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DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Study on treaties, agreements and other constructive arrangements between States and indigenous populations

First progress report submitted by Mr. Miguel Alfonso Martínez, Special Rapporteur

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A similar situation last June forced the Special Rapporteur to postpone, until September of this year, his second research trip to the Archivo de Indias in Seville (Spain).

14. The Special Rapporteur wished to call the attention of the Working Group and of the Sub-Commission to the fact that, although the request was reiterated in September 1991, only 15 responses to the questionnaire submitted in 1990 to Governments and to intergovernmental, non-governmental and indigenous peoples' organizations (see para. 3 above), have been received at the Centre for Human Rights as of 31 May 1992. 5/

15. Seven of those responses came from Governments (Brunei Darussalam, Canada, Colombia, Finland (2), Guyana, and Venezuela); one from an intergovernmental organization (UNESCO); one from a non-governmental organization (OXFAM); and six from organizations of indigenous peoples (Alexander Tribal Government [Treaty # 6, Canada], Movimiento Cooperativista Guatemalteco (MCG), Saddle Lake First Nation [Treaty # 6, Canada]; Consejo Indio de Sudamérica (CISA); Sovereign Nation of Hawaii and Pro-Hawaiian Sovereignty Working Group). However, it must be pointed out that, in practical terms, two of the replies by organizations of indigenous peoples received do not fully qualify as answers to the questionnaire.

16. The Special Rapporteur cannot but feel disappointed by the very limited results achieved until now in the direct consultation with the two parties in the bilateral juridical relationships on which the study is centred.

17. On the one hand, the lack of response from a number of Governments is somewhat surprising, considering the substantial number of situations to which treaties, agreements and other constructive arrangements between their authorities and the indigenous peoples who live within their boundaries would seem applicable.

18. On the other hand, the very limited number of indigenous responses is particularly regrettable. It is true that some indigenous peoples and organizations have expressly requested an extension of the time limit suggested, due to understandable difficulties in submitting on time the information requested. The Special Rapporteur had indicated to all who find themselves in such a situation that, of course, he preferred a late response to no response at all.

19. Additionally, it must be noted that in one response received, the indigenous organization indicated that the questions posed are "overlegalistic" and "dictate an interpretation process...that most Bands do not want to be trapped into doing". It further stated that it "does not feel comfortable enough to provide answers..., mainly for fear of undue repercussions which may be inflicted on [its people]" by the authorities of the nation-State in which they live. It added that this very nation-State "has gone to great lengths to reduce and interpret our [sic] treaty obligation." Moreover, the opinion was expressed that the present study "may cause us to suffer more hardships".

INTRODUCTION

1. The sequence and contents of the resolutions adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights and the Economic and Social Council which led to the appointment of the Special Rapporteur and his mandate to undertake this study (ECOSOC resolution 1989/77 of 24 May 1989), were extensively reviewed in his preliminary report submitted in 1991 to the ninth session of the Working Group on Indigenous Populations and to the Sub-Commission at its forty-third session (document E/CN.4/Sub.2/1991/33, paras. 4-27).

2. In that document (paras. 28-37 and 38-63), these bodies were also amply informed of the research work and other activities undertaken by the Special Rapporteur from the time of his appointment until July 1991 in fulfilment of his mandate.

3. The preliminary report was the subject of ample debate during the ninth session of the Working Group. 1/ The Group expressed its gratitude to the Special Rapporteur for that report. 2/ It also expressed its thanks to the Governments and organizations of indigenous peoples that had responded to the questionnaire prepared by the Special Rapporteur in 1990. 3/ At the same time, the Working Group decided to reproduce the questionnaire as an annex to its report to the Sub-Commission, recommended that it be again distributed to Governments, inter-governmental organizations and organizations of indigenous peoples and requested them to submit the information requested by the Special Rapporteur not later than 15 March 1992, so that it could be taken into consideration by him in the progress report he was to submit in 1992.

4. In light of the difficulties that the Special Rapporteur had encountered in obtaining the specialized consultancy required for his research work for the study, the Working Group asked that he be given the assistance foreseen in that respect in previous pertinent resolutions. The Special Rapporteur expresses his appreciation to the Centre for Human Rights for the assistance provided.

5. At its forty-third session, the Sub-Commission discussed the preliminary report in an extended meeting held on 27 August 1991. 4/ At the end of its deliberations, the Sub-Commission adopted decision 1991/111 of 29 August 1991 by which, in essence, it endorsed the recommendations formulated on this question by the Working Group (see paras. 3 and 4 above).

6. The present report has been prepared by the Special Rapporteur for submission to the Working Group at its tenth session and to the Sub-Commission at its forty-fourth session, pursuant to Sub-Commission decision 1991/111 of 29 August 1991.

7. In preparing this report, the Special Rapporteur has taken into account the general remarks and specific suggestions offered by his colleagues, the delegations of observer States and the organizations of indigenous peoples during the discussions on his preliminary report in 1991, both in the Working Group and in the Sub-Commission.

Chapter II

SOME ANTHROPOLOGICAL AND HISTORICAL CONSIDERATIONS ON KEY ISSUES RELEVANT TO THE STUDY

22. The negotiating process which leads to the existence of any treaty, agreement or constructive arrangement between States and indigenous peoples implies, of course, considerable and most varied contacts between two parties whose civilizations, historical experiences, forms of social organization, customs and perceptions on innumerable things are, in general, extremely different.

23. Consequently, in order to assess the utility of instruments of this type (whether already in force, or that may enter into force in the future), so as to achieve solidly based, stable and just relations between both parties, it is imperative to fully understand the rationality of the actions of those same two parties not only prior to and during the necessary consensual process which makes them possible, but also during their actual implementation.

24. It has not been difficult, of course, for the Special Rapporteur to understand the logic which governs, in general, the actions of nation-States and the rationality of the institutional and juridical norms of the so-called "modern societies", organized grosso modo in accordance with Western models.

25. Further, his national origin, his cultural background, his experiences in two very different types of centralized societies - based, moreover, on opposite ethical, political, social and economic standards - his training as a jurist within a legal system framed according to the European codified law tradition, have all considerably helped him in this part of his task. Additionally, his close contacts for more than three decades with the United Nations system - the setting par excellence for nation-States' international activities - has contributed to this understanding.

26. For a non-indigenous person, however, the difficulties of achieving a similar comprehension in terms of the actions of indigenous nations in this area turn out to be, for sure, considerably greater. The need to overcome these difficulties is obvious, since the key text guiding his work 7/ clearly mandates the Special Rapporteur to undertake this study with the ultimate purpose of ensuring, on a practical level, the promotion and protection of the basic rights and freedoms "of indigenous populations".

27. The first problem for attaining such a comprehension is of a methodological nature. It has to do with the enormous diversity of specific situations and problems confronting indigenous peoples today in different parts of the world. It consists of what Héctor Díaz-Polanco rightly typifies as "the lack...of an adequate, integrated and overall conception of the ethnic problem".

28. In his view, it is then necessary to achieve a perspective "in which the 'indigenous' and the 'regional-national' appear linked; and moreover, in which the ethnic element is accorded an appropriate dimension that prevents, on the

Chapter I

RESEARCH AND OTHER ACTIVITIES SO FAR UNDERTAKEN

9. From September 1991 to June 1992, noticeable progress has been made in the research work required by the study. This has been possible, to a considerable extent, because of the dedicated and most thorough specialized work by his consultant, Isabelle Schulte-Tenckhoff, who in her professional performance went far beyond the duties established in her contract with the Centre for Human Rights. In this context, it should be stressed that the consultant has dedicated to this task for which she was formally retained not the six months (two non-continuous periods of four months and two months, respectively) but practically double that time.

10. The Special Rapporteur wishes to express his recognition to Mrs. Schulte-Tenckhoff for her most generous attitude and for the quality and professionalism of the two research reports submitted in October 1991, and May 1992. Her contribution to the study is present in every chapter of the report.

11. Also in the period referred to, further progress was made in the gathering of information relevant to the study. New sources of both primary (complete texts of juridical instruments, for example, agreements and national legislation) and secondary (juridical, historical and anthropological works, as well as other specialized literature) nature were added to the already fairly extensive documentation to which the Special Rapporteur has direct access. During the last ten months, the Special Rapporteur has been able to dedicate more time to review and study the available materials, than was possible in 1990-1991. This process, however, is far from complete.

12. With respect to the important aspect of field work, the Special Rapporteur participated in the United Nations Technical Conference on the practical experience in the achievement of sustainable and environmentally sound self-development for indigenous populations, held in Santiago de Chile from 18 to 22 May 1992, under the auspices of the Government of Chile and the Centre for Human Rights. Thanks to a much-welcomed invitation of the Chilean authorities, he and other participants had the opportunity to visit the settlement of a Mapuche people community in the Andean mountains (Temuco province). The practical experiences derived from both the meeting and that visit, as well as the materials gathered in Chile, were extremely valuable for the work of the Special Rapporteur.

13. Also in connection with that aspect of his work, the Special Rapporteur regretted that unavoidable teaching commitments prevented him from attending two important meetings in which specific aspects of the indigenous problematique related to his study were discussed. These were the Meeting of Experts to Review the Experience of Countries in the Operation of Schemes of Internal Self-Government for Indigenous Peoples (Nuuk, Greenland, 24-28 September 1991), and the National Treaty Conference, convened under the auspices of the Assembly of First Nations to review the question of treaties in the present context of Canada (Edmonton, Alberta, 6-9 April 1992).

35. In his initial approach to key issues in the study, the Special Rapporteur has tried to keep very much in mind certain renovating currents of much greater value for his work, which have served as a counterweight to a number of all-too-evident deficiencies already noted in the fields of anthropological and historical investigation. He has relied, of course, on what has been called critical present-day anthropology and ethno-history. It seems pertinent to summarize some important traits of such currents.

36. Anthropology emerged as a discipline in the second half of the nineteenth century, aimed at dealing with the biological unity of humankind and the diversity - spatial and temporal - of socio-cultural systems. From the beginning, its main effort has been directed at classifying the plethora of societies and cultures, with a view to facilitating comparison among them.

37. It is clear that in a broad sense, the term anthropology can be understood as applicable not just to an academic discipline - in which the Western input has been and is predominant - but also to the wide variety of discourses on humankind elaborated by very different types of civilizations including, of course, indigenous civilizations. For the need to understand and explain the specific aspects of the socio-cultural life of humankind is universal and by no means self-explanatory.

38. In principle, anthroplogy does not exclude any society or culture. However, for historical reasons, it has come to concern itself mainly with so-called traditional - implicitly non-Western - societies and cultures. This division of scientific labour has been seriously criticized. 11/

39. One must bear in mind that it was the colonial phenomena which brought European peoples into close contact with other very different cultures, thus becoming one of the strongest elements configuring the historical conditions which led to the birth of anthropology as an instrument aiming to explain socio-cultural diversity.

40. This legacy from the colonial period is still very much present in numerous studies in this field and constitutes the basic problem of academic anthropology, whose substance is determined and nursed both by those historical conditions present at its emergence and the Western intellectual tradition and ideology. In this connection, it should be noted that the most notable paradox of academic, scientific anthropology resides, precisely, in its claim to universality while actually being partial. This is due to the inherent partial nature of all specific anthropological discourses designed by living societies so as to conceptualize their own vision of humankind, human sociability and spirituality as well as the place of human beings in nature.

41. Ethnocentrism - that is, judging or interpreting other cultures according to the criteria of one's own culture - is a universal phenomenon. All discourses on humankind are virtually ethnocentric, although tolerance for "otherness" indeed varies. It can hardly be maintained that Western scientific anthropology is intrinsically more tolerant of "otherness" than the discourses of traditional (notably extra-European) cultures/societies.

20. Notwithstanding cases and situations such as those mentioned above, the lack of a sizeable number of indigenous answers to the questionnaire suggests that the Special Rapporteur has not yet been able to persuade the majority of indigenous peoples and organizations of the major importance for achieving the greatest depth and balance possible of the study. In addition, the fact that these responses can very much facilitate the research work still pending, does not seem to have been fully perceived. Further, it appears that the advantages - both for the seriousness of the study, and for the possible interests of those very same peoples and organizations - of resorting to information coming directly from indigenous sources to reflect the indigenous point of view on various crucial issues (instead of depending on secondary, non-indigenous materials) are not yet sufficiently clear.

21. In the view of the Special Rapporteur, one element of particular importance for bringing this exercise to an early conclusion would be to make this information available to him as soon as possible, by means of a detailed response to the questionnaire already distributed almost two years ago. The Special Rapporteur respectfully appeals - once again, and in an urgent manner - to all the parties concerned to facilitate his task in the way indicated above. 6/

anthropology. The classical works of Franz Boas 15/ and, later, Bronislaw Malinowski 16/ - founding fathers of fieldwork anthropology - brought a higher level of scientific methodology to this discipline and greatly contributed to its professionalization.

49. Fieldwork-based anthropology is associated with two classical schools: North American cultural relativism and British functionalism. Both are relevant for this study, although they ought also to be viewed critically.

50. Cultural relativism has called for a detailed and comprehensive study of each culture's individual traits, including its specific history. It thus involves a historical particularistic approach.

51. In the classical North American tradition, the phenomenon of culture - understood both as the sum total of all living cultures and as an operational or abstract concept - is viewed as the principal subject matter of anthropology, and also as an explanatory principle likely to account for variations of behaviour in different human groups. According to cultural determinism, culture represents a primary variable structuring human life. The continuity of each living culture is doubly ensured: through a process - enculturation - which brings its members to conform to prevalent norms and values and through its structural consistency allowing for the adaptation or rejection of what is incompatible with existing norms and values. From this angle, each culture appears as the product of a unique historical process.

52. According to the culturalist perspective, phenomena of conquest and domination, especially colonialism, have tended to be tackled as problems of cultural conflict - a view which has incurred much criticism, since it neglects conflicts of interest between classes or groups.

53. Another problem of cultural relativism is its non-enlightened Euro-centrism, which continues to prevail despite the assertion of the specific nature of each individual culture or society. Thus, cultural differences are often being filtered through what are posited as universal aspirations and modes of behaviour, although they are in reality only typical of Western society and culture. A good example of this is the figure of the "Economic man", based on the image of the profit-oriented and individualistic entrepreneur. On this premise, the principle of reciprocity and the institution of gift-giving have been viewed as primitive illustrations of the present-day dominant market economy. 17/

54. Similar conceptual and theoretical problems relating to reductionism and Euro-centrism are to be encountered in legal and political anthropology (see para. 66 ff.). Indeed, it must be recalled that no one individual sub-discipline or school of thought can pretend to hold the ultimate truth. It must also be recalled that claims to scientific truth have often been made in order to legitimize vested interests. Relevant examples of this are the role played by anthropology in British colonial administration, the planning of regional hegemony and the fostering of certain so-called "development strategies". 18/

one hand, the excessive and unmanageable 'atomization' of the units of analysis and, on the other hand, the too global visions which are almost always artificial constructions". 8/ In chapter IV below, the Special Rapporteur has attempted to find a way to tackle this dilemma in the context of his specific mandate.

29. Nevertheless, in the judgement of the Special Rapporteur, the ultimate dimension of the problem lies in the fact that the basic social sciences - for example, anthropology and history - which should contribute to achieving a clearer vision of the rationality of the relevant indigenous actions within their past and present modes of social organization (particularly of their juridical-institutional manifestations), have not yet been able to extricate themselves from a varied range of focuses, conceptions and methodological approaches that, in his opinion, tend to obscure - and frequently distort and even hide - the actual contents and true sense of indigenous societal relations.

30. All those elements lead, all too frequently, to one-dimensional and Euro-centric approximations to the so-called indigenous question which are, by definition, simplistic, homogenizing, unscientific and hence, sterile. Taking off from models based on consumer societies, the market economy and the alleged intrinsic goodness of "modern" (Western) social organization, they tend to establish a mythical indisputable superiority of the culture (in particular of the "political" culture) of the so-called free-world, Western, Judeo-Christian paradigm, and to consolidate as conventional wisdom the notion that other conceptions in those areas are backward and obsolete and, for that reason, inferior and, if at all, of negligible value. 9/

31. The hegemonic, intolerant, racist and xenophobic contents of that trend are all too evident in today's world. To the already-mentioned one-dimensional currents in many quarters of the academic field dealing with indigenous issues, one must add now the uni-polar nature of present-day world geopolitics, which promotes a "new world order" based precisely on that very same paradigm.

32. For this reason, all attempts to explore and understand the motivations, constructions and aspirations of indigenous peoples with respect to juridical manifestations such as treaties, agreements and other consensual arrangements must be done in the light of what has been termed as "contemporary epistemological awareness", which favours a decentred view on culture, society, law and history.

33. Also needed, in this respect, are scientific contributions which start from the basis that each society/culture has its own rationality and coherence, in terms of which its modes of thought and action must be interpreted.

34. It goes without saying that this contemporary epistemological awareness is a prerequisite for attaining the pluralistic dimension conceived by the Special Rapporteur as inherent to this study; as already indicated in his 1988 outline and his 1991 preliminary report. 10/

inter-cultural level, it deserves closer scrutiny. By the same token, functionalism has contributed to a better understanding of non-centralized political formations, in particular so-called segmentary societies, formerly viewed as not having attained any level of political institutionalization.

64. Functionalism departs from the basis that law does not only amount to abstract principles and norms, but comprises concrete phenomena that can be understood through direct observation. It also insists on the interdependence between law and all other domains of socio-cultural organization.

65. Relativism, on the other hand, is crucial here because its basic assumption - respect for other cultures - is rarely taken to its logical consequence: respect for other cultures in all their possible manifestations. Indeed, while culturalism can be merited with having established an operative and all-encompassing culture concept, policy makers almost fatally fall back on the more restricted understanding of culture as education in aesthetics. Hence the predominance - and blatant insufficiency - of culturalist policies positing tolerance for cultural diversity regarding certain issues affecting indigenous peoples (for example, in the teaching of indigenous languages), but not for other key elements of indigenous lives (such as modes of land tenure, independent management of their own resources and full recognition of indigenous political organization).

66. Political anthropology deals with the political forms of organization of "primitive" societies which (it is implied) have not reached statehood, or else have been transformed or destroyed under the impact of modern Western society. From a less prejudiced viewpoint, however, it appears not only legitimate to study non-State political formations for their own sake - if only to gauge the political creativity of humankind - but also to question the idea that statehood is the final destiny of human societies.

67. The question of the emergence and evolution of the state lies at the heart of political anthropology. There are two basic approaches, grounded respectively on a positive or negative valuation of the State. The first is certainly more widespread.

68. Legal anthropology 19/ is currently understood as a synthesis of the paradigms inspired both by the continental tradition, where law equals explicit written norms generally assembled in the form of codes, and the less rigid Anglo-Saxon tradition of common law based on precedents. Each of these traditions has given rise to what can be considered as a specific philosophy of law. The normative tradition views conflict as pathological and holds that to perpetuate itself a society requires a centralized system of rules and sanctions. Conversely, the common law tradition gives prominence to dispute management through cooperation and the defence of particular interests.

69. It is the normative tradition with its insistence on written rules of law that has been the least open to inter-cultural questions - although there exist a few important anthropological works departing from the definition of law as a system of social control based on sanctions. 20/ It is nevertheless a limiting approach, since the reduction of law to a corpus of abstract norms and the necessity of sanctions, while typically Western, is not necessarily

42. Consequently, the credibility of academic anthropology's claim to objectivity and its alleged capacity to gain a comprehensive and detached understanding of the workings of society and culture per se depends on whether or not ethnocentrism (and especially Euro-centrism) is duly accounted for and reflected upon critically.

43. Anthropology, as a discipline, is indisputably relevant to this study. Its importance is determined both by what may be termed as the negative and positive sides of Western academic anthropology. Some of its negative aspects have already been mentioned above; others will be discussed elsewhere in this report. Its positive aspect is that it may indeed function as an instrument of knowledge and critical reflection leading to a comprehensive, critical analysis of the ideological underpinnings of the Western legal and cultural discourse and to a better understanding of indigenous legal and political systems.

44. The origins of academic anthropology were strongly marked by unilineal evolutionist schemes that attempted to explain the origins of social institutions and of the progress of societies and cultures. 12/ That initial stage was very much influenced by the French and English 13/ Enlightenment thought (in particular the idea of progress) and informed by the knowledge gained about many different peoples since the so-called "age of discoveries". It also drew heavily on Darwinian thought (in particular on the so-called social Darwinism) which argues that the forms of social organization evolve - just like biological organisms - from simple to more complex structures and are, in addition, subject to a process of selection.

45. Evolutionary thinking uses various criteria of classification, the most widespread of which (its roots can be found in Montesquieu's L'Esprit des lois of 1748) envisions the development of society on the basis of the evolution of forms of subsistence, starting with foraging peoples (i.e. hunter-gatherers) and culminating in the modern industrial, consumer and leisure society.

46. The evolutionary paradigm tries to explain, not only the dissimilar historical conditions under which peoples live (evolutionary stages), but also the alleged superiority of Western European civilization. This goes hand in hand with the idea that what differs from the latter is indeed what precedes it. For that reason, it is not unwarranted to insist that classical evolutionism accounts for socio-cultural differences by negating them, for it concerns itself mainly with explaining the backwardness of non-Western societies and cultures.

47. It is more than evident that the concepts of evolution and progress have been used to legitimize attempts to induce the so-called backward societies to bridge the gap that separates them from the Western European socio-cultural model. In this sense, classic evolutionism is indissociable from colonialism, neo-colonialism and a variety of assimilationist policies. 14/

48. Even before the dawn of the twentieth century, the ideas of classical evolutionist anthropology came under heavy criticism from various quarters which, among other things, emphasized the need and advantages of fieldwork and participant observation over the "armchair" methods which characterized early

76. Recognition of the diversity of such logiques fondatrices must be viewed in the context of two universals: that all societies have a system of law (whatever it consists of), and that all societies are rational (however this rationality is defined). Hence, the necessity to relativize the myth of "primitive anarchy" ("sans roi, ni loi ni foi"), whether viewed as "golden age" - as French Enlightenment culture did - or state of "warre" in the Hobbessian vision

77. While political anthropology has fostered reflection on the evolution and destiny of the State, legal anthropology has questioned the reduction of the state of law to the law of the State. Hence their importance for issues of particular relevance to the study and to the Special Rapporteur's work toward a better understanding of indigenous political and legal systems; in particular, of traditional ways of assuming obligations, exercising societal authority and interpreting their own norms and customs and the provisions of treaties and other juridical instruments.

78. There exists a number of typologies which have the merit of showing at a glance the main features of indigenous legal or political systems. Their drawback is, however, that being more often than not implicitly evolutionist, they require extensive critical comment. 25/ On the other hand, a consensus reigns within the field about certain fundamental characteristics of traditional, non-State societies. This consensus provides guidance at least in the general discussion.

79. First of all, since the instruments falling under the mandate of the Special Rapporteur have brought into contact very diverse societies, the issue of legal and political acculturation must be raised and taken very much into account.

80. On this premise, and given the prevalence of knowledge about the dominant State-based system, the specific indigenous conceptions of time and space, of the individual and the group, of their relationship with the land and, last but not least, of the significance and the role of authority and law, merit a most serious review.

81. Regarding legal and political acculturation, the question is not, at this stage, to what extent and under what conditions - if at all - dominant law has accommodated traditional forms of organization, 26/ but what the differences are between indigenous discourses on these matters and those of the modern, Western, State-based society.

82. Several fundamental sets of differences deserve mention and brief analysis. In the first instance, the differences concern concepts of individuality. Defining the individual vis-à-vis the group he or she belongs to, traditional anthropology departs from the principle that social groups -in particular, basic ones such as kin or age groups - pre-exist the individual and are also more permanent. Conversely, modernity views the individual as the fundamental unit as well as the point of reference of any social grouping.

83. By the same token, modern society can perceive the individual as the maker of the law, thus affirming humanity's power over law (as a result,

55. This also applies, of course, to the second "-ism" to be considered here, "functionalism". While contributing to a better understanding of - and some respect for - what was long viewed as exotic and irrational (such as witchcraft, rituals associated with traditional chiefs or kings, religious sacrifices, rites of reciprocity, and so forth), functionalism poses the problem of an equilibrium view of society.

56. Broadly speaking, functionalism views human society as an integrated whole, whose elements, including their modes of interaction, are to be investigated. In social anthropology, functionalism has mainly dealt with the functions which given institutions (including legal institutions), relations and behaviour fulfil in socio-cultural systems.

57. On this premise, functionalism has helped establish the systemic character of social entities, as well as some of the basic categories in which to conceptualize their components (notably institutions) and the individual's position in the group (status, role, etc.).

58. Nevertheless, by insisting on the harmonious functioning of society as a whole, functionalists have been led to neglect some crucial aspects of social life, notably change over time. Indeed, classic British functionalism has incurred much criticism for its ahistoric bend.

59. Critical anthropology, while aware of the contribution and significance of evolutionism, relativism and functionalism for the development of the discipline (and, in this instance, for the purposes of this study) endeavours also to keep in mind their ideological underpinnings and historical conditioning. For it is indeed impossible to conceive of a framework for the study of indigenous legal and political systems without reference to either of those three paradigms.

60. Regarding evolutionism, it must be recalled that, although the speculative character of its classic variant has been extensively criticized, the evolutionary paradigm itself has never fallen into disuse. The relevance and significance of such attempts to synthesize the history of human cultures and societies remains to be assessed.

61. A fundamental problem is that the point of reference or comparison required by any evolutionary model always happens to be modern industrial society; against which any other type of society is measured - often unfavourably. What is familiar to the researcher (who generally belongs to the dominant culture) continues to be viewed as what is "normal" and desirable. This is particularly evident in political and judicial (national or international) decisions regarding indigenous peoples (see chapter III).

62. As to functionalism and relativism, they are crucial for the assessment of existing models of interpretation in the fields of legal and political anthropology.

63. Functionalism is at the root of one of two main approaches in legal anthropology, namely the procedural versus the normative one. For this reason, and because it has fostered an enlarged conception of law on the

89. Regarding corporate groups, a general difference is made between groups defined exclusively by descent, and groups founded on descent and territoriality. Traditional concepts of territoriality and land use are thus another aspect deserving review.

90. It has often been stated that indigenous peoples ignore notions of appropriating or alienating land. Indeed, the prevalence of the principle of land guardianship over that of its ownership (in the established legal sense) must be accounted for when discussing indigenous forms of land occupancy and land use - without succumbing, however, to vague references to "primitive communism".

91. While traditional cultures/societies tend to consecrate and to socialize the land (whereas modernity views it as a simple commodity), it should be stressed that the absence of a system of private land holdings does not equal some sort of primeval collectivism. The latter term is too imprecise (and too tainted by early evolutionist thinking) to express the intricate modalities of indigenous land use.

92. The pre-eminence of the social dimension of modes of land use accounts for rather flexible systems in terms of ecological adaptation, but which have been vulnerable to foreign conquest and appropriation. For instance, in the absence of contemporary relations of ownership, it was relatively easy for the colonizer (or more recent intruders) to assert that land belonged to no one. Seasonal modes of land use have invited similar allegations.

93. In most traditional systems, however, although failure to use the land may justify withdrawal of that (derivative) right from the individual, this does not imply that the group controlling it relinquishes its (original) rights. It means that individual rights do exist, but their exercise depends on the situation of the individual within the group. By the same token, even outsiders may have access to the land on certain conditions, although this is generally reversible.

94. Contrary to Western notions of land ownership, traditional societies tend to model their forms of land use on their social relations. Thus, they do not conceive (as in modern Western legislation) of an objective link between owner and property. 29/ Such a conception is further contradicted by the spiritual relationship which for most indigenous peoples exists between human beings, the natural and the supernatural world.

95. Finally, in this connection, the principle of reciprocity (understood as the return of a counter value) should be taken into account, due to the bilateral nature of the juridical instruments under study. For Richard Thurnwald, 30/ one of the founders of legal anthropology, reciprocity is an essential principle of law. 31/

96. Broadly speaking, reciprocity refers to exchange and expresses both unity and division: it creates a relationship between persons or groups, while identifying the latter as separate members of that relationship. 32/ The main areas of investigation for which the concept has been used include economic organization and marriage. In the first instance, reciprocity has been set

the rule in all parts of the world. 21/ And it may be useful to mention in this connection that an assessment of European traditions of unwritten law in the light of "primitive" law would probably yield more than one interesting idea, particularly with respect to institutions such as family and marriage. 22/

70. Anglo-Saxon functionalism has contributed to a more nuanced approach (initiated by Malinowski) who questioned the idea that law could be reduced to sanctions emanating from a central authority; in his view, law must be defined by its function within the social system. A central concept in this regard is that of reciprocity: society is possible because it is based on relations of mutual obligations linking its members, rather than on constraint and the use of force. 23/

71. This view has given rise to the procedural approach and the case method, based on the analysis of situations of conflict when the legal system is at work and thus becomes the most apparent. However, this approach tends to be reductionist, since one can hardly equal law with dispute management. Also, historical problems such as conflicting legal systems under the impact of colonialism have often been left aside.

72. The most recent tendency in the field has thus attempted to synthesize both paradigms. Within this synthetic framework, the question of legal pluralism is a key element: in most contexts of investigation, there exist other forms of law than the official written one (generally that of the State), and non-official legal concepts are often passed in silence.

73. Suffice it to note with regard to the diversity of theories on legal pluralism, that the main problem does not seem to be pluralism as such (which appears to be a universal phenomenon), but the fact that the State negates it, for it tends to monopolize the law, and it notably assumes the right to be the sole protector of groups and the individual. The results of this State-assumed function vary widely.

74. The case of former European colonies is rather relevant in matters of legal pluralism. It is well-known, on the one hand, that European law was partly transformed by being transported elsewhere. On the other, although metropolitan law resisted the influence of autochtonous norms and customary law, it could not impose itself entirely in the colonies but required adaptations. Attempts made in a number of countries to reinterpret customary law on the basis of imported (and imposed) European State law thus furnish the substance of legal pluralism.

75. In light of the objectives assigned to this study, a major challenge is thus to gain an understanding about legal systems of entities other than the modern State. Since it is impossible to uphold some universally valid concept of "law", the approach stressing the phenomenon of law has revealed itself as most fruitful. For Rouland, the crucial matter is not even law as such, but so-called processes of juridization since ethnography has shown that "the juridical domain is essentially diverse and that its dimension and nature depend on the logiques fondatrices particular to each society". 24/

and overall structural flexibility. Indeed, the principle of reciprocity is of crucial importance here: positions of eminence are defined through exchange relationships and thus intrinsically mobile. The exercise of power also presupposes material generosity which is an efficient remedy against eventual exploitative accumulation of property. 35/

104. All these aspects of traditional forms of organization concur in defining the manner in which indigenous peoples have commonly related to each other. This is indeed a most important element for a better understanding of indigenous views on treaty obligations. Unfortunately, there is not much anthropological literature; specialists in this field have tended to allot greater importance to the internal workings of the societies and cultures they have studied.

105. The problem is further complicated by the fact that indigenous history still has to be written. Thus one must resort to indirect approaches, for instance by sounding the similarities and differences between the principle of reciprocity and contractual relations; another possibility would be to tackle conflict resolution or, for that matter, warfare (viewed as negative reciprocity).

106. In this connection, the following aspects merit a closer scrutiny:
(a) questions of indigenous protocol regarding encounters and dealings with outsiders, which have rarely been addressed in detail (related to the formalities necessary for entering into relations with other entities);
(b) indigenous modes of accommodating outsiders or newcomers, of which there are some interesting examples beyond the well-told story of indigenous Americans saving the first shipload of pilgrims from starvation (related to the object of the juridical documents stemming from those contacts); and
(c) the concept of time in traditional cultures, especially the principle of fidelity to the past (in terms of indigenous fulfilment of duly established obligations).

107. It is indeed this concept of time - in virtue of which agreements entered into at some point in history (or which will be celebrated in the future) have been or will be transmitted, mostly orally, from generation to generation - which allows us to reconstruct or foresee the purposes and understanding of such agreements. In short, the principle of intertemporal law must be reviewed and eventually reconstrued - and thus enlarged and relativized - in a non-Euro-centric manner

108. It has been shown in other contexts that treaties and other international agreements lend themselves to manipulation. The colonial history of indigenous America is a case in point 36/ since, more often than not, the conclusion of treaties was used as a means for subsequent European colonization and settlement. Similar observations have been made in the context of early contacts of Europeans with local autochtonous authorities in Africa.

109. By and large, the virtually manipulative character and strategic importance of treaties and other instruments are particularly, although not exclusively, related to the unequal relationship which evolved between indigenous peoples and European Powers. For at least in theory, treaty-making

notably, of a century-long process of secularization). Traditional societies, however, tend to see themselves as heteronomous, following Auge's formulation: 27/ conceiving of an ideal order instituted by a non-human instance (whether deity or spiritual being), they affirm that their foundation lies outside of society itself, hence the impossibility of a division between the visible and the invisible world, as well as the prevalence of custom in its prescriptive sense - the re-enactment, from generation to generation, of what is considered to be true because it has passed the test of time.

84. The concept of time is therefore another important element distinguishing modern from traditional discourses on humankind, especially the role attributed to myths in making the world intelligible (or in "prefiguring" it) through classifications based on metaphors and analogies. Here, respect for tradition expresses a concept of time undivided. Indeed, the notion of progress inherited from Western Enlightenment philosophy is based on the assertion that the past is different from the present and future, and that the future is intrinsically better than the past and present. However, and for most obvious reasons, such notions are far from self-explanatory and have yet to be accepted by many indigenous peoples.

85. Further differences relevant for the study concern modes of societal organization. In many cases - in addition to possible vested interests - the diffuse character of indigenous legal and political organization and the multifunctionality of the specific actions, roles and institutions have led non-indigenous observers and policy makers to underestimate or misconstrue the purpose and rationality of indigenous society, especially in cases impervious to facile analogies. Also, because there are few equivalents for terms such as "law" and "legal" in the ten thousand (or more) legal systems of proved existence, notions about the "inherent lawlessness" of, and "institutional void" in indigenous society have been allowed to persist for much too long.

86. While it is indeed difficult in many cases to arrive at clearcut categorization and distinctions, it is nevertheless possible to identify some general principles helping to differentiate traditional from modern forms of social organization.

87. In structural terms, kinship is fundamental: its terminology is the language in which indigenous peoples express a large part of their social relationships. Kinship relations are mainly viewed in terms of descent, alliance (marriage) and gender. The combination of all three, which determines each individual's genealogical position, may vary. In the context of this study, the relevant aspect is that kinship constitutes a system of norms, representations and modes of behaviour for building systems of solidarity. Regarding kin groups, it must be stressed that they fulfil one or more functions - whether economic, political or religious - which go beyond those related to kinship itself. 28/

88. It must be noted that from the individual's viewpoint, traditional non-Western society fosters multiple group membership in virtue of the system of descent practised in a given context. Descent equals the transmission of group membership and spells out the rules according to which a society assigns kinship positions to its members - a process which must be distinguished from the transmission of social positions (e.g. chief's office) and property.

Chapter III

THE FIRST ENCOUNTERS: INDIGENOUS PEOPLES, EURO-CENTRISM AND THE LAW OF NATIONS 40/

114. In the preceding chapter, the Special Rapporteur reviewed a number of conceptual approaches in the fields of historical and anthropological investigation that make it difficult to non-indigenous observers to have a clear, thorough understanding of indigenous cultures/societies; in particular of their political and juridical institutions.

115. The purpose of the present chapter is twofold. In the first place, an attempt will be made to assess the importance outside the academic world of those basically Euro-centric and distorting approaches which cast a long shadow of "inferiority", "backwardness" and "want of institutionalization" over indigenous societies.

116. This is absolutely necessary, since in different periods of history those ideas have crystallized as sterotypes in contemporary "conventional wisdom" in the minds of political thinkers, lawmakers, executive officers, arbitrators and members of the judiciary. They thus have too often contributed to the rationalization/justification of a number of juridical concepts, legal institutions, specific legislation and national and international decisions. Research conducted till now indicates that all these elements have been instrumental in the historical process leading to present-day discrimination against indigenous peoples and to the dispossession of indigenous rights.

117. Secondly, the Special Rapporteur has deemed it necessary to explore the nature of the formal juridical relations stemming from the early contacts between indigenous and non-indigenous societies.

118. This will be done with a view not only to assessing the present-day juridical value (whatever it may be) of the "historical" legal instruments governing those contacts, but primarily in order to be in the position - in light of the experiences gained through their implementation (or lack thereof) - to evaluate, at a later stage in his work, the potential utility of formal juridical relations to foster better relations between these very dissimilar parties.

119. However, in all fairness to early anthropology - which emerged much later in time - these stereotypes go back to the first contacts between indigenous peoples and settlers. These attitudes are amply documented in theological, historical and juridical literature. It is not difficult to perceive that they all have had, in every historical period and in all geographical regions, the same ultimate purpose: to justify the pre-eminence of the dominant culture over indigenous culture and mask - not too subtly - the interests of the conquerors.

120. For example, when in the mid-sixteenth century widespread massacres of indigenous peoples by the conquistadores were reported, Charles V convened a council of legal scholars to discuss the rights and responsibilities of Spain in the "New World". In a debate held in 1550, Ginés de Sepúlveda, one of the

off against redistribution (implying centralization) and market exchange (implying the establishment of prices), 33/ or conceived of by degrees. 34/

97. Indigenous legal and political systems must be understood in the light of such main characteristics and others to be further reviewed and taken into account by the Special Rapporteur in the conclusions of his final report. Legal and political acculturation raises a problem precisely because of fundamental incompatibilities between traditional and modern forms of social organization. Yet another relevant illustration on this matter is the way in which leadership is organized in traditional societies.

98. In general, one can distinguish between societies based on rank, led by elders or "big men", where corporate descent groups play a fundamental role, and societies based on stratification, characterized by marked differences in the attribution of power and wealth among the constituent groups, and often led by hereditary kings. Both are contrasted in turn with so-called egalitarian societies, where authority is related to merit and exercised by some primus inter pares, or where leadership is limited to specific functions (e.g., war chief or priest).

99. Among those broadly defined types, traditional stratified societies exhibit political institutions and divisions more clearly than the two others, at least in the eye of the non-indigenous observer. On the other hand, they differ from the modern State by their way of defining and legitimizing political power; the latter is often strongly ritualized and justified in religious terms.

100. For the purposes of this study, egalitarian and ranked societies are of special interest; the first not only because they put to the test a number of preconceived ideas, but also because today they are experiencing particular difficulties. Under colonial rule, primus inter pares-type societies suffered much pressure, to the point that their political existence and independence was denied for lack of governing structures identifiable in dominant terms. Nor were treaties - or other instruments related to the study - concluded with them, at least according to the research conducted until now.

101. Regarding their present situation, it must be remembered that foraging peoples belong to this catogory. Their legal status is to a great extent imprecise (to say the least) in a number of present-day States in several parts of the world.

102. As to ranked societies, they are especially relevant not only because they are widespread among indigenous peoples who entered into treaty relations with European Powers, but also because they raise interesting questions about legal and political organization in general. They also reflect on the kind of relations they have entertained from time immemorial with other similar or dissimilar cultures/societies, which in turn sheds light on indigenous practices and perceptions of treaty-making.

103. For instance, with respect to the internal aspect mentioned above, in most ranked societies power and wealth entertain a dialectical relationship which allows both for considerable social control over those having authority,

intended to destroy the traditional indigenous economic and political systems and to unilaterally repudiate formally recognized land and other rights (as was the case in the United States of the 1887 General Allotment Act, also known as the Dawes Severalty Act).

128. Building upon such Euro-centric, discriminatory criteria, legal concepts and institutions such as "discovery", "effective occupation", "terra nullius", "guardianship", "domestic dependent nations", "tutorial duties of civilized States towards aborigines", "tutelage", "wardship", "pupilage", "trusteeship", etc., were either tailor-made or adapted (in both municipal and international law) with the apparent sole purpose of giving at least some juridical "authority" to the economic/political interests of the dominant culture/society.

129. Domestic case law, particularly in English-speaking North America, gives ample proof of the above. In a precedent-setting 1831 decision, United States Chief Justice John Marshall coined the term "domestic dependent nations" to describe the legal status of indigenous nations living within United States territory. He went on to express that while they were "in possession" of certain lands, they were "in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian". 47/

130. A more recent (1990) decision, this time of the Supreme Court of British Columbia, Canada, clearly shows that deeply-rooted Western ethnocentric criteria are still widely shared in present-day judiciary reasoning vis-à-vis the indigenous way of life. In his Reasons for Judgement, the Honorable Chief Justice Allan McEachern stated: "The plaintiffs' [Gitksan and Wet'sutwet'en] ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was [sic] not uncommon, wars with neighbouring peoples were common, and there is no doubt, to quote Hobbs [sic] that aboriginal life in the territory was, at best, 'nasty, brutish and short'". 48/

131. From the outset, in the case of Spanish and Portuguese-settled America, these concepts of "inferior societies" led to outright colonial domination, the imposition of European legal institutions on indigenous peoples (with the necessary adaptations to the different milieu and due consideration given to the particular interests of those who ruled in situ). In many cases, it also led to the early extermination of numerous indigenous nations (as in the cases of those existing in present-day Cuba, Haiti and the Dominican Republic). Only on very rare occasions, specifically in the remote southern regions of South America, the new masters felt the need to enter into negotiated agreements with the autochtonous peoples.

132. A different situation arose in British- and French-settled North America. There, a number of factors forced or made it expeditious for the newcomers to establish juridical relations with indigenous nations soon after their first contacts. On the one hand, the European settlers arrived in areas of the eastern North American seaboard which were not thinly populated and, for that matter, inhabited by peoples who showed a remarkable degree of cohesion, organization and military prowess. In order to physically survive, the fledgling European enclaves very much needed to establish as peaceful relations as possible with the original inhabitants of those regions.

requires some sort of recognition of equality. The proof is that European Powers (or their successors) started to dispense with treaties when they felt superior, notably in military terms, unless it was judged expeditive or necessary to enter into a form of accord with extra-European peoples, in particular to establish "rights" and priorities over competing European Powers. This aspect will be further reviewed in chapter III.

110. In connection with early instruments, one should know more about the reactions of indigenous peoples. Of particular interest is the question of how European overtures and politicking were viewed from the perspective of indigenous relations with outsiders or newcomers. The present-day importance of such indigenous perceptions should not be underestimated either with respect to existing instruments, or in the possible context of future ones.

111. Searching answers to this and similar problems involves the (re)writing of history from the point of view of indigenous peoples, and in this field considerable efforts must still be made. In anthropology, the problems of method and interpretation thus raised have been addressed - if not always in the most relevant or even decentred fashion - under the heading of ethnohistory.

112. Broadly speaking, ethnohistory combines the anthropological problematique with the historical method. For some, ethnohistory is an auxiliary of anthropology: it permits us to check inaccurate historical evidence produced by individuals who were ignorant about indigenous cultures, against the published record of professional ethnology, and to identify with precision a given culture or to reconstruct migrations due to various circumstances, not least the European presence. Thus ethnohistory has been used to add a historical dimension to classic anthropology which has been frequently criticized for its historicism.

113. Another dimension of ethnohistory is the attempt to bear witness to the ways in which indigenous peoples conceive of their own histories, including oral tradition and myth, as well as the fundamental role of elders and traditional leaders in transmitting and interpreting such historical knowledge. Related to this endeavour, at least in spirit, are the histories written to redress unjust or racist historiography, 37/ as well as life histories. 38/ This type of ethnohistory owes much to critical relativism, especially the idea that there are many ways to write history. 39/

fact; namely, that they were indeed negotiating and entering into contractual relations with sovereign nations, with all the legal implications that such a term had at the time in international relations. 52/

139. It is important to stress that whatever present-day notions may be sustained about indigenous "self-determination", "nationhood" and "sovereignty", the fact still stands that in the early juridical relations between indigenous and non-indigenous societies, the European parties were very much aware that their indigenous counterparts indeed acted as sovereign nations. It was not difficult for the non-indigenous side to perceive that the first nations had the formal legal attributes required at the time to be recognized as such. Last, but not least, they reckoned that the "legitimization" of their own particular colonization and trade interests made it imperative for them to recognize indigenous nations as sovereign entities.

140. In the first place, it must be restated that in present-day English-speaking North America - as opposed to Spanish and Portuguese-colonized America and to most of Africa and Asia - those relations took the form of formal treaties for approximately 250 years. Such a pervasive utilization of this particular modality of entering into juridical relations offers solid proof of extensive European recognition of both the international (not internal) nature of the relations between both parties, and of the inherent international personality and legal capacity of the indigenous part for negotiating and entering into treaty relations, resulting from their status as subjects of international law in accordance with the legal doctrine of those times. 53/

141. Several elements lead to that conclusion. In the first place, at the time of those first encounters, most indigenous nations in the region had territory, a distinct, permanent population, capacity for international relations and easily identifiable forms of government. These constitute the four key criteria which throughout the history of international law (or "law of nations", as it was originally named) have been required for a political entity to be recognized as having the personality and the capacity to be the subject of international law. 54/

142. A large number of legal instruments agreed to in North America between the mid-seventeenth century and the late 1870s (as well as in much more recent documents) attest to the existence of clearly defined territories over which indigenous nations exercised exclusive rights. 55/ On the other hand, there were no doubts, at any time, about the existence of indigenous populations in those territories. Formally established links (of alliance as well as of another nature) of indigenous nations among themselves 56/ and with European Powers were proof not only of their actual capacity to negotiate and enter into relations with other international political entities, but also, in many cases, of their highly-developed diplomatic skills.

143. In the view of the Special Rapporteur, as far as political institutionalization is concerned, there can be no doubt that indigenous nations had developed, at the time of their early contacts with non-indigenous societies in all parts of the world, perfectly functional and effective forms

participants, arguing in favour of the conquest of indigenous nations, did not hesitate to label the Aztecs as "stupid, inept, uncivilized, cruel, idolatrous and immoral", which indeed made them "natural slaves". 41/

121. In the early seventeenth century, Samuel Purchas, the English promoter of the colonization in what is today the State of Virginia in the United States of America, considered indigenous peoples in the area as "more brutish than the beasts they hunt, more wild and unmanly than that unmanned country, which they range rather than inhabit; capitulated also to Satan's tyranny in mad pieties ... wicked idleness, busy and bloody wickedness". 42/

122. In his 1828 Message to Congress, the United States President John Quincy Adams bitterly complained that after having taught indigenous nations "the arts of civilization and the doctrines of Christianity ... [one finds them] in the midst of [our] communities claiming to be independent of ours and rivals of sovereignty within the territories of the members of our Union". 43/

123. These reactions to alien cultures and the idea that their "backwardness" required the "good work of civilization" would also be exceedingly evident at a later period, when the European Powers decided to establish some order in their competing endeavours to appropriate Africa for themselves.

124. The drafting committee of the 1885 Berlin Africa Conference felt obliged to declare "the necessity of securing the preservation of the aborigines, the duty to aid them to attain a higher political and social status, the obligation to instruct and initiate them into the advantages of civilization". The Final Act of the second Africa Conference (Brussels, 1889-1890) stated that the European Powers had the "duty" to "raise [the autochtonous tribes] to civilization and bring about the extinction of barbarous customs, such as cannibalism and human sacrifices ...". 44/

125. Indigenous "savagery" was contrasted, time and again, with the enlightenment of the non-indigenous "God-favoured" conquerors. Political theories - often also applied to other non-indigenous "inferior" peoples - were developed backing this position.

126. Professor Glen Morris rightly points out that the political philosophy of Manifest Destiny is a case in point. Typical of the conceptions of its supporters, Thomas Hart Benton, a United States Senator, proclaimed in 1846 that white people "had alone received the divine command to subdue and replenish the earth" and indigenous peoples had no right to the land of America because it had been created for use by the "white races ... according to the intentions of the Creator". 45/. This was more than a century after John Winthrop, the first colonial Governor of Massachusetts, had used the Scriptures to justify his legal contention that if the new settlers left indigenous peoples "sufficient" land for their use, they may "lawfully" take the rest. 46/

127. These stereotypes had very practical consequences for indigenous peoples everywhere. On multiple occasions they were translated into legal norms which either reduced them to slaves in practical terms (e.g. the encomiendas and repartimientos enforced by the Spaniards), forcibly evicted them from their ancestral lands (such as the 1830 Removal Act in the United States), or were

150. In those difficult and uncertain years, the fledgling nation - as Vine Deloria has noted - was very much in need of establishing its ability to comport itself responsibly and in accordance with the customs and conventions of diplomatic law. 68/ Several scholars have remarked that since many indigenous nations had already been formally recognized through treaties by a number of European nations, in entering into juridical international relations with the United States the first nations were in more of a position to recognize the legitimacy of the latter than the other way round. 69/

151. The 1787 United States Constitution (Art. I, 8, cl.2) and the 1790 Intercourse Act 70/ reflect the clear intention of the Founding Fathers of that country to recognize the sovereignty of indigenous nations. One of George Washington's presidential messages to the Senate clearly denoted that in 1789 the Executive was particularly keen to give the treaties entered into with indigenous nations, the very same institutional consideration and value as to those formalized with European nations. 71/ It can be added that the first of the treaties concluded by the new republican authorities was later described as "the model of treaties between the crowned heads of Europe". 72/

152. It is worth noting also that in two separate opinions rendered in 1821 and 1828, the United States Attorney General expressly recognized that (a) indigenous nations' "title and possession" to their lands were "sovereign and exclusive" as long as those nations existed; (b) their independence, for the purpose of treaty-making was "as absolute as [that of] any other nation"; and (c) "like all other independent nations, they are governed solely by their own laws, ... have the absolute power of war and peace ... [and] their territories are inviolable by any other sovereignty. As a nation, they are still free and independent ... [and] are entirely self-governed ...". 73/

153. Despite those very clear notions, mention has already been made (see para. 129 above) of the United States Supreme Court's decision in Cherokee Nation v. Georgia (1831), in which indigenous nations were declared to be only "domestic dependent nations" and in "a state of pupilage". In that landmark decision - rendered shortly after the 1830 Removal Act - the Chief Justice, speaking for the Court, dismissed the case without hearing the merits of the case, on the grounds that the Cherokee Nation was not a "foreign nation" within the meaning of the United States Constitution. 74/

154. However, the following year, the very same Supreme Court rendered yet another very important decision in the often mentioned case Worcester v. Georgia, which was also delivered by Chief Justice Marshall. Somewhat surprisingly, after the criteria expressed in Cherokee v. Georgia, in Worcester the Court acknowledged - it can be validly argued - the international status of indigenous nations living within the frontiers of the United States. In the Court's own words:

> "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties admits ... [indigenous nations] among those powers capable of making treaties. The words 'treaties' and 'nation' are words of our own language, selected in our diplomatic and legislative

133. On the other hand, the British-French competition for the acquisition of new territories for their respective empires led these two European Powers to eagerly try to rally indigenous support against each other's competitors. 49/ Indigenous Americans protected European colonies from other non-indigenous colonizers, as well as from hostile indigenous nations. The nature of European interests at that early stage (mainly trade, particularly the fur trade) made these juridical relations a practical necessity. In more than one historical period, indigenous nations held the balance of power in the ongoing struggle among the various European colonial projects in that part of the world.

134. Additionally, that very same colonial competition, and the need to legitimize their respective territorial claims in the "New World" vis-à-vis each other in accordance with European legal standards of the times, granted particular significance to formal juridical relations with America's original inhabitants. At a later stage, this practice was also to be followed for identical purposes by European colonial Powers in other regions such as Oceania and Asia, either directly or through charter companies.

135. As clearly pointed out by Professor Howard Berman, four medieval legal concepts predating European contacts with indigenous America could possibly validate - in the European legal world of those early contacts - claims to rights in newly "found" regions: conquest, agreement or cession, papal "donation" and original occupation ("discovery"). Of these, the two latter provided "the weakest and most tenuous claims ... [since they] amounted to little more than a naked declaration on the part of the asserting European State that its rivals should desist ... [while] both conquest and relationships established by agreement ... manifested actual State practice". 50/

136. None of those medieval legal concepts - Berman continues - could lead to automatic acceptance by other competing powers, but should be considered "more in the nature of arguments for the recognition of 'rights of exclusivity', depending of rival States' acquiesence to those claims". The same source reminds us that by the sixteenth century, "States were only willing to exclude themselves from opportunities for trade or colonization, if at all, on the basis of actual settlement and territorial control, or firm relationships established ... with indigenous societies". 51/

137. At this stage, it is important to establish the true nature and institutional characteristics of those legal relations which in North America soon became part and parcel of the political reality. The widely-extended and generally accepted contemporary legal European tradition of treaty-making provided the most suitable means to formalize such relations, particularly those which have come to be known as "formal indigenous territorial cessions" and were used by the European parts as a basis for their colonial claims.

138. Research by the Special Rapporteur has convinced him that, in establishing formal legal relationships with indigenous North Americans, the European parties were absolutely clear - despite their notions of the "inferior" nature of the former's culture/society - about a very important

(at least in those same regions) a clear trend in nation-States aimed at divesting those nations of the very same sovereign attributes and rights; particularly their land rights.

161. In the case of British-American settled North America, this trend can be exemplified - among other early cases - by the removal of the so-called "five civilized tribes" (the Cherokees, Creeks, Chickasaws, Choctaws and Seminoles) from their ancestral lands in what today constitute territories within the States of Georgia and North Carolina in the United States, as a result of the already mentioned 1830 Indian Removal Act. This specific piece of legislation authorized the President of that country to remove any indigenous nations with territory east of the Mississippi River, to the unsettled territories west of that river. 81/ As far as jurisprudence is concerned (both within the United States and internationally), Chief Justice Marshall's opinion in Cherokee mirrored this most visible trend.

162. Elsewhere in this chapter, reference has been made to a number of legislative actions which, step by step, encroached upon previously recognized indigenous rights in the region. During the remaining part of the nineteenth century and throughout the twentieth century, State practice and legal action have been clearly coherent with the obvious intention of making all indigenous issues as privy only to nation-States' domestic jurisdiction.

163. One cannot help but notice that an obvious aim of this policy was and continues to be to prevent any international connotation from being given to whatever remained of the original sovereignty that States had been willing to acknowledge for indigenous nations. This is particularly evident with respect to the treaties entered into with the original inhabitants of North America.

164. International adjudication and arbitration awards also record similar trends and policies. For example, in the Cayuga Indians arbitral case (1926), the tribunal considered that the Cayugas did not constitute a nation, sustaining that "[a] tribe is not a legal unit of international law". With respect to indigenous nations of America, it was further concluded that "American Indians have never been so regarded ... From the time of the discovery of America, the Indian tribes have been treated as under the exclusive protection of the power which by conquest or cession held the land which they occupied ... So far as an Indian Tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign within whose territory the tribe occupies the land, and so far only as that law recognizes it". 82/

165. In the Island of Palmas, yet another case of international arbitration, the arbitrator implied that the "discovery" of a territory, accompanied by effective acts of occupation and possession, could be invoked successfully to prove title. He concluded that treaties entered into by the island's indigenous authorities and the East India Company were not, "in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties". 83/

166. Raw evolutionist stereotypes, Euro-centric approaches and the trend to diminish or abolish any international status for indigenous nations and to consider whatever indigenous rights may exist as individual (not collective) rights, were very much in vogue at the beginning of the twentieth century.

of political organization and governance. This has been amply researched and demonstrated in the case of North America, 57/ but in no way can it be considered as a purely North American phenomenon. 58/

144. It is true that in numerous cases, such modes of political organization do not correspond to present-day forms of institutionalization, characterized by centralized power, administrative bureaucracies, a permanent coercive apparatus and codified law, typical of the twentieth century nation-State. However, there is every indication that those modalities of societal organization not only were capable of holding effectively their respective social fabrics but they also had achieved highly complex expressions. 59/

145. It has been pointed out that "indigenous governance in the Americas was far more refined than that evidenced across the Atlantic, at least until some point well into the nineteenth century". 60/ In this connection, and basing himself in ample specialized literature, Professor Berman stresses that "it is often overlooked in this context that the European societies that first encountered indigenous nations were themselves only in the early stages of evolving forms of statehood in the contemporary sense". 61/

146. In this respect, it is important to recall that international law (past or present) has not restricted the concept "subject of international law" only to States. 62/ The relative character of statehood has also been noted by a number of scholars. 63/ In particular, the law of nations of the late seventeenth and eighteenth centuries did not require a particular form of societal political organization as conditio sine qua non for considering a political entity as a sovereign actor in international relations. Martens, in his 1788 Summary of the Law of Nations listed as such not only empires, kingdoms, republics and principalities, but also towns, religious orders, duchies, provinces, cities, a bishopric and a number of "demi-sovereign entities" ruled by the electors of the Germanic Empire. 64/

147. It is unquestionable that indigenous nations considered themselves sovereign entities, with sovereign rights to the ancestral territories which they occupied centuries before the arrival of the new settlers and with no other limitations for conducting political relations with other entities to advance their own interests, than those privy to their own capabilities to do so.

148. In all regions where early treaty relations were established, North America is a very clear case in point, the treaty-making process was conducted on the basis of the recognized equal capacity of both European and indigenous parties to accept obligations and acquire rights in accordance with mutually-agreed-to, legally binding instruments. As one scholar has put it: "Expressly or de facto, wars and treaties evidenced European recognition of the political personality and territorial sovereignty of Indian nations". 65/

149. The fact that in the international State practice indigenous peoples were considered sovereign nations in that region and at the time, is soundly based in historical documents. This is very much the case of the United States in its treaty relations with America's original inhabitants, both immediately before 66/ and immediately after its formal institutionalization as an independent State. 67/

Chapter IV

DIVERSE JURIDICAL SITUATIONS WITHIN THE SCOPE OF THE STUDY

169. In accordance with the Special Rapporteur's mandate, and especially taking into account the need for an innovative, forward-looking approach to State-indigenous relations, extensive research has been conducted with respect to the five distinct types of juridical situations which he has identified as focal points of this study. These five types of situations are as follows:

(a) Treaties concluded between States and indigenous peoples;

(b) Agreements made between States or other entities and indigenous peoples;

(c) Other constructive arrangements arrived at with the participation of the indigenous peoples concerned. (In connection with this particular category of situations, it must be recalled that in his preliminary report the Special Rapporteur expressly stated that he had construed this terminology to mean "any legal text and other documents which are evidence of consensual participation by all parties to a legal or quasi-legal relationship" 85/);

(d) Treaties concluded between States containing provisions affecting indigenous peoples as third parties;

(e) Situations involving indigenous peoples who are not parties to, or the subject of any of the above-mentioned instruments.

170. Due to the universal scope of the study, research on all these situations was undertaken with respect to all regions of the world. The results until now continue to be unbalanced, primarily because of the exceedingly diverse practical policies implemented by the European colonial Powers and their successors in their relations with indigenous peoples. Additionally, certain difficulties have been, and continue to be encountered in attempting to gain access to relevant materials (particularly primary sources) from all regions. This particularly applies to Asia and Africa.

171. As a follow-up to his initial research, the Special Rapporteur selected a tentative series of case studies involving all five types of situations already mentioned. The purpose is to focus attention on primary issues relevant to the study and to illustrate the wide variety of situations today affecting - positively or negatively - indigenous-State relations. In each case study selected, special attention was paid to the historical, anthropological and legal dimensions of these situations, the processes which led to the existence of the juridical instruments regulating them (and their implementation), and their national and/or international present-day significance.

172. As could be expected (and for the reasons mentioned above), the list of case studies included in the present report is only indicative, since it could not be fully balanced in terms of the amount of data available, analytical results or regional representativity. Obviously, the cases reviewed in this progress report will not be the only ones which will contribute to the final

proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They applied to all in the same sense." 75/

155. As far as present-day Canada is concerned, the contents of the minutes recording (for the non-indigenous side) the negotiations entertained by the representatives of the Queen which led to the "numbered treaties", the formalities observed by both parties and the provisions of those instruments also seem to give grounds to the inference that both parties recognized the international character of the documents concluded. 76/

156. However, it should be recorded that in its response to the questionnaire circulated by the Special Rapporteur, the Government of Canada - on the basis of two rather recent decisions of Canadian courts 77/ - submits that "colonial-era treaties signed by Great Britain and Indian people in what is now Canada, have been found ... to be agreements which are sui generis, neither created nor terminated according to rules of international law". It further expresses that the relationship stemming from said treaties "was categorized by the Supreme Court of Canada ... as falling somewhere between the kind of relations conducted between sovereign States and the relations that such States have with their own citizens". 78/

157. The Canadian Government adds that on the basis of the Constitution Act, 1867, Canada has legislative jurisdiction over "Indians and lands reserved for Indians" and the provinces have legislative jurisdiction "over a number of areas of activity, such as property and civil rights in the province, local works and undertakings, and provincial lands ... and the capacity to make legislation in these areas which affects aboriginals and other people and may enter into agreements with aboriginals, reflecting activities within these areas". 79/

158. As seen above, the question as to whether or not indigenous nations were considered by their European interlocutors, in their early encounters, as political entities with treaty-making powers and full international personality is amply documented. On that basis, the Special Rapporteur is in the position to conclude that in English- and French-settled areas in North America and in those times, indigenous peoples/nations were indeed recognized as such by their European counterparts, in accordance with basic notions of the law of nations then applicable by non-indigenous standards.

159. There are elements leading to a similar conclusion with respect to the early contacts of the Portuguese, Dutch, French, Spanish and British parties in Africa, Asia and Oceania. 80/ Notwithstanding, the ongoing research on these regions (as well as that related to northern Europe and northernmost Asia) does not allow the Special Rapporteur to feel on solid enough ground, as yet, to advance even preliminary findings on the subject. Investigation on these areas will be, of course, continued, as a matter of priority, in the next stage of the research.

160. While it is not difficult to conclude that indigenous nations interacted (at least for a period of time and in some parts of the world) with European Powers as entities with international personality and sovereign rights, it is also true that since the early decades of the nineteenth century one witnesses

179. It is obvious that - as is also the case in other regions - the extremely complex situation of the first peoples of North America calls for an integral approach which must take into account the general historical and political context in the area, as well as the specific circumstances which facilitated the process of treaty-making in each particular case.

180. On the one hand, especially in the early days of Indian-European relations in what is today the United States of America, treaties were often viewed by the indigenous nations - and not only by them - as links in a chain of similar agreements, as illustrated by the so-called Covenant Chain linking the Haudenasaunee and their non-indigenous allies. On the other hand, questions of how a treaty came about and was concluded, in particular from the indigenous viewpoint, cannot be answered without - sometimes extensive - reference to historical and cultural circumstances. No treaty is self-explanatory.

181. Thus making a bid for contextualization, the Special Rapporteur has attempted to deal with a number of specific treaties according to what he has considered as representative situations. It is probably not necessary to say that the meaning, scope and purpose of treaties changed, as the history of European settlement - for example in North America - was being written. Still (and because of the very objectives of this study), such changes remain to be fully spelt out, in particular regarding the issue of indigenous versus settlement jurisdiction and what has come to be called the political question doctrine in United States judiciary tradition. 89/

182. The cases chosen to exemplify treaty relations in North America were selected taking very much into account key elements such as time, place and the overall socio-political situation in the respective areas. Those reviewed with respect to indigenous nations living in present-day United States territory, cover a period of more than 200 years; that is from the period of early Haudenasaunee contacts with the Dutch traders in the first half of the seventeenth century until the United States abandoned treaty-making with the continent's first nations in 1871.

183. It must be recalled that European settlement in the region proceeded mostly from east to west; California was settled earlier than the Plains, first as a result of Spanish and Mexican policies and later because of the gold rush of 1848 and the opening of the Oregon Trail.

184. In connection with the initial treaties, it is impossible to isolate them from a very important political factor: the manifold consequences of the French-British conflict, as they affected the situation of the eastern peoples, well illustrated by the evolution of the Covenant Chain and the fate of the so-called "five civilized tribes". Both situations will be extensively reviewed.

185. Many treaties concluded during the eighteenth century were treaties of peace and friendship, which also provided for limited cessions of land to accommodate settlers, as well as for the regulation of trade. However, the Treaty of Green-ville (1795) 90/ was different in that it pointed to what treaties made by the United States with indigenous nations were to become in the first half of the nineteenth century.

All these elements obviously influenced the mandate system created in Versailles by the Covenant establishing the League of Nations and also, to a certain degree, present-day United Nations work in the field of indigenous rights. Furthermore, attempts made by indigenous nations to have access to the League and to the International Court of Justice to assert what they claim to be their present international personality have so far proved unsuccessful. 84/

167. If, in present-day State practice, national legislation and national/international adjudication, such a remarkable difference does exist between the present and past international status of indigenous nations, the Special Rapporteur deems it necessary to explore (in the next stage of his work) the manner in which that dramatic change actually took place. He intends to review in a more detailed fashion the historical and contemporary developments which have marked such an involution and the juridical reasoning upon which the present factual international situation of indigenous nations is based.

168. Such a review and analysis will be carried out taking into account not only domestic developments (enactment of legislation, decisions by domestic courts and executive actions) but also those which actually have taken place at international, regional and bilateral levels. It will be based necessarily on case studies from all regions of the world considered as representative of the various juridical situations topical for the study, in which indigenous peoples find themselves at present (as detailed in chapter IV).

negotiated and entered into these specific types of relations as sovereign nations and that the instruments which formalize them are indeed treaties in the sense this term is given in international law.

194. Consequently, the Special Rapporteur has chosen as a case worth of further analysis the 1975 James Bay and Northern Quebec Agreement (Convention de la Baie James et du Nord Quebecois).

195. It is worth adding that a good example to account for the complexities of the treaty situation in Canada in historical as well as political terms would be the area which now constitutes the province of Ontario. This region was the scene of extremely active and varied treaty-making, covering one century and a half 91/, while illustrating the contradictions between the fur trade and European settlement.

196. Thus the Canadian Shield in the north was dominated by the Hudson Bay Company founded in 1670 by royal charter. The southern region, on the other hand, was the target of European settlers of various origins and therefore the object of negotiations with indigenous nations for the extinguishment of aboriginal title. From the point of view of the indigenous peoples involved, the area offers yet another facet of Haudenasaunee (Iroquois) dominance, as well as of their relations with other nations (such as the Hurons).

197. By and large, the situation in today's Canada is rather different from that of the United States, not least because settler pressure was minimal for a long time in most of the country. Nor did an allotment policy similar to the one conducted under the United States Dawes Act (1887) - and, subsequently, a reversal such as the Indian Reorganization Act (1934) - occur there. Nevertheless, in terms of conflicting legal and political systems - especially in reference to contradictions related to treaty interpretation and implementation - there are a number of similarities. On the basis of research done until now, it appears that in Canada, too, domestic legislation has not prevented the erosion of treaty rights.

198. In Oceania, the treaty situation of the Maori people has been amply researched. The Maoris travelled from eastern Polynesia 92/ to the islands constituting present-day New Zealand and settled in particular - but not exclusively - on Aotearoa, the North Island, preferred over the South Island because of its gentler climate and conditions for a better living.

199. The one crucial legal instrument relevant for the study, Maori-British relations and the subsequent status of the Maori people with the non-indigenous New Zealand Government is, of course, the Treaty of Waitangi, entered into by about five hundred Maori chiefs and the representatives of Queen Victoria.

200. As expressed in the preliminary report, treaty situations dating back to the Spanish colonial presence in Mexico, Central and South America have been relatively thoroughly reviewed, although research is still to be concluded, pending the Special Rapporteur's planned second trip to Seville's Archivo de Indias later this year. Neither the Spaniards nor the Portuguese implemented a treaty-policy vis-à-vis indigenous peoples in the Americas that could be considered as such. Evidence points to the fact that both colonial Powers depended heavily on the authority they conceded to the Papal Bulls which in

conclusions of the study. The selection will grow as research progresses. It should also be noted that the information reviewed till now strongly indicates that most of the issues and situations being addressed in the study are indeed of a universal character, certainly from a historical point of view and present-day interest, but also (most possibly) with regard to the potential applicability of treaties for governing indigenous/non-indigenous relations.

173. In terms of the source materials available to and used by the Special Rapporteur, it must be stressed that he has, whenever possible, relied on primary sources such as the actual texts of the instruments involved. In the case of some present-day States, existing treaty collections, 86/ including those compiled by indigenous organizations, 87/ have permitted easy access to many of the historical treaties. He has also canvassed secondary literature when necessary although this type of material differs both in scope and quality from one situation to another and from region to region.

174. In addition, where possible and relevant, an attempt was made to refer also to domestic legislation and jurisprudence in order to throw more light on the question of the contemporary significance either of the legal instruments already existing or the qualitative nature of the particular situation under review.

A. Treaties between States and indigenous nations

175. Because of their inherent juridical importance, treaty relations merited particular attention from the Special Rapporteur.

176. In terms of historical analysis, research for this report did not start with "the beginning", whenever that was supposed to be: first contacts in the 1500s, or first land purchase deeds and peace agreements in the 1600s. It started instead, basically, with the 1700s, when the European Powers became more and more closely involved with the extra-European world, thus establishing what Dorothy Jones has called an extended treaty-system in which, contrary to the European treaty-system of the times, Great Britain and no longer France played the leading role. 88/

177. This shift is evidenced by the more than one dozen treaties entered into by Great Britain and indigenous nations of North America between 1763 (the Treaty of Paris) and 1774 (the beginning of the former 13 colonies' War of Independence). In fact, it is the Anglo-Saxon legal tradition which perhaps offers the most interesting (and obviously the best-documented) examples of international instruments falling under the mandate of the Special Rapporteur. This is so, because Britain actually was the only colonial Power which conducted a consistent treaty policy with extra-European peoples.

178. This tradition was continued by the Powers which succeeded Britain in the territories concerned. Consequently, most examples of treaty situations taken into account in this first progress report come from areas - particularly in North America - where the British colonial presence was most evident and where the contemporary British legal tradition offers myriad details of the processes leading to the existence of those instruments and a very definite vision of their importance for all the parties concerned.

protectorate at Porto Novo and the Germans had established one on the Togolese coast (1884). The rules had been defined at the 1885 Berlin Conference; they included making treaties with autochtonous rulers in the interior. Africa is undoubtedly the clearest illustration of treaties made with the purpose of obtaining "land cessions" and other "exclusive rights" for securing claims against competing European Powers.

208. For the purpose of the study, one must bear in mind that contrary to North America, Australia and New Zealand, where a white settler population has gradually taken over from indigenous peoples (who for all basic practical purposes have been reduced to "numerical minorities"), present-day African States - with the sole exception of South Africa - are governed by their indigenous inhabitants.

209. Further, it must be pointed out that the Special Rapporteur has not yet reached final conclusions as to whether or not certain early contractual relations entered into by certain African kingdoms and/or local chieftains with a number of European colonial Powers - either directly or through royal or charter companies - should be considered as sources of treaty relations. Further data-gathering and analysis is obviously required with respect to possible situations of this type in Africa. 95/

210. Those of the Zulus and the Khoi/San nations are cases in point. The Zulus were involved, for example, in trade with Austrian companies which were active in the eighteenth century at Delagoa Bay. 96/ It should be noted that the mode of organization and transformation of the Zulu kingdom offers interesting insights into the question of political systems in traditional societies, including the manner in which they relate to each other and, subsequently, to the settler Government. 97/

211. As to the Khoi and San, their history in relation to European newcomers at Table Mountain can be traced back to Dutch sources of the mid-seventeenth century. It is interesting to the extent that there has been an ongoing debate on the historical and ethnic relationship between the two peoples, including the coexistence of a pastoral and a foraging mode of subsistence. 98/

212. Research conducted to date with respect to indigenous peoples in Northern Europe has not revealed treaty relations between indigenous nations and States of the area. The same applies to indigenous nations of the northern Far East and the former Soviet Union.

213. Little, if no comprehensive research on legal instruments binding indigenous peoples in Asia to former colonial Powers is available in contrast to the quantity of research existing for North America and New Zealand. However, a certain number of such instruments exists to illustrate early contacts with European traders and settlers in territories which are today under the sovereignty of India, Malaysia, the Philippines and Sri Lanka. It should be added that what was stated above (see para. 208) in regard to Africa, is also applicable to Asia; all States in the region are ruled by autochtonous Governments as a result of the decolonization process and the struggle for national liberation. This, of course, does not preclude the existence of a number of minorities or indigenous peoples in the multinational States of the region.

186. After American independence, especially since the 1812 war with Great Britain, treaties tended to be viewed on the Euro-American side as a means to extinguish aboriginal title to large tracts of land. A similar purpose underlay the so-called allotment and removal treaties in the 1830s with the first nations east of the Mississippi (and later with those of Kansas).

187. In terms of conflicting legal systems, this was a crucial period indeed: starting with the United States Constitution of 1787, mechanisms were set in motion which contributed to the erosion of indigenous jurisdiction over their lands through a variety of unilateral decisions and legislative measures both at the State and federal levels. However, the treaties which the indigenous peoples made with the United States generally did not relinquish jurisdictional power.

188. The treaty situation of indigenous peoples in Canada today has been dealt with separately, on the basis of four different situations. First, regarding the Maritimes, reference is made to the Micmacs, in order to illustrate the peace-and-friendship variety of treaties.

189. Secondly, the example of British Columbia was chosen mainly to recall the fourteen so-called Douglas treaties of the mid-1800s, but also to address briefly the question of land, fishing or hunting rights on the Pacific Coast in the absence of treaties.

190. After the formation of the Dominion of Canada in 1867, a series of numbered treaties were made in quick succession, which ran parallel to the establishment of provincial boundaries in the Prairies (Alberta, Saskatchewan and Manitoba); the example chosen for consideration here is Treaty No. 6.

191. In recent years a new modality of contractual relations has been observed in Canada, those called "modern treaties". In its response to the Special Rapporteur's questionnaire, the Canadian Government refers to this recent practice which involves not only the federal government and indigenous nations, but also the provinces of Canada. It is pointed out that these "modern treaties" have also been referred to as "comprehensive claims settlements".

192. In this connection, the Canadian response states that "[T]hese agreements with aboriginal peoples have been [made] for the purpose of resolving unsettled claims to lands and resources by the aboriginal communities ... which continue to use and occupy traditional lands and whose aboriginal title has not been dealt with by treaty, superseded by law or otherwise dealt with. With the Constitution Act, 1982, as amended, rights arising from these agreements receive constitutional protection." It adds that three "comprehensive land claims agreements" have been entered into to date: the James Bay and Northern Quebec Agreement (1975); the Northeastern Quebec Agreement (1978) and the Inuvialuit Final Agreement (1984).

193. It is important to note with respect to this modern practice in Canada that, according to the information available to the Special Rapporteur, the indigenous nations involved - at least in the cases of the Cree and Inuit (of Quebec) and the Inuit of Port Burwell nations - consider that they have

between the East India Company and the Mughal emperors or the rulers of Bengal in the early eighteenth century. No serious juridical appraisal of these documents is possible with such lacunae.

220. In other cases, the European version of the instrument is indeed available, although it has not been possible to adequately research the overall historical situation under which those texts were agreed to. Without such elements it is fairly difficult to fully understand the reasons leading to such agreements and the consequences of their implementation (or lack thereof). The so-called Articles of Friendship and Commerce and the Treaty of Commerce concluded by the East India Company, respectively with Sulu (Manila, 1761) and Oudh (Fort William, 1788) fall under this category.

221. In his second progress report, the Special Rapporteur hopes to have finished his research on this most complex issue of instruments to which charter companies are parties.

222. Having broadly reviewed the results of the ongoing research on treaty situations in the various regions of the world, the Special Rapporteur will now attempt to summarize certain elements which he deems of importance to understand the historical circumstances surrounding the conclusion of a number of treaties and the import of those instruments in the life of the indigenous nations parties to them. The diverse situations related to those treaties will be presented in chronological order, irrespective of the region in which they occurred.

Haudenasaunee

223. The Haudenasaunee (also referred to in most non-indigenous sources as the Iroquoia Confederacy, comprising the Cayuga, Onondaga, Mohawk, Senece, Oneida and Tuscarora nations), whose founding (ca. 1570) preceded contact with Europeans (early 1600s), was the largest and best-organized political unit in the area. It was not, however, the only one existing in North America when the European arrived.

224. The fundamental element of the Haudenasaunee (the people of the Longhouse) view of the world is the Great Law of Peace, contained in the Deganwidah epic which also includes the founding tradition of the Confederacy itself (naming the 50 founders, then village chiefs), as well as the principles governing the politics and diplomacy of its expansion.

225. The organization used for maintaining peace and conducting trade with the Europeans was the Covenant Chain, "a multiparty alliance of two groupings of members: tribes, under the general leadership of the Iroquoia, and English colonies, under the general supervision of New York. As in the modern United Nations, no member gave up sovereignty. All decisions were made by consultation and treaty, and all were implemented by each member individually". 101/

226. The functions of the Covenant Chain changed in the course of history; it must be approached both from the angle of the indigenous partners as well as that of British-French conflict. Its complex history - in particular the ramifications of the Chain and their political consequences mainly till the

the early period transacted their frequent quarrels in the "New World". They did not feel it was convenient or necessary to recur to treaty-making with the indigenous nations to facilitate their colonial projects, or to "legitimize" their exploits in the eyes of other European Powers.

201. There are, of course, references in secondary sources to some Spanish-indigenous nations treaty situations dating back both to the first and second halves of the seventeenth century. Such is the case of Spanish-Mapuche instruments attesting to the Peace of Quillán - ratified, according to some sources, by the Spanish monarch in 1641 - and the Negrete Parlamentos. 93/ Further information is required in all these cases.

202. Other materials recently made available to the Special Rapporteur offer evidence of negotiations and resulting contractual documents between indigenous peoples and some of the republican Governments which in the early nineteenth century succeeded Spain in most of South America. These documents refer to certain areas in present-day Argentina and Chile. Review and analysis of this primary documentation is under way at the present stage.

203. It is worth recalling that at the end of the eighteenth century the Spaniards were involved in intrigues with the "five civilized tribes", still powerful at that time, in order to unite them into barrier States against the United States. In the process, treaties were indeed entered into; for instance with the Chickasaws and Choctaws in 1784. This limited practice followed in a very specific area of North America seems to be nothing more than a reflection of a form of diplomacy chosen by the Anglo-Americans in their dealings with indigenous nations there. 94/

204. With respect to Africa, it should be recalled that Portuguese merchants were active on the West African coast in the mid-1500s, trading for gold, timber, rubber, etc. Toward the end of the sixteenth century, Dutch, French, English, Danish, Austrian and other merchants were also present. The slave trade started to become important at the end of the seventeenth century. It should not be forgotten that until the mid-nineteenth century, most of the interior of Africa was still unexplored.

205. In Africa, as in some regions of Asia, treaties were made by merchants, such as those by the British on the West African coast (especially in today's Sierra Leone), in order to ensure peaceful trading conditions and control over trade goods and trade relations.

206. Another type of treaty made with local rulers had to do with the British policy of suppressing the slave trade (made illegal in 1807), mainly in the 1840s: kings or chiefs solemnly agreed to abandon the slave trade, for which they received lavish gifts. However, such contractual commitments were generally inefficient.

207. What is at stake regarding treaties concluded in colonial Africa appears later, notably during the so-called scramble (ca. 1885-1900) among, inter alia, the British, the French and the Germans for preeminence on that continent. By that time, the British had annexed Lagos (1861) and Goldie had founded the United Africa Company (1878), while the French had established a

relations were shaped by the fur trade, as well as commercial fishing. Furthermore, French Jesuits 107/ were active among the Micmacs who thus have been Roman Catholic for generations.

232. A reaction to French-English conflict in the area was the formation of the Wabanaki Confederacy in the early 1700s, comprising, inter alia, the Micmacs, Passamaquoddy, Malecite, Penobscot and Abenaki, that is, mostly peoples who had traditionally been allied with France. Relations among the nations which were part of the Confederacy were confirmed through regular meetings.

233. The Wabanaki Confederacy must also be viewed in relation with the Haudenasaunee and the Covenant Chain: through intercession of the Ottawas, the Confederacy became allied with their former enemy, the Mohawks.

234. Relations of the Confederacy with the British were difficult because of the demands which the latter made on indigenous lands, for instance those of the Abenaki. A number of peace treaties were concluded with nations which were part of the Confederacy, thus with the Micmacs, Penobscot, Abenaki and others in 1725. The Micmacs consider the Treaty of 1725 as their first formal agreement with the British requiring periodical renewal, such as in 1749 by a group of Micmacs and Malecites.

235. British settlement among the Micmacs started about 1750, fostering the type of encroachments known in other areas. Renewal of the 1725 Treaty became necessary.

236. The Treaty of 22 November 1752 was concluded at Halifax between Micmac representatives and the Governor of Nova Scotia. It was a peace treaty which also guaranteed its indigenous signatories free hunting and fishing, as well as free trading. Other Wabanaki nations signed the Treaty in 1753 and 1754. 108/

237. As a result of a decision of the Supreme Court of Canada rendered on 22 November 1985, Mr. J.M. Simon, a registered Micmac indigenous person from the Shubenacadie band, was acquitted of offences with which he had been charged under the Lands and Forests Act of the Province of Nova Scotia. Mr. Simon had pleaded that he exercised his treaty hunting rights (referring in particular to the Treaty of 1752).

238. The Supreme Court ruled that the 1752 Treaty was a binding and enforceable agreement which had not been terminated (as had been asserted previously by the Attorney General for the Province of Nova Scotia) and which must prevail over the Nova Scotia Lands and Forest Act. 109/

Delawares and other nations east of the Mississippi

239. Two important treaties entered into by the United States in its early years as a sovereign entity are considered by the Special Rapporteur as examples of the evolution endured by indigenous-non-indigenous treaty relationships with the passing of time. These two instruments are the Treaty of Fort Pitt (1788) and the Treaty of Greenville (1795).

214. The difficulties encountered by the Special Rapporteur in his search for primary materials relating to treaty situations in Asia, have already been mentioned. However, he can safely affirm that, for example, during the so-called pacification of the peoples living in remote areas of upper Burma (ca. 1885), the British authorities frequently entertained pourparler with the inhabitants of those regions. This resulted in sanads, a treaty or compact embodying an investiture title delivered to a local chief, listing his rights and obligations toward the "local Burmese Government", the British Governor-General. 99/

215. Other secondary sources offer proof of instruments which may very well qualify as treaties in the sense the term applies to this study. Such is the case of the treaty reportedly signed on 21 June 1875 by Great Britain and Burma, with respect to the recognition of the separate status of the State of Western Karenni. It has been noted that the Karenni maintained, in fact, a quasi-independent status "as a separate feudatory State ... outside the colonial administrative structure". 100/ (Is. 110)

216. It must be stressed that, thus far, the investigation concerning possible treaty or agreement relations in Asia shows that the role played by the European charter companies was often central. Asia was another theatre of European bids for power, profit and hegemony as far back as the early seventeenth century. As was the case in North America, rivalry among European Powers was instrumental in shaping alliances with local rulers, whether on the coast where European merchants endeavoured to establish factories, or in the hinterland.

217. Regarding the charter companies active in South and South-East Asia, it should be recalled, first of all, that the autochtonous Asian trading system was disrupted by the Portuguese conquest of Malacca in 1511, which had been the centre of that system. None the less, the Portuguese failed to gain the trade monopoly. When Portuguese, then Dutch, then English traders started to arrive in Asia, they found powerful local States, whose capital was often a sea port and whose activities were mainly geared toward trade. The Islamic Sultanate of Malacca, founded at the beginning of the fifteenth century by Indian and Javanese merchants, was one such example (others were Aceh, Banten, Makasser and Palembang).

218. Two basic reasons have caused the Special Rapporteur to decide not to expressly select for review and analysis in this first progress report any of the various contractual instruments recording the early contacts between European charter companies and Asian autochtonous peoples of which he is already aware.

219. First, reference to most of them is made in secondary sources, which neither offer their integral text nor expressly establish in all cases in which capacity the company interacted with their non-European counterparts. This is the case of several instruments entered into during the seventeenth century by the Dutch East India Company (Vereenigde Oostindische Compagnie or VOC) with, among others, the Sultan of Kedah (Malay peninsula) in 1642, the rulers of Aceh (1650), the ruler of Mataram (1677) and the sovereign of Cheribon (1681). Similar situations exist in regard to instruments agreed to

248. It was under that reality that the Treaty of Greenville was signed on 3 August 1795. 112/ By the Treaty, the indigenous signatories had to surrender nearly all their ancestral lands in what are today the states of Ohio and Indiana. This Treaty is considered to be the confirmation of United States pre-eminence in the region, to the detriment of the former British role. 113/

249. Ohio gained statehood in 1802 and the area to the west started to be organized as the Territory of Indiana, whose Governor (later President Harrison) set out to clear the land for settlement. He was strongly opposed by Tecumseh who had not recognized the terms of the Treaty of Greenville. According to one source, "[T]he Indians had always contended that a tribe was not bound by land cessions given by bribed individuals, but Tecumseh developed the thesis that all the land belonged to all the Indians and that no tribe could sell a part of this common patrimony". 114/

250. Tecumseh endeavoured to establish a pan-indigenous union to wage war on the United States with the help of the British, but before preparations were completed Harrison attacked. The Indians retaliated by raiding the settlements. Then, in 1812, the United States entered into war against Great Britain. Tecumseh joined the British and started to plan for a concerted attack against the United States for which he had gathered several thousand warriors from different nations. Eventually, the British had to retreat and Tecumseh was killed in battle. With his death in 1813, the last hopes for a unified indigenous resistance east of the Mississippi were shattered: Indiana became a State in 1816 and Illinois in 1818.

The "five civilized tribes"

251. The so-called "Five civilized tribes" are the Creek, the Choctaw, the Chickasaw, the Cherokees, and the Seminole nations. The latter are an offshoot of Creek who moved into Florida in the first half of the eighteenth century. The other four traditionally occupied an area which now constitutes (totally or in part) the territories of the States of Alabama, Mississippi, Louisiana and Georgia in the United States.

252. Contact with Virginia traders goes back to the 1670s for the Cherokees. Possibly earlier, the Creeks started trading with the Carolinians (before 1700, the latter were trading with the Alabama nation who was part of the Creek Confederacy). English traders had reached the Chickasaw before 1700 and the Choctaws ca. 1710.

253. By and large, the indigenous nations of the Gulf of Mexico and south of the Appalachians were exposed to a three-cornered rivalry between the Spaniards in Florida, the French in Lower Louisiana and the English on the coast. In general, they preferred trading with the latter, who offered better goods and prices than the Spanish and French merchants. Nevertheless, all three Powers tried to ally themselves with one or the other nation of the south.

254. For instance, it was with the help of the Choctaws that the French annihilated most of the Natchez people in 1729; the few Natchez survivors were taken in by the Creek. The Chickasaws, on the other hand, were staunch

American War of Independence - the main ethnographic features of Iroquoia society in the seventeenth and eighteenth century, the principal metaphors, alliance mechanisms, and treaty protocol have been amply reviewed in a 1985 collective study, edited by Francis Jennings, 102/ and need not be analysed here. It also contains a most valuable contribution 103/ which deals with the various documents involved in Haudenasaunee treaty-making (that is, not only the written records, but also wampum belts and oral tradition, especially as both go together) and several glossaries permitting a better understanding of Iroquoia treaty and council protocol, as well as a descriptive treaty calendar.

227. On the other hand, in his amply documented recent work, 104/ Professor Berman has thoroughly analysed the main traits of the Haudenasaunee's brilliant diplomacy in the seventeenth and eighteenth centuries and the results of their treaty-making with the Dutch, French and British newcomers.

228. In general, the treaties made with those European counterparts during that period constitute, in the view of the Special Rapporteur, the most enlightening examples of both the nature (sovereign to sovereign) and object (trade, alliance attempts from the European party to buttress territorial claims vis-à-vis other European Powers) of the treaties stemming from the early contacts of indigenous and European nations, at least in what is today English-speaking North America.

The Micmac Nation

229. The Micmacs live in what is now Nova Scotia, East New Brunswick, Prince Edward Island, Gaspé and southern Newfoundland. They are an Alogonquin-speaking people whose way of life was similar to that of other eastern woodlands peoples. However, their traditional fishing and hunting economy was already profoundly changed by the time they started dealing with the British in the early eighteenth century. 105/

230. The Europeans arriving north of the 49th parallel (the future international boundary between the United States and Britain - subsequently Canada - under the Treaty of Washington of 1846) were mainly interested in the fur trade with indigenous peoples who did the hunting and trapping. 106/ Large-scale European settlement was attempted in a few areas only, such as the south-east and along the coast, and also much later than the first contacts which date back to about the year 1500. There was much English-French competititon regarding fur trading privileges and the establishment of trading posts. This also shaped relations with the indigenous nations; for instance, the Hurons were allied with the French and maintained for some time a trading monopoly. Along the Covenant Chain, alliances shifted according to circumstance.

231. The first settlers and missionaries among the Micmacs were French, after Jacques Cartier came to Micmac territory in 1534. The repercussions, on Micmac life, of the territorial shifts between the English and the French in the seventeenth (see Treaty of Breda 1667), then again in the eighteenth century (see Treaty of Utrecht 1713, or Treaty of Paris 1763, depending on the area) cannot be dealt with here. Suffice it to recall that Micmac-European

261. By 1830, the United States southern frontier had crossed the Mississippi, but some 60,000 Cherokees, Chikasaws, Creeks and Choctaws still lived east of that river. President Jackson's removal policy had a clear goal: to push the indigenous nations beyond areas of white settlement.

262. Removal was justified in terms of a narrow definition of civilization as that of a settled life spent in cultivating and improving the soil - the irony being that the peoples threatened with removal subsisted mainly on agriculture. The issue was rather one of land ownership and political organization, since the Indians continued to live on what had remained of their traditional territories. They adapted only selectively, which meant, among other things, maintaining their own tribal governments and collective land holdings.

263. The basic purpose of the policy was to disrupt tribal government and the indigenous communities by offering a fatal - and rather contradictory - choice: either agree to individual allotments (that is, complete assimilation and considerable territorial loss) or move west (that is, segregation). This "choice" was negotiated by treaties.

264. There are at least three treaties entered into by two of the "civilized tribes" (the Cherokees and the Choctaws) between 1817 and 1820 reflecting prima facie at such an early date the concepts which were to be later embodied in the 1830 Removal Act and the 1887 General Allotment Act. These were the Treaties of 8 July 1817 and 27 February 1819, signed by the United States with the Cherokee nation, and the Treaty of 20 October 1820 with the Choctaw nation.

265. The Cherokee treaties (entered into by them in "their anxious desire to engage in the pursuits of agriculture and civilized life in the countries they occupied" 117/) applied the so-called Crawford policy of 1816, which advanced the principle of reserving to individual as much land as they had under cultivation by the time the treaty was signed. The 1820 Choctaw treaty contained similar provisions.

266. Later developments, however, seem to indicate that the real intent of the United States Government at that time was to force these nations to settle further west. One step in this direction was to extend the application of State laws to the indigenous nations concerned (in Georgia, Alabama, Mississippi and Tennessee). This policy was in direct contradiction with existing treaty relations with the United States and nullified indigenous jurisdiction in most areas.

267. During the 1820s, negotiations took place with the different "civilized tribes" in view of removal. The year 1830 saw the passage of the Removal Act. The Choctaw were the first to "accept" a treaty of cession of their land (Treaty of 30 September 1830) which also provided for land allotments. The Creek tried to resist removal, but under the pressure of settler intrusions, they finally agreed to sign the Treaty of 21 March 1832, which was "an allotment treaty".

268. The Chickasaw agreed to removal, but until then they needed land in the east. They were luckier than the Creek and the Choctaws, since the terms of the treaty they signed in 1832 were more generous by comparison. Major

240. The 1778 Treaty of Fort Pitt was the first treaty the United States concluded with an indigenous nation (the Delawares). 110/ This treaty must be analysed in the context of the still ongoing hostilities between the former 13 colonies and Britain; at stake were the United States military movements against Detroit. The Delawares agreed to allow United States troops to pass through their country, sell them horses, foodstuffs, and other supplies and to have their own warriors enlist. Finally, the United States did not march against Detroit and the peace with the Delawares was short-lived.

241. An important point in the Treaty of Fort Pitt is that it recognized statehood for a confederation of indigenous peoples to be headed by the Delaware nation, which would have a representative in Congress. This never came about.

242. The 1795 Treaty of Greenville was entered into by the United States and a dozen indigenous nations, among them, the Wyandots (or Hurons), Delawares, Shawnees, Chippewas, Kickapoos, Potawatomis, Ottawas and Miamis. To fully understand the significance of this instrument, some remarks must be made on the historical conditions predating it.

243. In 1763, by the terms of the Treaty of Paris, all French possessions east of the Mississippi went to Britain. Some indigenous nations of the area resented being passed along in that manner. They launched a war against the British the same year, which entered into the annals of history as Pontiac's war.

244. Massive European settlement started in the area called the Old Northwest (later Ohio country). By the 1787 Northwest Ordinance, 111/ the United States Congress provided for extinguishment of Indian title and land surveys in view of settling the area, although not - at that stage - by ignoring indigenous jurisdiction. Negotiations with the Indian nations started immediately after the peace with England. These resulted in a number of treaties, but the land cessions for which these instruments provided were later not recognized by the indigenous parties, who considered them fraudulent.

245. In 1787, an Ohio Company was formed which bought a tract of land from Congress and established the first "legal" colony. The indigenous nations affected constantly attacked the new settlers. President Washington sent military expeditions against them in 1790 and 1791, which were both defeated. He then initiated negotiations (at first through the Haudenasaunee) which were inconclusive.

246. The Indian nations wanted recognition of the Ohio River as the boundary between their respective territories and the Euro-American settlements; they were supported in this by the Governor General of Canada, Lord Dorchester, who sent a British column into Ohio country. Meanwhile, American troops were being drilled in Ohio country, and the Ohio nations (especially the Shawnees under Tecumseh) started to establish alliances with the nations in the south in preparation for the foreseeable military confrontation.

247. United States and joint indigenous forces met at Fallen Timber on 20 August 1794, where the latter were defeated. The British contingent which had moved into Ohio country did not distinguish itself as being too helpful.

Special Rapporteur, the Treaty is particularly enlightening for the understanding of the difficulties encountered by Governments and indigenous peoples in achieving full implementation of treaty rights.

275. Consequently, it is useful to note in this progress report certain key aspects related to this Treaty. In the first place, the signing of the Treaty was preceded by about 70 years of Maori-European contact, during which expectations were raised on both parts. But the gap between Maori and European expectations with respect to this instrument remains unbridged.

276. It should also be noted that the Treaty was preceded, in 1835, by a Declaration of Indepencence. This must be viewed in the context of the precarious British presence on the islands which was mainly ensured by missionaries and traders.

277. Further, the Treaty did not represent the sole means for protecting British interests. Several alternatives were discussed at the time inter alia, trade factories placed under British jurisdiction, protectorate. However, the formula of complete sovereignty, voluntarily ceded, was politically and diplomatically desirable for it gave Britain - as Orange points out - an "unquestionable right to exercise authority" in the eyes of other European Powers. She also considers in detail translation problems and misunderstandings resulting from them, notably regarding cession of sovereignty.

278. As to this crucial issue of the cession of sovereignty, it should be pointed out that official moves to consolidate British sovereignty after the signing of the Treaty seem to confirm that the British were quite conscious of the fact that they had only obtained partial entitlement. From the conceptual point of view, there seems to have been a confusion between the "cession of land" (and sovereignty over it) and the right to govern; in this instance, the right to establish a centralized government under British jurisdiction. The famous phrases of one of the indigenous participants ("[I]t is the shadow of the land which had been given to the Queen while the soil remains" or "[O]nly the shadow of the land is to the Queen, but the substance remains to us" indeed point in that direction.

279. The issue of government raises two questions: the real significance of the "inter-tribal warfare" which was often invoked to affirm the need for protection of British interests (notably by claiming a stronger commitment from the Crown) and, more generally, preconceived ideas about government as such, since it seems that in practical terms it was assumed at the time that the Maori had no government at all.

280. The Special Rapporteur has also gained access to some pieces of legislation of historical and present-day relevance with respect to the Treaty of Waitangi. This includes, in particular, the Treaty of Waitangi Act of 1975 (later amended) leading to the establishment of the Waitangi Tribunal which examines claims and makes recommendations, the Native Land Act of 1909 and the Maori Affairs Act of 1953.

supporters of the British, with the result that the French attempted more than once to annihilate them. It should be noted that among the Choctaws, there was a pro-English and a pro-French faction. As mentioned before (see para. 203), the Spaniards made treaties with the Chichasaws and Choctaws in 1784 in order to draw them to their side during the wars of that period.

255. As for the Creek, they dealt with all three European Powers and succeeded in maintaining their independence. They traded with the English but remained politically neutral - at least until "the War of the Red Sticks" launched by Tecumseh. After the latter's death, the conflict spilled over into the south, culminating in the battle of Horseshoe Bend, where Creek forces were completely defeated by United States troops. These imposed the 1814 Treaty of Fort Jackson, which was nothing more than a treaty of capitulation, by which the Creek had to abandon large tracts of land in present-day Alabama and Georgia. 115/

256. By and large, during the early 1800s, the southern tribes concluded numerous treaties with the United States, ceding considerable tracts of land, always in the hope that the new boundary would be permanent. But settler pressure was too strong, culminating in the allotment and removal policies of the 1830s.

257. It is not difficult to perceive that by 1814 (and in an important area of what is today the United States), a new trend marked indigenous treaty relations with their non-indigenous counterpart: relinquishment - by means of juridical instruments negotiated and concluded under duress, many of them after military defeats - of the lands they had occupied since time immemorial.

258. In comparing the treaties between the Haudenasaunee and the Delawares and the European traders and settlers in the seventeenth century (and during practically all of the eighteenth century) with the contents of the Greenville and Fort Jackson treaties, one cannot but notice that although the nature (nation to nation) of the relationship was - at least formally - the same, its object had substantially changed. Cession of land rights had replaced trade and alliances in the instruments concluded, particularly after the 1830s, as a result of the relentless westward expansion of the new settlers and speculators.

259. More than half of the nearly 400 treaties entered into by the United States with North American first nations were concluded between 1815 and 1860, during the westward expansion of non-indigenous settlement. During this period, the 1830s represented a critical juncture, characterized by President Andrew Jackson's allotment and removal policies concerning, among other nations, the "Five civilized tribes", 116/ as well as by the establishment of an "Indian Territory" west of the Mississippi.

260. Regarding the legal status of the indigenous peoples, it is a period of contradicting views, as is evidenced by two already mentioned United States Supreme Cout decisions rendered in connection with the Cherokees and their relation with the State of Georgia (see paras. 129, 153 and 154 above).

289. Since the treaties of the 1850s, there have been no agreements in British Columbia with the first nations to extinguish aboriginal title, with the exception of Treaty No. 8 in the north-east of the province. This does not mean that the province's indigenous inhabitants did not claim the recognition of aboriginal title. A recent study offers new insights into the thorny issue of the British Columbian indian land question from a historical as well as a political perspective. 125/

The Shoshone people

290. The Shoshone are a people of the Great Basin in the United States who used to subsist on hunting and gathering wild plant foods. 126/ They were considered to be divided into an eastern, a north-western and a western nation.

291. White fur trappers started to enter their area about 1820. By the 1840s, settlers had established a wagon trail through the Great Basin to reach California. Within a short time, food supplies and game in the area were consideable depleted, gradually forcing the Shoshone to change their traditional patterns of food collecting and social life.

292. The Great Basin came officially under United States authority in 1848. The same year, the Mormons started arriving in the west and gold was discovered in the Californian Sierras.

293. The Nevada Territory was established in 1861 by the United States Congress, through reducing the Utah Territory; it became a State in 1864. White immigration intensified. The indigenous inhabitants, gradually dispossessed of much valuable land, reacted with hostilities. In 1862, President Lincoln appointed a special commission to negotiate a peace treaty with the Shoshone. Actually, three treaties were signed with the different Shoshone divisions. The commission had been instructed to negotiate for peace and the safety of roads, not for extinguishment of aboriginal title.

294. The Treaty of Ruby Valley, signed on 1 October 1863 with the Western Shoshone and ratified in 1869, mentions a "Shoshone country" (claimed by the signatories) whose boundaries are defined under Article 5. There is no provision in its text for the cession of lands or the establishment of a reservation. The Western Shoshone agreed, however, to authorize the President of the United States to set aside a reservation for them at a later stage when they wanted to change their way of life.

295. Reservations started to be outlined in the 1870s. Although the terms of the treaty are unequivocal, the Western Shoshone are at present engaged in what appears to be the longest land rights case in the United States.

296. The events leading to the present situation can be summarized as follows: in 1951, certain members of the "Western Shoshone Tribe" brought an action before the Indian Claims Commission (ICC) for the alleged loss of their ancestral lands. Their attorneys ignored the Treaty of Ruby Valley. The claim was awarded in 1974 (more than US$ 20 million). In the meantime, however, a reversal of policy had taken place on the indigenous side. The Western Shoshone now sought recognition of their ancestral title on the basis

problems with regard to all these treaties were with white intruders on indigenous lands and the sale of indigenous holdings located on the ceded portions of land. In the case of the Choctaws and the Creek, there was considerable speculation, mismanagement and fraud - with the result that many Indians found themselves left landless and with little or no cash. Emigration eventually became inevitable: 1838 was the year of the "Trail of Tears". 118/

269. The Cherokees escaped the allotment policy, but not removal: Georgia wanted their lands, whatever the provisions of existing treaties. After the enactment of the Removal Act, Georgia passed a number of laws encroaching upon indigenous treaty rights. Being continually harassed by the Georgian authorities, the Cherokees decided to apply to the Supreme Court to find out whether the United States President had rightly asserted that the federal Government was powerless to act against State laws which in fact dispossessed them of their rights.

270. This initiative resulted in the already mentioned Supreme Court decision in Cherokee Nation v. Georgia (1831), by which the Court refused to assume jurisdiction, arguing that the Cherokee Nation did not qualify as a foreign State and establishing, with the stroke of a pen, such "legal concepts" as "domestic dependent nations", "state of pupilage" and "relationship [resembling] that of a ward to his guardian". All these notions were to be applied not only to the "five civilized tribes", but to all other indigenous nations within the United States.

271. On the other hand, it was obvious that by entering into treaties with the indigenous nations, the United States expressly or implicitly recognized these nations as sovereign and independent Powers. This view was made explicit in the Worcester v. Georgia (1832) decision of the Supreme Court of the United States (see para. 154 above). Thus, within a year, two contradictory views were expressed by the highest court in the United States. Both coexisted for some time. The Worcester view prevented the compete alienation of indigenous lands; the Cherokee v. Georgia guardianship view, on the other hand, fostered interventionist policies geared toward assimilation. 119/

The Maori Nation

272. About 1,000 years ago, the Maori arrived in Aotearoa, New Zealand from eastern Polynesia. 120/ The first Europeans (notably James Cook) arrived at the islands in the 1760s. Subsequently, European traders went there for timber. Later, the European sealers and whalers began to visit the island's coastal waters.

273. One cannot but sense that the European presence had a number of disruptive effects on traditional Maori culture. Much has been written, in particular, on the impact of European weapons on Maori inter-tribal relations and warfare, as well as of missionary activities. 121/

274. The antecedents, negotiation, adoption and other aspects of the 1840 Treaty of Waitangi from the Maori as well as the British point view have been amply reviewed by Claudia Orange and other scholars 122/ and need not be detailed at the present stage of the study. In the view of the

305. Nine treaties were signed in this manner with the Sioux (Brulés, Hunkpapas, Oglalas and Minneconjous). These were hailed in Washington as proof of the final pacification of the warring Plains tribes. However, not a single war chief had signed, so that the treaties were meaningless, of which some members of the commission were aware. Hence there was pressure for a big treaty meeting at Fort Laramie which would include the war chiefs. A detailed description of the events leading to the 1868 Fort Laramie meeting is contained in Dee Brown's seminal history of the far west. 128/

306. The 1868 Treaty of Fort Laramie is a peace treaty, but it also provides for a large reservation and contains highly debated provisions, including those on jurisdiction still under discussion today.

307. Father Peter John Powell 129/ notes that according to indigenous (Lakota Sioux) interpretation, all the lands west of the Missouri river - comprising the greater Sioux territory - had been reserved, in perpetuity, for the use and possession of the Sioux Nation. Thus, law enforcement in those lands would be carried out, as it had been always, in the traditional way, by the Council Chiefs and the members of the Akicita societies. They should be the ones to carry out legal action against anybody breaking any of the Treaty terms.

308. In the 1880s, through various "agreements" - which according to the indigenous side were imposed on them - the United States organized the partition of the vast Sioux territory into a number of small reservations. 130/ The rest of the lands were taken over by the federal Government. The smaller reservations, in turn, were further fragmented under the Dawes Act of 1887. In this manner, vast tracts of land were opened to white immigrants, contrary to the provisions of the 1868 Treaty.

309. It should be pointed out that in 1980, the United States Supreme Court stated, in connection with the illegal confiscation of the Black Hills of South Dakota in what was considered Sioux territory, that "... a more ripe and rank case of dishonourable dealing will never, in all probability, be found in the history of our nation" and considered that "... [U.S.] President Ulysses S. Grant was guilty of duplicity in breaching the Government's treaty obligations with the Sioux relative to ... the Nation's 1868 Fort Laramie Treaty commitments to the Sioux". The Court also concluded that the United States Government was guilty of "... a pattern of duress ... in starving the Sioux to get them to agree to the sale of the Black Hills." 131/

Canada's Treaty Six Nations

310. In 1867, the Province of Canada - dating back to the union of Upper and Lower Canada in 1840, later to be divided into Ontario and Quebec - Nova Scotia and New Brunswick formed the Dominion of Canada. By that time, a variety of treaties had been concluded between the indigenous nations and European sovereigns.

311. Eleven so-called "numbered treaties" were entered into by the British Crown through its Canadian officials between 1871 and 1921 with indigenous peoples of northern Canada and the prairies, with the purpose of making vast tracts of ancestral indigenous lands accessible for settlement and railroad construction.

Indigenous peoples of present-day British Columbia, Canada

281. The Hudson's Bay Company (HBC) arrived on the northern part of the Pacific Northwest Coast (that is, the future province of British Columbia) in 1821 through a merger with the independent, Montreal-based Northwest Company which had been active in the area. The same year, the HBC, was granted an exclusive trading licence for the area west of the Rocky Mountains.

282. By the Treaty of Washington of 1846, the territory north of the 49th parallel was reserved for the fur trade, while to the south the Americans started to settle the Oregon Territory. Shortly afterwards, in 1849, the colony of Vancouver Island was proclaimed; the HBC was charged with the settlement and colonization of the Island by imperial grant.

283. James Douglas was the second Governor of the Island (after R. Blanchard) and at the same time chief factor (till 1858) over the HBC's fur-trading activities on Vancouver Island and in New Caledonia (that is, the mainland opposite). He was stationed at Fort Victoria, the Company's headquarters.

284. Between 1850 and 1854, James Douglas purchased land from 14 indigenous nations: 11 around Fort Victoria, two at Fort Rupert, one at Nanaimo. The imperial grant the HBC had obtained in 1849 was valid for 10 years; it was not extended in 1859 which explains - at least in part - why treaty making was discontinued. The HBC purchases were subsequently held by the courts to be Indian treaties. In its response to the questionnaire, the Canadian Government also considers "the 14 Vancouver Island or 'Douglas' treaties in British Columbia" under this category of instruments. 123/

285. In his negotiations with the indigenous peoples in that region, Douglas acted in accordance with the dominant British opinion about the nature of aboriginal land tenure (which was also applied by the New Zealand Company at more or less the same time). The HBC authorized him to confirm Indian title only to the lands they had cultivated or built houses on - which made little sense in a region whose aboriginal inhabitants practised itinerant forms of fishing and hunting. Nevertheless, Douglas only reserved lands to which Indian title could be recognized in European terms.

286. In exchange, the Indians received HBC blankets (which were to become an important item of ceremonial exchange), small portions of land reserved for their use, and freedom to hunt and fish on unoccupied land as before. Compensation was minimal (Douglas opted for annuities, but most of the indineous parties referred a lump sum).

287. Douglas only negotiated for areas in which Europeans wanted to settle and refused purchase of Indian lands in other areas. He made efforts to protect reserved Indian lands after the treaties were signed. 124/

288. His policy must be viewed in the context of the violent turn taken by the indigenous-white settlers conflict in the United States, which European newcomers north of the 49th parallel saw with misgivings. Because of the specific situation created by the Treaty of 1846, settler pressure on Vancouver Island was also relatively small till the 1858 gold rush in the Fraser area.

The Crees (of Quebec), the Inuit of Quebec and the Inuit of Port Burwell

319. The aforementioned indigenous First Nations in Canada entered into treaty relations with the Canadian federal Government and other parties, by means of The James Bay and Northern Quebec Agreement (Convention de la Baie James et du Nord Quebecois). The Agreement (Convention) was signed on 11 November 1975 and is one of the three "modern treaties" acknowledged by the Canadian Government.

320. These modern treaties are to be viewed in the light of the federal Government's policy on native claims, stated for the first time in 1973. According to the information available to the Special Rapporteur, it appears that two main categories of claims have been established: comprehensive claims relating to aboriginal rights, and specific claims through which the Government undertakes to discharge what it considers to be its lawful obligations.

321. The Agreement was the culmination of a long and bitter process set off by the initial phase of construction of a number of works related to a vast hydroelectrical complex to be developed on indigenous lands. Construction began without the consent of the indigenous peoples affected who consequently went to court to halt the project. The courts permitted construction to continue while the case was being heard. However, the legal battle which was initiated was definitely instrumental in precipitating a negotiating process between all parties concerned.

322. According to estimates by Cumm, 132/ the Agreement allows the Inuit and Cree indians in the region to retain, as owners, 1.3 per cent of their traditionally used lands. It also provides for the transfer of 225 million Canadian dollars to the approximately 10,000 to 11,000 native people of those nations over several years. One source has noted that in fact, this land/money formula "is not unlike the historical land cession treaties in southern Canada". 133/

323. The same author 134/ has contended that the Agreement "... is simply a forced purchase, an 'offer that could not be refused' in the sense that no other offer would be made". The fact that construction was permitted to proceed and that all political parties of the province strongly backed the project left the indigenous nations involved with very limited bargaining power.

324. This, of course, poses the problem of the nature and validity of the consent given by the indigenous parties to the Agreement. This element, together with the interchangeable utilization of the terms "agreement" and "convention" to identify this instrument and the long list of court actions initiated by the indigenous side to seek its implementation has motivated the Special Rapporteur to include the James Bay Agreement among those which merit particular attention in the next phase of this study.

B. Agreements between States or other entities and indigenous peoples

325. As to this second category of situations defined within the conceptual scope of the study, the Special Rapporteur is confronted with a wide variety of situations which will necessarily require a case-by-case examination to determine their relevance for his future research.

of the Treaty, but recognition was denied, and the award paid into a trust fund. The Western Shoshone blocked distribution of the award (now more than US$ 60 million).

297. Apparently, the link between awards of the Indian Claims Commission and extinguishment of aboriginal title seems rather unclear, since the Claims Commission Act was not designed to extinguish aboriginal title.

The Sioux Nation

298. Plains culture is probably the best known among all indigenous cultures of North America. The way of life of the peoples of this area, such as the Sioux, Cheyenne, Arapaho, Comanche and Kiowa, had changed completely by about 1800, with the introduction of horses. Some nations who had mainly subsisted on cultivated crops, such as the Crows, converted to buffalo hunting.

299. Dependence on the buffalo made the Plains peoples economically and culturally vulnerable, once European settlement and in particular railway construction and the indiscriminate killing of buffalo had begun. With the buffalo nearly extinct about 1880, probably as the result of a well planned project aimed at the pacification of the nations in the area, they had nothing to fall back on.

300. The Sioux and other northern Plains peoples had been in touch with whites since the seventeenth century, in particular fur traders and missionaries. However, few repercussions of the French-English conflict touched them.

301. They started to make treaties with American representatives in the early 1800s, many of which were treaties of peace and friendship. It should be recalled in this connection that the impact of European settlement reached the Plains rather late, if with customary violence, in particular after the 1858 Pike's Peak gold rush, the 1861 creation of the Territory of Colorado, and finally the Civil War (because of Bluecoat movements).

302. By that time, the Cheyennes, Arapahos, Sioux, Crows and other tribes had entered into a Treaty, the 1851 Fort Laramie Treaty, by which they agreed to permit the United States to establish roads and military posts across their traditional territories; although they did not relinquish any rights or claims to their land, nor surrender fishing and hunting rights or freedom of movement. Details of the proceedings from the point of view of the Treaty Commissioner are available. 127/

303. The second half of the 1860s was marked by Indian raids in the Plains, much of it was a reaction to the Sandcreek massacre of November 1864. In 1867, the United States Government created a peace commission to negotiate with the hostile Plains peoples who showed themselves unwilling to surrender their lands to white settlers or to abandon their traditional way of life.

304. The commission travelled along the upper Missouri River to sign as many treaties as possible. They sought rights of passage for trails and, eventually, railroad construction in view of massive white immigration.

333. It is obvious, on the one hand, that certain characteristics may enhance the intrinsic value of an "agreement" without changing its juridical nature. This is true, inter alia, for "agreements" to which States themselves are parties, or for those entered into by non-State entities expressly mandated by States to negotiate on their behalf with other sovereign or non-sovereign entities, and, even further, for instruments which have as their subject matter issues relating to the notion and contents of sovereignty (such as territory/land and other jurisdictional matters).

334. On the other hand, other traits of an "agreement" may reduce or even render nil its legal relevance for the purposes of this study. This could possibly be the case of certain "agreements" made by trade or charter companies without contemporary or subsequent approval by States. Similarly, "agreements" entered into during the period of colonial rule may no longer be applicable in countries which have since undergone decolonization, resulting in indigenous accession to State power and subsequent control of the subject matters covered in such instruments.

335. From these introductory remarks it follows that the value and utility of agreements are likely to vary considerably from case to case. In some instances, the "agreements" reviewed may indeed constitute "historical" or "modern treaties". In other cases the "agreement" may be only a contract or may have lost whatever previous significance it had at a given point in time.

336. As of this moment, the Special Rapporteur has tentatively selected the following as instruments possibly falling under the category of "agreements" in the sense pertinent to the present study, but on which further research and analysis are required:

1. Treaty between Great Britain and the Chiefs of Sierra Leone (22 August 1788); 137/

2. Agreement between the East India Co. (Great Britain) and the Mahrattas (6 June 1791); 138/

3. Treaty of Commercial Alliance between the East India Co. (Great Britain) and Selangor (22 August 1818); 139/

4. Panglong Agreement (12 February 1947); 140/

5. Agreement between the Federal Minister of Indian Affairs of Canada and the Federation of Saskatchewan Indian Nations (June 1989); 141/

6. Agreement between the Government of Canada and the Inuit of the Northwest Territories (the Nunavut Agreement) (1922). 142/

C. Other constructive arrangements

337. In his preliminary report (E/CN.4/Sub.2/1991/33, para. 96), and in the introductory words to this chapter, the Special Rapporteur has offered his definition of the term "other constructive arrangements" included in Commission on Human Rights resolution 1988/56, the key text governing his mandate.

312. By 1875, Treaties 1 through 5 had been concluded and non-indigenous settlers had gained what was considered as legal title to much of the area east of present-day Alberta. The remaining area of what is today Canada's prairies included the ancestral lands occupied by the great nations of the plains.

313. By July 1875, a number of incidents between these nations and the workers who were attempting to run a telegraph line through the area and their land surveyors had occurred. The First Nations had made it clear to non-indigenous authorities that no further white activity could take place in their areas until the Government had acknowledged their traditional rights and met with them to discuss the future.

314. David Mills, then Minister of the Interior, was putting increasing pressure on the Government to keep the peace and keep the country. He continuously received alarming reports from Alexander Morris, Lieutenant Governor of the North West Territories and from the highest ranking officers of the Mounted Police in the region. They reflected the growing tension in the region, as white settlement increased and other intruders set foot on indigenous lands.

315. Several events in the spring of 1876 precipitated developments. The outbreak of hostilities between the Lakotas and the United States army, Custer's "last stand" and Sitting Bull's retreat to areas in what is today Canada prompted the Government to start preparations for treaty-making with the nations of the plains.

316. Morris, who had actively participated in the negotiations which led to three previous numbered treaties, was appointed as Head Commissioner for the non-indigenous side. James McKay, a Metis member of the North West Council, was also appointed in the delegation.

317. Treaty No. 6 was negotiated and entered into between the Queen of Great Britain and the Plain and Wood Crees on 23-28 August and 9 September 1876 at Fort Carlton and Fort Pitt respectively. It covers the area of the North Saskatchewan River, now territories in Central Alberta and Saskatchewan provinces and a small portion of Manitoba. Like the other numbered treaties, it provides for reserve lands, gratuities and annuities, medals and flags, clothing for the chiefs and councillors, ammunition and twine, as well as schooling facilities. Unlike other numbered treaties, Treaty No. 6 also provides for a "medicine chest" and assistance during times of pestilence and famine.

318. The indigenous version of the negotiation and signing of Treaty No. 6 has been made available to the Special Rapporteur in a verbatim transcript of the first international Treaty No. 6 Meeting at the Onion Lake Reserve (Saskatchewan) in July 1989. Most of the speakers at that meeting, also attended by the Special Rapporteur, were Cree and Chipewyan elders who told what they had learned from their elders about the treaty negotiation and signing, as well as the obligations binding their people to the British Crown.

Home Rule Act passed by the Danish Parliament. It entered into force on 1 May 1979. It would seem that the model provided by the Greenland Home Rule constitutes the most extensive indigenous self-government arrangement in today's world.

345. A significant reform - although it took ten years to accomplish - was the 1990 abolition by the Landsting (Greenlandic Parliament) of the so-called "birthplace criteria", which determined that persons born in Greenland received lower salaries than "expatriates" (i.e., persons born in Denmark). 143/

346. The Greenland situation poses a number of specific problems that ought to be considered in the light of the Home Rule arrangement. Militarily, Greenland has been an important United States base. Economically speaking, there have been calls for amending present legislation regulating the rights to exploit the natural subsoil resources of the island. Apparently, hunting, fishing and sealing rights are still matters of controversy.

347. The Special Rapporteur has followed with interest the presentations made by Greenlandic delegates in the Working Group. It is his intention to give very thorough consideration to the specific provisions of the Home Rule Act and to the experiences accumulated under this self-government arrangement, with a view to assessing whether this kind of procedure can be useful for attaining better relations between indigenous and non-indigenous parties.

Other cases still under review

348. In the responses offered to the questionnaire by the Governments of Canada and Finland, mention is made of some general modalities (and certain specific cases) of what might be considered, in their view, as constructive arrangements. The Special Rapporteur has not completed his evaluation of the information provided.

D. Situations involving indigenous peoples who are not parties to, or the subject of any of the above-mentioned instruments

349. In the preceding sections of this chapter, the Special Rapporteur has described and illustrated situations which constitute the core of this study, namely those related to treaties, agreements and other constructive arrangements.

350. The number of possible case studies related to all the situations mentioned above is indeed impressive. However, the fact remains that a very sizeable number of indigenous peoples are not covered by any of those categories of juridical instruments.

351. In this context, it must be recalled that according to his mandate, the Special Rapporteur must explore "the potential utility" of treaties, agreements and other constructive arrangements between indigenous peoples and States, so as to guarantee the promotion and protection of indigenous rights and freedoms. 144/

326. The need for such a casuistic approach stems from the fact that the decision of the parties to a legal instrument to designate it as an "agreement" does not necessarily mean that its legal nature differs in any way from those formally denominated as "treaties".

327. In connection with this particular issue, one must bear in mind that article 2, section 1 (a), of the 1969 Vienna Convention on the Law of Treaties defines a treaty, for the purpose of that instrument, as "... an international agreement concluded between States in written form and governed by international law ... whatever its particular designation". It should be noted, of course, that all provisions of the 1969 Convention are non-retroactive: they apply only to instruments concluded by the parties to it after the Convention's entry into force, unless its provisions reflect internationally recognized customary law or are applicable to States because of their obligations in accordance with general international law.

328. Further, State practice and State domestic legislation often provide for specific meanings to be given to both terms (i.e. "agreements" and "treaties"), as far as their interaction with other national or international entities is concerned, or with respect to their specific municipal legislation governing, for example, the way in which State consent must be accorded to one or the other type of instruments. Obviously enough, not all national legislation approaches this issue in an identical manner.

329. For example, in the case of the practice followed by the United States between 1871 (when treaty-making as a policy was officially terminated by the federal Government) and 1902, Professor Morris points out that during that period "new covenants between [the United States and indigenous governments] were formalized in 'Agreements'". 135/

330. On the basis of a number of sources, he posits that "[A]s a practical matter, particularly as regards American policy which continued to regard Native nations as sovereigns, the semantic difference between "treaties" and "agreements" was of limited importance. The change was an internal process alteration which affected the procedure in which non-Native Governments would interact with Native nations, but it did not alter the nature, nor the United States perception, of Native sovereignty". 136/

331. In addition, as was pointed out in paragraph 157 above, national courts also offer, from time to time, their own construction on the nature of the specific instruments related to the particular indigenous situation submitted for their consideration and decision, regardless of the formal denomination originally given to those legal instruments.

332. Consequently, the Special Rapporteur has selected certain factors he will take into account in determining which of the historical or contemporary instruments under review should be considered either as "an agreement", or as "a treaty" in the next stage of his work on the study. These include: (a) who the parties to the instrument are (or were); (b) the circumstances surrounding its conclusion; and (c) the subject matter of the document.

benefit from treaties, agreements or other constructive arrangements, the present advantages and disadvantages of either being or not being covered by them, and to the relevance of the existence of such instruments for the recognition of indigenous rights in international law.

359. Finally, the Special Rapporteur is of the opinion that very different situations actually fall under the present section. It may include, inter alia, cases of indigenous peoples: (a) with whom the State has never entered into contractual relations; (b) who were parties to instruments that in practical terms have been unilaterally abrogated by the State; (c) who participate in the negotiation and adoption of instruments which were never ratified by the competent State institutions; and (d) who live in societies in which a deep process of acculturation has taken place and whose legislation does not contain specific provisions guaranteeing distinct protection for their indigenous component, different than the ones recognized for every citizen of the State.

360. The fact that the cases to be analysed under this section will result from their non-inclusion in any of the other previously-defined category of situations (a) to (d) in this chapter explain why research on them is only in its preliminary stage as of this date.

361. However, the Special Rapporteur has considered it his duty to advise the Working Group and the Sub-Commission that he has already chosen a number of cases considered to merit an in-depth review in the forthcoming stages of his work. As stated before, research work on them is in an initial phase. In some cases, even key primary materials are not yet available. The only exception to this, is the situation in Hawaii, as a result of the very thorough response to the questionnaire offered by Hawaiian indigenous peoples' organizations.

362. Consequently, the list of case studies chosen at this stage for further review is not definitive and does not contain examples of all the possible situations previously mentioned. The case studies selected until now include: Aboriginal Australians; Gitksan and Wet'suwet'en (Canada); Yanomami (Brazil); Ke Lahui Hawaii (United States of America); Chittagong Hill Tracts (Bangladesh); Mapuche People (Argentine-Chile); Indigenous peoples (Guatemala); Lubicon Cree (Canada); San (Bushmen) (Southern Africa); Ainu People (Japan); California Rancherias (United States of America); and Kuna Nation (Panama).

E. Treaties between States affecting indigenous peoples as third parties

Treaty of Tordesillas (1494)

363. The Treaty of Tordesillas embodied the division which Pope Alexander VI established in his Bull Inter Caetera (1493) regarding Spanish expansionist interests in relation to existing Portuguese claims. The rather vaguely defined demarcation line was supposed to run about 45° west. Thus Spain based her "New World" claims on the Treaty, as did Portugal with respect to Brazil.

338. In his view, the most important element for identifying this type of situation is proof of the free and informed consent of all parties concerned to the contents of the arrangement. Without that element, no arrangement can qualify as "constructive".

339. Given the history of indigenous-State relationships and the acute problems - including that of physical survival in certain cases - faced by indigenous peoples in today's world, it is difficult to perceive how an arrangement without the freely given assent of the indigenous side could be considered as firm grounds for establishing a solid, durable and equitable basis for the current and, in particular, future relations between indigenous peoples and the State within whose present borders they now live.

340. At the present stage, the Special Rapporteur has already identified some of the possible modalities that such arrangements may take. Formally, for example, they may be embodied in administrative or executive actions by State authorities either at the national (federal), provincial (state) or municipal levels aimed at solving specific issues affecting the way of life of the indigenous part, or their relations with the rest of the community or the society at large. They could also take the form of specific places of legislation regulating more general aspects of indigenous life, such as the establishment of meaningful institutions of self-government or autonomy; provided there has been significant participation of the indigenous side in the legislative process and explicit acceptance of both the procedure leading to the arrangement and its results. Settlement of specific issues solved, in a general manner, through previously-agreed-to treaties and agreements would also seem a possible object for this type of arrangement.

341. Upon such a basis, one concrete case illustrates, in the view of the Special Rapporteur, the nature, possible formal expression and potential objectives of the type of agreement falling under his mandate.

Greenland Home Rule (1979)

342. With a total of more than 2 million square kilometres, Greenland is the largest island in the world. However, the greater part of its territory is permanently covered by the ice-cap; the ice-free areas cover only 341,700 square kilometres. Its population is estimated at 50,000-55,000 inhabitants, of which about 95 per cent are indigenous. For more than 200 years, Greenland was a Danish colony. Between 1953 and 1979, Denmark tried to integrate Greenland.

343. Since 1980, Home Rule has been instituted. With a legislative and an executive branch, the autochtonous Home Rule Government exercises authority over a wide array of the island's internal affairs, including educational, cultural, linguistic, religious, social, welfare, labour, health, housing, transport, economic (both traditional and modern), environmental and other issues.

344. The Danish national legislation establishing the Greenlandic Home Rule was negotiated by representatives of both parties in a special commission instituted in 1975. In January 1979, the population of Greenland approved the

has not been solved in the three countries concerned, namely Sweden, Norway and Finland. In Finland, Sami reindeer herding is said to be threatened by large-scale logging projects. 147/

Treaty of Paris (1763)

371. The Treaty of Paris of 10 February 1763, ending the Seven Years War, affected various indigenous peoples in North America through the cession to Britain of the French colony of Canada and of the Spanish possessions in what is today United States territory bordering the Gulf of Mexico and Eastern Florida. In particular, it affected Iroquois diplomacy which had notably been geared to maintaining profitable relations with both France and Britain.

372. From the point of view of the indigenous nations, the Treaty of Paris was a partition treaty - entered into by the European colonial Powers without consulting the first peoples concerned. By and large, boundary claims and negotiations involving indigenous nations and European settlers were a characteristic feature of the 1760s and 1770s.

373. An important consequence of the Treaty of Paris was, of course, the Royal Proclamation of 7 October 1763. Its origin and concrete import - as a shift in "Indian" policy by defining "Indian territory" - have been subject to diverse interpretations. 148/ Among the nations concerned directly by the boundary line provided for in the Proclamation were the Cherokees, whose territorial situation between the 1720s and 1770s would therefore be a case in point.

Jay Treaty (1794)

374. This Treaty of Peace, Amity, Commerce and Navigation concluded in 1794 settled outstanding differences between the United States and Britain related to the British possessions in Canada (re: civil war of 1791). It was mainly concerned with the subject of trade, but also with the rights of the indigenous peoples residing in the two countries.

375. Furthermore, according to Dorothy Jones, the provisions of the Jay Treaty eliminated Britain "as an effective patron or ally, [for the southern Indians]"; and "the defeat of the northern Indians at Fallen Timbers the same year, had temporarily halted the attempts at united action by northern and southern Indians". She adds: "For 15 more years Spain and Great Britain were to be preoccupied by France, a circumstance that aided the United States as much as it damaged the American Indian nations". 149/

376. In this respect, the response of the Government of Canada to the questionnaire, dated 24 May 1991, states: "Indian people were not signatories to this treaty but were mentioned in one article. Specifically, Article III provided for free passage of the existing international border (excepting Rupert's Land, covering most of modern-day northern Quebec, Ontario and the prairie provinces) by citizens of the United States, British subjects and Indians living on either side of that border. Duty would not be paid by Indians on "their own proper goods or effects".

352. This being the case, in the early stages of his research the Special Rapporteur decided that in order to fulfil his mandate, it was imperative for him to review the situation of indigenous nations which, at present, are not covered as yet by any of the instruments directly related to the study. In his view, without such a review it would not be possible to assess whether or not future treaties, agreements or constructive arrangements might be instrumental to bettering their present situation.

353. In his 1991 preliminary report, this quite important conceptual and practical decision was duly submitted for consideration by both the Working Group and the Sub-Commission. 145/ No objections were voiced on this matter in either body. Consequently, and with the advances already achieved in his general research for the study, the Special Rapporteur is now in the position to expand his ideas on this area of investigation.

354. Without question, this particular aspect of the overall present-day indigenous situation gives rise to some interesting juridical considerations. It can be reasonably argued, on the one hand, that the rights and freedoms recognized in the domestic legislation of the nation-State in which they reside today may be applicable to indigenous peoples not covered by the various types of legal instruments specifically included in the mandate of the Special Rapporteur. In addition, it is obvious that the provisions of the 1948 Universal Declaration of Human Rights and the obligations accepted by States in international human rights instruments are applicable to all persons living within their present territory. Further, all indigenous peoples will benefit from the rights to be enshrined in the Declaration on the Rights of Indigenous Peoples, now being drafted by the Working Group on Indigenous Populations, once it is adopted by the United Nations General Assembly.

355. On the other hand, it can also be logically maintained that treaties, agreements and other constructive arrangements can be a most important tool for formally establishing and implementing (in a consensual, bilateral manner) those very same rights and freedoms mentioned in the preceding paragraph. The Special Rapporteur is very much inclined to accept this proposition.

356. His reasoning for taking this approach is simple. The negotiating and consenting process inherent in treaties, agreements and other constructive arrangements may be viewed as perhaps the most suitable way not only for securing indigenous input in the present-day recognition/restitution of indigenous rights and freedoms, but also for establishing much-needed practical mechanisms to construct and fully implement the rights written into national and international texts and to facilitate, at all levels, conflict-resolution of indigenous issues.

357. In most cases, at present, national and international texts affecting the daily life of indigenous peoples are, of course, adopted, enacted and implemented by State machinery and institutions, but without (or with only marginal) direct indigenous contribution. The Special Rapporteur clearly perceives the advantages of another approach in all these processes.

358. Additional interesting issues connected with the type of situation reviewed under this section relate, for example, to the factors which made it possible for some indigenous peoples (and not others within the same State) to

reconfirmed in the Alaska Statehood Act of 1958, when Alaska (then comprising ca. 40,000 indigenous inhabitants) became the 49th State of the United States. Apparently, neither of these legislative steps was the subject of consultations with the indigenous peoples affected. Statehood did not reveal itself as a suitable tool for exercising indigenous rights.

385. Furthermore, indigenous territorial rights had not been clearly defined, notably as long as there was little settler interest in the more remote areas of Alaska. This changed, however, with the oil rush in the 1960s and 1970s.

Migratory Birds Convention (1916)

386. This treaty was signed by the United States and by Great Britain on behalf of Canada. In 1917 the Canadian Parliament enacted the Migratory Birds Convention Act to enable the federal Government to regulate migratory bird management. This Act established open and closed seasons for the hunting of this type of bird and allowed (art. 2) the Inuit and other nations to take certain types of birds at any time and without permit for both food and clothing. The effect of the existing closed season is that indigenous hunters (particularly in the northernmost territories of Canada) have very little legal access to migratory game birds.

387. In its response to the questionnaire, the Government of Canada states that indigenous peoples have expressed concern about the effects of the Convention and the above-mentioned Act, particularly as concerns their hunting rights provided for in a variety of treaties and in all comprehensive land claim settlements realized to date. In the opinion of the Canadian Government, the relationship between the Convention and treaty rights to hunt migratory birds "is unclear", pointing out that litigation on this matter is under way.

388. The Canadian response to the questionnaire further states that in the case of land claim settlement agreements, Canada has committed itself to take all reasonable measures aimed at amending the Convention, so as to provide for a regulated spring harvest of migratory birds by beneficiaries of such settlements. According to the Canadian response, efforts in this connection have been unsuccessful to date, but Canadian federal authorities "[remain] committed to the negotiation of such an amendment with the United States".

ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169 of 1989)

389. In 1957 the ILO International Labour Conference adopted the Indigenous and Tribal Populations Convention [No. 107] and the corresponding Recommendation [No. 104]. The Convention recognized collective and individual indigenous rights to land ownership and compensation for lands taken by Governments, but some indigenous and non-indigenous sources have noted that its content reflected the common view of the 1940s and 1950s in promoting assimilation or integration and non-discrimination. 153/

390. These criticisms led to a decision of the ILO Governing Body agreeing to revise the 1957 Convention. This process of revision culminated in 1989 with a new Convention. The results have not been equally appreciated by all indigenous nations. Government reactions to this text have also been mixed.

364. Their claims were not universally accepted, however, not even within Spain, as is evidenced by the positions held by Las Casas and Francisco de Vitoria - at least in theory for the latter, since the requirements of spreading the Christian faith for the benefit of the conquered peoples (as those policies were defended at the time) apparently authorized all kinds of actions. In that respect, the transition, in Spanish policy, from commercial ventures to colonization proper is of particular significance, since it brought about the introduction of Castilian municipal organization, as well as of juridical and political institutions such as encomienda, corregimiento and congregaciones which had a most visible impact on indigenous life.

Treaty of Utrecht (1713)

365. Succinctly, the Treaty of Utrecht "brought to an end a cycle of wars which, while primarily concerned with the balance of power in Europe, had given English Governments an opportunity to take colonies away from other European countries and increase their empire by annexation as well as by settlement". 146/

366. Among the areas affected were "Rupert's Land" - that is, the activities of the Hudson's Bay Company - where trading posts had been captured during the French-English wars and Nova Scotia where the Acadians were pressed to take an oath of allegiance to George II and the Micmacs found themselves hampered in their relations with France.

Sweden/Finland-Norway/Denmark Border Treaty (1751)

367. In October 1751, Sweden and Finland agreed with Denmark and Norway on the State frontier dividing the territories inhabited by Lapps (the Sami people). In consequence, a Codicil on Lapps was added as a first protocol to the frontier treaty. The Codicil did not grant the Sami any new rights but attempted to secure existing rights on both sides of the frontier.

368. According to the response given by the Sami Parliament on 30 May 1991, article 2 of the Codicil contained the principle that no Lapp was henceforth allowed to own taxed land in more than one State. Citizenship was determined by either the location of their taxed land or their own choice according to their winter or summer taxed land. They could be authorized, under certain conditions, to change their citizenship and give up their taxed lands (arts. 3-9).

369. The Sami Parliament also states that the Lapps were in accordance [sic] with the old tradition which allowed them to move with their reindeer across the frontier to another State in the autumn and spring and to use the land and the shores there in the same way as the citizens of the country in order to feed their animals and themselves. In case of war, the Lapps were to be treated like citizens in whichever State they may be residing (art. 10). Under certain conditions, the Lapps could also use the reindeer pastures, hunt seal and fish and hunt in the territory of any of the signatories in the same way as the citizens of that State (arts. 12-14).

370. It should be noted in this regard that according to the information made available to the Special Rapporteur, the issue of Sami land and water rights

400. Because of all of the above, the Special Rapporteur offers the following recommendations:

(a) The permanent assistance required by him for his future work should be guaranteed in any of the two forms referred to in paragraph 397 above;

(b) Because of the amount of work remaining to be done (as explained above) the Special Rapporteur would prefer to be authorized to submit his second (and last) progress report to the Working Group on Indigenous Populations at its twelfth session and to the Sub-Commission at its forty-sixth session in 1994. This will allow him to submit his final report on the study in 1995.

Notes

1/ A summary of the various points of view expressed during the discussion appears in paragraphs 97-103 of the Working Group's report to the Sub-Commission on its ninth session in document E/CN.4/Sub.2/1991/40/Rev.1.

2/ Ibid., Annex I (Recommendations), recommendation 20.

3/ The questionnaires were included as Annex VI of the report of the Working Group on its eighth session (document E/CN.4/Sub.2/1990/42) and were submitted to governments, intergovernmental and non-governmental organizations and to indigenous organizations in January 1991, pursuant to Sub-Commission resolution 1990/28 of 31 August 1990.

4/ The debate that took place is contained in documents E/CN.4/Sub.2/1991/SR.31 and Add.1.

5/ It should be noted that, in a most welcomed development, the response of the Government of Australia to the questionnaire was received by the Special Rapporteur on 22 July 1992. However, it has not been possible to take its content into account for the present report.

6/ On this particular point, the Special Rapporteur wishes to once again stress the anomaly he perceives in the fact that among the responses still to be received are those of some indigenous organizations which in the discussion of the 1991 preliminary report sharply criticized what they termed as "the lack of substantial progress" in the present study. Cf. documents E/CN.4/Sub.2/1991/40/Rev.1 (paras. 101 and 103) and E/CN.4/Sub.2/SR.31/Add.1 (para. 32).

7/ Commission on Human Rights resolution 1988/56 of 9 March 1988; particularly, operative paragraph 1.

8/ Héctor Díaz-Polanco, La cuestión étnico-nacional, p. 85 (México, D.F., 1985).

9/ On the trend toward consolidating the "conventional wisdom" in the framework of culture in general and its repercussions for indigenous nations (in particular in the United States), see Bob Sipe, "Culture and Personhood", in Ward Churchill (Ed.), Marxism and Native Americans (Boston, 1983).

377. The Canadian Government response states further that "repeated Indian attempts to secure recognition by the Government of Canada of any contemporary force and effect of the border crossing provisions of the Jay Treaty, culminated in the case of Francis v. The Queen (1956) S.R.C. 618. In Francis, the Supreme Court of Canada held that neither the Jay Treaty nor any provision of the Indian Act had the effect of exempting Indians living in Canada from paying customs duties on goods brought into Canada from the United States, as the Jay Treaty was found to be not binding on Canada because it was not implemented or sanctioned by legislation."

Adams-Onis Treaty (1819)

378. By the Adams-Onis Treaty of 1819, Spain ceded Florida to the United States. 150/ The indigenous nation most affected by the treaty and the events surrounding it were the Seminoles. Further research is required in connection with this treaty.

Treaty of Guadalupe-Hidalgo (1848)

379. By the Treaty of Guadalupe-Hidalgo of 2 February 1848, the United States acquired California and the southwest territory from Mexico. According to Armando B. Rendon, 151/ it created a unique "person" in the Americas, namely the Chicano or Mexican American.

380. Also relevant in this connection is the situation it created for indigenous peoples in California, whose title to the land they occupied had never been confirmed legally, 152/ although the Treaty, at least in principle, extended its coverage to them.

Purchase of Alaska (1867)

381. Alaska was officially "discovered" by Vitus Bering in 1741. It started to be exploited by Russian, or rather Siberian, fur traders acting under the Russian-American Company founded in 1799 and granted a charter by Czar Paul. Russian colonial influence remained slight, however. In the early 1860s, the Company was taken over by the Russian Government. Russian management of its trade ventures did not fare well and the authorities seemed to have been quite relieved to cede their rights to trade in Alaska to the United States of America, for the sum of $US 7.2 million.

382. The transfer of authority took place in October 1867 at Sitka (former Russian fort in Tlingit territory). As "Indian Territory", the whole of Alaska was placed under the authority of the War Department, although the Treaty of Cession did not provide for ownership or jurisdiction over this vast territory. Soon Inuit and Indians were under heavy pressure by gold seekers and settlers.

383. This treaty committed its signatories to obtain the consent of the indigenous peoples of Alaska regarding any future interaction with them or any appropriation of their land.

384. In 1884 the United States Congress recognized in principle the territorial rights of the indigenous peoples of Alaska. This principle was

18/ E.g. Adam Kuper, Anthropologists and Anthropology: the British School 1922-72 (Harmondsworth, 1973); I.L. Horowitz, The Rise and Fall of Project Camelot. Studies on the Relationships between Social Science and Practical Politics (Cambridge, Mass., 1967); P. Bungener et al., La pluralité des mondes: théories et pratiques du développement (Geneva, 1976) and G. Rist/F. Sabelli (Ed.), Il était une fois le développement (Lausanne, 1986).

19/ For a historical overview, see R. Motta, Teoria del diritto primitivo (Milano, 1986); see also Sally Falk Moore, "Law and Anthropology" in Biennial Review of Anthropology (1969): 252-300.

20/ E.g. K.N. Llewellyn & E.A. Hoebel, The Cheyenne Way (New York, 1941).

21/ Norbert Rouland, Anthropologie juridique (Paris, 1988), pp. 12, 71. See also A. Negri Il giurista dell'area romanistica di fronte all'etnologia giuridica (Milano, 1983).

22/ See Jack Goody, The development of the Family and Marriage in Europe (Cambridge, 1983).

23/ For an overview of functionalist legal anthropology, see Leopold Pospisil, Anthropology of Law (New York, 1971); Max Gluckman, Politics, Law and Ritual in Tribal Society (Oxford, 1971), Ian Hamnett, Social Anthropology and Law (London/New York, 1977).

24/ Norbert Rouland, Anthropologie juridique, op. cit., p. 142.

25/ An exception is Rouland's table (op. cit., p. 200) in which he combines the interrelations between the social structure, the stratification levels of law and the type of juridical organization. It is meant to be non-evolutionist to the extent that it does not establish any correlations with "developmental stages" of society.

26/ This issue has, of course, been amply discussed, notably with reference to North America. Cf. Robert A. Williams Jr., The American Indian in Western Legal Thought: the Discourses of Conquest (New York, 1990). From the historical viewpoint, A.H. Snow's The Administraion of Dependencies (New York/London, 1902) is illuminating, as is his The Question of Aboriginals in the Law and Practice of Nations (Washington, D.C., 1919). See also Erica-Irena Daes' paper "On the Relations between Indigenous Peoples and States", in Without Prejudice II (2) (1989): 41-52. Regarding recent developments on the international level, notably the revision of ILO Convention 107, a pertinent analysis from an indigenous viewpoint is offered by Sharon Venne, "The New Language of Assimilation", in Without Prejudice II (2) (1989): 53-67.

27/ Marc Augé, Génie du paganisme (Paris, 1982).

28/ **The main kinship function would be exogamy, that is, the practice to marry out of the kin group.**

29/ Incidentally, ancien régime peasant societies in Europe did not differ markedly in this respect from traditional extra-European cultures.

Chapter V

CONCLUSIONS AND RECOMMENDATIONS

391. In the four preceding chapters of the present report, the Special Rapporteur has offered a number of conceptual and action-oriented conclusions with respect both to the work already done for the study and to the future approaches he intends to pursue in the coming stages of his research. Rather than reproducing here the above-mentioned conclusions the Special Rapporteur considers it more suitable to refer the reader to the specific paragraphs in this report which he deems contain particularly pertinent information in this regard.

392. In this respect, he would like to call attention to chapter I, paragraphs 16-18, 20 and 21. The same applies to chapter II, paragraphs 26-32, 39-42, 46-47, 53, 61, 66-67, 69, 74-76, 80, 85, 90-92 and 94.

393. In chapter III, the Special Rapporteur would like to underline the contents of paragraphs 116-117, 123, 125-128, 134-135, 138-139, 141, 143, 148, 160 and 163.

394. In chapter IV the paragraphs to be looked at in this context are 170-172, 177-179, 181, 182, 188, 198-199, 200, 207-208, 212, 213, 218 (all these appear in section A). In section B, in his view, paragraphs 325-326, 328 and 332 deserve particular attention. In section C, paragraphs 338-339 and 347. In section D, the Special Rapporteur considers it important to stress the contents of paragraphs 353, 354-357, 359 and 362. Finally with respect to section E, paragraphs 371-373 and 389-390.

395. Although as stated in chapter I research has notably advanced, there remains a considerable body of material to be investigated. This is particularly true in relation to Asia and Africa.

396. The Special Rapporteur is aware that a number of important primary sources are not yet available to him, but most of these will become so in the near future.

397. Because of all the analysis remaining to be done on the materials already gathered and because of the various primary information still to be collected, reviewed, organized and analysed in the immediate future, the Special Rapporteur feels it is essential to continue receiving specialized assistance either from the Centre for Human Rights or from an outside consultant.

398. In connection with the limited responses to his questionnaire the Special Rapporteur intends to communicate with all the participants in the tenth session of the Working Group on Indigenous Populations urging them to submit the information requested.

399. It should be mentioned that communications and contacts with the Centre for Human Rights have substantially improved in the period since the preliminary report was submitted. This has resulted in quick access to all documents related to the work of the Special Rapporteur.

Vol. 31, No. 2, 1989. Dorothy V. Jones' seminal work License for Empire: Colonialism by Treaty in Early America, University of Chicago Press (Chicago and London, 1982), has greatly contributed to the Special Rapporteur's overall understanding of the general nature and characteristics of the treaty relations stemming from the early contacts between the European newcomers and the indigenous nations of North America.

41/ Morris, op. cit. (note 40), pp. 285-286.

42/ Williams, op. cit. (note 40), p. 249.

43/ Ibid., p. 245.

44/ Barsh, op. cit. (note 40), p. 75.

45/ United States Congress, Senate, Congressional Globe, Appendix, d74, 27th Congress, 3rd session (1846); quoted by Morris, op. cit. (note 40), p. 299.

46/ Williams, op. cit. (note 40), p. 248, quoting F. Prucha, American Indian Policy in the Formative Years ... (1962).

47/ Cherokee Nation v. Georgia, 30 US (5 Pet.) 1 (1831), at 17, quoted by Morris, op. cit. (note 40), p. 295.

48/ Delgamuuk et al. v. the Queen, Smithers Registry, No. 0843, at 13.

49/ This has been documented by various authors including Berman, op. cit. (note 40), p. 131.

50/ Berman, op. cit. (note 40), p. 133.

51/ Ibid., Ibid.

52/ For more on this see Morris, op. cit. (note 40), p. 289; Berman, op. cit. (note 40), pp. 129-130; and Rebecca L. Robbins, "Self-Determination and Subordination: the Past, Present, and Future of American Indian Governance" in The State of Native America: Genocide, Colonization, and Resistance, edited by M. Annette Jaimes (Boston, 1992), p. 89.

53/ See, for example, Felix Cohen, Handbook of Federal Indian Law, (Albuquerque 1971), at 47; quoted by Morris, op. cit. (note 40), p. 285.

54/ For more on this see Berman, op. cit. (note 40), p. 131 and Robbins, op. cit. (note 52), p. 89-90.

55/ E.g., the treaties concluded between the United States with the Cherokee (25-27 October 1805), Sioux (17 September 1851) and Creek (9 August 1814) Nations.

10/ Cf. documents E/CN.4/Sub.2/1988/24/Add.1 (para. 11) and E/CN.4/Sub.2/1991/33 (paras. 84 and 85).

11/ It refers to a "division of labour" which establishes anthropology as the "science of primitive man/culture" and sociology as "the science of modern industrial society", and which also opposes anthropology to history. In this way, the anthropological investigation is confined to the so-called "traditional" cultures and societies, allegedly bypassed by the flow of "history"; for some still believe "history" to be the prerogative of modernity. An excellent appraisal of these misconceptions is offered by Claude Lefort's "Société 'sans histoire' et historicité", in Les formes de l'histoire, pp. 30-48 (Paris, 1978).

12/ For an in-depth analysis of evolutionism in the field of anthropology see Héctor Díaz Polanco's seminal El evolucionismo (México, D.F., 1983).

13/ For a much-needed, critical, and more sober appraisal of the often referred to contribution of John Locke to the cause of human rights and fundamental freedoms, see Robert A. Williams, Jr., "Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law", in Arizona Law Review 31/2 (1989): 250-253. In a most persuasive, documented fashion, Williams exposes the role played by Locke's ideas on the sanctity of private property (chapter on Property, Second Treatise of Government), in the rationalization of legislation passed in the United States during the nineteenth century which led to Native Americans' dispossession of their ancestral lands. Quoting another scholarly source, Prof. Williams also mentions another remarkable contribution by Locke; this, as a one-time functionary in a slave plantation in South Carolina and drafter of the Carolina Lord Proprietors' 1669 "Fundamental Constitutions", which granted every English colonial freeman "absolute power and authority over his negro slaves".

14/ It is not possible, however, to ignore the important contributions of the first great thinkers in this field, among them Lewis H. Morgan (Ancient Society [1877]) and Friedrich Engels (The Origins of the Family, Private Property and the State [1884]), in particular, with respect to establishing key conceptual frameworks for this discipline. For a good evaluation of these contributions, see George W. Stocking Jr., Victorian Anthropology (New York, 1987).

15/ Franz Boas, The Social Organization and Secret Societies of the Kwakiutl Indians (1897).

16/ Bronislaw Malinowski, Argonauts of the Western Pacific (1922).

17/ Two general studies about the conceptual problems of economic anthropology are: Maurice Godelier, Rationalité et irrationalité en économie (Paris, 1969) and George Dalton (Ed.), Tribal and Peasant Economies. Readings in Economic Anthropology (Garden City, 1967). For a critical assessment of anthropological theories on gift-giving, particularly the potlatch, see I. Schulte-Tenckhoff, Potlatch: conquête et invention (Lausanne, 1986).

71/ The Message, in the hand of John Stagg, Jr., and signed by George Washington, is in President's Messages on Indian Relations, Executive Proceedings, SR, DNA.

72/ In the landmark case Worcester v. Georgia (1832) (see para. 154 of the present report).

73/ Opinions of 26 April 1821 (345) and 1828 (613-618 and 623-633), quoted in Morris, op. cit. (note 40), p. 291 (note 61).

74/ See supra, (note 47).

75/ 31 US (6 Pet.), 559.

76/ This viewpoint has been vigorously argued by Sharon Venne in "Treaty and Constitution of Canada", (roneo, 1988), pp. 2-5, on the basis of George III's Royal Proclamation of 1763 and on Lord Mansfield's opinion in Campbell v. Hall (1774), (Cowp. 204, 98 ER 1045 (K.B.)). See also James O'Reilly, "Canadian Law: Treaty Violations and Treaty Rights", roneo, 1989, pp. 2,21.

77/ Simon v. The Queen (1986) 24 DLR (4th) 390 (S.C.C.), p. 404, and R. v. Sioui (1990) 3 C.N.L.R. 127 (S.C.C.).

78/ Ibid.

79/ Section 91 (24).

80/ See for example Treaty between Great Britain and the Kings and Chiefs of the Bago Country, signed at Crawford's Island, 6 July 1818 (British and Foreign State Papers, vol. LXIII, p. 1096); Treaty between Great Britain and Ashantee, signed at Coomassie, 7 September 1817 (Ibid., vol. XLVIII, p. 881; Treaty of Peace and Amity between the Dutch East India Co. (Netherlands) and Johore, signed at Riow, 10 November 1784 (Martens, Recueil des Principaux Traités (2nd ed.), vol. V, p. 82); The French-Haudenasaunee Peace Treaty (1665) (Dumont, Corps Universel Diplomatique du Droit des Gens, [Amsterdam, 1726-1731] (cited by Berman, op. cit. [note 40], p. 143). For Portuguese/Spanish, Danish and Swedish practices in their early contacts with non-European nations (basically through trade and charter companies) see Companies and Trade, eds. Leonard Blusse and Femme Gaastra (Leiden 1981), chaps. 7 and 8.

81/ Act of 28 May 1830, 4 Stat. 411.

82/ Cayuga Indians (Canada v. US), 6 R. Int'l Arb. Awards 173, 309 (1926), cited by Barsh, op. cit. (note 40), p. 79.

83/ Island of Palmas (US v Netherlands), 2 R. Int'l Arb. Awards 831 (1928).

84/ See Barsh, op. cit. (note 40), p. 98.

85/ Document E/CN.4/Sub.2/1991/33, paragraphs 96-97.

30/ Richard Thurnwald, Werden, Wandel und Gestaltung des Rechts (Berlin/Leipzig, 1934).

31/ For interesting details on the deeply-rooted value of the principle of reciprocity in international law and practice (particularly with respect to early [sixteenth century] British contacts with non-European societies), see Georg Schwarzenberger, The Frontiers of International Law (London, 1962). p. 129.

32/ A most poetic and intelligible explanation of the nature of the perceptions of indigenous Americans with respect to their relations with other cultures/societies (in this case, with the Dutch newcomers who occupied parts of Manhattan island in the early years of the seventeenth century), can be found in the description of the Guswenta's (or Two Row Wampum) content offered by Oren R. Lyons, the Haudenasaunee delegate to the Working Group on Indigenous Population's eighth session, in his statement of 2 August 1990.

33/ Cf. Karl Polanyi, Primitive, Archaic and Modern Economies (New York, 1968).

34/ Thus Marshall Sahlins in Stone Age Economics (Chicago, 1972) even establishes the concept of "negative reciprocity" which equals warfare between socially distant groups. This is contrasted with generalized reciprocity between close kinsmen.

35/ A relevant example is the potlatch; cf. I. Schulte-Tenckhoff, Potlatch ... op. cit.. Other examples include the large exchange networks linking the peoples of the Papua-New Guinea highlands.

36/ See Dorothy Jones, License for Empire: Colonialism by Treaty in Early America (Chicago, 1983).

37/ A well-known example is Dee Brown's Bury my Heart at Wounded Knee (New York, 1970).

38/ E.g. Jean Goodwill/Norma Sulwin (Eds.), John Tootosis (Winnipeg, 1984). See also H. Russell Bernard/Jesús Salinas Pedraza, Native Ethnography: A Mexican Indian Describes his Culture (Newbury Park, 1989).

39/ See Marshall Sahlins, Islands of History (Lanham, 1988).

40/ A number of essays by both indigenous and non-indigenous authors have been of particular help in the drafting of this chapter. They include: Russel L. Barsh, "Indigenous North America and Contemporary International Law" in Oregon Law Review, Vol. 62, No. 1, 1983, pp. 73-125; Howard R. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in Exiled in the Land of the Free: Democracy, Indian Nations, and the US Constitution, eds. Oren R. Lyons and John Mohawk (Santa Fe, 1992); Glenn T. Morris, "In Support of the Right of Self-Determination for Indigenous Peoples under International Law" in German Yearbook of International Law, Vol. 29 (Berlin, 1986), pp. 277-316; and Robert A. Williams, Jr., "Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law" in Arizona Law Review,

101/ Francis Jennings, "Iroquois Alliances in American History", in F. Jennings et al. (ed.), The History and Culture of Iroquois Diplomacy, (Syracuse 1985), pp. 37-65.

102/ Ibid.

103/ Mary Druke, "Iroquois Treaties: Common forms, varying interpretations" in The History and Culture of Iroquois Diplomacy, op. cit. (note 101) pp. 85-98.

104/ Howard Berman, op. cit. (note 40).

105/ See Wilson D. & Ruth S. Wallis, The Micmac Indians of Eastern Canada, (Minneapolis 1955), Leslie Upton Micmacs and Colonialists. Indian-White Relations in the Maritime Provinces 1713-1867, (Vancouver 1979).

106/ Relevant references are: Harold Innis, The Fur Trade in Canada, Toronto 1970); Lewis O. Saum, The Fur Trader and the Indian, (Seattle 1965). For the early French fur trade, see Marcel Trudel, La Compagnie des Cent-Associés, (Montréal 1979-1983). For the rest of Canada, see E.E. Rich, The Fur Trade and the Northwest to 1857, (Toronto 1967).

107/ It was also the Jesuits (e.g. Father Biard) who were the first to write about the Micmacs, whom they called the Souriquois. The standard English edition of the annual Relations and other materials which the Jesuits from New France transmitted to their Superior in Paris is Reuben G. Thwaites (ed.), The Jesuit Relations and Allied Documents 1610-1791 [1896-1901], (New York 1959).

108/ Cf. The Mi'kmaq Treaty Handbook, (Sydney and Truro N.S. 1987), pp. 6-7, 20-21.

109/ Simon v. The Queen; vid. note 77, supra.

110/ The text of this Treaty appears in pp. 1-3 of the volume entitled Eastern Oklahoma, published by the Washington D.C.-based Institute for the Development of Indian Law.

111/ J. Cont. Cong.32 (1787) 340-341.

112/ Cf. note 90, supra.

113/ See Reginald Horsman, Expansion and American Indian Policy 1783-1812, (East Lansing 1967).

114/ Angie Debo, A History of the Indians of the United States, (Norman 1970), pp. 105-106.

115/ Treaty of 9 August, 1814. Its text appears in pp. 206-209 of the volume Five Civilised Tribes, published by the Institute for the Development of Indian Law.

56/ A clear example of these inter-indigenous alliances is the establishment of the Haudenasaunee Great Peace political confederacy. See Sharon O'Brien's American Indian Tribal Governments (Norman and London, 1989), pp. 17-21. It should also be noted that a Maori jurist pointed out at the ninth session of the Working Group on Indigenous Peoples (July 1991) that the Treaty of Waitangi of 1840 may have been the first treaty a number of Maori tribes signed with a European power; but it certainly was not the first treaty signed by Maori tribes.

57/ Cf. O'Brien, op. cit. (note 56); Robbins, op. cit. (note 52), pp. 87-89; and Berman, op. cit. (note 40), p. 135.

58/ The Ashanti, Aztec, Mayan, Inca, and Moghul empires and the institutional structure of the Maori People are examples of these highly developed systems of government in Africa, the Americas, Asia and Oceania.

59/ Which in most cases included a highly developed sense of diplomacy and sophisticated diplomatic skills.

60/ Robbins, op. cit. (note 52), p. 87.

61/ Berman, op. cit. (note 40), p. 130.

62/ See infra. (note 64).

63/ E.g., D.P. O'Connell, International Law, Vol. 1, p. 303; Lissitzyn, "Territorial Entities Other Than Independent States", in Recueil des Cours: Collected Courses of the Hague Academy of International Law, Vol. 125 (Leyden: A.W. Sijthoff, 1970), pp. 8-11; mentioned by Berman, op. cit. (note 40), p. 349, (note 12).

64/ See Berman, op. cit. (note 40), p. 349, (note 13).

65/ Cf. Berman, op. cit. (note 40) p. 129.

66/ Prof. Morris has pointed out that, "In an effort to enlist the support of Native nations for the Revolutions, the Americans began to form treaties formally with the indigenous governments." He also noted, "The Continental Congress created separate departments for its diplomatic relations with Native nations. Commissioners were appointed to serve essentially the same function as ambassadors ...", op. cit. (note 40), p. 290, (and note 55).

67/ The texts of the Trade and Intercourse Acts of 1790 (1 Stat. 137) and 1793 (1 Stat. 329) also reflect this policy.

68/ Vine Deloria, Jr., "Sovereignty", in Roxanne Dunbar Ortiz and Larry Emerson eds., Economic Developments in American Indian Reservations (Albuquerque, 1979), cited by Robbins, op. cit. (note 52), p. 113, note 14.

69/ Ibid., p. 113 (note 15).

70/ 1 Stat. 137.

127/ See pp. 35-37 of the volume entitled Sioux, part of the compilation published by the Institute for the Development of Indian Law.

128/ Dee Brown, Bury my Heart at Wounded Knee, (New York 1970), Chapter 6. The text of the Treaty is contained in pp. 38-39 of the volume entitled Sioux, op. cit. (note 127).

129/ Father Peter John Powell, "The Sacred Treaty", in Roxanne Dunbar Ortiz (ed.), The Great Sioux Nation, (San Francisco 1977), p. 105. This work contains numerous and extremely valuable evidence on the indigenous viewpoint (and indigenous oral history) regarding the 1868 Treaty of Fort Laramie, its provisions and its binding force.

130/ E.g. An Act to Divide a Portion of the Reservation of the Sioux Nation ..., reproduced in the Sioux volume, op. cit. (note 127).

131/ Chief Phil Stevens, Special Chief of the Great Sioux Nation, Testimony to the United Nations Commission on Human Rights, (Rapid City 1991), pp. 34, 36 and 37.

132/ Peter A. Cumming, Canada: Native Land Rights and Northern Development, [IWGIA Document] (Copenhagen 1977), p. 31.

133/ Ibid., Ib.

134/ Ibid., Ib.

135/ Morris, op. cit. (note 40), p. 291.

136/ Ibid., pp. 291-292 and note 63.

137/ British and Foreign State Papers, Vol. LXIII, p. 1091.

138/ Aitchison, A Collection of Treaties etc. relating to India etc., Vol. VIII, p. 93.

139/ Maxwell & Gibson, Treaties & Engagements affecting the Malay States & Borneo, p. 30.

140/ See Robert H. Taylor, The State in Burma, (London 1987) pp. 226-227.

141/ See Canada's response (24 May 1991) to the questionnaire submitted by the Special Rapporteur, p. 14.

142/ Canada Reports, Vol. IV, No. 2 (1992), p. 21.

143/ An evaluation of the evolution of Greenlandic autonomy is offered by Theodor Veiter, "Die Autonomie Gronlands vom 21 November 1978 und ihre seitherige Entwicklung", in F. Riedl/Th. Veiter (eds.) Foderalismus, Regionalismus und Volksgruppenrecht, (Wien 1989), pp. 450-470.

144/ Commission on Human Rights resolution 1988/56 of 9 March 1988, operative paragraph 1.

86/ E.g., Charles J. Kappler ed., Indian Affairs, Laws and Treaties (Washington 1904); Clive Parry ed., Consolidated Treaty Series (New York 1969-1986), George Brown and Ron Maguire, Indian Treaties in Historical Perspective (Ottawa 1979).

87/ E.g. the collections, established by region, of treaties and agreements between Indian nations and the United States, published by the Institute for the Development of Indian Law (Washington D.C.), and Bennett McCardle, Canadian Indian Treaties (Ottawa 1980).

88/ Dorothy Jones, License for Empire, op. cit. (note 40), pp. 10-18.

89/ See Robert T. Coulter, "A History of Indian Jurisdiction", in [National Lawyers Guild], Rethinking Indian Law (New Haven 1982).

90/ This treaty's text is reproduced in pp. 11-16 in the volume Eastern Oklahoma of the treaty compilations by the Washington, D.C.-based Institute for the Development of Indian Law.

91/ About two dozen treaties before 1840, the two "Robinson Treaties" of 1850, Treaties No. 3 (1873) and No. 9 (), two more treaties in 1923.

92/ See, i.a. Felix Keesing, Social Anthropology in Polynesia (London 1953); Marshall Sahlins, Social Stratification in Polynesia (Seattle 1962) and Irvin Goldman, Ancient Polynesian Society (Chicago 1970).

93/ See José Bengoa Historia del pueblo mapuche (Santiago de Chile 1987), pp. 32-36.

94/ In this regard, studies such as Edward H. Spicer, Cycles of Conquest. The Impact of Spain, Mexico and the United States on the Indians of the Southwest 1533-1960, (Tucson 1962) can serve as a basis of comparison between the various approaches to indigenous-new settlers relations.

95/ For example, those resulting from the relations between the Ashanti authorities and representatives of Great Britain in the early nineteenth century.

96/ Cf. Sven H. Carlson, Trade and Dependency, (Uppsala 1984).

97/ The classic reference on this topic is Max Gluckman, "The Kingdom of the Zulu of South Africa [1940], in M. Fortes and E.E. Evans-Pritchard eds., African Political Systems, (London, 1987).

98/ The most complete ethnohistorical analysis on this subject is Miklos Szalay, Ethnology und Geschichte, (Berlin 1983), Part II.

99/ See Joseph Chailley, L'Inde britannique (Paris 1910).

100/ Quoted after Roland Bless, "Divide et impera"? Britische Minderheitenpolitik in Burma 1917-1948, (Stuttgart 1990), p. 27.

145/ Document E/CN.4/Sub.2/1991/33, paragraph 117.

146/ Trevor O. Lloyd, The British Empire 1558-1933, (Oxford 1984), p. 30.

147/ IWGIA Yearbook 1990, (Copenhagen 1991), pp. 141-143.

148/ For an overview, see Francis Prucha, American Indian Policy in the Formative Years, (Cambridge Mass. 1962).

149/ Dorothy Jones, op. cit. (note 40), p. 161.

150/ See Philippe Brooks, Diplomacy and the Borderlands. The Adams-Onis Treaty of 1819 [1939], (New York 1975).

151/ Armando B. Rendón, The Treaty of Guadalupe Hidalgo and its Modern Implications for the Protection of the Human Rights of Mexican Americans, [unpublished manuscript] (1982).

152/ Land grants were made to the mission orders exercising guardianship over more than 30,000 indigenous individuals; the missions were secularized and their lands expropriated after Mexican independence.

153/ See Russel Barsh, op. cit. (note 40), p. 81; Hurst Hannum, "The Limits of Sovereignty and Majority Rule: Minoritie, Indigenous Peoples, and the Right to Autonomy", in E.L. Lutz, H. Hannum and K.J. Burke (eds), New Directions in Human Rights, (Philadelphia, n.d.), p. 16.

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COMMISSION ON HUMAN RIGHTS
Forty-eighth session
Item 14 of the provisional agenda

IMPLEMENTATION OF THE PROGRAMME OF ACTION FOR THE SECOND DECADE TO COMBAT RACISM AND RACIAL DISCRIMINATION

Report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples

Nuuk, Greenland, 24-28 September 1991

Addendum

Introductory statements and background papers of the Meeting of Experts

CONTENTS

GE.91-14195/4086B

I do not want to suggest by these opening remarks that the world has become a secure haven of plenty for all or that it is not still a dangerous and unpredictable place. I have no need to remind you of the economic and social deprivation in which so many live or of the continuing violence in certain parts of the world. In the human rights field we still have a long distance to travel before we achieve the noble aspirations set out for us in the Universal Declaration of Human Rights. The Greenlandic people are well aware of the problems faced by countless human beings and their concern to promote human rights and contribute to greater understanding among peoples is demonstrated by their generous hosting of this meeting here at Nuuk.

Certain difficulties and obstacles notwithstanding, I believe we can regard the present time as offering us an opportunity to make further progress in realizing some of the aims of the drafters of the Universal Declaration and the Charter of the United Nations. These may be uncertain times but they provide an occasion to consolidate and strengthen human rights and make them a reality for all peoples and individuals. It is precisely in such an atmosphere that we can hope for considerable benefits from the recently proposed World Conference on Human Rights, of which the first preparatory session took place a few days ago. The World Conference will be held in 1993 and we hope it will become a focus for imaginative new ideas on human rights which will shape our thinking and action in the coming years.

Let me now turn to the subject of this meeting: schemes of internal self-government for indigenous populations. I will speak frankly. With the exception of the International Labour Organisation, which adopted a convention dealing with tribal peoples in 1957, the international community for many years largely ignored the special situation of indigenous peoples. But some 10 years or more ago, a process was set in motion in the United Nations which put indigenous peoples, their problems and their hopes, onto the agenda.

You are familiar with the first step in this process: the preparation of the Study of the problem of discrimination against indigenous populations prepared by the Special Rapporteur, Mr. José Martinez Cobo, completed in 1984. Its numerous recommendations and suggestions still provide a useful basis for our work today. You are also well aware of the activities of the Working Group on Indigenous Populations, established in 1982, with the dual mandate of reviewing national developments and elaborating international standards. The Working Group has become the focal point in the United Nations system for indigneous peoples. Indeed it has become one of our largest human rights meetings and at its recent session, which took place in the last two weeks of July, there were nearly 500 registered participants.

After nearly a decade which has seen indigenous peoples coming together at the United Nations at Geneva to share their views and concerns, I think I can say there has been an explosion of interest among the international community. The International Labour Organisation answered the call for renewed action in this field by revising its convention on tribal peoples and adopting in 1989 the new Convention 169 on indigenous and tribal peoples. In the wider arena of the United Nations this interest and concern is symbolized by the decision of the General Assembly last year to proclaim 1993 the International Year for the World's Indigenous People. Already a number of

Opening statement by the Representative of the United Nations, Under-Secretary-General for Human Rights

It is my pleasure to welcome you all to this United Nations meeting to review the experiences of countries in the operation of schemes of internal self-government for indigenous populations. I wish to express my gratitude to the Greenland Home Rule Government for providing a venue for the meeting and to the Government of Denmark for support and assistance in its organization. We all recognize the uniqueness of the occasion: it is the first United Nations meeting to take place in Greenland, one of the few such meetings to be held in the Arctic Circle, and, to my knowledge, is the only United Nations gathering to discuss exclusively the question of self-government and autonomy in the history of the Organization.

Let me point out at the outset that the Under-Secretary for Human Rights regrets not being able to attend personally this meeting owing to other commitments and has asked me to convey to you his best wishes for successful deliberations.

The meeting on internal self-government for indigenous peoples was authorized by the General Assembly in its resolution 42/47 of 30 November 1987 as part of the plan of activities for 1990 to 1993 being implemented during the Second Decade to Combat Racism and Racial Discrimination. The importance of such an expert meeting was also recognized by the Working Group on Indigenous Populations and the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 1990/27.

We are at a crucial moment in history. Peace has come to countries and regions which were locked for many years in apparently insoluble conflicts; international relations, once so obstructed by hostility and misunderstanding, are now being affected by a new sense of trust and cooperation; and human rights have perhaps never been so much discussed and promoted as standards by which we should live in the future as they are today. What 10 years ago might have seemed impossible in the areas of peace, democracy and human rights is now part of our everyday reality.

As you know, the human rights programme is based on the three pillars of legislation, implementation and information/education. They form a triangular relationship which is at the heart of the United Nations action for human rights. In this field we can point to many achievements: a comprehensive framework of international standards consisting of some 70 covenants, conventions and other instruments; a growing machinery of committees, special rapporteurs, and other procedures, to ensure implementation; a developing programme of information and education to promote a culture of human rights worldwide. These activities can now take place in a greatly improved international context, in a world where there is less confrontation and more cooperation in finding solutions. We can look forward to a period of full implementation of the rights which have been elaborated with so much care and wisdom.

One of the central issues in the elaboration of new standards to protect and promote the rights of indigenous peoples is that of autonomy or internal self-government. The Chairperson/Rapporteur of the Working Group has expressed the view on many occasions that the draft declaration will deal only with autonomous arrangements within States. But even with this qualification it is clear that there are many different points of view and the existing arrangements vary enormously from country to country. There is as yet no consensus on this important principle and, as we all agree, international human rights instruments can only be built on mutual understanding and respect, and consensus.

The present meeting on internal self-government of indigenous populations can contribute to our greater understanding of this principle. We are privileged to welcome experts from numerous Governments and indigenous peoples' organizations, distinguished resource persons from Greenland, Denmark, the Philippines and Costa Rica, as well as the representative of the International Labour Office and the Special Rapporteur on treaties and member of the Working Group, Mr. Alfonso Martínez.

In this informal, calm and propitious environment we hope that you can exchange views and make suggestions that might assist the United Nations in its standard-setting activities. You should keep in mind that United Nations standards aspire to the highest ideals in human and international relations.

States are planning special events, and the international organizations, particularly those with operational programmes in indigenous areas, are considering ways in which they can enhance the involvement of indigenous peoples and address their needs more directly.

The wider recognition of the concerns of indigenous peoples in the United Nations system may be attributed in large part to the prominence given to this issue in the human rights field. I think credit is due to the various organs of human rights - the Commission and Sub-Commission, in particular - for acknowledging that indigenous peoples face serious and unique human rights problems and aspire to special protection of their human rights. Among the distinctive characteristics identified are the special relationship between indigenous peoples and the land and nature; the different methods of resource management; and, of especial note, the holistic value system which makes the economy activity, developments, social organization, culture and philosophy of indigenous peoples interlinked and inseparable. New thinking in the international community emphasizes the need of respect for nature and the environment, of sustainable development, and of a holistic approach to problem solving and these ideas reflect very closely the traditional cultures of many indigenous peoples. The United Nations is now recognizing the important place of indigenous peoples in the global family, not only in the human rights field but also in the areas of environment, development and culture.

The meeting which starts today is the second to take place on indigenous peoples. The first seminar focusing exclusively on indigenous peoples was held at Geneva in 1989. The Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States (a summary of which is available as an ad hoc publication of the Centre for Human Rights (HR/PUB/89/5)), like the Working Group itself, was marked by innovation since it was the first time an indigenous person was elected rapporteur of a United Nations meeting. Its report, with recommendations, was submitted to the Commission on Human Rights for its consideration and you may wish to follow that procedure with any report resulting from the meeting here at Nuuk.

The Working Group itself has also generated new projects and studies. Mention can be made of the study currently under preparation by the Special Rapporteur, Mr. Alfonso Martínez, on treaties, agreements and other constructive arrangements between indigenous peoples and States, and of the working paper prepared by the Chairperson/Rapporteur of the Working Group, Mrs. Erica-Irene A. Daes, on the ownership and control of the cultural property of indigenous peoples.

But the primary focus of the Working Group's activities is the preparation of a draft declaration on the rights of indigenous peoples. Here, if you will permit me, I will pay tribute to the dedicated work of the Chairperson/Rapporteur of the Working Group, Mrs. Erica-Irene A. Daes, who has guided the drafting exercise so skilfully and creatively in the last seven years. Considerable progress has thus already been made on the draft declaration and, at the latest session of the Working Group in July of this year, the preamble and 18 operative paragraphs were agreed upon at first reading and submitted to the Sub-Commission when it met in August.

Unfortunately, the indigenous peoples of the world still belong to these peoples for whom the enjoyment of human rights is denied. For most of these peoples there is no immediate prospect of creating independent States. Partly for the simple reason that they as individual peoples are small in numbers. But also owing to the fact that the indigenous peoples share a common situation in which their lands have been enclosed within the boundaries of bigger State formations. Thus, we are left with the acknowledgement of the fact that the solutions used by the United Nations in the decolonization process are not readily usable for the indigenous peoples.

It is to the credit of the United Nations to have seen and to have been aware of this from very early on. As early as 1982, a special working group was established, under the auspices of human rights organizations, with the purposes of creating a special rights charter for indigenous populations. It is in this specific situation, where a people does not have the opportunity to create an independent State, that the State which encases it, has the responsibility to ensure that these peoples are secured the maximum freedom and dignity possible within the boundaries of the State.

Since 1982 it has been a goal of the United Nations to create the norms and set the minimum criteria for how this can be done. It is the purpose of this meeting to aid this process.

The paramount purpose of such work must be to ensure that, no matter how the States fulfil these norms, it is done in such a manner that the indigenous peoples are secured the highest degree of self-determination possible.

It was against this background that the United Nations Working Group on Indigenous Populations suggested that the present Meeting of Experts should be organized under the United Nations Programme of Action for the Second Decade to Combat Racism and Racial Discrimination. The combat against racism means combat for equality between people who live within the same territories. The attainment of equality is the best antidote to all forms of racism.

It is on the basis of our positive experiences in this particular field, with the establishment of home rule within the Danish State, that we, along with Denmark, wished for the meeting to be held here in Greenland.

It will be our task, in the next few days, to try to assess where the positive aspects of the establishment of ever increasing self-government for indigenous peoples lie. It is important that we all understand that these positive experiences not only are beneficial to the indigenous peoples, but also to the nation-States.

Naturally, not all will be concord and political harmony. But the feeling of being able to work with the disagreements in a dignified collaboration will remove the negative tension, which often poisons the relationship between two parties.

I would like to recommend this as the first experience which the meeting can learn from Greenland, and I would like to point out that self-government should be based on the possibility for dynamic development.

Opening speech by the Premier of Greenland,
Lars Emil Johansen

It is a very important event for us in Greenland, that we are here today as hosts for the first United Nations meeting being held north of the Arctic Circle. And especially, we are pleased that this particular meeting, where the United Nations has summoned experts from all over the world to discuss self-government for indigenous peoples, is being held in our country, Kalaallit Nunaat, where home rule has now existed for 12 good years.

But first and foremost, it is a pleasure for us that the United Nations, by conducting the meeting here, not only places Greenland on the United Nations political world map, but does so in connection with the efforts to create just and dignified living conditions for the 300 million indigenous people who live on this globe. This gives us the opportunity to contribute, in a symbolical as well as in a practical way, to the efforts to allow these many peoples to take their rightful position in the new world order.

Owing to the dramatic changes on the world scene within the last years, the United Nations has regained the unifying and peacekeeping role which was the very principle behind the Organization. In the various speeches concerning the new world order there is no doubt that the United Nations, specifically, is intended to have the role as the central body defining the guidelines and the rules for the new world order.

With the liberation of Kuwait, with the newly freed republic's admission to the United Nations, with the central role the United Nations has played in the hostage negotiations, with the constant development of human rights standards and the intensified surveillance in the area of human rights, the United Nations system has proved its viability. More than any other international body, it has understood that the protection of the weakest in the existing world order is the basic criterion by which to measure the true value of international cooperation.

Likewise, it is to the merit of the United Nations that many of the former colonies were able to free themselves from the bondage of colonialism in a peaceful and dignified manner, and become independent nations. It is, in fact, the decolonization and the full securing of the right, of States as well as of individuals, to live in freedom and equality, which is the core basis of the United Nations. And it is the United Nations combat against oppression and racism which has led so many small peoples in the world to place such high hopes in the Organization.

And this is precisely the perspective from which this meeting must be understood. For while a number of former colonies are now free and independent States, there are still peoples who live in conditions where they feel that their claim for lawful self-determination is not given the space and freedom to unfurl. People who still feel oppressed and deprived of their right to equality. People whose land and livelihood, culture and distinctiveness are not yet secured from coercive powers stronger and greater than they. People for whom the colonial structure is not abolished.

Assimilation policies should, in today's world, be tales of the past, not only in relation to indigenous people. The developments in the world that we are witnessing these days show acutely that no people wish to be assimilated into huge nation formations with a regimentation of cultures, languages, and lifestyles. National identity can never be replaced by an identity based on political ideology or economics.

Throughout history, this has been true for indigenous people, but their views are now being heard in practice. In fact, this has been the foundation for the revision of the International Labour Organisation's Convention on Indigenous Rights, away from this principle of assimilation, and towards the right to cultural diversity.

The time has come, when all ought to realize that the nation-State thrives on diversity and not on uniformity. Though it is obvious that increasing international economic cooperation binds the nation-States still closer on a regional basis, it is just as obvious that, today, this goes hand in hand with demands from smaller units, within the individual nation-States, for the recognition, and assurance, of their cultural distinction.

I believe this combination of strengthened international cooperation and of increased priority on the independence of people is the theme of tomorrow and the new world scene. It is from diversity that creative cooperation draws its nourishment and inspiration. Respect for differences and a committed cooperation is the essence of democracy.

This aspect is tremendously important for indigenous people. For us it is more important to be recognized and respected as distinct peoples with our own history, culture and identity than it is to seek the dismantlement of nation-States, into small States without a real substance. There are fields where the nation-State is benefical to all of us, and these should be maintained, while we at the same time try to attain self-government within our own territories.

It must also be realized that it is seldom possible for indigenous people to establish an independent and sustainable economy. We must realize our interdependence with and our dependence on larger economical and political units, in much the same way even most nation-States must do today.

Seen with a positive outlook, it is at the same time these units which ensure us our land rights, our cultural distinctiveness and our self-government institutions, which can give us the opportunity to place ourselves on the international world map so that we can be seen, heard and understood.

I would like to make it my last initiating recommendation, that each indigenous peoples are recognized as independent peoples.

Last December, the United Nations General Assembly decided to make 1993 the International Year for Indigenous People. The decision has given us a unique opportunity to put focus on the position of indigenous people in the new world order.

We have here in Greenland - in full accordance with the Danish Government - established a committee for foreign and security affairs, although these affairs belong under Danish jurisdiction and thus are not included in the Home Rule Act.

The prerequisite for establishing such a relationship is naturally that the various indigenous peoples within nation-States are given the right to decide over the land areas they inhabit. There must be a material basis for political rights. It is evident that the delimitation of land rights is one of the hardest problems to be solved in relation to the new self-governing parts of the nation-States, but the solution is at the same time an inevitable prerequisite for further collaboration.

Despite the fact that Greenland is an island, and that we, as Inuit, have always been in the majority on our island, we had to solve our land rights claim with Denmark through a compromise. During our negotiations on the Home Rule Act, this was the hardest point to overcome.

We accepted that the Constitution of the nation-State should not be broken and thus that its territory could not be apportioned. In return, Denmark accepted the principle that the resident population of Greenland had the fundamental rights to the natural resources of Greenland.

The result is that we decide from here on all activities in Greenland which are not related to mineral extraction. All decisions on mineral extraction in Greenland are made by Greenland and Denmark in unison, with both parties having a right of veto in the initiation and realization of mineral extraction projects. Likewise, we now have a profit sharing arrangement, whereby revenue is divided according to a scale both parties have agreed on.

I shall not go into this in depth, but only demonstrate that the consequence of the arrangement is that we in Greenland have in principle been given a collective property right to our own land. At the same time we have obtained the right of a collaborative partner to ensure, on an equal footing, that whatever happens in our land areas in the interest of the nation-State cannot take place without our consent.

It will be my second recommendation that the indigenous peoples are ensured the principal rights to their own land areas and at the same time are ensured a decisive influence on the utilization by the nation-State of the natural subsoil resources.

In that connection, I would like to point out that this is also a basic prerequisite for the protection of the environment, which we all fight for. It is of pivotal importance that the people who inhabit a given territory have a say in how development in an area is dealt with, if this is to be done in a sensible and sustainable way.

In connection with the reflections above, I would like to state that the prerequisite for the realization of the first recommendations is of course that States recognize the indigenous peoples as distinct peoples, and recognize their responsibility to the diversity and welfare of the nation-State.

Speech by the Minister for Justice of Denmark,
Hans Engell

I am very pleased that it has been possible to hold this United Nations experts meeting concerning internal self-government for indigenous populations here in Greenland, where Home Rule has been practised since 1979. The participants of the meeting will have a good possibility to see for themselves how well the cooperation between national and Home Rule authorities can function.

We feel ourselves that we have established an appropriate framework for such cooperation, and that there is the goodwill on both sides to accept necessary compromises in order to fulfil mutual obligations, and in this way ensure continued development of the good relations between Greenland and Denmark.

Traditionally, Denmark has played a very active role in the field of human rights, both within international organizations and in other forums. Denmark has often promoted resolutions and proposals concerning human rights questions, both with respect to the right of the individual and with respect to collective rights.

Within the field of the rights of indigenous peoples I will mention that within the cooperation which takes place under the Conference on Security and Cooperation in Europe (CSCE), Denmark and Greenland have put forward a proposal concerning the strengthening of the rights of indigenous peoples.

In the context of the initiative called the "Arctic Environmental Protection Strategy", which was endorsed at a conference of Ministers of the Environment in Finland in June this year, Denmark was instrumental in bringing about an agreement ensuring that representatives of indigenous peoples hold seats as permanent observers. Denmark and Greenland will be hosts of the next conference of Ministers in the context of this initiative, in 1993 here in Greenland.

Prior to the international Conference on Environment and Development to be held at Rio in 1992, Denmark in cooperation with Greenland has put forward a written proposal for a resolution concerning the rights of indigenous peoples in questions concerning the environment.

The traditional Danish respect for fundamental human rights forms an inherent part of Danish law and is reflected directly or indirectly in statutes, regulations and legal interpretation. You will find documents with provisions concerning the rights of individuals as far back as the thirteenth century, and our Constitution of 1953 contains a catalogue of the fundamental rights of the individual. Danish law, furthermore, contains a number of special provisions which aim at safeguarding fundamental rights. For example, the Penal Code contains provisions concerning racism and discrimination. But Danish law also has statutes concerning the rights of minorities. one of the best examples being - as a matter of fact - the Home Rule Act concerning Greenland.

In this connection, I would like to express the wish that 1993 not only becomes a year in which the United Nations puts focuses on indigenous peoples, but that it also creates an opportunity for us from the self-governing parts of nation-States to obtain a more independent status in the United Nations system.

We believe that we have much to contribute to a world which is in great need of a new cultural identity, and of a new understanding of the nature it is dependent on. We ourselves believe that since so many of us have been able to maintain basically the same way of living and to do so with a large degree of harmony with nature, then we have something we can contribute to the modern world of today, where, in many places, harmony with nature is disappearing.

The prerequisite is, of course, that we are ensured the right to maintain our own land areas, our culture, our identity and our history, on our own terms; and that this is understood in a dynamic way and not as an attempt to set time back. So our suggestion for the theme of the International Year is "The right for indigenous people to economic and democratic development".

We wish, as much as other people, to be fellow citizens in the modern world and to develop our cultures and societies in a dynamic interaction with the rest of the world.

But we wish to do this on our own terms and using our own guidelines, and this wish we share with all other peoples in the world. Greenland is a clear example that this is possible, not only for the newly freed States all over the world, but also for indigenous people.

This is why we wanted you to come here so that you could see for yourselves the positive effects of indigenous self-government, and this is why we are happy and proud to host this particular United Nations meeting.

It is my hope that this meeting will be able to send a series of positive recommendations to the United Nations on the establishment of rights for indigenous people; basic rights that in the United Nations and within our different nation-States can help us to secure our rightful place within the new world order.

May you have a productive meeting!

Other statutes and administrative orders which are of particular importance to Greenland shall likewise be referred to the Home Rule authorities for their comments before being put into force in Greenland. As a rule it is left to the Home Rule authorities to decide which statutes and orders are of particular importance to Greenland.

Over the years this procedure has been extended and an increasing number of bills and administrative orders are now referred to the Home Rule authorities for their comments.

As for the financing of the Home Rule system, the Home Rule Act provides as the main principle that the Home Rule authorities assume responsibility for expenditure in fields which have been transferred to them. In these fields the Home Rule authorities bear the full economic, political and legal responsibility.

Where national subsidies are required, powers are transferred to the Home Rule authorities by specific authorizing acts, whereby a framework concerning the field in question is established. Detailed regulation is left to the Home Rule authorities.

During the last few years, an increased part of the national subsidies have been granted in the form of a "block grant" which the Home Rule authorities may, to a very great extent, use without interference from the State authorities.

Almost all the fields mentioned in the annex to the Home Rule Act have now been transferred. I should mention that protection of the environment was transferred in 1988, and the transfer of the public health service is scheduled for 1 January 1992.

The Danish authorities see to it that consideration is given to the special Greenland conditions to the greatest extent possible in connection with regulations in fields which have not been transferred.

As Minister of Justice, I should like to draw attention to a particularly good example of a statute where special regard has been given to Greenland conditions, namely the Greenland Criminal Code.

The Greenland Criminal Code is exceptional and unique in its creation of a system of sanctions which are inspired not by the gravity of the offence itself, but by a desire to rehabilitate the offender and to protect society.

The Criminal Code does not prescribe sanctions for specific offences, but the decision on sanctions shall give proper consideration to the nature of the crime and society's interest in counteracting similar actions. Special regard shall be given to the personality of the criminal and to what is deemed necessary to prevent him from committing further crimes.

The Criminal Code is built on the results of the inquiries of a legal mission during a journey in Greenland in 1948-1949. The mission was sent by the Danish Government to study whether to introduce Danish criminal law to Greenland or to codify the existing law of Greenland It came to the

During the last decade, concurrently with increased international concern with regard to the human rights situation in the former communist countries and in a number of other countries throughout the world, public interest in Denmark in questions concerning human rights has grown.

The Danish courts and other public authorities have become more and more aware of Denmark's international obligations in the field of human rights. In May 1991 a committee under the Ministry of Justice submitted a report recommending that the Danish Government propose a bill to the Danish Parliament whereby the European Convention on Human Rights, which was ratified by Denmark in 1953, would be incorporated into Danish law by a special statute. Although this Convention, as well as other international conventions ratified by Denmark, may of course be invoked before the Danish courts, the Committee has been of the opinion that it would strengthen the respect of the principles contained in the Human Rights Convention, if the Convention were transformed into Danish law by a special statute. As to the question of the incorporation of United Nations Conventions on Human Rights into Danish law, in particular the International Covenant on Civil and Political Rights with its provisions concerning - among others - minorities, the Committee closely follows the considerations in other Nordic countries.

Home Rule in Greenland became a reality in 1979 after the Greenlanders had approved the Home Rule Act by referendum. The Danish Constitution whereby Greenland is an integral part of the Danish Kingdom with equal rights remained unamended.

The main purpose of the Home Rule Act was to transfer powers and responsibility - in the fields listed in an annex to the Act - from the Danish political authorities to the Home Rule authorities established by the Home Rule Act.

The fields transferred were, of course, the organization of Home Rule in Greenland and the organization of local government. In addition, other fields of basic importance to the functioning of Greenland society on its own conditions were transferred.

The fact that the unity of the Kingdom remained unchanged meant, however, that certain powers could not be transferred to the Home Rule authorities. This was the case of, for example, external relations, national finances and defence policy. Within my own sphere of competence I could mention, for example, the administration of justice, criminal law and family law.

In these fields the national authorities will, of course, act with due regard to specific Greenland conditions, taking into account opinions expressed by the Home Rule authorities.

In accordance with the Home Rule Act bills which include provisions which exclusively concern Greenland shall be referred to the Home Rule authorities for their comments before they are introduced in the Danish Parliament.

An equally balanced Danish/Greenland Joint Committee on Mineral Resources in Greenland to advise the Greenland Executive and the Danish Minister of Energy;

Administration of the mineral resources sector handled by the Mineral Resources Administration for Greenland, with associated institutions under the Minister of Energy.

This system has been functioning well for almost 12 years, with some modifications being agreed upon in 1988. Danish/Greenland cooperation within this framework has proved constructive and has produced solutions to a number of questions with which both sides can be satisfied.

Most recently, this was demonstrated by the acceptance and adoption in Greenland and Denmark of a new act on mineral resources in Greenland. This act, which entered into force on 1 July 1991, is designed as a basis for the implementation of a new and more dynamic policy regarding exploration and exploitation of mineral resources in Greenland. This common Danish/Greenland policy was recommended unanimously by the Joint Committee and endorsed by the Greenland Executive and the Danish Government.

Denmark became a member of the European Economic Community (EEC) in 1973. When the Home Rule Act entered into force in 1979 it was assumed that Greenland would continue its membership of the EEC.

In 1982, however, Greenland decided by referendum to leave the EEC, and with effect from 1 February 1985 was no longer a member.

The Danish authorities, in their negotiations with the EEC, have made every effort to obtain the most favourable arrangement for Greenland, which was finally associated with the EEC, with the status of an overseas territory.

I dare say that the status of Greenland within the EEC today is favourable, with free access to the EEC market and with subsidies from the EEC in return for EEC fishing rights in Greenland.

I wish to underline that the Danish authorities always have the special Greenland conditions in mind in negotiations with the EEC.

An aspect of the responsibility which is felt by the Danish authorities towards the special interests of Greenland was reflected in a joint declaration of November 1989 by the EEC Council, the EEC Commission and the Governments of Denmark, France, the Netherlands, Portugal and the United Kingdom on the procedure to reconcile divergent interests of the European Community and certain territories of the Member States in international conferences. In this declaration, the main principle is that a Member State should, in the first place, seek separate representation for overseas territories at international conferences. In any case, the EEC organs shall be kept informed of potential conflicts between the interests of the EEC and the territory in question. But in the event that it proves impossible for the EEC organs to reconcile a conflict, it should be possible for the Member State concerned to vote and speak separately for its overseas territories.

conclusion that punishment for a crime could often be more disruptive of a small community than the crime itself and that sanctions could often increase rather than reduce the community discord generated by a crime. This perspective on criminal sanctions is incorporated in the Criminal Code.

The traditional legal sanctions in Greenland were conditioned by feelings of social solidarity, by an intimate knowledge of the offender, by the lack of prisons or similar institutions and by the smallness and isolation of the communities. The Criminal Code therefore intended to preserve the existing pattern of legal sanctions, that is individualized treatment of criminals without isolating them from society.

In order to emphasize that punishment, as it is traditionally conceived, is only one of the sanctions, the Code uses the words "will be convicted of" instead of "will be punished for".

The most radical sanction is custody. Other than this, warning, fine, supervision, suspended sentence and placement in institutions are applicable. If a convicted person is sentenced to custody, he is normally allowed to work outside in the community during the daytime.

During more recent years, the Criminal Code has been exposed to criticism for being insufficient and for offending the community's sense of justice concerning severe crimes. It has also been said that the lack of specific sanctions for specific offences might lead to arbitrary decisions.

But it is important to stick to the spirit of the Criminal Code and to preserve the intentions of special prevention and resocialization. The provisions and their flexibility leave the courts considerable freedom to take into account the population's feeling of justice towards the offender and his crime, as well as individual considerations.

However, since the Greenland Criminal Code was written, in the 1950s, Greenland has undergone immense development. What was the right thing in the 1950s may, of course, some day prove to be less appropriate with regard to a Greenland society which, more and more, acquires the features of other modern societies. We are, of course, willing to adapt the Criminal Code as new needs arise in modern Greenland society.

A very important aspect of the relations between the Danish State and the Greenland Home Rule authorities is the Mineral Resources system for Greenland, which was established in 1979 as part of the Home Rule status for Greenland.

The basic elements of this system are as follows:

Joint decision-making competence, with mutual right of veto for the Danish State and for the Greenland Home Rule authorities concerning important dispositions regarding non-living resources in Greenland;

Distribution between the Danish State and the Greenland Home Rule authorities of public revenue from activities pertaining to non-living resources in Greenland;

cooperation, where the national State will transfer more and more powers to international organizations. In the long run, this could mean that we would have to find new ways to cooperate within the Kingdom.

The special geographic conditions of the Kingdom of Denmark give us the possibility of saying that if the three parts grow apart, Greenland and the Faroe Islands have the possibility to leave. It was clearly stated by our Prime Minister during this year's summer meeting of the Nordic Council when discussing the relations of the Baltic States to the Soviet Union. However, I do not think we shall be facing this situation in the near future, partly because of our Home Rule arrangements, partly because of the economic, cultural and family ties within the Kingdom.

I wish all the participants a very pleasant and profitable meeting. I hope you will also have the time to enjoy some of the wonderful outdoor possibilities which Greenland so generously offers.

In the context of cooperation between the Nordic countries, independent Greenland representation in the Nordic Council is assured by two Greenland members of the Danish delegation appointed by the Greenland Assembly (the Landsting).

Furthermore, the Greenland Executive (the Landsstyre) is an active participant - both at a political and an administrative level - in the work of the Nordic Council of Ministers, primarily in the fields of culture, education and fishing.

Finally, I wish to mention that the Danish Government, in all international forums where Greenland is not represented itself, is very much aware of specific problems concerning Greenland, and that the Danish State on a number of occasions has subsidized international conferences concerning indigenous populations. As an example, I can mention the Inuit Circumpolar Conference.

The relations between Denmark and Greenland are characterized by tolerance, friendliness and mutual respect.

The coming into effect of the Home Rule Act has stabilized and further developed those good relations. And the cooperation between the Danish authorities and the Home Rule authorities is characterized by a mutual will and ability to find good solutions to sometimes difficult problems. This has resulted in a Home Rule system which I think must be among the best in the world, and which in a most profound way takes into account the interests of Greenland - not only in theory but very much so in practice.

The relations between Greenland and Denmark are, however, not static. On the contrary, the years of Home Rule have been a very dynamic period in our relations, providing the capability of substituting old agreements and arrangements with new ones adapted to new realities in Greenland. It should not be forgotten that over a rather short period of time Greenland has undergone development which has taken centuries for other peoples.

Both in Denmark and in Greenland we find that we have created a good framework for Danish-Greenland relations, which we would like to export to other parts of the world. But I must stress that the Danish Home Rule arrangement with Greenland - and for that matter also with the Faroe Islands - is based on Danish law, our common traditions and our view on how to organize society. This has been easy, because both the Greenlanders and the Faroese are the overwhelming majorities within a well-defined geographical area. Our Home Rule arrangements are very pragmatic solutions to our need and not a theoretical approach to the need of indigenous peoples in the rest of the world.

Though we are content with our Home Rule arrangements, they are not created to last forever. They have to be modified in accordance with the development of the surrounding world. In fact they can be looked upon as a result of the present worldwide interest in national cultural heritage. One of the great challenges will be to adjust them to the modern world, where one of the key words is internationalization. This might lead to a new pattern of

church and in the home, the local authorities, the municipilaties, the organizations - all make an effort to do their best for a good and modern society, which has to survive in a world undergoing rapid changes.

Therefore this conference is very welcome just now. Because the eyes of the world are focusing more on us and on the ways of existence for self-governed communities. So that we, together and in solidarity, can prove that we are in no way a dying race, but that we are a part of this world. Each of us fights to obtain full freedom, and that is an important starting point, but all the time we must keep in mind that dialogue is the best weapon, not arms and violence, if a positive understanding of internal and external relations is sought; and none of use are able to dictate to the world around us.

Somewhere it is written that there is a time for everything. A time to speak and a time to be silent. Here, these days, we shall have a time to be together, until the time that we must part. It is my hope that together we shall confirm to ourselves and to the world at large that even in small societies there are values which are a pleasure to the world in its continued existence.

My best hopes to you all for this conference and once again I thank the United Nations and its staff for inviting us to this conference.

Welcome once again.

Statement by Mr. Jonathan Møtzfeldt,
Chairman of the Meeting of Experts

Under the auspices of the United Nations we are working with a conference which has to my opinion chosen the right name, the right time, and - not least - the right place: Nuuk in our country, Kalaallit Nunaat.

Because it is a truth that Greenland is one of the newest self-governed communities in the world.

Secondly, Greenland has, through its situation with regard to its mother country, special conditions worth looking at when discussing self-government in any nation in the world having different minority groups.

Thirdly, the whole course of our efforts, the negotiations and the implementation of our Home Rule have happened without war, violence or other destruction which may occur during similar political confrontations.

One may immediately, at the beginning of this conference, raise the question: "What was the reason for me, together with, among others, the Premier, to start the negotiation and implementation of our Home Rule at the time?" The answer is not only that Greenland geographically is situated several thousand miles from the mother country. But, foremost, that this great land was for several thousands of years inhabited by Inuits who have survived the Arctic conditions of hard life and work.

For these reasons we must state that we - and nobody else - are the ones to know best how to create our life, our culture, our destiny. Mind you, without any accusation in the future from our side of our mother country or its population forcing on us a development not suited to our everyday life or to our future.

The fact that we have achieved good results from negotiations is in my opinion because of a good and sober understanding with the majority of the Danish population and especially the large majority of the Danish Parliament, cutting across party lines, as only the extreme right and left parties of the Danish Parliament were opposed to our Home Rule. The fact is, therefore, that our Home Rule is the product of joint Greenlandic and Danish efforts to this effect, and thus a joint task for us and our Danish friends. Now 12 years have elapsed since the introduction of Home Rule in Greenland. Are we satisfied with the arrangement? The answer to this is a clear "yes" for my part.

The establishment of the Greenland Assembly and the Executive, "the Landsstyre", the transfer of almost all community functions apart from defence, security and foreign relations policy and the administration of justice, as well as referenda concerning membership and non-membership of the European Economic Community have cost us a lot of money and have had in many cases also a human price.

Nevertheless, we are happy about our growing self-government under our own responsibility and duty. Those two are completely linked. We can observe not only here in Nuuk, but in all parts of the community - at school, in

PALABRAS PRELIMINARES

1. AMBITO Y EJERCICIO EFICAZ DE LA AUTONOMIA INTERNA Y EL AUTOGOBIERNO

A. Esferas en las que la autonomía sería eficaz como medio de fortalecer el disfrute de todos los derechos humanos

1. Presupuestos que conforman un marco idóneo para que surja pacífica y democráticamente la autonomía institucionalizada dentro de la estructura del Estado;

a) Percepción del hecho de que el reconocimiento de la diversidad no debilita la unidad del Estado, como lo haría la uniformidad impuesta artificialmente;

b) Reconocimiento del carácter multiforme y de la diversidad de la sociedad;

c) Políticas de pluralismo;

d) Educación para la coexistencia pacífica y respetuosa dentro del Estado.

2. La autonomía como una de las formas de ejercer el derecho de libre determinación en y dentro del Estado.

3. El Estado y sus formas estructurales básicas. Estado unitario y Estado federal. El acceso a la autonomía en el seno del Estado afecta a la estructura del mismo.

a) El Estado y sus formas estructurales básicas;

b) El Estado federal;

i) El Estado federal clásico

ii) El Estado federal modificado y matizado

iii) Algunas de las formas "autonómicas" posibles dentro del Estado federal.

c) El Estado unitario:

i) Estado unitario centralizado

ii) Estado unitario con descentralización administrativa

iii) Estado unitario con autonomía política.

Ambito y ejercicio eficaz de la autonomía interna y el autogobierno

a) Esferas en las que la autonomía sería eficaz como medio de fortalecer el disfrute de todos los derechos humanos;

b) Medios de garantizar la participación popular y el respeto de los derechos humanos por parte de las instituciones indígenas autónomas.

Documento de antecedentes

preparado por

Augusto Willemsen Díaz

Nota: Las opiniones expresadas en el presente documento son las del autor.

iii) Pueblos indígenas que conformen un alto porcentaje de la población.

c) Procedimiento para acceder a la autonomía regional o de región con pueblos indígenas numéricamente importantes o mayoritarios en ellas:

i) La solicitud o petición original. Respaldo y ratificación por referéndum

ii) Tramitación de la solicitud.

1) Elaboración del proyecto de estatuto

2) Examen del proyecto por una comisión mixta legislativa

3) Si hay acuerdo en la comisión mixta

4) Si hay acuerdo en la comisión mixta con hasta tres puntos concretos de divergencia

5) Si, como resultado del referéndum, se aprueba el proyecto

6) Si la comisión mixta no alcanzare acuerdo

7) Si, como resultado del referéndum, sólo algunas de las provincias afectadas lo aprueban

8) Si, como resultado del referéndum, sólo una de las provincias afectadas lo aprueba.

d) Procedimiento para acceder a la autonomía étnica o de pueblo indígena:

i) La solicitud o petición original. Respaldo y ratificación por referéndum

ii) Tramitación de la solicitud.

1) Elección y nombramiento de los negociadores indígenas y nombramiento de los estatales. Redacción del documento de bases

2) Elaboración del proyecto de estatuto

3) Examen del proyecto por una comisión mixta de legisladores indígenas y legisladores no indígenas

4) a 9) Correspondientes, mutatis mutandis, a los puntos 3) a 8) del apartado c) ii) anterior.

6. ¿Qué se logra con la autonomía?

a) Beneficios y virtudes en el ámbito político

b) Ventajas en aspectos socioculturales

4. ¿Qué es y en qué consiste la autonomía?

a) Contenido y alcance indispensables de la autonomía política;

b) Elementos de la autonomía política;

i) La potestad autoorganizativa

ii) La potestad normativa

iii) La potestad de dirección política y ejecutiva

iv) La potestad jurisdiccional o de administrar justicia

v) La potestad de ordenar y administrar las finanzas.

c) La distribución y separación de competencias frente al principio jerárquico de suprasubordinación;

d) Arreglos para la prevención de los conflictos de competencia:

i) Reuniones periódicas

ii) Conciliación

iii) Mediación.

e) La composición arbitral;

f) Controles sobre los órganos de los entes autónomos:

i) El control judicial

ii) Control político del poder delegante.

g) Participación de los órganos autonómicos en la composición y el funcionamiento de ciertos órganos generales del Estado.

5. Entes públicos que tienen derecho a la autonomía

a) Entes públicos que tienen derecho constitucional a la autonomía;

b) Entes públicos que deberían tener acceso a la autonomía sin estar favorecidos específicamente por estipulación constitucional o de ley fundamental al respecto;

i) Pueblos indígenas que hayan entrado en relación de tratados o acuerdos con las autoridades estatales competentes o con las autoridades coloniales que las precedieron;

ii) Pueblos indígenas que hayan sido incorporados en forma indiferenciada y contra su explícita voluntad al Estado o a la entidad colonial que lo precedió;

i) Procurador Autonómico de derechos humanos

ii) Procurador Autonómico de derechos históricos y específicos de los pueblos indígenas

iii) Otras figuras compatibles con las tradiciones indígenas.

h) La educación en materia de derechos humanos y la capacitación popular para la defensa de los mismos:

i) Proporcionará el conocimiento sistemático de la Constitución y los instrumentos internacionales de derechos humanos

ii) Fomentará el respeto de los derechos humanos y libertades fundamentales de todos

iii) Promoverá activamente la capacitación en materia de la defensa de sus derechos individuales y colectivos

iv) Pondrá el necesario énfasis en el respeto y la protección de los derechos de los no indígenas que vivan en el territorio indígena de la comunidad autónoma

v) Reforzará la vocación al mantenimiento de la paz

vi) Impartirá, con base en todo lo anterior y en las costumbres y tradiciones indígenas, la instrucción cívica y la formación social del educando.

OBSERVACIONES FINALES

PALABRAS PRELIMINARES

La autonomía dentro del Estado es una de las variadas formas en las que puede manifestarse el derecho de libre determinación de los pueblos indígenas. Atender esa reivindicación histórica y específica es una forma de dar vida al principio de la igualdad de derechos entre los pueblos y a la vigencia auténtica, real e integral de sus derechos humanos y libertades fundamentales.

Es una forma de ejercer la libre determinación de manera que no ataca ni afecta la integridad territorial del Estado. Es una concepción más profunda y equitativa de la unidad política en el Estado. Esto significa que se reorientan las políticas de éste, superando caducas nociones asimilacionistas e integradoras, reemplazándolas con el respeto y valoración de la identidad étnica indígena, el aprecio de su cosmovisión, costumbres y tradiciones y el apoyo a sus esfuerzos por dar contenido efectivo a sus derechos como pueblos y como personas en el marco de un pluralismo justo. Es, además, una forma directa e integral de construcción de la democracia, dando satisfacción a las justas aspiraciones y reivindicaciones indígenas.

c) Beneficios económicos

d) Ventajas en áreas de perspectiva múltiple.

7. La importancia del principio de solidaridad. La cooperación

a) La solidaridad

b) La cooperación.

B. Medios de garantizar la participación popular y el respeto de los derechos humanos por parte de las instituciones indígenas autónomas

a) Observaciones iniciales

b) Participación popular al institucionalizar la autonomía en la Constitución

c) Participación popular en el proceso de iniciativa y de acceso a la autonomía en casos concretos

d) Participación popular durante la existencia y el ejercicio de la autonomía

i) Formas directas e indirectas previstas o establecidas.

1) Directas

2) Indirectas.

e) Formas de participación popular directa que convendría agregar a las ya existentes

i) El plebiscito

ii) La iniciativa popular

iii) La petición popular

iv) La acción popular

v) El referéndum

vi) El recall.

f) La participación popular lleva el ingrediente de respeto por los derechos humanos de todos

g) Funcionarios que velen por la efectividad de los derechos y libertades

eficaz". Es decir, aquello en lo que, en principio, podría o debería consistir -para ser efectiva- la autonomía cimentada en la participación popular y el respeto a los derechos humanos.

Se deja así más bien a aquellos a quienes les ha tocado vivir esas realidades en el curso de sus vidas diarias, aportar a la Reunión de Nuuk sus experiencias y el conocimiento de ellas extraído, dando así contenido práctico sustantivo a esos aspectos abstractos. Así se interpretó la intención de quienes prepararon el programa.

Además, como se me pidió, me he acercado al tema con la vista puesta en particular en los países latinoamericanos. Esos han sido exacerbadamente centralistas, basándose, en general desde la época del surgimiento de los Estados actuales, en ideas y nociones de unicidad y homogeneidad cultural de la población que no se compaginan con la realidad de las poblaciones de esos países. Se necesita de un esfuerzo solidario y generoso, constructivo, paciente y perseverante que articule las realidades diferenciadas y distintas entre sí en Estados pluriculturales, multiétnicos y plurilingües.
Una sociedad global en la que los elementos vivos y palpitantes de cada cultura e identidad etnicolingüística tengan cabida equitativa y respetuosa, vertebrados dentro del Estado, según principios y prácticas democráticas e igualitarias en cuanto a los derechos de cada uno, sin hegemonías, discriminaciones, explotaciones, opresiones ni represiones.

A. Esferas en las que la autonomía sería eficaz medio de fortalecer el disfrute de todos los derechos humanos

1. Presupuestos que conforman un marco idóneo para que surja pacífica y democráticamente la autonomía institucionalizada dentro de la estructura del Estado

Para que pueda surgir normal y democráticamente la autonomía institucionalizada de los pueblos indígenas en el seno de los Estados contemporáneos, es necesario que concurran ciertas circunstancias. Las principales y más obvias de éstas se enunciarán en seguida.

a) Percepción del hecho de que el reconocimiento de la diversidad no debilita la unidad del Estado como lo haría la uniformidad impuesta artificialmente 1/

La verdadera unidad nacional. La unidad que preocupa a los Estados puede lograrse más cabalmente y a nivel más profundo a través de una diversidad respetuosa de las diferencias entre los grupos existentes que reivindican una realidad diferenciada dentro de la sociedad global. Esa unidad será más sólida si se basa sobre esa diversidad que si se busca sustentarla sobre una uniformidad que no corresponde a los sentimientos profundos de los pobladores.

La diversidad en sí no niega la unidad y tampoco la uniformidad en sí produce necesariamente la anhelada unidad. Por el contrario, puede haber debilidad en la uniformidad producida artificialmente y fortaleza en la diversidad coordinada dentro de un todo armónico, aunque polifacético, a base del respeto a la especificidad de cada uno de los componentes. En ella cada

La autonomía busca, en función de una nueva estructuración pluralista del Estado, devolver a los pueblos indígenas -en medida significativa- la oportunidad real y efectiva de restablecer ellos mismos sus propias instituciones, dentro de su cosmovisión y en función de sus valores, costumbres y tradiciones, retomando así la realización de su proyecto histórico como pueblos tal como lo conciban ellos mismos hoy en día.

Se trata, en breve, de la institucionalización de la autonomía indígena en el Estado y dentro de él. Pero, al lado de la autonomía institucional, subsiste la autonomía de hecho. En efecto, hay diversas manifestaciones de autonomía que habría que estudiar y caracterizar en un esfuerzo futuro. Existen formas de autonomía de hecho, no reconocidas pero actuantes, que comprenderían formas de autonomía ancestral milenaria, o sea comunidades y pueblos aislados en la selva o la montaña que no han trabado o mantenido contacto con otros grupos existentes en la sociedad global de lo que hoy es territorio bajo la jurisdicción de un Estado. También estarían comprendidas aquí formas de autonomía histórica de hecho, o sea pueblos que han vivido en contacto -esporádico o constante- con otros sectores de la sociedad global del Estado y que practican y viven una autonomía no reconocida por el Estado, pero vigorosa y palpitante. No han sido conquistados ni sometidos. No han sido ni están colonizados. Han hecho quizá una defensa militar exitosa de su autonomía (vgr. la nación Yaqui, en México).

También hay diversas formas de autonomía institucional que gozan de cierto grado, variante, de reconocimiento jurídico político de parte del Estado.

En ellas puede discernirse, por el sujeto titular de la autonomía, las regionales o territoriales y las étnicas o de pueblos indígenas. Hay entonces una autonomía regional, o sea, ámbitos autónomos en los que existen pueblos indígenas o grupos étnicos, o ambos, conviviendo con otros grupos de población de la sociedad global (vgr. Costa Atlántica de Nicaragua, Región Norte (pueblos indígenas) y Región Sur (grupos étnicos)). Asimismo existe una autonomía étnica o de pueblo indígena en su territorio (vgr. Pueblos y comarcas Kuna y Emberá y, en su momento, la comarca del Pueblo Guaymí, en Panamá). Por el estado de progreso y afianzamiento de su establecimiento, pueden establecerse las autonomías en vías de negociación (vgr. la Comarca Ngobe o Guaymí, en Panamá), las autonomías legalmente institucionalizadas en proceso de afianzamiento (vgr. la Comarca Emberá, en Panamá) y autonomías histórica y legalmente institucionalizadas y sometidas siempre a un proceso de constante erosión y recuperación (vgr. la Comarca Kuna en Panamá y los Resguardos y Cabildos indígenas, en Colombia, en particular en el Cauca). En el curso de la Reunión de Nuuk, los expertos indígenas establecerán con voz autorizada el estado jurídico y funcional de esas formas de autonomía y las fuerzas contrarias -siempre presentes- que intentan socavarlas y erosionarlas, ambicionando apoderarse de los recursos y de las tierras de los territorios indígenas autónomos.

En la presente nota no se ha examinado las manifestaciones concretas e históricas de las formas de institucionalizar las autonomías a las que se ha hecho referencia arriba. Siguiendo la enunciación del punto I del programa, ésta contempla, de la manera que han permitido las circunstancias y en forma teoricoabstracta, las "esferas en las que la autonomía sería

En el marco de estas políticas de pluralismo cultural, jurídico, social, económico y político que deben adoptar esas sociedades, los pueblos indígenas tienen derecho a la asistencia necesaria a fin de tener realmente oportunidades y recursos para el pleno desarrollo de sus propias iniciativas, normas e instituciones que en el contexto de la sociedad global conduzcan al más pleno y efectivo disfrute y ejercicio de los derechos y libertades reconocidos en los instrumentos internacionales en la materia.

A ese respecto, el Estado tiene la obligación de apoyar y promover genuinamente los procesos de autogestión y autodeterminación por los que esos pueblos buscan reivindicar plenamente su identidad y retomar la realización de su propio proyecto histórico (tal como lo conciben hoy ellos mismos) actualizándolo y suplementándolo en la medida en que ellos mismos perciban como necesaria.

Para ellos, para la sociedad global y para el Estado, es esencial que se produzcan genuinamente el fortalecimiento y la consolidación del derecho (que tienen (colectivo en tanto que pueblos e individual en tanto que personas integrantes de esos pueblos) de afianzar, mantener, conservar, desarrollar y transmitir a generaciones futuras sus propias instituciones y prácticas culturales, sociales, políticas, jurídicas y económicas y su autoidentificación como tales pueblos o como integrantes de aquéllos.

En todo caso, esto debe basarse primero en las medidas necesarias tomadas para hacerles sujetos del derecho al pleno y efectivo disfrute y oportunidad de un ejercicio real de todos los derechos humanos y libertades fundamentales reconocidos en los instrumentos internacionales de derechos humanos. Asimismo de las responsabilidades y el cumplimiento de las obligaciones correspondientes reconocidas en los mismos instrumentos internacionales.

Ha de tenerse siempre presente a este respecto que, como es de conocimiento general, en la inmensa mayoría de casos estos pueblos fueron "incorporados" a los actuales Estados sin consultar su voluntad o bien, e incluso a menudo, contra su manifiesta voluntad de seguir ejerciendo la libertad, la soberanía y la independencia que antes ejercían.

A la luz de esa realidad histórica se les ha de reconocer además, en particular, el derecho a que el Estado establezca las medidas especiales indispensables a fin de reconocer y respetar las características diferenciadas de los pueblos indígenas en el seno de la sociedad global. Esto con el propósito de salvaguardar sus comunidades, personas, instituciones, tierras y bienes. Al hacerlo ha de ponerse énfasis especial en medidas que les faciliten la conservación de sus costumbres, tradiciones, usos y prácticas sociales, jurídicas, económicas, culturales y ambientales, así como sus derechos históricos y específicos.

De ello se desprende la necesidad de tomar debida cuenta de lo distintivo en lo global, o sea las características que distinguen a esos pueblos indígenas en el contexto de la sociedad global y, si es el caso, de otros sectores diferenciados a su manera dentro de la sociedad global o general. Esto conlleva en la práctica la manera mejor de atender esos aspectos en lo que perciben al menos tres áreas importantes en las que

grupo participaría más plenamente, pues lo haría a base de sus propias concepciones, valores y patrones y no esforzándose vanamente por hacerlo a través de vías de expresión que le son extrañas.

Pluralismo, autogestión, autogobierno, autnomía y autodeterminación, dentro de una política de desarrollo endógeno, haría justicia a las aspiraciones de los pueblos y comunidades indígenas que han estado sometidas a interferencias e imposiciones durante tanto tiempo.

Con ello no se estaría fomentando ni propiciando diferenciaciones artificiales ni separatismos donde esos sentimientos no existen. Simplemente se reconocería así la realidad multiforme de las sociedades de los Estados en los que viven los pueblos y comunidades indígenas.

b) Reconocimiento del carácter multiforme y de la diversidad de la sociedad

Ese reconocimiento implica el abandono explícito y definitivo de la falsa concepción de unicidad y uniformidad de la población del Estado, que ha sido la fuente de tantos problemas y dificultades 2/.

Los pueblos indígenas siguen siendo realidades diferenciadas dentro de la sociedad global. Tienen el derecho colectivo a existir como pueblos distintos, a ser diferentes, a considerarse diferentes y a ser considerados como diferentes 3/. Confirman hoy, de manera clara y distinta, su determinación de seguir ejerciendo ese derecho histórico y han demostrado -a menudo a través de varios siglos- su resistencia a ser despojados de su identidad étnica como condición para ser aceptados en pie de igualdad en el seno de sociedades de los Estados a los cuales fueron incorporados sin su voluntad, o manifiestamente en contra de ella 4/. Razón de más para garantizarles el derecho a retener, desarrollar y transmitir a generaciones futuras la conciencia de su propia existencia y dignidad como pueblos libres, portadores de cultura propia.

Consecuentemente, los Estados en los cuales existan pueblos indígenas como realidades diferenciadas, cultural, social, jurídica y económicamente de otros sectores de la sociedad global, deben reconocer y establecer -de preferencia ya a nivel constitucional 5/ o por medio de ley fundamental (de carácter esencial) 6/ el carácter multiétnico, plurilingüe y pluricultural de la población del Estado 7/. Deben asimismo desarrollar ese principio constitucional por actos legislativos y medidas políticas y administrativas que les den contenido concreto 8/.

c) Políticas de pluralismo

El Estado estará obligado, en esa virtud, a adoptar y aplicar realmente políticas cimentadas en esa realidad multiforme, diversa y polifacética, así como a hacer todo esfuerzo por lograr la coexistencia pacífica, armónica y solidaria de los sectores y pueblos diversos de su población, a base del respeto a la especificidad de cada uno de ellos y de la igualdad de derechos entre todos ellos en el seno de la sociedad global.

Se debe estar bien consciente de que para lograr realmente que haya comprensión, cooperación y paz internacionales y respeto por los derechos humanos y libertades fundamentales a que se refiere la UNESCO en su recomendación de 1973 12/, se ha de pasar necesariamente por la comprensión, la cooperación y la paz entre los pueblos y sectores diferenciados de la sociedad global al interior de los Estados. Todo esto, basado necesariamente en el respeto a los derechos humanos y libertades fundamentales de todos ellos y en la igualdad de derechos y el justo reconocimiento de sus respectivas identidades etnicoculturales.

2. La autonomía como una de las formas de ejercer el derecho de libre determinación en y dentro del Estado*

Obviamente no se ha pretendido aquí, incluso por razones de limitación de tiempo y de espacio, desarrollar siquiera nociones fundamentales acerca de la libre determinación. El presente esfuerzo se contrae a examinar algunos aspectos del significado de ésta en una de sus manifestaciones internas, la autonomía. Algo ha de decirse, empero, en un esfuerzo por centrar el tema de la autonomía en el entorno de la libre determinación más amplia como una de sus múltiples y diversas manifestaciones.

En el contexto de las Naciones Unidas, la libre determinación aparece en la Carta de las Naciones Unidas (1945). En dos disposiciones, los artículos 1 (párr. 2) y 55 (párrafo de introducción) aparece como principio, formando parte de la expresión que se refiere al "principio de la igualdad de derechos y al de la libre determinación de los pueblos" 13/.

Este principio se desenvuelve en dos corrientes de acción. La primera es la de la descolonización que se encuentra, sin duda, entre los procesos más exitosos de las Naciones Unidas en sus propósitos formales. Un alto porcentaje de los pueblos ahora organizados como Estados soberanos e independientes y hoy miembros de la Organización, no gozaban en 1945 de la libre determinación, al menos no en forma plena.

Este proceso cobra especial vigor a partir de la proclamación de la resolución 1514 (XV) de la Asamblea General el 14 de diciembre de 1960 14/ sobre la concesión de la independencia a los países y pueblos coloniales. Es éste el instrumento de base del proceso, junto con una pléyade de resoluciones conexas y concordes acerca de los llamados pueblos coloniales. Entre esas otras resoluciones se ha de destacar la resolución 2625 (XXV) del 24 de diciembre de 1970 15/ que proclama la Declaración sobre los principios de derecho internacional referentes a las relaciones de amistad y a la cooperación entre los Estados en conformidad con la Carta de las Naciones Unidas. Esta le da impulso a muchos de los aspectos de ese proceso, en el que desde 1960 se da gran importancia a los principios de la unidad política y de la integridad territorial de los Estados. Estos principios llevan la

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* El hecho de que la presente nota se contraiga a esa forma de libre determinación no implica, de ninguna manera, que los pueblos indígenas no tengan o no deban tener acceso a otras formas de ejercer ese derecho, dentro y fuera del Estado.

hay que garantizar: 1) el respeto a las características diferenciadas y diferenciadoras, 2) la participación diferenciada en los esfuerzos generales y 3) el establecimiento de áreas territoriales o ámbitos de actividades o sectores de servicios públicos en los que se respetará la autonomía de esos pueblos, como manifestación de la libre determinación de los mismos dentro del Estado en cuyo territorio habitan 9/.

Una forma global y sistemática de hacerlo sería a través de la reestructuración del Estado por medio de la cual se reconozcan esas realidades y se establezca una pluralidad de centros de poder político, los estatales centrales y los autonómicos indígenas. Todo esto visto desde la unidad del Estado, pero con dimensiones distintas, adicionales a la centralizada. A esa posibilidad se dedica gran parte del presente trabajo que busca explorar las dimensiones y el alcance del establecimiento del Estado con autonomías, o Estado autonómico.

Debe dejarse claro que ésta no es sino una de las formas de libre determinación a la que tienen derecho los pueblos indígenas como pueblos que son. Si ellos en su sabiduría deciden en las circunstancias actuales de su existencia optar por esa forma de ejercer su libre determinación, nadie debe impedírselo y deben hacerse esfuerzos por encontrar con ellos las formas de ejercicio reales de ese derecho 10/.

Debería concebirse todo esto en función de una forma armónica y solidaria de convivencia dentro de una sociedad consciente de la diversidad que contiene y de la riqueza que para ella representa esa pluralidad y, por ello, respetuosa de las distintas maneras de pensar, de sentir y de concebir el mundo.

Para lograr esa armonía respetuosa han de hacerse esfuerzos de todo tipo, incluso, y muy importantemente, por medio de la educación pública.

d) Educación para la coexistencia pacífica y respetuosa dentro del Estado 11/

El cumplimiento de la obligación del Estado en el que existan diversas identidades étnicas, culturas e idiomas, y del deber y derecho de los pueblos y sectores así diferenciados, de desarrollar programas que preparen a todos los niños más adecuadamente para la vida en el seno de sociedades multiétnicas, pluriculturales y plurilingües, eliminando todo prejuicio racista y etnocentrismo agresivo en la interpretación de la historia y las aspiraciones de cada uno de los pueblos y sectores diferenciados que integren la sociedad global.

El Estado debe adoptar medidas especiales y positivas para promover por todos los medios, utilizando en particular los medios de difusión de masas y los materiales de educación en general, la educación y la información interculturales. En ellas se ha de poner el énfasis necesario en propiciar una clara percepción de la necesidad de que se haga igual justicia a todos en el respeto a su dignidad y en su diversidad. Se ha de dar gran importancia a la aceptación mutua, la tolerancia, el entendimiento, la comprensión, la amistad y la paz así como las buenas relaciones entre los pueblos indígenas y no indígenas y el aprecio de unos por otros en el seno de una sociedad pluralista.

En sus expresiones "internas" dentro de la sociedad nacional, sin embargo, ese derecho a la libre determinación significa que un pueblo o grupo que tiene un territorio definido puede ser autónomo en el sentido de disponer de una estructura administrativa y un sistema judicial separados y distintos, determinados por ellos mismos e intrínsecos a ese pueblo o grupo [párr. 273] 18/."

Se concluye entonces que:

"Tal como se aplica a las naciones y los pueblos indígenas la esencia de este derecho es el derecho a la libre elección y, por lo tanto, los propios pueblos indígenas han de crear en gran medida el contenido específico de ese principio [párr. 276]."

Claramente se adopta a este respecto una posición que da por sentado el principio y afirma que la aplicación (el contenido específico) de este principio corresponde crearlo en gran parte a las naciones y pueblos indígenas.

Todo esto sólo en calidad de "pueblos indígenas" como "pueblos", sin otro requisito ni condición. El texto del artículo 1 de los dos Pactos dispone:

> "1. Todos los pueblos tienen el derecho de libre determinación. En virtud de este derecho establecen libremente su condición política y proveen asimismo a su desarrollo económico, social y cultural.
>
> 2. Para el logro de sus fines, todos los pueblos pueden disponer libremente de sus riquezas y recursos naturales, sin perjuicio de las obligaciones que derivan de la cooperación económica internacional basada en el principio de beneficio recíproco, así como del derecho internacional. En ningún caso podrá privarse a un pueblo de sus propios medios de subsistencia.
>
> 3. Los Estados Partes en el presente Pacto, incluso los que tienen la responsabilidad de administrar territorios no autónomos y territorios en fideicomiso, promoverán el ejercicio del derecho de libre determinación, y respetarán este derecho de conformidad con las disposiciones de la Carta de las Naciones Unidas." 19/

En efecto, al leer el texto de ese artículo se observa que ni en el párrafo primero ni en el segundo del mismo puede discernirse ningún elemento que lo relaciona en particular, explícita o implícitamente, con los pueblos coloniales.

En el párrafo tercero se estipula que tienen obligación de promover el ejercicio del derecho de libre determinación y de respetar ese derecho de conformidad con las disposiciones de la Carta de las Naciones Unidas, "los Estados Partes en el presente Pacto, incluso los que tienen la responsabilidad de administrar territorios no autónomos y territorios en fideicomiso". La referencia aquí parece orientada a no excluir a los Estados que se menciona, pero no a centrar en ellos el propósito de la disposición.

intención de marcar las fronteras de lo permisible en materia de libre determinación cuando de Estados soberanos e independientes se trata. Con ese carácter ha permeado toda la acción intergubernamental, que marca claramente ese propósito.

La segunda corriente de acción y desenvolvimiento del derecho a la libre determinación se basa en la concepción de ésta como derecho humano fundamental, incluso a manera de requisito previo para el disfrute de todos los demás derechos y libertades. El carácter de la libre determinación como derecho humano fundamental parece quedar claramente establecido en su consagración con idéntico texto en el Pacto Internacional de Derechos Civiles y Políticos y en el Pacto Internacional de Derechos Económicos, Sociales y Culturales. Es significativo que esto se haga en el respectivo artículo 1, con idéntico texto. Esto lo presenta ya como clave para los otros derechos y libertades de que se ocupan estos importantes instrumentos internacionales que, con la Declaración Universal, integran la Carta Internacional de Derechos Humanos.

Según un autor: "la existencia -auténtica, real o integral- de los derechos humanos y de las libertades fundamentales solamente se da cuando existe la libre determinación" 16/.

En ese contexto se sitúa la exposición hecha en el Estudio de las Naciones Unidas sobre la discriminación contra las poblaciones indígenas, en cuyo capítulo relativo a Conclusiones, propuestas y recomendaciones se hace referencia explícita a la autonomía de los pueblos indígenas como forma de libre determinación 17/. En sus párrafos 269 a 276 y 580 a 584 se la concibe como una de las formas que adopta ese derecho cuando se postula su ejercicio en y dentro del Estado en el que viven esos pueblos. Se reconoce la importancia de este derecho de libre determinación como condición básica para que los pueblos indígenas puedan disfrutar de sus derechos fundamentales, así: "La libre determinación en sus múltiples formas es, consecuentemente, la condición previa fundamental para que las poblaciones indígenas puedan disfrutar de sus derechos fundamentales y determinar su futuro, a la vez que preservar, desarrollar y transmitir su especificidad étnica a las generaciones futuras [párr. 269].

En general, los pueblos indígenas tienen derecho a la libre determinación que les permita continuar una existencia digna y consecuente con su derecho histórico de pueblos libres [párr. 270].

El derecho a la libre determinación se plantea a diversos niveles e incluye factores económicos, sociales y culturales, además de políticos, que se deben estudiar en cada caso, a fin de establecer a qué nivel y de qué tipo se la requiere [párr. 271]."

En los párrafos 272 y 273 caracteriza cómo entiende el estudio referido las manifestaciones "externas" y las "internas", incluyendo entre estas últimas a la autonomía:

"En el sentido más amplio de sus manifestaciones "externas" ese derecho significa el derecho a constituirse en Estado e incluye el derecho a elegir diversas formas de asociación con otras comunidades políticas [párr. 272].

Hay unanimidad en considerar que si un segmento indentificable de la población de un país se ve excluido sistemáticamente de tomar parte en la vida económica o política podrían necesitarse métodos alternativos de asegurar esa participación.

Estos métodos cubren las "medidas de "recuperación" o de "discriminación positiva" de carácter provisional, a fin de dar a ese pueblo los medios de beneficiarse, de un modo real, de todos sus derechos y libertades" como se estipula en la Conclusiones de San Marino 23/. Pero también hay entonces medidas mucho más serias que, según ese y otros textos internacionales, puede tomar ese pueblo cuando se le niega persistentemente la oportunidad de participar en forma significativa en la vida económica y política y en los procesos de toma de decisión en esos ámbitos. Se ha opinado que en esas circunstancias el pueblo interesado puede, en última instancia, recurrir al principio de la libre determinación, en alguna de sus variadas formas, a fin de asegurar una participación significativa en la vida de la sociedad en la que vive. Hay varios textos en los que se contempla la situación que se plantea en este párrafo.

Generalmente se cita a este respecto, y con razón, la Declaración Universal de los Derechos de los Pueblos (la Declaración de Argel) para ilustrar las consecuencias allí previstas para casos en los que los pueblos no encuentren otra salida para hacer valer sus derechos, que el uso de la fuerza 24/. Sobre este particular el artículo 28 dispone:

> "Todo pueblo... [cuyos] derechos fundamentales son gravemente desconocidos tiene el derecho de hacerlos valer especialmente por la lucha política sindical e incluso en última instancia recurriendo a la fuerza" (el subrayado es nuestro) 25/.

Un autor comenta a este respecto que se habla del "uso de la fuerza" quizá reflejando conscientemente el derecho a "la rebelión contra la tiranía y la opresión" mencionado en el preámbulo de la Declaración Universal de Derechos Humanos 26/.

La Declaración de San José sobre el etnocidio y el etnodesarrollo 27/, después de enunciar (en su párrafo quinto, numerales 4) a 10)) una serie de principios en los que se incorporan derechos fundamentales para los pueblos indígenas, en los numerales 11) y 12) del mismo párrafo, al hablar del desconocimiento de esos principios, hace referencia explícita a la rebelión contra la tiranía y la opresión sin llamarlo "derecho", utilizando literalmente los términos del párrafo tercero del preámbulo de la Declaración Universal de Derechos Humanos 28/ cuando dice:

> "El desconocimiento de estos principios constituye una violación flagrante del derecho de todos los individuos y los pueblos a ser diferentes y a considerarse y a ser considerados como tales, derecho reconocido en la Declaración sobre la Raza y los Prejuicios Raciales adoptada por la Conferencia General de la UNESCO en 1978 y por ello debe ser condenado, sobre todo cuando crea un riesgo de etnocidio.

Por eso se lo considera inmerso en una corriente diferente, como derecho humano, sin condiciones ni requisitos. Ahora bien, en el proceso de desarrollo de esa dimensión como derecho humano fundamental, y a pesar de que el texto transcrito no contiene mención alguna de la unidad política y la integridad territorial de los Estados, se ha venido invocando esos conceptos como valladar protector.

Sin entrar ahora a examinar la concurrencia o no de justificación para esa transferencia de una corriente a otra, ni el alcance que se le dé a esa extensión, se entiende fácilmente que así lo hagan los Estados que en esa forma pretenden asegurar esos elementos concebidos como esenciales a su continuada existencia como tales Estados.

De esto resulta, sin embargo, que si se hace extensivos esos dos conceptos en esta área, lógico sería que se los transfiriera completos, necesariamente incluyendo las condiciones y los requisitos que traen incrustados. Eso implica la obligación de respetar la igualdad de derechos y la libre determinación de los pueblos.

A este respecto, resulta claro que para que el Estado sea titular de un respeto y protección plenos de su unidad política y la integridad de su territorio éste debe, a su vez, proceder de conformidad con ciertos principios proclamados por la Asamblea General de las Naciones Unidas. En el penúltimo párrafo de la resolución 2625 (XXV) se requiere que el Estado:

> "se conduzca de conformidad con el principio de la igualdad de derechos y de la libre determinación de los pueblos antes descrito y estén, por lo tanto, dotados de un gobierno que represente la totalidad del pueblo perteneciente al territorio sin distinción por motivo de raza, credo o color 20/.

> ... usa para precisar este concepto una fórmula particularmente feliz porque reafirma la necesidad de preservar la integridad territorial de los Estados soberanos e independientes, pero relaciona dicho concepto con la obligación de que éstos estén "dotados de un gobierno que represente a la totalidad del pueblo perteneciente al territorio, sin distinción por motivos de raza, credo o color"." 21/

Más adelante el mismo autor agrega:

> "Cuando está en juego la integridad territorial del Estado, no se aplica, en principio, el derecho a la libre determinación. Esta es una afirmación capital que determina el criterio de las Naciones Unidas en la materia. Pero la propia Declaración sobre los principios de derecho internacional referentes a las relaciones de amistad y a la cooperación entre los Estados exige que los Estados independientes y soberanos, para tener el derecho a que se respete su integridad territorial, se conduzcan "de conformidad con el principio de la igualdad de derechos y de la libre determinación" y estén, "por tanto, dotados de un gobierno que represente a la totalidad del pueblo perteneciente al territorio, sin distinción por motivos de raza, credo o color"." 22/

Los pueblos indígenas que optan por la autonomía significativa dentro de los Estados en los que viven no están planteando la rebelión ni la secesión como derechos ni recurriendo a ellas. Están planteando el acceso a cierto grado autonómico de poder político dentro del Estado, particularmente en sus territorios ancestrales. No hay en ello separatismo, secesionismo ni rebeliones. Hay, sí, un planteamiento pacífico y que no ataca la integridad territorial del Estado.

La Declaración de San José de 11 de diciembre de 1981 incluye entre su articulado el siguiente texto:

> "9. El respeto a las formas de autonomía requeridas por estos pueblos [indios] es la condición indispensable para garantizar y realizar estos derechos" (los derechos fundamentales que plantea en sus párrafos 4 a 8) 34/.

Es indispensable 35/ apoyar a los pueblos indígenas en su reivindicación plena de la conciencia histórica de su pronta existencia y dignidad como tales y la toma de las riendas de su destino, según sus propias aspiraciones. Deben tener esa oportunidad, como todo otro pueblo, si se quiere evitar fricciones y conflictos que sin falta emanarán de la incomprensión y la injusticia.

Se impone el reconocimiento y la garantía de la igualdad de derechos y la libre determinación de todos los pueblos que integran la población del Estado.

El principio de la libre determinación de los pueblos consagrado internacionalmente no necesariamente implica la separación de los mismos del Estado para formar otros, como equivocadamente se afirma. Por el contrario, incluye formas de autonomía dentro del Estado.

Esta es la forma que en sus diversas manifestaciones parecen favorecer hoy los pueblos y comunidades indígenas en los países latinoamericanos. Hacerla posible es un imperativo de la convivencia pacífica y democrática dentro del Estado contemporáneo.

Se objeta a la libre determinación calificándola de separatismo e independentismo y de otras cosas más.

Lo cierto es que la autonomía es una opción que puede y debe abrirse dentro del Estado y que implica, como se verá más adelante en la presente nota, una distribución y transferencia de poder, incluso y en lo fundamental, de poder político, pero dentro del Estado.

3. El Estado y sus formas estructurales básicas. Estado unitario y Estado federal. El acceso a la autonomía en el seno del Estado afecta la estructura del mismo 36/

a) El Estado y sus formas estructurales básicas. Estado federal y Estado unitario

En el Estado unitario no necesariamente se dan entidades con autonomía política fuera de los órganos estatales centrales establecidos en la estructura clásica de este tipo de Estado, idea que, por el contrario, figura

Además, crea desequilibrio y falta de armonía en el seno de la sociedad y puede llevar a los pueblos al supremo recurso de la rebelión contra la tiranía y la opresión y a poner en peligro la paz mundial y, consecuentemente, es contrario a la Carta de las Naciones Unidas y al Acta Constitutiva de la UNESCO". 29/

En otro aspecto, el autor recién citado escribe que si se lee el artículo 28, citado supra, conjuntamente con los artículos 7 y 21 de la Declaración de Argel, esta Declaración apoya también implícitamente el derecho de un grupo minoritario de recurrir a la secesión de la entidad más grande si se le deniegan sus derechos humanos 30/.

El artículo 7 establece que:

"Todo pueblo tiene derecho a un régimen democrático que represente al conjunto de los ciudadanos sin distinciones de raza, sexo, credo o color y [sea] capaz de asegurar el respeto efectivo de los derechos humanos y de las libertades fundamentales." 31/

Y el artículo 21, a su vez, que:

"El ejercicío de estos derechos [de las minorías] debe hacerse en el respeto de los intereses legítimos de la comunidad tomada en su conjunto y en ningún caso podría autorizar un atentando a la integridad territorial y a la unidad política del Estado, cuando este último se conduzca conforme a todos los principios enunciados en la presente declaración" (el subrayado es nuestro) 32/.

Las Conclusiones de San Marino también se refieren a la secesión entre otros arreglos posibles:

"En virtud del derecho a la autodeterminación, todos los pueblos pueden dotarse de las instituciones políticas que les convengan y delegar, en especial a asambleas elegidas libre y democráticamente, su poder de decisión en cuanto a política, economía, cultura y asuntos sociales se refiere. Pueden decidir igualmente asociarse con otros pueblos en federaciones o en otras formas.

Cuando las instituciones así creadas no respondan ya a sus necesidades, aspiraciones y valores fundamentales, el pueblo debe poder, en todo momento y cualesquiera sean las circunstancias, decidir que se reemplacen por otras. Siempre debe poder, en última instancia, recuperar plenamente su poder de decisión en cuanto a política, economía, cultura y asuntos sociales o separarse de otros pueblos a que se hubiese unido, cuando esas instituciones pongan en peligro su existencia o no le permitan ya garantizar su misión fundamental de respeto de los derechos humanos y de las libertades fundamentales para todos, sin distinción de raza, sexo, lengua o religión" (el subrayado es nuestro) 33/.

Aparte de la rebelión y de la secesión como formas de ejercer el derecho de libre determinación, hay otras menos drásticas y que no afectan los principios de unidad política ni de integridad del territorio. Entre éstas está la autonomía.

ii) El Estado federal modificado y matizado

Algunos de los Estados federales de nuevo cuño surgen de la transformación descentralizadora del poder político de un Estado unitario que deviene Estado federal, en virtud de decisión en el sentido de dividir federalmente el poder estatal. Las razones para proceder así pueden radicar, sea en la convicción de que es el sistema que más conviene al país, sea en la creciente dificultad o imposibilidad que pueden haber encontrado en mantener la unidad estatal sobre bases centralistas-centralizadas, o bien por razones diversas de conveniencia.

Numerosos de estos países federales han matizado y modificado el federalismo clásico y parecen estar matizando y transformando aún más ciertos de los aspectos de éste que conservaban.

iii) Algunas de las formas "autonómicas" posibles dentro del Estado federal

En algunos de los Estados de estructura federal han surgido las llamadas reservas indígenas en relación con el Estado y las autoridades federales, casi siempre por razones históricas. Esos arreglos están, por regla general, muy lejos de ser satisfactorios y fueron impuestos a los pueblos indígenas tras la agresión militar y han sufrido constante deterioro adicional. De esta reunión de Nuule saldrá con toda probabilidad una nueva apreciación de esas situaciones.

Por otro lado, en procesos de reestructuración estatal podrían surgir arreglos más satisfactorios y significativos. Podrían constituirse nuevos Estados federados con el fin de reconocer la autonomía a los pueblos indígenas que allí viven. No es extraña la existencia de los llamados "territorios federales" para designar áreas sujetas a las autoridades federales que podrían llegar a ser Estados federados al cumplirse los requisitos al efecto estipulados en la constitución federal. También podrían entonces unos de esos territorios federales, o al menos parte de éstos, devenir Estados federados con fines de constituir territorios autónomos indígenas en esa calidad. Asimismo en los Estados federados pueden establecerse entidades autónomas, de manera similar a como sucede en el Estado unitario, al considerársele unidad estatal con facultades para hacer esos arreglos en parte de su territorio.

El presente trabajo concentra atención en el Estado unitario.

c) El Estado unitario

En el Estado unitario hay siempre un solo Estado, una sola constitución y un solo ordenamiento jurídico estatal. Puede este Estado, sin embargo, adoptar varias formas estructurales de concentración (Estado centralizado) o de distribución de la administración y la decisión administrativa (Estado descentralizado administrativamente) o bien puede presentar también descentralización administrativa, pero como resultado consecuencial de la descentralización y distribución del poder político (Estado con autonomía(s) o Estado autonómico).

en la esencia del Estado federal en su forma clásica o en sus formas más recientes.

En ninguno de estos tipos de estructura estatal parece haber arreglos de autonomía de pueblos indígenas que sean plenamente satisfactorio, a no ser quizá, por excepción, que puede surgir del examen que se hará en la reunión al considerar las experiencias concretas en esta materia, en la exposición de los expertos indígenas.

En ambos tipos de estructura estatal puede, sin embargo, establecerse mediante el proceso pertinente en cada caso, territorios regionales autónomos indígenas de mayor significación e idoneidad.

En el caso del Estado unitario, con el establecimiento de una o varias regiones indígenas autónomas o en la transformación del Estado unitario centralizado en Estado unitario autónomico. En el caso del Estado federal, éstas serían regiones indígenas autónomas como entidades autónomas adicionales y de tipo distinto, sea en territorios hoy bajo administración federal o en territorios de uno o más Estados federados.

b) El Estado federal

De manera sencilla y sin pretensión alguna de rigor científico descriptivo, pero sí creyendo apuntar a aspectos pertinentes para la presente exposición, aun hoy, a pesar de modificaciones y matizaciones puede afirmarse que las siguientes figuran entre las características principales del Estado federal en la actualidad.

i) El Estado federal clásico

Es un Estado formado por una pluralidad de centros de decisión política y jurídica que incluyen al Estado federal y los Estados federados. Estos últimos siguen siendo Estados con su constitución, sus órganos de gobierno y competencias propias que ejercen con independencia. Por lo general, siguen caracterizándose por tener poder constituyente propio. Participan en determinadas maneras en la formación de la voluntad del Estado federal y en la reforma de la Constitución federal.

Debe señalarse que existen hoy Estados federales que no surgen mediante el proceso clásico de integración de varios Estados soberanos presentes que se unen mediante un pacto federal, creando un nuevo Estado dotado de los órganos propios de todo Estado (legislativo, ejecutivo y judicial). Este es destinatario de la delegación de una serie de funciones que constituyen la competencia federal que se realizará en común para todos ellos (defensa, relaciones exteriores, comercio exterior, etc.), reservándose cada uno de los Estados que se federan entre sí el resto de las competencias que no han transferido explícitamente al Estado federal en la nueva Constitución ratificada por todos ellos al unirse entre sí para integrar el nuevo Estado. Esto se ha denominado cláusula residual o poderes residuales.

plenamente como tales en la formación de la voluntad estatal general ni en la reforma de la Constitución del Estado. Están sometidos a controles más rigurosos que en Estados de esas otras formas organizativas.

4. ¿Qué es, en qué consiste la autonomía? 37/

a) Contenido y alcance indispensables de la autonomía política

Con la erección de un territorio autónomo dentro del Estado se realiza explícitamente una distribución del poder político, una descentralización política, no solamente una nueva descentralización administrativa. Vale decir que esto comporta una distribución del poder legislativo y del poder ejecutivo-administrativo, así como, en ciertos casos y niveles, del poder judicial.

Surgen así niveles distintos, cada uno de ellos atribuido respectivamente en esos ámbitos legislativo, ejecutivo y judicial, en forma recíprocamente excluyente al nivel estatal o general y al nivel regional o autonómico. Estos poderes legislativo, ejecutivo y judicial centrales y los autonómicos, son independientes los unos de los otros, sin que ninguno de ellos pueda legalmente invadir, interferir o usurpar el ámbito político de los otros y sin que se requiera ninguna intervención del poder central para la plena validez de las normas, las políticas y la ejecución de las mismas por los poderes autonómicos.

Se opera, entonces, una verdadera descentralización política y, por consecuencia, una distribución del poder político. En virtud de ésta se transfiere, otorga y atribuye a las partes que integran el todo, o sea a las regiones autónomas del Estado, ciertas funciones y potestades que antes ejercía el poder central. Concurre a formar el otro nivel, que completa los enunciados, el Estado mismo que conserva y retiene las funciones y potestades que no se transfiere. Así el Estado y las regiones o entidades autónomas tienen en las esferas central y autonómica, respectivamente, el poder de gobernar sin tutelas ni interferencias, con plena libertad, haciendo uso de las facultades que esto implica, sin más limitaciones que las establecidas en la Constitución y -bajo ésta- en los Estatutos autonómicos. No tendrá facultad el poder central, el gobierno del Estado, para revocar o anular las decisiones de ninguna comunidad autonómica esgrimiendo o argullendo razones de idoneidad u oportunidad. Sólo por razones de constitucionalidad y legalidad podrá impugnarse la actuación autonómica ante un tribunal constitucional instituido, inter alia, para ello.

Ha de señalarse, además, que es claro que en el Estado unitario la distribución del poder público no surge del pacto entre iguales, por acuerdo entre Estados previamente soberanos, elemento que figura en la base de la organización y distribución del poder político en los Estados federales de corte clásico. Surge sí de la voluntad de todos los ciudadanos de un Estado preexistente, manifestada a través de su Asamblea Constituyente.

Las entidades o regiones autónomas que surgen serán seguramente subdivisiones territoriales distintas de las inspiradas meramente en los esfuerzos descentralizadores y forjadas en cuadros de descentralización de la administración pública. Podrían, sin embargo, consistir de uno de aquellos

i) Estado unitario centralizado. En éste la unidad nacional se alcanza por medio de un proceso de organización uniforme y a base de centralizar todo el poder en las instancias unitarias.

En él existe sólo una instancia dotada, con la debida separación, de órganos y funciones de 1) capacidad normativa plena con potestad de dictar normas jurídicas con rango de ley, 2) plena capacidad jurídica de dirección política, de aplicación de las normas y de administración así como 3) la potestad de administrar justicia.

De este centro dependen -a través de una relación de subordinación jerárquica- todos los órganos de la administración (sean éstos centrales, intermedios o periféricos) con misión de ejecutar y aplicar, de modo uniforme en todo el territorio estatal, las decisiones y normas emanadas del único poder político, normativo, ejecutor y juzgador.

Las divisiones territoriales (provincias, municipios, etc.) tienen únicamente el carácter de circunscripciones para la prestación de los servicios estatales emanados de decisiones del poder central, único con poder político.

ii) Estado unitario con descentralización administrativa. En él, a pesar de que exite un único centro con poder político, capacidad normativa y potestad de administrar justicia plenos, se reconoce a ciertas entidades territoriales facultades para autoadministrarse. Esto significa poder para decidir la forma de aplicar en su circunscripción territorial las decisiones tomadas por el poder central y facultades para aplicarlas efectivamente, disponiendo del ejercicio de la potestad normativa reglamentaria y de la función administrativa.

Vale decir que se descentraliza la administración y la decisión administrativa, pero no la función política.

iii) Estado unitario con autonomía política. Esto supone un paso más en el proceso descentralizador. Se reconoce, en este tipo de Estado, junto a los órganos generales del Estado, la existencia de entes políticos territoriales con capacidad no sólo de autoadministrarse sino, principalmente, de autogobernarse, lo que trae consigo la autoadministración.

Es decir, tienen plena capacidad -dentro del marco de competencias en materias determinadas y con vigencia en las circunscripciones territoriales correspondientes que hayan sido reconocidas constitucionalmente- para: 1) tomar por sí solos las decisiones políticas que crean pertinentes, incluso la determinación concreta de sus opciones políticas diferenciadas dentro de su propia orientación política; 2) dictar normas jurídicas con rango de ley y 3) administrar justicia.

Vale la pena señalar que sigue habiendo un solo Estado, una sola Constitución y un solo ordenamiento constitucional. Los entes autónomos no son Estados en sí mismos como sucede en cambio en las formas organizativas federal y confederal (y en otras más sueltas aún) y por ello no tienen poder constituyente independiente propio, ni Constitución propia, ni participan

iii) La potestad de dirección política y ejecutiva, o sea para fijar libremente sus opciones y objetivos propios en aquellas materias que son de su competencia autonómica según el texto constitucional. También tienen la facultad de tomar decisiones y formular políticas que desarrollen sus propias competencias y atribuciones específicas así como de aplicarlas libremente, sin necesidad de la autorización previa ni de la aprobación posterior de las mismas por parte del Estado central.

Esto significa que, correlativamente, el Estado no tendrá facultad para revocar o anular las decisiones de ninguna entidad autónoma esgrimiendo razones que no sean la falta de legitimidad constitucional de las mismas, lo que podrá hacerlo sólo ante el tribunal constitucional que corresponda. Conforma la autonomía de dirección política y de poder ejecutivo-administrativo.

iv) La potestad jurisdiccional o de administrar justicia, o sea la facultad de crear o reconocer en el estatuto autonómico entes jurisdiccionales para declarar y aplicar el derecho en casos concretos con aplicación de normas jurídicas sustantivas y adjetivas propias y en los ámbitos y niveles determinados por el estatuto autonómico, sin que sus fallos queden sujetos a recursos ante otros niveles jurisdiccionales (salvo la prueba de legitimidad constitucional). Autonomía en la administración de justicia en las materias asignadas específicamente.

v) La potestad de ordenar y administrar las finanzas. Se ha de reconocer a la entidad autónoma amplia libertad tanto en la obtención de recursos financieros económicos como en la determinación de la forma en la que éstos deben invertirse y gastarse. Esto constituye la autonomía financiera.

Son los estatutos de cada entidad autónoma los que han de determinar y regular las instituciones de autogobierno, las competencias que asumen y los recursos financieros de que disponen para su desarrollo.

Aquí ha de señalarse que en el caso del Estado "regionalizado" se transfiere las potestades concretamente determinadas en la Constitución o ley fundamental mientras que en el Estado "regionalizable" se establece en la Constitución sólo lo que puede asumir la entidad autónoma excluyentemente y establecer las competencias que se reserva el Estado y las que éste puede delegar y/o compartir con las entidades autónomas. Esto conforma el marco y la base de fondo a las condiciones que cada estatuto de autonomía dará a las reivindicaciones o demandas objetivas y subjetivas y a las de cada pueblo, nacionalidad o región correspondiente.

c) La distribución y separación de competencias frente al principio jerárquico de suprasubordinación

En los Estados unitarios centralizados, los órganos de poder se organizan para desempeñar sus respectivas funciones en jerarquía de suprasubordinación correspondiente.

En los Estados unitarios con autonomía(s) se crean áreas nuevas de competencia. Se separan las competencias autonómicas de las competencias estatales centrales. Como se realiza una distribución con separación de

departamentos o provincias que coincidan con las regiones que se desea erigir en regiones autónomas (regiones unidepartamentales o uniprovinciales) o bien engarzar a varios de los antiguos departamentos o provincias (regiones pluridepartamentales o pluriprovinciales).

Cuando se erijan varias entidades o regiones autónomas y algunas de éstas sean contiguas, también podría darse el caso de que un departamento o provincia resulte dividido entre varias regiones autónomas y compartido por ellas, quedando atribuido en secciones distintas a regiones autónomas diferentes. Asimismo podría acontecer que una sección de un departamento o provincia resulte atribuido a una de las regiones autónomas emergentes, mientras que la otra sección del mismo departamento o provincia quede atribuida al territorio general del Estado, sea como departamento o provincia de área reducida o en otros arreglos que al efecto se haga.

Si los antiguos departamentos o provincias tienen cuerpos legislativos o diputaciones departamentales o provinciales, se producirán diversos resultados dependiendo de si las regiones autónomas que surgen son unidepartamentales o uniprovinciales o bien pluridepartamentales o pluriprovinciales. En el primer caso como regla general, la diputación departamental o provincial resultaría subsumida y extinguida al absorber sus funciones la propia región autónoma, sea atribuyéndoselas al cuerpo legislativo de la región autónoma correspondiente, o mediante otros arreglos que se haga al respecto. En el caso de entidades o regiones autónomas pluridepartamentales o pluriprovinciales podría, si así lo pidieren los municipios existentes en la región autónoma en las respectivas áreas antes departamentales o provinciales, mantenérselas a manera de entidades de apoyo, asesoramiento y coordinación de los municipios correspondientes. La autonomía consiste, pues, en que las entidades autónomas (regiones, comunidades, etc.) pueden autogobernarse con plena libertad política sin más limitaciones que las establecidas en la Constitución estatal y en sus respectivos estatutos autonómicos.

Entonces, para que la autonomía no consista en una mera ficción inoperante se requiere, según lo dicho, que ella incluya, por lo menos:

b) Elementos de la autonomía política

i) La potestad auto-organizativa, es decir, la facultad de estructurarse orgánicamente, con libertad y de acuerdo con sus tradiciones culturales, jurídicas y políticas diferenciadas en esas esferas. O sea, para establecer, del modo que crea más conveniente, sus propios órganos e instituciones de autogobierno sin que, al efecto, se requiera la intervención del poder central para su plena vigencia. Esto constituye la autonomía de organización interna o de autogobierno.

ii) La potestad normativa, o sea de la facultad de iniciar, elaborar y promulgar leyes y reglamentos en los ámbitos determinados y dentro del marco definido como el autonómico por el respectivo estatuto y que no requieren la intervención del poder legislativo central para su plena validez. Consiste ésta en la autonomía legislativa.

f) Controles sobre los órganos de los entes autónomos

Cabe repetir que para que exista autonomía política genuina y efectiva los entes autónomos deben poder determinar libremente su orientación política sin más límites que los que derivan del deber de respetar la Constitución y el ordenamiento jurídico fundamental del Estado (principios de constitucionalidad y de legalidad).

i) El control judicial. Legalmente, el único control posible es el ejercido por los tribunales de justicia a los que se haya dado jurisdicción y competencia al respecto, a fin de comprobar si la actuación de esos órganos autonómicos se concilia con las normas jurídicas vigentes de rango fundamental del Estado.

Según la naturaleza del acto impugnado se deberá recurrir al Tribunal Constitucional, de Garantías Constitucionales, o su correspondiente, que se ocupa de la impugnación de la legitimidad constitucional de las leyes cuando se trate de una ley autonómica, o al Tribunal de Conflictos de Competencia, creado especialmente al efecto y que tendrá funciones y facultades de tribunal de lo contencioso-administrativo para conocer de casos en que se impugnen las actuaciones administrativas y normas reglamentarias de las entidades autonómicas, así como al Tribunal de Cuentas, cuando se trate de las actuaciones económico-financieras y presupuestarias de esas entidades autonómicas.

ii) Control político del poder delegante. Cuando se trata de diferencias en relación con el ejercicio de facultades delegadas, la cuestión no pasa a control judicial. En cambio, sí es susceptible de los procedimientos de prevención, conciliación y mediación, debiendo ser considerado en las reuniones periódicas, a menos que concurran circunstancias extraordinarias que hagan urgente la acción. Se ejerce entonces un control político directo, cuando fracasan la conciliación y la mediación o cuando haya circunstancias que exijan acción inmediata.

Excepcionalmente, en el caso de las facultades delegadas o transferidas a los órganos autonómicos por una ley orgánica, competencias que en principio corresponden al gobierno central estatal, se ejerce un tipo de control político, ejecutivo-administrativo por el Gobierno central, previo dictamen favorable a esa acción por el Consejo de Ministros.

g) Participación de los órganos autonómicos en la composición y el funcionamiento de ciertos órganos generales del Estado

Se mencionarán aquí los mecanismos por medio de los cuales contribuyen los órganos autonómicos a formar la voluntad del Estado, aunque en forma débil e incidental.

Participarán en la integración del cuerpo legislativo general designando el número de representantes en el Senado o Cámara alta de aquél en los sistemas bicamerales. En los sistemas unicamerales, podría preverse una participación corporativa como parte de la composición del cuerpo legislativo central.

poderes autonómicos y centrales en cada una de las funciones básicas, se conserva la jerarquización dentro de cada ramal de competencias y surgen así dos vías jerárquicas independientes y paralelas, que no deben cruzarse.

Como resultado no hay jerarquía entre las áreas competenciales estatales centrales y las autonómicas. Entre ellas hay separación, sin que una de ellas pueda predominar y prevalecer sobre la otra.

El órgano o funcionario más bajo de una vía prevalecerá sobre el más alto de la otra en sus intentos de interferir en la acción legal y legítima de potestades dentro de la competencia del primero, y viceversa.

d) Arreglos para la prevención de los conflictos de competencia

i) Reuniones periódicas de representantes o comisionados estatales y representantes o comisionados autonómicos para examinar conjuntamente las áreas de actuación en las que podrían surgir o han surgido diferencias de opinión o divergencia de enfoques. Se trata de aunar esfuerzos por encontrar formas de conciliar intereses y puntos de vista a fin de evitar controversias que pueden devenir conflictos en casos en los que no se argumenta ninguna violación de la Constitución. El caso se puede remitir a procesos de conciliación y de mediación de esas divergencias y las controversias que se desarrollen a pesar de esos esfuerzos.

ii) Conciliación. Reuniones formales de las partes en una controversia bajo la dirección de un funcionario de la confianza de ambas partes, con el fin de conciliar las diferencias y resolver e intentar la concertación de un acuerdo en el que las partes acepten hacer ciertas concesiones con legitimidad constitucional y legal recíprocas entre sí a fin de obviar el conflicto. El conciliador juega un papel de mero impulsor de las conversaciones, instando a las partes a considerar los puntos de vista opuestos al propio.

iii) Mediación. Nombramiento de tercera persona de la confianza de ambas partes para que intervenga entre los representantes estatales y los autonómicos con el propósito de reconciliarlos o persuadirlos a ajustar sus posiciones y solucionar sus disputas dentro de la Constitución y la ley. El mediador juega un papel activo y hace propuestas y contrapropuestas.

e) La composición arbitral

Arbitraje. Nombramiento del titular de la fusión pública estipulada en el estatuto autonómico o tercera persona de la confianza de la partes, seleccionada de acuerdo con los requisitos establecidos en el estatuto, con el propósito de que conozca en el caso de un conflicto concreto y lo decida, sometiéndose de antemano las partes a acatar su laudo, en calidad de sentencia, en su contenido y efectos.

Diferente es el caso cuando se impugna la legalidad o la legitimidad constitucional de una norma o un acto de los órganos autonómicos.

Es la voluntad de todos los ciudadanos a través de sus representantes en una asamblea constituyente o en el cuerpo legislativo ordinario con voto calificado o con formalidades o solemnidades, la que establece, desde ya, esa(s) autonomía(s). Se trata en este caso del Estado "regionalizado", organizado territorialmente con una o más regiones autónomas a la(s) que se reconoce por ese acto el derecho a la autonomía y se la(s) erige en ese carácter, explícita y directamente.

Entes a los que se declara con derecho a acceder a la autonomía si se dan ciertos supuestos y cuando se den. Se reconoce el derecho que podrán ejercer los entes que cumplan determinados requisitos y condiciones mínimas que fija taxativamente el propio texto constitucional y se hará realidad cuando esto suceda.

La voluntad de todos los ciudadanos del Estado a través de sus representantes en la Asamblea Constituyente o cuerpo legislativo ordinario con voto calificado o cumpliendo formalidades o solemnidades hace posible potencialmente la autonomía. Como atribución real de poderes ésta sólo operará por medio de la voluntad expresa de los electores de la comunidad, región o nacionalidad concreta de que se trate en cada caso, manifestada en decisiones y actos tendientes a su establecimiento y por los estatutos de autonomía que redacten, aprueben y presenten estos mismos, una vez aprobados formalmente (ratificación formal) por la Asamblea Legislativa General del Estado.

En este caso se trata del Estado "regionalizable" que institucionaliza la posibilidad jurídica de la erección de entes autónomos dentro del Estado.

En todas estas hipótesis se establece un juego dialéctico entre dos principios, el de "unidad" y el de "autonomía". Para los Estados unitarios que han sido profundamente centralizados durante su vida independiente la aceptación de ese juego constituirá un cambio fundamental en la estructura formal de los mismos.

En el contexto del reconocimiento de autonomía en un Estado unitario, el principio de unidad se afirma en relación con el Estado, la Constitución y el ordenamiento constitucional garantes de esa unidad y del interés "suprarregional" de la sociedad estatal en su conjunto.

El principio de autonomía toma cuerpo con el reconocimiento a ciertos entes, a los que generalmente se identifica como regiones, territorios o nacionalidades dentro del territorio total del Estado, el derecho a gozar de autonomía política dentro de ese territorio.

b) Entes públicos que deberían tener acceso a la autonomía sin estar favorecidos específicamente por estipulación constitucional o de ley fundamental al respecto

Se ha visto en la sección precedente que ciertos entes son autónomos legalmente por declarar la Constitución o una ley fundamental que son autónomos o que pueden acceder a la autonomía como derecho establecido constitucionalmente si cumplen las condiciones y llenan los requisitos para

Estarán facultados para interponer recursos de inconstitucionalidad y de amparo en materias de su competencia autonómica.

Participarán en los procesos legislativos generales a través de la iniciativa legislativa. Podrán siempre designar comisiones informativas que asistan a las sesiones de la asamblea legislativa general cuando se discutan materias que corresponden o podrían afectar a la autonomía de los entes autónomos, y en particular cuando pueda afectarles a ellos directamente.

Participarán en la actividad planificadora del Estado proporcionando al Estado central previsiones económicas para que se las tome en cuenta al elaborar proyectos de planificación general.

Participación en los procesos de reforma constitucional cuando en ella se incluyan los artículos que se refieren o afectan al régimen autonómico previsto.

Están facultados para presentar iniciativa de ley y participar así en el proceso legislativo general.

Están facultados para presentar iniciativa para la reforma constitucional.

Tendrán derecho de petición ante el Gobierno central.

Estarán autorizados para, si así lo desean, poder actuar como delegados o colaboradores del Gobierno central para la recaudación, la gestión y la liquidación de los recursos tributarios del Estado.

5. Entes públicos que tienen derecho a la autonomía 38/

Este derecho puede surgir de la declaración expresa de la Constitución o de una ley fundamental, de la forma de incorporación de los pueblos indígenas al Estado y su importancia numérica relativa (porcentaje) en la población del mismo junto con la forma en que se conduzca el Estado, o bien de esta última circunstancia y el derecho fundamental de todo pueblo a la libre determinación reconocida en la Carta Internacional de Derechos Humanos. Este capítulo se propone examinar algunos aspectos de esas hipótesis y terminar con breves referencias a las iniciativas y al proceso de acceso real a la autonomía.

a) Entes públicos que tienen derecho constitucional a la autonomía

Son titulares formales de la autonomía i) los declarados titulares de la autonomía o autónomos en la Constitución o en ley fundamental y ii) los declarados titulares del derecho a obtener la autonomía cuando cumplan las condiciones y requisitos estipulados para ello en la Constitución o en ley fundamental.

Entes a los que se declara autónomos. En este caso se determina precisamente en el texto constitucional o en la ley fundamental cuál(es) es (son) la(s) comunidad(es) que el Estado reconoce autónoma(s). La autonomía se hace realidad jurídica en el mismo texto constitucional o legal y habrá sólo que desarrollar esas disposiciones para darles forma concreta.

En todos los casos se necesita la concurrencia de una manifestación pública específica de voluntad de acceder a la autonomía en el Estado, para que se actualicen las condiciones previas legales al efecto y pueda iniciarse formalmente el proceso que coronará con la autonomía reivindicada.

c) Procedimiento para acceder a la autonomía regional o de región con pueblos indígenas numéricamente importantes o mayoritarios en ella

En garantía del procedimiento democrático y de la consulta real y efectiva de la voluntad popular al iniciarse un proceso cuyo fin es el de crear una entidad políticamente autónoma en el territorio de un país deben observarse condiciones y requisitos que aseguren la participación más amplia posible.

i) La solicitud o petición original debe: 1) contar con el respaldo explícito de a) las diputaciones departamentales o provinciales que existan en el territorio que sería el de la nueva entidad, más b) una mayoría calificada de los municipios y comunidades indígenas y no indígenas del mismo que debe alcanzar los dos tercios (o los tres cuartos) de ellos y cuya población constituya la mayoría del censo electoral de cada departamento o provincia y 2) ser ratificada mediante referéndum popular por el voto afirmativo de la mayoría absoluta de los electores de cada uno de los departamentos o provincias.

ii) Tramitación de la solicitud

El trámite formal que se dará a la solicitud incluiría al menos los siguientes pasos indispensables:

1) Elaboración del proyecto de estatuto

El Gobierno estatal convocará a todos los miembros del cuerpo legislativo estatal elegidos en las circunscripciones comprendidas en el ámbito territorial que pretenda acceder al autogobierno, y los de las diputaciones departamentales o provinciales correspondientes para que con los representantes de los municipios y comunidades que alcancen al menos la mitad más uno de los mismos se constituyan en congregación proponente autonómica al solo efecto de elaborar el proyecto de estatuto de autonomía que corresponde, mediante el acuerdo de la mayoría absoluta de sus miembros.

2) Examen del proyecto por una comisión mixta legislativa del cuerpo legislativo estatal, con asistencia de representantes de comunidades indígenas con derecho a voz

Aprobado el proyecto de estatuto, la congregación lo remitirá a la comisión de asuntos y puntos constitucionales del cuerpo legislativo estatal, la cual, dentro del plazo de cuatro a seis meses y junto con las comisiones de comunidades y asuntos indígenas y de derechos humanos del mismo cuerpo legislativo estatal y con el concurso y asistencia de una delegación de 5 a 15 miembros de la congregación proponente, lo examinará para determinar de común acuerdo una formulación definitiva.

ello estipulados en la Constitución o ley fundamental, pues son titulares explícitos del derecho actual o potencial a la autonomía en el Estado que así lo determina y define en su Magna Carta.

En esa virtud, los pueblos indígenas que se encuentren en uno de esos dos casos, los declarados autónomos, o con derecho a la autonomía si llenan las condiciones y requisitos estipulados en la Constitución, tendrán claramente el derecho correspondiente por disposición constitucional o fundamental.

Fuera de estos casos, ¿habrá otros pueblos a los que se pueda considerar como titulares del derecho a la autonomía como derecho definido, por concurrir en ellos y en el Estado ciertas circunstancias que así lo hagan concluir?

Según lo expuesto en el capítulo segundo de esta nota, quod vide, siempre que los Estados en los que viven esos pueblos no "se conduzcan de conformidad con el principio de la igualdad de derechos y de la libre determinación de los pueblos" y no "estén... dotados de un gobierno que represente la totalidad del pueblo perteneciente al territorio, sin distinción por motivos de raza, credo o color", y los pueblos indígenas del caso así lo reclamen, tendrán buena fundamentación para reivindicar su derecho a la autonomía como forma de libre determinación dentro del Estado, si concurre alguna de las siguientes circunstancias:

i) pueblos indígenas que hayan entrado en relación de tratados o acuerdos con las autoridades estatales competentes o con las autoridades coloniales que las precedieron, en los que se les reconozca alguna forma de autonomía politicoadministrativa y que estos arreglos no hayan sido cumplidos o respetados por el Estado.

ii) pueblos indígenas que hayan sido incorporados en forma indiferenciada y contra su explícita voluntad al Estado o a la entidad colonial que lo precedió con posterioridad a su derrota puramente militar, sin que ellos hayan aceptado nunca esa incorporación indeferenciada que significaría la pérdida de su identidad étnica y su calidad de pueblo libre, diferenciado dentro de esa sociedad global;

iii) pueblos indígenas que conformen un alto porcentaje de la población del país y, en todo caso, cuando excedan del 40% de la misma o del 80% de la de la región sin que hayan aceptado esa incorporación al Estado en forma indiferenciada que significaría la pérdida de su identidad étnica y de su calidad de pueblo libre, diferenciado en el seno de esa sociedad global.

Los pueblos indígenas no incluidos en ninguno de los tres grupos anteriores tendrán derecho a la autonomía como derecho humano fundamental al tenor de los artículos 1 de los Pactos Internacionales de Derechos Civiles y Políticos y de Derechos Económicos, Sociales y Culturales (ambos de 1960) particularmente cuando el Estado del caso no se conduzca en la forma prevista en la resolución 2625 (XXV) de la Asamblea General (1970), ya mencionada.

8) Si, como resultado del referéndum, sólo una de las provincias afectadas lo aprueba

Si al someterse al referéndum el proyecto de la comisión mixta o el del cuerpo legislativo estatal sólo una de las provincias del ámbito territorial de la propuesta comunidad autónoma lo vota afirmativamente, se aprobará el proyecto de autonomía para ésta, salvo estipulaciones en contrario contenidas en el propio proyecto.

d) Procedimiento de acceso a la autonomía étnica o de pueblo indígena

1. La solicitud o petición original. Respaldo y ratificación por referéndum

La solicitud o petición original debe: 1) contar con el respaldo explícito de: a) una mayoría calificada del 65% de las comunidades indígenas; b) una mayoría absoluta de los municipios mixtos y c) una mayoría simple de los municipios no indígenas existentes, todos ellos, en el territorio que sería el de la entidad que busca acceder a la autonomía; y 2) ser ratificado mediante referéndum popular por el voto afirmativo de la mayoría absoluta de los electores votantes del territorio ya mencionado. El planteamiento será sencillamente: "Se pronuncia usted a favor de la constitución de... como entidad autónoma"; "Se pronuncia usted en contra de la constitución de... como entidad autónoma".

ii) Tramitación de la solicitud

El trámite formal que se dará a la solicitud incluirá al menos los siguientes pasos:

1) Elección y nombramiento de los negociadores indígenas y estatales. Redacción del documento de bases

El Gobierno estatal convocará a todas las comunidades indígenas del territorio que pretende acceder a la autonomía a elegir de 6 a 10 negociadores indígenas para que, junto con igual número de negociadores que nombrará el mismo Gobierno, discutan y aprueben los temas básicos sobre los que habrá de basarse la redacción del proyecto de estatuto autonómico, el documento de bases. Sesionará con la asistencia y participación de los miembros del cuerpo legislativo estatal y los de las diputaciones provinciales o departamentales elegidos en las circunscripciones comprendidas en el ámbito territorial que pretende acceder a la autonomía. Aprobado el documento de bases, se le dará amplia difusión por tres meses solicitando que en el plazo de seis meses, incluyendo los tres meses mencionados de difusión, se haga comentarios sobre ese documento en los medios de comunicación social y presentándolos a la congregación proponente autonómica.

2) Elaboración del proyecto de estatuto

El documento de bases, con los comentarios hechos por escrito y a través de los medios de comunicación social, grabados y audiovisuales, se considerará por los negociadores indígenas y estatales, los legisladores estatales y

A las sesiones de esta comisión mixta del cuerpo legislativo estatal podrán asistir con derecho a voz en ellas, los representantes acreditados por las comunidades indígenas y no indígenas del territorio indicado.

3) Si hay acuerdo en la comisión mixta

Si se alcanzare ese acuerdo, el texto resultante será sometido a referéndum del cuerpo electoral de los departamentos o provincias comprendidos en el ámbito territorial contemplado en el proyecto de estatuto aprobado por el acuerdo.

4) Si hay acuerdo en la comisión mixta con hasta tres puntos concretos de divergencia

Si se alcanzare acuerdo sustancial con hasta tres puntos concretos y precisos de divergencia, el proyecto, presentando las dos alternativas surgidas en el seno de la comisión mixta, será sometido a referéndum en sección separada y con identificación aparte para cada punto de divergencia, con explicitación de esas alternativas, pudiendo votarse afirmativamente sólo una de ellas por cada votante.

5) Si, como resultado del referéndum, se aprueba el proyecto

Si, como resultado del referéndum, el proyecto es aprobado en cada una de las provincias por la mayoría de los votos válidamente emitidos, será elevado al cuerpo legislativo estatal. El pleno de éste (unicameral) o los plenos de cada una de las cámaras (bicameral) decidirá(n) sobre el texto, mediante un voto de ratificación. Aprobado el estatuto, el ejecutivo estatal lo sancionará y lo promulgará como ley.

6) Si la comisión mixta no alcanzare acuerdo

Si, por el contrario, la comisión mixta no alcanzare acuerdo sobre el proyecto de estatuo, se dará a ese proyecto la tramitación como proyecto de ley ante el pleno del legislativo estatal. El texto aprobado por éste será sometido a referéndum del cuerpo electoral de las provincias comprendidas en el ámbito territorial del proyectado estatuto. En el caso de que sea aprobado por la mayoría de los votos válidamente emitidos en cada provincia, procederá su promulgación en los términos del párrafo anterior.

7) Si, como resultado del referéndum, sólo algunas de las provincias afectadas lo aprueban

Si al someterse al referéndum el proyecto de la comisión mixta o el del cuerpo legislativo estatal, no se aprueba el proyecto del caso por una o varias de las provincias afectadas, esto no impedirá la constitución de la comunidad autónoma proyectada entre las restantes que lo aprobaron, si éstas son contiguas entre sí o están conectadas entre sí en alguna extensión de su territorio.

personal y directamente de investigar, determinar, elaborar, acrisolar y aplicar tales estrategias, tácticas, planes, programas y políticas de acción.

iv) La realización de trabajos y actividades de significación sociopolítica en su ámbito territorial orientadas a alcanzar las metas y hacer realidad los fines propuestos en beneficio de la comunidad o región.

v) El ejercicio mejor y más cabal del examen, control y fiscalización de las actuaciones concretas de los representantes y funcionarios de la comunidad o región y de la forma en que éstos han concebido y aplicado en la práctica las decisiones, políticas, estrategias y tácticas adoptadas.

Los habitantes de la región y los integrantes de la entidad o comunidad autónoma estarán mejor ubicados para seleccionar a sus representantes o funcionarios y empleados. Asimismo se encuentran en situación más idónea para disminuir la distancia y acercar y estrechar la relación que existe entre el Gobierno y los gobernados y entre la administración y los administrados. Hay allí más proximidad física, sociopolítica, psicológica y cultural con los poderes políticos que están más cercanos y radicados en el ámbito territorial de su actuación que, por cubrir menos territorio, es más compacto y accesible.

b) Ventajas en aspectos socioculturales

Se presentan más claras, entre otras:

i) La posibilidad de vivir más plenamente los valores y tradiciones, costumbres, prácticas y usos que conforman la personalidad etnicocultural y a afianzar el rostro civilizatorio propio de los pueblos indígenas dentro del marco fundamental de su cosmovisión.

ii) La posibilidad más efectiva de mantener, revitalizar, desarrollar y transmitir a las generaciones futuras la propia cultura así como de controlar los procesos respectivos.

iii) La posibilidad de esforzarsse con más dedicación y ahínco a apoyar y fomentar la creación cultural y los procesos de etnogenesis a partir de las propias características diferenciales que conforman su propia identidad etnicocultural, sin descuidar la difusión y el disfrute de otras culturas y, particularmente, de la cultura universal.

iv) La posibilidad más concreta de recuperar la práctica efectiva de las técnicas ancestrales, de rescatar las artes populares y de revigorizar las artesanías.

v) La promoción del uso, estudio y enseñanza del idioma propio, así como su utilización más plena en la vida política y administrativa, y en los medios de comunicación de masas (prensa, radio, televisión), dentro de cuadros bilingües e interculturales. Esto, sin descuidar el idioma oficial y los otros, indígenas y no indígenas que sea pertinente cultivar.

provinciales o departamentales, los representantes de las comunidades indígenas y los representantes elegidos por los municipios y comunidades no indígenas del territorio y se constituirán en congregación proponente autonómica que elaborará el proyecto de estatuto como sola atribución.

3) Examen del proyecto por una comisión mixta de legisladores indígenas y legisladores no indígenas

Aprobado el proyecto de estatuto, la congregación lo remitirá y procederá como se contempla en el punto c) ii) 1) supra, que se aplicará, salvo el plazo dentro del cual se considerará el proyecto a fin de determinar de común acuerdo su redacción definitiva, que será fijada por la comisión mixta entre el mínimo de 3 meses y el máximo de 10 meses. Este plazo podrá ampliarse por el voto unánime de los miembros de la misma.

4) a 9) correspondientes, mutatis mutandis a los puntos 3) a 8) del apartado c) ii) anterior.

6. ¿Qué se logra con la autonomía? 39/

Cabe preguntarse en qué forma se manifiestan los beneficios, ventajas y virtudes de ser entidad autónoma una vez lograda esta autonomía. Sería útil determinar las esferas en que ésta sería eficaz en el proceso de la construcción más cabal de la democracia y como medio de fortalecer el disfrute de los derechos humanos.

Seguidamente se exponen algunos aspectos que aparecen más claros a este respecto, en ámbitos político, sociocultural y económico financiero.

a) Beneficios y virtudes en el ámbito político

La resultante configuración estructural del Estado y la transferencia de poderes a la entidad autónoma conlleva posibilidades más reales y oportunidades más directas y concretas de participación en diversos procesos que incluyen, entre otros:

i) La toma de decisiones, con más peso relativo por ser menor la población pertinente, al aportar su opinión que, con las de los otros votantes de la entidad autónoma, contribuye a formar decisiones como resultado de consultas populares o por integrar organismos o entidades que tradicionalmente desempeñan funciones que entrañan la toma de decisiones de diversos tipos o que han sido instituidas precisamente con ese propósito.

ii) La selección y elaboración de las estrategias y tácticas para enfrentar situaciones e intentar solucionar los problemas y cuestiones de la vida pública que les afectan directamente en su existencia, trabajo y actividades diversas.

iii) La selección libre y periódica, sea en forma directa por elección popular, o bien en forma indirecta por nombramiento que hacen esos representantes elegidos popularmente, de las personas que en el ámbito inmediato de su región o comunidad deben asumir y desempeñar los puestos de dirección y gestión, así como responsabilizarse

indiferencia, la falta de percepción, las concepciones hegemónicas o tendencias discriminatorias y enfoques etnocéntricos de esos sectores.

c) Beneficios económicos

Los servicios públicos de la región autónoma se prestan en ámbitos regionales o locales más compactos, con población más homogénea y con cuadros ecológicos y ambientales conocidos históricamente por los habitantes. Por ello son más eficientes en términos económicos y socioculturales que cuando se cubren espacios de más amplitud, más diversidad humana y ecológica y que involucran cuadros y patrones culturales más complejos y heterogéneos debido a la diversidad que abarcan. Esto permite optimizar a escala más reducida la prestación de servicios públicos de carácter regional o local, de manera que la relación socioeconómica de costo y beneficio resulta más idónea.

Lo mismo acontece con la actividad económica en general, cuya planificación se ajustará más a las necesidades, perspectivas y aspiraciones reales y concretas de los integrantes de la comunidad o región autónoma. Cuando surge o se elabora en esas comunidades o regiones autónomas a su escala es más idónea que cuando se produce y elabora a proporciones más extensas y según criterios a menudo tecnocráticos y globalistas al nivel general del Estado.

En general, resulta menos costoso y más eficaz planear y ejecutar prácticamente todas las actividades mencionadas en las dos secciones precedentes.

Cabe mencionar aquí, también, que la administración de un Estado en el que existen regiomes o comunidades autónomas, no tiene por qué costar más que la del Estado centralista o centralizado.

Por el contrario, al permitir un control más ajustado y pormenorizado de los gastos públicos que se financian con sus impuestos y una fiscalización directa e inmediata de la probidad, honradez, capacidad, así como de la actuación real de sus mandatarios y funcionarios públicos en las entidades autónomas cabe producirse una gestión más económica.

El hecho de existir el Estado o entidad general y una o más entidades autónomas no significa necesariamente que se sumen o añadan los costos de las estructuras administrativas y burocráticas autónomas a las del Estado central o general. Al constituirse la(s) entidad(es) autónoma(s) se divide(n) los gastos globales, separándose en ellos los que corresponden a esa(s) entidad(es) autónoma(s) y los que siguen correspondiendo al ente estatal general y los autonómicos se restan de la cantidad antes global, que se ve así reducida en el importe de los mismos.

En efecto, se divide esos gastos según las proporciones debidas y conforme a la distribución de poderes y potestades en que se opera la transferencia y se restan.

vi) La educación. El establecimiento y desarrollo del sistema educativo basado en idiomas específicos, el propio y el oficial, resulta más simple que hacerlo en varios idiomas además del oficial. En forma similar, el aspecto cultural es también menos complejo; las motivaciones y finalidades son menos complicadas cuando se les escoge desde una visión más homogénea de las cosas. No se descuidará otras culturas ni la cultura universal en la educación.

vii) La sanidad y los servicios médicos y farmacológicos que consistirían, idealmente, en una combinación sui generis de servicios tradicionales y modernos, tanto propios como ajenos. Se respetará más cabalmente desde un trasfondo cultural menos heterogéneo las concepciones y prácticas idóneas en el marco de tradiciones y realidades más concretas.

viii) Las ocupaciones tradicionales (agricultura, pastoreo, caza y recolección, pesca en sus diversas manifestaciones, alfarería, tejidos, comercio, etc.) El ejercicio actual de éstas se hará posible y más fácil si se las concibe con criterios más uniformes y basados en las concepcione, tradiciones y prácticas ancestrales, tal como se las interprete y aplique en la actualidad.

ix) Las formas y medios de superar el desempleo y el subempleo así como el ordenamiento de las políticas de previsión, asistencia y seguridad social.

x) La previsión y el ordenamiento de la producción, el consumo, el comercio y el mercadeo de los productos de la región, en el marco de la economía estatal e internacional.

xi) Las formas y medios de transporte público local, cuyos servicios y modalidades se ajustarán más a las necesidades reales de los usuarios.

xii) La construcción de vivienda y los materiales que en ello se utilizarán. Los planes y programas de construcción de vivienda seguirán más fácilmente los patrones tradicionales de distribución de viviendas -compactos o dispersos- adecuados a las condiciones prevalecientes en la región que son conocidos y apoyados. La disposición interna de los ambientes y servicios ofrecerá menos diversidad por razones económico-culturales. Idealmente se utilizarán los materiales de construcción disponibles localmente que son menos caros y de más fácil acceso allí y por ello preferibles a otros que no están al alcance en la localidad y cuyo uso terminará creando dependencias indeseadas al tenérselos que conseguir en el exterior.

Cabe mencionar a estos respectos que cuando los centros de decisión y de apoyo a la iniciativa cultural están lejos de la realidad vital de los portadores y creadores palpitantes de esa cultura -y quizá en manos de personas o grupos que no la comparten y tienen otras motivaciones y aspiraciones- no se atenderá ni apoyará adecuadamente esas acciones y proyectos. Aún más, se atropellará mucha energía creadora debido a la

injerencias de todo tipo así como iniciar acciones orientadas a hacer efectivas las reparaciones e indemnizaciones por daños ocasionados por extraños o desde el exterior y restablecer condiciones más satisfactorias.

iii) Determinar su propio desarrollo económico, integral, endógeno y autónomo, de manera que fortalezca su poder autónomo de decisión y la autosuficiencia para llenar sus necesidades esenciales y obtener y utilizar continuadamente sus propios medios de subsistencia habituales. Proceder a ese respecto, inspirándose a la vez en los valores fundamentales de sus tradiciones y costumbres culturales, sociales, jurídicas y políticas y en su estilo y modo de vida. Controlar injerencias indeseadas y cuidar que no se atropelle ese desarrollo propio al articularlo a planes y programas más amplios de ámbito nacional o internacional, así como gestionar, reclamar y obtener las restituciones y reparaciones del caso.

7. La importancia del principio de solidaridad. La cooperación 40/

a) La solidaridad

La solidaridad de las partes que integran el todo constituye una condición esencial para el funcionamiento democrático y eficiente del Estado.

Para ello el Estado debe velar por el establecimiento de un equilibrio económico, adecuado y justo, entre las diversas partes del territorio.

En España -el Estado de las autonomías- la Constitución de 1978 prevé en su artículo 158 el establecimiento de dos fondos económicos en los presupuestos generales del Estado: el Fondo de Asignación y el de Compensación, de la manera siguiente:

"1. En los Presupuesto Generales del Estado podrá establecerse una asignación a las Comunidades Autónomas en función del volumen de los servicios y actividades estatales que hayan asumido y de la garantía de un nivel mínimo en la prestación de los servicios públicos fundamentales en todo el territorio español.

2. Con el fin de corregir desequilibrios económicos interterritoriales y hacer efectivo el principio de solidaridad se constituirá un Fondo de Compensación con destino a gastos de inversión, cuyos recursos serán distribuidos por las Cortes Generales entre las Comunidades Autónomas y provincias, en su caso."

Se busca emparejar y nivelar situaciones diversas, colocándolas en el mismo plano. La diversidad, las diferencias entre unos y otros entes autónomos cuando hay más de uno, naturalmente dependen de la variedad cultural, lingüística, religiosa, histórica y económica entre las nacionalidades, comunidades y regiones que asumen esa autonomía y entre ellas y lo que reste del Estado central. Se ha de atender diferencias reales y profundamente sentidas por los integrantes de esas entidades autónomas.

Los gastos de la entidad autónoma dejan de serlo del Estado general, ya que éstos se reasignan y atribuyen al ente autónomo surgido del central-general.

Todo esto implica necesariamente un manejo riguroso y pormenorizado de los gastos y los costos efectivos de los servicios transferidos, los que ya no figurarán en el presupuesto general del Estado sino en el de la entidad autónoma. Se hace, en esencia, una operación contable. Nada más.

Se debe garantizar que el nivel central general del Estado transfiera al ente autónomo los recursos necesarios y en medida suficiente para sufragar los gastos ocasionados y cubrir totalmente el costo de los servicios y responsabilidades transferidos. Es decir, lo mismo que le costaban al Estado general. Los ingresos antes del Estado son ahora ingresos del ente autónomo, en la misma cuantía y significación económica.

La eficiencia en la prestación de los servicios públicos y la aceptación popular de las administraciones autónomas les permitirá ejercer efectivamente su derecho de crear sus propios impuestos y contribuciones fiscales.

Cabe precisar, para concluir con esta parte, que con gran probabilidad se producirán ahorros debido a la gestión más concentrada de la administración de la comunidad autónoma y la reducción de gastos de control y de coordinación. Esto vendrá a compensar los gastos de los cuerpos legislativos autonómicos que surgen como adicionales a los del cuerpo legislativo general estatal a menos que se subsuman en ellos los gastos de las diputaciones departamentales o provinciales que pudieron haber existido, particularmente en el caso de regiones autónomas pluriprovinciales y que desaparecerán en la nueva entidad.

d) Ventajas en áreas de perspectiva múltiple

Muchas de las áreas mencionadas en este capítulo son pertinentes en aspectos que rebasan las estrechas categorías aquí establecidas. Corresponden a una perspectiva al menos triple (económica-sociocultural-política). Se ha decidido colocar aquí algunas de las áreas que tienen importancia fundamental sin pretender, por ahora, formar con ellas un grupo especial separado. Se lo ha hecho con el propósito de darles la atencón que merecen más allá de las limitaciones compartimentales y sin ninguna intención de hacer una enunciación limitativa a este respecto. Se incluye aquí, en este momento, las siguientes, en las cuales se procederá en mejor forma a:

i) Determinar libremente, y de acuerdo con sus costumbres y tradiciones, lo relativo a la tenencia y control de la tierra y los recursos de la misma, así como su transmisión dentro de la comunidad y a las generaciones futuras.

ii) Disfrutar de un medio ambiente sano y ecológicamente equilibrado que puede garantizarles las mejores condiciones para su pleno desarrollo colectivo e individual en calidad de derecho fundamental. A este respecto podrán, también, velar por que las transferencias de contaminación y perturbaciones ambientales, de cualquier clase que sean, no atenten contra ese derecho y podrán, además, controlar

sobre el derecho al desarrollo, de 1986, contiene una disposición en la que se usa precisamente esas palabras, así:

> "Los Estados deben alentar la participación popular en todas las esferas como factor importante para el desarrollo y para la realización de todos los derechos humanos" (art. 8, párr. 2, el subrayado es nuestro) 43/.

Es claro que la efectiva participación del pueblo en los procesos de toma de decisión política y económica no sólo se ve asegurada a través de la efectividad del ejercicio de otros derechos y libertades sino que hay una verdadera interdependencia entre todos esos derechos y libertades. No hay desarrollo si no hay efectividad de goce y de ejercicio de otros derechos y esos derechos no se ejercerán plenamente sin desarrollo y sin el dinamismo, el cambio y la renovación necesaria en la vida en sociedad y de la sociedad misma.

La participación popular consiste, pues, en que todos los sectores que componen la sociedad tengan el derecho y la posibilidad de participar en los procesos de toma de decisiones políticas, económicas y socioculturales y, además, que se les dé efectivamente la oportunidad de hacerlo en la forma más amplia posible.

En el ya mencionado estudio de la Secretaría General de las Naciones Unidas se hace notar la importancia de no reprimir la expresión y difusión de las opiniones divergentes de los grupos minoritarios en aras a no afectar el dinamismo de la sociedad y el cambio y la renovación de la vida en sociedad. En él se asienta una conceptuación de la participación popular como la participación de los ciudadanos en los asuntos públicos con pleno respeto a los derechos humanos sin discriminaciones de ninguna especie y dando atención especial a los grupos a los que hasta ahora se ha dejado fuera de una participación genuina 44/.

Ambos aspectos tienen particular relevancia en relación con los pueblos indígenas. Efectivamente éstos han sido constantemente marginados de una participación real, desde su propia identidad y en función de la misma, en los procesos de toma de decisión que afectan a la vida económica y política del país.

Por ello buscan la autonomía como una de las formas de la libre determinación a fin de salir de esa situación sin tener que abandonar ni negar su propia identidad y poder, al nivel de sus comunidades y en sus territorios, avanzar el desarrollo tal como ellos lo conciben, en forma diferente del concepto de otros segmentos de la sociedad global, con metas propias en el contexto de su cosmovisión, su estilo de vida y sus costumbres y tradiciones a la vez que articulado el desarrollo general del país. Lo que debe examinarse aquí, según el título del tema, son los arreglos que se pueden hacer para asegurar la participación popular y el goce y ejercicio efectivos de los derechos humanos por parte de las instituciones autonómicas indígenas.

Entrando al tema específico de los medios de garantizar la participación popular y el respeto de los derechos humanos por parte de las instituciones

Como en estas líneas se trata de formas de la autonomía en el Estado, dentro de él, y no de separatismo ni de independentismo, es importante, sin embargo, que esas mismas diferencias e identidades sean comprendidas y afirmadas por todos -tanto cada una de las entidades autónomas como el Estado por su parte- como formando parte de una unidad distinta, a la vez plural y global, que es el Estado mismo.

Hay un imperativo de solidaridad. Este es imperativo político y social y dentro de marcos de respeto a las diferencias y basado en la igualdad de derechos, solidaria entre las distintas entidades vertebradas en el Estado. La solidaridad se manifiesta entre iguales, es decir entre las entidades autónomas y entre los miembros de las mismas.

b) La cooperación

Como secuela de la solidaridad se impone la cooperación en ciertas circunstancias. Los ámbitos de entidades autónomas limítrofes a menudo plantean cuestiones que deben abordarse en común y conjuntamente por las mismas. La solución unilateral y egocéntrica por parte de una sola de ellas, o grupo no completo de las mismas, puede ocasionar pérdidas, costos elevados innecesarios. Estos problemas de frontera o de borde exigen un planteamiento y una solución conjunta para beneficio de todos.

Toma pleno cuerpo en este contexto la idea de la solidaridad traducida en cooperación específica para los casos apuntados. Se ha de prever y determinar de antemano las circunstancias que lo exijan, los requisitos sobre los que se asentará la cooperación y los términos, formas y condiciones de los convenios posibles entre entidades limítrofes para la concepción, gestión y la prestación de los servicios necesarios.

Ha de buscarse que presida todos esos esfuerzos el trinomio autonomía-solidaridad-cooperación.

B. Medios de garantizar la participación popular y el respeto de los derechos humanos por parte de las instituciones indígenas autónomas

a) Observaciones iniciales

Según un estudio de la Secretaría General de las Naciones Unidas el "derecho a la participación popular" no ha sido aún incorporado al derecho internacional público como derecho reconocido per se. Hay, sin embargo, elementos de la esencia del mismo que sí figuran explícitamente en varias disposiciones dispersas en los textos de los instrumentos internacionales de derechos humanos 41/.

Ha surgido como tema específico en el contexto de la necesidad de consultar a los que se ven más afectados por los planes nacionales de desarrollo, en general los pobres de las áreas rurales 42/. La Declaración

la iniciativa popular ante el legislativo autonómico que debe instituirse a fin de hacer posible que el pueblo mismo lleve sus inquietudes al seno del cuerpo representativo que hace leyes.

En el aspecto sociocultural, da oportunidad de vivir más plenamente los valores y principios así como las tradiciones, costumbres y prácticas propias en comunidad, de hablar, estudiar, perfeccionar y desarrollar más el idioma, el control y la tenencia y disfrute de las tierras y los recursos, de dar los giros deseados a la educación y a los servicios sanitarios, médicos y farmacológicos; de revitalizar y ejercer intensamente las ocupaciones tradicionales y tantas otras áreas de gran interés y significación.

En la esfera económica se interviene directamente para que los servicios públicos y la actividad económica en general se ajusten más y mejor a las necesidades reales de los pobladores y usuarios locales.

Habrá determinación más fácil de alcanzar en el mantenimiento y perfeccionamiento del propio desarrollo económico, según su propia concepción del mismo como endógeno y autónomo que fortalezca el poder autónomo de decisión. También se podrá proceder más resueltamente a su protección frente a otras formas de desarrollo y ante la penetración abusiva de intereses y entidades extraños y el rechazo de estos últimos.

En diversas secciones de la parte A de esta nota se ha señalado ya varios aspectos en los que el establecimiento y el funcionamiento de la autonomía implica la participación necesaria de grandes sectores de la población de la región autónoma y del país en general.

b) Participación popular al institucionalizar la autonomía en la Constitución

Se presentan modos e instancias de participación popular bien caracterizados, aun antes de que quede formalmente establecida la autonomía institucional en casos concretos.

Si, como se supone, la asamblea constituyente ha estado compuesta de representantes elegidos mediante sufragio universal, libre, igual, directo y secreto, y que en la elección han participado grandes sectores del cuerpo electoral del país, el texto constitucional en el que se institucionaliza la autonomía es resultado de la participación popular indirecta a través de sus representantes.

Esto constituye entonces la primera oportunidad de participación popular en relación con la autonomía, esto es, al introducir esa institución al derecho constitucional del país.

En el proceso de la producción de la constitución puede haberse presentado una oportunidad más de participación popular, directa esta vez, si como no es inusitado el texto constitucional que contiene innovaciones importantes es sometido a referéndum para su ratificación popular.

indígenas, vale decir de entrada que las costumbres y tradiciones indígenas en todas partes se ajustan sin dificultad a esos requisitos.

Es natural inclinación y práctica inveterada de los pueblos indígenas actuar en la gestión de los asuntos públicos con participación de la comunidad entera y con respeto a los derechos varios de todos los participantes en la vida comunitria. Aquélla (la participación popular) se manifiesta a través de formas participativas, tanto directas (congresos generales y asambleas y reuniones multitudinarias) como indirectas (por vía de representantes, funcionarios y mandatarios) y éste (el respeto de los derechos) en amplia oportunidad de expresar opiniones y pareceres que se toman debidamente en cuenta y en los esfuerzos siempre presentes por sustentar la toma de decisiones en formas de consenso en las que no se atropella a nadie.

Se ha dicho ya que la nueva estructuración del Estado no debe originarse en decisiones impuestas burocrática y arbitrariamente ni contener fórmulas antojadizas de los poderes centrales. No debe surgir de decisiones caprichosas del ejecutivo ni de invenciones arbitrarias del legislativo estatal central.

Debe, por el contrario, reflejar las fórmulas propias reivindicadas por cada entidad autónoma como medio para recobrar sus tradiciones culturales, sociales, económicas y políticas, acceder al autogobierno y retomar la realización de su proyecto histórico como pueblo.

La autonomía regional implica la descentralización y la democratización del Estado. Significa, en verdad, una profundización de la democracia y la participación popular ya que acerca los niveles de toma y de ejecución de decisiones a los ciudadanos, permitiendo esa participación más profunda, más inmediata y directa y más constante.

En efecto, como se ha visto en la parte A, la participación popular tiene 1) más peso relativo en la toma de decisiones debido a la menor población y a la inmediación; y 2) tiene posibilidades más reales, directas y concretas de influir en a) la selección y elaboración de las estrategias y tácticas para intentar solucionar problemas y cuestiones de la vida pública; b) la selección libre y periódica directamente por elección popular de sus representantes y la selección indirecta de los funcionarios designados por sus representantes elegidos directamente; c) la realización más completa de trabajos y actividades de significación sociopolítica en su ámbito territorial autonómico y d) el ejercicio mejor y más cabal del examen, control y fiscalización de las actuaciones concretas de funcionarios y representantes. Dicho en pocas palabras, disminuye la distancia entre gobernantes y gobernados y entre administradores y administrados. Los acerca más a los fines de la selección y control de los gobernantes y administradores por el gobernado y administrado.

Mención especial merece la toma de decisiones directamente por el pueblo al participar en consultas populares en forma de referéndum, plebiscito y otras que se mencionarán más adelante. También hay participación directa en

e) Formas de participación popular directa que convendría agregar a las ya existentes

Se ha dicho al empezar a tratar lo relativo a la participación popular y el respeto a los derechos de todos, supra, que es natural inclinación y costumbre inveterada de los pueblos indígenas incluir ambos elementos en su gestión de los asuntos públicos. En el capítulo 5 de la parte A y en la sección a) de esta parte B de la presente nota se ha hecho referencia a varias de las formas que adoptan esa participación y ese respeto en la comunidad autonómica indígena. Se desea, sin embargo, sugerir algunas normas adicionales que, actuando siempre con respeto a las costumbres y tradiciones indígenas y en función de las mismas, podrían venir a completar un poco más el cuadro respectivo en lo relativo a la participación directa.

i) El plebiscito para plantear modificaciones importantes al estatuto autonómico y otros planteamientos de crucial importancia.

ii) La iniciativa popular ante el legislativo autonómico.

iii) La petición popular ante funcionarios del ejecutivo autonómico.

iv) La acción popular (actio popularis) para denunciar violaciones de las instituciones autonómicas.

v) El referéndum. Convendría conservarlo en todas sus funciones ya mencionadas pero agregarle otras, vgr. para obtener la ratificación de modificaciones ya sancionadas por las autoridades competentes autonómicas, del Estatuto y de las leyes autonómicas.

vi) El recall. Convendría instituirlo como facultad que el pueblo se reserve o que se establezca en ciertas áreas y ámbitos para que, en circunstancias estipuladas taxativamente en el Estatuto Autonómico, pueda destituir a funcionarios públicos o representantes suyos por el voto del pueblo, antes de que termine el período de su elección o designación. Asimismo para dejar sin efecto su actuación en el cargo, así como para revocar las resoluciones de unos y otros. Al efecto se ha de presentar una solicitud con ese propósito respaldada por la firma del número requerido de miembros de la comunidad, si consideran que su actuación en el desempeño del cargo o sus resoluciones, o ambas, a) son contrarias al interés general de la comunidad autónoma, b) se subordinan a intereses o motivaciones no legítimos en su actuación o resoluciones, o c) proceden en ella con abuso o desviación de poder, dañino a la comunidad.

f) La participación popular lleva el ingrediente de respeto por los derechos humanos de todos

Este ingrediente está presente también en la autonomía misma al actualizarse la posibilidad del ejercicio más efectivo y real, tanto de los derechos como de las libertades fundamentales individuales, como también los derechos y libertades colectivos y los derechos históricos y específicos de los pueblos indígenas como tales, que son derechos colectivos esencialmente.

c) Participación popular en el proceso de iniciativa y de acceso a la autonomía en casos concretos

Se presentan formas de participación directa (por el pueblo en sí) e indirectas (por medio de representantes):

Participación directa del pueblo. Presentada la iniciativa autonómica se suele celebrar un plebiscito o referéndum para que el pueblo del territorio que será el de la nueva entidad se pronuncie en favor o en contra de la iniciativa de acceso a la autonomía. En esta consulta pueden plantearse interrogantes acerca del alcance y contenido de la autonomía buscada o de aspectos de la negociación que habrá de realizarse.

Participación indirecta. Representantes. Al presentarse la iniciativa deben intervenir los miembros de las diputaciones departamentales o provinciales, los de las corporaciones municipales y los representantes de las comunidades de territorio que será el de la nueva entidad.

Para la redacción del proyecto de estatuto se agregarán a ellos los miembros del cuerpo legislativo estatal que hayan sido elegidos en el territorio que será el de la nueva entidad que, con los demás, integrarán la congregación proponente autonómica.

d) Participación popular durante la existencia y el ejercicio de la autonomía

Como se ha señalado antes, la misma autonomía al funcionar reclama la intervención popular sea en forma directa -en asambleas populares- o indirecta -a través de su cuerpo legislativo autonómico, a través del titular del ejecutivo autonómico, sea éste uni o pluripersonal, de carácter presidencialista, parlamentario, semiparlamentario u otro.

i. Formas directas e indirectas previstas o establecidas

1) Directa. Asambleas populares, congresos generales para discutir orientación política con selección de las opciones abiertas a su consideración.

Elección de representantes diversos y de ciertos jueces (si es el caso).

2) Indirecta. Actuación de legisladores.

Actuación de Presidente (sistema presidencialista).

Elección de segundo grado: funcionarios elegidos por representantes legisladores.

Todo funcionario designado por representante de elección popular.

Jueces en general.

v) Reforzará la vocación al mantenimiento de la paz, a la realización del derecho al desarrollo endógeno y a un orden social y económico justo y equitativo, y a la vital recuperación y conservación de un medio ambiente o entorno sano y del equilibrio ecológico, en que tan sabiamente sobresalieron las antiguas generaciones indígenas.

vi) Impartirá, con base en todo lo anterior y en las costumbres y tradiciones indígenas, la instrucción cívica y la formación social del educando.

Observaciones finales

La autonomía de la que se trata en el presente trabajo es una institución política que entraña necesariamente un proceso de distribución y de descentralización de poderes públicos. Para conformar su concepto no basta reconocer la existencia de esos pueblos indígenas y hacer arreglos de descentralización administrativa. Se necesita ir más allá y reconocerles el derecho de autogobernarse como entidades autónomas dentro del Estado, con separación de competencias entre las de las autoridades estatales y las de las autonómicas. Se necesita también concomitantemente, y de manera crucial abandonar actitudes y políticas negadoras de la especificidad indígena, repudiadas históricamente por esos pueblos que han reafirmado siempre su identidad y su dignidad de pueblos libres y diferenciados dentro de la sociedad global.

De otra manera, puede muy bien darse la autonomía regional con potestades legislativa, ejecutiva y judicial o jurisdiccional en el seno de un Estado, en otros aspectos aceptablemente democrático y autonómico, sin que la situación de colonización de los pueblos indígenas sea superada. Es decir, se puede reproducir, a escala más reducida, el cuadro -no necesariamente mejorado en lo sustancial- de imposición y opresión que se trata de superar.

Los pueblos indígenas no sólo cuestionan el centralismo estatal sino rechazan su asimilacionismo y las circunstancias que permiten a la sociedad global o a sectores importantes de la misma, imponerles la dominación hegemónica, con discriminación generalizada, explotación económica y opresión étnica. La sociedad que reprime sus reivindicaciones históricas y específicas como amenazas a la seguridad nacional habrá de experimentar cambios sustanciales que le permitan comprender los arreglos equitativos y profundamente distintos que conlleva la distribución en centros de poder político distintos del estatal central, pero dentro de una nueva estructura de la sociedad y del Estado.

Para los pueblos indígenas no se trata solamente de la obtención de una autonomía regional, de cualquier autonomía regional. Como proyecto de emancipación étnica, la autonomía ha de incluir para los pueblos indígenas, como para cada pueblo diferenciado dentro del Estado, el derecho igual a existir como tales, es decir, como pueblos, con su identidad y su cosmovisión, con lengua, cultura y organización social propias y asentamiento en su territorio ancestral.

Así cabe tener por posibilitado en mejor forma el ejercicio de:

El derecho a la propia vida cultural

El derecho a profesar y practicar su propia religión

El derecho a emplear su propio idioma

El derecho a las formas de tenencia de la tierra y de los recuros y el control, uso y transmisión de los mismos según normas tradicionales; etc.

g) Funcionarios que velen por la efectividad de los derechos y libertades

Para asegurar el pleno disfrute y ejercicio efectivo y mejor protección de los derechos y libertades se podría crear figuras como:

i) El Procurador autonómico de derechos humanos;

ii) El Procurador autonómico de derechos históricos y específicos de los pueblos indígenas de la comunidad autónoma;

iii) Otras figuras compatibles con las tradiciones indígenas al respecto, si las hubiere.

h) La educación en materia de derechos humanos y la capacitación popular para la defensa de los mismos

Es de gran importancia que la educación, además de sus propósitos y fines consabidos, se oriente a difundir el conocimiento y la comprensión de esos derechos y a capacitar a todos los habitantes de la comunidad autónoma indígena para la defensa de sus derechos individuales y colectivos. Al efecto:

i) Proporcionará el conocimiento sistemático de la Constitución y los instrumentos internacionales de derechos humanos, en particular los ratificados.

ii) Fomentará el respeto de los derechos humanos y libertades fundamentales de todos y la comprensión, la tolerancia y la amistad entre todos los pueblos, comunidades y grupos étnicos, lingüísticos, culturales y religiosos.

iii) Promoverá activamente la capacitación, por medio de la información, el análisis y los ejercicios prácticos, en materia de la defensa de sus derechos individuales y colectivos en el seno de la sociedad global, de manera que puedan superar los factores limitantes que afectan su desarrollo en forma de dominación hegemónica, discriminación generalizada, explotación económica, opresión étnica y represión diversa.

iv) Pondrá el necesario énfasis en el respeto y la protección de los derechos de los no indígenas que vivan en el territorio indígena de la comunidad autónoma.

ya que, además, ésta es una de las vías escogidas por ellos en esta coyuntura histórica de la proximidad del inicio del siglo XXI, a más de 500 años de la invasión y la agresión que inició el doloroso camino de la colonización.

La estructuración del Estado con pluralidad de centros dotados de poder político debe obedecer fundamentalmente a criterios de respeto debido a esas características, anhelos y reivindicaciones. Se modificará así la estructura unitaria centralizada que no les da este espacio democrático y de justicia histórica, así como también las estructuras federales en las que no se ha querido o sabido dar lugar a este tipo de autonomía política indígena -y eso dentro de un Estado concebido básicamente como agregación de espacios con poder político autónomo.

Notas

1/ Los párrafos que aparecen en esta sección son tomados, con ligeras modificaciones, de Willemsen Díaz, Augusto "Derechos indígenas. Aporte al plenario", presentado al Seminario de Sisoguichi, Territorio Tarahumara, Chihuahua, en enero de 1989, en Talleres de derecho alternativo - México, D.F., Sisoguichi, Tehuantepec. ILSA, Asociación Interamericana de Servicios Legales, Documento - 2, 1989. Bogotá, Colombia, 1989, págs. 36 y 36.

2/ A principios del siglo pasado, los países latinoamericanos -iberoamericanos e indoibéricos (a los que se ha tenido particularmente en mente)- se constituyeron en Estados-nación después de su emancipación política de España y Portugal. Se inspiraron al efecto en ideas de la Revolución Francesa y concibieron a los nuevos Estados como entidades de corte occidental y como formados por poblaciones uniformes e indistintas, constitutivas de una nación única. Esto, desde luego, estaba en contradicción directa de la realidad en muchos de ellos, donde a la par de la población criolla y mestiza existían -a veces formando la inmensa mayoría de la población- pueblos indígenas con su cosmovisión, su identidad étnica y formas de organización interna y costumbres, tradiciones y prácticas propias.

3/ Artículo 1, párrafo 2 de la "Declaración sobre la raza y los prejuicios raciales" aprobada por la Conferencia General de la UNESCO en su vigésima reunión, París, 27 de noviembre de 1978. Publicación de la UNESCO con el mismo título Declaración sobre la raza y los prejuicios raciales, que contiene además como anexos las cuatro declaraciones preparadas en 1950, 1951, 1964 y 1967 por expertos reunidos por UNESCO a título individual. París, 1979, págs. 9 a 18.

4/ Sea en su forma actual de Estado soberano e independiente (caso de Chile y de los mapuche) o bien cuando eran territorios dependientes de otras potencias y que fueron retenidos al constituirse como Estados independientes (caso general).

5/ Las constituciones en varios países contienen disposiciones que implícita o explícitamente reconocen esas características. Entre éstas cabe mencionar como más claras al respecto, al menos las constituciones hoy vigentes en Bolivia, Brasil, Colombia, Guatemala, Nicaragua, Panamá y Perú.

Deben ser ellos mismos, los pueblos indígenas, quienes solucionen y superen, a su manera, los problemas que confrontan en el seno de la sociedad global indiferenciada y concebida desde parámetros extraños a los indígenas. Por eso se requiere indispensablemente que, en su caso, la autonomía sea autonomía indígena.

Pero no con hegemonía y etnocentrismo agresivos. No para oprimir ellos, esta vez. Se trata de hacer posible un arreglo regional armónico y en función de los intereses reales de toda la población regional. Se aspira a lograr una autonomía regional pluriétnica de una región territorial indígena, que garantice sus derechos a todos los grupos que componen la población regional. Se necesita, sin embargo, repito, que sea una autonomía regional indígena.

Por ello, los esfuerzos han de concentrarse en el acceso a la autonomía de los territorios indígenas y para construir un proyecto de autonomía indígena.

Esta autonomía no va orientada ni está dirigida contra los no indígenas que habitan el territorio. El Estatuto de Autonomía territorial indígena debe tomar debida cuenta de la realidad pluriétnica que exista en la región. La autonomía de la que se trata debe beneficiar significativamente al conjunto de la poblacion del territorio que accede a la autonomía.

En nuestros días se habla mucho de la necesidad de "construir la democracia" y de la "democratización de las sociedades" en los Estados actuales, de manera que ésta alcance a todos los sectores, en particular los entes marginados. En el caso de los países pluriétnicos, debe tratarse, sin embargo, no sólo de la construcción de un Estado democrático, de una sociedad democrática, que bien podría lograrse en lo sustancial, sin resolver realmente los problemas que confrontan los pueblos indígenas que en ellos viven.

Para tomar el camino de esa democratización a niveles más reales y profundos en esos países habría que empezar, cabe repetirlo una vez más, por rechazar y abandonar totalmente las políticas integracionistas-asimilacionistas. Haría falta también promover la toma de medidas especiales para crear las condiciones que hagan posible a los pueblos indígenas gozar de plena igualdad de derechos como pueblos con el otro pueblo o los otros pueblos que existan en el seno de la sociedad global del país respectivo, lo que muchos Estados en nuestros días proclaman tener la firme y determinada intención de lograr.

Habida cuenta, entonces, de la declarada voluntad política en varios países de hacer justicia a los pueblos indígenas después de varios siglos de negación de su identidad étnica y de frecuente represión ante los intentos de reivindicar sus derechos históricos y específicos. Dada la presencia continuada de los pueblos y comunidades indígenas en sus territorios ancestrales milenarios, donde aún conservan alguna parte de los mismos en medida significativa. Vista la constante reivindicación y reafirmación de su identidad étnica frente a todo esto. A la luz de la explícita voluntad colectiva de realizar sus propios proyectos históricos como pueblos, se impone la percepción de que una de las vías más obvias para apuntar a buen fin, es el acceso de los pueblos indígenas a la autonomía política dentro de los Estados,

16/ Gros Espiell, Héctor, en Naciones Unidas, El derecho a la libre determinación. Aplicación de las resoluciones de las Naciones Unidas. Preparado en calidad de Relator Especial de la Subcomisión de Prevención de Discriminaciones y Protección a las Minorías. Publicación de las Naciones Unidas, N° de venta: 8.79.XIV.5, Nueva York, 1979, párr. 59.

17/ Martínez Cobo, José R., Naciones Unidas, Estudio sobre el problema de la discriminación contra las poblaciones indígenas. Preparado en calidad de Relator Especial de la Subcomisión de Prevención de Discriminaciones y Protección a las Minorías. Publicación de las Naciones Unidas, N° de venta: S.88.XIV.3, Nueva York, párrs. 269 a 279 y 580 y 581.

18/ Se redactó "estructuras politicoadministrativas", pero a fin de cuentas apareció sólo como "estructuras administrativas". Con esto se le privó de una de las principales características de la autonomía, la política, a la que, inter alia, se refiere la presente nota.

19/ Naciones Unidas, Derechos Humanos. Recopilación de instrumentos internacionales, op. cit., págs. 8 y 19.

20/ Citado por Cristescu, Aureliu, op. cit., párr. 73.

21/ Gros Espiell, Héctor, op. cit., párr. 60.

22/ Gros Espiell, Héctor, op. cit., párr. 89.

23/ Conclusiones adoptadas por el Simposio Internacional de Expertos sobre el tema "Derechos de solidaridad y derechos de los pueblos", celebrado a invitación de la República de San Marino y con la ayuda de la UNESCO, en la República de San Marino, 4 a 8 de octubre de 1982 en: Mosca, Juan José y Pérez Aguirre, Luis. Derechos Humanos. Pautas para una educación liberadora, Ediciones Trilce, Montevideo, Uruguay, diciembre de 1986, págs. 171 a 178. Párrafo 18, en página 174.

24/ Texto de la Declaración Universal de los Derechos de los Pueblos, también conocida como "Declaración de Argel", adoptada en una reunión internacional no gubernamental en Argel en 1976 en: Comisión para la Defensa de los Derechos Humanos en Centroamérica (CODEHUCA), Secretariado Permanente. Declaración Universal de los Derechos de los Pueblos, folleto de nueve hojas, sin fecha.

25/ Ibid., pág. 8.

26/ Hannum, Hurst. Autonomy, Sovereignty and Self Determination. The Accomodation of Conflicting Rights. University of Pennsylvania Press, Filadelfia, 1990, pág. 116.

6/ En México se ha tenido recientemente en estudio una reforma constitucional que contempla esa materia (reformas al artículo 4). No se tiene claridad acerca del estado de este proceso.

7/ Mención aparte merece Argentina con su Constitución federal de 1853, reformada que no favorece la identidad indígena y varias constituciones estatales ("provinciales") algunas de las cuales sí disponen en sentido favorable. En efecto, ese reconocimiento constitucional figura como principio en la plataforma política de varios movimientos indígenas. Es punto fundamental en los planteamientos de la Confederación Nacional Indígena del Ecuador (CONAIE).

8/ Vgr. Argentina, Ley Federal N° 23.302 de 1985; Colombia, Ley 89 de 1890; Paraguay, Ley N° 904 de 1981, etc.

9/ Willemsen Díaz, Augusto. Texto redactado en marzo de 1991 para entregar a una organización. Aún no publicado.

10/ Ibid.

11/ Los párrafos colocados bajo este título se basan primodialmente en Willemsen Díaz, Augusto, "Los derechos culturales de los pueblos indígenas", contribución a un grupo de discusión durante el Seminario Internacional sobre la Educación para la comprensión internacional y la paz organizado por la Asociación Guatemalteca pro Naciones Unidas con el patrocinio de la UNESCO, et. al., Guatemala, Guatemala 23 a 25 de agosto de 1989. Publicado más tarde, asignándole el título de "Derechos culturales e integración", en Estudios Internacionales, Revista del Instituto de Relaciones Internacionales y de Investigación para la Paz, Año 1, N° 2 (julio a diciembre de 1990), Guatemala, Guatemala C.A., 1991, págs. 107 a 112.

12/ UNESCO Recomendación sobre la educación para la comprensión, la cooperación y la paz internacionales y la educación relativa a los derechos humanos y las libertades fundamentales.

13/ Texto de la Carta en: Naciones Unidas, Servicios de Información Pública, Carta de las Naciones Unidas y Estatuto de la Corte Internacional de Justicia, Nueva York.

14/ Naciones Unidas, Centro de Derechos Humanos, Recopilación de instrumentos internacionales. Publicación de las Naciones Unidas, N° de venta: S.88.XIV.1, Nueva York, 1988, págs. 46 a 48.

15/ Citada por Cristecu, Aureliu, en Naciones Unidas, El derecho a la libre determinación. Desarrollo histórico y actual sobre la base de los instrumentos de las Naciones Unidas. Preparado en calidad de Relator Especial de la Subcomisión de Prevención de Discriminaciones y Protección a las Minorías. Publicación de las Naciones Unidas, N° de venta: S.80.XIV, págs. 15 y 16, párr. 73.

37/ El mencionado estudio especial de la Secretaría General de las Naciones Unidas, preparado a pedido de la Comisión de Derechos Humanos en su resolución 1883/14 y presentado a la Comisión en 1984, después de examinar los diversos aspectos del mismo, concluyó que el derecho a la participación popular per se y en sus términos más generales no parece estar establecido expresamente en instrumentos universales con fuerza jurídica vinculante. También concluye, sin embargo, que numerosos textos internacionales de variada naturaleza jurídica contienen elementos de la participación popular y algunos de esos textos llegan a enunciar un derecho global a la participación. Ver Hannum, Hurst, op. cit., págs. 113 a 118. En particular en págs. 113 y 114.

38/ Véase la nota 36, supra.

39/ Ibid.

40/ Ibid.

41/ Ibid.

42/ Véase por ejemplo Naciones Unidas, Popular Participation in Decision Making for Development, United Nations publication, Sales N° E.75.IV.10. Como publicación posterior véase también Naciones Unidas Popular Participation as a Strategy for Promoting Community level and National Development, United Nations publication, Sales N° E.81.IV.2.

43/ Adoptada por la Asamblea General de las Naciones Unidas en su resolución 41/128 de 4 de diciembre de 1986 en Naciones Unidas, Derechos Humanos. Recopilación de instrumentos internacionales, op. cit., págs. 404 a 409. En particular pág. 408.

44/ Citado por Hannum, Hurst, op. cit., págs. 113, 114 y 115.

27/ Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura (UNESCO). Texto de la Declaración de San José adoptado por aclamación el 11 de diciembre de 1981 como resultado de la Reunión de expertos sobre etnocidio y etnodesarrollo en América Latina, convocada por la UNESCO y la Facultad Latinoamericana de Ciencias Sociales (FLACSO), La Catalina, Santa Bárbara de Heredia, Costa Rica, del 6 al 13 de diciembre de 1981. Aparece en anexo VI al capítulo II, Medidas tomadas por los organismos especializados. Naciones Unidas, Estudio sobre el problema de la discriminación contra las poblaciones indígenas, anexo VI al capítulo II, incorporado después en el volumen I, con los capítulos I, III y IV del mismo de la compilación en cinco volúmenes marcada con la sigla E/CN.4/Sub.2/1986/7, págs. 132 a 134.

28/ Esta parte de la Declaración de San José se basa directa y deliberadamente en los términos usados en el párrafo tercero de la Declaración Universal de Derechos Humanos.

29/ UNESCO, loc. cit., pág. 133.

30/ Hannum, Hurst, op. cit., pág. 116.

31/ Texto de la Declaración en: CODEHUCA, op. cit., pág. 4.

32/ Ibid., pág. 7.

33/ Texto de la Declaración en: Mosca y Pérez Aguirre, loc. cit., pág. 173.

34/ Naciones Unidas, Estudio del problema..., op. cit., pág. 132.

35/ Willemsen Díaz, A., Contribución al plenario, op. cit., pág. 36.

36/ Mucho del contenido de los capítulos 3 a 7 se basa en ideas expresadas en anteriores trabajos preparados por el autor de la presente nota, Willemsen Díaz, Augusto, entre los cuales cabe al menos destacar: 1) Legisladores indígenas, legislación y políticas que afectan a los pueblos y comunidades indígenas. Documento preparado a instancia y petición del Instituto Indigenista Interamericano y presentado al Primer Encuentro de Parlamentarios Indígenas de América Latina, Panamá, Panamá, 26 a 29 de agosto de 1987 y 2) Análisis crítico del proyecto de ley de creación de la comarca Guaymí en la República de Panamá, Panamá, agosto de 1987. Se apoya también significativamente en materias expuestas en dos libros: P. Sunyer, C. Viver, Conocimiento de la Constitución, editorial Vicens Vives, Barcelona, España, 1987 y en Larroque, Luis, Comunidades autónomas, editorial Popular, sin fecha.

At this stage of the worldwide movement for self-determination of indigenous peoples, certain over-arching values have crystallized to serve as standards for evaluating existing powers and responsibilities, as well as structures and processes. Among them are territorial autonomy and sovereignty, democracy and justice, equity and cultural freedom. Interestingly enough, these are already found, in one form or another, in existing United Nations instruments on human rights and in some cases, in Constitutions and national laws.

Operationally, they include the following:

(a) Control of territory (expressed variously as ancestral domain, ancestral homeland, indigenous territory, etc.) and its natural resources, both surface and subsurface;

(b) Legislative, executive and judicial bodies, to include corresponding indigenous institutions;

(c) Proper actual representation of the indigenous cultural communities in the various organs of power, not only in the autonomous territorial unit but also in the national Government;

(d) Fiscal autonomy, including power to raise revenues, a just share of national revenues and a capable fiscal administration; and

(e) Respect, protection and development of indigenous cultures.

We shall try to take these into account whenever the available literature allows. In addition, we shall also take into account trends in public development and administration 1/ which parallel the trends in indigenous peoples' struggles for self-determination and are therefore complementary and supportive:

(a) Geographical, instead of sectoral, focus in the delivery of goods and services, which means that one office or agency assumes responsibility over a wide range of related functions instead of a single-function national department or ministry, branching out into local government units.

(b) Decentralization, which means the substantial devolution of powers and responsibilities from central Government to local governments; this would also include recognition and use of indigenous political and administrative institutions such as the Council of Chiefs/Elders;

(c) Movement away from a top- or centre-oriented bureaucracy towards greater people's participation in decision making and development management;

(d) Increasing concern for such values as equity and social justice and not merely for administrative effectiveness and efficiency.

Fiscal and administrative relations between indigenous governments and States

Background paper prepared by
Ponciano L. Bennagen

Over the years, the worldwide struggles of indigenous peoples for the right to self-determination have made concrete gains, particularly in the area of self-governance and of the rights to land and natural resources. In an increasing number of countries, these rights are being enshrined in their Constitutions. However, there exist continuing violations of indigenous peoples' rights and a lack of political will of States or national Governments to push through with appropriate legislation and development programmes. Self-governance and fiscal autonomy remain to be fully realized. In some countries initial gains have been nullified by subsequent legislation. Clearly, the gap between constitutional and statutory rights on the one hand, and the continuing violation of indigenous peoples' rights on the other, underscore the urgent need to examine the complex conditions that either favour or obstruct the protection and enjoyment of constitutional and statutory rights, let alone of human rights in the various instruments of the United Nations. In this brief background paper, we will focus on the fiscal and administrative relations between indigenous governments and the State as represented by the central or national Government. Specific concerns are structures and processes involving the following:

(a) Responsibility-sharing, consultation and cooperation, and dispute or conflict resolutions; and

(b) Resource-sharing, development planning and management.

In a study of this nature, it would be highly instructive to survey a broad range of country experiences to enable us to make empirically-grounded generalizations that could prove useful in the task of setting international standards for the recognition, protection and enjoyment of indigenous peoples' rights. This presupposes that the Constitutions governing the national experiences have been democratically promulgated and that indigenous peoples themselves, along with other groups, have actively participated in the exercise. As such, we can assume that the Constitution could already provide a substantive basis for the further elaboration of international instruments. For lack of time and resources, this could not be done (but it is hoped that the meeting itself will provide ample opportunities for cross-country comparisons).

Note: The opinions expressed in this paper are those of the author.

In the United States of America, a reservation may be created by Congressional action or by treaties. These are meant to guarantee the reservations as Indian homelands. But while treaties between Indian nations and the United States of America are considered treaties between sovereign entities, the governing powers of the Indian nations are restricted by the United States Federal Government and the various local government units to which the reservation belong. Even the traditional powers of the indigenous council of chiefs have been usurped by State-organized tribal councils. The net result is that the reservations are only partially self-governing, if at all. The tribal councils become mere implementors of State or federal policies. Worse, the United States Congress could amend or repeal specific treaty provisions without the consent of the Indian nations.

Since the 1960s the United States Government has been saying that it is United States policy to support steps towards Indian nations' self-determination and self-sufficiency. During the term of President Ronald Reagan, federal funding for Indian nations was cut off and the private sector was encouraged to become involved in Indian development. However, the private sector was more interested in the extraction of natural wealth found in the reservations than in the building of infrastructure and other improvements needed by the reservations. What bears watching is the ongoing Self-Governance Demonstration Project, which could pave the way for each of the 10 participating nations to negotiate with the United States Government for a self-governance compact.

The Philippine experience with reservations has not been any better than that of the United States of America, in spite of United States colonial efforts to learn from the United States experience. Of the several reservations established by the United States colonial administration for what it called "non-Christian tribes", only a few survive to this day. These are occupied by a small number of indigenous cultural communities, often in competition with lowland Christianized Filipino migrants. In many cases, the reservations have been encroached upon by logging, mining and ranching concessions without lasting benefit at all to the indigenous cultural communitites. The Philippines Government, by Executive issuances, can unilaterally reduce the area of reservations, or cancel them without the consent of the affected groups.

Present-day efforts at reservations have not benefited from earlier efforts. In Africa, reservations (which include national parks and reserves for both wildlife and indigenous peoples) have been called by critics "human zoos". They are essentially isolationist and they preclude the development which many indigenous peoples desire.

While there may be possibilities for some kind of economic self-determination in reservations, the reservation as a form of territorial autonomy needs to be thoroughly investigated for appropriate action in cases where it may provide a viable short-term alternative.

One possible direction for transforming reservations into autonomous territorial units would be to convert them into local government units within large autonomous units. This would be some kind of "autonomy within autonomy". It would be desirable where there are several ethnolinguistic groups within an autonomous region making uniform policies extremely difficult.

Self-determination: full integration or full independence?

In the context of self-determination, the options open to indigenous peoples are: (a) full integration into the national society; (b) territorial autonomy within the territorial integrity of the States; and, (c) full national independence or secession. The trends seem to be towards some territorial autonomy which could lead to full national independence if basic rights are not enjoyed. This background paper limits itself to selected experiences of territorial autonomy within the State.

Territorial autonomy varies from the reservation type, as in the United States of America, some African countries and the Philippines, to comarca in Panama to autonomous regions in a growing number of countries, and to a home rule type, as in the case of Norway and Denmark for the Saami and the Inuit, respectively. But whatever the form, what is essential are the rights that are guaranteed by Constitutions or laws or executive issuance (for example, presidential decree or proclamation) and the structures and processes that facilitate and enable the enjoyment of these rights.

The degree of autonomy of indigenous peoples in relation to the State is influenced to a large extent by fiscal autonomy and the quality of administrative relations between indigenous government and State. But in general, these have not been adequate and effective. An indication of this is the general inability of indigenous peoples to manage their own affairs, particularly if threatened by external economic forces interested in the extraction of natural resources on their ancestral territories. Another is their inability to pursue their own development in a consistent and comprehensive manner. In discussing these points, this paper will focus on the Philippine experience in greater detail. Additional materials from other countries will be cited to give an idea of the available range of experience.

Reservation type 2/

The reservation, one of the earlier forms of territorial autonomy, emerged out of the colonial situation as an administrative measure to control indigenous peoples. The reservation type, therefore, is found in numerous former colonies. Reservations may be created by executive issuances (for example, presidential decree or proclamation). As such, reservations could also be unilaterally eliminated with the consent of indigenous peoples. Reservations generally have no legislative powers and they tend to be merely beneficiaries, of State policies and programmes, if they enjoy any such benefits at all. Ironically, the autonomy of reservations derives from State neglect, in the same manner that village communities attain their autonomy from the sheer inability of the State to serve its entire constituency. But once the reservation is found to have wealth, such as water, forests, minerals, oil and gas, the State intervenes to the disadvantage of the occupants and to the destruction of the environment. Whatever autonomy the reservation has becomes severely undermined as the State intervenes either directly as a development actor (for example, in the construction of dams) or as an agent for big business (as in logging, mining and agri-business).

As a territory, comarca refers to areas inhabited by indigenous peoples. To the Indians, a comarca is a "homeland with semi-autonomous political organization under the jurisdiction of the federal Government". The comarcas are already delimited on paper but most of them remain to be demarcated on the ground. Comarcas are governed by their carte organica (organic charter) subject to the Constitution of Panama. The Panama Constitution recognizes the right of indigenous peoples to participate in the national political system. It also provides reserves of land for their survival and economic well-being. The organic charter formalizes the cacique-congreso political system as the indigenous form of government. This ranked political organization is composed of chiefs (cacique) who represent the comarca communities in the democratic congresses.

The State retains control over the administrative district. The establishment of a comarca has to be approved by the national legislature. The organic charter, after having been agreed upon by the government ministries and the comarca leadership has to be approved by executive decree. As local government, the comarca is supervised by a national ministry, the Ministerio de Gobierno y Justicia through the Oficina de Asuntos Indigenos. The indigenous peoples have full voting rights. They have their own representatives in the national assembly and the national legislature.

The comarca judicial system resembles the federal judicial system but is run by the indigenous peoples themselves. For major crimes, however, the comarca laws yield to the federal laws. When unauthorized outsiders encroach upon the comarca territories, the central Government will support the indigenous peoples in their claims over the comarca.

The comarca economy depends on agriculture, tourism and tourism-related activities such as handicrafts. It is able to support the indigenous communities and even contribute to the State. The comarcas may welcome national and international development programmes in accordance with guidelines in the national law, as well as in the organic charter.

As of 1989, problems identified are mostly administrative. The demarcation of boundaries has not yet been completed, resulting in some boundary conflicts with outsiders. A more rational land-use plan needs to be put in place to take into account population growth and appropriate technological inputs to improve the productivity of comarca economies. Human resource development and appropriate training and education need to be undertaken to enable the comarca leaders and administrators to deal effectively with the ever-increasing complexity of national and international realities.

The Brazilian experience

The 1988 Constitution of Brazil contains provisions granting fundamental rights to the indigenous peoples of Brazil. These rights are granted to individuals, tribes and communities, but not to territories as autonomous political units. Referred to earlier as "forest dwellers", the indigenous peoples of Brazil are now referred to in the new Constitution as Indians,

Home rule 3/

Theoretically, home rule as a devolution of power from a central Government or authority to a dependent political unit can be withdrawn unilaterally by the central Government. It could be a useful administrative device for addressing short-term problems while working out long-term solutions that could lead to full self-governance or full independence for indigenous peoples.

In 1979, Greenland started its Home Rule or national self-government. By this is meant that the Danish Government transferred political authority and responsibility to the Greenlanders (Danes and Inuit). The Greenlandic Parliament has legislative and executive powers affecting the economy, taxation, education and cultural and political affairs. It has jurisdiction over the fishing industry, retail trade, construction and housing, transport and telecommunications. It has veto power on the use of non-renewable resources. Denmark, however, retains (as of 1987) jurisdiction over foreign relations and monetary policy.

In 1988, the Danish and the Greenlandic Parliaments signed a new agreement on mineral resources, oil and gas. The agreement stipulated that all revenues from these resources would be shared equally between them. Revenues beyond 500 million Danish kroner ($US 75 million) would be shared, subject to negotiation between the two parties. In 1989, 10 years after the start of Greenlandic Home Rule, the Greenlanders already controlled all matters concerning land use and the economy, political affairs, education and culture.

In Norway, the Saami Parliament has been established, and the Saami have thus been recognized as a people. Just like the Saami Parliament of Finland, the Saami Parliament of Norway deals with all matters affecting the lives of the Saami people. But the Saami Parliament of Norway is only an advisory body (as of 1987). It is expected to become a decision-making body in the future.

It should not be assumed automatically and uncritically that Home Rule is not without serious problems. Already, there appears to be uneven development taking place in Greenland, with the centre developing faster than the countryside. This is, of course, a worldwide occurrence, but the problem must be a concern of development administration even at the early stage of Home Rule.

The comarca of Panama 4/

The comarca as a concept aims to guarantee the right to self-determination of the Indians of Panama. This would be achieved through the recognition of land rights, through socio-economic development and the preservation of cultural heritage, and through internal administration by the Indians themselves following their own traditions. There is, however, no adequate protection of their rights to natural resources and they have no control over subsurface wealth.

In relation to the concerns of this background paper, I shall focus on the Philippines for the simple reason of availability of materials. Materials on European experiences, as well as those in other regions, do not offer much detail beyond the general Constitutional provisions, such as adequate representation of all indigenous communities in the various organs of power and adequate taxation powers within the region in accordance with the law. Such is the case with the Autonomy Law of Nicaragua and, with some variations, that of China.

Autonomous Region in Muslim Mindanao, Philippines

The 1987 Philippine Constitution provides that there shall be autonomous regions in Muslim Mindanao in the Southern Philippines, and in the Cordilleras of Northern Philippines. 5/ This was a response to the demand for regional autonomy by groups from the two regions (although in the case of the Moro National Liberation Front in Muslim Mindanao, the initial demand was for secession, and only later for regional autonomy).

The organic laws to govern the autonomous regions were decided by a plebiscite (held in 1989 for Muslim Mindanao and in 1990 for the Cordilleras). Unfortunately, for various reasons, the peoples of the Cordilleras, except those of one province (Ifugao), rejected the Organic Act. Since only one province approved it, the Supreme Court decided that no autonomous region could be established in the Cordilleras, in accordance with the Constitution.

Jurisdiction and powers of government

In the case of Muslim Mindanao, only four provinces of the expected 13 provinces and none of the 10 cities ratified the Organic Act. These are predominantly populated by Muslims, with Christians and one indigenous cultural community (Tiruray) in the minority.

According to the Constitution, the autonomous region shall have the following: (i) a regional executive body; (ii) a regional legislative assembly; and (iii) special courts with personal, family and property law jurisdiction. Maintenance of peace and order shall be the responsibility of the local police agencies; defence and security of the region shall be the responsibility of the national Government (art. X, section 21).

The autonomous region has jurisdiction over the following (art. V, section 2 of the Organic Act):

(a) administrative organization; (b) creation of sources or revenues; (c) ancestral domain and natural resources; (d) personal, family and property relations; (e) regional, urban and rural planning development; (f) economic, social and tourism development; (g) educational policies; (h) preservation and development of the cultural heritage; (i) powers, functions and responsibilities now being exercised by the departments of the national Government, except: (i) foreign affairs; (ii) national defence and security; (iii) postal service; (iv) coinage, and fiscal and monetary policies; (v) administration of justice; (vi) quarantine; (vii) customs and tariff;

communities and indigenous peoples. They would have liked to be called Nations. In any case, the Constitution now recognizes "the Indians' social organizations, customs, languages, beliefs and traditions, as well as their original rights over the lands they have traditionally occupied" (chapter VIII, art. 268). They have permanent possession of their lands and have exclusive usufruct over the soil, river and lake resources on them (chapter VIII, art. 269). Use of the lands for production is according to customs and traditions (chapter VIII, art. 269 (2)). It is the State's responsibility to demarcate, protect and ensure respect for property on Indian lands (chapter VIII, art. 268).

The same article provides, however, that the use of water resources, including hydroelectricity, and the research and mining of minerals on Indian lands need the authorization of the National Congress, which shall consult the affected communities who shall then be assured of the benefits according to law. Unless the proper mechanisms to ensure lasting community benefits are assured, this may be interpreted as a limitation on self-governance.

Other areas needing Congressional approval are: (i) displacement or removal of groups from Indian lands for whatever reason; and (ii) economic, social and military investment on Indian lands.

To resolve conflict and defend their rights and interests, the Indians, their communities and organizations are legitimate parties and can take legal action; the Public Minister will mediate in all stages of the case (chapter VIII, art. 270). Indeed, judicial defence of the interests and rights of the indigenous populations are institutional functions of the Public Ministry (chapter VIII, art. 232). Article 131 provides that the federal judges are to preside over and judge disputes concerning indigenous rights. Legislation over indigenous populations, however, is the exclusive right of the State (art. 23).

While there have been clear advances in the area of Indian rights in Brazil, the legislative and judicial powers of the State remain practically intact. These are serious limitations on the self-governance of Brazilian Indians.

Regional autonomy

Regional autonomy has been one of the responses of States to the increasing demand of indigenous peoples for self-determination. As an administrative device, it is intended to meet the economic, political and cultural demands of indigenous peoples within the framework of the territorial integrity and the Constitution of the country. Short of being an independent State, the autonomous region, in theory, would have vast legislative, executive and judicial powers. For these reasons, it has been used as a device to counteract separatist tendencies, especially of highly marginalized groups within a multi-ethnic nation-State. It enables Governments to keep their national territories intact.

Permits, licence, franchise or concession for the use of natural resources within the ancestral domain shall be approved by the regional Assembly after consultations with the affected indigenous cultural community (art. XIII, section 2).

As additional mechanisms for strengthening the judicial system of the indigenous cultural community, the Organic Act provides for the creation of a system of tribal courts, which may include a tribal Appellate Court. These courts shall determine, settle and decide controversies and enforce decisions involving personal, family and property rights in accordance with the tribal codes of the indigenous community (art. IX, section 14). Indigenous and customary laws shall be codified and compiled (art. IX, section 16).

In the application and interpretation of laws, resolution of conflict will be guided by the following:

(a) The Tribal Code shall apply only to the members of the indigenous cultural community and the Muslim Code only to Muslims (art. IX, section 17 (1));

(b) In case of conflict between the Muslim Code and the Tribal Code, the national law shall apply (art. IX, section 17 (2));

(c) In case of conflict between the Muslim Code or the Tribal Code, on the one hand, and the national law on the other, the latter shall prevail (art. IX, section 17 (3)).

The Autonomous Region shall have a Regional Governor and a Vice Regional Governor directly elected by the people. The Regional Governor shall be assisted by a nine-member Cabinet, at least four of whom shall come from indigenous cultural communities. The members of the Cabinet shall, as far as practicable, come from the various constituent units of the Autonomous Region (art. X, sections 1 and 2).

Through the Regional Governor, the President of the Philippines exercises general supervision over the Regional Government including the local governments, to ensure that national and regional laws are faithfully executed (art. VI, section 1). Furthermore, the Regional Government maintains close coordination with the national Government in the management of the special courts (art. VI, section 2).

The Regional Government shall devolve regional powers to the local governments where appropriate (art. III, section 3). The Regional Governor exercises general supervision over the local governments. He has control of all the regional executive commissions, boards, bureaux and offices, whose appointments are vested in him (art. VIII, sections 17 and 18).

Fiscal autonomy

With these administrative mechanisms for responsibility-sharing, conflict-resolution, cooperation and consultation in place, there is a need for fiscal autonomy to ensure the viability of the Autonomous Region, in

(viii) citizenship; (ix) naturalization, immigration and deportation; (x) foreign trade; (xi) maritime, land and air transportation and communications that affect areas outside the autonomous region; and (xii) patents, trademarks, tradenames, and copyrights; (xiii) such other matters as may be authorized by law for the promotion of the general welfare of the region.

Directly affecting the indigenous cultural community is the provision on ancestral domain and lands:

> "Protection of the ancestral domain and lands subject to the Constitution and national policies; the ancestral domain includes all lands and natural resources in the autonomous regions that have been possessed or occupied by the indigenous cultural community since time immemorial, except when prevented by war, force majeure, or other forms of forcible usurpation; it includes pasture lands, worship areas, burial grounds, forests and fields, mineral resources, except strategic minerals such as uranium, coal petroleum, and other fossil fuels, mineral oils, and all sources of potential energy: lakes, rivers and lagoons; and national reserves and marine parks, as well as forest and watershed reservations; lands in the actual, open, notorious, and uninterrupted possession and occupation by an indigenous cultural community for at least thirty (30) years are ancestral lands." (art. XI, section 1)

Resource management and conflict resolution

What laws govern the use and management of ancestral domains and lands? What happens in case of disputes? What administrative mechanisms help to ensure cooperation between the autonomous region and national Government. The Organic Act provides:

(a) The customary laws, traditions, and practices of indigenous cultural communities on land claims and ownership and settlement of disputes shall be implemented and enforced (art. XI, section 4);

(b) The Regional Government shall require corporations, companies and other entities within the ancestral domain ... whose operations adversely affect the ecological balance to take the necessary preventive measures and safeguards (art. XI, section 5);

(c) Lands of the ancestral domain titled to or owned by an indigenous cultural community shall not be disposed of to non-members, unless authorized by the Regional Assembly (art. XI, section 6);

(d) No portion of the ancestral domain shall be open to resettlement by non-members of the indigenous cultural communities (art. XI, section 7).

As a whole, the Regional Government is responsible for the exploration, utilization and development of the natural resources (except so-called strategic minerals, potential energy sources, etc.) of the Autonomous Region, subject to the Constitution and national laws (art. XIII, section 22).

(a) Local governments shall have a just share in the national taxes which shall be automatically released to them (art. X, section 6);

(b) Local governments are entitled to an equitable share in the proceeds of the use and development of the national wealth within their respective areas, to include direct benefits for the inhabitants (art. X, section 7).

In furtherance of democratic values, the Constitution provides that it is State policy to encourage, support and strengthen the active participation by the people in decision-making at all levels of governance and in the various phases of development (art. II, section 23).

It is also State policy to recognize and promote the rights of indigenous cultural communities within the framework of national unity and development (art. II, section 22).

Local government units (including the Autonomous Region), various public sectors (including indigenous cultural communities), and public agencies shall be consulted in economic development planning (art. IX, section 9).

The State shall respect the role of independent people's organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means (art. XII, section 15).

People's participation at all levels of social, political and economic decision-making shall be facilitated, by law, through the establishment of adequate consultation mechanisms. This right to participate shall not be abridged (art. XII, section 16).

Legislative bodies of local governments shall have sectoral representatives (including the indigenous cultural communities) (art. X, section 9).

The State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions, and shall consider these rights in the formulation of national plans and policies (art. XIV, section 7).

The Congress may create a consultative body to advise the President [of the Philippines] on policies affecting indigenous cultural communities, with the majority of the members coming from such communities (art. XVI, section 12).

All told, it may be said that there are enough provisions in the 1987 Philippine Constitution and the Organic Act of the Autonomous Region in Muslim Mindanao to meet the requirements of self-governance and self-sufficiency. But a number of key provisions are watered down by the Constitution itself (which is understandable within the framework of a unitary State) as well as by national law and national policies. Such limiting provisions have been perceived by critics as an infringement on the right of self-determination of indigenous peoples.

general, and the indigenous cultural community, in particular. Experiences with decentralization and regionalization show that local governments remain largely dependent on the central or national Government for financial needs. Recognizing this, the Organic Act devotes an entire article (art. X) to fiscal autonomy, guided by the State policy of ensuring the autonomy of local governments (art. II, section 25 of the Philippine Constitution).

The Organic Act provides the Autonomous Region with the power to create its own sources of revenue and to levy taxes, fees and charges. Income taxation, however, is the responsibility of the national Government.

Revenue-sharing shall be guided by article X, section 5, which deserves quoting extensively:

> "The total collections of a province or city from national internal revenue taxes, fees and charges, and taxes imposed on natural resources, shall be distributed as follows:
>
> (a) thirty per cent (30%) to the province or city;
> (b) thirty per cent (30%) to the Regional Government; and
> (c) forty per cent (40%) to the National Government.
>
> "The thirty per cent (30%) share of the province shall be distributed equally as follows: ten per cent (10%) to the province, ten per cent (10%) to the municipality, and ten per cent (10%) to the barangay [the smallest political administrative unit].
>
> "The thirty per cent (30%) share of the city shall be distributed as follows: twenty per cent (20%) to the city and ten per cent (10%) to the barangay.
>
> "The province or city concerned shall automatically retain its share and remit the seventy per cent (70%) to the Regional Government, which shall, after deduction of its share, remit the balance to the National Government on a monthly basis.
>
> "The Regional Government shall be responsible for the remittance procedures within the Autonomous Region and the Department of Finance for remittances in the National Government.
>
> "The Organic Act empowers the Regional Government, either by regional legislation or by executive agreement, to evolve a system of economic agreements and trade compacts to generate block grants for regional investments and improvements for regional economic structures. The Regional Planning and Development Board of the Regional Government shall assist the local government units in their need for counterpart funds for foreign-assisted projects."

Constitutional support for people's participation

Supportive of all these provisions on fiscal autonomy and administrative relations in the Organic Act are provisions in the Constitution itself, such as the following:

local autonomy (Autonomous Region being one form), there is no real self-governance for the vast majority of indigenous cultural communities.

It is true that there are two agencies (created in 1987 by an Executive Order) mandated to "preserve and develop the culture, traditions, institutions and well-being ... of the cultural communities in conformity with the country's laws and in consonance with national unity and development." These two agencies (the Office of Northern Cultural Communities for those north of Manila and the Office of Southern Cultural Communities south of Manila) are not explicitly mandated to empower the indigenous cultural communities for self-governance. Thus far, they have concentrated on livelihood projects, legal services, organizing of tribal councils, etc. There is no sustained programme for the recognition of the right to ancestral domain and yet land problems have always been identified by various groups and by Government itself as the central issue affecting indigenous cultural communities. In this connection, there is a bill pending in the House of Representatives of the Philippine Congress to create a Commission on Ancestral Domain which will be responsible for settling the age-old claims of the indigenous cultural communities to their ancestral domain and lands. With the next general elections already preoccupying the minds and time of Congressional leaders, the probability of the bill becoming law is nil.

In view of the failure of the national Government to carry out faithfully the Constitutional mandate for the recognition of the various rights of the indigenous peoples, those who have organized themselves have firmed up their resolve to continue their struggle for self-determination. For now, this has taken the form of regional autonomy for the peoples of the Cordillera and recognition of ancestral rights for the other groups. The organized groups, notably the Cordillera People's Alliance, the Lumad-Mindanao, and the Katipunan ng mga Kabutubong Mamamayan ng Pilipinas (National Alliance of Indigenous Filipinos) continue to launch educational campaigns on the conditions and aspirations of the indigenous peoples, to organize more groups and to mobilize them to address a wider range of concerns such as health, environment, cooperatives, appropriate technology, human rights, agro-forestry, land problems, etc., intended to strengthen their capability to govern their communities and take control of their lives. 7/

Concluding remarks

History tells us that international human rights standards, Constitutions and statutes, organic laws or charters, do not by themselves guarantee the enjoyment of human rights. In the end, the aspirations for territorial autonomy, sovereignty and democratic rights, equity and social justice, cultural freedom and integrity (and let me add the currently fashionable buzzword, sustainable development), can be realized only by persistent concerted efforts of all concerned groups - indigenous peoples, support groups, and enlightened officials throughout the world and all educational institutions.

For fiscal autonomy, which is required by the everyday concerns of administering programmes and projects emanating from Constitutions and statutes governing autonomous regions, the various indigenous communities need

It may be argued that the Organic Act itself as a national law (since it is enacted by the National Congress), could provide adequate support for more thorough-going self-governance in the Autonomous Region. Unfortunately, in the Philippines experience, as elsewhere, the draft organic acts (of both the Cordilleras and Muslim Mindanao), already flawed from the beginning, were further weakened by the subjection of numerous provisions to national laws and policies. The limitation on the use of strategic minerals and energy sources by the Autonomous Region is an outstanding example. This was expected from the character of the Philippine Congress, which, for cultural, political and economic reasons, was not predisposed to granting thorough-going autonomy to the indigenous cultural communities. 6/ The challenge remains for indigenous peoples and their support groups to continue pressing their demands for the unequivocal recognition of the right to self-determination of indigenous cultural communities.

Self-governance for the majority of the indigenous peoples of the Philippines

The challenge to continue the struggle for self-governance is especially urgent for the vast majority of the indigenous peoples of the Philippines. They are estimated to number about 6 or 7 million (excluding the Muslims) or at least 10 per cent of the entire Philippine population. In the Autonomous Region in Muslim Mindanao, the only sizeable indigenous cultural community is the Tiruray, who numbered 34,341 in 1975 (the last official census year), based on mother tongue or first language spoken. They will exercise autonomy within the Autonomous Region.

While there is a Cordillera Administrative Region (CAR) in name, it is only an administrative unit created by an Executive Order in 1987. It was meant to provide a transition to an autonomous region with full powers provided for by an Organic Act, in accordance with the Philippine Constitution. Partly because CAR was meant to be merely transitory and partly because it was intended as a counter-insurgency measure, it is a highly watered-down version of regional autonomy. Its key officials are appointed by the President of the Philippines. CAR is to coordinate the planning and implementation of programmes and services in the region. It coordinates with national Government in the supervision of field offices of the various government departments and in the identification, planning and acceptance of projects and activities in the region.

CAR has no taxation powers, other than those already granted by the national Government to local governments. The Executive Order, however, specifies that at least 50 per cent of the revenues generated in the region should be left with CAR and the local governments in the region. CAR has no legislative powers, although it can promulgate and implement needed rules and regulations.

Interestingly enough, part of its scope of authority is the "development of indigenous laws and political institutions, particularly those of direct democracy and collective leadership, as well as the promotion of indigenous institutions and processes for conflict resolution and dispute settlement". In effect, therefore, despite the intent of the Constitution to encourage

Cultural Survival Quarterly 9(1) (1985) pp. 31-36; Toby Alice Volkman, "The hunter-gatherer myth in southern Africa", Cultural Survival Quarterly 10(2) (1986) pp. 25-32; Robert K. Hitchcock, "Hunters and herding: Local level livestock development among Kalahari San", Cultural Survival Quarterly 11(1) (1987) pp. 27-30.

3/ For a general comment on home rule see John J. Schrems, Principles of Politics, Prentice-Hall, Englewood Cliffs, New Jersey, 1986, p. 253. On Greenland, see IWGIA Newsletter No. 51/52 (October-December 1987), pp. 41-44; IWGIA Yearbook 1988, p. 57; IWGIA Yearbook 1989, pp. 39-41.

4/ See Peter H. Herlihy, "Panama's quiet revolution: Comarca homelands and Indian rights", Cultural Survival Quarterly 13(3) (1989) pp. 17-24, see "Indian Rights in the New Brazilian Constitution", Cultural Survival Quarterly 13(1) (1989) pp. 6-12; Marcio Santilli, "Notes on the constitutional rights of the Brazilian Indians", Cultural Survival Quarterly 13(1) (1989) pp. 13-15; Elizabeth Allen, "Brazil: Indians and the new Constitution"; Third World Quarterly 11(4) (1989) pp. 148-165.

6/ The Constitutional Commission which drafted the 1987 Philippines Constitution did not provide for territorial autonomy for other indigenous cultural communities since they were not as organized as the Cordillera and the Muslim groups and occupied areas which were not contiguous. As understood in the academic literature and by the Constitutional Commission, indigenous cultural communities refer to those who were not Islamized and Christianized and have retained much of their pre-Islam and pre-Western culture.

7/ Ponciano L. Bennagen, "State policies and indigenous peoples of the Philippines", paper prepared for the UNESCO Division of Human Rights and Peace, Paris, 1989. This sentiment has also been expressed by others, Marcio Santilli, op. cit., p. 15; IWGIA Document No. 62 (1989), p. 101; Baguio Cordillera Post, 9 October 1988, p. 5.

9/ Cordillera Resource Center, "What is genuine regional autonomy?" Cordillera Papers Monograph No. 1. Baguio City/Cordillera Resource Center, 1989.

to organize and consolidate themselves for effective and efficient action. Owing to the multiplicity of forces, often with diverse and opposing interests, there will always be organizational and administrative problems. The search for an enduring basis of consensus has to proceed. Divisive and obstructive factors need to be identified and remedied immediately in as democratic a manner as possible.

Where there is no effective indigenous representation in the organs of power and in the administrative machinery, it is important to obtain the cooperation of enlightened and sympathetic non-indigenous officials. It has been observed (in Brazil, Australia, the Philippines, Argentina, in Europe and elsewhere) that where there are enlightened and sympathetic non-indigenous officials in the central Government, the general cause of democratization is advanced. For one thing, bureaucracy may be easier to mobilize for the delivery of goods and services, including the planning and management of development specifically addressed to the indigenous peoples. Educational institutions and the mass media should be mobilized to educate government officials, decision makers, opinion makers and the public about the conditions and the rights of indigenous peoples. Appropriate training in administrative skills to complement indigenous institutions has to be undertaken.

Ultimately, however, fiscal autonomy and self-governance are best served by the direct participation of the indigenous peoples in the development process and in their actual involvement in self-governance. These could be achieved both in the formal structures of government and in community associations, including a broad range of mechanisms for popular participation. The international solidarity network needs to be expanded and consolidated to help create a global political, economic and cultural climate favourable to the enjoyment of human rights in general and of indigenous peoples' rights in particular. All these human organizations, after all, are responsible for translating the spirit and the letter of Constitutions and statutes into food and medicines, clothing and shelter, dances and songs, prayers and rituals, and all other things that make human rights real in the everyday life of indigenous peoples.

Notes

1/ Cf. Raul P. de Guzman, and Danilo R. Reyes. "Public administration and the agenda of change", in Raul P. de Guzman et al (eds.), Public Administration in a Changing National and International Environment, Manila: Europa Secretariat General 1989 and George K. Najjar, "Development Administration and 'New' Public Administration: A Convergence of Perspectives", Public Administration Review 34(6) (1974), pp. 534-537.

2/ On United States reservations, see IWGIA (International Work Group for Indigenous Affairs), Newsletter No. 33 (1983), pp. 115-116; IWGIA Yearbook 1989, pp. 50-59; IWGIA Document No. 62 (December 1988/January 1989); IWGIA Document No. 68 (1991). On the Philippines, see Clavel, Leothiny S. They Are Also Filipinos: Ten Years With the Cultural Minorities. Manila/Bureau of Printing; 1969. On Africa see Robert K. Hitchcock, "Foragers on the Move".

Two defining characteristics of the term "indigenous" may be identified, one legal and one socio-economic. First, the term "indigenous" points to the fact that the populations/peoples in question are primarily characterized by their long-standing ("Since time immemorial") connection with a specific territory, which later in time has been taken over or at least cohabited by other population groups. Second, the original inhabitants will often find themselves in a position of legal and/or de facto subordination or domination and economic deprivation. They suffer from lower living standards than the rest of the population, which may in itself raise an issue under the International Covenant on Economic, Social and Cultural Rights. In order to remedy this situation, the original inhabitants may frequently try to claim "historic rights" in political and legal forums of the State in question or bring the claims to the international arena.

Claims to historic rights are often claims to, inter alia, constitutional recognition (if not full self-determination as a nation and subsequently as a full-fledged State), self-government, land rights, natural resource rights and language rights.

2. The international legal framework

Members of indigenous populations are, as any other individual, protected by applicable global or regional human rights conventions such as the International Covenant on Civil and Political Rights and, in large parts of Europe, the European Convention on Human Rights and Fundamental Freedoms. 6/ Most major human rights conventions contain provisions prohibiting discrimination against individuals on the basis of their ethnic origin. But this negative statement of equality may not prove sufficient.

2.1. Minorities

The question of the rights and protection of indigenous peoples is closely related to the legal status of minorities. As stated above, indigenous people often constitute a minority in a particular State, but may enjoy special minority rights or demand special protection. 7/ Numerically inferior indigenous populations may be classified as a "qualified minority".

Much time and effort has been spent on defining a minority. 8/ It has not been possible to obtain international consensus on a comprehensive definition, both for conceptual and, more importantly, for overriding political reasons. 9/

One recent development in a regional, quasi-legal context is the Concluding Document of the Copenhagen CSCE/CHD meeting (Copenhagen, June 1990), in which the term "national minority" is accepted. 10/ In the Charter of Paris for a New Europe, which was adopted by the Heads of State or Government of the participating States of the Conference on Security and Cooperation in Europe (Paris, November 1990), it is confirmed that "the ethnic, cultural, linguistic and religious identity of national minorities be protected and conditions for the promotion of that identity be created". 11/ At the same time it was decided to convene a meeting of experts on national minorities in 1991. 12/ In the Concluding Document of the Moscow meeting, held in September-October 1991, no significant further development was recorded.

Effective means of planning for and implementing autonomy, including negotiated constitutional arrangements and involving both territorial and personal autonomy

Background paper prepared
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1. Delimitation of the topic

Legal and practical aspects of setting up autonomy arrangements for indigenous populations have gained increasing practical importance in the last few decades.

In the present context, "autonomy" is understood to mean a legal regime, whereby (revocable or irrevocable) powers of self-government, including legislative competence, concerning one or more specified areas - within the overall constitutional make-up of the State in question - are conferred on a distinct group of individuals (defined by their ethnic origin, and/or language, etc.).

The powers conferred may be restricted to certain or all aspects of personal jurisdiction or may be extended to territorial jurisdiction. 1/ This paper will touch upon experiences covering both personal and territorial application of self-government.

By definition, self-government will have to take place within the constitutional framework of a particular State, be it a unitary State or a confederation. Whether the system of self-government rests on the Constitution itself or on a statutory basis of a subsidiary nature may entail important theoretical and practical consequences, for example, in relation to the question of fundamental rights of indigenous populations and of the (ir)revocability of the autonomy arrangement.

In international diplomatic discussions one will often find the term indigenous "populations" and not "peoples". 2/ This may be taken to indicate that some State representatives primarily see the question of indigenous groups as situations which may resemble that of ethnic and other minorities 3/ within States and not as self-determination of peoples and, thereby, not entailing the establishment of new States. 4/ In the present context situations where the right of self-determination of indigenous peoples may be pertinent will not be dealt with. 5/

One has to recognize, however, that it may be very difficult to determine the precise border line between the application of article 1, paragraph 1, of the International Covenant on Civil and Political Rights and article 27 of that Covenant, on minorities. In many situations there will be a grey zone between the right to self-determination at the one end of a continuum and the rights of minorities at the other end. The paper will take its point of departure in the situation described in article 27 of the International Covenant on Civil and Political Rights.

Note: The opinions expressed in this paper are those of the author.

point of view, is perhaps voting rights. In a democracy it is axiomatic that every citizen has an equal right to influence the composition of the legislature. If indigenous peoples are in the minority, they may claim certain prerogatives in order to remedy past (and present) disadvantages. Such prerogatives easily militate against fundamental democratic principles. Respect for the formal rules of democracy may make it difficult to rectify past injustices committed under undemocratic circumstances.

Land rights and claims to redistribution of land very often raise complex questions. The livelihood of members of both the minority and the majority may depend on such disputes. Should historic rights prevail or should consideration for each individual citizen prevail (which may mean that historic rights are not given priority or that they only lead to some kind of compensation)? In any case it may be very dangerous to leave the solution to be found on an ad hoc basis before individual courts of law.

As stated above, in democratic societies all citizens, indigenous as well as late coming immigrants, are - at least in a number of situations and for a number of purposes - (meant to be) equal in law and fact. This also means that general international human rights provisions should apply to indigenous peoples' communities. 20/ Special protection may not degenerate into unwarranted privileges. The risk of this happening on a general scale for the time being is, however, minimal.

As the "cold war" in human rights, at least in an East-West perspective, may by now have subsided somewhat, it is time for the United Nations to move on. One initial step could be the amendment of the International Covenant on Civil and Political Rights so as to include a specific provision on indigenous peoples' rights.

2.3. International Labour Organisation Conventions

Neither the Universal Declaration of Human Rights, the Covenants, nor the International Convention on the Elimination of All Forms of Racial Discrimination refer specifically to indigneous populations. The same is also true of the European and American human rights instruments. The International Labour Organisation (ILO) was an exception to this trend. The adoption of ILO Convention No. 169, which is a partial revision of ILO Convention No. 107, is a step forward for indigenous peoples and populations. 21/

The development of the term "indigenous" started with ILO Convention No. 107, article 1 (1) (b), which defines indigenous populations as people who descend "from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong". This definition stressed the historic relationship between the indigenous people and the inhabited land.

In 1971, the Economic and Social Council, by resolution 1589 (L), authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) to undertake a study of the problem of

2.2. Article 27 of the International Covenant on Civil and Political Rights

The most important legally binding human rights provision for the time being is probably article 27 of the International Covenant on Civil and Political Rights. This provision has to be seen in the light of other provisions in the same Covenant and in the context of other Conventions, especially the International Covenant on Economic, Social and Cultural Rights and International Labour Organisation Convention 169.

Article 27 is concerned with minorities characterized by their ethnic origin, religion or language. The main thrust of the provision is to ensure that State authorities do not interfere with the daily life of the minority (protection against State measures). Article 27 guarantees that the minority in question has a right to maintain its own culture, exercise religious practices and use its own language within the minority population, without outside interference.

The existence of a minority is often easily verified when it comes to indigenous populations, but may be more difficult in other instances. 13/ The real acceptance and formal recognition of a minority by State authorities may, however, be difficult to obtain in both cases.

The travaux preparatoires of article 27 demonstrate that the question of positive measures was discussed in some detail during the negotiations on the actual wording of article 27. 14/ The prevailing opinion in the Human Rights Commission at that time was that no obligation to provide positive measures, such as building and maintaining special schools for minority children, existed. Article 27 recognizes, however, that it may be relevant to give minorities preferential treatment.

It must be admitted that the scope of article 27, as conceived, is somewhat limited. The main function of the provision is primarily to act as a barrier to undue State interference with the "internal life" of the particular minority. 15/ The subsequent jurisprudence from the United Nations Human Rights Commitee has not meant a fundamental break away from the original intentions of the States parties. 16/ In the cases of Kitok v. Sweden 17/ and Ominayak/Lubicon Lake Band v. Canada, 18/ the Human Rights Committee has, however, introduced an interpretation of the concept of "culture" in article 27 which implies an extension of this concept to cover traditional economic activities.

Article 27 can be said to cater for certain classical human rights problems. Solutions to the specific problems of indigenous populations cannot, however, be said to be exhausted with the adoption of this provision. Subsequent experience and ensuing legal developments bear testimony to that.

The wish to reconcile majority and minority rights may present difficult questions of how to strike a fair balance between the two. This balancing act is particularly painful in areas where the clash takes place between human rights of the same legal standing (i.e. rights which can be weighed against each other on the same level). 19/ Conflicts between majority and minority population groups often raise issues of this kind and present a unique challenge to democratic societies. The most difficult area, from a theoretical

2.4. Subsequent developments

Independent of the developments with regard to the ILO Conventions, the Sub-Commission decided to establish the Working Group on Indigenous Populations in order to develop standards concerning the rights of indigenous populations and peoples. As Chairman-Rapporteur, Mrs. Erica-Irene A. Daes prepared a draft declaration on the rights of indigenous peoples. 26/

The idea underlying the endeavours to have a declaration adopted is the belief that group protection and autonomy in the political sphere can best be attained by providing special rights and other measures. This approach to the concerns of indigenous peoples can already be found in the International Convention on the Elimination of All Forms of Racial Discrimination.

In the draft universal declaration on the rights of indigenous peoples, prepared by the Working Group on Indigenous Populations, 27/ it is stated in part V, paragraph 23, that they have the right "to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions". In paragraph 24 it is furthermore declared that indigenous peoples have "the right to decide upon the structures of their autonomous institutions", including determination of the membership, and States have the "duty ... to recognize such institutions ... through the legal systems and political institutions of the State". 28/

It may be worthwhile considering whether the aspirations voiced in these draft provisions are reflected in any existing legal arrangements. As far as the present author is aware, only very few States have implemented measures as wide-ranging as described in these provisions.

The so-called "Home Rule" arrangement for Greenland may be offered as an example of a fairly comprehensive implementation of the requirements mentioned. 29/ A short look at the legal framework of the Greenland Home Rule may thus be warranted (see Infra, item 3.2.).

2.5. Individual and collective rights

In recent years many debates have centred on the inadequacy of human rights coined in individual terms. The historic origin and the classical tradition emphasize the rights and freedoms of the individual against the State. This is still highly relevant in modern democracies. The notion of self-determination implies some kind of collective decision-making process which has given rise to the concept of collective rights. The analysis of the exact legal content of the notion of collective rights has not progressed very far. Is it merely a "pooling" of individual rights or is it a genuine, self-contained right?

It is important that more effort is devoted to this exercise inasmuch as the notion of collective rights in recent times has been abused, with detrimental effects, to legitimize and emphasize the duties of the individual to the State and/or the governing authorities.

discrimination against indigenous populations. The Sub-Commission appointed José R. Martínez Cobo to prepare the study. In his study 22/ he defined indigenous populations as follows:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."

The study by Martínez Cobo signified a change by which the original idea of assimilation of indigenous populations, which found expression also in ILO Convention No. 107, was transformed into the concept of self-definition or self-identification as a fundamental criterion for determining the groups to which rules of indigenous populations apply. 23/ Martínez Cobo stated, inter alia, that on an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

ILO Convention No. 169 adopts, in article 1 (b), the following definition of indigenous peoples, which stresses the political status of the indigenous people in question. These are regarded as "indigenous peoples" on account of "their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions". This definition produced considerable controversy. It was argued that the text used terms which did not reflect international law. Several governmental representatives expressed definite preference for the word "populations" rather than "peoples". 24/ The adoption of the text was made possible by adding paragraph 3, which states:

> "The use of term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." 25/

ILO Convention No. 169 emphasizes the rights of indigenous peoples to exercise control over their own institutions, ways of life and economic development, and to maintain and develop their identities, languages and religions, within the framework of the States in which they live (Preamble, para. 6).

It is significant that ILO Convention No. 107 was never ratified by more than a few States, and it can be expected that the rate of ratification of ILO Convention No. 169 may also be low. Several countries in all parts of the world seem to experience great problems in recognizing and guaranteeing the rights of indigenous populations.

It is important to stress that the following list does not necessarily entail a qualification of the genuineness of the degree of self-government obtained under the different arrangements. In some States a statutory arrangement may ensure a higher degree of real self-government than a constitutional arrangement in other States and vice versa.

The list of different legal modi vivendi between the State and the indigenous people could be construed as follows:

1. Independence of the indigenous people (a State-to-State relationship, perhaps with special ties such as trade arrangements);

2. Treaty relationship (a State-to-quasi-State relationship, e.g. the New Zealand Waitangi Treaty);

3. Constitutional recognition of distinct status (e.g. Norway);

4. Statutory arrangement of a more or less irrevocable nature (e.g. Greenland);

5. Other de facto arrangements; and

6. Non-recognition of a distinct status.

Different instances of types 3 and 4 will be touched upon below. It is important to bear in mind that the political processes underlying legal recognition of different degrees are dynamic. Thus, some of the present arrangements may "move up on the list" in the course of time, while others will have found (or will have been put to) rest in a specific type of relationship.

3.2. The Greenland Home Rule Act

The Greenland Home Rule Act (Danish Parliamentary Act No. 577 of 29 November 1978) is an example of a self-government system which goes comparatively far in the direction of real self-government within a unitary State system. As can be seen from the Act, the Home Rule system does not mean a disruption of the territorial and legal unity of the Kingdom of Denmark. 30/ The Greenland Home Rule arrangement forms part of a historic tradition in which the independence of Iceland from Denmark in 1948 and the passing of the Home Rule Act for the Faeroe Islands in 1948 (Act No. 137 of 23 March 1948) are the main elements.

3.2.1. The international legal status of Greenland

It is stated in section 1 (1) of the Act that Greenland is "a distinct community within the Kingdom of Denmark. Within the framework of the unity of the Realm, the Greenland home rule authorities shall conduct Greenland affairs in accordance with the provisions laid down in this Act". This provision is to a certain extent modelled in accordance with the wording of the Faeroe Islands Home Rule Act.

2.6. The legal-political process of internationalization and the impact of the nation-State

The present decade is probably going to be one of the most decisive periods of the century. Momentous changes in the international power structure and the rise of democracy in the northern hemisphere are some of the key elements. At the same time an unprecedented scale of global economic (and ensuing political) integration is taking place. In Europe this is most clearly seen in the possible development of monetary and economic union and possibly even political union within the European Community.

The integration process presupposes a reduction of State sovereignty and corresponding transferral of powers to supra-national or federal authorities and thereby, at least potentially, reduces the participating States to self-governing territories. At the same time, in Eastern Europe, a process of decolonization and the exercise of self-determination is taking place, resulting in the genesis of new States or redesign of existing States.

This dual-track development, at least in Europe, makes it much more difficult to talk about minority questions inasmuch as some (Western European) States may now become minority self-governing territories within a European federal structure. Some of the smaller European Community States with an indigenous language of their own (for example, Denmark and the Netherlands) may find themselves in a situation where minority protection and minority rights are called for in the long run.

Another feature which deserves mention is the changing legal position of the individual in public international law. The obvious need for international cooperation in different areas, such as law enforcement, and the growing realization that human rights concerns cannot be left to the individual State leads to a growing pressure for recognition of the individual as a subject of public international law. This development towards recognition of the individual on the international plane and access to humanitarian intervention is reflected in the tenth preambular paragraph and paragraph 17.2 of the Concluding Document of the recent Moscow meeting of the Conference on Security and Cooperation in Europe.

These different and to a certain extent parallel and interdependent developments (international integration, building of federal structures, growing exercise of self-determination, the rise of democracy and the strengthening of the international legal position of the individual) will no doubt have an impact on the political and legal possibilities of indigenous peoples.

3. State implementation of self-government or more restrictive arrangements

3.1. The legal foundation: a typology

A survey of existing arrangements of self-government shows that they rest on different legal foundations. A list can be established of different types of relationships, ranging from full independence with special ties between the States (a "Commonwealth" type) to non-acceptance of any distinct status for the indigenous people.

It is, for instance, sometimes the case that representatives of the Greenland Home Rule Government travel abroad and negotiate fisheries agreements with States. Representatives have travelled to the USSR and Canada for discussions on fisheries.

A very special situation arose when Greenland decided to leave the European Community (EC) with effect from 1985. 32/ During the negotiations on the secession of Greenland from the EC, Denmark and Greenland were in a way represented on both sides of the table inasmuch as Greenland and Danish representatives were negotiating with the EC Commission and at the same time the Danish Government was sitting as a member of the EC Commission's delegation and thereby also representing Greenland interests on the EC Commission side. This instance provides another example of the proven flexibility of the Greenland-Danish relationship.

Recently it has been reported in the media that the Greenland Home Rule Government has suggested to the Danish State Government that there should be a distinct Greenland representation on different Danish delegations abroad, for example, the Danish delegation to the annual session of the United Nations General Assembly. This wish by the Greenland Home Rule Authority has met with preliminary approval from the Foreign Minister. 33/

The Home Rule Act delegates many other powers to the Home Rule Government. 34/ Parts of the list of areas transferred to the Greenland Home Rule Government may give an impression of the scale. As of May 1979: the Greenland Home Rule administration and the management of the municipalities. By the end of 1980: taxes, schools, social services, the church, training of teachers and social workers, radio and television, library system, labour exchange, management of foreign workers, management of commercial fisheries and hunting. By 1981: training in business studies, social assistance to Greenlanders in Denmark, conservation, planning, museums. By 1982: certain labour market regulations. By 1984: names of places in Greenland. By 1985: Royal Greenland Trading Company, financial support to the industry, the Greenland flag, further labour market regulations. By 1986: management of imports, air traffic, competition regulation. By 1987: The Greenland Technical Organization, import of oil, electricity supply, water management, heating, telegraph and telephone communications. By 1989: management of non-commercial hunting and fishing. By 1991: further labour market regulations and management of certain airports. By 1992: the health service.

As is apparent from this list of the mandates handed over, the powers delegated include many, if not most, of the areas which are subjects of special rights of indigenous peoples. The list probably extends somewhat further than is required in the draft declaration mentioned above under item 2.4. One important area not handed over yet is law enforcement, prisons and the judiciary. The judiciary and the law enforcement system is still integrated into a uniform Danish legal system. 35/ This area, of course, presents some specific problems. Nevertheless, should the Home Rule Government want it, this area also should be mandated to the Home Rule. This, however, will require a change in the present legislation.

Although Greenland, according to the Home Rule Act, on the one hand is a "distinct community" within the Kingdom of Denmark, this wording on the other hand emphasizes that the Greenland community is not like any other local community (for example, municipal council) in Denmark. It is a community with special features and with its own rights and obligations, including legislative powers.

At the same time this phrasing also makes it quite clear that the Greenland Home Rule Government is not a State Government, it is a Government with powers delegated by the legislators of the Kingdom of Denmark. 31/ The Home Rule Government is vested with further reaching powers than a municipal authority, but is not - as a Danish municipal authority is - constitutionally protected against repeal of the Home Rule Act as such.

Within the overall constitutional framework the law makers have, however, found a compromise between strict adherence to the constitutional principles of a unitary State and more pragmatic considerations. These pragmatic considerations have resulted in some very interesting delegation of powers to the Home Rule Government. A system which may set a precedent for future developments in other parts of the world.

As seen from the point of view of the Home Rule Act, Greenland does not possess a separate legal personality in public international law. Greenland is, from this point of view, not able to enter into treaty obligations on her own. But in practice this formal point of view is slowly being changed.

3.2.2. Foreign policy and treaty making powers

In section 10, paragraph 1, of the Act it is stipulated that "the home rule authorities shall be subject to such obligations arising out of treaties and other international rules as at any time are binding on the Realm". Furthermore, in section 13 it is stated that "treaties which require the assent of the Folketing and which particularly affect Greenland interests shall be referred to the home rule authorities for their comments before they are concluded".

And finally in section 16, paragraph 1, it is emphasized that "the home rule authorities may demand that in countries in which Greenland has special commercial interests Danish diplomatic missions employ officers specifically to attend to such interests", and in paragraph 2 it is furthermore laid down that "the central authorities may after negotiation with the home rule authorities empower the home rule authorities to advance special Greenland interests by taking part in international negotiations of special importance for Greenland's commercial life".

To this is added in paragraph 3 that "where matters of particular interest to Greenland are at issue, the central authorities may on a request by the home rule authorities authorize them to negotiate directly, with the cooperation of the Foreign Service, provided such negotiation is not considered incompatible with the unity of the Realm".

3.2.5. Assessment of the Home Rule arrangement and possible independence of Greenland

Greenland is still very dependent on economic support from the Danish State. Naturally, this economic dependence creates a certain disequilibrium in the relationship. Research has shown that much, if not most, of the financial aid to Greenland actually returns to Denmark, inasmuch as the money is spent on goods and services from Denmark.

The Danish State and the Danish people no doubt feel some kind of historical responsibility for the evolution and fate of Greenland. This will most likely guarantee a reasonable degree of financial assistance for a long time to come.

One basic and peculiar aspect is the fact that Denmark and Greenland are geographically divided. This fact may have been a contributing factor to the demonstrated willingness to implement a fairly comprehensive Home Rule system. 37/ In those States where it is more difficult to distinguish the relevant territories, the legal and practical problems may increase accordingly. This may especially be the case in States where the immigrant population is scattered all over, including areas of indigenous habitation.

Could Greenland become an independent State if she so wished? In the present stage of the relationship this may only be of academic interest. The question of formal independence for Greenland has, however, recently been clarified in a statement by the Danish Prime Minister, delivered at a Nordic Council meeting on 26 February 1991. In his statement, the Danish Premier recognized the right of the Greenlanders and the Faeroese to opt for (full) independence, should this be clearly expressed by the Greenland and Faeroe Islands populations.

Consideration of the risks to the natural environment has meant that mining and other exploitation of minerals has been kept at a very low level. It also means that the economic interests of the Danish State and of the Danish private sector in Greenland are rather limited. To this must be added that Greenland probably no longer "enjoys" the same strategic interest from a Danish State and NATO defence point of view. These and other factors may mean that Greenland, from a purely political point of view, would be able to become an independent State if the Greenland population made a firm commitment to that cause. It is, however, perhaps more fruitful for Greenland to be dependent on a small far-away State like Denmark than on some of the bigger immediate neighbours. To this must be added that the EC may like to keep Greenland within the EC sphere of interest, primarily because of the potential occurrence of huge living and non-living natural resources.

The final evaluation of the Greenland-Denmark relationship and Home Rule can, of course, only be undertaken by the Greenlanders themselves. From an outsider's point of view it seems that Home Rule has worked according to plan and that its implementation has been smooth, especially when compared to the awesome dimensions of the task.

The Home Rule Act thus seems to be able to serve as an example for other home rule arrangements.

3.2.3. Natural resources

As regards the right to make use of natural resources, section 8 of the Act contains rather equivocal language. It is stated in section 8, paragraph 1, that "the resident population of Greenland has fundamental rights to the natural resources of Greenland". 36/ This wording apparently means that the right of the Greenland population to the natural resources is a question of fundamental law, i.e. a question which may not be altered (restricted) by statutory regulation or even constitutional amendments.

However, in the same section it is stated (para. 2) that "prospecting and the exploitation of these resources are to be regulated by agreement between the Government and the Landsstyre". In paragraph 3 a kind of veto right is guaranteed so that the Greenland authorities may in fact block any attempt at the use of natural resources in Greenland, but the interesting thing is that the Greenland authorities cannot themselves make any positive decision as to the use of natural resources without prior agreement with the State Government.

So when it is stated above that section 8 represents a strange kind of compromise between, on the one hand, saying that the rights of the Greenland population are fundamental and, on the other hand, saying that the Danish Government should have a decisive word in the decision-making process, it is also indicated that the fundamental character of the rights must be seen within certain limitations.

A comparison with the draft declaration indicates that the established system of power sharing in the management of Greenland natural resources probably meets the requirements in the draft declaration to a large extent.

3.2.4. Gradual implementation of the transferral of areas of competence

An important element of the Home Rule Act is that it envisages the transferral of all powers, except certain State functions such as foreign policy, treaty making power and defence, to the Home Rule Government. Today there is no doubt that the State Government wants the Home Rule Government to take over and administer as many areas as possible.

One of the reasons for the relative success of the Home Rule system is probably this gradual process of transferral of responsibility, which has been conducted in an atmosphere of good faith. This has made it possible for the Home Rule Government to build up expertise and the necessary administrative structures, although it is still heavily dependent on the recruitment of civil servants from Denmark. Soon the Home Rule Government will be capable of taking over all the responsibilities originally envisaged. Only the constant strains on the Greenland economy may put limits on further new legal and political developments in this process.

This provision is in line with the special measures approach taken by existing international instruments, and may set an interesting example for other States.

In Norway there is an ongoing discussion on Sami rights on, for instance, the right to administer natural resources in Sami settlement areas and on the continuing implementation of equality of the Sami language and the Norwegian language.

In April 1991 the Norwegian Government published a report on transferral of tasks and authority to the Sameting. 42/ In the report it is suggested that the consultative status of the Sameting should be strengthened and that a number of different administrative matters should be transferred to and managed by the Sameting. The Report suggests, inter alia, that the management of financial support to Sami cultural and educational activities, reindeer herding, etc. should be managed by the Sami.

3.3.2. The proposed Swedish arrangement

In 1983 the Swedish Government decided to establish a committee to look into the Sami population's situation in Sweden. This Committee has, up to 1990, published four reports: on the status of the Sami people in public international law (SOU 1986:36), on Sami law and the Sami advisory body (SOU 1989:41), on change of language and the preservation of language (SOU 1990:84) and a report on Sami law and the Sami language (SOU 1990:91). The last report was presented to the Council of State and the Under-Secretary for Legal Affairs in November 1990.

In the report it is recommended that the special status of the Sami as an ethnic minority and an indigenous people in Sweden be codified in the Constitution Act. It is furthermore recommended that a special Act on Sami conditions be adopted which will include provisions concerning the promotion of Sami culture and social life, above all through the establishment of a Sami Advisory Body (Sameting) elected by the Sami people themselves. The tasks of the Sameting should be to work for the preservation and development of the culture and social life of the Sami people, including decision-making power on the distribution of State grants and of moneys from the Sami Fund to Sami culture and Sami organizations, the right to take part in community planning, ensuring that the interests of reindeer herding are allowed for in connection with the exploitation of land and water, dissemination of information on Sami conditions and the position of the Sami in Swedish society, the promotion of Sami culture and cooperation with other authorities and community bodies and right of returning official statements on matters affecting Sami interests.

From this it will be seen that the proposed Sameting is not a full-fledged parliament, but is first and foremost a consultative body with certain powers of allocation of economic means. The Committee recounted in one of the reports (SOU 1989:41, p 71) that "the Sameting would acquire the status of an obligatory advisory body. Given the special expert knowledge which the Sameting will possess of matters relating to reindeer herding, its views will carry a great deal of weight in the processing of permit applications".

3.3. Existing or proposed indigenous advisory councils in Norway and Sweden

It may be interesting to look at the experience of other Nordic countries. 38/ One may, however, object that the total number of people affected by the different legal arrangements in the Nordic area is comparatively small. All in all, not more than 100,000 indigenous people in Greenland, Norway and Sweden can be said to be affected by these arrangements. This figure, of course, has to be seen in comparison with the overall estimated figure of indigenous populations (including tribal people) worldwide, which is put at 300 million. The majority of them live in Asia and the Americas, and only some in the Polar region and northern Europe.

3.3.1. The Norwegian arrangement

In Norway a limited system of advisory powers has evolved in the Sami areas within the last century, although it is probably fair to say that legal recognition of the Sami people has come later than more practical initiatives to support education and culture. 39/

In 1987 the Norwegian Parliament adopted Act No. 56 of 12 June 1987 on the establishment of the Sami Advisory Body (Sameting) and other Sami legal questions. 40/ It is stated in the introductory article of the Act (art. 1, para. 1) that the purpose of the Act is to build a framework for the Sami population group ("folkegruppe") in Norway in order that this population group may secure and develop its language, its culture, and its social life ("samfunnsliv"). In article 2 of the Act the Sami Advisory Body is given powers of general consultation. The Sameting may on its own initiative raise any question of interest to the Sami population. The Sameting, however, may not take any decisions binding on Norwegian citizens unless specifically authorized in the Act or any other enabling statutory provision.

Furthermore, it is stated that Norwegian State authorities should refrain from taking any decisions concerning Sami matters without having first consulted the Sami Advisory Body. In article 2, paragraph 13 it is stated that both the Sami and the Norwegian languages may be used at meetings in the Sameting. The Act entered into force on 24 February 1989.

As can be seen from this brief survey of the Act, it provides a very broad framework for further developments in the relationship between the Norwegian State and the Sami population. It is noteworthy that the Sameting has not been vested with legislative powers even though it has the general capacity to raise any matter of interest to the Sami population.

In early 1988 the Norwegian parliament adopted a resolution to include a new article 110a in the Constitution, with the following wording:

"Article 110a.

It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture, and way of life." 41/

5. Suggestions for further action

Building on some of the experiences described above, one may be able to point to some priorities for future action.

I. It seems very important that genuine political will to implement home rule arrangements in good faith is present.

II. Constitutional obstacles to home rule are mainly technical obstacles. They can be solved, if real political will exists. Indigenous communities should be recognized as distinct communities within the State structure.

III. Home rule arrangements may be a confidence-building measure which ensures, rather than destroys, the unity of States. These arrangements contribute to reducing tensions and keep the international community at ease.

IV. Transferral of powers should be done in an orderly manner. Preparation for the task is vital. For States acting in good faith it is important to demonstrate that home rule is a functioning alternative to more restrictive "solutions". The political organization of the indigenous people should be encouraged as a preparative step to home rule. Training of future civil servants and managers should be undertaken in order to facilitate gradual acceptance of responsibility.

V. Economic assistance from the State to the home rule, at least in a transitory phase, is crucial. A long-term commitment of some kind will also be necessary.

VI. Indigenous home rule arrangements are not exempt from general human rights obligations. Special protection does not warrant human rights violations. Within the home rule a fair balance must be struck.

VII. The powers mandated should be as broad as possible within the State structure. The criteria should be: what is best solved at the local level and what meets the particular interests and needs of the indigenous population? In order to obtain a real level of self-administration, if not full-fledged home rule, it is important that indigenous people are "taught" to administer themselves. They can only learn to become working democracies by being allowed to practise democracy, by being able to legislate for themselves and to enforce their own rules. The indigenous language must be recognized.

VIII. Indigenous peoples recognized as distinct communities, preferably on a constitutional level, may derive benefits from staying within a State structure. Mutual interests may exist (economic, defence, etc.). Compromise as to the exploitation of natural resources (e.g. mutual consultation with veto powers), with due consideration of the environmental impact, may be the price to be paid in real politics, if this approach is adopted.

IX. The International Covenant on Civil and Political Rights should be amended so as to include a specific provision on indigenous peoples' rights and special measures to rectify past injustice.

One of the major problems in connection with the living conditions of the Sami people is, of course, the exploitation of natural resources, including reindeer herding, the preservation of the forest, and other uses of land and water. The Committee recommended that it be made clear in the Reindeer Herding Act that the reindeer herding rights of the Sami are based on immemorial prescription, that all Sami enjoy the right of reindeer herding, and that the right of reindeer herding is a special right attaching to real property. The Committee also suggested special consultation procedures for new projects on large-scale forestry. Finally it was suggested that the coordination of Sami affairs within the Cabinet Office be established on a more permanent basis. A special coordinating secretary for Sami affairs should be considered.

In the last report (SOU 1990:91), on Sami rights and the Sami language, it is recommended (p. 23) that "the use of Sami be allowed in dealings with certain national authorities concerned with Sami affairs". These authorities include certain administrative boards and the National board of Agriculture. Furthermore, it is recommended "that the right to use Sami in dealings with national municipal authorities be made applicable to both verbal proceedings and correspondence. For practical reasons, however, the possibility of using Sami in verbal proceedings is restricted to visits to local government offices by Sami speakers and to telephone communication". 43/

4. Present status of self-government arrangements in the Nordic area

Of the three different existing and proposed legal arrangements described above, the Greenland arrangement seems to be by far the most comprehensive, including delegated legislative and executive powers. In other parts of the world similar arrangements may be in existence, but for present purposes it will be assumed that the Greenland case may be taken as an example of an advanced stage of self-government.

The Greenland system is, however, a mandate system. The Home Rule Act may, at least in principle, be repealed by the Danish Parliament. This is probably not a real political option any more. Nevertheless, the status of Greenland as a distinct community should be constitutionally recognized.

The existing or proposed Sameting in Norway and Sweden are primarily vested with advisory or consultative powers. It has to be acknowledged that the Sameting are not legislatures. However, a great deal is being done in areas such as access to education, the promotion of Sami cultural life and protection of the reindeer. Steps are being taken to facilitate equality of language as regards communication with public authorities.

The question of constitutional recognition of the special position of the Sami population is under discussion. As regards preservation of the forest and exploitation of natural resources, it seems that the State Governments still want a decisive influence. Thus, more could be done to restore self-administration, if not full-fledged self-government, in the Nordic Sami areas.

6/ From a numerical point of view only a few indigenous peoples are protected by the European Convention on Human Rights and Fundamental Freedoms. Many more are covered by the American human rights system. Indigenous people in Asia, certain parts of Eastern Europe and the Pacific are not covered by regional human rights instruments.

7/ It should, however, be noted that the different application of minority definitions may lead to strongly varying results. In some instances the indigenous people from a numerical point of view is in the majority, but this may not be officially recognized in the public census. Sometimes an indigenous people may be a minority - as seen as a proportion of the overall population - and sometimes the minority indigenous people may be an overwhelming majority in the geographical area of the State in which they live.

8/ See, for example, the report of the Special Rapporteur, F. Caportorti, United Nations document E/CN.4/Sub.2/383/Rev.1, para. 568, in which it is proposed that the term "minority" may be taken to refer to: a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

9/ Political considerations may often carry more weight than purely conceptual reasons, cf. the reservation of the Republic of France to article 27 of the International Covenant on Civil and Political Rights, the effect of which is that article 27 is not applicable to France. See the decision of the United Nations Human Rights Committee in Communication No. 220/1987, T.K. v. France. The French Government does not recognize the existence of minorities, even though vocal groups like the Bretons and Basques often claim minority status. The strange thing is that the French Government apparently recognizes the existence of minorities in other States.

10/ Cf. Conference on the Human Dimension, Document of the Copenhagen meeting, Chapter IV. The term "national minority" is somewhat strange inasmuch as nation refers to ethnic and other groupings which are not necessarily confined within one State. Minority problems very often arise from the fact that there is no exact equation between State and nation. A State may consist of several nations, one or more of which may want to form new States (and thereby being able to shred the minority status). If this is accepted, one should prefer the term "State minority" rather than "national minority". On the political implications of "national minority" reference is made to Christian Tomuschat, in Festschrift für Hermann Mosler, Berlin 1983, pp. 959 f. In United Nations phraseology the term "national minority" has long been accepted, cf. e.g. The Genocide Convention which speaks of "national group" and the 1960 UNESCO Convention on Discrimination in Education, article 5, para. 1 (c).

11/ Charter of Paris, p. 17.

X. The question of indigenous peoples should be placed permanently on the agenda of the United Nations with a view to further institutional development.

XI. Codification of customary law and studies on the relationship between customary legal systems in indigenous societies and statutory and international legal arrangements should be undertaken in order to facilitate recognition of indigenous legal solutions and a harmonious development between the different legal systems.

Notes

1/ Full jurisdiction will normally encompass powers to legislate and enforce rules.

2/ Article 1 of the United Nations Charter and articles 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights speak explicitly about self-determination of "peoples" and not "populations". The term "population" may be understood as a broader term, including the notion of "peoples" (aspiring to become States) and other distinct ethnic groups (preferring to opt for home rule arrangements).

3/ As mentioned below, indigenous peoples can only to a certain degree be characterized as minorities. In fact, indigenous people often constitute a minority in the particular State. But indigenous people are often not a "normal" minority inasmuch as they have a special historic relationship with the country (land, landscape, etc.) in which they live and thereby claim special rights.

4/ The Sub-Commission has, however, in 1988 decided henceforth to use the term "peoples", which may also, depending on the circumstances, cover the notion of "population". This change of terms is not formally reflected in the title of the working group, i.e. the Working Group on Indigenous Populations. In this context the term peoples will be used without any prejudice to the status in public international law.

5/ On self-determination of peoples, see generally United Nations General Assembly resolutions 1514 (XV) of 14 December 1960 on the Granting of Independence to Colonial Countries and Peoples, 1541 (XV) concerning information under Article 73 (e) of the Charter of the United Nations, and 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. In the Principles and Elements on Self-Government adopted by the Inuit Circumpolar Conference, an indigenous NGO, the question of self-government is viewed as one suboption within the overal framework of self-determination. According to this view, this means that self-government cannot replace self-determination, but may be a temporary or permanent manifestation of self-determination as long as this is the wish of the particular indigenous people.

25/ For a similar conflict, see chapter IV, paragraph 37, of the Document of the Copenhagen CSCE/CHD meeting, in which it is stated that none of the "commitments" undertaken on protection of minorities "may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the Charter of the United Nations ... including the principle of the territorial integrity of States".

26/ For a survey of its development, see Gudmunder Alfredsson in a contribution to the 7th Council of Europe Colloquy on equality and non-discrimination, 1990, published as Council of Europe document H/Coll (90)6, Strasbourg 1990.

27/ Cf. United Nations document E/CN.4/Sub.2/1991/40, annex II, p. 35. The Declaration, if adopted by the United Nations General Assembly, will not constitute a legally binding instrument.

28/ Natan Lerner, op. cit., p. 104, makes the following comments on an earlier draft: "The suggested principles did not incorporate controversial claims advanced by indigneous groups, such as the right to self-determination; the exclusion of jurisdiction asserted by States over indigenous nations or peoples, except in accordance with their freely expressed wishes; the right to permanent control and enjoyment of historical territories; and the right to restitution of lands. Some indigneous organizations based their claims on the ground that discovery, conquest, or settlement, and unilateral legislation 'are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples'."

29/ Autonomy arrangements may be found elsewhere, e.g. in Spain. In this context, however, only examples from the Nordic countries are touched upon.

30/ A Danish colony since 1721, Greenland became an equal, integral but distinct part of the Danish Kingdom in 1953. Article 1 of the Danish Constitution of 1953 provides that the Danish Realm consists of Denmark, Greenland and the Faeroe Islands. The introduction of this provision in the Constitution and the general applicability of the Constitution to Greenland, including most of the provisions on civil and political rights, enabled the Danish Government to have Greenland removed from the list of colonies (non-self governing territories) according to Article 73 of the Charter of the United Nations. For a critical review of the relationship between Greenland and Denmark and comments on the decolonization process, see Gudmundur Alfredsson, in German Yearbook of International Law 1982, pp. 190 ff. For an early general assessment of the Home Rule arrangement, see Isi Foighel (Chairman of the Home Rule Commission which prepared the Home Rule Bill), Home Rule in Greenland, Meddelelser om Grønland. No. 1. Copenhagen 1980, also reproduced as Appendix I to United Nations document CERD/C/106/Add.9, and the same in Common Market Law Review 1980, pp. 91 ff. The Home Rule Commission Report is published in 4 volumes (in Danish) as Betænkning 837/1978.

12/ The meeting was held in Geneva from 1 to 19 July 1991. Reportedly the meeting was not very productive because of the tense political situation in Yugoslavia and the USSR obtaining at the time. In particular because one of the main problems is precisely the very sensitive question of minority rights, self-government and self-determination. Thus, some States (both from Western and Eastern Europe) are very reluctant to advance the issue of minority rights in the prevailing political circumstances and some States are most likely worried about a "spill-over" effect from the disintegration of certain Eastern European States.

13/ It is thus generally assumed that immigrants, refugees and others may not invoke CCPR article 27. Manfred Nowak criticizes this assumption in his CCPR-Kommentar, Kehl 1989, p. 523.

14/ Cf. the discussions in the Human Rights Commission in 1952-53, United Nations document A/2929, Chapter VI, and the deliberations in the Third Committee in 1961, document A/5000, paras. 120-123 and document A/C.3/SR.1103.

15/ By "undue" is meant, inter alia, discriminatory or disproportional State interference.

16/ For example, Sandra Lovelace v. Canada (Communication No. 24/1977).

17/ Application No. 197/1985.

18/ Application No. 167/1984.

19/ If the rights involved are not on the same level, there will be no need to strike a balance inasmuch as the more fundamental right should prevail.

20/ In certain indigenous societies sex discrimination is rampant. The fact that it happens in an indigenous society is, of course, no justification.

21/ General reference is made to Natan Lerner, Group Rights and Discrimination in International Law, Dordrecht, 1991, p. 99 ff.

22/ Study of the problem of discrimination against indigenous populations, United Nations document E/CN.4/Sub.2/1986/7/Add.1-4. See for a short survey Fact Sheet No. 9 from the United Nations Centre for Human Rights, Geneva 1990. The Study was reportedly prepared with very substantial assistance from Augusto Willemsen Díaz.

23/ This concept of self-identification is reflected in the Norwegian Act of Parliament No. 56 of 12 June 1987 on the Establishment of a Sami Parliament (primarily vested with advisory powers), article 2 (6), in which conditions for membership of the electorate are defined thus: those entitled to register are those who "regard themselves as Sami" and who use Sami as their home language or have a parent or grandparent who does or has done so. See for a smiliar proposal the Swedish Government Report SOU 1989:14 on Sami Law and the Sami Parliament, p. 67.

24/ Cf. Natan Lerner, op. cit., p. 102.

39/ It should be noted that Norway is the first Nordic State to ratify ILO Convention No. 169. For an evaluation of the legal position of the Sami in Norway see Hakon Eriksen, GYIL 1985.163.

40/ The Act was drafted on the basis of a Ministry of Justice Committee report on the legal status of the Sami (NOU 1984:18).

41/ In the 1987 report Individual and Democratic Rights of the Australian Advisory Committee to the Constitutional Commission, Canberra 1987, pp. 74 ff, the Committee likewise supported the insertion within the Constitution of a provision which would confer broad power on the Commonwealth of Australia to enter into a constitutionally based contract with representatives of Aboriginal and Torres Strait Island peoples. This proposal has not been acted upon. Treaties between States and indigenous peoples may entail de facto constitutional recognition. General reference is made to the preliminary report submitted by Miguel Alfonso Martínez, Special Rapporteur, on treaties, agreements and other constructive arrangements between States and indigenous populations, United Nations document E/CN.4/Sub.2/1991/33 of 31 July 1991.

42/ Overføring av oppgaver og myndighet til Sametinget, Tilradning fra en interdepartmental arbeidsgruppe, Kommunaldepartementet, Oslo 1991.

43/ The Swedish ombudsman for questions of ethnic discrimination has criticized the proposals made by the Swedish Government, see Opinions of 20 October 1989 (File No. 367-89), of 19 December 1989 (File No. 547-89) and of 3 June 1991 (File No. 107-91). The ombudsman pointed out, inter alia, that the proposals did not meet the requirements of ILO Convention No. 169.

31/ The relationship with the State Government has changed formally within the past few years. The Home Rule Government demanded that the Ministry for Greenland (which was a relic from the colonial period) should be closed down. The State Government accepted this and Greenland affairs are now dealt with by the different ministries, coordinated by the Prime Minister's Office. The Home Rule arrangements is part of the Prime Minister's portfolio.

32/ Cf. Hjalte Rasmussen (ed.), Greenland in the Process of Leaving the European Communities, Copenhagen 1983. In law, Greenland was not capable of leaving the EC. What happened was that the geographical application of the EC treaties was restricted to certain parts of the Kingdom of Denmark (originally excluding the Faeroe Islands and subsequently Greenland), cf. article 227 of the EEC Treaty. Denmark on behalf of Greenland has negotiated an association agreement with the EC in accordance with articles 131-136a of the EEC Treaty.

33/ To this may be added that the Greenland Home Rule Government participated as an observer at the ninth session of the Working Group on Indigenous Populations, Geneva, 1991.

34/ The implementation of the Act in many of the practical areas of administration will be dealt with in a paper by the Home Rule Government to be submitted at the meeting, and will not be touched upon further in this context.

35/ Special regulations apply in Greenland. A tailor-made Greenland Criminal Code, which to a certain extent is a codification of Greenland customary legal traditions, and a special Greenland Administration of Justice Act exist. The criminal justice system is probably somewhat more liberal and flexible than in Denmark. Also the prison system has been adjusted to Greenland local conditions (e.g. more open prisons than in Denmark). It should, however, be noted that certain aspects of the Greenland legal system may raise an issue under articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms. These concerns include, inter alia, the composition and independence of the Greenland Courts and the existing rules on access to prolonged remand in custody without proper judicial review.

36/ "Resident population" must be understood to mean Inuit (Eskimo) and immigrant residents from Denmark.

37/ This does not detract from the fact that many non-self-governing indigenous populations and peoples around the world are in exactly the same geographical position (i.e. island communities).

38/ It should be noted that Finland was the first Nordic State with a Sami population to introduce a Sami advisory body, the Sameting. For an account of recent developments in Finland see United Nations document E/CN.4/Sub.2/AC.4/1991/1 of 5 June 1991. The Aland Islands have since 1922, building on a 1921 recommendation from the League of Nations, enjoyed autonomous status. In February 1991 the Finnish Parliament passed a revised Autonomy Act for the Aland Islands which will enter into force in 1993, see Gunnar Jansson, "Reform of the Autonomy Act of the Aland Islands", in Finnish Features, May 1991, Ministry for Foreign Affairs, Helsinki 1991.

B. The scope of Home Rule and the economic principles of the Act

1. Home Rule powers

The Home Rule authorities are the popularly elected legislative Greenland Assembly, the "Landsting", and the executive committee, the "Landsstyre". The Home Rule Act does not specify the method of election of the "Landsstyre", nor detailed rules for eligibility to the "Landsstyre", the functioning period nor the possibilities of dismissing the "Landsstyre" or a member of the "Landsstyre". The final decision on these issues is left for Greenland politicians to establish in a Greenland Assembly and Executive Act, and from this basis the Home Rule parliamentarism has grown. In this respect, article 3 of the Home Rule Act is a fairly flexible one.

2. The provisions of Home Rule

The main purpose of Home Rule is to transfer (delegate) legislative and executive powers and consequently responsibility from the Danish political authorities to the Greenland authorities.

The Home Rule Act provides that the Home Rule authorities may request that a number of fields specified in a Schedule annexed to the Act be transferred to Home Rule (cf. art. 4 of the Act). The list of functionally defined transferable fields is not exhaustive; transfer of legislative and executive powers in fields other thán those listed is subject to prior agreement between the Home Rule authorities and the national authorities of the Realm (cf. art. 7 of the Act).

During the 12 years that have elapsed since the establishment of Home Rule, the Home Rule authorities have almost exhausted the list in the Schedule, and thus assumed authority in most aspects of life in Greenland. Only the health services remain to be transferred (as of 1 January 1992).

The more important fields in which transfer has taken place include:

The organization of the Home Rule system.

Taxation,

Regulation of trade, fisheries and hunting,

Education,

Supply of commodities,

Transport and communications,

Social security,

Labour affairs,

Housing,

Environmental protection and conservation of nature.

Home Rule in Greenland

Background paper prepared by
Emil Abelsen

By Danish Act of 29 November 1978, Home Rule was established in Greenland within the unity of the Danish Realm. The Act was prepared by a Danish-Greenlandic Commission, comprising five members elected by the Greenland Provincial Council, the two Greenland Members of Parliament, seven members elected by Parliament and a Chairman appointed by the Minister for Greenland.

The structure of Home Rule in Greenland serves as a unique model for local autonomy. For the Faeroe Islands, Home Rule was introduced in 1948 and the Commission stated that the Faeroese arrangement was undoubtedly in conformity with the 1953 Danish Constitution. Thus the Faeroese arrangement served as a legal model for the Greenland Home Rule Act.

I shall outline:

A. The legal basis of the Greenland Home Rule structure;

B. The scope of Home Rule and the economic principles of the Act;

C. The political aspects of the Act;

D. The provisions of the Act with regard to mineral resources;

E. Greenlandic as the main language.

A. The legal basis of Home Rule

From the outset it was accepted by Danish and Greenlandic members of the Home Rule Commission that the introduction of Home Rule should take place "within the frame of the unity of the Realm" (cf. art. 1 of the Home Rule Act).

This principle is derived from article 1 of the Danish Constitution, and it implies: that sovereignty continues to be exclusively with the authorities of the Realm (the Government and Parliament); that Home Rule in Greenland could not be established through a treaty based on international law, but exclusively on the basis of constitutional law through a Danish act by means of which the Danish Parliament delegated a certain, precisely defined, part of its competence to Home Rule; and that only part of the competence of the authorities of the Realm may be delegated to Home Rule, just as only fields pertaining exclusively to Greenland may come under Home Rule.

Also, the principle of maintaining national unity excludes the formation of a federation.

Note: The opinions expressed in this paper are those of the author.

National finances;

Defence policy;

Fundamental principles regarding the law of persons, family law, inheritance law, and the law of contracts.

The fact that these fields cannot be transferred to the Home Rule authorities does not prevent the adoption of specific provisions by the Danish Parliament, "Acts for Greenland", having due regard to Greenland conditions. A specific example of a Danish Act for Greenland is the criminal code for Greenland, adopted in 1954 long before the introduction of Home Rule. This Act was adopted after an intensive study of Greenland tradition and thinking with regard to punishment and penalty. As a result of this research, this Act has no terminology of isolation, prison, or punishment, but institute sanctions of resocialization, using the term "precautions". At the time of its adoption, this Act was regarded as the most advance criminal code in the world, much in line with new sociological theories in Denmark and Europe. I shall not go into further details here, as I know that a special session of this seminar will deal with this issue.

However, with respect to non-transferable fields, the Home Rule authorities have an important advisory function with the central authorities of the Realm. Proposed legislation exclusively addressing Greenland affairs must be submitted to the Home Rule authorities for comments prior to the introduction of the Act in the Danish Parliament (cf. art. 12 (1) of the Home Rule Act). Where proposed legislation is "of particular importance to Greenland", the Home Rule authorities must be consulted before it is put into effect in Greenland, (cf. art. 12 (3) of the Home Rule Act).

5. Greenland and Danish foreign policy

I have mentioned that treaty-making power is still vested with the national authorities. However, the Home Rule Act has created cooperative procedures serving to accommodate the interests of Greenland and to alleviate potential conflict of interests between Greenland and Denmark in matters of foreign policy by granting the Home Rule authorities a number of important functions of an advisory, representative and executive nature, which I shall mention briefly.

Extensive, legislative and executive powers, territorially as well as functionally defined, have been transferred to Home Rule. Consequently, the cooperation of the Home Rule authorities will often be necessary to fulfil Denmark's international obligations. Accordingly, the Home Rule Act provides that the Danish Government must consult the Home Rule authorities before entering into treaties that particularly affect Greenland interests (cf. art. 13 of the Home Rule Act). This consultative procedure applies whether or not the treaty concerns a transferred field.

As mentioned in the official comments on the Act, it is the practice, and was so for some years before Home Rule, that until such consultation has taken place, a reservation is made with regard to Greenland before entering into or signing the treaty.

3. Procedures for the transfer of power

The Home Rule Act is based on the principle that legislative power and the power of the purse should not be divided. Consequently, article 4 (2) of the Act provides that the Home Rule authority must assume the inherent expenses of a transferred field. Conversely, the Home Rule authorities is the sole beneficiary of taxes and revenues generated in fields transferred.

Since Greenland self-financing is not yet possible in all capital-intensive fields, an instrument has been created in the Home Rule Act to facilitate transfer of power to Home Rule in fields requiring Danish subsidies (art. 5). The Parliament passes, after consultation with the Home Rule authorities, an enabling act specifying the competence transferred to Home Rule and establishing a framework in the form of a few fundamental principles for each field, while leaving it to the Home Rule authorities to decide the more detailed regulations and undertake the administration of the said field.

The Danish subsidies to the Home Rule authorities are not earmarked for specific purposes but granted as a lump sum, "block grants". Thus, the Home Rule authorities have the freedom to determine the order of priority for expenditure of the funds allocated by the Parliament, while still adhering to the framework of the enabling acts for each field. Subsidies are fixed by Danish acts for three-year periods, and the amount is provided for annually in the Danish budget.

It is an essential principle of the Home Rule system, that the Home Rule authorities is not indirectly governed through considerations of economic support.

Implementing this system presupposes that the transfer of fields leads neither to savings nor to additional expenses for the Danish State.

Danish State subsidies have been based upon expenses which the State has so far incurred for the purposes in question. If the purpose in question has not had the priority with the State that Home Rule authorities would wish to apply to this field, the size of subsidies have been the object of difficult negotiations between Home Rule authorities and the State. I shall return later to the more political aspects of our Home Rule structure.

4. Constitutional limits to Home Rule

I have mentioned, that the constitutional principle of the national unity of the Realm means that certain fields must remain with the authorities of the Realm and cannot be transferred to the Home Rule authorities.

This applies particularly to such fields as:

Constitutional law (including the administration of justice and constitutional rights);

Foreign relations (including treaty-making power);

No changes have been made so far to the Greenland Home Rule Act of 1978, and this is also the case for Home Rule as established back in 1948 for the Faeroe Islands. It has been possible to solve arising problems by interpreting the Home Rule Act, its spirit and meaning. In this way its character of a constitutional agreement has been respected.

Probably due to the basic principles of the Home Rule Act it has never been necessary either to invoke article 18 of the Act (also to be found in the Faeroese Home Rule Act), regulating the solution of conflicts arising with regard to the division of powers between the Home Rule authorities and the Danish authorities.

The decision-making board consists of political and legal members, weighted in favour of the political elements. It is assumed that the board is competent to take a position only on political conflicts between the Danish Government and the Home Rule authorities which it has not been possible to solve in any other way. The board is not in permanent existence and so far has never functioned.

D. Mineral resources

With regard to mineral resources, a special solution has been found in article 8 of the Home Rule Act.

1. During the work of the Home Rule Commission, the view was expressed from Greenland that sovereignty over mineral resources stemmed from the Greenlandic people's right to self-determination as formulated in the Covenants of Human Rights, article 1, paragraph 2. Some members of the Commission felt that Greenlanders were not a "people" in the legal sense of the Covenants. Others felt that Greenland had already used its right to self-determination in 1953 by opting for Greenland to constitute an integral part of the Realm and emerge from the status of colony.

However, the Commission did not express its view on this matter, but concentrated its deliberations on a practical solution, guided here also by its overall concepts of maintaining the unity of the Realm.

The first paragraph of article 8 of the Act reads: "The resident population of Greenland has fundamental rights to the natural resources of Greenland".

The official comments to the Act characterizes this provision as a political declaration of principle and further states that the recognition of fundamental rights to natural resources of the permanent population stems, above all, from an emotional cohesiveness between a population and the land which it has inhabited for centuries. This cohesiveness naturally leads to demands for certain rights not covered by traditional legal parlance.

2. The following provisions of article 8 dealing with mineral resources (the terminology of the Act is "non-living resources") have been the particular focus of political debates between the Home Rule and the national authorities:

Conversely, the Home Rule authorities are under obligation to consult the authorities of the Realm before introducing measures that might prejudice Denmark's interests vis-à-vis other countries, for instance, measures concerning regulation of fisheries (cf. art. 11 (2) of the Home Rule Act).

Let me add here a further cooperative measure which has lately been introduced, showing the flexibility of Danish/Greenlandic relations. With the approval of the Danish authorities a special permanent committee of the Greenland Assembly has been established under the Greenland Assembly Act - the Greenland Assembly Foreign Relations and Security Policy Committee - whose task is to consider and discuss statements and information received from the Premier of the Executive on these issues. In this way the Greenland Assembly has a "parliamentary" control of the Greenland Executive on such issues. The Committee often holds its meetings with the Danish Foreign Minister as its guest, debating foreign relations and security policy matters directly with him.

Further, in accordance with article 16 (3) of the Home Rule Act, the national authorities may, upon request, authorize the Home Rule authorities to conduct, with the assistance of the Foreign Service, international negotiations on purely Greenland affairs. The Home Rule authorities have notably availed themselves of the right to conduct bilateral negotiations in connection with the conclusion of fishery agreements.

C. Political aspects

I have mentioned the basic principle of the Home Rule Act: the unity of the Realm. This also implies a somewhat diffuse assumption of a political-moral nature regarding mutual solidarity between the various parts of the Realm.

From the way that Home Rule has been established, that is:

- prepared in a commission with a political composition,
- the fact that the Greenland population approved by referendum the entering into force of the Home Rule Act,
- the special and unusual preamble to the Home Rule Act, stating the special constitutional position of Greenland within the Realm,

it follows that the Home Rule Act politically and morally is regarded as an agreement that should not be changed by the Danish Parliament without the consent of the Home Rule authorities, even if a unilateral change by an act of the Danish Parliament might in theory be regarded as a possibility. (Article 3 of the Danish Constitution states that legislative power rests jointly with the King (Government) and Parliament, and some have argued that legally King and Parliament have the prerogative of withdrawing the legislative power delegated to the Home Rule authorities.)

Even changes of the Home rule Act that might have the consent of the Home Rule authorities, should be necessitated by strong political motives in the relations between the two parts of the Realm.

led to a 50-50 division of revenue, while division of income beyond 500 million Kroner was to be settled by Danish Act after negotiations between the parties (Amendment to Mineral Resources Act, No. 844, 21 December 1988).

There is a natural desire on the part of the Home Rule authorities to become more independent of subsidies from Denmark, and the income from the exploitation of mineral resources would meet that purpose. It is still to be seen what income is generated by such activities, and the future will show how a greater part of the income for Greenland can be negotiated with the national authorities.

E. The Greenland language

Lastly, may I mention article 9 of the Home Rule Act as being of special relevance in this forum:

"(1) Greenlandic shall be the principal language. Danish must be thoroughly taught.

"(2) Either language may be used for official purposes."

This article means a formal recognition of the Greenland language as the main language of Greenland. The Greenland language is an integral part of the way in which we conceive our own identity. By history and tradition, and Greenland Home Rule being established within the Realm, Danish has become our linguistic link with the world at large. The enormous development in communications in the world will also raise the demand for the teaching of English.

Let me finish by adding that we believe that, by way of Home Rule we have come far on our way to autonomy, and also that we have come futher than is the case for many indigenous people around the world.

We have now had 12 years of experience of Home Rule, and it has been hard labour to create for ourselves our identity as a young democracy. We believe that we have succeeded, and that our Home Rules system deserves the attention of other indigenous peoples or minorities within a State, and is a possible model for Home Rule in other parts of the world.

It is therefore a special pleasure for us to host this meeting.

Thank you.

The Nuuk Conclusions and Recommendations

- on Indigenous Autonomy and Self-Government

The United Nations Meeting of Experts, meeting at Nuuk, Greenland, 24–28 September 1991, recognizes that indigenous peoples are historically self-governing with their own languages, cultures, laws and traditions.

The Meeting of Experts shares the view that indigenous peoples constitute distinct peoples and societies, with the rights of autonomy, self-government, and self-identification.

The Meeting of Experts recognizes that serious problems faced by indigenous peoples are specific for each country and region of the world and there cannot be a single and uniform solution for them. On this basis the meeting adopts the following conclusions and recommendations to be implemented with due consideration to the specificity of each situation, without detracting from the established minimum standards set out in international instruments on human rights:

I.

1. Self-determination of peoples is a precondition for freedom, justice, and peace both within States and in the international community.

2. Indigenous peoples have the right of self-determination as provided for in the international convenants on human rights and public international law and as a consequence of their continued existence as distinct peoples. This right will be implemented with due consideration to other basic principles of international law. An integral part of this is the inherent and fundamental right of autonomy and self-government.

3. For indigenous peoples, autonomy and self-government are prerequisites for achieving equality, human dignity, freedom from discrimination and the full enjoyment of all human rights.

4. Indigenous territory and the resources it contains are essential to the physical, cultural and spiritual existence of indigenous peoples and to the construction and effective exercise of indigenous autonomy and self-government. This territorial and resource base must be guaranteed to these peoples for their subsistence and the ongoing development or indigenous societies and cultures. Where appropiate the foregoing should not be interpreted as restricting the development of self-government and self-management arrangements not tied to indigenous territory and resources.

5. Autonomy and self-government of indigenous peoples is beneficial to the protection of the natural environment and the maintenance of ecological balance which helps to ensure sustainable development.

6. Self-government, self-administration and self-management of indigenous peoples constitute elements of political autonomy. The realization of this right should not pose a threat to the territorial integrity of the State.

7. Indigenous autonomies and self-governments must, within their jurisdiction, assure the full respect of all human rights and fundamental freedoms and popular participation in the conduct of public affairs.

8. Autonomy and self-government can be built on treaties, constitutional recognition or statutory provisions recognizing indigenous rights. It is further necessary for the treaties, conventions and other constructive arrangements entered into in various historical circumstances to be honoured, in so far as such instruments establish and confirm the institutional and territorial basis for guaranteeing the right of indigenous peoples to autonomy and self-government.

9. Autonomy and self-government are essential for the survival and further development of indigenous peoples and are a basis for international cooperation and bilateral and multilateral legal arrangements.

10. Indigenous peoples have the right to be different, to consider themselves as different and to be considered and respected as such, as recognized in the 1978 Declaration on Race and Racial Prejudice.

11. Within States, autonomy and self-government for indigenous peoples contribute to peaceful and equitable political, cultural, spiritual, social and economic development.

12. Subject to the freely expressed desire of the indigenous peoples concerned, autonomy and self-government include, *inter alia*, jurisdiction over or active and effective participation in decision-making on

the matters concerning their land, resources, environment, development, justice, education, information, communications, culture, religion, health, housing, social welfare, trade, traditional economic systems, including hunting, fishing, herding, trapping, gathering, and other economic and management activities, as well as the right to guaranteed financial arrangements and, where applicable, taxation for financing these functions.

13. Autonomy anf self-government arrangements are to be faithfully respected. They may only be amended by a new agreement between the parties to the original agreement or in accordance with established constitutional or legal procedures.

14. Arrangements should be made for the prevention of potential conflicts of competance. An effective, independent and impartial mechanism for solving disputes between the self-government and the State should be established by constitutional provisions or by law. Equal representation of the self-government in this mechanism should be guaranteed.

15. Where autonomies and self-governments are affected by matters outside their jurisdiction, including actions taken by the regional and local governments of federated states, they should be closely involved in the planning stages of these activities and their consent should be obtained by States before these activities are implemented.

II.

16. The Meeting of Experts recommends that States should undertake, if they have not already done so, regular periodic reviews together with indigenous peoples through their own organizations, of the obstacles to autonomy and self- government and take the measures agreed upon to overcome them and to promote fully significant processes of construction of autonomy or self-government.

17. The Meeting of Experts recommends that where State borders pose obstacles to the free movement, trade and communications among members of indigenous autonomies and self-governments, States must undertake arrangements to eliminate these obstacles.

18. The Meeting of Experts furthermore recommends that States should consider favourably the ratification of international instruments relevant to the situation of indigenous peoples, including the International Convenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and the ILO Convention 169.

19. The Meeting of Experts recommends that States should cooperate by providing the means for training necessary to assist indigenous peoples in the exercise of autonomy and self-government.

20. The Meeting of Experts invites governments to support, by providing adequate resources, the United Nations Centre on Human Rights and the International Labour Office with the publication and distribution of a manual on autonomy and self-government (see Annex).

21. The Meeting of Experts recommends that existing advisory and technical assistance programmes within the United Nations system should be used and enlarged, if need be, to finance training for indigenous peoples and autonomous and self-governmental institutions.

22. The Meeting of Experts recommends that the question of the rights of indigenous peoples and the protection thereof shall be dealt with on a permanent basis within the United Nations. The Meeting recommends to the Commission on Human Rights to consider the possibility of establishing international monitoring mechanism to deal with indigenous peoples.

23. The Meeting of Experts recommends that the conclusions and recommendatios of the Meeting be considered among the themes for inclusion in the 1993 International Year for the World's Indigenous People.

24. The Meeting of Experts requests the Secretary-General to give the widest possible distribution to the report, recommendations and working papers of this Meeting, including the distribution of the report and recommendations to the General Assembly at its 47th session, the Commission on Human Rights at its 48th session, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities at its 44th session, and the Working Group on Indigenous Populations at its 10th session, Governments and competent international, inter-governmental and non-governmental and regional organizations and other international fora; and that the present report, recommendations and working papers be issued as a United Nations publication.

View from Nuuk, Greenland.
Photo: Jens Dahl

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Discrimination and Protection of Minorities

Forty-third session
I

DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Third revised text of the Draft Universal Declaration on Rights of Indigenous Peoples prepared by the Chairman-Rapporteur of the Working Group on Indigenous Populations, Mrs. Erica-Irene Daes

THIRD REVISION OF THE

DRAFT UNIVERSAL DECLARATION OF RIGHTS OF INDIGENOUS PEOPLES

PREAMBULAR AND OPERATIVE PARAGRAPHS TO THE DRAFT DECLARATION AS SUBMITTED BY THE MEMBERS OF THE WORKING GROUP AT FIRST READING

1st Preambular Paragraph

Affirming that all indigenous peoples are free and equal in dignity and rights in accordance with international standards, while recognizing the right of all individuals and peoples to be different, to consider themselves different, and to be respected as such,

2nd Preambular Paragraph

Considering that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

3rd Preambular Paragraph

Convinced that all doctrines, policies and practices of racial, religious, ethnic or cultural superiority are scientifically false, legally invalid, morally condemnable and socially unjust,

4th Preambular Paragraph

Concerned that indigenous peoples have often been deprived of their human rights and fundamental freedoms, resulting in the dispossession of lands, territories and resources, as well as in poverty and marginalization,

5th Preambular Paragraph

Welcoming the fact that [in] order to bring an end to all [violations of human rights where ever] they occur, indigenous peoples are organizing themselves [to eliminate] forms of discrimination and oppression wherever they occur,

6th Preambular Paragraph

Recognizing the urgent need to promote and respect the rights and characteristics of indigenous peoples which stem from their history, philosophy, cultures, spiritual and other traditions, as well as from their political, economic and social structures, especially their rights to lands, territorities and resources,

7th Preambular Paragraph

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from adverse discrimination of any kind,

8th Preambular Paragraph

Endorsing efforts to consolidate and strengthen the societies, cultures and traditions of indigenous peoples, through their control over development affecting them or their lands, territories and resources,

9th Preambular Paragraph

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, understanding and friendly relations among all peoples of the world,

10th Preambular Paragraph

Emphasizing the importance of giving special attention to the rights and needs of indigenous women, youth and children,

11th Preambular Paragraph

Recognizing in particular that it is in the best interest of indigenous children for their family and community to retain shared responsibility for the upbringing of the children,

12th Preambular Paragraph

Believing that indigenous peoples have the right freely to determine their relationships with the States in which they live, in a spirit of coexistence with other citizens,

13th Preambular Paragraph

Noting that the International Covenants on Human Rights affirm the fundamental importance of the right to self-determination, as well as the right of all human beings to pursue their material, cultural and spiritual development in conditions of freedom and dignity,

14th Preambular Paragraph

Bearing in mind that nothing in this Declaration may be used as an excuse for denying to any people its right to self-determination,

15th Preambular Paragraph

Calling upon States to comply with and effectively implement all international instruments as they apply to indigenous peoples,

16th Preambular Paragraph

Solemnly proclaims the following ***Declaration of The Rights of Indigenous Peoples***:

PART I

Operative paragraph 1

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of coexistence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.

Operative paragraph 2

Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the Charter of the United Nations and other international human rights instruments.

Operative paragraph 3

Indigenous peoples have the right to be free and equal to all other human beings and peoples in dignity and rights, and to be free from adverse distinction or discrimination of any kind based on their indigenous identity.

PART II

Operative paragraph 4

Indigenous peoples have the collective right to exist in peace and security as distinct peoples and to be protected against genocide, as well as the individual rights to life, physical and mental integrity, liberty and security of person.

Operative paragraph 5

Indigenous peoples have the collective and individual right to maintain and develop their distinct ethnic and cultural characteristics and identities, including the right to self-identification.

Operative paragraph 6

Indigenous peoples have the collective and individual right to be protected from cultural genocide, including the prevention of and redress for:

(a) any act which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities

(b)any form of forced assimilation or integration;

(c)dispossession of their lands, territories or resources;

(d)imposition of other cultures or ways of life; and

(e)any propaganda directed against them.

Operative paragraph 7

Indigenous peoples have the right to revive and practise their cultural identity and traditions, including the right to maintain, develop and protect the past, present and future manifestations of their cultures, such as archaeological and historical sites and structures, artifacts, designs, ceremonies, technology and works of art, as well as the right to the restitution of cultural, religious and spiritual property taken from them without their free and informed consent or in violation of their own laws.

Operative paragraph 8

Indigenous peoples have the right to manifest, practise and teach their own spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

Operative paragraph 9

Indigenous peoples have the right to revive, use, develop, promote and transmit to future generations their own languages, writing systems and literature, and to designate and maintain the original names of communities, places and persons. States shall take measures to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary, through the provision of interpretation or by other effective means.

Operative paragraph 10

Indigenous peoples have the right to all forms of education, including access to education in their own languages, and the right to establish and control their own educational systems and institutions. Resources shall be provided by the State for these purposes.

Operative paragraph 11

Indigenous peoples have the right to have the dignity and diversity of their cultures, histories, traditions and aspirations reflected in all forms of education and public information. States shall take effective measures to eliminate prejudices and to foster tolerance, understanding and good relations.

Operative paragraph 12

Indigenous peoples have the right to the use of and access to all forms of mass media in their own languages. States shall take effective measures to this end.

Operative paragraph 13

Indigenous peoples have the right to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their own economic, social and cultural development, and for the enjoyment of the rights contained in this Declaration.

Operative paragraph (to be numbered)

Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or to the Declaration of Principles of International Law on Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.

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PART III

Operative paragraph 14

Indigenous peoples have the right to maintain their distinctive and profound relationship with their lands, territories and resources, which include the total environment of the land, waters, air and sea, which they have traditionally occupied or otherwise used.

Operative paragraph 15

Indigenous peoples have the collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes the right to the full recognition of their own laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective State measures to prevent any interference with or encroachment upon these rights.

Operative paragraph 16

Indigenous peoples have the right to the restitution or, to the extent this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Unless otherwise freely agreed upon by the peoples concerned, compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those which were lost.

Operative paragraph 17

Indigenous peoples have the right to the protection of their environment and productivity of their lands and territories, and the right to adequate assistance including international cooperation to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories.

Operative paragraph 18

Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing arts, cultigens, medicines and knowledge of the useful properties of fauna and flora.

Operative paragraph (to be numbered)

In no case may any of the indigenous peoples be deprived of their means of subsistence.

OPERATIVE PARAGRAPHS AS REVISED BY THE CHAIRPERSON/RAPPORTEUR PURSUANT TO SUB-COMMISSION RESOLUTION 1990/26

Draft Operative paragraph 18

PART IV

"The right to maintain and develop within their areas of lands and other territories their traditional economic structures, institutions and ways of life, to be secure in the traditional economic structures and ways of life, to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fresh- and salt-water fishing, herding, gathering, lumbering and cultivation, without adverse discrimination. In no case may an indigenous people be deprived of its means of subsistence. The right to just and fair compensation if they have been so deprived;"

Draft operative paragraph 19

"The right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities;"

Draft operative paragraph 20

"The right to determine, plan and implement all health, housing and other social and economic programmes affecting them, and as far as possible to develop, plan and implement such programs through their own institutions;"

PART V

Draft operative paragraph 21

"The right to participate on an equal footing with all the other citizens and without adverse discrimination in the political, economic, social and cultural life of the State and to have their specific character duly reflected in the legal system and in political and socio-economic and cultural institutions, including in particular proper regard to and recognition of indigenous laws and customs."

Draft operative paragraph 22

"The right to participate fully at the State level, through representatives chosen by themselves, in decision-making about and implementation of all national and international matters which may affect their rights, life and destiny;"

"(b) The right of indigenous peoples to be involved, through appropriate procedures, determined in conjunction with them, in devising any laws or administrative measures that may affect them directly, and to obtain their free and informed consent through implementing such measures. States have the duty to guarantee the full exercise of these rights;"

Draft operative paragraph 23

"The collective right to autonomy in matters relating to their own internal and local affairs, including education, information, mass media, culture, religion, health, housing, social welfare, traditional and other economic and management activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions;"

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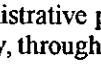
Operative paragraph (to be numbered)

Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or to the Declaration of Principles of International Law on Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.



ship of the indigenous people concerned for these purposes; States have the duty, where the peoples concerned so desire, to recognize such institutions and their memberships through the legal systems and political institutions of the State;''

Draft operative paragraph 25

''The right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms;''

Draft operative paragraph 26

''The right to maintain and develop traditional contacts, relations and cooperation, including cultural and social exchanges and trade, with their own kith and kin across State boundaries and the obligation of the State to adopt measures to facilitate such contacts;''

Draft operative paragraph 27

''The right to claim that States honour treaties and other agreements concluded with indigenous peoples, and to submit any disputes that may arise in this matter to competent national or international bodies;''

PART VI

Draft operative paragraph 28

''The individual and collective right to access to and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes and any infringement, public or private, between States and indigenous peoples, groups or individuals. These procedures should include, as appropriate, negotiations, mediation, arbitration, national courts and international and regional human rights review and complaints mechanisms;''

PART VII

Draft operative paragraph 29

''These rights constitute the minimum standards for the survival and the well-being of the indigenous peoples of the world;''

Draft operative paragraph 30

''Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein;''

Third Revised Draft

United Nations Universal Declaration of Rights of Indigenous Peoples

projects with Indigenous people from other parts of the world who have experienced the effects of these projects and who have been seeking strategies to control the developments which are effecting their communities.

* * * * * * * * * * * * *

Following is a draft of an International Covenant on the Rights of Indigenous Peoples. This Covenant is to be discussed at the WCIP Fourth General Assembly where it is hoped the Covenant may be officially adopted. Comments and criticisms in regards to the Covenant are most welcome and may be forwarded to the WCIP Secretariat in Lethbridge, Canada.

INTERNATIONAL COVENANT ON THE RIGHTS OF INDIGENOUS PEOPLES

Preamble

The parties to the present covenant:

Considering that the recognition of the inherent dignity and the equal and inalienable rights of individuals and of peoples is the foundation of freedom, justice and peace in the world, and considering that these principles are recognized and proclaimed in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights and the Inter-American Convention on Human Rights,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for and observance of human rights and fundamental freedoms of all without distinction as to race, sex, language or religion,

Recalling that Convention 107 and Recommendation 104 of the International Labour Organization, 5th June 1957, recognized the need for the adoption of general international standards to govern the relations between Indigenous Peoples and states,

Recalling that the Declaration of the General Assembly on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (xv), 14th December 1960, recognized the ardent desire of the peoples of the world to end colonialism in all its manifestations,

Recalling that the inter-relationship of racial equality and decolonization was recognized in the Resolution of the General Assembly, Resolution 20166 (xx) B, 15th December 1965, associated with the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination,

Considering that colonialism and the consequences of colonialism have not been eradicated for Indigenous Peoples, and, in consequence, Indigenous peoples are frequently denied their political, economic, social and cultural rights,

Recognizing that the rights of Indigenous Peoples to self-determination is accepted in international law and has been increasingly given effect in

the domestic law of States, and

Recognizing the long struggle by Indigenous Peoples to have their rights recognized in international law; agree on the following articles;

Part I
SELF-DETERMINATION

Article 1. All peoples have the right to self-determination. By virtue of that right Indigenous Peoples may freely determine their political status and freely pursue their economic, social and cultural development. [redacted].

Article 2. The term Indigenous People refers to a people:

a) who lived in a territory before the entry of a colonizing population, which colonizing population has created a new state or states or extended the jurisdiction of an existing state or states to include the territory, and

b) who continue to live as a people in the territory and who do not control the national government of the state or states within which they live.

Article 3. One manner in which the right of self-determination can be realized is - by the free determination of an Indigenous people to associate their territory and institutions with one or more states in a manner involving free association, regional autonomy, home rule or associate statehood as self-governing units. Indigenous People may freely determine to enter into such a relationship and to alter those relationships after they have been established.

Article 4. Each state within which an Indigenous People lives shall recognize the population, territory and institutions of the Indigenous People. Disputes about the recognition of the population, territory and institutions of an Indigenous People shall initially be determined by the state and the Indigenous People. Failing agreement, such questions may be determined by the Commission of Indigenous Rights and the Tribunal of Indigenous Rights, as subsequently provided.

Part II
CIVIL AND POLITICAL RIGHTS

Article 1. Each Indigenous People has the right to determine the persons or groups who are included within its population.

Article 2. Each Indigenous People has the right to determine the form, structure and authority of its institutions of self-determination. Those institutions, their decisions and the customs and practices of the Indigenous Peoples shall be recognized by domestic and international law on a basis of equality and non-discrimination.

Article 3. Where an Indigenous People exercise their right of self-determination

within one or more states, and that state or states has some extent of jurisdiction over the Indigenous People or over individual members of the Indigenous People,

a) the individual members of the Indigenous People are entitled to participate in the political life of the state or states on the basis of equality with citizens of the state or states,
b) the Indigenous People is entitled to representation in the legislative and executive branches of government, the courts and civil service.
c) it is recognized that it is desireable for the Indigenous People to have a national organization or organizations of their choosing and structure, independent of the organs of the state, to represent their interests in dealing with the state. Where the poverty or the dispersed character of the Indigenous People inhibit the development of such an organization or organizations, the state shall provide funding to the Indigenous People to facilitate the establishment and maintenance of such an organization or organizations.

Part III
ECONOMIC RIGHTS

Article 1. Indigenous People are entitled to the lands they use and to the protection of the extent of use in areas where the use of land is shared in a compatible manner with others, and to those parts of their traditional lands which have never been transferred out of their control by a process involving their free consent.

Article 2. The need to protect the integrity of the lands of an Indigenous People is recognized. The land rights of an Indigenous People include surface and subsurface rights, full rights to interior and coastal waters and rights to adequate and exclusive coastal economic zones.

Article 3. All Indigenous Peoples may, for their own ends, freely use and dispose of their natural wealth and resources, without prejudice to any obligation arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a people or a component unit of a people be deprived of its own means of subsistence.

Article 4. Where an Indigenous People have an economy reliant in whole or in part on hunting, fishing, herding, gathering or cultivation, they have a right to the territory and the waters used and needed for those pursuits. States are bound to respect such territories and waters and not act or authorize acts which could impair the ability of such lands and waters to continue in such use.

Part IV
SOCIAL AND CULTURAL RIGHTS

1. The cultures of the Indigenous Peoples are part of the cultural heritage of mankind. The shared beliefs of Indigenous People in cooperation and

harmonious relations are recognized as a fundamental source of international law.

2. The primary responsibility for the protection and development of the cultures and religions of the Indigenous People lies with the Indigenous People. To this end the original rights to their material culture, including archeological sites, artifacts, designs, technology and works of art lie with Indigenous People or members of the Indigenous People. Indigenous People have the right to reacquire possession of significant cultural artifacts presently in the possession of public or semi-public institutions, where possession of those artifacts was not obtained from the Indigenous People in a just and fair manner or where the artifacts are of major cultural or religious significance to the Indigenous People.

3. The Indigenous People have the right to fully control the care and education of their children, including the full right to determine the language or languages of instruction.

4. The Indigenous Peoples have the responsibility for the preservation and development of their languages. Their languages are to be respected by states in all dealings between the Indigenous People and a state on the basis of equality and non-discrimination.

Part V
RATIFICATION AND IMPLEMENTATION

Article 1. This Covenant shall be open to ratification by states and by Indigenous Peoples.

Article 2. To ensure the fulfillment of the provisions of this Covenant there shall be established a Commission of Indigenous Rights and a Tribunal of Indigenous Rights.

Article 3. The duties of the Commission of Indigenous Rights are:

a) to receive and assess the reports of the states and of the Indigenous Peoples who are parties to this Covenant.
b) to receive and assess petitions alleging the violation of the rights of Indigenous Peoples in contravention of the provisions of the present Covenant.
c) to determine the appropriate recognition of the population, territory and institutions of an Indigenous People by a state, in compliance with Part I, Article 4.
d) to investigate any petitions alleging the violation of the rights of Indigenous Peoples, with the power to require documents from state parties with a right of access to officials of the state parties and with access to Indigenous lands, institutions and people within a state.
e) to attempt to achieve a peaceful settlement of disputes involving Indigenous rights, by mutual agreement of the parties.
f) to determine whether there has been a violation by any state or any Indigenous People of the provisions of the present Covenant.
g) to conduct or commission research on matters of Indigenous rights.

to conduct or support educational programs and to publish any reports, studies or determinations.

h) to determine, in cases of dispute, the groups that are Indigenous People with a right of self-determination, subject to an appeal to the Tribunal of Indigenous Rights as subsequently provided. The Commission shall review all ratifications of the present Convention by Indigenous People to determine whether the ratifying group is an Indigenous People with a right of self-determination.

Article 4. The Commission will be composed of no fewer than 6 and no more than 19 persons. Each commissioner will be an Indigenous person of good moral character.

Article 5. Three persons will be nominated to the Commission from every state affected by the Covenant. A state is affected by the Covenant if:

a) it has ratified the Covenant, or
b) an Indigenous People living wholly or partly within the state has ratified the Covenant.

Article 6. If a state has ratified the Covenant, or if an Indigenous People living wholly or partly within the state has ratified the Covenant, three Indigenous persons will be nominated by the most representative Indigenous organization or organizations in the state. The organization or organizations so qualified shall be designated by the Executive Council of the World Council of Indigenous Peoples. If sufficiently representative organizations do not exist, the Executive Council of the World Council of Indigenous Peoples shall designate an individual of the state to make all or some of the nominations.

Article 7. The members of the Commission shall be selected from the nominees by the Executive Council of the World Council of Indigenous Peoples, which shall also determine the number of Commissioners. Members shall serve terms of four years.

Article 8. The duties of the Tribunal of Indigenous Rights are to determine, after an investigation and determination by the Commission of Indigenous Rights:

a) the groups which are Indigenous Peoples with a right of self-determination;
b) any question of compliance with this Covenant.

Article 9. A matter may be taken before the Commission by a state party, an Indigenous party, the World Council of Indigenous Peoples or a person or persons affected by an alleged violation of the rights of an Indigenous People. A matter may be taken before the Tribunal after the investigation and determination of the Commission of Indigenous Rights, by the Commission of Indigenous Rights.

Article 10. The tribunal may request an advisory opinion from the International Court of Justice on any question of law arising in the course of its work.

Article 11. The Tribunal will hold public hearings and receive oral or written submissions. Parties may be represented by council. No rules of the Tribunal shall exclude any category of evidence.

Article 12. The Tribunal shall consist of up to 15 persons, 4 of whom will serve on a full-time basis. The members of the Tribunal may be Indigenous or non-Indigenous, shall be of good moral character and shall serve in their individual capacities.

Article 13. Each state party may nominate one candidate for the Tribunal. Each Indigenous People signatory to the present Covenant may nominate one candidate for the Tribunal. The members of the Tribunal shall be elected by secret ballot by the states and the Indigenous Peoples who have ratified the present Covenant. The elections will be conducted in a manner to ensure that a majority of the members of the Tribunal will be Indigenous people.

Article 14. The costs of the institutions created pursuant to the present Covenant shall be borne by the United Nations Organization.

Article 15. Nothing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any rights recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Article 16. There shall be no restriction upon or derogation from any of the rights recognized or existing in any state party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Part VI
REPORTING

Article 1. Each state and each Indigenous Peoples which has ratified the present Covenant shall report to the Commission on Indigenous Rights every three years, describing fully the situation of the Indigenous People and the extent of compliance with the provisions of domestic and international law, including those of the present Covenant.

Part VII
COMING INTO FORCE

Article 1. The present Covenant is open for signature and ratification by any state and by any Indigenous People. Instruments of ratificat shall be deposited with the Secretary-General of the United Nation

Article 2. The present Covenant shall enter into force three months after

the date of the deposit with the Secretary-General of the United Nations the sixth ratification by a state and the sixth ratification by Indigenous People. Until the establishment of the Commission of Indigenous Rights, the Executive Council of the World Council of Indigenous Peoples shall certify groups to be Indigenous People with a right of self-determination for the purposes of ratification of the present Covenant.

* * * * * * * * * * * * *

NATIONAL CONGRESS OF AMERICAN INDIANS

Est. 1944

Draft
8 October 1983

NCAI RESOLUTION NO._____

INDIAN RIGHTS UNDER INTERNATIONAL LAW: A Resolution concerning U.S. Indian Support, modification and adoption of the World Council of Indigenous Peoples' sponsored "Draft International Covenant on the Rights of Indigenous Peoples" to be considered for final adoption at the Fourth General Assembly of the WCIP in June 1984 at Tlahuitolpec, Mexico.

1.0 Statement of Findings:

Over a period of more than two hundred years, Indian Nations located inside what is now asserted to be the United States of America have concluded treaties and agreements among themselves and with the states of the United Kingdom, France, Spain the Netherlands, Russia and the United States of America. These treaties and agreements are international instruments of "peace and cooperation", "land cession" and or security compacts to preserve the sovereign distinction of Indian nations and preserve their international personality as peoples.

Despite these treaties and agreements, newly formed nation-states like the United States of America and older states like the United Kingdom and the Netherlands have systematicly worked to suppress the original sovereign identity of Indian and other indigenous nations through the enactment of certain domestic laws. These laws have been aimed at the ultimate assimilation of indigenous peoples under nation-state control. The suppression of the identity of Indian nations has worked to shroud the international identity and personality of Indian peoples.

1.2 The domestic denial and suppression of Indian sovereignty, and the confiscation of Indian lands and natural wealth have forced Indian nations into economic and political dependence on the United States. This dependence has not improved the economic and political development of Indian Nations, but placed them in a continual state of economic, social and political distress. By this process Indian Rights and sovereignty have not been protected, but rather eroded by the United States of America.

1.3 Under ordinary circumstances the rights of Indian peoples would be ensured under international law in accordance with the "law of nations" and new international law. Just

as the United States of America and other nation-states have worked to promote assimilation under domestic laws, nation-states have worked to deny Indian sovereignty and promote assimilation in international law.

1.4 Several major pieces of international legislation have been passed into law among nation-states which directly affect Indian Rights and sovereignty. These include:

a. Convention (No.50) Concerning the Regulation of Certain Special system of Recruiting Workers (Indigenous Peoples). International Labour Organization (ILO) Geneva, Switzerland: 8, Sept. 1939.

b. Convention (No. 82) Concerning Social Policy in non-Metropolitan Territories, ILO, Geneva, Switzerland: 1947. Coming into force 19 June 1955.

c. Convention (No. 107) Concerning the Protection and Integration of Indigenous and other Tribal and Semir Tribal Populations in Indepedent Countries. ILO, Geneva, Switzerland, 1957: coming into force 2 June 1959.

d. Inter American Treaty on Indian Life, Currently under the Organization of American States administration. 1944.

1.5 These international laws referr to indigenous rights and Indian Rights. Like U.S. law, they are designed to promote the "integration" or assimilation of Indian peoples through cooperation between nation-states. Indigenous peoples are described as "populations" and not as peoples or nations and, therefore, are not considered eligible to be treated as "peoples" under other international law. By denying Indians the status as "peoples" nation-states have generally barred Indian rights and Indian selfdetermination as a matter for consideration under international statutes.

1.6 Recognizing both domestic and international suppression of Indian rights as an obstacle to the free development of Indian Peoples, the World Council of Indigenous Peoples adopted, inprinciple, a "Draft International Covenant on the Rights of Indigenous Peoples" at its Third General Assembly in Canberra, Australia in the Spring of 1980. The NCAI sent a delegation to the WCIP General Assembly which played a direct role in the formulation of the Draft Covenant. The WCIP invited member organizations to review the Draft International legislation and return to the Fourth General Assembly in Tlahuitolpec, Mexico in June, 1984 with suggestions for ammendments and final adoption. The proposed Covenant requires that International law become applicable to Indigenous peoples in the same way it is applied to other nations in the world.

1.7 In November 1979, the United States of America officially altered its position of opposing the application of international law to Indian Rights. The U.S. government announced to other nation-states signatory to the Helsinki Final Act that: "Indian Rights issues fall under both Principle VII of the Helsinki Final Act, where the rights

national minorities are addressed, and under Principle VIII, which addresses equal rights and the self-determination of peoples.

1.8 Under the Helsinki Final Act, Principle VIII the United States notified other nation-states of its pledge to apply and uphold international covenants (including the UN Charter)in its relations with organized Indian and native nations and communities.

1.9 On August 10, 1983 the NCAI notified the United Nations Working Group on Indigenous Populations in Geneva, Switzerland, through a diplomatic transmission, that the United States of America had changed the international standards concering the rights of Indian peoples by virtue of its representations under the Helsinki Final Act. Actions of the United Nations, the WCIP and the United States of America in the field of international law demand a responce by member governments of NCAI. The Draft International Covenant on the Rights of Indigenous Peoples constitutes a direct and immediate means bywhich Indian peoples and their governments may protect and advance Indian Rights within the framework of International relations.

2.0 WHEREAS, in consideration of the founding principles upon which the National Congress of American Indians Consitution is based, where member Indian Governments and peoples are committed to the preservation of Indian cultural values, the equitable adjustment of Indian Affairs, the preservation of Indian Rights, the promotion of the common welfare of the American Indian; and a better understanding of Indians, and

2.1 WHEREAS, Recalling Resolution #55, 1950 where the NCAI reaffirmed the Indian Right of Self-government, and

2.2 WHEREAS, Recalling Resolution #1, 1966 where NCAI in the 23rd Annual Convention established a long-range policy to achieve self-determination among Indian peoples,

2.3 WHEREAS, Reminded of the American Indian Declaration of Sovereignty 1974, adopted by the 31st Annual Convention, declaring the "inherent sovereign rights and powers of self-government to Indian nations without interferrence", and

2.4 WHEREAS, Recalling the Tribal/Global Relations Policy and Action Plan for the 80's, 1980, adopted by the 37th Annual Convention; objective #6 directs NCAI to "promote and facilitate the development of internationally binding laws which ensure recognition of tribal peoples' permanent sovereignty over their territories", and,

2.5 WHEREAS, Reminded that the National Congress of American Indians is a Charter member of the World Council of Indigenous Peoples from 1975.

3.0 NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians, meeting in 40th Annual Convention in Greenbay, Wisconsin does endores and approve the Draft Internationa Covenant on the Rights of Indigenous Peoples in principle, and suggests certain ammendments, adjustments and/or modifications to *be subsequently attached to this resolution, and*

3.1 BE IT FURTHER RESOLVED, That the NCAI Delegation to the Fourth General Assembly of the WCIP in Tlahuitolpec, Mexico is directed to present the attached ammendments, adjustments and/or modifications for consideration by the WCIP General Assembly, and

3.2 BE IT FURTHER RESOLVED, that this Resolution and Attachments be transmitted to the WCIP Secretariat, and

3.4 BE IT FINALLY RESOLVED, that the National Congress of American Indians shall consider final ratification of the International Covenant on the Rights of Indigenous Peoples at the 41st Annual Convention.

C E R T I F I C A T I O N

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COUNTY OF YAKIMA ET AL. *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90–408. Argued November 5, 1991—Decided January 14, 1992*

Yakima County, Washington, imposes an ad valorem levy on taxable real property within its jurisdiction and an excise tax on sales of such land. The County proceeded to foreclose on various properties for which these taxes were past due, including certain fee-patented lands held by the Yakima Indian Nation or its members on the Tribe's reservation within the County. Contending that federal law prohibited the imposition or collection of the taxes on such lands, the Tribe filed suit for declaratory and injunctive relief and was awarded summary judgment by the District Court. The Court of Appeals agreed that the excise tax was impermissible, but held that the ad valorem tax would be impermissible only if it would have a "'demonstrably serious'" impact on the Tribe's "'political integrity, economic security or . . . health and welfare'" (quoting *Brendale* v. *Confederated Yakima Indian Nation*, 492 U. S. 408, 431 (opinion of WHITE, J.)), and remanded to the District Court for that determination.

Held: The Indian General Allotment Act of 1887 permits Yakima County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act and owned by reservation Indians or the Yakima Indian Nation itself, but does not allow the County to enforce its excise tax on sales of such land. Pp. 5–18.

(a) As the Court held in *Goudy* v. *Meath*, 203 U. S. 146, 149, the

*Together with No. 90–577, *Confederated Tribes and Bands of the Yakima Indian Nation* v. *County of Yakima et al.*, also on certiorari to the same court.

Syllabus

Indian General Allotment Act authorizes taxation of fee-patented land. This determination was explicitly confirmed in a 1906 amendment to the Act, known as the Burke Act, which includes a proviso authorizing the Secretary of the Interior, "whenever . . . satisfied that any [Indian] allottee is competent . . . [,] to . . issu[e] to such allottee a patent in fee simple," and provides that *"thereafter all restrictions as to . . . taxation of said land shall be removed."* (Emphasis added). Thus, the Indian General Allotment Act contains the unmistakably clear expression of intent that is necessary to authorize state taxation of Indian lands. See, *e. g., Montana* v. *Blackfeet Tribe of Indians,* 471 U. S. 759, 765. The contention of the Tribe and the United States that this explicit statutory conferral of taxing power has been repudiated by subsequent Indian legislation rests upon a misunderstanding of this Court's precedents, particularly *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U. S. 463, and a misperception of the structure of the Indian General Allotment Act. Pp. 5–13.

(b) Because, under state law, liability for the ad valorem tax flows exclusively from ownership of realty on the annual assessment date, and the tax creates a burden on the property alone, this tax constitutes "taxation of . . . land" within the meaning of the Indian General Allotment Act, and is therefore prima facie valid. Nevertheless, *Brendale, supra,* and its reasoning are inapplicable to the present case, which involves an asserted restriction on a State's congressionally conferred powers over Indians rather than a proposed extension of a tribe's inherent powers over the conduct of non-Indians on reservation fee lands. Moreover, application of a balancing test under *Brendale* would contravene the *per se* approach traditionally followed by this Court in the area of state taxation of tribes and tribal members, under which taxation is categorically allowed or disallowed, as appropriate, depending exclusively upon whether it has in fact been authorized by Congress. Pp. 14–15.

(c) However, the excise tax on sales of fee-patented reservation land cannot be sustained. The Indian General Allotment Act explicitly authorizes only "taxation of . . . land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the activity of selling real estate, this Court's cases require that that interpretation be applied for the benefit of the Tribe. See, *e. g., Blackfeet Tribe, supra,* at 766. Pp. 15–17.

(d) The factual question whether the parcels at issue were patented under the Indian General Allotment Act or some other federal allotment statute, and the legal question whether it makes any difference, are left for resolution on remand. Pp. 17–18.

Syllabus

903 F. 2d 1207, affirmed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part.

SUPREME COURT OF THE UNITED STATES

Nos. 90-408 AND 90-577

COUNTY OF YAKIMA, ET AL., PETITIONERS
90-408 *v.*
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, PETITIONER
90-577 *v.*
COUNTY OF YAKIMA AND DALE A. GRAY, YAKIMA COUNTY TREASURER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 14, 1992]

JUSTICE SCALIA delivered the opinion of the Court.

The question presented by these consolidated cases is whether the County of Yakima may impose an ad valorem tax on so-called "fee-patented" land located within the Yakima Indian Reservation, and an excise tax on sales of such land.

I

A

In the late 19th Century, the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually. The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large. See, *e. g.*, *In re Heff*, 197

SUPREME COURT OF THE UNITED STATES

Nos. 90-408 AND 90-577

COUNTY OF YAKIMA, ET AL., PETITIONERS
90-408 *v.*
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, PETITIONER
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I

A

In the late 19th Century, the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually. The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large. See, *e. g.*, *In re Heff*, 197

U. S. 488, 499 (1905). Congress was selective at first, allotting lands under differing approaches on a tribe-by-tribe basis. See F. Cohen, Handbook of Federal Indian Law 129–130 (1982); Gates, Indian Allotments Preceding the Dawes Act, in The Frontier Challenge 141 (J. Clark ed. 1971). These early efforts were marked by failure, however. Because allotted land could be sold soon after it was received, see, *e. g.*, Treaty with the Wyandots, Apr. 1, 1850, 9 Stat. 987, 992, many of the early allottees quickly lost their land through transactions that were unwise or even procured by fraud. See Cohen, *supra*, at 130. Even if sales were for fair value, Indian allottees divested of their land were deprived of an opportunity to acquire agricultural and other self-sustaining economic skills, thus compromising Congress' purpose of assimilation.

Congress sought to solve these problems in the Indian General Allotment Act of 1887, also known as the Dawes Act, 24 Stat. 388, as amended, 25 U. S. C. §331 *et seq.*, which empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved. The Dawes Act restricted immediate alienation or encumbrance by providing that each allotted parcel would be held by the United States in trust for a period of 25 years or longer; only then would a fee patent issue to the Indian allottee. 24 Stat. 389; see *United States* v. *Mitchell*, 445 U. S. 535, 543–544 (1980). Section 6 of the Act furthered Congress' goal of assimilation by providing that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. 390.

In *In re Heff*, *supra*, at 502–503, we held that this latter provision subjected Indian allottees to plenary state jurisdiction immediately upon issuance of a trust patent (and prior to the expiration of the 25-year trust period). Congress promptly altered that disposition in the Burke Act

of 1906, 34 Stat. 182, decreeing that state civil and criminal jurisdiction would lie "[a]t the expiration of the trust period . . . when the lands have been conveyed to the Indians by patent in fee." A proviso, however, gave the President authority, when he found an allottee "competent and capable of managing his or her affairs," to "issu[e] . . . a patent in fee simple" prior to the expiration of the relevant trust period. Upon such a premature patenting, the proviso specified (significantly for present purposes) *not* that the patentee would be subject to state civil and criminal jurisdiction but that "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." *Id.*, at 183.

The policy of allotment came to an abrupt end in 1934 with passage of the Indian Reorganization Act. See 48 Stat. 984, 25 U. S. C. §461 *et seq.* Returning to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era, Congress halted further allotments and extended indefinitely the existing periods of trust applicable to already allotted (but not yet fee-patented) Indian lands. See 25 U. S. C. §§ 461, 462. In addition, the Act provided for restoring unallotted surplus Indian lands to tribal ownership, see 25 U. S. C. §463, and for acquiring, on behalf of the tribes, lands "within or without existing reservations." 25 U. S. C. §465. Except by authorizing reacquisition of allotted lands in trust, however, Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints on the ability of Indian allottees to alienate or encumber their fee-patented lands, nor impaired the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands allotted under the Dawes Act. See W. Washburn, Red Man's Land/White Man's Law 145 (1971).

B

The Yakima Indian Reservation, which was established

by treaty in 1855, see Treaty between the United States and Yakama Nation of Indians, 12 Stat. 951, covers approximately 1.3 million acres in southeastern Washington State. Eighty percent of the reservation's land is held by the United States in trust for the benefit of the Tribe or its individual members; 20 percent is owned in fee by Indians and non-Indians as a result of patents distributed during the allotment era. See *Brendale* v. *Confederated Yakima Indian Nation*, 492 U. S. 408, 415 (1989) (plurality opinion). Some of this fee land is owned by the Yakima Indian Nation itself.

The reservation is located almost entirely within the confines of petitioner/cross-respondent Yakima County. Pursuant to Washington law, Yakima County imposes an ad valorem levy on taxable real property within its jurisdiction, and an excise tax on sales of such land. Wash. Rev. Code §§84.52.030, 82.45.070 (1989). According to the County, these taxes have been levied on the Yakima Reservation's fee lands and collected without incident for some time. In 1987, however, as Yakima County proceeded to foreclose on properties throughout the County for which ad valorem and excise taxes were past due, including a number of reservation parcels in which the Tribe or its members had an interest, respondent/cross-petitioner Yakima Nation commenced this action for declaratory and injunctive relief, contending that federal law prohibited these taxes on fee patented lands held by the Tribe or its members.

On stipulated facts, the District Court awarded summary judgment to the Tribe, and entered an injunction prohibiting the imposition or collection of the taxes on such lands. On appeal, the Court of Appeals for the Ninth Circuit agreed that the excise tax was impermissible, but held that the ad valorem tax would be impermissible only if it would have a " 'demonstrably serious' " impact on the " 'political integrity, economic security, or the health and welfare of the tribe,' " and remanded to the District Court for that

determination to be made. 903 F. 2d 1207, 1218 (CA9 1990) (emphasis deleted) (quoting *Brendale*, *supra*, at 431). We granted certiorari. 500 U. S. ___ (1991).

II

The Court's earliest cases addressing attempts by States to exercise dominion over the reservation lands of Indians proceeded from Chief Justice Marshall's premise that the "several Indian nations [constitute] distinct political communities, having territorial boundaries, within which their authority is exclusive . . . ." *Worcester* v. *Georgia*, 6 Pet. 515, 556–557 (1832). Because Congress, pursuant to its constitutional authority both "[t]o regulate Commerce . . . with the Indian Tribes" and to make treaties, U. S. Const., Art. I, §8, cl. 3; Art II, §2, cl.2, had determined by law and treaty that "all intercourse with them [would] be carried on exclusively by the [Federal Government]," *Worcester* v. *Georgia*, *supra*, at 557, the Court concluded that within reservations state jurisdiction would generally not lie. The assertion of taxing authority was not excepted from this principle. *E. g.*, *The Kansas Indians*, 5 Wall. 737, 755–757 (1867); *The New York Indians*, 5 Wall. 761, 771–772 (1867).

The "platonic notions of Indian sovereignty" that guided Chief Justice Marshall have, over time, lost their independent sway. See *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 172 and n. 8 (1973); *Organized Village of Kake* v. *Egan*, 369 U. S. 60, 71–73 (1962). Congress abolished treaty-making with the Indian nations in 1871, Rev. Stat. §2079, as amended, 25 U. S. C. §71, and has itself subjected the tribes to substantial bodies of state and federal law. This Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands, see, *e. g.*, *New York ex rel. Ray* v. *Martin*, 326 U. S. 496 (1946); see also F. Cohen, Handbook of Federal Indian Law, at 352 and n.39.

We have even observed that state jurisdiction over the relations between reservation Indians and non-Indians may be permitted unless the application of state laws "would interfere with reservation self-government or impair a right granted or reserved by federal law." *Organized Village of Kake, supra*, at 75. In the area of state taxation, however, Chief Justice Marshall's observation that "the power to tax involves the power to destroy," *McCulloch* v. *Maryland*, 4 Wheat. 316, 431 (1819), has counseled a more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is without power to tax reservation lands and reservations Indians. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973). And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has "made its intention to do so unmistakably clear." *Montana* v. *Blackfeet Tribe*, 471 U. S. 759, 765 (1985); see also *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 215, n. 17 (1987).

Yakima County persuaded the Court of Appeals, and urges upon us, that express authority for taxation of fee-patented land is found in §6 of the General Allotment Act, as amended.[1] We have little doubt about the accuracy of that threshold assessment. Our decision in *Goudy* v. *Meath*, 203 U. S. 146, 149 (1906), without even mentioning the Burke Act proviso, held that state tax laws were "[a]mong the laws to which [Indian allottees] became subject" under §6 upon the expiration of the Dawes Act trust period. And we agree with the Court of Appeals that by specifically mentioning immunity from land taxation "as one of the restrictions that would be removed upon conveyance in fee," Congress in the Burke Act proviso "manifest[ed] a clear intention to permit the state to tax" such Indian lands. 903 F. 2d, at 1211.

Neither the Yakima Nation nor its principal *amicus*, the United States, vigorously disputes this.[2] Instead, they

[1] Section 6 provides in pertinent part:

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of *and be subject to* the laws, both civil and criminal, of the State or Territory in which they may reside . . . . *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, *and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.*" 25 U. S. C. §349 (emphasis added).

[2] The Yakima Nation does, however, make a preliminary objection to the taxes on the ground that the Washington State Constitution permits land taxes to be imposed only on those Indians holding fee patents who have terminated their affiliations with the Tribe—which the Indian plaintiffs in this case have not done. The provision at issue provides in pertinent part as follows:

"That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . ; Provided*, That *nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant*, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe." Wash. Const., Art. XXVI, Second (emphasis added).

We agree with the Court of Appeals that, under this text, the Indian lands not covered by the quoted proviso are not *exempted from taxation*,

contend that §6 of that Act—the Burke Act proviso included—is a dead letter, at least within the confines of an Indian reservation. The Tribe argues that, by terminating the allotment program and restoring tribal integrity through the Indian Reorganization Act of 1934, Congress impliedly repealed §6's jurisdictional grant and returned the law to its pre-Allotment Act foundations. Congress's subsequent actions, according to the Tribe, confirm this implication. In 1948, for instance, Congress defined "Indian country" to include all fee land within the boundaries of an existing reservation, whether or not held by an Indian, and preempted state criminal laws within "Indian country" insofar as offenses by and against Indians were concerned. See Act of June 25, 1948, 62 Stat. 757–758, as amended 18 U. S. C. §§1151–1153; *Seymour* v. *Superintendent of Washington State Penitentiary*, 368 U. S. 351 (1962). And in 1953, Congress once again signaled its belief in the dormition of §6 by enacting Pub. L. 280, which authorized States to assume criminal and civil jurisdiction over Indians within Indian country in certain circumstances. See Act of Aug. 15, 1953, 67 Stat. 588.

Though generally in agreement with the Tribe, the United States takes a slightly different tack. It claims that the Allotment Act removed only those barriers to state jurisdiction that existed at the time of its enactment, *e. g.*, those associated with tribal sovereignty and the trust status of allotted land. The Allotment Act did not remove—indeed, the argument goes, *could not* have removed—a jurisdictional bar arising after the Act's passage. For just such an after-arising jurisdictional bar, the United States points to the same statutes on which the Tribe rests its case. In the United States' view, these enactments must

but merely committed to "the absolute jurisdiction and control of [Congress]." If Congress has permitted taxation, the provision is not violated.

be construed to preempt the application "of state laws (especially state tax laws) to Indians and their property within a reservation." Brief for United States as *Amicus Curiae* 14.

In support of their convergent arguments, the Yakima Nation and the United States cite this Court's unanimous decision in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U. S. 463 (1976), which they contend repudiates the continuing jurisdictional force of the Allotment Act. In that case, the State of Montana sought to impose its cigarette sales and personal property taxes, as well as vendor-licensing fees, on Indian residents of a reservation located entirely within the State. It relied for jurisdiction upon §6 of the General Allotment Act, but did not limit its claim of taxing authority to the reservation's allottees or even to those activities taking place on allotted reservation fee land. Instead, the State made an "all or nothing" claim to reservation-wide jurisdiction (trust land included), arguing that any scheme of divided jurisdiction would be inequitable. Brief for Appellants in *Moe*, O. T. 1975, No. 74–1656, p. 17. We declined Montana's invitation to ignore the plain language of §6, which "[b]y its terms [did] not reach Indians residing" or conducting business on trust lands. *Moe*, 425 U. S., at 478. The assertion of reservation-wide jurisdiction, we said, could not be sustained. But we went much further: In light of Congress's repudiation in 1934 of the policies behind the General Allotment Act, we concluded that the Act could no longer be read to provide Montana plenary jurisdiction even over those Indians residing on reservation fee lands:

> "The State has referred us to no decisional authority—and we know of none—giving the meaning for which it contends to §6 of the General Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands . . . . Congress by its more modern legislation has evinced a clear intent to eschew any

such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area." *Id.*, at 479.

Reasoning from *Moe*, the Yakima Nation and the United States argue that if §6 no longer provides for *plenary* State jurisdiction over the owners of reservation fee lands, then it cannot support the exercise of the narrower jurisdiction asserted by Yakima County here. They concede, as they must, that in *Moe* the Court did not address the Burke Act proviso to §6, which figures so prominently in Yakima County's analysis. But real property taxes were not at issue in *Moe*, they argue, making the proviso irrelevant. And because a proviso can only operate within the reach of the principal provision it modifies, cf. *United States* v. *Morrow*, 266 U. S. 531, 534–535 (1925), neither the language of §6 proper nor the proviso can be considered effective after *Moe*.

We think this view rests upon a misunderstanding of *Moe* and a misperception of the structure of the General Allotment Act. As to the former: The Tribe's and the United States' interpretation of our opinion in *Moe* reduces ultimately to the proposition that we held §6 to have been repealed by implication. That is not supportable, however, since it is a "cardinal rule . . . that repeals by implication are not favored," *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936), and since we made no mention of implied repeal in our opinion. *Moe* was premised, instead, on the implausibility, in light of Congress' post-allotment era legislation, of Montana's construction of §6 that would extend the State's *in personam* jurisdiction beyond the section's literal coverage ("each and every *allottee*") to include *subsequent* Indian owners (through grant or devise) of the allotted parcels. This approach, we said, would create a "checkerboard" pattern in which an Indian's personal law would depend upon his parcel-ownership; it would contradict "the many and complex intervening jurisdictional statutes" dealing with States' civil and

criminal jurisdiction over reservation Indians; and it would produce almost surreal administrative problems, making the applicable law of civil relations depend not upon the locus of the transaction but upon the character of the reservation land owned by one or both parties. See *Moe*, *supra*, at 478–479.

Thus, even as to §6 personal jurisdiction, *Moe* in no way contradicts *Goudy* v. *Meath*, which involved the personal liability for taxes of an Indian who not merely owned an allotted parcel, but was, as the language of §6 requires, himself an allottee. See 203 U. S., at 147, 149. But (and now we come to the misperception concerning the *structure* of the General Allotment Act) *Goudy* did not rest exclusively, or even primarily, on the §6 grant of personal jurisdiction over allottees to sustain the land taxes at issue. Instead, it was the *alienability of the allotted lands*—a consequence produced in the present case not by §6 of the General Allotment Act, but by §5[3]—that the Court found of central significance. As the first basis of its decision, before reaching the "further" point of personal jurisdiction under §6, *id.*, at 149, the *Goudy* court said that, although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." *Ibid.* For "it would

[3] Section 5 of the Allotment Act provides in part:

"[A]t the expiration of said [trust] period the United States will convey [the allotted lands] by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever. . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void . . . ." 25 U. S. C. §348.

The negative implication of the last quoted sentence, of course, is that a conveyance of allotted land is permitted once the patent issues.

seem strange to withdraw [the] protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it [*sic*] from taxation." *Ibid.* Thus, when §5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

The Burke Act proviso, enacted in 1906, made this implication of §5 explicit, and its nature more clear. As we have explained, the purpose of the Burke Act was to change the outcome of our decision in *In re Heff*, 197 U. S. 488 (1905), so that §6's general grant of civil and criminal jurisdiction over Indian allottees would not be effective until the 25-year trust period expired and patents were issued in fee. The proviso, however, enabled the Secretary of the Interior to issue fee patents to certain allottees *before* expiration of the trust period. Although such a fee patent would not subject its Indian owner to *plenary* state jurisdiction, fee ownership would free the *land* of "all restrictions as to sale, incumbrance or taxation." 25 U. S. C. §349. In other words, the proviso reaffirmed for such "prematurely" patented land what §5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.[4] And when Congress, in 1934, while putting an end to further allotment of reservation land, see 25 U. S. C. §461, chose *not* to return allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs and assigns, see *Brendale*, 492 U. S., at 423 (plurality opinion); *Hodel* v. *Irving*, 481 U. S. 704, 708–709 (1987), it chose not to terminate state taxation upon those lands as well.

[4] Since the proviso is nothing more than an acknowledgement (and clarification) of the operation of §5 with respect to *all* fee patented land, it is inconsequential that the trial record does not reflect "which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust period . . . ." Brief of United States 13 n.10.

The Yakima Nation and the United States deplore what they consider the impracticable, *Moe*-condemned "checkerboard" effect produced by Yakima County's assertion of jurisdiction over reservation fee-patented land. But because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned; and it is not impracticable either. The parcel-by-parcel determinations that the State's tax assessor is required to make on the reservation do not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally owned, state owned and church owned lands. We cannot resist observing, moreover, that the Tribe's and the United States' favored disposition also produces a "checkerboard," and one that is *less* readily administered: They would allow state taxation of only those fee lands owned (from time to time) by non-members of the Tribe. See Brief for Yakima Nation 16, n. 8; Brief for United States 14, n. 12. See also *Brendale*, *supra*, at 422–425 (plurality opinion) (affirming "checkerboard" with respect to zoning power over reservation fee land).

Turning away from the statutory texts altogether, the Yakima Nation argues that state jurisdiction over reservation fee land is manifestly inconsistent with the policies of Indian self-determination and self-governance that lay behind the Indian Reorganization Act and subsequent congressional enactments. This seems to us a great exaggeration. While the *in personam* jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government, the mere power to assess and collect a tax on certain real estate is not. In any case, these policy objections do not belong in this forum. If the Yakima Nation believes that the objectives of the Indian Reorganization Act are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress. Judges "are not at liberty to pick and choose among congressional enactments, and when two [or more] statutes are capable of

co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974).

III

Yakima County sought to impose two separate taxes with respect to reservation fee lands, an ad valorem tax and an excise tax on sales. We discuss each in turn, in light of the principles set forth above.

A

Liability for the ad valorem tax flows exclusively from ownership of realty on the annual date of assessment. See *Timber Traders, Inc.* v. *Johnston*, 87 Wash. 2d 42, 47, 548 P. 2d 1080, 1083 (1976). The tax, moreover, creates a burden on the property alone. See Wash. Rev. Code §84.60.020 (1989) ("The taxes assessed upon real property . . . shall be a lien thereon from and including the first day of January in the year in which they are levied until the same are paid . . . ."); *Clizer* v. *Krauss*, 57 Wash. 26, 30–31, 106 P. 145, 146–147 (1910). See also *Timber Traders, Inc.*, *supra*; *In re Electric City, Inc.*, 43 B. R. 336, 341 (Bkrtcy. WD Wash. 1984) (dictum). The Court of Appeals held, the Tribe does not dispute, and we agree, that this ad valorem tax constitutes "taxation of . . . land" within the meaning of the Allotment Act, and is therefore prima facie valid.

The Court of Appeals, however, derived from our decision three Terms ago in *Brendale* the conclusion that the Yakima Nation has a "protectible interest" against imposition of the tax on tribe members upon demonstration of the evils described in that opinion, and remanded to the District Court for further findings in that regard. Neither of the parties supports this aspect of the Ninth Circuit's ruling, believing that the law affords an unconditional answer to permissibility of the tax. We agree.

Brendale addressed a challenge to the Yakima Nation's assertion of authority to zone reservation fee land owned by

non-Indians. The concept of "protectible interest" to which JUSTICE WHITE's opinion in the case referred, see 492 U. S., at 431 (opinion of WHITE, J.), grew out of a long line of cases exploring the very narrow powers reserved to tribes over the conduct of non-Indians within their reservations. See *Montana* v. *United States*, 450 U. S. 544, 566 (1981) (citing cases). Even though a tribe's "inherent sovereign powers . . . do not extend to the activities of nonmembers, . . . [a] tribe may . . . retain inherent power *to exercise civil authority over the conduct of non-Indians on fee lands within its reservation* when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 565–566 (emphasis added). *Brendale* and its reasoning are not applicable to the present case, which involves not a proposed extension of a tribe's inherent powers, but an asserted restriction of a State's congressionally conferred powers. Moreover, as the Court observed recently in *California* v. *Cabazon Band of Indians*, 480 U. S., at 215, n.7, we have traditionally followed "a per se rule" "[i]n the special area of state taxation of Indian tribes and tribal members." Though the rule has been most often applied to produce categorical prohibition of state taxation when there has been no "cession of jurisdiction or other federal [legislative permission]," *Mescalero Apache Tribe*, 411 U. S., at 148, we think it also applies to produce categorical allowance of state taxation when it has in fact been authorized by Congress. "Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress." *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S., at 177 (opinion of REHNQUIST, J.). If the Ninth Circuit's *Brendale* test were the law, litigation would surely engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to

parcel. For reasons of practicality, as well as text, we adhere to our per se approach.

B

We think the excise tax on sales of fee land is another matter, as did the Court of Appeals. While the Burke Act proviso does not purport to describe the entire range of *in rem* jurisdiction States may exercise with respect to fee-patented reservation land, we think it does describe the entire range of *jurisdiction to tax*. And that description is "taxation of . . . land." Yakima County seeks to expand this text by citing our statement in *Squire* v. *Capoeman*, 351 U. S. 1 (1956), to the effect that "[t]he literal language of the [Burke Act] proviso evinces a congressional intent to subject an Indian allotment to *all* taxes" after it has been patented in fee. *Id.*, at 7–8 (emphasis added). This dictum was addressed, however, to the United States' assertion that the General Allotment Act barred only States and localities, and not the Federal Government, from levying taxes on Indian allotments during the trust period. "All taxes," in the sense of federal as well as local, in no way expands the text beyond "taxation *of* . . . *land*."

It does not exceed the bounds of permissible construction to interpret "taxation of land" as including taxation of the proceeds from sale of land; and it is even true that such a construction would be fully in accord with *Goudy*'s emphasis upon the consequences of alienability, which underlay the Burke Act proviso. That is surely not, however, the phrase's unambiguous meaning—as is shown by the Washington Supreme Court's own observation that "a tax upon the sale of property is not a tax upon the subject matter of that sale." *Mahler* v. *Tremper*, 40 Wash. 2d 405, 409, 243 P. 2d 627, 629 (1952). It is quite reasonable to say, in other words, that though the object of the *sale* here is land, that does not make land the object of the *tax*, and hence does not invoke the Burke Act proviso. When we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's

Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe of Indians*, 471 U. S., at 766. See also *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S., at 174.

To render this a "taxation of land" in the narrow sense, it does not suffice that, under Washington law, the excise tax creates "a specific lien upon each piece of real property sold from the time of sale until the tax shall have been paid . . . ." Wash. Rev. Code. §82.45.070 (1989). A lien upon real estate to satisfy a tax does not convert the tax into a tax upon real estate—otherwise all sorts of state taxation of reservation-Indian activities could be validated (even the cigarette sales tax disallowed in *Moe*) by merely making the unpaid tax assessable against the taxpayer's fee-patented real estate. Thus, we cannot even accept the County's narrower contention that the excise tax lien is enforceable against reservation fee property conveyed by an Indian seller to a non-Indian buyer. The excise tax remains a tax upon the Indian's activity of selling the land, and thus is void, whatever means may be devised for its collection. Cf., *e. g.*, *Washington* v. *Confederated Tribes of Colville Reservation*, *supra*, at 154–159 (Indian proprietors may be compelled to precollect taxes whose incidence *legally* falls on non-Indians); *Moe*, 425 U. S., at 482 (same).

The short of the matter is that the General Allotment Act explicitly authorizes only "taxation of . . . land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Washington's excise tax on sales of land cannot be sustained.

* * *

We hold that the General Allotment Act permits Yakima County to impose an ad valorem tax on reservation land

patented in fee pursuant to the Act, but does not allow the County to enforce its excise tax on sales of such land. The Yakima Nation contends it is not clear whether the parcels at issue in this case were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act. *E. g.*, 25 U. S. C. §§ 320, 379, 404, 405. We leave for resolution on remand that factual point, and the prior legal question whether it makes any difference.

The judgment is affirmed and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 90–408 AND 90–577

COUNTY OF YAKIMA, ET AL., PETITIONERS
90–408 *v.*
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, PETITIONER
90–577 *v.*
COUNTY OF YAKIMA AND DALE A. GRAY, YAKIMA COUNTY TREASURER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 14, 1992]

JUSTICE BLACKMUN, concurring in part and dissenting in part.

I have wandered the maze of Indian statutes and case law tracing back 100 years. Unlike the Court, however, I am unable to find an "unmistakably clear" intent of Congress to allow the States to tax Indian-owned fee-patented lands. Accordingly, while I concur with the majority's conclusion that Yakima County may not impose excise taxes, I dissent from their conclusion that the county may impose ad valorem taxes on Indian-owned fee-patented lands.

The Court correctly sets forth the "unmistakably clear" intent standard to be applied. *Ante*, at 6. But then, in my view, it seriously misapplies it, over the well-taken objections of the Yakima Nation and against the sound guidance of the United States as *amicus curiae*. At bottom, I believe the Court misapprehends the nature of federal pre-emption analysis and, as a result, dramatically devalues longstand-

ing federal policies intended to preserve the integrity of our Nation's Indian tribes. As I see it, the Court errs in three ways in arriving at its finding of "unmistakably clear" intent to allow taxation of Indian-owned fee-patented lands. First, it divines "unmistakably clear" intent from a proviso, which by its very terms applies only to land patented prematurely (and not to all patented land) and which is now orphaned, its antecedent principal clause no longer having any force of law. Second, acting on its own intuition that it would be "strange" for land to be alienable and encumberable yet not taxable, the Court *infers* "unmistakably clear" intent of Congress from an otherwise irrelevant statutory section that itself makes no mention of taxation of fee lands. Finally, misapprehending the nature of federal pre-emption of state laws taxing the Indians, the Court mistakenly assumes that it cannot give any effect to the many complex intervening statutes reflecting a complete turnabout in federal Indian policy—now aimed at preserving tribal integrity and the Indian land base—since enactment at the turn of the century of the statutory provisions upon which the Court relies. These current and now longstanding federal policies weigh decisively against the Court's finding that Congress has intended the States to tax—and, as in this case, to foreclose upon—Indian-held lands.

1. The majority concedes that the principal clause of § 6 of the Dawes Act, which subjected allottees to the plenary civil and criminal jurisdiction of the States, can "no longer be read to provide . . . plenary jurisdiction even as to those residing on reservation fee lands." *Ante*, at 9. See also *DeCoteau* v. *District County Court*, 420 U.S. 425, 427, n. 2 (1975) (recognizing that statutory definition of "Indian country," which includes all reservation land "notwithstanding the issuance of any patent," 18 U.S.C. § 1151, demarcates general boundary of civil jurisdiction of States); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 177–178, and n. 17 (1973) (discussing more recent congressional enactments, *i.e.*, Pub. L. 280 and the Indian Civil Rights Act of 1968, giving States civil and criminal jurisdiction over reservations but only upon consent of the affected tribe).

Rather than rely on the principal clause of § 6, the Court turns to a proviso added by the Burke Act of 1906.[1] *Ante*, at 12. It acknowledges that the proviso was not even mentioned in *Goudy* v. *Meath*, 203 U.S. 146 (1906),[2] a case upon which the majority relies. *Ante*, at 6. As an initial matter, the proviso's attachment to an obsolete principal clause, if anything, must diminish its force as a measure of congressional intent. Moreover, by its terms, the proviso does not remove "restrictions as to . . . taxation" from *all* allotted land. It removes restrictions solely from allotted land that happened to be patented in fee "prematurely," *i.e.*, prior to the expiration of the 25-year trust period. To be sure, the proviso could be read to suggest that Congress *possibly* intended taxation of allotted lands other than those lands patented prematurely.[3] But a possibility, or even a

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[1] The proviso states in pertinent part:

"[T]he Secretary of the Interior may, in his discretion . . . whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . ." 25 U.S.C. § 349.

[2] *Goudy* relied upon the principal clause of § 6. Even if this principal clause had any continuing vitality, whether *Goudy* would still be good law is questionable in light of the Court's more recent decision in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), where it declined to find a clear intent of Congress to allow a State to tax Indians on the basis of a statute, § 4(a) of Pub. L. 280, that on its face conferred upon the State general civil jurisdictional powers over Indian country.

[3] This reading, which would imply the taxability of all fee-patented lands *regardless of whether the owner was an original allottee*, is in some tension with what the majority points out to be the "literal coverage ('each and every *allottee*')" of the principal general-jurisdiction-conferring clause. *Ante*, at 10.

likelihood, does not meet this Court's demanding standard of "unmistakably clear" intent.

2. And so the Court turns to § 5 of the Dawes Act for support. The majority claims that "the proviso reaffirmed for such 'prematurely' patented land what §5 of the [Dawes Act] *implied* with respect to patented land generally: subjection to state real estate taxes." *Ante*, at 12 (emphasis added). Because § 5 renders fee-patented lands alienable and encumberable, the majority suggests that "'it would seem strange to withdraw [the] protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it [*sic*] from taxation.'" *Ante*, at 11 (quoting *Goudy* v. *Meath*, 203 U.S., at 149).

The majority concedes that § 5 only "implied" this conclusion. *Ante*, at 12. In my view, a "mere implication" falls far short of the "unmistakably clear" intent standard. Cf. *EEOC* v. *Arabian American Oil Co.*, ___ U.S. ___, ___ (1991) ("Given the presumption against extraterritoriality . . . and the requirement that the intent to overcome it be 'clearly expressed,' it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC has done") (SCALIA, J., concurring in part and concurring in the judgment) (slip op. 2).

Nor can what this Court finds "strange" substitute for the "unmistakably clear" intent of Congress. To impute to Congress an intent to tax Indian land, because the Court thinks it "strange" not to do so, overlooks the countervailing presumption that "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). I need not pass upon the wisdom of the majority's fiscal theory that if land is alienable and encumberable, it must be taxable. I pause only to comment that Congress has made its own agreement with this particular economic theory less than "unmistakably clear." Cf. *Lochner* v. *New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain.").

3. In any event, if "strangeness" is the benchmark of what Congress unmistakably intends, I find it stranger still to presume that Congress intends States to tax—and, as in this case, foreclose upon—Indian-owned reservation lands. This presumption does not account for Congress' "abrupt" termination of the assimilationist policies of the Dawes Act in favor of the Indian Reorganization Act's now well-established "principles of tribal self-determination and self-governance." See *ante*, at 3.

The Court announces that the Yakima's "policy objections do not belong in this forum." *Ante*, at 13. Yet, not to consider the policies of the Indian Reorganization Act is to forget that "we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments." *Bryan* v. *Itasca County*, 426 U.S. 373, 386 (1976). See also *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 479 (1976) (noting that State's interpretation of § 6 of the Dawes Act cannot survive "the many and complex intervening jurisdictional statutes" subsequently enacted). The majority appears to assume that these intervening enactments need not be given any effect here, because they do not rise to the level of a "repeal" of the Dawes and Burke Acts. *Ante*, at 10. I agree with the majority that implied repeals are not favored. But this is beside the point. A "repeal"—whether express or implied—need not be shown to preclude the States from taxing Indian lands.

As in all state-Indian jurisdiction cases, the relevant inquiry is whether Congress has *pre-empted* state law, not whether it has *repealed* its own law. See, *e.g.*, *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987); *Bryan* v. *Itasca County*, 426 U.S., at 376, n. 2. Under established principles of pre-emption, and notwithstanding the majority's derisive characterizations, see *ante*, at 13, state laws may in fact give way to "mere" federal policies

and interests. See *English* v. *General Electric Co.*, 496 U.S. ___, ___ (1990) (state law is pre-empted to the extent that it "'stands as an obstacle to the accomplishment and execution of the *full purposes and objectives* of Congress'" (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added))). Thus, in the Indian context, "'[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority'" (emphasis added). *California* v. *Cabazon Band of Mission Indians*, 480 U.S., at 216 (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)).[4] See also *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143–145 (1980) (recognizing "firm federal policy" of promoting tribal self-sufficiency and economic development and noting that the pre-emption inquiry "call[s] for a particularized inquiry into the nature of the state, federal, and tribal *interests* at stake").

Accordingly, this Court has made clear that "the inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 480 U.S., at 216. In *Cabazon*, for example, the Court gave weight to recent policy statements by Congress and the President in support of Indian autonomy and self-determination, deeming them to be "particularly significant in this case." *Id.*, at 216, n. 19; see also *id.*, at 217–218, & nn. 20–21.[5]

[4] In *Cabazon*, the Court reiterated that "the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak." 480 U.S., at 215, n. 17.

[5] I have previously observed:

> "Surely, in considering whether Congress intended tribes to enjoy civil jurisdiction, . . . this Court should direct its attention not to the intent of the Congress that passed the Dawes Act, but rather to the intent of the Congress that repudiated the Dawes Act, and established the Indian policies to which we are heir."

Brendale v. *Confederated Yakima Indian Nation*, 492 U.S. 408, 464 (1989) (opinion concurring in part and dissenting in part).

I believe that if the majority were inclined to give federal policy interests any effect, its conclusion as to Congress' "unmistakably clear" intent would doubtless be different today. The nature of federal policy interests emerges clearly from a review of the effects of the Indian land-allotment policies. During the allotment period from 1887 to 1934, Indian landholdings were reduced nationwide, through a combination of sales by allottees to non-Indians and government sales of "surplus" unallotted lands, from about 138 million acres to 48 million acres. See F. Cohen, Handbook of Federal Indian Law 138 (1982 ed.). Of the 90 million acres lost, about 27 million acres passed from Indians to non-Indians, as a result of the alienability of the newly allotted land. *Ibid.* See also Hearings on H.R. 7902 (Readjustment of Indian Affairs (Index)) before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 17 (Comm. Print 1984) (Hearings) (Memorandum of John Collier, Commissioner of Indian Affairs).

For 12,000 years, the Yakima Indians have lived on their lands in Eastern Washington. See H. Schuster, The Yakima 14 (1990). Because of the allotment policies, non-Indians today own more than a quarter million acres, more than half the land originally allotted to individual members of the Yakimas. *Id.*, at 83. "Allotment and the subsequent sale or lease of Indian lands accomplished what the 'genocide' of epidemics, war, and bootlegged alcohol had not been able to do: a systematic 'ethnocide' brought about by a loss of Indian identity with the loss of land." H. Schuster, The Yakimas: A Critical Bibliography 70 (1982).

It is little wonder that, as Congress moved toward repudiating the allotment system in 1934, the Commissioner of Indian Affairs informed Congress:

> "It is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul while pauperizing him, and cast him in so ruined a condition into the final status of a nonward dependent upon the States and counties." Hearings, at 18.

I am mystified how this Court, sifting through the wreckage of the Dawes Act, finds any "clearly retained remnant," *ante*, at 13, justifying further erosions—through tax foreclosure actions as in this case—to the land holdings of the Indian people.[6]

The majority deems any concerns for tribal self-determination to be a "great exaggeration." *Ante*, at 13. I myself, however, am "far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S., at 179. The majority concludes that, as a practical matter, "mere" property taxes are less disruptive of tribal integrity than cigarette sales taxes and certain personal property

[6] The Court concludes that Congress' decision in the Indian Reorganization Act not to reimpose restraints on alienation of land already patented suggests that Congress also "chose not to terminate state taxation upon those lands as well." *Ante*, at 12. In 1934, when the process of allotment was halted, 246,569 assignments had been made nationwide, totaling nearly 41 million acres (slightly less than the entire acreage of the State of Washington). *Indian Heirship Land Survey*, Memorandum of the Chairman to the Senate Committee on Interior and Insular Affairs, 86th Cong., 2d Sess., Part I, p. 2 (Comm. Print 1960). In my judgment, Congress' choice not to effect a taking of this magnitude does not reflect an intent to continue other policies contributing to the loss of Indian lands. If anything, Congress' intent is to be gauged not by negative implication from what it failed to do, but from provisions in the Act that stop further allotment, that freeze in trust already allotted-but-not-yet-patented land, and that affirmatively authorize repurchases of Indian lands to rebuild the tribal land base. See generally 25 U.S.C. §§ 461–465.

taxes (as on automobiles) that were at issue in *Moe*. *Ante*, at 13. I cannot agree that paying a few more pennies for cigarettes or a tax on some personal property is more a threat to tribal integrity and self-determination than foreclosing upon and seizing tribal lands.

Finally, the majority platitudinously suggests that the Yakima "must make [their policy] argument to Congress." *Ante*, at 13. I am less confident than my colleagues that the 31 Yakima Indian families likely to be rendered landless and homeless by today's decision are well-positioned to lobby for change in the vast corridors of Congress.