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Working Group on Indigenous Populations

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STATEMENT ON THE RECOGNITION AND PROTECTION OF INDIGENOUS PEOPLES' RIGHT TO LAND

by the

FOUR DIRECTIONS COUNCIL

a non-governmental organization in consultative status, category II, with the Economic and Social Council

Sante' Mawi'omi wjit Mikmaq:

Article 1(2) of the International Covenant on Civil and Political Rights guarantees to "all peoples" the right to "freely dispose of their natural wealth and resources," and adds that "in no case may a people be deprived of its own means of subsistence." We believe this prohibits the aggressive seizure, settlement, or alien domination of a people's land. We also believe that any indigenous tribe or nation subjected to alien domination by encircling settlers is a "people" within the meaning of the Covenant. Both the International Labour Organisation (in Convention 107 [1957]) and the World Bank (in Tribal Peoples and Economic Development [1982] have already recognized indigenous peoples' right to participate, at least, in land-use and development decisions affecting them. Unless indigenous peoples are accorded the same right as other non-self-governing peoples to prevent development altogether, however, the United Nations system will perpetuate an unjustifiable discrimination against "tribal" groups - a discrimination on the basis of culture and socio-political organization we believe violates General Assembly Resolution 1514 (XV) (1960).

We think five principles should guide the United Nations in guaranteeing full respect for indigenous peoples' land rights.

First, indigenous peoples' land and natural resources cannot be taken from them or settled without their free and informed consent, witnessed by a public treaty or agreement.

Second, since the cession of land usually results in a change of indigenous peoples' political status, treaties or agreements to cede or sell land must be ratified by a majority of the indigenous people affected, expressed through democratic means of their own choosing.

Third, where indigenous peoples' lands have already been settled without their consent, or in violation of the terms of a treaty or agreement, the State involved has an obligation to provide full restitution. Indigenous people have the right to insist upon the return or exchange of land to the extent that other populations need not be displaced unjustly.

Fourth, indigenous peoples' right to the secure use and enjoyment of their land includes minerals, timber, an equitable share of the waters flowing over it, and, in the case of coastal and riparian lands, the free and undiminished use of fisheries.

Fifth, sacred lands and sites employed for traditional ceremonial purposes are of particular concern, and should be protected, preserved, respected, and made freely available to indigenous users, even if located in areas already settled or used by others.

Even among States with developed legal systems and positive records on human rights generally, indigenous peoples' lands remain insecure. We attribute this to several ideas that have long been advanced to justify dispossession, and as such merit express condemnation by the United Nations.

Indigenous or "tribal" peoples have no system of land tenure to respect and protect (the "roaming beast" theory). Since the indigenous people themselves have no conception of land ownership, immigrant States argue, they have no right to complain about sharing their land with strangers.

This theory played a large role in the British colonization of Africa, North America and Australia, and was formalized by the House of Lords' 1919 decision In re: Southern Rhodesia. Ethnographically, it was fiction. Indigenous peoples always had governments and well-defined national territories. Every place had an owner, but no place belonged to or could be sold by a single man or woman. All property was in some sense corporate or collective, whether of the family, clan, village or nation. Indeed, it is still widely felt that land should not be sold at all - that the families of animals, birds, plants and people living in a place are all kinsmen and are inseparable.

Immigrant States also argue that land rightfully belongs to those who can exploit it the most (the "effort" theory of ownership). In other words, materialistic societies have a greater claim to the earth than ascetic societies. This limits the enjoyment of human rights to exploitative, industrialized cultures.

The "effort" theory was evoked as recently as 1971, in the Australian decision Millirrpum v. Nabalco Pty Ltd. The learned judge explained that he could not protect the Aboriginal land tenure system because it was spiritual rather than economic in nature - "the people belong to the land rather than the land belonging to the people." The same reasoning seems to lie behind continued Canadian expansion into the Arctic and Brazilian settlement of Amazonia, i.e., that indigenous peoples have no right to withhold natural resources from industrialized peoples that have exhausted their own territories.

A logical corollary of the roaming beast and effort theories is the pretence that discovery confers title on the discoverer. Immigrant States argue that the land was physically but not "legally" inhabited when discovered by Europeans, because its original peoples were pagans and lacked proper Christian kings (terra nullius). As such, their land could be claimed by the first Europeans to set eyes on it.

Of course the assertion of terra nullius was rejected by the International Court of Justice in its 1975 Western Sahara advisory opinion, but its use continues. Canada's current expansion into the Arctic is justified by the so called "sector principle" -- a unilateral 1927 Canadian declaration of sovereignty over everything north of its inhabited frontiers. The continued displacement of Aboriginal Australians from western and northern mining territories reflects a view that the entire continent was "peacefully occupied" the moment immigrants set foot on its shores in 1788.

It is also often argued that indigenous peoples were "conquered" because they failed to exterminate European settlers. As such, indigenous peoples have only those rights to land given to them (or recognized) by the conqueror. Even recognized rights may be taken away at any time and for any reason because they exist at the whim of the conqueror.

Deriving title from a real or imagined conquest rewards aggression and penalizes peaceful peoples. In many parts of North America, at least, it also contradicts history. There was no surrender or debellatio in the international law sense. On the contrary, the United States was forced to resolve conflicts with indigenous nations by treaty. Treaties of peace have since been broken under the pretence that they are instruments of surrender. The United States legal doctrine of "plenary" congressional power over native Americans' liberty and property is a continuing manifestation of the fiction of conquest.

Finally, it is often maintained that indigenous peoples' land must be administered by others for their own protection (the white man's burden or "trusteeship"). Like the roaming beast and effort theories, trusteeship presupposes the inferiority of indigenous or tribal cultures. Instead of security and freedom, it gives indigenous peoples a protector to tell them how to live and use their land.

All such justifications for dispossession discriminate among cultures in the same indefensible way that racism discriminates among peoples biologically. It is another manifestation of subhumanization (untermenschen). The United Nations has already emphasized that socio-cultural organization is not a legitimate basis for denying any people's right to self-determination, decolonization, or territorial security. General Assembly Resolution 1514 (XV) (1960). It nonetheless bears repeating that

> indigenous or tribal populations' social, cultural and economic institutions and beliefs never justify or excuse a violation of their rights as persons or as peoples.

We furthermore believe that, as a first step towards the effective recognition and protection of indigenous peoples' right to land, the Working Group proposed that

> the indigenous system or pattern of land tenure should be ascertained and recognized within the municipal legal system to the same extent as other property rights.

Every indigenous people has its own traditions of land ownership, distribution and use. Protection of rights already defined by indigenous institutions is preferable to legislating a new system of rights as part of a programme of "native claims" or "settlements" because it preserves the continuity and diversity of indigenous communities. It means preserving rights rather than creating new rights.