Working Group on Indigenous Populations-11th Session 1993
Item 5.

REVIEW OF DEVELOPMENTS IN THE GITKSAN WET'SUWET'EN LAND CLAIMS CASE.
(Delgum UUKW v. Attorney General of British Columbia)
Submitted by Prof. MICHAEL JACKSON, Legal Counsel to the Hereditary Chiefs of the Gitksan and Wet'suwet'en Peoples.

July, 28 1993, Geneva.

The Gitksan and Wet'suwet'en Peoples wish to bring to the attention of the Working Group developments in their land claims case for four reasons.

First, this case in terms of the scope of the rights sought and the length of the trial is unique in British Columbian and Canadian history.

Second, like the decision of the High Court of Australia in Mabo, the ultimate decision of the Canadian Supreme Court will likely set an important precedent of interest to indigenous peoples in other parts of the world.

Third, the decision of the trial judge in the Supreme Court of British Columbia has already attracted international attention and is the subject of particular comment in the First Progress Report on the Study on Treaties by Prof. Miguel Alfonso Martinez and

Fourth, in their legal argument before the courts of British Columbia the Gitksan and Wet'suwet'en Peoples have referred to and relied upon the work of this Working Group and the Draft Declaration in articulating the contours of evolving International Law principles regarding the nature and content of indigenous rights to land and self-determination.

The Hereditary Chiefs filed their case in 1984 claiming rights of ownership and jurisdiction over 58,000 square kilometers of British

Columbia. The hearing of the case began in 1987 and lasted three years. The chiefs testified as to their oral histories reaching back many thousands of years, their social, economic, cultural and legal systems and their continuing resistance to the efforts of government agents, missionaries and settlers to dispossess and assimilate them. Despite the extensive evidence of their elaborate and sophisticated social system the trial judge, the Chief Justice of British Columbia, concluded that " The (Gitksan and Wet'suwet'en's) ancestors had no written language, no horses or wheeled vehicles and there is no doubt that aboriginal life in the territory was at best "nasty, bruitish and short".

In rejecting the hereditary chief's evidence that they maintained their institutions and exercised their authority over the territory through their institutions, the Chief Justice concluded that "they more likely acted as they did because of survival instincts".

It was language such as this which led Dr. Martinez in his first Progress Report on the Study on Treaties to comment: "The judgement of the Supreme Court of British Columbia clearly shows that deeply rooted Western ethnocentric criteria are still widely shared in present day judicial reasoning."

(Study on Treaties, First Progress Report E/CN/4/Sub2/1992 32, 25 August 1992 para 130)

The Chief Justice in his judgement ruled that as a matter of common law, aboriginal rights did not include ownership of land nor did the law recognize any legal right to self-government for indigenous peoples. Rather aboriginal rights were limited to traditional subsistance activities and existed " at the pleasure of the Crown". He then went om to find that all aboriginal rights to land had been extinguished at the time of colonial settlement in the nineteenth century by the passage of colonial land laws which gave the

colonial government the power to grant land to non-indigenous settlers. In other words, the Indian Nations of British Columbia had no legally recognized rights to land with the exception of the small reserves which had been established for them. In the case of the Gitksan and Wet'suwet'en these reserves consist of 80 sqare kilometers. As far the reminder of their 58,000 square kilometers, the judgement ruled that they had been legally dispossessed, without their consent and without compensation.

As for the claim of the Hereditary Chiefs that they had never given up their inherent right to self-government, the trial judge found that in the Canadian Constitution there was no conceptual space for indigenous peoples' powers of governance. All legislative authority had been divided between the Federal and Provincial Governments. There was no legal room left for the Indian Nations. Here again he found they had been legally dispossessed of their rights.

The trial judgement was appealed to the British Columbian Court of Appeal. Many other Indian Nations in British Columbia together with the National Indian organization, the Assembly of First Nations, intervened in support of the Gitksan and Wet'suwet'en. The appeal hearing took place in May and June 1992, the longest appeal in Canadian legal history. It was heard by a special panel of five judges (instead of the normal three) reflecting the importance of the case. The judgements of the Court of Appeal were handed down on June 25, 1993, and are a partial victory for indigenous peoples.

All five judges overruled the trial judge's ruling on extinguishment. They held that aboriginal rights to land had not been extinguished last century by colonial land legislation and that the rights still existed.

However, a majority of three judges defined the scope of these rights in very narrow terms similar to the trial judge, extending only to traditional subsistance activities and not to commercial rights. The majority also upheld the trial judge's finding that under the existing Canadian Constitution there was no legal right to indigenous self-government.

The two dissenting judges found that the rights of the Gitksan and Wet'suwet'en were much broader and included the right to occupy, possess, use and enjoy their territory and the right to harvest, manage and conserve their land and resources. This included the right to commercial harvesting. The dissenting judgements also found that the Gitksan and Wet'suwet'en did have a legal right to self-government, exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity.

Although the Hereditary Chiefs are still considering the judgements, it is likely that the case will be appealed to the Supreme Court of Canada.

The final point I wish to make relates to the way in which the work of this Working Group was important to the legal argument of the Gitksan and Wet'suwet'en Peoples.

In their legal argument the Gitksan and Wet'suwet'en charted the course of International Law as affecting the rights of Indigenous Peoples, starting with the writings of Las Casas and Victoria in the sixteenth century, through to the revisions in the seventeenth and eighteenth century as reflected in Vattel and the emergence of the modern law of self-determination. The argument was made that a Canadian Court in declaring the common law of Canada should have regard to the principles of contemporary International Law and that

these principles were evolving ones, most clearly articulated in the Draft Declaration on the Rights of Indigenous Peoples.

You, Madam Chairperson, in your opening comments to this session of the Working Group, referred to the role of the Group and the Draft Declaration in shaping the evolution of International Law. As such, the work is of fundamental importance to securing justice for Indigenous Peoples. The principles in the Declaration must have the breadth and vitality to strengthen the struggle of Indigenous Peoples to take ~~that~~ their rightful place in the history and future of the World Community. The final product of your Working Group and the Indigenous' Peoples' labour must be the full measure of historical and cultural understanding, legal acumen and our collective imagination. Its completion and perfection must not be rushed or compromised. One of the lessons of history is that compromises have rarely, if ever, worked in favour of Indigenous Peoples.