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DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Written statement submitted by the Four Directions Council,
a non-governmental organization in consultative status
(category II)

The Secretary-General has received the following communication which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[10 August 1988]

GLOBAL SCOPE AND SIGNIFICANCE OF THE QUESTION OF TREATIES

1. In the course of the Sub-Commission's debate on the proposal for a study of treaties at its thirty-ninth session, the question was raised whether such a study could have universal significance - in that only three States currently acknowledge having treaties in force with the indigenous peoples under their administration. The practice of making such treaties was in fact more widespread, however, and the experience of the few States where such treaties are still in force can usefully be applied to situations in other parts of the world.
2. In the eighteenth and nineteenth centuries, most of the European colonial powers employed treaties with indigenous peoples as an instrument of establishing overseas territorial claims in the Americas, Asia and Africa. At the same time, indigenous societies negotiated treaties to try to slow the advance of European colonization, and to seek the protection of rival European States. Treaties with indigenous peoples were most common in particular situations of relative power: European rivalry for the control of territory, and organized indigenous societies capable of offering some degree of military resistance.
3. In the Americas, treaties with indigenous societies were made as early as the sixteenth century in contested areas such as north-east Brazil (Portugal-Spain-France), Florida (France-Spain), and the North Atlantic seaboard (Great Britain-France-The Netherlands). Intense diplomacy with indigenous nations accompanied the French-British colonial war in North America in the 1740s, the American Revolution in the 1770s, and the second British-American war of 1812-1814. In South America, similarly, indigenous treaties were made along the long-contested Rio Plata frontier, and in Central America, as a means of dividing British, American and Nicaraguan interests in what was then known as Mosquitia.
4. Treaties served a parallel role in the nineteenth-century European colonization of African societies. "In situations of dispute" rival European powers "bolstered territorial claims by referring to treaties concluded with African rulers". Saadia Touval, The Boundary Politics of Independent Africa (Harvard University, 1972), p. 7. In turn,

The African rulers hoped for a variety of political benefits from the treaties. Some hoped a precarious status quo would be strengthened in the face of pressure from Africans and Europeans alike. Others may have had more far-reaching plans to strengthen their position in conflicts with other African rulers. Still others, like the ruler of Buganda, attempted to make use of special treaty relationships with European powers to preserve their own rule over rebellious subject peoples. In other cases European alliances served the opposite purpose in helping to throw off a superior's yoke. Sometimes African rulers tried to preserve as much of their independence as possible by remaining "non-aligned" and playing off European powers against each other.

"The relationships thus formed can in some measure be regarded as alliances." Ibid., pp. 6-7. The history of treaty-making shows that colonized peoples were never passive or entirely powerless, but used diplomacy, like war, to struggle against colonialism.

5. The history of the Indian subcontinent offers many parallels. The East India Company exacted treaties from native rulers under which it assumed the "sub-rule" (administration and taxation) of their territories, which evolved over time into complete control. As long as French presence in the region maintained a somewhat balanced military situation, however, it was possible for some indigenous nations to win concessions by treaty. Like many eighteenth-century treaties with the Six Nations in North America, for example, the 1778 British treaty with the Maratha Confederacy was framed in terms of a perpetual alliance and coexistence.

6. After the consolidation of British power in India, treaties continued to be employed as a means of extending influence over northern tribal frontier areas which were contested with Czarist Russia. Following the 1876 Treaty with the Khan of Kelat, Lord Lytton wrote to Queen Victoria in these terms:

Some of the most experienced political officers of your Majesty's Indian Government advised the Government to depose the Khan and take forcible possession of his country; others proposed that we should enter into separate relations with [each of] the tribes. I have now, however, the satisfaction of being able to inform your Majesty that the Khan of Kelat has agreed to sign with me a treaty, the terms of which will make us virtually the masters of Kelat, not by annexing the country, but by re-establishing the Khan's authority on conditions which secure his implicit allegiance.

A similar policy was followed in the 1879 Treaty of Gundamuk with the Afghans, placing the British rather than the Russian Czar in the position of allies and protectors of the native ruler. B.D. Basu, India Under the British Crown (Calcutta: R. Chatterjee, 1933), pp. 168, 200.

7. In order to maintain the usefulness of treaty alliances as a basis for their territorial claims, European States had to afford these promises at least some token respect. In Africa and India as well as North America then, treaties often formed the only legal basis on which indigenous societies could resist further encroachments, however much in the short term. As they grew more powerful, however, all of the colonial powers adopted legal rules which excused them from the permanent effect of their indigenous treaties. As early as the 1830s, British courts reasoned that the Government's repudiation of a treaty is an unreviewable "act of State". Mayor of Lyon v. East India Company (1836), Moo.P.C. 175, pp. 275-276. In the United States it was not until 1902 that the Government successfully asserted "plenary power" to disregard its treaties with indigenous peoples. Cherokee Nation v. Hitchcock, 187 US 294, 308. Under United States law, repudiation must be explicit, by legislation. Until the 1980s, Canadian courts regarded any inconsistency between treaty obligations and municipal law as an implicit repudiation.

8. In Africa and Asia, decolonization has superseded whatever remained of colonial-era treaty obligations. Full implementation of the principle of self-determination goes far beyond the rights of limited, residual self-government and land-ownership contained in most of the treaties formerly made with indigenous peoples in any part of the world. In other regions, however, decolonization may not be feasible, and colonial-era treaties continue to be the strongest form of legal protection available to many indigenous peoples for their lands, their wildlife-harvesting activities, and their recognition as distinct societies with some measure of internal

autonomy. This situation will continue unless there is universal acceptance of a United Nations declaration of indigenous rights which guarantees both autonomy and territorial rights to all indigenous peoples, whether or not they made treaties.

9. At their best - and this may have been the exception rather than the rule - indigenous treaties constituted an element of nation-building through alliance or confederation, as opposed to compulsion. This at least is the view taken by most indigenous North American peoples. While the precise terms of the treaties may be weak, vague, or even exploitative, the fact that treaties were made at all is evidence that the present-day State is multinational and originated in a confederation. This is why treaties bear such importance for indigenous peoples, however unjust their terms may be.

10. It is also in this aspect of nation-building that treaties can serve as a model for future measures for the realization of indigenous peoples' rights. States should be encouraged to view future treaties with indigenous peoples as a means of national reconciliation and of strengthening national unity. International standards and supervision must none the less be adopted, because the inequalities of power between States and indigenous peoples have not diminished, and future treaties could be as exploitative as those which were made in the past.