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土著问题

人权和土著问题

土著人民人权和基本自由情况特别报告员鲁道夫·斯塔文哈根先生
根据委员会第 2003/56 号决议提交的报告

增 编

对智利的访问*

* 本报告的内容提要以所有正式语文分发。报告本身载于内容提要的附件，仅以原文和英文分发。

内 容 提 要

本报告根据人权委员会第 2003/56 号决议提交，述及土著人民人权和基本自由情况特别报告员于 2003 年 7 月 18 日至 29 日对智利进行的正式访问情况。

1993 年，智利通过了《土著人民法》(第 19,253 号法令)，在这部法律中，国家承认土著人民是“自哥伦布到达美洲之前时期以来就一直在国境内存在，并且保持了自身的民族和文化表达方式的人类群体的后裔，土地是这些人类群体的生存及其文化的主要基础”。智利境内的主要土著民族群体有：马普切人、艾马拉人、拉帕努伊人或帕斯库恩塞人、阿塔卡梅诺人、盖丘亚人、科拉人、卡瓦西卡人或阿拉卡洛夫人、亚马纳人或亚岗人。智利境内现有大约 70 万土著居民，占总人口的 4.6%。

尽管自智利恢复民主制度以来作出了一些努力，但是，由于遭受社会中的多数群体的长期剥夺、社会和经济排斥以及歧视，土著居民现在仍然在总体上遭到忽视，并且被排斥在公共生活之外。智利仍未在这一方面实行宪法改革，而且尚未批准国际劳工组织《土著和部落居民公约》(第 169 号公约)。

人权问题依然影响到该国境内的所有土著居民，虽然公众主要关注的是马普切人的状况。应当首先注重的是土著居民的高度贫困现象及其非常低的生活水平，用各种人的发展指标来衡量，此种生活水平低于国家平均水平。政府的福利政策产生了相当大的效果，但迄今为止不足以纠正这种状况。

一个影响到智利境内土著居民的最为严重的长期问题是土地所有权和土地权问题，这一问题的根源在于土著居民长期遭受剥夺，因而失去土地和资源。智利民主政府制订的为土著居民征用土地的计划进展缓慢，而且经费不足—该计划规定私人可以拥有数块土地，但没有规定归还以前的公地。所以，这项计划无法推广到所有需要该计划的地区，这就引起了土著居民的不满。当涉及开采和利用地下资源和其他资源包括水资源和海洋资源时，问题变得更加复杂。各种部门法律现在便利和保护对传统上属于共有财产的资源私人产权的登记注册。

对土著居民权利的保护和促进现在受到以下情况的影响：在 Alto Biobio 修建 Ralco 水电站；在内部干旱地区的艾马拉人和阿塔卡梅诺人获取和利用水资源方面出现了问题；Araucanía 沿海地区的许多 Lafkenches 家庭受到限制，从而使其在从事传统的渔业和捕捞海产品方面受到阻碍。

过去 13 年中，政府在经济和社会领域作出了相当大的努力，但是土著社区对社会服务的要求遭到压制。尽管许多土著居民和其他人一样，已经从近年来的持续经济增长中得益，但是土著居民的生活水平现在仍远低于全国平均水平和智利非土著居民的水平。尽管贫困程度在下降，但是严重的经济不平等现象对土著居民影响的程度要高于其他智利人。例如，在卫生保健领域，特别报告员提请人们注意土著居民在享受医疗服务方面和所得到的医疗服务的质量方面遭受的有系统的歧视。土著社区的传统医药如果不是被完全禁止，也可以说遭到了贬低和忽视。为在土著地区的一些医院提倡结合使用不同种族的医药而作的一些少量尝试取得了可喜的成果，但有关方案仍处于初级阶段。

尽管在双语文化教育方面作了一些努力，但是多数土著社区仍然没有能够得益于这项方案，教育系统尚未充分满足土著居民保护、维持和促进其传统化的要求。在特别报告员访问的所有地区，都听到了要求保护土著居民文化特性的呼声。例如，北部地区的阿塔卡梅诺人和盖丘亚人抱怨说，由于在太平洋战争之后遭受“智利化”，他们的语言已经丧失。拉帕努伊人认为，由于越来越多的人移居到他们的岛屿，还由于他们传统上的管理机构对人员流入产生的影响毫无办法，他们的特性遭受着威胁。

在以上结论的基础上，特别报告员主要提出以下建议：与土著事项相关的宪法改革进程应当加快；应当迅速批准国际劳工组织第 169 号公约；任何与《土著人民法》相抵触的部门立法都应当加以修改；应当制定一项减轻土著社区贫困状况的计划，该计划订有现实、明确的议程；应当采取必要步骤设立一个国家人权机构。还建议：作为紧急事项重视预防和解决土地占有和使用方面的冲突；提高土地基金的灵活性并对其加以扩充；保障土著社区获取和利用水资源和海洋资源；采取必要措施，避免将正当的抗议活动或社会要求定罪；提供高质量的双语法律援助。

Annex

**REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS
PEOPLE, Mr. RODOLFO STAVENTHAGEN, ON HIS MISSION TO
CHILE (18 to 29 July 2003)**

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Introduction

1. Pursuant to Commission on Human Rights resolution 2001/57 of 24 April 2001, which established his mandate, and at the invitation of the Chilean Government, the Special Rapporteur visited Chile from 18 to 29 July 2003. His visit coincided with the final phase of the work of the Historical Truth and New Deal Commission, with whose members the Special Rapporteur was able to talk at length.
2. The Special Rapporteur would like to express his gratitude to the Government of Chile for its invitation and cooperation and to the Ministry of Development and Planning (MIDEPLAN) for organizing so efficiently the part of the schedule devoted to contacts with government institutions. He would also like to express his appreciation to the office of the Regional Representative/Adviser for Latin America and the Caribbean of the United Nations High Commissioner for Human Rights and to the office of the United Nations Development Programme (UNDP) in Chile for their excellent work in organizing a full and well-planned schedule of meetings and in taking care of the arrangements and logistics for the mission. He would also like to thank the many indigenous organizations that gave their time and provided useful information. Finally, he would like to thank the Inter-American Institute of Human Rights for its cooperation and, in particular, the Institute's Diego Iturralde for his support during the mission.
3. The indigenous population of Chile currently numbers almost 700,000 persons, or 4.6 per cent of the total population. The largest indigenous group is the Mapuche people, which is concentrated in the south and which is in turn subdivided into various indigenous territorial groups (the Huilliche, Lafkenche, Pehuenche and Nagche). A sizeable contingent of Mapuche people also lives in the metropolitan area of Santiago, where they are classed as "urban Mapuche" ; their characteristics and problems differ significantly from those of the Mapuche in the south. The Aymara (7.1 per cent of all indigenous people) , Quechua (0.89 per cent) , Colla (0.46 per cent) and Atacameño (3.04 per cent) peoples live in the north of the country. The Rapa Nui people - nowadays down to about 2,000 persons - live on Easter Island, and a small number of Kawashkar and Yagán remain in the far south. The situation of most indigenous people is one of poverty and marginalization as a result of the discrimination from which they have historically suffered.
4. This report contains the Special Rapporteur's assessment of the situation of indigenous people in Chile and is based on information from various sources and on an exchange of views with State and municipal authorities, leaders and representatives of indigenous communities and representatives of indigenous, human rights and non-governmental organizations.

I. SCHEDULE FOR THE VISIT

5. The schedule for the visit included talks with national and regional government officials in Santiago, Temuco, Iquique and Arica. In Santiago, the Special Rapporteur met with the President, Mr. Ricardo Lagos ; the Minister-Secretary General of the Presidency,

Mr. Francisco Huenchumilla ; the Minister for Foreign Affairs, Ms. Soledad Alvear ; the Minister of the Interior, Mr. José Miguel Insulza ; and the Under-Secretary at the Ministry of Development and Planning, Mr. Jaime Andrade. The Special Rapporteur also had meetings with members of the President's Strategic Analysis Group, members of the Indigenous Policies and Programmes Coordinating Group, which includes representatives of various ministries with responsibility for issues that affect indigenous people, and with the President and members of the Senate Commission on the Constitution, Legislation, Justice and Regulations. He also had several meetings with Mr. Patricio Aylwin, President of the Historical Truth and New Deal Commission, and members of the Commission.

6. On his trip around the various regions, the Special Rapporteur visited indigenous communities, met with local officials and with members of civil and grass-roots organizations, and had meetings with representatives of indigenous peoples in Temuco, Ralco, Iquique, San Pedro de Atacama and Santiago. Although he was unable to travel to Easter Island, the Special Rapporteur met with representatives of the Rapa Nui people in Santiago, where they told him of their concerns and hopes and explained the implications of the island's future special status.

7. The Special Rapporteur gave two lectures during his visit to Chile, one on 18 July at the First International Seminar on Indigenous People, at the headquarters of the Economic Commission for Latin America and the Caribbean (ECLAC) , and the other on 21 July at an international seminar entitled "Human rights and indigenous peoples : international trends and local realities" , organized in Temuco by the University of La Frontera.

II. HISTORICAL BACKGROUND AND CONTEXT : A NEW DEAL FOR NATIVE PEOPLES

8. The present situation of indigenous people in Chile is the outcome of a long history of marginalization, discrimination and exclusion, mostly linked to various oppressive forms of exploitation and plundering of their land and resources that date back to the sixteenth century and continue to this day. The current problems facing indigenous peoples cannot be understood without reference to the history of their relations with Chilean society.

9. After the first Spanish colonizers settled in the central valley in Chile, the native population began to disappear as a result of the conquest and colonization, and the survivors were gradually absorbed and integrated into the nascent Chilean population. Several attempts by the Spanish to subjugate the Mapuche failed and the Crown recognized the independence of these peoples in various agreements (*parlamentos*) , respecting their territorial sovereignty south of the Bío Bío river, which became a real, though porous, border between two societies and two cultures. The Chilean Republic maintained the same relationship with the Mapuche nation during the first half of the nineteenth century, but Chilean forays into the region gradually weakened indigenous sovereignty and led to several conflicts.

10. Finally, in 1888, Chile embarked upon the military conquest of Araucanía in what became known in the official history books as the "pacification of Araucanía" , which brought

about the integration of the region into the rest of the country. In addition, as a result of the war of the Pacific (1879-1883) , the Aymara, Atacameño, Quechua and Colla groups in the north of Chile were also integrated. Also in 1888, Easter Island, the natural home of the Rapa Nui people, was annexed following an agreement between the island authorities and the Chilean Government. The main outcome of this period for native peoples was the gradual loss of their territories and resources, as well as their sovereignty, and an accelerated process of assimilation imposed by the country's policies and institutions, which refused to recognize the separate identities of indigenous cultures and languages. Chilean society as a whole, and the political classes in particular, ignored, if not denied, the existence of native peoples within the Chilean nation. The exclusion of native peoples from the popular imagination in Chile became more pronounced with the construction of a highly centralized State and lasted, with a few exceptions, until the late 1980s.

11. President Salvador Allende, who was elected in 1970, introduced various social reforms and speeded up the process of land reform, including the return of land to indigenous communities. The military regime that came to power following the coup led by Augusto Pinochet reversed the reforms and privatized indigenous land, cracking down on social movements, including those representing indigenous people and the Mapuche in particular.

12. The treatment of indigenous people as if they were "invisible" did not begin to change until the decline of the military regime, when their most representative organizations began to push a number of demands for recognition of the rights denied to them. The return to democracy in 1989 signalled a new phase in the history of the relationship between indigenous peoples and the Chilean State, embodied in the Nueva Imperial Agreement signed by the then presidential candidate, Mr. Patricio Aylwin, and representatives of various indigenous organizations, and culminating in the 1993 Indigenous Peoples Act (No. 19,253) , in which, for the first time, the Chilean Government recognized rights that were specific to indigenous peoples and expressed its intention to establish a new relationship with them.

13. Among the most important rights recognized in the Act are the right to participation, the right to land, cultural rights and the right to development within the framework of the State's responsibility for establishing specific mechanisms to overcome the marginalization of indigenous people. One of the mechanisms set up in this way was the National Indigenous Development Corporation (CONADI) , which acts as a collegiate decision-making body in the area of indigenous policy and which includes indigenous representatives.

14. In order to provide a comprehensive response to indigenous demands, the Office of the Under-Secretary at the Ministry of Development and Planning was designated as the executive coordinator of indigenous programmes and policies and set up a comprehensive development programme for indigenous communities entitled "Origins" , which was designed to improve the living conditions and promote the development of the Aymara, Atacameño and Mapuche peoples in rural areas while respecting their identity.

15. To back up the State's indigenous policy in this new phase, the Government of President Ricardo Lagos set up the Historical Truth and New Deal Commission, chaired by former President Patricio Aylwin and consisting of various representatives of Chilean society

and indigenous people. Its mandate was to investigate “the historical events in our country and to make recommendations for a new State policy”. The Commission submitted its report, conclusions and proposals for reconciliation and a new deal between indigenous people and Chilean society in October 2003. Constitutional recognition of indigenous rights is still pending, as is the country’s adoption of international standards in this respect, as the bills submitted by the executive to Congress have been blocked by the majority in the Senate.

III. HUMAN RIGHTS SITUATION OF INDIGENOUS PEOPLE IN CHILE : PRIORITY ISSUES

16. Poverty and indigenous origins are closely correlated in Chile. The majority of indigenous people, particularly the Mapuche in Araucanía, suffer from high levels of poverty and low levels of human development as a result of their long history of discrimination and social exclusion, particularly during the military dictatorship.

Indigenous people and poverty in Chile

The incidence of poverty is significantly higher among indigenous populations (35.6 per cent) than among non-indigenous populations (22.7 per cent).

On average, indigenous families’ income is less than half that of non-indigenous families.

School attendance among indigenous children is 2.2 years less than the average for non-indigenous children (9.5 years) and only 3 per cent of the rural Mapuche population over the age of 15 have any post-secondary education.

Only 41 per cent of indigenous people’s homes have drains, 58 per cent running water and 65 per cent mains electricity.

The infant mortality rate among indigenous peoples is above average, particularly in rural areas, where it exceeds 50 per cent in some municipalities.

Source : World Bank, August 2001.

17. The great challenge now is to strike a balance between the country’s economic and social development and the protection of the right of indigenous communities to an ethnic identity. The exclusion, discrimination and denial from which the indigenous people of Chile have historically suffered have also prevented them from taking an active part as citizens in the democratic transformation of the country. The participatory mechanisms envisaged in the Indigenous Peoples Act have not had the desired result ; nor have they managed to expand opportunities for autonomy as demanded by many indigenous groups.

18. Against this general background, the visit brought to light some specific human rights issues that are priorities for the indigenous peoples of Chile, some of which are described in detail in the following section. During his visit, the Special Rapporteur was handed a large amount of documentation on this subject. As it would be impossible to refer to all this information given the constraints on the length of this report, some of the most pertinent situations or cases are presented below in boxes.

A. Land and territory

19. One of the most pressing problems affecting the native peoples of Chile concerns their ownership of land and territorial rights, particularly in the case of the Mapuche. According to the information given to the Special Rapporteur by various Mapuche leaders and by experts, and his own observations, the following are the main problems :

(a) The land owned by the Mapuche is extremely limited and overexploited ;

(b) The communities' lands are in remote locations on private property, mostly inside vast forest plantations that are fenced off and protected by private guards (leading to transit problems and harassment and cutting off access to the woods) ;

(c) As a result of the development of the forest plantations, the soil on Mapuche land has lost its sources of water (for drinking and irrigation) and the woodland fauna (that were part of their diet) and undergrowth vegetation (traditionally used for ritual, medicinal and nutritional purposes) are in decline or have disappeared ;

(d) The use of herbicides (when planting and cultivating new forest species) and pesticides (to maintain new woodlands) applied from crop-spraying planes and other phytosanitary practices affect health and crops in various ways ;

(e) Lumbering in mature forests is causing pollution in lakes, rivers and streams, substantially reducing their ichthyological (fishing) potential.

20. Pursuant to the Indigenous Peoples Act, which established the Land and Water Fund to expand indigenous lands, about 255,000 hectares of disputed land have been acquired, transferred or regularized since 1993. However, the Special Rapporteur was told by representatives of these communities that this mechanism for recovering land, after initially raising indigenous people's hopes, soon proved inadequate, in part because of speculative price increases and procedural delays, which left the indigenous population frustrated and disappointed. President Lagos told the Special Rapporteur that many land disputes involving the Mapuche were due precisely to this situation. The Government's Indigenous Policies and Programmes Coordinating Group explained to the Special Rapporteur that the indigenous land policies followed so far needed to be rethought and a land bank set up to prevent speculation.

21. The land issue is also a priority for the Rapa Nui people, which is having to deal with tensions over land tenure and resource management on Easter Island. Although the Indigenous Peoples Act guarantees the protection of Rap Nui land, Decree Law No. 2885 (1979) allows all

“Chileans who come from the island” , not just indigenous inhabitants, to be granted free documents of title. It is estimated that 18 per cent of the surface of the island is today in the possession of the Rapa Nui, while the rest of the territory is State-owned.

The Special Rapporteur met in Santiago with the Rapa Nui Council of Elders, whose members expressed concern about the “constant threat to land ownership” that islanders have to live with. Among other problems, the Council representatives and the island’s mayor pointed out that the law allows Chileans who come from the island, and not necessarily Rapa Nui indigenous people, to purchase land. The Government, for its part, explains that the current legislation does not allow foreigners to purchase properties of any size on Easter Island.

22. Another issue of great concern to indigenous communities relates to the exploitation of forests. Plantations have been established under Decree Law No. 701 of 1974, which subsidizes firms in the forestry sector. With the support of public institutions (the National Forestry Corporation and the Forestry Institute) and private ones (Corporación de la Madera) , the area covered by forest has grown considerably and in recent years has also engulfed numerous small properties. Communal lands have gradually been getting smaller and have been cut off in the middle of private properties, mostly inside vast forest plantations that are fenced off and protected by private guards. This gives rise to transit problems and harassment or cuts off access to the woods, and thus to the Mapuche people’s traditional means of sustenance. The impact of the development of forest plantations on the soil on Mapuche land is particularly worrying. The communities interviewed complain that their sources of water for both drinking and irrigation purposes are diminishing and that the woodland fauna that forms part of their diet and the undergrowth vegetation traditionally used for ritual, medicinal and nutritional purposes are in decline or have disappeared.

23. The introduction of single-crop forests of exotic species such as pine or eucalyptus by the powerful transnational forestry corporations that now control a large part of Mapuche territory has had negative effects on the local environment. The increased use of herbicides and pesticides applied from crop-spraying planes is affecting the health of indigenous people and has led to a break in the traditional food chain, the drying-up and pollution of rivers and springs, at considerable cost to their ichthyological (fishing) potential, and the disappearance of the rich and varied traditional fauna and flora which are vital to the survival of the Mapuche communities. Members of these communities can no longer devote themselves freely to hunting and gathering in order to live, which not only affects the food economy but also their traditional herbal medicine, their spiritual life, and the social and cultural fabric of their communities. This process has led to growing poverty in the region and has forced many young people to migrate to the cities in search of new opportunities.

24. In recent years, a number of social conflicts have arisen in connection with the impact on the human rights of indigenous people of the start of work on major development projects, including the Temuco bypass, the coast road and dam construction. In this context, the classic

case of a project involving the State, the private sector and indigenous communities is perhaps, as has already been pointed out by the Special Rapporteur elsewhere (E/CN.4/2003/90) , the construction of the Ralco hydroelectric plant in Alto Bío-bío, which led to the displacement of dozens of Pehuenche families from their traditional habitat.

The Ralco project

In the course of his visit to Chile, the Special Rapporteur met with Pehuenche families opposed to the Ralco project, the lawyers representing them and representatives of Endesa, the company building the dam. Together, they discussed in detail the various consequences that the project has had since its inception. On the basis of these conversations and the wide range of materials presented by the parties, the Special Rapporteur was able to establish that :

(a) There were serious irregularities in the design, planning and implementation stages of this project and the one at Pangué, which are part of a larger integrated project. These irregularities have been fully documented and acknowledged by the Chilean Government, the courts and the Inter-American Commission on Human Rights. The neighbouring Pehuenche communities affected by the construction work were not consulted, nor were their needs and rights taken into consideration in the crucial stages of the project, which was carried out over the opposition on technical grounds of CONADI and other State services ;

(b) After long and difficult negotiations between the construction company, the Government and the people affected, a land swap was agreed to and carried out on terms that were generally unfavourable to the Pehuenche ;

(c) To meet some of the needs of the relocated Pehuenche population, the Endesa company's Pehuen Foundation provided welfare, educational and cultural programmes. However, the communities are finding that this help is not proportionate to the losses they have suffered as a result of the construction of the dam or to the profits the company will earn from its use ;

(d) Despite resistance by a small number of families and the precautionary measures requested by the Inter-American Commission on Human Rights, there was no let-up in the pace of construction.

25. As he was completing this report, the Special Rapporteur was informed about an agreement reached between the parties which would allow construction to be completed as the Pehuenche families still objecting to resettlement had reached an agreement that would put an end to the conflict. The Government told the Special Rapporteur that the agreement was satisfactory to all sides and that the conflict was considered settled. Bearing in mind that it is impossible to quantify the harm caused since the beginning of the project, the Special Rapporteur trusts that the negotiations have allowed the families to obtain appropriate and commensurate compensation for the loss of their ancestral lands and sites.

26. The issue of the right to land becomes more complicated when it concerns access by indigenous people to underground resources and other resources such as water and maritime resources, which are vital to their subsistence economy and traditional cultural identity. Various sectoral laws, such as the 1981 Water Code, despite a number of reforms made to them, facilitate and protect the registration of private property rights over resources that have traditionally belonged to indigenous communities. In the arid northern region, for example, access to water is vital to the lives of the Aymara, Atacameño and Quechua rural communities, but is often denied to them because the resources have been appropriated by mining companies. Along the coast of Araucanía, many Lafkenche families have had what used to be free access to their traditional fisheries and coastal resources restricted by the registration of vast stretches of coastline in the name of *huincas*, or non-indigenous persons, in accordance with the provisions of the Fisheries Act and to the detriment of the Mapuche communities.

During his visit to the north of the country, the Special Rapporteur had meetings with representatives of the Aymara, Quechua and Atacameño peoples in Iquique and San Pedro de Atacama, who brought up the following issues :

(a) They complain that most of the water resources already have owners and that all the rights to underground water are being allocated to the mining company, not to the communities trying to pursue their traditional economic activities ;

(b) The proliferation of sectoral regulations and their position in the legislative hierarchy are affecting the implementation of the Indigenous Peoples Act. They complain that the Mining Code and the Water Code are given precedence over the Act ;

(c) They complain that applications by indigenous communities for water rights are dealt with in a discriminatory fashion as compared with those by mining companies and that the existing mechanisms for environmental impact assessments are inadequate ;

(d) The communities condemn the failure to provide information and to involve them when regulations are adopted or actions taken that concern their territory and the natural resources traditionally considered to belong to them.

27. Under Chilean legislation, the regulations governing water, the subsoil and maritime and lake resources are completely independent of those governing land ownership and the productive use to which they may be put : the rights to “ownership” and “use” may be granted freely by the State to anyone who applies for them. Under this system, the concessions for most of the springs and streams in indigenous areas have been granted to third parties, including the owners of forest plantations. Likewise, many concessions have apparently been granted for mining exploration and production on indigenous land. This situation also affects communities living on the Pacific coast or beside lakes, who are facing the loss of their traditional right to extract resources from the sea.

The Special Rapporteur received information on the problems confronting the Mapuche Lafkenche identified with the coastal region, including the lack of consultations on the construction of a road that would affect 10 Lafkenche communities and the effects of implementing the 1992 Fisheries and Aquaculture Act, under which unions must be set up to manage maritime resources in a given area.

The persons interviewed claim that these actions infringe upon the rights set out in the Indigenous Peoples Act with regard to consultations on issues affecting them and their communities' traditional right to use these resources, and that their access to the sea has been restricted.

B. Social grievances and conflicts

28. The Special Rapporteur was informed about the growing number of conflicts in the Mapuche area, including in Regions VIII, IX and X. Most of the conflicts reported stem from Mapuche land claims and generally involve one of three types of protest :

(a) The organization of pressure groups acting on behalf of those who have unsuccessfully applied for additional land or for the restitution of their land ;

(b) The occupation of disputed land, as a means of applying direct pressure and gaining publicity ;

(c) The occupation of land that is not the object of any ongoing legal claim, involving actions that are serious by definition (such as setting fire to forest plantations or buildings, destroying equipment and fences or blocking communication routes) and clashes with the police.

29. As will be appreciated, the distinctions between these three types of protest are not clear-cut and in some cases a transition from one to another can be observed, depending on whether there are delays or problems in finding solutions to the demands for additional land and for restitution of land. It should also be pointed out that the third, and most serious, type of conflict occurs mostly in the provinces which have higher concentrations of indigenous people and higher poverty rates and which were adversely affected between 1973 and 1990 by the reversal of the measures taken to implement land reform.

During his visit to Temuco, the Special Rapporteur was able to talk to relatives of a 17-year-old youth, Alex Lemún, who died on 13 November 2002 from his injuries after being shot by the police (*carabineros*) during a clash. Reports say that Alex Lemún died after being shot several times during a demonstration calling for the return of the Santa Alicia estate, which is controlled by a large lumber company. Alex Lemún was a member of the Arauco Malleco Coordinating Committee.

The Special Rapporteur regrets that the necessary steps have not yet been taken to punish those responsible or compensate the family, and calls on the Government to take the necessary steps to resolve this matter. It is a matter of concern that the police officer responsible for the young man's death was released in September 2003.

30. Since the Indigenous Peoples Act was adopted, it has been possible to deal with these problems through administrative procedures conducted by CONADI, which are generally aimed at negotiating with the parties and acquiring the disputed land for subsequent allocation to the indigenous people. However, this solution has been gradually becoming less effective for various reasons, including the limited resources of the Land Fund, the gradual rise in the asking price for land that is to be expropriated or sold - either because of improvements made (to plantations or buildings) or because of speculation related to the growing demand from indigenous people - and the constantly growing number of land claims.

31. Because it is becoming increasingly difficult to find and apply timely solutions and because pressure, mainly in the form of the seizure of lands by the Mapuche, is growing, the preferred course is to take these problems to the criminal courts. In the last few years there has been an increase in the number of criminal cases brought against the leaders of Mapuche communities and organizations. These cases are reportedly related to offences against private or public property and attacks on police officers during protests or the occupation of land and buildings. In addition, several informants expressed concern about the large and permanent police presence in the communities, where inquiries were sometimes accompanied by physical and verbal abuse, leaving the population in a state of fear.

32. In recent years, Chile has reformed its rules on criminal procedures. The reform includes the following measures : a division of the tasks of investigation, defence and judging/sentencing between the Public Prosecutor's Office, the Public Defender's Office and the judge or court ; the elimination of secrecy during the pre-trial proceedings ; the introduction of oral proceedings during the trial ; the possibility of taking preventive measures other than pre-trial detention ; and the possibility of handing down sentences suited to the social and cultural circumstances of the accused as an alternative to imprisonment.

33. As pointed out to the Special Rapporteur by the national authorities in this branch of government, the reform establishes a procedure that guarantees the rights of the parties better than the inquisitorial procedure that predominated in previous legislation. In particular, the new system provides for the use of a person's mother tongue and the presence of a translator ; guarantees that defence counsel will be provided by the State ; allows a number of cultural and social factors to be taken into account as mitigating circumstances ; requires any evidence provided by community authorities to be evaluated ; and permits alternative punishments to imprisonment.

34. The reform of criminal procedure is being introduced gradually throughout Chilean territory. Region IX is one of the first two regions where it is being put into practice : the relevant institutions - the Regional Prosecutor's Office and the Public Defender's Office - have been set up. The Regional Prosecutor's Office has posted one of its officials (a prosecutor) to the regions with the highest density of Mapuche inhabitants and the Public Defender's Office has started a special programme to deal with cases in which the accused is a Mapuche.

35. In the past year, under the reformed criminal procedure, proceedings have been started against a group of Mapuche leaders with links to a de facto coordinating group for the offence of “conspiring to commit a terrorist act” and other offences (mostly setting fire to forests, buildings and equipment). For this reason, a large number of leaders have been in pre-trial detention since December 2002. According to the information given to the Special Rapporteur, this offence is defined in the Counter-Terrorism Act, which has been in force since the military Government took power in 1973 and which provides for the prosecution of illicit acts intended to terrorize the population. The provisions of the Act modify some aspects of criminal procedure, permitting some elements of secrecy in the pre-trial investigation phase, eliminating preventive measures other than pre-trial detention, and increasing sentences. The possibility of protecting witnesses, which is permitted under the Anti-Terrorism Act, cancels out some of the advantages of oral proceedings and introduces a serious imbalance in the weight given to oral testimony as opposed to documentary and material evidence.

36. Finally, under the legislation still in force, all acts involving a member of the police or armed forces as the alleged perpetrator or victim of an offence are outside the jurisdiction of the ordinary criminal courts (and thus the scope of the Public Prosecutor’s Office and Public Defender’s Office) and are referred to military courts, which follow their own procedures.

37. In the opinion of some experts, this combination of a new criminal procedure, the counter-terrorist law and military jurisdiction creates a situation in which the right to due process is weakened, and this affects, in a selective way, a clearly identified group of Mapuche leaders. This is a matter of concern, regardless of the seriousness of the acts in which they may have been involved, with regard to respect for their right to due process.

The Special Rapporteur visited Ms. Mireya Figueroa, an indigenous Mapuche woman from the Tricauco community in Region IX, in the women’s prison in Temuco. She had been held for over six months while awaiting trial, accused, according to a letter sent to the Special Rapporteur in July 2003, of a terrorist attack, arson and conspiracy. During the meeting, she reported several irregularities in the case, including flaws in the investigatory process that undercut several procedural guarantees.

The Special Rapporteur, in his meetings with officials, expressed his concern about the irregularities in the case of Mireya Figueroa and also about the length of time she had been waiting for trial, all of which raised doubts about the protection of her fundamental rights.

38. The situation described above is perceived by most traditional leaders of indigenous communities and by the activists in their organizations as an attempt to criminalize their protests, which they see as a just claim for land and a basically political demand for a new deal from the State.

While the Special Rapporteur was in Temuco, various Mapuche organizations from Regions VIII, IX and X, including the organization Aukin Wallmapu Ngulam (Council of All Lands) , the Autonomous Mapuche Commission (COTAM) , the Coordinating Committee of Mapuche Communities in Conflict in Panguipulli, the Coordinating Committee of Mapuche Communities in Traiguén, Newen Mapu de Ercilla, and the Coordinating Committee of Mapuche Communities in Collipulli, presented him with documents in which they claim to have been the victims of “unjust persecution via the courts” since 1992 on account of their activities in support of their claim to have their traditional rights observed.

The individuals interviewed condemned in particular several procedural irregularities in the cases brought against them for their campaigns over the land issue and drew the Special Rapporteur’s attention to the “police cordon” allegedly thrown around them for taking part in actions to recover their ancestral lands and territories.

The complainants submitted the case to the Inter-American Commission on Human Rights, which, in February 2002, declared the complaint on alleged violations of the rights protected in various articles of the American Convention on Human Rights admissible. This declaration followed the failure of several attempts to find a friendly settlement in the dispute between the Chilean Government and the Mapuche petitioners.

39. In addition, the Senate Commission on the Constitution, Legislation, Justice and Regulations prepared a study on the Mapuche conflict in relation to public order and public safety, a copy of which was given to the Special Rapporteur. The Commission expresses “its deep concern over the serious changes in the applicability of the principle of legal safeguards in the regions of Bío Bío and Araucanía. It considers that the Government is not fulfilling its obligations to protect farmers and legitimate landowners from criminal or even terrorist acts. It acknowledges that only a minority of Mapuche organizations are committing acts of violence against farmers, but these are unjustified, as their rights to the land are guaranteed in the existing laws, and the conflict is due to poverty and the ineffectiveness of government policies”.

40. Some members of the Senate Commission, expressing a minority view, maintain that the Mapuche conflict cannot be reduced to a question of public order and safety and that the demands of indigenous communities must be dealt with, a view shared by the Special Rapporteur. The so-called Mapuche conflict should be viewed from every angle, and all of its aspects, not just public safety, need to be considered. This would help forestall actions against Mapuche organizations that are being used as a way to criminalize a legitimate demand and to turn what is essentially a social conflict into a judicial one.

During his visit to Temuco, the Special Rapporteur received information on a case involving two *lonkos* (community leaders) that arose in the context of the recent reform of criminal procedure. In a conflict over land, the *lonkos* Pascual Pichún and Aniceto Norín, from Region IX (Araucanía), were accused in December 2001 of setting fire to a well-known pine forest on the Nanchahue estate belonging, it is said, to a famous national politician. They were arrested under the Counter-Terrorism Act and other offences were added to the charges against them. After over a year of pre-trial detention, the court acquitted them of the charges of “terrorist attacks and threats” for lack of evidence, after the statements made by the “faceless witnesses” produced by the prosecution were set aside.

In July 2003, the Supreme Court of Justice accepted an appeal for annulment submitted by the plaintiff and the State prosecutor and ordered a new trial of the *lonkos*. In September they were sentenced to a prison term of five years and one day for posing a “terrorist threat”.

The Special Rapporteur cannot help but express concern at such an extraordinary situation, which has arisen in the context of a social conflict and in which the right to due process could be violated and the impartiality of a respected body such as the Supreme Court of Justice could be called into question.

C. Limitations of the Indigenous Peoples Act and constitutional recognition

41. The problems discussed above have arisen within an ambiguous legislative framework that has not so far been very conducive to the protection of the identities of native peoples. As it stands, the Indigenous Peoples Act does not provide adequate mechanisms to protect indigenous people's human rights and this has led to a feeling made abundantly clear to the Special Rapporteur by the indigenous representatives he talked to that the present law does not afford them sufficient protection. This is why, in addition to other considerations relating to the position of social exclusion, marginalization and subordination that indigenous people hold in Chilean society, they are calling for constitutional recognition by the State and for Chile to ratify ILO Convention No. 169.

42. The Governments of the Democratic Concertation that succeeded the military regime have heeded the demands of indigenous people and have on several occasions sent Congress proposals for the reform of the Constitution and the ratification of ILO Convention No. 169, but these have been rejected by Parliament. The Special Rapporteur makes an urgent appeal to the Chilean Chamber of Deputies and Senate to agree to the constitutional recognition of indigenous peoples and their rights and to ratify Convention No. 169. There is also a need to review all sectoral legislation that in practice infringes on the ancestral rights of indigenous communities, in order to bring it into line with modern human rights standards. Failure to do so could, in the Special Rapporteur's opinion, lead to considerable social conflict, with the consequent threat to the democratic stability and governance of the country.

43. The possible constitutional reform mentioned above is intended to give constitutional recognition to indigenous peoples, but its adoption is being delayed by debates on the use of the

term “peoples”. The Special Rapporteur believes that the right of peoples to self-determination, as a universal human right (enshrined in article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which Chile has ratified) , applies to all peoples, including indigenous peoples, as reaffirmed in ILO Convention No. 169 and other international instruments.

44. The constitutional reforms undertaken by many countries in recent decades have not been concerned with limiting or circumscribing this human right but rather with establishing the conditions in which it can be exercised, given the particular circumstances in each country. Similarly, a new relationship between the Chilean State and its native peoples could allow them to determine perfectly well the conditions for the exercise of this right on the basis of democratic consensus and with the full participation of the indigenous population, without violating the principle underlying this universal right.

D. Health, education and the preservation of indigenous culture

45. There is a pent-up demand for social services by native communities, with particularly strong demands in the fields of education, health and housing. While many indigenous people have benefited from the sustained economic growth of recent years, their standard of living is generally far below the national average and that of non-indigenous Chileans. Despite falling poverty levels, the profound economic inequalities that persist in the country affect indigenous people more than other Chileans.

46. In the field of education, the Ministry of Education is starting up a bilingual intercultural education programme based on sound theoretical and pedagogical principles. Owing to the scarcity of trained staff and resources, most indigenous communities have not yet been able to benefit from the new programme, and so far the country’s educational system has not been able to meet indigenous people’s demand for the protection, preservation and promotion of their traditional culture.

47. In the field of health, for example, the Special Rapporteur was told about systematic discrimination against indigenous peoples in access to medical services and in the quality of these services. The traditional medicine of indigenous peoples has been devalued and ignored, if not banned altogether, although some attempts are now being made to promote intercultural medicine in some hospitals in indigenous areas and have produced promising results ; however, the programme is still in its infancy. The municipality of San Pedro de Atacama, a centre for the Atacameño population in El Loa province, does not even have a maternity clinic, which means that women in labour have to go to the city of Calama for care and newborns are registered in that city’s registry office. This anomalous situation gives the impression that the indigenous Atacameño population is decreasing in size, as well as creating serious problems for families.

48. The Special Rapporteur also received information on the problems indigenous children face in gaining access to education and on big increases in school failure and dropout rates, which are already high. He is particularly concerned about the low number of indigenous children going on to secondary education and about the way children with behavioural problems are treated on account of their indigenous origin.

49. The Special Rapporteur heard calls from indigenous people and their leaders for the preservation of their cultural identity in every region he visited. The Atacameño people complain about the loss of their language as a result of the forcible “Chileanization” to which they were subjected after the war of the Pacific. The Quechua people also complain about the loss of their identity. In the metropolitan area of Santiago, and also in cities like Calama, Iquique and Temuco, the cultural changes resulting from migration to the cities upset not just old people but also a growing number of young indigenous professionals, intellectuals and students, who are determined to preserve and regain their cultural identity. The Rapa Nui people also complains that its cultural identity is threatened by immigration to their island. San Pedro de Atacama, in the middle of the magnificent and spectacular Atacameño desert, has been transformed in recent years into an international tourist attraction. Although this has brought economic opportunities for the population, it has also created tension with regard to the preservation of their cultural identity, an issue of which the Atacameño authorities are very aware.

IV. CONCLUSIONS

50. **The prompt and positive response by the Chilean Government to the Special Rapporteur’s request to visit the country is clear evidence of its readiness to cooperate with the international community on questions concerning human rights and indigenous populations. This constructive approach to tackling indigenous issues has been noticeable since Chile’s return to democracy.**

51. **Despite this progress, the Special Rapporteur observed that there are some human rights issues that are a matter of grave concern to the indigenous peoples of Chile and that are closely related to political, economic and social factors. Attention should first be drawn to the failure to monitor and deal properly with the needs of indigenous communities in terms of their economic, social and cultural rights. This failure highlights a situation of vulnerability and extreme poverty that is particularly worrying in the case of the Mapuche. The poverty and illiteracy rates among the indigenous population, and particularly the Mapuche population, are more than twice the national average, and are particularly marked among women and children.**

52. **There can be no doubt that in recent years the relationship between the Chilean State and native peoples has begun to change. However, it is still in a transitional phase, perhaps because of the ongoing process of healing the wounds of the past in the area of human rights. Ten years after the adoption of the Indigenous Peoples Act, there are still gaps in the actual protection of indigenous people’s human rights. The climate of insecurity is reinforced by the continuing existence of a few laws enacted by the previous regime which are in practice an obstacle to progress in the recognition and protection of the rights of the country’s indigenous people. The Government has tried to implement various initiatives, in submitting draft constitutional reforms or pushing for the ratification of ILO Convention No. 169, but these initiatives have been blocked by Congress. This causes indigenous leaders to wonder how much priority the Government and Chilean society really give to indigenous issues.**

53. **Despite the country's rapid economic growth, there is still a large gap between Chilean society in general and native peoples. There is a need for innovative mechanisms that use dialogue to resolve inter-ethnic conflicts, with the aim of achieving proper recognition of the cultural, political and territorial rights of native peoples. The latter want to be beneficiaries and partners in the country's development process, not its victims. The Ralco project for the hydroelectric plant in Alto Bío-Bío, for example, has been a classic example of how the human rights of indigenous peoples can be violated if those rights are not taken into account by either the construction and operating company or public institutions from the very conception of such mega-projects.**

54. **All the facts cited above stem mainly from the as yet unresolved conflict over land ownership and the access to and exploitation of natural resources. The indigenous peoples of Chile saw the Indigenous Peoples Act as a step forward that would meet their demands and allow them to identify their natural resources in terms of the ground, subsoil, water, lakesides, rivers and the coastline. The Act was to be an excellent tool for protecting the indigenous territorial heritage and ensuring that the wishes of indigenous communities were respected. However, the application of certain sectoral laws, such as those on water, fisheries and mining, has weakened the expected impact of the Indigenous Peoples Act in this respect, inspiring a good deal of scepticism in the communities.**

55. **Throughout this process, the role of the media has been crucial. During his visit, the Special Rapporteur observed how the media deal with the still burning topic of past violations of human rights in Chile but pay little attention to indigenous people's human rights. Mapuche organizations complain that the press and broadcast media do not give them the same coverage as they do the "powers that be" , and consider that this situation violates their human right to information. In this context, the Special Rapporteur believes that, now that the press has recovered its freedom in Chile, the media have a duty to put forward an objective and balanced view of such important issues as the struggle for the human rights of indigenous peoples.**

V. RECOMMENDATIONS

56. **The current situation of the indigenous peoples of Chile requires the urgent attention not only of the Government but also of all political groups and society in general. Although significant progress has been made on indigenous questions in the country in the last 10 years, indigenous people continue to live in a situation of marginalization and denial that leaves them cut off in significant ways from the rest of the country.**

A. Recommendations to the Government

Legislation

57. **The Special Rapporteur calls on the Chilean Congress to adopt the proposed constitutional reform on indigenous matters as soon as possible.**

58. **He also recommends the prompt ratification of ILO Convention No. 169, as well as of other international conventions that guarantee the human rights of indigenous people.**

59. The sectoral legislation on land, water, mines and other sectors that may be in conflict with the provisions of the Indigenous Peoples Act should be revised, and the principle of the protection of the human rights of indigenous peoples should take precedence over private commercial and economic interests.

60. The Special Rapporteur suggests that the Government should take into consideration the proposals contained in the report by the Historical Truth and New Deal Commission on the legal, economic and cultural changes that are needed.

61. The planned statute of autonomy for Easter Island (Rapa Nui) should contain guarantees for the protection of the rights of the native Rapa Nui people over their land and resources and their right to respect for their social organization and cultural life.

Poverty

62. The Special Rapporteur recommends that the Government should, in consultation with the indigenous communities and with the necessary technical assistance from the United Nations system, set up a programme to reduce poverty among the country's indigenous communities, in accordance with the relevant millennium development goal, with specific targets for indigenous women and children.

63. Taking up the recommendations in a report on human development in Araucanía prepared by UNDP, the Ministry of Planning and the University of La Frontera (*"Informe sobre el desarrollo humano en la Araucanía"*), he also recommends that the Government should continue with its efforts to compile disaggregated data on the indigenous and non-indigenous population and that, in drawing up public policies, it should pay special attention to rural areas and urban poverty and that more resources should be made available to combat gender inequality. The Special Rapporteur recommends that these initiatives be extended to the other indigenous communities in the country.

Land

64. The Land Fund managed by CONADI for the acquisition of land for indigenous people should expand and expedite its work, and its resources should be increased substantially so that it can meet the needs of indigenous families and communities. Efforts to recover indigenous lands should be stepped up, especially in Mapuche areas. In this context, the Special Rapporteur appeals for the programmes aimed at rural indigenous women to be strengthened and recommends, in particular, that a statistical study should be carried out to assess the progress made in improving the conditions of rural indigenous women, and that the study should include specific variants covering their health and education.

65. In addition to the granting of title for private pieces of land, traditional communal indigenous territories containing resources for communal use should be reclaimed and re-established.

66. Both in law and in practice, access by indigenous communities to the water and maritime resources on which they have traditionally depended for their survival should take precedence over private commercial and economic interests.

Sustainable development

67. Indigenous people should be consulted in advance about any development project planned for their regions and territories, as provided for in ILO Convention No. 169, and their views and respect for their human rights should be taken into account by the authorities and the companies carrying out the work at every stage of such projects. Indigenous communities should be actively involved in all decisions on development projects planned for their regions and territories.

68. In indigenous areas, and particularly in the Mapuche region (Araucanía) , indigenous municipalities should be established to allow indigenous people to be fully involved in decision-making and in the independent management of local affairs.

Administration of justice

69. Under no circumstances should legitimate protest activities or social demands by indigenous organizations and communities be outlawed or penalized.

70. Charges for offences in other contexts (“terrorist threat” , “criminal association”) should not be applied to acts related to the social struggle for land and legitimate indigenous complaints.

71. The Special Rapporteur recommends that the case of the *lonkos* on trial, Pascual Pichún de Temulemu and Aniveto Norín de Didaico (from Region IX, Araucanía) , should be reviewed, in strict accordance with the guarantees of due process established in international human rights standards.

72. The implementation of the reform of criminal procedure should take into account international human rights standards, including due process for all indigenous people accused of social defence or protest activities (particularly with regard to the use of “faceless” witnesses and the pre-trial detention of suspects).

73. In any judicial or administrative proceedings involving indigenous persons, the latter should be assisted by trained bilingual translators and, where necessary, a competent court-appointed defence lawyer with knowledge of indigenous cultures.

74. In any judicial or administrative proceedings involving indigenous persons, indigenous legal customs should be respected.

75. The Special Rapporteur recommends that the Chilean Government should consider declaring a general amnesty for indigenous human rights defenders on trial for social and/or political activities in the context of the defence of indigenous lands.

Educational and social policy

76. The Government's bilingual intercultural education programme needs an adequate budget if it is to be quickly and effectively implemented in all indigenous regions. The Special Rapporteur recommends that specific measures be taken to improve the assistance given to indigenous students at the secondary and higher university levels in the form of youth hostels, particularly in the south of the country.

77. The Special Rapporteur takes note of the Government's efforts to continue improving welfare schemes for families, particularly those intended to help them discharge their responsibility to bring up and educate their children with respect for their cultural identity. In this context, he would encourage the Government to make a greater effort to coordinate activities aimed at reducing the number of indigenous children in need of institutional care and encouraging them to grow up in the family home.

78. The health services for indigenous communities should be expanded and adequately funded so that they fully meet the needs of the whole indigenous population, and the use of traditional indigenous medicine should be respected and promoted whenever possible.

Publicizing indigenous issues

79. On the basis of the conclusions of the Historical Truth and New Deal Commission, which describe the realities faced by indigenous peoples throughout Chilean history, the Special Rapporteur recommends that the Government should conduct national and regional publicity campaigns to combat discrimination, encourage recognition of cultural diversity and assert and reinstate indigenous cultures as part of the country's great cultural wealth.

The promotion and protection of human rights

80. The Special Rapporteur joins with other international human rights mechanisms, such as the Committee on the Rights of the Child, in recommending that the necessary measures be taken to establish a national institution for the defence and protection of human rights, or an ombudsman, in Chile. In this context, the Special Rapporteur would encourage the Government to take this suggestion on board and draw up a specific timetable for the establishment of such an institution. An institution of this sort, with a broad mandate in line with the Paris Principles, would be of incalculable value in defending and protecting the rights of the country's indigenous peoples, as well as being a clear sign of the State's intentions towards its native peoples.

B. Recommendations to the international community

81. The Special Rapporteur recommends that the United Nations country team should continue its efforts to ensure coordination on human rights issues and in this context encourages them to set up a special thematic group on indigenous issues that would help coordinate the response to the needs of this community.

82. **The Special Rapporteur recommends that the Office of the United Nations High Commissioner for Human Rights, in consultation with its adviser/representative for Latin America and the Caribbean and in cooperation with the Government, the country's indigenous peoples and other parties concerned, should organize a follow-up meeting to identify ways in which the United Nations system can assist the State authorities in implementing the recommendations set out in this report.**

C. Recommendations to civil society

83. **In order to overcome the discrimination and historical denial from which indigenous peoples have suffered, Chilean society as a whole has an important role to play ; the Special Rapporteur therefore recommends that ongoing publicity campaigns should be organized to combat prejudice, racism, intolerance and the stigmatization of indigenous issues in public opinion.**

84. **In this context, it is recommended that political parties and organizations should focus in their approach to human rights issues not only on the consequences of the recent past but also on the promotion of the individual and collective rights of the country's indigenous peoples.**

D. Recommendations to the media

85. **Indigenous communities and peoples should have the facilities and support they need if they are to have full access to the mass media (the press, radio, television and Internet) ; it is therefore recommended that the country's main media organizations, together with the university faculties concerned, should offer courses and seminars with a view to finding new means of access to the media for indigenous communities.**

86. **It is also recommended that the existing media should redouble their efforts to give broad, balanced and fair coverage of the needs and situation of indigenous peoples and of the social conflict in indigenous regions.**

E. Recommendations to the academic community

87. **The Special Rapporteur takes note of the studies carried out in several universities in the country on indigenous issues and recommends that these efforts be extended to other academic centres so that all the issues relating to the human rights of indigenous peoples are covered.**
