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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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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

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.

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.

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/

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/

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

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

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/

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,

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.

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

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,

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

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/

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

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

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.

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

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

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/

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

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

(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.

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).

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

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.

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.

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

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

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

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.

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

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

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

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).

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.

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

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).

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

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

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.

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.

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

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.

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.

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.

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.

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.

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.

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

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/

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

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.

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

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".

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

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.

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.

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).

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).

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.

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,

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.

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.

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.

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.

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 Civilized Tribes, published by the Institute for the Development of Indian Law.

116/ The antecedents and details of the removal policy have been reviewed at length by Williams, op. cit. (note 40).

117/ In the early 1800s, the Cherokees had begun to formulate a legal code (in English). Later, Sequoyah had created a Cherokee alphabet, used to publish religious works (several protestant missions were active among the Cherokees) and a newspaper. The Cherokees had also changed their government system by introducing, i.a. a bicameral council. See Anna G. & Jack. F. Kilpatrick, The Shadow of Sequoyah, (Norman 1965); C.C. Royce, The Cherokee Nation of Indians [1887], (Chicago 1975).

118/ See Grant Foreman, The Last Trek of Indians, (Norman 1946), and the same, Indian Removal, (Norman 1953); Angie Debo, And Still the Water Runs: The Betrayal of the Five Civilized Tribes [1940], (Princeton 1991); Mary Young, Redskins, Ruffleshirts and Rednecks, (Norman 1961). Alexis de Tocqueville was at Memphis when the Choctaws crossed the Mississippi there. His description of the event appears in his classic Democracy in America and was quoted by F. Prucha in his I The Great Father: The United States Government and the American Indian, (1984) (cited by Williams, op. cit. (note 40) at p. 240).

119/ It has been argued that the United States Indian policy also reflects these vacillations, in particular the passage from the Allotment Act (1887) to the Reorganization Act (1934), and back to the termination policy of the 1950s. As M.B. Hooker (Legal Pluralism, Oxford 1975) wrote: "Congressional policy on the 'Indian problem' has vacillated between that of separation/protection and assimilation."

120/ For references, see note 92, supra.

121/ For an overview, e.g. Eric Schwimmer (ed.), The Maori People in the Nineteenth Century, (Auckland 1968); Hans Mol, The Fixed and the Fickle. Religion and Identity in New Zealand, (Waterloo N.Z. 1982).

122/ Claudia Orange, The Treaty of Waitangi, (Wellington 1987), I.H. Kawharu (ed.), Maori and Pakeha Perspectives on the Treaty of Waitangi, (Auckland 1989).

123/ The texts of the 14 "Douglas Treaties" are contained in [British Land and Works Department], Papers Connected with the Indian Land Question, (Victoria 1875), pp. 5-11.

124/ Wilson Duff, "The Fort Victoria Treaties", in B.C. Studies 3 (1969), p. 3-.

125/ Paul Tennant, Aboriginal Peoples and Politics. The Indian Land Question in British Columbia 1849-1989, (Vancouver 1990).

126/ For ethnographic and historical data on the Shoshones, See Jack Forbes, Native Americans of California and Nevada, (Happy Camp CA 1982). Also Newe: A Western Shoshone History, published by the Inter-Tribal Council of Nevada (Salt Lake City 1976).

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.

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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8. The purpose of the present progress report is as follows:

(a) To inform the Working Group and the Sub-Commission on the research and other activities that have been undertaken in accordance with the mandate of the Special Rapporteur;

(b) To establish some anthropological and historical premises which appear of importance to the Special Rapporteur with respect to several key issues directly related to the central purpose of the study;

(c) To further elaborate on some juridical issues that he considers of prime importance for the study;

(d) To review and summarize - on the basis of certain initial methodological criteria of classification he has established - a number of cases that, at this stage of his work, have been considered useful to illustrate the vast diversity of juridical situations existing in various parts of the world which may be relevant to this study. It should be noted that case studies and other examples of practices and precedents brought up in this report are only indicative and do not, by any means, provide an exhaustive listing of the situations which will be contained in the Special Rapporteur's forthcoming reports and final conclusions.

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".

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