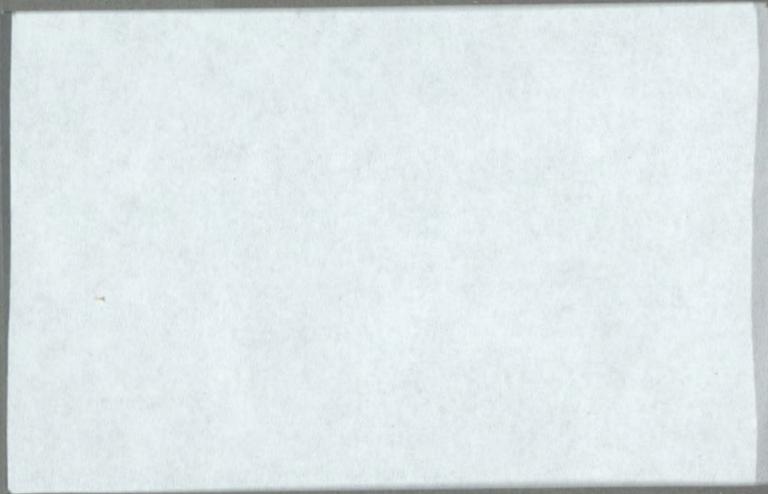


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TRANSCRIPT OF PROCEEDINGS
ROUNDTABLE DISCUSSIONS
VOLUME XXXI
THE PLACE OF NATIVE PEOPLES
IN THE WESTERN WORLD
MARCH 15, 1985
ANCHORAGE, ALASKA

ALASKA NATIVE REVIEW COMMISSION
HON. THOMAS R. BERGER
COMMISSIONER

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Transcripts of the Alaska Native Review Commission are produced in two series. Those in Roman numerals are for the Roundtable Discussions. Those in Arabic numbers are for the Village Meetings.

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PARTICIPANTS*

Roundtable On

THE PLACE OF NATIVE PEOPLES IN THE WESTERN WORLD

Anchorage, March 13 - 16, 1985

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David S. Case, Commission Counsel
Rosita Worl, Special Consultant
Dalee Sambo, Inuit Circumpolar Conference Representative

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*This list includes invited participants at the Roundtable. It may not include others who contributed in the course of discussions; such persons are identified in the verbatim transcripts.

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March 15, 1985

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ALASKA NATIVE REVIEW COMMISSION
ROUND TABLE DISCUSSION
MARCH 15, 1985

TAPE 8, SIDE A

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JUDGE BERGER: Well, could I --
could I start -- could I begin by reminding you that -- by
reminding you that the -- that we are invited at noon -- when
we adjourn at noon, John Buchholdt, who is with the North Slope
Borough, has invited us to come at noon to see the geographic
information system. This is on display at their office here in
Anchorage, and we can just walk over there. Oran Young will --
and -- and some of the folks from the Borough will lead the
way. So, when we adjourn at lunch, if you'd like to -- to go
over here, we'll just go over with Oran and this is quite a
remarkable display, I'm told. There's just one question I
forgot to ask John Buchholdt; do we -- do we drop into the
cafeteria on the way to make sure we eat, or it is -- do you
know anything about that, Oran?

MR. YOUNG: I would think we go
over there first.

JUDGE BERGER: All right, we go
over there first.

MR. YOUNG: (INDISCERNIBLE DUE TO
DISTANCE FROM THE MICROPHONE)

JUDGE BERGER: Okay. Okay.
Okay.

MR. YOUNG: (INDISCERNIBLE DUE TO
DISTANCE FROM THE MICROPHONE)

JUDGE BERGER: Okay, so that's
the program at noon for those who are interested, is to go over
to the Borough office and see the -- the geographic information



1 system that -- that I believe is quite remarkable and I -- I
2 hope to go over myself to see it.

3 Bishop De Roo had to leave today, but I know I speak
4 for all of you in saying how much we appreciate his attendance
5 and his -- his -- his remarks that I think made a real impact
6 on all of us.

7 Dennis Demmert had to go back to Fairbanks today. He
8 is the parliamentarian at Doyon's annual meeting which is being
9 held in Fairbanks today and I think the rigors of that
10 particular office exceed those of being a participant in the
11 Roundtable. And we wish him well, but Dennis said he will be
12 back tomorrow morning to rejoin us.

13 I should say that Professor Hanke will likely be
14 leaving for Fairbanks tomorrow and won't be with us tomorrow,
15 so I want, on your behalf, to thank him in advance for -- for
16 coming and I know we will hear more from him today, but I do
17 want to thank him before it gets lost in the general confusion
18 of adjournment later today.

19 And Clem Chartier has to leave tonight, so Clem will
20 not be with us tomorrow and I want again to thank Clem in
21 advan- -- in advance for his attendance here today.

22 What we thought we would do today, Rosita and David
23 and I had a chat about this and with your approval, what I
24 thought we would do would be something like this: first of all,
25 one or two wanted to -- to add a few words to the discussion
that Bishop De Roo initiated yesterday. I think Bernie
Nietschmann -- there he is -- and Sheldon Katchatag wanted to
add a few words, and if anyone else does, by all means, just
catch my eye and you're more than welcome.

What I thought we would then do is this: it seems to
me that it would be worthwhile today examining the extent to
which U.N. resolutions and the work of U.N. agencies and other
international bodies has given rise to a clear definition or an

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1 unclear definition of the status of indigenous peoples under
2 emerging international law, and so I was going to ask Bernie
3 Nietschmann to begin that discussion and I was going to ask
4 Doug Sanders to -- to follow it up and to tell us about the
5 work of the International Court of Justice and to what -- to
6 what extent its decisions particularly the decision in the
7 western Sahara case bear on this -- this question. And then I
8 was going to ask Sandy Davis to -- to tell us about the work of
9 the organization of -- the Inter-American Human Rights
10 Commission and the extent their work may bear on this. And
11 then I was going to ask Clem Chartier and Henry Shue to
12 followup after that. I only mention those names so that there
13 is some organization to this thing and, of course, everyone is
14 welcomed to -- to pitch in.

15 But I thought with your concurrence that we might
16 proceed in that way and then David Case has prepared a list of
17 questions that seemed to arise out of the discussion thus far,
18 and we will be passing those around and they may be -- it may
19 be that sometime this afternoon, they will give us a basis for
20 -- for -- for focusing the remainder of the discussion later
21 today and -- and tomorrow.

22 It may be that others besides Professor Hanke and
23 Clem Chartier are -- are leaving tonight and won't be here
24 tomorrow, but we do plan to carry on tomorrow even if the
25 numbers are diminished. We think we are fortunate in having
you here and we would like to carry on and indeed every
roundtable thus far that has scheduled meetings on Saturday
morning, they have been well attended, sometimes to my
astonishment, but -- so we will plan on a Saturday meeting and
Dennis will be back from Fairbanks for that. And David during
the course of the day will just let -- pass his questions
around.

So, I thought that might be the -- a good way of

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1 using our time today and so, if you don't mind we'll proceed
2 along those lines. And Bernie Nietschmann, you wanted to -- to
3 explore this vein that was opened by Bishop de Roo yesterday, I
4 think, and -- call on you and then Sheldon and then anyone else
5 who would like to say something on that before we turn to
6 international law.

6 MR. NIETSCHMANN: One of the
7 things I wanted to comment on that the Bishop had mentioned is
8 he made a comment about oppressed peoples will survive or
9 vanish depending on how clearly they understand who they are,
10 and this -- what he's talking about is cultural resistance and
11 it's something that we often hear too little about. We hear a
12 great deal about cultural change but very little about peoples
13 who persist, societies that persist, and the role of identity
14 as a means of resistance to imposed change. And what struck me
15 about this was -- is actually a very personal event that
16 happened when I encountered people at another roundtable. The
17 roundtable was in a rain forest in a place that you go without
18 having to get a visa and Indian warriors and Indian leaders
19 were sitting down discussing the works of Ineka (ph) Cabrall.

16 Cabrall is -- was the secretary general of the Kanaba
17 Kasal (ph) liberation movement that eventually freed that
18 country from Portuguese colonization. And Cabrall was one of
19 the world's outstanding political theoreticians and practioners
20 of those theories. And what the Miskito warriors were, in
21 fact, discussing was Cabrall's comments on the power of culture
22 as a means of resistance. And they were reading a piece that
23 Cabrall had delivered at Syracuse University in 1970 called
24 "National Liberation and Culture", and I jotted down a few
25 exerpts from that which I felt were significant at the time and
I still do. It's from a book called "Return to the Source" and
Cabrall wrote, "To take up arms to dominate a people is above
all else to take up arms to destroy, or at least, to



1 neutralize, to paralyze its cultural life. For with a strong
2 indigenous cultural life, foreign domination cannot be sure of
3 its perpetuation. At any moment depending on internal or
4 external factors cultural resistance, indestructible, may take
5 on new forms; political, economic, armed, in order to fully
6 contest foreign domination. The ideal for foreign domination
7 whether imperialist or not, would be to choose." And here
8 Cabrall outlined the dilemma of the foreign colonialist. "One,
9 either to liquidate practically all of the population of the
10 dominated country, thereby, eliminating the possibilities for
11 cultural resistance, or, two, to succeed in imposing itself
12 without damage to the culture of the dominated people. That
13 is, to harmonize economic and political domination of these
14 people with their culture and personality.

15 The first hypothesis implies genocide and ethicize.
16 The second hypothesis has not yet been confirmed by history.
17 The response of one of the Miskito leaders to that was more to
18 the point when he said, "Our people and our land are the same
19 and our cultural is our resistance and for centuries people
20 have tried to change that, but they won't. We still are here,
21 we still have our language, our land and our identity and that
22 won't change."

23 And I thought this was appropriate not only at that
24 time but to bring up the idea that the Bishop was expressing in
25 terms of colonialism and culture as a form of a resistance.
26 And I wanted to simply emphasize that to the Bishop, and now I
27 find myself in his seat, and it's a bit awkward, but that was
28 what I wanted to say.

29 JUDGE BERGER: Sheldon.

30 MR. KATCHATAG: Thank you Justice
31 Berger. First of all, I'm pretty much trying to get myself
32 organized as to what I had intended to say yesterday evening
33 when -- when the iron was hot. One of the things --

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1 JUDGE BERGER: You're saying we
2 missed it then?

3 MR. KATCHATAG: Well, no. It's
4 not -- it's not a shame because you didn't miss it, it just
5 takes a few seconds for me to organize.

6 One of the things that we must realize about this,
7 the Native situation here in Alaska, is that it is the most
8 obvious effect of the policies of the federal government with
9 regard to indigenous people, and I think what -- what we have
10 to realize is that the Federal Government is playing both sides
11 of the fence at the same time.

12 Now, what I mean by this is that they are attempting
13 on the one hand to appease Alaska's Natives and they -- and
14 their demands for fulfillment of all their rights. And on the
15 other hand they are trying to prove to the people of America
16 that what they did was not wrong. Now, -- now, that creates a
17 problem for them because they're going have to end up lying to
18 both sides.

19 Now, a parallel, I think, has to be made between the
20 actions of the United States of America and that of another
21 western society, that being the Union of Soviet Socialistic
22 Republic. Recently, in the paper, there was a news article
23 which stated that the Russian Government was taking some
24 100,000 village children from Afghanistan and relocating them
25 to Russia, and the purpose of this relocation was a very noble
cause of education. And their premise was that the -- the
facilities were not available, the instructors were not
available to provide this education for these Afghani children
in Afghanistan. So, as a result, we now see that the Russians
are taking 100,000 children, not to be educated, but to be
programmed, to think a certain way. Is that not what education
is, development of thought processes?

Now, we can call it indoctrination, we call it

1 anything we want, but I think that we would all agree that this
2 -- this kind of behavior of a dominant culture over a
3 subordinate culture is reprehensible; 100,000 being removed
4 from their villages, taken across international boundaries for
the purpose of education.

5 In the past 50 years, I think most Alaskan Natives
6 would agree with me, when they say that a similar action was
7 taken, not by the Russians, but by the Americans with regard to
8 Alaska's Natives. And in reading some of the things that I've
9 gone through I think that has taken place to a less greater
10 extent in Canada. In our case, our children were taken from
11 their villages, some as young as five and six years old, and
12 depending on the ease with which it could be done; in other
words, the ease with which they could convince the parents that
this was necessary, they met with varying degrees of
resistance.

13 So, that in some communities children were taken as
14 young as five and six years old, whereas, in other communities
15 they were required to provide the first through the eighth
16 grades, and then from the ninth to the twelfth grades they were
taken out of the community.

17 What was the purpose of this? Education. Now, we
18 have seen the product of this education. We have had these
19 leaders which I would like to call at this time due to the
20 parallel, these are Afghani Alaska Natives because they have
21 been indoctrinated. They have been reprogrammed so that they
22 -- they do not think in the tribal sense. They do not know
23 their responsibility to their tribe, and they only know the
24 values of the education system through which they went through.
25 And I think that is very evident when you look at the ways
things are now. The way has been paved for these Afghani
Alaska Natives to re-enter Alaska and to assume positions of
leadership with the blessings of the Federal Government. We

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1 have lettered these people. We have taken them to our
2 institutions and allowed them after a certain period of
3 indoctrination to carry letters after their name. John Q.
4 Eskimo, BS; we all know what that means.

5 And I think that all of our Native people should
6 realize that this has happened including these so-called
7 Afghani Alaska Natives. That they have been reprogrammed and
8 my position by saying this is that the press has made this
9 issue, this Alaska Native issue, ANSCA, sovereignty,
10 self-determination, local control; all of these things, they
11 have made this a polarizing issue.

12 As chairman of the United Tribes of Alaska, that is
13 not my function. My function as outlined in our charter is to
14 unite our people and to inform them of their first
15 responsibility, to their tribe. And I think it's important
16 that our people realize this and I would hope that these
17 Afghani Alaska Natives would look at their situation and try to
18 understand who they are, not just by the color of their skin,
19 not just by the color of their hair, and not just by who their
20 mother or father happened to be. They must now, I think, in --
21 in -- in the interest of not only helping themselves but
22 helping our people, they must look at their actions. And take
23 this perspective, not from their individual perspectives as
24 these Afghani Alaska Native leaders, but look at it from the
25 position of the Alaska Native most impacted by their actions,
the village Alaska Native, that vast majority out in the middle
of nowhere who cannot make his feelings known.

Where do we go from there? We have to have an
education campaign, we have to have an information campaign.
In effect, we have to reprogram these leaders, not against
their will, that's not our way. We give them every opportunity
to look at the facts of the matter and we would hope they would
make an informed decision. That is all that we ask.

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1 Now, this -- this particular roundtable is aimed at
2 the future. What is the place of Alaska's Natives in
3 particular and Natives in general around the world, or in this
4 case, in the Americas, in the Western world.

5 I have just been handed a news release that came off
6 Associated Press which is entitled "Agency Backs Indian's
7 Rights to Tax Oil Leases on Tribal Land". What does this say?
8 Associated Press, date line, Washington. "The Reagan
9 Administration urged the Supreme Court on Monday to allow
10 Indian tribes to tax mining and oil and gas leases on tribal
11 land without federal approval. In a case involving Navaho
12 Lands in Arizona, New Mexico and Utah, the Justice Department
13 said that the Court should uphold a ruling that the Secretary
14 of the Interior is not required to review Indian taxing
15 authority. Congress permitted the Interior Secretary to
16 supervise Indian land management but did not mandate it, said
17 government lawyer Lewis F. Clayborn. He added that a
18 substantial number of other tribes are amending their
19 constitutions to prevent them to impose taxes without federal
20 approval. The Navaho tax is being challenged by Kerr McGee
21 Corporation to avoid paying a levy on uranium, oil and gas
22 leases the company has on tribal land. Alvin H. Schago (ph) of
23 Phoenix, Arizona, a lawyer for the corporation, said that for
24 50 years, and this is important, most tribes have assumed
25 federal law requires them to get approval from the Interior
Secretary before enacting taxes on non-Indians. The
administration's current position is encouraging tribes to
revoke their constitutions, to eliminate the requirement for
federal approval of tribal taxes. Elizabeth Bernstein, an
attorney from Window Rock, Arizona representing the Navahos,
said the tribe enacted the taxes because it is badly in need of
funds for central services on the reservation."

So there's the word from the horse's mouth on an

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1 option for Alaska's Native people, but they can't do it as
2 corporations. Corporations cannot tax, they are not
3 governments, they are business entities, and that is a point
4 that I have been trying to make all along. As we get into --
5 the basis for this, by the way, comes from, I believe it's the
6 97th Congress, 2nd Session; a particular act which says, title
7 2, Tax Status of Indian Tribal Governments, this title may be
8 cited as Indian tribal government tax status act of 1982.
9 There -- there is a whole rap -- we also have a federal
10 register, department of the treasury, temporary procedural and
11 administrative tax regulations, Indian tribal governments
12 treated as states for certain purposes, including taxes, and
13 bars by the way.

14 We also have a procedure here, part of 25 USC
15 subsection 443, revenue procedure 8387, which outlines how
16 tribal governments can comply and take advantage of this law.
17 And we also have under revenue procedure 8387, a list of tribal
18 governments across the states and in the very back, we have a
19 list of Alaska Native entities recognized by the IRS, the
20 Congress, Federal Register, and the Treasury Department as
21 having this ability, not only to tax, but to sell bonds. There
22 are certain restrictions as usual. But you will see that there
23 are a large number of villages all the way from Akiachak to
24 Wrangel that have this authority and they include such tiny
25 places as, Craig Community Association, Grayling, Hydauerg,
Beaver, Ambler, Kiana, Kiawok, Stebbins, and so on.

Now, this has great implications, I think, for the
direction that this particular group should take with regard to
what is the place of Native people in the Western world and
particular what is the place of Alaska's Natives in our world,
however western it may it.

And this brings us around to that most important, at
least from my perspective, because it's -- it relates to

1 everything that I am and that I do, and that is my source of
2 livelihood. Now, I have here another clarification that I
3 think will be invaluable to our discussion here because it
4 clarifies this means of getting a livelihood. The word
5 subsistence is meaningless if left standing alone. If used as
6 an adjective in defining an economic system, then, the term
7 "subsistence economic system" makes sense.

8 It is now necessary to define "economic system" so
9 that there is no erroneous preconceived idea of what we are
10 talking about. What I mean by an economic system, is the most
11 efficient, organized production and distribution of goods and
12 services to people, so that people can subsist off the
13 resources available to them. The basis of subsistence economic
14 systems is centered around the individual. As he integrates
15 his efforts to subsist off the resources with other individuals
16 into an organized family unit, he arrives at the first
17 civilized -- civilized, the first civilized cooperative
18 interrelationship called a "family subsistence economic
19 system".

20 The next level of organization integrates the family
21 system into a village subsistence economic system. The
22 increased access to goods and services, thus available through
23 organization, results in expanded trade of surplus to a greater
24 community. And this then, you can get into region, you can get
25 into continental subsistence economic systems, if you wish.

But I believe it's important, that as far as our
people are concerned, that we concentrate our efforts on
developing the village and the regional subsistence economics
system.

The state of Alaska, the Supreme Court recently ruled
that subsistence is a right of all people and that it must be
-- must not be discriminated by law. That's all well and good.
We all have to eat. But the state's subsistence law as enacted

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1 in 1978 and the federal subsistence laws as enacted in ANILCA
2 title 8, all say the same thing. But these laws are not being
3 enforced. They say that there is a certain priority that must
4 be recognized, if in fact, you are going to be limiting
5 subsistence activities. And all of these laws say that Native
6 people, due to their dependence on this subsistence economic
7 system, are entitled to the last chance at that resource before
8 it is cut off from everybody in the -- in the interest of
9 making this -- these resources, whichever resources are under
10 pressure, renewable. Reasonable. Reasonable. There's --
11 there's nothing ambiguous about the -- the law. It's
12 well-written, I think. But the point is these laws are not
13 being enacted, they are being enforced, and I think that in
14 order for our people to ensure, number one, that the federal
15 government's subsistence laws and the state of Alaska's
16 subsistence laws are enforced, and this is a recommendation, by
17 the way, from the resource specialist subsistence for the
18 Bureau of Indian Affairs, that the tribal governments, since
19 they, in effect, will be the last priority users, that they in
20 fact, should regulate subsistence. Why do we have to have
21 second and third party brokers when we are developing a means
22 to provide for our own livelihood. Alaska's people, Alaska's
23 Native people, do not require that the citizens of the United
24 States abide by their regulations with regard to subsistence
25 economic activities. I think, United States would be a lot
better off if they did, but that's neither here nor there.

And I think even though we have proved down through
the centuries that we have developed a workable subsistence
economic system community by community that we have been
needlessly regulated by external forces. And I think it would
it -- these tribal governments would be the most valuable to --
for our people to, in fact, regulate their subsistence. I'm
sure we -- we, as Native people, would be more than willing to

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1 abide by regulations that we develop ourselves and enforce
2 ourselves than those which are imposed upon us from the
3 outside. Is that not what this is all about?

4 Alaska's Native people want to be able to control
5 their own lives. And what is more important to life than the
6 food you eat? You are what you eat. And Bishop De Roo
7 yesterday was speaking to the Bible's precept of stewardship,
8 and I would content here that Alaska's Native cultures are the
9 highest examples of harmonious responsible stewardship of the
10 land and its resources, because we have been doing it for
11 thousands of years.

12 The point has been made with regard to ANCSA during
13 all those months of testimony that what evidence is there that
14 Alaska's Native people have been here for thousands of years?
15 I'm glad they developed archaeologists because they didn't
16 believe us when we said we were here for thousands of years.
17 They said where's your Captain Cook, where's your Sheffield
18 Hotel, where is your Federal Building? What you must realize
19 is that these things are sitting on very useful land as far as
20 we're concerned.

21 Our cultures have developed a way of living with our
22 environment that is non-destructive, self-renewing, and
23 harmonious. And if, in fact, these activities must be
24 regulated, I think it's the Native people's right to regulate
25 their own subsistence. Thank you.

JUDGE BERGER: Thank you,
Sheldon. Rosita.

MS. WORL: May I just expand on
Sheldon's earlier remarks about the removal of children from
their homes, Native children from their homes, and the
potential that it holds for cultural genocide through the
removal of its future members. A study by Cary Feldmen and
other anthropologists a couple of years ago, and this was after

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ATD

1 the passage of the Indian Child Welfare Act that supposedly was
2 enacted to -- to decrease the rate of removal of Indian
children from their homes.

3 This study showed that Alaskan Native children were
4 being removed from their homes at three times the rate as
5 non-Native children and placed in various institutional care,
6 education, health, and some of the correctional institutions.

7 And there -- we have no studies on the removal of
8 children from single mothers, you know, at -- at -- right after
9 birth. But we have -- we have some confirmed reports about
10 suggesting that the removal is extensive. And one unconfirmed
11 report right after the enrollment indicated that their were
12 some 800 Alaska Native children placed in homes in northeast,
13 northeastern areas where indigenous societies are -- are very
14 prominent. They are communities in New England that I guess
15 they have a fetish about having Indian children. And I -- I,
16 myself was --

17 JUDGE BERGER: These are white
18 families?

19 MS. WORL: Yes, white families,
20 that they're indigenous societies, and I attended one of their
21 functions in a community in New Hampshire when I was back east,
22 and they actually have these community days where they play
23 Indians, and they have all -- all of these Indian children. We
24 -- the -- and as I said, this is unconfirmed reports that we
25 have, they're after the enrollment, there were 800 children,
but it was traced back to the adoption from the Native Hospital
where mothers were pressured by different religious orders to
give up children who were illegitimate and, of course, the
concept of a -- a fatherless child was -- is an alien concept
to Alaskan Native societies. We have always had single mothers
and children have always been placed with extended family
members. So, the removal, it appears, is continuing and

1 probably even at a greater rate than -- than we know.

2 JUDGE BERGER: Oran, you wanted
3 to say something and then Rayna.

4 MR. YOUNG: Yes, I wanted to make
5 just a couple of clarifying remarks on the content of the
6 existing subsistence provisions, particularly in title 8 of
7 ANILCA.

8 One thing that's very explicit in the provisions of
9 title 8 of ANILCA is that the subsistence regime that it sets
10 up is not in any way based on a Native, non-Native distinction.
11 It's fundamentally based on a rural, non-rural distinction.
12 Now, title 8 of ANILCA may be a good law and it may be a very
13 bad law, but it is certainly not a law which has anything to do
14 with recognizing, much less, promoting a special place for
15 indigenous people in society unlike the place of any other
16 recognized minority.

17 To come back to a question that --

18 JUDGE BERGER: That's right.

19 MR. YOUNG: -- Tom raised at the
20 very beginning of this roundtable, which I think is really one
21 of the fundamental issues that we all need to address. Is
22 there, should there be, can there be a place for Native people,
23 indigenous peoples, unlike the place of any other minority in
24 society?

25 ANILCA, title 8 is a legal regime which cuts directly
in the other way from that and so, if you really -- it doesn't
-- it doesn't suggest any opposition to rural subsistence users
including Natives playing a significant part in the decision
making process. That's not the problem. The problem is it
rests on a very direct fundamental proposition that runs
counter to the idea that there should be a special place unlike
that of any others. And so, if one wants to promote that goal,
which I think is a very interesting goal, one has to attack



1 ANILCA, root and branch.

2 JUDGE BERGER: Yes. Oran, might
3 I intervene at this point. I think that your -- your point is
4 -- is a vital one and indeed, we had a roundtable in October on
5 subsistence for four days and discussed the -- the current
6 Alaska subsistence regime at length. That has been thrown into
7 some confusion by the recent judgment of the Supreme Court of
8 Alaska. And that's something that the Commission will have to
9 deal with in due course. I don't want us to be side-tracked
10 onto a discussion of subsistence because we've been through
11 that. It's in my mind and in all our all minds, but I think
12 what I would like to do is -- Rayna wanted to say something
13 rising out of the earlier discussion and I was going to ask
14 Oscar or Virna if they wished to as well since there may be two
15 views about the -- the preport of Sheldon's earlier remarks
16 relating to schools and so on. But, what I wanted to do after
17 that was to turn to the place of Native peoples in the western
18 world. Does -- we know what the U.S. Constitution says, we
19 know what Alaska law says, we've studied those, discussed it at
20 length.

16 (TAPE 8, SIDE B)

17 What I'm really interested in finding out from the folks that
18 we've got here is whether international law as it is emerging
19 can be called an aid, so to speak? Whether it does indeed
20 reveal a tendency to acknowledge the right of indigenous
21 peoples to the things Sheldon was talking about;
22 self-government, land? And the point that Oran made; does it
23 reveal as a matter of principle the right of Native peoples to
24 subsistence, acknowledging that that is a right that adheres in
25 their condition, their status, as Native people.

24 And that -- that's, I think, something that we should
25 allow to emerge from what Doug and Sandy and Clem have to say
to us and then to Mr. Shue a little later. So, forgive me, I

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1 don't -- don't want us to start talking about what the Supreme
2 Court of Alaska did two weeks ago because we've all been kind
3 of wrestling with that -- that judgment and indeed, the judges,
4 obviously, did a certain amount of wrestling with it. I don't
5 know who won, but I bet he's in the wrestling match. Rayna,
6 you wanted to say something. There's a mike there, if you
7 wouldn't mind.

8 MS. GREEN: This is something of
9 a continuation of Nietschmann's earlier remarks and -- and
10 Sheldon's and Rosita's, and referring back To Bishop De Roo's
11 yesterday and it is very much on the topic of -- of the place
12 of indigenous peoples in the world. Though I am less
13 interested, I must confess and -- and I -- and this is a part
14 of what I want to say in what the law says or does not say.
15 And I think we always have to keep in mind that the law is
16 someone else's, you know, and if we need to raise the questions
17 about the indigenous peoples and the place of indigenous
18 peoples in this world, one of the issues we must raise, is
19 whether the law is relevant at all, or irrelevant, and how we
20 could make it relevant, or how we could make it irrelevant. As
21 long as we continue to fret about what the law does, we are
22 operating in some one else's arena and this is part of a
23 continuation of my earlier remarks yesterday.

24 When we raise the issue of children, for example,
25 being taken from Native people, we may be raising a issue
that's perfectly -- perfectly within the rights of the law to
raise. The law protects the taking of Native children from
their parents. The law protects the taking of Native children
from the extended family.

JUDGE BERGER: You mean the law encourages it?

MS. GREEN: The law -- well, -- well, it protects them. In fact in the Indian Child Welfare



1 Act, the Mormon Church, in specific, got the one exemption,
2 because it saw itself not only as part of the law but, in fact,
3 above and beyond it. Well, that's a whole other matter. But
4 -- but I -- I say these things to open an arena of questioning
5 that really gets beyond what the law does and what the law does
6 not do, and raises some philosophical questions about the place
7 of indigenous peoples in this world.

8 As long as we coll- -- this is very much what Sheldon
9 was talking about. As long as we collaborate with systems
10 which have been engineered to make us something other than
11 Native, we are then in an arena which will never allow us to
12 raise questions again. It all becomes a game and Native people
13 know this. They're presented with one model after another in
14 which a -- a -- a treasure has been held out to us. I was
15 telling Bernie and Sandy last year, you know, here Indian,
16 here's Christianity take that, that will save you. Here,
17 Indian, take education, this will save you. But what happens
18 when you become educated is that they tell you then you're no
19 longer Indian. I've sighted an example of a institution which
20 said they couldn't hire Indians because Indians didn't have the
21 kinds of credentials they wanted and I said, well, but what
22 about so and so, and so and so? Naming a whole list of people
23 who had those credentials. Well, they're not really Indian
24 anymore, you see.

25 As long as we play in those games and one more lure
is held out to catch our particular fish we're trapped, we're
trapped. Because it's always a snare and an illusion to use
biblical language for something that is biblically unspeakable.

So, I think we have to ask ourselves as well what
other options are there? One of the things I've begun to think
about and I was, again, saying this last night to some people;
as we keep talking, one of the things that seems to be the most
frightening, the most unspeakable, rather than patching up a --

1 a flawed system, and we can patch up ANSCA, you know, we can
2 patch up the Constitution, we can keep making amendments to it,
3 you know, we could patch it all up, we can allow Indians in
4 under the Civil Rights Act, you know, say, here you really are
5 an individual just like everybody. That way lies, you know,
6 another kind of trap. One of the things I think we have to
7 raise is what is it about us that is so frightening. When we
8 stop talking about folk festivals and we stop talking about
9 ethnic food and we stop talking about restuarants and we stop
10 talking about culture as art and we stop -- and we start
11 talking culture as resistance, culture as land, culture as
12 self-determination, culture as nationhood; it becomes
13 frightening, because to talk of that is to talk of isolation.
14 To talk of that is to talk of separatism. To talk of that is
15 to talk about difference, and that is the thing that is the
16 most frightening about us in raising those issues. You know,
17 and it doesn't matter left or right, they all have got a system
18 that we can come in under, you know. Liberals call it
19 integration, you know. Rightists call it assimilation. It
20 doesn't make much difference. When we start calling it
21 self-determination, that's the frightening thing. When we
22 start talking about -- to raise the issue that seemed to be so
23 lively yesterday; when we start talking about museums that are
24 defined in our terms, education that is defined in our terms,
25 to talk of that is to talk of separatism and isolation and
identity that exists beyond some one else's identity, that
exists beyond the Constitution.

21 What is the Constitution to us? It is nothing. It
22 is nothing except something that holds a door open and a pit
23 looms beyond, the abyss yearns for us when we walk in that
24 door. So, that's what's frightening about us, and I think we
25 have to come to terms with why that's frightening and why we
must press on and ask what we would be if there were no

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1 Constitution. If there were no schools as they know them, but
2 as we know them. What would we do to preserve that which we
3 think is remarkable and in which ways would we preserve it.

4 Culture -- I don't want to think that culture is
5 simply resistance in the same way that I don't want to think
6 that culture is simply a culture of property, which is how our
7 culture often gets mistaken. But we have to begin talking
8 about ways of seeing ourselves that exist apart. I'm not
9 talking about -- I'm not talking about another kind of illusion
10 which is separatism in the old sense. That is, that we don't
11 go to schools, that we don't get educated, that we don't ride
12 snowmobiles, you know. Salvation does not come and people say,
13 give up your technology. Technology is not our means, it's the
14 uses to which it is put and I think we have to all know that
15 very clearly.

16 So we cannot talk about separatism as a -- as a kind
17 of programmatic construct but as a philosophical one. What would
18 it mean to construct and reconstruct a world in which we know
19 how to -- to do what we have to do in the natural universe. In
20 which we know how to teach our children. In which we know how
21 to preserve our culture. I'm not talking about a world in
22 which we are -- we will not make mistakes, but a world in which
23 we determine our own freedom to make mistakes.

24 So, all I'm simply suggesting, following up on
25 discussions yesterday and today, is that there must be a
philosophical discussion not only resting in what other new and
different systems are doing, once again, to redefine us, but in
insisting that we must have that philosophical discussion about
how we define ourselves. Once again, it keeps cropping up and
it will continue to crop up and it will have different names,
but we can't avoid that discussion.

JUDGE BERGER: A young woman in
Seattle at the hearing that we held there last week, Rayna, I

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1 can't remember her name because there were many people who
2 spoke but she was a Kingka (ph), she was -- she is a Kingka
3 (ph). And she said -- she said that -- she referred to the --
4 the willingness of people to -- to buy and appreciate Kingka
5 (ph) art and she said -- she said the white people are willing
6 to embrace our art, but they won't embrace us.

6 MS. GREEN: You see, we are just
7 another commodity and as long we allow ourselves to become just
8 another commodity then -- then you can consign culture to the
9 -- folk festival. We can be Klingit (ph), you know, once a
10 year, thank you very much.

10 JUDGE BERGER: Yeah. Well, I
11 think this is worth pursuing before we -- we move on and that
12 we -- and Mr. Shue and Oscar and Robert Goldwin and Virna.

12 MR. SHUE: This is really just a
13 very quick footnote. I agree very much with the general spirit
14 of what Rayna Green just said and I would be the last person to
15 argue against raising the deeper philosophical questions and --
16 and challenging the existing laws, but I do think there's a
17 third level that comes in-between the -- what we might call
18 natural rights, or moral rights, that would be part of the
19 philosophical discussion and the particular domestic laws that
20 we might wanted to challenge, and that is the whole body of
21 international human rights law. And in a way this is just the
22 defense in what we're going to do later. I don't that we
23 should forget that there has been this attempt to embody in the
24 international human rights law some of the deeper moral
25 requirements, and international human rights law has all kinds
of limitation, but it does have some strengths and I think it's
one of the things available to use, so that I -- I certainly
agree that the fact that an existing state has passed a certain
law is not the end of the story, and we may want to raise
philosophical questions.

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1 But I also think we may in some cases be able to
2 appeal to the body of international law about human rights
3 which is an attempt to -- to rise above particular national...

4 JUDGE BERGER: Yeah. Well, I --
5 I think that that's a connection that Henry has usefully made,
6 but we'll continue with this and move our
7 Nietschmann/Sanders/Davis group a little back on the -- to the
8 back burner just for the moment.

9 Oscar Kawagley, you wanted to go next, I think? Did
10 I -- oh, Robert Goldwin? Go ahead, sorry.

11 MR. GOLDWIN: To follow-up on
12 Rayna Green's point I think she has -- has brought a problem
13 into clear focus. It's been clear for the last few days that
14 we have been talking about two different worlds and what the
15 relationship is of those two different worlds. I have some
16 quarrel with the way the non-Native world has been depicted,
17 but I don't see much point in belaboring that now. The
18 significant thing is that the Native peoples present a very
19 different problem to the general principles of the United
20 States as expressed in its great documents such as the
21 Declaration of Independence and the Constitution. Very simply,
22 the principles of equality and liberty and justice all starting
23 from the rights of the individual to express themselves is an
24 effort to let every individual and every group share fully in
25 the life of the society so that there is a powerful
intergrating, assimilating, absorbing flow constantly out of --
as a result of -- of these principles and the idea of justice
is to bring everyone in, not -- not to exclude. And not only
is there that drawing force but there's also a demand from
almost all groups that they be let in.

Now, this special problem, of course, with the Native
peoples is that the impulse is exactly in the opposite
direction, and so what is ordinarily thought of as justice with

1 regard to all other groups is manifest injustice and, in fact,
2 cruelty as described here.

3 So the difficulty is in trying to make an adjustment
4 in what is otherwise considered the American way, to rectify
5 the behavior and to try to find out what would be sensible,
6 fair and appropriate with -- with a people who for very good
7 reasons want something almost exactly the opposite of what all
8 other groups seem -- seem to want as part of the society of the
9 United States.

10 As I understand Rayna Green's argument and I -- I
11 mean, I have no way of judging how representative her view is
12 but others of you can judge it better. As to the two worlds
13 she says, we want one and we don't want the other. As much
14 separation as is possible and makes sense. That separation is
15 what we want and so, it would be not the educational system
16 that everybody else is trying to get in to, but an exemption
17 from that educational system and an educational system of our
18 own. Not the economic system that everybody else is insisting
19 on getting into and getting their fair share of, but our own
20 economic system -- and then work out the relationships of our
21 educational system to -- to yours and our economic systems to
22 yours, and our political system to yours.

23 It seems to me it's a difficult task, but I don't see
24 why it's impossible. The first step is the kind of thing
25 that's being done now. A clear explanation of why what seems
just to everybody else is a severe injustice in this case. I
think the case can be made persuasively -- I think when it's
carried too far and is strident and develops into a political
harangue, I think that's counter productive, but that's just my
outsider's opinion; and one thing I'm learning here is not to
tell other people how to -- how to do what they do. But it
would be helpful if I -- if someone could begin describing, and
carry it beyond just a brief statement, that need an for

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1 educational program. To -- to give some idea of what the
2 Native education would be so that we could begin to under- --
3 to see how it might be developed, how those who have some say
4 in it too; education official of -- of the state and of the
5 United States and whose agreement or cooperation might be
6 needed just to let go, you know, of the control they have. For
7 them to begin to see that it might be consistent with what they
8 think their responsibilities are to say, all right, do it your
9 way. But there would have to be some -- if we carry the -- the
10 description of it far enough we might begin to see what the
11 exceptions have to be, what the difficulties would be, what
12 kinds of compromises and cooperation would be required.

13 But I would, as I see it, the whole thing is really
14 possible because it follows a -- a principle that most
15 Americans adhere to, at least to in words and is very old and
16 conservative: laissez faire, which means, let them do what they
17 want. So, if you -- your idea is a laissez faire program for
18 Native Alaskans, once we could see what the implications are,
19 what the consequences are, what the principles are, it seems to
20 me that there are real possibilities of -- of accomplishing it
21 starting from a clear explanation as has been developing here
22 that there are really two worlds and what looks like justice in
23 dealing with all other kinds of groups is really very
24 different.

25 You see most Americans would be appalled at the
notion that what the efforts at educating Indian children can
be compared to what the Soviets are doing with Afghan children.
And it is a wild exaggeration until you make clear the
difference of the two worlds. Once that is -- is made clear
then something of the analogy begins to be persuasive. Once
the analogy is persuasive, I think, most Americans will say,
let me hear how we can rectify this. Well, I'm finished. Yes,
I'm finished, go ahead.

1 MS. GREEN: I just want to
2 make --

JUDGE BERGER: Rayna, then Virna.

3 MS. GREEN: -- three very simple
4 connections. One, I -- I -- I don't presume to say what Alaska
5 Natives should want or need. I'm just raising some questions.
6 I mean, there -- there is no presumption on my part about --
7 about that. Two, God-forbid should it ever get out that I came
8 out for "laissez faire". I'd cut my throat. I know, I know
9 you're being provocative. There is certainly some resemblance
10 to that. Let's just get the record clear.

11 Yeah, I want us to be let alone. I don't want us to
12 let you alone. That's -- that's the difference and there is a
13 real difference. And three, most Americans might be horrified
14 at being compared to the Soviet Union, but if the shoe fits.
15 And they do mean to do what the Soviets do. I will never
16 believe that they don't mean to do just that. It would be
17 foolishness to assume 250 years of history tells us otherwise.
18 They do mean to do precisely that; otherwise, the whole body of
19 law and history would be a different body of law and a
20 different history.

21 Don't think for one minute that Americans don't mean
22 to do that. Americans in the Lower 48 right now who want to
23 get in my bed certainly want me in their schools and want to
24 change my mind. So, it would be a total snare and illusion to
25 think that they don't want to do that to us.

MR. GOLDWIN: Well, Rayna, just
for the record, I think you are completely wrong, and I think
it's very harmful that you have that opinion.

MS. GREEN: Well, we disagree.

MR. GOLDWIN: Yes. I want it to
be clear that we do.

MS. KIRKNESS: It's always very

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1 difficult to have other people understand what it is we mean
2 when we talk about education and the kinds of things that the
3 formal system of European education has done to us.

4 In an attempt to maybe clarify that perhaps I could
5 talk a little about -- about my life, about going to school.
6 I'm from a Indian reserve in Canada and I started school there
7 in the 40s. And when I went to school there in the 40s, one of
8 the things that -- first things that we encountered is not
9 being able to speak your language and you've heard that time
10 and time again, and you're sick of hearing it, but that was
11 very, very detrimental to us. It told us right away that
12 something that is near and dear to our heart was not the right
13 kind of -- was not right and that English was the only right
14 way to -- to -- the only right language to speak. So that was
15 one thing.

16 And when, like, our families were respected we were
17 told, you know, you see the Canada food rules and the kinds of
18 things you're supposed to eat and eating the kinds of things we
19 weren't eating was wrong, like, bandit (ph) and, you know,
20 things like that from our own culture. I mean, this -- these
21 are the kinds of teachers we had. We didn't learn the history
22 of our own people. We -- we heard, in fact, negative history
23 about our people. We hear about the savages. Even I was
24 afraid of the Mohawks for a long time, you know.

25 MS. GREEN: You should've been.

MS. KIRKNESS: I should have
been, she says. But you -- you know, you hear all about these
things. We weren't told that these great rivers and, you know,
places that were discovered. We were told that the people from
other countries came and discovered these. They didn't tell us
that the Indian showed them where these rivers and lakes were,
and that they simply put their names on them. You know, again,
the same old idea. This goes on and on in our -- in our

1 history, in our lives. You know, not learning anything at all
2 of our own background and, in fact, everything -- most things
3 about our own way of life was wrong.

4 I remember those days when -- those were the days
5 when my father was a fisherman and we used to go out and work,
6 this is what we're calling subsistence, I suppose. Although he
7 was a commercial fisherman, but in our way that was a way of
8 making a living and the whole family used to go out with my
9 father to -- to the fishing grounds and -- and we learned how
10 to fish, we learned. I knew how -- I can fix -- I can the nets
11 or -- I can't think of the terminology now. That's what
12 education has done to me, but I can -- I could make nets, I
13 could clean fish, I could do all these things, you know, that
14 was expected in -- in a subsistence kind of economy and then
15 the Government passed a law. Brought in family allowance and
16 said that we couldn't go out to the lake anymore. So,
17 ourselves and my brothers and so on, that should have learned
18 that way of life were not able to learn that same way of life.
19 You know, so, and these are the kinds of things that -- that
20 we've been exposed to over the years and even my mother could
21 tell worse stories. My -- my uncle tells some really good
22 stories about the kinds of teachers they had in their old days.
23 You know, the veterans in Canada had first choice for jobs
24 after they came back and that wasn't Indian veterans as much as
25 others. So, you have got all kinds of people teaching our
people out on the reserves.

21 We had people there, my uncle said, that for one
22 whole year all he did was march. They had a shell shocked
23 teacher that came back from the war and he was there and they
24 marched and marched. And he said, you know, that was really
25 quite fun, but he said, you know, the girls never could march.
Now, you know, but it's things like that. The kinds of
teachers we have had, the kinds of -- the lack of attaching

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1 honor to our way of life, our customs, our culture, our peoples
2 contributions to the Canadian -- development of Canadian
3 society.

4 That's what we're talking about when we talk about
5 the education system. It's a brainwashing system. And as
6 Sheldon was saying, you know, the people that become educated
7 become very suspect. People say, okay, you're not Indian
8 anymore, you know, because of that. Well, it's true, it's very
9 -- there's two sides to that. One, I think it speaks to the
10 fact that many of our people don't finish, don't complete
11 school. We have a wide, large, large number of drop-outs in
12 all over Canada and all over the other places. We hear that
13 all the time. And that is because they're resisting. It's
14 really a resistance of the education system in order to
15 preserve themselves for who they are, and I think that is one
16 of the reasons we're saying that we have to do something to
17 insure that the education system is a meaningful system to our
18 own people and acknowledges our own way of life.

19 But the other side of the coin tells me this and that
20 is, that those of us, some people that do get through in the
21 education system, I think we do because our identity is in
22 tact. And I really think that that is one part of it because I
23 -- I know who I am. I was fortunate to have a grandfather that
24 lived to be 104 years old that made damn sure I knew who I was.
25 And I think that carried me, that carried me through and I
26 could -- I could take what I wanted from this other system, and
27 I could manage to get through, and I have -- I have clearly in
28 my mind, you know, who we are and -- and so on.

29 So, that is one -- another way to look at it. So,
30 that's what we have to do for all our children. That is what
31 we have to do for all our children. They have to have a sense
32 of who they are. We can't have the destructive forces of the
33 schools and the churches doing what they did over the years.



1 You know, one interesting thing that happened, I was a teacher
2 and -- for a number of years and I remember one time. You
3 know, you can't do this. I was teaching history and, you know,
4 I woke up while I was teaching that history lesson. I don't
5 mean I was really physically asleep. I was -- I woke up and I
6 was teaching this crap, this nonsense, you know, and I suddenly
7 realized, you know, this is -- this is not right at all. This
8 isn't the history of Canada, this isn't the history of our
9 people and so, I went -- I went completely the other way and I
10 started talking about real people, our people, our lives. And
11 I said to the students, these were grade seven students; I said
12 write me an essay, I said, about Canada -- I hate to tell the
13 year, it was 1965, I think, without white man. You know, write
14 us -- a story about that. You know, a lot of the times they
15 say, oh Indians don't like to write, they hate writing because
16 it's in English and all that. These kids wrote pages and pages
17 and pages. They really enjoyed the topic of 1965 -- Canada
18 1965 without white man and their portrayal. You know,
19 essentially was, if they were able to carry on -- they -- they
20 did have some idea of the way it was. You know, people say we
21 romanticize when we talk about the past a lot, but they saw it
22 as their own development and they saw it in a way that they
23 would be productive and happy people today. And they saw
24 themselves as really unhappy with the kinds of restrictions and
25 barriers in this kind of life.

I think that's what we're talking about. You know, I
often think we -- we're -- we've had our own way of life for so
long, which was totally interrupted for many centuries.
Interrupted by -- by schools, by church, by laws, by
settlement, by everything. I often wonder where would we be
today, where would we be today if we didn't, you know, if we
weren't fortunate to be discovered, you know, where would we be
today? I think that's the part we're talking about, that

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1 interruption. You know, people say to me when -- when I
2 suggest that we would be far better off today, that our
3 cultures would have evolved, that we might have even discovered
4 the wheel -- invented the wheel, I mean. You know, they always
5 say, oh Indians they're -- they're not too bad, but, you know,
6 they never had the wheel when we got here, you know, big deal.

7 So I think we would have done that too. I think
8 there are a lot of things because when you talk about Indian
9 culture, it's always the way that we lived, our people lived
10 years ago. I mean, our culture evolves the same way as
11 everyone else even Dr. -- Professor Hanke in his statements
12 said something about oh, he wondered about his own culture of
13 -- because he didn't like rock music and television, you know,
14 and I thought -- and I thought to myself, now that I've gotten
15 -- now that I've gotten to know him, I'm sure he likes rock
16 music because he's -- he seems quite lively to me. No, I may
17 have misunderstood that, but -- but sometimes people say, okay,
18 but you're -- you're losing your culture, you know, you're
19 losing your culture. Well, how the heck can you lose something
20 when it's dynamic and it evolves and it includes somethings of
21 yours. Like, one time, someone said to me, oh, yeah, you have
22 TVs and washing machines and all that, you know, you wouldn't
23 have that today. I said, yes, okay, you have canoes, and snow
24 shoes, and that, I said, does that make you an Indian? You
25 know, that's the same thing. You can reverse this.

Anyway I'm rambling on here. I think there's a lot
-- there is that problem. We -- have also, they say -- they
say, if you talk about this they say, oh, if we didn't come
along you all would have died off, you know, because you - you
were dying off. And you know, with their things and yet, we do
know, I mean, history tells us that the diseases that were
brought and the kinds of things that went on caused the, you
know, the mortality rate so high of our people all over the

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1 years. I'm sure, again, survival of the fittest, we would have
2 lived through -- through all of that.

3 I know that's like talking, you know, after the fact.
4 I mean, this is today, we cannot do that. But what we're
5 trying to find here, all of us, is what do we do now, you know,
6 and it's so hard. I think to me the greatest block is this
7 understanding. We can't seem to say -- we can't say anything
8 without -- without -- with understanding. We seem to have such
9 a hard time to have -- be on the same wave lengths in anything
10 that we try to describe. In Canada we really moved along to
11 have Indian control of Indian education, because we really
12 believe that we have to design our own form of education if
13 we're going to survive as a people. We can't continue to have
14 these kinds of values inculcated into the -- into the
15 curriculum and into the learning of our people today. We have
16 to turn that around and in phil- -- philosophical -- well, in a
17 statement we can just say that we have to, within that system,
18 tie what we're learning with our own economy, and I think
19 that's what people have been trying to say. The way we -- we
20 want to live in the 21st century, and we're not talking about a
21 long time ago again. Today, how we're going to live today. We
22 need to be able to -- to do that within our school systems.
23 So, our school system has to address the needs of our people
24 and have to attach this kind of, you know, honor or whatever
25 you want to call it, they have to do something with -- with our
culture, our own way of life.

21 We talk about learning styles too, you know, and
22 that's very real. We have certain ways with our learning
23 styles that are based on our values. I heard someone say, I
24 think it was Bishop De Roo, that said values are lasting.
25 That's what it is with us too. Our values are lasting and our
values can fit into this century too. There are many things.
There are many ways to arrive, achieve the same end and I don't

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1 want any -- I feel that we're -- our aim also is to be able to
2 have our people educated in the -- in every sense just like
3 everyone else; doctors, lawyers, merchants, chiefs. No, you
4 know, in every -- every way. I think that -- that we want to
5 do that, but I think that we can achieve that far better by
6 addressing the system of education. We have to have a system
7 based on our philosophy.

8 I just want to make one more point and that -- if I
9 made any points at all. One thing I wanted to say too is, you
10 know, the -- one of the -- the greatest tragedies I think of
11 all time and that really has posed the greatest difficulty that
12 all of this emanates from, and that is the -- the way the
13 church is or the belief of the people that came here, that we
14 didn't have a religion, that we didn't have a power greater
15 than ourselves, that made us not recognize the great spirit,
16 and all of that, and that was central to many, many indigenous
17 people of the world and everyone has been subjected to this
18 same kind of change. Bringing in Christianity and not allowing
19 the people their own way of worship which was central to the
20 life of the people.

21 I was thinking yesterday when the Bishop was talking
22 that, you know, that was one of the things I was really
23 wondering about. First of all, the people that, you know,
24 disrupted our -- our lives, of course, when they came here for
25 the sake of economy. And then the missionaries came and when
the missionaries came they really did a -- I mean, change
people so much and I wondered what are the churches doing to
address this issue. I think we had very good words from the
Bishop yesterday, but when you come right down to
practicalities, what is the church doing now to reflect maybe a
new thinking to support the kinds of things that the Bishop
himself was saying in recognition of Indian people and Indian
rights?

1 And, you know, and also, what are they doing for the
2 parishioners? What are they doing for the other people to help
3 them to understand what it is, why we have to fight for what we
4 want to be, what are the issues and why are the issues what
5 they are?

6 Anyway, I just -- I get so frustrated and sometimes
7 it's hard. I'm -- I'm -- I always listen to my friend to my
8 left and I find that he -- he's so articulate and clear in
9 presenting what he wants to say and I -- I just get so, you
10 know, riled up and -- and frustrated and in my feelings that
11 sometimes it -- it just gushes out. But I do hope -- my hope
12 is and I believe that there is a way that we can understand
13 each other and I think people have to really, in fact, let us
14 -- not let us. We have to do it ourselves. We've got to take
15 hold of this and do things the way that we know is right and I
16 know that the ways are there, the directions are there, and we
17 can -- we want to do this.

18 JUDGE BERGER: Thank you Virna
19 very much. David Case and Josephine Bigler. Excuse me. And
20 Gard I was wondering if you wanted to get in on this particular
21 fight? I'll -- I'll be willing to -- willing to call out --
22 you moved up there closer to a mike and -- but maybe we can
23 hear from David.

24 MR. CASE: I just wanted to say
25 that I don't know if this point will get made. I've done a
little teaching and I think it -- the thing that frustrates me
about the -- a lot of what you were saying is that not only are
these matters not taught to Native American people, they're not
taught to non-Native American people, and it seems to me that
that is something that is crucial, perhaps, in Alaska because
maybe it seems to be more doable in Alaska than in the United
States, but it is -- it is important I think that the schools
should expose non-Native American people to, at least, the



1 facts that there is a great difference between these of what I
2 think are -- you have to stereotype it and simplify it to say
3 it, but are two ways of life. They're quite different and at
4 least, we ought to get out of the -- out of high school knowing
5 that. That way when the issue comes up for a vote to the peop-
6 -- in -- in an election that you will at least have what Thomas
7 Jefferson thought you ought to have, an educated informed
8 electorate. Otherwise, you just got cannons rolling around on
9 the deck.

10 JUDGE BERGER: Josephine Bigler
11 and then Gart.

12 MS. BIGLER: I guess I want to
13 address what I heard from Virna over there, perhaps, some
14 people are wondering what I am doing here and people have asked
15 me, you know, about my work and I come as a representative of
16 the Methodist Church, the United Methodist Church. I work for
17 Global Ministeries, which is the United Methodist Church, and
18 my particular portfolio is ethnic and language ministry. I
19 have two other colleagues; one's Asian, the other is Hispanic.
20 So, we work with the ethnic minority people and that was -- the
21 ethnic minorities were mentioned a day or so ago. And the
22 ethnic minority local church -- and when we say ethnic
23 minorities in my work it refers to the Asians, Hispanic, Black,
24 and Native American. And I am responsible for the Native
25 American portfolio. I relate to the Indian Methodism, which
spreads out across the four -- the Lower 48, and the ethnic
minority local church emphasis is the number one priority of
the United Methodist Church. It has been for eight years and
it is going into this new quadrennium of for- -- '85 through
'88 and I have to tell you that ethnic minority people were
responsible for carrying it into this new quadrennium because
people did not expect it. And the one large agency that
carries this or decides -- I thought it was deciding the

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1 priority, people didn't expect it to be the next -- the
2 priority again, but the ethnic people got together and they had
3 to work at this a year prior to 1984 when we have our general
4 conference, every four years.

5 But the people strategized and they were able to
6 carry through a third quadrennium which is unprecedented. So,
7 in National Division we have the ethnic minority local church
8 emphasis, and I carry the Native American and I only -- I also
9 carry, what I call -- we call the North Central jurisdiction,
10 which is, you know, Michigan, Indiana, Illinois, Ohio, those
11 states are included. So, work with all the ethnics in that
12 north central region and we not only do funding. Now this
13 ethnic minority local church priority has some many million
14 dollars assigned for the quadrennium and the National Division
15 to which I am attached we -- we can only -- our monies go
16 toward salary support of the ethnic pastors and out- -- what we
17 call out reach ministry. The out reach could be, you know,
18 your food and clothing, your various kinds of programs which
19 are out-reach

20 And then there's also the capital, which car- --
21 another department on the same floor. Carries remodeling in
22 the -- building of churches and the -- some of you call them
23 manze (ph) or the parsonage, the house that the pastor and his
24 family lives in.

25 Okay, those are the monies that go toward helping the
Native people, but some -- our Native people have not really
come through with proposals. We find other caucusses or you
know, really much more active in getting proposals to us, but
it's not only the ethnic minority local church, but we have
other funding. In this we have to work with the Methodist
women. We call the United Methodist women and they usually
have two other types of funding and when -- and these are also
non-Methodist groups that can apply. But when -- it's United

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1 Methodist women's proposals. They look at the women who are
2 involved, the percentage; 50% or more, and they look at ethnic
3 women particularly. Are ethnic women involved? Are -- what
4 kind of board? Are they involved in the planning? And when --
5 when I say ethnic minority local church I say EMLC. We look at
6 the percentage of ethnics involved. Who sits on the board,
7 yous (sic), women and the older people, and if they were
8 involved in the planning and the monitoring that will be done.

9 So it's not only funding but we also help in
10 advocacy, in building networks, referring to other ecumenical
11 agencies within our building, we help facilitate programs and,
12 of course, the number one need among all of our ethnic Native
13 people is leadership development, and so it's a constant effort
14 to work on leadership development. And so we find people who
15 will -- try to find people and fund people to go to seminars,
16 workshops, and we have one. Some of you who live in the
17 Washington area know Impact, which is -- brings people from all
18 over the U.S. to hear the congressional legis- -- Congress
19 people present their legislation and the issues that we hear
20 about. And we find people from the different four ethnic
21 groups that we sent to the Impact that's coming up the last
22 part of this month and we do have a couple of Native people,
23 Methodists, and I'm sure there are Presbyterians, Lutherans,
24 others will send Native people from their groups to Washington
25 for the Impact meeting.

And we also, when we get proposals, we look to see if
these are people -- how many Native people, where they are,
what their project is and we do have many non-Methodists...

(TAPE 9, SIDE A)

MS. BIGLER: ...who apply to our
agency and where the church once did for Natives now we have to
work with the Natives and we here and we work upon groups with
a self-determination. Are these people involved in the

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1 self-determination effort and how will we help them to be more
2 self-determining.

3 And so, as I -- I -- I mentioned I came from Oklahoma
4 and I look at my own particular intermission conference; for
5 many years we had white superintendent who presided over our
6 work, we had white deconesses, and then about somewhere in the
7 '60s, I was away from home at the time, in the '60s then the
8 Indians decided that it was time that they took over and did
9 their own work, and so they -- it was, I guess, kind of a
10 (INDISCERNIABLE) issue and some of our Indians and bishop
11 weren't on speaking terms, and some of our Indian pastors were
12 on the outs, the outside, but, now, we longer have white
13 general superin- -- well, of course, we do have the bishop who
14 is white and, of course, he comes from the -- appointed through
15 the general conference, but we longer have white deconesses and
16 the -- we have -- in Oklahoma, particularly, we have all Indian
17 pastors, who can only move within the bounds of their
18 conference. They can't do the -- serve communion or do other
19 ordination outside of the bounds. So, there are special kinds
20 of education that -- they're only applicale to them, but they
21 are able to move within the bounds of their own conference
22 because the men -- the -- these people say once their men or
23 women -- now, we had -- there are five women who are pastors
24 and one in the seminary. They say that once these people go to
25 the seminaries when they come back they are not fit to serve.
They are no longer fit. We hear this about the education of
our people who go out and come back, and some how or other,
they are not able to relate and they're not acceptable.

Or more often they're -- they're snatched up by other
conferences if they have, you know, the English speaking. So,
they are taken -- other areas and do -- do not come back to
their own people, and, I guess, a lot of what I'm hearing from
Shetlon and from what just Virna was saying, that, you know,

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1 brings back some very, very vivid pictures because I went to
2 government school and I know the discrimination. The personal
3 kinds of things that I heard made in my own hearing, you know,
4 the put-downs, and I -- and I think it was because of -- as she
5 was saying, the grandparent that made the impact upon her life.
6 And even today I go into some groups that will say, you know,
7 always identify as an Indian. I'm Indian first. I know who I
8 am. And, perhaps the grandmother, the strong grandmothers had
9 that impact. And I can recall my paternal grandmother scolding
10 the grandchildren, you're Usshe (ph) and when you're around
11 here you're at home, you speak Usshe (ph). That was her remark
12 to the grandchildren and so, she had that impact upon my life.
13 She was a very strong woman and even though she was a Christian
14 she was quite traditional in that whenever the first green corn
15 of the season came, grandmother always made medicine. She made
16 medicine because she no longer went to the ceremonial ground
17 because the Christian church say it was a no no. But she made
18 medicine at home for my father, my uncle and they took the
19 medicine at home before they ate the first green corn of the
20 season and the women in their monthly period always sat aside.
21 You didn't eat with the rest of the family, you were set aside,
22 you had your own bedding, you had your own dishes and later
23 years when I married and moved -- my husband is a white
24 Methodist minister, but I noticed when I came home that she
25 always served her men folk with separate dishes, you know, so
they wouldn't be contaminated by me because I was the outsider
now.

21 But this was -- these are some of the traditional
22 things that I went through in growing up at home but as I say,
23 -- I started out as saying that what the church, the United
24 Methodist Church is doing is to help our ethnic people, our
25 Native people especially and that's my role and portfolio is to
faciliate and enable Native people in our churches where we



1 have established churches and mission projects.

2 And so I hope that gives you a little picture of what
3 I do.

4 JUDGE BERGER: Thank you Ms.
5 Bigler. Gard Kealoha, did you want to add anything?

6 MR. KEALOHA: I would like to add
7 just a -- a personal reaction to some of the discussion that
8 went on earlier, and please consider it constructive.

9 I -- we can look at our historical experiences and we
10 can remain at a level of sustained anger or we can look at them
11 as lessons or challenges. Now, I appreciated the laissez faire
12 idea because I think that's there some substance to that.

13 In looking at the Hawaiian experience of -- not
14 because -- and that's all I can look at. I can't look at the
15 Native Alaskan, I can't look at the Native American because I
16 don't know it thoroughly, but I know that there are
17 similarities in the Hawaiian experience. I have to say that
18 not all of the American or the missionary experience is
19 negative. The missionaries gave the Hawaiians a language, a
20 written language. And if it wasn't for that I think we would
21 have lost a great deal of our history without having had a
22 written language.

23 It was interesting when they -- when they put the
24 Hawaiian language, for instance, into written form, an entire
25 nation became literate within a years time because the
Hawaiians was so eager to -- to learn the new way and the new
learning. And it allowed them then to put into permanent
record the -- the history of their -- of their culture. So it
isn't all negative.

The same way with the American experience. You know,
when we talk about where do we go back to, what kind of culture
we want to sustain, what period of time are we talking in? You
know, the American experience gave to each Native Hawaiian a

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1 certain dignity, the right to vote, the right to make -- to
2 participate in decision making which was not present for all
3 Hawaiians in a highly stratified Polynesian society. You had
4 an aristocracy that was there because they -- because they
5 preserved the geneology, and then you had the common people in
6 a feudalistic system and I know -- I know of very few Hawaiians
7 who want to go back to that period of their history or that
8 time of their culture because they have had this idea of the
9 enobling of an individual and his ability to contribute to --
10 to -- to life.

11 That's what I wanted to say. I guess I wanted to say
12 more but the -- this -- this business of isolating one self,
13 again, this is a personal thing. I -- I tell my fellow
14 Hawaiians that we can go on and we can Namu Namu (ph), we can
15 grumble. We can talk about all the kinds of things that have
16 happened to us, but the people who created that kind of things,
17 they're all gone, they're muckee (ph), they're past, they've
18 past on. Do we then bla- -- do we expect the setting --
19 setting right or the correcting of those transgressions to be
20 fulfilled by the people living today. Is it fair to burden
21 them with that onus? I think that we should take -- we should
22 take a look at that. Do we -- why -- the people that created
23 the (HAWAIIAN) or the people that created these events that
24 have caused so much damage to the Hawaiian intellect and
25 (INDISCERNIBLE) in the culture, they're gone. They've been
gone for quite a while.

And we're saying to today's citizens that you owe us,
because you sometimes hear that. You owe us, you have to pay
us back for that loss. And I don't know if you know, as
justified as that may seem, I don't know if that's really
correct. I really think, I really believe once, at least, the
future of our children, once they know, as she said earlier;
they know their culture, they know who they are, I cannot see

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1 why it doesn't give them that confidence to be able to go ahead
2 and to harness the newest technology, to create a cure for
3 cancer, to do all the kinds of things that we need because we
4 are when you come down to it, a family of man. And we have to
5 -- it's my sense of the law. It seems to me that we need not
6 to look at ourselves that way but to look at the commonalities
7 that we share even with white people because that is what's
8 going to, it seems to me, allow us to sustain our unique and
9 special way of looking at life.

10 JUDGE BERGER: Thank you, Gard.
11 Moana, you wanted to say something too.

12 MS. AKAKA: Gart was talking
13 about the past. Well, before there was no such thing as
14 private land ownership and everything was -- was -- it was a
15 communal lifestyle we had and we shared. But that whole aspect
16 of private land ownership now forces a great number of my
17 people to be forced with their families to live on the beach in
18 tents because they cannot afford to buy land or pay for
19 lodgings in their homeland.

20 Now, as far as our culture is concerned, up until
21 much -- just recently the more white you were, the more fair
22 you were, even in our family sometimes, when, well, my
23 grandfather who's part Hawaiian, married my grandmother who was
24 pure Hawaiian, and his own brothers and sisters -- his own
25 sisters, excuse me, after his wife had died leaving seven
children; young ones, the oldest was nine; his own sisters
didn't even help him with his children or pay any attention to
these children because they were too much Hawaiian.

You know, this is the kind of thing that -- that our
people have suffered. So, the more you assimilate, the more
you deny your Hawaiianess and in some instances, members of my
family who would pass for white, grand aunts of the age of
Victoria, with names like Hotense (ph) for Hawaiian. The more

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1 you assimilated, the more -- the more successful you were by
2 the standards that have been imposed upon us by this dominant
3 culture.

4 Even in (HAWAIIAN) School, the Hawaiian school that
5 some of us went to, and it was a honor to go there, a
6 generation ago you would be spanked for speaking Hawaiian, yet
7 that was the Hawaiian school. As I was growing up, there were
8 Japanese schools after school for the -- for the -- for the
9 students. For those Japanese ancestry. Chinese schools. No
10 Hawaiian schools. We were denied identity and our culture.
11 And when on the island of Kahoolawe our sacred island that is
12 being used as a bombing target by the U.S. Navy, when I was
13 there several years ago, there was a young man, high school,
14 virile young man for a high school student that was from Waiian
15 (sp), one of our areas where there's a high concentration of
16 Hawaiians. A rural area, by some, considered a ghetto.
17 There's a great deal of poverty there. There's a lot of social
18 problems there. When this young man tells me that he was
19 learning to dance ancient hula, when before in the old days
20 only the men danced, he was telling me as he smiled with pride
21 that it was more better than being a football player and that's
22 the kind of respect that he was getting by knowing more about
23 his identity and his culture. Now, that kind of identity is
24 going to help that man stay out of jail like a number of his --
25 his fellow students might end up doing. Possibly dropping out
of school and he learned -- he has more pride in himself in
having knowledge about his culture.

21 Hawaiian kids go to public schools and there are
22 many, many conservative middle-class Japanese school teachers
23 and there's no questions about the discrimination. I know
24 women that were told in high school, don't bother going to
25 college because -- because you're Hawaiian, you can't make it.
That's the whole mentality. Yet, these women said, bullshit,

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1 and they became Masters and Ph.D's.

2 So, to deny us our culture, our identity, making us
3 strangers in our whole land, we cannot forget because that's
4 what help us -- helped lead to the social problems that we have
5 in our land. No, we weren't kidnapped, like, Indian and Native
6 Alaskan children were and taken from their homes and their
7 families, but still, even in the public school system in our
8 own homeland we're treated like aliens.

9 But recently we have (HAWAIIAN) programs in the
10 schools where our elders go and unfortunately it's too short a
11 time; they spend some moments of the day with students of all
12 nationalities. And it's not just Hawaiian kids, but Japanese
13 kids, Howli kids, all nationalities get to learn and appreciate
14 and have a better understanding of the culture and the land
15 that they living in and that's very positive.

16 It's that understanding that you were talking about,
17 David, so, the people can make wise decisions. So that they're
18 not lead by ignorance and stereotypes, negative stereotypes
19 that our people are forced to live with. Stereotypes like lazy
20 Hawaiian because the missionaries would see the Hawaiians
21 relaxing under the -- under the coconut tree on the beach in
22 the middle of the day. But the fact that my people would work
23 by the light of the moon to plant and they would plant by the
24 moon because they know they would get more, more yield. While
25 this -- these missionaries were sleeping and while everyone
else is sleeping my people are working. They're not fools,
they work by the moon, not the heat of the sun in the middle of
the day. That's when you relax an rest a while and you've
earned it because you've been working half the night from 2:00
o'clock in the morning.

One of our (HAWAIIANS) who stills lives with us, when
he's in our area, to this day he's up at 2:00 o'clock in the
morning. He's 95 years old and he goes outside and he turns on

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1 my electricity light -- my electricity, the outside lights and
2 starts planting in the yard or -- or cutting the grass or he --
3 that's his lifestyle.

4 And so a lot of these ugly negative stereotypes came
5 out of ignorance and we -- we are owed the right to have our
6 culture, our educational system sensitive so that we may not
7 only learn ourselves, but so that others may learn and so that
8 our people may begin to get the dignity and the respect that
9 all Native peoples deserve.

10 JUDGE BERGER: Thank you, Moana.
11 Moses, did you want to add anything?

12 MR. KEALE, Sr: Yes, a few short
13 comments here. Listening from the back of the room and
14 (HAWAIIAN)

15 I'd like to relate some things about being Hawaiian
16 for those of you who are not familiar with Hawaii. It's made
17 up of eight major islands. I happen to be born on a island
18 called Niihau (ph), which is privately owned. It's part of the
19 state but it's privately owned. On that island until today the
20 first language spoken there is Hawaiian and English is the
21 second language. Having been born there and of the nine
22 trustee's on the board I speak the language, I write it, I read
23 it.

24 As a kid growing up my parents moved to the next
25 island over, which is 17 miles away, so that I could attend
public school. I spoke only Hawaiian, and when I went there
the stock was something to behold. And while attending the
schools there the thing that stands out in my mind until today
is everybody would say that Hawaiians are stupid, and that's
why you lost all your lands, and that's why you don't have
anything and I grew up with that.

Unfortunate enough, my parents could afford to send
me only to the 12th grade. After that I had to learn by

1 reading, and I made myself a promise that given an equal
2 opportunity in anything that I undertook I could be better than
3 anyone of those other peoples, and I've tried until today. I
4 guess this is why I ran for the office of Hawaiian Affairs when
it was created.

5 As far as the question goes, is there a place for the
6 Native peoples in the western world, for the Hawaiians I see,
7 yes, there is. That place the Hawaiian has to make for
8 himself. It cannot be created by governments. They can help,
9 but the individual and the Native themselves got to create it.

10 The world has changed since I was born and since
11 before that, and it's still changing. If Native peoples do not
12 change as the world changes, you follow the path of the
13 dinosaur and you'll be a thing of the past. This is how I
14 feel.

15 In today's Hawaii I still speak the language although
16 for a time because I tried not to be Hawaiian, because of
17 hearing all these things in school, I forgot for a while how to
18 speak the language I could understand it, but my tongue could
19 not keep up with my brain when I wanted to speak Hawaiian. It
20 was when I was about 22 years of age when it finally dawned on
21 me, hey stupid, this is the Hawaiian Islands, why are you
22 ashamed to speak your language? The Philippino emigrants that
23 came there spoke Philippino in the streets. The Japanese spoke
24 Japanese, so did the Portuguese and the Spanish and the Howlis,
25 but here are the Hawaiians, they were either forbidden to speak
Hawaiian or they were too ashamed to speak their own language.

26 In today's educational system in Hawaii it is
27 guaranteed by the Constitution that Hawaiian be taught in the
28 schools. Until today not all of the schools teach Hawaiian.
29 It's left up to the principals in each school whether he wants
30 Hawaiian to be taught or not.

31 I've often been asked by a lot of people how can we

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1 better the conditions of Hawaiians? The only answer I could
2 give them was give me back his dignity and his self pride,
3 everything else will fall in place, but for an individual to
4 get that, he must also put back into it, he must earn it.
5 Thank you.

6 JUDGE BERGER: Thank you very
7 much, Moses. Oscar Kawagley.

8 MR. KAWAGLEY: Yes, I just have a
9 very short comment to make and I think a lot of things that we
10 said this morning epitomized a lot of things that I wanted to
11 say especially in regards to education. And I must again
12 reiterate that the federal and state governments have to
13 recognize and give us some form of government, be it tribal or
14 otherwise. And that way, once that's established then that
15 would give us some respite so that we could actually sit down,
16 get our manpower together and being establishing, planning the
17 policies as far as education. Because education is the most
18 important thing that we have and that's going to be the saving
19 factor for our culture. And I like to think that as we
20 progress into the future, that my Yupik society is going to get
21 stronger and stronger.

22 Why should I be willing to give up my culture because
23 there's so much that it has to offer the rest of the world.
24 Our concept of human rights, our egalitarianism, the ipitit of
25 it. Those are fanastic. So, why should I be willing to give
26 those up? The human rights, the egalitarianism, with respect
27 to life, liberty and the pursuit of happiness. And, of course,
28 in our educational system our own lifestyle has to be infused
29 into it because man, just like plants, have to have roots.

30 Another thing that I like about my Yupik culture is
31 that we're very close to nature. And I think that's one of the
32 problems of the dominant society they lost their touch to their
33 own environment and to need nature. And the reason why I say



1 that is because when you're in touch with nature, you're in
2 touch with the spirit of the universe. When you're in touch
3 with the spirit of the universe, you're in touch with science,
4 and science is nothing more than a curiosity as to why things
happen the way they do.

5 And certainly our people have always been, like
6 Sheldon pointed out, land and game managers for many thousands
7 of years. And I think only we, if we get our government
8 established, we are the ones that would be able to figure out
9 what our needs our and certainly the talents that we already
10 have, we can expand upon those so that we can enhance our
11 environment. And certainly we don't want to be separate from
12 the State of Alaska or the United States. We want to be
13 working with them and working within the perimeters of the
14 federal and the state laws.

15 And the education, like I say, language is important
16 because that is the voice of our culture and my Gods, if we
17 wanted to make the Yupik language within our region the working
18 language for all business, we should have that perogative. But
19 I always say, you also have to master the English language
20 because you're always going to be dealing -- well, it's going
21 to -- almost the international language, and it's a
22 technological language. So, we have to master it.

23 And no matter whether you choose to be living the
24 traditional lifestyle you must be able to read, write and --
25 because they'll be new federal laws, new state laws that will
always be enacted that will infec- -- affect you in some way,
shape, or form.

So, I think once we get control of our own
educational system, then, that's when we'll start to really
begin to make forward progress.

JUDGE BERGER: Thanks Oscar. The
-- I'm -- I'm concerned a little bit about our program but

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1 Sheldon just -- if you'd like to add something at this stage.

2 MR. KATCHATAG: Thank you, hon-
3 -- Justice Berger. I would like to say a few things regarding
4 what has been said by the Hawaiians with regard to whether or
5 not we want to go back and the answer is, no, that's not the
6 idea. You cannot go backward. You have to decide where you
7 want to go from here.

8 What we are outlining is in order to be able to chart
9 the best possible course from here on out, first we must
10 identify where we are and we must also, this is a crucial point
11 because I think it's important for our people to know where
12 they have been. Everytime you talk about planning, anytime,
13 any kind of planning, this -- these are the parameters that you
14 have to go by. You look at where you have been, you look at
15 your current situation, you say where are we going from here?
16 And it is in this context that I -- I think that everybody
17 would believe that the current situation is an extension of the
18 past. Our concerns with regard to government, with regard to
19 education, the history of our people, economic development,
20 culture and identity, are all in the current situation. But
21 they are a reflection of the past and what David Case alluded
22 to and what Virna talked about is understanding of the fact
23 there are differences in perspective as far as what reality is.

24 We have to develop this understanding, this
25 education, this compassion between cultures. And I think that
the most effective efficient means of doing this is a
government to government relation. The federal government has
said time and time again, prior to 1959 anyway, Natives of
Alaska we have a special government to government relationship
with you, but the actions are different.

Virna identifies with what I say. I have -- I have
just met her in the last three days and yet she identifies with
what I say because I am articulating the concerns of my people

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1 and they are similar, if not identical, to the concerns of her
2 people. She understands me. We have the same perspective.
3 And I think this relationship, like any relationship, is going
4 to have to abide by those certain laws that govern
5 relationships. It -- it may not be proper and I think I might
6 come under fire from different people that I am going to
7 compare this relationship to marriage. I have heard that there
8 are four "C's" that guarantee, or close to guarantee, there's
9 no guarantees in this life, a successful marriage. I don't
10 know, I don't have a finger yet. The four "C's" are:
11 commitment, consideration, communication and cooperation.

12 And I think that until the federal government can
13 prove that number one, that they are committed to a resolution
14 of these problems, that they have considered our point of view,
15 that they are willing to communicate with us, and that they are
16 willing to cooperate with us in a positive, constructive
17 negotiation, that we cannot -- we cannot enter in to a
18 successful relationship. I've mentioned this before and I'll
19 mention it again because it bears repeating.

20 The tribes and the governments are governments of
21 their people, by their people, for their people. United States
22 of America is a government of the people, by the lawyers for
23 the multi-national corporations and until we get this
24 government straightened around to be the democracy that they
25 claim to be, we will not have any substantial change. And
since we are talking about the place of Alaska's Natives in
this western world, I would like to again throw out -- not
throw out, but throw in, an idea for a concept or an option,
which I think is very relevant at this time.

Oscar mentioned the fact that we must have a
government of our own to develop these relationships,
government to government. And I -- the -- the case with regard
to the State of Alaska is very evident of this lack of

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1 commitment, this lack of cooperation, this lack of
2 consideration. There is no mention whatsoever in the
3 Constitution of the United States of tribal governments,
4 nothing. And yet the tribal governments preceded the State of
5 Alaska and any form of local government here in Alaska. There
6 is a lack of commitment, there is a lack of communication,
7 there is a lack of cooperation. This has to be addressed.

8 And we can no longer, as a people, be content to
9 correct the injustices just for our people. That will not do
10 anymore. The tribal governments are the oldest governments on
11 this continent and as such, because of the world situation,
12 east versus west, communism versus democracy, that we the
13 oldest governments have an obligation, not just to our own
14 people, not just to the people of the United States, but to the
15 people of the world. We have to stop this madness. These
16 children are playing with dangerous tools, toys, if you will.
17 We have to educate these junior governments. Junior, but more
18 powerful. It's just like -- it's just like the father and son
19 thing. If, in fact, junior is not educated to have a respect
20 for his elders, he won't.

21 The federal government must develop this if they
22 expect in any time to become an elder.

23 JUDGE BERGER: Well, I think
24 Sheldon that -- that we should move on because the -- the --
25 some of these folks are going to have to leave later this
afternoon and I would like just to suggest how we might
proceed, and we'll come back to you later during that -- that
discussion.

What I would like to do is just take advantage of my
role as chairman to -- to say a few words of my own at this
stage and then to outline the way in which we perhaps might
proceed after lunch. Adjourning a little early so that we can
get a full afternoon here.

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1 I think this has been a very useful discussion this
2 morning and I -- I -- I'm grateful to Sheldon and Robert
3 Goldwin for provoking it and I think that we all found it a
4 very good background against which to consider the issues to be
discussed for the rest of the day.

5 And might I say to Mr. Goldwin that what Virna and
6 Rayna were saying today is what I heard in the meetings that I
7 held around Alaska during the past year. In those 60 villages,
8 people were saying things very much along those lines and they
9 were using --they were putting it often in a constructive way,
10 but in terms that -- that some Americans might find offensive.
11 But the frustration and anger out there is palpable and that,
it seems to me, should not be forgotten. I -- I don't intend
to forget it.

12 One of the other things that Oscar Kawagley made me
13 think of was that -- that in the bush, certainly where Oscar
14 comes from, those folks are bilingual. They have achieved
15 something that most Americans haven't achieved. That is, they
16 speak two languages, they function in two languages. It's
17 something that could be acknowledged as -- as -- as an
18 achievement and coming from Canada, as I do, we have -- we have
19 lived with this whole question of two languages and we regard,
20 I think, being able to use two languages as -- as an
21 achievement of very great importance nowadays.

22 Well, let me turn to what Rayna Green said. She said
23 looking at the sorry ranks of lawyers and so on, she said,
24 well, is the law relevant? And if I might be allowed to detain
25 you for a moment with one or two reflections of my own, I think
it is because we purport to be a nation, yours and mine. The
west says it lives by the rule of law. That is what
distinguishes us from many other places in the world. This is
where the rule of law and not the rule of men prevails. And
that, it seems to me, is vital. Due process and democracy



1 reflect that belief in the rule of law, and we are proud of
2 that and cling to it.

3 And that means that those principles enunciated as
4 Robert Goldwin referred to the Northwest Ordinance. Others
5 have referred at other roundtables to the Organic Act of 1887,
6 and you could repeat these references to high sounding notions
7 of fairness to Native people, respect for their rights to their
8 own land, and those are enshrined in the law. It seems to me,
9 that there is something to be said for urging that the dominant
10 society live up to the principles which it says, and I think,
11 most of us believe lie at the foundation of the society that
12 has been erected on this -- this continent.

13 And, it seems to me that to consider the way in which
14 international law and recent developments in international law
15 may afford a strengthening of the arguments that Alaskan
16 Natives and native people everywhere else or events, is a -- is
17 a -- is not a frivolous exercise. I think it -- it's useful.
18 And I say that because a few months ago I was in Australia and
19 without -- and I discovered that without the firm intellectual
20 underpinnings for the assertion of native rights, they do not
21 rest, they -- they can easily be blown away.

22 I say that because in Australia there were no
23 treaties, there was never any acknowledgment of the principles
24 of limited sovereignty laid down by John Marshall. And it is
25 meant that today when the government of Australia is eager and
many of the state governments in Australia are eager to settle
land claims. Land claims have emerged there and they -- the
governments of Australia are saying yes, we want to settle land
claims, you're nice people, we're nice people, we've got to
settle these claims because we're all nice people living here
together.

And what has happened, but -- is that, as these
claims people find are claims to land, substantial tracts of

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1 land not in the desert of central Australia where the federal
2 government in the Northern Territory has been able to -- to
3 ensure that those lands are made available to people, but in
4 lands that may turn out to be valuable. The -- many people are
5 concerned and frightened and they're -- in western Australia
6 there're -- there're ads that the mining community has financed
7 on television responding to land claims. The government of
8 western Australia set up a royal commission to look at land
9 claims, and a very able lawyer chaired the commission and
10 brought in a proposal to settle land claims, to provide land to
11 the aboriginal people of western Australia. The mining
12 industry there is financing advertisements on television that
13 show a black hand, the aboriginal people of that country are --
14 are black skinned show a black hand creeping over the map of
15 western Australia and I was discussing land claims with people
16 in the federal government and people in the -- in the National
17 Aboriginal Council of Australia, and they were very, very
18 troubled by this. They said this is hard to fight back
19 against. And I think their problem was that there was no firm
20 intellectual underpinning, no constitutional underpinning for
21 what they were seeking to do.

22 The speeches were being made along the lines of,
23 well, I know our forefathers were very bad to these folks 200
24 years ago, but that has changed, we don't do those things
25 nowadays, and -- and so what is there really to -- to talk
about? We are allowing them to participate fully in Australian
life, what more do people want? And so, unless, it seems to
me, there is some idea of the place that Native people have
under international law, because all of the notions of limited
sovereignty that are being talked about in Alaska today emerged
from the beginning from international law, unless there is that
underpinning, unless people know what the -- the -- the legal
foundations for their claims are, they can be blown out of the

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1 water, and they will find that they are allies, people of good
2 will seeking to --to come to their aid, are at a lost to know
3 well, why are we talking about self-determination, why are
4 talking a land base, why are we talking about these things; and
5 it seems to me, it would be worth our while to -- to spend a
6 little time talking about that this afternoon.

7 Robert Goldwin said that he had found that the
8 discussion here was -- was one of great usefulness to him
9 because it meant that when people talked about
10 self-determination, he understood the reasons why they talked
11 about it. It said, what does it mean? And that, of course, is
12 something that Native people continually face. Well, what do
13 you mean, what is it you really want? Well, these ideas are
14 evolving. I don't think you can capture them in time and say
15 this is the program, it's all laid down here and that's it.
16 Because the relationship between the dominant society and
17 Native people will continue to evolve, and even if this
18 Commission, and it is most unlikely, were able to set it all
19 out in the compass of one short report, we would find that 10
20 years later people were talking about new ideas, new strategies
21 would be evolving and that's the nature of both societies, both
22 cultures. They change and evolve.

23 Now, I -- I -- let me just offer two ideas that --
24 that might be -- I only mention this because the discussion has
25 been a useful one, and it may be that I am able to in a limited
26 fashion to clarify it, but the notion of subsistence is --
27 comes up again and again. And whenever I was in the bush, that
28 was the dominant theme; land and subsistence. And the point
29 that Oran Young made is absolutely at the core of all of this.
30 Are Native people entitled as a matter of Native status to a
31 subsistence preference?

32 Now, that isn't a notion that should be necessarily
33 be laughed out of court and dismissed out of hand. There is a



1 place in this state where there is a subsistence preference.
2 At Metlakatla there is a 3,000 foot exclusive Native fishing
3 zone around the island. In the State of Washington Native
4 people have a right to take 50% of the catch on the Columbia
5 River and that's -- that's American. It isn't some alien
6 notion that crept in to -- to an otherwise pristine
7 constitutional situation. In Canada, last year, the Inuvialuit
8 of the western arctic reached settlement with the government of
9 Canada that gave them a -- exclusive rights to certain species,
10 ownership of -- of polar bears and grizzly bears and certain
11 other species that have slipped my mind at the moment. And in
12 addition, a subsistence preference based on the fact that they
13 are the Native people of that region and the -- the other rural
14 subsistence users are to hold for their lifetimes a right to
15 engage in subsistence. Their preference will be shared with
16 that of the Native people, but after each of them dies that
17 permit dies with them and there will be perhaps at the end of
18 the century or thereabouts, a more or less exclusive --
19 exclusively Native subsistence preference in the region of the
20 arctic that -- and climate and geography is very similar to
21 much of Alaska. And indeed, the people are the same people
22 speaking the same language as the Inuit.

(TAPE 9, SIDE B)

18 The -- the other notion that emerges from our
19 discussion is this: we heard from Virna and Rayna and the other
20 -- and Oscar and the other educators about Native education.
21 It may be that in urban areas self-determination means -- it
22 means the same thing in the rural areas too, no doubt, but in
23 urban areas, it may mean that self-determination takes the form
24 of the right of Native people to determine what kind of
25 education their children shall receive in the midst of great
metropolitan areas, like, Anchorage. I don't know, but these
things are evolving and emerging and we will see where they

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1 take us.

2 Now, it seems to me, that this afternoon what we
3 might usefully do is what we talked about earlier and that is,
4 to ask Bernie Nietschmann and Doug Sanders and Clem Chartier
5 and Henry Shue and Sandy Davis to talk about the -- the recent
6 developments in international law, what is emerging at the ILO,
7 the United Nations, the Inter-American Commission on Human
8 Rights, the International Court of Justice. I think those
9 things are relevant and I would like to hear what these folks
10 have to say since they will be disbursing, some of them, later
11 today, and others tomorrow. And I think it is an opportunity
12 that -- that should not be missed and I would also hope that
13 before the afternoon is out Professor Hanke, who began this
14 discussion yesterday, or was it the day before, might offer
15 some thoughts bringing us full circle because these ideas, as
16 we understand them, in terms of western law/international law,
17 began with the Spainards, with Vittoria and Las Casas and we
18 are still discussing these same ideas today.

19 So, that's what I would like to do this afternoon.
20 We know that the North Slope Borough has invited us all to come
21 to their office nearby, and Oran will lead the delegation over
22 there to take a look at this geographic information system.

23 Might I also take this opportunity of saying that
24 through the Inuit Circumpolar Conference the North Slope
25 Borough -- the support of the North Slope Borough has been
indispensable to the -- to the work of this Commission and we
are grateful to them. Now, I know others want to speak, but if
we are going to get through our schedule I have to take
advantage of my role as chairman and... Yes?

MS. HASH-PEAT: I have to take
advantage of my role as a woman --

JUDGE BERGER: Yes?

MS. HASH-PEAT: -- to scold.

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1 JUDGE BERGER: Well, you're --
2 you're --

3 MS. HASH-PEAT: Okay, Justice
4 Berger. I'm going to tell you that I want to answer David
5 Case's thing about the land is the education thing, okay. Go
6 take a look at rural Alaska and -- and look at our highway
7 systems and look at our one and a half to three and a half
8 million years of use and occupancy in dominion subsistence and
9 all the rest of it and see the tracks of our people.

10 Robert Goldwin, we do not practice genocide.
11 Genocide is genocide whether it's practiced by Russian or the
12 United States. I don't mean to always be scolding but these
13 things are true, they have to be heard.

14 JUDGE BERGER: Well, I think that
15 -- that Sheldon.

16 MS. HASH-PEAT: And by not
17 calling on me or recognizing me you -- you put yourself out for
18 an outburst like this without curocity.

19 JUDGE BERGER: Well, all right.
20 Sheldon, you -- you -- I'll give you the last word, but it must
21 be just a word or two.

22 MR. KATCHATAG: Yes, thank you,
23 Justice Berger. To carry this thing just that much further I
24 would recommend very strongly, not only as an Alaskan Native,
25 but as Chairman of United Tribes of Alaska, that the Alaskan
Native Review Commission since there is one party to all of the
discussion that -- that we have not heard from, that we have
hearings in Washington, D.C., and I'll just leave it at that,
thank you.

JUDGE BERGER: All right. Well,
that leaves me without any response. All right, we'll adjourn
to -- let's come back at 1:30 sharp and carry on. There is
somebody here from the Borough or Oran, at least, can take you



1 over there.

(HEARING ADJOURNS)

(HEARING RESUMES)

3 JUDGE BERGER: Washington, D.C.,
4 hey? Next stop Washington, D.C. Well, I guess we might as
5 well get under way and I hope those of you who went to the
6 North Slope Borough found it useful. I should say that I
7 believe Steve Nakque (ph) President of the Dene Nation is here
8 and I was going to invite him to sit at the roundtable when he
9 comes. He might -- we might give him the Bernard Nietschmann
10 chair over there beside Rayna that is kind of --

11 So, to start with Dalee Sambo of the Inuit
12 Circumpolar Conference is -- has a few words to say just before
13 we start the discussion.

14 MS. SAMBO: Thank you. I regret
15 that I haven't been able to sit in the roundtable session and
16 listen to all of the discussion that has taken place here. For
17 the most part, it's because I've been active with the fund
18 raising effort to get the Commission alive and on the road and
19 for these roundtable hearings to be held, so I am in and out of
20 here calling foundations. I just finished a proposal to the
21 Episcopal Church Foundation, the -- had to be in by a certain
22 deadline so, that's one reason why I've been in and out of the
23 discussion.

24 The reason why I wanted the opportunity to -- to
25 speak is because there have been a number of different church
organizations who have generously supported the work of the
Commission both through political and moral support and
generating awareness among their congregations and memberships,
as well as direct financial assistance and I think that it's
very remarkable that Josephine Bigler from the Global
Ministeries of the United Methodist Church made her way to
Anchorage, Alaska to see first hand what it is that this

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1 Alaskan Native Review Commission project is doing and hopes to
2 do in the future. The United Methodist Church gave a direct
3 grant of over \$15,000 for the work of this Commission, and I
4 think it has certainly been put to good use and it's very much
5 appreciated by the Inuit Circumpolar Conference and the Alaska
6 Native Review Commission. And, Josephine, I know that you're
7 here somewhere and thank you very much.

(APPLAUSE FROM AUDIENCE)

7 MS. SAMBO: The other churches
8 who have shown support and also generated awareness, not just
9 in the United States, but world-wide, the World Council of
10 Churches, the program to combat racism contributed. They are
11 headquartered in Geneva, Switzerland and gave us a contribution
12 as well. The Unitarian Church under the Vece (ph) Program has
13 contributed also and greatly, in fact, and we're very
14 appreciative of that. We have prospective donors in the church
15 world as well. The Episcopal Church Foundation, as I just
16 mentioned, I submitted a proposal. The local churches have
17 endorsed the proposal, and we'll be sending along their
18 endorsement to the National Church Foundation. Also, the
19 Trinity Church, The Presbyterian Church; both on a local level,
20 as well as a national level have shown support, and hopefully
21 they'll do it by giving us some money as well.

22 Those people we have contacted that hope to -- not
23 give financial support but hope to assist the Alaska Native
24 peoples in their cause in the future have been the National
25 Council of Churches and also, the American Friends Service
Committee. I continue to fund raise and hope that the churches
not only support with financial contributions and in time
services, but also in the work that the Alaska Native people
have ahead of themselves in terms of making some changes to the
provisions of the Native Claims Settlement Act that need and
require immediate attention, but also hope that they're there

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1 for other activities that the Native peoples will be carrying
2 on in the future.

3 Now, for some of the discussion that I have been able
4 to take in there have been some things said that I just like to
5 point out and I'll just briefly read some of the notes that I
6 have related to the discussion. And it's been through my
7 experience that the fund raising effort that has been just over
8 a year's worth of time that I've put energy and money and a lot
9 of writing into in terms of raising the funds that I've --
10 awareness that I've gained about the place of Native peoples in
11 the western world and the type of force that they have.

12 I feel it's important for Native peoples to realize
13 that we have a tremendous power in the United States. That we
14 have a moral power. That we have an opportunity to get the
15 appeal and the support of non-Native peoples for gaining
16 justice. We can mobilize this support, we can mobilize it
17 through the churches, through other friendly organizations.

18 There is, I feel, a measure of good will towards
19 Native people to have a force in this world, a moral force, a
20 moral power to gain what is rightfully ours. There will have
21 to be room for compromise, some give and take, and we must be
22 prepared for that.

23 The local control of the resources through safe and
24 wise use and development of our resources; all the things that
25 we have been talking about in other roundtables and in this
roundtable. Besides the things were reiterated and resounded
by people like Hugh Brody, who stated that there is a
staggering opportunity for justice in the north. That Native
people can harbor and protect the values that many people care
about and, in particular, Native peoples and their values.

And further -- we shouldn't be fatalistic. Let us
not be fatalistic, let us be realistic. We've been reminded
here that there is time, that there is an opportunity to think

1 about the issues, to change, and to plan. That there is time
2 to plan, to realize this opportunity, build those alliances,
3 cultivate them and move forward in a positive way.

4 Just on a point that Virna Kirkness had made, I
5 wanted to respond to it. That young people were cited an
6 education of young people and -- and you, not only here in
7 Alaska, but among all indigenous peoples have played a role and
8 have played a part in Alaska. With my position at the ICC I
9 speak to young people in high schools, in churches, through
10 Native culture clubs. I've spoken to young people in detention
11 facilities, at youth conferences that are held in this state.
12 They are concerned, not only about the issues facing us on a
13 regional or state-wide level, but also on an international
14 level. They've gained awareness about the issues facing the
15 indigenous peoples and are concerned about it and I think play
16 a major role. And I think, they, themselves have a great moral
17 force and a great moral power to attempt to bring about some
18 change.

19 So, there is awareness, however, there's no limit to
20 it. All of us can attempt to touch the lives of young Native
21 people for the improvement and betterment of all Native
22 peoples. Thank you for your time and, again, the roundtables
23 in this entire project have been supported by many, many
24 different foundations, church organizations. And, again, on
25 behalf of the ICC and the Alaska Native Review Commission I
thank all of them.

JUDGE BERGER: Thank you, Dalee.
(APPLAUSE FROM AUDIENCE)

JUDGE BERGER: Maybe I could just
say that Dalee Sambo has really made an outstanding
contribution to the success of the Commission, not only through
her fund raising efforts which have been remarkable and enabled
the Commission to stay on the road, and even to return to

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1 Anchorage. But her -- her sound advice and experience and
2 wisdom beyond her -- her years have been invaluable to me
3 throughout the course of our -- our journeys. When I say, keep
4 us on the road, I think that since we are almost at the last
5 day when this Commission will be sitting, that it isn't just a
6 case of getting me around the villages; Jim Sykes, our sound
7 man, he's on the phone, but, you know, you all know Jim Sykes
8 has taken the tapes of all the evidence. They've been
9 transcribed, they form a permanent record that may be unique in
10 Alaskan history of the views and aspirations and concerns of
11 Alaskan Native people.

12 Those meetings in the villages were organized by
13 local people and with the cooperation of local village and
14 regional corporations and tribal governments and non-profit
15 groups and -- and they were also organized by members of our
16 staff; Mary Kancewick whom many of you know, and Eileen
17 MacLean, who worked with us until August when she ran for
18 office in the North Slope Borough and was elected to the
19 assembly and is now in Barrow.

20 And I should say that the meetings we've held
21 recently have been organized by Joyce Johnson of our staff and
22 Asta Keller. And while I'm paying tribute to all these folks
23 let me not omit Don Gamble, who really served as coordinator of
24 all the Commission's activities from it's inception until
25 December, 1984, when he returned to Canada and his -- his job
-- he worked closely when he was here with Dorik Mechau, and
now Dorik is doing all the work that Don and he used to do
together, and I know you all appreciate as I do the
contribution that of these folks have made. And I'm glad that
Dalee did speak because she gave me an opportunity to pay
tribute to -- to all of those -- all of those persons.

26 Well, I think we're ready for the
Nietschmann/Sanders/Chartier/Davis/Shue/Hanke sextet, so, go

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1 ahead Bernie, you start off.

MR. NIETSCHMANN: Thank you.

2 Well, I'm a geographer, and geographers have a long view of
3 history and a close view of the land. But you don't have to be
4 a geographer, an anthropologist, or a lawyer, you don't have to
5 be a professional to know what's going on. Internationally, if
6 you look around, you don't have to know much about Native and
7 non-Native worlds to understand. Just follow the transfer of
8 land and the containment of right. You don't have to know much
9 about politics to understand, just follow which way the
10 refugees go, the external refugees, and in many countries, the
11 internal refugees.

12 Some of my remarks might appear to some to be blunt,
13 but where I work we operate beyond state laws and on the other
14 side of the frontier of justice where it is the power to impose
15 and the power to defend that counts. And recourse to rights is
16 directed to defending not asking for rights. As well as trying
17 to educate a state and the world community of states about a
18 people and about a people's right.

19 If one accepts definitions from other worlds about
20 the fourth world; other worlds being the first, second, and
21 third, who write the books. The fourth world doesn't exist.
22 Native peoples are not supposed to have politics, sovereignty,
23 ownership of land and resources, nationality, an economy, or
24 any distinct rights as distinct peoples.

25 The title for our roundtable, "The Place of Native
Peoples in the Western World" has a lot of meaning to me, not
only as a geographer, but also knowing about other struggles
for a place. A place, not meaning a role, but a place that has
an area, a place that is bounded, a territory. Of course, we
could always reword our title, maybe we should think about it
sometime, "The Place of The West in the Native World".

Well, we've heard about (INDISCERNIBLE - SPANISH) and

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ATD

1 their views on the right to enslave versus the right to
2 liberty. I want to start off by getting -- using another
3 example briefly. Some of you know this example. But to get us
4 to think about individual rights and group rights because
5 that's where a lot of the Land Claims rest. And I want to do
6 this with -- briefly -- bringing us to think about a debate
7 that started off and became very one-sided between these people
8 on the same sides; Sir Henry Sommer Maine (ph) and Lewis Henry
9 Morgan, late half of the 19th century, who used kinship and
10 territory to distinguish between the forms of social
11 organization and what they called ancient society and modern
12 society. Both were lawyers, and both wrote books. Maine wrote
13 "Ancient Law", 1861; Morgan wrote "Ancient Society", 1877.
14 Both had important effects on anthropology and preceptions of
15 territory. As a result of their work some people think that
16 anthropologists went off to study kinship without territories,
17 and others went out to study political territory without
18 natives.

15 Well, like Maine, Morgan distinguished between
16 primitive society that was based on ties of kinship and modern
17 civil society that was based on relations of property and
18 territory. I'd like to share an exerpt from Morgan's book,
19 "Ancient Society" where he writes "All forms of government are
20 reducible to two general plans. In their basis the two are
21 fundamentally distinct. The first, in order of time, is
22 founded upon persons and upon relations purely personal and may
23 be distinguished as a society. The second is founded upon
24 territory and upon property and may be distinguished as a
25 state. The township or ward circumscribe by meets and bounds
with the property contained is the basis or unit of the latter
and the political society is the result. Political society is
organized upon territorial areas and deals with property as
well as with persons through territorial relations. In ancient



1 society this territorial plan was unknown and when it came in,
2 it fixed the boundary line between ancient and modern society."

3 What these people were arguing was that territory
4 gradually came to substitute itself for kinship as the primary
5 political bond. Well, many people disagreed, Lowely and
6 others, at this speculative history, and many people later came
7 to see the errors in that interpretation. But you don't leave
8 territory out just because you call -- talk about kinship. But
9 print sticks and first prints sticks best.

10 These ideas influenced, as well as many, many others,
11 I'm just using this as an example of the time, these ideas and
12 others influenced the conceptualization of individual rights
13 and group rights. Many other people spoke about these ideas
14 and -- from times before Morgon and Maine.

15 But it came to be that the state or the world's
16 family of states might accept individual rights, that is, human
17 rights, by accepting Native peoples as citizens. But to accept
18 group rights to territory would be to accept the existence of a
19 separate state and a separate political society. You may
20 recall the definition I gave from the United Nations of -- of a
21 minority: a citizen that had said nothing about territory,
22 nothing about sovereignty, nothing about self-determination,
23 and nothing about resources.

24 Well, in the 18th century and with the French
25 Revolution, the idea of a nation was a liberating force. A
26 nation of a people with a common territory could determine
27 their political leadership and become a nation-state. But by
28 the mid-19th century the nation- state was no longer a
29 liberating force, but a controlling force that attempted to
30 forge a common alliance from different peoples that might be
31 contained by that nation- state. Different peoples that claim
32 distinct territorial areas.

I'll use Indonesia as an example. The Indonesia, the

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1 motto of the nation-state of Indonesia, is unity and diversity,
2 that's 300 different peoples. Whereas, one of the groups
3 fighting against that unity through -- and diversity, which
4 translates as a joblization (sic) of Indonesia, the free Papuan
5 (ph) movement, the OPM. Their motto is "One people, one soul".
6 We hear Moana tell us this morning, we're being denied our
7 identity, our culture. In west Papaun because of the
8 Indonesian state, it is illegal to call West Papaun, West
9 Papaun. It is illegal -- illegal to identify as a Papman (ph).
10 You are an Indonese (ph), you are a part of Indonenia (ph).
11 Reference to Melanesian people is prohibited. The word
12 "Melanesian" cannot appear in a newspaper or a book in
13 Indonesia. They are to be called Indonesians.

14 I'd like to share with you some thoughts I've been
15 jotting down and trying to put together a -- a book on rights,
16 and I want to start off by sharing some of my researches in
17 individual and group rights because we hear a lot about these
18 rights but they're very distinct and some have been won and
19 some have yet to be won. And then I share with you some
20 comments about the United Nations, and then I'm sure others
21 here in this sextet will have much more to say about the
22 international legislation.

23 I'm going to start by quoting Brooklyn Rivera from
24 (INDISCERNIBLE) where he starts off saying "All governments are
25 anti-Indian. They have internal colonization, racism, policies
of assimiliation. So, we have to be the protagonist, that's
the only way we can be sure that we can guarante our freedom
and rights as a group, as Indian people, not just as
individuals. So, you can see our struggle is not just to
defeat the Sandinisas in our land, we have more reasons; our
dignity, the real genuine liberation of the Indian, our Indian
people". And that's the core of that struggle, and that is the
core of many, many struggles whether it, unfortunately be

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1 armed, political, or legal, is that distinguishing between the
2 individual rights, some of which have been won and some of
3 which are important, the group rights as a people.

4 Now, human rights is -- is interesting because wide
5 spread recognition of human rights and condemnation and their
6 violation are rather recent and continually evolving
7 developments in international law. The abuse of a -- by a
8 country of its people by its government was -- excuse me. The
9 abuse of a people in a country by its government was once
10 thought to be considered only a domestic problem and not really
11 subject to international concern. And this is no longer the
12 case, it's generally accepted that the rights of individuals
13 and of peoples in any one nation-state are, or should be, the
14 concern of the world community of nation-states and peoples.
15 And various international laws and organizations have come into
16 existence to protect and to monitor and to bring to public
17 attention human rights violations.

18 Now, just because they recognize human rights
19 international laws, does not mean that the violations will be
20 reduced in many countries. As yet, no effective international
21 courts or international police system exists to monitor or
22 enforce these human rights in a meaningful way. However, this
23 doesn't mean that governments are -- have free rein to abuse
24 individuals, minorities, native peoples, native nations without
25 -- within one state's borders without being brought to some
26 sort of international accountability. Certainly, to bring to
27 public attention violations of human rights can bring
28 political, and in some cases even economic pressure and world
29 opinion to bear, which in some cases may limit or curtail the
30 violations.

31 Well, internationally it's generally accepted and I
32 quote here, "That all individuals and all peoples of the world
33 have certain basic rights which countries must respect. These

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1 rights are called human rights"

2 And David, if you'd allow me I'd like just to lean
3 over here and use this to -- this is "Indian Rights and Human
4 Rights" have been put out the end of last year by the Indian
5 Law Resource Center NGO in Washington, D.C. and this is a
6 handbook not to explain simply what rights are, but a handbook
7 to explain to Native leaders how they may go about demanding
8 and working toward recognition of individual and group rights.
9 So it's a handbook, not just a compilation of what laws are out
10 there.

11 So this thing that people have kinship and not
12 territory or land claims, that when they become citizens they
13 may have human rights as individuals, but not group rights as
14 still on the modern scene. It's very much at the heart of
15 evolving concern and law to have these rights recognized.

16 Human rights that are part of international laws and
17 agreements and which have been approved by many countries,
18 internationally, include the right to life and personal dignity
19 free from physical or psychological abuse; the right to a
20 nationality; the right to freedom from genocide, torture, and
21 slavery; the right to freedom from arbitrary arrest; the right
22 to freedom of movement; the right to privacy; the right to own
23 property; the right to freedom of speech, religion, and
24 assembly; the right of peoples to self-determination; the right
25 to preserve culture, religion and language; the right to
adequate food, shelter, health care, and education.

But one of the aspects of international law is
evolving is to extend these rights to groups, not just to add
more individual rights. But to groups of individuals that may
be an ethnic minority or a native people, an indigenous nation.

Western legal concepts in much of international law,
as we all know, are strongly oriented to individual not group
rights based on ideas of common property, rights of an

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1 individual to property, the rights of an individual. However,
2 in many non-western countries the rights of a group, not the
3 individual, dominate. And laws from one cultural tradition may
4 not protect or reflect another cultural traditional.
5 Indigenous peoples, Native peoples, Indian peoples who hold and
6 use land and resources communally and who may claim historical
7 group rights of ownership generally seek international and
8 national recognition of group rights. In fact, group rights
9 are the most endangered of all rights for many Native peoples
10 worldwide.

11 Now, just because people seek them, those rights,
12 nevertheless, must be won from central governments that claim,
13 though paradoxically, the right to be the only group-forming
14 entity. Of course, all of this is in the name of the state and
15 the individual. The state's right to do so often simply comes
16 from the power to do so or from the fact that the states agreed
17 to do so, as well as from unilateral claims to historical
18 conquests, sovereignty, or the inheritance left from the
19 departure of a colonial power. As many of us that have heard
20 about colonization and decolonization, even revolutions of
21 national liberation, this often does little more than replace,
22 not remove, central government claims of sovereign rights.

23 In other words, the third world is doing to the
24 fourth world what the first world used to do to the third world
25 and that's happening everywhere.

Particularly appropriate to a situation of many
Indian peoples in Central and South American and especially in
Guatemala and Nicaragua are some observations by John Bodley
(ph) in a book called "Victims of Progress" when he wrote "Many
newly independent nations are following an active policy of
exerting control over tribal areas in the professed interest of
national unity. Economic considerations aside, government
authorities see the existence of a fully autonomous tribal

1 population within it's boundaries of the state as a challenge
2 to their authority and a possible invitation to agression by
3 foreign powers. This has been particularly true where tribal
4 populations occupy remote border areas."

4 And he goes on, he says "It has become fashionable to
5 describe tribal peoples as national minorities and as such,
6 even to speak to them as obstacles to national unity and
7 sources of instability. Newly independent nations have often
8 been eager to politically incorporate zones that former
9 colonial governments had left relatively undistrubed on the
10 theory that such zones had been deliberately perpetuated in
11 order to create division within the country."

10 Well, many Native peoples maintain that they are
11 separate peoples, communities, or nations and that they are not
12 ethnic minorities within the national population, and many
13 Native peoples resist attempts by central governments and
14 central authorities and social scientists to describe them as
15 ethnic group, ethnic minorities, or national minorities as
16 simply the terminology of colonialism.

15 A group's recognition of itself has a people and the
16 acceptance of that entity by a central government has
17 considerable physiological and political weight. On the other
18 hand an ethnic group might be absorbed by the dominant society.
19 An ethnic group can be broken down more easily. An ethnic
20 group can be divided more easily into parts.

20 The rights to self-determination remain a principal
21 goal and is recognized in the United Nations Charter. The
22 right of self-determination of peoples is described in the two
23 United Nations International Covenants on Human Rights. And
24 Shelton shared some of those with us the day before yesterday.
25 And these pertain to determination of what's called "a people",
not an ethnic minority or an ethnic group. A people with a
common identity and a common territory actually inhabited or

1 one that they would wish to reclaim.

2 All peoples have the right to self-determination. By
3 virtue of that right they freely determine their own political
4 status and freely pursue their economic, social and cultural
5 development. All peoples may for their own ends freely dispose
6 of their wealth and resources without prejudice to any
7 obligations arising out of international economic cooperation
8 based upon the principle of mutual benefit and international
9 law. In no case may a people be deprived of its own means of
10 subsistence.

11 Another point: "The state's parties to the present
12 covenant including those having responsibility for the
13 administration of non-self-governing and trust territories,
14 shall promote the realization of the right of
15 self-determination and shall respect that right in conformity
16 with the provision of this charter of the United Nations."

17 In principle this sounds good, sounds excellent. It
18 would appear that Indian peoples rights to self-determination
19 are covered by this international law but as stressed in this
20 handbook "Indian Rights and Human Rights", the concept of group
21 rights is still evolving in the...and the right of
22 self-determination is not fully established for Indian peoples
23 under international law.

24 The state will, in reality, and I speak generally and
25 internationally here, will recognize individual political
rights of individuals in Native populations, but recognition of
group political rights and group sovereignty is often, usually
actually, limited to avoid competition, sometimes called
political severance (ph) with the state. When you go down the
list of what the states impose, of course, Indian rights are
what's left over.

I have a list here of United Nations' laws and so on
and which many of you will know from your own work in seeking

1 what is already on the books, but I think I would rather have
2 some others speak to those who've worked on them more directly
3 and have been to Geneva concerning these group rights. So, I
4 will end here, thank you.

5 JUDGE BERGER: Thank you, Bernie,
6 very much. Doug is it appropriate to ask you to pick it up
7 there or... Doug Sanders.

8 MR. SANDERS: It's -- it's
9 important to remember that international law is not in it's
10 origins truly international law. It's not a global law, it's a
11 law which was developed by the western European expansionist
12 powers, and it developed in the context of colonialism. The
13 preoccupation of early -- early international law was then
14 essentially the relations between the imperialist powers. It
15 did not come into being with any intent of defying the rights
16 of the European colonial powers in relation to populations
17 which were being subjugated.

18 The point that international law is not neutral
19 politically, and not truly universal has been made many times,
20 and particularly by the third world nations in the period of
21 formal decolonization in the years after the second world war.
22 And there has been, in fact, quite a lot of effort from the
23 third world to attempt to alter the bias or eliminate the bias
24 of international law which was historically in favor of the
25 western European powers.

What's going on now can be seen as -- as a kind of
parallel, I think, to that effort by the third world or,
perhaps, even an extension of that. It's, again, an attempt to
get at the inherent biases in international law which are
completely understandable in terms of -- of the history and --
and function of international law.

Thomas said a few times about how the Marshall
judgments are built on international law and that's what

1 Marshall says in the judgments. There's -- it rather
2 interesting there are no footnotes.

JUDGE BERGER: No footnotes.

3 MR. SANDERS: No footnotes. I
4 mean, as an academic, I was scandalized when I first saw this.
5 And it's very interesting. At one point I thought when we were
6 trying to figure out some aspects of the concept of
7 trusteeship. Well, perhaps, the international law of trust
8 territories will -- you know, we can find some source material
9 there. So, you go to the international law of trust materials
10 -- trusteeship materials from the -- going back to the days of
11 the League of Nations and what do you find? What -- what's
12 their footnote? Their footnote is the Marshall judgments.

13 Now, I asked Professor Hanke two days ago if he could
14 supply the footnote which is -- was Cohen/Wright, that it all
15 linked back to Las Casas and Vittoria, and Hanke said, what I
16 knew in my heart to be true, that the -- you can't just jump
17 300 years like that, it isn't really there.

18 The truth is, I think, that the principles to the
19 degree that they were developed began with the colonial
20 experience in North America, and to the degree that similar
21 concepts developed in -- in international law and in relation
22 to subsequent areas of colonial expansion, such as Africa.

23 The footnotes don't go back before the Marshall
24 pronouncements. So, it's not that -- that -- this is not a way
25 of attacking Marshall, but it's a way of trying to understand
that the process of altering international law, of getting
beyond the historical biases of international law in this area,
in many ways began with Marshall making up international law in
the 1820s and depoliticizing it to a -- to a fair degree. When
the basic question is asked -- when Marshall himself poses the
basic question, "By what right?" A phrase I've always liked
and that -- that our chairperson has -- has used a few times

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1 over the last couple of days. "By what basic rights?"
2 Marshall avoids it and he says, if I can freely translate him,
3 look it was the U.S. Government that set up this court, am I
4 supposed to make a pronouncement of the illegitimacy of the
5 United States Government and therefore, the illegitimacy of
6 this court?

7 And on that he explicitly refers to a power
8 relationship. He says, the force -- the power that lies behind
9 this, in a sense, the success of colonialism has created this
10 court, and I'm in no position to challenge it.

(TAPE 10, SIDE A)

11 MR. SANDERS: That's the first
12 principle and that's not what international law scholars would
13 normally put down as a first principle. That is not the
14 principle of international law that Marshall is remembered for,
15 but it is explicit in his judgments.

16 And he then goes on, in a sense, to do what other
17 judges have done in both Canada and the United States, which in
18 some ways is to vindicate colonialism, to say, yes, it's
19 colonialism, but there are certain kinds of principles
20 involved; yes, we're not going to deal with the essential
21 rightness of what happened, but we're not -- we're not going to
22 say that -- that there were no rights.

(CONTINUED ON NEXT PAGE)



1 But all that Marshall does in the judgments and
2 indeed, all that the traditional committee of the Perfect (ph)
3 Council do in the closest Canadian parallel is from Kathren
4 Miller's case, is to, in fact, vindicate or -- or affirm the
5 legal validity of state actions which have already occurred.
6 Now, the state actions which have already occurred in both
7 countries and in both instances, it is a process of negotiating
8 treaties between the colonial power and local tribal groups.

9 Once -- all right, if -- if Marshall made things up
10 and vindicated what had already happened, what were the roots
11 of what had already happened? And we have required over the
12 last decade or so, revisionist historians to go back beyond
13 some of the myths to find, to fit, it together. So, a book,
14 like, Jennings book, "The Invasion of America" is one which
15 roots the practice of signing treaties in the reality of
16 contact between significant populations, one of which had
17 intensive patterns of land use; and the other which wanted to
18 establish intensive patterns of land use in the same area. And
19 it was a practical political reality which lead to these
20 patterns.

21 Indeed, the truth was, with populations of the
22 density of the Indian populations in New England, it was simply
23 not possible for the numbers of Europeans to take over the area
24 without some recognition of indigenous rights in the process.
25 And it's that practical recognition which is affirmed later by
Marshall in -- in the famous judgments and by Canadian courts
in upholding treaty making patterns as being legally real in
Canadian -- right.

Now, so what I suggest is that in that whole era the
question of the -- the rights of acquisition of territory is
essentially papered over. One can, however, go back to the
Spanish period where the propriety of the acquisition itself
was discussed and Vittoria gives certain grounds, comments on

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1 certain of the pretensions that Spain held out to justify the
2 acquisition of territories, such as, and -- and in here,
3 indeed, we get the recycling of -- or perhaps the first
4 recycling of -- of -- of material that is recycled constantly
5 since, you get notions that they are -- certainly people can
6 have rights, but the Indians are too stupid. To which,
7 Vittoria replies, that they -- they may not be very bright but
8 there are a lot of Spanish peasants that don't appear much
9 brighter, and we recognize land rights in them.

8 Vittoria does a very interesting analysis of --of
9 sort of premises of equality in terms of paganism and -- and
10 degree of education, these kinds of things. But that kind of
11 analysis and in some ways, Vittoria plays a card that I -- that
12 I think he did not anticipate the use that would be of later,
13 because he said, an acquisition of territory without the
14 consent of the Native people would be valid morally and
15 legally, if it was for the benefit of the tribal populations
16 involved. In many ways that is the simile beginnings of the
17 doctrine of trusteeship, not as a doctrine of benevolence to
18 Native people, but as a doctrine of justification for
19 acquisition of territories.

17 But it's -- it has some comprised elements in -- in
18 it. It says, yes, we can do it. We are apparently the ones --
19 we, Europeans are apparently the ones who could, can, decide
20 when it's in their benefit, but we have to, to justify this in
21 our intellectual terms, we have to say that there's got to be
22 some standards. We can't just do whatever we want to do. But,
23 by the time we start to get some -- certainly by the time we
24 get to decolonization after the First and the Second World
25 Wars, things -- things are moving on quite different basis.

24 You do get some holdings in international law, the
25 three celebrated decisions before the western Sahara in which
the rights of indigenous people lose each time. In the Island

1 of Palmer's (ph) case --

2 JUDGE BERGER: These are here in
3 the International Court of Justice, are they?

4 MR. SANDERS: They are in varying
5 institutions. The -- the -- you have in the period between the
6 two World Wars what is called the permanent court of
7 International Justice, which is -- has been -- commentators
8 have said was, not a court, did not dispense justice and
9 clearly was not permanent. But it was the predecessor of what
10 is now the International Court of Justice, or often referred to
11 as the World Court.

12 And you had the Olive Palmer's (ph) decision which --
13 I'm sorry, I don't have notes on it here, it may -- it may have
14 been an international arbitration as opposed to a decision of
15 the permanent courts. It was -- okay, it was an international
16 arbitration. It is normally cited for the proposition that
17 indigenous tribes do not have status in international law.
18 They are not recognized as nation states. You'll find that
19 recycled in -- in a lot of -- sort of orthodox, older
20 international law materials. You have the Eastern Greenland
21 Case and you have the Keonga (ph) arbitration between Canada
22 and the United -- and -- and between the United Kingdom and --
23 and the United States in relation to the Keonga Indians who
24 moved from New York State to Canada. I want -- they all
25 reflect the earlier colonial assumptions in which state status
is denied to the tribes, and international law character to
treaties with indigenous tribes are denied.

26 You find in literature, in the international law
27 literature, a fair preoccupation with the questions of some --
28 some preoccupation with the questions of acquisitions of
29 colonial territories and various methods of acquisition are set
30 out, including consent.

31 The -- the others -- this -- there's relatively

1 little focus on this material anymore and for rather good
2 reason. It was all -- it was all terribly self-justifying and
3 the essential point of it historically was to solve disputes
4 between colonial powers, not relationships between colonial
5 powers and indigenous populations. The simple point is that
6 the reference on the Western Sahara, that Tom Berger has
7 referred to a few times over the past three days, decided by
8 the International Court of Justice, really lays to rest a
9 number of the elements of the -- of the earlier international
10 law tradition. The western Sahara is, of course, an area in
11 northern Africa below Morocco. The question was Moroccan
12 pretensions to claim it as part of Morocco and claims by
13 indigenous populations within the area to independence with
14 mineral wealth as being seen as the -- a very key factor in the
15 whole thing.

16 The decision of the International Court of Justice
17 which is a very long series of judgments is usually cited for
18 the proposition that the doctrine of "terra nullius" is now
19 finally disposed of. "Terra nullius" was Latin for "no
20 person's land" and reflected the doctrine that you could
21 approach a territory which was sparsely populated by migatory
22 hunting bands and say that it didn't belong to anybody. You
23 denied both the political and legal occupation of the land,
24 therefore, treated it as if it was vacant and, therefore, open
25 to the acquisition by any power wanted to come around and --
and take first grabs at it.

The question was whether the patterns of occupation
in the western Sahara were of such a minimal quality that they
would clearly fit into "terra nullius" and justify this kind of
acquisition. In terms of a simple comparison between the
patterns of occupation there and the patterns of occupation in
aboriginal North America, it is clear that the population
density was higher here and the established patterns of land

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1 use were clearer here. Therefore, it becomes an extremely
2 effective test of whether international law would in retrospect
3 justify the acquisitions of territories in North America on any
4 basis other than consent. And the answer of the International
5 Court of Justice was that the rights were the local population.
6 It was not "terra nullius, it was not open to acquisition
7 except on the basis of consent.

8 In many ways what the judgment has done is to create
9 a juristic potential base for a modern proposition not yet
10 completed -- completely accepted in international law, which is
11 that colonialism is to date illegal. The only way of
12 acquisition of territory today would be by consent which is not
13 colonialism, but is, indeed, the exercise of the right of
14 self-determination of a people, a decision by them freely to
15 amalgamate their judicial entity with another state. That is
16 possible, that's not colonialism. The modern law, if not
17 established at this point, the way we're going is very clearly
18 that colonialism is -- is itself now illegal.

19 The -- one has to remember -- so -- so, in terms of
20 -- this is an attempt to discuss the law on acquisition of
21 territories as it's developed and where it is at today. That
22 then poses a fundamental problem of legitimacy under
23 international law for nation-states, like, Canada and the
24 United States and Norway and Sweden and Japan, other countries
25 in which -- which have either been nation states created by
emigration or nation-states which have expanded to incorporate
in their territory areas that formerly were autonomous areas of
indigenous populations.

JUDGE BERGER: Russia would
qualify too, I take it?

MR. SANDERS: Russia would
qualify. You can get in -- China has -- has areas. There'd be
some questions of -- of what were the historical boundaries of



1 China. It's -- it's something that -- that applies to all of
2 the regional areas of -- of the world and -- and raises certain
3 questions of the degree to which treaty arrangements in North
4 America, for example, comprised an example of consent being
5 given and if it was consent, on what terms was it given? And
6 so, you do find among certain of the current activists on this
7 issue a great concern as to whether arrangements, like, the
8 Alaska Native Claims Settlement Act or other modern
9 arrangements can be interpreted in international law now as
10 having comprised elements of consent. Consent, perhaps, on
11 terms or, perhaps, broadly that -- that has now and -- and
12 quite recently entered into the discussions.

10 MR. GOLDWIN: (QUESTION OFF
11 MICROPHONE) Is there a retroactive effect or (INDISCERNIBLE
12 DUE TO DISTANCE)

12 MR. SANDERS: Well, international
13 law is -- is somewhat peculiar. It -- it is not an exact
14 parallel to national law, particularly in terms of
15 enforceability and perhaps, because it's not exactly parallel
16 in terms of enforceability, it's also in some ways in
17 international law terminology programatic as opposed to --
18 opposed to the creation of rules, it is the creation of
19 standard or goals. So, that if -- if it was as rule oriented
20 as domestic law, then, the answer to that would have to be that
21 it could not be retroactive or there would have to be something
22 -- would have to do about retroactivity.

21 Given that it is progamatic and goal oriented there
22 is some debate in international law about the degree of
23 retroactivity. Tio Elias (ph) who is one of the figures on the
24 International Court of Justice has written about the doctrine
25 of Intertempura (ph) Law which is the phrase which is used for
this debate within international law and has suggested that
indeed the doctrine of Intertempura Law which is -- has basis



1 in international decisions says that rights previously acquired
2 must be judged by the international law as we now understand
3 and not the international law in place at the time of
4 acquisition. Therefore, the legitimacy of prior acquisitions
5 is put in question because there would be no -- I think there
6 would be little doubt that early acquisitions in portions of
7 Canada which I'm most familiar, would have been understood in
8 those times to be acquisition of "terra nullius" lands, and,
9 therefore, in compliance with doctrines of international law.

8 Elias' view is that if that is a correct
9 understanding of the law at that time it is not now legitimate
10 in international law terms.

10 MR. GOLDWIN: Therefore basis for
11 claims, retro- --

12 MR. SANDERS: Yes, yeah. So,
13 that the present rules are retroactive. He does not spell out
14 exactly the consequences. There are other concepts of
15 international law which may have some bearing on this. I think
16 he was thinking of notions of acquiescence and -- and relying
17 on patterns of acquiescence to long established jurisdictional
18 arrangements as mitigating the most radical effects of his
19 conclusions that these rules are to be applied retroactively.

18 But certainly, Elias is a very prominent figure in
19 international law and his conclusion, to state it in one
20 sentence, is that these -- this is to be applied retroactively.

20 JUDGE BERGER: Is he a member of
21 the World Court?

21 MR. SANDERS: Yes.

22 MR. GOODWIN: From what country?

23 MR. SANDERS: I believe from
24 Nigeria.

24 JUDGE BERGER: How many judges
25 sat on the Western Sahara case in 1975?



1 MR. SANDERS: I'm sorry, I don't
2 know the numbers offhand. They -- they sit large panels and
3 there are quite a number of judges.

4 JUDGE BERGER: Usually 15, I
5 think.

6 MR. SANDERS: Yes.

7 JUDGE BERGER: Sorry, carry on.

8 MR. SANDERS: That was -- this
9 portion was on -- on the issue in international law of the
10 acquisition of territories. We can wind up with international
11 law posing the problem that there is no international law
12 explanation for legitimacy of many of these acquisitions.
13 Nevertheless, we have a reality of acquisition having occurred.

14 Let me turn to the international law and
15 decolonization. Now, international law on decolonization is
16 more recent than most people think. There -- there was no
17 principle of decolonization established after the First World
18 War, nor was there one established after the Second World War
19 with the establishment of the United Nations. It was still not
20 possible at that point. What you had after both world wars was
21 the taking of colonies from defeated powers and bringing them
22 under some formal international system of supervision and
23 determination of -- of their future course because it was only
24 of defeated powers did not represent any beginning or
25 articulation of first principles.

The modern law of decolonization is seen as focusing
on the 1960 Declaration of the General Assembly. So, to turn
to basic general source documents, that's the one.

The question of decolonization has not been handled
simply in the context of whether acquisition was legitimate.
To just use an example to make that point, Fiji is one of the
examples of acquisition of a territory by consent, by treaty of
cession. No going into any question as to whether the treaty

1 could have been challengeable. You did have tribal authorities
2 on Fiji voluntarily, apparently, accept British control over
3 the island. However, in the period of decolonization since the
4 Second War World the question has tended to be more whether
5 this population was a people with a right of self-determination
6 rather than the question whether this territory had been
7 acquired validly by the United Kingdom, and so Fiji was
8 decolonized and became independent without any judgment being
9 passed on the question of acquisition.

10 So, it may be that the whole issue of the status of
11 indigenous peoples can simply be approached, not from the
12 question of initial legitimacy of acquisition, but from the
13 question as to whether the principle of self-determination of
14 people, which Bernard Nietschmann referred to, applied to these
15 populations. That is the general tender of decolonization
16 since 1960.

17 Now, the -- we -- we still had the situation that
18 international law was in the hands of the other guys and so
19 there were doctrines which were developed to limit the right of
20 self-determination of peoples. One, is often referred to as
21 the "salt water" or the "blue water" theory which is that
22 decolonization refers to a separate colony. It applies to
23 British colonies in Africa or French colonies in Asia or Dutch
24 colonies in -- in Indonesia, these kinds of things. They're
25 obviously colonies, the color of the skin is different, and
there is often a tremendous amount of salt water between the
metropolitan country and the colony. That's one reason I think
why Alaska may have been somewhat troubling because it was not
contiguous. And the Irish have a wonderful folk song in which
they praise the sea, thank God for the sea, the beautiful blue
sea, if it weren't for the sea, Ireland never would be free.

So, this was a protective measure. The other way of
saying stating this thing -- kind of proposition was that the



1 right of self-determination of peoples did not allow the
2 splitting up of a national territory. Seemed to be that if you
3 had a contiguous territory, there was an assumption that you
4 could not have a right of self-determination which would
5 splinter that continuity. There were a couple of other ways in
6 which that was --

JUDGE BERGER: Can you give us an
example of -- of that?

7 MR. SANDERS: All right. We have
8 one rather close at home which was Quebec in Canada. The
9 Quebec nationalists argued that they were a separate people
10 with a right of self-determination under international law.
11 There were ways that Canada responded to that. One of which
12 was that you're a minority, not a people. Another was that
13 you're contiguous, and the doctrine of self-determination does
14 not allow for the splitting up of national territory. And a
15 third was the "once only" theory: that Canada had gained its
16 independence from the United Kingdom and the French, however,
17 happily had come along with us and they were stuck with the
18 marriage. In this -- this kind of context, international law
19 did not permit divorce. So, this sort of constellation of
20 arguments meant that in -- a right of an indigenous population
21 to self-determination was denied by one of a combination of --
22 of these kinds of arguments.

23 However, the earlier statements of the right of
24 self-determination of peoples in international instruments
25 tended to be guarded and tended to be linked always with a
reiteration of the principle of not breaking up national
territory. But over the last 15 years the restatements of the
right to self-determination of peoples have been -- have come
out without the qualifications being specified. Not that they
have been explicitly denounced, but that they are no longer
restated, so that in the two international human rights



1 conventions, which Bernard Nietschmann referred to, which were
2 -- the text of which were approved by the General Assembly of
3 the United Nations in 1966, the first article of both of those
4 is an unqualified statement of the right of peoples to
5 self-determination.

6 Those are the International Covenant on Civil and
7 Political Rights, and the International Covenant on Economic,
8 Social and Cultural Rights. In the United States there's some
9 problems with these documents because the United States does
10 not sign the International Human Rights Documents. They have
11 not signed either of those. They have not even signed the
12 International Convention Against Genocide, the International
13 Convention on the elimination of all forms of racial
14 discrimination, which is the most widely adhered to of the post
15 World War II human rights conventions at the international
16 level, has also not been adhered to by the United States.

17 JUDGE BERGER: You're using
18 adherence in the formal sense of agreeing to be bound by it?

19 MR. SANDERS: These documents as
20 international legislation are only binding on states which sign
21 them.

22 JUDGE BERGER: Yes.

23 MR. SANDERS: They are in the
24 form of treaties. This is what's called "conventional
25 international law" that is the international law created by
26 treaties or conventions which is only binding on the nation
27 states which sign them. The United States has a surprisingly,
28 given its pretensions on human rights questions, has an
29 amazingly uniform record at the international and even regional
30 levels of signing nothing at all.

31 One of the reasons that the Helsinki accords features
32 so much in U.S. discussions of human rights and U.S.
33 accusations of human rights violations on the part of the



1 Soviet Union is it's about the only thing that the United
2 States has ever signed. It happens to be something that the
3 Soviet Union signed as well because the impetus of the whole
4 Helsinki course was to settle the post war boundaries and
5 security questions in Europe. The Helsinki course are not UN.
6 The whole process was outside of the United Nations, but there
7 are human rights provisions which were included. But if you
8 move into international covenants under UN auspices or
9 international human rights agreements under the auspices or
10 parallel to the organization of American states, as Sandy Davis
11 will no doubt indicate, the -- the United States is not -- has
12 not adhered to the Inter-American Convention on Human Rights.
13 Yes?

14 JUDGE BERGER: Henry Shue, just
15 for the record.

16 MR. SHUE: I just wonder. There
17 is the argument that failure to become a signatory does not
18 mean that the U.S. is not bound. One version of it is that
19 this is such widely accepted conventional law that it now has
20 the status of customary.

21 MR. SANDERS: Yeah.

22 MR. SHUE: So, I just wondered if
23 you could comment on it? Because you're sort of letting the
24 U.S. completely off the hook.

25 MR. SANDERS: Well, I -- I didn't
realize that I was letting them off the hook. I thought I was
being somewhat unfriendly as an alien within the borders,
but...

International law is divided into two broad
categories; customary international law, which is the creation
of treaties and conventions and therefore created by the
consent, formal consent of the nation-states involved; the
other body of international law as Henry Shue has indicated is



1 customary international law and the doctrine on this in
2 domestic United States law, as it is in much of the common law
3 tradition countries is, that customary international law is
4 automatically a part of the domestic legal system unless it is
5 in conflict with explicit legislation within the country. And
6 there have been some recent rulings in the United States
7 confirming this tradition, the Dela Tiga (ph) case, if I got
8 the name right.

MR. SHUE: (OFF MICROPHONE)

Philaritia (ph).

9 MR. SANDERS: Philarita case has
10 confirmed this and has been the subject of considerable comment
11 within -- within the U.S. legal system. Therefore, some of the
12 elements -- I mean, in that you had a ruling by a United States
13 court that torture by a state was now so broadly accepted at
14 the international level as a violation of -- of human rights
15 that it had become an element of customary international law
16 and had, therefore, become incorporated within the domestic law
17 of the United States.

18 So, that is a rooting for this international law
19 material to gain formal recognition within the legal system of
20 the United States. The -- the principle, therefore, of the
21 self-determination of peoples could without any trouble, it
22 seems to me, be stated at this point to be an extremely widely
23 adhered to principle in international law. It certainly
24 appears in so many major documents; Declarations of the General
25 Assembly and International Conventions, that I would assume
there would be very little difficulty in -- in arguing even
within the framework of the United States domestic court that
it has attained the status as being a rule of customary
international law.

Which then takes us to a second stage of this
analysis which is what is the content of the right of



1 self-determination of a people. The phrase has been associated
2 with the development of the formal law of decolonization in the
3 period since the second World War and, therefore, has the
4 connotation for most people of full formal decolonization with
5 the emergence of the people as an independent nation-state
6 recognized as such by the other nation-states.

6 There has been a body of argument developed quite
7 recently for different or a broader possible content to the
8 right of self-determination of peoples; that indeed it could
9 have a "domestic content" in the sense that it need not
10 represent a complete breach of the juridical unity of the
11 nation-state but, nevertheless, be something recognized by
12 international law and therefore in effect be a right of a group
13 within a nation's state to a degree of self-determination
14 appropriate to the grouping which would be recognized both, in
15 the domestic legal system, and at the international level.

13 Now, statements internationally on this have been to
14 date quite cautious. Madame Erika Dias of Greece who is their
15 representative on the commission -- on the sub-commission on
16 the prevention of discrimination and the protection of
17 minorities, which is a sub-commission of the Commission of
18 Human Rights of the United Nations, Madame Erika Dias was
19 appointed by the sub-commission to be the chairperson of the
20 working group on indigenous populations, which now meets every
21 year in Geneva. At a speech at a international law conference
22 on minority rights in Quebec City last week, she gave a speech
23 in which she stated that in her view, the principle of
24 self-determination of peoples applied to indigenous populations
25 in a nonsuccessionist context, was the way in which she put it.
Therefore, this was to my mind, a very significant statement by
Madame Dias along the lines, that it seemed to me very clearly,
we had been moving in at international law. But in all
fairness, I would have had to say and I would still say, is not

1 a settled question in international law.

2 Now, if I can move away from that for a moment? This
3 -- this is the second part of my comments which dealt with
4 decolonization in the present law and the significance of
5 self-determination of peoples.

6 JUDGE BERGER: Doug, could I just
7 interrupt you for a moment.

8 MR. SANDERS: Yes.

9 JUDGE BERGER: I -- I think we're
10 all -- we're all getting an awful lot out of this. It's fairly
11 densely packed, at least, --

12 MR. SANDERS: And -- and my voice
13 is running out.

14 JUDGE BERGER: But I wonder if we
15 could, just in a moment, break for coffee and let Doug resume
16 while we catch our breath? And when Doug finishes his
17 presentation, I'd like to call on Lewis Hanke to make any
18 observations he thinks appropriate since he will be leaving
19 tonight, and after that Clem Chartier who will be leaving
20 tonight. And then we'll turn to Sandy and Henry Shue. But
21 would you mind if we took a five minute break for coffee and...

22 (MEETINGS ADJURNS)

23 (MEETINGS RECONVENES)

24 JUDGE BERGER: Well, maybe we
25 should be seated. The -- we'll start again and let me just say
that I'm eager to continue and complete the discussion that
we're into now, but I -- I'm being a little selfish about this.
I think this discussion on recent developments in international
law may be especially helpful to me and -- and I'm the one who
is supposed to write a report, so that's why I'm trying to keep
the discussion going here.

We'll call on Doug and then on Lewis Hanke and Chem
Chartier to start things rolling and I thought that -- that



1 tomorrow morning if this discussion is not yet completed we'll
2 carry on with it. But Robert Goldwin suggested to me that it
3 might be useful tomorrow since we're going to be here to
4 perhaps ask the educators; Dennis Demmert will be back, we have
5 Rayna, and -- and Virna and Oscar here to, perhaps, indicate
6 for us the criteria or the standards that they feel an educat-
7 -- and Gard, as well, the criteria or the standards that an
8 educational system ought to meet if it is fairly to present the
9 history of Native peoples, not only to Native students but to
10 non-Native students. And I -- I put that out for your
11 consideration.

12 Robert suggested that it might -- if we succeeded in
13 doing that tomorrow, we might then set out the criteria for
14 self-determination within a nation-state. That -- those two
15 tasks might very well keep us here for two years, but let's --
16 let's think about it overnight, and maybe we could take a shot
17 at it tomorrow. Let's just -- just see. I -- I -- all right,
18 Doug, please continue.

19 MR. SANDERS: Okay. I'll -- I'll
20 try to finish somewhat briefly. The third -- the third area
21 that I thought should be covered was the development of the
22 international law of human rights in the period since the
23 Second World War.

24 There had been a -- an extremely limited development
25 of a international law on minority rights in the period between
the First and Second World Wars, which was seen as a failure
and was not something that was built on in the period after the
Second World War. The United Nations Charter stated a goal of
the promotion of human rights and fundamental freedoms. And on
the formation of the United Nations a major project was the
drafting of a international bill of rights, that took the form
in the end of three documents; the Universal Declaration of
Human Rights, which as a declaration of the General Assembly

1 was not technically binding in international law, although
2 potentially a source of customary international law. The two
3 other parts of the International Bill of Rights were the two
4 human rights covenants, which I've mentioned before and which
5 Bernard Nietschmann mentioned. Which -- the text of which were
6 approved by the General Assembly in 1966, which came into force
7 with sufficient state signatories in 1976.

8 In the structure of the United Nations the issue of
9 human rights is, by the charter, assigned to the Economic and
10 Social Council. And the Human Rights Commission was
11 established responsible to the Economic and Social Council.
12 Under that body there was a mandate in the charter for the
13 establishment of bodies concerned with minority rights and
14 discrimination. Rather than establishing two bodies, only one
15 was established. The Sub-commission on The Prevention of
16 Discrimination and The Protection of Minorities. The fact that
17 minority rights did not --

18 JUDGE BERGER: What was the other
19 one -- what was the other one?

20 MR. SANDERS: The --

21 JUDGE BERGER: It wasn't
22 established?

23 MR. SANDERS: Well, two were
24 supposed to be established. One, concerned with minority
25 rights and a second one, concerned with discrimination.

JUDGE BERGER: And the first
wasn't established?

MR. SANDERS: Instead of
establishing two, they established --

JUDGE BERGER: Oh, I see.

MR. SANDERS: -- one with a
mandate for both.

JUDGE BERGER: Yeah, all right.



1 MR. SANDERS: Called the
2 Sub-commission on the Prevention of Discrimination and the
3 Protection of Minorities. The significance of that
4 organizational change was what it meant in relation to minority
5 rights. It was impossible to accomplish anything on minority
6 rights questions in the context of the United Nations for at
7 least the first decade of the organization.

8 And so the -- while you had considerable work in the
9 area of discrimination, in particularly racial discrimination;
10 minority rights were essentially a taboo subject for a number
11 of reasons. Again, writers suggest that the United States with
12 its individual rights orientation plays a role in this and the
13 melting pot ideology most often associated with the United
14 States. Also the views of third world countries emerging from
15 colonialism also are seen as playing a role in this because
16 they were tremendously concerned with national intergration and
17 were not interested in -- in rights of sub-groups within their
18 nation-states. There are other factors which are attributed as
19 well, which I won't go into at this moment.

20 The first break-through on minority rights was
21 Article 27 of the International Covenant on Civil and
22 Political Rights approved by the General Assembly as part of
23 the covenant in 1966. It casts minority rights in terms of
24 individual rights and Article 27 says that individuals who are
25 members of ethnic, religious and linguistic minorities have the
right to practice their religion, speak their language, and
live -- live their culture in community with other members of
their group.

26 The thinking -- and there are people at the
27 international level who will deny that this is a minority
28 rights section. A tension is perceived between individual
29 rights and collective rights. A fear is involved that if
30 minority rights are recognized as the rights of collectivities,

1 then, international law has now recognized collective rights,
2 collectivities at a sub-state level.

3 If I could back up for a moment. Traditionally
4 international law was the law of relations between nation
5 states and individuals had no role in -- or standing in
6 international law. The development of the international law of
7 human rights on an individualist basis was the recognition --
8 was a breach of that tradition and the recognition of
9 individuals as having certain rights directly under
10 international law. To move to collective groupings less than
11 nation-states and more than individuals, is -- is an area in
12 which there's been painful and miniscule development.

13 The -- in the context -- and -- I'd be interested --
14 Henry Shue might be interested at some point in commenting on
15 the widespread preception that there is a natural tension
16 between the idea of individual rights and the idea of group
17 rights. It seems to me that that is spurious, but it seems to
18 me to be fairly widespread as -- as a articulated concern.

19 In terms of the international law of human rights,
20 you had the development of certain international forums.
21 Initially, with the creation of the UN, there was no mechanism
22 for non-state groupings to have an international adjudication.
23 The International Court of Justice would only hear from nation
24 states and that remains true today, although nation-states can
25 refer to the International Court of Justice, questions which
involve the rights of groups other than recognized
nation-states. The International Covenant on Civil and
Political Rights has created an international forum. The --
the Human Rights Committee within adjudicatory power for some
states which have signed what is referred to as the optional
protocol, which allows that procedure, we have this slow
development of institutions with technical competency and
recognized adjudicatory roles. Again, I would note that the



1 United States is outside of this development but since -- since
2 it is a signatory to the United Nations Charter, which itself
3 is a treaty, it is associated with the major organs of the
4 United States, such as the commission and the sub-commission.

5 It was in the context of the human right's law
6 relating to racial discrimination that a specific concern with
7 indigenous populations arose. A special repertoire study was
8 commissioned by the Sub-commission on The Prevention of
9 Discrimination and The Protection of Minorities on the question
10 of racial discrimination. In around 1970 or 1971, the
11 repertoire and the preliminary report said to the
12 sub-commission, that the situation of indigenous populations
13 was a special separate situation which merited an independent
14 investigation and recommended that such an investigation take
15 place. A special study was commissioned by the sub-commission,
16 the Cobal (ph) Study, which was completed last year. This is
17 -- so, there is now at the UN level a study on -- under the
18 title "Discrimination Against Indigenous Populations", plus, a
19 special body, the Working Group on Indigenous Populations,
20 which is under the Sub-commission on The Prevention of
21 Discrimination and The Protection of Minorities. Both of
22 these, the Institution and the report are in the United
23 Nation's terminology aimed at the development of standards in
24 international law relating to the treatment of indigenous
25 populations.

It is assumed by many who are involved in this that
the development will take the following steps: that there will
be the preparation of a declaration which will set out certain
standards, which will go to the General Assembly to be adopted
at that level. Therefore, that will be a declaration, like,
the Universal Declaration of Human Rights, which can set
standards and have influence on customary international law,
but which is not in itself a binding part of international law.

1 Many who are involved anticipate going on to a second stage in
2 which a convention is developed, a treaty, which would
3 articulate standards which would then be binding as a matter of
4 international law on the nation-states which were signatories
to it.

5 These developments have occurred within the context
6 of human rights, not in the context of decolonization.
7 Nevertheless, the boundaries between human rights as individual
8 rights; human rights as collective rights; and human rights as
9 involving the collective political right of self-determination,
10 those boundaries are not maintained well or scrupulously in the
11 modern international law of human rights. Therefore, the two
12 international human rights conventions, which came into force
13 in 1976, while primarily oriented towards individual rights in
the major traditions of United States human rights law and
French human rights law; those conventions both begin with the
statement of the right of self-determination of peoples.

14 (TAPE 10, SIDE B)

15 MR. SANDERS: A collective
16 political right recognized outside of the institutional
17 framework that is handling decolonization within the United
18 Nations at this point. In other words, this, the area of
19 self-determination outside of formal decolonization now
20 recognized is an area of international law at the UN level
without a responsible competent body other than those in the
human rights field.

21 The other factor in terms of this law of human rights
22 is that the only international recognition at this point in
23 conventional international law of the rights of minorities is
24 Article 27 of the International Covenant of Civil and Political
25 Rights which came into force in 1976. Again, while that's a --
I would -- I'd certainly call it a group rights section. And
while it is a group rights -- minority rights section, it is,



1 again, put in the context of the international law on human
2 rights. So, the international law of human rights is often
3 rejected by indigenous populations as an inadequate framework
4 for the articulation of their goals because of its presumed
individual rights orientation.

5 In general, that is true, but the international law
6 of human rights as it's developed over the last 10, 20 years
7 has included elements which indigenous peoples, in fact, have
used and -- and are comparable.

8 Just one final point. The -- the structure of the --
9 of the United Nations is one in which the -- well, rights may
10 now be recognized on levels other than that of the
11 nation-state. There is still -- there's still very little in
12 the way of a departure from the structure of the United Nations
13 in which only nation states are the actors. Nevertheless, even
14 on this point there has been some movement and the recognition
15 of the Palestine Liberation Organization and SWATPO (ph) as
16 having observing status, is a clear departure from the premise
17 that only recognized nation-states can be involved in the
18 formal structure of United Nation's bodies.

16 JUDGE BERGER: Thank you, Doug,
17 for that masterly analysis of recent and not so recent
18 developments in international law. Well, Mr. Hanke, we turn to
19 you now, sir. And...

19 MR. HANKE: Mr. Chairman, I have
20 just a footnote to this erudite exposition by Douglas Sanders.
21 Although I am a citizen of the United States and live in
22 Amhearst, Massachusetts, I now speak as an informal member of
23 the Hispanic tribe. I don't know whether by international law
24 one can belong to two tribes. Is that possible? If so, I do.
25 I now speak to make certain that Spain and Hispanic
contributions are properly recognized when it comes to
international law.

1 There was a book published about a half century ago
2 by James Brown Scott, director of the -- then director of the
3 Carnegie Endowment for International Peace, entitled "The
4 Spanish Origin of International Law". He'd been to Ssllamanca,
5 had studied the published works of Francisco De Vittoria and in
6 other ways he argued that the true basis for international law
7 had been constructed by Spain. Then, so much so, that when I
8 had the problem of getting a book published, you know, young
9 historians often have a difficult time getting their valuable
10 contributions to learning published, I turned to Dr. Scott,
11 because I discovered in the Spanish archives a whole volume of
12 unpublished treatise on the rights of Spain to the New World,
13 on the relations of Spain to the Indians/Natives of the New
14 World, not only America, but also in the Phillipines; and there
15 was Dr. Scott, willing to put up, I think, \$500 to get this
16 (SPANISH) published in spanish in Mexico. Unfortunately, it
17 came out in 1943 during the war; very bad paper, nobody's read
18 it. But there -- there you will see, not only questions
19 relating to territory, which was one of the important focuses
20 of Doug Sanders, but all various aspects of relations between
21 peoples, and remember they were the ones who first met the
22 peoples of the New World from Europe.

17 And they didn't discuss merely these arcane subjects,
18 which sometimes our international lawyers do, but realities.
19 For example, there was a (INDISCERNIBLE) Santaz (ph), a Jesuit,
20 who published several treatises. He was very hot against the
21 Moslems in the Phillipine Islands, and he said with respect to
22 these ancient enemies of Spain who attacked Christian Spain
23 during the Middle Ages and occupied Spain, we should declare
24 war only by fire, by sword.

23 Not only was there a whole volume of treatises, but I
24 found enough references to other treatises, so, I prepared a
25 bibliography year by year of every treatise I've heard about,



1 which concerned these questions. Well, and after this volume
2 came out a very distinguished Jesuit scholar today, Earnest
3 Budist (ph) published a splendid edition of the treaties or
4 rather the university lectures by the Augustinian (SPANISH)
5 Professor at the University of Mexico on all these questions
6 following Las Casas. So I just want to make certain that this
7 body does not forget that when the difficult problems or
8 relations between Europe and the peoples of the New World and
9 in the Phillipines are studied, they must take into account the
10 Spanish contributions.

JUDGE BERGER: Thank you, sir.
11 Clem Chartier, you're going to have to leave tonight I gather,
12 so, please feel free to give us your views now.

MR. CHARTIER: Thank you, Mr.
13 Commissioner. I just want to preface my remarks by stating
14 that for those that have read the -- I'm not sure what it's
15 called, the description of the expected participants, Mr.
16 Douglas Sanders, of course, is put down here as, among other
17 things, Legal Counsel for the World Council of Indigenous
18 Peoples. I just wanted to mention that Mr. Sanders has been
19 with the World Council prior to its formation and since its
20 formation. And the work that he does, of course, he charges
21 nothing for. I just want to state that the advice that we get
22 is not reflective of that fact.

23 Anyway, with that, Doug has given quite an overview
24 of the international law and developments. What I will do is
25 try to give some overview of what the World Council of
Indigenous Peoples is attempting and some of our future
initiatives.

To begin with, we make it clear and have stated that
the United Nations, the international community has to deal
with the fact that there are indigenous, there is a indigenous
world. Some people call it the fourth, some people call it

1 other things, but nevertheless, we are there and we have to be
2 dealt with by the international community. The other fact is,
3 of course, is that the indigenous peoples themselves will be
4 the ones that will set and will -- will have to be the ones and
5 will be the ones to set the basis of future international law
6 which will accommodate us within the international community.

7 Any of the issues, conflicts, can only be resolved
8 internationally by the determination by ourselves of our
9 future. So, I think, that's the basis premise, at least, that
10 the World Council of Indigenous Peoples is basing our work on.

11 Where -- where is this work being done? I think it's
12 right to say that we have to do this work both internationally
13 and nationally. Now, since my election in September of last
14 year, I -- I have had opportunity to do some traveling and I'll
15 speak with respect to -- to the experience I've had since that
16 time.

17 Nationally, of course, we have the situation in
18 Nicaragua, which has been dealt with over the past three days.
19 There you see a situation where the Indian peoples are dealing
20 with the government of the country and are seeking ways in
21 which their right to self-determination will be expressed in a
22 relationship with the rest of the country. I think the hope is
23 that there will be a treaty concluded and that that treaty will
24 be reflected in the new constitution of that country. So, I
25 think that's a significant development.

26 We have the situation in Canada where the aboriginal
27 peoples of Canada, the Indian, Inuit, Native peoples are
28 negotiating with the leaders of the country, the premiers and
29 the one prime minister at the highest political level there.
30 The aboriginal peoples are seeking their rights to
31 self-determination in the ways that they feel best suits their
32 needs, but, again, it's within the context of -- of the -- of
33 the country, at least, those indigenous peoples that are

1 involved in that process.

2 You have a situation in Norway where the Sami people
3 have been instrumental in getting two commissions set up; one
4 is a commission on Sami rights, the other is a commission on
5 Sami culture. The commission on Sami rights has made its
6 report. It's been published. It's about 700 pages. The
7 unfortunate thing is that it's in Norwegian. I can't read it.
8 There is a summary, however, of it in English. I've had an
9 opportunity to -- to glance through that. I've also had an
10 opportunity to speak to government peoples with respect to --
11 to that report, as well as, to the Sami people themselves.

12 That is quite an extensive report by the commission.
13 It deals with the possibility of and the desirability of
14 amending the constitution of Norway to reflect Sami rights. As
15 well, there's a total chapter devoted to the -- to
16 international law and Sami rights. Now, I haven't had a chance
17 to analyze that chapter in total, I do know that they give a
18 lot of emphasis to the issue of -- of minority rights under the
19 covenants, especially section or Article 27, and I think tend
20 to rely on that as being the basis of Sami rights, as opposed
21 to the naked right of self-determination itself. But,
22 nevertheless, at least, that country and the Sami people are
23 going through the exercise of debate and that's always helpful.

24 Then we have the situation that is in front of us
25 today. Here in Alaska we have the Native Alaska Review
Commission. This also is another forum which gives the Indian
people, the Inuit peoples, the indigenous peoples of Alaska an
opportunity to express desires, aspirations and statements of
rights. And, again, that's important. The work of this
commission, I'm sure, will -- will go a long way in debating
future developments or standards, both of national law and
international law.

So, it's important that, again, work be done at the

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1 -- at the national level. Now, I know I can use Canada as an
2 example, that's -- that's where I live, we won't see
3 developments as progressively as -- as we'd like to see them,
4 but nevertheless, again, it's -- it's a form of debate, a form
5 of discussion and that debate, of course, is reflected in the
6 institutions of the United Nations.

7 We, as well, have to debate internationally. Those
8 same national governments are involved at the international
9 community and in a sense try to -- to justify statements at the
10 international level that they are either making or not at the
11 national level and vice-a-versa. So, it's an opportunity for
12 us to -- to play the game at its -- to its ultimate and to make
13 people accountable for statements that are made both
14 internationally and nationally.

15 And, also it's an opportunity for us to police
16 statements made by, in my case, countries, like, Canada, that
17 put themselves out as the champions of human rights
18 internationally, but yet sort of turn a blind eye to situations
19 in Canada itself. So, it gives us a good opportunity to play
20 that role.

21 As Doug was stating, there has been developments at
22 the international level. The working group in addition on
23 populations was created. I, personally had an opportunity to
24 participate in the first and second sessions in 1982 and '83.
25 So, I have a bit of knowledge as to -- as to its functioning or
not functioning. One of the major purposes of that working
group is to develop standards for guiding the international
community in its relationship with indigenous peoples or
populations as -- as they describe us. And I think that,
again, is an important exercise, and it enables or allows
people, like, myself and other indigenous delegates to -- to
express ourselves at -- in a forum. It -- it's sort of the
lowest forum available internationally, but, at least, it's a



1 forum that's devoted specifically to debating this issue. It's
2 a small start, but, nevertheless, it is a start.

3 One of the significant developments, I believe, is
4 the decision -- I think there was a decision made. It was
5 supposed to be made when I left Geneva. That the working group
6 session in 1985 would begin the discussion and drafting of
7 standards with respect to -- to the rights of indigenous
8 peoples and this year's drafting would begin with respect to --
9 to land. Last year's session dealt with the agenda item, land
10 and resources and definition of indigenous peoples or
11 populations. The latter agenda item didn't go very far, but
12 there was some wide ranging discussions on land, and if things
13 go as expected, there will be some preliminary discussion and
14 drafting with respect to the indigenous peoples to land.

15 So, I think that -- that's significant and it allows
16 indigenous organizations an opportunity to help develop that --
17 that kind of phraseology which we would want to see reflected
18 in international law.

19 One of the other things that's of significance that's
20 developing within the United Nations is a potential covenant on
21 the rights of the child, and one of the things that we've
22 insured and -- and brought attention to is that when any
23 convention is brought forward -- covenant is brought forward
24 that there be specific reference to the right of the indigenous
25 child to be brought up within their culture and within their
own communities. So, that is something that we will continue
working on.

26 With respect to the United Nations, we also have what
27 are known as specialized agencies. We mentioned earlier the --
28 it was mentioned earlier the I.L.O., the International Labor
29 Organization. Now, the world council of indigenous people has
30 taken the -- the view that the I.L.O. Convention on Indigenous
and Tribal Peoples, whatever the name of it is, is not

1 acceptable as it is assimilationist, however, the I.L.O. is
2 looking at the possibility of -- of redrafting the -- the
3 covenant, particularly their reference to the indigenous and
4 tribal peoples and have invited our active participation with
5 respect to that. So, over the next three to five years,
6 however long it takes, we will be actively involved with
7 members of the I.L.O. to draft something which we feel will
8 adequately reflect our aspirations. And it seems that they are
9 willing to give wide latitude to that participation and there
10 seems to be a willingness to, in fact, amend the I.L.O.
11 Convention.

12 Just another organization or another initiative that
13 I stumbled across -- we don't pretend to know everything. We
14 have -- we have a lot to learn and we are attempting to learn,
15 but there's an organization called the Independent Commission
16 on International Humanitarian Issues and that was created by
17 virtue of a general Assembly resolution, not as a specialized
18 agency or as a -- as a creature of the General Assembly. But,
19 I suppose, something more like a international think tank which
20 is to report back to the General Assembly in 1986. As I said,
21 I didn't know anything about it. I did meet a -- I did go to
22 their office when I was in Geneva several weeks ago and found
23 out they are dealing with six to eight issues.

24 One of the issues is indigenous peoples and there is
25 a specific person assigned to that -- that topic. She feels,
that in the end result there might be two or three pages of the
report devoted to indigenous peoples because the commissioners
really aren't -- really concerned or totally aware of
indigenous peoples, but are looking at other -- other areas,
like, the environment or humanitarianism, things of that
nature. But we informed her that, yes, we as a World Council
of Indigenous Peoples, we'll want to be involved in this
development, and we said we would take it upon ourselves to



1 ensure that the commissioners, in fact, decide to give greater
2 emphasis to this particular part of the report. So, that's
3 another area that we'll be looking at.

4 On a more practical side there are things that we can
5 do to start preparing ourselves, and I guess preparing the
6 international community, to accept our deliberations and our
7 suggestions. First of all, at our General Assembly the World
8 Council has set up several commissions. We have two
9 commissions; one on the situation of the Indians in Guatemala,
10 another commission on the reunification of the Miskito family.
11 We feel that by getting involved directly in these issues we
12 not only bring the World Council to the -- to the international
13 community's attention, but we bring the -- and I guess more
14 importantly we bring the issue to the international community,
15 and I think by doing this we -- we show the international
16 community that indigenous peoples are, in fact, able to deal
17 with issues and as well, are, in fact, sincere in the things
18 that we say. Things, like, the right to self-determination,
19 the right to land and the right to life.

20 Another commission that we have is a commission to
21 draft an international convention or covenant on the rights of
22 indigenous peoples. The Commission is basing its work on a
23 declaration of principles on indigenous rights which was
24 adopted by our Fourth General Assembly. And we're hoping to
25 give as wide a distribution to this declaration as possible and
to solicit as wide a range of views with respect to the future
covenant as possible. So, the commission hasn't begun active
work yet. We're still in the process of getting it in place
and getting the resources to do the necessary work. But we
are, at the same time, looking at ways we can give it wider
distribution in views of involvement.

26 In this connection, again, the General Assembly made
it quite clear to the executive of the World Council that we



1 must insure that the women are involved in the World Council of
2 Indigenous Peoples movement, and in that connection we are
3 striving and are making some headway in assuring that there is
4 a significant women's delegation at the Nairobi Conference to
end the decade on the women.

5 With respect to another initiative, we want to ensure
6 that the views of the youth are known in terms of the rights of
7 indigenous peoples and rights that should be reflected in the
8 covenant. We are working and have organized, in fact, an
9 International Indigenous Youth Conference, which will be held
10 in July of this year in Saskatchewan, Canada. So, we're trying
11 to ensure that all segments and sectors of the indigenous world
are heard and play a role, an active role in future
developments.

12 We feel that as much as possible we have to get the
13 views of everyone. Now, there are sources from which we can
14 draw upon and one of them, of course, are the hearings, the
15 transcripts of the hearings from this Commission and hopefully
16 the report. I'm sure the recommendations contained in the
report will give a lot of meat towards the development of our
covenant with respect to rights.

17 The other initiative that we're undertaking is more
18 in-house for indigenous peoples. We're working in conjunction
19 with several other international non-governmental
20 organizations, indigenous organizations to set up a training
21 program in Geneva this summer prior to the next session of the
22 working group on indigenous populations. The Inuit Circumpolar
23 Conference, our organization, the Indian Law Resource Center in
24 Washington, D.C. and hopefully, several others will get
25 together to ensure that this training program does come off,
and that it does take into account the things that are
necessary for us to develop ourselves to continue this struggle
at the international level. As well, in conjunction with that



1 we will be organizing a pre-session meeting. We found in the
2 past that because of the tremendous amount of work that all
3 organizations have to face both at home and nationally and
4 internationally, that we sometimes don't have enough resources
5 and don't spend enough human resources and financial resources
6 to be able to prepare adequately for conferences.

7 Over the past three working group sessions we have
8 gotten together during the session itself, but last year there
9 was a -- finally a determination made that we have to get
10 together prior to the working group session, and we now plan on
11 getting people together about four or five days prior to the
12 working group session so that the indigenous peoples can get
13 together, discuss our common issues and possibly come up with
14 some common strategies and some common principles which we'll
15 put forward at the working group session and go there as united
16 as possible on certain general broad principles.

17 JUDGE BERGER: You mean the
18 annual working group sessions in Geneva?

19 MR. CHARTIER: Yes. So, that's
20 something that we're looking at. I just to get back maybe just
21 very quickly to this notion of minorities and peoples. That's
22 one that's very -- that's a sensitive issue for politicians,
23 indigenous politicians. We state that we're not merely
24 minorities. We are a people with a right to
25 self-determination. We say that the covenants in other
international expressions, laws, don't state all peoples except
indigenous peoples have the right to self-determination.

So, as a people we say that we have the right to be
self-determining, but as the Indian Law Resource Center book
points out, there are certain rights by the covenant, Section
27, the rights of minorities. And in the interim we should use
what's there.

One example is in Canada, Sandra Lovelace, a Metis

1 (ph) Indian who lost her rights under the Indian Act took an
2 action to the Human Rights Committee and, in fact, was
3 successful. The Human Rights Committee found that Canada did
4 violate the covenant in that it denied her the right to live on
5 the reserve in order for her to continue her cultural affinity
6 with the land and with her people. So, in that sense it was a
7 useful tool, but we can't -- we say that we can't stop there,
8 that we have to continue and get the full right that we see as
9 being ours.

8 The World Council, as I say, was in Geneva and during
9 the period of time that I was there two oral presentations,
10 they are written out and they are available on the information
11 table at the back, and rather than go into some of the things I
12 said there, people could pick them up and maybe glance through
13 them later.

12 I think what's important now is, you know, what --
13 what are we going to do from here on. I'd like to say and
14 believe that the World Council of Indigenous Peoples and the
15 Inuit Circumpolar Conference have done a good job with this
16 joint initiative. I think this, as I say, the report that will
17 come out of this, I believe, will go a long way in helping as
18 another very important instrument in developing further
19 discussions with respect to the rights of indigenous peoples
20 internationally. I think we have to continue this kind of
21 cooperative effort and one of the ways that I see this taking
22 place is the possibility of a continuing sort of relationship
23 at the international level in which we can do some joint work.

21 One of the things that I see as an opportunity is --
22 well, one of the things that is necessary is to have a
23 permanent and high profile within the United Nations.
24 Currently because of the emphasis on human rights, because
25 that's where we currently can make our biggest impact, we have
decided that we should have an office in Geneva and I think the



1 ICC and the WCIP could set up a joint office and work at
2 influencing international sentiment, international development
within that system.

3 Doug Sanders, also made reference to the fact that
4 ZOPO (ph) and the Palestine Liberation Organization, who are
not nation-states, have observer status in the United Nations.
5 I think, one of the things that the indigenous peoples should
6 do, not necessarily the World Council of Indigenous Peoples,
7 but the indigenous community, the indigenous world, I think,
we, as indigenous people should look at the possibility of, in
8 fact, gaining at least observers status within the United
9 Nations as a first step. I think we should as indigenous
10 peoples have full rights within the United Nations. I'm not
sure how we could accomodate -- make that kind of an
11 accomodation at -- now, but I think that's something we can
12 aspire to. But as an interim measure we should have observer
13 status.

14 Now, I think that would, of course, necessitate the
international non-governmental organizations, indigenous
15 organizations getting together and finding some kind of
16 framework within which we could make a reality or make that
possible. That's, I think, something else we should be working
17 towards.

18 But anyway to sum up, so that we can give other
19 people a chance here before the topic closes. It's clear that
all of the statements made by indigenous peoples
20 internationally, wherever, back in our communities; all of the
21 conferences that we have gone to over the past number of years,
22 15, 20 years, are starting to bear fruit. The working group on
indigenous populations would not have come about had the
23 indigenous peoples not taken an active role internationally,
24 had not made declarations, had not put forth covenants,
conventions, had not made resolutions and had not lobbied. I
25

1 think it's important that this continues, and I am sure you
2 will find that the report that comes of this will be another
3 added initiative to convince the international community to
4 finally recognize, you know, the rights of indigenous peoples.

5 And I think if nothing else -- I know, I guess this
6 will be useful for the people in Alaska, but if nothing else
7 the work of this Commission is going to be a valuable aid in
8 further development of rights internationally. And I'd like to
9 thank the Commissioner and the Inuit Circumpolar Conference for
10 having invited me to take part at this session. And I want to
11 say that the World Council of Indigenous Peoples will continue
12 its involvement with the work of the Commission. We won't end
13 our work with the -- when the publication of the report comes
14 out, we will do all that we can to to ensure the publicity and
15 the promotion of the report internationally at all the meetings
16 that we're at and we'll ensure that this issue stays alive.

17 Thank you.

18 JUDGE BERGER: Thank you Clem,
19 thanks very much. And I should say speaking for the Commission
20 that we do appreciate that the World Council has been a
21 co-sponsor of the Commission since December 1983. Of course,
22 it was the ICC that established the Commission in the first
23 place and they have had the pulling oar when it comes to fund
24 raising, but it has been of great assistance to be co-sponsored
25 by the World Council and we thank Clem and his colleauges at
the World Council.

I have two questions I just wanted to ask Doug Sanders while they're in my mind. You said that the United States hadn't signed the -- any of the UN covenants that bear on the rights of minorities and indigenous peoples, that is putting that expression rather -- casting it rather loosely. What is the reason why the United States -- what is -- there must be an official reason given for not signing; what is the

1 reason? There must be a policy. Sandy, do you as an American,
2 want to answer?

3 MR. DAVIS: The Senate is the
4 problem.

5 JUDGE BERGER: Sorry, go ahead
6 there.

7 MR. DAVIS: The Senate is part of
8 the problem. It depends on the administration. Even now the
9 administration wants to go through with the Genocide
10 Convention, but there's Jesse Helms there in, you know, the
11 Senate Foreign Relations Committee, who, you know, has a long
12 standing opposition to that convention.

13 JUDGE BERGER: So, it's the --
14 those international conventions that are the equivalent of
15 treaties, you have to have two-thirds of the Senate concur?

16 MR. DAVIS: I think that's the
17 case.

18 JUDGE BERGER: I see.

19 MR. DAVIS: I think it's been a
20 problem too with treaties that were signed with Native American
21 people that were ratified by Congress. There's dozens of them
22 on, I'm told, from the State of California that were signed and
23 that sat in achieves and weren't discovered until the Indian
24 Claims Commission started in 1946 because they were never
25 ratified by the Senate. Am I right on that? I think so.

MR. SANDERS: Well, certainly the
conventions as treaties under U.S. law have to be ratified by a
majority of the Senate. That's the constitutionally prescribed
procedure before the United States is bound. However, I don't
accept that as an explanation as to why the U.S. hasn't signed
them.

The Canadian practice on international treaties is
that we seek, in treaties which affect the jurisdiction of the

1 provinces, which is very wide in the Canadian structure, we
2 seek the consent of the provincial governments. The text of
3 the international human rights covenants was accepted or
4 formalized by the General Assembly in 1966. Canada did not
5 sign until 1976 because, and I think this is a more complex
6 procedure than getting it through the Senate, which is, we went
7 to 10 provinces to get their consent before we signed. And
8 that's why it took us 10 years.

9 I think the United States has the problems of many
10 great powers that they are parochial. That they do not regard
11 the international level as being real. If you have power
12 you're not interested in an international legal order because
13 you can make it on your own, because you're powerful. Canada
14 has the advantage of being relatively weak, and therefore we
15 are more internationalist in our view than the United States,
16 though we're not a great power and haven't been an imperialist
17 power because we haven't, apparently, had the opportunities.
18 Although, occasionally in our history lusted after a couple of
19 colonies in the Carribean because, of course, we have greater
20 need of palm trees than the continental United States does, but
21 we never succeeded in that.

22 I think that's the key thing. But it's interesting
23 to compare the behavior of the United States and the behavior
24 of the socialist bloc countries. Because the socialist bloc
25 countries have signed all of the human rights treaties, but
they don't sign any of the implementation procedures, so that
they will do state reports, i.e., the Soviet Union itself will
file a report reporting on its own compliance with documents
like the International Covenant on Civil and Political Rights
and their representatives are subject to questioning by
international representatives in the human rights committee on
whether their report reflects reality or not in a context in
which these international people can draw on non-governmental

1 sources, publicly available information from human rights
2 investigory bodies. And so while it's not as effective as
3 having a individual complaints procedure, nevertheless, it does
4 subject the Soviet Union to a public event in which
5 international human rights experts question the country on its
6 stated compliance with the standard that it has signed.

7 There are other countries which sign, not only the
8 human rights documents, but also sign any of the special
9 implementation procedural portions. Canada signs them all and
10 the Scandanavian countries, typically, sign them all.
11 Nicaragua, interestingly, also has signed them all. And there
12 is a fair number of adherence to the treaties themselves in
13 Central and South America. And some examples of signing the
14 optional protocols on individual complaints Nicaragua and
15 Uruguay for some odd reason, are the major examples that come
16 to mind.

17 JUDGE BERGER: Oran Young and
18 then Robert -- yeah, all right.

19 MR. GOLDWIN: I have a brief
20 question just on this point. How much correlation is there
21 between those nations that sign these documents and those that
22 have -- and their record of -- how should we put it? I don't
23 want to use the word "adherence" because you're using it in a
24 technical sense related to a document. But those that really
25 do conform to requirements of protection of human rights. Some
of the ones you've mentioned have deplorably dismal records
on human rights.

MR. SANDERS: Uruguay was
particularly interesting because people in he human rights
committee couldn't figure out why the country didn't simply
denounce the convention. I guess it had some liberal spasm 10
years ago or something and it signed the thing and tremendous
series of complaints, individual complaints from Uruguay about

1 instances of torture and imprisonment, and Uruguay rather than
2 simply saying -- giving notice they were pulling out continued
3 to reply to the complaints and the procedure ground on. And
4 we, Canada, wer somewhat embarassed that the first batch of
5 complaints against nation states linked us with -- linked
6 Canada with Columbia and with Uruguay, which weren't the sort
7 of company that we normally expected to hang around with.

8 There's no answer to that at the present time. I
9 think in terms of correlation one could say that countries like
10 the Scandinavian countries where adherences is by all of the
11 countries, that the standards of economic equality within the
12 country is -- are very high by international standards and the
13 respect for human rights are very good by international
14 standards. Although those countries have had immense problems
15 with coming to terms with the claims of the Sami indigenous
16 minority in the northern areas, while they have been extremely
17 enlightened internationally. This part of the international
18 human rights agenda, if I can put it in those terms, is quite
19 recent and presented particular problems for them. So, in
20 terms of adhering to theories on the collective rights of
21 peoples, the Socialist bloc countries in many ways, in terms of
22 theory, have been way ahead of everybody else.

23 So, in terms of judging them, in many ways it's
24 better to judge them in terms of their stated principles,
25 adherence to those as opposed to the stated principles in
international law which are not well developed at the present
time. We don't yet have a consensus at the international level
of the proper conceptualization particularly, most clearly, in
two areas. One of which is economic and social rights. I
mean, the critiques by the Socialist bloc countries of the
western industrial democracies is that, sure you have concepts
of individual rights but you will have -- you allow tremendous
injustice within your economic system; the high levels of

1 unemployment which read out on a class basis. The west has
2 typically said, this stuff, while important, is not to be
3 fitted into a human rights structure.

4 And so you have a continuing debate well established
5 internationally between those two viewpoints. As well, you
6 have another debate which is more directly germane to what
7 we've been talking about today, between whether rights should
8 be perceived overwhelmingly in terms of individual rights or
9 whether collective rights of groups, either as ethnic minority
10 groups or as peoples with a right of internal
11 self-determination; whether those should be an important
12 component. You simply do not have, at the present time, a
13 consensus at the international level of a balancing of the
14 importance of these two items. If there was a consensus -- why
15 I go into this is that if there was a consensus, then it might
16 be quite possible to judge standards of compliance. Without
17 the consensus we're still at a rather preliminary stage. You
18 do have attempts at assessing compliance, the number of
19 non-governmental organizations, and, indeed, the United States
20 government itself for the last number of years does an annual
21 report on compliance with human rights standards. But the
22 criteria which were used in determining that would not be
23 universally accepted as being complete in terms of the
24 questions of adherence, which should be examined.

19 JUDGE BERGER: Oran Young and
20 then David Case, he wanted to ask something.

21 MR. YOUNG: I wanted to make an
22 American supplement of the Canadian interpretation of American
23 politics, which you just heard, and let me offer three points
24 about this question that Tom has raised.

25 The first point is this: it is hard to get treaties
ratified in the United States Senate. Whether it's easier or
harder than in other places is a separate question. It is hard

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1 and it's getting harder. It's getting harder because the
2 post-war bipartisan foreign policy consensus that was operative
3 in the United States in the late 40s and 50s and into the 60s
4 is clearly breaking down.

5 For diversity of viewpoints and the differences and
6 values and outlooks and perspectives that are reflected in the
7 composition of the Senate is growing all the time, making it
8 harder to put together a majority, a simple majority for
9 anything much less a two-thirds majority. Therefore, in order
10 to get a treaty ratified it requires a fairly substantial act
11 and exercise of political will. And what an exercise of
12 political will means in this context is a willingness on the
13 part of the administration to expend a fair number of political
14 chips. They've got to want it badly enough to be willing to
15 expend some reasonable proportion of their limited capital.

16 JUDGE BERGER: Like Carter and
17 the Panama Canal Treaty.

18 MR. YOUNG: Carter expended a
19 large proportion of his foreign policy chips to get that
20 through and barely managed to do and (INDISCERNIBLE). It was a
21 big decision on his part. It's hard for an administration at
22 any time. It's harder still for the administration that's
23 getting ready to face a re-election campaign or for an
24 administration that's becoming a lame duck administration when
25 it's no longer likely to submit itself to re-election.

So, the first point I want to make is that it's got
to be a high priority and for various reasons a number of these
particular treaties that we've been talking about just haven't
made it on to high enough priority on the agenda or the sort of
scale of concerns of the administrations that have been dealing
with.

The second point I wanted to make is that one of the
big problems I think from the point of view of ratifying these



1 treaties is not so much a kind of parochialism as Doug
2 suggested, but the Americans in the post-war period have always
3 thought of the American empire as a liberal empire and a
4 cosmopolitan empire. This, of course, may seem different when
5 looked at from a non-American vantage point, I admit. But the
6 Americans have always sort of portrayed themselves as
7 broadminded and a different kind of an empire, a liberal
8 empire, an empire beyond reproach with respect to sensitivity
9 and concern for all of these sorts of rights. Of course, after
10 all look at the 200 year glorious history and our sacred
11 documents, and so on, and therefore, the fact that people push
12 these issues is somehow rather preceived within this world view
13 as a kind of a criticism. Something that's -- you know, why do
14 you need to raise these kinds of problems, of course, it goes
15 without saying, but (INDISCERNIBLE - NATIVE) is sensitive to
16 these kinds of things. It doesn't need to be enshrined in
17 these documents and the more to do so is niggardly criticism,
18 it should really be made.

19 And the third point I wanted to raise is that as we
20 go on now into the '80s and further into the Reagan era, awful
21 as that may be from a lot points of view, we are as you all
22 know, moving into an era in which the senior officials of the
23 American Federal Government are now more and more taking a kind
24 of a knee jerk negative attitude toward almost anything
25 associated with the United Nations and the specialized agencies
of it. Now, it's a long story and a sad story as to why this
is the case, but increasing politically in this country
anything that can be associated with the United Nations and its
connected organizations will almost automatically be regarded
in a rather critical light at best, and in more likely a
negative light, and that's a very unhappy development. It's a
very unfortunate thing, but it's a political reality in this
country that can't be denied.

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JUDGE BERGER: David, did you --
now look it's past 4:30 and I think we have to adjourn, but
David and I and Rosita...Rosita had to go see the eye doctor
this afternoon, but she'll be back tomorrow. We'll carry on
tomorrow morning with this discussion with Sandy and Henry and
then, perhaps, move on to other matters. I think everyone is
eager to continue the discussion tomorrow, so I suggest that we
start at our usual time, 9:00 AM precisely.

(MEETING ADJOURNS)



