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> 土著人民的人权 土著人民及其与土地的关系 <u>土著人民及其与土地的关系</u>

特别报告员埃丽卡-伊雷娜·泽斯夫人 编写的最后工作文件

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序言

本最后工作文件则是根据初步工作文件(E/CN.4/Sub.2/1997/17 和 Corr.1)、各国政府、土著人民、政府间组织和非政府组织的建议和资料和关于经修订的初步工作文件的第一次和第二次进度报告(E/CN.4/Sub.2/1998/15 和 E/CN.4/Sub.2/1999/18)编写的。

在编写最后报告时,收到了新西兰政府和一些土著组织和非政府组织提出的建议、评论和其他有用的数据,并列入报告或加以考虑。所收到的关于进度报告的来文见以下第7段的说明。

特别报告员建议并强烈要求将这份最后工作文件分发给各国政府、土著人民、专门机构、有关政府间组织和非政府组织,要求它们提出有关建议、评论和其他最新资料。她还建议,按照任何有关答复或任何必要的增补或建设性建议,将本最后工作文件提交增进和保护人权小组委员会 2001 年第五十三届会议最后审议。

导言

- 1. 人权委员会 1997 年 4 月 11 日第 1997/114 号决定注意到少数小组委员会 1996 年 8 月 29 日第 1996/38 号决议,同意任命埃丽卡一伊雷娜·泽斯夫人为特别报告员,起草关于土著人民及其与土地的关系的工作文件,以便提出实际措施,处理目前在此方面存在的问题。
- 2. 根据这一决定以及特别报告员先前的工作文件(E/CN.4/Sub.2/1996/40),特别报告员编写了一份初步工作文件(E/CN.4/Sub.2/1997/17 和 Corr.1),阐述有关土著土地的问题,以增进土著人民与国家之间对于土著土地问题的相互了解,提供可有助于公正解决这些问题的资料和分析,并推动理解联合国土著人民权利宣言草案(小组委员会第 1994/45 号决议,附件)所载的有关土地权的条款。并注意查明和审议实际措施,处理目前与土著人民和土地有关的问题。
- 3. 小组委员会第四十九届会议第 1997/12 号决议请秘书长将初步工作文件尽快转交给各国政府、土著人民以及政府间和非政府组织,供它们提出意见和建议,并请特别报告员根据从各国政府、土著人民和其他方面收到的评论和资料编写最后工作文件,并将它提交土著居民问题工作组第十六届会议和小组委员会第五十届会议。1998 年 3 月,秘书处向某些政府、土著人民和其他方面征求意见和建议。
- 4. 或许由于时间太短,收到的答复、评论或提交的其他资料并不多。只有四个国家作出答复。它们对初步工作文件提供了极佳和极有帮助的资料、分析和评论。十一个土著人民组织或与土著人民有关的组织作出了答复,其中有些提供了广泛有用的资料。由于收到的资料极少,收到的时间又很晚,因此无法根据收到的评论和建议编写最后文件。
- 5. 特别报告员就工作文件向小组委员会第五十届会议提交了一份进度报告 (E/CN.4/ Sub.2/1998/15),她尤其请各国提供资料和分析,说明国家关于土著土地 权利的利益和需要,她鼓励各国、土著人民和其他方面提交与工作文件有关的进一步资料。小组委员会第 1998/21 号决议请秘书长将进度报告转交各国政府、土著人民、政府间组织和非政府组织以便提出意见、资料和建议,并请特别报告员根据所收到的意见和资料编写最后工作文件。1998 年 11 月 4 日发函转交了进度报告,要求提供评论、数据和建议。

- 6. 关于工作文件的第二份进度报告(E/CN.4/Sub.2/1999/18)连同经修订的初步工作文件一起提交小组委员会第五十一届会议。小组委员会 1999 年 8 月 26 日第 1999/21 号决议请秘书长尽快将第二份进度报告分发给各国政府、土著人民、政府间组织和非政府组织,以征求它们的意见、资料和建议; 小组委员会请特别报告员根据各国政府、土著人民和其他方面提出的意见和资料编写最后工作文件,并提交土著居民问题工作组第十八届会议和小组委员会第五十二届会议审议。
- 7. 特别报告员收到了新西兰政府提交的关于编写最后工作文件的资料。此外,以下方面提交了有用的来文:

不列颠哥伦比亚印第安人酋长内部联盟和联合会(加拿大);

蒙塔格纳德人基金会(美国);

莫肯驯鹿放牧区(挪威);

Sámediggi 外交部(挪威);

条约定居点办事处(新西兰);

Nga Kaiwhakamarama I Nga Ture(毛利人法律事务社)(新西兰);

公谊会土著人事务委员会加拿大友人事务委员会(加拿大);

印第安人法律资料中心(美国)。

特别报告员向应这次和前几次要求提交与工作文件有关的资料和建议的国家、土著人民、政府间组织和非政府组织表示真诚的感谢。

- 8. 世界各地的土著人民在土著居民问题工作组会议上所作的报告和发言和在编写工作文件时收到的资料表明,土地和资源问题——特别是将土著人民从其土地上逐出的问题——是一个最迫切的根本问题。同时,一些国家、学术机构、非政府组织及个人十分忧虑,担心一旦承认土著人民的人权,以前从土著人民手中夺走的所有土地和资源就必须物归原主。由于世界上许多土著人民的历史很多很杂,各不相同,政治关系和发展也各不相同,过去和目前的法律问题复杂繁多,因此这些问题只能逐个对待,如有可能由土著人民和各国一道解决土著人民的土地权利问题。下文第三节将讨论这一问题。
- 9. 关于土著土地权利的问题众多,因此,这次历时不长的工作过程中不可能 靠一项研究报告或论文来加以充分讨论。如果用一份工作文件来论述所有的土地 和资源问题,则势必流于浮浅和冗长。而此处采用的则是一种较好的办法,就是

对诸多问题加以整理和组织,纳入一个分析性的框架,力求发现那些最根本或最严重的问题,那些在寻求办法减轻土著人民遭受的痛苦和不公正的努力中最值得注意的问题。

10. 应该用哪些核心价值观来指导我们在这一工作中作出判断呢?首先是《世界人权宣言》和国际人权盟约所载的人权原则,特别是平等及自治原则和禁止歧视原则。此外,我们所应遵循的还必须包括那些构成联合国土著人民权利宣言草案基础的根本价值观念和利益:除其它外,保护土著文化和土著社区及其福祉、消除土著人民的贫穷和匮乏并寻求实现土著人民和所有人民在法律之前的平等和公正这一宏伟目标。本最后工作文件附件列出了《世界人权宣言》、《公民权利和政治权利国际公约》、国际劳工组织关于独立国家土著和部落民族的公约(第 169 号)和其他有关国际和区域人权文书的有关部分,并在编写报告时予以考虑。特别报告员还提请注意在小组委员会第 1998/21 号决议序言段落中所表示的关注,该决议请特别报告员编写本最后工作文件¹。正是在这一前提下,我们请小组委员会成员、人权委员会成员、其他联合国机构、专门机构、各个国家、土著人民、学术机构、非政府组织以及其他相关的个人研读和审议这份工作文件,并对其作出评论。

一、土著人民与其土地、领土和资源的关系

- 11. 自土著居民问题工作组成立至今,土著人民自始至终在这一论坛上强调与自己家园的关系的基本性质。他们之所以如此,是因为他们迫切需要非土著社会理解土地、领土和资源对于土著社会继续生存、保持活力所具有的精神、社会、文化、经济和政治意义。为了理解土著人民与其土地、领土和资源的深厚关系,必须承认特别是在土著人民居住的国家里他们与非土著人民的文化差异。土著人民敦促国际社会积极评价这一独特的关系。
- 12. 必须指出,正如土著人民解释过的,土著人民与其土地、领土和资源的关系的概念是难以同其文化差异和价值观念分隔开来的。与土地和一切自然事物的关系是土著社会的核心。例如,尼泊尔林布土著人民的土地所有权制度为 Kipat,这种制度是表示属于某一地和某一独特社区的一种方法,两者不可分离。Kipat 将它们界定为"部落"²。根据权威人士,Kipat"与文化融合在一起,并是文化的表

- 现,对 Kipat 的攻击即是对林布人作为一个不同的社区在社会上生存的威胁。"³ 在土著居民问题工作组讨论土著人民的土地权时,Robert A. Williams 教授指出:"土著人民强调,其文化个性的精神和物质基础有赖于他们与自己传统土地的独特关系。"⁴
- 13. James Sakej Henderson 教授试图对这种独特关系和概念框架加以说明,他说: "土著人观念中的财产是创造我们意识的生态空间,而不是一种意识形态构想或可代替的资源……他们的观念属于包含在神圣空间之中的不同领域……这是他们的个性、人格和人性的根本……自我的观念不以肉体为终结,而是随其意识延伸至土地。"5 这种关系表现在土著人民的文化差异如语言之中。例如,一位因努伊特族长用自己的话对上述关系的表述是: "我们的语言包含着对北极细致的了解,我们没有发现任何其他人表现出这种了解。"6
- 14. 由于一些不同的原因,国际社会开始透过一种新的关于土地、领土和资源的哲学思想和世界观来回应土著人民。在某种程度上,正在形成的新标准就是以土著人民所表明的符合其关于土地、领土和资源的观念和哲学的价值观为基础的。
- 15. 特别报告员何塞·马丁内斯·科博载于《关于歧视土著人民问题的研究报告》⁷ 第五卷中的结论、提议和建议是小组委员会和联合国其他机构通过的关于土著人民与其土地、领土和资源的关系的政策和理论的基础。这些政策和理论普遍反映了土著人民对这种独特关系的表述。马丁内斯·科博先生指出:
 - "关键是要了解和理解土著人民与其土地之间存在一种完全超乎世俗的特殊关系,这种关系是其生存、其全部的信仰、风俗、习惯和文化的基础。
 - "对土著人民而言,土地不仅仅是占有物及生产资料。土著人民的精神生活与大地母亲——即土地——之间的全部关系具有诸多由来已久的影响。他们的土地不是一种能够获取的商品,而是一种可以自由享用的物质元素。"⁸
- 16. 承认这一特殊关系的例子还有:国际劳工组织关于土著和部落民族的(第169号)公约第13条具体提到"……重视有关民族与其所占有的或使用的土地或地

域——或两者都适用——的关系对于该民族文化和精神价值的特殊重要性,特别是这种关系的集体方面。"

17. 联合国土著人民权利宣言草案的序言和执行部分也都反映了土著人民与土地的独特关系。特别是第25条指出:

"土著人民有权维护和加强与他们历来拥有或占据或使用的土地、领土、水域、近海和其它资源的独特精神和物质上的关系,有权在这方面负起他们对后代的责任。"

18. 最后,由美洲人权委员会起草、目前正在由美洲国家组织常设理事会审议的《美洲土著民族权利宣言》的序言部分行文如下:

"「各国,]

"承认尊重美洲土著人民文化造就的环境,考虑到土著人民与其居住的环境、土地、资源和领土以及其自然资源的特殊关系。

"

"承认在许多土著文化中,控制和使用包括水体和沿岸地区在内的土地、领土和资源方面的传统集体制是土著人民生存、社会组织、发展、个人和集体福祉的必要条件……" ⁹

19. 总而言之,上述的例子都强调了土著人民特有的一些因素:(一)土著人民与其土地、领土和资源之间存在深厚的关系;(二)这一关系产生各种社会、文化、精神、经济和政治影响及责任;(三)这一关系的集体性质意义重大;以及(四)这一关系的代代相传对于土著人民的个性、生存及文化活力也至关重要。这些例子可能并未能一一列出其他表明土著人民与其土地、领土和资源关系的要素。

二、历史和背景:强占理论的影响

20. 土著社会日渐式微,其根源在于土著人民与其土地、领土和资源的深厚 关系以及其它基本人权没有得到承认。一种不同的、不再由自然环境和土著人民 与自然的关系确定的生活秩序威胁了、并将继续威胁土著人民的自然生活秩序。 一些国家的土著社会正在迅速衰变,其主要原因就在于土著人民的土地、领土和 资源权利被否定。

- 21. 土著领土的殖民化对土著人民产生了多种影响。土著人民人口结构退化的原因有:受到虐待、奴役、自杀、因反抗受到惩罚、战争、自然环境的破坏和自然资源的过度使用造成的营养不良、疾病以及公然的剿杀。Rodolfo Stavenhagen指出:"美洲的总人口在与外界初次接触之后的一个半世纪内减少了 95%。"¹⁰让土著人民皈依基督教、将他们纳入外国君主的"统治权"之下的企图造成了广泛的破坏,尽管最初有一些"友好相待"的尝试。由于人口的减少,传教士的种种作为以及西方对劳动分工和性别差异的看法等等,传统社会秩序遭到破坏。用金钱衡量包括土地在内的一切事物的价值、认为一切都可以买卖的看法助长了一种完全不同于多数土著社区传统经济秩序的经济环境的形成。这些概念都与土著社区的集体社会组织格格不入。
- 22. 关于强占和侵占土著人民土地的史实记载多种多样,详尽而广泛,在这份工作文件中不可能一一加以研究。从全世界的土著人民身上可以了解许多关于据以驱出土著人民的做法和法律理论的情况。然而,目前关键的是重点分析那些帮助构成据以将殖民化合法化的概念框架和据以侵占土著人民土地、领土和资源的各种做法的文化偏见。可以说,用以为强占土著人民土地作辩解的态度、理论和政策曾经并继续在很大程度上受国家经济需要的驱动。¹¹
- 23. 推崇"自然主义"学说的早期理论家最先解决土著人民在现代国际法中地位这一困难的问题、特别是土著人民作为其土地、领土和资源的合法所有者这一点。这种"自然主义"的构架建立在高于世俗的权威和神圣理性观念的基础上,根植于道德观。它的一个重要特点是人类平等原则,这在自然法适用于新世界"印第安人"的理论中占有重要位置。最近几年来,这一平等原则被北美一些反对纠正过去不平等现象的团体用来辩解,认为"人人平等"意味着保持现状,更有甚者,意味着取消土著人民在加拿大和美国法律、条约和宪法中的独特地位。12
- 24. 对于西班牙根据征服和发现的理论声称有权拥有、使用和开发印第安人的土地和资源的说法,早期自然主义论者实际上为印第安人说话,反对王室和教会的权威。他们的论点是,印第安人的确拥有土地权,有些人则更进一步,联系战争法论述了印第安民族和人民建立条约关系的权利和能力,尽管他们是"真正宗教之外的人"。按照对这种论点的理解,如果印第安人确实是人类平等的一

- 员,就有"正义的理由"对入侵者发起战争。然而,除非征服是正义战争的结果,否则就不能单方面将印第安人从其土地上逐出,或剥夺其自主生存。
- 25. 上述关于欧洲人与土著人民相遇的规定是确立规范世界所有各国人民相遇的原则和规定的基石。后来的论者在 19 世纪初将非欧洲土著人民包括在人们所说的"万国公法"、后来又称为"国际法"的主体之中。
- 26. 因此,早期的论者的确论述过印第安人在自然法方面的权利问题,尽管印第安人本身既未参与,也不知情。但是,这些论者认为自然法确实能够处理美洲的土著人民的权利和利益问题。无论早期的万国公法为土著人民提供了什么保护,都不足以阻挡殖民化和帝国的力量在全球扩张。那些论者最终修改了万国公法,使之反映征服土著人民的情况,从而也使这种情况合法化。国际法至今仍然主要涉及欧洲和其它类似"文明"国家的权利和义务,其渊源也主要在于这些国家自己共同同意的行为。
- 27. 遗憾的是,既定的基督教和其它宗教价值观逐渐根植于自然法和国际法,因此土著人民在被征服之后没有任何可能推进其权利和价值观。土著人民在自然法论著中通常被称为"没有信仰的人"和"异教徒"。这些用词本身就显示出歧视和种族主义态度。尽管自然法在某些方面可能比较豁达,但是,随着殖民国家在美洲及其它地区推进,一种十分狭隘的概念开始产生。他们的视角和价值观开始包含土著民族及土著人民。
- 28. 在大多数情况下,殖民者仅仅利用这种理论依据和军事统治就"拥有了"土著人民的土地、领土和资源。美洲和其它地区土著人的领土是通过许多方式夺取的,但主要都是通过军事力量夺取的。当不能够发起"正义战争"时,有时就签署条约。关于北美的情况,Vine Deloria, Jr. 写到:

"签定条约是一项可行的办法,既可在美洲大陆站住脚跟,又不会惊动土人。由于同印第安人签定条约,白人定居者与印第安人的关系显得文明、合法,不会立即导致各部落的报复。印第安人当时没有受到奴役、其土地也没有被人以武力夺取——尽管西班牙最终还是这么做了,当时的北美弥漫着文明气息。印第安人的土地和在某些地区的居住权是在正式的条约会议上购得的。"¹³

- 29. 强制迁移、异地安置和分配使得剩余的少量领土进一步减少。北美的许多土著社区被迫迁往保留地。土著人民与其土地和领土的联系被切断,国家不承认土地的社会、文化、精神和经济意义,这对土著社区产生了各种短期和长期影响。
- 30. 现代国际法后来的发展中产生的强占理论,特别是"无主地"和发现"理论,对土著人民产生了众所周知的不利影响。运用于土著人民的无主地理论认为,在殖民者抵达之前,土著土地一直是合法闲置的,因此殖民国家可以通过有效占领拥有这些财产。¹⁴ 严格地说,在 17、18 和 19 世纪,"发现"的理论赋予发现国它先前一天所知的土地,这种初步的权利随着在合理时间内的有效占领可以完善起来。¹⁵ 这种理论开始被一些国家运用,但很少或根本得不到国际法的支持。这种理论使"发现"殖民国可自由地拥有仅仅被土著人使用和占领的土著土地,这种土地有时称为土著所有权。¹⁶ 直到最近,国际社会才开始了解到这些理论不合法,而且具有种族歧视性质。例如,在 1933 年东格陵兰一案中 ¹⁷ ,常设国际法院的判决就是基于前述框架和态度,而在 1975 年,国际法院则裁定无主地理论对西撒哈拉部落民族适用是错误而无效的。¹⁸
- 31. 澳大利亚高等法院在 1992 年就马布对昆士兰一案所做的裁决中讨论了无主地理论的法律和其它影响。法院谴责了这一理论,指出"不能够再接受这一不公正和歧视性理论。"这一判决导致澳大利亚政府 1993 年通过《土著产权法》,为澳大利亚的土著人民获得土地权建立了框架和机制。然而,澳大利亚土著人民向工作组报告说,他们认为该法有很大的缺点,并认为,国家声称,马布一案裁决确认,它有权剥夺土著土地权,这是不公正和毫无根据的 19。澳大利亚政府可在何种程度上继续通过歧视土著产权的法律来剥夺土著人民的土地权,这仍是一个不断讨论的问题。消除种族歧视委员会于 1999 年 3 月 18 日作出决定,认为1998 年《土著产权法》修正案的规定剥夺或阻止行使土著产权法和权益,歧视土著产权所有人(A/54/18,第 21 段,第 2(54)号决定)。下文第 46、64、89 段进一步讨论了这一问题。这表明欧洲中心论和歧视观念仍然充斥于法律理论和行动中,国家法律存在上述态度和法院的判决可能会使得土著人民陷入一种不承认其独特的文化价值、信仰、组织或观念的法律论断的限制之中。20

三、据以分析当代土著土地权问题的框架

32. 本工作文件将要探讨的主要问题十分繁多。这些问题经过整理可构成一个有助于澄清问题、找到可能的解决办法的分析性框架。此一框架如下。

A. 国家不承认土著土地权、领土权和资源权

33. 这一最根本、最普遍的问题分为两个部分: 国家不承认土著使用、占据和拥有状况的存在; 国家不给予土著人民土地所有权适当的法律地位、法律能力和其它法律权利。

1. 不承认土著使用、占据和拥有状况的存在

- 34. 在许多情况下,土著人民的社区、部落或国家自远古以来就居住和使用着陆地和海洋的某些地区,世界上的许多国家不是尚未意识到就是有意无视这一事实。这些地区一般都远离各国的首都和其它都市地区,而各国则一般将这些土地和资源视为公共或政府土地。尽管相关的土著人民有充分的理由认为他们拥有自己占据和使用的土地和资源,但是,国家却通常支配这些土地和资源,仿佛土著人民并不存在一样。²¹ 在加拿大和美国等联邦国家里,这种政府倾向进一步加剧,州/省政府,乃至市政府有时要么与中央政府或国家政府联手,要么单独地采取这种行动和自己的政策。²²
- 35. 上述对传统的土著土地采取的单方面国家行动的事例众多。例如,在伯利兹,政府最近给予外国公司 17 份砍伐特许权,允许它们在马雅人一直生活并赖以生存的森林中砍伐木材。非洲一些国家的桑人,即布须曼人除了其他一些土地问题外,还困难重重,因为缺少保护他们使用土地和土地权的国家法律 ²³。有两个组织报告说,挪威的萨米人据理力争,反对威胁到其剩余土地和资源的一些政府行动,例如把芬马克的大片土地转让给一家国有营利性公司,计划扩大和联接两个现有的军事训练场。²⁴ 在西巴布亚新几内亚(西伊里安),印度尼西亚政府鼓励向土著人民生活的土地上迁徙和定居 ²⁵。在有些国家里,这种做法据说造成大批土著人民流离失所,几乎迫使许多人移居他国。一位权威人士说,"菲律宾土著人民成了他们自己土地的非法占用者",因为菲律宾政府宣称全国约 62%的土地均

由政府拥有 ²⁶。印度尼西亚、泰国和印度亦有类似情况,而大多数非洲国家据报宣称拥有全部的林地 ²⁷。在尼加拉瓜,政府计划在某地建立环境保护区或公园,却全然无视生活在那片土地上的土著人。马丁内斯·科博的研究报告发现,许多有大量土著人生活的国家报告说其国内没有土著人民。尽管如今情况有所改善,但此一问题看来仍然存在。

2. <u>国家不给予土著人民适当的法律地位</u>、 法律能力和其它法律权利

- 36. 这一问题与上文讨论的问题密切相关。尽管国家知道土著社区、民族或群体存在,并且只有他们在使用和占据着一个地区,但是,一些国家不承认相关的土著人民对土地和资源具有法律资格或权利。在一些情况下,土著人民被视为经政府默许使用着公共或国家土地。
- 37. 土著产权的概念以及这一法律概念与土著人民人权的关系极为重要。在许多国家,特别是英联邦国家,自古独家使用和占据土地即产生土著产权,这一产权的有效性只有在一种情况下有例外,那就是国家政府的主权 ²⁸。在土著产权得到承认的情况下,土著人民至少能够在国内法律制度中认定拥有某些法律权利。然而,土著产权往往被非法假设可任由国家剥夺,而不是象在多数国家里那样享受对非土著公民、其他人和社团的土地和财产加以保护的法律保护和权利(下文第 40 至 47 段进一步讨论了这一问题)。这一事实也许就足已解释绝大部分影响土著人民的人权问题。
- 38. 在许多承认土著权利的国家里,这种权利的法律范围和与其有关的权利较有限,与其他土地权利相比,土著权利所受保护范围较小。比方说,加拿大最高法院在 1997 年 12 月 11 日关于 Delgamuukw 诉女王》一案的判决中广泛审议了土著权利问题。该法院认定,1982 年《宪法法案》确认并肯定土著权利。该法院认定,这是一项土地权、财产权和集体权利,而且这是独特的权利。但首席法官明确表示,加拿大的土著土地权与普通的无条件继承权相比,显然是一项独特的次级权利。土著所有权被称为是官方所有权的一项"义务"。它是一项不可转让的权利,但让与官方不在此限。它仅是一项使用和占有土地的权利。最高法院对土地的使用施加了很大的限制。土地的使用方式必须符合声称拥有该地者的感

情。比方说,做为猎地的土地的使用方式不能损及其做为猎地的价值。土著土地 权受侵犯应得到公平赔偿,但该判决并未明确规定赔偿原则。²⁹

39. 在一些国家里,土著社区在拥有土地方面没有法律能力,或者说没有集体拥有土地的能力。当土著人民或群体的法律地位或存在得不到承认时,土著人民就不能拥有土地或资源的产权,也不能采取法律行动保护这些财产利益。许多国家的上一代人尚否认土著人民的这种法律能力,而现在正进行积极改革,但仍然需要对这一问题作进一步研究。

B. 影响土著人民与其土地关系的歧视性法律和政策

40. 有些国家已形成了一套关于土著人民的成文法和法律体系,这些国家的数目还在增加。在这些国家中,最重大的问题似乎产生于坚持对土著人民及其土地和资源使用歧视性的法律和法律理论。³⁰ 上文讨论过的土著产权概念本身就具有歧视性,因为它给予土著人民的土地和资源所有权的法律地位是不充分的,脆弱和低劣的。³¹ 应特别注意这些歧视性法律和法律理论,因为它们的存在十分广泛,违背了现行国际人权规范,而且相对而言似乎易于更正。

1. 关于剥夺土著人民土地和资源权的法律 32

- 41. 几乎所有有土著人民生活的国家都声称其有权不经土著人民同意而宣布 其境内土著人民的土地产权和权利"失效"。失效的概念包括自愿买卖产权,但 "失效"一词更多地用于直接夺取或征用,而且多数情况下没有公正的补偿。与 土著产权的概念一样,失效一词在殖民时期开始盛行。³³
- 42. 失效问题与土著产权的概念有关。所谓土著产权的主要缺陷在于从定义上讲,土著产权是主权机关——即殖民政府或今天的国家——能够随意夺取的产权。与土著产权一样,土著人民土地权的非自愿失效的做法是殖民时期的产物。在现代社会,没有补偿的土地权非自愿失效的做法似乎只适用于土著人民。因此,这一做法至少是不公正的、具有歧视性的,值得加以仔细研究。
- 43. Tee-Hit-Ton 印第安人诉美国案 34 是权利失效问题的一个尤为显著的例子。在该案中,最高法院判定美国可以(除少数例外以外)占用或征用印第安部落的

土地或财产,而不必经过正当的法律程序,也无需付出公正的赔偿。这项判决无视《美国宪法》关于政府未经正当法律程序和公正赔偿不得获取财产的明确规定。最高法院裁定,土著人名下的财产(大多数印第安土地是在土著人名下的)不能享受象其他所有财产一样的宪法保护。可以从以下摘引的判决理由中看出 Tee-Hit-Ton 案种族歧视的本质:

"本法院在任何一个案件中均未认定取消印第安人的所有权或由国会征用情形为需要赔偿的。一些印第安人由于文明的强劲趋势而被剥夺了家园和猎区,因此美国人民对他们的后裔感到同情。他们想要让印第安人作为本国公民分享我们社会的福利。因此甘心情愿地制定了慷慨的规定,让各部落昭雪沉冤,这样做不是出于法律义务,而是一种宽厚大度的表示。……

美国的中小学生都知道,这块大陆上的野蛮部落被武力剥夺了全部祖 产,即使印第安人通过条约以几百万顷土地的代价换取了毯子、食物和 一些廉价的东西,这也不等于买卖,而是征服者想剥夺他们的土地。"

- 44. 这个案件创立的法律学说一直在左右着美国当今在这一问题上的法律 ³⁵。尽管这项裁决带有种族歧视,但并未影响法院和美国国会在立法时毫无约束地运用这一学说,即使在最近几年也是如此。实际上,国会于 1971 年依靠这种学说几乎剥夺了阿拉斯加所有 226 个土著民族和部落的所有土地权和对土地的要求权,通过了《阿拉斯加土著人所有权清算法》。该法规定土著人民必须开办盈利的公司,并将土地转让给它们;还规定向每个土著公司支付一笔远远低于土地价值的资金。阿拉斯加土著民族本身分文未得。属于部落的领土的其余土地或其认为拥有的土地被转交给阿拉斯加州和联邦。阿拉斯加土著部落从未同意过这种立法。由于土著所有权和土著人权利失效的概念,由于下面将进一步论述的有关的歧视性法律学说,人们认为,这些土著人的土地可以直接没收,不用付钱或作出公正的赔偿。³⁶
- 45. 土著代表和专家已有报告说,许多其他国家在这方面的法律和政策与美国相似。例如,加拿大在 1888 年就确立了这一理论 ³⁷ ,但是 1982 年的《宪法法案》第 35(1)节承认并肯定了土著权利和条约权利。根据 1982 年的《宪法法案》,加拿大的法院不再承认政府有权"取消"土著权利。与此相反,法院决定,土著

权利,包括土著的土地权,不是绝对的,而是有可能在广大社会需要的情况下受到联邦或省政府的"侵夺"。在最近一宗案例中,加拿大最高法院大法官莱默写道:"依我之见,发展农业、林业、采矿业和水力发电,不列颠哥伦比亚内地的一般经济发展,保护环境或濒危物种,建设基础设施以及为此目的安置外国人口,皆属此种与该一目标相符的目的,因此原则上可以作为剥夺土著权利的理由。"(Delgamuukw 诉女王案,大法官意见第 165 段,未发表的决定,1997 年 12月 11日)。仍不明确的是,这种对"理由"的新要求能否在事实上比以前的法律给土著土地权利提供更大的保护。如上文指出的,该法律能否对土著的财产权提供与其他人的财产权平等的、一视同仁的法律保护,这仍然是一个疑问。

- 46. 如上文已讨论过的,澳大利亚高等法院在马博诉昆士兰案中裁定,无主土地理论不得用于否认土著人的土地权,但仍然肯定了国家有权取消土著人的土地权。³⁸ 该法院主张,土著权利可以被取消,但须依照法律,依照国王对土地的征用或依照国王以不继续承认土著权利的方式对土地实行占用的办法实施。1998年颁布的《土著权利修正法案》规定了若干可以取消土著权利的手段。该法案因在几个方面有歧视性而遭到抨击:该修正案优待非土著土地拥有者的权利,而歧视土著土地拥有者的权利;未能象保护其他土地拥有者那样保护土著土地拥有者;允许政府采取歧视性行动;对保护和承认土著土地权设置障碍;没有规定对土著文化的独特方面给予适当的区别对待。³⁹ 消除种族歧视委员会发现该法案中有一些条款具有歧视性:
 - "7. 委员会特别指出:按新修正的法案,其中有四处具体条文对土著土地拥有者构成歧视。这包括:该法案的'生效'条款;'对取消条款的确认';初级生产升级条款和土著土地拥有者谈判非土著土地用途的权利的限制。"⁴⁰

委员会发现该修正案不可以看作是《公约》第一(4)条和第二(2)条意义范围以内的特别措施,并对澳大利亚遵守《公约》第二和第五条的情况表示关切。

2. 全权

47. 还有一个传播很广的法律学说是,国家几乎权力无限,可以控制或规定 土著人土地的使用,可以不管本来能适用的宪法对政府权力的限制。在美国,这 称为"全权学说"。这种学说认为,美国国会可以对土著民族和部落及其财产行使几乎无限的权力。任何其他人口或群体都没有被置于这种无限并有可能滥用的政府权力之下。

3. 条约的废除和土地权

48. 关于与土著人民签署的条约的法律问题,是歧视性法律学说的另一个例子。条约主要被用作割让土著人土地和假称保障土著民族对拥有的其余土地的权利的机制。后来,国家废除或违反条约,就产生了歧视问题。普遍的情况是,受伤害的土著民族或部落既不能根据国内法,也不能根据国际法向国家要求法律补救。剥夺国际法下的补救,与条约用作法律机制的原则不一致,也与土著人民作为国际法的主体的地位不相符合。因此,因国家废除或违反国家与土著民族、土著部落或土著人民签署的条约而使权利受到侵犯又得不到法律补救的,土著人民似乎是唯一的。包括新西兰和美国在内的某些国家,认为条约既是国内法的工具,也是国际法的工具,因而并不认为,国际法规定的补救必然是适宜的。在这种情况下,问题仍然是,对于条约的违反或废除是否给予了公正的补救,以及在国内法方面使用条约机制是否不具歧视性。

C. 没有划界的问题

- 49. 就申诉的频率和范围而言,国家没有给土著土地划界,是今天土著人民的一个最大问题。⁴¹ 土地划界是确定土著土地或领土的实际位置和边界以及实实在在地在地面上划出界限的正式程序。纯抽象或者纯在法律上承认土著土地、领土或资源,而不是实实在在地确定和标出财产所属,实际上是毫无意义的。
- 50. 巴西等一些国家制定了强有力而且非常明确的法律,要求对土著土地划界。还有一些国家——也许是大多数——都没有这种法律。在制定了要求划界的法律的国家,这些法律的落实和执行非常薄弱或者根本没有落实和执行。如果没有这种法律或者这种法律很薄弱,就会产生问题,因为不对土著土地划界,国家就不能确定哪些是土著土地,哪些不是土著土地。因而就与土著社区发生冲突。尼加拉瓜和伯利兹目前的情况就是如此。

- 51. 美洲人权法院目前正在受理的一项重大案件就提出了一个问题:国家是否有义务承认和尊重土著人民的土地、资源、领地,以及国家是否有义务对这些土地和领地划界。该案例是阿瓦斯廷尼的马雅纳土著社区诉尼加拉瓜,是 1998 年 6 月美洲人权委员会向该法院提出的。⁴² 该法院以一致意见驳回了尼加拉瓜于 2000 年 2 月提出的初步反对意见,并着手审理此案。⁴³
- 52. 阿瓦斯廷尼社区向美洲人权委员会递交请愿书,指控尼加拉瓜政府不遵守《尼加拉瓜宪法》和国际法规定的义务,不承认和保障该社区成员历来占有和使用其土地的权利,因而提出申诉。虽然阿瓦斯廷尼社区作出种种努力要对其传统土地划界或争取其他具体的法律承认,该社区对其土地的使用和占有受到越来越严重的威胁。尼加拉瓜政府既不理会阿瓦斯廷尼人关于尊重其土地权利的要求,也不同他们商量,就把一块历来由阿瓦斯廷尼人拥有的土地(将近 6.5 万公顷)租让给一家韩国木材公司供伐木之用。
- 53. 法院受理的这一案件表明,根据《美洲人权公约》第 21 条("每一个人都有权使用和享受他的财产……")和《公民权利和政治权利国际公约》第 27 条的规定: "在那些存在着人种的、宗教的或语言的少数人国家中,不得否认这种少数人同他们的集团中的其他成员共同享有自己的文化、信奉和实行自己的宗教或使用自己的语言的权利"。尼加拉瓜有法律义务,划定和尊重阿瓦斯廷尼的传统土地。尼加拉瓜是上述两公约的缔约方。有相当有力的权威论证:传统的土著土地使用制度和土地使用格局属于文化的一部分,受《公约》第 27 条的保护。这一案例首次提出了土著土地权利和国家有义务尊重这一权利的问题。对于根据《美洲人权公约》和《公民权利和政治权利国际公约》,尊重和划分土著土地和资源的国际法律义务的现行范围如何确定,美洲法院的裁决可能产生深远的影响。

D. 国家没有执行或落实保护土著土地的法律

54. 有些最严重的情况,如大规模侵犯巴西的雅诺马马人土地并造成数千名雅诺马马印第安人死亡的情况,之所以发生,大抵是因为国家没有执行现行法律。即使对雅诺马马的领土划界后,巴西政府也没有投入必要的资源防止数千名采金者的非法侵犯。最近,采金者又在一定程度上造成空前的大火,在雅诺马马人领地大规模燃烧,毁坏了大面积的森林和粮食作物。火灾引起疫病的大规模爆

发,1998年造成一百多雅诺马马人丧生。44还有一些情况是,土著人民发现自己 不能保护对土地和资源的权利,因为他们不能有效地诉诸法院或其他法律补救措 施。最糟的情况是,暴力、恫吓和腐败使土著人民或他们的代表不能采取有效的 法律行动,例如据报道,巴西的 Macuxi 印第安人在努力保护自己的土地方面遇到 了这种情况。1998年12月,巴西政府采取一项积极步骤以求改善局面,发布一项 决定为北方的罗拉玛州境内的 Raposa/Serra do Sul 地区划界。该地区是 Macuxi、 Wapixana、Ingariko 和 Taurepang 印第安人的故乡。此前,美洲国家组织的美洲人 权委员会已访问过该地区,并正式建议巴西政府对该地区划界。45 但是,在政府 作出决定之后,据广泛的报道:数月中该地区的采金者和农场经营者进行了更多 的人身恫吓和政治恫吓。Raposa/Serra do Sul地区的正式划界尚待巴西总统批准, 而在划界开始之前该地区被进一步缩小的可能性仍相当大。46 在另外一些背景 下,各国有时没有有效的法律制度来提供补救措施,或者是土著人民付不起必要 的专业法律代理费用,或者是他们无法使用法院或法律代理机构要求的语言,或 者是他们无法前往法院或法律代理机构,或者是他们完全不知道可以采用法律补 救措施。至于其他人权,土著人民的贫困、地处边缘以及文化和语言上的不同等 问题,严重阻碍对他们的土地、领土和资源权利的保护。

E. <u>土地要求和土地归还的问题</u>

- 55. 土著人民的领土被不公正和不人道地剥夺,其历史很长,经验很惨痛,使许多土著人民没有土地或资源,即使有也是极少,无法维持自己的社区和文化。情况并非普遍如此,但对许多土著人民来说,他们的未来将取决于取得可持续经济发展和一定程度的自给自足所必需的土地和资源。有些国家对于解决土著人民的土地要求既没有法律补救措施,也没有法律或政策的制度,这些国家存在的问题最为严重。例如据报道尼泊尔对已经丧失了几乎全部土地和资源的土著人民就没有这类补救措施或机制。⁴⁷
- 56. 下文第四节论述在土地要求和土地归还方面的积极和成功的措施。这里讨论的是一些权利要求和谈判程序以及土地归还措施所造成的问题,有些相当严重。⁴⁸

- 57. 有一个特殊问题已反复提请人权委员会和小组委员会的注意,这个问题是使用或误用土地要求程序来剥夺土著人民的土地和资源权或者它们对土地和资源所要求的权利。许多国家的土著人民报告了大量这类问题。这些问题可以概括如下:在有些情况下,有人擅自向某一法院或行政机构提出错误的权利要求,指称国家占用或者以不公平的低价购买了原属土著人民的一块土地,而实际上这块土地没有被抢走,仍然属于土著人民。在另外一些情况下,土地被征用,但有关的土著人民不要补偿,而是要归还这块土地。实际上,这些欺诈性或不实的权利要求是由于受了一些法律规定的驱使,这种法律规定允许律师赚取所获赔偿金10%的费用。这种权利要求一旦结束,赔偿金一旦付出,赔偿金的支付就完全取消了土著人对这块土地的所有权。即使在印第安民族或部落仍然拥有这块土地的情况下,也发生过这样的情况。因此,这些"权利要求"程序是剥夺印第安人的土地的。
- 58. 欺诈性和不适当的权利要求所造成的问题因缺乏适当的权利要求法律程序而更形恶化。诸如美国现已不复存在的印第安人权利要求委员会等机构所进行的程序并没有保证要求权利者有适当的权利为有关部落采取行动。程序并没有规定适当通知有关部落或者给他们提出意见的机会。上述委员会不止一次允许律师直接作为其假定或名义上的当事人部落的对立面,甚至在要求赔偿的部落为停止要求诉讼而辞退律师之后还允许律师继续要求资金赔偿。
- 59. 虽然印第安人权利要求委员会不再存在,但它所处理的案件及其引起的问题继续存在。有一些重要的案件仍然没有解决,例如布莱克丘陵的权利要求(在该案中,Sioux 各部落拒绝接受判给的补偿,而要求归还一部分土地)和 Western Shoshone 案(在该案中,Western Shoshone 各部落也拒绝接受付款,而要求收回一些土地)。在后一个案件中,一些 Western Shoshone 人仍拥有据称被美国联邦政府征用的若干土地,并抵制政府干预他们对土地的使用。印第安人权利要求委员会方面的问题广泛,并引起混乱,已经在学术上引起了注意。⁴⁹ 这些问题也是向联合国和其他机构提出的申诉所涉及的问题。⁵⁰
- 60. 上几段讨论的许多问题是在一份正式的人权申诉书中提出来的,该申诉书是由 Western Shoshone 的两位印第安妇女代表她们的部落向美洲国家组织的美洲人权委员会提交的。⁵¹ 他们认为他们现在并一直拥有 Western Shoshone 民族领

地的若干部分,该地区曾在 1863 年的《鲁比峪条约》中得到美国的承认。他们利用该土地放牧、进行宗教活动、狩猎和采集。美国声称它现已几乎全部拥有该处土地,Western Shoshone 人对该处土地的权利早在 15 年前已被印第安人权利要求委员会的程序予以取消了。美国声称 Western Shoshone 人非法入侵该处土地,而且美国已采取各种措施驱逐他们和他们的牲畜。近年在这处土地上发现了北美洲最大的金矿床之一,使这些 Western Shoshone 人受到更大的压力,因为他们反对露天开采金矿。

- 61. 该申诉书认为,美国从来没有依法取消 Western Shoshone 人的土地权,而印第安人权利要求委员会的手续具有歧视性,缺乏正当法律程序。其主要理由归纳如下。据指称,受理该项权利要求的律师伪称并同意该处土地已经收回,Western Shoshone 人的土地权早已取消,而事实并非如此。委员会允许律师们代表全体 Western Shoshone 人,但他们实际上没有做到。该委员会拒绝任何其他的Western Shoshone 部落或团体提出反对或发表意见。委员会作出了裁决,但没有一个Western Shoshone 部落同意该项要求。美国政府自始至终鼓励并参与了这场诉讼。权利要求委员会的裁决对被认为收去的土地每公顷付给约 0.15 美元。美国认为该申诉书根据各种程序性理由不能接受,而且因为事实并未构成对人权的侵犯。52 美洲人权委员会对美国采取了预防措施,请美国政府暂停其针对申诉人采取的行动,待该委员会对案情进行充分调查。53 同一年晚些时候,美洲人权委员会宣布 Danns 案件应予受理,认为 Danns 人满足了所有程序要求,并提出了其人权显然遭到侵犯的问题。54
- 62. 从这一事件的诉讼中可以明显看出,美国公然取消了 Western Shoshone 印第安人对一大片祖传土地的权利,而且没有赋予一般正当司法程序的权利,也没有给予公平的市价补偿,而非印第安人土地所有者都是会得到这种补偿的。美国在 1863 年同 Western Shoshone 人签订的一项条约中本已承认该土地为 Western Shoshone 人的土地,由此看来事情更加彰明卓著了。印第安人权利要求委员会的法律程序看来在很多方面都缺乏起码的公正性,尤其是:没有保证申诉人的充分代表性,没有事先通知和让 Western Shoshone 人的其他有关方面得到机会发表意见,没有要求为收取土地提供证据,以及对争议的土地只给予每公顷几美分的补偿。该权利要求委员会在这一案例中,以及据报道在若干其他案例中,看来是违

背了无歧视和法律面前人人平等的基本要求。无论如何,这一案例似乎表明任何 解决土著人土地权利的权利要求程序,如要行之有效必须做到基本上公平。

- 63. 这一案例中的中心法律问题看来是上文(第 41-44 段)已经讨论过的一种学说,即国家可以不经正当法律程序,不给公平市价补偿即取消印第安人或其他土著人民的土地权。美国和存在这种公然歧视的学说的所有国家都应该将这种学说视为对要求法律面前人人平等的现行人权标准的侵犯,将其摒弃。
- 64. 其他一些国家也有关于土地权利要求机制的申诉。在加拿大,据报道诉讼程序极其花费时间。在新西兰,有人对据称未经授权解决权利要求表示愤怒。55 在澳大利亚,1993 年《土著人所有权法》的规定在 1998 年作了大幅度修改,使得土著人的所有权要求变得更为困难,尤其是因为对权利要求登记规定比过去高得多的起点标准。这些规定被认为具有种族歧视性质。(见上文第 46 段)。

F. 为包括开发在内的国家利益而征用土著土地

- 65. 殖民主义遗留的问题,在为了国民经济和开发而征用土著土地、领土和资源方面也许最为严重。全球各地都存在阻碍土著人民以符合自己价值观念、观点和利益的方式从事发展的情况。国家集中大量的法律、政治和经济权力,使发展问题以及土著人民对土地、领土和资源的权利问题更加严重。例如,在马来西亚沙捞越省的婆罗州岛,约有五分之一的土地被划归"土著习俗权利土地"(其中只有十分之一由土著社区所有),但是在这些土地上,政府却可以超越土著权利将之租让给木材开发者。56 据报道,印度尼西亚政府在国家利益不受威胁的情况下尊重土著习俗权利,但是经济发展等同于国家利益,从而废止了土著人民的土地权利。57
- 66. 此外,完全从万国公法,而不是民族或万民法的角度严格看待国际法,加剧了这种国家对待发展的狭义态度。发展概念可以直接与"对自然资源的永久主权" 58 和国家"自由利用和开发" 59 自己的自然资源的权利联系起来。与此特别有关的,是国家声称它对地下资源完全有权利。这种观点在社会、经济、环境和文化上产生了许多不良后果。对于全世界土著人民来说尤为如此,因为他们直到最近一直将发展看作是非常消极的概念。许多大规模的经济和工业发展是在没有承认和尊重土著人民对土地、领土和资源的权利的情况下进行的。经济发展

在很大程度上是从外部强加的,完全忽视土著人民参加对发展的控制、落实和获 益的权利。多年来,一些非政府组织一直在疾呼,土著人民的许多或所有土地已 被剥夺,并被改为商用或用于发展项目。60 此外,为获利或者影响土著人民的发 展项目的执行,也是未经与有关的土著人民协商的。土著居民问题工作组还获 悉,在国际援助下开展的一些发展项目和活动,也是没有土著人民的参与,未经 他们的同意或与他们磋商的。例子有, 国家用美洲开发银行的财政援助建造公路 和高速公路,以及世界银行资助在印度和其他地方营造水坝。其他项目有,营造 需要淹没一些土地、中断土著人民传统的经济习惯的水坝,砍伐森林和开采金矿 等项目。61 国民经济开发计划不仅剥夺土著人民的土地,而且还使土著人民成为 工业的廉价劳动力,这是由于他们的土地被征用,环境恶化,使他们无法生活。 在第十三届会议上,一名土著人代表告诉土著居民问题工作组,一个国家的议会 核准了一项与一家伐木公司签定的关于 100 多万公顷雨林的合同。他声称,这家 公司的活动将使他的人民根本无法按传统和宁静的方式生活下去。一名亚洲土著 人代表提请工作组第十四届会议注意的另一个问题是,有一项采矿活动不仅使环 境退化,而且还造成受影响的土著人民的暴乱,反过来又造成安全部队的杀人和 酷刑。

- 67. 即使在有些地区,由于经济发展,土地转让给了土著社区,但他们也未能完全控制这种发展。具体的例子有,1971 年《阿拉斯加土著人权利要求清算法》和 1975 年《詹姆斯湾和北魁北克协定》。公然侵犯人权的其他发展形式还有在雅诺马马印第安领土上开采金矿。
- 68. 石油和天然气的勘探和开发、地热能的开发、采矿、水坝建造、伐木、农业、放牧和表面上符合国家利益的其他经济活动,既给深受与外界接触和殖民主义之害的土著人民带来不利影响,也给长期闭塞的地区的土著人民带来不利影响。62 发展常常是未经土著人民同意,未与他们磋商,没有他们的参加,也没有使他们得益。

G. 迁出和异地安置

69. 将土著人民从他们的土地和领土上迁出,既是全世界的一个历史问题, 也是一个严重的当代问题。有些国家将土著人民从他们的土地和领土上迁出的政 策看作是"消除"一个问题的恰当解决办法或合适的途径,不管这种政策据称是为了保护土著人民还是为了用他们的土地、领土和资源促进国家利益。相反,必须承认,这种政策充其量只是推迟解决满足有关土著人民的权利和利益的实际问题。

- 70. 迁出和重新安置的情况非常普遍,国际社会已经在制定人权标准方面对此作出了反应: 《劳工组织 169 号公约》第 16 条、联合国土著人民权利宣言草案第 10 条、拟议中的美洲土著人民权利宣言第十八(6)条。在拟订这些具体标准时使用了"强迫"迁移一词,以此表述政府未经土著人民同意采取强迫和伤害行动,将他们从他们的土地上迁出。迁出的事例包括: 加拿大政府将 Mushuau Innu 人从Davis Inlet 迁移到 Nutak, ⁶³ 将因努伊特人迁移到 High Arctic ; 丹麦政府将北格陵兰的因努伊特人迁出; 放牧者将基奥瓦印第安人赶出他们的土地,而美国政府尽管于 1996 年承认印第安人的土地所有权,却没有采取任何行动。在工作组的会议上,许多发言者指出,将土著人民强行赶出他们的土地,使政府能够增加向多国公司提供伐木和石油开采特许。还有的发言者谈到了据称为了防止土著社区遭受军事行动或武装冲突之害而将他们迁出的问题。
- 71. 土著人民将人口迁移和强迫性异地安置称作是一个非常严重的问题。这些非自愿迁移和异地安置意味着丧失传统土地和传统生活方式,给有关社区的社会经济福祉带来毁灭性后果。在 1990 年第八届会议上,土著人组织向工作组发出的联合声明强调了人口迁移给土著文化带来的消极影响。政府用此来对抗自决的要求,强加非土著民族的文化,为处置自然资源提供便利。对重新安置提出的理由有:人口过多、重新安置和移居的必要性、资源开发和安全等。

H. <u>给土著人民与土地、领土和资源的关系带来</u> 不利影响的其它<u>政府方案和政策</u>

72. 必须注意有其他一系列政府的方案和政策被广泛用于或滥用于为侵犯土 著人土地权利辩护。有些国家似乎没有认识到这种方案和政策的有害影响。以下 简述这种方案和政策:

1. 将土地分配给个人

73. 这种方案将共同拥有的土著土地分割成块,并将土地分配给个人或家庭。这些方案不可避免地削弱了土著社区、民族或人民,通常最终造成大多数或全部土地的丧失。所谓的让个人用自己的土地作为贷款担保品的优点,实际上远不如几乎不可避免的土地的丧失及其造成的土著人民现有资源的全面减少。1970年代和1980年代智利马普切人的经历就是一个令人伤心的例子。64

2. 定居方案

74. 国家常常将土著人民的土地看作是适合于非土著人定居的地方,即使该地区的资源只为土著所有者提供了有限的经济。这种方案的结果似乎造成更加严重的贫困和社会不安定。鼓励在孟加拉国吉大港丘陵地带定居就是一个例子,南美洲也报道说有这样的问题。

3. 国家承担托管权

75. 在有些国家里,特别是在美洲,国家 ⁶⁵ 创立了国家本身对所有或多数 土著土地拥有所有权和对各种土著民族、部落或人民有托管权的法律概念。印第 安土地的这种法律地位已在美国受到学术上的注意。 ⁶⁶ 这种托管权制度有许多问题。它通常是在未经土著人同意的情况下强加的。它赋予国家以广泛的权力,控制土地及其资源的使用。土著部落或民族往往对违反托管责任或国家滥用控制或处置他们土地和资源的权力得不到充分的补救。国家作为托管人的责任特别包括保护土著人民资源的责任,对此可能没有作出很好的规定,可能与国家的其他所有权利益和政府利益相冲突。托管权制度有时会使土著人对土地和资源的所有权成为次等法律权利,因此这种制度具有或可能具有种族歧视性。

4. 贷款方案

76. 如关于土地分配的一节所述,鼓励将土著土地用作贷款担保品的方案很可能最终造成土著土地和资源的丧失。出现这种情况的部分原因似乎是大多数土

著人民较缺乏经济权,因而将土著土地或资源作为市场上的商品的几乎所有方案都可能导致有关土著人民失去这些资源。这并不是说土著人民不应参加市场经济,而是说应该在公正和平等的条件下参加市场经济。

5. 政府对圣地和文化遗址的管理

77. 在许多国家里,对土著人民具有重大的宗教意义或文化意义的具体场所或地方,现均属国家或国家的某一政府机构所有。这种情况,即使对土地所有权没有争议,但如果对这些场所或地方的管理禁止或干涉土著人进入或者禁止或干涉土著人与这种场所有联系的宗教活动,就可能会产生特殊问题。

I. 不保护土著土地和领土的环境完整

- 78. 为了分析起见,应查明由于有些活动破坏土著人民环境完整而造成剥夺 土著人土地权所涉的情况。环境退化和发展方面的问题说明国家未能保护土著人 民的土地、领土和资源的完整性不受直接和间接不利影响的具体问题。此外,这 个问题涉及全球环境问题以及国家发展行动。
- 79. 这个问题的一方面是,土著人民的领土和土地并不总是与国家、省或其它行政边界相一致。领土跨过国界的土著人民有中美洲和南美洲的许多土著人、加拿大和美国的莫霍克人和帕萨马科迪人、英国和墨西哥的 Tohono O'odham 人、俄罗斯远东、美国、加拿大和格陵兰的因努伊特人。不同的管辖区的利益、法律、政策和国民发展计划各不相同,可能对土著人的土地、领土和资源完整造成直接的不利影响。声称对领土有管辖权或管理权的国家常常不承认它们的政策会影响到边界以外。例如,对阿拉斯加北极区野生动物国家禁猎区的辩论是一个国际问题,影响到依靠北美驯鹿生境的美国和加拿大两地的各土著人民的利益。在关于国家北极野生动物保护地的发展的讨论中没有充分考虑到这种野生动物资源的完整。
- 80. 此外,虽然政府可以发起和要求环境影响评估,但国家在缓解或尽量减少环境退化的工作中往往不从土著人民的角度出发,忽视他们的价值观念。其他

对土著土地、领土和资源未能保护的情况还有: 越界污染、倾倒有害或有毒废物、海洋倾倒、臭氧层耗竭、军事化和淡水供应减少。

81. 土著人民与土地、领土和资源的关系渊源深厚,非常复杂敏感,在保护 其环境的完整性免受退化时必须予以考虑。它还包括社会、经济、文化和宗教方 面的问题,当前的讨论绝不能忽视。作为环境的不可分割的部分而繁荣起来的文 化再也不容受到破坏了。土著人民对土地、领土和资源完整的依赖,仍然是一个 非常重要的因素。

J. <u>土地和资源的使用和管理以及土著土地</u>、 领土和资源方面的内部自决

- 82. 在确认土著的土地权方面有一个重要内容,即土著人民通过自己的机构,采取措施控制土地、领土和资源。虽然可以确认对土地、领土和资源的权利,但仍然往往不能切实通过对发展、自然资源的使用、管理和保护措施的控制和决策等形式来落实内部自决。例如,土著人民可以自由地从事传统的经济活动,如狩猎、捕鱼、设陷阱捕兽、收获或种植等,但他们可能无法对可能会减少或破坏这些活动的发展予以控制。
- 83. 本节简短地调查了政府和土著人民面临的一些问题。下一节举例说明为解决其中一些当代问题而作出的努力,以便为今后找到解决的办法。

四、为解决土著土地问题而作出的努力

- 84. 全世界在土著土地权利方面的进展有许多积极实际的例子;在本工作报告中只能举少量的例子。这些发展情况大多代表了一种理论观念的变化,从剥夺土著人民权利的倾向略为转向现代的人权方案,开始采纳土著人民的价值观念、观点和哲学。但是尚未发生巨大变化。尽管有所进展和积极的发展,但仍然存在着迫切的问题。
- 85. 提出一些解决土著土地问题和土著人问题的努力应实现的目标可能是有益的。虽然这一清单可能有所缺失,任何有创见的人都可加以补充,不过这些目

标是各国和其他各方在解决土著人民及其土地和资源问题方面可争取实现的一些重要目标。这些目标大体上是以上文第10段讨论的核心价值观为基础。

- (一) 确保土著人民拥有足够的土地和资源,尽可能包括其传统文化和圣地,作为独特的人民和文化生存、发展和享福利;
- (二) 公正地纠正向土著人民不当地夺取土地和资源的行为;
- (三) 避免制造难民和无土地的社区,避免非自愿的个人或社区迁移;
- (四) 维持国家的安全和领土完整;
- (五) 解决和避免土地和资源所有权的不确定性,避免在土著的土地和资源 权利方面发生冲突、不稳定和暴力;
- (六) 确保对土著人民及其土地和资源权利实行法治、不歧视和法律面前人 人平等的原则,同时承认土著人民因其独特文化应享有某些独特权 利:
- (七)确保所有土地和资源得到可持续和无害环境的利用。 这些目标以及其他各方可能建议的目标可有助于评估有关土著人民的土地和资源 权利的拟议原则和其他措施或努力的价值和适当性。
- 86. 积极的措施可以分为 5 类: (a) 司法机制、(b) 谈判机制、(c) 宪法改革和纲要立法、(d) 土著人民的主动行动和 (e) 人权标准。

A. 司法机制

- 87. 在论述不承认权利要求及土著土地问题上实行歧视性政策的章节中,简要地提到了土著人民利用司法机制维护自己权利遇到的各种困难。本工作文件将简要地探讨和评估土著人民已采取的一些司法行动,并审查这些行动方针的未来。
- 88. 在国内和国际舞台上的许多案件结果好坏参半。从常设国际法院 1933 年的判决(东格陵兰)到 1975 年国际法院关于西撒哈拉的判决,可以看出关于土著人民地位的法律思想在不断演变。美国最高法院的马歇尔判决被解释为有好有坏: 在马歇尔坚持承认印第安人土地权利和自治权利的意义上来说是好的;不过,马歇尔对这些权利的解释局限于"发现"理论的范围内。

- 89. 结果好坏参半或司法机制局限性的一个实例是澳大利亚的 Mabo 案件。这项判决有积极意义,因为它谴责无主地理论。然而,从澳大利亚土著人民的角度来看,这项判决没有消除所有的文化偏见,也没有全面阐述和充分地探讨国家在决定土著土地权利范围方面假定具有的权威和权力。法官和其他人都担心解决这些问题产生的难以估量的代价。因此,许多人设法保留解释的余地。这一点在澳大利亚高级法院另一起案件引起的行动中可见一斑。1996 年 12 月在"Wik 人民诉昆士兰州"一案中,澳大利亚高级法院认为,土著土地所有权不一定因牧场租约而被取消或消失。67 牧场租约覆盖大面积的土地,实质上是政府为了畜养羊、牛或其他牲畜而给予的权益。这一案件与 mabo 判决一起促使《土著土地所有权修正法》于 1998 年颁布,该法可被用于废除土著土地所有权,实际上否定了法院承认的大部分权利。上文第 46 段和 64 段对此已有讨论。
- 90. 对于数目有限的集体诉讼案件和人数有限的土著人,美国法律提供了归还土著土地的手段。美国最高法院判定,违反某项国会法律而夺取的土地仍归印第安所有人所有。然而,实际上没有任何土地是通过美国法院的行动归还的。提出归还土地的诉讼众多,但只有几起案件由于谈判和立法使大面积土地归还给少数印第安人部落。
- 91. 司法或准司法机制的另一实例是新西兰的温坦吉(Waitangi)法庭。这是为了审理毛利人声称的《温坦吉条约》不被履行而设立的法定机构。⁶⁸ 温坦吉法庭判决的作用是解决一些长期以来毛利人在土地方面的不满。不过,由于法庭的权力有限,也由于法庭对案件做出的决定和谈判成的解决办法,引起了一些批评和申诉。
- 92. 目前,无庸置疑,因为不同的解释手段、这些由国家掌握的法庭的主观性和高度政治性、以及政府不断表现出来的文化偏见等问题,对司法机制的使用可能有风险。以上提到现存和已使用过的司法机制的一些实例。将请各国政府和土著组织进一步通报关于司法机制的积极措施的情况。

B. <u>谈判机制</u>

93. 谈判机制可通过各种各样的问题、概念和视野来探讨如何调解土著人民土地权利的问题。谈判还可使双方有更多的机会取得或达成真正的谅解,彼此建

立信任。如果谈判充分尊重和承认土著人民的基本权利,还可有助于建立持续和持久的政治和法律关系。这样的选择对政府和土著人民以及其他人都更有建设性。

- 94. 建立国际谈判机制的一个近期实例是北极理事会的组成,它包括 8 个北极圈国家以及俄罗斯北部小民族协会、北欧萨米(Saami)理事会和因努伊特人北极圈会议的代表。这个新机构的基本文件还规定该地理区域的其他土著人民组织可以直接参加。虽然土著人民对文件的若干限制不完全满意,但他们毕竟已坐在谈判桌前,可以对环境和发展问题发表自己的意见。
- 95. 另一国际机制是通过谈判达成危地马拉和平协议的程序。在这个程序的范围内,联合国在缔结《土著人民身份和权利协议》中起到了作用。《协议》包括一些关于土著土地、土地的归还和获得以及其他措施的具有深远意义的条款。⁶⁹
- 96. 新西兰政府指出过去十年来它在通过谈判解决因过去违反温坦吉条约而引起的有充分根据的权利要求方面取得了很大进展。解决办法通常包括政府对违反条约正式道歉、转让现金和资产、承认提出要求群体在特定保护区和对它们具有特殊意义的物种方面的权益。政府还说,由于直接谈判的结果,占新西兰面积一半以上的一个地区的厂史冤情已得到解决;所有过去的商业捕鱼权要求已得到解决,迄今提供的条约赔偿已超过 5 亿美元。70
- 97. 在加拿大、由加拿大、不列颠哥伦比亚政府和土著人民最高级会议三方成立了不列颠哥伦比亚条约委员会,其任务是加快谈判不列颠哥伦比亚省的新条约。委员会由五名专员组成,其中二名由土著人民最高级会议指定,联邦政府和省政府各指派一名,而委员会主席由三方共同推选。委员会于 1993 年 12 月开始工作。截至 1997 年 10 月,该委员会已接受 51 个土著民族要求谈判条约的意向声明(占该省土著居民 70%以上),已为土著人民参加谈判划拨了年度经费,并宣布已准备好 42 个谈判桌。据加拿大政府称,截至 1998 年 5 月,已签署框架协议 30 多项,使这些土著人民进入了"原则协议谈判"进程。
- 98. 最近谈判达成的协议有"纽纳武特协议"(在加拿大北部建立一个新地区),还有与加拿大境内其他土著民族达成的一系列协议。据该国政府称,自 1973 年联邦政府颁布全面土地权利要求政策以来,已经达成 12 项全面土地权利要求协议。尼斯加民族和不列颠哥伦比亚省之间的尼斯加协议于 2000 年 5 月 11 日生

效。该协议承认尼斯加人对大约 2000 平方公里土地享有权利,并承认他们在该地区自治的权利。加拿大政府希望尼斯加协议成为一个先例,用以解决加拿大境内印第安人提出的大约 50 宗类似的权利要求。尼斯加协议是加拿大达成的第 13 宗土地权利协议。但是,在该协议生效后不到一星期,不列颠哥伦比亚自由党党员就向不列颠哥伦比亚最高法院提起诉讼,以违反加拿大宪法为由反对该协议。不管结果为何,这个案件可能会上诉到加拿大最高法院,因而对其他谈判造成一段不确定的期间。⁷¹ 若干土著群体也反对用尼斯加协议作为未来协议的模式,不能接受它的理由从尼斯加人对其传统土地的所有权除 8%外都丧失了到加拿大人与尼斯加人之间的资源使用权和通行权不平衡。⁷²

99. 在尼斯加协议生效前,加拿大最近达成的协议是同尤肯人的 6 项协议,也包括有类似尼斯加协议的自治规定。联邦政府表示将坚持解决权利诉求的势头,据报道在 1998 年共参加了约 70 项新条约的谈判。该国政府向特别报告员提交的报告中提供了以下情况:

"正在稳步取得进展。解决权利要求确实费时间,因为必须处理正确:条约是神圣的、有法律约束力的文件,是受加拿大宪法保护的。费时的另一个原因是谈判的复杂性,涉及到许多利害悠关者和司法管理的交叉现象。在加拿大,参加谈判的有三个当事方:联邦政府、省(或地区)政府和土著人团体。有许多关键问题,如费用分摊和司法安排,都需要联邦与省之间单独讨论,而需要谈判的问题范围极广,涉及到土地、资源和自治问题。公私合法利益必须公平处理,而常常有好几个土著团体对同一地区提出权利要求,更使得谈判复杂化。"

100. 加拿大政府提请特别注意,经过谈判解决土地权利要求问题是一积极可行的措施,能实现土著人民对土地和资源关系方面的良性目标。该国政府在提交的资料中指出:

"土地权的解决提供许多机会,因为在谈判过程中可以做很多事情促进土著人民在其传统领地中与土地和资源保持持续的关系。加拿大的土地权利协议给土著团体提供的权益包括:在协议涵盖地域内享有某些土地的完全所有权;保证有野生动物狩猎权;保证能参与全地区土地、水、野生动物和环境的管理(通常以委员会、理事会或其他决策机构成员

的方式); 财政补偿; 分享资源收益; 促进经济发展的具体措施; 以及在管理该地区文化遗产和国家公园方面发挥作用。共同管理安排体现了土著人民和政府代表平等参加的原则, 尊重并吸收土著人民的传统知识和科学知识。

"土地权协议的经济效益为土著社区提供了迫切需要的资金用于投资和经济发展,而培训和教育机会的增加有助于实现自力更生。分享土地使用费的安排能提供持续的收益来源。新条约以这样或那样的方式为经济和政治的发展提供了重要的助力。"

- 101. 加拿大政府在条约谈判和土地权利要求政策方面所作的努力是解决加拿大土著土地权利要求的积极步骤。但是,执行这两项进程方面存在若干问题需要进一步予以注意。土著群体和联合国人权机构最常提出的关注是加拿大继续执行废除土著所有权的政策。⁷³ 报导的另一个令人关注的问题是,目前执行的条约谈判进程对争论中的土著土地和资源在冗长的谈判过程中不提供保护。一个土著群体提供了证据,表明任何向法院寻求这种保护的尝试都会导致省政府终止谈判,而且不列颠哥伦比亚的法院极不可能对任何案件提供这种保护。此外,这一土著群体说,据他们了解,如因寻求司法补救办法而导致谈判终止,也将使土著人民有义务在那时候偿还国家提供给他们参与谈判进程的贷款。迄今为止提供给不列颠哥伦比亚土著人民的这些贷款总数约为 7,500 万美元,显然他们打算用通过国家条约谈判进程商定的解决办法得到的款项予以偿还。这一土著群体还说,不列颠哥伦比亚条约委员会无法保持独立和中立,因为它的经费完全由政府提供,而且它没有权力强迫国家承认和保护土著土地和权利。⁷⁴ 另一土著群体说,许多土著民族和人民没有参与谈判进程,而且他们可用于保护其土著土地权利并获承认的渠道,包括全面土地权利要求政策,仍然不可接受。⁷⁵
- 102. 美洲人权委员会的友好解决程序为土著人土地权利谈判提供了一个渠道。根据美洲人权公约,当委员会收到有关人权的请愿书时,委员会即负责与有关各方共同寻求在尊重人权的基础上达成友好解决。1998 年 3 月,该委员会宣布已解决巴拉圭政府与 Lamenxay 和 Riachito 土著社区之间的土地权利要求,根据一项协议将一大片土地移交给印第安人。这一案例是美洲人权系统内第一个为土著社区恢复土地权利的协议。另一个案例是,该委员会于 1999 年 2 月正式主持伯利

兹政府与伯利兹南部玛雅印第安人之间正式谈判的开始。这场谈判的背景是玛雅领导人长期开展运动要求承认他们的土地权。这些土著人民发现他们对于自己一贯居住的土地没有任何正式的法律权利。那片土地被政府当成是"公有"土地。自 1993 年以来,政府私下里发放了 17 个伐木许可证,在 50 万公顷以上的玛雅人土地上进行伐木作业,另外还发放了若干石油和天然气开发许可,事实上遍及全地区,而这些做法全都没同玛雅人商量。玛雅人向伯利兹法院提起诉讼未能取胜,于 1998 年向美洲人权委员会呈交请愿书,指控出让土地不承认玛雅人土地权利是侵犯他们的人权。该国政府起初愿意在美洲人权委员会主持下与玛雅人进行谈判,但在经过几个月毫无进展的讨论之后,友好解决程序终止了。不过,主要由于美洲人权委员会的监督和随后对案件的调查(正在进行中),与玛雅人的谈判已再度开始。

103. 最后,在国际、国家和地方各级进行的关于国际土著人权标准的实质性和建设性的正式对话,可以说是了解土著人价值和观念的较富有成果的方法或机制。这样的教育进程对于设法解决长期冲突和了解兼顾土著人民与国家之间相互竞争的权利和利益的影响是必要的。

C. 宪法改革和立法

104. 保障土著权利的一个积极步骤是,各国越来越多地通过宪法修正案、具体立法和普通法内的条款在不同程度上承认和保护土著土地权利。近年来特别值得注意的一个例子是 1988 年通过的《巴西宪法》。该宪法包含了要求对土著土地进行划界和保护的重要规定。其宪法承认土著拥有公地或自然资源和/或保障这类土地的权利保留或分界线的其他中美洲和南美洲国家有阿根廷、玻利维亚、厄瓜多尔、危地马拉、洪都拉斯、墨西哥、尼加拉瓜、巴拿马、巴拉圭、秘鲁和委内瑞拉。此外,玻利维亚、哥伦比亚和秘鲁等国宪法承认土著人民有权根据国家宪法和/或法律在其土地上实行自治。伯利兹则是南美洲有较多土著人口但其宪法或法律尚未规定保护土著土地权利的一个国家。北美洲的一个积极例子是加拿大,其 1982 年宪法法案第 35 条对当时存在的土著土地权利给予宪法保护;以条约形式解决的土地权利要求现在也同样地得到宪法保护。在马来西亚,1957 年的联邦宪法给予国家政府对土著人民福利的立法管辖权,并规定了土著人民的保护、福

利和进步,包括土地权利保留。菲律宾宪法承认土著文化社区和土著对祖传土地的权利。

- 105. 一些国家采取了较为具体的行动,归还土著人民土地,或承认或尊重土著人民土地面积。阿根廷向土著人民归还土地就是一例。⁷⁶ 根据 1994 年宪法改革法,政府现在将大约 400 万公顷土地归还给阿根廷 60 万土著人民当中的一部分人,并计划到 1999 年再归还 988,400 公顷。哥伦比亚近年也有类似的土地归还。这些措施的成功以及所存在的问题都值得密切注意。
- 106. 1978 年《格陵兰地方自治法》可能是照顾土著人民权利和愿望的建设性框架法律的最佳范例之一。格陵兰的土地所有权是根据格陵兰因努伊特土地占有制度,按一种完全不同的方式安排的。该法律的一个显著特点是授权因努伊特人对土地的使用做出决定。例如,涉及发展问题时,由议会选出的格陵兰自治政府(即 Lanasstyret)可对发展活动行使否决权。
- 107. 若干其他国家通过了专为承认或保护土著对土地和资源的权利的立法。 巴西《民法》第 6 条中的"印第安人法规"承认三类不同的印第安人土地,并规 定行政部门必须对所有三类土地划定界线。巴西第 24 号指令授权全国印第安人基 金会通过执行防止环境退化的措施、适当的生态技术和教育方案,协助土著人民 维持其土地自然资源的价值。1993 年智利通过一项有关若干土著问题的法律,其 中包括规定承认、保护和发展土著人民的土地以及设立一个基金来为协助土著社 区和个人获取土地和用水权利提供补贴。77 哥斯达黎加的 1977 年 11 月第 6172 号 法律规定了土著人民的土地权利。洪都拉斯的 1999 年 3 月第 37-99 号法令授权行 政部门在全国各地以市场价格购买私人财产以便用于履行政府对农民和土著人民 的承诺。尼加拉瓜的《沿海地区自治法规》承认历来属于大西洋沿岸土著社区的 土地、水和森林等公有财产。在委内瑞拉,1999年1月的第3273号法令规定了对 土著社区传统占有的土地财产权的承认。在澳大利亚,1993年的《土著土地所有 权法》为澳大利亚土著人民获得土地所有权建立了框架和机制,但该机制受到 1998 年《土著土地所有权法修正案》的破坏,因为修正案取消或削弱了土著权利 (见上文第 31 和 46 段)。马来西亚现行的《土著人民法》是 1954 年制订的,于 1967年和1974年修改过。根据马来西亚的法律制度,某些土地是为土著人民保留 的,并承认他们有权在其他土地上打猎和采集。菲律宾国会于 1997 年通过的《土

著人民权利法》建立了国家土著人民委员会来执行促进和保护菲律宾土著人民和 土著文化社区的权利和福利的政策、计划和方案。

- 108. 除了专门或仅涉及土著权利的立法外,土著土地问题也逐渐被列入比较普通的法律,这一趋势在中南美洲的农业和林业立法中特别明显。一个较广泛的例子是墨西哥的农业、林业、生态和环境法,其中包括了承认和保护土著人民的土地、资源和发展权利的许多规定。(但是,这些法律可能导致互相矛盾的执行,因为有些法律鼓励通过现代化和商业性开发森林资源实现土著人民的社会经济发展,另一些法律则承认传统的资源利用和土著人民的知识。)在玻利维亚,关于国家土地改革服务处的第 1715 号法重申了关于土著人民的土地权利的宪法规定并保障土著人民对其原有公地的权利。玻利维亚林业法承认土著人民对其土地上的森林的权利,禁止国家发放在土著人民居住的地区伐木的特许权并将在其地区伐木的特许权优先给予土著社区。在哥斯达黎加,1998 年 9 月的第 27388-MINAE 号法令规定,印第安人社区的权利是在规划森林的利用和管理时必须考虑的一个原则。在厄瓜多尔,《农业发展法》第 38 条规定国家将保护在全国土地改革方案下分配给土著人民发展的土地,并说土著人民的传统生活方式将纳入为帮助农村地区经济发展设立的国家土地改革体制并与其协调。在尼加拉瓜,《保护土地所有权法》充分保障各族群,包括大西洋沿岸的印第安人社区对土地的既得权利。
- 109. 除了本工作文件其他地方讨论过的资料外,未收到任何有关上面所列的宪法和立法规定实际上得到多大程度的执行以及它们在实现上文第 85 段所列的目标方面的效果如何的资料。对全世界有关土著土地权利的立法和宪法规定进行比较研究将是有益的工作。

D. 土著人民的主动行动

110. 应该指出,土著人民本身也在发起各种与他们的土地、领土和资源有关的项目和方案,藉以维护和促进他们的权利。例如,阿拉斯加和另一些地方对土地实行管理和联合管理。土著人民还积极参与全球和全国环境保护倡议。土著人民非政府组织在联合国环境与发展会议上对《21世纪议程》第 26 章的起草和通过起到了关键作用。这是土著人民对国际社会的重要贡献。

111. 某些国家的土著人民发动了土地测绘项目,以记录和明确他们传统的土地所有权和土地使用方式。这可能成为一个重要途径来促成对土著人民土地所有权更广泛的认识和理解,并为最终对这些土地和资源的权利给予法律承认和保护打下基础。在伯利兹,玛雅印第安人对托勒多地区的测绘工程,导致 1998 年出版了《玛雅地图册:为保护伯利兹南部玛雅土地而斗争》,据说这是世界上第一部由土著人民绘制的地图册。由托勒多玛雅文化理事会和托勒多市长联合会合作绘制的《玛雅地图册》记录了 Mopan 和 Ke'kchi 玛雅人传统和当代的土地使用情况,其中包括对玛雅历史、文化、土地耕种和社会经济文化的独特描述。《玛雅地图册》内载有伯利兹南部每一玛雅人村落的地图,都是玛雅社区研究人员走访村内每一户玛雅人之后绘制的。这种地图册是为了给玛雅人的土地争取法律保护而绘制的。由土著人民测绘地图,以明确土地权利,这种做法在另一些国家也实行。主要关心北极环境保护和发展问题的北极理事会所起的作用是另一个有说服力的实例。

E. 人权标准和机制

- 112. 《里约宣言》、国际劳工组织第 169 号公约、拟议的《美洲土著人民权利宣言》和《联合国土著人民权利宣言》草案,都是解决国家与土著人民之间土地问题的手段。土著人民在某种程度上还使用了处理人权诉讼的各种机制。最后文件将分析这些情况并酌情将它们列入。
- 113. 此外,土著人民在关于发展权利、几代人之间权利、和平权利以及安全和健康的环境权利的新兴起的人权规范等领域已开始影响旧的观念,并促使土著人民和整个人类更加关心、负责和有作用的标准逐步得到发展。在回顾关于人权标准的变化和发展时,不应忽略勃兰特委员会报告《我们共同的未来》的结论。该报告承认土著人民的特殊情况:

"对这些群体实行一种公正和人道政策的出发点是承认和保护他们对维持其生活方式的土地和其他资源的传统权利——他们对这些权利的界定可能与标准的法律体系不相符合。这些群体拥有自己的机构调整这些权利和义务,这对于保持与自然的和谐以及与反映传统生活方式特点的环境意识是必不可少的。所以,承认传统权利的同时,必须采取措施保护

对资源的使用负有责任的地方机构。这一承认还必须给予地方社会决策 权利,以使它们对其地区资源的使用做决定。"⁷⁸

五、结 论

- 114. 这份最后工作文件说明有必要灵活的办法考虑土著人民及其与土地的关系问题。必须承认正在发生重要的演变。十多个国家已采取宪法和立法措施在不同程度上承认土著人民对其土地和资源的合法权利,这有力地证明了这类法律措施是符合国内法律制度而且是必要的。土著人民对土地、领土和资源的权利不断发展,必须被看作是土著人民和国家促进人权标准逐步发展的一个机会。必须承认不能"冻结"这些法律概念,权利以及土著人民本身。土著社区和社会与所有其他社会一样也在变化和演变。
- 115. 这份最后工作文件比所有其他文件更应被看作是土著土地问题迫切性的一个证明。政府和土著人民之间现存的长期问题亟需解决。由于土著土地、领土和资源受到不断威胁,它们的生存面临着危险。
- 116. 特别报告员有幸访问了全球各地的许多土著社区并评估了存在的严重土地权利问题。特别报告员也有幸研读了下列资料: 遵照 1994 年 12 月 23 日大会第 49/214 号决议、人权委员会 1994 年 3 月 4 日第 1994/29 号决议和经济及社会理事会 1994 年 7 月 22 日第 1994/248 号决定举行的有关土著人民土地权利及要求的实践经验专家讨论会的报告(E/CN.4/Sub.2/AC.4/1996/6)。该报告不仅有许多有益的资料和分析,还提供了许多建设性结论和建议,值得密切注意。其中若干结论和建议在此处予以复述。
- 117. 土著人民与他们土地有着独特而深刻的精神和物质联系,这包括空气、 水体、海岸、冰原、植被、动物和其他各种资源。这一联系具有各种各样的社 会、文化、宗教、经济和政治涵义和责任。
- 118. 历史上,世界上许多地方的土著人民被各种各样的非正义行为全部或部分地剥夺了土地和资源,其中包括:军事势力、非法定居、强制迁移和安置,法律欺诈以及政府的非法征用。
- 119. 一系列国家内的土著人社会情况迅速恶化和变化,主要原因是土著人民对土地、领土和资源的权利遭到否认。

- 120. 当前普遍存在的问题之一是国家不承认存在着土著人民对土地的使用、 占用和拥有,不肯给予适当的法律地位和法定权利以便保护此种使用、占用和拥 有。
- 121. 在某些国家,土著社区不具备拥有土地的法律资格,甚至不具备集体拥有土地的法律资格。
- 122. 土著人拥有土地的权利在许多情况下经常被国家权力的非法使用而予以取消,这与许多国家对其他公民的土地和财产赋予合法权利和保护形成了对照。 仅此事实可能是造成土著人民人权遭到侵犯绝大多数问题的根源。
- 123. 有的国家具有一整套涉及土著人民的法律,但由于对土著人民及其土地和资源适用歧视性法律和法律理论,从而造成很大问题。
- 124. 这类歧视性理论包括: "无主地"理论,土著土地权利可以不经必要程序和补偿而予取消的理论,"全权"理论以及与土著人民签订的条约可以违反或废除而不予补救的理论。
- 125. 从投诉的频率和规模看,当前土著人民面临的最大问题是国家不给土著土地划界。
- 126. 国家不肯落实和执行保护土著土地及资源的现有法律,也是一个普遍存在的问题。
- 127. 权利要求处理程序不当、严重不公平或有欺诈性,也是某些国家土著人民遇到的一个严重问题。
- 128. 为国家发展而征用土著土地和资源是一个日益增加的严重问题。发展项目经常在土著人的土地和领地上进行,但未取得土著人民的同意,甚至不同他们商量。
 - 129. 迁移和易地安置土著人民是一个不断发生的问题。
- 130. 已查明的其他重大问题包括:把土著土地分配给个人的计划;在土著土地上定居的计划;要求把土著土地交国家托管的做法;把土著土地当作贷款抵押的做法;国家对圣地和文化遗迹管理不善;国家或其他方面不能保护土著土地和资源的环境完整;不给予土著人民管理、使用和控制发展其土地和资源的适当权利。

- 131. 已查明若干解决土著土地问题的积极可行的措施。这些措施当中最令人 鼓舞和富有成效的看来都是以国家与土著人民进行公正自愿的谈判为基础的,谈 判或在国家一级或在国际机构主持下进行。
- 132. 公正的宪法和法律制度,包括公正的司法系统的存在,且能够保障正当法律程序,是解决土地权程序得以成功落实的一个重要条件。某些国家的经验证明,建立公正的司法程序以执行与土著人民达成的条约、协议和其他建设性安排,是一个有益的方式,可鼓励人们尊重这些协议,并对土著社区和非土著社区进行宣传教育。
- 133. 任何土地权利要求程序,若要在解决土著土地权利问题中行之有效,必 须彻底公平。
- 134. 经验表明,在国家与土著人民之间就土地问题缔结公平公正的条约、协议和其他建设性安排并予以落实,可以有助于无害环境的可持续发展,造福于所有的人。
- 135. 政府有责保证土著人民取得充足资源对其权利要求进行研究和谈判,以取得公平、公正而持久的解决。
- 136. 必须使有关土地和资源的条约和协议在精神上和意图上具有实际效力。 这要求各当事方都须具有诚意,以伙伴而不是敌人的身份行事,还要求所有当事 方对有关土地和资源的条约和协议的精神和意图具有明确的认识。
- 137. 许多国家需要有承认土著人民的土地和资源并给予法律保护的一般或框架立法。有些国家需要修改宪法的有关条款,以便对土著人民的土地和资源实行应有程度的法律保护。
- 138. 劳工组织关于独立国家土著和部落人民的第 169 号公约,被一些国家和许多土著人民认为规定了一些尊重土著人土地权利的最低标准。
- 139. 增进和保护人权小组委员会(为防止歧视及保护少数小组委员会)通过的 关于土著人民权利的联合国宣言草案给各国提供了一个机会,通过一项反映土著 人民和专家之间就土著土地和资源权利问题达成的广泛共识的重要国际文书。

六、建 议

- 140. 尚不存在这种立法的国家,应制订法律,包括规定特别措施对土著人民的土地、领土和资源给予承认、划界和保护,使其所享有的法律保护、权利和地位至少平等于赋予本国其他土地、领土和资源者。
- 141. 此类立法必须承认土著人民的传统做法和土地占有规律,制订此类法律时必须有相关土著人民的参与和同意。
- 142. 有关土著土地和资源的特别措施不得剥夺土著人民对国内其他个人和群体享有的对土地和资源的合法权利。
- 143. 在每一国家的法律范围以内,必须考虑修改宪法的有关部分,以便保证对土著土地和资源给予必要程度的法律保护,尤其要保证土著人民对土地和资源的权利不受政府的侵犯和减损。
- 144. 各国政府应正式放弃否定人权或限制土著土地和资源权利的歧视性法律理论和政策。它们尤其应该考虑在世界土著人民国际十年范围内酌情通过纠正性立法,宪法修正案或纠正性政策,所涉问题有:
 - (a) 发现和无主地理论:
 - (b) 土著社区没有资格拥有或集体拥有土地的理论;
 - (c) 土著土地、产权或所有权可以不经必要的法律程序且不予充足和适当 的补偿而由国家或第三方取消或侵夺的理论
 - (d) 土著土地必须不顾有关土著人民意愿而交由托管的理论或政策;
 - (e) 对土著土地、产权或所有权实行单方面废除的理论或政策;
 - (f) 把某些土著人民从国家规定的土地权利要求程序中排除出去的政策。
- 145. 各国应公开放弃对土著人民及其土地和资源使用不受尊重人权和国内普遍适用的各种权利限制的权力。
- 146. 权利和财产的保护不得以产权或其他利益由土著人民和土著群体共同拥有而不是由个人拥有为理由加以减少或取消。
- 147. 鼓励各国政府考虑建立和使用公正不倚的机制,包括国际机制,来监督和便利土著人民土地权利要求的公平公正解决,以及土地协议的执行。
- 148. 各国政府应与土著人民协商建立公平的程序来审查并纠正由于过去采取基本不公正或歧视性程序而使土著土地或资源被夺取或权利被取消的情况。

- 149. 各国应与土著人民协商,考虑建立一项能够创收足够资金的常设基金用于在土著人民过去被夺取的土地和资源无法归还或无法向他们提供相等的土地和资源时,给予土著人民赔偿。
- 150. 各国应规定有效措施,落实、修订和贯彻土地安排和协议,以及解决争议。
- 151. 各国和政府间机构,包括联合国系统各机关和机构,应该查明如何满足培训、教育、财政及技术资源的严重需要,以便使土著人民可以在对土地权利谈判的全面意义完全知情和技术上有所准备的情况下参与谈判进程。培训和教育也应是所商定协议的重要内容。
- 152. 最近设立的土著人民常设论坛应考虑在解决土地权利、资源权利和环境保护问题中发挥建设性作用。对于以下各点尤其应该给予考虑:
 - (a) 设立一个调查机构,其职责为进行现场访问并编写有关特定土著土地和资源问题的报告;
 - (b) 设立一个土著土地和资源专员或办事处,提供回应、调解、调停服务;
 - (c) 设立一个投诉机制或程序,受理人权遭到侵犯的土著土地和资源情事:
 - (d) 设立一个具有"寻求和平"权力的机构,调查、推荐解决办法、调解、调停及以其他方法协助避免或结束因土著土地权利引起的暴力行为:
 - (e) 建立一个程序,要求各国定期汇报各自在保护土著人民土地和资源权利方面的进展。
- 153. 联合国及其各专门机构应考虑对各国和土著人民提供技术援助,为解决 土地权利要求和其他土地及资源问题作出贡献。
- 154. 联合国及其各专门机构和其他政府间组织应保证在实施《二十一世纪议程》时和为其后续行动设立的机构,保护土著人民的文化多样性、传统价值和生活方式。
- 155. 联合国人权事务高级专员应考虑收集土著土地协议范例,以便促进该一领域的技术合作。

- 156. 各国应尽最大努力保证使被剥夺土地或缺乏足以维持生存的土地的土著 人民能够取得土地,以保障他们的文化和物质发展。
- 157. 在国际、区域、国家和地方各级,土著人民应参加有关土地、资源和发展的决策和政策制定。
- 158. 鼓励各国政府与土著人民协商,制订土地和资源共存和共同管理的程序、标准和方法,以期容纳土著人民的传统做法和土地占有规律。
- 159. 歧视土著人民及其与土地的关系的法律和政策内容应是订于 2001 年 9 月在南非举行的反对种族主义、种族歧视、仇外心理和有关不容忍现象世界会议 议程上的首要项目。

注

¹ The relevant paragraphs are as follows:

"The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Acknowledging that indigenous peoples in many countries have been deprived of their human rights and fundamental freedoms and that many of the human rights problems faced by indigenous peoples are linked to the historical and continuing deprivation of ancestral rights over lands, territories and resources,

Recognizing the profound spiritual, cultural, social and economic relationship that indigenous people have to their total environment and the urgent need to respect and recognize the rights of indigenous people to their lands, territories and resources,

Acknowledging that lack of secure land rights, in addition to continued instability of State land tenure systems and impediments to efforts for the promotion and protection of indigenous communities and the environment, are imperilling the survival of indigenous peoples,

Recognizing that United Nations organs and Member States have increasingly acknowledged that lands and natural resources are essential to the economic and cultural survival of indigenous peoples, and that some States have enacted legal measures that uphold indigenous land rights or have established procedures for arriving at legally binding agreements on indigenous land-related issues,

Mindful of the development of relevant international standards and programmes which promote and affirm the rights of indigenous peoples to their lands and resources, in

particular, the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization, Agenda 21 adopted by the United Nations Conference on Environment and Development ..., World Bank Operational Directive 4.20, the draft Inter-American declaration on the rights of indigenous peoples developed by the Inter-American Commission on Human Rights of the Organization of American States, and the draft United Nations declaration on the rights of indigenous peoples,

Recognizing that despite these international and national advances, problems continue to abound which impede the effective enjoyment of indigenous land rights,

Recalling that many States in which indigenous peoples live have yet to enact laws or policies regarding indigenous land claims or in other instances have not provided adequate implementing mechanisms concerning indigenous land rights that are mutually acceptable to the parties concerned."

- ² Communication from Manju Yakthumba, Chairman, Kirat Yakthung Chumlung, Katmandu, to Mr. John Pace, 5 January 1998.
- ³ Lionel Caplan, "Tribes in the ethnography of Nepal: some comments on a debate", in Nepalese Studies, vol. 17, No. 2 (Katmandu, CNAS, Tribhuvan University, July 1990), cited in the communication referred to in note 2 above.
- ⁴ Robert A. Williams, "Encounters on the frontiers of international human rights law: redefining the terms of indigenous peoples' survival in the world", <u>Duke Law Journal</u>, 1990, p. 981.
- ⁵ James Sakej Henderson, "Mikmaq tenure in Atlantic Canada", <u>Dalhousie Law Journal</u>, vol. 18, No. 2, 1995, p. 196.
- ⁶ Statement by Eben Hopson, founder of the Inuit Circumpolar Conference (ICC), at the organizing conference held in Barrow, Alaska, in June 1977, and also contained in a statement by the ICC representative to the Working Group in 1985.
- ⁷ United Nations publication, sales No. E.86.XIV.3.
- ⁸ <u>Ibid</u>., paras. 196 and 197.
- ⁹ Proposed Inter-American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on 26 February 1997.
- ¹⁰ Rodolfo Stavenhagen, "The status and rights of the indigenous peoples of America", report prepared for the Inter-American Commission on Human Rights, July 1991.
- The views of early international legal theorists are discussed in Robert Williams, <u>The American Indian in Western Legal Thought: The Discourses of Conquest</u>, Oxford University Press, 1990, and "The Medieval and Renaissance origins of the status of the American Indian in Western legal thought", <u>Southern California Law Review</u>, vol. 57, No. 1, 1983, pp. 68-85. See also S. James Anaya, <u>Indigenous Peoples in International Law</u>, Oxford University Press, 1996.

- ¹² Quaker Aboriginal Affairs Committee, (Canada) Response to Preliminary Working Paper on Indigenous People and their Relationship to Land (May 1999).
- Vine Deloria, Jr., <u>American Indians</u>, <u>American Justice</u>, University of Texas Press, 1983, p. 36. An in-depth exploration of how indigenous languages and conceptions of land affected treaty negotiations in Canada, can be found in James (Sakej) Youngblood Henderson, Marjorie L. Benson & Isobel M. Findlay, <u>Aboriginal Tenure in the Constitution of Canada</u>, Carswell Thomas Professional Publishing, 1999.
- ¹⁴ See for example, S. James Anaya, <u>Indigenous Peoples in International Law</u>, Oxford University Press, 1996, p. 22.
- ¹⁵ See for example, J.L. Brierly, <u>The Law of Nations</u>, Oxford University Press, 1960, p. 154.
- ¹⁶ See for example <u>Delgamuukw v. The Queen</u>, para. 38.
- ¹⁷ Eastern Greenland (Denmark v. Norway), 1933 P.C.I.J. (ser. A/B) No. 53.
- Western Sahara, Advisory Opinion, 1975 I.C.J. 12. Douglas Sanders, a professor of law at the University of British Columbia, has described modern condemnation of the doctrine of terra nullius. "The 'terra nullius' analysis, with its apparent denial of the existence of the Aboriginal people, became a potent symbol of the oppressive character of the legal system. The Pope, on a visit to Australia, expressly condemned the doctrine of 'terra nullius'. The United Nations Working Group on Indigenous Populations drafted a Declaration of the Rights of Indigenous Peoples, which specifically condemned 'terra nullius' in a preambular paragraph." Indigenous and Tribal Peoples: The Right to Live on their Own Land, 12th Commonwealth Law Conference, Kuala Lumpur, Malaysia, 13-16 September 1999. See also Douglas Sanders, and others, "Common Law Rulings on the Customary Land Rights of Aboriginal or Indigenous People," unpublished paper on file with the Special Rapporteur, 6 August 1999.
- Reports of the Working Group on Indigenous Populations E/CN.4/Sub.2/1993/29, E/CN.4/Sub.2/1994/30 and Corr.1, E/CN.4/Sub.2/1995/24 and E/CN.4/Sub.2/1996/21 and Corr.1. See also, Willheim, "Queensland pastoral leases and native title", Aboriginal Law Bulletin, vol. 3, No. 89, 1997, p. 20; M. Dodson, "Human rights and extinguishment of native title", 1995.
- ²⁰ See also the Conclusions and Recommendations contained in the Report of the Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States, Geneva, 16-20 January 1989 (HR/PUB/89/5).
- Rodolfo Stavenhagen, op. cit., p. 22. The situation of indigenous peoples of the Philippines is addressed in a paper prepared by Donna Gasgonia for the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, Whitehorse, Canada, 24-28 March 1996 (E/CN.4/Sub.2/AC.4/1996/6/Add.1).
- ²² Quaker Aboriginal Affairs Committee (Canada), response to preliminary working paper on indigenous people and their relationship to land (May 1999).

- Kristyna Bishop, "Squatters on their own land: San territoriality in western Botswana" (1998) 31 Comparative and International Law Journal of Southern Africa 92.
- ²⁴ Communication from Heidi Salmi, Assistant Director, Sámediggi Ministry of Foreign Affairs, 30 March 2000; Communication from Mikkel Oskal, Chairman, Mauken Reindeer Herding District, 3 April 2000.
- ²⁵ Communication from Rev. Leva Kila Pat, General Secretary, Papua New Guinea Council of Churches, 22 April 1998.
- Alan Thein Durning, "Guardians of the land: indigenous peoples and the health of the Earth", Worldwatch Paper 112 (December, 1992), pp. 21-22. The Indigenous Peoples Right Act of 1997 now provides a means for recognition of indigenous land rights. The usefulness of the Act deserves careful evaluation.
- ²⁷ Ibid.
- See Newton, "At the whim of the Sovereign: Aboriginal title reconsidered", <u>Hastings Law Journal</u>, vol. 31, No. 1215, 1980; Cohen, "Original Indian title", <u>Minn L. Rev.</u>, vol. 32, 1947; Smith, "Concept of native title", <u>Toronto Law Journal</u>, vol. 24, No. 1, 1974; McHugh, "The constitutional role of the Waitangi Tribunal", <u>New Zealand Law Journal</u>, vol. 224, No. 3, 1985.
- Aboriginal title has received considerable scholarly attention in Canada. See, for example, Kent McNeil, Common Law Aboriginal Title, Oxford, Clarendon Press, 1989; "The meaning of Aboriginal title" in Michael Asch, ed., Aboriginal and Treaty Rights in Canada, Vancouver, UBC Press, 1997; Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar Rev. 314.
- ³⁰ See report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, loc. cit.
- Felix Cohen, the foremost scholar of United States law in regard to Indian affairs, commented on the discriminatory nature of property ownership by Indian tribes: "That there are peculiar incidents attached even to fee-simple tenure by an Indian tribe is an undoubted fact, and the explanation of this fact is probably to be found in the contagion that has emanated from the concept of aboriginal possession". Handbook of Federal Indian Law, 1942, p. 291.
- See P. Joffe and M.E. Turpel, <u>Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives.</u> A comprehensive study by the Royal Commission on Aboriginal Peoples (Canada), 3 volumes, June 1995; and <u>Treaty Making in the Spirit of Coexistence: An Alternative to Extinguishment.</u> A report by the Royal Commission on Aboriginal Peoples, Ottawa, 1995.
- See Vattel, <u>The Law of Nations</u>, Book 1, 1805, chap. XVIII. An account of the extinguishment policies of Spain, France and England during the colonial period is set forth in Royce, "American Indian land cessions", Introduction by Cyrus Thomas, Bureau of American Ethnology, Eighteenth Annual Report, 1899.

- And the United States Government continues to exploit the doctrine to defeat Indian claims. For example, the <u>Tee-Hit-Ton</u> decision was the basis for the decision of the United States Court of Federal Claims in Karuk <u>Tribe of California</u>, et al. v. United States (6 August 1998).
- The Alaska Native Claims Settlement Act and its consequences are discussed in full detail in Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission, 1985. Commissioner Berger presented the report to the thirteenth session of the Working Group on Indigenous Populations in 1995, on behalf of the Inuit Circumpolar Conference, the non-governmental organization which sponsored the Commission project.
- ³⁷ St. Catherines Milling Co. v. Queen, (1888) 14 App. Cas. 46; 2 C.N.L.C. 541; 58 L.J.P.C. 54; 60 L.T. 197; 5 T.L.R. 125, affirming 13 S.C.R. 577.
- ³⁸ Michael Dodson, op. cit.
- ³⁹ "Aboriginal and Torres Strait Islander Peoples and Australia's obligations under the United Nations Convention on the Elimination of All Forms of Racial Discrimination", a report submitted by the Aboriginal and Torres Strait Islander Commission to the United Nations Committee on the Elimination of Racial Discrimination (February, 1999), 4.1.1.
- Australia, 18 March 1999 (A/54/18, para. 21) "Validation" refers to validation of certain non-indigenous titles; the consequence of validation is the arbitrary extinguishment or impairment of affected native title and the loss of an opportunity to negotiate. "Confirmation of extinguishment" provisions refer to past acts of extinguishment. A range of previously issued titles are deemed by the Act to extinguish native title permanently, whether or not such titles extinguish title at common law. "Primary production upgrade" provisions permit pastoral lease holders to apply to upgrade their rights to permit a broad range of higher intensity "primary production activities" without requirements of consultation or negotiation with affected native title holders. The restrictions on the right of native title holders to negotiate mean that states and territories are entitled to establish regimes for the grant of interests to mining companies and other developers on terms significantly less favourable to native title holders than before the amendments.
- ⁴¹ Roque Roldán Ortega, "Notes on the legal status and recognition of indigenous land rights in the Amazonian countries", Report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims, op. cit. See also Stavenhagen, op. cit.
- ⁴² Maria Luisa Acosta, "The State and indigenous lands in the Autonomous Regions: The case of the Mayagna community of Awas Tingni", Indigenous Affairs, No. 4, December 1998, p. 35.
- ⁴³ Corte Interamericana De Derechos Humos, Caso De La Comunidad Mayagna (Sumo) Awas Tingni, Sentencia De 1 De Febrero De 2000, para. 60.
- ⁴⁴ Comissão Pro Yanomami <u>Update</u>, No. 101, February 1999.

³⁴ 348 U.S. 272 (1995).

- ⁴⁵ Inter-American Commission on Human Rights, <u>Report on the Situation of Human Rights in Brazil</u>, 1997.
- ⁴⁶ Comissão Pro Yanomami <u>Update</u> No. 101, February 1999; Conselho Indigenista Missionário CIMI, Newsletter Nos. 354, 356.
- ⁴⁷ Communication from Manju Yakthumba, Chairman, Kirat Yakthung Chumlung, Katmandu, Nepal to Mr. John Pace, 5 January 1998.
- ⁴⁸ See report of the Working Group on Indigenous Populations on its seventh session (E/CN.4/Sub.2/1989/36).
- Newton, "Indian claims in the courts of the conqueror", 41 <u>American University Law Review</u>, vol. 41, No. 753, 1992; Barsh, "Indian claims policy in the United States", <u>North Dakota Law Review</u>, vol. 58, No. 7, 1982; Orlando, "Aboriginal title claims in the Indian Claims Commission: <u>United States v. Dann</u> and its due process implications", <u>Environmental Affairs</u>, vol. 13, No. 241, 1986.
- See for example, S. Tullberg, R. Coulter and C. Berkey, Indian Law Resource Center, "Violations of the human rights of the Sioux Nation, the Six Nations Iroquois Confederacy, the Western Shoshone Nation and the Hopi Nation by the United States of America", a complaint communicated to the Commission on Human Rights under the confidential "1503" procedure on 12 March 1980; Petition of Mary and Carrie Dann and the Dann Band of the Western Shoshone Nation to the Inter-American Commission on Human Rights, 3 April 1993.
- Petition of Mary and Carrie Dann on behalf of themselves and the Dann Band of the Western Shoshone Nation against the United States to the Inter-American Commission on Human Rights (1993).
- ⁵² Response of the United States (9 September 1993).
- Letter from Jorge E. Taiana, Executive Secretary of the Inter-American Commission on Human Rights, to S. James Anaya and Steven M. Tullberg, Indian Law Resource Center (28 June 1999).
- ⁵⁴ Inter-American Commission on Human Rights Report No. 99/99 (27 September 1999).
- The Government of New Zealand submitted comments on the preliminary working paper stating, among other things, that such anger is expressed by very small groups, and pointing out that there is rarely complete support for a settlement from all involved. Letter from Deborah Geels, First Secretary, Permanent Mission of New Zealand to the United Nations Office at Geneva, addressed to the High Commissioner for Human Rights, 25 June 1998. The Government of New Zealand submitted additional comments on the second progress report in which it describes its processes for defining the claimant group, verifying the authority of negotiators and approving the final settlement. Facsimile from Emma Eastwood, Policy Analyst, Office of Treaty Settlement to Janet Lowe, Ministry of Foreign Affairs and Trade, 14 March 2000.

- Alan Thein Durning, "Guardians of the land: indigenous peoples and the health of the Earth", Worldwatch Paper 112 (December 1992) p. 26, citing Sahabat Alam Malaysia, "Native customary rights in Sarawak", <u>Cultural Survival Quarterly</u>, vol. 10, No. 2 (1987). In 1998, the Malaysian Court of Appeal in <u>Adong bin Kuwau v. State of Johor</u> upheld a trial judgement which awarded compensation to the Jakun tribe for the loss of 53,273 acres of ancestral lands in the southern state of Johor.
- ⁵⁷ Durning, op. cit., p. 26.
- ⁵⁸ General Assembly resolution 1803 (XVII) of 14 December 1962, entitled "Permanent sovereignty over natural resources".
- ⁵⁹ General Assembly resolution 626 (VII) of 21 December 1952, entitled "Right to exploit freely natural wealth and resources".
- See, for example, the report of the Working Group on Indigenous Populations on its seventh session (E/CN.4/Sub.2/1989/36). In regard to hydroelectric development and the indigenous peoples of the Chittagong Hill Tracts, see the report of the Chittagong Hill Tracts Commission, May 1991. See also Rajkumari Chandra Kalindi Roy, <u>Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts</u>, <u>Bangladesh</u> (Norwegian Agency for Development Corporation (NORAD), 1996).
- ⁶¹ Reports of the Working Group on Indigenous Populations (E/CN.4/Sub.2/1989/36; E/CN.4/Sub.2/1993/29).
- ⁶² For example, one indigenous organization in Peru submitted a communication on the adverse effects of commercialization of the Amazon region on the indigenous communities and the environment, particularly the problems of mining, oil development, road building and deforestation. Communication on the situation of indigenous peoples and their lands and territories in Amazonian Peru, Mr. Miquea Mishari Mofat, Central de Comunidades Nativas de la Selva Central, Peru, 15 April 1998. In a communication of 5 April 1998, Chief Teobaldo Melgar of the Yuracare people, and Bernardo Toranzo C., "Proyecto Munay", Bolivia, point out that this indigenous people has been relocated from its lands and that the discovery of oil on those lands has made it more difficult to seek their recovery. Nevertheless, the Yuracare people hope that they will be able to return to their territories in order to maintain their traditions. In Japan, the Nibutani Dam project was the impetus for the administrative confiscation of land belonging to the Ainu people. Although authorization for the project was later held to be illegal because it did not account for the effects on the Ainu, the dam was not deconstructed. The court held that removing the dam would be against public interest and, in any case, would not restore Ainu cultural sites that had already been destroyed. Kayano et al. v. Hokkaido Expropriation Committee, translated by Mark A. Levin, 38 International Legal Materials 394 (1999).
- ⁶³ The Government of Canada reports in its submission of 27 May 1998 to the Special Rapporteur that settlements have been reached with groups such as the Mushuau Innu of Davis Inlet.

- ⁶⁴ Thomas R. Berger, <u>Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992</u>, Douglas & McIntyre, Ltd., 1991, p. 99.
- ⁶⁵ The Government of Canada reports in its submission of 27 May 1998 to the Special Rapporteur that the Government now does not believe that lands "transferred to Aboriginal people through land claims settlements should continue to be held and managed by the Government of Canada for First Nations, but that First Nations should own and control these lands themselves".
- 66 See, for example, Ball, "Constitution, courts, Indian tribes", 1987 <u>A.B.F.</u> Res. J. 1, 63 (1987); Newton, "Enforcing the Federal-Indian trust relationship after Mitchell", <u>Catholic University Law Review</u>, vol. 31, No. 635, 1982.
- ⁶⁷ This case is discussed in Willheim, op. cit.
- See Durie and Orr, "The role of the Waitangi Tribunal and the development of a bicultural jurisprudence", New Zealand Universities Law Review, vol. 14, No. 62, 1990.
- ⁶⁹ R. Plant, "Addressing indigenous land rights and claims: the role of international technical assistance", paper prepared for the Expert Seminar on Practical Experiences regarding Indigenous Land Rights and Claims (E/CN.4/Sub.2/AC.4/1996/6/Add.1).
- ⁷⁰ Facsimile from Emma Eastwood, Policy Analyst, Office of Treaty Settlement to Janet Lowe, Ministry of Foreign Affairs and Trade, 14 March 2000.
- ⁷¹ Greg Joyce, "Nisga'a treaty violates constitution, lawyer says: Liberals begin challenge", The Canadian Press, 16 May 2000.
- For one indigenous group's viewpoint on the problems with the Nisga'a Agreement, see The Union of B.C. Indian Chiefs, "Modern land claim agreements: through the Nisga'a looking glass", draft, 7 September 1998.
- CCPR/C/79/Add.105 (7 April 1999); concluding observations on Canada, para 18, E/C.12/1/Add.3.1 (4 December 1999); Interior Alliance and Union of B.C. Indian Chiefs, Joint submission to the Special Rapporteur regarding the second progress report on the working paper on indigenous people and their relationship to land (23 February 2000).
- Amended petition to the Inter-American Commission on Human Rights and reply to submission of Canada by the Carrier Sekani Tribal Council, 1 May 2000, paras. 5-6, 40, 120-144.
- ⁷⁵ Interior Alliance and Union of B.C. Indian Chiefs, Joint submission to the Special Rapporteur regarding the second progress report on the working paper on indigenous people and their relationship to land (23 February 2000).

⁷⁶ The New York Times reported on 20 March 1997 that the Government of Argentina had restored ownership of 308,900 acres of ancestral lands to the Collas Indians.

For more information on recent legislation in Chile, see Report of the Expert Seminar on Practical Experiences Regarding Indigenous Land Rights and Claims (E/CN.4/Sub.2/AC.4/1996/6).

⁷⁸ Gro Bruntdland, <u>Our Common Future</u>, Oxford University Press, 1987.

Annex*

RELEVANT STANDARDS AND MATERIALS CONCERNING INDIGENOUS LANDS AND RESOURCES

The following compilation of standards and materials is comprised of the most relevant portions of various legal instruments, draft legal instruments and other relevant materials. It contains only the main or most important legal materials that pertain to indigenous peoples and their relationships to land, territories and resources. The purpose of this compilation is to facilitate understanding of current international standards and of the draft principles contained in the draft United Nations declaration on the rights of indigenous peoples and the proposed Inter-American Declaration on the Rights of Indigenous Peoples.

Universal Declaration of Human Rights

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 17

- 1. Everyone has the right to own property alone as well as in association with others.
- 2. No one shall be arbitrarily deprived of his property.

International Convention on the Elimination of All Forms of Racial Discrimination

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(v) The right to own property alone as well as in association with others;

* The annex is reproduced as received, in English only.

Committee on the Elimination of Racial Discrimination General Recommendation XXIII (51) on the rights of indigenous peoples, adopted at the Committee's 1235th meeting, on 18 August 1997

- 1. In the practice of the Committee on the Elimination of Racial Discrimination, in particular in the examination of reports of States parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, the situation of indigenous peoples has always been a matter of close attention and concern. In this respect the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.
- 2. The Committee, noting that the General Assembly proclaimed the International Decade of the World's Indigenous People commencing on 10 December 1994, reaffirms that the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination apply to indigenous peoples.
- 3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardized.
 - 4. The Committee calls in particular upon States parties to:
- (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.
- 5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to

return those lands and territories. Only when this is for factual reasons not possible, should the right to restitution be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

6. The Committee further calls upon States parties with indigenous peoples in their territories to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention.

International Covenant on Civil and Political Rights

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Human Rights Committee

General comment 23, on article 27 of the International Covenant on Civil and Political Rights (fiftieth session, 1994)

- 3.2 The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article for example, to enjoy a particular culture may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.
- 7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)

Article 4

...

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

- 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.
- 3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Article 13

- 1. In applying the provisions of this Part of the Convention Governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
- 2. The use of the term "lands" in articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

- 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
- 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
- 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

- 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
- 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, Governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

- 1. Subject to the following paragraphs of this article, the peoples concerned shall not be removed from the lands which they occupy.
- 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
- 3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
- 4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
 - 5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

- 1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
- 2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
- 3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Adequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and Governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

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

Agenda 21

Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26 (vol. III))

Chapter 26, Recognizing and strengthening the role of indigenous people and their communities

Basis for action

26.1 Indigenous people and their communities have an historical relationship with their lands and are generally descendants of the original inhabitants of such lands. In the context of this chapter the term "lands" is understood to include the environment of the areas which the people concerned traditionally occupy. Indigenous people and their communities represent a significant percentage of the global population. They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Their ability to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.

are already contained in such international legal instruments as the ILO Indigenous and Tribal Peoples Convention (No. 169) and are being incorporated into the draft universal declaration on indigenous rights, being prepared by the United Nations Working Group on Indigenous Populations. The International Year of the World's Indigenous People (1993), proclaimed by the General Assembly in its resolution 45/164 of 18 December 1990, presents a timely opportunity to mobilize further international technical and financial cooperation.

Objectives

- 26.3 In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:
- (a) Establishment of a process to empower indigenous people and their communities through measures that include:
 - (i) Adoption or strengthening of appropriate policies and/or legal instruments at the national level;
 - (ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate;
 - (iii) Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development;
 - (iv) Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities;
 - (v) Development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns;
 - (vi) Support for alternative environmentally sound means of production to ensure a range of choices on how to improve their quality of life so that they effectively participate in sustainable development;
 - (vii) Enhancement of capacity-building for indigenous communities, based on the adaptation and exchange of traditional experience, knowledge and resource-management practices, to ensure their sustainable development;

- (b) Establishment, where appropriate, of arrangements to strengthen the active participation of indigenous people and their communities in the national formulation of policies, laws and programmes relating to resource management and other development processes that may affect them, and their initiation of proposals for such policies and programmes;
- (c) Involvement of indigenous people and their communities at the national and local levels in resource management and conservation strategies and other relevant programmes established to support and review sustainable development strategies, such as those suggested in other programme areas of Agenda 21.

Activities

- 26.4 Some indigenous people and their communities may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them, including, where appropriate, participation in the establishment or management of protected areas. The following are some of the specific measures which Governments could take:
- (a) Consider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights;
- (b) Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.

World Bank Operational Directive 4.20 (September 1991)

(Note: The World Bank is in the process of revising Operational Directive 4.20)

Contents

- 15. The development plan should be prepared in tandem with the preparation of the main investment. In many cases, proper protection of the rights of indigenous people will require the implementation of special project components that may lie outside the primary project's objectives. These components can include activities related to health and nutrition, productive infrastructure, linguistic and cultural preservation, entitlement to natural resources, and education. The project component for indigenous people's development should include the following elements, as needed:
- (a) Legal Framework ... (ii) the ability of such groups to obtain access to and effectively use the legal system to defend their rights. Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction.

...

(c) Land Tenure. When local legislation needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples. Where the traditional lands of indigenous peoples have been brought by law into the domain of the State and where it is inappropriate to convert traditional rights into those of legal ownership, alternative arrangements should be implemented to grant long-term, renewable rights of custodianship and use to indigenous peoples. These steps should be taken before the initiation of other planning steps that may be contingent on recognized land titles.

Preparation

17. If it is agreed in the IEPS (Initial Executive Project Summary) meeting that special action is needed, the indigenous peoples development plan or project component should be developed during project preparation. As necessary, the Bank should assist the borrower in preparing terms of reference and should provide specialized technical assistance (see para. 12). Early involvement of anthropologists and local NGOs with expertise in matters related to indigenous peoples is a useful way to identify mechanisms for effective participation and local development opportunities. In a project that involves the land rights of indigenous peoples, the Bank should work with the borrower to clarify the steps needed for putting land tenure on a regular footing as early as possible, since land disputes frequently lead to delays in executing measures that are contingent on proper land titles (see para. 15 (c)).

United Nations draft declaration on the rights of indigenous peoples

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, are preserved, respected and protected.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Proposed Inter-American declaration on the rights of indigenous peoples

Approved by the Inter-American Commission on Human Rights on 26 February 1997

Article VII. Right to cultural integrity

- 1. Indigenous peoples have the right to their cultural integrity, and their historical and archaeological heritage, which are important both for their survival as well as for the identity of their members.
- 2. Indigenous peoples are entitled to restitution in respect of the property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favourable than the standard of international law.
- 3. The States shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.

Right to environmental protection

Article 13

1. Indigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.

- 2. Indigenous peoples have the right to be informed of measures which will affect their environment, including information that ensures their effective participation in actions and policies that might affect it.
- 3. Indigenous peoples shall have the right to conserve, restore and protect their environment, and the productive capacity of their lands, territories and resources.
- 4. Indigenous peoples have the right to participate fully in formulating, planning, managing and applying governmental programmes of conservation of their lands, territories and resources.
- 5. Indigenous peoples have the right to assistance from their States for purposes of environmental protection, and may receive assistance from international organizations.
- 6. The States shall prohibit and punish, and shall impede jointly with the indigenous peoples, the introduction, abandonment, or deposit of radioactive materials or residues, toxic substances and garbage in contravention of legal provisions; as well as the production, introduction, transportation, possession or use of chemical, biological and nuclear weapons in indigenous areas.
- 7. When a State declares an indigenous territory as protected area, any lands, territories and resources under potential or actual claim by indigenous peoples, conservation areas shall not be subject to any natural resource development without the informed consent and participation of the peoples concerned.

Traditional forms of ownership and cultural survival. Rights to land, territories and resources

Article 18

- 1. Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.
- 2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.
 - 3. (i) Subject to 3.ii, where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.
 - (ii) Such titles may only be changed by mutual consent between the State and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.

- (iii) Nothing in 3.i shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.
- 4. Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.
- 5. In the event that ownership of the minerals or resources of the subsoil pertains to the State or that the State has rights over other resources on the lands, the Governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent, before undertaking or authorizing any programme for planning, prospecting or exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation, on a basis not less favourable than the standard of international law for any loss which they may sustain as a result of such activities.
- 6. Unless exceptional and justified circumstances so warrant in the public interest, the States shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples, but in all cases with prior compensation and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with guarantee of the right to return if the causes that gave rise to the displacement cease to exist.
- 7. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged, or when restitution is not possible, the right to compensation on a basis not less favorable than the standard of international law.
- 8. The States shall take all measures, including the use of law enforcement mechanisms, to avert, prevent and punish, if applicable, any intrusion or use of those lands by unauthorized persons to take possession or make use of them. The States shall give maximum priority to the demarcation and recognition of properties and areas of indigenous use.

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