

Centering on land as an economic base, the following questions may be raised:

1. Is the concept of stewardship with exclusive use for a period of time and management according to customary law acceptable to all stakeholders?

2. Will the extent of traditional territory allow for the medium-to-large scale management of resources on the land?

3. Are other stakeholders aware of and willing to consider indigenous knowledge systems in upland development, especially, those in place covering ancestral domains?

4. On the national level, is the government capable of protecting and developing its forests resources? Is it open to partnerships with indigenous peoples for the purpose of protecting and developing forest resources on their ancestral domains? What is the national government's stand on the increasing migration from the lowlands into the uplands?

The final question that should be answered is what keeps the government, the business sector and other stakeholders from recognizing the rights of indigenous peoples to their ancestral domains when these peoples have managed these lands since time immemorial and have generally maintained the biodiversity therein. Central to this is the tenurial security of indigenous peoples over their traditional territories. Like any stakeholder, they cannot produce long term results without long term security. Like any investor, they need security and recognition of management authority to control the enterprise. Like any steward, they will consider biodiversity conservation and sustainable development in the projection of economic returns to their investment.

Working paper prepared by Mr. Roger Plant, Advise Indigenous Issues, Minugua, Guatemala

This meeting aims to focus on practical rather than strictly conceptual issues. What has been done by intergovernmental organizations to further indigenous land rights and claims through technical cooperation? What more could be done, and how?

Nevertheless, technical cooperation cannot be understood only as the actual implementation of programmes to demarcate, title and protect indigenous lands; or to enhance the opportunities for development in accordance with the values and priorities of indigenous peoples themselves. In the majority of cases there are prior stages; first, to generate consensus concerning the basic principles for addressing conflicts between indigenous peoples and the state or external actors over indigenous land rights and claims; and second, to develop the legal and administrative machinery for resolving competing claims to the land.

For these reasons some comparative analysis is required, before the United Nations agencies can think of practical solutions. There are in fact tremendous complexities arising from indigenous claims to the land and territory, not least because the legacy of conquest and colonization has been so different throughout the world.

In many parts of the developing world, indigenous peoples have almost completely lost their land base, but may still be making historical claims to the land which their ancestors lost several centuries ago. Their claims may be based on written title, or on traditional possession.

In other developing regions (the Amazon basin being a clear example), the threat to indigenous lands has been more recent. The indigenous peoples of Bolivia, Brazil, Colombia, Ecuador and Peru enjoyed traditional occupation of vast areas of the Amazon until the appearance of multinational companies and the search for hydroelectric, mineral and timber resources first threatened their livelihood only a few decades ago. Here the important thing is to delimit and demarcate the territorial base of these vulnerable peoples as quickly as possible, in order to provide effective protection against further encroachment and dispossession.

However, while indigenous peoples should usually be seen as disadvantaged vis-a-vis the remainder of national populations, this does not mean that they always need “protection” from the State. In recent years the most important development has been the growing recognition that indigenous peoples (I) have rights against the State (ii) are most likely to manage their lands and related natural resources in an environmentally sustainable fashion, at least if they are provided with the means to protect their own environment against harmful intervention from outside.

Much of this paper is therefore concerned with the policy challenge, which must be addressed before the agencies of the United Nations system can undertake more specific programmes of technical assistance either to governments or to organizations of indigenous peoples themselves. This leads on to a brief review of the kinds of technical assistance programme that have been undertake in recent years by different intergovernmental agencies, including the World Bank and the regional development banks. The paper concludes by identifying some possible areas of international cooperation, to support the efforts of indigenous peoples to protect their lands and environment, and to assert more control over their economic, social and cultural development in accordance with their own values.

2. The policy challenges: indigenous land rights in a changing world

Trends in international and national law on indigenous rights

Over the past decade, among the most significant developments in global trends has been the marked resurgence of interest in the rights of indigenous peoples. New paths have been set in national and international law, as indigenous and tribal peoples in all parts of the world press their claims for a special status, setting themselves apart from the remainder of national population grups.

What began as a more limited movement, led mainly by the indigenous peoples of the Americas, has now become a truly global phenomenon. In Northern Europe, the Middle East, Russia, South and South East Asia, Australia and the Pacific, and even in parts of Africa, indigenous peoples are pressing their claims for economic, social and political self-determination; and for a greater degree of control over the management of their lives, institutions and natural resources.

Without exception, the main issue at stake is land. It is by no means the only issue, in that indigenous demands also encompass language and cultural

identity, civic and political institutions, and autonomy in its broad sense. But the unifying factor is land and territorial control. A land base, enabling indigenous peoples to preserve their unique lifestyles, is the single most important factor which underlies all their other demands.

In the recognition of indigenous land rights, the achievements at least in law over the past decade have in some senses and in some individual cases been quite remarkable. At the international level the most significant have been the adoption of the ILO's own Indigenous and Tribal People's Convention, No. 169, in 1989; and the progress towards the adoption of a Declaration on Indigenous Rights by the United Nations. Revising an earlier Convention of 1957, the ILO's new instrument addresses the land rights of indigenous and tribal peoples in considerable detail, both recognising new principles and establishing new mechanisms to render these land rights truly effective. The ILO's new Convention has now been ratified by nine States in Latin America and Europe, having force of domestic law in the ratifying countries. Its ratification has also become a major demand of indigenous and tribal peoples in other regions of the developed and developing world. The United Nations Declaration on Indigenous Rights does not as yet have binding force of law. But it is again an instrument of immense potential significance.

At the national level, the past few years have seen new Constitutions and landmark court decisions of equal significance, reversing an earlier trend towards the erosion of indigenous land and territorial claims. In Latin America, examples are the new Constitutions of countries including Brazil, Colombia, Guatemala, Paraguay and Peru. Some of these for the first time give constitutional protection to indigenous land rights. Others now recognise the concept of immemorial possession, and establish new mechanisms for dealing with indigenous land and territorial claims. In the Philippines, the concept of ancestral domain in the 1987 Constitution is potentially far-reaching. Of the developed countries, recent legislation and policy reforms in Australia, Canada and parts of Scandinavia open up new avenues for addressing longstanding historical claims, or for challenging the doctrine that indigenous land rights have been extinguished by conquest. In other countries, a prime example being Russia, renewed importance has been attached to indigenous land claims in the current process of constitutional reform.

What are the main factors behind these recent developments? A key factor has been of mobilization of indigenous peoples themselves and their support groups, and their enhanced capacity to present their concerns on the international stage. However, when indigenous peoples themselves often tend to be vulnerable minorities, it is important to ask what forces in the international economic and political environment have facilitated the presentation of their claims.

One factor of obvious importance has been the renewed international concern with the environment. Many indigenous and tribal peoples are forest-dwellers, whose traditional practices of resource management are perceived as environmentally sustainable. Others are nomadic hunters and gatherers in polar or desert regions, who have been able to adapt their lifestyles to harsh climatic situations and ensure the regeneration of natural resources. In all too many cases, the assault on indigenous lands has been associated with environmentally destructive practices, whether logging in Latin America or Asia; oil, gas and other mineral extraction in Australia, Russia or North America; or massive hydro-electric projects in so many developed and developing countries.

A second factor has been the undoubted influence of human rights lobbies, an dthe professed concern of governments to protect the most vulnerable members of their societies. The appaling violence unleashed against indigenous peoples of many developing countries in the 1970's and 1980's, notably in Latin America, has been amply documented by human rightss organisations.

A possible third factor has been the general trend in development philosophy towards reducing the role of the state in economic management, and encouraging decentralization. This is a complex issue, of which the implications for approaches towards indigenous land rights require careful analysis. In brief it can be argued that the thrust of development policy in the early postwar decades was to strengthen the state, enabling it to allocate land in the interests of both equity and efficiency, and thereby requiring uniform systems of land law. In the many developing countries which professed a strong commitment to agrarian reform, the implications were that both private and customary land rights were weakened as the state assumed the powers to redistribute land rights in accordance with economic and social need. As the impetus for land reform has generally ground to a halt, there has been a renewed emphasis on the titling and registration of land in the interests of greater economic efficiency. In turn, this has provoked intensive debates as to the relative advantages of private or common property systems of resource management. In some cases, it has also involved a trend towards devolving powers over land management to local authorities.

Indigenous lands and the market

There is an apparent paradox, in that there has been a enewed concern with indigenous land rights at precisely the time when market-oriented economic philosophies have been in the ascendancy everywhere. Liberal and free-market approaches to economic development are in conflict with traditional indigenous notions of the land and environment. In the past, the imposition of Western systems of land law and land use has been the principal factor behind the widespread dispossession of indigenous lands. This was clearly the case in Latin America, where Civil Codes adapted from Europe after the mid nineteenth century paved the way for the destruction of communal land tenure systems.

Today, can the protection and promotion of indigenous land rights be reconciled with market-oriented approaches to overall agricultural development? Is the aim to establish a dual system of land tenure and land rights, promoting a free land market for all sectors of the population except for indigenous peoples themselves? Or is it also to adapt the operations of the market to the particular needs of indigenous peoples, enabling them to benefit from modernization on their own terms?

Two main approaches can be detected.

One is the "reservation" approach, under which State laws and policies clearly keep indigenous peoples and their lands outside the framework of market operations, by preventing non-indigenous outsiders from having access to reserved lands, and also by imposing certain restrictions on the right of indigenous peoples to alienate, mortgage or otherwise encumber their lands. This can be seen as a segregationist approach, which can involve greater or lesser degrees of paternalism by the State authorities. Under the more paternalistic variation, the State determines the rules of land use and access within the indigenous reservations, together with the rules of contact between

indigenous peoples and broader national society. Under the less paternalistic and more autonomous variation, indigenous peoples themselves determine the rules of engagement with outsiders, perhaps including the negotiation of terms for mineral extraction within their traditional territories and the sharing of profits.

The second approach accepts that indigenous peoples have long experienced a degree of de facto integration within national society, participating in markets from a position of obvious disadvantage. It encourages greater participation through affirmative action programmes, hopefully taking account of the specific characteristics of indigenous peoples and their particular relationship with the land and environment. As in the first case there is likely to be emphasis on the demarcation and titling of indigenous lands. But in the second case there is a greater assumption that indigenous peoples will produce within the market, participating also in capital and labour markets, and will progressively adapt their lifestyles to the exigencies of the market environment.

It is the degree of interaction with the broader market environment that is often the cause of most controversy. Indigenous societies, when given the freedom and opportunity to do so, have adapted their patterns of land use and management to opportunities for economic development. But the balance between special protection and equality of opportunity can be a very difficult one to strike. One of the main demands of indigenous peoples is likely to be a special status for their land rights, involving total or at least partial restrictions on the right to commoditize the land.

Indigenous peoples and their land rights: some basic typologies

If indigenous land rights are to receive special protection from the State or a special legal and political status, the first task is to identify the natura of their claims.

The most basic distinction is between the claims made on the basis of prior historical rights; and those based on prsent-day economic, social, cultural and environmental needs. Indigenous land and territorial claims are clearly rooted in history. But further distinctions are needed between two major types of historical claim. The first is based on the concept of immemorial possession, arguing that traditional land rights were never extinguished by conquest or colonisation, whether or not they were recognised in the codified laws of the colonial power. The second is based on the written titles or treaty agreements that were recognised by the colonial power, but which may have been unilaterally abrogated since independence. A number of such cases could be illustrated, from diverse parts of Asia and the Americas.

Vulnerable tribal peoples, who would not qualify for the status of indigenous under the ILO's definition, can also have clams grounded in history. Notably in the case of some former British colonies in Asia, where the land rights of identified tribal minorities enjoyed a special status and proteccion in identified tribal areas, present-day demands are often for the maintenance of this special status and in some cases for land restitution accordingly. The conflicts can also be perceived as ones between customary and statutory law, when the land titling and registration systems introduced by governments have prejudiced the land security of traditional tribal cultivators and forest-dwelling peoples.

In some regional contexts this raises a broader set of policy issues, namely the extent to which national land law and policies should be constructed on the basis of diverse indigenoous land tenure arrangements. In some regions for example, only a small minority of the population manage their lands under customary land tenure systems. This is the case of the forest-dwelling peoples or shifting cultivators of Asia. As in Latin America, the predominant trend is towards private land tenure and ownership, though ownership of the forests tends to be vested in the state. There are strong pressures to replace customary tenure with registered private title, and present-day debates concern the arguments for and against reservation policies for the relatively small numbers retaining their traditional lifestyles. In much of Africa and the Pacific, the context tends to be very different. Indigenous and customary tenure arrangements are still the norm, with much diversity among these customary arrangements, though there are similar pressures to introduce land privatisation in the interests of greater agricultural efficiency. The need for land privatisation for land privatisation is now being questioned by economists and anthropologists, who argue that customary indigenous tenure systems are constantly adapting, and can achieve high efficiency without social cost in a sympathetic policy environment. Seen in this light there is a broader and ongoing clash between different philosophies of land use and management, one based on community and communal values, the other based on the market values referred to above.

On the above basis, some typologies of indigenous or tribal land claims or demands can now be formulated. First, there are the claims for specially protected lands or land restitution, based on historically derived rights. These assume that the peoples concern will enjoy land rights different from those of the population at large. Second, there are the claims for a special status and protection, enabling vulnerable minorities to pursue traditional lifestyles. This can involve for example traditional hunting and gathering, fishing, nomadic pastoralism or shifting cultivation. As in the first category the assumption is that the rights accorded to indigenous or tribal peoples are exceptional, providing them and their lands with a special status regulated by law. Third, there are the cases where indigenous peoples are the majority of national populations, and where their customary patterns of land tenure can influence national law and policy on land rights.

Indigenous peoples and rural landlessness

In terms of absolute numbers, probably the majority of the indigenous peoples of Latin America or Asia are either landless or near-landless rural workers. In many cases, indigenous peoples have been systematically prevented from having sufficient land for their subsistence needs, in order to ensure the supply of cheap labour for the agricultural or mining sectors.

Notably in Latin America, indigenous peasant farmers have comprised the bulk of the seasonal labour supply for commercial agriculture. The expansion of coffee, cotton and sugar plantations, and also fruit and vegetable farming, has given rise to seasonal migrant labour flows which display some similar characteristics in Mexico, Central America and the Andes. Indigenous peasant communities are concentrated in the highland regions, on tiny farm plots held under either communal or private systems of tenure. The plots are invariably too small to provide for an adequate subsistence, they have been fragmented over time, and demographic pressures have also increased both landlessness and near-landlessness. In consequence, entire indigenous communities migrate within the country for a few months of the year. The extent of these internal migrations has increased in recent decades, as an earlier commitment to

redistributive land reform has been abandoned, and State policies have tended to further promote the expansion of commercial export agriculture. Sometimes there is a further pattern of intra-regional or international migration, examples being the seasonal flow of Guatemalan Indians to southern Mexico, and of Mexican Indians in turn to the southern regions of the United States.

This trend towards landlessness and near-landlessness raises further complex questions. In many cases traditional indigenous communities have long ceased to exist as viable economic units, though they continue to serve their function as a labour reserve for commercial agriculture. Moreover, unlike the indigenous peoples in tropical rainforests or polar regions, these indigenous peasants tend not to have a contiguous territorial base. Their plots are not only small and fragmented but often intermingled with non-indigenous farms. Reviving their communities would require drastic agrarian reforms, and radical changes in the patterns of rural employment.

Difference and discrimination: the two faces of indigenous land rights

It is the bare facts of discrimination, and the exploitation of indigenous peoples in the wider national economy, that is often overlooked in analysis of indigenous land rights. Most of the emphasis has been on the titling and demarcation of the land and territorial areas to which the remoter indigenous groups, a minority of the world's total, have still retained access and use.

Where they constitute majorities or near majorities of the rural population, the indigenous landles and land-poor can be a potent force. Aware of the discrimination to which they have been subjected over centuries, they are capable of fighting back. The recent and also more distant history of Latin America, for example, is studded with indigenous armed rebellions, with land rights at the centre of indigenous demands.

Thus the picture often drawn of indigenous and tribal peoples as weak and vulnerable peoples outside the mainstream of national society, whose survival as distinct cultural groups is threatened if their land rights are not protected from environmental and humanitarian considerations alone, is not universally true. In some cases there can be a political imperative to address their demands for the land, in the interests of wider social peace and stability. In the latter cases, what often remains unclear is the nature of indigenous demands. In the cases of widespread land fragmentation and dispossession, is the concept of indigenous territory still part of their worldview? If their movements gather in strength in the years to come, will they demand a completely separate status for their lands, involving complex restitution claims and the removal of non-indigenous settlers from their main areas of habitation? Or are their demands rather for a new round of land reform programmes, enabling indigenous farmers to participate in the market on a footing of more genuine equality with non-indigenous populations?

3. Strategies and Programmes for the Protection of Indigenous and Tribal Land Rights

At the inter-governmental level there have been some significant initiatives since the late 1980’s, first in the area of standard-setting and the establishment of operational guidelines for technical assistance, and second in the planning and implementation of projects directed specifically at indigenous and tribal peoples.

While the ILO's Conventions Nos. 107 and 169 remain the only binding international instruments, there are important ongoing initiatives at the United Nations. The UN Working Group on Indigenous Populations has emphasised standard-setting since its creation in 1982, and has given much attention to land and resource rights. More than any other international forum, it has provided for full participation by indigenous peoples in the preparation of its draft Declaration. Moreover, a number of international financial institutions and funding agencies have prepared internal operational guidelines, each of which stresses the importance of land rights, land demarcation, security against arbitrary removals, and improved administrative mechanisms to render these rights effective. One example is the Operational Directive on Indigenous Peoples, adopted by the World Bank in 1991. Another United Nations funding agency, the International Fund for Agricultural Development (IFAD) has also committed itself to the preparation of such internal guidelines.

As indigenous and tribal land rights receive progressively greater attention from the United Nations and its specialised agencies, international financial institutions and national governments alike, there has been a need to examine the scope for common policies and programmes of action in consultation with the peoples concerned. At the regional level one highly useful initiative was a seminar on land rights and natural resource management in the Amazon region, held in Colombia in 1991 with the joint sponsorship of UNDP, the ILO and the World Bank.

At the programme and project level perhaps the most interesting inter-governmental initiatives have occurred in the Amazon region, where the policy environment is currently most favourable for activities of his kind. Since the early 1980's the World Bank has been most extensively involved, at first including the demarcation of indigenous lands as one "defensive" component of wider-reaching projects, and more recently directing environmental projects more specifically at land rights and resource management. Notably in the Bolivian Amazon, ILO assistance has played a vitally important role in preparing a suitable legislative framework. There are indications that IFAD will now become an important actor, targeting projects at indigenous land rights and resource management in countries including Bolivia, Brazil and Venezuela. UNDP has earmarked resources for Amazon region. Outside the immediate UN family an important potential actor is the Inter-American Development Bank which, in consultation with other agencies including the ILO, has responded to a proposal of Latin American governments initiated by the Government of Bolivia for the Ibero-American Fund. The Fund's projects have been aimed largely at land rights and demarcation concerns.

In the Asian region outside the Philippines there appears to have been little United Nations activity to date, either addressing the legislative and policy framework for indigenous and tribbal land rights and tenure, or undertaking specific programme and project activities in this area. The World Bank, UNDP and FAO have addressed these issues in consultancy reports and limited research activities in South-East Asia.

In Africa, a number of United Nations agencies have now identified pastoral issues, including their land rights, as a priority area of activity. FAO has undertaken research programmes and policy seminars. UNICEF and UNSO have recently undertaken a two-year networking project. The World Bank has been active in both research and policy issues, notably in the Sahel region. And the United Nations Research Institute for Social Development (UNRISD) has undertaken a number of pilot studies, in conjunction with international and national non-governmental organisations.

4. Verifying indigenous land rights at the national level: a new role for the United Nations

In Guatemala, where I am currently employed as the Adviser for Indigenous Issues in the United Nations Mission for the Verification of Human Rights (MINUGUA), the United Nations has had a new and unique role through the signing of an Agreement on the Identity and Rights of Indigenous Peoples in March 1995, one of the several agreements signed under United Nations moderation in the context of ongoing peace negotiations between the Government of Guatemala and armed insurgent groups.

Guatemala's Indigenous Agreement contains a significant number of commitments by the Government to eliminate discrimination against indigenous peoples, and also to recognize and promote the specific rights of indigenous peoples. It calls for a number of Constitutional reforms, as well as legal and administrative reforms, and for the establishment of new structures at both national and regional levels to render these indigenous rights effective.

Substantive issues covered by the new Agreement include: the identity of indigenous peoples; the struggle against discrimination in both law and practice; cultural rights of indigenous peoples; and the civil, political, economic and social rights of indigenous peoples with a particular focus on their land rights.

The requirement for participation by indigenous peoples in the enactment of law and policy reforms, and for consultation with their representative organizations at all leves, is a general feature of the Agreement. In certain key areas the Agreement provides for joint commissions, to be composed of an equal number of representatives of the Government and representatives of indigenous organizations. The role of these joint commissions it to carry out the preparatory work for the design of reforms and institutional arrangements envisaged by the Agreement, including their land rights.

The land rights provisions of the Indigenous Agreement are far-reaching. While based in part on the ILO's Convention 169, they go further than the ILO instrument. The Government, “recognizing the special importance which their relationship to the land has for the indigenous communities, and in order to strengthen the exercise of their collective rights to the land and its natural resources” undertakes either to adopt directly or to promote (when this is within the competence of the legislative organ or municipal authorities) measures including: regularization of the land tenure of indigenous communities; land tenure and use and administration of natural resources; restitution of communal lands and compensation for rights; acquisition of land for the development of indigenous communities; and legal protection of the rights of indigenous communities. To implement these provisions the Government “shall, in consultation with the indigenous communities, establish a joint commission on the rights relating to land of the indigenous peoples to study, devise and propose more appropriate institutional arrangements and procedures. The commission shall be composed of representatives of the Government and of indigenous organizations”.

The Agreement, it should be emphasized, has not as yet entered fully into force. Only those aspects which relate directly to human rights were considered by the parties to have immediate force and application upon its signing. Remaining aspects are to enter into force only upon the signing of a final peace agreement, expected under the more optimistic scenarios to take place sometime

during the current year. The stage has nevertheless been set for some complex technical preparations, to which the United Nations agencies can contribute within their areas of competence, providing technical assistance both to pertinent Government agencies and to the organizations of indigenous peoples themselves.

Indeed, in the months and years to come, Guatemala's Indigenous Agreement will provide tremendous scope for the provision of intergovernmental assistance, along lines to be determined jointly with indigenous peoples themselves. To take just one example, the section relating to the legal protection of the rights of indigenous peoples, the Government of Guatemala has committed itself to the adoption or promotion of measures including:- the development of legal rules recognizing the right of indigenous communities to administer their lands in accordance with their customary norms; to promote an increase in the number of courts dealing with land cases; to urge faculties of law and the social sciences to strengthen the agrarian law component of the curriculum and include a knowledge of the relevant customary norms; to establish competent legal advisory services to advise on land claims; to provide the indigenous communities with the service of interpreters, free of charge, in respect of legal matters; and to eliminate any form of discrimination against women with regard to facilitating access to land.

5. Conclusions

Guatemala's Indigenous Agreement deserves extensive international publicity and support, as a unique instrument that provides the appropriate balance between special protection where necessary, and the right of indigenous peoples to participate in the negotiation of their land rights.

In other countries of the world - whether or not afflicted by severe ethnic conflict - the challenge is to find the appropriate mechanisms for enabling indigenous peoples to formulate their land claims and grievances, and then to find the procedures for channelling international technical assistance programmes around specific reform commitments. Beyond this, it would be futile to make general recommendations as to the kind of technical assistance that is most urgently required. In some cases the assistance will be a highly technical nature, for cadastral surveys, for land demarcation and titling programmes, or for projects that enable indigenous peoples to make more effective use of the lands under their control. But in many parts of the world, the first stage is to build consensus, to devise the laws, policies and procedural mechanisms for enabling indigenous peoples to formulate their land claims. The challenges ahead are formidable. But significant progress has been made over the past decade, linking standard-setting on indigenous rights with international technical assistance which is increasingly being channelled through organizations of indigenous peoples themselves.
