



**EXPERT SEMINAR ON TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE  
ARRANGEMENTS BETWEEN STATES AND INDIGENOUS PEOPLES**

**Geneva  
15-17 December 2003**

**Organized by the Office of the United Nations High Commissioner for Human Rights**

**Background paper prepared by  
The International Indian Treaty Council**

-----  
*The views expressed in this paper do not necessarily reflect those of the OHCHR.*

*"Our word is sacred to us and so are these Treaties. The US government came to us, not the other way around. They asked us to lay down our arms and to live in peace and friendship with them in perpetuity. They said they would respect our traditional land rights in return. We have held up our end of the bargain. When can we expect the same from them?"*

*James Main Sr., IITC Board member  
Elder, White Clay Society, Gros Ventre Nation, Montana, USA*

The International Indian Treaty Council (IITC) was founded in 1974, at Standing Rock, South Dakota, at a gathering called by the American Indian Movement (AIM), of over 5,000 representatives of close to 100 Indigenous Nations and Tribes. The IITC's mandate was to address internationally the continued violations of treaties and agreements entered into between Indigenous Peoples and the colonial and successor States. The IITC was sent to the United Nations precisely because there was no effective mechanism, no redress for broken treaties within the legal systems of the United States or other settler governments. The first matter the IITC was directed to address in the international arena was the 1868 Fort Laramie Treaty between the United States and the Sovereign Lakota Nation, which had been unilaterally and illegally abrogated by the United States.

It was therefore with great enthusiasm that the IITC worked along with many others to bring about the UN Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous (sic) Populations,<sup>i</sup> and offered our assistance to Special Rapporteur Mr. Miguel Alfonso Martinez in his work on this historic study. It is with a sense of hope that we address this Expert Seminar, as called for by the Special Rapporteur Dr. Alfonso Martinez, to continue this work and formulate next steps.

### **Agenda Item 1: Presentation of the recommendations of the Final Report:**

1) The Special Rapporteur's legal reasoning leading to the fundamental conclusion that Treaties and agreements freely entered into between Indigenous Peoples and States continue to be binding international obligations bears repeating. This conclusion is the starting point for our discussions at this seminar.

As the Special Rapporteur emphasized, there is no doubt that Indigenous Peoples were sovereign and self-determining before the colonists came, and that they possessed all of the attributes of sovereign nations, including the legal capacity to enter into internationally binding treaties and agreements with the Colonists and their Successor states. Examining applicable international law at the time, the Law of Nations, the Special Rapporteur found:

"... incontrovertible evidence that during the first two and a half centuries of contacts between the European colonizers and indigenous peoples the Europeans recognized "both the international (not internal) nature of the relationship between both parties and ... the inherent international personality and legal capacity [of those peoples] ... resulting from their status as subjects of international law in accordance with the legal doctrine of those times," as well as, "the status of those peoples as 'sovereign nations,' with all the legal implications that such a term had at the time in international relations."<sup>ii</sup>

Special Rapporteur Dr. Alfonso Martinez also observed that, by using outright racism, fraud, genocide and domestic legislation since the early decades of the 19<sup>th</sup> century, the colonizers and their successors in newly formed independent countries such as the United States, were able to establish "... a clear trend in the nation-states, aimed at divesting those nations of the very same

sovereign attributes and rights, particularly their land rights."<sup>iii</sup> He calls this process the "domestication" of the "indigenous problematique."

As the Special Rapporteur points out, legal doctrines that have served as the basis of the "domestication" of Indigenous Peoples, such as *Terra Nullis* (so-called "empty lands," or lands apparently not possessed by anyone), as well as conquest by armed force, have been discredited by modern international law as a basis for depriving Indigenous Peoples of their lands and territories.<sup>iv</sup>

In the case of abrogated or terminated treaties entered into between Indigenous Peoples and the colonizers or successor states, the States many times argue that modern law on treaties, codified in the 1969 Vienna Convention on the Law of Treaties, which entered into force in 1980, has a non-retroactivity provision. This provision expressly states that the Convention "applies only to treaties which are concluded by States after the entry into force of the present convention with regard to such States."<sup>v</sup> But the Vienna Convention also states that this non-retroactivity "shall not affect the legal force of international agreements" entered into **prior** to its entry into force."<sup>vi</sup> (Emphasis supplied.) In fact, the Special Rapporteur of the Treaty Study found that the Vienna Convention codified international principles and law that had stood the test of time, "and were, in 1969 already part and parcel of international law, either as customary law or as positive law embodied in a number of already-existing bilateral and/or multilateral international instruments."<sup>vii</sup> Thus,

"The Special Rapporteur is of the opinion that those instruments indeed maintain their original status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them (or their successors), who shall implement their provisions in good faith."<sup>viii</sup>

In his Treaty Study, the Special Rapporteur also stresses the point that unilateral termination of international obligations is disfavoured, even by modern international law today:

"On the other hand, the unilateral termination of a treaty or of any other internationally legally binding instrument, or the non-fulfilment of the obligation contained in its provisions, has been and continues to be unacceptable behaviour according to both the Law of Nations and more modern international law."<sup>ix</sup> And, "It is well known that fulfilment, in good faith, of legal obligations that are not in contradiction with the Charter of the United Nations (Art. 2.2) is considered one of the tenets of present day positive international law and one of the most important principles ruling international relations, being as it is, a peremptory norm of international law (*jus cogens*)."<sup>x</sup>

The Special Rapporteur concludes that these instruments, treaties between States and Indigenous Peoples, continue to this day to maintain their original status and are the source of internationally legally binding obligations incumbent on the parties. For example, the 1868 Fort Laramie Treaty between the United States and the Sovereign Lakota Nation, studied and commented upon by the Rapporteur,<sup>xi</sup> continues to bind the United States both legally and morally, as do many other treaties which the US and other states made with Sovereign Indian Nations.

The Special Rapporteur repeatedly points out that States have consistently violated, ignored, abrogated and abused their Sacred treaty obligations with impunity. It is clear to both the Special Rapporteur and Indigenous Peoples that mechanisms established unilaterally by states to adjudicate Treaty violations are by nature tainted by the contradiction of one party to a dispute also being the sole arbitrator of the dispute. Indigenous Peoples are faced with the quandary of

being parties to legally binding international treaties but having no adequate forum to seek a just redress of their violation.

2) Based upon these findings, the Special Rapporteur makes a series of recommendations:

A. The Creation of State Entities: The Special Rapporteur suggests the creation of State entities with the jurisdiction to deal exclusively with these issues.<sup>xii</sup> Unfortunately, such entities, such as the United States' Bureau of Indian Affairs and the Land Claims Commission, have only served to perpetuate the injustice of terminated or abrogated treaties. There is no reason to believe that "new" entities created on the domestic level would do more than perpetuate and legitimise the continued dispossession of Indigenous Peoples from their lands. (These State entities and this recommendation are discussed further under Agenda Item 2, below.)

B. The establishment of an international body or adjudication mechanism to address claims or complaints from Indigenous Peoples arising from treaties and constructive arrangements:

As the Special Rapporteur himself points out, domestic remedies require "strong political determination" to make these historically abusive national (domestic) processes viable.<sup>xiii</sup> He also points out that these domesticated remedies do not address the internationally legally binding nature of these treaties, which warrants "proper consideration."<sup>xiv</sup>

His recommendation for an internationally legally competent body to address these issues is also the remedy proposed in Article 36 of the UN Draft Declaration on the Rights of Indigenous Peoples, as approved by the Sub-Commission for the Promotion and Protection of Human Rights:

"Indigenous Peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. ***Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.***"<sup>xv</sup> (Emphasis added)

This important recommendation will be explored in Agenda Item 4, below.

C. The Special Rapporteur also recommends to the Office of the High Commissioner for Human Rights, (1), that staff be increased to carry out Indigenous affairs related activity, and (2), that a web page be established dedicated to Indigenous Peoples' issues. The IITC welcomes both of these suggestions and notes that such a web page has been established by the OHCHR.<sup>xvi</sup>

D. The IITC would highlight and strongly support, and urge the OHCHR to implement, the Special Rapporteur's recommendation on the establishment of a section within the United Nations Treaty Registry, with the responsibility for locating, compiling, registering, numbering and publishing of all treaties concluded between Indigenous Peoples and states, with due attention to securing access to the indigenous oral version of the instrument in question.

The International Indian Treaty Council believes that all Indigenous Peoples from all regions of the world would be very willing and able to submit and register their treaties, with their own understanding of their content to the United Nations Registry of Treaties. The Registry would be relatively cost effective and provide an international setting for treaties with international character and scope, in keeping with the Special Rapporteur's own findings. States might also be invited to submit treaties as well as their own views. Such a registry would provide some measure of recognition for these often neglected and abused Sacred understandings and might

provide a beginning to a process of dialogue, equity, mutual understanding, respect, and eventual reconciliation.

E. The International Indian Treaty Council would also strongly support the Special Rapporteur's call for a series of three workshops, not just this one seminar, to more fully explore the important issues raised by the study as noted by the Special Rapporteur, of the (1), the establishment of an international conflict resolution mechanism, (2) modalities for redressing the effects of the historical [and ongoing] process of land dispossession, and (3) the implementation and observance of Indigenous treaty rights.

**Agenda Item 2: The situation of existing treaties agreements and other constructive arrangements, including: a) difficulties relating to their full implementation, in particular, of the rights of indigenous peoples recognized in those instruments, b) the importance of confidence building steps, and c) the important role of national mechanisms to ensure the full recognition of, implementation and protection of indigenous treaty rights.** The fundamental problem regarding both historical and contemporary treaties and agreements between States and Indigenous Peoples is the lack of observance and compliance by the State parties. Many Treaties between Indigenous Peoples and States had the objective of Peace and Friendship, purposes subverted and destroyed once the State established military and economic dominance. States have shown little willingness to use treaties or any other mechanism available to them to cease or undo violations of their legal and moral obligations.

We cite the Treaty of Ruby Valley of 1863 between the Sovereign Shoshone Nation and the United States, as an example reflective of the difficulties related to the full implementation of the rights of Indigenous Peoples, and the role of national mechanisms to ensure the full recognition of, implementation and protection of indigenous treaty rights. In December of 2002, the Organization of American States Inter-American Human Rights Commission (IACHR) found that the United States had violated the Western Shoshone Peoples' right to equality before the law (Article II), right to a fair trial (Article XVII), and right to property (XXIII), under the Inter-American Declaration on the Rights and Duties of Man.<sup>xvii</sup> The IACHR found that the Indian Land Claims Commission, expressly set up by the United States government to "settle" Indian land claims<sup>xviii</sup> had not given the opportunity to the Western Shoshone to raise the issue of their title to their land, as evidenced by the Treaty of Ruby Valley of 1863, a treaty of Peace and Friendship between the Shoshone Nation and the United States. The Land Claims Commission only had the jurisdiction to make payment for ceded or lost lands but had no jurisdiction to adjudicate whether the land had been ceded or lost to begin with. In effect, the Indian Land Claims Commission was created solely to clear title to stolen Indian land even if that land had never been legally lost, ceded or for sale.<sup>xix</sup>

There are many such treaties between the United States and Sovereign Indian Nations that were addressed by the Indian Land Claims Commission with similar outcomes. This IACHR decision calls into question State entities and remedies meant to resolve historical land claims and treaties. There is a very real need for confidence building and reconciliation between Indigenous Peoples and States. But States have shown a profound lack of political will to take such steps. In the case of the Western Shoshone, the State response has been silence and the total confiscation of Western Shoshone livestock. Legislation continues to be introduced in the United States Congress to force payment of the Indian Land Claims Commission "award" to individual Western Shoshone members. The Western Shoshone Nation, like the Lakota Nation, the Hopi Nation and many others, have consistently refused to accept Indian Land Claims Commission payment for lands that have never been for sale.

As the Special Rapporteur repeatedly points out in various sections of his reports, there is little political will on the part of States to take actions to correct historically grounded but ever present racism, discrimination, oppression, and marginalization of Indigenous Peoples, or to alter the continued national goal of resource acquisition. Given this history and present-day reality, “confidence building steps to promote harmonious relations between indigenous and non-indigenous sectors of the population in multicultural societies” can only be made in the context of good faith, serious attempts by each State to fully comply with the terms of the treaties and agreements it has made with Indigenous Peoples and Nations. This process would necessarily involve the good faith participation of national mechanisms and institutions that are charged with the protection of Indigenous Peoples and their rights.<sup>xx</sup>

If it were truly interested in confidence building steps, the United States could begin by returning the portion of the Sacred Black Hills now held and administered by the federal government, to the Lakota Nation.<sup>xxi</sup> 87.6% of the State of Nevada is also “owned” by the United States federal government, a large part of which it could also be returned to the Western Shoshone Nation without prejudice to other “third parties.”

**Agenda Item 3. The modern day treaties, agreements and other constructive arrangements:** Contemporary or “modern day” treaties, agreements and other constructive arrangements face the same problems regarding lack of State compliance.

One notable example of a contemporary agreement is the San Andreas Accords, negotiated between the Indigenous *Ejército Zapatista de Liberación Nacional* (EZLN) on behalf of the Indigenous Peoples of Mexico and the government of President Ernesto Zedillo of Mexico in 1996. Observance of this agreement would have initiated a new relationship between the Mexico State and the Indigenous Peoples within that state based upon key constitutional reforms, and would have contributed greatly to redress the historical process of dispossession of the Indigenous Peoples of Mexico. However, the Mexican legislature, despite the vehement protest of the Indigenous Peoples and the EZLN, changed the terms of the agreement so completely that the Indigenous Peoples have now rejected the revisions and continue to call for adoption of the original negotiated agreement. It is notable that a report by the office of the UN High Commissioner on Human Rights office in Mexico just issued on December 8, 2003, calls upon the Mexican government to implement the constitutional reforms contained in the original San Andres Accords as a fundamental basis for the full exercise of Human Rights for the Indigenous Peoples of that country. (We explore role of international mechanisms under item 4, below.)

An example of a modern-day constructive arrangement upholding the rights of Indigenous Peoples is the Guatemala Peace accords, including the Accord on the Identity and Rights of Indigenous Peoples, negotiated and signed by the Guatemalan National Revolutionary Unity (UNRG) and the State in 1996, to end 36 years of civil war in that country. Rather than proceeding with implementation as supported by the Mayan Peoples of Guatemala, the Guatemalan government submitted important terms of this accord to a public referendum, where centuries of racism and marginalization assured its failure.

The Special Rapporteur mentions several processes, principles and other essential elements in modern day treaties, agreements and other constructive arrangements, particularly through participation by Indigenous Peoples. These aspects and elements in modern-day treaty making do not differ in context or reality from ages-old practices, both between so-called European States and the practices of Indigenous Sovereign Nations. The Special Rapporteur notes that Indigenous Peoples were making (and observing) treaties between themselves and other Indigenous Nations long before the colonists arrived: The principles in Indigenous as well as

European treaty-making include mandated representatives, basic agreement, ratification, and the actual power of the negotiators to bind the parties.<sup>xxii</sup>

The most essential quality of treaty making, whether it be between Indigenous Peoples themselves, or between colonial States or their successors and Indigenous Peoples is mutuality, not only in the full legal meaning of the word, but describing a process and outcome that is freely entered into in the broadest sense by both parties. There has to be good faith between the parties and a willingness on the part of both parties to negotiate freely and without coercion, on an equal footing, and with the intent to fully comply with and implement the agreements reached.

For example, the Special Rapporteur comments on the treaty making process currently underway in Canada, pursuant to the Canadian Supreme Court decision in *Delgamuukw*.<sup>xxiii</sup> The Canadian government has taken the position that it will only “negotiate” the extinguishment of Aboriginal title. If Canadian First Nations are not interested in negotiating the extinguishment of title to their ancestral lands there is no negotiation. This stance on the part of Canada utterly fails to reflect the basic principle of mutuality based on equality of the parties and leaves little possibility for justice. For the non-treaty Indigenous Peoples of Canada, in spite of *Delgamuukw*, this contemporary (so-called) treaty making process only serves to perpetuate historical dispossession.

As the Special Rapporteur correctly points out, Indigenous Peoples have been deprived of three of the four elements on which their sovereignty is grounded: their territory, their recognized capacity to enter into international agreements, and their own forms of government.<sup>xxiv</sup> This “retrogression” (as he calls it) was and continues to be founded on the persistent, unquenchable desire of the colonist and the successor States to take Indigenous lands, territories and natural resources with impunity and without recourse for the aggrieved parties. The practical experience of Indigenous Peoples has led them to conclude that there is little justice where the final arbiter of a dispute is also a party to the agreement. There is a great need for an international mechanism for the arbitration of disputes over treaties, agreements and other constructive arrangements between Indigenous Peoples and States, with regard to both “historical” as well as contemporary processes.

**Agenda Item 4. Implementation, monitoring, and dispute resolution and prevention in relation to treaties, agreements and other constructive arrangements:** The fundamental basis for treaty violations by States is the issue of ownership and control of Indigenous lands and resources. However, both established international standards and emerging human rights standards, notably the United Nations draft Declaration on the Rights of Indigenous Peoples, directly and indirectly address the matter of treaties, agreements and land rights in a wide variety of ways, affirming the rights of Indigenous Peoples in this regard.

Established human rights norms, such as International Labour Organization Convention No. 169 contains a section on lands and territories describing the collective rights of Indigenous Peoples over their traditional lands and territories.<sup>xxv</sup>

“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 peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.”<sup>xxvi</sup>

The Treaty Monitoring body of the Convention on the Elimination of all Forms of Racial Discrimination, the CERD Committee, has also adopted General Recommendation 23, addressing the rights of Indigenous Peoples to their lands and natural resources.<sup>xxvii</sup> The CERD Committee would require the State, where Indigenous Peoples, “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.”<sup>xxviii</sup> (Emphasis added).

The Human Rights Committee also has its own General Comment 23, also addressing the collective rights of Indigenous Peoples and their relationship to land.<sup>xxix</sup> Article 27 of the International Covenant on Civil and Political Rights establishes the right to language, culture and religion. The Human Rights Committee, the Treaty Monitoring Body of this Covenant, in General Comment 23, determined that:

“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.”

Internationally competent bodies are already examining the principles, rights and obligations contained in treaties, albeit not directly. Limitations on space do not allow a description of the jurisprudence developed by these international and regional human rights mechanisms that relates to treaties, agreements and other constructive arrangements. Suffice to say that in their consideration of the Lubicon Lake Band complaint under the Optional Protocol, the Human Rights Committee necessarily had to examine Treaty 8 of 1899 as a basis of the complaint.<sup>xxx</sup> What is lacking is a competent international mechanism with the specific mandate to directly examine compliance with treaties, agreements and truly constructive arrangements between States and Indigenous Peoples and to address these matters when other processes, such as direct discussions among the parties, have failed.

Other United Nations mechanisms, including the special procedures of the Commission on Human Rights can also play a positive role. We have noted the recent call by the OHCHR to Mexico to implement the San Andreas Accords. This positive step will surely promote public attention and discussion that may lead to further positive action on the part of the State. The mandate of the Special Rapporteur on the human rights of Indigenous (sic) People is also one special procedure among others that can play a positive role. Although his mandate mentions only the Universal Declaration on Human Rights as a standard,<sup>xxxi</sup> it is clear that UDHR Article 7 (the right to quality before the law), Article 8 (the right to an effective remedy) and Article 17 (the right to own property individually or in community with others) allows him the opportunity, as reflected by IACHR in the Western Shoshone case, to examine such issues. The Special Rapporteur on the right to food could also examine treaty violations as they relate to Indigenous Peoples’ means of subsistence.<sup>xxxii</sup>

**Conclusions and Recommendations:** There are unresolved or unexamined issues raised by the Treaty Study itself that merit further consideration and study in future workshops.

We note as an example the issue of treaties, agreements and other constructive arrangements between colonial and successor States and the Indigenous Peoples of Africa and Asia. Since the writing of the Final Report, the Permanent Forum was established with membership from all regions of the world, including Asia and Africa, elected by States and Indigenous Peoples. Indigenous Peoples are increasingly being recognized in Africa, including the Batwa Forest Peoples in Central Africa, the Maasai Peoples of East Africa, and the KoSan, Gana and Gwi



Peoples of Southern Africa. The African States regional organization now has a Working Group on Indigenous Peoples. Asian Indigenous Peoples are firmly established and recognized as Indigenous in many States of Asia, and increasingly so. The application of the recommendations and conclusions of the Treaty Study to Indigenous Peoples of Asia and Africa were not addressed substantially in the Study. This matter warrants further discussion in order to reflect the true universality of the problems regarding treaties, agreements and other constructive arrangements between Indigenous Peoples and States.

**Based on all of the factors and issues presented above, the International Indian Treaty Council makes the following recommendations to this Expert Seminar:**

1. That the OHCHR begin immediately to work toward the implementation of the Special Rapporteur's recommendations regarding the United Nations Treaty Registry to include treaties between Indigenous Peoples and States, as a positive first step toward confidence building and the recognition of Indigenous Peoples' treaty rights;
2. Given the important and complex issues raised by the Treaty Study, as well as some unresolved and emerging issues not examined in the Treaty Study itself, that the Sub-Commission and/or the WGIP create a working group to follow up and further study these issues, and that regional representation from all parts of the world be included in this working group;
3. That the three seminars recommended by the Special Rapporteur take place, one or more held on lands affected by treaties between Indigenous Peoples and States;
4. That existing human rights mechanisms and jurisprudence as they relates to treaties be given immediate and thorough study, with the objective of furthering the Special Rapporteur's recommendations on the creation of an international body with the mandate of receiving and hearing disputes over treaties entered into between Indigenous Peoples and States; and,
5. That this expert seminar reaffirm the importance of article 36 of the UN Draft Declaration for the Rights of Indigenous Peoples in its current text as approved by the Sub-Commission, in particular its importance as a critical element of the right of self determination, as well as the importance of its last sentence which calls for the establishment of a competent international body to directly adjudicate treaty disputes unresolved through other mechanisms.

For All Our Relations.

---

**INTERNATIONAL INDIAN TREATY COUNCIL**

2390 Mission St., Suite 301  
 San Francisco, CA. 94110  
 Telephone (415) 641-4482  
 Fax (415) 641-1298  
 email:alberto@treatycouncil.org

---

<sup>i</sup> Hereinafter, the "Treaty Study."

<sup>ii</sup> Treaty Study, Second Progress Report, E/CN.4/Sub.2/1995/27, 31 July 1995, para. 130 (citations omitted).

<sup>iii</sup> Id, at para 131.

---

<sup>iv</sup> Treaty Study, Final Report, E/CN.4/Sub.2/1999/20, para 287, citing, *inter alia*, the International Court of Justice, Western Sahara case, Western Sahara Advisory Opinion of 16 October, 1975, I.C.J. Reports 1975, p.12; and the Charter of the United Nations, Article 2.4.

<sup>v</sup> Vienna Convention on the Law of Treaties, signed at Vienna 23 May 1969, Entry into Force 27 January 1980, 1155 United Nations Treaty Series, vol. 1155, No. 331, article 4.

<sup>vi</sup> *Id.*, Vienna Convention, article 3.

<sup>vii</sup> Treaty Study, Final Report, fn.2, para. 268.

<sup>viii</sup> *Id.*, at para. 271,

<sup>ix</sup> *Id.*, at para. 279.

<sup>x</sup> *Id.*, at para 277, citing Article 27 of the Vienna Convention of the law on Treaties (fn. 5.)

<sup>xi</sup> Treaty Study Final Report, E/CN.4/Sub.2/1999/20, 22 June 1999, para. 276.

<sup>xii</sup> *Id.*, Final Report at para. 307.

<sup>xiii</sup> *Id.*, Final Report, at para. 309.

<sup>xiv</sup> *Id.*, Final Report, at para. 312.

<sup>xv</sup> Draft United Nations declaration on the rights of indigenous peoples, The Sub-Commission on Prevention of Discrimination and Protection of Minorities, 36<sup>th</sup> meeting, 26 August 1994, [Adopted without a vote] E/CN.4/1995/2, page 103, annex page 114, Article 36.

<sup>xvi</sup> <http://www.unhchr.ch/indigenous/main.html>, last visited 14 October 2003.

<sup>xvii</sup> OAS Commission on Human Rights, Report No. 75/02, Case 11.140, Mary and Carry Dann v. United States, December 27, 2002.

<sup>xviii</sup> Established by the Indian Land Claims Act, 60 Stat. 1049 (1946), codified, 25 USC 70.

<sup>xix</sup> The issue of the Western Shoshone land claims arose when the government began to tax the Western Shoshone for grazing their livestock on Western Shoshone traditional lands. When the Western Shoshone protested that their land claims had not been properly settled and filed their complaint with the IACHR, the United States government began a series of confiscation of their cattle and horses despite repeated precautionary measures requested by the Inter-American Commission to cease their confiscations and threats of confiscation until the issue before the Commission had been resolved. The United States response to the recommendations by the OAS Inter-American Human Rights Commission, that the title to Western Shoshone lands should be justly settled, the United States government confiscated the Western Shoshone's remaining horses. The Western Shoshone are now faced with almost a million dollars in fines and their lands and sacred sites are being overrun by gold mining and the storage of high level nuclear waste.

<sup>xx</sup> See, eg, Cobell et al v. Norton, Case no. 96CV1285, (DC District Court, 1996), where the Native American Rights Fund is suing the United States Department of Interior (DOI) in a class action on behalf of 300,000 Native Americans. The DOI, the lead Department of the Bureau of Indian Affairs, has the responsibility of approving all leases and sales of natural resources found on Indigenous lands and hold the proceeds in trust for Native American owners. The DOI's failure to account for 100 years of trust proceeds may lead to a 2.4 billion dollar liability for the United States. It is estimated that over 80% of lumber exported from Brazil is illegal. The FUNAI, the indigenous institute of Brazil has the responsibility of protecting Indigenous lands and resources in Brazil.

<sup>xxi</sup> In 1987, then Senator Bill Bradley introduced a bill to return over 750,000 acres of the Black Hills now held by the United States government to the Lakota Nation. Because of virulent racist anti-Indian reaction, the bill was withdrawn. See, CERD General Recommendation XXIII, fn. 27 below, requiring the return of traditional lands to Indigenous Peoples taken without their free and informed consent.

---

<sup>xxii</sup> Final Report, para. 61.

<sup>xxiii</sup> *Delgamuukw v. A.G. (B.C.)* (1993), 103 D.L.R. (4th) 470 (B.C.C.A.)

<sup>xxiv</sup> Final Report, para. 105.

<sup>xxv</sup> International Labor Organization Convention No. 169 (1989), Part II, Land, Article 13 et. seq..

<sup>xxvi</sup> *Id.*, at Article 14.

<sup>xxvii</sup> CERD General Recommendation XXIII (General Comments) Indigenous Peoples, Fifty-first Session, (1997): “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.” And, “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, the right to restitution should 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.

<sup>xxviii</sup> *Id.*, General Recommendation XXIII, paras. 4(d) and 5.

<sup>xxix</sup> (CCPR General Comment 23, Fiftieth Session, 1994.)

<sup>xxx</sup> Human Rights Committee Communication No. 167/1984; Canada, 10/05/90, CCPR/C/38/D/167/1984: see, summary of submission, para. 29.1

<sup>xxxi</sup> Human rights and indigenous issues, Commission on Human Rights resolution 2001/57, E/CN.4/RES/2001/57, 24 April 2001.

<sup>xxxii</sup> See, e.g. Article 1 in Common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: “In no case may a peoples be deprived of their means of subsistence.”