STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

by José R. Martínez Cobo
Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities

VOLUME II

UNITED NATIONS
INTRODUCTORY NOTE

The documents containing Parts I and II of the Study of the Problem of Discrimination against Indigenous Populations prepared by Mr. José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, are hereby re-issued in accordance with decision 1985/137 of the Economic and Social Council.

A revised version of Part III of the same study, containing the conclusions, proposals and recommendations, will be published separately under the symbol E/CN.4/Sub.2/1986/7/Add.4
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Final Report (Supplementary Part) submitted by the Special Rapporteur
Mr. José R. Martínez Urtub

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CHAPTER V
DEFINITION OF INDIGENOUS POPULATIONS

A. Introduction

1. In chapter II, paragraph 19, of the preliminary report on the study (E/CN.4/Sub.2/L.566), it was stated that:

"The definition of indigenous populations for the purposes of this study involves the following four tasks:

(a) Establishment of a 'working definition' to be used in the collection of information for the study;

(b) Identification of population groups which should be regarded as indigenous in individual countries; this is a task to be undertaken when the individual country papers relating to the study are drafted;

(c) Comparative study of all the definitions contained in the individual country papers;

(d) Definition of indigenous populations from the international point of view. This definition will be one of the results of the study and will constitute the basis of the proposals which the Special Rapporteur will submit as part of his final report so that the Sub-Commission may formulate recommendations concerning measures to be adopted in this area."

2. These four tasks have been regarded as four essential stages in the work to be undertaken.

3. Stage (a) has already been completed. Chapter II of the above-mentioned preliminary report dealt with the working definition (paras. 20 to 25); and the "main criterion to be used in collecting information was inserted at the beginning of the outline for the collection of information, after it had been approved without change by the Sub-Commission at its twenty-fifth session. Stage (b) has now also been completed, with the drafting of the summaries of material dealing with specific countries; and, in the cases where the Governments concerned have transmitted comments and information, the definitions contained in the summaries have been confirmed or corrected. In the texts on which no comments have been received from the Governments concerned, the definitions appear in the form in which they have been discovered by research in each particular case. In some cases, 1/ no information on the subject is available. This chapter is intended to accomplish stage (c), namely, the comparative study of all the definitions and concepts contained in the above-mentioned summaries.

4. The basic question is how to determine which groups should be considered as indigenous populations in the various countries covered by the study. As everyone knows, this question raises many difficulties of various kinds. In the world of

1/ For example, for Argentina, Burma, El Salvador, Honduras, Nicaragua and Suriname.
today, identification of a person or group as indigenous is frequently a complex and
difficult task. Each country has approached the problem of definition in its own
way, and the criteria of differentiation used in the solutions thus adopted vary
very widely, ranging from factors which are exclusively or almost exclusively racial
to considerations in which social and cultural criteria predominate.

5. As Mr. Hernán Santa Cruz has written in his study on Racial
Discrimination: 2/

"346. Identifying a person or group as indigenous may be a complex and
difficult proposition, however. In many instances, the first confrontation
between 'inhabitants' and 'invaders' took place centuries ago. With the
passing of time, life in common broke down the physical and ethnic
distinctions between the two groups and brought about varying degrees of
biological and cultural hybridism. The resulting social racial and cultural
blending makes it very difficult to arrive at a precise definition of who
may today be considered to be the 'indigenous' or 'aboriginal' inhabitants
in a given country. The only exceptions may be groups which occupied or
sought refuge in jungle areas, thick forests or mountains, or other areas of
difficult access, where they could maintain their own distinct culture and
way of life, and who have remained in relative isolation up to the present day.

"347. Under these circumstances, the problem arises today of determining
in each case the criterion to be applied in defining which groups are to be
held as 'indigenous'. In this connection it has been written: 'The notions
with reference to which such groups are classified are so flexible and varied
that there are often discrepancies in statistical data or estimates within
a single country, and useful comparisons between one country and another are
impossible. Different and often contradictory criteria tend to be used by
administrators, lawyers and sociologists as a basis for their definition,
such as the colour of the skin, language, customs, tribal conditions and
living standards. Every country has tackled the problem of definition in
its own way, according to its own traditions, history, social organization
and policies.'"

6. Furthermore, different criteria are sometimes applied even within a single
country. Informal social practice may reflect ideas either broader or narrower
than those constituting the legal notion of "indigenous populations". In addition,
experts on the subject sometimes have their own ideas concerning the definition which
should be adopted in a given country. The effective notion of what constitutes
"indigenous", as applied in practice by government authorities, may differ from what
is embodied in the officially accepted definition of what should be regarded as
"indigenous". It may even happen that within a single country there are different
legal criteria applying in matters covered by different branches of the law.

7. It is therefore necessary to examine the classification criteria used in the
definitions which appear in most of the summaries of material relating to the
different countries covered by this report. Accordingly, the various elements
which are taken into consideration in defining indigenous populations in the
countries concerned will first be examined briefly, and the criteria proposed will
in each case be subjected to a summary appraisal, in order to ensure that due
attention is given to specific cases in which ancestry, culture (in general terms
only, and also including specific aspects), language, and various combinations of
these factors are referred to as classification criteria. Mention will also be made

2/ United Nations publication, Sales No.: E.71.XIV.2.
of additional criteria used in some countries. Next, we shall undertake an examination of systems which require a formal declaration that certain communities, groups or persons are indigenous, and also of registration and certification formalities for indigenous persons, and of the rules used by the authorities of certain countries to decide, in doubtful or disputed cases, whether or not persons are to be officially classified as indigenous. Cases of changes of status from "indigenous" to "non-indigenous" and vice versa, in countries where the relevant information is available, will also be briefly examined.

8. Before entering into the analysis of definitions and criteria applied by public authorities in the different countries covered in the study to define indigenous populations, it should be pointed out that indigenous populations themselves have claimed the right to do so themselves as an exclusive right on their part.

9. In this connection, the World Council of Indigenous Peoples has adopted as one of the five principles that must guide indigenous action, one reading as follows:

"... the right to define what is an indigenous person be reserved for the indigenous people themselves. Under no circumstances should we let artificial definitions such as the Indian Act in Canada, the Queensland Aboriginal Act 1971 in Australia, etc. tell us who we are" (Res. 5, Canada (3)).

10. On this subject of the definition of indigenous peoples, the Fourth Russell Tribunal has stated as regards the Indian peoples of the Americas that

"The Indian peoples of the Americas must be recognized according to their own understanding of themselves, rather than being defined by the perception of the value-systems of alien dominant societies." 4/

11. Some definitions have been proposed by indigenous organizations themselves. Among them is one proposed by the World Council of Indigenous Peoples, as follows:

"The World Council of Indigenous Peoples declares that indigenous peoples are such population groups as we are, who from old-age time have inhabited the lands where we live, who are aware of having a character of our own, with social traditions and means of expression that are linked to the country inherited from our ancestors, with a language of our own, and having certain essential and unique characteristics which confer upon us the strong conviction of belonging to a people, who have an identity in ourselves and should be thus regarded by others." (Res.2 Argentina).

12. On its part the Indian Council of South America (Consejo Indio de Sud America) has proposed the following definition:

"We the INDIAN PEOPLES are descendants of the first populations of this continent: we have a common history, an ethnic personality of our own, a cosmic conception of life, and as inheritors of a thousand year old culture, after almost 500 years of separation, we are newly united in order to be the vanguard of our total liberation from western colonialism." (Number 2)

5/ Ibid., p.32 and annex III, p.5.
13. The sole concern in preparing this chapter has been the determination of the criteria existing in different countries to establish which sectors of the population are relevant to the present study and not the rights and obligations that may derive from this determination, which is reserved for the substantive chapters that follow. The possible effects that the resulting classification might have are, therefore, not specifically examined in this chapter, although, in some cases, general indications that are inseparable from the material relating to definition will be reproduced here. In this connection, exceptionally it is useful to point out here that while in some countries the classification of an individual, group or community as indigenous is said to carry with it a special status, with entitlement to specified services, in most countries covered by the study taxonomic criteria are said to be used merely for statistical purposes, no status consequences deriving from such classification. As examples of the first position outlined above, Registered Indians in Canada and Recognized Indians in the United States are the particular responsibility of the respective federal Government of those countries. Their "registration" or "recognition" are essential for entitlement to "certain beneficial provisions of the Indian Act" (see paras. 291 and 299, Canada) or for being "designated as an Indian eligible for basic Bureau of Indian Affairs services" (see para. 323, United States). As examples of the second position, the Mexican Government has stated inter alia that "these criteria of differentiation do not relate to the equality of individual and social rights" (see para. 332, Mexico) and the Government of Denmark in connection with Greenland when it states inter alia: "No formal distinction is made between genuine Greenlanders and others in terms of national, linguistic, cultural or other similar criteria. The legal, economic and other social disparities existing between the Greenland society and that of Denmark proper are more or less alike for all residents in Greenland regardless of origin." (Emphasis added) (see paras. 69, 135, 256 and 336 below).

14. Since in the case of most countries the information at present available on these subjects is fragmentary or inadequate, it has been decided to reproduce in full only the legal definitions existing in certain countries, on the understanding that even these are not always generally accepted and that they are sometimes formulations with a limited and precise meaning in certain legal contexts. With regard to the other criteria or definitions applied in different countries, we shall reproduce those parts of the formulations which include the different classification criteria, just as they appear in each of the classification formulations concerned.

B. Ancestry

15. The biological factor or the fact of descent from members of the native population of a country is always present when persons or groups are described as "indigenous", "autochthonous", "aboriginal", "Indian", etc. It should be stated at the outset that the only cases in which there is any significant divergence from this component of the definition of "indigenous" are cases in which there is a certain tendency to believe that the population is divided only into "urban" and "rural" population, and that the second of these two categories should be designated solely by the word "peasant"; but in these cases, in fact, the problem of the definition of "indigenous" is merely being avoided.

16. On the other hand, from the information available it is not possible to determine precisely in all cases to what extent the ancestry factor is involved in the formula used. It is clear, however, that it is always present, although the relative importance attached to it varies considerably from case to case. It is evident, as has already been explained, that various countries have arrived at solutions which embrace a wide variety of criteria of differentiation, ranging from factors which are exclusively or almost exclusively "racial" to considerations which are purely social and cultural.
17. In this connection some attention must be given to the word "race", and to the way it is used in this context. It must be stated, first, that popularly held notions about "race" represent one of the most widespread misconceptions of our time, and a misconception which has the most dangerous and tragic consequences. Scientific evidence has been disregarded; and many people on the contrary seem to take it for granted that science determined many years ago what the word "race" meant, and that it demonstrated the existence of important physical and psychic differences between the so-called races. This not not true. In popular parlance, nevertheless, the word "race" is still used to designate a considerable variety of groups and categories whose members are united by relationships of various kinds which go far beyond inherited physical characteristics. Hence the widespread impression that there is a causal link between physical and cultural characteristics. Daily life affords ample proof that this is not the case. Physical type, culture, language, religion, etc. vary independently of one another, and there is an infinite range of combinations and permutations.

18. Furthermore, attempts have been made to attribute different abilities to the different so-called "races" as such. But biology has amply proved that there is a basic anatomical, histological and physiological similarity between all human beings. Members of different groups with different characteristics have the same set of psychological mechanisms. There are no groups consisting only of individuals who lack the mental abilities which are possessed by all individuals in other groups. The differences which undoubtedly exist between one individual and another in all groups relate to quantity and quality and to a particular combination of factors; and, it should be stressed, these differences may be observed in all groups. The greater or lesser development of certain abilities or aptitudes in individuals belonging to different groups of mankind is due to a series of environmental factors and to the way of life selected, and not to inherited characteristics or aptitudes. There is no valid proof, from the scientific standpoint, that so-called racial groups have constitutional or innate abilities or disabilities which are determined genetically. There is, on the contrary, an increasing volume of information which confirms that all human beings belong to the same species, and that this species covers all the variants that can be proved to exist.

19. Indeed, scientists are today in general agreement that the word "race" should be used principally in a biological sense to describe groups of individuals who have a specific combination of physical characteristics of genetic origin.

20. It has been pointed out, however, that even in this sense "races" do not exist as groups which can actually be identified in nature; but that they are rather man-made classifications. Such classifications are indeed based on a certain concentration of hereditary physical characteristics; but these characteristics are not separate or invariable entities which make it possible to divide mankind into strictly differentiated races. It has been proved, in fact, that these characteristics do not serve to divide human beings into clear-cut and exclusive groups, since the most groups contain persons with marked variations and their members range, for example, from persons with very pale skin and to others with a very dark skin; from persons with long skulls to others with almost round skulls; and from persons with thin noses to others with very broad noses; etc.

Such as the shape of the skull (brachycephalic, i.e. almost round, with a breadth at least four fifths of the length; dolichocephalic, i.e. longheaded, with a breadth less than four fifths of the length); height and bone structure; light or dark skin; shape and colour of the eyes; wide or thin nostrils; flat or high bridge to nose; colour and texture of the hair, etc.
It has been observed, furthermore, that such characteristics do not occur in fixed series, but vary with time and circumstances. In fact the characteristics which have been mentioned — and others which might be mentioned as well — change independently of each other so that the dolichocephalic skull may be found with any skin colouration, with any shape of nose, height and bone structure, colour and shape of eyes, colour and texture of hair, etc. Also, these characteristics do not remain unchanged with the passage of time but are constantly varying owing to environmental influences and man-made changes.

The Expert Committee on Racial Problems, convened by UNESCO in Paris in December 1949, concluded — in terms which take account of these facts — that the term "race" designates "a group or population characterized by some concentrations, relative as to frequency and distribution, of hereditary particles (genes) or physical characters which appear, fluctuate and often disappear in the course of time by reason of geographic and/or cultural isolation." 2/

Classification of the "races" which may exist within the human species, even in strictly biological terms, presents a number of problems which are apparently insuperable, since none of the classifications hitherto proposed has been universally accepted. The Group of Experts which was convened by UNESCO in Paris in June 1951 set out among the factors which it held to be scientifically established concerning individual and group differences, 3/ that in matters of race the only characteristics which anthropologists had so far been able to use effectively as a basis for classification were physical (anatomical and physiological). However, the Group added that certain biological differences between human beings within a single race might be as great as, or greater than, the same biological differences between races. ("Statement on the nature of race and race differences", para. 9 (a) and (c)).

The Conference of Experts convened in Moscow by UNESCO in 1964 to study the biological aspects of race approved a series of proposals on the subject, including the following: all men living today belong to a single species, homo sapiens, and are derived from a common stock; pure races — in the sense genetically homogeneous populations — do not exist in the human species; there is no national, religious, geographical, linguistic or cultural group which constitutes a race in se facto (proposals 1, 3 and 12 respectively). The Conference concluded by affirming that the biological data given "stood in open contradiction to the tenets of racism" and that such tenets could in no way pretend to have any scientific foundation. 10/


25. The Conference of Experts which in 1967 approved in Paris the "Statement on race and racial prejudice" expressed the view that "human problems arising from so-called 'race' relations are social in origin rather than biological. A basic problem is racism—namely, antisocial beliefs and acts which are based on the fallacy that discriminatory inter-group relations are justifiable on biological grounds".

26. This Conference reaffirmed the principles underlying the proposals adopted by the Moscow Conference, pointing out in this connection that the division of the human species into "races" was partly conventional and partly arbitrary and did not imply any hierarchy whatsoever. (para. 3 (b)).

27. In the same sense and in rebuttal of the assertions based on general popular notions that there is a link between the biological characteristics of groups of mankind and their intellectual and moral capacities, the UNESCO Expert Group (Paris, 1951) stated that available scientific knowledge provides no basis for believing that the groups of mankind differed in their innate capacity for intellectual and emotional development, and that vast social changes had occurred that had not been connected in any way with changes in racial type; the Group concluded that historical and scientific studies supported the view that genetic differences were of little significance in determining the social and cultural differences between different groups of men. ("Statement on the nature of race and race differences", para. 9 (b) and (d)).

28. The UNESCO Expert Committee (Paris, 1949) maintained that the biological fact of race should be distinguished from the myth of "race". For all practical social purposes, "race" was not so much a biological phenomenon as a social myth. The Committee added, inter alia, that the biological differences between ethnic groups should be disregarded from the standpoint of social acceptance and social action. The unity of mankind from both the biological and social viewpoints was the main thing. To recognize this and act accordingly was the first requirement of modern man.

29. It is now being confirmed with increasing force that there is only one race: the human race. It should nevertheless be pointed out that some social scientists accept the use of the word "race" not only in the biological sense, but also in a social sense. But these experts stress themselves that the use of the word in this sense is accepted in full awareness of the fact that the same word is being used with a different meaning. Some sociologists, in order to demonstrate their disagreement with the use of the word, always place it in inverted commas whenever they are referring to socially defined groups; or they use other more explicit expressions (e.g. the "so-called races", etc.) to signify their refusal to accept this word when it is applied to certain groups with an alleged scientific implication which they reject. 12/ The above-mentioned statement by the UNESCO Committee (Paris, 1949), to the effect that the biological fact of race should always be distinguished from the myth of "race", is consonant with this way of thinking.

30. In the literature of social science, the word "race" and "racial" are used in contexts such as "racial differences", "race relations", "racial conflict", "racial problems", "racial prejudice", "racial discrimination", etc. In some cases, such

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12/ As will be obvious, this is the approach which has been adopted in the present study.
phrases undoubtedly refer to biological groups but in others they relate to ethnic groups and the relationships between them. In order to overcome the inadequacies of the foregoing terms, expressions such as "inter-ethnic relations", "inter-group relations", "group prejudice", etc. have been used. It is immediately apparent that the use of the word "group" in the abstract is unacceptably vague unless the word is appropriately qualified. The term "inter-ethnic" is more acceptable; but expressions containing the word "race" are still being used for reasons of linguistic convenience, for the sake of brevity and above all as a result of ingrained habits since these expressions have, so to speak, acquired a certain droit de cité. In short, a number of terminological difficulties still exist, although in scientific circles the concepts themselves are becoming increasingly clear.

31. One of the main differences in the extensive collection of references to hereditary characteristics - ancestry and "race" - relates to the concept of "blood". For example, some systems use classification criteria which refer to what is described as "a percentage of such-and-such blood" or "a degree of such-and-such blood", in order to decide whether a person belongs to one or another group of the population.

32. This idea is derived from the ancient and widespread but erroneous belief that the characteristics of groups were transmitted by the blood which was the element establishing the link of kinship, and was the vector of physical and personality characteristics with all their individual peculiarities, abilities and disabilities. It was also thought that the blood of the ancestors was mingled in the offspring of marriages, informal unions or casual sexual relations between individuals belonging to the various groups concerned.

33. It is a scientifically proved fact that hereditary characteristics are not transmitted by the blood but by the genes contained in the germ plasm. Nevertheless, as has already been indicated, in popular usage and even in official definitions of indigenous populations in various countries, the formula which may be described as the "blood-tie" has been used, and in some cases is still being used, with reference to ancestry.

34. This system is unsatisfactory from the social and psychological viewpoints and perhaps even more so than other systems which, in regard to ancestry, refer to conglomerates of supposedly permanent characteristics, and to disadvantages supposedly associated with the concept of "degree" or "percentage". The description of persons of mixed descent as "half-castes" or "half-blood", or a reference to their ancestry in terms of a fraction corresponding to the "degree" of mixture, inevitably creates the impression that such persons are incomplete in some fundamental sense. It leads - even if unintentionally - to the feeling that when "blood is mingled" the blood of one of the persons concerned is "diluted", "contaminated" or "polluted" by that of the other.

35. This idea starts from the assumption that there are "pure race" groups - an assumption which is not scientifically correct since it is clear that the classification of the established groups is purely conventional. Also, the system is very difficult to apply. The difficulties increase when one moves beyond the first "mingling of blood". When more than two identifiable groups are taken into account for this purpose, the situation becomes still more complicated. A system of accurate genealogical knowledge and records would be required in order to apply the method.

13/ In this connection, mention may be made of another of the conclusions reached by the above-mentioned Group of Experts which met in Paris in June 1951. This conclusion reads: "There is no evidence that race mixture produces disadvantageous results from a biological point of view. The social results of race mixture, whether for good or ill, can generally be traced to social factors." ("Statement on the Nature of Race and Race Differences", para. 5 (a)).
properly. This would be very difficult and complicated in the case of entire groups of the population. It is almost impossible to classify and record the "race" of men and women contracting formal alliances; but it is still more difficult in the case of informal unions and completely impossible in the case of casual sexual relations which result in the birth of new citizens of "mixed blood". Considerable weight is, ultimately, given to the statements of the parties concerned, and account is taken of other factors.

36. One writer, describing the situation in New Zealand where this system exists, observes that: 16/

"The concept of 'degree of Maori blood' is unscientific, originating in the old belief that intermarriage 'mixed the blood': 'degree of Maori blood' really means 'degree of Maori ancestry', i.e. the proportion of Maori to Pakeha forebears in a person's ancestry. A 'three-quarter caste', for instance, is a person who has three Maori and one Pakeha grandparents or six Maori and two Pakeha great-grandparents, while a half-caste is either the child of parents who are full Maori and full Pakeha, or the grandchild of two Maoris and two Pakehas. The Census classified persons of Maori-Pakeha ancestry into 'Maori full blood', 'Maori-European three-quarter caste', 'half-caste- and 'quarter-caste', but many Maoris claim such complicated fractions as five-eighths, eleven-sixteenths, and twenty-five thirtyseconds.

'Declarations of 'degree of Maori blood' are generally accepted by officials at face value. Proof is rarely required and there is no legal penalty for mis-statement. According to the 1961 Census, 51.5 per cent of the Maori population declared themselves to be full-blooded, but a medical team seeking full-blooded Maoris for blood-group research found that even in a remote community only 25 per cent could be proved to have no Pakeha ancestor. I personally know Maoris with one or two Pakeha grandparents who invariably declare themselves as full Maoris. The Maori electoral roll undoubtedly includes persons who are technically less than half Maori, the European roll some who are more. Inaccurate declarations are sometimes due to mistakes in calculation or lack of knowledge, but most are an expression of subjective feelings. It is a matter of identification. Part-Maoris who identify themselves as Maoris tend to overstate their degree of Maori ancestry: 'I always put myself down as full Maori because I feel full-Maori'. Those who identify themselves as Pakehas understate it: for instance as 'quarter-', rather than 'half-Maori' if they are actually 'three-eighths'."

37. It is consequently affirmed that: 15/

"The Census does not give an objective count of the number of persons who are half Maori or more. Instead it gives us something of far greater significance, the number of those who identify themselves as Maoris: in other words, a reliable measure of the Maori social group."

38. The comments regarding New Zealand can in varying degrees be applied, mutatis mutandis, to other countries which have adopted the system described.

15/ Ibid., p.55.
39. In all countries, the classification criteria applied to the indigenous population contain some reference to the fact that persons who are regarded as indigenous are descended from the "native" inhabitants of the country. As has been stated above, however, some countries lay more stress than others on such factors, and not all countries allude to them in the same manner. The following paragraphs will show the way in which "ancestry" appears in the definitions adopted in the various countries covered by this report, but it must be noted that this factor is always combined with other classification criteria in complex and multifaceted formulations.

40. For certain countries, no information is available on this subject. In the information available to the Special Rapporteur, ancestry is referred to merely by implication in some countries. In a number of other countries, however, explicit reference is made to descent, in terms which will now be reviewed.

41. In Australia, some definitions are contained in Federal statutes, while others are provided for in State legislation. All contain references to ancestry.

42. At Commonwealth level, ancestry is alluded to in two recent Federal Laws, the Aboriginal Land Commission Act 1974 and the Aboriginal Land Fund Act 1974, as follows:

"Aboriginal means 'an indigenous inhabitant of Australia and includes an indigenous inhabitant of the Torres Strait Islands.'"

43. It is also referred to in the definition used by Commonwealth Government authorities for administrative purposes, which defines an Aboriginal as "a person of Aboriginal or Islander descent..."

44. The definition contained in the legislation of the State of Queensland mentions ancestry in the following terms:

"'Aborigine' means a person who is a descendant of an indigenous inhabitant of the Commonwealth of Australia, other than the Torres Strait Islands,

"'Islander' means a person who is a descendant of an indigenous inhabitant of the Torres Strait Islands.'"

45. In Brazil, an Indian or Forest Dweller is defined as "Any individual of pre-Columbian origin or ascent..." (Act No. 6001 (The Indian Statute) of 19 December 1973, Art. 3, 1).

46. There was an oblique reference to Lappish descent in the criterion adopted in 1955 for the study made by the Nordic Lapp Council in Finland. Persons were considered to be Lapps when, in addition to their residence within the Lappish region, at least one of their parents or grandparents had learnt Lappish as his or her first language. In the course of the study it was later required only that the persons themselves had learnt Lappish as their first language.

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16/ Argentina, Burma, El Salvador, Honduras, Nicaragua and Suriname.
17/ Colombia, Chile and Laos.
47. The Amerindian Ordinance defines Amerindians in Cuyana on a basically ancestral criterion. This is contained in the reference to "Any Indian..." (para. (a)) and explicitly in the addition stating that "Any descendant of an Amerindian of paragraph (a) of this definition to whom in the opinion of the Commissioner of Interior the provisions of the Ordinance would apply." (para. (b)). In operating the definition the principle has been for mixed Amerindians that they should fulfill other requirements in order to be considered Amerindians.

48. In the State lands (Amerindians) Regulations it is stipulated that for a person to be considered an Amerindian, both his or her parents must have been "of pure Amerindian blood" and belong to the Amerindian tribes of Guyana.

49. Children of an Amerindian, but whose other parent is not an Amerindian, are called "half-castes." Half-castes forfeit all privileges as Amerindians, unless they have been duly registered under the Indian Regulations 1890, in which case they are personally entitled to all the privileges of an Amerindian, but their descendants will not be considered as Amerindians.

50. In Malaysia, descent from parents who are, or were, members of an aboriginal ethnic group is among the requirements defined by law for being considered an Orang Asli. Descent from at least one Aboriginal parent is explicitly recognized in the following wording: "Any person whose male parent is or was, a member of an aboriginal ethnic group,..." (The Aboriginal Peoples Ordinance 1954, as amended in 1967, Section 3 (1) (a)); "the child of any union between an Aboriginal female and a male of another race,..." (Ordinance, Section 3 (1) (c)).

51. There is an exception to the requirement of Aboriginal ancestry, as provided by the same Ordinance (Section 3 (1) (b)):

"Any person of any race adopted when an infant by aborigines who has been brought up as an Aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains as a member of an aboriginal community."

52. As already indicated, ancestry, in the guise of "Maori blood", has always been the legal criterion for considering a person as a Maori in New Zealand. Until 1935, it was generally required by law that a person should be at least half Maori by descent, in order to be considered as a Maori. For Census and Electoral Law purposes, this criterion still holds, but no check is made of Maori ancestry claimed. In practice, then, the criterion established by the Maori Housing Act 1935, which included "any person descended from a Maori" is applied for purposes of the definition of who is a Maori. The present trend is stressing self-identification as a Maori and moving away from a specific degree of Maori blood. A fuller description is given below, under "Legal Definitions".

53. For census purposes, the criterion of ancestry, expressed as "race" seems to be of fundamental importance in the United States of America. This ancestry criterion comes into play in conjunction with objective subjective criteria which vary in accordance with the circumstances. It may thus be present through an act of

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19/ The elements mentioned in this paragraph have been drawn from the statement transmitted by the Government of the United States, which reads as follows:

"For Census purposes, an Indian, for example, has been identified on a self-declaration basis. If an individual did not declare his race, the enumerator has counted him as an Indian if he appeared to be a full-blooded American Indian or of mixed Indian and white blood: was enrolled on an Indian tribal or agency roll or was regarded as an Indian in the community in which he lived. To be designated as an Indian eligible for basic Bureau of Indian Affairs services, an individual must live on or near a reservation or on or near trust or restricted land under the jurisdiction of the Bureau; be a member of a tribe, band, or group of Indians recognized by the Federal Government; and for some purposes, be of one-fourth or more Indian descent."
self-identification or group consciousness on the part of the person included in the census; or as a result of a lack of declaration on the latter's part, by the application of the subjective estimation of the enumerator, who considers the person for census purposes as a full-blooded Indian; or by the estimation of the enumerator that the person concerned is partly Indian plus the fact of the person's inclusion in the roll of an Indian tribe or agency; or by the estimation of the enumerator plus the fact that the person was regarded as Indian in the community where he lived. In addition determination of "the amount of Indian blood" seems to be necessary in varying percentages to meet membership requirements laid down by a tribe which varies with the tribe and ranges from "a trace to as much as a half". For some purposes it is required that a person be of one fourth or more Indian descent in order to be designated as an Indian eligible for basic Bureau of Indian Affairs services.

54. In Canada, ancestry seems to be always an underlying criterion since, in connection with the different groups established in that country among the native people, namely, Status Indians, non-Status Indians, Métis and Inuits, the Government of Canada has stated that Canadian native people are undoubtedly "the existing descendants of the peoples who inhabited the present territory of the country... when persons of another culture or ethnic origin arrived there from other parts of the world." In addition determination of "the amount of Indian blood" seems to be necessary in varying percentages to meet membership requirements laid down by a tribe which varies with the tribe and ranges from "a trace to as much as a half". For some purposes it is required that a person be of one fourth or more Indian descent in order to be designated as an Indian eligible for basic Bureau of Indian Affairs services.

55. In Norway there is an indirect reference to ancestry in the definition proposed by the Nordic Lapp Council, according to which "a person is considered to be a Lapp if either one of his parents or any of his grandparents normally speaks, or has spoken, Lappish in daily use at home." The Government states: "some people, no doubt, would decide in the basis of descent whether or not the individual in question is to be classified as a Lapp." The main considerations are, however, language and self-identification.

56. In Costa Rica, there is also considered to be an oblique reference to indigenous ancestry, as the legal definition refers to "ethnic groups which are directly descended from the pre-Columbian civilizations". The Special Rapporteur

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19/ See para.227 below, under "group consciousness".
20/ See paras.228 and 229 dealing with attribution of identity in the United States, below.
21/ See paras.128-131 under "the fact of living under a tribal system" and paras.229 and 230 under attribution of identity, below.
22/ See para.231 dealing with the attribution of identity and para.243 under "acceptance by the indigenous community", below.
23/ See para.243 under "acceptance by the indigenous community", and also para.323 below.
24/ See para.323 below.
25/ See para.20 and footnote 36, below. Also see, in para.250 below under "residence in certain areas of the country", what concerns the geographical isolation of the Inuits which points, indirectly, at the criterion of ancestry. Also see paras.299 and 303 below.
26/ See para. 293 below.
considered that these words have more than one sense, and has therefore also mentioned them under "culture". 27/

57. In Bolivia, in the 1950 census, the main criterion used was that of the "race of the respondent", who could belong to one of the following three groups: "white", "cholo" (half caste) and "Indian". The "cholos" would include those persons of "an Indian-white mixture plus the more or less racially pure Indians who have learned to speak Spanish well, have mastered a skilled trade and have abandoned indigenous dress. The Indian usually is dark-skinned, illiterate, speaks only a native tongue and provides the unskilled labour in the economy." 28/

58. In Ecuador, in the preparation of statistical records "Indians are still considered an ethnic category, and an effort is therefore made to account for the indigenous persons who have preserved their racial purity and have the smallest amount of mixed blood". 29/

59. In order to consider an individual as an indigenous person in Paraguay it is important to ascertain whether this person is one of the "descendants of pre-Colombian populations born in communities of pre-colonial model, even if they have left home, e.g. for a town, at a later age". 30/

60. In French Guyana, one of the criteria used to identify the Amerindians is that of "descent from the old indigenous tribes". 31/

61. In Bangladesh, the Government states that the members of Tribal or Semi-tribal populations are regarded as indigenous "on account of their descent from the populations which are settled in specified geographical areas of the country." (emphasis added).

62. In Panama, ancestry is referred to when the term "Indian" or "individuals of indigenous race" is employed in the criterion transmitted by the Government and also in that used in the 1940 census.

63. In the criteria used in the 1940 census in Peru, the "race" of the individual was included among the requirements taken into account in this population survey.

64. In the Philippines all formulations require that in order to be considered as a member of the National Cultural Communities, a person must be a "native of the Philippines", that is, a person of Aeta, Dungar, Indonesian or Malay descent.

65. Ancestry is suggested in Sri Lanka by the reference to "the Veddha, Rodiya or Kinnaraya groups."

66. In Sweden having Lappish ancestry (kinship) is among the criteria for determining who is a Lapp.

27/ See para. 87 below.
30/ Information furnished on 3 September 1976 in connection with the present study.
67. According to the information available on Venezuela, descent from the pre-
Columbian groups of the population is implicit as a requirement for a person to be
considered as "indigenous".

68. In its observations submitted on 27 May 1981 on the draft summary of information
relating to Greenland that had been prepared for the purposes of the present study,
the Danish Government stated that the guiding criterion adopted for the collection of
information in connection with this study "can be applied to neither the Greenland
population nor any part thereof". In the same submission the Government also quotes
from the Report of the Home Rule Committee composed only of Greenlanders the reasons
the Committee adduces in favour of Home Rule. Among these passages is the following:

"Greenland and its indigenous Eskimo population differ from metropolitan
Denmark in so many ways that the relationship between Danes and Greenlanders'
can never be such as that existing between Zealanders and Jutlanders."

(Note) Emphasis added.

C. Culture

1. Culture in general

69. References to this classification criterion reflect the considerable predominance
of elements of an "autochthonous" nature in the material and spiritual culture of a
person, group or community.

70. In the field of the descriptive disciplines, therefore, an attempt will be made
to draw up an inventory of the material, technological, normative, and ideological
elements of the culture of an "indigenous" group or community and to classify them,
from the point of view of their origin and their social and economic importance, in
one of the following three categories: (a) those of an "autochthonous" nature;
(b) those of an "alien" nature, which will in turn be subdivided into: (i) "colonial"
and (ii) "contemporary"; (c) "mixed".

71. Any group in which the so-called "autochthonous" elements predominate to a
considerable degree would therefore be classified as an "indigenous" group.

72. In this respect, some difficulties arise with regard to: (a) the standards to be
used for defining a given cultural element as "autochthonous" or "non-autochthonous";
(b) determination of the number and nature of the cultural elements to be used in the
classification; (c) the percentage or functional value which these elements must
attain among the members of a specific group before it can be classified as
"indigenous".

73. The cultural elements to be considered must clearly include both material
and technical elements as well as those relating to behaviour and ideology.

32/ It is well-known that from the sociological point of view, the world of
culture, as well as each specific culture or individual cultural heritage, comprises
a wide variety of elements: language, popular, scientific and philosophical knowledge,
religious, moral, political, social and other beliefs, ideas, legends, traditions,
symbols, customary forms of behaviour, standards of behaviour, legal, moral,
hygienic, social, agricultural, culinary, medical, etc.), quality criteria or
tabs, proverbs, forms of social organization, forms of political organization, legal
structures or institutions, economic patterns and organizations, writings, drama,
poetry, song, statuary, sculpture, painting, architecture, music, dance, manners and
clothing, utensils, implements, artefacts, instruments, machines, etc.
Consideration must be given inter alia to the instrumental and technological aspects, the economy and agriculture, as well as beliefs, habits, customs, rites and ancestral symbols, social and family organization, social and legal institutions, dress, religious and mythical concepts, etc. One important point to be borne in mind is that the meaning of all these aspects is coloured by a conception of the world which is peculiar to these communities when compared to the ideas of other population groups living alongside them.

74. It is not the purpose of this study to try to examine in detail which elements should be regarded as "autochthonous" and which as "alien". This is an extremely complicated question which each country must solve according to its own criteria and guidelines. There would be little point in giving partial descriptions; and full descriptions would require many volumes that would in any case contribute little to the purposes of this study, which is not designed to give a minute description of the characteristics and elements peculiar to each group, but merely to indicate their existence and the need to recognize them as relevant for determining who is and who is not "indigenous". Moreover, the information supplied in connection with this study contains no important details in this respect. It is simply stated that this element is recognized as an important classification factor for the purpose of the relevant definitions.

75. The cultural criterion is of great importance. A knowledge of the aspects of the culture of a group may be extremely useful in the practical application of certain projects, since it is essential to orient projects in such a way that they do not unnecessarily conflict with the surviving cultural standards and patterns - a circumstance that might easily lead to the failure of projects which were in other respects most carefully planned. It is essential, in proposing and planning educational programmes and in approaching the solution of the problems of persons and groups which have moved from the country to urban areas - with all the fundamental changes that this involves - to take into consideration and cultural patterns of the groups one wishes to help. These patterns must also be borne in mind in any attempt to introduce scientific or technological changes in communities with a different culture, whenever such changes are deemed to be necessary in specific situations.

76. The classification criterion of "primitiveness" as compared with "modernism", or "rural" or "folk" as compared with "urban", "modern", or "national", is not always applicable in this field. It is not the case that everything which is "indigenous" is "primitive", or that everything which is "alien" is "modern". In many countries, the "national" culture has not yet been fully defined; and it must be assumed that, in view of the importance of the indigenous section of the population, the "national" culture must include some "indigenous" elements in its function of synthesizing the various "national" factors.

77. The purity of "origin" of cultural elements is not of any great importance, either. It is well-known that all cultures comprise "original" elements and elements "borrowed" or "adopted" from other cultures. In extreme cases, even, groups which have lived and are still living in a state of maximum geographical isolation have been infiltrated by a series of "alien" cultural elements (tools, animals, plants, traces of beliefs and religions alien to the region, etc.) as a result of the activities of religious missions, military garrisons, road building and maintenance teams, oil or mining prospecting workers, scientific expeditions and even small groups of individual explorers.

78. Cultural borrowings are always present. They increase with contact between communities of different cultures, and increase even more when the groups in question change their habitat.
79. It must therefore be concluded that the culture criterion, although it is very useful, is not enough to classify a person as indigenous or non-indigenous. However, although they do not suffice for that purpose, cultural considerations, like somatic considerations, are important factors which must be taken into account in defining the persons, groups and communities which are to be considered as indigenous.

80. This has been understood by many of the countries which have indigenous populations, and which have included the culture criterion among those which are used in the difficult task of defining indigenous populations.

81. Thus, the culture criterion is one of those which are taken into account in various countries for defining indigenous populations. We shall therefore consider first the presence of this criterion in general, and then examine some particular aspects of this criterion, such as religion, tribal way of life, livelihood, etc.

82. No information is available for certain countries. In others, the indigenous culture requirement is not expressly mentioned. On the other hand, this criterion is included in various other countries; and in the following forms:

83. In Brazil, belonging to an ethnic group, the cultural characteristics of which distinguish it from the national society, is among the criteria for determining whether a person is an indigenous person (Act 6001, Art. 3 (I)).

84. This is implied in Columbia through the use of the words "[they] do not participate in [the] national society."

85. In Chile the general definition of an indigenous person requires that he "forms part of a group which ... is distinguished from the generality of the inhabitants of the Republic by its preservation of ways of life, patterns of neighbourliness, customs, forms of work or religion, derived from the autochthonous ethnic groups of the country."

86. In Bangladesh some of these isolated or marginal groups are said to "speak a language of their own, have their own dances, music and love songs and a uniform style of home, dress, food and customs distinct from the other tribes", in some cases also including religions which may be "a mixture of Buddhism and totemism". Several of these groups are described as "small communities leading a life undisturbed by alien influences" for a very long time "because of the heavy monsoon that cuts off their area from the outside world for much of the year."

87. In Costa Rica, outside the legal definition, reference is made to "autochthonous culture" and to the fact of having "retained a clearly defined culture of their own", as well as to the "cultural factor and the feeling of self-awareness and the use of vernacular languages". The legal definition contains the cultural element, as it refers to "persons who form ethnic groups which are directly descended from the pre-Columbian civilizations and retain their own identity".

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33/ Argentina, Burma, El Salvador, Honduras, Nicaragua and Suriname.
34/ Australia, Finland, New Zealand, Norway, Paraguay and the United States.
35/ See para. 280 below.
38. In Guatemala, a person's culture and a value system based more on the community than on the individual in addition to the normal use of an indigenous tongue, are the factors which determine whether a person is to be classed as indigenous or non-indigenous in censuses.

39. In Mexico, according to the Government's report, the Instituto Nacional Indigenista uses, in addition to the language criterion generally used for statistical exercises, indicators referring to expressions of "culture and social organization."

40. The Government of Canada stated that Canadian native people "retain a sense of their unique heritage and historical identity" and "in many cases maintain their ... diverse traditional forms of social custom and religion". 36/

41. In Ecuador, besides indigenous ancestry, "censuses have assessed only some characteristics of the material and spiritual culture of the aboriginal peoples, and only to a very limited extent the social forms existing among the indigenous population". 37/

42. Among the criteria used for identifying a person as tribal in Pakistan is the fact that they "keep their own culture and live substantially in accordance with their own customs and reval (traditions)."

43. The adherence to "cultural patterns typical of specific tribes" is among the relevant criteria in Paraguay.

44. In French Guiana, a person's culture and preferred language seem to be effective criteria for classification in case of doubt.

45. In Guyana, indigenous culture is alluded to by the use of the words "living the life of an Amerindian", included in the Amerindian Ordinance and in the State Lands (Amerindian) Regulations quoted under "legal definitions", as reported by the Government. 38/

46. Ainu culture would clearly be among the criteria for determining that a person is an Ainu in Japan.

47. In Laos, cultural characteristics are mentioned among the most important considerations for establishing whether a person is a member of the "ethnic autochthonous groups", in all sources available to the Special Rapporteur.

36/ This was expressed by the Government in the information submitted to the Special Rapporteur with reference to the relative validity for Canada of the guiding criterion adopted for the preparation of the study. The Government also stated in this regard that it would, however, be an unwarranted generalization to say that native people today "live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part".


38/ See para.274 below.
98. "Habitually following an aboriginal way of life and aboriginal customs and beliefs" is a requirement in all cases in Malaysia, but while in the case of descent from an aboriginal father or aboriginal parents, either this or the habitual use of an aboriginal language are to concur with descent, in the case of descent only from aboriginal mother, both circumstances are to concur with descent. 39/

99. In Panama, this criterion, which is followed by the Directorate of Statistics and the Census, includes - as part of its concept for identifying the indigenous population of the country - the requirement that such persons should "preserve their traditions and customs". 40/

100. "Community affiliation" seems to be among the criteria prevailing in Peru, in the main, for determining whether a person is or is not an indigenous person. 41/

101. In the Philippines "the desire to preserve their own culture, religion or language through the formation of their own communities and the continued practice of their own customs, religion and beliefs, use of their own particular dress and language ..." has been considered to be very important in determining the affiliation of persons or communities.

102. Cultural characteristics seem to be important in Sri Lanka for the determination that a person is an indigenous person whether Vedda, Rodiya or Kinnaraya.

103. In Venezuela, explicit reference is made to indigenous culture in the case of "accessible" indigenous populations. The words used here are "their nature and customs" which place them on a "different order of treatment or relationship from the rest of the population of the country". Indigenous culture must, a fortiori, be presumed to be present in the case of isolated "inaccessible" indigenous populations which are termed "forest-dwellers" and which, it is specified, are not accessible owing to the topography of the terrain or "their bellicosity or nomadic habits".

104. In Sweden "adherence to, and self-identification with, Lappish culture" is one of the criteria for determining who is a Lapp. It goes with a requirement of speaking the Lappish language.

105. A short account will now be given of some of the cultural aspects which are mentioned separately and which are fairly consistent from country to country, e.g. religion, the fact of living under a tribal system, belonging to an "indigenous" community, dress and livelihood.

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39/ There are cases, however, in which descent is not indispensable, as discussed above (para.51) and below (para.363).

40/ See para.279 below.

41/ See para.136 below.
2. **Particular aspects**

(a) **Religion**

106. Religion as an element of indigenous culture is always implicit, but some countries mention it explicitly.

107. As stated above, the words "religions which may be 'a mixture of Buddhism and totemism'" are included among the relevant criteria in Bangladesh for some groups.

108. The Canadian Government mentions "religion" in particular, stating that in many cases native people in Canada "maintain their diverse traditional forms of ... religion."

109. In Chile, "religions originating among the autochthonous ethnic groups in the country" are among those cultural aspects which are listed in the general definition of an indigenous person, as requirements additional to the use of an aboriginal language: thus, an indigenous person is a person who, "living in any part of the national territory, is a member of a group which habitually expresses itself in an aboriginal language and is distinguished from the generality of the inhabitants of the Republic by its preservation of ways of life, patterns of neighbourliness, customs, forms of work or religion originating among the autochthonous ethnic groups of the country" (emphasis added).

110. In the Philippines, there are recorded Court decisions to the effect that the term "non-Christian", which has traditionally been applied to the indigenous groups of the country, does not refer so much to religion but primarily to other considerations.

111. In the case Ruby vs. Provincial Board of Mindoro (39 Phil. 660) it was held that: "The term 'non-Christian' refers more to the degree of culture and civilization of the public affected rather than to their religion."

112. Similarly, in the cases People vs. Cayat, (88 Phil. 12), and Porkan, et al vs. Navarro, (73 Phil, 2006, p. 32, 33) it was held that this expression:

"... refers not to religious belief, but in a way to the geographical area and more directly to the natives of the Philippine Islands of a low grade of civilization, usually living in tribal relationship apart from settled communities."

113. Religion, nevertheless, figures among the considerations for establishing that a person is a member of the National Cultural Communities, as communicated by the Government when describing the subjective element that must concur with objective elements to form the set of circumstances deemed essential for these purposes. This subjective element is described in the following terms:

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42/ See para. 86 above.
43/ See para. 90 above.
"... the desire to preserve their own culture, religion or language through the formation of their own communities and the continued practice of their own customs, religion and beliefs, use of their own particular dress and language..." (Emphasis added).

"... this subjective factor involves active and passive resistance by minorities to changes in their own characteristics, hence, there has been reluctance to participate in the national educational programmes of the government which is western-culture oriented. The minority groups do not emigrate from their natural habitat and communities and do not abandon their own groups, religions, customs and beliefs; so much so that there is always that hope of one day being the national majority ..." (Emphasis added).

(b) The fact of living under a tribal system

114. In some countries this fact seems to be of prime importance. This is the case in India and Pakistan and, to a certain degree, in Bangladesh, Indonesia and the Philippines. This circumstance has great importance in Panama, Venezuela, Guyana and French Guiana.

115. In India this requirement is indicated in the constitutional designation of these communities as "scheduled Tribes". The specification that a person must be a "member of a tribe, a tribal community, or a part of a tribe or of a tribal community or of a group within a tribe or within a tribal community" in order to be considered as "tribal" seems to give this criterion overriding importance for determining whether a person is or is not indigenous. The absence of any obligation to be "presently endogamous, although originally they might have been so" is to be noted as a taxonomic element in differentiating "scheduled tribes" from "scheduled castes".

116. Similarly in Pakistan this is explicitly present as the guiding criterion in the name given in the Constitution to the areas where these populations live "Tribal areas" and in the requirement of "belonging to the tribes".

117. In Bangladesh for example, the relevant groups are said to "consist of small tribal or semi-tribal communities". Allusion is also made to "members of tribal or semi-tribal populations".

118. In Indonesia "living in an isolated community under a tribal organization" seems to be one of the most important guiding criteria for identification purposes.

119. One of the judicial decisions mentioned above includes, as a factor for determining which persons are indigenous persons, the condition that the natives of the Philippine Islands in question "[be] usually living in tribal relationship apart from settled communities", (Erbani et al vs Navarro and Pecal vs. Gavat, cited above).

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44/ See chapter VII, Basic Principles, paras. 54 to 59 E/CN.4/Sub.2/1982/2/Add.2.
45/ Ibid., para. 53.
46/ See para. 112, below.
47/ See para. 112, above. 22
120. In Panama, "... those inhabitants who live under a tribal system ..." are regarded as indigenous (the criterion adopted by the above mentioned Directorate of Statistics and Census, Office of the Controller-General of the Republic).

121. This criterion may be presumed to be implicit in the words "of whom there are only indirect reports from neighbouring tribes ...", which are used in Venezuela in formulating the criteria for defining "inaccessible" indigenous populations.

122. In various countries special reference is made to this circumstance. In Guyana, for instance, the information received from the Government indicates that, in operating the definition, the principle has been for mixed Amerindians that they should be residing in an Amerindian area or community living the life of an Amerindian. An Amerindian is, in turn, defined as "any Indian of a tribe indigenous to Guyana or to the neighbouring countries".

123. In French Guiana, this indicator is implicit in the reference to "indigenous tribes". 48/

124. Finally there are systems in which "being a member of a tribal group" rather than the fact of actually "living under a tribal system" is required. As various terms such as "tribes", "bands", "groups" or "communities" are used in this connection, these cases will be discussed both here and under the next heading, "Membership of an indigenous community". Consequently it should be understood that under the present heading only references to tribal groups will be specifically pertinent. Membership of all other "groups", "bands" and "communities" that are not tribal or semi-tribal would belong more specifically under the heading "Membership of an indigenous community".

125. In Canada a Status Indian has been defined as a "person who pursuant to the Indian Act is registered as an Indian or is entitled to be registered as an Indian." 49/ Among the criteria used to establish whether a person is entitled to be entered in a List called the Indian Register, maintained by the Department of Indian Affairs and Northern Development of the Federal Government, there is one calling for membership of a tribe or band.

126. As stated by the Canadian Government, those entitled to register as Status Indians in accordance with an Indian Land Statute passed in 1874 would include

"a member of a band for whose use and benefit lands have been set apart or have been agreed by treaty to be set apart, or that has been declared by the Governor-in-Council to be a band for the purpose of this Act; and, generally, descendants in the male line of one of the persons described above."

48/ See above, paragraph 60. This criterion is not watertight as it is possible to be descended from the old indigenous tribes without necessarily retaining tribal organization at present.

49/ Being entitled to "use and enjoy" the lands "belonging to the various tribes and bands of Indians" is also discussed under the heading "Membership of an indigenous community", since membership of a tribe or band of at least one of the close ascendants of the person concerned is implied.
127. The Government further stated that

"The status Indians are members of Bands who hold in common certain reserve lands generally by virtue of written treaties, though treaties were not signed in all cases. Some of these Band members have taken up residence off reserves ..."

"Obviously, a person can be 'registered' whether or not his band or tribe has signed a treaty, and whether or not he lives on a reserve (though in this latter case, certain beneficial provisions of the Act are lost)."

128. In the United States, according to government sources, to be designated as an Indian eligible for basic Bureau of Indian Affairs services, an individual must among other considerations, "be a member of a tribe, band or group of Indians recognized by the Federal Government."

129. The Government has added that "one becomes a member of an Indian tribe or, if an Alaskan Native, a member of an Alaskan village, by meeting membership requirements laid down by a tribe. The amount of Indian blood needed varies with the tribe. It ranges from a trace to as much as a half." The Government has also stated that "thousands of people in the United States have some degree of Indian blood. Generally, unless an individual has at least one parent who is legally entitled to membership in a Federally-recognized Indian tribe he cannot qualify for membership or for Federal services available solely to Indians, or to share in the assets of an Indian tribe. Sometimes, however, an individual with Indian blood who may be qualified to be an enrolled member of a specific tribe may not have taken the necessary steps to prove this. If and when he or she takes the initiative to prove his or her eligibility for membership and becomes an enrolled member of an American Indian tribe with a Federal relationship, he or she becomes entitled to special services reserved to it."

130. A writer states: 50/

"In the legal sense, the question of who is an Indian is most important, because of the distinct rights and obligations of Indian citizens as opposed to non-Indian citizens ...

"The legal question actually becomes more social and political than biological. A full-blooded Indian can withdraw from a tribe and thereby, for all legal purposes, cease to be an Indian. On the contrary, an individual with only the most tenuous Indian ancestry can be accepted by the tribe and thus can be legally an Indian. It is interesting to note that a Wyandot tribal roll that was proposed to Congress in the 1930's listed a person with only 1/256 degree of Wyandot blood." 51/


51/ For census purposes and in the absence of self-identification as an Indian, when a person is of mixed Indian and white ancestry, the enumerator will count him/her as an Indian if he/she has been entered in the roll of an Indian tribe (see para. 53 above.).
131. Discussing some of the important aspects of definition it has been written: 52/

"The right of a society to determine its own membership is crucial to its survival. Yet a number of federal laws have had the effect of giving power to federal officials in the executive and judicial branches to compel tribes to admit persons to membership and voting privileges according to federal policy goals and not in accordance with the long-term goals of the tribe itself. Historically the Bureau of Indian Affairs has asserted the power to approve tribal membership rolls: Congress has legislated those who are to be deemed eligible to share in tribal assets such as claims judgements. But perhaps the greatest present threat is posed by the Civil Rights Act of 1968.

"In 1968 Congress imposed upon the tribes by statute a version of the Bill of Rights, which is found in the U.S. Constitution. Although well-meaning, this gesture could have disastrous effects on the tribal exercise of self-government by imposing Western-style rights on members of tribal societies without due consideration to the appropriate definition of these rights in context. The intent of Congress in passing this act was to control problems in the tribal administration of justice, but a good deal of the recent litigation under the act has been aimed at voting and membership practices. Voting and citizenship regulations are among the most essential questions for any government to determine, and the imposition upon already-threatened tribal societies of the standards of urban America could well be crippling for Indian tribes.

"This legislation was passed in violation of the principle of tribal consent. No funds were provided to ease the transition from the existing practices to compliance with the act. Several tribes have been brought to the brink of bankruptcy in defending lawsuits brought by government-funded lawyers seeking to enforce their policy notions on the tribes by bringing 'law reform' litigation under the act." 53/

(c) Membership of an indigenous community

132. The mere circumstance of living as a member of an indigenous community is mentioned in the available information concerning Bangladesh, Canada, the Philippines, Guyana, Malaysia, Peru and the United States of America. 54/

52/ American Indian Law Newsletter, Vol. 7, No. 11, Special Issue containing the American Indian Response to the Response of the United States of America, pp. 7-8

53/ In this connection the Government has stated that "... the scope and application of the 1968 Indian Civil Rights Act to Indian tribes was in 1976 interpreted by the U.S. Supreme Court to mean that disputes arising under that Act are to be resolved in tribal forums. Thus, the door has, essentially, been closed to interpretations of rights by non-indigenous forums. See, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

54/ This criterion would also be implied, at least as one of the possible alternatives, in some systems where reference is made to birth in an indigenous community (as in Paraguay) to the relevance of "organizational expressions" (as for the Instituto Nacional Indigenista in México) or to "un sistema de valores más comunal que individual" (as in Guatemala).
It has been stated before that in the Philippines "living ... apart from settled communities" and "the formation of their own communities ..." are mentioned among the considerations to be taken into account when determining whether or not a person is a member of one of the National Cultural Communities.

In Guyana, belonging to an indigenous community is referred to in the words "Any Indian of a tribe ..." (paragraph (a)) and in the operation of paragraph (b) "residing in an Amerindian area or community ..." (Emphasis added in both quotations), for mixed Amerindiains in the terms of the Amerindian Ordinance as described by the Government. For the purposes of the State Lands (Amerindian) Regulations, as quoted by the Government, "the term Amerindian means a person whose parents are both of pure Amerindian blood, and belong to the Amerindian tribes of Guyana" (Emphasis added).

Being or remaining "a member of an Aboriginal community" is specified in Malaysia in the Aboriginal Peoples Ordinance 1954, amended 1967 (Section 3 (1), (b) and (c)) as a requirement for establishing that a person is an Aborigine. The same Ordinance provides in Section 3 (1) letter (a), as one of the requirements therein listed, that the person in question must be the child of a male parent who "is or was a member of an aboriginal ethnic group ...".

In Peru it is simply stated that: "In general terms the Indian is identified by community affiliation and by language, dress and economic status" (Emphasis added).

In Bangladesh the wording is similar "consist of small tribes of semi-tribal communities" cited above and "members of tribal or semi-tribal populations".

In Indonesia the references to these groups as "isolated communities of autochthonous peoples" or as "isolated ethnic tribes" describing them as groups "under a single head of clan" clearly imply this membership.

In the United States one of the requirements for being eligible for basic Bureau of Indian Affairs services is to be a member of a "tribe, band or group" of Indians recognized by the Federal Government.

Membership of an Indian community, band or tribe or acceptance by any one of them is among the criteria for establishing the entitlement of a persons to be registered as a Status Indian or as a non-Status Indian or an Inuit in Canada. Although clearly overlapping the preceding criterion of "living under a tribal system" in cases where these bands or communities are "tribal organizations", it is discussed here as "membership of an indigenous community" as it seems that some of these communities or bands are not necessarily organized on a tribal basis.

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55/ See paras. 113 and 119 above.
56/ See para. 101 above.
57/ See para. 117 above.
58/ Ibid
59/ See para. 118 above.
Membership of these bands or communities is required, and this may flow from being born and living as a member in one of these groups or may be acquired by subsequent acceptance in such bands or communities.

141. As communicated by the Government of Canada those entitled to register as Status Indians would include any person considered (by an Indian land statute passed in 1874) to be entitled to use and enjoy the lands belonging to the various tribes and bands of the Indians of Canada 60/ or a member of a band for whose use and benefit lands have been set apart or have been agreed by treaty to be set apart, or that has been declared by the Governor-in-Council to be a band for the purpose of this Act; and, generally, descendants in the male line of one of the persons described above.

142. The Status Indians are members of bands who hold in common certain reserve lands generally by virtue of written treaties, though treaties were not signed in all cases. Some of these Band members have taken up residence off reserves.

143. "A person can be "registered" whether or not his band or tribe has signed a treaty, and whether or not he lives on a reserve (though in this latter case, certain beneficial provisions of the Act are lost)."

144. In 1973 the Canadian Government stated that of the approximately 256,000 status Indians, 166,000 lived on reserves, and about 24,000 on Crown lands. The Government added: "There are about 560 separate Indian communities or bands, which (with the exception of certain nomadic groups occupying the outlying and northern regions) are located on 2,200 reserves, varying in size from a few acres to more than 500 square miles."

145. A 1980 official publication transmitted by the Government contains more up-to-date figures and states that

"... In 1979 there were 300,000 in 573 bands. Some 30 per cent were living outside Indian reserves.

"Except in the north, Indian bands are located on reserve lands set aside for Indians exclusive use through treaties or other legal arrangements. There are 2,242 separate parcels of reserve land with a total area of 10,021 square miles. This land base has remained relatively the same since 1960.

"The average band size has grown from about 350 in 1960 to about 525 in 1979, when the smallest band was New Westminster, with 2 members, and the largest, Six Nations of the Grand River, numbered 9,950.

"About 65 per cent of the Indian population is located in rural or remote communities, compared to 25 per cent of the national population." 61/

60/ It is assumed that "membership of an indigenous community" is implied, be it only in the close ascendants of the person concerned, as a requirement for being entitled to "use and enjoy the lands belonging to the various tribes and bands of the Indians of Canada."

61/ Indian Conditions. A Survey. Published under the authority of the Minister of Indian Affairs and Northern Development. Ottawa, 1980, p. 5.
146. Membership of an indigenous community is also suggested in some of the
criteria used for determining who is a non-Status Indian in Canada since,
according to the Government "Identification of members of the non-status
native groups is not fixed in law but includes such factors as ... acceptance
by the Indian community, or the following of a traditional manner of living."

147. Likewise, as regards the Inuits, the Government states "The Eskimo group
is somewhat more distinct because of geographical isolation ... There is no
precise definition of an Eskimo; status is generally determined by acceptance
in the group as an Eskimo."

148. In conclusion, it should be stated that this circumstance objectively
describes a communal situation without necessarily referring to any sort of
subjective elements on the part of the individual, the community or the
society as a whole, except in the case of membership of a community through
acceptance by this group of a person who is not its natural member. In the
latter case, this acceptance is essential.

(d): Dress

149. In some countries traditional indigenous dress is explicitly mentioned
among other cultural characteristics which are useful for classification
purposes. Indeed, dress may be of great symbolic importance in the indigenous
culture and in determining the preservation of that culture by a community,
group or person.

150. Dress is mentioned among other relevant cultural aspects in Bangladesh,
Bolivia, Guatemala, the Philippines and Peru.

151. In Peru, dress is simply mentioned among those considerations that are
taken into account for the purposes of deciding whether, in general terms,
a person is or is not indigenous. 62/

152. In Bangladesh, "drass" is mentioned among the characteristic indicators
necessary for identifying the members of the tribal communities. 63/

153. It has already been stated that in the Philippines "the desire to preserve ...
their own particular dress ..." is included among other considerations for
determining whether or not a person belongs to one of the National Cultural
Communities. 64/

154. It has also been stated that in Bolivia indigenous dress indicates the
place of origin of the person wearing it, as

"dress [varies] from one community to another. Thus any person familiar
with a given geographic area can identify an Indian with his community
of residence by his dress. The variety of hats, skirts, shawls and
large blanketlike garments called ponchos that are to be found in
any large gathering of Indians is a never ending source of wonder ..." 65/

62/ See para. 136 above.
63/ See para. 86 above.
64/ See paras. 101 and 113 above.
65/ See para. 57 and foot-note 28/ above.
155. Among the criteria for determining whether a person is indigenous in Guatemala is the use of indigenous dress. "An indigenous person is one who acknowledges his [indigenous] heritage by using one of the 288 different autochthonous types of dress when marrying a woman dressed in the same fashion ... If he renounces that form of dress and dresses according to western tradition and develops more competitive and individualistic values, he may become a ladino ..." 66/ in addition. "In the 1964 census, a further criterion for the enumerator was the respondent's replies to the questions on the use of indigenous dress ... [and] the use or non-use of any type of footwear (shoes and sandals)." 67/

156. Any person who is familiar with a specific area of Guatemala can recognize the community to which a Guatemalan indigenous person belongs by his dress. There is clothing for every-day use and ceremonial dress (more beautiful and formal) that is characteristic of each indigenous community.

157. Dress is generally considered as an aspect of group consciousness, or of the self-identification of the person, group or community with the indigenous population, or of the option or choice of that person, group or community with the indigenous population, or of the option or choice of that person, group or community. It is stated that by their continuing decision they reflect both the indigenous culture and their attachment to it.

(a) Livelihood

158. The way in which a person earns his means of livelihood is an important aspect of the cultural criterion that may be singled out for taxonomic effects. In this manner, reindeer breeding or reindeer herding are mentioned in Norway and Sweden as additional guiding pointers to be taken into account when determining whether or not a person is to be considered a Lapp. In Finland, the same would apply, although to a lesser degree.

159. In Bangladesh "leading a semi-nomadic life" or practicing "jum" (slash and burn agriculture) or gaining their livelihood from "fishing, fruit gathering and hunting", are mentioned among other taxonomic criteria.

160. In Canada identification of members of non-status native groups includes such factors as "the following of a traditional manner of living". Reference is also made to "certain nomadic groups occupying the outlying and northern regions".

161. Under the present heading of "livelihood" it is important to discuss certain subjective criteria concerning the traditional occupations and organizational expressions of the indigenous populations which tend to appraise from an ethnocentric viewpoint these important aspects of indigenous life. Without passing judgement here on the validity or otherwise of such appraisals, which is not the purpose of this chapter, their existence and importance in some systems are noteworthy.

66/ Thomas and Marjorie Melville, Tierra y pueblos en Guatemala, Editorial Universitaria Centroamericana, EDUCA, 1975 p. 31. See also para. 88 above.

162. In many countries, important sectors of opinion, often including the public authorities, consider, either implicitly or otherwise, that indigenous life-styles, social organizations and economic practices are "less advanced", "primitive", "isolated and undeveloped", "backward", "marginal" or "marginalized" as compared with those of the predominating sectors of society. In several cases such opinions have become important in processes of determining the criteria relevant for defining who is and who is not indigenous.

163. This seems to be the case in many countries. The following paragraphs, however, contain only some examples of systems where criteria along those lines are used, among others, for identifying indigenous persons or communities with some official effects.

164. Thus, for example, several provisions of the Constitution of Bangladesh make reference to "backward sections of citizens" (for example, the relevant parts of Articles 28 (4) and 29 (3)(a)).

165. The Government states in this connection that "... no group or individuals are separately treated on the basis of religion, race, caste, sex or place of origin. However, for development purpose, some regions or groups have been identified as 'backward'. Special treatment is given to these groups or regions."

166. Neither the Constitution nor any of the Statutes or other texts that the Special Rapporteur had at his disposal, nor the information furnished by the Government, contain any description of the groups considered to be "backward sections of citizens" nor of the nature of the measures taken for their "special treatment" and "development". In the information received from the Government mention is made, however, of the Chittagong Hill Tracts as a "backward area" for which even a special autonomous agency has been established under the name of the "Chittagong Hill Tracts Development Board". It is to be presumed that the most backward groups living there may have been included within those chosen for "Special measures of development".

167. The Government has used the term "indigenous" in respect of the "tribal and semi-tribal" or "less advanced" populations, as follows:

"(a) The members of tribal or semi-tribal populations in this independent country are less advanced than that of other national community. But the Government has given priority to raise the lot of the tribal population soon.

“(b) The members of tribal or semi-tribal populations are regarded as indigenous on account of their descent from the populations which are settled in specified geographical areas of the country."

69/ India and Pakistan seem to have adopted a similar approach although being less advanced than other groups is not considered the prevailing characteristic of the relevant groups for identification purposes.

69/ See paras. 61 above and 253 below.
168. In Indonesia "not matching up to standards of development required by
the Government in accordance with the ideals or organization and
development of the Indonesian society" or "having less ability to perform
adequately their social functions" in terms of the Indonesian community
are taxonomic criteria applied to the identification of "isolated communities
of autochthonous peoples" or "isolated ethnic tribes" as they are called.
These groups have also been referred to as "pre-villages" contrasting
them with villages at different stages of development, which are called,
respectively, traditional (or Swadaya), transitional (or Swakarya) and
developed (or Swaembada). 70/

169. The relevant groups have been described by the Department of Social
Affairs in 1975 as "Societal groupings, which because of their social
cultural system, have their own specific process of development and have
suffered limitations in their communications, so that as a consequence
their mode of life and living takes place in a simple way, isolated and
dispersely and with less ability to perform adequately their social
function." [Department of Social Affairs, Written Statement of 24 October
1975, p.3].

170. One of the considerations invoked to classify a person as indigenous in
Paraguay is that he is "marginalised", "backward" or "outside of the economic
realities of the country". On this basis it has even been said that the
indigenous populations are not Paraguayan citizens properly speaking. This
is illustrated by the use of the terms "indio" and "Paraguayan" in everyday
language to denote the differences between these two groups of persons. 71/

171. It has been said that, in Ecuador, the view has been advanced by persons
who are not professional sociologists that indigenous persons are merely the
victims of economic backwardness and lack of access to the sources of
progress. In other circles, it is felt that this view ignores the "value,
importance and right" of such persons to retain "the essential, positive
elements of their culture". 72/ 73/

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70/ Anti-Slavery Society, information furnished on 3 September 1976 and
on 24 April 1977.

71/ Anti-Slavery Society, information provided on 3 September 1976.

72/ Gonzalo Rubio Orbe. "Ecuador Indígena" in América Indígena,
Instituto Indigenista Interamericano, Vol. XXXIV-3, Mexico City, 3rd quarter, 1974
pages 586-587.

73/ In this connection, it should be recalled that the Instituto
Nacional Indigenista of Mexico and the bulk of government action concerning
indigenous populations has been placed under a superior co-ordinating entity
called Coordinación General del Plan Nacional de Zonas Desprinizadas y Grupos
Marginados (COPLAMAR). See para. 36, Chapter X (ECN.4/Sub.2/1982/2/Add.4).
It must also be pointed out that "marginality" has not been formalised into
a taxonomic criterion.
172. The use of a vernacular language by an individual group or community has always been considered one of the criteria for classifying them as indigenous.

173. Language or tongue is one of the cultural elements, but deserves particular mention because of its special importance. It must be separated from the rest of the cultural elements and regarded as a separate criterion.

174. Indeed, language fulfills functions of great importance for every individual. When a person is born, he finds the language already formed and used in the community which he is to join and, with the passage of time, he begins to speak this language which he hears around him. The native language or mother tongue is his means of contact with the world. Through his apprenticeship in the language, the child receives the basic cultural legacy of the community of which he is a member and he participates in the life-style peculiar to that community. Language is, in effect, the concrete expression of a particular interpretation of the world as seen through the culture for which it serves as a vehicle of expression.

175. The members of a community speak the same language, and to a certain extent constitute the community precisely because they speak the same language. The language of a group is one of the strongest points of solidarity between the members of the group. This bond becomes particularly strong vis-à-vis groups of another language.

176. The phenomena of solidarity between the persons of the same speech become more accentuated in situations in which various languages confront one another - for example, in societies in which different language communities live together, and especially when some of these communities are politically or socially dominated by others.

177. Mention will of course be made of various problems and situations in which it will be possible to appreciate the importance of the language of a community; but these will be referred to in the chapter on language later in this study. For the time being attention will be concentrated on the language criterion as a classification factor for the purpose of defining indigenous populations.

178. There is no doubt that in the case of monolingual aboriginals - in other words, in cases where individuals, groups or communities speak only an indigenous language - this criterion is generally decisive. This is why language has been included as a criterion in all the theoretical and most of the practical formulations aimed at defining classification factors for defining population groups as indigenous or non-indigenous. On the other hand, the mere fact of speaking an indigenous language is not decisive, since the language may have been learnt for theoretical study or as an instrument for practical activity which might not even be directed towards the preservation of that language.

179. Consequently, criteria have been proposed in which the indigenous language must for this purpose be the only or the main language used. The following formulations, among others, have been suggested:

(a) use of the indigenous language as the only language; 74/

74/ Bolivia (1950 census), Colombia (implicit).
(b) use of the indigenous language as mother tongue;

(c) use of the indigenous language at home as the habitual means of communication within the family, also referred to as the "first language";

(d) use described as the main, preferred, habitual, general, or normal use of the indigenous language, even if the official language is known.

These requirements suggest that it is essential that the indigenous language should have been acquired ab initio, or that it should be the habitual vehicle of expression of the individual, group or community, even though they may have acquired other languages and even if they use them frequently. Efforts are therefore made to determine whether the persons, groups or communities in question consider the indigenous language to be "their own language" and particularly whether the phenomenon "loyalty to the language" arises, based on awareness that the language in question is the vehicle of cultural expression and a fundamental element in the preservation of a culture.

Reference has also been made to the relationship between language and the indigenous culture, which is a close relationship, not only because the language is the vehicle of expression of the culture but also because it is often the symbol of the desire to preserve the culture.

Consequently, the linguistic criterion is of great importance for classification purposes. Knowledge of the linguistic limitations which may affect the life of indigenous persons can be, and often is, of considerable practical use. For instance, the language of the individual, group or community in question should be borne in mind when trying to formulate an educational policy designed to solve the problems of monolingual indigenous communities, or again when trying to explain their rights to workers who are insufficiently familiar with the official language to understand, without linguistic assistance, the scope and meaning of their work.

Finland (1900-1940), Sweden (use of indigenous language, possibly with a requirement that it be the mother tongue). It may be assumed that this is the use referred to in some countries, although only the requirement known is that an indigenous language be spoken (Colombia, Philippines, Japan, Laos, Peru and Sri Lanka).

Finland (1960 and 1970).

Bolivia (1950 census), Finland (1962).

Finland (in case of doubt the person concerned is asked which language group he feels he belongs to).

Chile (general definition) and Malaysia (in general).

Panama (criterion used by the Directorate of Statistics and Census).

Norway.

In Finland (1950), persons questioned in the census were asked which language they spoke best.

The words "speak a language of their own" are included among the relevant criteria in Bangladesh. In this respect it should be remembered that in Finland the person concerned is asked, in case of doubt, which language group he feels he belongs to.
contract or the instructions on work safety. It is essential to take into account
the possible linguistic limitations of an accused person — or of one of the litigants
in judicial proceedings — who has insufficient knowledge of the official language,
in order to assure him a proper trial or prepare the defence of his rights and
interests, etc. etc.

183. Except in the case of persons, groups or communities which know only an
indigenous language, however, this criterion alone does not seem to be sufficient
for defining indigenous populations. Consequently, although the great importance
of the linguistic criterion is recognized, it has generally been combined with other
criteria in those countries which include it among the circumstances to be taken into
account in efforts to establish whether or not persons, groups or communities are
to be considered as indigenous.

184. No information is available for certain countries. In other countries, the
use of an indigenous language is not required as a criterion for considering persons
as indigenous.

185. This requirement is always implicit in references to indigenous "cultures",
since language is a fundamental element of culture. In this connection, it is useful
to give here an example of the bond between language and cultural identity of
distinct groups within society in general, which unites all people who consider a
language as "their own tongue" and know it is tightly linked to the way they "live
and think". Although the Government observations of 27 May 1981 among other
statements expressed the view that language was not a taxonomic linguistic criterion
used to distinguish between "genuine Greenlanders and others", the following statement
quoted in the same observations from the Report of the Greenland Home Rule Committee,
and used by it among other arguments in favour of Home Rule, is pertinent here:

"Language problem. The Danish and Greenlandic languages are "so far apart
that the process of translating ideas from one tongue into the other
presents huge problems. It is not a matter of education only for the
Greenlandic language is tightly bound up with the way Greenlanders live
and think and they do not wish to relinquish their own tongue ... Once
the Greenlandic language is lost the Greenlanders will be headed towards
extinction as a minority group." (Point 4).

186. Possession of the traditional Ainu language would clearly be one criterion to
determine whether a person is or is not an Ainu in Japan. Some Ainu people
continue to cling to their own speech, although nearly all speak Japanese.

187. Linguistic distinctions are prominent in Laos for establishing whether a person
does or does not belong to the "ethnic autochthonous groups".

188. In the Philippines, "the desire to preserve their own ... language ... and use
of their own particular ...language" are among the considerations taken into account
when determining the affiliation of a person to one of the National Cultural
Communities.

189. The daily use of an aboriginal language seems to be a major consideration in
Sri Lanka for determining who is an aborigine, although the Veddas, Rodiyas and
Kinarayas are said to be gradually adopting the Singhalese language.

34/ Argentina, Burra, El Salvador, Honduras, Nicaragua and Suriname.
35/ Australia, Guyana, New Zealand, Paraguay and the United States of America.
190. In Colombia, 'in the most remote areas of the country ... the use of an indigenous tongue is considered a major element in the definition of Indian status primarily because these people cannot speak Spanish and, therefore, do not participate in the national society'. 86/

191. In French Guiana, 'the Amerindians are classified on the basis of their languages into three groups (Arawak, Carib and Tupi-Guarani)'. 87/

192. In Pakistan, the criterion of language is referred to when it is said that tribal people "speak their own language". 88/

193. Similarly, in India, one of the elements relevant for considering a person as a member of the Scheduled Tribes seems to be membership in a group "speaking a common dialect". 89/

194. The words "speak a language of their own" are included among the relevant criteria in Bangladesh.

195. The Canadian Government has stated that the native people of Canada "in many cases maintain their language".

196. In Costa Rica, "use of vernacular languages", "native language" and "own language" are mentioned among the criteria used to identify the indigenous population. 90/

197. In several countries 'indigenous language' is one of the criteria that have been accorded great importance for statistical purposes.

198. Thus, in the 1940 census in Peru, language was one of the two criteria (language and race) taken as the basis for classifying a person as indigenous or white. This criterion is also in current use for such purposes.

199. In Ecuador, census data have been collected on "speakers of indigenous languages aged six years and over". 91/

200. In Bolivia "speaking only or chiefly an indigenous language (or not speaking Spanish well)" was a determining factor in the 1950 census. 92/

201. The habitual use of indigenous languages figures prominently among the criteria of classification in Guatemala for census purposes. In the preparation of the 1964 census, which was prepared on the basis of identification of a person as indigenous by the person himself or by others, reference is made to the use of an indigenous language as a further criterion in case of doubt. 93/

87/ P. Dupont-Gomin, op.cit., p.62. See paras. 60 and 123 above.
88/ See paras. 92 and 116, and foot-note 45/ above.
89/ See para.115 above.
90/ See paras. 56 and 87 above.
91/ Alejandro D. Marroquín, op.cit., p.148.
92/ See para.57 above.
93/ VIII Censo de Población, op.cit., p. xxx.
202. In Mexico, the Government reports that, among the criteria used to decide whether a person, group or community is indigenous, "the national system of statistical information, through population censuses, and the Ministry of Education place more emphasis on the language criterion, while the Instituto Nacional Indigenista includes forms of culture and social organization."

203. It has already been stated that in Norway, according to the Nordic Lapp Council, "a person is considered to be a Lapp if either one of his parents or any of his grandparents normally speaks or has spoken Lappish in daily use at home". Possession of Lappish, or sometimes more strictly its daily use, is the usual criterion in national censuses of Lapps.

204. Speaking the Lappish language - possibly requiring that this be as a mother tongue - is among the criteria used for determining who is and who is not a Lapp in Sweden.

205. Reference has already been made to the fact that in Finland it was required that either one parent or a grandparent spoke Lappish as his or her first language, as an element of the initial definition adopted by the Nordic Lapp Council in its study in 1962. In the course of the study, an addition has been made to the criterion used, to the effect that persons who have learnt Lappish as their first language are also considered as Lapps even if none of their parents or grandparents was of Lappish origin. In official censuses, language has always been the criterion, but it has varied in specific requirements. Thus, from 1900 to 1940, mother tongue was used as the criterion. In the census of 1930, people were asked which language they spoke best. In the censuses of 1960 and 1970, people were asked about their main language. In dubious cases, people have been asked to state their own views as to what language group they considered themselves to belong.

206. In some countries "speaking an indigenous language" has been included in administrative provisions or in legislative enactments formalizing this as a requirement for considering a person as indigenous.

207. Thus, in Panama, the criterion followed by the Directorate of Statistics and Census of the Office of the Controller-General of the Republic for identifying the indigenous population includes the requirement that persons to be considered as indigenous persons should "in general, speak an indigenous dialect".

208. In the general definition included in the information received from the Government of Chile, it is required that the person in question should "be a member of a group which habitually expresses itself in an aboriginal language".

209. In Malaysia, speaking an aboriginal language is a requirement for considering a person as an Aboriginal or Orang Asli. When descent from an Aboriginal father and mother or from an Aboriginal father is present, this circumstance must necessarily concur only with habitually following an aboriginal way of life or speaking an aboriginal language. When only descent from an Aboriginal mother is present, the circumstance of being, or continuing to be, a member of an aboriginal community is required to concur with habitual use of an aboriginal language and habitual following of aboriginal way of life, customs and beliefs. (Aboriginal Peoples Ordinance, Section 3, Subsections (1) and (2)).

24/ The other criteria are ancestry, self-identification and earning their means of livelihood from reindeer breeding, although it is not necessary to satisfy all the criteria in each case.
S. Group consciousness

210. The use of this criterion emphasizes the fact that the individual or group considers himself or itself as "indigenous", or that the community in which the individual or group lives considers him or it "indigenous", or alternatively that there is a combination of personal and communal considerations which make him or it an "indigenous" person or group.

211. In other words, the subjective criterion of the person, group or community in question is taken into consideration. Ideally, when the opinion of the person concerned is sought, his answer will reflect his own true position as closely as possible. In this way, a genuine census is obtained of persons who feel themselves to be "indigenous", and those groups and communities which consider themselves to be indigenous are accurately located.

212. This approach, therefore, offers all the advantages derived from the fact that a person genuinely considers himself to be an "indigenous" person. Very exceptionally there will be persons or groups who classify themselves as "indigenous" without really feeling that they are; they do so for reasons which are materially favourable to this misrepresentation of their real feelings. Generally speaking, an accurate enough picture will be obtained both of those individuals, groups and communities which genuinely identify themselves subjectively as "indigenous" and, by extension, of the "indigenous" populations of the country.

213. Unfortunately, this approach harbours all the disadvantages of strictly subjective criteria: the accuracy of census results when this criterion is applied consequently depends to a large extent on the sincerity of the person consulted and his personal conception of the criteria used. Consequently, the information obtained is not strictly comparable and is only of relative usefulness for the purposes of an objective investigation.

214. Moreover, it is known that in these circumstances cases of misinterpretation, error or concealment frequently arise and distort the results. These phenomena occur in particular when, as often happens with "indigenous" populations, the group to which an individual should correctly state that he belongs is at a lower level in the country's economic and social scale. The individual hides or omits to manifest his genuine group consciousness and even misrepresents his position by identifying himself with groups that are alien but more highly regarded among the prevailing groups.

215. Although this criterion gives a fairly accurate picture of those who feel themselves to be "indigenous" and identify themselves as such according to their own conceptions, the information thus obtained is of subjective value only and does not lend itself to comparison even within one and the same census.

216. The importance of the subjective element consisting of group consciousness, self-identification, option or choice is emphasized in a number of countries. In several of them it has been mentioned as a requirement for certain purposes. In some of these countries acts of "designation" as indigenous for census purposes are

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25/ See the quotation in para. 37 above.

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also referred to in this connection. Although they do not properly constitute instances of self-identification on the basis of group consciousness, these acts of designation as indigenous are discussed here as a different type of identification, but nevertheless as a subjective act assigning a person to a certain group as its member.

217. There is information in this regard—self-identification and designation—only regarding Australia, Canada, Costa Rica, Finland, Guatemala, New Zealand, Norway, Sweden and the United States of America.

218. In Costa Rica, "feelings of ties and belonging to original native groups, and consciousness of so belonging" are mentioned among the elements currently used to determine the indigenous population. The inclusion of the factor of retaining their own identity, which appears in the legal definition, also alludes to this subjective element.

219. In Norway, emphasis is placed on the fact that under the definition proposed by the Nordic Lapp Council, in 1959, Lapps in all types of occupations would be included and not only reindeer owners. The Government states in this regard:

"...this represents a principle to which due attention should be paid, namely the option of belonging to a group or not. The Lapp Council fully supports this principle of option. When population records of people covered by this definition are being compiled, it should be possible for each single person concerned to decide as an individual whether he or she shall be recorded as a Lapp. Some people, no doubt, would decide on the basis of descent whether or not the individual in question is to be classified as a Lapp."

220. It has been reported that in Sweden the Lapps' ties with the Lappish culture "vary all the way from strong identification with the Lapps as an ethnic group to total assimilation within the Swedish majority. But in recent years, self-awareness seems to have grown much stronger among the Lapps, partly as a result of several decisions by the Swedish Government that have benefited the Lapp minority, and partly because of growing international interest in minority problems as a whole." Identification with the Lappish culture is tantamount to self-identification as a Lapp.

221. In Finland any person is considered as a member of a particular minority group on the basis of his expressed will in connection with the official census. For these purposes, the expressed will of the person concerned is the only source of information. Official statistics are based on the results of the official census. Any person may reconsider his belonging to a language group in the next official census. In mixed marriages, the different languages of the spouses are indicated; it is up to the parents to indicate the main language of their children. On the effects of these expressions of will, the Government has communicated:

"The information concerning various language groups is used only for statistical purposes. No rights or obligations of the people concerned are involved and, consequently, the expressed will of the person in an official census does not produce any effects on his status."
222. When carrying out the 1975 census in Guatemala, use was made of the criteria of self-identification and designation as an indigenous person. In the case of self-identification, if there was any doubt, the respondent was asked whether he was "indigenous", "non-indigenous" or "ladino", and his reply was recorded. In the 1964 census, the replies given by the respondent to questions on use of indigenous dress, use of indigenous language, use or non-use of any type of footwear (shoes or sandals) were used as an additional criterion to assist the enumerator in deciding. All these elements involve forms of self-identification as an indigenous person.

223. In the case of designation, it appears that, in the same 1973 census in Guatemala, the criterion adopted was essentially that used in the 1950 census, which basically used the "social evaluation" of a person in the place where the census was taken; use was thus made of "designation as an indigenous person" by members of the community where the person was recorded for census purposes.

224. Tribes, bands, communities and groups identify themselves as indigenous in Canada and the United States of America by having - or demanding from the Department of Indian Affairs and Northern Development or the Bureau of Indian Affairs, respectively - recognition as such, on the basis of treaties and agreements or otherwise. They then acquire status as Status or Registered Indians (in Canada) or as "Recognized Indians" (in the United States).

225. It has been pointed out that the Government of Canada has stated that Canadian native people "retain a sense of their unique heritage and historical identity". These references to "heritage" and to "identity" constitute elements of self-identification as indigenous.

226. Acts of self-identification and of "designation" as indigenous are important in these two countries for census purposes as well as for entitlement to beneficial provisions as "Registered" or as "Recognized" Indians.

227. In the United States, for census purposes, an Indian has been identified on a self-declaration basis, by "declaring his race".

228. For census purposes, further, there is what will be called here "designation as indigenous", since, in the absence of a person's own declaration, another person, namely the census enumerator, decides that the person included in the census is indigenous.

229. These acts of designation consist of a combination of subjective and objective criteria and may take one of the following forms depending on the grounds for such designation: (a) on the basis of the fact that "he appeared to be a full blooded Indian"; (b) on the basis of the fact that he "appeared to be of mixed Indian and white blood" and (i) "was enrolled in an Indian tribal roll or in an Indian agency roll" or (ii) "was regarded as an Indian in the community in which he lived".

230. As can be seen in case (b) (i) there is first a subjective appraisal on the part of the census enumerator who decides that the person "appeared to be" of mixed ancestry, and secondly the fact of acceptance as indigenous by a tribe, by enrolment in the tribal roll or designation by an agency by enrolment on the agency roll.

231. In case (b) (ii) the first element is present in the same manner, plus a second element, consisting, this time, of designation of the person as an Indian by members of a community in which this person lives.

232. Other acts of designation as indigenous may come from the legislator or from the administrator in the United States. Thus, according to the information provided by the Government, "By legislative and administrative action, the Aleuts and Eskimos are eligible for programs of the Bureau of Indian Affairs." Identification as an
Aleut or an Eskimo under these acts, whether self-identification or designation must necessarily precede the decision as to eligibility for entitlement to such programmes and services.

233. All references to acceptance by an indigenous Community also involve, on the part of the person concerned, acts of self-identification as indigenous that logically must precede acceptance, the sine qua non, since the act of acceptance only responds to an act of self-identification, in a sense merely validating it.

234. In Australia, self-identification is required as an element in the determination of whether a person is or is not an Aborigine (or Torres Strait Islander) in order to "establish eligibility for the Australian Government's special programmes in respect of Aboriginal people". The Government indicates that "identification as Aboriginal or Islander at the national census is of statistical significance only".

"There is no arrangement for a general and formal declaration of identification as Aboriginal or otherwise although a declaration may be required for specific administrative purposes. To qualify for some of the special benefits for Aboriginals such as the Aboriginal Study and Secondary Grants Schemes, for example, applicants are required to sign a declaration that they are of Aboriginal or Islander descent. When the national census is conducted, people are invited to indicate their race and, if of mixed race, to indicate with which racial group they identify.

"For administrative purposes the children of a person who identifies as Aboriginal are deemed to be Aboriginal; where neither parent identifies as Aboriginal, children would not be deemed Aboriginal unless some special case or evidence to the contrary were put. Changes in self-identification would not affect the status of a spouse, who could identify or decline to identify as an Aboriginal in his or her own right."

235. In New Zealand, the trend has been to drift away from a strict application of legal requirements concerning the degree of Maori blood. The Government states that "in practice there is no check on the way in which a person describes himself in a census form" and that "in practice again, no check is made on the ancestry of a person registering as an elector so that, in fact, there exists and is commonly exercised, a great and subjective choice in this matter". As a conclusion in this respect, the Government has further stated that, in this situation, persons with some Maori ancestry can make a choice: "it is possible for an individual to decide for himself whether he wishes to be considered a Maori or not".

3. The multiple criterion

236. Attention has already been drawn to deficiencies in the individual criteria. It has also been pointed out that extensive application of any one of these criteria on its own might have restrictive effects, since it would exclude a large proportion of other sectors of the population which would be classified as indigenous if different individual criteria were applied.

237. In part to overcome the shortcomings and the restrictive nature of the individual criteria discussed above, the idea of a "multiple criterion" has been advanced. This would combine two or more of the individual criteria with a biological standard of varying importance into a complex and multifaceted criterion. It would therefore amount to the joint application of classification factors which were individually considered to be significant.

238. None of the criteria described above is at present used as the only criterion of differentiation; and none of the experts who have dealt with this subject has advocated the application of any one of the individual criteria on its own. It has been pointed out, however, that when the multiple criterion is applied, the size of
the demographic group to be defined decreases as the number of components in the multiple criterion increases, i.e. when all these requirements have to be met simultaneously.

239. As can be seen from the preceding paragraphs, the multiple criterion is used in all the countries studied, although in different ways. Also, in addition to the classification factors described above which are combined in this multiple criterion, some countries have other requirements, including the acceptance of the person or group by the indigenous community and their residence in certain parts of the country. The following is a short analysis of the way in which these requirements are formulated in the countries concerned.

G. Acceptance by the indigenous community

240. In principle, acceptance is implicit in criteria such as living under a tribal system, membership of an indigenous community and, to a certain degree, residence in certain parts of the country "where indigenous communities live". This could be so, in particular, in those cases of communities which live in geographical isolation from other groups or communities.

241. In Canada, identification of members of non-Status groups includes such factors as "acceptance by the Indian community". As regards the Inuits "status is generally determined by acceptance in the group as an Eskimo".

242. The acquisition of status by a woman who marries a Status Indian in Canada involves her acceptance by the tribe, band or community concerned as one of its own members, since she receives his number and treaty status, even when she is an Indian herself, irrespective of her own Indian status.

243. In the United States of America, the inclusion of the name of a person in the roll of a tribe is tantamount to acceptance of this person as indigenous by the tribe. Likewise the inclusion of a person's name in the roll of an Indian agency means acceptance of a person as indigenous, although in this case it is rather an act of "designation" as explained above.

244. In Guatemala, an act of "social evaluation" of a person as being indigenous is tantamount to the acceptance of that person as indigenous when the community which thus evaluates him is an indigenous one. The act constitutes "designation" in the case of mixed or non-indigenous communities.

245. In addition to ancestry and self-identification, the definition used for purposes of establishing eligibility of a person as an Aboriginal or Torres Strait Islander for the Australian Government's special programmes in respect of Aboriginal or Islander people, requires that this person be "accepted as such by the community with which he is associated". 36/

246. Conversely, the Government of New Zealand has communicated that acceptance by the Maori community of any person of Maori descent who wishes to identify himself as a Maori is not required.

247. In this connection, it should be pointed out that, almost invariably, indigenous populations are inclusive people and will accept all descendants of any of their group who identify themselves as "indigenous", without any other requirements of any sort. 27/

26/ The Government adds that acceptance would possibly be required, if a person who is not of Aboriginal or Islander-descent would assert Aboriginal or Islander identity. See para. 356 below.

27/ This has been expressly asserted of the Maori community. See the New Zealand Government statement quoted in para. 367 below.
248. This seems to be one of the requirements established, in certain countries, in the criteria used to define indigenous populations.

249. The Government of the United States has stated that, among other considerations, to be designated as a Recognized Indian eligible for basic Bureau of Indian Affairs services an individual "must live on or near a reservation or on or near trust or restricted land under the jurisdiction of the Bureau".

250. Similarly in Canada, to be entitled to all beneficial provisions under the Indian Act, an individual must live on a reserve. It must be remembered in this connection that according to information provided by the Government of Canada "Status Indians are members of Bands who hold in common certain reserve lands generally by virtue of written treaties, though treaties were not signed in all cases". Nevertheless "Some of these Band members have taken up residence off reserves" and "A person can be 'Registered' whether or not he Band has signed a Treaty, and whether or not he lives on a reserve (though in the latter case, certain beneficial provisions of the Act are lost)". Inuits "Live above the tree line" and are said to be "more distinct because of geographical isolation" (see paras. 289 and 305 below).

251. In Guyana, for example, in operating the definition contained in the Amerindian Ordinance, the principle has been for mixed Amerindians that they should be "residing in an Amerindian area or community and living the life of an Amerindian". (Emphasis added.) The meaning of "Amerindian area" is not defined in this text. It is not known whether these areas are determined by the administrative authorities and, if so, how.

252. In Panama the requirements for considering certain inhabitants to be indigenous include the requirement that they live in places situated in areas principally inhabited by them (the Indians). (Criteria followed by the Directorate for Statistics and Census.) The other available formulation, which was used in the 1940 census, contains references to certain regions, such as "... living in the most remote and inaccessible mountainous and coastal regions of the isthmus".

253. In Bangladesh there are explicit references to "the populations that are settled in specified geographical areas of the country" as one of the criteria relevant to the identification of these groups, which "are described as small communities leading a life undisturbed by alien influences" for very long stretches of time "because of the heavy monsoon that cuts off their area from the outside world for much of the year". There are explicit references to the areas concerned, for example, the statement that some of these groups have "lived in the Chittagong Hills south of Karma ghat since ancient times".

29/ In some countries residence in "residencias" (Chile) or "reducciones" (Chile) is required in certain cases. No information concerning these requirements is included in the present report, because the data available are insufficient. The necessary information has been requested with a view to including the relevant material in the next report.

30/ A request for information in this regard has been included in the summary transmitted to the Government for comments and supplementary data. Unfortunately, no information has been received on these aspects.
254. In Pakistan this criterion is applied with reference to groups that "inhabit the legally defined tribal areas" and, for some communities and groups that have led an "isolated life for a long time".

255. Among the criteria applied in India there is one that these groups should be "occupying or professing to occupy a common territory".

256. In Indonesia, residence in the area occupied by an isolated community or a pre-village is a requirement for being considered a member of those communities or pre-villages.

257. In Venezuela too, among the criteria used for the definition of inaccessible indigenous populations, the following reference is made to the regions in which they live: "... due to the isolation of the places in which they live or are assumed to live, ..."

258. In Greenland there is a requirement that a person should be born in or be a resident of Greenland to be considered as indigenous to Greenland for certain purposes of employment. In its submission of 27 May 1981 the Danish Government states:

"In Greenland the term 'indigenous' can be taken to mean 'born in Greenland' only. To a certain degree this criterion is applied in demographic contexts in order to distinguish loosely between genuine Greenlanders and others, mostly persons from Denmark, who will usually be staying in Greenland for a few years only. However, the distinction only represents an approximate national, cultural or linguistic division since the group designated 'born in Greenland' includes a large number of children born of Danish parents.

"In one particular respect a person's affiliation to either the Danish or the Greenland community does carry some legal implication as public sector hiring practice distinguishes between original and non-original persons. Personnel hired as non-original have been recruited outside Greenland - usually in Denmark - by virtue of their background in administration, teaching, health services or because they hold the technical skills necessary in the execution of several public service functions, in all of which fields the Greenland community has a shortage of trained staff. In order to recruit such personnel from outside Greenland it has been necessary to pay salaries largely equivalent to those paid in Denmark whereas salary rates in Greenland as a whole are only 60 to 75 per cent of the salary level in Denmark. In addition, non-originals enjoy several accommodation rights, paid holiday trips to Denmark, etc.

"To obtain non-original status a person must first of all be domiciled outside Greenland at the time of employment. Domicile notwithstanding, a person who was born in Greenland or settled permanently in Greenland before his completed fifth year cannot obtain status as non-original. Exemption from the said rules may, however, be granted in exceptional circumstances."
I. Legal definitions

259. Several Governments have stated explicitly that there are no legal definitions of indigenous populations in their countries. 100/

260. Several others have not furnished information on this subject. 101/ There is no information on whether a legal definition of indigenous populations exists in several other countries. 102/

261. In some countries legal definitions exist in the statute books but there are wide variations in the scope of application and purposes of these definitions. A single definition may apply for all purposes 103/ or else there may be particular definitions obtaining in different fields of law 104/ or for different groups of people. 105/ In some countries different criteria may exist at Federal Government level and at State Government levels. 106/ In other countries 107/ a legal definition exists for some groups of indigenous populations while there is none for other groups. 108/ Definitions for census purposes will not be discussed here, unless they appear to have wide application producing effects beyond mere statistical purposes. 109/

100/ Bangladesh, Denmark (Greenland)*, Finland*, France (French Guiana), Guatemala*, Japan, Laos, Mexico*, Norway* and Sweden*. Countries marked with an asterisk have formulations for use in census operations only.

101/ Argentina, Colombia, Peru (the criteria applied in the 1940 Census were available to the Special Rapporteur) and Philippines.

102/ Bolivia, Burma, Ecuador, El Salvador, Honduras, India, Indonesia (the criteria included in an operational formulation were available to the Special Rapporteur), Nicaragua, Pakistan, Sri Lanka, Suriname and Venezuela (the criteria utilized in the 1950 Census were available to the Special Rapporteur).

103/ This seems to be the case in Brazil, Canada (although tripartite), Costa Rica, Malaysia (as regards the Orang Asli of West Malaysia), Panama (where the criteria used by the Directorate of Statistics and Census of the Office of the Controller-General of the Republic seem to constitute the "concept most generally used for official purposes in Panama").

104/ As for example in Guyana, New Zealand and the United States of America (though basically tripartite).

105/ As for example in Canada (Status Indians and Inuits, plus non-Status Indians), and in the United States of America (Recognized Indians, Alaskan Natives, plus non-Recognized Indians and Urban Indians).

106/ As for example in Australia, where there are definitions in the State of Queensland, while the Commonwealth Government authorities have an officially adopted criterion for administrative purposes in "establishing eligibility for the Australian Government's special programmes in respect of Aboriginal people".

107/ As in Chile, for instance, where before Act 17.729 (1972) established a general definition, only the Mapuches were included in legal definitions.

108/ No definition was available for non-Status Indians in Canada, nor for non-recognized Indians and Urban Indians in the United States. The determination of these groups is attained by exclusion or failure to meet the established criteria as regards Status or Recognized Indians, respectively.

109/ This seems to be the case in Panama (see para. 273 below).
262. In describing the criteria examined above, the separate elements of the legal definitions obtaining in certain countries have been discussed. It is deemed useful, however, to reproduce here the full texts of those formulations in order to give a clear idea of how those different component elements fit with the others within these taxonomic characterizations. The following paragraphs are therefore devoted to the reproduction of the legal texts containing the definitions adopted in the relevant countries, or the information transmitted by the Governments concerned on legal definitions obtaining in their respective countries. The texts are included in alphabetical order.

263. In Australia, specific criteria have become institutionalized in certain States but there is no definition which is generally applied at the Federal level. At this level, working criteria have been adopted; and these have acquired a certain legal significance in cases where statements by the persons concerned are open to doubt.

264. The Government states that the following definition is used by Commonwealth Government authorities for administrative purposes in "establishing eligibility for the Australian Government's special programmes in respect of Aboriginal people:

"An aboriginal or Torres Strait Islander is a person of Aboriginal or Islander descent who identifies as an Aboriginal or Islander and is accepted as such by the community with which he is associated."

265. The criteria used in this definition are, therefore, (1) descent from aboriginal parents or Torres Islander parents, (2) self-identification as an aborigine or Torres Islander, and (3) acceptance of the person as aborigine or Torres Islander by the community with which he or she is associated.

266. The criterion of ancestry or descent has been used in a simple manner in two recent enactments of the Australian Parliament, the Aboriginal Loans Commission Act, 1974, and the Aboriginal Land Fund Act, 1974. In both of these enactments the word "aboriginal" means "an indigenous inhabitant of Australia and includes an indigenous inhabitant of the Torres Strait Islands".

267. The Government has also pointed out that in the 1971 national census, the aboriginal population was enumerated on the basis of self-identification, adding that "identification as Aboriginal or Islander at the national census is of statistical significance only". There is no need for a formal declaration as Aboriginal or otherwise. On this aspect, the Government has stated that:

"There is no arrangement for a general and formal declaration of identification as Aboriginal or otherwise although a declaration may be required for specific administrative purposes. To qualify for some of the special benefits for Aboriginals such as the Aboriginal Study and Secondary Grants Schemes, for example, applicants are required to sign a declaration that they are of Aboriginal or Islander descent. When the national census is conducted, people are invited to indicate their race and, if of mixed race, to indicate with which racial group they identify."

110/ Particularly in the State of Queensland, as will be seen below.
It is possible that some people might cease to identify as Aboriginal or Islander, but it is unlikely and we do not know of any cases. A person who is not of Aboriginal or Islander descent could assert Aboriginal or Islander identity, but this would be of no interest to the Government unless such a person sought special Government benefits, when it would be necessary to inquire into the claim, and possibly to test community acceptance.

268. According to information transmitted by the Government "an individual may elect at any time to change his identification".

269. The Government has further communicated that:

"For administrative purposes the children of a person who identifies as Aboriginal are deemed to be Aboriginal; unless neither parent identifies as Aboriginal children would not be deemed Aboriginal unless some special case or evidence to the contrary were put. Changes in self-identification would not affect the status of a spouse, who could identify or decline to identify as an Aboriginal in his or her own right."

270. This means that an Aborigine who has changed his identification to non-Aborigine could, of his own free will, choose to identify again as an Aborigine. He would, therefore, pass from Aborigine to non-Aborigine in the first instance, and from non-Aborigine to Aborigine in the second instance.

271. It has been pointed out already that changes in identification by both parents who cease to identify as "Aborigines" would affect their children's identification. III/ On the other hand, it is not clear whether the change by one parent would be reflected in the children being considered as having ceased to be "Aborigines" also. It may be presumed from the transcribed statement that "the children of a person who identifies as an Aboriginal are deemed to be Aboriginals" (emphasis added), that as long as one of their parents still identifies as an "Aboriginal", the children would qualify as such. It is clear that the spouse of a person who ceases to identify as an Aborigine would only change his or her identification upon his or her free statement in that sense.

272. In Brazil, the Indian Statute, Act No. 6001 of 19 December 1973 provides that:

"Art. 3. For all legal effects, the following definitions are hereby established:

I - Indian or Forest-dweller - any individual of pre-Columbian origin or descent who identifies himself and is identified as belonging to an ethnic group, the cultural characteristics of which distinguish it from the national society.

II - Indigenous Population or Tribal Group - A cluster of Indian families or communities, living either in a state of complete isolation from other sectors of the national community, or in intermittent or permanent contact therewith, but not integrated therein.

III/ See the statement on "group consciousness or self-identification", quoted in para. 234 above.
"Art. 4. The Indians are considered:

"I - Isolated - When living in unknown groups, or groups of which only a little vague information is forthcoming from fortuitous contacts with elements of the national community.

"II - Integrating - When in intermittent or permanent contact with alien groups, living to a greater or lesser extent in the conditions of their native existence, but accepting certain practices and ways of life common to the other sectors of the national community, of which they stand progressively more in need for their very subsistence.

"III - Integrated - When incorporated in the national community and recognizedly in full enjoyment of their civil rights, even while retaining practices, customs and traditions that are characteristic of their own culture."

275. In Chile, Law No. 17,729 of 26 September 1972 determines, in its article 1, who is to be considered as indigenous. The Government quotes the three paragraphs of this article, which read as follows:

"(1) anyone who invokes a right, directly and immediately derived from a título de merced (formally established communal holding) or a título gratuito de dominio granted in accordance with the Laws of 4 December 1856, 4 August 1874 and 20 January 1853; Law No. 4169 of 8 September 1927; Law No. 4802 of 11 February 1950; Decree No. 411 of 9 July 1951; Law No. 14,511 of 3 January 1961, and any other legal provisions which may amend or supplement them;

"(2) anyone who invokes a right conferred by a court decision for the partition of an indigenous community, with a title granted in accordance with the legal provisions referred to in the preceding paragraph, unless the said right was acquired by a title purchased prior or subsequent to the partition, and

"(3) anyone who, living in any part of the national territory, is a member of a group which habitually expresses itself in an aboriginal language and is distinguished from the generality of the inhabitants of the Republic by its preservation of way of life, patterns of neighbourliness, customs, forms of work or religion originating among the autochthonous ethnic groups of the country.

274. The Government of Guyana states:

"The Aboriginal Indian tribes of Guyana are considered the indigenous population. They have been officially designated by the Amerindian Ordinance, Chapter 58, as 'Amerindians'. The Ordinance which makes provision for the good government of the Amerindian communities of Guyana defines 'Amerindian' as:

(a) Any Indian of a tribe indigenous to Guyana, or to neighbouring countries.

(b) Any descendant of an Amerindian within the meaning of paragraph (a) of this definition to whom in the opinion of the Commissioner of Interior the provisions of the Ordinance would apply."
The Ordinance also provides for the registration of Amerindians. In operating the definition the principle has been for mixed Amerindians that they should be residing in an Amerindian area or community living the life of an Amerindian.

The State Lands (Amerindian) Regulations which make provision for the occupation and use of ungranted and unlicensed State lands by Amerindians in any part of Guyana defines 'Amerindians as follows:

2(1) For the purpose of these regulations, and subject to the special provisions hereinafter contained, the term Amerindian means a person whose parents are both of pure Amerindian blood, and belong to the Amerindian tribes of Guyana.

(2) The term half-caste shall mean the child of an Amerindian whose other parent is not an Amerindian. Half-castes shall, save in the exceptional cases mentioned hereafter, forfeit all privileges of an Amerindian.

3(1) A female Amerindian who is married to or living as the reputed wife of any person other than an Amerindian shall forfeit all the privileges of an Amerindian, as defined in these regulations:

Provided that after the death of the husband this regulation shall not apply, nor in the case of a reputed wife after cohabitation cease.

(2) Any half-caste who has been duly registered under the Indian Regulations 1890, shall be personally entitled during his lifetime to all the privileges of an Amerindian, but his descendants shall not be considered Amerindians.

If any question arises at any time as to whether any person is an Amerindian, the onus of proof shall rest on such person. Communities and groups are considered indigenous where they consist of persons of pure and mixed Amerindian blood who live the life of Amerindians.

275. In Malaysia, the Aboriginal Peoples Ordinance, 1954 and the Aboriginal Peoples (Amendment) Act 1967, contain the following definitions and related provisions:

3. (1) In this Ordinance an aborigine is:

(a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;

(b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community;

(c) the child of any union between an aboriginal female and a male of another race, provided that such child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.
(2) Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practising such religion.

(3) Any question whether any person is or is not an aborigine shall be decided by the Minister.

'Aboriginal community' means the members of one aboriginal ethnic group living together in one place;

'Aboriginal ethnic group' means a distinct tribal division of aborigines as characterized by culture, language or social organization and includes any group which the Ruler in Council or the Governor in Council may, by order, declare to be an Aboriginal ethnic group.

'Aboriginal inhabited place' means any place inhabited by an aboriginal community but which has not been declared to be an aboriginal area or aboriginal reserve;

'Aboriginal language' includes any language and such dialectal modifications or archaic forms of such language as any aborigines habitually use;

'Aboriginal racial group' means one of the three main aboriginal groups in the Federation divided racially into Negrito, Senoi and Proto-Malay;

'Aboriginal reserve' means an aboriginal reserve declared to be such under this Ordinance.

'Aboriginal way of life' includes living in settled communities in kampungs either inland or along the coast."

276. The Government of New Zealand has stated:

"Until 1935 the law provided, in all cases to which the description was relevant, that a Maori was a person who was at least half-Maori by descent. People of Maori descent but less than half-Maori were not deemed to be Maori, but this did not in any way affect their right to inherit interests in land from their Maori forbears.

"The Maori Housing Act 1935, which made provision for State financial assistance to Maoris wishing to build new houses (and which is still in force) extended the definition to include any person descended from a Maori. Since that time, there has been an increasing tendency, for the limited purposes for which the description Maori is still relevant, to follow the definition used in the Maori Housing Act. This applies to special educational assistance, vocational training, social welfare work and a number of other activities.

"For census purposes the old definition still applies, but in practice there is no check on the way in which a person describes himself in a census form. For electoral purposes the situation is somewhat similar. A person
who is less than half-Maori must register as a voter in a general electorate. A person who is more than half-Maori must register in a Maori electorate while a person who is half-Maori may choose whether to register in a general electorate or in a Maori electorate. But in practice again, no check is made on the ancestry of a person registering as an elector so that, in fact, there exists and there is commonly exercised, a great and subjective choice in this matter.

"It is recognized that a definition based on the degree of Maori blood is not particularly satisfactory, especially in a society where inter-marriage between races is not only common, but is rapidly increasing, with the result that there are many people who do not know how much Maori ancestry they have. This is the reason why there has been a steady practical broadening of the definition since it is possible for an individual to decide for himself whether he wishes to be considered a Maori or not."

277. The Government has added:

"There is no formal legal procedure whereby a person who has been considered 'non-indigenous' may come to be considered 'indigenous', or vice versa. As indicated, in contexts where the classification is relevant, it is very much a matter of individual choice as to whether a person wishes to be classed as a Maori or not. It also has to be borne in mind that New Zealand law is impersonally worded except for the relatively few and diminishing number of enactments relevant to Maoris."

278. The Government has further added that the acceptance by the Maori community of any person identifying himself as Maori is not required, and adds that "generally speaking, Maori are 'inclusive' people and accept as a Maori any person of Maori descent who wishes to identify himself with them".

279. The Government of Panama states that:

"The criterion adopted by the Directorate of Statistics and Census of the Office of the Controller-General of the Republic for identifying the indigenous population is the concept most generally used for official purposes in Panama. This criterion is as follows:

"Inhabitants are considered indigenous if they live under a tribal régime in places situated in regions inhabited principally by them, and if they habitually speak a dialect and preserve their traditions and customs."

"This definition excludes indigenous persons who have emigrated to urban centres, and disregards the important and growing phenomenon of the proletarianization of the indigenous inhabitants in the metropolitan area (Panamá and Colón), the Panama Canal Zone and the banana- and coffee-growing regions in the eastern part of the country."

280. In Costa Rica, article 1, paragraph 1, of Act No. 6172 on Indigenous Peoples, of 16 December 1977, published on 20 December 1977, 112/ contains the following definition: "Indigenous persons are those who constitute ethnic groups directly descended from the pre-Colombian civilizations and retain their own identity".

112/ La Cacera, Diario Oficial de la República de Costa Rica, 20 December 1977.
261. According to the information gathered in 1976 during the Special Rapporteur's visit to Canada there are three groups of native people in the country: the first may be designated as status, registered or treaty Indians, the second, as Métis and non-status Indians, the third, as Inuits.

262. Status (registered, treaty) Indians, are native people who are members of a band and hold certain rights under the Indian Act of 1976, revised in 1951 and individual treaties.

263. Each man over 21 years of age has an assigned number and his children use their father's treaty number until they in turn reach the age of 21 years, when they receive their own number.

264. When a registered man over 21 years of age marries, his wife receives his number and treaty status, irrespective of her tribal origin or her non-native ancestry.

265. When a treaty Indian woman marries a non-treaty man (non-Status Indian, Métis or non-native man) she loses her own Indian status, and so do the children of the union.

266. Métis and non-Status Indians, are native people who identify as Indians but are not legally recognized as such. This group is composed of two distinct portions: the Métis or half-breeds, on the one part, and the non-status Indians on the other. (a) Métis and half-breeds. Prior to Confederation the census recorded these groups as Métis (French-Indian), Scottish-Indian, Irish-Indian and English-Indian Half-breeds. Today, all of them are designated as Métis. Métis never had status (as registered Indians). They never gained it; they never lost it. (b) Non-Status Indians are native people who, on their own, or because of something their parents or grandparents did or did not do, have relinquished or lost Indian status. They may have relinquished status to gain the right to vote (before 1960), to own land or to conduct businesses off the reserves; they may have lost it, simply through failure to register.

267. Notwithstanding the above noted distinctions, the use of Métis or non-Status Indians seems to be subject to regional preferences.

268. Métis and non-Status Indians differ from registered Indians in their access to services since the Federal Government claims to have no official responsibility for their well-being, in spite of the fact that many treaties included provisions for half-breed people. Consequently, Métis and non-Status Indians are dependent, for consideration of their special needs, on the attitudes of the provinces or territories where they reside.

269. The Inuits are native people living above the tree line and across the sweep of the Arctic. Small communities are spread throughout this vast region and great distances between them makes communication extremely difficult. There are among them, five cultural groupings and two basic languages with many dialects. (The Cree Indian word "Eskimo" meaning "Eater of raw flesh" has been officially rejected by them who wish to be called by their traditional term for themselves, "Thulits", meaning "the people".

270. In terms of the information transmitted by the Government in this connection, there seems indeed to exist an essentially tripartite definition on the basis of Indians and Eskimos, "with several (essentially administrative) classifications of Indians whose situations differ from one another. There are what are called Status or Registered Indians; there are Eskimos; and there are also non-Status Indians and Métis".

51
People with Indian status are only one segment of the indigenous population, and not necessarily those of purest Indian extraction, but they are the particular responsibility of the federal Government of Canada, and an Indian Act exists specifically to protect their interests. Registered Indians covered by the Indian Act constitute less than one-half of those people in Canada who have a claim to be descendants of the pre-European inhabitants of the country. The question of jurisdiction between federal and provincial governments was settled in the British North America Act of 1867, the constitution of Canada; it decreed that "Indians, and lands reserved for Indians" were a federal responsibility. Non-native Canadians, and those natives who are not covered by the terms of the Indian Act, are served in a number of areas such as education by the appropriate provincial authorities, while status Indians generally look to the federal government for their educational and other needs.

To facilitate the administration of its responsibilities for the Indians, the Government established a set of criteria (consolidated in the Indian Act of 1876, and a revised Act passed in 1951, with several minor later amendments), defining an Indian as a "person who pursuant to the Indian Act is registered as an Indian or is entitled to be registered as an Indian", which is to say, registered in a list called the Indian Register composed of Band Lists and General Lists.

As communicated by the Government those entitled to register include any person considered (by an Indian land statute passed in 1874) to be entitled to use and enjoy the lands belonging to the various tribes and bands of the Indians of Canada, or a member of a band for whose use and benefit lands have been set apart or have been agreed by treaty to be set apart, or that has been declared by the Governor-in-Council to be a band for the purpose of this Act; and, generally, descendants in the male line of one of the persons described above.

Persons who are registered and subject to the Indian Act are commonly referred to as "status" Indians.

Obviously, a person can be "registered" whether or not his band or tribe has signed a treaty, and whether or not he lives on a reserve (though in this latter case, certain beneficial provisions of the Act are lost).

The Status Indians are members of bands who hold in common certain reserve lands generally by virtue of written treaties, though treaties were not signed in all cases. Some of these band members have taken up residence off reserves; of the approximately 253,000 Status Indians, 156,000 live on reserves, and about 24,000 on Crown lands.

There are about 560 separate Indian communities or bands, which (with the exception of certain nomadic groups occupying the outlying and northern regions) are located on 2,600 reserves, varying in size from a few acres to more than 500 square miles.

White women who marry Indian men are entered on the Indian Register and acquire Indian status.

All these Status Indians are listed in an Indian Register maintained by the Federal Government Department of Indian Affairs and Northern Development.
500. **Non-Status, Non-Registered Indians, Métis or "Half-Breeds"**: The Government states that identification of members of the non-status native groups is not fixed in law but includes such factors as the percentage of Indian blood, acceptance by the Indian community, or the following of a traditional manner of living. Indians of mixed blood are frequently called Métis. The term "half-breed" is also applied to Indians of mixed blood, but has become pejorative in nature.

501. Excluded from coverage by the Indian Act are those "who have (in the past) received or have been allotted half-breeds lands or money scrip", and those who have chosen to "enfranchise" (a process by which an Indian gives up both the benefits and burdens of the Indian Act; it has nothing to do with voting privileges, which are available to all Indians within or without the jurisdiction of the Indian Act), giving up special legal status as Indians, and joining the Canadian community at large. Any adult Indian may, upon application, be "enfranchised".

502. An Indian woman who marries a person who is not an Indian must give up her Indian status (though white women marrying Indian men are added to the rolls as persons having Indian status).

503. The loss of Indian status by marriage in the case of Indian women has been challenged before the courts in Canada. Two cases have been discussed in paragraphs 349 and 350 under the heading "Changes in status from indigenous, to non-indigenous" because of their specific relevance to that aspect.

504. **Inuits**: According to information provided by the Government "a reference in the Indian Act to an Indian does not include any person of the race of aborigines commonly referred to as Eskimos". However, the Eskimos (or Inuit, as they prefer to be called) are still the particular responsibility of the Federal Government, by virtue of Section 91 (24) of the British North America Act which gives the Federal Government legislative jurisdiction over "Indians, and Lands reserved for Indians"; and it has been held by the Supreme Court (Re Eskimos/1939/S.C.R.104) that Eskimos are "Indians" within the meaning of that Section.

505. The Eskimo group of aborigines is somewhat more distinct because of geographical isolation. The Eskimo call themselves 'Inuit', meaning 'people'. There is no precise definition of an Inuit; status is generally determined by acceptance in the group as an Eskimo.

506. Indians and Eskimos are considered to be Canadian citizens and British subjects, according to an amendment to the Canadian Citizenship Act passed in 1956.

507. According to the information gathered in this respect in the United States during the Special Rapporteur's visit to that country in 1976, a three-group classification also seems to obtain there, although it is not established on formal lines as in Canada, and is quite different from it.

508. The fact that there is some degree of formal official recognition of this tripartite classification has been shown, for example, in the composition of the Indian Policy Review Commission in which - apart from the Congressional membership, there are three representatives of "recognized Indians", one representative of the "non-recognized Indians" and one of the "urban Indians".
309. There is no general legal (legislative or judicial) definition of an "Indian". For specific purposes there are, however, very numerous legislative or judicial determinations of who is an indigenous person, depending on the particular circumstances.

310. Classification as an Indian is meaningless in practice unless it carries with it such an entitlement to BIA services. For this, a person must have been recognized to be an Indian, by the Federal Government.

311. "Federally Recognized Indians" entitled to BIA services, are persons who meet the following requirements:

(a) live on or near a reservation (or trust or restricted land under the jurisdiction of the Bureau);

(b) have membership in a tribe, band or group of Indians which, by Treaty or otherwise, has been recognized as such by the Federal Government (membership requirements are laid down by each tribe, band or group);

(c) for some purposes, be of one-quarter or more Indian descent (for membership in certain tribes, a higher degree of Indian ancestry of one-half may be required). In general, having at least one parent who is a member of the tribe is the requirement for membership in or sharing in the assets of the tribe; for entitlement to federal services available only to "Indians", the requirement is that this tribe be federally recognized.

312. By legislative and administrative action the Aleuts and Eskimos of Alaska are eligible for programmes of the Bureau of Indian Affairs. To become a member of an Alaskan Village one must meet membership requirements laid down by the village.

313. Contrary to the practice followed in Canada, neither status as a federally recognized Indian nor entitlement to Bureau of Indian Affairs services are acquired or lost on the basis of marriage alone.

314. Non-Recognized Indians are persons of native ancestry who may belong to a tribe, band or group, but who do not enjoy federal recognition as such because:

(a) Although the tribe, band or group of which they may be formally qualified to be an enrolled member has by treaty or otherwise been recognized by the Federal Government, this person has not taken the necessary legal steps to prove this;

\[113/\] The requirements for being considered as an Indian for census purposes have been discussed in para. 53 and foot-note 18 above.

\[114/\] A non-native person who has been formally adopted by a recognized tribe, band or group does not qualify for federal BIA services. It is not clear whether this person would be considered as a "non-recognized Indian" or as a "non-Indian". This question will be posed in the monograph on the United States requesting clarification.
(b) the tribe, band or group to which they belong has never obtained recognition by treaty or otherwise from the Federal Government;

c) the tribe, band or group to which they belong, has in one way or another lost Federal Government recognition.

315. These persons are not entitled to Bureau of Indian Affairs services, and are eligible for all general federal programs available to everyone and to have all their local services provided for by State and locality.

316. Urban Indians are persons who have left the reservation, trust or restricted land area and have established themselves in the cities or urban centres. The Federal Government disclaims any responsibility for them as "Indians", as they do not qualify any more as such under the terms of legal definitions.

317. Urban Indians, as non-recognized Indians, are not entitled to Bureau of Indian Affairs Services, and are eligible for all general federal programs available to other urban dwellers and have all their local services provided for by the State and locality where they live.

318. Commenting on the essentially legal or quasi-legal nature of definition as indigenous or as non-indigenous in the United States, a non-governmental publication contains the following statement:

"Indigenous is an ethnographic term to American anthropologists and ethnologists. To the United States Congress and the Bureau of Indian Affairs, it is a legislative or judicial determination. Since it is obvious that one cannot change genes, for one to be indigenous or non-indigenous must be a description of a legal or quasi-legal status."

319. The Government has stated that: "All descendants of the American Indians, Alaskan Natives, Hawaiian Natives are considered indigenous to what is now the United States of America. However, there is no general legislative or judicial definition of any one of these that can be used to identify a person as such."

320. On the question concerning legislative or judicial definition, the same source contains the following statement:

"The response of the United States is correct in that ... There is no general legislative or judicial definition of indigenous people, however, there are myriads of judicial and legislative definitions of who is an indigenous person depending upon the particular circumstances. Indigenous becomes, in the mouth of the bureaucrat, an Orwellian phrase, its meaning transient like the words of a treaty. While the United States may consider all descendants of American Indians, Alaskan Natives and Hawaiian Natives indigenous it clearly does not provide benefits for all these peoples, notwithstanding the implication of the response.

115/ Some of these tribes, bands and groups may be struggling now to have recognition extended to them, as they claim to fall under an act of recognition of a larger group to which they belong, no explicit provision having been made for them; although they were entitled to be included. Upon the successful conclusion of their claim, these groups and their members would be considered as federally recognized, but not before.

116/ American Indian Law Newsletter, loc.cit., p.3.
The United States has adamantly resisted efforts to increase or extend the vast majority of benefits that it speaks so proudly of providing. Indians must continually lobby and litigate to insure even a minimal level of governmental assistance. The sine qua non for receiving even the minimal benefits is federal recognition of an indigenous status for the individual or the community and often times both. Since this recognition is a condition precedent for benefits, the United States may, by failing to recognize the status of a group, deny them all rights. The criteria by which the status is conferred is of such an arbitrary and capricious nature that it is impossible to determine rules for decisions. As a general proposition, the longer a group of individuals are in contact with the whites, the more tenuous is the status. This is a result of some of the policies of acculturation discussed in question. For example, most of the great Indian tribes of the east coast are not recognized, their power and status disappearing with the land. Tribes that were subject to the genocidal policies of the early Californians and the mission system have lost much of their power and rights, so that recognition is also dependent on a tribe's ability to avoid the European. 117/

The same publication contains the following statements: 118/

"... the basic fact concerning the legal status of indigenous peoples in the United States [is] the essentially diplomatic federal recognition of an Indian tribe. From federal recognition flows the status of tribal governments; membership of particular Indian individuals in a recognized tribe generally determines their eligibility for federal Indian services. The United States denies benefits unless this criteria is met." ...

"The failure of the United States to respond with a precise definition of policy and law is probably an error. Rather, it is reminiscent of the propagandistic 'revision' of Felix Cohen's landmark Handbook of Federal Indian Law which was ordered in the 1950s to ensure that the official federal legal treatise conformed to the anti-tribal 'terminationist' policies of that administration. The termination policy has been directly repudiated by the last three administrations, including the Nixon administration in the President's Message to Congress of July, 1970, which the response later cites. It has been indirectly repudiated by many subsequent acts of Congress. In the context of the present international study, however, the private policy judgements of the preparers of the response are clear despite administration policy: the importance of the treaty-based relationship between the United States and the Indian tribes - which has its roots in international law - must be minimized in order to avoid the possibility of an international obligation being recognized. The United States answers are therefore obscured with an unhelpful discussion of the difficulties of determining the status of a particular individual. The discussion is preoccupied with the problem of determining eligibility for federal Indian services without an adequate discussion of the basis for those services: the federal recognition of the tribe.

"Three basic policy problems should have been discussed because of their relevance to the obvious goals of the study: (1) the problem of federal non-recognition of Indian tribes; (2) the potential of the 1968 Indian Civil Rights Act for removing essential membership and voting questions from tribal control; and (3) the Federal policy goal of enforced expatriation."
322. The Government also stated that:

"Federal recognition is not the sole criteria used in determining eligibility for Federal Indian services. It is only one of a number of criteria utilized in determining service eligibility. In fact, a number of Federal agencies specifically do not require Federal recognition as an Indian tribe for their service eligibility. And, notwithstanding the implication that the government does not provide benefits for all these peoples, it must be understood that merely because the Federal Government may not provide benefits does not mean that the same benefits are not provided by either State or local units of government. The reader must be disabused of drawing the unwarranted assumption that no benefits at all are provided because there remains the general eligibility for benefits which are available to every citizen."

323. In order to give a more precise idea about the criteria required by law and applied generally for determining who is indigenous in the United States of America, it is useful to reproduce here the Government's comments in that regard for the purposes of the present study. In enumerating the requirements for eligibility for basic Bureau of Indian Affairs services, which are of a federal character, the Government lists a number of criteria as joint requirements which, it would seem, must all be met, as follows:

"To be designated as an Indian eligible for basic Bureau of Indian Affairs services, an individual must live on or near a reservation or on or near trust or restricted land under the jurisdiction of the Bureau; be a member of a tribe, band, or group of Indians recognized by the Federal Government; and for some purposes, be of one-fourth or more Indian descent. By legislative and administrative action, the Aleuts and Eskimos of Alaska are eligible for programs of the Bureau of Indian Affairs. One becomes a member of an Indian tribe, or, if an Alaskan Native a member of an Alaskan village, by meeting membership requirements laid down by a tribe. The amount of Indian blood needed varies with the tribe. It ranges from a trace to as much as a half."

324. In an official report it has been stated that: 119/

"American Indians have much in common with other United States minority groups. However, it would be extremely misleading to view the rights of American Indians solely in terms of their status as a racially distinct minority group, while neglecting their tribal rights. The Indian tribes are sovereign, domestic dependent nations that have entered into a trust relationship with the United States Government. Their unique status as distinct political entities within the United States federal system is acknowledged by the United States Government in treaties, statutes, court decisions and executive orders, and recognized in the United States Constitution. This nationhood status and trust relationship has led American Indian tribes and organizations, and the United States Government to conclude that Indian rights issues fall under both Principle VII of the Helsinki Final Act, where the rights of national minorities are addressed, and under Principle VIII, which addresses equal rights and the self-determination of peoples."

J. Change in status from indigenous to non-indigenous

325. Persons who have been considered as "indigenous" may come to be considered as "non-indigenous" in many countries and under different circumstances.

326. In this respect, basic policies of assimilation and integration have been embraced for a long time by many States. Regardless of their official names these policies were based on the postulation of the superiority or preferability of the prevailing "national culture" over the indigenous cultural, social and legal customs and institutions and counted on phenomena of acculturation to bring the indigenous populations into the mainstream of the national society in a cultural, social, economic and political sense. Several political and administrative actions have also favoured or accelerated these processes in the past as part of an over-all policy directed toward those ends of assimilation integration. Overt reaction by the indigenous populations to these policies is almost totally absent from the information available to the Special Rapporteur. Statements available to him in this connection will be included in this chapter. Only recently has the right to be different and to keep their ethnic specificity been accorded in some form or another in certain States and this in terms that are far from clear.

327. In this connection the Chapter IX dealing with Fundamental Policy contains information regarding some aspects of these questions. The present chapter contains available information dealing strictly with formal changes from indigenous to non-indigenous, which is extremely scanty and fragmentary.

328. In Indonesia a person who has been considered as a member of an isolated community or of a pre-village may come to be considered as a member of Indonesian society or of a village by conversion to Christianity or Islam, by attainment of minimal literacy and by the extent to which the person's economic activities are capable of producing acceptable levels of cash surplus. This is purely a de facto consideration to be assessed in each case. There is no legislative consideration.

329. The Government of Australia states:

"It is possible that some people might cease to identify as aboriginal or Islander, but it is unlikely and we do not know of any cases".

330. The Government of Costa Rica states that "an 'indigenous' person may come to consider himself "non-indigenous" purely for the sake of convenience or because his environment forces him to do so, but in his heart of hearts he continues to retain his own identity.

It is the children of 'indigenous' men with 'non-indigenous' women or vice versa who occupy the middle ground, identifying with one or the other, according to their environment.

The Government adds: "the persons who are engaged in one of the processes of definitive change described in the preceding paragraph do not represent a problem in our environment. In other words, there are no restrictions in either direction, with the possible exception of social pressure by the dominant group or national society prior to the incorporation of such a person into that environment. However, that is a purely personal problem".

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331. It has been reported that in Colombia, "Indians who are integrated into the subproletariat by becoming ranch hands" are considered as "having ceased to be Indians".

332. The Government of Mexico says that "In view of the foregoing replies, it may be said that (a) in the legal sphere, this passage from one status to the other does not exist; (b) in the social sphere, indigenous people, as a marginal group, take part, with other groups in a similar position, in the struggle to improve their living conditions; (c) in the cultural sphere, ethnic identity is the result of specific historical processes, and therefore no person who is considered "non-indigenous" could be considered "indigenous".

As stated earlier, these criteria of differentiation relate not to the equality of individual and social rights, but rather to national programmes aimed at improving their communication and standard of living through the teaching of Spanish, education at all levels and respect for their own cultural forms.

"Furthermore, ethnic groups in Mexico have continued to evolve from the period of Mesoamerican civilization to the present day. They are changing societies, like all societies. They have imparted and received cultural influences, and for 150 years now the trend is towards greater sharing in national sentiments and identity, which does not exclude ethnic identity".

333. In Finland any person is considered as a member of a particular minority group on the basis of his expressed will in connection with the official census. The information concerning various language groups is used only for statistical purposes. No rights or obligations of the people concerned are involved and, consequently, the expressed will of the person in an official census does not produce any effects on his status.

334. The Government of Norway states that in that country each person concerned is free "to decide as an individual whether he or she shall be recorded as a Lapp" and that "this expression of will shall be officially respected. The Government adds, nevertheless, that for certain sectors of social opinion this would not be decisive since "some people no doubt, would decide on the basis of descent whether or not the individual in question is to be classified as a Lapp ..." A catch phrase often used today is 'Once a Lapp, always a Lapp'.

335. In Sweden, according to information received from the Government "since no important legal consequences are attached to the fact of belonging to a minority group, the questions in this ... [aspect] are hardly relevant in Sweden".

336. The Government of Denmark has stated that in Greenland the statistical distinction "between persons born in or out of Greenland can, of course, not be changed. On the other hand, it is not unusual for a public employee to go from original to non-original status. Take as an example a person who when he was first employed by the public sector had non-original status because of his domicile outside Greenland. If, after a period in Greenland without public-sector employment, he reapplies for public-sector employment while domiciled in Greenland his status will become that of an original".

337. In Malaysia the Aboriginal Peoples Ordinance, in Section 3 (1) (b), provides that if an Aborigine continues to follow an aboriginal way of life and aboriginal customs and continues to speak an aboriginal language, he shall not be deemed to have ceased
to be an Aborigine, even if he has been converted to any non-aboriginal religion, or, for any other reason, has ceased to adhere to aboriginal beliefs (Section 3(2)). It follows then, a contrario, that an Aborigine who for any reason ceases to adhere to aboriginal beliefs and ceases to follow aboriginal customs and ways of life, and does not speak an aboriginal language any more, shall be deemed to have ceased to be an Aborigine.

The Government of New Zealand has stated that "there is no formal legal procedure whereby a person who has been considered 'indigenous' may come to be considered as 'non-indigenous'. In contexts where the classification is relevant, it is very much a matter of individual choice as to whether a person wishes to be classed as a Maori or not. It also has to be borne in mind that New Zealand law is impersonally worded except for the relatively few and diminishing number of enactments relevant to Maoris".

As regards change of status in India an author has written:

"Much confusion has arisen in recent years due to the rather indiscriminate use of the two words, tribe and caste, which are the special features of the social organization of India. These words have been used by many as synonymous and therefore many tribes have been described as castes while a number of castes have received tribal designation.

"The minimum definition of a tribe as suggested by W.J. Perry "is a group speaking a common dialect and inhabiting a common territory". The definition that we find in current literature on the subject is that given in the Imperial Gazetteer and may be stated thus: a tribe is a collection of families bearing a common name, speaking a common dialect, occupying or professing to occupy a common territory and is not usually endogamous, though originally it might have been so. A caste in its simple sense is also a collection of families bearing a common name, occupying or professing to occupy a common territory and very often speaking the same dialect, though it is always endogamous. When the same caste is found in two geographical areas, speaking different dialects, there is no social relationship between them and no intermarriage takes place, so that the groups may be taken as distinct castes though with the same appellation.

"From very early times, there has been a gradual and insensible change from tribe to caste and many are the processes of conversion from tribe to caste. The lower castes of today, most of them had a tribal origin. Risley describes four processes by which transformation of tribes into castes is effected. The processes may be stated thus: (1) The leading men of an aboriginal tribe, having somehow got on in the world and become independent landed proprietors, manage to enrol themselves in one of the more distinguished castes. They usually set up as Rajputs, their first step being to start a Brahmin priest who invents for them a pedigree hitherto unknown. (2) A number of aborigines embrace the tenets of a Hindu religious sect, losing thereby their tribal name. (3) A whole tribe of aborigines or a large section of a tribe enrol themselves in the ranks of Hinduism, under the style of a new caste which though claiming an origin of remote antiquity is readily distinguishable by its name. (4) A whole tribe of aborigines or a section thereof, become gradually converted to Hinduism without abandoning their tribal designation. To these four processes may be added a fifth in which an individual member of an aboriginal or semi-aboriginal tribe adopts a surname and some of a particular caste, manages to enrol himself as a member of that particular caste...". 120B

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340. In Panama, the 1940 census did not consider as "Indian" the indigenous inhabitants who had abandoned their tribal organization and had adopted the customs, language and religion of the descendants of the conquistadores (such as the cholos of Cocle and Veraguas who speak Spanish and practice the Catholic religion).

341. The criterion adopted by the Directorate of Statistics and Census "excludes indigenous persons who have emigrated to urban centres, and disregards the important and growing phenomenon of the proletarianization of indigenous inhabitants".

342. It has been stated above that in Guyana, by operation of the definition contained in the Amerindian Ordinance, mixed Amerindians must be residing in an Amerindian area or community living the life of an Amerindian, in order for them to be considered Amerindians. It follows then, a contrario, that when mixed Amerindians are not residing in such areas or communities living the life of Amerindians, they would not be considered as Amerindians. The Commissioner of Interior decides in cases of doubt.

343. The Government has communicated that:

"Emphasis is on the assimilation of the indigenous peoples into the rest of the population".

344. The Government has further stated: "... no significant problems arise in defining persons undergoing change from indigenous to non-indigenous".

345. It would appear, however, that legal entitlement to "the privileges of an Amerindian" depends, logically, on a person being considered as an Amerindian. It would also appear that in some cases persons who have been considered to be Amerindians up to a certain moment may cease to be so considered and consequently lose their privileges as Amerindians. This would happen, for example, by discontinuing residence "in an Amerindian area or community living the life of an Amerindian", or for an Amerindian woman, by marrying or living as the reputed wife of a non-Amerindian male; while her husband is alive or the cohabitation with the de facto husband continues.

346. It should be borne in mind in this connection that, according to information furnished by the Government "if any question arises at any time as to whether any person is an Amerindian, the onus of proof shall rest on such person" 121/ and that definition as an Amerindian, with its legal consequences described above depends, in the case of descendants of all Amerindians, on his or her determination as a person "to whom in the opinion of the Commissioner of Interior the provision of the Ordinance would apply". 122/

347. Excluded from coverage by the Indian Act in Canada are those "who have (in the past) received or have been allotted half-breed lands or money scrip", and those who have chosen to "enfranchise" (a process by which an Indian gives up both the benefits and burdens of the Indian Act; it has nothing to do with voting privileges, which are available to all Indians within or without the jurisdiction of the Indian Act), giving up special legal status as Indians, and joining the Canadian community at large. Any adult Indian may, upon application, be "enfranchised". 123/

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121/ See the last paragraph of the legal definition quoted in para. 274 above.
122/ See subparagraph (b) in the first paragraph of the legal definition quoted in para. 274 above.
123/ The content of this paragraph has also been quoted in para. 301 above.
348. An Indian woman who marries a person who is not an Indian must give up her Indian status. Though white women marrying Indian men are added to the rolls as persons having Indian status, 124/

349. There was a case on appeal before the Supreme Court of Canada (the Lavell case) in which this situation was challenged as being contrary to the Canadian Bill of Rights. The five to four decision to maintain the status quo will remain a controversial one, not least of all because this is the major cause of this enfranchisement. (There were 652 persons declared enfranchised between 1 April 1970 and 31 March 1972. Of those, 37 applied for enfranchisement, and 615 resulted from marriages of Indian women to non-Indians).

350. A similar case (the Lovelace case) was brought before the Human Rights Committee for its views under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights. The facts of the case (Communication No. R. 6/24) showed that Sandra Lovelace has been denied the legal right to reside on the Tobique Reserve. On 30 July 1981 the Committee adopted the view that there had been "a breach by Canada of Article 27 of the Covenant". A member of the Committee expressed his individual view that in the case "articles 2 (paragraph 1), 3, 23 (paragraphs 1 and 4) and 26 of the Covenant" had also been breached "for some of the provisions of the Indian Act are discriminatory particularly as between men and women". In the course of the case, statistics furnished by Canada showed that from 1965 to 1973 on an average 310 Indian women married non-Indian men each year. Marriages between Indian women and Indian men of the same band during that period were 590 on the average each year. Between Indian women and Indian men of a different band, 422 on the average each year, and between Indian men and non-Indian women, 449 on the average each year. 125/

351. On special aspects of these processes of change the Government stated that:

"Contrary to the system followed in Canada, an Indian woman who is eligible for Bureau of Indian Affairs services because she is an enrolled member of a tribe with a Federal relationship who marries a non-Indian does not lose her right to special services available to her because of her Indian descent."

352. A non-governmental organization states in this respect that historically the United States has used a number of methods to change the status of indigenous people to that of non-indigenous:

"Since these methods of change are legal in nature, the process from one status to another is similar, although it has been used almost exclusively to make indigenous people non-indigenous."

"The most blatant method of status change has been through lack of Federal recognition. The United States simply refused to recognize a group of people as being indigenous. This can be done in a number of ways. In the case of Hawaii or certain Indian tribes, the United States failed to refuse to make initial recognition thus depriving the groups of any status. This speeds the loss of land and culture, and increases the ultimate goal of acculturation."

124/ The content of this paragraph has also been quoted in para. 302 above.

A second method is to withdraw Federal Recognition from groups. This can be done by legislative act as evidenced by the Termination Acts of the 1950s. These Acts specifically withdrew Federal Recognition from named Indian tribes. One of the tribes terminated in this manner, the Menominee, after difficult and expensive lobbying in Congress, had their indigenous status restored. Unfortunately, the same restoration is being considered for the other tribes similarly treated. 126/

353. On the question as to whether a person who has been considered as "indigenous" may come to be considered as "non-indigenous" and vice versa. The following extract reflects the views of an indigenous source. 127/

"A far more subtle method of changing status is through acculturation. This was also attempted through a variety of methods. Ever since the first colonies were established in America, the churches, both protestant and Catholic, have conscientiously attempted to destroy the culture and religious beliefs of American Indians. This attempt was paralleled by the policy decisions of the United States to turn Indian people into Yeoman farmers in the image of European immigrants.

"The allotment system, the practice of breaking up tribal land holdings into pieces for individual Indian ownership, was the most disastrous and dramatic of the United States' policies. This policy not only destroyed the tribal power by taking its land base; it forced millions of acres of Indian land into the hands of whites. Too often the land that remained in Indian control, particularly the allotment, was of insufficient size or quality to adequately support a family. The residue of the policy today insures that millions of acres of Indian land either go unused or are leased by Indians to white farmers who manage to control large tracts of land at attractive prices through their superior capital position and the collusion of the Bureau of Indian Affairs".

354. Concerning one of the most common ways of "passing from one category to the other" the American Indian Law Newsletter contains the following information: 128/

"Assimilation is relevant to the section on definition, of course, in that those indigenous peoples who can be determined to be assimilated will be no longer considered indigenous and thus their treatment will be subject to less interna tional supervision, and that supervision will be in accordance with a different set of standards which does not take into account their cultural and other group rights. Little attempt is made in national policies generally to explore the subtleties of the distinction between that social and economic assistance which is designed to aid indigenous populations to achieve a 'better' life (however that may be defined) and that social and economic assistance which is designed to destroy indigenous culture, identity, integrity, self-reliance and bring about a "final solution" to the problems of indigenous populations by merely submerging them into the general population, usually at the bottom of that population socially and economically."

126/ American Indian Law Newsletter, loc. cit. pp.3-5
127/ Ibid.
128/ Ibid., pp. 9-10
Felix Cohen, in his unexpurgated Handbook of Federal Indian Law, propounds a theory of the "right of expatriation" as a policy alternative. In the same sense that the determination of membership can be seen to be a universal right of societies, Cohen says that the right of expatriation from his society is or should be a universal right of individuals. That being the case (which finds support in the United Nations Declaration of Human Rights), he identifies as an underlying policy of the government of the United States deliberately to make life on an Indian reservation so unpleasant that the individual Indian will be forced to expatriate himself through assimilation into the majority society. It cannot be doubted that such a policy would be deemed unacceptable by international standards.

"It can be readily seen that this device has been used by the United States, even if unconsciously. The notorious 'termination' policy provides only a recent example. There, the development of Indian reservations was virtually abandoned as a policy goal and great emphasis was placed upon the relocation of Indians into the urban centres of the United States. The disastrous failure of this policy and the enormous human misery it caused are well-documented."  

355. In this connection, the Government stated in 1982 that:

"The assertions made by the non-governmental publication in this section dwell extensively upon what are called the 'allotment, assimilation and termination' policies of the United States. Despite their claim as to the recency of these policies, it should be pointed out that the most recent of these 'policies' is more than 30 years old and has over and over again been repudiated and denounced by the United States Congress and the Executive Branches of government for many years."

356. The American Indian Law Newsletter has also included the following information.129/  

"It is much easier to obtain approval for federal budgetary items which are designed to encourage assimilation and relocation of Indians than it is to obtain approval of items which will encourage development of reservation resources and the amelioration of the conditions of reservation life. A thorough comparative study over the years being conducted by the National Congress of American Indians reveals a consistent pattern of federal investment in the non-Indian development of western resources both on and off the reservation, and federal refusal - both by Congress and by the Office of Management and Budget - to invest in or aid in the development of Indian resources under Indian control. Despite sincere policy promises to the contrary, the implementation of policy is still largely in the hands of officials who do not share the promises of the various administrations."

357. Persons who have been considered as non-indigenous may come to be considered as indigenous under certain circumstances in several countries.

129/ Ibid., page 9.
358. In this respect, the Australian Government has stated:

"... A person who is not of aboriginal or Islander descent could assert aboriginal or Islander identity, but this would be of no interest to the Government unless such a person sought special Government benefits, when it would be necessary to inquire into the claim, and possibly to test community acceptance".

359. It seems clear that at least the same would apply in the case of a person who is of aboriginal descent but who had not chosen to identify as such, should he choose to be considered as an Aborigine. In this case no other conditions would be required.

360. The Government of the United States of America has stated that:

"The main problem in defining which persons are descended from members of indigenous groups is whether or not such ancestry makes them eligible for Federal (Central Government) services. Only certain indigenous groups have a treaty or other relationship with the Federal Government which makes their membership eligible for special services. All other descendants of indigenous peoples are eligible for all general Federal programs available to any person in the general population regardless of race and have all their local services provided by the State and locality in which they live".

"Thousands of people in the United States have some degree of Indian blood. Generally, unless an individual has at least one parent who is legally entitled to membership in a Federally-recognized Indian tribe he cannot qualify for membership or for Federal services available solely to Indians, or to share in the assets of an Indian tribe. Sometimes, however, an individual with Indian blood who may be qualified to be an enrolled member of a specific tribe may not have taken the necessary steps to prove this. If and when he or she takes the initiative to prove his or her eligibility for membership and becomes an enrolled member of an American Indian tribe with a Federal relationship, he or she becomes entitled to special services reserved to it".

361. According to information provided by the Government, "a non-Indian or non-indigenous person adopted into an indigenous group is not entitled to participate in Federal programs that are designed for indigenous groups".

362. On the contrary, adoption by an indigenous community seems to be at the basis of certain cases of change of status from non-indigenous to indigenous in certain systems.

363. Thus, for instance, in Malaysia, the Aboriginal Peoples Ordinance, in Section 3 (1) (b), provides for the case of a person who has been, and would continue to be, considered non-aboriginal but has come to be considered as an aboriginal because of the concurrence of certain specified conditions: (a) adoption when an infant by aborigines; (b) up-bringing as an Aborigine; (c) habitually speaking a aboriginal language; (d) habitually following aboriginal ways of life, customs and beliefs, and (e) being a member of an aboriginal community.

364. In Canada, as has been stated, white women who marry Indian men are entered on the Indian Register and acquire Indian status.
365. It would appear that in Guyana persons having ceased to be legally considered Amerindians and consequently, as not being entitled to the relevant privileges, may some again to be considered as Amerindians and return to enjoy the corresponding privileges. This would be the case of an Amerindian woman, after the death of her non-Amerindian husband or after having discontinued cohabitation with her de facto husband, etc.

366. The New Zealand Government states that "there is no formal legal procedure whereby a person who has been considered 'non-indigenous' may come to be considered 'indigenous' or vice versa. As indicated, in contexts where the classification is relevant, it is very much a matter of individual choice as to whether a person wishes to be classed as a Maori or not. It also has to be borne in mind that New Zealand law is impersonally worded except for the relatively few and diminishing number of enactments relevant to Maoris".

367. The Government adds that "acceptance by the Maori community of any person identifying himself as Maori is not required, ... generally speaking, Maori are 'inclusive' people and accept as a Maori any person of Maori descent who wishes to identify himself with them".

368. It is clear, then, that a person of non-Maori ancestry is not covered by the above statement, which requires that the person concerned be "of Maori descent".

369. From the definition adopted in its 1959 report by the Select Lapp Committee reading "Anyone who possesses Lappish as his mother tongue and/or regards himself as a Lapp is considered to be a Lapp", it may be concluded that in Norway a person who has not previously regarded himself as a Lapp could come to regard himself as a Lapp, and therefore, come to be considered as a Lapp. It is unclear whether a person not having Lappish ancestry could so proceed. It seems that, for certain sectors of social opinion, a person with Lapp ancestry will always be a Lapp, in accordance with the above-mentioned catch phrase "Once a Lapp, always a Lapp".

370. The Costa Rican Government states "In our country a 'non-indigenous' person never comes to be considered as indigenous, inasmuch as it would be difficult for him to accept or identify himself as indigenous".

371. On the other hand, an indigenous person who previously has preferred to pass as non-indigenous, as a result of some degree of cultural assimilation and social pressure, but who, basically, has not lost his indigenous identity, may once again become considered indigenous "by virtue of the rights established in the existing laws". These are cases which may be described as a return to or recovery of indigenous status by individuals or groups who had lost that status by force of circumstance.

372. Thus, according to the information provided in 1979 as a comment on the draft summary of the information relating to Costa Rica, the Government of that country states that "an indigenous person never loses his status in so far as he retains it in his heart of hearts". This may be solely subjective, because of the pressures or circumstances of his environment, for example, "when a person who has considered himself to be indigenous subjectively loses his indigenous status, as in the case of some
students or [persons engaged] in entrepreneurial activities who do not wish to feel inferior, because of a wrong understanding of the term indigenous in that environment. This change is not always final, because there are cases of indigenous groups which have become acculturated but who, on becoming aware of the value of their own origins, demand to be considered as indigenous groups, under the rights established in the existing laws, even though previously they preferred to be considered "non-indigenous".

373. In its information, the Mexican Government does not seem to envisage the possibility of a return to, or recovery of, indigenous status, or any other such possibilities when it states that in Mexico "ethnic identity is the result of specific historical processes, and therefore no person who is considered to be 'non-indigenous' could be considered indigenous".

374. In Sweden, according to information received from the Government, "since no important legal consequences are attached to the fact of belonging to a minority group, the questions in this ... [aspect] are hardly relevant".

L. Registration and certification

375. Countries have furnished information on this matter: Canada, Chile, Guyana, the Philippines, and the United States of America. This requirement may be held as existing in a few other countries, like India and Pakistan, for example.

376. In Chile, the Institute of Indian Development issues certificates certifying that a person is indigenous. If refused such a certificate, the person concerned may appeal to the competent Indian Court (Juez de Letras). If a person's status as indigenous is challenged, the case may also be referred to the same Court. The Court shall in both cases rule after hearing the views of the Institute.

377. The Government states that:

"Indigenous status is proved by a certificate issued by the Institute of Indian Development. If the Institute refuses this certificate, the person concerned may then appeal to the competent Indian Court, which will render a short summary judgement, after hearing the views of the Institute.

"Nevertheless, anyone desiring to do so may challenge in a court of law another person's status as indigenous, even though this person may have a certificate from the Institute; and the Court shall rule after hearing the views of the Institute".

378. In Guyana, the Government states that "the Amerindian Ordinance provides for the registration of Amerindiands", giving no further details.

379. In the Philippines, upon the person's formally expressed will and the submission of the pertinent required documents, the Commission on National Integration issues a formal certification that a person is a member of a national cultural minority.

380. The Government states:

"The determination of membership of an individual in a cultural minority is made by a Government agency known as Commission on National Integration which makes the formal certification to the fact, upon the person's formally expressed will and submission of the required documents. The laws defining minority groups are used as criteria for the issuance of certifications".
Registration is very important in Canada, as upon being inscribed on the Indian Register persons acquire Indian status as Status or Registered Indians. This is a key aspect of the legal definition quoted above which requires, either "being registered" as an Indian, or "being entitled to be registered" as an Indian. 131/

Indications as to who is entitled to be registered have been included above. 132/ It would, however, be useful to repeat here that only registration plus residence on a reserve carries with it full benefits under the Indian Act. 133/

It is worth reiterating that persons who are registered and subject to the Indian Act are commonly referred to as "Status" Indians. Further, all Status Indians are listed in an Indian Register which is maintained by the Federal Government Department of Indian Affairs and Northern Development. 134/

Each man over twenty-one years of age has an assigned number and his children use their father's number until, in turn, they reach the age of twenty-one years, when they receive their own number. When a man over 21 years of age marries, his wife receives his number and treaty Status, irrespective of her own Indian status, and so do the children of the union until they reach full age, as explained above. 135/

Concrete causes for exclusion from the Indian Register have been also discussed under legal definitions. 136/

In closing it should be repeated that although upon marrying a "Status Indian" a white woman is entitled to be registered on the Indian Register and acquires status, an Indian woman who marries a non-Indian man loses Indian status and is excluded from the Register. 137/ So are the children of the union. 138/

In the United States, tribes, bands, communities or persons entitled to Bureau of Indian Affairs' services are to be listed on Indian tribal rolls or on Indian agency rolls. Federal recognition of tribes, bands, communities and persons would, as a logical consequence, require the keeping of a register where all recognized entities and persons or at least all acts of recognition would be entered.

131/ See paras. 292 to 295 above.
132/ See paras. 292 to 299 above.
133/ See para. 295 above.
134/ See paras. 294 and 299 above.
135/ See paras. 282-285 above.
136/ See paras. 347-350 above.
137/ See paras. 298 and 302 above.
138/ See paras. 283 and 285 above.
388. Registration may be deemed to be required in India in the sense that, under the conditions specified above 139, the Schedules Tribes have to be specified by public notification by the President, or, by law, by Parliament, in order to be considered as such.

389. Similarly in Pakistan, where tribal areas are listed in the Constitution (article 246), the President of the Federation classifies the Federally Administered Areas and, in the case of Provincially Administered Tribal Areas, does so in conjunction with the Governors of the Provinces concerned. Under article 247 of the Constitution, acts of Parliament shall apply to the Tribal Areas only under directions given by the President and no act of a Provincial Assembly shall apply in Provincially Administered Areas unless so directed by the Governor of the Province concerned with the approval of the Federal President, also specifying such exceptions and modifications as may have been specified in the direction. The President may, at any time, by order, direct that the whole or any part of a Tribal Area shall cease to be a Tribal area and this order may contain such other incidental or consequential provisions as appear to the President to be necessary and proper. Before making any such order, however, the President shall ascertain in such manner as he considers appropriate, the views of the people of the Tribal Area concerned, as represented by the tribal chief. 140

M. The authority which decides whether a person is or is not indigenous

390. In some countries, the law determines who has to decide in case of doubt whether or not a person fulfills the requirements to be considered indigenous.

391. In Chile, according to the information given in the preceding paragraph, it is the competent Indian Court which finally decides these questions after hearing the case of the Institute of Indigenous Development.

392. As has already been stated, in the Philippines the Commission on National Integration is the Government agency that decides whether a person is or is not a member of a "national cultural minority".

393. In Guyana the Commissioner of Interior decides when a descendant of an Amerindian comes under the terms of the Amerindian Ordinance (Ordinance, part (b) of the definition).

394. In Malaysia, according to the Aboriginal Peoples Ordinance (Section 3, Subsection (3)) "any question whether any person is or is not an Aborigine shall be determined by the Minister" (See para. 193, above). All problems encountered in determining whether any person is or is not an Aborigine shall, therefore, be determined by the Minister of Home Affairs, whose portfolio includes the Department of Orang Asli Affairs. This would empower the Minister to determine whether a person who has been considered to be an Aborigine is still an Aborigine or has ceased to be an Aborigine, or whether a non-Aborigine has or has not become an Aborigine, in accordance with provisions of the same Ordinance.

395. In Canada it is the Federal Government Department of Indian Affairs and Northern Development which maintains the Indian Register in which are listed all Status or Registered Indians. As stated above it is this Department which certifies the fact of registration and assigns a number to the registered person. 141

139/ See para. 115 and footnote 44/ above, and paras. 86 to 89 in chapter VII.

140/ See para. 83, chap. VII.

141/ See paras. 283 and 299 above.
396. In the United States each tribe keeps a roll of its members and each Indian agency does so, too. Although available information is not very clear and explicit in this respect it would also seem that the Bureau of Indian Affairs would need to maintain records of federally recognized tribes, bands, groups and individuals that are entitled to Bureau of Indian Affairs services. 142/

397. In India, only the President, by public notification, or Parliament, by law, is empowered to specify the tribes, tribal communities or parts thereof or groups therein in relation to any State or Territory of India, which are to be included in or excluded from the corresponding lists. 143/

398. In Pakistan in accordance with provisions enshrined in the Constitution, the tribal areas are enumerated and classified as Federally Administered Tribal Areas or as Provincially Administered Areas by the respectively competent executive federal and provincial authorities, namely the President for the Federally Administered Tribal Areas and the President, acting with the corresponding Governor, in respect of Provincially Administered Tribal Areas. The President and the Governor acting as indicated above may also exclude any area from such classification. 144/

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142/ See paras. 53, 309, 311, 312 and 323 above.
143/ See para. 115 and footnote 64/ above, as well as para. 64-69, chap. VII.
144/ See para. 339 above and para. 83, chap. VII.
STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Final Report (first part) submitted by the Special Rapporteur

Mr. José R. Martínez Cobo

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</tbody>
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Chapter VI

Composition of the Population

Introduction

1. It is obviously essential to have an accurate idea as possible of the size of the indigenous populations in the countries with which the study deals. At the time of writing this part of the report, reliable up-to-date information is not available for certain countries with large indigenous populations; no effort will be made, therefore, to produce total figures, but the following presentation will contain all the relevant information at present available to the Special Rapporteur in this regard.

2. It must be pointed out that the present study cannot, and is not required to, include a detailed inventory of the various types of individual features of indigenous groups and communities which at present exist in the world. Such an undertaking would call for special research which would go far beyond the scope of this report. Therefore, the descriptive aspects - anthropological, ethnological, geographical and historical - will not be discussed in detail here, however important they may be.

3. The purpose of this chapter is more modest: an attempt has been made rather to present proven statistics derived either from censuses officially conducted and recorded in the countries under consideration, or from official estimates and calculations, or from unofficial estimates and calculations which can be regarded as reliable.

4. In countries with indigenous populations, it is usually difficult to obtain accurate statistics on the size of these population groups; and the information obtained from different countries is hardly comparable, since in some countries the agencies responsible for the compilation and recording of population statistics are well organized, and in others they are less well organized. Also, as has been pointed out in the chapter on the definition of indigenous populations, the approach to the subject differs considerably from one country to another, and even from region to region in the same country. Furthermore, in any effort to identify trends, one is constantly faced with the difficulty that the classification criteria have varied from census to census; and this difficulty is compounded still further when subjective classification criteria are used - a practice which although highly valuable and useful in other aspects, greatly detracts from the reliability of data obtained from a single census. In cases where reliance is placed on the censor's capacity to decide whether a person is or is not indigenous, one can at least count on some degree of uniformity in the application of the classification criteria; but this uniformity is lacking when persons questioned in a census are requested to classify themselves. In this case, the situation is aggravated by the fact that approaches to self-classification may differ widely from group to group and even from person to person.

5. For some countries reasonably complete information is available on indigenous populations and on the various relevant aspects relating to different groups; but in other cases only minimal and fragmentary data - and sometimes only rough estimates - were available on the size of these population groups. In certain countries, the relevant information is incomplete or out of date; and in most countries the data
are in some respects inadequate, since considerable disparity often exists between
the information on some groups and the amount of data gathered on others. Even in
cases where the information as a whole is well compiled, the data for certain groups
have been calculated or estimated incompletely, or by inaccurate or unsuitable
methods. This occurs, for example, in the case of isolated indigenous groups
(e.g. certain groups dwelling in forests, mountains or deserts). In such cases,
it is virtually impossible to obtain the information required, mainly owing to the
fact that these groups live in remote or relatively inaccessible areas, or are
nomadic or semi-nomadic. On occasion, the information available cannot be
considered reliable because the means used to obtain it have been inappropriate.
Lastly, there are groups of countries in which there is an almost complete absence
of statistics on the total size of the indigenous population. In this connection,
it should be pointed out that in some countries, the absence of official data on
the indigenous population is due to the fact that, for reasons of principle, no
distinction is made in censuses or estimates between the different biological or
ethnic groups forming part of the population.

6. Within the limits imposed by the difficulties and shortcomings mentioned above,
the data available to the Special Rapporteur are presented below. In addition to
mentioning that the data presented are in most cases not comparable, it is essential
to repeat the warning that even the information on the absolute size of the indigenous
population in each country - and consequently the data on the relative size - must
be treated with the necessary caution.

B. Present situation

7. The table below gives:

(a) in column 1, numbers corresponding to each country in alphabetical order;

(b) in column 2, the names of the countries covered by the present report;

(c) in column 3, the figures of the total population of each country;

(d) in column 4, certain letters and dates containing indications relating
to the figures appearing in column 3;

(e) in column 5, the figures for the total indigenous population of each
country;

(f) in column 6, certain letters and dates containing indications relating
to the figures appearing in column 5;

(g) in column 7, the relative size of the indigenous populations, as a
percentage of the corresponding total population;

(h) in column 8, upward trends in the absolute size of the indigenous
population;

(i) in column 9, downward trends in the absolute size of the indigenous
population;

(j) in column 10, upward trends in the relative size of the indigenous
population;

(k) in column 11, downward trends in the relative size of the indigenous
population.
Preliminary data concerning the total indigenous population and the percentage it represented in 1970 of the total population of the country.


### Table: Population Table

<table>
<thead>
<tr>
<th>Country</th>
<th>Total Population</th>
<th>Indigenous Population</th>
<th>Relative Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>21,000,000</td>
<td>250,000</td>
<td>0.12%</td>
</tr>
<tr>
<td>Australia</td>
<td>12,955,639</td>
<td>115,511</td>
<td>0.19%</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>71,316,000</td>
<td>1,510,000</td>
<td>2.10%</td>
</tr>
<tr>
<td>Bolivia</td>
<td>5,956,000</td>
<td>1,080,000</td>
<td>1.15%</td>
</tr>
<tr>
<td>Brazil</td>
<td>90,000,000</td>
<td>140,000</td>
<td>0.15%</td>
</tr>
<tr>
<td>Chile</td>
<td>10,250,000</td>
<td>100,000</td>
<td>0.11%</td>
</tr>
<tr>
<td>Colombia</td>
<td>25,000,000</td>
<td>540,000</td>
<td>2.16%</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>14,667,700</td>
<td>14,000</td>
<td>0.10%</td>
</tr>
<tr>
<td>Denmark [total]</td>
<td>5,956,770</td>
<td>1,473,000</td>
<td>0.43%</td>
</tr>
<tr>
<td>Greenland only</td>
<td>49,134</td>
<td>1,473,000</td>
<td>0.43%</td>
</tr>
<tr>
<td>Ecuador</td>
<td>6,757,190</td>
<td>1,473,000</td>
<td>0.22%</td>
</tr>
<tr>
<td>El Salvador</td>
<td>4,066,714</td>
<td>1,473,000</td>
<td>0.35%</td>
</tr>
<tr>
<td>Finland</td>
<td>4,600,000</td>
<td>1,473,000</td>
<td>0.35%</td>
</tr>
<tr>
<td>France (....)</td>
<td>5,956,770</td>
<td>1,473,000</td>
<td>0.22%</td>
</tr>
<tr>
<td>French Guiana</td>
<td>4,060,000</td>
<td>1,473,000</td>
<td>0.35%</td>
</tr>
<tr>
<td>Guatemala</td>
<td>6,264,513</td>
<td>1,473,000</td>
<td>0.23%</td>
</tr>
<tr>
<td>Guyana</td>
<td>7,000,000</td>
<td>43,000</td>
<td>0.10%</td>
</tr>
<tr>
<td>Honduras</td>
<td>3,433,700</td>
<td>2,433,700</td>
<td>0.70%</td>
</tr>
<tr>
<td>India</td>
<td>25,920,000</td>
<td>38,000,000</td>
<td>0.01%</td>
</tr>
<tr>
<td>Indonesia</td>
<td>13,800,000</td>
<td>1,500,000</td>
<td>0.11%</td>
</tr>
<tr>
<td>Japan</td>
<td>9,900,000</td>
<td>11,000</td>
<td>0.01%</td>
</tr>
<tr>
<td>Korea (....)</td>
<td>1,460,000</td>
<td>1,460,000</td>
<td>0.10%</td>
</tr>
<tr>
<td>Malaysia (total)</td>
<td>10,432,300</td>
<td>1,432,308</td>
<td>0.14%</td>
</tr>
<tr>
<td>Western Malaysia</td>
<td>8,819,928</td>
<td>1,432,308</td>
<td>0.16%</td>
</tr>
<tr>
<td>Mexico</td>
<td>16,977,259</td>
<td>7,922,259</td>
<td>0.47%</td>
</tr>
<tr>
<td>New Zealand</td>
<td>2,904,671</td>
<td>2,433,700</td>
<td>0.81%</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>3,308,489</td>
<td>1,460,000</td>
<td>0.10%</td>
</tr>
<tr>
<td>Norway</td>
<td>3,973,990</td>
<td>1,460,000</td>
<td>0.10%</td>
</tr>
<tr>
<td>Pakistan</td>
<td>64,890,000</td>
<td>2,547,000</td>
<td>0.04%</td>
</tr>
<tr>
<td>Panama</td>
<td>1,400,000</td>
<td>75,738</td>
<td>0.54%</td>
</tr>
<tr>
<td>Paraguay</td>
<td>2,570,000</td>
<td>125,000</td>
<td>0.25%</td>
</tr>
<tr>
<td>Peru</td>
<td>13,454,430</td>
<td>5,434,430</td>
<td>3.90%</td>
</tr>
<tr>
<td>Philippines</td>
<td>13,710,000</td>
<td>1,510,000</td>
<td>0.11%</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td>13,500,000</td>
<td>2,543,700</td>
<td>0.18%</td>
</tr>
<tr>
<td>South Africa</td>
<td>440,000</td>
<td>21,000</td>
<td>0.05%</td>
</tr>
<tr>
<td>Sweden</td>
<td>8,100,000</td>
<td>10,000</td>
<td>0.12%</td>
</tr>
<tr>
<td>United States</td>
<td>201,186,772</td>
<td>827,091</td>
<td>0.41%</td>
</tr>
<tr>
<td>Venezuela</td>
<td>11,900,000</td>
<td>10,000</td>
<td>0.09%</td>
</tr>
</tbody>
</table>
8. Before we examine somewhat more closely certain aspects of the trends which may at present exist in this field, it should be pointed out that any upward or downward trends discernible today are not part of a constant or uniform picture. It is a well-known fact that, immediately after the first contacts between the population groups from which the present-day populations of the countries concerned are largely descended, there was a sharp - and in many cases, tragic - decline in the size of the indigenous populations, some of which became totally extinct. The explanation for this was usually lack of resistance to diseases introduced from abroad, and violent conflicts - frequently involving genocidal or at least ethnocide - which were sometimes actually the result of a deliberate policy pursued by the dominant groups. There are also well-known cases of mass suicide by certain groups faced by imminent total defeat; and other groups adopted practices which were designed to curb reproduction and thus led indirectly to group suicide.

9. In this connection, the reader's attention may be directed to certain comments which illustrate the results of these initial trends and the way in which they have changed:

"The Aboriginal population when Europeans first settled in Australia in 1788 has been variously estimated at from 150,000 to 300,000 or more. The most thoroughly researched estimate puts the total at 251,000. The Aboriginal population declined rapidly, particularly in areas of heaviest European settlement. This decline was the result of many factors including the introduction of diseases to which Aboriginals had no resistance, violent conflict and the many other repercussions of confrontation between a hunting and gathering society and a technologically advanced society based on pastoralism and agriculture. By 1921 the total Aboriginal population was estimated at 60,479. The decline of the Aboriginal population was arrested in the 1930s and reversed in the 1940s and early 1950s..." (Information furnished by the Government in 1973 in connection with the present study.)

"When the European penetration of New Zealand began in the early part of the nineteenth century there were, according to reliable estimates, about 200,000 Maoris, whose eastern Polynesian ancestors had arrived in ocean-going canoes over a period beginning about nine hundred years earlier. European diseases and muskets (used in the intensification of tribal warfare in the 1820s and 1830s) led to a drastic drop in population before New Zealand became a British colony in 1840, and thereafter the population continued to decline due primarily to the lower birth rate and tuberculosis. After 1865 this decline was closely related to land-selling facilitated by the operations of the Native Land Court. By 1896 the population had fallen to 40,000, less than 5 per cent of the total population: and it was generally believed that the Maori were a dying people. But from the turn of the century the Maori population has increased steadily (except for a temporary setback in the influenza epidemic) and, in recent years, dramatically. Thus since 1900 it has increased five-fold and in the past twenty years it has almost doubled. This increase has been not only absolute but also relative to the total population, thus the rate of increase of Maori population in the past ten years has consistently been about double the national rate, and the Maori population of 233,000 is now about 8 per cent of the total population." 1/

10. According to a well-known authority on the subject, the total indigenous population of the western hemisphere in the age of discovery amounted to about 13,400,000. This figure fell sharply between the period of discovery and that of independence owing to a number of destructive factors, such as the wars of conquest, the slave labour system operating during a large part of the colonial period, epidemics of European origin, malnutrition, excess of alcohol, etc., together naturally with the steadily growing process of racial mixture. Taking this figure as a basis, it is also clear that, since the beginning of the period of independence, the indigenous population has increased sharply and has not only doubled but is about 5 million above what it was presumed to be in the age of discovery. Using approximate figures, Rosenblat has prepared the following table showing changes in the indigenous population of the Americas between 1492 and 1940 (see page 109 of Rosenblat's study):

<table>
<thead>
<tr>
<th>Year</th>
<th>Indigenous population</th>
<th>Increase or decrease</th>
<th>Total population</th>
<th>Percentage of indigenous population</th>
</tr>
</thead>
<tbody>
<tr>
<td>1492</td>
<td>13,385,000</td>
<td>-</td>
<td>13,385,000</td>
<td>100.00</td>
</tr>
<tr>
<td>1570</td>
<td>10,827,150</td>
<td>-2,557,850</td>
<td>11,229,650</td>
<td>96.41</td>
</tr>
<tr>
<td>1650</td>
<td>10,035,000</td>
<td>-792,150</td>
<td>12,411,000</td>
<td>80.85</td>
</tr>
<tr>
<td>1825</td>
<td>8,654,301</td>
<td>-1,400,699</td>
<td>7,253,601</td>
<td>57.10</td>
</tr>
<tr>
<td>1940</td>
<td>16,211,670</td>
<td>+7,577,369</td>
<td>27,427,111</td>
<td>5.91</td>
</tr>
</tbody>
</table>

11. Most of the indigenous communities did, however, recover after a certain time; and during the present century, particularly from the 1930s onwards, those peoples have shown a clear tendency to increase in numbers. This is usually attributed to more and better medical services, improvements in hygiene, greater possibilities of obtaining nourishing foods, together with adoption of - or reversion to - more balanced diets, all of which led to a marked rise in the birth-rate and a corresponding decline in the death-rate. This increase has not, however, always sufficed to offset the differences in the absolute increase of other groups of the population, since morbidity rates - particularly those for infant morbidity and mortality - have not declined among the indigenous peoples as much as they have among the other population groups. Another factor to be mentioned here is "defection" from the indigenous group by persons or groups who "cross over" and join other segments of the population, and whose assimilation leads both to an increase in the size of the latter groups and to a corresponding decline in the size of the indigenous population.


3/ In some cases the natural increase in these populations seems even to have reached "explosion" rates, similar to the rates observable among other groups of the population. Such a situation is described by the Government of the Philippines in the information it has provided for this study: the situation is described as general, and applying to all groups of the aboriginal population (see paras. 29-31 below).
Changes in classification criteria, which are often made in official censuses or estimates and in unofficial calculations, frequently tend to result in a narrower criterion for classifying individuals or groups as "indigenous". This sometimes creates an inaccurate impression of diminution in the absolute size of indigenous populations.

12. It will be necessary, therefore, to consider some aspects of the information available to the Special Rapporteur on current prevailing statistical trends, as reflected in the summaries of information prepared for this study. First, we shall set forth briefly the general trends discernible.

C. Statistical trends

13. In a number of countries, the indigenous population is decreasing in absolute figures, and its size relative to the total population of these countries is shrinking as well. 4 This would also seem to be the prevailing trend in other countries for which no clear and unequivocal information is available. 5

14. By contrast, indigenous populations in other countries are increasing in absolute figures, 6 but are nevertheless simultaneously decreasing in relative size. 7 However, this is not the case in Guatemala and New Zealand, where the Indian and Maori populations respectively are increasing in relative size. 8

15. The Government of Australia states that:

"... The decline of the Aboriginal population was arrested in the 1930s and reversed in the 1940s and early 1950s. The Aboriginal population is now increasing at a substantially higher rate than the rate of natural increase of

4 For example in Japan, Norway, Sri Lanka and Sweden.

5 For example in French Guyana and in Guyana. Possibly also in Brazil (with conflicting information both as regards a particular group and as regards the general trend), El Salvador, Indonesia, Laos, Paraguay and Suriname.

6 For example in Argentina, Australia, Bolivia, Canada, Chile, Colombia, Costa Rica, Denmark (Greenland), Ecuador, El Salvador, Finland, Honduras, India, Malaysia, Mexico, Pakistan, Panama, Peru, Philippines, United States of America and Venezuela. Possibly also in Bangladesh, Burma and Nicaragua.

7 Australia, Argentina, Bolivia, El Salvador, Finland, Malaysia, Peru. Possibly also in Bangladesh, Burma, Canada, Chile, Colombia, Costa Rica, Denmark (Greenland), for some years (see paras. 23-28 and foot-note 8 in fine below), Ecuador, Honduras, India, Mexico, Nicaragua, Pakistan, Panama, Philippines, United States of America and Venezuela.

8 According to reliable unofficial estimates, Guatemala's indigenous populations reached in 1978 59.70 per cent of the total population of the country in a consistent upward trend and is now the highest in the world (see paras. 36-37 below). The Maoris in New Zealand have increased from 4.7 per cent of the population in 1926 to 8.8 per cent in 1972 (see paragraph 35 below and foot-note 1 above). The Greenlandic population has also increased in relative size in some years.
the non-Aboriginal population. At the national census in 1961, a total of 80,526 people of Aboriginal descent were enumerated; at the 1966 census the count was 102,035. Rates of natural increase in the Aboriginal population vary from place to place and studies have indicated extraordinarily high rates in some communities. The minimum rate of increase can be calculated at something more than 2 per cent per annum and in some States is as high as 4 per cent. It is reliably estimated that the Australian Aboriginal population will double in less than 20 years and reach 300,000 by the end of the century."

16. The Government of Finland stated in 1973 that "the size of the Lappish population has increased in the past 200 years". In 1974 the Government provided the following concrete information in this regard:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Lapps</th>
<th>Criterion</th>
</tr>
</thead>
<tbody>
<tr>
<td>1900</td>
<td>1 336</td>
<td>Mother tongue</td>
</tr>
<tr>
<td>1910</td>
<td>1 659</td>
<td>&quot;</td>
</tr>
<tr>
<td>1920</td>
<td>1 605</td>
<td>&quot;</td>
</tr>
<tr>
<td>1930</td>
<td>2 113</td>
<td>&quot;</td>
</tr>
<tr>
<td>1940</td>
<td>2 345</td>
<td>&quot;</td>
</tr>
<tr>
<td>1950</td>
<td>2 347</td>
<td>Language which the person speaks best</td>
</tr>
<tr>
<td>1960</td>
<td>1 312</td>
<td>The main language</td>
</tr>
<tr>
<td>1970</td>
<td>2 240</td>
<td>&quot;</td>
</tr>
</tbody>
</table>

17. With regard to the Ainu of Japan it has been written that:

"Once spread over Honshu and possibly Kyushu and Kyukyus, the Ainu now live in Hokkaido. Estimates vary but they appear to have numbered about 12,000 in 1960, including nearly 1,000 relocated from southern Sakhalin upon its cession to the Soviet Union in 1945. The number of Ainu, if any, on the Kurile Islands is not known. Between the world wars, many Kurile Ainu died after they had been resettled on one of these Islands by the Japanese Government."

"The Ainu population is still decreasing. Poverty and diseases especially tuberculosis, trachoma, and venereal diseases, addiction to alcohol, prejudice, and their own inability to adjust successfully to the world of the Japanese majority make them a depressed people." 2/

18. The Government of Malaysia has transmitted the following data compiled by the Department for Orang Asli affairs:

"In general the Orang Asli population of Malaysia has shown a continuous increase since 1957. (Population figures for Orang Asli prior to 1960 are not reliable.) The figures given below were collected by the Department itself and are considered to be quite accurate:

<table>
<thead>
<tr>
<th>Enumeration year</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>43 890</td>
</tr>
<tr>
<td>1965</td>
<td>45 895</td>
</tr>
<tr>
<td>1969</td>
<td>52 945</td>
</tr>
</tbody>
</table>

"The present Orang Asli population of Malaysia (July 1974) is estimated to approximate 57,000. Results of the 1974 census will be available in September 1974.

"From the above figures it can be seen that during the period 1960-1969 the Orang Asli population increased by 9,053 persons, or 20.6 per cent, or approximately 2.3 per cent per year taken on the average during the period 1960-1969."

19. The Government of Norway has communicated that:

"The number of Lapps has not been estimated since 1950 when it was approximately 8,800. This figure must be assumed to be somewhat higher today.

"The first large-scale survey of the size of the Lapp population was in 1724 when the figure was 7,231. In 1865 it was 14,535, in 1865 17,187, in 1890 20,786 and 8,800 in 1950. These figures must be regarded as estimates, since there may often be doubt as to whether or not an individual shall be counted as a Lapp.

"The Lappish-speaking population has been declining up to the last few years. The reason is not to be found in the normal population processes. It is rather to be found in the lower level of resistance of the scattered small settlements to the pressure exerted by the surrounding rural communities to Norwegianize the Lapps' social identification and thereby their everyday language. The Lapp settlements furthest from the dominant Norwegian-speaking areas of population settlements have been less exposed because they form larger connected areas. Here the growth of population has not been followed by a corresponding or greater degree of Norwegianization. In the period 1951-1968, the population figure increased substantially in the largest Lapp municipalities. From 1968 to 1970 there was an outward movement of population. Since then this development has been reversed, so that the population movement has now taken an inward direction."

20. The Government of Panama has communicated figures for the indigenous population of the Republic covering the last four decades, and also for the relative size of this population, according to data obtained from the censuses of 1940, 1950, 1960 and 1970 respectively. The figures are:

<table>
<thead>
<tr>
<th>Year</th>
<th>1940</th>
<th>1950</th>
<th>1960</th>
<th>1970</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indigenous population</td>
<td>55,987</td>
<td>48,654</td>
<td>62,107</td>
<td>75,738</td>
</tr>
<tr>
<td>Indigenous population as percentage of total population</td>
<td>9.0</td>
<td>6.0</td>
<td>5.8</td>
<td>5.3</td>
</tr>
</tbody>
</table>

21. The Government adds the following comment:

"In general, the figures for the last four national censuses show an increase in the absolute size of the indigenous population, in contrast to the decline in the relative size."
22. According to information furnished by the Government of Canada:

"At the time of the first white settlements in North America about four centuries ago, the Indian population of what is now Canada was, according to the best estimates of anthropologists, about 200,000. Shortly after the advent of the Europeans, the Indian population was found to be declining. By the early 1900s it had decreased by almost half, owing to exposure to diseases to which the Indians had no natural immunity, a growing incapacity, or inability to draw from traditional food supplies, and the consequent substitution of an alien, and often unsuitable, diet. The general effect was one of social and cultural deprivation, and the loss of a traditional pattern of meanings for their existence.

"The Indian population has reversed the downward trend and for the past 30 or 40 years has been rapidly increasing. The Eskimo population is also increasing rapidly, with the highest birth rate of any population group in the country and a decreasing infant mortality rate. The major reason for this change is the improved health services which have been made available to the native peoples, particularly in remote areas of the country."

23. The Government of Denmark stated, in information supplied to the Special Rapporteur on 26 May 1981, on which the content of paragraphs 23 to 28 and corresponding foot-notes, as well as the table following paragraph 28 and foot-notes thereon is entirely based, that the first general census in Greenland was made in 1834 but covered only Western Greenland. Since then, censuses have been taken every fifth or tenth year, and for the last 100 years a summary census has been taken on 1 January every year. This summary gives information on births and deaths and the total number of inhabitants of the various settlements, broken down by birthplace (in or outside Greenland), marital status and age. The table on page 13 shows the development of the population of Greenland from 1834 to 1979.

24. It will be seen from the table that during the 96-year period beginning in 1834 the Greenlandic population in Western Greenland increased from 7,500 to about 15,500 in 1930. From 1930 onwards data for the whole of Greenland became available; they show that the Greenlandic population doubled in 35 years, increasing from 16,500 in 1930 to 35,000 plus in 1965. The Greenlandic population grew particularly rapidly in the post-war period owing primarily to a great improvement in the public health service which resulted in a much lower mortality rate. The Government statistics show that from 1930 to 1948, summary mortality (i.e. the mortality figure obtained from the annual summary census referred to in paragraph 23 above) ranged from 30 per 1,000 to 45 per 1,000; though by 1965 it had fallen to 9.4 per 1,000. The birth rate also rose somewhat, ranging during the period 1930 to 1948 from barely 40 per 1,000 to 46-47 per 1,000. It peaked in 1960 at 50.2 per 1,000 then fell again, and in 1965 stood at 45.7 per 1,000.

25. Since 1965, summary mortality has been declining steadily albeit modestly, and in 1978 was recorded as 7.3 per 1,000.

26. The decline in the birth rate which began in the early 1960s has also continued and in recent years the figure has been steady at 10-19 per 1,000. This decline

<table>
<thead>
<tr>
<th>Year</th>
<th>Western Greenland</th>
<th>Northern Greenland</th>
<th>Eastern Greenland</th>
<th>Greenland Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Persons born in</td>
<td>Persons born in</td>
<td>Persons born in</td>
<td>Persons born in</td>
</tr>
<tr>
<td></td>
<td>Greenland</td>
<td>Greenland</td>
<td>Greenland</td>
<td>Greenland</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total</td>
<td></td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>a/</td>
<td>b/</td>
<td></td>
<td>a/</td>
</tr>
<tr>
<td>31/12/1834</td>
<td>7 356</td>
<td>196</td>
<td>7 552</td>
<td>...</td>
</tr>
<tr>
<td>1/1/1835</td>
<td>9 648</td>
<td>248</td>
<td>9 896</td>
<td>...</td>
</tr>
<tr>
<td>1/1/1860</td>
<td>9 720</td>
<td>280</td>
<td>10 000</td>
<td>...</td>
</tr>
<tr>
<td>1/1/1901</td>
<td>11 190</td>
<td>262</td>
<td>11 452</td>
<td>431</td>
</tr>
<tr>
<td>1/1/1921</td>
<td>13 401</td>
<td>266</td>
<td>13 667</td>
<td>250</td>
</tr>
</tbody>
</table>

Not belonging to any specific municipality:

Total population:

1/1/1976  36 888  36 888  7 552  44 440  702  47 749  2 740  289  3 029  40 350  7 899  49 249

1/1/1978  37 031  7 357  44 388  702  44 746  2 818  268  3 086  40 551  7 669  48 220

1/1/1978  37 004  6 770  43 774  713  34 747  2 839  272  3 110  40 602  9 138  49 739

1/1/1979  37 150  6 904  44 054  718  37 755  2 846  261  3 107  40 775  8 563  49 338

(See page 14 for notes)
Foot-notes to table

a/ Until 1930, "Natives". From 1945, Persons subject to Greenland law
b/ Statistical table 1.6 published by the Statistical Bureau, Copenhagen
c/ Statistical data 1.4.6. " " " " " " "
d/ " " " 3.6.2. " " " " " " "
e/ " " " 4.14.5 " " " " " " "
f/ " " " 4.66.5 published by the Statistical Department, Copenhagen
g/ " " " 4.87.6 " " " " " " "
h/ " " " 4.134.5 " " " " " " "
i/ Statistical table 1965 Greenland
j/ " " " 1969.9 published by Denmark Statistics
k/ Greenland 1975 Annual report of the Ministry for Greenland
l/ " 1976 " " " " " "
m/ " 1977 " " " " " "
n/ " 1978 " " " " " "
o/ See foot-note l/ page 1
is attributed to extensive use of contraceptive methods coupled with continuing emigration from Greenland, so that in the 1970s the population was almost stationary at about 40,000.

27. During the period 1830 to 1945 the non-Greenland population of Greenland accounted for some 2 to 3 per cent of the total population. In 1945 they amounted to some 5,000 to 6,000 persons, the vast majority being Danes.

28. The number of non-Greenlanders rose sharply in the years after 1945 owing to increased economic, social and cultural development and the resulting need for extraneous manpower. From 1945 to 1955 the non-Greenland population trebled and by 1945 it had risen to 2,500 persons or 19 per cent of the total population. As of 1 January 1979 however, the figure had fallen to 2,000 persons or 17 per cent of total population.

29. The Government of the Philippines has stated:

"The minorities have proportionately increased in number along with the tide of population explosion in the country and the availability of social and medical services."

30. There are, however, reports on the decrease in the number of certain groups. Thus, according to one source:

"The Negrito population has been decreasing, at least since the firm establishment of Spanish rule, and they now number less than 15,000."

"The Dumagates are even less numerous and less known than the Negritos ..." 13/

31. It is feared that mere contact as a result of discovery of certain groups might bring about their decrease in numbers or even their extinction:

"The threat of extinction as a result of discovery illustrates the fate that has befallen most of the small, primitive tribes whose protective isolation has been penetrated by modern man... The Tasaday's lifespan is short. No elderly man and women were found. In a group of 24 individuals, 13 were children below the age of 10." 14/

32. As concerns the Vedda of Sri Lanka, it has been reported that they numbered 2,361 according to the 1946 census and that "after increasing in number between the 1881 and 1911 censuses (2,228 in 1881 and 5,332 in 1911), their number decreased to 4,510 in 1921 and the above figure in 1946. It is added that "since many live in inaccessible parts of the eastern forests, in a primitive state, their exact enumeration is impossible". No trends are explicitly stated for the Kinnaraya, except for statements that they are "being progressively assimilated" into the Sinhalese language and cultural group. 15/


15/ Indigenous Peoples, op.cit., pp. 74 and 190.
33. As regards Sweden, the Government states that the "autochthonous minorities have diminished in number during this century" and adds, as an explanation of the probable cause for this decrease, that "one important factor may be that many Lapps have given up reindeer breeding as their means of livelihood and have subsequently been assimilated with the population in general". The Government further states that as it is difficult to define appurtenance to the Lapp group it is also difficult to estimate the size of the decrease in the number of people belonging to it.

34. According to information furnished in 1973 by the Government, in New Zealand:

"From 1926 to the present day there has been a steady increase in the proportion of Maoris to non-Maoris. In 1926 there were 4.7 Maoris to every 100 non-Maoris. By 1972 there were 8.8 Maoris to every 100 non-Maoris. In the last 10 years the Maori birth rate has been falling at a faster rate than that of the rest of the population. This is thought to be due to the fact that family limitation is a very recent practice amongst Maoris, whereas it has been normal practice amongst the rest of the population. Even so, the rate of natural increase in the Maori population is still almost twice that of the non-Maori population. In comparison with the general population the Maori population is very young. Approximately 60 per cent of the Maori people are under 20 years of age as compared with 40 per cent in the non-Maori population."

35. On the apparent reasons for this increase in Maori population in recent times and some of the factors affecting ethnic characteristics in the population, it has been written that:

"... This growth in the Maori rate of population increase is a result of a substantial drop in the death rate: the birth rate has remained fairly constant for many years, while the non-Maori figure has grown - although not to the level of the Maori rate. The Maori death rate is, however, when the age distribution of Maoris and non-Maoris is taken into account, still about twice as high as that for non-Maoris; consistently with this, the differences in the expectation of life for the two groups, while narrowing, still exist. The higher birth rate also means that Maori families are likely to be larger and that Maori housing is likely to have more occupants. The average number of occupants in private dwellings, according to the 1966 Census, was 3.5; the figure for Maori dwellings was 5.3. This, it was said, reflected also the strength of the ties of kinship and the greater propensity of Maoris for communal living.

"Not only have the numbers and the proportions of Maoris been increasing but so also have the opportunities for contact with the remainder of the population, the strains on traditional ways, and the advantages and disadvantages resulting from modern urban life: until the Second World War the vast majority of Maoris lived in rural districts but since then a massive migration to the cities has taken place. So in 1936 only 8,000 Maoris (10 per cent of the total) lived in cities, boroughs and independent town districts, and 25 years later, in 1971, about 125,000 (about 55 per cent of the total); in recent years the growth in the urban Maori population has exceeded the over-all growth figure - that is the rural Maori population is decreasing. One consequence of this

36/ The autochthonous minorities mentioned by the Government are the Lapps and the Finnish-speaking population, and what has been said about the Lapps applies also to the other group.
movement is that Auckland, the largest city in New Zealand, can also be called, with 50,000 Maoris and 15,000 Pacific Islanders, the largest Polynesian city in the world. Further, these increases still proceed although perhaps the flood is easing; thus in the five years between the last censuses the Maori population of Auckland has increased by about 25 per cent, that of Wellington by almost 50 per cent and that of Christchurch by about a third.

"The increase in population and the movement into the cities has been paralleled by an increase in intermarriage and children of mixed-racial origins. Thus a 1966 census survey of almost all the children classified as Maoris for census purposes (that is, all those of half Maori origin or more) showed that 47.5 per cent were full Maoris, while the 1961 figure was 49.4: 1956, 54.1 and 1951, 61.0. Of those with mixed origins more than two thirds had at least one parent who was a full European or full Maori." 17/ 36. A study on the indigenous population of America prepared in 1978 by the Inter-American Indian Institute includes the following information on Guatemala:

1. As regards the absolute numerical size of the indigenous population and its relative numerical size within the total population:

"Guatemala has proportionally the highest percentage of indigenous population of all the American countries. Available statistical and census information shows constant growth. In 1950 the indigenous population was 1,497,261 and in 1964 1,820,960; in 1973 it was 2,226,024.

"As may be seen from Table 1 (Guatemala), the indigenous percentage of the country's population is less in the 1964 and 1973 censuses than in that of 1950. This drop is questionable and may be attributed to a change in census criteria. It is probable that the population considered indigenous in one census was counted as non-Indian in another. The National Indian Institute of Guatemala considers that the census criteria used are debatable." 7/ 17/ The National Indian Institute of Guatemala reports that the census criteria used to identify the indigenous population are the following:

1. The basis was the investigation of social esteem to determine whether or not a person is considered Indian.

2. The person enumerated is asked directly whether or not he is Indian.

3. He is asked whether the majority of the family at home speak an indigenous language. It is considered that:

'The above criterion is in no way recognized as valid by the National Indian Institute, and the competent authorities will be duly informed. This means that the total figure for the indigenous population, supplied by the General Statistical Office, is debatable'. National Indian Institute. Official letter 102-21/3/75. 18/
This opinion is reinforced by data from 1940, when according to the census 68.3 per cent of the population was indigenous. The decreases of 1940-1950 and 1950-1964 can only be explained by a change in the external identification criteria.

"The Institute considers that the indigenous population enumerated in 1973 was underestimated by 30 per cent. We projected the 1973 result to 1978 applying the national growth rate including the 30 per cent. This correction factor must be regarded as modest since the 1940 percentage was not reached.

"The 1964 census revealed the existence of a large sector of urban Indians amounting to 17.3 per cent of the indigenous population. In the 1973 census, 24.03 per cent of a total of 2,260,024 Indians were urban dwellers; for 1978 we have assumed that this percentage is maintained."

37. As regards the evolution of the indigenous population over the last 38 years:

<table>
<thead>
<tr>
<th>Year</th>
<th>Indigenous population</th>
<th>% of national population</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940</td>
<td>1,504,896</td>
<td>68.3</td>
</tr>
<tr>
<td>1950</td>
<td>1,497,261</td>
<td>53.6</td>
</tr>
<tr>
<td>1964</td>
<td>1,820,960</td>
<td>43.3</td>
</tr>
<tr>
<td>1973</td>
<td>2,260,023</td>
<td>43.7</td>
</tr>
<tr>
<td>1978</td>
<td>3,739,914</td>
<td>59.7</td>
</tr>
</tbody>
</table>


38. With regard to the general statistical trends discernible among the Amerindian populations of the western hemisphere, we may quote the following paragraphs from a work published in 1953 which, because the analysis they contain is so accurate and because the trends they describe have continued, are still relevant in the present-day situation:

"Rosenblat distinguishes two zones as regards the demographic structure of indigenous America: a peripheral or extinction zone; and a zone of concentration or increase. He describes the former as a zone of shock or conflict where the aboriginal population, made up of relatively small groups of nomads who live by hunting, or alternate between this and primitive agriculture, was subject to encirclement and pressure by the whites. These gradually took possession of their lands and hunting grounds in order to use them for new forms of production; and the Indians were obliged to retire to less accessible land, which was also usually much poorer, or gradually disappeared owing to inability to adapt themselves to the new conditions of life.
and work imposed upon them by the colonists, to lack of immunity against the diseases imported from Europe and, in some regions, to constant racial mixture. In a considerable part of this zone the aboriginal population has been replaced by Negroes, who - Rosenblat says - have proved more adaptable to modern forms of employment in the coastal and tropical regions. In the second zone the whites have economic and political control but are, ethnically speaking, a small minority; here the population is composed to a very large extent of compact indigenous groups, which continue to speak their aboriginal languages and keep up - in a stage of stagnation - their traditional forms of economic organization and many cultural features and institutions. This population appears to be steadily increasing and its birth-rate rather more than makes up for the decrease in the first zone.

"Rosenblat's analysis seems to amount, in general terms, to the following: geographically, the peripheral or extinction zone is composed of the coastal and forest regions; while the zone of concentration and of increase comprises the high plateaus of the Andes and the mountainous regions of Central America and Mexico. This includes in particular the large, compact Indian and mestizo groups belonging to the various traditional indigenous communities (comunidades, parcialidades, etc.) of Bolivia, Peru, Ecuador, Central America and - to a smaller extent - Mexico, as well as the Indians settled in the reservations of Chile, Colombia, the United States and Canada. The peripheral zone would include some of the Indian forest-dwellers of the Chaco region (Argentina, Bolivia, Paraguay), the Amazon and Orinoco regions (part of Brazil, Colombia, Peru, Venezuela), Ecuador and some semi-tropical regions in Central America and Mexico. Among the forest-dwelling tribes which appear to be in course of extinction, mention may be made of the Pilagá of the Argentine Chaco, the Caingang and Carajá of Brazil, the Jívara of Ecuador, the Nitolon of Colombia and the Lacandon and Siri of Mexico, as well as the indigenous populations of Tierra del Fuego (Chile and Argentina) and Patagonia (Argentina)." 19/

STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Final Report (first part) submitted by the Special Rapporteur
Mr. José R. Martínez Cobo

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<tr>
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<td>121 - 150</td>
<td>41</td>
</tr>
</tbody>
</table>
VII. Basic principles

A. Introductory remarks

1. In many countries, the words "basic principles" make reference to measures adopted for the establishment of adequate machinery to take charge of indigenous affairs and implement the official State policy as concerns the indigenous populations. In other countries, measures to eliminate discrimination against indigenous populations, either in general terms or in special areas, may have been taken as fundamental ingredients of action to overcome unsatisfactory institutions or practices. Some provisions deemed to be of permanent relevance in this field may have been enshrined in the Constitution or other fundamental laws. Special legislative enactments, administrative rulings, executive decrees and judicial decisions may have come to form a mass of legal pronouncements seeking to solve the legal and practical problems arising from the application of the officially adopted outlook vis-à-vis indigenous populations, and to bring State action to take due account of the desires and preferences of the indigenous populations themselves. A body of law may exclusively contemplate indigenous populations in all relevant aspects of State action.

2. It is not possible to deal in this chapter with all these matters, many of which will be discussed under the appropriate headings further on as part of the respective areas of study. Thus, for example, questions of policy will be discussed under the "fundamental policy" chapter, while another chapter will deal with "administrative arrangements", grouping all the material on machinery created for action in this field. Each of the substantive chapters discussing matters relating to "health", "housing", "education", "language", "culture", "occupation", "employment", "land tenure", "political rights", "religious rights and practices" and "legal assistance and fair administration of justice" will deal with the most important decisions and action taken in the particular area of action enunciated in the corresponding table.

3. The present chapter, then, will have the limited function of indicating what questions concerning indigenous populations may have been dealt with in constitutional provisions or other fundamental laws, and the fundamental juridical status attributed to those populations. It will also mention the special basic legal provisions dealing with indigenous populations and the measures taken or contemplated to put an end to discrimination against such populations in general terms, or in areas not specifically covered in the chapters dealing with the ten areas of study mentioned above. In preparing the final report, when it is hoped that confirmed data will be available, treaties concluded between a few States and some indigenous nations and peoples will be mentioned as basic provisions in those systems, regardless of whatever discussion may be included later under each particular area where the existence and effects of these treaties may be relevant.

B. Fundamental provisions concerning indigenous populations

4. In some countries there is no systematic set of legal provisions (laws, regulations, administrative and executive decisions or judicial rulings) that constitute a legal regime applicable to the indigenous populations. These countries have isolated provisions dealing with specific aspects which remain ad hoc provisions, unrelated to others unless they are amendments to them. Other countries have moved from a system of isolated provisions to a systematic body of law. In still others, by contrast, a broad and comprehensive legal regime has disappeared in the course of time and all that is now left is a number of measures and provisions relating to particular subjects.
5. Although it is clear that State action can in theory be better directed in a systematic and coherent way through clear and co-ordinated legal channels within a specific body of law, the fact of indicating that a special legal régime does or does not exist in particular countries is not intended to give the impression that the lack of such a régime makes effective and methodical action impossible. Such action can be carried out with or without legal rules of this kind, while conversely, the lack of action does not necessarily result from the absence of such a régime. Attention is simply being drawn to a situation in which legal development has been either diffuse or concentrated, these being discernible characteristics, in order to constitute groups for the sole purpose of organizing the description given in this chapter. It must be emphasized that reference is made to the available data concerning basic provisions as presented by the material that serves as the basis and support for this study, especially the relevant country monographs in the form in which they were communicated to the Governments concerned for their observations and comments. Naturally, where replies have been received, the observations and data provided have been duly taken into consideration.

6. In this connection, the available information on Nicaragua appears to show that between 1880 and 1935 a series of legal texts were promulgated in connection with the sale and leasing of land belonging to indigenous communities, the restitution and gift of land to those communities and legal personality for them. A number of these texts relate to the status of the Miskito Indians. For example, a decree of 28 February 1893 provided that the Indians concerned were to remain under the protection of the Republic and that all income derived from the Miskito territory along the coast would be invested for their benefit. On 5 October 1903 it was provided that each of the indigenous families established in the villages and settlements within what had formerly been the Miskito reserve would be assigned ownership of four manzanas of land. In pursuance of the treaty concluded in 1905 between Great Britain and Nicaragua with respect to the territory of that reserve, a decree dated 21 August 1905 provided for the establishment of an ad hoc committee responsible for legalizing the title of the Indians to such land as they had acquired and for awarding plots of land to those who did not possess any. By a decree of 24 May 1934 it was decided to donate 40,000 hectares of land to the creole/indigenous community of Bluefields. Decree No. 293 of 26 November 1945 established the National Indigenous Institute of Nicaragua.

7. According to the available information on Paraguay, Supreme Decree No. 81 was issued over 100 years ago, on 7 October 1840. This has been described as the first basic text dealing with certain aspects of the activities and properties of the indigenous groups of that time. Subsequently there was a multitude of isolated provisions dealing with specific aspects, but they were never compiled or recast in the form of a consolidated and systematic legal text. Indeed, it was reported in 1975 that in Paraguay there is no specific indigenist body of laws. The indigenous population is mentioned in laws, decrees and resolutions concerning land property and labour contracts. The most specific is Resolution No. 1689, 3 October 1973, of the Instituto de Bienestar Rural, the government office for questions of land distribution. It recommends that all indigenes be inscribed in the birth register in order to obtain full civil rights, but this recommendation comes from an office without legal authority for this matter.

1/ Ramón César Bejarano, "Solucioneamos el Problema Indígena" (Protección de sus Derechos), article published in the daily newspaper ABC Color on 24 December 1972.

2/ Information supplied by the Anti-Slavery Society on 3 September 1976.
8. As concerns the Aché, Resolution No. 391, 13 June 1957, of the Minister of the Interior, states that the killing, injuring or kidnapping of Aché "of any age or sex" is a crime that must be punished "with all severity of law". This is completed by Circular No. 1 (3 September 1957) of the Supreme Court of Justice, stating (with reference to all indigenes, but meaning especially the Aché case) that "the Indians are as much human beings as the other inhabitants of the national territory". 3/

9. In the case of some other countries, all that is available is a specific body of data relating to a particular subject or to certain matters in particular.

10. In some of the latter countries, stress is placed on the creation of agencies and other machinery as basic provisions for the establishment of effective services to the indigeneous populations.

11. Thus, in Venezuela, Decree No. 20 of 6 March 1952 set up the National Indigenous Commission, whose functions are set forth in article 3 of that Decree. 4/ The Commission is the body called upon to promote the policy adopted towards the country's indigenous population in furtherance of the constitutional provision concerning "the exceptional system required for the protection of the indigenous communities and their gradual incorporation into the life of the nation" (article 77 of the Constitution). 5/

12. In the Philippines, the creation of the Commission on National Integration was hailed as the institution of the agency needed to achieve the goals proclaimed in the Constitution concerning the National Cultural Communities, on which the Philippines Government, making reference to Article XV Section II of the Constitution, has stated that the laws of the country officially recognize through special provisions and exceptions for the benefit of the members of the groups collectively referred to as National Cultural Minorities recently changed to National Cultural Communities by the New Constitution. The Bill of Rights of the Constitution guarantees expressly the fundamental constitutional rights to every citizen without any distinction as to any ethnic, religious or linguistic classification or groupings. 6/

13. The Bill of Rights embodied in the old and new Constitution guarantees the right of all persons to enjoy their own culture in the manner not contrary to the laws of the land, and according to the Government:

"the provisions of the new Constitution are the culmination of the recognized right of the minorities to autonomous cultural development. There is no law abridging or stultifying such natural right of the individual. The Philippines specifically prohibits class legislation and any law found to be of such nature is declared unconstitutional and hence, null and void."

3/ Ibid.

4/ See the section on administrative arrangements, which will be submitted at a later stage.

5/ See section C below on specific constitutional provisions relating to indigenous populations.

14. In the preface to the 1973 Report of the Commission on National Integration the then Chairman of the Commission Mr. Sinsuat stated that "the Government agency commonly known as CHI (Commission on National Integration) was organized by an act of Congress, R.A. 1000 on 22 June 1937 ... This agency has the task of working for the political, social, moral and economic uplift of the National Cultural Communities (Minorities) and hence, speeding their integration into the body politic". He added that "... The legal fiction does not contemplate a dominating culture of groups since equal status is recognized and the numerical minority is protected and given special attention."

15. As regards the native Muslim inhabitants, the same author has stated:

"The Filipino Muslims together with the other ethnic minority groups of the country have now been guaranteed recognition in the fundamental law of the land (see article XV of the Constitution).

"The great attention and massive thrust of socio-economic development of the Muslim areas of Mindanao and Sulu by the present administration has given proof of the sincerity in the implementation of this vital provision in the new Constitution. Now the ethnic cultural minorities could feel secure that they will not lose their identity and culture. For it is when the minority groups feel that it is not possible to merge into a larger political and national community as an integral but distinguishable part of it that they will succumb to dejection and perhaps demand self-determination in their own right." 7/

16. In Laos, it would appear that emphasis is placed on certain aspects of education. According to a Government statement on legal matters, article 3 of Royal Ordinance No. 248 of 30 July 1972 relating to the reform of the education system stipulates that a special effort will be made to ensure women, villagers and ethnic groups real equality of access to education. In all possible cases, ethnic groups will receive primary education in their mother tongue at the same time as education in the national language. The application of the principle of equality of education has, however, encountered innumerable problems in the case of heterogeneous nomad minorities comprising several subgroups and speaking very different dialects among themselves. In this case, in an effort to reduce de facto inequality, the Ministry of Education has decided to draw up for their benefit special lists of admission to the normal schools, and hopes in that way to be able to extend education further to the children of these minorities through the use of teachers with the same ethnic background. 8/

7/ Sinsuat, Datu Mama S., The Filipino Muslim, Speech delivered on 24 September 1973, at the Symposium-Discussion Series on National Development, sponsored by the Department of Foreign Affairs and Department of Public Information. Asian Institute of Management Building, Makati, Rizal, p.5.

17. Information available on Australia in connection with basic provisions does not show the existence of any systematic body of law on Aboriginals, except in the State of Queensland. More will be said later in connection with the Queensland Statutes and Regulations regarding Aboriginals and Torres Strait Islanders (see paragraph 149 below).

18. The Australian Constitution no longer makes any special provision for Aboriginals. In May 1967 a referendum resulted in a massive vote in favour of two changes in the Constitution: section 127, providing that Aboriginals should not be counted in censuses, was repealed; and the words "other than the Aboriginal race in any State" were deleted from Section 51 (xxvi), which had formerly read:

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

"... (xxvi) the people of any race other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws."

19. The result was to confer upon the Commonwealth a concurrent power to make special laws for people of the Aboriginal race in any State if the Parliament considered it desirable or necessary.

20. Previously, the State Governments had exercised sole legislative power and responsibility for the Aboriginals resident within their boundaries, responsibility for Aboriginals in the Northern Territory being vested in the department of the Commonwealth Government which administered the Northern Territory. The State departments responsible for Aboriginal affairs functioned under various State Acts. Most of the protective and restrictive provisions of State and Territory legislation had been removed in the 1960s though the process of repealing such provisions is only now being finally completed.

21. Since the 1967 referendum above-mentioned, the Commonwealth has not introduced fundamental national legislation in respect of Aboriginals, although it has repealed sections of Commonwealth laws and encouraged the repeal of State legislation that might be regarded as discriminatory.

22. Legislation in Peru does not refer to the Indian as an isolated individual but to the Indian as part of an indigenous community. There is a special legal régime for the traditional indigenous communities, and special laws or decrees have been promulgated protecting the Indian in such areas as wages, the organization of producers' co-operatives, personal services, domestic work by minors, internal migration and schools. Once he is considered as a worker, the Indian comes within the framework of the general legal system whereas as a member of a traditional community he is subject to special provisions of the Constitution, or of the Civil Code as far as the system of land tenure is concerned.

23. Articles 207 to 212 of the Peruvian Constitution are quoted below in the section on specific constitutional provisions relating to indigenous populations. 2/

Title IV of the Civil Code of 1936 provides as follows:

2/ See para. 72 below.
"Art. 70. The indigenous communities shall be subject to the relevant provisions of the Constitution and of legislation enacted in accordance with the requirements of the Constitution.

"Art. 71. It shall be mandatory for these communities to be entered in their own special registers. It shall also be obligatory to keep community land registers and to conduct a census review once every five years.

"Art. 72. The communities shall be represented by persons elected from among the individuals of full age forming the community; individual members of the group who can read and write and who have obtained an absolute majority of the valid votes shall be elected.

"Art. 73. The indigenous communities cannot rent or transfer the use of their land to the owners of adjoining estates.

"Art. 74. Pending the enactment of the legislation referred to in article 70, the indigenous communities shall continue to be subject to their specific laws, to the ownership regime laid down in this Code in so far as it is consistent with the indivisibility of their land, and to provisions issued by the Executive Power."

24. Act No. 14,669, relating to the election of Municipal Councils, establishes the right of the indigenous communities to elect their representatives to speak and vote in the District Municipal Councils. The communities may replace these representatives one year after their original appointment, or as vacancies occur (articles 55 to 60).

25. Decree-Law No. 20,653 issued in June 1974 deals separately with the native communities of the forest and forest-bordering regions. The preamble states that a basic requirement for the regions in question is the introduction of an orderly system governing the rights to own, use and work the land. The following articles of the operative part of the Decree-Law are of interest here:

"Article 1. The object of this Decree-Law is to establish an agrarian structure contributing to the over-all development of the forest and forest-bordering regions so as to enable their population to attain levels of living compatible with the equality of human beings.

"...

"Article 6. The State recognizes the legal existence and the juridical personality of the native communities."

26. Decree-Law No. 21,156 of 27 May 1975 recognized Quechua as an official language of Peru on an equal footing with Castilian Spanish, and certain legal provisions intended to give practical effect to that declaration were adopted. 10/ Peru's Criminal Code contains provisions for determining the applicable penalty in certain cases where an Indian is the perpetrator or victim of an offence, with a view to affording special protection to the Indian (article 45, in connection with articles 42 and 90, and articles 225 to 227)." 11/

10/ See the chapter on language (L/C1T.4/Sub.2/476/Add ...).
11/ See the chapter on legal assistance and fair administration of justice.
27. In Ecuador, the legislation adopted in connection with the indigenous communities includes Supreme Decree No. 23 of 7 December 1937 (Legal Status of Peasant Communities) which recognizes the legal personality of such communities and provides for efforts to be made to convert them into producers' co-operatives. It is stated that customs and "the present situation" determine the status of members of the community. Participation in the use of community land is determined by the number of members of each family and the benefits they derive, and is in proportion to the work performed by each individual, except in the case of work carried out for the collective benefit (articles 1 to 5). Title II of this Supreme Decree contains the following provisions for the protection of the indigenous communities:

"Article 7. The State shall provide effective protection and tutelage to the peasant communities, in particular through the Minister for Social Security, who shall have the following functions and duties in this regard:

(a) regulating the use of community capital goods, taking into account the conditions and ways of life of the various communities;

(b) assigning officials to visit the communities at least once a year, to ascertain whether they are complying with the relevant laws and regulations and to report on their requirements, in order that these can be duly met;

(c) keeping the register of communities;

(d) arranging for a topographical survey to be made of the community settlements and for a census to be carried out of each community; and

(e) expropriating water and land that are essential to the maintenance of the communities.

"Article 8. Should the communities require capital for the purpose of productive investment in agriculture, they may, with the authorization of the Minister for Social Security, mortgage community property and banking institutions.

Any mortgages constituted in this form shall have all the effects indicated in the ordinary law.

"Article 9. The State or the municipalities shall found at least one primary school in each community."

28. The following has been written about the effects of the foregoing Decree:

"In 1937 the Law of Communities established the legal status of Indian communities and provided for a new system of local government. However well-intentioned, this law began with the assumption that communal lands were more extensive than they actually were, and therefore the law had little effect." 12/

12/ Veil, Thomas B., and others, Area Handbook for Ecuador, Foreign Area Studies, American University, Washington D.C., p.79.
28A. Finally, with regard to language, article 1 paragraph 3 of the Ecuadorian Constitution states that "The official language is Castilian Spanish. Quechua and other indigenous languages are recognized as forming part of the national culture."

29. In many countries there is a group of texts or a single fundamental text, sometimes with supplementary stipulations, purporting to deal systematically with basic issues affecting indigenous populations. Information on these aspects varies from the bare mention of the relevant texts (often starting with concurrent ad hoc texts or measures that have come to be incorporated into a body of law applicable to indigenous populations), to a discussion in historical perspective of the process of integration of the pertinent texts into a body of law and/or the disintegration of that body of law into separate texts.

30. In Burma, the aborigines, and particularly the forest-dwelling populations, are governed by special regulations applicable to the hill tracts of the Kachin, Shan and Kayah States and the frontier areas. The aims of the Chin Special Division Act of 1948 are to make the aborigines in that area self-governing and to assist them to improve their standards of public health and education (including technical and vocational training), and their economic conditions.

31. In Norway the first part of the Act of 12 May 1933 contains provisions granting the exclusive right of reindeer husbandry to the Lapps. According to the Act of 13 June 1969 concerning the Basic School (section 41, subsection 7), children of parents who use Lappish as their daily spoken language shall be provided with teaching in Lappish if their parents so demand. Among relevant Royal Decrees (decisions by the King in Council), the following may be mentioned: the Royal Decree of 20 November 1962 containing specific measures of an economic and cultural nature to make it possible for the Lapps to improve their skills and realize their potentialities within the framework of society; the Royal Decree of 19 June 1970 concerning measures for improving housing conditions for the Lapp population in Inner Finnmark; and the Royal Decree of 26 June 1974 concerning a plan of action aimed at strengthening the economic base and ensuring the pattern of settlement of the Lapp population in Inner Finnmark.

32. In Malaysia, the legal position of the Orang Asli is entrenched in a fundamental law, the Aboriginal Peoples (Amendment) Act 1967. This Act defines the Orang Asli, allocates responsibility for the administration of their affairs and their general well-being and advancement, and contains a statement of Government policy with regard to these matters (see also paragraph 79 below).

33. In Indonesia members of all isolated groups are nominally Indonesian citizens and are thus subject to the basic provisions of the 1945 Constitution. Supplementary to that Constitution is the Law on the Basic Stipulation of Social Welfare (No. 6 of 1974) which, inter alia, imposes on the State the obligation to handle the problems of isolated communities and to bring development to them. The Law does not define rights or obligations of such isolated communities but is rather a general act laying down broad guidelines for the State to follow in its dealings with them.
34. In Guyana, in addition to the constitutional provisions quoted in another part of this report, 13/ basic provisions relating to Amerindians are contained in the Amerindian Ordinance and the State Lands (Amerindian) Regulations. Provisions of these fundamental texts are quoted in several parts of the present study. The Government stated that provisions on the protection of fundamental rights and freedoms apply to every person in Guyana "including the indigenous populations".

35. In Brazil there is a special law, the Indian Statute, Act No. 6001 of 19 December 1973, incorporating all basic provisions on the indigenous populations of Brazil, among which the following may be cited here. */

"Art. 1. This law regulates the juridical situation of the Indians or forest-dwellers and native communities for the purpose of preserving their culture and integrating them progressively and harmoniously in the national communion.

"Sole Paragraph. The protection of the laws of the country is extended to the Indians and native communities in the same terms as it applies to other Brazilians, safeguarding native usages, customs and traditions, as well as the particular conditions recognized in this Law.

"Art. 2. It is the duty of the Union, the States and the Countics (municipios), as well as the agencies of the respective indirect administrations, within the limits of their competence, for protection of the native communities and preservation of their rights, to:

"I - Extend to the Indians the benefits of common legislation, whenever application thereof is possible.

"II - Furnish assistance to the Indians and native communities, even though they are not integrated in the national communion.

"III - Respect, while providing the Indians with means for their development, the peculiarities inherent to their condition.

"IV - Assure the Indians of free choice of their way of living and means of subsistence.

"V - Guarantee the Indians the right to remain, if they so wish, permanently in their habitat, providing them with resources there for their development and progress.

"VI - Respect, in the process of integrating the Indian in the national communion, the cohesion of the native communities, and their cultural values, traditions, usages and customs.

*/* English text supplied by the Government of Brazil.

13/ See Section С below, "Specific Constitutional Provisions dealing with Indigenous Populations".
"VII - Carry out, whenever possible with the co-operation of the Indians, programs and projects tending to benefit the native communities.

"VIII - Utilize the co-operation, spirit of initiative and personal qualities of the Indian, with a view to improving his living conditions and integrating him in the development process.

"IX - Guarantee the Indians and native communities, in the terms of the Constitution, permanent possession of the land they inhabit, recognizing their right to exclusive usufruct of the natural wealth and all the utilities existing on that land.

"X - Guarantee the Indians full exercise of the civil and political rights to which they are entitled by law.

"..."

"Art. 4. The Indians are considered:

"I - Isolated - when living in unknown groups, or groups of which only a little vague information is forthcoming from fortuitous contacts with elements of the national community.

"II - Integrating - when in intermittent or permanent contact with alien groups, living to a greater or lesser extent in the conditions of their native existence, but accepting certain practices and ways of life common to the other sectors of the national community, of which they stand progressively more in need for their very subsistence.

"III - Integrated - when incorporated in the national community and recognized in full enjoyment of their civil rights, even while retaining practices, customs and traditions that are characteristic of their own culture."

36. The information relating to some countries contains references to the process of gradual integration of the basic instruments now governing State action in indigenous affairs.

37. In this respect, the following statements relating to Chile may serve as an example of the gradual process of consolidation of legislation which typifies some phases of the process noted in many countries.

"A large number of decrees and laws have been passed in stages with the aim of providing legal protection for land ownership in the Araucanian reserves.

"A chronological list of those instruments is omitted in view of the fact that they are all now consolidated in a single text: the Act on the Division of Communities, the Repayment of Loans and the Settlement of Indigenous Persons (No. 4.11), adopted on 12 June 1931." 14/

38. In information supplied in 1975, the Government also mentioned Act No. 14,511 of 3 January 1961 and "the present Act No. 17,729".

39. The Special Rapporteur recently learned of a Decree-Law signed by the President of the Republic of Chile on 21 May 1979; it contains provisions concerning the indigenous population of that country.

40. The process of elaboration of legislative provisions in this matter in Colombia has been described as follows:

"Subsequent provisions amending and supplementing Act No. 89 did not alter its character as an instrument aimed exclusively at regulating land tenure among the communities placed in reserves (reducidas) which had still not lost all they received under the Spanish crown. The Indigenous Statute was supplemented by Act No. 36 of 1921, which provided that 'The indigenous populations dealt with in Act No. 89 of 1890 may not be assigned to any service by individuals or authorities of any kind unless they are paid the appropriate wage, stipulated in advance'. Since that time, the best-known modification of this legal system lay in two provisions of Act No. 135 of 1961, or social agrarian reform. The first empowered the Colombian Agrarian Reform Institute (INCODA) to restructure the indigenous properties and, where necessary, 'to provide them with additional areas of land or facilitate the settlement of the surplus population'; the second authorizes it to divide up the remains of the communities already placed in reserves. Most of the 70 surviving reserves, whose native population has more or less merged with the present smallholders of the Colombian Andes, are in this situation. However, the good intentions which appear to underlie these regulations are in practice counteracted by the obligation imposed on indigenous persons to pay for the new land assigned to them, often on ridiculous terms. Such is the case of the tribes of the Sibundo Valley: once the expropriation of their lands had been publicly announced by the Capuchín-Catalan community of Putumayo, INCODA proceeded to purchase the lands occupied by the religious communities in order to divide them up among the natives, after a major drainage operation had been carried out which put up the price (according to the original calculations) to over 20,000 pesos (US$1,000) per hectare.

"Let us pass over the ineffectiveness of the limited legislation protecting the work of the indigenous minorities most assimilated into the life of the nation, in order to see how extensive it is in comparison with that enacted for the benefit of the "savages", which were under the jurisdiction of the missionaries. For these only a short piece of national legislation was found (Act No. 60 of 1916), which provided that settlers could not be allocated land 'in territories occupied by Indians'. This was subsequently restricted by the above-mentioned Act No. 135 under the favourable attitude towards the Division of Indigenous Affairs' but was supplemented by the following: 'The Institute (INCODA), after consultation with the Ministry of the Interior, shall set up reserves of land for the benefit of the indigenous groups or tribes which do not possess them'.
This piece of legislation is totally ineffective, since: (a) no settler has ever been refused a plot of land, because when land has been allocated to a settler the natives have disappeared; (b) during the 10 years when Act No. 135 was in force, not even one reserve for indigenous peoples was set up, despite the fact that the number of groups which were compulsorily displaced ran into the hundreds.

41. Furthermore, the effects of this legislation:

"... are evident in bizarre situations [to which it gives rise] and in the permanent infringement of the most elementary human rights.

For example: the Supreme Court of Justice recently ruled that since the natives who were not culturally assimilated were outside the range of national legislation, there was no legal penal system applicable to them. This does not, however, prevent many of these natives accused of more or less serious offences from spending months and years in prison awaiting a judgement that never arrives."

42. On the subject of present efforts to update legislation concerning the indigenous populations, the Government of Colombia states that intensive work is proceeding on matters connected with the preparation of a statute modernizing the concepts of integration and cultural exchange, to replace the anachronistic and obsolete legal system based on Act No. 39 of 1890. At present, priority is being given to implementing regulations for Act No. 61 of 1967 approving the ILO Convention on Indigenous and Tribal Populations, which will become the most effective instrument for protecting the land, lives and assets of those peoples. The National Indigenous Policy Council has also been restructured recently in order to make it more effective. Agencies working at the level of the indigenous communities, on which genuine representatives of these ethnic minorities will hold seats, are to participate in its work.

43. The following text, containing a list of legislative instruments relating to the indigenous populations of Costa Rica and some information on the National Commission for Indigenous Affairs, has been supplied by the Government of that country:

Act No. 124 (21 August 1943) authorized the Executive to sign the instrument of accession to the Convention establishing the Inter-American Indian Institute, with headquarters in Mexico City.

Decree No. 45 (3 December 1945) established the Board for the Protection of the Aboriginal Races of the Nation and established territorial reserves for the indigenous tribes.

Decree Law No. 346 (13 January 1949) granted legal status to the Board for the Protection of the Aboriginal Races of the Nation.

Decree No. 11 (3 January 1950) identified the indigenous schools within the reserves.

Decree No. 34 (15 November 1956) defined the territory of certain indigenous reserves.


16/ V.D. Bonilla, loc.cit.
Act No. 2025 (14 October 1961) established the Institute of Lands and Settlement (ITCO) to initiate agrarian reform in Costa Rica. This Act clearly provides that the so-called Indigenous Reserves are in future to be considered national reserves and that ITCO is to be responsible for their administration. This means that the Protection Board no longer performs this function.

44. In 1971 a movement developed with the objective of combining in a single entity the voluntary pro-indigenous groups and the Board for the Protection of the Aboriginal Races of the Nation. This resulted in the creation of the National Commission for Indigenous Affairs (CONAI), but it was not until 11 July 1973, under Act No. 5251 that this body was granted legal status as an autonomous agency under public law and financed from public funds. The composition of this Commission and its Executive Board, and details of their respective functions and the funds required for the performance of their important tasks, will be discussed in the section on administrative arrangements.

45. Since the establishment of CONAI, important legislation, prepared with the Commission's active participation, has been passed. This includes:

Executive Decree No. 5904-G (14 March 1976), which established a number of indigenous reserves, defined their boundaries, and took a number of extremely important measures in connection with the indigenous community of Costa Rica.

Executive Decree No. 5905-G (26 March 1976), which declared some indigenous reserves to be national emergency areas, in view of the constant invasion of these lands by non-indigenous persons. This Decree also provided that the National Emergency Commission and the Executive should co-operate with CONAI in protecting these reserves and guaranteeing the safety of their inhabitants.

Executive Decree No. 6036-G (26 May 1976), which recognized other indigenous communities, declared the territories they occupied to be "indigenous reserves", made minor alterations to the boundaries of the reserves, and corrected errors and omissions in the earlier texts.

Executive Decree No. 6037-G (26 May 1976), which extended to other indigenous reserves certain provisions of Executive Decree 5904-G and entrusted CONAI with a number of important functions;

Executive Decree No. 6666-G (14 March 1977), which rectified omissions in previous decrees relating to the land registration procedure for Indigenous Reserves.

46. Act No. 6172, the Indigenous Affairs Act of 20 December 1977 17/ deserves special mention. It is the culmination of a successful promotion and co-ordination process on CONAI's part, under the provisions of article 4 of Executive Decree No. 6037-G. This act consolidates all the legal provisions referred to above that were in force in December 1977.

47. Also worth noting are the regulations issued under the Indigenous Affairs Act, Executive Decree No. 8407-G of 26 April 1978, 18/ which embody the necessary provisions for the implementation of Act No. 6172.

17/ La Gaceta Diario Oficial, 20 December 1977
18/ Ibid., 10 May 1978.
Basic provisions made for the indigenous peoples of Canada have been summarized by the Government in historical perspective as set out in the following paragraphs.

"Special legal and constitutional provisions relating to the native people of Canada extend back to colonial administration: most such references have to do with the protection of Indians on lands reserved for them. Thus, at the capitulation of Montreal to the British in 1760, the document of surrender stipulated:

'Article 40. The savage or Indian allies of his Most Christian Majesty shall be maintained in the lands they occupy if they wish to remain there; they shall not be disturbed on any pretext whatsoever ...'

"The British administration in 1763 established its policy toward native people in North America in a Proclamation of His Majesty George III, forbidding private purchase of land set aside for Indians and requiring the licensing of anyone who wished to trade with the Indians. It said in part that Indians 'should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them, as their hunting grounds ...' This early royal proclamation has the force of a statute in Canada and has never been repealed.

"At Confederation in 1867, the new constitution of Canada, the British North America Act, made clear in the sections dividing the jurisdictions between provincial governments and the federal government that the federal government assumed responsibility for Indians and lands reserved for the Indians' (91(24)).

"In a decision of the Canadian Supreme Court in 1959, Section 91 of the BNA Act was said to include 'Eskimos' in the term 'Indians'.

"In subsequent legislation establishing new provinces or extending their boundaries, provisions were explicitly made retaining federal responsibility for Indians and Indian lands. In a particular case, the transfer of the northern Ungava region to the province of Quebec in 1912 included the stipulation that the provincial government 'will recognize the rights of Indian inhabitants in the territory ... to the same extent and will obtain surrender of such rights in the same manner as the government of Canada has heretofore recognized such rights and has obtained surrender thereof'. The provincial government has not subsequently acted to reach agreement with the Indians resident in the area.

"The first post-Confederation act dealing with 'Indians and lands reserved for Indians' was passed in 1860, entitled 'An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance lands'. This Act provided, inter alia, that the Secretary of State would be the Superintendent General of Indian Affairs who would have the control and management of the lands and property of Indians in Canada. This Act was amended in 1869 and 1874.
"In 1876 the first act to be entitled the 'Indian Act' was passed for the purpose of amending and consolidating the laws respecting Indians (the 1868 Act and its amendments). This Act (1876) was the first Federal Legislation which clearly defined a 'reserve' and what classes of people would be 'Indians' for the purposes of the Act.

Native people are encompassed by the Canadian Citizenship Act (1946), and this inclusion is made specific in a 1956 amendment which states that the Act shall apply to Indians and Eskimos.

The Canadian Bill of Rights (1960) setting forth civil rights, equality before the law, freedom of religion, speech, assembly and the press, is assumed to apply to native people in that it states there shall be no discrimination 'by reason of race, national origin, colour, sex ...'.

An important legal decision in 1969, Regina v Joseph Drybones, ruled that the Canadian Bill of Rights supersedes the Indian Act where adverse discrimination appears to exist in the Indian Act. The reasons of the Court as stated by Mr. Justice Ritchie were: '... an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty'.

However a distinction may be seen in that 'positive discrimination' in the Indian Act is acceptable: a judgement to this effect was handed down in 1962 by Mr. Justice Tysoe in Regina v Gonzalez: 'The Indian Act is legislation which applied to a particular group of citizens, namely native Indians, a group which Parliament feels that for the good of its own members and for society as a whole ought to have particular rights and privileges and particular disabilities'.

'Indians and Eskimos are also assumed to be covered by provincial Human Rights Acts, which contain the same provision as that in the Canadian Bill of Rights against discrimination on the basis of 'race, national origin, and colour' in regard to matters under provincial jurisdiction, such as employment and education.

'A number of treaties between the Executive authority of Canada and various Indian bands or tribes set forth terms pertaining to the relinquishment of Indian territorial rights in exchange for specific land reserves and certain privileges. They apply only to about half of Canada and most date from the 19th century. These treaties have a particular status since they originated primarily with the executive arm of government, representing the Crown. Their particular value in the eyes of the Indian population is that they establish a relationship between the aborigines and the federal government, bypassing provincial jurisdictions.

'The case law developed in Canadian courts in dealing with Indian treaties is exceptionally sparse. The courts have ruled that the provisions of the treaties may be overridden by federal legislation but not by provincial legislation. The cases which have interpreted and applied treaty provisions make it clear that the Indian treaties constitute legally enforceable obligations. Unfortunately, the extent to which treaty obligations are enforceable, and the extent of compensation which would be accorded breaches of treaty obligations is unclear.
A recent decision by the federal government in regard to Treaty No. 7 is considered significant, however. The Treaty was signed in 1877. Indian tribes claimed that money in lieu of ammunition, promised in the Treaty, had never been paid. In March 1973 the federal government recognized the obligation and agreed to a settlement of $250,000. Several bands in southern Alberta will benefit from the settlement, which they regard as setting a precedent."

49. In New Zealand, in fulfilment of the Treaty of Waitangi (1840) and other agreements, many acts were included in the statute book to deal exclusively with Maoris or making a difference between Maoris and Pakehas. The Government has, however, been gradually removing such acts from the statute book. Thus, restrictions on the sale of liquor to Maoris were abolished in 1946 and separate registration of births and deaths in 1961; Maoris became eligible for jury service in 1961.

50. The New Zealand Government states that the greatest body of statute law still extant that applies specifically to Maoris is concerned with Maori (or ancestral) land. There are two underlying reasons for the laws specifically regarding this land. The first is that most Maori land is owned in common by families or sub-tribes, sometimes running into many hundreds or even thousands of people. This fact requires special provisions. Secondly the Maori land law includes protective provisions to safeguard the rights of Maoris to their ancestral lands.

51. In addition to the Maori land law, which is more fully dealt with later, the specialized enactments still in force are designed to remove difficulties and handicaps peculiar to, or more common amongst, Maoris than non-Maoris. Examples of such enactments are the Maori Housing Act, the Maori Welfare Act, the Maori Education Foundation Act and the New Zealand Maori Arts and Crafts Institute Act. These will be referred to in their appropriate places.

52. The Citizens' Association for Racial Equality states in this regard:

"The whole tenor of the law, as indicated above, has been to bring Maoris as rapidly as possible within the general framework of British law as applied to New Zealand. They have been granted special status only for limited periods or in limited ways. English criminal and civil law were applied as fully as the forces of government would allow, though in fact Maoris in certain districts remained beyond the pale of British law for some time, and subject to their own law and custom (often modified by Christianity). One of the most significant exceptions has been in the franchise: since 1867 Maoris have voted separately for four members of the lower house (which has always had some 80 European seats), a concession which, with the increase in Maori population, has come progressively to under-represent the Maori people, but which is jealously guarded by them as it preserves a Maori voice in Parliament.

19/ See the chapter on land, to be submitted later.
There are few other legal exceptions as far as Maoris are concerned - these were listed in the Report on Maori Affairs (The Huun Report) of 1960 - but they have been progressively eliminated since then. Most of these exceptions were discriminations in favour of Maoris but so strong has been the European pressure for conformity (and legal equality) that special Maori legislation has been largely eliminated. It has been assumed that Maoris have become so assimilated that they no longer need protection.

53. In connection with the suppression of legal exceptions in favour of Maoris the Government comments:

"The fact also is that since that time there has been a tremendous increase in special programmes for the benefit of the Maori people ..." 20/

54. As far as other countries are concerned, there is information only concerning draft legislation. The Special Rapporteur does not know what is the current status of the bills concerned, despite his having requested more specific information on important aspects.

55. Data available in connection with the United States, whether Government or non-Governmental information, is of a different character. Thus the information made available by the Government of the United States in connection with the present study under the topic of basic principles reads as follows:

"Although many Indians had been made citizens prior to 1924, on that date all Indians and Alaska Natives became citizens of the United States and of all the respective States in which they resided. Thus they are subject to the basic provisions of the United States Constitution, the State Constitutions, and local city and county ordinances unless they are on a reservation, in which case Federal jurisdiction is retained." 21/

56. With respect to the question of citizenship it has been written that:

"Citizenship was not sought by the Indians as a group; indeed, many leaders objected to the measures when they learned about it fearing that it might somehow impair their tribal relationship. Their experiences in dealing with the government had been such that citizenship was not a possession of great promise. Relatively few individuals made use of the franchise in the first years after the passage of the citizenship act." 22/

20/ These special programmes will be discussed in the pertinent chapters of the Study.

21/ The Government makes reference to educational and law-and-order services illustrated in a table it provided and which is reproduced elsewhere in the present report. The Government also mentions here that "more Indian children in so-called federally recognized reservations attended public schools than Federal schools maintained by Indians." Finally, the Government made reference to jurisdiction for Indians in the several States "for law and order functions", as appearing in the table above mentioned.

57. Further, it has been stated that:

"In the United States, Indians are citizens, and have the same rights, duties, and responsibilities to local, state and federal governments as do all citizens. Nonetheless, several conditions may modify an Indian citizen's relationship to the government: (1) the current existence of a reservation, generally established before the territory became a State; (2) still applicable provisions of treaties; (3) special federal and State statutes applying to Indians as an ethnic group, such as substantive statutes relating to Indian education and administration of trust land and statutes appropriating funds specifically for Indian programs or services; (4) recognition of some Indians as eligible for 'Indians only' federal services, usually based on (1), (2) and (3) above and generally related to Indian land held in trust by the federal government." 23/

58. In an article developed by the staff of the Institute for the Indian Tribal Curriculum and Training Program, it has been written:

"... the Constitution does not actually give the federal government any authority to govern Indian people in Indian territory. Yet it is often said that Congress has 'plenary' power (meaning complete authority) to govern Indians and Indian land, based upon one or more of these provisions in the Constitution. The United States courts, for the most part, refuse to say whether this is legal or not. The courts say that the legal status of Indian nations is a 'political question' which they cannot decide. As a result Congress, as well as the Executive Branch, has been largely free to infringe on Indian jurisdiction and sovereignty even without any clear constitutional power to do so". 24/

59. Commenting upon the constitutional provisions contained in Section 8(1) and (3) of the United States Constitution regarding Congressional power to regulate commerce with the Indian tribes and on the Government information contributed to the study and quoted above, it has been written:

"Instead of holding forth the basic constitutional recognition of Indian tribes as an example for the world - which indeed it could well be - the United States response construes the question to launch what amounts to an attack on the legal status of Indians within the federal system. The Commerce Clause of the Constitution, along with the Treaty and War powers, provide the basis for all federal Indian programs and policies. The recognition of a tribe based upon these constitution, along with the Treaty and War powers, provide the basis for all federal Indian programs and policies. The recognition of a tribe based upon those constitutional powers is the basic provision which justified federal services and federal supervision long before the passage of the Citizenship Act of 1924." 25/

25/ American Indian Law Newsletter, Vol. 7 No. 11, p.13.
Specific constitutional provisions relating to indigenous populations

61. The information on some countries does not indicate whether the relevant constitution contains provisions regarding indigenous populations. 26/

61. Some Governments on the other hand have provided specific information on this point. For example, the Government of Finland states that "The Constitution Act does not contain any provision dealing specifically with the Lapps ...", and the Government of Norway states that "there are no relevant provisions in the Constitution ...".

62. The statements of some other Governments may be interpreted in the same way. Thus, the Government of Indonesia states that "the Constitution does not recognize any distinction between citizens" and the Government of the Philippines states that "the present Constitution does not distinguish them (non-Christian tribes) from other citizens".

63. New Zealand reports that "unlike many countries, New Zealand does not have a separate body of written constitutional law. The basic human rights are guaranteed by a number of different enactments, and by common law. These apply equally to all citizens ...".

64. In a number of countries, on the other hand, questions relating to the indigenous population have been considered to be so basic that provisions regarding them have been included in their constitutions. 27/

65. Some of these constitutional texts contain only a few very brief and abstract provisions. For example, the Constitution of the United States of America, 17 September 1787, as amended up to 1967, provides that "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes (Section 8(1) and (5))." Similarly the Constitution of Argentina of 1 May 1955, as amended in 1930, 1966 and 1957, provides that "Congress shall have power to maintain peaceful relations with the Indians and to promote their conversion to Catholicism (article 67 (15))." Under article 91 of the British North America Act of 29 March 1867, which is the basic constitutional document of Canada, Parliament has legislative jurisdiction over the Indians and the land reserved for Indians (see para. 48 above). The Constitution of Venezuela of 23 January 1961 provides that the law shall establish an exceptional system required for the protection of the indigenous communities and their gradual incorporation into the life of the nation" (article 77, second paragraph) (see paragraph 11 above).

66. Other constitutional texts contain provisions which contemplate, in a more explicit form, the need to take special measures in favour of indigenous populations.

26/ These countries are Bolivia, Chile, Colombia, Costa Rica, El Salvador, Finland, France (French Guiana), Honduras, Japan, Laos, Mexico, Nicaragua, Norway, Paraguay, Philippines, Sri Lanka, Suriname and Sweden.

27/ These countries are Argentina, Bangladesh, Brazil, Brunei, Canada, Ecuador, Guatemala, Guyana, India, Malaysia, Panama, Pakistan, Peru, the United States of America and Venezuela.
67. Thus, some constitutions contain principles providing for equality before the law, coupled with stipulations allowing or making provision for the special protection, well-being, development and advancement of certain groups as not being inconsistent with or contrary to the established basic equality. The groups on whose behalf these measures may be taken have been variously described and include: "the backward sections of citizens" 29/ "the weaker and less advanced sections of the people" 29/ "members of under-privileged castes, tribes and groups" scheduled as "under-privileged classes" 50/ "backward classes of citizens" and "the scheduled castes and scheduled tribes". 21/ From other data available on those countries it becomes clear that the populations which are the object of study in this report are included among the groups for which these provisions are meant.

68. Among the groups on whose behalf these special measures may be taken the indigenous populations of some countries are, however, more explicitly mentioned as "the aboriginal peoples of the Malay Peninsula" 32/ "the Amerindians of Guyana" 33/, "the indigenous population" 34/, "the indigenous communities" 35/, "the communities of indigenous peoples" 36/, "the indigenous groups" 37/, "the indigenes". 38/

69. Some of these constitutional provisions are examined in greater detail in the following paragraphs, with examples of the specific wording used.

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28/ Bangladesh (art. 20 (4) and 29 (3-c))
29/ Burma (art. 35)
30/ Pakistan (Section 5, on Principles of Policy)
31/ India (arts. 16 (4), 341 and 342)
32/ Malaysia, Section 8 (5 - c)
33/ Guyana, Section 15 (6 - c)
34/ Guatemala, article 123, third paragraph; and article 109 (25)
35/ Guatemala, article 133, third paragraph; Panama, articles 83, 85, 110, 115 and 116; Peru, 20
36/ Peru, articles 207 and 211
37/ Guatemala, article 133, third paragraph; Panama, article 102
38/ Peru, article 212

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70. Article 1(3) of the Constitution of Ecuador states that:

"the official language is Castillian Spanish. Quechua and other indigenous languages are recognized as forming part of the national culture." (see para. 26A above).

Article 30 provides that:

"the State shall assist the organization and moral, cultural, economic and social development of the various public sectors, particularly the rural sector, so as to enable those groups to play their part in community development. The State shall encourage programmes for sanitary low-cost housing".

71. The Constitution of Brazil of 24 January 1967, as amended on 17 October 1969, provides:

"Article 4. The patrimony of the Union includes:

"...

"IV. The lands occupied by forest-dwelling aborigines:

"...

"Article 6. The Union shall have the power to:

"...

"XVII. Legislate upon:

"...

"o. Nationality, citizenship, and naturalization; incorporation of the forest-dwelling aborigines into the national community:

"...

"Article 190. Lands inhabited by forest-dwelling aborigines are inalienable under the terms that federal law may establish; they shall have permanent possession of them, and their right to the exclusive usufruct of the natural resources and of all useful things therein existing is recognized.

"Paragraph 1. Legal effects of any nature whose purpose is the ownership, possession, or occupation of lands inhabited by forest-dwelling aborigines are declared null and void.

"Paragraph 2. The nullity and voidness mentioned in the preceding paragraph shall not give the occupants the right to any action against, or indemnity from, the Union or the National Indian Foundation."

(English text provided by the Government of Brazil)
72. The Constitution of Peru of 29 May 1933, as amended, contains provisions which recognize the legal status of the indigenous communities and are designed to protect their land. The indigenous communities have a legal existence and juridical personality (article 207). The State guarantees the integrity of the property of the communities. The law shall organize the corresponding register of real property (article 208). The property of the communities is imprescriptible and inalienable, except in the case of expropriation on account of public utility, on payment of compensation. It is not, moreover, not attachable (article 209). Neither the municipal councils nor any corporation or authority shall intervene in the collection or administration of the income and property of the communities (article 210). The State shall endeavour to provide by preference lands for indigenous communities which do not possess them in sufficient quantity for their needs, and may expropriate lands in private ownership for this purpose, on payment of compensation (article 211). The State shall enact civil, penal, economic, educational and administrative legislation which the peculiar conditions of the indigenous demand (article 212).

73. In Guatemala the Constitution of 15 September 1965 contains various provisions relating to the indigenous population, including one whereby one of the functions of the President of the Republic is to establish and maintain a directing and co-ordinating institution and the necessary subordinate offices to organize and develop plans and programmes designed to achieve effective and practical integration of the indigenous population into the national culture (article 109(23)). Similarly, article 11 of the Constitution provides that the State shall promote a policy of social and economic development for indigenous groups so that they may be integrated into the national culture. The Constitution states that one of the fundamental principles of the agrarian reform laws is to give preferential protection to farm workers and to small and medium farmers under a rural policy designed to give them lands, housing, education, health and anything which will permit them to raise their standard of living and that of their families (article 126(9)). The Constitution also establishes that municipal lands and the property of communities shall enjoy special protection by the State, which shall supervise the exploitation and utilization thereof. The property and the administration of the assets of indigenous communities and groups, as well as other rural communities, shall be governed by special tutelary laws (article 133, first and third paragraphs). The constitutional provisions declare the literacy campaign aimed at giving basic education to the people to be a matter of national urgency. It is a social obligation to contribute to the literacy campaign. The functions of the authorities of the State, especially the President of the Republic, include that of organizing, developing and intensifying related activities with all the necessary resources (articles 96 and 169(22)).

74. In Panama, the Constitution of 11 October 1972 provides that the State shall give special attention to rural and Indian communities in order to foster their economic, social and political participation in national life (article 113).

75. The Constitution further provides that the policy established for the implementation of Chapter 7 on the agrarian system shall be applicable to indigenous communities in accordance with scientific methods of cultural change. To fulfill the objectives of the agrarian policy, the State shall carry out the following activities:

(i) grant the necessary farm lands to rural dwellers and regulate the use of water; a special system of collective ownership may be established for rural communities which so request;
(ii) organize credit assistance to meet the financing needs of agricultural operations, particularly those of low-income persons and groups, and give special attention to small and medium producers;

(iii) take measures to ensure stable markets and fair prices for products and foster the establishment of agencies, corporations and co-operatives for production, processing, distribution and consumption;

(iv) establish means of communication and transport to link rural and indigenous communities with centres of storage, distribution and consumption;

(v) settle new lands and regulate the tenure and use of such lands and of lands incorporated in the economy as a result of the construction of new highways;

(vi) foster the development of the agrarian sector by means of technical assistance and promotion of organization, training, protection, mechanization and other activities determined by law; and

(vii) conduct soil studies in order to establish a classification of Panamanian land.

The State guarantees to indigenous communities the reservation of necessary lands and the collective ownership thereof, to ensure their economic and social well-being. The law shall regulate the procedures to be followed for this purpose, and the boundaries within which the private appropriation of land is prohibited (article 116).

76. As far as culture, indigenous languages and general guidelines for education programmes for indigenous groups are concerned, the Constitution stipulates that the State recognizes and respects the ethnic identity of national indigenous communities, and shall carry out programmes to develop the material, social and spiritual values of each of their cultures. It shall establish an institution for the study, preservation and dissemination of indigenous cultures and languages, and for promotion of the comprehensive development of Indian groups (article 85). The Constitution also stipulates that the indigenous languages shall be the subject of special study, preservation and dissemination and that the State shall promote bilingual literacy programmes in the indigenous communities (article 93). The Constitution further provides that the State shall develop educational and advancement programmes for indigenous groups with their own cultural patterns, in order to ensure their active participation in civic life (article 102).

77. The Constitution of Burma of 24 September 1947 as amended in 1959 and in 1961, provides for minorities and the weaker and less advanced sections of the people, inter alia in the following manner:

"22. No minority, religious, racial or linguistic [group] shall be discriminated against in regard to admission into state educational institutions nor shall any religious instruction be compulsory imposed on it."

"35. The State shall promote with special care the educational and economic interests of the weaker and less advanced sections of the people and shall protect them from social injustice and all forms of exploitation."
78. Other texts combine recognition of equality before the law and the right to equal protection by the law with provisions designed to cover particular sectors of the population, which they identify and in whose favour special measures may be taken.

79. The Constitution of Malaysia, of 1957, as adopted by Part IV of the Malaysia Act No. 26 of 1963, with amendments, provides for equality before the law and equal protection of the law, and for the special protection, well-being and advancement of the Orang Asli of the Malay Peninsula, in the following terms:

"3. Equality.

"(1) All persons are equal before the law and entitled to the equal protection of the law.

"...

"(5) This Article does not invalidate or prohibit -

"...

"(1) Any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service."

80. The Constitution of Guyana of 16 May 1966, in addition to stipulating that one minister shall be charged with responsibility for Amerindian Affairs (article 36, first paragraph, in fine), provides (in a way very similar to that of the Malaysian Constitution just quoted) that it shall not be considered discriminatory to make statutory provisions for the protection, well-being and advancement of the Amerindians of Guyana (article 15 (6) (c)).

81. The Constitution of Bangladesh of 4 November 1972, provides for equality before the law (article 27), prohibits discrimination on stated grounds, and makes special provision for, inter alia, backward sections of citizens as follows:

"20. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

"...

"(4) Nothing in this article shall prevent the State from making special provision ... for the advancement of any backward section of citizens.

39/ The Guyanese Constitution also contains provision for the appointment of Parliamentary Secretaries (Section 43 (1)) and this has resulted in the appointment of a Parliamentary Secretary for Amerindian Affairs. In this connection, see the chapter on administrative arrangements, below.
"29. (1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

"...

"(3) Nothing in this article shall prevent the State from:

"(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic.

32. The Constitution of Pakistan of 17 April 1973, 40/ contains the following provisions: In Part II, Chapter 1, dealing with Fundamental Rights and Chapter 2, dealing with Principles of Policy:

"28. Subject to article 251 any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and, subject to law, establish institutions for that purpose. 41/

"36. The State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services.

"37. The State shall -

"(a) promote with special care the educational and economic interest of backward classes or areas".

83. In Part XI, Chapter 3, dealing with Tribal Areas:

"246. In the Constitution -

"(a) 'Tribal Areas' means the areas in Pakistan which, immediately before the commencing day, were Tribal Areas, and includes:

(i) the Tribal Areas of Baluchistan and the North-West Frontier Province; and

(ii) the former States of Amb, Chitral, Dir and Swat.

"(b) 'Provincially Administered Tribal Areas' means:

(i) the districts of Chitral, Dir and Swat (which includes Kalam), Malakand Protected Area, the Tribal Area adjoining Hazara district and the former State of Amb; and

40/ The Constitution was passed by the National Assembly of Pakistan on 10 April 1973 and authenticated by the President of National Assembly on 12 April 1973.

41/ Article 251 of the Constitution deals with the national language and use of languages for official purposes.
(ii) Chob district, Loralai district (excluding Duqi Tehsil), Dalbandin Tehsil of Chagai district and Harri and Bugti Tribal territories of Sibi district; and

"(c) 'Federally Administered Tribal Areas' include:

(i) Tribal Areas adjoining Peshawar district;
(ii) Tribal Areas adjoining Kohat district;
(iii) Tribal Areas adjoining Dami district;
(iv) Tribal Areas adjoining Dera Ismail Khan district;
(v) Bajaur in Khyber Agency;
(vi) Kohat Agency;
(vii) Kurrum Agency;
(viii) North Waziristan Agency; and
(ix) South Waziristan Agency.

247. (1) Subject to the Constitution, the executive authority of the Federation shall extend to the Federally Administered Tribal Areas, and the executive authority of a Province shall extend to the Provincially Administered Tribal Areas therein.

(2) The President may, from time to time, give such directions to the Governor of a Province relating to the whole or any part of a Tribal Area within the Province as he may deem necessary, and the Governor shall, in the exercise of his functions under this Article, comply with such directions.

(3) No Act of Parliament shall apply to any Federally Administered Tribal Area or to any part thereof, unless the President so directs, and no Act of Parliament or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situated, with the approval of the President, so directs; and in giving such a direction with respect to any law, the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction.

(4) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter within the legislative competence of Parliament, and the Governor of a Province, with the prior approval of the President, may, with respect to any matter within the legislative competence of the Provincial Assembly make regulations for the peace and good government of a Provincially Administered Tribal Area or any part thereof, situated in the Province.

(5) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter, make regulations for the peace and good government of a Federally Administered Tribal Area or any part thereof.

(6) The President may, at any time, by Order, direct that the whole or any part of a Tribal Area shall cease to be a Tribal Area, and such Order may contain such incidental and consequential provisions as appear to the President to be necessary and proper;
"Provided that before making any Order under this clause, the President shall ascertain, in such manner as he considers appropriate, the views of the people of the Tribal Area concerned, as represented in tribal jirga.

"(7) Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless Parliament by law otherwise provides;

"Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day."

84. The Constitution of India of 26 November 1949, with amendments, contains special entrenched and particularly detailed provisions for the advancement of socially and educationally backward classes of citizens and for the Scheduled Castes and Scheduled Tribes. Concentrating on the latter groups, the main provisions are as follows:

85. Part III of the Constitution deals with "Fundamental Rights" and, under "Right of Equality", it contains the following relevant provisions:

"14. Equality before law. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

"...

"(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

"16. Equality of opportunity in matters of public employment. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

"...

"(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

86. In Part IV the Constitution provides for Directive Principles of State Policy from which the following may be quoted here as basic principles in this matter:

"46. Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."
87. Articles 330 and 332 provide for the reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People and in the Legislative Assembly of the States, respectively; article 334 stipulates that these arrangements shall cease after 50 years, and article 335 provides for the claims of Scheduled Castes and Scheduled Tribes to services and posts.

"330. Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People. (1) Seats shall be reserved in the House of the People for -

(a) the Scheduled Castes:

(b) the Scheduled Tribes except the Scheduled Tribes -

(i) in the tribal areas of Assam;
(ii) in Nagaland;
(iii) in Meghalaya;
(iv) in Arunachal Pradesh;
(v) in Mizoram; and

(c) the Scheduled Tribes in the autonomous districts of Assam.

(2) The number of seats reserved in any State or Union territory for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union territory in the House of the People as the population of the Scheduled Castes in the State or Union territory or of the Scheduled Tribes in the State or Union territory or part of the State or Union territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union territory.

(3) Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the People for the Scheduled Tribes in the autonomous districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous districts, bears to the total population of the State.

Explanation. In this article and in article 332, the expression "population" means the population as ascertained in the last preceding census of which the relevant figures have been published.

Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2000 have been published, be construed as a reference to the 1971 census.

"332. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. (1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in Nagaland and in Meghalaya, in the Legislative Assembly of every State.
"(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

"(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

"(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

"(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district.

"(6) No person who is not a member of a Scheduled Tribe of any autonomous district of Assam shall be eligible for election to the Legislative Assembly of the State from any constituency of that district.

"...

"334. Reservation of seats and special representation to cease after thirty years. Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to -

"(a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the State; and

"(b) ...

shall cease to have effect on the expiration of a period of thirty years from the commencement of this Constitution.

"Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

"335. Claims of Scheduled Castes and Scheduled Tribes to services and posts. The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration in the making of appointments to services and posts in connection with the affairs of the Union or of a State."
83. Articles 338, 339 and 340 provide, respectively, for a special officer for Scheduled Castes and Scheduled Tribes (338); the control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes (339) and the appointment of a Commission to investigate the conditions of backward classes (340).

338. Special Officer for Scheduled Castes, Scheduled Tribes, etc. (1) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

(3) In this article references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of article 340, by order specify and also to the Anglo-Indian community.

339. Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes. (1) The President may at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States.

The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable.

(2) The executive power of the Union shall extend to the giving of directions to a State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.

340. Appointment of a Commission to investigate the conditions of backward classes. (1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.
341. Scheduled Castes. (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

342. Scheduled Tribes. (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

D. Basic legal status

1. Introductory remarks

The countries covered by this study have had to adopt a basic approach towards the indigenous inhabitants who make up a considerable part of their population. This basic approach has, in principle, found expression in a decision of substance concerning the fundamental legal status to be conferred upon the indigenous populations concerned. In such decisions the indigenous populations are, or are not, considered as having all the rights and obligations of the country's other nationals. If the latter is the case, a special legal status has to be created for them which resembles capitis diminutio in certain specific areas, since they neither enjoy all the rights nor have all the obligations enumerated. In the former case, account is generally taken of the special circumstances of these population groups and, as in the case of other groups in similar conditions, measures are taken to cater for their special needs so as to place them on a more equal footing with the other population groups.
The Special Rapporteur was not able to obtain explicit information for some countries on this matter although from other information available concerning the countries in question it may be assumed that the positive approach described in the previous paragraph has been adopted, despite the fact that the special measures in favour of indigenous persons have not always been clearly spelled out.

In respect of other countries, information from governmental and/or non-governmental sources was available regarding the basic status conferred on indigenous populations under the national legal system. Most of this information is in the form of governmental declarations or governmental or non-governmental conclusions drawn from the constitutional provisions relating to "theoretical" equality in law and the "actual" equality to which more specific attention is devoted under some of these systems.

The countries for which analysable information was available may be divided into at least two groups which largely correspond to the criteria set out above: some countries have created a special legal status which seeks to protect indigenous persons and relieve them of some obligations while at the same time limiting their exercise of certain rights until they reach the level of development which is deemed necessary for them to be placed on an equal footing with the rest of the population. Other countries recognize that indigenous persons have all the rights and obligations of citizens, but, because such persons have a weaker position in society, their countries have adopted special measures in their favour which they enjoy as long as they remain in that weaker position.

It should be noted that in many cases, the information at the Special Rapporteur's disposal in respect of the countries concerned does not make it entirely clear whether or not there is in fact a special legal status for indigenous populations. Since the information may often be interpreted in either way, the Special Rapporteur has been obliged to draw up an ad hoc classification and, in some cases, to include information concerning the same country under both headings.

The first of the two groups mentioned in paragraph 93 above is made up of the countries in which indigenous populations appear to have special legal status, at least in certain circumstances.

In Paraguay interpretations are contradictory and seem to depend on particular situations, as no general law on indigenous peoples exists. On 22 July 1957, the Minister of Education and religion issued Note 402, stating:

"In our legislation now in force, no distinction at all exists between indigenous and civilized ... In our civil legislation, the Indians are not even included among the incapable persons".

These countries are Bolivia, Burma, Chile, Denmark (Greenland), Ecuador, El Salvador, France (French Guiana), Honduras, Nicaragua, Pakistan, Panama, Peru, Sri Lanka, Suriname and Venezuela.

For example in Argentina, Honduras and Nicaragua.

For example in Brazil, Canada, Colombia and Paraguay.
This view was confirmed by Circular No. 1 of 5 September 1957 of the Supreme Court of Justice:

"All indigenes, in their quality of inhabitants of the national territory, enjoy, to the same degree as civilized persons, the rights and guarantees which the laws recognize for the latter".

Nevertheless, in 1963 Mr. J.A. Borgognon, then Vice-Director of the Indigenous Affairs Department of the Ministry of Defence, the office which in fact decides the policy towards the indigenous population of Paraguay, expressed the following opinion:

"They are not inscribed in the Birth Register, which means that they have no legal civil personality. They are beings without political, social or economic obligations. They do not vote. They pay no taxes".

This opinion is correlative to the practice that indigenes cannot denounce, quarrel or testify in law courts. In a 1965 case at Villarica the judge decided that the defendant could not be punished for homicide, because of "unsurmountable ignorance". It was stated, as regards indigenous people, that:

"Although in our country they belong to the category of citizens with rights and duties, the state of civilization they live in, and the natural misery caused by the lack of an education that would be necessary to develop their activities within the civilized social group, make useless the constitutional declaration, if the necessary aid is not given to these human groups in order to attract them to the active life of society. The Indian does not reach the text of Law. He does not understand it".

In recent years, especially since 1974, a number of adult indigenous persons were inscribed in the Birth Register, thus obtaining full citizenship. In this way, the difference established by Borgognon becomes temporary and can be overcome. Yet the authorities seem sometimes reluctant to permit this procedure, inscribing an indigene in the Birth Register usually only if this is requested by an influential non-indigene. The process remains limited to individual cases, although it is spreading. Literacy in Spanish is usually a necessary condition - not fulfilled by many non-indigenous citizens (more than 30 per cent of Paraguayans speak only Paraguayan Guarani). Of the total indigenous population, the great majority has not yet attained full citizenship.

The Western Guarani, numbering some 1200 persons, are an exception, since full citizenship was expressly granted to the entire group in 1955. However, the fact that it was thought necessary to make an explicit statement to that effect implies that full citizenship is not normally granted to indigenous groups. It is pertinent to observe also that although one of the important duties of citizenship is military service, only some of the Western Guarani fulfill this obligation, and many of them refuse to serve on the ground that they are indigenes. The fact that such refusals are readily accepted tends to show that even in the case of the Western Guarani, legal equality has not yet been fully achieved.

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45/ Case of the Indigene Angel Santacruz.
46/ Information furnished by the Anti-Slavery Society on 5 September 1976.
102. In Brazil, the Indian is the subject of special legislation which protects him for as long as he leads a primitive existence. The Civil Code of 1916, modified in 1942, places such protected persons on the same level as the relatively incapable, such as minors. A special decree (Decree No. 5404 of 27 June 1920) places forest-dwellers under the special tutelary jurisdiction of the Federal State and provides for their gradual transition from tutelage to full integration into the Brazilian community.

103. Moreover, as can be seen from paragraph 35 above, the Indian Statute embodied in Act No. 6001 defines three kinds of status - isolated, integrating, integrated - which Indians may possess.

104. Act No. 6001 also provides that, although Indians are Brazilians in accordance with the Constitution, their enjoyment of civil and political rights depends on the fulfilment of certain special conditions. Thus, the Act states that:

"Art. 5. The norms of Articles 145 and 146 of the Federal Constitution relating to nationality and citizenship, apply to the Indians or forest-dwellers.

*Sole paragraph.* Enjoyment of civil and political rights by the Indian depends on verification of the special conditions established in this Law and in the pertinent legislation.

"Art. 6. The usages, customs and traditions of native communities and their effects shall be respected as regards kinship, order of succession, distribution of property and dooms or business among Indians, unless they opt for application of common law.

*Sole paragraph.* Common law norms apply to relations between non-integrated Indians and persons alien to the native community, except insofar as they are less favourable to the former with due exception of the provisions of this Law." */

105. In Title II on "Civil and Political Rights", Chapter II on "Assistance or Tutelage", provides:

"Art. 7. The Indians and native communities not yet integrated in the national communion are subject to the tutelary regime established by this Law.

1. The principles and norms of common law tutelage apply, where appropriate, to the tutelary regime established by this law, irrespective, however, of tutelage in the special branch of legally mortgaged real estate, as well as that of real or fidejussionary suretyship [real or personal guarantees].

2. Tutelage is assigned to the Union, which shall exercise it through the competent Federal agency of assistance to the forest-dwellers.

"Art. 8. Acts practiced between the non-integrated Indian and any person alien to the native community are null and void, when unassisted by the competent tutelary agency.

*Sole paragraph.* The ruling of this article does not apply to the case when the Indian shows an awareness and knowledge of the act practised so long as it is not detrimental to him, and of the extent of the effects thereof. */

*/ English text supplied by the Government of Brazil.
106. The legal status of indigenous persons may also be affected in other ways. For example, under article 147 of the Constitution all illiterates and those who do not know how to express themselves in the national language (Portuguese) are excluded from the right to vote. This, together with the requirements of article 9 of the Indian Statute, would eliminate most indigenous persons from the exercise of political rights.

107. On the other hand, indigenous offenders would receive penalties according to their degree of integration. According to the Indian Statute sanctions may be imposed in accordance with tribal institutions if not cruel or degrading (art. 57). Prison terms shall be served as far as possible under a regime of semi-liberty and in premises as close as possible to the dwelling place of the sentenced person (art. 56).

108. In the same Title II and Chapter II mentioned above, the Indian Statute provides that exceptions to the tutelary regime may be granted under conditions specified in articles 9, 10, and 11, wherein emancipation on an individual or communal basis are contemplated. These provisions will be discussed later on, as emancipated individuals or communities would not have any capitis diminutio and would enjoy fully all civil and political rights under constitutional or statutory provisions in Brazil.

109. Before describing the various aspects of the legal status of indigenous persons in Colombia, it should be pointed out that the existing regulations provide for two major categories of Indians, each subject to a different legal regime. Law 89 of 1890 mentioned earlier (see paragraphs 40-42 above) distinguishes between those indigenous persons who have not been brought into civilized life and those who have.

110. With regard to the former, article 1 of Law 89 lays down that "the general legislation of the Republic will not apply to the savages who are being brought to civilized life by means of missions". Consequently, the Government, in agreement with the ecclesiastical authorities, will determine the way in which these incipient societies are to be governed.

111. This rule is in keeping with the Missions Agreement concluded between the Holy See and the Colombian Government in 1896, in respect of which the following comments have been made.

"... the Roman Church obtained the monopoly of the evangelization and acculturation of the unbelieving aborigines. The remote regions inhabited by them now became "mission territories" (vicariates and apostolic prefectures), the actual administration of which largely remained in the hands of the missionaries in virtue of the Law (72 of 1892) according to which the State could - as it did - delegate to them "extraordinary powers to exercise civil, penal and judicial authority over the catechumens ... until, leaving the savage state, in the judgement of the government they are in a state to be governed by them". This also established the legal status of the aborigines as that of minors.
Historically, the setting up of this theocratic regime over the native non-aculturated groups had its origin not only in the Catholic ideals of political government of that time but also in the practical and economic inability of the Colombian State to deal with the vast, sparsely inhabited forest territories of the Pacific coast and of eastern Colombia. However, the survival of this juridical infrastructure down to our time is itself an indication of the indifference of the governing classes to the lot of the aboriginal groups. 47

112. It is further observed that the Government is "satisfied with having accepted the recommendations of the International Convention on Native and Tribal populations. These norms do not apply to Colombian aborigines who have not been 'brought into civil life', as long as these natives remain, from the legal point of view, on the margin of State authority." 48

113. Information is given below about indigenous persons who have been "integrated into civilization". 49

114. Indigenous persons in Canada have a special legal status that differs from that of other citizens. According to information provided by the Government, Parliament has approved protective legislation - the Indian Act - which is administered by the Department of Indian Affairs and Northern Development. This law establishes inter alia certain advantages and controls in respect of matters such as the sale or mortgage of land reserved for Indians, the testamentary capacity of Indians (for example, there is special protective legislation covering the distribution of property when Indians die intestate), the possession and use of intoxicants, the administration of Indian money and assets, and the education of Indian children.

115. The Government states that the concept of "wardship" in relation to native people was prevalent until about the time of the Second World War, but judicial opinion seems now to have established that native people are British subjects resident in Canada, subject to the jurisdiction of Canadian Legislatures, as provided in the British North America Act. Their special status is confirmed in the provisions of the Indian Act. They are exempt from certain forms of taxation relating to property rights or income earned on the reserve. They are under the special protection of the Crown in ways that limit their local self-government and their control of bank funds, and the Federal Government assumes an obligation toward their health, education and economic development. The provisions of the Indian Act permit a progression toward more independent bank management.

116. The Government also states that the law is revised from time to time in order to take account of the changing conditions of Canadian society and the new stages of development and autonomy of the Indian tribes, and that various programmes have been

47/ Victor Daniel Bonilla, op. cit.
48/ Ibid.
49/ See paragraphs 136 and 137 below.
established for the indigenous populations of Canada 50/ with a view to accelerating their full participation in Canadian society on the same conditions as other citizens.

117. According to a source:

"By the time of Confederation, Canada had a fully developed Indian policy inherited from the British Imperial and Colonial Governments and already administered by the Crown Lands Department (which became the Department of the Interior and was the predecessor of the present Department of Indian Affairs and Northern Development). The basis of this policy, which gave the Federal Government legislative jurisdiction over "Indians and Land Reserved for Indians", were: alienation of Indian interest in land through treaties, reservation of lands, and a government department charged with managing the affairs of Indians. The policy's aim was to effect a transition from the native way of life to that of the white majority (assimilation), and the basic assumption was that the Indian required both assistance and protection in making this transition." 51/

118. On the question of the fundamental status attributed to the indigenous populations in the United States, statements from the Government and from indigenous groups differ as to the significance of certain arrangements. The Special Rapporteur decided to place this information in this part of the study, quoting first the government information which would justify its placement here, subsequently reproducing the indigenous groups' statements as regards the particular points on which they disagree with the Government's view.

119. As regards this question of the fundamental legal status of the indigenous populations, the Government reports:

"Federally recognized Indians who have organized Indian governments and who live on trust land (land held in trust for them by the Federal Government) have special rights and privileges not available to other citizens of the United States. For example, they are not subject to real property taxes on trust land, nor is their income from such land subject to taxation. They are subject to tribal policy and tribal courts and they make their own ordinances to govern their domestic relations. The United States Attorney and the Federal Courts are available to them for defending themselves against non-Indians and for cases concerning certain major crimes - murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, carnal knowledge, assault with intent to commit rape and assault resulting in serious bodily injury.

"Many Federal agencies have allocated specific sums of money for programs for the betterment of the indigenous minority. These include efforts to improve housing, grants for economic development, grants to businesses that will be owned and operated by minority business people, small business loans, and the like. Some programs provide for direct allocation of funds from the Federal Government to Indian people. All other citizens receive federal grant funds through the State and local governments.

50/ The programmes mentioned by the Government include various health, welfare and community development programmes and a number of educational activities. The information was provided in connection with the Study on Racial Discrimination.

51/ Joanne Hoople; And What About Canada's Native People. Published by the Canadian Council for International Co-operation, Ottawa, Canada, p.7.
"Although the indigenous population has certain special privileges, such as those cited, they have no corresponding obligations or responsibilities. Thus an Indian on an Indian reservation is subject to tribal law and order and tribal government, in many cases, but may vote in a county, State, or Federal election, the results of which will affect all United States citizens. The non-Indians in the county, State, and the Nation have no corresponding right or opportunity to exercise control over that same Indian community.

"Thus there is a privilege of voting in affairs affecting non-Indians without the reverse being possible, except through Congressional action concerning Federal reservations with residual tribal government and involving trust land.

"The special relationship of trust land and funds held in trust and the special programs for the indigenous population are provided because the indigenous minority has been in a relatively weak position and it is anticipated that they will remain in effect for as long as such groups need support in order to adjust to the non-indigenous culture surrounding them."

120. Disagreeing with the information quoted in the preceding paragraph it has been written that:

"It is true that all that flows to Indians from the fact of tribal recognition is not available to non-Indian citizens, but that fact is inherent in the relationship and in the concept of dual citizenship. The U.S. response seems to suggest that Indians are a privileged class in the United States — an assertion which the objective indicia of poverty will easily disprove.

"It also treats Indian property tax exemption as if there were no other tax exemptions within the entire state and federal tax structure of the United States. Certainly there are compelling policy reasons to support continued (and even expanded) tax exemption for Indians, and its constitutional basis is clear. But those advantages are not available to the rest of the population in the same sense that the sacred oil depletion allowance is not available to those Americans who are not fortunate enough to be in the oil business, and the vast business exemptions are not available to wage-earners.

"It is absolutely untrue to say that Indians "have no corresponding obligations or responsibilities". The Indians have the obligations of any citizen with respect to their state, county and local (non-Indian) governments to the extent that those governments have jurisdiction. In addition, Indians have responsibilities toward their tribal governments. But vastly more important is an obligation which virtually every Indian feels and which is no less an obligation simply because it is not imposed by the federal government. Individual Indians have the enormous responsibility of being the custodians of the most fragile of human creations — a culture. As a part of that responsibility they have a relationship to the few remaining acres of land which is in Indian hands and which they hold in trust for their future generations. It is unfortunately typical of the attitude of many federal employees to characterize Indians as irresponsible, privileged people who have an unfair advantage over the non-Indian taxpayers.

"As a final note in this regard ... concerning the disabilities that accompany Indian status, ... [the] restriction on alienation of trust property is well-known. However, there are many other restrictions on the activities of
Indians. The average community has virtually full control of its schools, for example. It is only recently that the Bureau of Indian Affairs could even begin to accommodate advisory school boards at BIA schools, and those boards even today do not have real power in the policy-making of the schools that serve their community and their children. In addition, federal power over the lives of Indians is traditionally vast. In fact, there is virtually a presumption that Indian homes are inadequate to raise Indian children, and the power of bureaucrats to remove Indian children from their homes to be placed in foster homes, adoptive homes, or boarding schools is vast. On some reservations 40% or more of the Indian children have been removed from their homes on a more or less permanent basis.

"Indian votes in state and local elections are for the most part meaningless because of their relatively small proportion of the population, although in a few cases the Indian vote can be conclusive in a close election. But the power of the non-Indian voter, contrary to the suggestion in the U.S. response is vast. Congress has asserted and the courts have upheld the plenary power of the United States over Indian tribes. Thus the actual situation is the reverse of that described in the U.S. response. The present inability of non-Indians to vote in tribal elections does not significantly reduce the power of the non-Indian segment of American society over the affairs of the Indian tribes, and to suggest that it does is one of the gross distortions that unfortunately characterize the U.S. response.

"It is not true that all non-Indian citizens receive federal grant funds through their state and local governments. Some programs, of course, provide direct federal benefits to eligible citizens, and these benefits may come to Indians or non-Indians depending upon the program. Some programs are federally funded but administered through state and local governments. And in a few cases, federal programs are administered through Indian tribes rather than through the states. This is a necessary consequence of the recognition of tribal government. To the extent that tribal governments are not the administrative vehicle for federal programs, it could be said that the states have a special legal arrangement not available to Indian governments. Those who prepared the U.S. response appear again to be arguing against the policy of the United States in its recognition of tribal government.

"The United States also suggests that U.S. Attorneys are available to represent Indian tribes and individuals for their protection. There is, of course, a famous statute in the United States Code, 25 U.S.C. 175 which does, in fact, state in mandatory language that the United States Attorney shall represent Indians in court. This mandatory statute, however, has been interpreted to be discretionary. The United States Attorney rarely represents Indians in court in cases involving the trust responsibility and there is even a tremendous backlog of such cases upon which the United States Attorneys have failed to act. If they are not representing Indians, then the U.S. should not claim before the world community that they are. President Nixon has said as much in his 1970 Message and in his package of proposed Indian legislation which includes the Indian Trust Counsel Authority bill. He has recognized the serious conflict of interest between the government's duties toward the Indians and its public responsibilities. It is puzzling that the United States now tells the world that this conflict does not exist.
"Finally, the United States ... [states] that the basis for the special relationship between the United States and the Indian tribes is the relatively weak position of the tribes economically, and ... that once the tribes attain economic parity the special relationship will cease to exist. In fact, the courts have repeatedly recognized that Indian tribes will exist as long as there are Indian societies. The relationship between the Indian tribes and the United States is based partly upon the treaties and other indications of federal recognition and has been recognized repeatedly in the U.S. Supreme Court as a quasi-international protectorate relationship. When the tribes attain economic parity some of the economic facts surrounding the relationship will naturally change but the nature of the relationship will persist into the indefinite future. President Nixon himself, presumably speaking for his own administration, promised the tribes the exact opposite of the U.S. response in his concept of "self-determination with termination", which holds that the tribes will not jeopardize their existence by entering more and more into the management of their own affairs and by adjusting to the demands of the modern American economy.

"In seeking to establish the favored position of Indians within the American system, the United States contradicts its own studies. It suggests that, although some tribes receive few federal services, "others receive the full gamut". In a recent study conducted by the government itself and since suppressed, it was revealed that only about 10% of federal domestic assistance programs are now serving even one of the 275-odd Indian tribes. Around 2-3% of the federal domestic assistance programs are serving a variety of tribes." 52/

3. General legal status

121. Within the second of the two groups into which the Special Rapporteur divided the countries under study (see paragraphs 93 to 95 above), and on which he has based his analysis of the available data regarding the basic approach adopted by countries in reviewing their fundamental position vis-à-vis their indigenous populations, two subgroups may now be distinguished. The first of these, which we may call the "explicit" subgroup, comprises a number of countries which have stated in general terms that "indigenous persons have the same status as non-indigenous persons", or that "no special status is accorded to indigenous persons".

122. The other subgroup, which will be called the "implicit" subgroup, comprises a number of countries 53/ which have been included in the subgroup even though, with the exception of Laos, no specific information was available (hence the term "implicit").

123. To deal with this second (implicit) subgroup first it appears, for instance, from the information obtained by the Special Rapporteur that no special legal status is attributed to indigenous ethnic groups by Lao legislation. In the preamble to the Constitution it is stated that the Constitution recognizes as the fundamental principles of the rights of the Lao people: equality before the law, the legal protection of the means of subsistence, freedom of conscience and other democratic freedoms in the conditions defined by law; the Constitution imposes upon the people as duties: public service, respect for conscience, the practice of solidarity, the fulfilment of family obligations, zeal in work and learning, integrity, and respect for the law.

52/ American Indian Law Newsletter, loc. cit., pp.15 to 17.
53/ In addition to Laos, there are Bolivia, Burma, Chile, Denmark (Greenland), Ecuador, El Salvador, France (French Guyana), Honduras, Nicaragua, Pakistan, Panama, Peru, Sri Lanka, Surinam and Venezuela.
124. Article 4 of the Constitution states that all persons who belong to races that are definitively established on Lao territory and do not already possess another nationality are citizens of Laos.

125. The information available seems to indicate that there are also some special provisions in favour of certain groups, particularly in the field of education.

126. The Code of Civil Procedure (article 53(2)) embodies special provisions concerning certain indigenous groups. One of these provisions stipulates that before the end of court proceedings in cases involving members of hill tribes with no written language, the court must hear in an advisory capacity one or more chiefs of the tribes concerned, so as to be informed of any special customs or usages of those tribes. The judgment must contain a reference to the hearing of this advice.

127. Turning now to the other (explicit) subgroup, it is necessary to differentiate between countries in which the general legal status applies to all the indigenous inhabitants without distinctions of any kind and those in which it is applicable only to certain indigenous communities which fulfil the necessary conditions.

128. As indicated earlier, there are legal systems in which certain indigenous inhabitants come within the group that has a special legal status, while others form part of the group to which the general legal status applies, (Brazil, Colombia and Paraguay are cases in point). In these countries, the indigenous inhabitants who meet certain legal requirements will enjoy the same general legal status as the people as a whole, whereas those who do not will continue to have a limited legal status, as was explained when the first group (with special legal status) was considered.

129. Thus it seems clear that in Paraguay, once an indigenous person is registered in the Civil Register, there could no longer be any doubt as to his or her legal status, which would be that of full citizenship with all rights and duties attaching to it. Groups that, as in the case of the Western Guaraní discussed above, may have been granted citizenship collectively, would also clearly enjoy full citizenship, thus falling under the second system established above, namely that of persons enjoying the general legal status attributed to all citizens, without any difference whatsoever.

130. As already mentioned above (see para. 103 above), in Brazil, fully integrated Indians may apply for their individual emancipation from the tutelary regime established in articles 7 and 8 of Act 6001 (13 December 1961). The same Act provides, to that end, that:

"Art. 9. Any Indian can petition the competent Court of Justice to release him from the tutelage provided in this Law, vesting him with full civil capacity, so long as he fulfils the following requisites:

"I - Minimal age of 21 years.

"II - Knowledge of the Portuguese language."

54/ See paras. 96 to 115 above.

55/ See para. 101 above.
"III - Possession of the necessary skill to perform a useful activity in the national communion.

"IV - Reasonable comprehension of the usages and customs of the national community.

"Sole paragraph. The Court shall decide after summary investigation, in the light of the opinion of the agency of Indian assistance and the Public Prosecutor, and the sentence granting the petition be transcribed in the civil register.

"Art. 10. Upon fulfillment of requirements of the preceding paragraph, and at the written request of the interested party, the assistance agency can recognize the Indian's integrated condition by formal declaration, all restrictions as to capacity being thereby removed, so long as, the decision being, judicially ratified, it is entered in the civil register.

"Art. 11. By decree of the President of the Republic, emancipation of the native community and its members from the tutelary regime established by law can be declared, when applied for by the majority of the members of the group and proof has been furnished, by an inquiry made by the competent Federal agency, of their full integration in the national communion.

"Sole paragraph. For purposes of the provisions of this article, the requirements established in Article 9 must be met by the applicants. 2

131. Individuals who have fulfilled all these conditions, although they may have retained practices, customs and traditions that are characteristic of their own culture, would be considered to be "integrated Indians" under the terms of article 4 (III) of the Indian Statute.

132. The Special Rapporteur has learnt that a Presidential Decree in Brazil which, inter alia, envisaged further rules for the implementation of individual and communal emancipation, has been left in abeyance.

133. Public opinion, indigenous organizations, native leaders, universities and church organizations are said to have rejected this proposed decree as harmful to the indigenous populations of Brazil. Among them, one author, discussing the impact of this proposed Bill dealing with the "emancipation" of the indigenous peoples of Brazil, has written the following:

"Perhaps the crowning example of self-contradiction of Brazilian indigenist policy was the attempt this year to change the provisions of the Indian Statute for the "emancipation" of the Indian from the tutelage of FUNAI, representing the State, under which, as a minor, he is considered "relatively incapable" and has the State's protection. Clearly, the denial of ordinary civil rights to the Indian, which in fact, contravenes the Geneva Convention of 1957, to which Brazil was a signatory, is wrong and absurd and patently racist, and provisions should be made for this situation to be changed.

*/ English text supplied by the Government of Brazil.
"But the "Emancipation Decree" sent to the President of the Republic on the 30th October 1970, by the Minister of the Interior, Rangel Reis, had other objectives in view, and these, in the context of present Brazilian development and its implications for the indigenous population, were sufficiently obvious to alarm the national and international community of supporters of the Indians' cause. Thanks to an extremely effective publicity campaign organized by the leading Brazilian universities, the Church, journalists and countless individuals who had worked with Indians, the "Rangel Reis Decree" was brought to the forum of public debate and criticism, where the voice of the Indian joined with those of his supporters in a universal condemnation of the decree.

"The controversial provisions of the decree were that "Emancipation" could henceforth be conferred on an individual Indian on the initiative of FUNAI, whereas the 1973 Statute only allowed for emancipation to be granted on the request of the Indian; that the minimum age to qualify for emancipation be reduced to 16 years; and that Indian territory could be donated to the community emancipated and would thus lose State protection. This decree, the third and final version, had already suffered one significant change as the result of the furore which greeted the first versions, which provided for the division of communally-held territory into separate lots for the emancipated Indian.

"Nevertheless, the decree represents, as it stands, serious dangers, for it has appeared precisely at the time of greatest land pressure in Brazil, when it would eminently suit those economic groups who have not yet gained access to Indian lands, to see State protection removed from them, and also at a time when Indians are beginning to make themselves heard, in a new political awareness. There are several very articulate Indian leaders who are beginning to inconvenience the government with their candid denouncing of the violence suffered by their people: tutelage protects them, but once emancipated, they could be prosecuted under ordinary penal law.

"In one of the culminating events of the anti-emancipation campaign, a "Public Act" which took place with an audience of 2,500 people on the 8th November in Sao Paulo, a Farcai Indian declared:

"'The struggle for emancipation will be carried out neither by the government, nor the Minister of the Interior, nor by anyone else. This emancipation will be carried out by ourselves, we, the Indians. In the same way in which the oppressed classes are forming their awareness, so we are beginning to form our awareness in order to demand our rights.

"'This emancipation is a lethal weapon, which will simply take from us all chance and every weapon we have to protest the infringement of our rights. Perhaps we will be prevented from realising the assemblies which have so helped us, for if this emancipation is approved, we will also be marked along with those who are called subversive.'

"Finally, on the 19th of December, 1978, 24 representatives of Indian tribes from Amapá, Amazonas, Mato Grosso, Santa Catarina, Rio Grande de Sul and Espírito Santo, Indians of the Karipuna, Palikur,Calibri, Desana, Apuriná, Jamamedí, Tapirapé, Xavante, Richardtsa, Paraci, Kaiví, Kaingang and Guarani tribes, gathered in Brasilia. The day was the expiry date of the five-year term established by article 65 of the Indian Statute of 1973 for the demarcation
of all Indian territories hitherto undemarcated. The Indians presented a
document, composed at an assembly during the preceding three days, signed by
all of them on behalf of the indigenous population of Brazil, requesting that
the emancipation decree be "tom up" and that in spite of the term having
expired, the land be demarcated according to the law, to the President of the
Republic, the Minister of the Interior and the President of FUNAI."56/

154. The participants in the gathering on 19 December 1970 of twenty-four
representatives of Indian tribes issued a letter-declaration containing statements
and demands, some of which were quoted in the preceding paragraph. It is deemed
useful to quote from that letter what refers to the proposed emancipation:

"As we are on the verge of seeing the new draft for the Decree for
Emancipation which will "regularize" the Statutes respecting the Indian signed
by Your Excellency, we would inform The President of the problems which have
been raised, studied and resolved in this Assembly:

"Having sent to Your Excellency the Draft Decree for Emancipation, we are
hereby setting forth our opinion - the opinion of the Indian, the only
individual who was not invited to give his opinion with regard to the
emancipation which he is about to attain.

"In the first place, we would like to call to mind a passage from the
letter by Andila Inacio Kalingang, with which Your Excellency must be acquainted.
We have in this Assembly today repeated the same things and have merely adopted
some of his thoughts as our own.

"We are taking the liberty of sending this Document in the name of the
Indians who inhabit the immense territory of Brazil.

"Mr. President, it would not perhaps be possible for our people merely to
speak and understand their mother tongue without their understanding these cries
for peace, love and understanding. No, Mr. President, we are sure that our
people will understand this message, even though it be in other languages, as
it has understood the word "patience" which has up to now been shouted in our
ears - a patience which has now reached its limits, as would happen with any
nation whatever might be the stage of its civilization.

"Mr. President, Your Excellency, you must agree that the passions of our
people can no longer be contained within limits when they look at the lands
remaining to them in comparison with the vast territories of Brazil over which we
used to have full dominion and which have been unlawfully taken from
us by the White Man.

"What puzzles us most is that it is in these conditions that the Draft
Decree for Emancipation is being launched, when we know that various Articles of
our Law, the Statutes respecting the Indian, have not been included.

"...

56/ Anna Presland, "Reconquest. In Account of the Contemporary Fight for
Survival of the Amerindian Peoples of Brazil", in Survival International Review,
Spring of 1979, Vol. 4 No. 1 (25), p2.16-40. The passages quoted appear on
pages 27 and 28.
"Mr. President, we are not seeking to lay down regulations and laws because we are neither pedagogues, juristes nor theologians, but we simply wish clearly to state our immediate demands, as guaranteed to us by the Statutes respecting the Indian.

"We are not impressed by the statements made by the Minister on behalf of the President of the FUNAI, in the Press in defence of the emancipation, because we, who are the victims of this policy, are the only ones who can give a sincere opinion as to what this emancipation represents; for if fine words could solve our problem, we should not today be in a situation which is so different from that which the Statutes respecting the Indian upholds, since the emancipation desired by the Minister will bring about the destruction of the tribal system for the Native Communities, and consequently to the collective and individual desecration of its elements, in as much as the Indian must live in his own community, with the full liberty to continue his cultural traditions and with the freedom to own his own land.

"...

"Just as public opinion condemned this emancipation, so we, in the name of the Native Brazilian Community, reject this emancipation. May it be dismissed by your Council and may our demands be taken into consideration. May that article of the Law be fulfilled, that article appearing to be one of the vital points which the new Law avoids. May the Indian be acknowledged as the heir to and lawful owner of his own lands and may the reservations be recognized as the collective property of the Native Communities. Any omission or lack of concern regarding this aspect of the matter will constitute an attitude which will lead us to conclude that the emancipation proclaimed by the Minister of the Interior forms nothing more or less than a hostile attitude and ill-intentioned as regards the Native Communities, and therefore worthy of censure." 27/

135. The writer quoted in paragraph 133 above in connection with the "Emancipation Decree" comments further:

"The Decree had not yet been signed by the President, and two days later, on the 21st of December, the Jornal do Brasil, in an editorial entitled "The Dialogue of the deaf" announced:

"In a belated demonstration of good sense, the Minister of the Interior has requested that the President of the Republic shelve the project of the regulation of the Statute of the Indian, which includes the so greatly disputed question of "emancipation".

"In the case of the "Emancipation Decree" the tensions set up by the self-contradiction in Brazilian indiginist policy reached breaking point, and last public pressure not forced the authorities to retract the protest, a big step would have been taken in the direction of rapid integration of the Indian into the national society. The first article of the decree makes the government's intentions clear, when it provides for the creation of a "support committee" for the Indians, comprising representatives of the Ministries of Education and Culture, of Agriculture, of Social Welfare, of Labour, of Health and the Secretariat of Planning of the President, which would promote the designing and execution of an "Integrated Plan of action for the development of the Indigenous Communities" to permit "greater technical, economic and social
assistance to these communities and to the Indians, with the aim of incorporating them, gradually, into the national community, through integration or emancipation, in order to assure them consequently the full exercise of their civil rights." (emphasis mine)

"That the Indians themselves reject emancipation is not a form of racism or dependency: it is based on the realisation that integration means no more than joining the already swollen numbers of landless exploited peasants and urban slum-dwellers of Brazil, who have always enjoyed, theoretically, the "full exercise of their civil rights." The tendency of official policy to try to enforce or speed up integration - which also contravenes the Geneva Convention referred to earlier - is, with the land issue, the greatest threat the Brazilian Indian faces today, and his survival depends on the extent to which he is able to withstand it.

"To sum up this section, we look at the three main categories of reasons for the apparently incomprehensible pressures the government is applying to the Indian community. In the past, the Indian has been referred to as an "ethnic boil" by the ex-president of FUNAI, and an "obstacle to progress" by the ex-minister of the Interior. Is it reasonable to suppose that this tiny handful of people who would not fill a Brazilian Football Stadium, mostly inhabiting the most inaccessible areas of Brazil, and amounting to 1% of the country's population, could really hold back the development of the other 99.9% of the population? Is it not patently absurd that this group of a mere 200,000 people, who have no arms, only the most simple and rudimentary technology, no material wealth, no common language, virtually no means of inter-communication, and who are largely illiterate, should pose such a threat to a huge and growing country with nuclear power and the fastest growing city in the world?" 58/

136. In Colombia, Act No. 39 of 1890 specifies that the indigenous inhabitants "integrated into civilized society" shall be subject to the general laws of the Republic except in matters concerning the reservations, to which the special provisions established by that Act shall apply (art. 2).

137. With regard to the legal capacity of those persons as established by the Act in question and other legal instruments, the only provision to be found in the legislation applicable to the indigenous people which represents an exception is to be found in Act No. 89 of 1890, which specifies that they are to be accorded the status of minors in so far as their share of the reservation land is concerned (art. 36 of the Act). The logical conclusion therefore is that they are legally capable, except in the matter of disposing of their share of land in a reservation; to be entitled to do this they must comply with the same formalities as those applicable to minors. In line with this, article 29 of Act No. 19 of 23 September 1937 provides that "when an indigenous reservation has been divided up, the members of the community owning land in the reservation acquire the ordinary status of Colombian nationals with respect to both person and property". It should be pointed out that there is no apparent justification for the reference to "person" in this article, since the limitation on the capacity of the indigenous persons relates solely to their power to dispose of their rights in the reservation.

58/ Anna Presland, _loc. cit.,_ pp. 27 and 28.
138. The following statement by the Argentine Government is illustrative of the explicit subgroup, whose members have a legal status generally applicable to all:

"In accordance with article 16 of the National Constitution, which establishes the principle of equality before the law, the indigenous inhabitants are citizens who enjoy the same rights and have the same obligations as the other inhabitants of the territory of Argentina and, among other things, are registered for the purpose of the exercise of their civic rights and the performance of military service."

139. The Government of Guatemala states that the legal status of the indigenous people is based on article 43 of the Constitution "which embodies the principle that all human beings are free and equal in dignity and rights, and establishes that no one may be subjected to servitude or to any other condition that is prejudicial to his dignity and the respect due to him. Discrimination on the grounds of race, colour, sex, religion, birth, economic or social position or political opinion is prohibited. The Government maintains the aforesaid principle intact, hence the indigenous population of Guatemala is not exposed to discrimination of any kind."

140. Although not expressly mentioned, it will be noted from other information on some of these countries that a number of special measures have been adopted with respect to the indigenous people.

141. On the other hand, the information relating to other countries does refer explicitly to the main reasons for the adoption of special measures favouring the indigenous populations. Either it is specifically stated that such measures have been taken, or it can be deduced from the institutionalization of the measures that they are intended to ensure that the indigenous people are able to exercise their rights more effectively and to give full effect to their obligations and responsibilities as citizens within the institutional system concerned.

142. Thus, for example in Indonesia, the Constitution does not recognize any distinction in legal status between citizens, so that any exemptions from obligations imposed by law tend to be on a de-facto basis in that country. Moreover, as there is no legal status for members of isolated groups or communities of autochthonous peoples, there is consequently no hard-and-fast rule that may be applicable when outside authority becomes involved.

143. The Government of Finland states that in that country, "the legal status is the same for all citizens, including the Lapps". Certain special provisions have been made, however, the effects of which would directly or indirectly benefit the Lapp population.

144. More specific reference is made in certain cases to some of the special measures taken for the benefit of the indigenous people.

145. Thus, for example it has been stated that citizenship rights and obligations are largely the same for the Lapps as for nationals. This applies to all the Finnsoscanian Countries. In Sweden, however, the Lapps also have the privilege of exclusive reindeer herding rights; moreover, the practising herdsmen are in time of peace exempt from military service. The Swedish Government has stated that "there is a provision stating that in principle peoples of Lappish origin have an exclusive right to reindeer breeding".
146. In 1973 the Government of the Philippines stated that in that country "between 1918 and 1935, the non-Christian tribes were governed by special laws under the supervision of the Bureau of Non-Christian Tribes. The present Constitution does not distinguish them from other citizens, although the Civil Code contains special provisions relating to their marriage". That situation still seems to obtain today.

147. In Japan the Ainu have no special status and in law are simply Japanese citizens. In the late 1920s they were granted legal citizenship with the concomitant obligation of army service. Various protective and educational programmes were carried out by the Japanese Government at all times in their history for the Ainus in Hokkaido. The consequences of these measures are said to have been varied and are described in the appropriate parts of this study.

148. In the information available in other countries there is, as indicated above, a specific mention of the need to take these special measures. It is deemed useful to quote here some of the statements available on these aspects.

149. On the fundamental status attributed to aborigines and Torres Strait Islanders in Australia the Government states that the Commonwealth has developed a national policy which clearly recognises that Aboriginals have the same rights and obligations as other citizens and, in addition, may choose to benefit from certain special provisions established in their favour. Most such measures are designed to overcome the disabilities now being experienced by many Aboriginals and should therefore be regarded as temporary, but some special provisions, such as those pertaining to land rights, might more properly be regarded as permanent. The federated States have developed broadly similar policies with the exception of the State of Queensland.

150. According to the replies received, the indigenous populations do not have a special legal status in any of the other countries whose Governments have provided information. The realization that these people face special problems because of their cultural and social differences with respect to the rest of the population has led the Governments to institute special measures in an effort to compensate them to some extent for the problems they confront. Some statements made in this connection are reproduced below.

151. The Government of Bangladesh has stated:

"In Bangladesh, there being no discrimination against any citizen on ground of religion, race, caste, sex or place of birth, the question of any special legal status for any group or individual will not be relevant."

"...

"However, for development purposes, some regions or groups have been identified as "backward". Special treatment is given to these groups or regions".

152. In Norway, although as pointed out by the Government "no special legal status has been established in respect of the Lapps", mention is made also of particular provisions that have been effectively drawn up, specifically in order to give the Lapps special facilities which they need in order to enjoy certain rights.
153. In a broader sense, the Government of India emphasizes that the Scheduled Castes and Scheduled Tribes, which have been described as the weaker sections of the population, enjoy all the rights open to other citizens of India, but, additionally, they have certain special privileges, such as reservation in public services and in legislatures. The grant of these additional privileges does not debar them from obtaining employment or seeking election outside the quotas reserved for them.

154. In Pakistan the "underprivileged castes, tribes and groups" that have been identified by the Governments of the respective provinces and entered in a schedule of "underprivileged classes" enjoy the same rights and duties as other citizens. In addition, and in order to bring them to terms of equality with other persons, they are granted special representation in the higher cadres of the administration. Among other things, tribal candidates for public office enjoy favourable consideration in certain districts.

155. In Costa Rica, where the indigenous people are regarded as inhabitants of the country and Costa Rican citizens under the Constitution, all the rights and obligations of citizens have been attributed to them by law and executive decrees, and they are also entitled to benefit from any provision especially concerned with the land which is interpreted in their favour on the grounds that they are in a weaker position in society. Furthermore, they are exempt from certain obligations, particularly with regard to land taxes, without this restricting their rights as citizens.

156. From the material made available to the Special Rapporteur, it appears that there is no restriction on the exercise of any right except the right to dispose freely of the community reservations, which are inalienable and cannot be ceded but only negotiated with other indigenous persons. Restrictions are also placed on the right of non-indigenous persons to lease, rent, purchase or in any other way acquire land or farms within reservations. Sales of land in indigenous reservations to non-indigenous persons are declared null and void with the appropriate legal consequences (article 6 of Executive Decree No. 5904-G, as amended by article 14 of Executive Decree No. 6036-C).

157. The information concerning certain countries contains, in varying degrees of clarity, the idea that the special measures adopted in connection with the indigenous populations will be continued only so long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits to which they should be entitled under the general laws of the country, and only to the extent that they are deemed necessary.

158. For example, the Government of New Zealand has stated that:

"The Maori population is recognized as having all the rights and obligations of citizenship. There are, in addition, enactments which confer special rights and privileges on Maoris for the express purpose of ensuring that their position in society is equal to that of the rest of the community. These special provisions are reviewed continuously and those that are no longer required are repealed ...".

159. Somewhat more explicitly, the Government of Guyana has stated that the indigenous populations have all the rights and obligations of citizens and in addition benefit from special provisions established in their favour and considered necessary because of the fact that they have a relatively weak position in society, such provisions to remain in force as long as they continue to be in such a position. These special provisions are contained in the Amerindian Ordinance, Chapter 58.
160. According to an official statement of policy which spells this out to a much clearer degree, in Malaysia the Orang Asli have been recognized as having all the rights and obligations of citizens and, in addition, benefit from certain special provisions established in their favour and considered necessary because of the fact that they have a relatively weak position in society, such provision to remain in force as long as they continue to be in such a position. The following are among the basic principles adopted in this respect, as transmitted by the Government:

"(a) The aborigines, being one of the ethnic minorities of the Federation must be allowed to benefit on an equal footing from the rights and opportunities which the law grants to the other section of community. In so far as their social, economic and cultural conditions prevent them from enjoying the benefits of the laws of the country, special measures should be adopted for the protection of the institutions, customs, mode of life, persons, property and labour of the aborigine peoples. However, such measures of protection should not be used as a means of creating or prolonging a state of segregation and should be continued only so long as there is need for special protection and only to the extent that protection is necessary.

"(b) In order to assist in providing the aborigines with opportunities for the full development of their initiative, special training facilities should be introduced so that they can receive the training necessary for occupations for which they have traditionally shown aptitude. However, such special facilities should be provided only so long as the stage of cultural development of the communities concerned requires them. With the advance of the process of integration they should be replaced by the facilities provided for other citizens."
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STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Final Report (first part) submitted by the Special Rapporteur
Mr. José R. Martínez Cobo

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VIII. General measures for the prohibition, prevention and elimination of discrimination

A. Preliminary observations

It must be stated from the outset that in all countries, whether developed or developing, unitary or federal and wherever they may be located and whatever their background may be, there is discrimination in fact even when full equality may have been formally proclaimed in law. To be sure, there are varying degrees and different characteristics in the incidence of this phenomenon, but, everywhere the de facto situation is at variance with the de jure situation. Actual behaviour is often very far from what has been foreseen in juridical norms. Regardless of the best of intentions and of the most generous ideals that may have inspired the adoption of legal provisions, their actual workings may have ended up producing unwanted results. Unfavourable distinctions affecting indigenous populations are, of course, not seldom based on intentional and very realistic oppressive or repressive actions or practices specifically designed to bring about freely chosen effects to the detriment of indigenous populations. Existing discriminatory patterns have also, by way of reaction, produced defensive attitudes or conduct against them, or against proposed ways of preventing them or the enactment of provisions seeking their elimination. Everywhere legal norms have been elaborated to cope with existing discriminatory acts or practices by prohibiting them and declaring them to be punishable, establishing ways or procedures to avoid or overcome them, or else to punish those responsible for and remedy the effects of these actions or practices.

2. The available data on existing discrimination and ways of preventing or eliminating it will be studied for each of the areas covered by the main body of this study. The following paragraphs contain, for each area, an analysis of the special measures taken in the different fields to place indigenous groups on a footing of more effective equality with the rest of the population and to deal with the special circumstances in which they find themselves. It has been deemed useful, however, to outline the general provisions in force for prohibiting and eliminating discrimination based on race, colour, belief and ethnic or national origin, because, in those countries where such provisions exist, they can be invoked on behalf of the indigenous population. On the other hand, no analysis will be made here either of the provisions or of their effects, since the latter will be obvious from the study of how they operate in relation to each of the subjects in question. Both the specific and the general aspects of these provisions will be outlined with respect to each area, as well as in the chapter on conclusions, recommendations and proposals at the end of the study, and as a corollary thereto. It would be premature to try to describe them in this part, which aims simply to give an idea of the legal framework of this aspect of the study.

3. Today, the Constitutions and fundamental laws of all States contain provisions relating to human rights and fundamental freedoms that are observed in the respective territories subject to their jurisdiction, and legislative or other measures have been taken everywhere aiming at the attainment of equal rights for all the inhabitants or for all citizens without unacceptable distinctions. Equality of opportunity for all citizens is also sought through the basic policies of the State in all countries.

4. Thus, in most countries the laws provide for equality before the law and/or for the equal protection of the laws and in many systems these provisions may be invoked against acts or expressions of discrimination, although these enactments do not specifically refer to this question. In numerous countries these
provisions are coupled with others specifically aiming at prohibiting, preventing or eliminating discriminatory acts and practices. In some other States that have ratified certain international instruments containing provisions prohibiting discrimination, or that are wholly devoted to that purpose in certain aspects, systematic laws for the prohibition and elimination of discrimination have been enacted, while provisions or sections of existing laws have been repealed whenever they were regarded as discriminatory. Provisions to ensure access to all under conditions of equality to places and services intended for the public have also been inserted in fundamental or other laws. Provisions seeking to overcome barriers that either exist or could come into existence and to encourage harmony between the different groups coexisting in countries have also been inserted into fundamental laws or other enactments. In numerous States, concrete acts of discrimination or of instigation to discrimination in concrete forms have been made into criminal offences, with provisions for their punishment by fines and/or imprisonment, while providing much more serious penalties for acts of extermination or instigation to the extermination of groups. A very succinct analysis of these different matters follows, as far as the information available on them would permit.

B. General provisions establishing equality

5. Traditionally, all Constitutions and fundamental laws contain a recognition of equality before the law. Recognition of the right to equal protection under law then follows as a natural complement. Thus, in many of the countries considered in connection with this study equality before the law is explicitly recognized for all the country's inhabitants 1/ or all its nationals 2/ while the right to equal protection under the law is recognized for all inhabitants 3/ or nationals. 4/.

6. As will be seen later, the Constitutions of some countries combine these provisions with specific declarations prohibiting discrimination for stated reasons (see paragraph 26 below).

1/ Argentina ("inhabitants", Const. art.16); Brazil (Const. art.153); Canada ("individuals", Bill of Rights, part I (b)); Ecuador ("all persons", Const. art.19); El Salvador ("all persons", Const. art.150); Guatemala ("all persons", Const. art.43); Honduras ("Honduran nationals and resident aliens", Const. art.51); India ("every person", Const. art.14); Paraguay ("inhabitants", art.54); Surinam (Const. art.1 (1)).

2/ Bangladesh (Const. art.27); Burma (Const. art.13); Finland (Government Declaration); Indonesia (Constitution, chapter on citizenship); Japan ("All the people", meaning the Japanese people, Const. art.14); Laos ("les lao", Preamble to the Constitution); Malaysia (Const. art.8 (1)); Nicaragua ("los nicaragüenses", art.37); Norway (Government Declaration); Pakistan (Const. art.25); Panama (implicit art.); Sri Lanka (Const. art.18 (1-a)).

3/ Bangladesh (Const. art.27); Burma (Const. art.13); Finland (Government Declaration); Indonesia (Constitution, chapter on citizenship); Japan ("All the people", meaning the Japanese people, Const. art.14); Laos ("les lao", Preamble to the Constitution); Malaysia (Const. art.8 (1)); Nicaragua ("los nicaragüenses", art.37); Norway (Government Declaration); Pakistan (Const. art.25); Panama (implicit art.); Sri Lanka (Const. art.18 (1-a)).

4/ Argentina ("inhabitants", Const. art.16); Brazil (Const. art.153); Canada ("individuals", Bill of Rights, part I (b)); Ecuador ("all persons", Const. art.19); El Salvador ("all persons", Const. art.150); Guatemala ("all persons", Const. art.43); Honduras ("Honduran nationals and resident aliens", Const. art.51); India ("every person", Const. art.14); Paraguay ("inhabitants", art.54); Surinam (Const. art.1 (1)).
7. The Constitutions or fundamental laws of other countries contain different provisions for achieving similar ends, for they make no specific mention of discrimination or of prohibiting and punishing it. In addition to establishing general equality before the law or the right to equal protection under the law, the Constitutions of some countries stipulate that "privileges based on blood or birth" are not recognized in the country (Argentina, art.16, Paraguay, art.54) or that special laws may be enacted "if this is required by circumstances, but not by reason of differences between individuals" (Peru, art.23).

8. The Government of the United States has made a general reference to formal equality before the laws and the equal protection of the laws under the Constitutions when it states:

"The protection of individual rights under the Constitution of the United States is available to all indigenous citizens in the same manner as it is to all other citizens. This protection has been available to all indigenous persons since 1924. The specific explanation of individual civil rights was enacted into law by the Congress during the 1960s. The law applied to all American citizens, Indian and non-Indians alike."

9. In this connection it has been remarked that:

"In theory, the protection of individual rights under the Constitution of the United States is available to all indigenous citizens in the same manner as it is to all other citizens. Special laws have been enacted from time to time to ensure that the rights of all Americans are protected, and these laws were made necessary by the persistence of overt racial discrimination in many parts of the country. However, the enforcement of civil rights laws for the benefit of Indians has been sorely lacking. The administration of justice, particularly in border towns surrounding the reservations, is of very poor quality and often enforced discriminatorily with respect to Indians. The Federal Bureau of Investigation has a very bad reputation in investigating crimes committed against Indians on the reservation as well as civil rights violations against Indians off the reservation. This agency has historically had a bad reputation with respect to the protection and the hiring of minorities, and in the case of Indians particularly this reputation is well deserved."

10. Regarding other measures taken in a general context, which may work to the direct or indirect benefit of the indigenous populations, mention should be made of stipulations imposing on the State the duty to make provisions endeavouring to ensure equality of opportunity to all citizens, or to remove social and economic inequalities between human beings. The attainment of this goal is sought through a number of provisions establishing the approach to the organization and conduct of the economic and social policies of the State and the many measures to be taken by the public authorities in this connection.

11. Provisions of this type are present in most Constitutions or fundamental laws and the underlying principles emerge from very numerous provisions in each case. The discussion of these stipulations and their impact and grasp would take much space, and as, in addition, some of these aspects will be covered when dealing with fundamental policy, it is thought inadvisable to embark upon their close examination here. In a few countries there are, however, in addition, specific

provisions dealing with equality of opportunity which should be mentioned here. It should be noted that given the different socio-economic context in which they will have to be operative, their impact and scope may be quite different despite very similar wording.

12. An example of this type of approach may be found in the Constitution of Bangladesh which contains the following among its fundamental provisions: 6/

"19. (1) The State shall endeavour to ensure equality of opportunity to all citizens.

(2) The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic."

13. Another example of this type of provision is the following taken from the Constitution of Sri Lanka:

"Art. 16.

(5) The State shall endeavour to eliminate economic and social privilege, disparity and exploitation and ensure equality of opportunity to all citizens."

14. The Indian Constitution adopts a similar approach when, in the Preamble, the People of India declare themselves solemnly resolved ... "to secure to all its citizens Justice, social, economic and political ... Equality of status and of opportunity ...".

15. Read together with other articles of the Constitution, in particular articles 14, 15, 16 and 17, this declaration conveys the determination of the Constituent Assembly to eliminate discrimination and to overcome in that country the caste system and "untouchability". Articles 14, 15 and 16 have been quoted elsewhere in the present report together with other articles of the Constitution which make special provisions for scheduled castes and scheduled tribes. Article 17 provides:

"17. Abolition of Untouchability. - 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law."

16. Untouchability is a concept of "ceremonial purity" according to which the touch or the near approach of a person of certain "low castes" pollutes persons of a "higher class". 7/ In addition to article 17 of the Constitution, the Untouchability (Offences) Act, 1955, makes the offence of untouchability cognizable and punishable uniformly throughout the country. Together with the caste system, untouchability has a long tradition in India, extending through thousands of years and long held traditions die hard. The Constitution of 1949 makes many provisions in favour of the Scheduled Castes (which are the untouchables), and in the Directive Principles of State Policy contained in the Constitution, the State was directed to promote with special care the educational and economic

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6/ The Constitution also provides for equality before the law and for the equal protection of the laws, and proscribes discrimination on the grounds that it specifies. See paragraphs 5 above and 26 below.

interests of the weaker sections of the people and, in particular, of the scheduled castes and scheduled tribes and to protect them from social injustice and all forms of exploitation (art. 45). Although these Directive Principles are not enforceable by the Courts they are declared, nevertheless, to be "fundamental in the governance of the country" and it is the duty of the State to apply these principles in making laws (art. 37).

17. This report will concentrate exclusively on the Scheduled Tribes; it is, however, deemed useful to place them in their social context and to differentiate them from the Scheduled Castes, as most relevant Constitutional provisions deal with both the Scheduled Castes and Scheduled Tribes. According to one writer: 8/

"The institution of caste which is peculiar to India, goes back to the earliest times in Indian history. A good deal has been written about the origin and nature of the Indian caste system; in essence it is a system of social stratification on a hereditary basis which, through the ages, has acquired extreme rigidity making vertical mobility in the social hierarchy almost impossible. It was the complete separation of the various social strata on the basis of birth which made the caste structure unique.

As Jawaharlal Nehru said: 'The ultimate weakness and failing of the caste system and the Indian social structure were such that they degenerated a mass of human beings and gave them no opportunity to get out of that condition educationally, culturally or economically.' He added that, in the context of society today, 'the caste system and much that goes with it are wholly incompatible, reactionary, restrictive and barriers to progress. There can be no equality in status and opportunity within its framework, nor can there be political democracy and much less economic democracy.' (Jawaharlal Nehru: The Discovery of India (Calcutta, 1960) (3rd edition), p. 234).

"It is in this context that the significance of the articles of the Indian Constitution quoted earlier becomes clear. The Constitution directs the State to promote with special care the educational and economic interests of the weaker sections of the people and in particular of the 'scheduled castes and scheduled tribes' and to protect them from social injustice and all forms of exploitation.

"A word of explanation is necessary to clarify the terms 'scheduled castes' and 'scheduled tribes'. 'Scheduled castes' means the castes, tribes or groups deemed to be such under article 341 of the Constitution and 'scheduled tribes' means the tribes or tribal communities deemed to be such under article 342 of the Constitution. The scheduled caste population live along with the other sections of the population and participate in the general economic life of the country; but, owing to past discrimination, extreme poverty and lack of educational opportunities, the majority of them are confined to low-paid, unskilled and less attractive occupations; they are the people who under the caste system came at the bottom of the caste hierarchy. By and large the 'scheduled tribes', on the other hand, have developed in geographical isolation from the general population as they inhabit the more remote hill and forest areas; their economic and educational conditions are at a less advanced stage than that reached by other sections of the national community. The State has assumed the responsibility for co-ordinated and systematic action for the protection of the tribal population concerned and for their social and educational advancement and their progressive integration with the life of the country.

8/ Ibid.
Though the problems of development of the scheduled castes and scheduled tribes differ in detail because of these distinguishing factors, basically the problem is the same, namely providing facilities for economic betterment, education and the removal of social disabilities so that equality of opportunity to participate in the general life of the community becomes available to them in real terms. Even before the advent of political independence and the new Constitution, the development of the social reform movements in India, and particularly the teachings of Mahatma Gandhi, had helped powerfully to awaken the public conscience against the objectionable and discriminatory features of the caste system. But with the adoption of the Constitution the State (which, under article 12 of the Constitution, means the central and state Governments and Parliament and the state legislatures and local authorities) is required actively to promote equality of opportunity for all citizens and to remove discrimination in all forms.

"Even today, one comes across divergent views about the hold of the caste system on Indian society. It is still strong in many places. The optimistic view is that caste is gradually losing importance; and, while a 'casteless' society may still be far off, with the coming up of new generations and the strengthening of democratic forces the objectionable and discriminatory features of the system will be left behind."

C. Measures to ensure that public authorities and individuals, groups or private organizations engage in no act or practice of discrimination against indigenous populations and do not sponsor, defend or support any such act or practice or prevent the full and equal enjoyment of human rights and fundamental freedoms by indigenous populations

18. In some countries the institution of ombudsman or its equivalent makes possible individual complaints against public officers which may or may not have a racial background. 2/ In Canada, six of the provinces have established the office of Ombudsman or Parliamentary Commissioner to receive and act on complaints by individuals against the public authority. These offices are of course designed to serve native people as well as other citizens and, among other things, safeguard them from discrimination.

19. The Canadian Government and the Governments of nearly all the provinces at one time or another have enacted positive anti-discrimination legislation aimed at the achievement of equal opportunity and equal treatment in employment, trade union membership, and public accommodation, regardless of race, colour, religion or ethnic origin. The administration of these statutes lies in the hands of specified Government agencies, and penalties for discriminatory practice are invoked after discussion, conciliation and persuasion have failed.

20. The provinces of Canada have established Human Rights Commissions charged with the responsibility of promoting public understanding of civil rights and assisting citizens in claiming restitution for infringement of their rights. These Commissions have intervened repeatedly on behalf of native people, especially in matters of housing accommodation refused on basis of race. They have required and obtained restitution for the native person. Less frequently there have been cases of discrimination against natives in regard to access to restaurants and other commercial establishments. The provincial Commissions have also intervened on behalf of the native people in these cases. 10/

2/ For example in Canada, Guyana, New Zealand, Norway, Sweden.
10/ Similarly in Denmark, where the courts have dealt with these cases.
21. In Brazil, the Council for the Defence of Human Rights has been created to initiate formal inquiries, investigations and studies concerning the efficacy of the laws guaranteeing human rights as inscribed in the Federal Constitution, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights.

22. In New Zealand, the Race Relations Act, 1971 provides for the appointment of a Race Relations Conciliator and a Deputy Conciliator whose principal functions consist in investigating, either on complaints made to him by any person or of his own motion, any action or omission or any practice which is or appears to be a breach of the Act. The Act further provides for court proceedings to be taken against any person when recommended by the Conciliator and for damages and other relief to be awarded to injured parties. The Act provides also that every person commits an offence against this Act and is liable on summary conviction to a fine not exceeding $200 who resists the Conciliator in the exercise of his powers under this Act, or refuses to comply with any lawful requirement of the Conciliator.

23. In Australia a post of Commissioner for Community Relations was established under the Racial Discrimination Act, 1975. The functions of the Commissioner are to inquire into alleged infringements of the provisions of the Act and endeavour to effect a settlement of the matters alleged to constitute those infringements; to promote an understanding and acceptance of, and compliance with, this Act; and to develop, conduct and foster research and educational and other programmes designed to combat racial discrimination and prejudices that lead to such discrimination. Where a complaint in writing is made to the Commissioner that a person has done an act that is unlawful by reason of a provision of the Act, or where it appears to the Commissioner that a person has done such an act, he shall inquire into the act and endeavour to effect a settlement of the matter to which the act relates.

24. The Government of the United States has communicated:

(i) on certain de jure aspects:

"A special act, The Civil Rights Act of 1963, has a specific provision for protecting the civil rights of Indians on reservations. This law has been opposed by some Indian groups as a contravention of their traditional method of governing - particularly the Pueblos".

(ii) on certain de facto aspects:

"It can be said historically that prejudices and discrimination against indigenous persons varies with proximity to an Indian community. To a large extent, non-Indian communities have taken the initiative in striving for equality and personal dignity for Indian people. An example is the development and success of a community event sponsored by the town of Sheridan, Wyoming, called 'All American Indian Days'. In this celebration a young Indian woman is chosen 'Miss Indian America'. She then travels about the nation and abroad interpreting the Indian community to non-Indians.

"She is expected to have a costume of her tribe and a traditional skill which she can display. Indian tribal songs, dances, and chants are a part of the All American Indian Days festivities. The promoters of this event point out that the Indian in the frontier communities was not highly regarded, and this low image is one the celebration hopes to overcome".

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25. It has also been reported: \(11/\)

(i) As to the de jure situation:

"The United States Department of Justice ... [has] created an Office of Indian Rights which was ostensibly designed to secure greater enforcement of civil rights laws for the benefit of Indians. This office, however, has displayed a tendency to place a high priority on finding cases which would involve imposing non-Indian standards on the administration of tribal government. Despite the many border-town problems in the administration of justice and access to public services and accommodations, the Office of Indian Rights has not responded with sufficient effort to bring about major change.

"...

"The United States ... contrasts the ideal in the United States with an allegation of actual practice under the tribal jurisdiction. No Indian denies that tribal justice needs improvement. But Indians are 25 times more likely to be arrested than the average citizen in the United States yet all authorities agree that there is, if anything, less non-alcohol-related criminality among Indians than among the general population".

(ii) As regards the de facto situation:

"If non-Indian communities have taken the initiative in striving for equality and personal dignity for Indian people, who are they striving against? It is the very non-Indian communities near the reservations who deny Indians these same basic human rights. To be sure, some communities such as Sheridan, Wyoming and Gallup, New Mexico have created celebrations in which a caricature of Indian culture is prominently featured for the benefit of attracting the tourist trade. These festivals are obviously held for their commercial advantages to the non-Indian businessmen of the towns involved. The same towns are less than hospitable to Indians throughout the year, and provide little in the way of public accommodations to Indians who visit and shop in their towns when the celebrations are not being held. During the celebrations themselves, Indian dances and other cultural events are presented in a carnival-like atmosphere. It is interesting to note that a recent 'Miss Indian America' resigned to protest against this exploitation. One can imagine the outrage if a city in China caused its Christian minority to perform a caricature of the Mass for Chinese tourists who would then take pictures and buy souvenir priest's outfits for their children to wear. The tourist celebrations receive some Indian support, to be sure, but that can easily be explained as a function of the desperate economic conditions of the Indian people who are forced to such public performances in order to survive.

"A particularly repellent practice has come to public attention with the recent mass murders in northern New Mexico. It is a common custom of young people in border towns to harass Indian people by beating them up or running their cars off the road. This is often but by no means exclusively directed at Indians who happen to be in an intoxicated condition. Local law enforcement officials take little action against these rampaging local hoodlums, and the practice is evidently accepted as a normal part of life by the local non-Indian community. In some border towns local resident Indians are also subject to similar harassment. It is difficult to see where an annual tourist celebration is having any positive effect on this practice".

D. Measures to prohibit and bring to an end any act of discrimination against indigenous populations

26. As was mentioned earlier, there is a marked tendency to include in Constitutions clear provisions which not only guarantee equality before the law and equal protection under the law, but also expressly prohibit discrimination. The Constitutions of many countries contain provisions which prohibit discrimination against persons or groups on the following series of grounds: political or religious convictions or descent (Denmark, art.77 (1)); birth, social status or race (Nicaragua, art.54); origin, race or religion (French Guyana) (France, art.2). birth, religion or race (Burma, art.13); nationality, race, sex or religion (El Salvador, art.150); race, sex, creed or social status (Venezuela, art.6); religion, race, descent or place of birth (Malaysia, art.2 (2)); race, sex, religion, view of life or political persuasion (Suriname, art.1 (2)); race, creed, sex, social status or family origin (Japan, art.14 (1)); race, creed, political opinions, colour or creed (Guyana, art.15 (2)); race, birth, social class, sex, religion or political ideas (Panama, art.19); sex, race, occupation, religious creed or political convictions (Brazil, art.153 (1)); religion, race, caste, sex or place of birth (Bangladesh, art.28 (1), (2)); race, religion, caste, sex, residence or place of birth (Pakistan, arts.26 and 27); religion, race, caste, sex, descent, place of birth, residence (India, art.15 (1, 4) and 16 (2)); race, colour, sex, religion, birth, economic or social status or political convictions (Guatemala, art.43); sex, race, class or any other form of discrimination detrimental to human dignity (Honduras, art.95); race, sex, language, religion, political or other opinions, origin, economic or social status or any other circumstance (Bolivia, art.6); race, colour, sex, language, religion, descent, political or other opinions, social origin, economic status or birth (Ecuador, art.9).

27. The provisions prohibiting discrimination on the grounds referred to above apply to all persons 12/ or to nationals, 13/ depending on the text in question.

28. In other countries special enactments have addressed themselves in a systematic way to the prohibition of discrimination and to the provision of means of overcoming its incidence and effects. Some of these countries have signed and ratified or acceded to international instruments under which they assumed clear duties and obligations in this regard.

29. Regarding Australia, there is information on action to prohibit discrimination and/or the effects of discriminatory legislation.

30. On prohibition of discrimination the following paragraphs contain information furnished in 1974-1975 by the Government.

"In the past State and Commonwealth Governments had generally taken the view that the problems of racial discrimination were best dealt with otherwise than by legislating against discrimination, the exception being South Australia where the Prohibition of Discrimination Act was introduced in 1966. This Act

12/ Argentina, Australia, Brazil, Ecuador, El Salvador, Guatemala, Guyana, Panama, Paraguay, Venezuela.

13/ Bangladesh, Burma, Honduras, India, Japan, Malaysia, Nicaragua, Pakistan.
makes it an offence to discriminate in the provision of various specified services. The authorities concerned with its administration report that the existence of the legislation has served as an effective deterrent against discrimination, especially in service in hotels and restaurants.

"The Prime Minister has indicated that the new Government will legislate to prohibit discrimination on the grounds of race, and will ratify the United Nations Convention on the Elimination of All Forms of Racial Discrimination.

"The Convention on the Elimination of All Forms of Racial Discrimination has not yet been ratified by the Australian Government. A Bill was introduced into the Australian Parliament in November 1973 to give effect to the Convention and allow ratification. It was deferred and reintroduced in 1974 and is again before the Parliament in 1975. The Bill includes specific provisions to override sections of the Queensland laws affecting Aboriginals and Islanders." 14/

31. On repeal of discriminatory legislation, in 1974-1975 the Government of Australia communicated that since the 1950s official policy in respect of Aboriginals has evolved from one of protection and control (which often included restriction of personal rights and freedoms) and during this time legislation discriminating against Aboriginals has been progressively eliminated.

"At the end of 1974 the only remaining provision in Commonwealth law that is regarded as discriminating against Aboriginals was a provision in the Migration Act 1958-1966 - which imposes certain restrictions on overseas travel by some classes of Aboriginals. This section of the Act has not been administered for several years and it is to be repealed at the next session of the Federal Parliament early in 1975. In 1975 the Government has communicated that the Migration Act 1958-1966 was amended by the Migration Act 1975 to remove the provision restricting the emigration of certain Aboriginals.

"State legislation discriminating against Aboriginals or on the basis of race has been repealed or amended. The only State statutes which still do not fully satisfy the requirements of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination are the Queensland Aborigines Act 1971 and Torres Strait Islanders Act 1971, with their regulations, which, inter alia, provide for official management of the property of certain Aboriginals and Islanders to continue otherwise than at the request of the individual concerned. It is hoped that these difficulties can be resolved shortly." 15/

14/ Information furnished by the Government in 1975.

15/ See, however, what concerns the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill 1974 and recent partial amendments in the Queensland legislation in document E/CN.4/Sub.2/476/Add.2

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32. The Commonwealth has acted to ensure that a wide range of human rights are recognized in laws in force in all levels of Government in Australia. In 1975, subsequent to the making of the Racial Discrimination Act, the Commonwealth Parliament passed the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act. This Act was designed to meet the situation created by certain specific provisions of Queensland legislation relating to Aboriginals and Torres Strait Islanders; its purposes are described as those of "preventing discrimination in certain respects against those peoples under the laws of Queensland".

33. Act No. 75 of 1975, assented to on 19 June 1975 contains provisions on management of property; residence and other acts on reserves; reasonable or not reasonable conduct observed on reserves; entry on premises situated on reserves; legal proceedings against an Aboriginal or Islander in courts established for a reserve; directions to perform work to be complied with only under specific circumstances and the terms and conditions of employment of Aboriginals or Islanders. All these provisions will be properly analysed in the respectively appropriate parts of this study later on.

34. Since 30 October 1975, when the International Convention on the Elimination of All Forms of Racial Discrimination entered into force in Australia, the Racial Discrimination Act 1975 has operated to prohibit legislatively in Australia and in Australian Territories all forms of racial discrimination.

35. The provisions of the Racial Discrimination Act 1975, implementing the obligations that Australia assumed under article 5 of the Convention are largely contained in Part II of the Act. Section 9 makes it unlawful to do an act involving a distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin thus applying the definition of "discrimination" in article 1 of the Convention.

36. Section 10 is designed to guarantee equality before the law in the enjoyment of rights (including rights referred to in article 5). By reason of section 109 of the Constitution this provision overrides all Commonwealth, State and Territory laws that may discriminate on a racial basis and avoids the need to make piecemeal amendments to such laws. In addition to laws which are patently discriminatory, this section applies to laws which discriminate in consequence of the manner in which they operate or are administered. Subsection 10 (3) is directed to ensuring equality of treatment of Aboriginals and Torres Strait Islanders in relation to the management of their property.

37. Section 11 makes it unlawful for a person to discriminate in relation to:

(a) access to or the use of any place or vehicle that members of the public are entitled to enter or use; and

(b) the use of facilities in a place or vehicle that are available to members of the public.

38. Section 12 makes it unlawful for a person (whether as principal or agent) to discriminate in a wide range of transactions concerning housing or other accommodation.
39. Section 13 proscribes discrimination in relation to the supply of goods and services to the public or to any section of the public.

40. Section 14 makes invalid any provision in rules of a trade union that prevents or hinders a person joining an organization, on the grounds of race, colour, national or ethnic origins. It also makes it unlawful to prevent or hinder a person from joining a trade union on similar grounds.

41. Section 15 prohibits discrimination in employment on racial grounds in the form of:

(a) failing to employ a person who is qualified for available work;

(b) failing to offer the same terms of employment and conditions of work and opportunities for training and promotion; and

(c) dismissing from employment.

42. The section additionally prescribes discriminatory practices related to the procuring of persons for employment or aimed at preventing a person from offering for employment or from continuing in employment. By subsection 15 (3), similar provisions are applied to organizations of employers or employees. Subsection 15 (4) recognizes the impracticability of applying these provisions to foreign vessels as regards persons engaged for employment outside Australia.

43. Section 16 makes unlawful the publishing of an advertisement that indicates an intention to do an act that is proscribed under Part II of the Act.

44. Section 17 provides that it is unlawful to incite, assist or promote, whether by financial assistance or otherwise, the doing of an act that is unlawful by reason of Part II of the Act. These provisions prohibit in large measure any overt acts by organizations directed at promoting racial discrimination.

45. One of the basic principles of the Act is that the prevention of discriminatory advertising is important in order to grant threshold equality of opportunity especially in employment and housing. An additional reason for such prevention is the great impact on attitudes in society that advertising of a discriminatory nature can produce.

46. In New Zealand the main substantive provisions of the Race Relations Act make it unlawful to discriminate against any person, on the grounds of the colour, race or ethnic or national origins of that person or of any relative or associate of that person, in respect of access to public places, vehicles and facilities, the provision of goods and services, employment, land, housing and other accommodation. Discriminatory advertisements are also made unlawful.

47. Sections 3 and 4 are discussed later on, in connection with the right of access to public places or services, quod vide.

48. Section 5 deals comprehensively with discrimination in the field of employment; it covers discrimination in the hiring, firing, terms of employment, conditions of work and opportunities for training and promotion, of any person.
49. Section 6 provides that discrimination in a wide range of transactions concerning land, housing and other accommodation shall be unlawful. This section needs to be read in conjunction with provisions inserted in the Property Law Act 1952 by the Property Law Amendment Act 1965. One of these provisions, section 35A, makes void any restraints on the disposition of property on the grounds of colour, race or ethnic or national origins. The other, section 110 (1A), was an addition to a provision requiring that the consent of a landlord to the assignment, underletting, charging or parting with the possession of leased premises should not be unreasonably withheld. The new subsection added in 1965 provides that the withholding of consent on the grounds of colour, race or ethnic or national origin is to be treated, ipso facto, as unreasonable. These provisions are set out in annex II to this report.

50. Section 7 of the Act makes it unlawful for any person to publish or display any advertisement or notice indicating an intention to commit a breach of sections 3 to 6 of the Act.

51. Two ancillary provisions, which are relevant to the undertaking given under article 5 of the Convention to prohibit and eliminate racial discrimination, should also be mentioned. Section 23 deals with licences and registration. It provides that where any person is licensed or registered under any other legislation to carry on any occupation or activity or where any premises or vehicle are registered or licensed under any other legislation, then the licensing or registering authority may exercise a power to revoke or refuse to renew a licence or registration in a case where there has been a breach of sections 3 to 7 of the Race Relations Act.

52. Section 27 makes void any condition, whether written or oral, in a deed, will or other instrument which restrains marriage and which does so in a discriminatory manner.

53. Section 9 of the Act is a provision to which, in the words of the Government, Maori organizations attached considerable importance in the submissions made by them to the Committee of Parliament that considered the Bill. Section 9 reads as follows:

"Anything done or omitted which would otherwise constitute a breach of any of the provisions of sections 4 to 7 of this Act shall not constitute such a breach if

(a) it is done or omitted in good faith for the purpose of assisting or advancing particular persons or groups of persons or persons of a particular colour, race, or ethnic or national origin; and

(b) those groups or persons need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community."

54. The Race Relations Act of New Zealand, cited above, has created two offences in sections 24 and 25. See what refers to section 24 in paragraph 65 below. Section 25 reads as follows:

"(1) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $500 who with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.
(a) Publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting, or

(b) Uses in any public place (as defined in Section 40 of the Police Offences Act 1927), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting, being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

(2) For the purposes of this section -

'publishes' or 'distributes' mean publishes or distributes to the public at large or to any member or members of the public;

'written matter' includes any writing, sign, visible representation, or sound recording."

55. This section was framed in such a way as not to impinge unnecessarily on the principles enumerated in the Universal Declaration of Human Rights and the rights set forth in article 5 of the 1965 Convention, in particular the right to freedom of opinion and expression.

56. When article 4 of the Convention was adopted by the Third Committee of the General Assembly at its 1318th meeting on 25 October 1965, the New Zealand representative stated her delegation's understanding of article 4 as a whole. She said that New Zealand had voted in favour of it, on the understanding that the insertion of the "due regard" clause at the end of the opening portion of article 4 would allow the application of its terms with proper regard to the rights set forth in article 5 of the Convention and in the Universal Declaration of Human Rights. The understanding stated then by the New Zealand representative was not challenged. Section 25 of the Race Relations Act gives effect, consistently with this understanding, to the undertaking contained in article 4 (b) of the Convention. Out of regard for the right to freedom of association, section 25 does not make racist organizations illegal. It does provide a means of attacking the activities of any such organizations and rendering them wholly ineffective. There has been no occasion, as yet, to bring a prosecution under section 25.

E. The right of equal access to public places and services

57. The Constitution of some countries expressly guarantees the right of access to any place or service intended for use by the general public to all persons, without distinction on grounds of race, colour or national or ethnic origin.

58. Thus under the Constitution of India "no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment: or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public". (article 15, (2, a and b)) Similarly the Constitution of Pakistan provides that in respect of access to places of public entertainment or resort, no intended for
religious purposes only, there shall be no discrimination against any citizen on the
ground only of race, religion, caste, sex, residence or place or birth. It is also
provided that nothing in the preceding provision shall prevent the State from making
special provision for women and children (article 26, clauses (1) and (2)).
Combining certain elements of the two preceding provisions, in Bangladesh the
Constitution stipulates that no citizen shall, on grounds only of religion, race,
caste, sex or place or birth be subjected to any disability, liability, restriction
or condition with regard to access to any place of public entertainment or resort, or
admission to any educational institution (article 20 (3)).

59. In other countries, this right is guaranteed in the Constitution in general
provisions relating to non-discrimination, equality before the law and equal
protection under the law. This has been stated by the Governments of several
countries. 16/

60. The Government of Guyana states that article 15 of the Constitution establishes
protection against discrimination based on race, place of origin, political opinion,
colour or belief, and adds that there are no other laws specifically prohibiting
access to public places.

61. The Government of Mexico states that, in that country, this right is derived from
the equality of Mexican citizens before the law. In practice, the indigenous peoples
have unimpeded access to public places.

62. In Malaysia, in accordance with information provided by the Government, "the
Orang Asli are equal (to everyone else) before the law in respect of the right of
access to any places or services".

63. A general constitutional provision is, however, not in itself sufficient to
guarantee effective protection against discrimination. Some countries have therefore
introduced constitutional provisions designed to ensure equality of access to public
places and services or, where there are no relevant constitutional provisions, have
promulgated laws which aim to put those principles into practice.

64. Thus, in Canada, 17/ the Federation and nearly all the provinces have enacted
anti-discrimination legislation aimed at the achievement of equal opportunity and
treatment in public accommodation and in other fields regardless of race, colour,
religion or ethnic origin. The administration of the relevant statutes lies in the
hands of specified government agencies, and penalties for discriminatory practices

16/ Provisions pursuant to the Penal Code which lay down that nobody should be
obliged to do anything not prescribed by law, nor prevented from doing anything which
the law does not prohibit may also serve to uphold this right, as in Guatemala and
Peru. Constitutional provisions which provide that "the statements, rights and
guarantees set out in the Constitution shall not be interpreted as a negation of
other rights and guarantees which are not stipulated but derive from the principle
of the sovereignty of the people and the republican form of government" may also be
invoked in this connection, as in Argentina, Guatemala and Honduras.

17/ See E/CN.4/Sub.2/476/Add.2.
are invoked after discussion, conciliation and persuasion have failed. Generally, anyone who feels that he has been discriminated against may make a written complaint to the government department (whether federal or provincial) and an inquiry is made. In most cases as well, a person making a complaint is protected by law from retaliatory action.

65. In New Zealand, the Race Relations Act of 1971 provides that it is unlawful for any person (a) to refuse to allow any other person access to or use of any place or vehicle which members of the public are entitled or allowed to enter or use, (b) to refuse any other person the use of any facilities in that place or vehicle which are available to members of the public, or (c) to require any other person to leave or to cease to use that place or vehicle or those facilities, by reason of the colour, race, or ethnic or national origin of that person or of any relative or associate of that person.

66. In Australia, the South Australian Prohibition of Discrimination Act (1966) seems to have served as an effective deterrent against discrimination, especially as regards service in hotels and restaurants.

67. The Australian Government states (1975):

"Aborigines have the same rights of access to places and services intended for use by the general public as do other Australians. The Racial Discrimination Bill would guarantee these rights (Clause 10).

"The Racial Discrimination Bill will make racial discrimination in Australia unlawful. The Bill also makes special provision for discrimination relating to access to places and facilities and the provision of goods and facilities".

68. The Australian Racial Discrimination Act 1975 (sect. 11) now provides that it is unlawful for a person to refuse to allow another person access to or use of any place or vehicle that members of the public are entitled or allowed to enter or use, or to refuse to allow another person use of any facilities in any such place or vehicle that are available to members of the public, or to require another person to leave or cease to use any such place or vehicle or any such facilities, by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person. 16/

69. In Brazilian law, Act No. 1390 of 3 July 1951, approved unanimously by the National Congress, establishes the penalty of imprisonment for from 15 days to three months and a fine of from 500 to 3,000 cruzeiros for whoever, "through racial or colour prejudice", refuses, on the part of a commercial or educational establishment of any kind, to house, serve, attend or receive a client, customer

16/ Ibid.
or pupil; whoever refuses lodging in a hotel, boarding-house, inn or other
establishment for similar purposes, or refuses to sell goods in stores or shops
of any kind, or to serve customers in restaurants, bars, teashops or similar
premises open to the public where food, drink and refreshments are normally served.

70. The Penal Code of Costa Rica provides that any person, administrator or
manager of a public or private institution or director of an industrial or
commercial establishment who applies any prejudicial discriminatory measure based
on considerations of race, sex, age, religion, civil status, political opinion,
social origin or economic status should be liable to imprisonment for from 20 to
60 days or a fine. In the case of repeated offences, the judge may also order, as
an accessory penalty, suspension from public function or office for not less than
15 nor more than 60 days (article 371).

71. The Norwegian Government states that in Norway there are no special laws or
administrative decisions prohibiting discrimination between different races as
regards public transport and hotel and restaurant services. It is considered a
matter of course, however, that everyone, regardless of race, has the same right
to use public transport and hotel restaurant services. Refusal of transport,
hotel or restaurant services on grounds of race, colour or nationality would be
contrary to the normal regulations on boycott and would lead to criminal
proceedings on that basis. It would also violate the obligation to provide
transport which is a consequence of a licence granted for commercial transport,
and would then lead to withdrawal of the licence. Section 349 of the Norwegian
Penal Code, however, makes it an offence punishable by fine or imprisonment up to
six months, to deny a person goods or services on the same terms as others in a
professional or similar activity because of that person's belief, race, colour or
national or ethnic origin, or for similar reasons to deny a person access to a
public performance or exhibition or any other public gathering on the same terms
as others.

72. In Sweden, new provisions have been added to the Penal Code concerning
"unlawful discrimination" making it an offence for a businessman to discriminate
against a customer because of his race, colour, national or ethnic origin or
religious creed in his business, by not giving him the same service as they would
give his other customers under ordinary business conditions. The same provisions
can also be applied to the same actions committed by people arranging public
gatherings or public meetings, who proceed in the same manner.

73. In accordance with article 6-b of the Penal Code of Finland, anyone engaged
in an enterprise or being in the service of such a person or in a comparable
position, or any public official who in such a capacity and under conditions
generally applicable does not serve a customer because of his race, colour,
national or ethnic origin, or religion, shall be sentenced for discrimination to
a fine or imprisonment for up to six months. Similarly, anyone organizing a
public entertainment or a meeting or assisting at it who, under conditions generally applicable, refuses to admit a person because of his race, colour, national or ethnic origin, or religion, shall be sentenced for discrimination to imprisonment for up to two years or to a fine.

74. According to information provided by the Government of the United States, Indians

"have the right of access to any place or service intended for use by the general public, and they exercise such rights. Note: Non-Indians may not have as complete freedom as Indians in that an Indian tribe on a reservation has the authority to restrict activities on such reservation and has exercised this authority on occasion". 19/

75. In this connection it has, however, been also stated:

"The United States produces a puzzling 'Note'. An Indian tribe, as the governing body, has the authority to regulate behaviour and the use of Indian property on the reservations, just as the State has the same police power off the reservation. Such Indian regulations are applied to anyone who falls under the scope of the law, Indian or non-Indian. It is difficult to understand how the exercise of lawful police power by a tribe gives Indians greater freedom than non-Indians. The tribe also has the power both as a government and as a landowner to determine the use of tribally-owned property, and on occasion this power is used to prefer tribal members in the use of tribal property. Any non-Indian landowner has the same rights with respect to his own property unless he falls under a legitimate public accommodations law." 20/

76. Up to now there is little information available on machinery and procedures to put into practice these provisions, whether they are constitutional or legal provisions or administrative decisions. In this connection it has been reported that in Canada the Human Rights Commissions set up in the Canadian provinces have repeatedly intervened on behalf of native people in matters of housing accommodation refused on the basis of race. In these cases they have required and obtained restitution for the native persons. Less frequently these Commissions have intervened in favour of native people in cases of discrimination against natives in their access to restaurants and other commercial establishments.

77. The Finnish Government states that the Lapp population have access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and spectacles, parks, beaches and markets.

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19/ Information furnished to the Special Rapporteur in connection with the present study.
20/ American Indian Law Newsletter, loc.cit, p.23.
F. Measures to promote the elimination of barriers between the indigenous and non-indigenous segments of the population and to discourage anything which tends to exacerbate division and rivalry

78. Little information is available concerning measures taken to promote the elimination of barriers between the indigenous and non-indigenous segments of the population and to discourage anything which tends to exacerbate division and rivalry. No information whatsoever was provided by some countries. 21/

79. The Governments of some countries stated that, for reasons which they indicated, they had not introduced this type of measure. The Government of Norway, for example, simply stated that it had no information to offer on this subject. The Finnish Government states that there has been no need to take special measures in this connection. Similarly, the Mexican Government reported that the barriers between the indigenous and non-indigenous peoples were fundamentally of a linguistic and cultural nature and that there is no rivalry based on ethnic difference.

80. In providing information on this point, other Governments referred to certain aspects of their policy towards the indigenous populations.

81. Thus in Burma it has been stated that in the late 1960s the Government was training 425 students of 47 nationalities of Burma to be architects of the future for building up the edifice of unity and solidarity in the Union of Burma. It has been stated, in this connection, that among the goals pursued by the ethnic policy of the Revolutionary Government there are endeavours "to de-emphasize ethnic differences and to eliminate when possible the causes of ethnic friction and national disunity."

82. In Sri Lanka, the Constitution contains the following provision:

"Section 16.

"...

"(4) The State shall endeavour to strengthen national unity by promoting co-operation and mutual confidence between all sections of the people of Sri Lanka including the racial, religious and other groups."

83. In Pakistan there are indications of recognition that regional diversity of culture and language are not to be taken as signs of national weakness but as sources of national pride. The policy of the Government is to accelerate the pace of development activities in the tribal areas so as to bring them at par with the other development regions of the country.

84. At a mass open air meeting in 1968 the Prime Minister of Guyana declared: "I cannot emphasize enough our intention to create a new society completely orientated towards the people as a whole and based on the principle that man is the most precious of all resources ... The problem of racial cleavage has been considerably lessened since the PNC (People's National Congress) took over the administration in 1964 ... Nonetheless, we do now realize that much work remains to be done in the area of race relations." 22/

21/ Argentina, Bangladesh, Bolivia, Brazil, Colombia, Costa Rica, Chile, Denmark (Greenland), Ecuador, El Salvador, France (French Guyana), Guatemala, Honduras, India, Indonesia, Japan, Laos, Malaysia, Nicaragua, Panama, Paraguay, Peru and Sweden. 22/ Forbes Burnham, A Destiny to Mould, Africana Publishing Corporation, New York 1970, page 61.
85. Concrete measures have been taken in a few countries in this respect. Thus in Australia programmes are being developed and expanded to help educate the community generally to understand, respect and enjoy the contribution that Aboriginal culture can make to the national life. Increasing attention is given in the schools to general education programmes designed to promote racial understanding and eliminate prejudice. Teaching materials relating specifically to the Australian Aboriginals are being improved and the present Government has pledged that every Australian child shall be taught the history and culture of Aboriginal and Islander Australians as an integral part of the history of Australia.

86. In some areas special programmes of community education have been developed (in Western Australia, for example, a unit of the Department of Community Welfare staffed by Aboriginal educators visits schools with special programmes designed to promote racial harmony and an understanding of Aboriginal problems and aspirations.)

87. In Canada, the public education programmes of the Human Rights Commissions seek to eliminate barriers between the indigenous and non-indigenous segments of the population. Courses in public schools also emphasize the common rights and privileges of all Canadians.

88. Provisions relating to certain offences not specifically enacted with a view to punishing discriminatory acts or practices may nevertheless be invoked in order to punish discrimination. Examples of this are the offences of insulting behaviour (involving acts injurious to the reputation or honour of a person or designed to have him held in contempt), coercion (obliging a person to do something not required by law or preventing him from doing something which the law does not prohibit) and grounds for criminal proceedings constituted by abuse of public authority not involving other offences (arbitrary or unlawful acts prejudicial to the interests and rights of individuals). In many systems, such provisions of the Penal Code may be invoked against persons who discriminate against others on any of the grounds prohibited by the Constitution and law. As will be seen below, however, many countries have made such acts a specific offence.

89. In the United States, in accordance with the information furnished by the Government:

"... the Civil Rights Commission has taken an interest in the degree of discrimination against Indian persons and has recently issued a report on the southwest in which Indians allege discrimination on the part of both Federal Government and the private sector. This conclusion is arrived at on a statistical basis, however, and may not give sufficient weight to the number of indigenous persons with qualifications for the jobs. The Congress, the Executive Branch, the States and the general public are predominantly in favour of elimination of barriers and discrimination. Great progress can already be seen. In fact, the President has said the country esteems a pluralistic culture and welcomes contributions from all segments of it with special emphasis on the contribution of the indigenous population."

90. The following comments have been made in this connection: 23/

"The United States argues that racial discrimination should not be supported on the grounds of the statistics presented in its own Civil Rights Commission. Its weak excuse misapprehends the importance of such statistics in Civil Rights matters as well as in the context of the present international inquiry. The lack of "qualified" Indians to fill federal jobs is of course an indication of the scope and duration of the persistent denials of rights and equal opportunity to Indians, and cannot be used by the United States as a justification for continued discrimination."

91. Many countries have enacted provisions making criminal offences of acts of discrimination and of incitement to hatred against persons or groups because of their race, colour, descent, national or ethnic origin or belief, or several of these grounds.

92. In Argentina, Act No. 16,643 of October 1964 incorporated in the Penal Code article 213 bis, under which persons participating in organizations or engaging in propaganda based on ideas or theories of superiority of any race or any group of persons of a particular religion, ethnic origin or colour, for the purpose of justifying or promoting any form of religious or racial discrimination (paragraph 2), and persons who incite others to violence for incitation's sake or commit acts of violence, either individually or as members of organizations, against any race or group of persons of another religion, ethnic origin or colour (paragraph 3), are liable to imprisonment for a term of one month to three years. The Government of Argentina states that Argentine law has thus taken into account the distinction made in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination between the organized fostering of discrimination and creation of a climate conducive to violence or persecution, and the individual or collective act of inciting to or committing these offences.

93. In Norway sections 135-a and 349-a have been added to the Penal Code. 24/ Section 135-a makes it a crime punishable by fine or imprisonment up to two years to make a public statement or otherwise disseminate a statement among the public whereby a person or group of persons is threatened, insulted or subjected to hatred because of his or their religious belief, race, colour or national or ethnic origin. Section 349 has been mentioned already. 25/

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24/ The Penal Code of 22 May 1902 provided already in section 135 that:

"Anyone who jeopardizes general law and order by publicly mocking or inciting to hatred against the Constitution or any public authority or by publicly inciting one section of the populace against another, or who is an accessory to this, shall be liable to punishment by fines, detention or imprisonment up to 1 year.

"The same punishment applies to anyone who publicly mocks or incites to hatred against or contempt for a section of the populace characterized by a specific religious faith, descent or origin or who threatens such a section of the populace or spreads false accusations against it. Any person being accessory to this shall be punished similarly."

Section 140, first paragraph, of the same Penal Code stipulates, moreover that:

"Anyone who publicly incites or encourages the carrying out of a criminal act or who exalts such an act, or who offers to carry out or to assist in the carrying out of such an act, or who is an accessory to the incitement, encouragement, exaltation or offer, is liable for punishment by fines, or by detention or imprisonment up to 8 years, however in no case with loss of liberty greater than two-thirds of the maximum penalty applicable to the criminal act itself."

25/ See section E above, the right of equal access to public places and services, para. 71.
94. In Sweden amendments were introduced into the Freedom of the Press Act by inserting a new paragraph to the effect that it shall constitute a press libel to make, in any means of communication intended for the public, printed statements to threaten or insult an ethnic group because of its race, colour, national or ethnic origin or religious creed. The Penal Code, which already contained provisions on agitation against ethnic groups, was amended to include newly phrased offences in Chapter 16, articles 8 and 9. Article 8 now provides that if a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for a group of a certain race, skin colour, national or ethnic origin or religious creed, he shall be sentenced for agitation against an ethnic group to imprisonment for up to two years or, if the crime is petty, to pay a fine. The provisions of article 9 were referred to in paragraph 12 above.

95. In Finland articles 6-a and 6-b were added to the Penal Code. Article 6-a is couched in language which is very similar to that of the just quoted section 8 of the Swedish Penal Code. Section 6-b was discussed in paragraph 13 above.

96. The Penal Code of Denmark provides in section 266-b that any person who in public or with the deliberate aim of dissemination to wider circles makes any statement or other announcement by which a group or groups of persons are threatened, ridiculed or humiliated because of their race, colour, national extraction or ethnic origin or religion shall be liable to a fine or to imprisonment for up to two years.

97. In Malaysia the Sedition Act, 1948, as revised up to 1 December 1969, which entered into force on 14 April 1970, provides (article 3, paragraph 1 (c)) that there is a seditious tendency where the intention is "to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia". Any person doing such an act shall be guilty of an offence and shall be liable for a first offence to a fine not exceeding 5,000 dollars or to imprisonment for a term not exceeding three years or to both, and, for a subsequent offence, to imprisonment for a term not exceeding five years.

98. The Penal Code of Costa Rica provides that any person, administrator or manager of a public or private institution or director of an industrial or commercial establishment who applies any prejudicial discriminatory measure based on considerations of race, sex, age, religion, civil status, political opinion, social origin or economic status shall be liable to imprisonment for from 20 days to 60 days or a fine. "In the case of repeated offences, the judge may also order, as an accessory penalty, suspension from public function or office for not less than 15 nor more than 60 days" (article 371).

99. The fundamental law of Guatemala, namely, the Civil Service Act of May 1968, forbids public servants from "discriminating on grounds of a political, social, religious or racial nature or on grounds of sex in favour of or against public

26/ Article 6-a provides that anyone who disseminates to the public any statement or other information in which a section of the population is threatened, slandered or insulted on account of being of a certain race, colour, national or ethnic origin or confession or faith shall be sentenced for discrimination against that section of the population, by imprisonment up to two years or by a fine.

servants or persons seeking to enter the Public Service" (article 65). Other provisions of this law prohibit "the authorization, initiation or exercise of pressure or discrimination against or in favour of an applicant for a post, a candidate already listed or any public servant, on the basis of his or her race, colour, sex, affiliation or political, social or religious opinion" (article 86 (3)). Acts or omissions which contravene any prohibitory provision of the kind mentioned above make the offender liable to a fine of 20-100 quetzals, suspension or, in serious cases, dismissal following a hearing by the National Civil Service Board (article 89 (1)).

100. As regards more serious offences, in several countries, generally as a consequence of having ratified the Convention on the Prevention and Punishment of the Crime of Genocide, provisions dealing with genocide have been included among crimes to be punished with very severe sanctions. 22/

101. In Mexico under the provisions of article 149 of the Penal Code, the deliberate destruction of national, ethnic or racial groups is punishable with penalties ranging to 20 years' imprisonment.

102. The Penal Code of Costa Rica includes the following provisions:

"Article 373. Any person who takes part with homicidal intent in the total or partial destruction of a particular group of human beings, because of their nationality, race, or religious or political belief shall be liable to imprisonment for a term of from 10 to 20 years. The same penalty shall be applicable in respect of any person who:

"(1) causes grave bodily or psychological harm to members of such groups;

"(2) places such groups in living conditions so precarious as to make possible the disappearance of all or part of the individuals who constitute them;

"(3) takes measures designed to prevent births within those groups;

"(4) transfers children by force or intimidation from any such group to other different groups."

103. The Penal Code of Guatemala makes genocide and instigation to genocide an offence in the following terms:

"Article 376. Any person who commits any of the following acts with intent to destroy wholly or in part a national, ethnic or religious group, shall be guilty of genocide:

"(1) causing the death of members of the group;

"(2) causing injuries which seriously affect the physical or mental integrity of members of the group;"

22/ For example in Costa Rica, Guatemala, Mexico.
"(3) subjecting the group or members thereof to living conditions which may
give rise to their total or partial physical destruction;

"(4) transferring children or adults by force from one group to another;

"(5) taking measures to sterilize members of the group or in any other way
to prevent reproduction of the group.

"Persons found guilty of genocide shall be liable to imprisonment for a term
of from 20 to 30 years.

"Article 377. Any person who publicly incites others to commit the offence of
genocide shall be liable to imprisonment for a term of from 5 to 15 years.

"Any person who encourages others or conspires to commit acts of genocide
shall be liable to the same penalty."

104. In Canada, the Criminal Code was amended in 1970, 29/making it an indictable
offence punishable by imprisonment for five years for an individual to advocate or
promote genocide against any identifiable group. This legislation, aimed at
preventing and curbing the wilful promotion of hatred and genocide, is for the
protection of both majority and minority groups who can be distinguished by colour,
race, religion or ethnic origin. There are certain defences open to a person charged
under this section, namely:

(a) if he establishes that the statements communicated were true;
(b) if, in good faith, he expressed or attempted to establish by argument
an opinion upon a religious subject;
(c) if the statements were relevant to any subject of public interest, the
discussion of which was for the public benefit, and if on reasonable grounds he
believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose of removal,
matters producing or tending to produce feelings of hatred towards an identifiable
group in Canada.

105. Several countries have explained the reasons for having adopted measures
providing penal sanctions for acts of discrimination, in the sense that it was rather
to prepare ratification of the International Convention on the Elimination of All
Forms of Racial Discrimination than to overcome discrimination, which does not really
occur that often. Suffice it to quote the statements of the Governments of Finland
and New Zealand in this regard.

106. The Finnish Government states 30/ that:

"The measures taken in connection with the ratification of the International
Convention on the Elimination of All Forms of Racial Discrimination were
prompted by the provisions of the Convention (articles 3 and 4) rather than by

30/ Similar statements were made by the Governments of Norway and Sweden.
practical needs. According to the constitutional system of Finland, international conventions do not become part of the national law merely through ratification. In order to bring the substantial provisions of a convention into legal force on national level, legislative measures are necessary."

107. Prior to New Zealand's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, the New Zealand Parliament passed the Race Relations Act 1971, which entered into force on 1 April 1972. In its information furnished in connection with the present study, the Government has stated:

"The passage of this legislation in New Zealand did not reflect a belief that there were acute problems of discrimination in the various subject areas covered by the Act. Its principal purpose was to enable New Zealand to ratify the International Convention on the Elimination of All Forms of Racial Discrimination, which required that our law contain certain specific provisions which at the time were lacking."

G. Main international instruments binding on some of the States covered by this study

108. This section contains a very brief note on the ratification of various relevant international instruments by the States with which this study is concerned. Among the provisions with a bearing on this study to be found in some of these texts are anti-discrimination clauses (for example, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). Other texts are exclusively concerned with combating discrimination in the areas they cover (for example, the International Convention on the Elimination of All Forms of Racial Discrimination and the UNESCO Convention Against Discrimination in Education (1960)). Information is also given, of course, on ratification of the Indigenous and Tribal Populations Convention, No. 107 (1957), of ILO 31/ and the International Convention relating to the Inter-American Indian Conferences and the Inter-American Indian Institute (1940) of the Organization of American States.

109. The relevant provisions of the instruments in question are to be found in the corresponding chapters and will be analysed and commented upon at the appropriate time with a view to determining their relevance, impact and significance for the human rights and fundamental freedoms of indigenous populations. 32/

110. For the time being, only the names of States for which each of the instruments is binding will be given, and the lists will, of course, be limited to the 37 countries for which information has been collected in the context of the study of which this report forms part.

111. Each instrument will form the subject of a separate list giving only the names of the parties and the date of ratification, when the instrument became binding on the State in question.

31/ Recommendation 104, which bears the same title and date as the Convention, is not discussed because it is not subject to ratification and therefore not binding on States.

32/ Contained in the relevant chapters, as indicated in the text, and the chapter devoted to conclusions, recommendations and proposals.
1. UNITED NATIONS

(a) International Covenant on Economic, Social and Cultural Rights

(This Covenant entered into force on 3 January 1976)

<table>
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a/ Accession.
(b) International Covenant on Civil and Political Rights
(This Covenant entered into force on 23 March 1976)

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a/ Accession.
b/ Made the declaration under article 41 of the Covenant.
(s) Optional Protocol to the International Covenant on Civil and Political Rights
(The Optional Protocol entered into force on 23 March 1976)

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a/ Accession.
(d) **International Convention on the Elimination of All Forms of Racial Discrimination**

(The Convention entered into force on 4 January 1969)

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*a/ (Up to December 1979, Colombia, Guatemala and the United States of America had signed, but not yet ratified this Convention).

*a/ Accession.

*b/ Made the declaration under article 14, para. 1, of the Convention.
(e) Convention on the Prevention and Punishment of the Crime of Genocide

(This Convention entered into force on 12 January 1951)

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2. INTERNATIONAL LABOUR ORGANISATION

The Indigenous and Tribal Populations Convention No. 107 (1957)

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3. UNESCO

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4. ORGANIZATION OF AMERICAN STATES

(a) American Convention on Human Rights

(This Convention entered into force on 18 July 1973)

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(b) International Convention relating to the Inter-American Indian Conferences and the Inter-American Indian Institute

(December 1940)

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* Also called "Pact of San José", this Convention was signed at San José, Costa Rica on 22 November 1969 at the Inter-American Specialized Conference on Human Rights.
International Convention relating to the Inter-American Indian Conferences and the Inter-American Indian Institute (December 1940) (Cont'd)

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5. COUNCIL OF EUROPE

European Convention on Human Rights
(The Convention entered into force on 3 September 1953)

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COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Thirty-sixth session
Item 11 of the provisional agenda

STUDY OF THE PROBLEM OF DISCRIMINATION
AGAINST INDIGENOUS POPULATIONS

Final Report (last part) submitted by the Special Rapporteur,
Mr. José R. Martínez Cobo

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IX. FUNDAMENTAL POLICY

A. Policy alternatives

1. Preliminary remarks

1. In discussing the policy alternatives available to States with multiethnic populations and in which indigenous populations live, it must be duly taken into account, at the outset, that the situation of the indigenous peoples in the countries covered by this Study is too diverse to allow for a rigid or uniform approach. The situation of indigenous communities which have long maintained contact with the dominant society but are nevertheless concerned with the enjoyment of self-determination, cannot easily be compared with that of threatened forest-dwelling indigenous groups in remote areas. The latter may only now be coming into contact with non-indigenous groups of population existing in the country in which they live and may, therefore, be in need of special measures by the State in order to protect them from the dangers of such contacts and even from possible extinction.

2. Policy measures must necessarily be based on a minutely detailed knowledge of indigenous customs and life-styles, as well as an understanding of the preferences and aspirations of the indigenous peoples themselves. An over-all uniform theoretical approach carries with it the risk of over-simplifying the issues, and failing to grasp the complexities of indigenous societies which, as all other societies, are, themselves, in constant evolution.

3. In one very important sense, however, indigenous peoples throughout the world do share a common experience. They have all suffered in the past the imposition of, and abuse from, dominant societies, which in dealing with them have generally shown scant respect for their traditional cultures and life-styles. Indigenous peoples, however, invariably have shown a firm determination to resist attempts at forced assimilation within the dominant society. Disadvantaged integration has naturally also been rejected as a modified form of assimilation, regardless of the official designation given to the policy adopted.

4. There are then several policy patterns which provide alternative ways of dealing with problems of group relations in multiracial societies. It is in the context of one or more of these policies, often a combination of several of them, that action is taken in the different countries concerned for the protection of the indigenous populations.

5. Understanding the policies applied by individual Governments poses several problems: policies frequently change with the passing of time; different policies are often applied to different groups by the same administrations; at times, administrators may apply the same over-all official policy differently in their respective jurisdictions. Under these circumstances, little is achieved by applying labels to policies, as the same terms may mean different things for different people charged with important aspects of policy implementation. These terminological difficulties make it necessary to analyse in detail the steps actually taken to arrive at a conclusion about a given situational policy, regardless of the label by which it is formally designated.
6. The lack of adequate substantial information on governmental measures taken did not permit a thorough analysis to determine with some precision the type of policy in effect with regard to indigenous peoples in different countries. It is possible, however, to assert that most countries seem to have adopted social integration policies with assimilationist characteristics in varying degrees. It is clear that in the recent past all had interventionist and protectionist measures in operation and that, in conformity with over-all policies they were instituting special measures with the avowed purpose of improving living conditions of indigenous peoples and their protection from different kinds of discrimination and its consequences. While the explicit aim of these policies and measures was that of affording important groups of indigenous peoples a real and effective opportunity to participate fully and dynamically in the life of the nation, it is, nevertheless, also clear that some aspects of these interventionist and protectionist measures have been callous towards their ethnic identity and characteristics which the groups concerned are obviously bent on preserving, developing further and transmitting to future generations. In addition, important international measures have been taken to that end. The following paragraphs contain a brief reference to some of these national and international measures.

7. In considering policy options towards indigenous populations, therefore, one of the first principles to be affirmed is the acceptance of their right to be and to be regarded as different from the remainder of the population. This principle has been enshrined in the Declaration on Race and Racial Prejudice, adopted by the General Conference of UNESCO at its twentieth session in 1978. The Declaration recognizes that

Article 1

1. All human beings belong to a single species and are descended from a common stock. They are born equal in dignity and rights and all form an integral part of humanity.

2. All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. However, the diversity of life styles and the right to be different may not, in any circumstances, serve as a pretext for racial prejudice; they may not justify either in law or in fact any discriminatory practice whatsoever, nor provide a ground for the policy of apartheid, which is the extreme form of racism.

3. Identity of origin in no way affects the fact that human beings can and may live differently, nor does it preclude the existence of differences based on cultural, environmental and historical diversity nor the right to maintain cultural identity. 1/

8. On the other hand, the right to be different is in no way inconsistent with the right to full participation in the development processes, on an equal footing with other members of society. Special measures may be required however, to give de facto equality of opportunity in this regard. Without detriment to the differentiating characteristics cherished by each group involved.

9. As noted by the participants in a United Nations Seminar on the Relations between Peace, Human Rights and Development:

"The Seminar affirms that at the national level individuals should be engaged as agents as well as beneficiaries in the development process. The realization of equality of opportunity requires that special measures be undertaken to facilitate the participation of vulnerable or disadvantaged groups, including migrants, migrant workers and indigenous peoples". 2/

10. Without such participation in both the planning and implementation of development programmes, there are severe dangers that development projects will not only fail to satisfy the manifest needs of indigenous peoples, but may also be initiated and developed at their expense. In their desire to develop strategic mineral and hydro-electric resources in general for the benefit of the non-indigenous populations, many Governments have tended to disregard the traditional land rights and cultures of native peoples who have been considered marginal to the national economy.

11. In recent years the adverse effect of these large-scale economic development projects on indigenous populations has reached acute proportions in many areas. It has been stated that:

"In a world increasingly hungry for raw materials and untapped natural resources, indigenous peoples who live mostly in remote areas now find that their lands are attracting the attention of powerful economic interests. In many cases the rational exploitation of such resources under the control of the local population could provide the basis for major economic advance and improvement of social conditions for the affected populations". 3/

12. In this regard the policies of international financial institutions, as well as national Governments, have also proved cause for concern. At its thirty-fourth session, the Subcommission on Prevention of Discrimination and Protection of Minorities expressed the view that in some countries, even currently so-called development projects funded by international funding agencies constituted a threat to the existence of indigenous populations. In particular, the responsibility and accountability of these agencies were not adequately defined. Furthermore they were not open to independent scrutiny. 4/


13. It is clear that while appreciating the need for rational exploitation of natural resources, development policies should reconcile the needs of indigenous peoples with the requirements of national economic development. In the following section some of the major theoretical policy alternatives which have been considered up to the present time will be discussed, as well as policy options which are increasingly being advocated by experts and by the indigenous peoples themselves. The latter place more emphasis on the need for self-reliance, self-management and self-determination, and particularly on concepts of ethno development in choosing the model of development as it affects their own interests, within the formulation of general development plans and efforts.

2. Theoretical aspects

14. The sources available in connection with the present study review several possible theoretical policy alternatives for indigenous populations. These alternatives include, inter alia: (a) Segregation, (b) Assimilation, (c) Integration, (d) Fusion (Pluralism), (f) Self-reliance, (g) Self-management and (h) Ethno development.

15. As regards segregation it has been noted that this policy is based on the belief in the superiority of the dominant culture and aims at keeping certain ethnic groups separate, unmixed and ranked in a hierarchical position. It is an unwanted separation imposed by a dominant group upon certain other ethnic groups in the society through its control of economic wealth and governmental functions. To this end, appropriate community authorities apply both formal and informal sanctions to limit contact and other social relations. Segregation operates under a variety of circumstances and it would be useful to remember here that it has assumed a multitude of forms, from "apartheid" through "caste systems", "reservations", and "ghettos", "Chinatowns", "barrios" and "Jim Crowism" to lesser forms, all meaning separation and zonification of some sort, although not necessarily with complete physical separation.

"With such a record, segregation seems hardly a policy to recommend itself for adoption in dealing with indigenous peoples, as the underlying reasons for such a policy are usually the preservation of the "racial purity" and the socio-economic predominance of the culturally dominant group, the better to exploit the other groups. 5/

"Nevertheless, it has sometimes been considered necessary to enforce some form of separation for the more effective protection of primitive and formerly isolated groups from disease, drastic changes in food supply and in customs, loss of land and the disorganizing impact of modern civilization ...". 6/

6/ Ibid, para. 368.
16. Indeed, there are inevitably cases where a degree of segregation in the form of a "buffer zone" is necessary in the short term to protect isolated forest-dwelling groups, mountain populations or north-of-the-tree-line peoples from encroachments and disease. Many other indigenous groups and peoples, who have long been subjected to a degree of incorporation within national society, have nevertheless maintained a cultural identity in the form of a separate language, a separate form of internal organization and local government, and a system of communal land rights different from that prevailing in the rest of national society. Their concern has generally been to maintain this level of social and cultural identity while participating in and benefiting from national development programmes on the basis of their own cultural patterns. To lose their identity altogether in the process of integration would be too high a price to pay. There are yet other cases where indigenous groups, while numerically constituting the majority of their national population, have come to be the most deprived sector of society in economic and social terms within present day conditions in the countries in which they live. Their concern has generally been that their economic, social and cultural conceptions, patterns and institutions should be adequately reflected and protected within multinational institutional frameworks and development policies as a whole. Finally there are also indigenous peoples with a high degree of awareness of their existence as socio-political entities, whether or not they celebrated treaties in the past with a colonial power or an independent country, by which their status of separate nationhood was recognized, which are now reiterating their demands for political self-determination in varying degrees.

17. Assimilation is said to be

"also firmly based on the idea of the superiority of the dominant culture, and aims at producing a homogeneous society by getting indigenous groups to discard their culture in favour of that of the dominant one. It spells the total absorption of persons and groups into the dominant culture as the established pattern into which the others are to fit. There is a willingness on the part of the dominant group to accept members of the other groups, but this is contingent - as a conditio sine qua non - upon their accepting its culture." [1]

18. Integration is described as

"a process by which diverse elements are combined into a unity while retaining their basic identity. There is no insistence upon uniformity or elimination of all differences, other than those differences of each component part which would disturb or inhibit the total unity.

"Integration, as differentiated from assimilation, is a two-way process which does not entail the disappearance of indigenous institutions and traditions. It implies consciously refraining from bringing pressure upon indigenous groups to abandon their culture. It can, nevertheless, become a process of assimilation, although it is likely to continue as a constantly adapting process of integration, or result in fusion.

"Integration seeks (1) to eliminate all purely ethnic lines of cleavage; (2) to guarantee the same rights, opportunities and responsibilities to all citizens, whatever their group membership." [3]

[1] Ibid, paras. 370
19. The ILO Convention No. 107, concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, explicitly favours a policy of integration as its title clearly indicates. The principles of integration, as laid down in this Convention seek to reject measures "tending towards the artificial assimilation" of indigenous populations, and also to reject "recourse to force or coercion as a means of promoting the integration of these populations" (article 2). They do, however, allow for special measures to be adopted for the protection of indigenous populations, so long as they "are not used as a means of creating or prolonging a state of segregation" and "will be continued only so long as there is need for special protection and only to the extent that such protection is necessary" (article 3). In this Convention it is provided that, in applying the provisions of the Convention relating to the protection and integration of the populations concerned, Governments shall

"seek the collaboration of these populations and of their representatives; provide these populations with opportunities for the full development of their initiative; stimulate by all possible means the development among these populations of civil liberties and the establishment of or participation in elective institutions". (article 5).

20. In practice it is the concept of integration with assimilationist projections which has been given most emphasis by official policy. Most Governments now believe that their indigenous populations must eventually be integrated into the national community. This is, however, not necessarily the view of the indigenous peoples themselves, or of the organizations which represent them.

21. Reference has also been made to the concept of fusion, both as a process and as a result thereof. Fusion has been described as

"a process by which two or more cultures combine to produce another which is significantly different from each of its parent cultures, but includes elements from all of them, together with the new ones produced through the stimulation of contact and subsequent internal development. Fusion is complex and many-sided, while assimilation is essentially one-sided. Like assimilation, fusion can be held up if one of the groups involved is reluctant to lose its identity." 10/

22. As a quite different concept which means the preservation of distinctiveness and diversity within an atmosphere of respect and positive valuation of all groups as essentially equal to each other in value to society as a whole, pluralism is also a process and a result thereof, and

"aims at uniting different ethnic groups in a relationship of mutual interdependence, respect and equality, while permitting them to maintain and cultivate their distinctive ways. It may involve physical separation but most often does not. Whatever separation exists is voluntarily chosen, not imposed. Whatever lines of cleavage there are, are vertical ones; ideally there should be no ranking of one group above another." 11/

10/ Adopted on 26 June 1957, this Convention entered into force on 2 June 1959.
23. In recent times and in an increasing manner, a significant number of indigenous groups and peoples have been demanding the recognition of their identity, and demanding a degree of autonomy and self-determination.

24. This view was expressed by the participants at the International NGO Conference on Indigenous People and the Land, held in Geneva in September 1981. It was stated in the final declaration of the Conference that

"The Conference declares its solidarity with the indigenous peoples in their just struggle for self-determination and for the right to determine the development and use of their land and resources, and to live in accordance with their values and philosophy. In this time of crisis, indigenous peoples have much to contribute to the human and spiritual development of the world." 12/

25. Mention must also be made of the concept of self-reliance. Though most writers on self-reliance as a strategy for development tend to refer to relations between States, 13/ the concept is also important for understanding the attitudes of underprivileged groups within States who reject the emphasis placed by many development planners on economic growth per se, as too restricted, and place far more emphasis on the maintenance of traditional or human values within the development process.

26. As one author has commented

"In the wake of the monetary and oil crises of the early seventies there has now emerged something like a worldwide consensus, not only on the need for development of the world as a whole, but also on self-reliance as a possible means of bringing about such development. Self-reliant development takes us far from the traditional western European concept of economic development, which is grounded on the belief that development is basically a matter of a consistent annual rise in the gross national product and the per capita income." 14/

27. There is virtually no recent document on indigenous affairs which omits, in one way or another, to invoke the concept of self-management as an important element in the policy favoured by indigenous peoples to make themselves masters of their own destiny, generally by means of participation in national power. One author has listed what he regards as "requirements for indigenous self-management" in the following terms:

"(1) The consolidation of communal power in order to guarantee justice and the survival of tribal institutions, of the ethos which is so necessary for the cohesion of the group. The growth of this communal power should enable some of the ground yielded to or occupied by outside elements to be won back.


14/ Monica Wargah, "Self-reliance and the search for an alternative life-style in industrial countries", in Galtung et al., op. cit., p.118.
"(2) The legalization of land ownership under global title deeds. The ownership of property signifies both security and economic power. Title to the land should be collective so as to avoid the corroding influence of individualism and the emergence of a social stratification liable to endanger the community spirit and deprive it of the power to withstand the colonial pressure of the interethnic system.

"(3) The federation of communities from the same ethnic group so as to promote their political unification.

"(4) The confederation at the regional level of the various organized ethnic groups, followed by their confederation at the national level.

"(5) The association of the various national confederations in an inter-American umbrella organization which will be able, by exerting pressure on public opinion in the continent and in the world, to compensate for the inequality between the opposing forces in cases of aggression against a particular group." 15/

28. In the words of the same author:

"Self-management leads on to an evolving self-development. This self-development, which cannot occur without borrowing from the West, should not be confused with what we have called acculturation. Indigenism will of course refrain from emphasizing the differences, since this would be to seal its own doom, but the differences are there all the same. Self-management presupposes reculturation, previous or contemporary, whereas acculturation cannot occur without deculturation, again previous or contemporary, which may be slow or rapid. Self-management is the banner under which indigenous peoples strive to enjoy a balanced relationship with the white man based on a degree of dialogue and symmetry. Acculturation as imposed by the white man from a position of dominance is essentially asymmetrical, although a veneer of mellifluous paternalism seeks to conceal its true nature. Self-management is able to achieve a measure of political and economic independence, whereas acculturation involves the integration of the de-tribalized indigenous population in the lowest strata of a society of highly subordinated classes, where it will lose all vestiges of power, once the nucleus which could have sustained it has been dissipated. Self-management is conducive to an optimum social equilibrium, acculturation to imbalance. In other words, the former ensures ethnic survival and the latter the swallowing up of the group in the national society. The corollary of self-management is Indian power, whereas acculturation involves the subjection of the ethnic group to the national administrative and political machine. The fruits of self-management are participation and self-government, those of acculturation are domination by political and other forms of control. In the process of self-management the contribution of the West provides a stimulus; in acculturation the irruption of Western culture is a centrifugal force in social life. With self-management political awareness will derive from a recognition of ethnic identity; with acculturation, on the other hand, political awareness, if any, will come about through a denial or repudiation of ethnic identity, associated

15/ Adolfo Colombres, "Hacia la autogestión indígena" in Siete Ensayos sobre Indigenismo, Instituto Nacional Indigenista, Mexico City, 1976, pp.29-49. The requirements are given on p.45.
with a retrograde and shameful past which is better buried. Lastly, in the self-management system it is the ethnic group which makes the rules and defines the elements to be incorporated in its social life, adapting them to meet its own special circumstances. With acculturation, on the other hand, it is the oppressor who decides which elements of the indigenous society are to be preserved for the time being, while imposing indiscriminately and by main force his entire culture and conception of the world. In other words, self-management enables the members of an indigenous population to act. In the acculturation process they are nothing but the passive objects of action taken by others, beings who are "acted on", divorced from fundamental elements of their own nature, victims who are given the illusion of acting, the illusion of making their own history." 16/

29. The San José Declaration (13 December 1981) 17/ affirmed that "ethnodevelopment is an inalienable right of Indian groups", ethnodevelopment being understood to mean "strengthening and consolidating a culturally distinct society's own culture, by increasing its independent decision-making capacity to govern its own development and the exercise of self-determination, at any level considered, and implying an equitable and just power structure. This means that the ethnic group forms a political and administrative entity, with authority over its own territory and decision-making powers in areas constituting its own development from within processes of expanding autonomy and self-management," 18/

30. Among the fundamental socio-cultural aspects of this ethnodevelopment policy the Declaration mentions the following:

"For the Indian peoples the land is not merely an object of possession and production. It is the whole basis of their physical and spiritual existence as an autonomous entity. Territorial space is the fundamental reason for their relationship with the universe and for the maintenance of their cosmic vision.

These Indian peoples have a natural and inalienable right to keep the territories they possess and to claim the lands which have been taken from them. In other words, they are entitled to the natural and cultural patrimony contained in the territory and to determine freely how to use it and benefit from it.

The philosophy of life of these peoples, their experience, their knowledge and their accumulated historical achievements in the cultural, social, political, juridical, scientific and technological fields are an essential part of their cultural patrimony. Hence they are entitled to enjoy access to, utilization, dissemination and transmission of this entire patrimony.

16/ Ibid., pp. 45-46.
17/ Text adopted by acclamation on Friday, 11 December 1981, as a result of the work of the Conference of Specialists on Ethnocide and Ethnodevelopment in Latin America, convened by UNESCO and the Latin American School of Social Sciences (FLACSO) and held at La Catalina, Santa Bárbara de Heredia, Costa Rica (6-13 December 1981). The full text of this Declaration was published as annex VI to document E/CN.4/Sub.2/1982/2/Add.1.
18/ Ibid.
Respect for the forms of autonomy required by these peoples is an essential pre-requisite for guaranteeing and implementing these rights.

Moreover, the specific forms of internal organization of these peoples are part of their cultural and juridical heritage, which has contributed to their cohesion and the maintenance of their socio-cultural tradition. 19/

31. Disregard of these principles constitutes a failure to respect the ethnic identity of these peoples, giving rise to the danger of ethnocide. In the words of the Declaration:

"Disregard for these principles constitutes a flagrant violation of the rights of all individuals and peoples to be different, and to consider themselves as different and to be considered as such, a right recognized in the Declaration on Race and Racial Prejudice adopted by the General Conference of UNESCO in 1978 and hence must be condemned, especially when it creates a risk of ethnocide.

Moreover, it creates a disequilibrium and a lack of harmony within society and may induce these people, as a last resort, to rebel against tyranny and oppression and thus endanger world peace and, consequently, is contrary to the Charter of the United Nations and the Constitution of UNESCO." 20/

32. To be sure, policy has to be kept flexible, the alternatives will have to vary in accordance with the social and economic conditions of the diverse groups within any one country, with their level of de facto incorporation within national society, and also with the level of political awareness and aspirations of the peoples themselves. This has been explicitly recognized as regards indigenous populations.

33. Very frequently, the diversity of groups and subgroups forming the indigenous population in most countries makes it questionable whether they can have one over-all policy concerning the different groups or whether reality calls for alternative policies, and for alternatives within policies that are designed to deal effectively with the problems of different groups. Conditions may even call for the successive adoption of different policies with regard to the same groups, as their positions change.

3. Socio-cultural aspects

34. Identity feelings may be equally strong among isolated communities which have lived without contact with other life-styles and basic concepts, and among indigenous communities whose ancestors were forced several centuries ago to live in close contact with non-indigenous populations. While in the first case the sense of being different and wishing to continue to be different may be a new realization, in the second hypothesis this sense and desire have been intensified and refined in a continuous process.

35. There are, of course, cultural differences between some indigenous groups or communities and other indigenous groups and communities. Indeed, there are neither absolute universally uniform cultural patterns nor are there cultures that may have remained unchanged for centuries. The mere existence of a basic occupation shapes important aspects of a people's attitude to life. Thus there

19/ Ibid.
20/ Ibid. 183
are clear differences between agriculturalists, pastoralists and hunters/gatherers. Indigenous urban dwellers have today their undeniably peculiar cultural patterns. The passage of time and the accumulation of experiences are also important factors altering cultures which evolve with time, in part to adapt to changing circumstances, even in isolation.

36. In cultural co-existence situations these processes are forcing these cultures in constant contact to react to each other in a constant process of give-and-take, in action and reaction and influence and counter-influence, in unrelated examination and re-examination, interpretation and re-interpretation. If in an isolated cultural entity there is constant evolution, then the more there is in cultural-contact situations. Nowhere is there a stationary situation. All cultures and all societies are in constant evolution.

37. Policies that would not take these facts into account, are policies that would not be in conformity with basic realities in societal and cultural existence. In this respect, it is useful to mention here what an author has written:

"Indigenist policy applies measures of planned acculturation to the aboriginal peoples to facilitate their gradual and harmonious integration into the national system. It is assumed, in other words, that native problems are essentially rooted in cultural differences, in the backwardness or inadequacy of the cultural norms of the natives in comparison with the dominant culture of the nation as a whole. People apparently prefer to shut their eyes to a whole series of obvious facts. In the first place, it is a fact that the cultures of many Indian groups have changed substantially in the course of four and a half centuries of subjection. Again, many native agricultural communities present greater similarities than differences in comparison with their non-Andean neighbours, and at the same time stand in marked contrast to tribal groups of the forest (selva), who after all are Indians, just as they are." 21/

38. Thus cultural patterns will vary greatly between forest-dwelling groups, who may be hunters and gatherers having little or no contact with the rest of society and enclave groups settled on reservations, who may or may not have retained separate languages, religion, dress, work customs and other forms of social organization, or indigenous rural workers who may form the majority of the country's population, and who may constitute indigenous communities which have been granted a distinct legal status by the national Government. These categories are by no means exhaustive. As has been shown elsewhere in this report (cf. chaps. VI and XII) in some countries there is a significant urban-dwelling indigenous population, while in other countries a widely scattered indigenous rural population may have no separate legal status, but may be easily distinguished by separate forms of language, dress etc.

39. Several of the States considered in this report, either in their Constitutions or elsewhere, affirm that the preservation of indigenous cultures and forms of social organization is an integral part of national policy. The means and degree of implementation of such provisions, however, have in general not corresponded to these lofty ideas. In particular, in those countries where conventions have been signed with missionary organizations, which have been granted a great deal of independence in carrying out education and development programmes in isolated regions, these missionaries have effectively dictated policy, often without due regard to the cultural and religious values of the indigenous peoples themselves.

40. Serious concern was voiced in this connection by the participants in the Social and Cultural Commission of the International NGO Conference on Discrimination against Indigenous Populations in the Americas, held in Geneva in 1977. The Commission's final report asserted that

"The survival of indigenous cultures, and through it the physical integrity of indigenous communities, is threatened most especially by the direct imposition and promotion of foreign values, beliefs and ideals among the Indian peoples. Ample testimony has been received as to the forcible character of this cultural transposition, particularly in the vast backing given by private and public sources for the missionary activity of the various Christian denominations. ....

"The content of both state and missionary education is the single most pernicious threat to the survival of indigenous culture". 22/

41. Indeed, while on the one hand it has been pointed out that missionary organizations have transcribed and preserved indigenous languages, and have provided the resources for intercultural contact and the dissemination of traditional values and customs, which might otherwise have been beyond the powers of many States, on the other hand they have also been found to have applied in the past clear policies of forced assimilation with intimidatory and outright punitive measures being applied in a consistent manner and having opened these communities to all kinds of destabilization and acculturative pressures.

42. It is clear that irrespective of statements or provisions for the respect of indigenous traditional socio-cultural values and patterns in many States, and whether directly by State authorities or by any kind of surrogate authority of a different nature, the policies actually in force have been those of assimilation and integration, rather than those of respect and protection of indigenous social and cultural values. Indigenous and non-indigenous experts are now clearly favouring policies of self-management and ethno-development as the only suitable approach and appropriate policy to be followed in cases of indigenous populations wishing to maintain, further develop and transmit to future generations the peculiar socio-cultural manifestations of their ethnic specificity.

4. Legal aspects

43. In discussing the alternatives available to States in legislative formulation and executive implementation of policy towards indigenous populations, consideration must be given to the diverse legal traditions in the countries covered by this study, and also to previous colonial legislation which has varied much from country to country.

44. The historical evolution of policy will be discussed in some detail later in this chapter. However, a distinction must be drawn between countries where legislation on indigenous policy has been enacted mainly in the comparatively recent past, and countries where the law has evolved over a protracted period of time.

45. In some areas, for example, indigenous people have in general remained deeply aware of the rights which were guaranteed to them by treaty during the colonial period or soon after declarations of national independence. In other areas indigenous communities may possess land titles which were granted to them during the colonial period by the colonial authorities. In forest areas around the Amazon basin, where there has been no contact with alien cultures until the comparatively recent past, indigenous communities may have no legal claims to "historical" rights issuing from colonial or "national" grants, agreements or enactments. The first legislation on indigenous matters may not have been enacted until well into the twentieth century.

46. All of these factors have their bearing on contemporary legal alternatives. While in a few cases, they may be contained in judicial decisions, more commonly fundamental policy provisions are contained in constitutional, statutory or treaty law. These provisions may be of a very general nature. In other cases a special Act or Statute may contain far more precise regulations, and also provide for a special legal status for all or part of the indigenous population. In the latter case, the implications of such a special legal status may vary substantially from one situation to another. At one end of the spectrum, indigenous peoples may be recognized as having the right to self-government, and to the management of their internal affairs in accordance with their own traditional legal customs. At the other end, indigenous peoples may be considered as having the legal status of minors, without the rights and duties of other citizens, but also without any effective control over their own affairs.

47. The question of basic legal status has been discussed at length elsewhere in this study. 23/ It should be noted here that according to many indigenous organizations their identity cannot be adequately preserved unless they are granted a status which recognizes them as equal to but different from the remainder of the population. However, if such a status equates their situation with that of minors under the tutelage of the State, although providing for eventual "emancipation" from this special status, this policy may not only discriminate against the basic rights of the indigenous population but will also tend to disparage indigenous cultures.

48. Special Acts and Statutes, while not discriminating against the civil and political rights of indigenous populations, may provide for separate systems of land tenure, education and other aspects of social and cultural life. They may provide for special indigenous courts to implement such statutory law, and may also allow for

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a degree of self-government distinct from that prevailing in other areas. In addition to distinct forms of local government, national legislation may also provide for a number of indigenous representatives in national parliamentary bodies. Rather than concentrate only on separate legislation towards indigenous groups, such a system may be designed to ensure that the interests of indigenous peoples are represented in over-all national legislation.

49. Without effective participation, and without some special measures, to compensate for imbalanced situations, the concept of equality before the law is likely to have adverse consequences for those indigenous populations which have limited access to law and its enforcement.

50. Indeed, formal equality in law has been found to result very often in marked inequality, in fact, adversely affecting the indigenous persons and groups living within societies ruled by non-indigenous institutions, economies and people. Among other evils, this "equality" has favoured massive exploitation of labour and the parcelling of ancestral and communal land which had previously been under co-operative exploitation.

51. With or without special measures and a legal framework for consultation with, and participation by, the indigenous persons and groups themselves in the formulation of policy, state policy has been aimed at the eventual integration of indigenous groups within the larger society within which they live. It has been noted above, however, that indigenous groups and experts are increasingly laying more emphasis on the need for autonomy and self-determination. The new policy adopted by the Inter-American Indian Conferences is also a case in point. Advocates of such an approach have referred to the international law of recent decades, including the Charter of the United Nations itself, the International Covenant on Civil and Political Rights, the International Commission on Economic, Social and Cultural Rights, and the Declaration on the Granting of Independence to Colonial Peoples and Countries. Reference should also be made to the Declaration on Race and Racial Prejudice adopted by State representatives gathered at UNESCO's General Conference in 1978, as well as to the San José Declaration of 1 December 1981, cited above.

52. Emphasis on the need for self-determination and self-government has been made by many indigenous nations and peoples in one way or another. This has been done with particular force and insistence by indigenous nations and peoples that have great relative numerical importance within the present populations of the countries within which they now find themselves and by most of those nations and peoples that have in the past entered into treaty agreements with the authorities of the colonial powers or those of the countries that emerged from the decolonization processes. Such treaties may have been celebrated not only between colonial powers and native populations during the period of settlement or conquest, but also between the

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independent nation-States that succeeded the colonial powers and the indigenous nations and peoples, long after this initial period. They may have involved the cession of native territories in exchange for a recognition of native sovereignty and the unrestricted use of reservation land. In contemporary jurisprudence there is controversy as to whether such treaty law should be considered as lying within the domestic jurisdiction of nation States, or as part of international law beyond the exclusive jurisdiction of nation States.

53. The decision to grant consultative status with the Economic and Social Council to a number of non-governmental organizations constituted by indigenous populations has now given through these organizations an increased opportunity to such populations to plead their cause before the international community. 25/

Formulation and evolution of policy: organs, procedures, implementation

1. Historical development of policy

54. Before proceeding with an analysis of contemporary policy, it is useful to summarize briefly the major trends in the historical evolution of policy.

55. In the early period of colonization, a very extended tendency of the colonial powers was to establish a separate legal status for indigenous populations. The extent of de facto incorporation into the emerging society as already noted, varied in accordance with the economic interests of the early colonizers, and the extent of metropolitan control over the activities of the colonists themselves. In many places the colonists were keen to avail themselves of indigenous labour, in mining, cattle raising and agriculture. In Latin America the policy of the Spanish Crown was to permit the use of indigenous labour, first as slave labour and subsequently as forced wage labour under the mita and encomienda systems. 26/ Tribute was also exacted from the indigenous populations. The conditions of labour were in theory regulated by the Spanish Crown, while certain extensions of land were legally set aside for the use of the indigenous populations. Several authors have observed that the protective legislation of the colonial period was frequently ignored by the colonists themselves. 27/

56. Religious missionaries played a prominent role, frequently intervening to protect the indigenous populations from abuse, and lobbying for more effective protective measures. At the same time they saw their own role as one of "civilizing" the "primitive" and "evangelizing" the "infidel" and showed relatively little concern for the preservation of indigenous culture.

57. When the new nation-State were created from the late eighteenth century onwards on the American continent, there were marked contrasts between the policies adopted in the former British and Spanish colonies respectively, and even in different countries and regions within them. In Canada, even before independence, the Civilisation of Indian Tribes Act of 1857 extended citizenship to certain Indians; but enfranchisement was limited to those Indians of "sufficiently advanced education" and those who were "capable of managing their own affairs", and entailed the loss of certain special status otherwise accruing to those of Indian status. The Indian Act of Canada of 1876, as amended in 1951, specified that an enfranchised person was not entitled to be registered as an Indian. 28/ In the United States, Indians were granted a wholesale conferment of citizenship only in 1924, and it has been written that "Indian reactions to this supposed munificence were not entirely favourable - it was regarded by many as an attempt to undermine further their tribal identity and independence". 29/

26/ See, for example, Silvio A. Zavala, La Encomienda Indiana Madrid, 1939, and Juan Frieda, El Indio en la Lucha por la Tierra, Ediciones Punta de Lanza, Bogotá, 1976.

27/ Ibid.


58. In Latin America, in general, the adverse effects of formal equality before the law, solemnly granted immediately after the independence declarations of the 1820s, have already been mentioned above. Despite the provisions for legal equality, in several countries the exaction of Indian tribute survived well into the nineteenth century. Furthermore the Constitutions of many States disenfranchised illiterates and this massively affected indigenous populations which were almost wholly illiterate at that time. In the absence of protectionist legislation, and special measures of assistance, vast numbers of indigenous communities lost their communal lands and ended up as indebted workers on the proliferating haciendas.

59. Throughout the Americas in the course of the nineteenth century, whatever the "legal" policy, the over-all practical effect was one of efforts towards forced assimilation of the more acculturated groups, erosion of traditional landholdings everywhere, and an expansion of private property at the expense of the communal holdings of the indigenous populations.

60. The initial trend of indigenism, which lasted with few changes up to and beyond the first half of the present century, may be illustrated by the following quotation:

"The indigenist current of thought made its appearance in the second half of the nineteenth century during a period which saw the consolidation of the liberalism imported from Europe and its advocacy by the 'progressives' of that age, and was reflected in an increasing awareness of the Indian presence in the new nation States which came into being on the post-Napoleonic model.

Indigenism, in essence a non-Indian ideology, gave rise initially to a humanitarian attitude which was mainly reflected in literature. This approach, in the first place romantic and humanitarian, gradually acquired a new dimension; demands were presented and protests registered against the injustice to which the Indian was exposed. Indigenism was no longer a literary movement, but found a place in the social sciences with the appearance of pro-indigenous organizations, in reviews, etc. The 'indigenous question' became a central feature of discussion at the beginning of the twentieth century and fuelled the flames of controversy. Cultural indigenism ... gradually gave way to a more socially oriented movement, introducing the element of class also ... Although this shift of emphasis benefited the economic at the expense of the cultural and ethnic aspects of the problem, it had the advantage of breaking away from the purely romantic approach and thus posed a greater threat to the dominant classes. It also provided a counterweight to racist and culturalist theories which were very widespread at the beginning of the century.

Advocating the integration of Indians in non-Indian society, indigenism did not call in question the colonial relationship; it did, however, contribute to a better understanding of the problem and mitigated some of the abuses. Viewed initially with distrust, this current of opinion proved

30/ Juan Comas, La Realidad del Trato dado a los Indígenas de América entre los Siglos XV y XX, Mexico City, Instituto Indigenista Interamericano, 1951.
easy for Governments to exploit, since it was seen as a means of inducing the Indians to bear their colonial yoke more easily, the most typical case being the enlistment of indigenism in the service of nationalism. Once it became official doctrine, indigenism would lose its original function of claiming rights and become an instrument of power." 31/

61. By the early twentieth century, the colonial expansion throughout the world had greatly increased the number and diversity of indigenous populations under colonial rule. Concern about the abuses perpetrated against indigenous peoples led to the convening of an international Congress to discuss their basic rights. A writer summed up the proceedings as follows:

"In 1900 an international congress of colonial sociology met in Paris to discuss the duties of civilised States to aboriginal peoples under their sovereignty. The conclusions of the participating experts in colonial administration on this 'international' problem represent a model for the government of indigenous peoples rather than a reflection of actual practices by nations. With a few exceptions the resolutions of the congress showed respect for the dignity and human rights of the aborigine, and the right of these populations to maintain their own culture as far as possible received approval ... At the beginning of the twentieth century, therefore, the law of nations seemed to recognize a general guardianship duty of a colonial State towards its wards, the indigenous populations within its sovereignty. Moreover, this guardian role was understood to imply a duty of positive protection of and tutelage of those less 'civilised' peoples". 32/

62. The guardianship duty implied a policy of segregation for certain tribal indigenous groups during the period of colonial administration. An example of this is British colonial policy in the hill tracts of what is now the State of Bangladesh. According to one writer:

"After attacks by outside tribes, the British colonial government recognised the separation of the hill tracts from the district and appointed a Superintendent of the hill tribes ... The Chittagong Hill Tracts Regulation of 1900 gave special status to the Hill Tracts and they were ruled under tribal jurisdiction by tribal chiefs and headmen. Their special status was honoured by Pakistan, until the introduction of Basic Democracies in 1960, which was applied in tribal areas also. The special status of the Chittagong Hill Tracts was abrogated in the 1972 Constitution of Bangladesh". 33/

63. As regards what is now the Indian State of Nagaland an author has commented that:

31/ Marie Chantal Barre, "De l'indigénisme à l'indianisme", in Le Mondo Diplomatique. Paris, March 1982.


33/ "Bangladesh Tribals fight for Land in Chittagong Hill Tracts", in International Work Group for Indigenous Affairs Newsletter, June 1981.
Adapting their own administrative practice to the sensibilities of the administered, the British made it an unwritten rule, observed until the last years of the Raj, that no Indian official should be posted to the hill districts; and by regulation they made sure that traders and speculators from the plains would not be allowed to infiltrate and exploit the Naga areas... The British were not in that creating a gulf between the Nagas (and other hill-men) and the people of the plains, as was later so frequently to be alleged; they were recognising that a cultural gulf with a high content of antipathy and high potential for destruction of the hill cultures already existed, and seeing that it was not bridged to the cost of the hill-men". 34/

64. In Latin America, new trends emerged in the decades after the Mexican Revolution. In what has since been referred to by some as a policy on "new indigenismo" many States gave some attention to the importance of indigenous cultures and traditions in the development of their national heritage. Traditional and communal indigenous forms of land tenure, which had once been abolished by law, began once again to be legally recognized in certain countries. The First Inter-American India Conference, held in Mexico in 1940, issued a solemn declaration of principles on the rights of indigenous populations.

65. In the decolonization processes after the Second World War, some newly independent States encountered complex problems in the form of tribal and indigenous populations which had received separate administration during the colonial period, which had little contact or affinity with the new dominant culture and which, at times, made vigorous attempts to secede from the new State. Mention has already been made of some such cases in the Indian subcontinent. In certain instances these demands have been met with the granting of limited political autonomy after protracted periods of civil strife.

66. In 1957, the International Labour Organisation adopted its Convention 107 on Indigenous and Tribal Populations. Apologists of the Convention have pointed out that it provides for a very broad degree of participation by the indigenous peoples themselves within the process of integration. As noted before, however, this Convention has also been challenged by many critics including indigenous peoples' organizations for its emphasis on integration and protection.

67. In recent years there would appear to be two fundamental issues which have aroused most international attention and concern. The first is the widespread and open rejection by indigenous peoples of the concept of integration. At times this is coupled with demands that they should be treated as peoples entitled to autonomy and self-government and even as independent nations and as subjects of international law. In other instances there are demands for forms of less ample autonomy, for a development policy based on self-reliance and for their right to choose their own path of development within policies of ethnodevelopment.

68. The second issue is the adverse effects of large-scale economic development programmes on those areas hitherto inhabited by tribal and indigenous populations. In all the regions and most of the countries covered by this study, indigenous populations have been removed from their traditional lands in order to make way for major hydroelectric, petroleum and other mineral or development projects. Reference has already been made at the beginning of this chapter to the concerns expressed by non-governmental organizations in this regard.

69. It appears, however, that the potentially adverse effect of such programmes on indigenous populations has now prompted some major multilateral financial institutions to consider special criteria for the appraisal of its projects in isolated areas.

70. It has been reported in the press in connection with the World Bank that:

"The World Bank has become the first international development agency to recognize that economic development places in jeopardy the survival of tribal peoples. Economic Development and Tribal Peoples, a remarkable document prepared by the Bank's Office of Environmental Affairs and released last week, proposes a bank policy for indigenous peoples which, if fully implemented, will support their rights to their land, resources, ethnic identity and cultural autonomy. Economic Development and Tribal Peoples proposes that bank tribal policy would be to assist projects within areas used or occupied by tribal people only if it is established that best efforts have been made to obtain the voluntary, full and conscientious agreement of the tribal people and that the project design and implementation strategy are appropriate to the tribe's special needs and wishes. In the case of uncontracted tribes within an area influenced by a project (such as a highway or rural development) proposed bank policy would be to ensure that the project contains measures to ensure their survival. Finally, in the case of tribes at a more advanced stage of interaction with the nation, bank policy would be to 'facilitate their development in a way which enhances their welfare and, to the extent desired by the beneficiaries and the nation, preserves their identity as well as their individual and collective rights'."

2. Formulation of policy: organs, procedures, implementation

71. The administrative arrangements for the implementation of policy will be dealt with in more detail elsewhere. Here, the different approaches to the formulation of policy, and the different branches of government involved in policy issues will be mentioned. The procedures for involving representatives of the indigenous peoples themselves in the formulation and implementation of fundamental policy will also be briefly discussed.

72. To date most States have created a specialized agency of government, usually attached to a specific Ministry or Department, with over-all responsibility for Indian affairs. The extent to which such an agency actually formulates policy

36/ See chapt. X on Administrative arrangements, below.
will however depend on a number of factors within each State's legislative, judicial and political framework. In some States the specialized agency is directly responsible to the executive branch, and may have very broad discretion in formulating over-all policy. In other States the actual formulation of policy may be vested in the legislative branch. And particularly in those States where policy has gradually evolved over a long period of time, there may be some controversy as to the extent to which congressional or parliamentary Acts should in turn be subordinate to past judicial decisions within the common law or civil law tradition. Furthermore, in those States where a federal system of government exists, federal policy may, to a certain extent, be limited by the provisions of individual State law.

73. Most of the countries with significant indigenous populations are now independent States which at one stage of their history came under foreign, generally European, colonial domination. In the case of British colonization, the emphasis of the colonial power was on political, economic and social segregation, often with land rights and a degree of self-government articulated de jure through treaty arrangements or through British Crown rulings which clearly recognized the possessory rights and sovereignty of the native populations. In the case of Spanish colonization there was far more emphasis on political, economic and social incorporation into the colony. Often the Spanish Crown granted possessory rights over traditional communally owned lands, in exchange for tribute and regular periods of forced labour on the colonial haciendas and encomiendas. 37/

74. In the former British colonies it can be said that, despite subsequent policies which have at times been aimed at forced assimilation or the termination of a separate Indian status, there has been a considerable degree of continuity between the legal aspects of colonial policy and those present in the evolution of contemporary policy. In the United States, for example, Congressional law of the late nineteenth century once provided for the unilateral abrogation of many provisions of earlier treaty law, and for the wholesale abolition of communal reserve lands. 38/ The contemporary legal system has, however, also adopted much of the common law tradition inherited from the British colonial era. Supreme Court rulings of the early nineteenth century recognized many of the rights which accrued to the native populations through judicial decisions of the colonial period. 39/ Policy has undergone review of a judicial, legislative and executive character. It may be said that policy has evolved through a complex web of legal decisions and political acts, with the actions of the executive and congressional branch sometimes keenly contested by the judicial branch of government. 40/

37/ José María Ots Capdequi, Estudios de Historia del Derecho Español en las Indias, Bogotá, Colombia, 1980.
38/ The General Allotment Act of 1887, often referred to as the "Dawes Act".
40/ Notably the decisions of Chief Justice Marshall, who served as Chief Justice of the Supreme Court up to 1835.
75. In the United States the Government organ responsible for the implementation of policy since the Indian Reorganisation Act of 1934 has been the Bureau of Indian Affairs (BIA), organically part of the Department of the Interior. The policies of the Bureau are said to be "ultimately decided not by the Commissioner but by the Congressional Committees on Interior and Insular Affairs and by the Indian section of the Bureau of the Budget, all of which have been traditionally unsympathetic to Indian demands for self-determination and have followed an unimaginative, conservative approach based on the assumption that the government knows best and that the native must assimilate". 41/ 

76. In Australia, where the British colonial experience was of shorter duration, and where the rights of the aboriginal populations were perhaps less articulated by law, there have been similar conflicts of jurisdiction between the executive, legislative and judicial branches and, at times, between federal and state Governments. Until recently, official federal policy was one of assimilation, while both state legislation and Supreme court rulings rejected the notion of separate aboriginal rights 42/ inherited from the British common law tradition. The Australian Government has stated that although new federal measures have now been taken to establish the nature of aboriginal land rights, they have been hampered by state legislation which conflicts with a federal policy aimed at granting security of tenure and effective self-government to the aboriginal population.

77. In Latin American countries, policy towards indigenous populations has often been marked by abrupt changes, rather than by constant gradual evolution. Upon independence in the early nineteenth century, the newly independent States tended to adopt constitutions and legislation granting equality before the law to indigenous peoples, aimed at terminating their special status. The Civil Codes adopted in different parts of the continent around the middle of the nineteenth century put emphasis on private title to land, and in theory paved the way for the abolition of communal forms of land tenure and social organization. With few exceptions, Indian reserved areas survived only amongst the more isolated communities, particularly in the case of forest-dwelling groups in the Amazon basin and elsewhere. A dual policy thus evolved in some countries. In frontier zones, agreements were often celebrated with missionary organizations, which were given the task of "protecting and acculturating tribal groups"; though many groups remained completely isolated from national society. In other areas, where sedentary indigenous communities had been protected by colonial law and to some extent by colonial practice, the policy was one of assimilation without regard to indigenous cultural values. The extent to which such policies were in fact enforced has depended on many factors, including numerical importance of the indigenous populations concerned, the nature of the agricultural economy, the size of the available land areas, and the extent of the demand for seasonal or permanent labour on traditional haciendas or commercial plantations.


78. The trend was to some extent reversed in the first third of the twentieth century. In particular, the social provisions of the Mexican revolution sought to recognize former indigenous forms of land tenure and social organization, and to provide for the restoration to indigenous communities of lands which had been unlawfully expropriated from them during previous decades.

79. In some parts of Latin America, notably in the Andean countries, traditional indigenous forms of land tenure and social organization started to be recognized by law. The nature of these changes, and the historical evolution of this policy, is too broad a subject to be discussed in this report. It should be noted, though, that while some States limited themselves to affirming in their constitutions and social legislation that indigenous cultures would be protected and preserved, others went further and developed specific state organs for dealing with indigenous affairs.

80. International action taken by the Organization of American States and the relevant Inter-American institutions are covered elsewhere in this report (see chap. III above). It should be noted here, however, that the First Inter-American Indian Conference held at Pátzcuaro, Mexico, in 1940, did much to co-ordinate the initial framework of fundamental policy towards indigenous populations in the Latin American Republics within the general trends of what is known as indigenismo. In some of its resolutions, the Conference recommended specific types of action, among which was the creation in each country of specialized institutions to implement policies developed towards indigenous populations.

81. The nature of the action taken and the characteristics of the special institutions created to deal with indigenous affairs in the implementation of those resolutions taken at a hemispheric conference, as well as the actual official policy developed in that connection have varied from country to country and with the passage of time. In cases where the historical rights of indigenous populations have been reaffirmed, new policies have been adapted to past and even to colonial legislation. In those cases where the indigenous groups are widely dispersed throughout the national territory, with their scattered lands adjoining non-indigenous properties, policy may be developed, not by a state organ with specific responsibility for indigenous affairs, but within the over-all framework of agrarian and community law. In those cases where the indigenous populations are predominantly non-acculturated groups, and where there is no past body of law on which current policy could be built, policy is more likely to be centralized in a specific government agency which has control over almost every aspect of indigenous affairs.

82. In Mexico, for example, the decentralized Instituto Indigenista Nacional (INI) was given direct responsibility for indigenous policy since its creation in 1948. However, due to the diverse nature of the indigenous populations, and because of the complex nature of post-revolutionary legislation on indigenous land rights and despite the fact that several ministries are represented in the Institute it came as no surprise that fundamental policy was formulated through the actions of a large number of separate government agencies and departments.

43/ See paras. 64 and 96.
44/ The INI was established as a result of an Inter-American recommendation. See para. 80, above.
83. The situation has been described as follows:

"In Mexico, indigenous action consists of a heterogeneous collection of measures, reflecting different criteria, sometimes contradictory and sometimes complementary; the different Secretaries of State, for Agriculture, Health and Public Assistance and Water Resources, apply their own particular indigenous policy, on occasion completely separate from that of the INI ...". 45/

84. It has been pointed out in connection with Mexico that one of the obstacles standing in the way of the formulation of a clear policy has been the "absence of an integrated body of principles, policies, objectives, programmes and goals, indicating clearly the area of direct responsibility of the Instituto Nacional Indigenista." By an Executive Decree of January 1977, a new administrative unit was established under the jurisdiction of the Presidency of the Republic, designed to give the executive branch closer control over the formulation and implementation of fundamental indigenous policy (see chapter X on Administrative Arrangements, below).

85. In Peru nineteenth century civil law abolishing communal lands was also overruled by early twentieth century law which recognized the legal personality of the comunidades indígenas. The Constitution of 1920 affirmed that it was an obligation of the State to protect the indigenous population and to promulgate special legislation for its economic and cultural advancement. 46/

86. A Department of Indian Affairs was set up in the Ministry of Development in Peru as long ago as 1921, for the purpose of studying the situation of the Indians, and proposing measures for their protection, education and economic advancement. A Superior Council for Indian Affairs was set up in 1936, as a consultative body responsible for giving an opinion on technical and legal questions concerning indigenous populations. There have been numerous procedural changes since then, together with new legislation which has altered the Government's fundamental attitude towards the status of its indigenous populations.

87. The recent changes, in particular those during the agrarian reform period of the late 1960s and early 1970s, are too varied and complex to be summarized adequately here. But they should be mentioned briefly as an example of a governmental policy which has on the one hand, aimed at transforming rural society taking some account of indigenous cultural and economic patterns, and on the other hand, has withdrawn the special indigenous status which was previously granted to indigenous rural workers.

88. The main purpose of the agrarian reform programme was to grant land titles and further land areas to indigenous rural workers living in the mountain (sierra) regions, in what prior to 1969 had been legally recognized as Comunidades Indígenas (Indigenous Communities). But Decree Law 17716 of 24 June 1976 equated their status with that of the remainder of the rural population. In outline the situation was as follows:

45/ Alejandro Marroquín, Balance del Indigenismo, pp. 110-118.
"In the non-forest areas, communities of indigenous populations formerly enjoyed recognition as Indigenous Communities; however, legislation adopted under the agrarian reform programme transformed the Indigenous Communities outside the forest regions into Rural Communities and no longer recognised that the more settled agricultural indigenous groups in these regions had any special status as indigenous peoples. The communities of indigenous populations in the non-forest regions have therefore been treated on the same basis as other population groups in respect to agrarian reform and redistribution of land, and the Government has reported that it cannot distinguish between the treatment afforded these populations and others in these regions". 47/

89. In the forest areas, new legislation of 1974 for the first time recognized in principle the full rights of ownership by tribal groups over their land. 48/

90. Brazil and Paraguay are examples of countries where a specialized state organ has a very wide mandate not only in the formulation but also in the execution of policy. In Paraguay the National Indian Institute (INDI) comes directly under the jurisdiction of the Ministry of Defence. It was created by Decree No. 20653 of 1975, which stipulated that its Council should be presided over by the Minister of Defence. It has been empowered to supervise, direct and co-ordinate all programmes undertaken in respect of indigenous populations by the Governments as well as by religious and private bodies. INDI may approve the commencement or continuation of programmes or mandate any changes it may deem necessary.

91. In Brazil, the National Indian Foundation (FUNAI) is attached to the Ministry of the Interior. It exercises tutelage over the Indians and has complete responsibility for them in law and control over all aspects of their lives. In addition to the usual role of such an agency, which includes programmes for development, health, education etc., of the indigenous populations, FUNAI also administers contracts of employment on their behalf. It takes legal proceedings in their name and manages the land they occupy. 49/

92. In both countries, separate advisory bodies exist to advise these state organs on policy issues. In Paraguay, this function has been served by the Asociación Indigenista de Paraguay, a semi-official organization which is often consulted on matters of indigenous policy. In Brazil Decree No. 68377 of 19 March 1971, which revised the functions of FUNAI, stipulated that the President of FUNAI should be advised by a Conselho Indigenista composed of seven members nominated by the President of the Republic on the recommendation of the Interior Ministry. As discussed in another part of the present study, 50/ the Estatuto do Indio, or Law 6,001 of 19 March 1973, breaks the Indian population down into the three categories of: isolados (isolated), em vias de integração (on the way to integration) and integrados (integrated). By this law, Indians are empowered to petition the competent court of justice to be released from the

47/ Swepston, loc.cit.,

48/ Ley de Comunidades Nativas y de Promoción Agrícola de las Regiones de Selva y Caja de Selva, Decreto-Ley No. 20653, Editorial Inti, 1974.

49/ See chap. X.

50/ See chaps. V and VII.
tutelage provided for in the law, so long as they can satisfy certain requirements including knowledge of the Portuguese language and a "reasonable comprehension of the usages and customs of the national community". By decree of the President of the Republic, emancipation of a native community and its members can also be declared when applied for by the majority of its members, and when proof has been provided by the competent federal agency of their full integration into the national community. It has been alleged that this law has at times been misused to emancipate Indian leaders from indigenous status against their will, on the basis of their "proven capacity of action within the larger society". 51/

93. In Colombia the Division of Indigenous Affairs (DAI), the agency within the Ministry of Government which has formal responsibility for policy matters, has exercised somewhat less control. This is partly because authority has been delegated to missionaries to deal with indigenous people in marginal zones; 52/ and partly because a body of nineteenth century law, which establishes a separate regime of traditional self-government and communal land rights in the provincial department inhabited by the largest number of acculturated Indians, is still considered to have validity today. The nature of these land rights, and the extent of the resguardo areas, has been the subject of controversy in recent years between the indigenous communities of the department of Cauca and the local landowners and authorities. When agrarian reform legislation was enacted in the 1960s, the agrarian reform agency INCORA was empowered to create new resguardos for indigenous peoples where necessary, after consultation with the Ministry of Government. 53/

94. In an apparent attempt to formalize and regularize its policy, the Government of Colombia has now prepared a draft Indian Statute. A version of this draft law was included in the Government of Colombia's report to the VIII Inter-American Indigenist Congress held in Mérida, in November 1980. It empowered the President of the Republic to set up a new state organ to deal with indigenous policy questions. It was also stipulated that:

"For the establishment of the Legal Regime for Indigenous Peoples, the National Government shall appoint an Advisory Commission, consisting of two members from each house of Congress, ministers appointed by the President of the Republic, representatives of the Colombian Association of Universities, the Colombian Academy of Jurisprudence, the indigenous communities and other bodies which, in the Government's judgement, should participate in the relevant studies." 54/

51/ Allegations made at the UNESCO-FLACSO gathering of Experts on Ethnocide and Ethnodevelopment in Latin America, December 1981.


53/ Ley 135 of 1961, as modified by Ley 1 of 1963.

95. In this brief survey it can be seen that - even in the one region of Latin America - the organs and procedures have varied greatly in accordance with the nature and conditions of the indigenous populations. It should also be noted that, in all the countries considered, there have been substantial modifications in recent years. And in all States there is growing concern by the indigenous peoples themselves that they should be consulted and should participate in the making of national policy as it affects their interests and livelihood. Although procedures for consultation often exist, it is clear that in several cases the members of consultative bodies are designated by the executive branch and may not adequately represent or even reflect the views of indigenous peoples, particularly those whose views and attitudes may be at variance with government policy.

96. Reviewing very briefly the evolution of inter-American indigenist policy, as proposed by the various Inter-American Indigenist Congresses, from the first to the eighth and most recent, one author has described the situation in the following terms:

"Inter-American indigenist policy hinges round two important dates, 1940 and 1980. In 1940 the first Inter-American Indigenist Congress was held at Patzcuaro (in Michoacán State, Mexico) in the presence of the then President of Mexico, Lazaro Cardenas. Resolutions on the following subjects were adopted by the Congress: a request for the establishment of indigenous affairs offices in various countries, demands that traditional institutions should be respected, allowing at the same time for development of the community with a view to its integration in the social life of each country, the drafting of protective legislation for the indigenous population and action to preserve indigenous culture, recognizing the importance of indigenous languages. Although this Congress was dominated by integrationist ideas, it has to be remembered that this was the first occasion on which the Indian problem had been raised at the continental level. Shortly after this the Instituto Nacional Indigenista was set up at Mexico City.

"Inter-American indigenist congresses have continued to be held regularly in Latin America. The Eighth Congress, held at Mérida (Mexico) in 1980, criticized the policy of 'indiscriminate integration of the indigenous population' pursued by traditional indigénismo which 'systematically served the interests of the groups in power', making use of programmes which were frequently converted into 'mechanisms to reverse and strategies intended to check and repress the advancing levels of organization and struggle of indigenous populations'. This new indigénismo, which preaches the participation of ethnic groups in the development of national society, has come into being at a time when a new ideology specific to the Indians alone is starting to spread, namely Indianism.

"Conceived by its ideological promoters as a philosophy based on the Indian's vision of the world, the concept of Indianismo has in recent years enabled indigenist organizations to acquire their own ideological base on which to build continental solidarity, pan-Indianismo or Indian internationalism." 55/

55/ M. Ch. Barre, loc.cit.
97. Indianism, which has become a substitute for indigenism at both the national and inter-American levels, has been formulated and put forward by the indigenist organizations themselves:

"At the first Congress of Indian movements in South America, held at Ollantaytambo (Peru) in March 1980, the majority of delegates and participants affirmed in a resolution, that Indianism provided an ideological basis for political action: 'We reaffirm that Indianism is the central tenet of our ideology, since its vitalist philosophy champions self-determination, the self-sufficiency and the social, economic and political self-management of our peoples and constitutes the only alternative mode of life in a world which is currently in a state of absolute moral, economic, social and political crisis.'

"Indianism has arisen as an evolving ideology which is essential for the struggle of Indian peoples against the colonial system under which they live in the Americas, a means of confronting the extension and modernization of capitalism and the universalization of the development model of society. Ethnic groups have been organized at the communal, local, regional, national and international levels, their principal objectives being self-determination and the establishment of a new type of development based on the Indian communal spirit. This attitude finds fault with the shortcomings of non-Indian organizations, in particular political parties, which tend to give priority to the class struggle, neglecting the problems of indigenous peoples (which are to be solved 'later')."56/

56/ Ibid.
C. Description of policy adopted in the States covered by this study

1. Introductory remarks

98. This section will be devoted to discussing de jure and de facto aspects of the content and orientation of official policy reflecting the views of Governments and those of non-governmental organizations. Particular attention will be given to the views expressed by organizations of indigenous peoples themselves. The extent to which the desires and preferences of the indigenous peoples have been taken into account in fundamental policy issues, will also be briefly examined.

2. Government views

99. Many States did not provide any specific information on the content of their fundamental policy as regards indigenous populations. 57/ A few limited themselves to asserting that no special policy provisions had been made to date towards indigenous populations, but that this was now about to change. 58/

100. The Government of Costa Rica has stated that, whereas "problems arose in the past" in this regard,

"State policy has now evolved very much in favour of indigenous populations during the past two years. [1/]

"... the measures adopted by the State are reflected in the decrees and law ... [cited].

"Up to now there has been no change in the policies pursued by non-official organizations, although this is expected to occur in the near future as a result of current co-ordinating legislation, aimed at avoiding the confusion which has arisen up to now in regard to indigenous groups."

101. The Finnish Government has stated:

"So far there has been no particular coherent policy towards the Lapps as a separate group. The administrative measures taken in order to improve the living conditions in the northern part of the country have benefited the whole population in these regions.

"The special needs of the Lapps have now been perceived more clearly than before, and the formulation of a particular policy towards them is under preparation. Certain efforts have already been made to help the Lapps to preserve their language and culture.

57/ Argentina, Bangladesh, Bolivia, Burma, Ecuador, El Salvador, Guyana, French Guyana, Honduras, India, Indonesia, Japan, Laos, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka, Suriname and Venezuela.

58/ Costa Rica, Finland, Guatemala and Sweden.
"It is the duty of the local administrative authorities, in particular the County Government of the Lapp county, to see to it that the interests of the Lapps are also taken into consideration".

102. The Government of Guatemala has reported that:

"No fundamental policy has been formulated in regard to the indigenous peoples of Guatemala. Although some legislation has been passed on isolated problems affecting the indigenous population - generally reflecting an ill-conceived paternalist attitude - the laws which have been adopted are not based on clearly defined criteria as to what constitutes indigenous culture, what are the values of that culture which have to be respected and what support they are to be given in national development plans.

"A positive change in the attitude of the State is apparent at present, however, in that cultural pluralism is now recognized as essential to the formation of genuine Guatemalan nationhood."

103. The Government of Sweden has reported that:

"The question of the situation of the Lapps has been handled ... [over a long period of time] as a question of economic policy, where the task of the public authorities has been to try to make it possible for the Lapps to keep their reindeer breeding even in the future. A general principle in the new Reindeer Husbandry Act (Official Gazette STS 1971:437) is that the Lapps will be granted a greater measure of self-determination. The opportunities to engage in reindeer breeding have been reduced. About 75 per cent of the people in Sweden identifying themselves with Lappish culture and speaking Lappish do not make their living from reindeer breeding. In view of these facts, the Government Commission on Lapp Affairs was set up in 1970 for the purpose of taking measures in favour of the language and the culture of the Lapps".

104. The Government also noted that in 1970 the Government Commission on Lapp Affairs was set up for the purpose of taking measures in favour of the language and culture of the Lapps, and that the Commission was to carry out its work in close contact with the representatives of the Lapps themselves. The Special Rapporteur did not have a report of the Commission at his disposal.

105. Several Governments 59/ submitted somewhat more explicit information on fundamental policy. In general, these Government reports lay emphasis on voluntary integration over time, with due regard for the cultural values and traditions of the indigenous peoples, and mention some of the procedures by means of which the indigenous peoples' organizations are enabled to play a role in decision-making.

59/ Australia, Brazil, Canada, Chile, Colombia, Denmark (Greenland), Malaysia, Mexico, New Zealand, Norway, and the United States.
106. The Government of Brazil stated:

"In the case of the indigenous population, the Brazilian Government has always taken care to elaborate special laws for their protection while they are living under primitive conditions. These laws are aimed at maintaining their lives and property, as well as progressively integrating them into the national community, by appropriate means, which is to say, without violence or any form of coercion. The basic legal text is Decree No. 5484 of 27 June 1928, which establishes a special code for the Indians, placing them under the guardianship of the State, and providing for a steady pace of progressive emancipation until such time as they are completely integrated into the life of the nations."

107. It should be noted that this basic legal text had been complemented by the Indian Statute (Act 6001 of 1973) in which the State's official policy is described as follows:

"Art. 1. This law regulates the juridical situation of the Indians or forest-dwellers and native communities for the purpose of preserving their culture and integrating them, progressively and harmoniously, in the national communion.

"Sole paragraph. The protection of the laws of the country is extended to the Indians and native communities in the same terms as it applies to other Brazilians, safeguarding native usages, customs and traditions, as well as the particular conditions recognized in this Law."

108. The Government of Australia has transmitted the following information:

"the fundamental objectives of Government policy in relation to Aboriginal Australians are that they should be assisted as individuals and if they wish as groups, at the local community level, to hold effective and respected places within one Australian society with equal access to the rights and opportunities it provides and acceptance of responsibilities towards it. At the same time, they should be encouraged and assisted to preserve and develop their own culture, languages, traditions and arts, so that these can become living elements in the diverse culture of Australian society... We also believe that programmes to give effect to such a policy must evolve in accordance with the effects of action so far taken and the needs of the times. They must take into account the expressed wishes of Aboriginal Australians themselves."

109. The Government of Canada notes the substantial changes in its policy since "an exhaustive study of the situation of the Indian people of Canada was commissioned in 1964 by the Canadian Government, and the two-volume Hawthorne Report was published in 1966". The report "did not propose that the Indians be assimilated, but that much improved assistance programmes be developed.

60/ This statement was made by a former Prime Minister of Australia, in an official statement of Commonwealth policy on Aboriginal affairs issued on 26 January 1972 and reaffirmed on 12 July 1972."
as 'prerequisites of proper choice and decision' by the Indian people in regard
to their own future. Thus the main recommendation of the Report was that Indians
should be granted equal status but should become 'citizens plus' with a special
claim on programmes of social and economic development to compensate for past
disabilities".

110. The Government of Canada also notes that a new Indian policy was put forward
in the form of a White Paper in 1969 which proposed to end a separate status, to
replace the earlier Indian Act with an Indian Lands Act, and to turn over to the
provinces the responsibility earlier held by the Federal Government for education,
health and social services. It further proposed to turn over to the Indians the
control and legal title to Indian lands, in effect ending the reserve system; and
to set up an Indian Claims Commission to deal with outstanding obligations under
treaties and other agreements. The Commissioner was appointed in 1969.

111. The Government of Chile, while also stressing the need for integration in the
interests of national unity, lays considerably less emphasis on the preservation
of indigenous culture and forms of social organization. It states that past
special legislation, notably that specifying the inalienable nature of indigenous
land tenure, has in its opinion resulted in "significantly retarding the economic
and social development of this social group". It asserts furthermore that:

"In our opinion it is necessary to ensure acceptance, especially by
Chilean civil servants, of the State's views: the indigenous peoples are
Chilean and must be integrated with the rest of the nation as soon as
possible; in turn, society in general must assimilate them as promptly and
completely as possible.

"It might be regrettable if this process of assimilation involved the
loss of indigenous languages and forms of culture typical of the indigenous
groups, but this would in no way be an impediment to the final consolidation
of the unity of Chilean society, which cannot be other than a single whole".

112. The Government of Colombia reports in connection with official policy that:

"The premise on which this policy is based is the impossibility of
preventing the physical and cultural integration of these populations in
the majority society, modernized and racially mixed. It is, however, the
responsibility of the Government and of the country itself to ensure that
this integration is carried out with minimum tension and maximum respect
for the cultural values of indigenous groups."

113. The Government of Denmark, in its communication of 21 May 1981, gives
information on recent changes in its policy and administrative arrangements
towards Greenland. It explains, however, that "the special arrangements which
the national authorities have introduced for Greenland apply to all Greenland,
rather than selected population groups". A policy of Home Rule for Greenlanders
was passed into law by Act No. 577 of 29 November 1978. Since then the Home Rule
administration has progressively assumed control over more and more aspects of
indigenous Greenlanders' affairs, including: taxation, the public school system,
social welfare, several cultural affairs, and church affairs.
114. The Government of Mexico writes that:

"Since 1977 the officially declared policy in relation to indigenous populations may be summarized as follows: strengthening their productive capacity and guaranteeing them the fruits of their labour, in what is deemed the most effective way of preserving their cultural values and hence of strengthening the distinctive features of the personality of Mexico ...

"Indigenous policy, which is regarded as a necessity, is based on the tenet that the strengthening of the national consciousness will be achieved by respecting ethnic pluralism."

115. The Government of New Zealand states that, whereas until recently "New Zealand tended to demonstrate, in culture and attitudes, a transplant of the culture and attitudes of the United Kingdom" and "the policy was ill-defined and perhaps unconsciously tended towards assimilation", current policy now recognizes a multiplicity of cultures with equal rights and opportunities.

"In recent years the policy of the Government has recognized the fact that New Zealand society embraces more than one culture in one citizenship. This means, first of all, that all citizens regardless of race have the same rights and liabilities and that every citizen is entitled to the same opportunities as others, but full recognition is given to the fact that New Zealand is a multiracial and multicultural country. This combined policy provides that, while being in every sense a full citizen of the State, the Maori is entitled to retain his social and cultural institutions and that all other citizens should be taught to know and respect those institutions".

116. The Government of Norway, in the information provided in 1975, stated that:

"The official Norwegian attitude on questions connected with policy towards the Lapps is based on the premise that the Norwegian Lapps are Norwegian citizens with the same rights and obligations as other Norwegians. In regard to suffrage and eligibility for election to public positions and offices and for appointment to public and private offices and posts, the Lapps have the same status as all other Norwegian citizens."

117. The Government, however, also noted that the policy now to be followed towards the Lapps would take account of such factors as their language, their scattered pattern of settlement and their economic livelihood, all of which made it difficult for them to take advantage of normal facilities. The Norwegian Government also affirmed that:

"Considerable financial support is granted to Lapp cultural projects. Lapp organizations receive financial aid and cooperate in dealing with questions of particular interest to the Lapps, as well as in matters which may be regarded as having special consequences for Lapp areas or which affect Lapp interests. The Norwegian Government has already appointed a special body 'The Norwegian Lapp Council' to be the advisory organ for the Government on Lapp questions."
118. On the changing characteristics of fundamental policy towards indigenous populations, present in so many States, the following information applies to the United States of America. An official report contains the following statement:

"Throughout the history of federal/Indian relations, there has never been a comprehensive or consistent approach by the Congress and the Executive that dealt effectively with Indian problems and, at the same time, efficiently fulfilled Indian needs." 61/

119. In a recent official statement on policy towards indigenous populations, it is stated that:

"In 1970, President Nixon announced a national policy of self-determination for Indian tribes. At the heart of the new policy was a commitment by the federal government to foster and encourage tribal self-government. That commitment was signed into law in 1975 as the Indian Self-Determination and Education Assistance Act."

"The principle of self-government set forth in this Act was a good starting point. However, since 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decision making, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency."

"This Administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favourable environment for the development of healthy reservation economies. Tribal governments, the federal government, and the private sector will all have a role. This Administration will take a flexible approach which recognizes the diversity among tribes and the right of each tribe to set its own priorities and goals. Change will not happen overnight. Development will be charted by the tribes, not the federal government." 62/

3. Non-governmental and indigenous peoples’ views

120. Almost without exception, information from non-governmental and indigenous sources has been deeply critical of official policy. The prevailing view is that, even though in theory a Government may advocate cultural pluralism and pledge to respect indigenous cultural values within the process of integration, in practice the indigenous legal, cultural, social and economic conceptions, patterns and institutions have suffered under what has been more akin to a process of assimilation. Such views, which have been expressed most forcefully by the representatives of the indigenous peoples themselves, have frequently been echoed by other non-governmental bodies and independent policy review commissions. While these or similar views may have been expressed for generations in certain countries, they have undoubtedly become more frequent in recent years with the growing number of organizations of indigenous peoples at the national, regional


and international levels, as well as with the strengthening of international non-governmental organizations which endeavour to document the situation of indigenous peoples throughout the world.

121. The views of indigenous peoples are available only for some of the countries covered in this report. In order to reflect the different nature of their concerns, arising from diverse historical and political circumstances, countries will be chosen from each of the main geographical areas covered in the report. As already noted their concerns can cover a broad spectrum of issues, ranging from respect for native laws, languages, forms of social organization and land rights to appropriate participation in national communities and legislatures, and representation on consultative policy bodies. The issues of autonomy, self-determination or statehood have also been prominent among their expressed views.

122. In Australia, aboriginal groups have been critical of federal or State policy on mining and land rights, and of interference with their customary laws.

123. Although legislation has granted ownership of existing Aboriginal Reserves in certain States to traditional Aboriginal land-owning groups, with administration in the hands of Land Councils consisting of representatives of each Aboriginal community in their respective areas, such Land Councils have limited powers which may not reflect the interests of the Aboriginals themselves. The Land Councils "are also empowered to negotiate the terms and conditions of mining to go ahead, except for several important categories of mining ... These provisions have already been used to pressure the Northern Land Council into agreeing in 1978 to uranium mining on the Ranger prospect in Arnhem Land where it was strongly opposed by most Aborigines. Indeed the Australian Government would appear to have deliberately set up an organization which appears to represent Aboriginal interests, but which in practice is constrained by white advice, complex legislation and powerful institutions to submit to the wishes of Government and the mining industry". 63/

124. On the issue of customary laws, Australia's leading Aboriginal organization has questioned the terms of reference of the Australian Law Reform Commission, which was set up in 1981 to enquire into the extent to which Australian law should accommodate Aboriginal customary law. The National Aboriginal Conference "set out its reaction to the inquiry by the Law Reform Commission in a motion put before the Third Assembly of the World Council of Indigenous Peoples in Canberra. The NAC demanded that Aborigines have the right to define their customary laws, and warned that they would reject 'definitions arrived at by white legal commissions of inquiry or any other white legal institution in Australia ...'. We demand Aboriginal involvement and proper consultation of all the appropriate groups and at all levels. Fundamental to this is recognition of Aboriginal customary rights in land and Aboriginal equity transactions, as well as post-colonial Aboriginal land tenure, including historical occupation, rights of residence and land rights on the basis of need and compensation". 64/


125. In India and Bangladesh the demands of some tribal and indigenous populations have centred on political autonomy or statehood, and the maintenance of the separate system of land tenure which were formerly granted to them under British colonial administration. Tribal representation in policy-making in India, at the local or national level has been described as follows:

"They have special representation in the legislatures both in the States and at the centre, as well as in services. Thus the tribals are made to feel that they are sharing in the administration of the whole country. Tribal advisory councils have been set up where there are scheduled areas in the States, and special autonomous hill districts have been set up in Assam under the Sixth Schedule of the Constitution. These autonomous districts have been given powers to evolve in their own way and according to their own ideas the institutions for governing these districts." 65/

126. The Anti-Slavery Society has given a less favourable account:

"Everybody admits that the Government policies so far implemented to develop the tribals have failed ... Government programmes have almost totally failed to mobilize the people for their own development and in fact because of the kind of 'development' officers sent by State Governments have alienated the majority of the tribals. The very use of the term 'uplift' demonstrates the Government's philosophy of 'development'. Development is something done to tribals by Hindus, not a process which the tribals are actively involved in and control". 66/

127. In those parts of India where tribal peoples predominated after independence, the kind of autonomy sought is reflected in the agreement drawn up between the Nagas and the Governor of Assam in 1947. In the judicial field, it was stipulated that all cases whether civil or criminal arising between Nagas in the Naga Hills be disposed of by a duly constituted Naga Court according to Naga customary law, or such law as may be introduced with the consent of duly recognized representative organizations; save that where a sentence of transportation or death has been passed there will be a right of appeal to the Governor. In the legislative field it was stipulated that no laws passed by the Provincial or Central Legislature which would materially affect the terms of this agreement or the religious practices of the Nagas should have legal force in the Naga Hills without the consent of the Naga National Council. As regards land, it was further stipulated that land with all its resources in the Naga Hills should not be alienated to a non-Naga without the consent of the Naga National Council. However, from the moment it was concluded "the agreement was treated by the central government as a dead letter, a reaction which embittered the Naga leadership and confirmed their mistrust of the Indians". 67/ Nagaland was granted independent statehood in 1963.


128. In Bangladesh there have been demands for regional autonomy and the preservation of their traditional land rights made by the tribal peoples of the Chittagong Hill Tracts, through their political organization, the Pahari Janasanghiti Samity. Their present demands are: "(1) Stop Bengali intrusion into the hill tracts and vacate the present settlers (2) remove the leaders of the Tribal Convention, who represent the elite and not the majority of tribals (3) democratize the Chittagong Hill Tracts Act of 1900". 68/

129. In Chile, the Mapuche Indians have frequently expressed their opposition to Government policy, which is apparently aimed at the voluntary subdivision of indigenous reserves. The following information is taken from a report of the United Nations Ad Hoc Working Group on Chile, on the Situation of Indigenous Populations:

"At a meeting held on 28 June 1978 in Temuco, the Council of Mapuche Peasants decided to send to President Pinochet a communication signed by the representatives of six Mapuche communities. The representatives refer to the existence of the draft plan 'which involves an attempt to divide up the indigenous reserves and to collect taxes' and express their concern and anxiety over the fact that to divide up the indigenous reserves would mean:
(1) the disappearance of the Mapuche people; (2) the loss of Mapuche lands; (3) the loss of Mapuche customs and traditions; and (4) the loss of Mapuche lands which have been usurped. They go on to state that the division of the communities would lead to an even more serious lack of education and would increase emigration and poverty, and that it is inadmissible for the Mapuches to have to pay taxes in respect of their own land. The document concludes with a statement demanding respect for their land, customs, culture and religion". 69/

130. In Colombia there is at the moment a full scale reassessment of policy towards the indigenous communities going on, "a process that has been hastened by the propagating work of Bonilla and other ethnologists on their own account and within a pressure group called the Comité de Defensa del Indio". 70/

131. The most outspoken of the indigenous organizations has been the Regional Council of Cauca Indians (CRIC), whose members have encountered much repression in recent years from local and national authorities; CRIC has defined its own programme as follows:

"(1) Recovery of indigenous community lands, (2) increasing their area, (3) strengthening of indigenous councils, (4) non-payment of rent, (5) publicizing legislation affecting indigenous populations and ensuring its proper implementation, (6) upholding the history, language and customs of indigenous populations; (7) training indigenous teachers to provide education for indigenous populations in their own language, (8) promotion of community economic organizations." 71/

68/ IWGIA Newsletter, June 1981.
69/ A/33/331, para. 709.
71/ Consejo Regional Indígena del Cauca, Unidad Indígena, Unidad, tierra y cultura, Bogotá and Popayán, December 1982, pp. 6-7.
132. Although the Government of the United States has affirmed that "The views of the indigenous groups affected by policy are actively sought in the formulation of such policy", the American Indian Policy Review Commission has stated the following in its interim report of July 1976:

"Throughout the history of federal/Indian relations, there has never been a comprehensive or consistent approach by the Congress and the Executive that dealt effectively with Indian problems and, at the same time, efficiently fulfilled Indian needs. Indian policy has led directly to a situation of deep despair and frustration among Indian people documented by countless alarming statistics reflecting all aspects of the living conditions of Indian people. This frustration has been physically manifested in events such as the occupation of the Bureau of Indian Affairs and the siege of Wounded Knee". 72/

133. As reported to the Special Rapporteur during his official visit to the United States of America, 1976, many United States Indians have explicitly rejected the policy of integration, and are actively seeking political autonomy or a return to the treaty relationships of earlier times.

134. According to a source:

"Many Indian people today think that a return to the treaty relationship, and the accompanying recognition of sovereignty, is the only way to keep non-Indian governments from interfering in the affairs of Indian governments. For example, in November 1972, the Trail of Broken Treaties Caravan presented a paper to the United States Government in which a call for the restoration of the treaty relationship was made". 73/

135. Another source states:

"Indians are not seeking a type of independence which would create a totally isolated community with no ties to the United States whatsoever. On the contrary, the movement of today seeks to establish clear and uncontroverted lines of political authority and responsibility for both the tribal governments and the United States so as to prevent the types of errors and maladministration which presently mark the Indian scene". 74/

136. Most countries have asserted that the desires and preferences of indigenous peoples are taken into account in the formulation of policy. Several of them have pointed to the existence of a specific consultative body through which these preferences are articulated. As has been seen above, however, the consultative body may be nominated by the executive without consulting representative

72/ Interim Report of the American Indian Policy Review Commission, paras. 8-9, 59-60. Part of this statement has also been quoted in para. 118 above.


organizations formed by the indigenous peoples themselves. In Brazil, for example, while the Conselho Indigenista is nominated by the President, legal personality has recently been denied to a new grouping of indigenous organizations, the União das Nações Indígenas. In Colombia, although the draft Indigenous Statute provides for an advisory commission comprising representatives of the indigenous communities, the Consejo Regional Indígena del Cauca (CRIC) has regularly been denounced by government spokesmen as a "subversive organization". In other States, it has at times been alleged that Governments have given recognition to tribal councils which do not represent the wishes of the majority of indigenous peoples. But the major complaint of indigenous peoples is that, although some form of consultation may take place, their own views will rarely affect decision-making over the use and control of land or mineral resources.
D. Control, examination and review of officially adopted policy

137. No information is available in these respects for many countries. 75/ For a few countries there is government information on some aspects of these questions. 76/ Non-governmental information is available only for a very few countries. 77/ From whatever information is available on some of the countries covered by the present study it seems clear that procedures for control, examination and review of policies officially adopted by the States as concerns indigenous populations vary considerably from country to country. Examples of the information at the Special Rapporteur's disposal are found in the following paragraphs.

138. The Government of Australia has reported that:

"Efforts are being made to increase effective consultation with Aboriginals at all levels: Aboriginal advisory bodies have been established in most States and in the Northern Territory, either by Statute or otherwise, to provide a formal means of consulting Aboriginal opinion in the development and review of policies and programs. A number of national Aboriginal conferences and meetings of representative consultative bodies have been convened."

139. The Government of Canada has stated that: 78/

"The most direct and effective action taken by the Canadian Government to ensure an examination and review of policy toward the native people, has been in assistance to the natives themselves to organize for this purpose.

"In 1966 the extensive review of the Indian position by H.B. Hawthorne noted the lack of a unified voice to speak for the Indians. Scattered across Canada in many tribes speaking many languages, the Indians had been unsuccessful in efforts at countrywide organization. This was even more true of the non-status Indians and Eskimos.

"The most remarkable development in recent years has been the rapid organization of all three groups, which now maintain three headquarters offices in Ottawa for direct contact with the government. In 1968 a meeting of Indian and Métis representatives from eight provinces decided to organize nationally in two separate bodies ...".

75/ Argentina, Bangladesh, Bolivia, Brazil, Chile, Costa Rica, Denmark (Greenland), Ecuador, El Salvador, Finland, France (Guyane), Guyana, Honduras, India, Indonesia, Japan, Laos, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka and Venezuela

76/ Australia, Canada, Guatemala, Mexico, New Zealand, Norway, Sweden and the United States of America.

77/ Colombia, India and the United States of America.

78/ The Government then provided information on the National Indian Brotherhood, the Native Council of Canada and the Inuit Tapirisat of Canada.
140. The New Zealand Government has communicated that the Maori and Island Affairs Department reviews legislation annually and the law is constantly being amended to keep up with the changing situation. The New Zealand Maori Council also makes representations to the Minister suggesting changes in legislation.

141. As far as the New Zealand Maori Council is concerned, the Government has stated that the Maori District Councils were organized in 1962 into the New Zealand Maori Council, created as a consultative body. The Council expresses its views on all proposed legislation affecting the Maori population, before the Maori Affairs Select Committee, and has frequent meetings with the Minister of Maori Affairs to discuss matters of policy.

142. The Government of Sweden has stated that a government Commission was set up in 1970, to consider what further measures could be taken to promote the language and the culture of the Sami people and that the Commission was to carry out its work in close consultation with Sami representatives.

143. A United States of America government source stated in 1978 that:

"The Select Committee on Indian Affairs of the Senate, established in the 95th Congress primarily to consider over 200 progressive legislative recommendations made by the American Indian Policy Review Commission, will continue to function in the 96th Congress." 72/

144. Mention has been made above of the American Indian Policy Review Commission established in 1975. 80/

145. The Government states:

"The Indian groups are sophisticated politically, and know how to work with the Congressmen and Senators and with the State and Federal agencies. In general, the Government tends to be responsive to their needs and very few measures remain in force after they have ceased to be useful. Not all would agree with this statement, but they are the ones who object to certain measures or procedures that are supported by a majority.

"Since Indian programs cost money, at any time a majority wishes to reduce government control of all services, the Congress and the Executive Branch of the Federal Government are likely to be only too willing to do so. This, in fact, is one of the main concerns of the Indian community - that Federal services will be terminated prematurely."


80/ See para. 132, above.
146. According to a report: 81/

"Incidentally, one sentence in the US response bespeaks an attitude that is completely unworthy of the traditions of the United States. It is reproduced here in sorrow and without further comment: 'Not all would agree with this statement, but they are the ones who object to certain measures or procedures that are supported by a majority.'

"As any review of the termination era will attest, it is not true that no bill is passed by the Congress without hearing from those affected by the bill, mainly the Indian population. Although the record of Congress has been considerably better in recent years, particularly with the recent tendency of major parties to select their presidential candidates from the Congress, Indian tribal representatives are still not routinely invited to testify on general legislation which affects them, nor are they included in such legislation unless as an afterthought and often as a result of expensive lobbying efforts conducted by the tribes themselves."

147. The Government of Mexico has merely stated in its report that:

"The system of work of the Office for Over-all Co-ordination of the National Plan for Depressed Areas and Marginal Groups under the jurisdiction of Office of the President of the Republic, which covers the Instituto Nacional Indigenista, includes systems of evaluation."

148. Two Governments provided only negative information in this connection. 82/

The Government of Guatemala, after describing a change of attitude on the part of the State in recognizing cultural pluralism as "essential to the formation of genuine Guatemalan nationhood", states that:

"The new trend in State policy (promotion of co-operatives for indigenous rural workers and craftsmen, etc.) is still in the planning stage and, in consequence, no provision has yet been made for the examination and review of policy concerning these ethnic groups."

149. The Government of Norway states that "no special measures had been taken to control an examination of State policy towards the indigenous population", adding that it was felt that the "over-all review and any updating required are taken care of through the democratic organs and the regular functions of the various organizations including discussion of the budget and the reports on activities in different fields."

150. The view has been expressed that in Colombia a fundamental examination of the bases of the policy adopted toward indigenous populations was begun in the early 1970s. In the words of one author:

82/ Guatemala and Norway.
"At the moment there is a full scale reassessment of policy towards the indigenous communities going on a process that has been hastened by the propagating work of Bonilla and other ethnologists on their own account and within a pressure group called the Comité de Defensa del Indio. In November 1971 President Pastrana set up a Consejo Nacional de Política Indigenista (National Council on Policy towards the Indian) with a very wide brief to recommend future policy on the question." 83/

151. As regards India, "there are at present 11 Tribal Research Institutes in the country. To co-ordinate their activities, a 30 member Central Research Advisory Council has been set up. The Council provides guidance on policy formulation and serves as a clearing house for the Institutes, Central and State Governments and other research organizations connected with tribal problems". 84/

152. From information available to the Special Rapporteur, it would appear that in most other countries considered in the present report, no thorough co-ordinated examination of the questions involved has been undertaken in many years, if ever. It would further seem that no systematic arrangements have been made for consultation with, and the participation of, indigenous populations on the fundamental determination of attitudes regarding issues which affect their lives and which will form the basis of State policy concerning them.

153. It is, otherwise, a well established fact that indigenous peoples' organizations have become more and more active in recent times and that there may well not exist universal agreement among the indigenous populations themselves as to what constitutes the most authentic form of representation of their best interests, their desires and preferences. There can thus be no foolproof mechanism to ensure that policies in fact reflect the wishes of the majority of the relevant indigenous groups. There can be little doubt, however, that policies without any review or consultation procedures whatsoever will inescapably lead to disenchantment and conceivably to civil unrest.

154. It would thus appear that the most enlightened manner of proceeding with examination and review of policy is precisely to give government support to the existence of representative indigenous organizations, and then ensure indigenous representation in the major policy-making bodies, and to build into the policy formulation procedures the necessary consultation with, and participation of, the different indigenous groups involved. Should this not be the case, then there is a very serious danger that whatever special measures may have been taken will outlive their usefulness and fail to reflect the present-day needs, concerns, desires and preferences of the indigenous populations concerned.

83/ O'Shaughnessy, op. cit., p.20.
E. Review of policy adopted by non-governmental or unofficial organizations

155. In point 13 of the outline for the collection of information in connection with the study, an attempt was made to gather information concerning the review of the policy pursued by unofficial organizations, including: religious missions, missions, commissions or groups of a scientific, anthropological, ethnological, sociological or other nature that have undertaken action programmes among indigenous populations.

156. Many of the 37 countries covered in the present study did not provide any information whatsoever in this regard. 85/ Information is available, however, on a few countries, whether it was provided by the Governments concerned 86/ or by non-governmental sources. 87/

157. Some Governments have provided information on the review of the policy pursued by unofficial organizations as carried out by State authorities. Thus, the Government of New Zealand has reported that:

"So far as scientific bodies are concerned, the principal scientific organization in New Zealand is the Royal Society of New Zealand. This body, formerly known as the New Zealand Institute, quite early in the history of New Zealand, began publishing material on Maori society, traditions, arts and crafts, customs, and so forth. In 1892 the Polynesian Society of New Zealand was formed. This is a voluntary scientific body with a worldwide membership which had for the last 80 years continued to publish anthropological, ethnological and sociological material on the Maori peoples and kindred people of the Pacific. The Society's publications represent the principal body of Maori traditional law that has been published and had it not been for the work of the society the present day movement amongst the Maori people to revive their tribal customs would have, in many cases, been frustrated."

158. The Government of the United States replied referring to indigenous peoples interest groups, as follows:

"There are numerous Indian interest groups which at times have played an important part in formulating Indian policy. Currently there are three primary groups. The National Congress of American Indians which was established in 1946, the National Tribal Chairman's Association, established in 1971, and a more militant group called the American Indian Movement established in the last decade, led largely by nonreservation or acculturated persons with some degree of indigenous blood. There is no question but that these organizations have an impact both within the legislature and the Executive Branch of Government on the legislation about and the carrying out of Indian programs."

85/ Argentina, Bangladesh, Bolivia, Brazil, Burma, Chile, Colombia, Denmark (Greenland), Ecuador, El Salvador, France (Guyane), Guyana, Honduras, India, Indonesia, Japan, Laos, Malaysia, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka, Suriname, Sweden and Venezuela.

86/ Australia, Canada, Costa Rica, Finland, Guatemala, Mexico, New Zealand and the United States.

87/ Brazil, Colombia and Venezuela.
159. The Australian Government refers rather to the review of State policy by non-official organizations as well as the influence these organizations exert on policy towards indigenous peoples in general:

"Unofficial organizations of all kinds and individuals, both Aboriginal and non-Aboriginal, can and do review and influence the development of policy in a variety of ways, for example by petitioning the Government, making submissions to the Minister responsible for Aboriginal Affairs, developing specific proposals for which Government funds are requested, publishing reports, making submissions in respect of Aboriginal Affairs to Government committees of enquiry, and so on."

160. Something similar may be said of the information furnished by the Government of Canada, which has stated that:

"An active non-government white organization concerned with the needs and problems of native people has been the Indian-Eskimo Association. It conducts research and pursues a broad program of public education, giving practical assistance to native people. Its policy has altered as the native organizations came into being. In 1971 it changed its name to the Canadian Association in Support of the Native Peoples. While it maintains an independent point of view in regard to the selection and review of issues and policies, its general objective is to promote understanding and support among the white population in matters concerning the native people.

Similarly, the active social agencies of leading churches of Canada, including the Anglican Church, the United Church, the Roman Catholic Church, and the Moravian Church, have undergone a change in policy. There is a conscious effort to abandon a 'paternalistic' attitude for a more co-operative and supportive role. The Churches have withdrawn from the administration of Indian residential schools, a role they traditionally occupied under the authority of the Federal Government. Schools are now conducted through varying arrangements with provincial governments."

161. Some Governments have provided information on this question, for example those of Costa Rica, Finland and Guatemala.

162. The Government of Costa Rica has reported:

"Up to now there has been no review of the policies pursued by unofficial organizations, although this is expected to occur in the near future as a result of current co-ordinating legislation, aimed at avoiding the confusion which now exists in regard to indigenous groups."

Similarly, the Government of Guatemala has reported:

"Nor has a review been conducted of the policy followed by unofficial organizations when implementing cultural action programmes among indigenous populations. The reorganization of the activities and functions of the Instituto Indigenista Nacional - at present under examination and preparation - will enable supervision to be exercised over these non-governmental activities in relation to indigenous populations."

163. The Finnish Government has stated that:

"The Government has not interfered in the policy pursued by unofficial organizations."
164. In a statement which appears to relate rather to Government bodies, covered in another part of its report, the Government of Mexico has indicated that:

"Programme IV.I.3 Bases for Action is aimed at improving the judicial and administrative instruments regulating the entities of these organizations, with a view to guaranteeing the rights of communities."

165. Non-governmental sources have reported on the considerable independence that had been traditionally given to religious missionaries for the conduct of their activities in some countries. Information dating from the late 1960s and early 1970s was available to the Special Rapporteur in this regard. It was reported, for instance, that in Venezuela, "As regards the activities of the Catholic missions working in Indian territory by virtue of delegation of functions from the national government, these are carried out in accordance with their own judgement and interest; the only stipulation being that they present a monthly statement of accounts regarding the grant made to them by the Ministry, and a report at the end of each year, as required by the present law of the Ministry, for inclusion in the balance-sheet and statement of accounts laid before the National Congress." 88/

166. As to the situation prevailing in Colombia under arrangements then obtaining in the early 1970s, there was a "total lack of official interest in recovering the function of acculturation which was handed over to Catholic missionaries, although their ineffectiveness and their frequent abuses have often been denounced. In fact, quite the contrary; there has been increased delegation of powers to private persons or associations who have shown an interest in assuming them. This explains the cases of ... an Eudist priest ... and ... an American Bruce Olson among the Bari, and, on the national scale, the formal legal delegation of the acculturation of the 'savages' to 219 Catholic mission posts and to 33 groups of research workers of the Summer Institute of Linguistics (SIL), while the State maintains only 8 small commissions in the whole national territory.

"...

"... Various factors have influenced the nascent movement towards change which has been apparent in the last few years in some Catholic missionary circles in Colombia. Some are external, for example the criticisms expressed against missionary activity and the expansion of Protestantism. Most are internal, first of all the repercussions of the world-wide crisis of the Church and the impact on the priests of the Golconda movement by the anticolonialist ideology and the determination of Camilo Torres, the guerilla priest.

"From this point of view the Vaupés proved fertile ground. Both because of the challenge of United States Protestantism and the SIL, which has 10 landing strips and 25 members in the area, and because it was the apostolic see of the visible head of the Golconda movement and also suffered the effects of colonialism." 89/


167. The Special Rapporteur has already noted above some of the historical reasons for the missionary presence in isolated indigenous areas, and has made mention of their past record as the protectors of Indians against abuse by encroachers. But in more recent times there has been widespread concern at the reported tendency of certain missionary groups to impose alien cultural patterns without regard for the views of the local population. Such accusations have been frequently made against the Summer Institute of Linguistics (SIL) itself, which has engaged in substantial missionary activity amongst indigenous populations in Africa, Asia and Latin America. And information available indicates that "co-ordination between government agencies and missions is not effective; laws and educational plans may not be observed by missions; and missions are rarely obliged to keep the governments informed of the details of educational activities ... Several governments have contracted with the SIL to produce teaching materials in indigenous languages, or even to undertake total responsibility for the education of the Indians. Recently, however, the SIL has been expelled from Brazil and Panama". 90

168. It should be noted that contracts with SIL missionaries have also been terminated elsewhere. 91/ Such decisions can be prompted by hostile public opinion, which can itself be a reaction to an absence of national control over the activities of foreign missionaries. In countries with vast geographical areas, poor communications and often slender resources, adequate supervision may doubtless prove a very difficult task. However, in those cases where indigenous peoples are subject to effective administration by an external organization, whether official or unofficial, there is a need for ways and means by which they can report abuses or shortcomings at the local level to the competent national authorities.


91/ It should be noted that contracts with SIL missionaries have also been under criticism in other countries, for example, Ecuador and Mexico.
COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of Discrimination
and Protection of Minorities
Thirty-fifth session
Item 12 of the provisional agenda

STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST
INDIGENOUS POPULATIONS

Final Report (Supplementary Part) submitted by the Special Rapporteur
Mr. José R. Martínez Cobo

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NOTES 

1. Not all the countries included in the present study have special bodies charged with the formulation and implementation of official policy toward their indigenous populations, but most of the countries surveyed have made some type of administrative arrangement for that purpose. A few countries have created ministries or cabinet-level bodies whose sole function is the formulation and implementation of policy toward indigenous peoples. Most have established specialized offices, departments or divisions within one or more ministries which are responsible for indigenous policy in general or for the particular aspects of that policy which come within the more general functions of ministries as a whole. The nature of these specialized offices varies from country to country: some are primarily advisory, executory, co-ordinating, planning, or policy-making bodies, with a mixture of functions; others combine all those functions. Some give their full attention to over-all indigenous policy, whereas others are concerned with indigenous populations as related to national development, particular spheres of economic activity, or the provision of governmental services to those sectors of the population. A number of the countries under study have created administrative bodies for the purpose of co-ordinating governmental policy and programmes for indigenous populations. These entities generally include representation from the various cabinet-level bodies and other agencies whose programmes affect or involve indigenous populations: their primary role as a co-ordinating body is sometimes enhanced by the granting of the authority to make policy decisions and to design and carry out specific programmes. Several countries have established officially recognized bodies of a purely advisory or consultative nature, which are either made up of, or include, representatives of indigenous groups. On the basis of the information available to the Special Rapporteur, only one country has established an autonomous institution for the sole purpose of attending to one particular problem affecting the indigenous population, i.e., the distribution of land.

2. National institutions representative of the above types of administrative arrangements are described below under the following subheadings: Specialized Ministries or Cabinet-level Bodies; Specialized Administrative Arrangements within Cabinet-level Bodies or Attached to those Bodies; Inter-Agency Co-ordinating Bodies, Official Advisory Bodies, and Parliamentary Committees. The final subsection makes brief reference to those systems which have no specialized arrangements.

1/ On the basis of the information made available to him, the Special Rapporteur has referred to various aspects of national systems in order to illustrate the types of administrative arrangements established by countries with indigenous populations. Insufficient information was available to allow comment on whatever administrative arrangements may exist in Japan, Laos, Sri Lanka and Suriname.

2/ It should be noted that the 17 American States which have ratified the 1940 Pátzcuaro Convention of 1940 (See Chapter I, para. 69 and foot-note 5) assumed international obligations to establish institutions for indigenous affairs.
3. Governmental Entities and their Functions

1. Specialized Ministries or Cabinet-level Bodies

3. Australia, Canada, Guyana, New Zealand and the Philippines are representative of those countries with ministries or cabinet-level bodies specialized in indigenous affairs.

4. In December 1972, the Government of Australia appointed a Minister solely responsible for Aboriginal Affairs and established a new Department of Aboriginal Affairs with regional offices in all States and the Northern Territory. This administrative re-organization represents the Government’s assumption of full responsibility for policy, planning and co-ordination at the national level.

5. Canada’s Federal Department of Indian Affairs and Northern Development, which administers the Indian Act and the Yukon and Northwest Territories Acts, has responsibility for native policy and programmes, extending to all registered Indians and Eskimos. It has a large staff throughout the country, and its annual budget for 1973-1974 was about $400 million. Local administrative arrangements provided for under the Indian Act are described by the Government as follows:

"Under the Indian Act, Band Councils are recognized as local administrative bodies on Indian reserves. The Act provides guidelines for their election and structure, but approximately 166 out of 560 Bands choose their councils according to their traditions. Councils may enact local by-laws, and those which have reached an advanced stage of development may raise money and administer it for local purposes. Over $6 million has been budgeted for the 1973-1974 fiscal year to cover necessary administrative costs (office expenses, salaries, and travel expenses) for some 465 Bands which have assumed the responsibility for operating such programmes as housing, roads, water and sewer installation. Other operating costs of these programmes are estimated as close to $30 million annually. A number of Indian regional associations now administer community development programmes by agreement with the Federal Government."

6. New Zealand’s Cabinet includes a Minister of Maori Affairs, and there is a separate Department of Maori and Island Affairs with nine district offices located in areas chosen to suit the Maori population. Each district office has suboffices. The functions of this Department are described by the Government as follows:

"(a) The recording of titles to Maori land and the servicing of the Maori Land Court.

(b) The administration of the Maori Housing Programme.

(c) Social Welfare work amongst the Maori population.

(d) Some aspects of pre-school education and vocational training for Maoris.

(e) The administration of the Maori Trustee (this is a statutory office set up to administer the estates of deceased Maoris and the administration of certain Maori Trust Funds).

(f) The administration of the Maori Land Development programme.

(g) A general "watching brief" to see that Maori interests are protected in dealing with other Government departments, and to ensure the co-ordination of government activities generally in respect of Maoris."
7. According to the Constitution of Guyana (Art. 36), "one Minister shall be charged with responsibility for Amerindian affairs," and a Parliamentary Secretary for Amerindian Affairs has been appointed in the past.

8. In the Philippines, policy toward indigenous peoples is developed and implemented by the Commissioner on National Integration, appointed by the President, who enjoys the rank and pay of a Secretary of Department and is a member of the Cabinet. "Provided with only 218 permanent and 20 casual employees, this Commission mans and maintains a central office, 6 regional offices and 27 field offices located all over the archipelago with the object of bringing the national Government and the national cultural minorities permanently close and accessible to each other." In general, the Commission on National Integration has the authority to promote the development of industrial and agricultural enterprise among the National Cultural Communities, to take the necessary steps to provide them with electrical power, public schools, and feeder roads. It is also charged with carrying out homesteading and resettlement projects, the promotion of community life, the training of National Cultural Communities and helping them to secure employment. Trial lawyers of the Commission may be authorized to assist indigent members of the Cultural Communities accused in criminal cases involving their landholdings.

2. Specialized Administrative Entities within Cabinet-Level Bodies or attached to those Bodies

9. Governments which have entrusted responsibility for indigenous affairs to specialized entities within cabinet-level bodies have often set up their administrative structure within ministries responsible for governmental affairs or some area of economic policy. In a few cases, the principal policy-making body is found within a ministry charged with social responsibilities, and in this instance it is a part of the Ministry of Education. Though these forms of administrative arrangements may reflect to some degree the Government's over-all approach to policy vis-à-vis indigenous populations as a matter of government, economic development or social welfare, they may represent nothing more than an attempt to achieve the most convenient means or organization, taking into account the existing governmental structure.


5/ Republic Act No. 1888, Section 4, as amended. (See foot-note 3, above). According to the Statement of the Anti-Slavery Society for the Protection of Human Rights to the Thirty-fourth Session of the Sub-Commission, the Commission on National Integration was replaced in 1975 by PANAMIN. That statement goes on to assert that "PANAMIN has no democratic or indeed any representation of tribal people in its decision-making bodies. The leadership is rather drawn from the ranks of the powerful in business and in the military." The Special Rapporteur has received no further information on PANAMIN.
10. Brazil's central body for indigenous policy is the National Indian Foundation (Fundação Nacional do Índio – FUNAI), attached to the Ministry of the Interior. Founded in 1967, its legal basis rests on the Federal Constitution, Law No. 5371 (5 December 1967), which provided for its creation, Law No. 6001 (19 March 1973) - known as the Indian Statute, and on Decree No. 68,638 (16 April 1980), entitled FUNAI Statute. According to Law No. 5371 (Art. 1), its objectives are the following:

I. To lay down guidelines, and to guarantee the observance in regard to the indigenous population of a policy based on the following principles:

(a) Respect for the Indian's person and for tribal institutions and communities;

(b) Guarantee of permanent possession by the Indians of the land they inhabit and exclusive enjoyment of the natural resources and all services existing there;

(c) Maintenance of the Indians' cultural and biological balance in their contact with Brazilian social life;

(d) Supervision of the spontaneous acculturation of the Indians in order to protect them from sudden changes in their socio-economic evolution;

II. To administer the property of the Indians with a view to protecting it, increasing it and enhancing its value;

III. To promote surveys, analyses, studies and scientific research on the Indians and indigenous social groups;

IV. To promote medical and health care for the Indians;

V. To promote appropriate basic education for the Indians, with a view to their integration as individuals into the society of the Brazilian nation;

VI. To stimulate public interest in the Indians' cause through the various publicity media;

VII. To exercise a policing function in the Reserves in matters relating to protection of the Indians.

Single paragraph. The Foundation shall fulfil the function of representing the Indians or providing legal aid as an integral part of their protection, in accordance with customary civil law or special laws. 6/

11. FUNAI accomplishes its objectives through its Regional Delegations and numerous Indian posts which function under those delegations. An official report of 1976 estimated that FUNAI had extended its services to approximately 111,000 of the 200,000 Indians in Brazil. Between 1967 and 1973, those services were directed primarily to measures for the defense of Indian lands and protection of their health. Special medical teams were organized to provide health care at the Indian posts, and the effectiveness of this service was improved by the increased use of communications by air since 1971. Indian lands were protected by the creation of Indian Reserves. The Indian Statute added a developmental role to FUNAI's functions of protection and assistance, the overall goal being the integration of Indian communities into national life. According to an independent observer, the authority exercised by FUNAI has a direct impact on the lives of individual Indians: "... [FUNAI] administers the tutelage of the Indians and has complete responsibility for them in law and control over all aspects of their lives. In addition to the usual role of such an agency, which includes programmes for the development, health, education, etc. of the indigenous populations, FUNAI also administers contracts of employment on their behalf, takes legal proceedings in their name and manages the land they occupy ...". 11/

12. In addition to its Federal Department of Indian Affairs and Northern Development, the Government of Canada has identified the following sub-departmental agencies which deal with indigenous affairs:

- A second federal department which plays a large part in aid to the native population is the Department of the Secretary of State. Through the Native Citizens' Section of its Citizenship Branch, this department makes grants and supplies field officers to assist a number of native groups. A special charge on the department are the "Friendship Centres", established over many years in urban communities across Canada and staffed jointly by white Canadians and native people, which play a major role in the adjustment of native migrants to city and town life.

- The Canada Health and Welfare Department administers directly to registered Indians and Eskimos through its Indian Health and Northern Health Services.

- The Department of Regional Economic Expansion is responsible for a number of developmental programmes which are mainly or wholly of benefit to natives.

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10/ Ibid., p. 19.

The Department of Justice has a programme of legal aid in the Northern Territories of special service to native people.

The National Museums of Canada, which include the National Art Gallery, have extensive programmes of research and exhibition of native arts and crafts.

While most of the activities of the Department of Agriculture are for the benefit of Canadian farmers in general, native peoples have benefited as well. The department's work on soils, plants and animals under the stress of cold might be expected to be especially important to the development of northern regions, where much of the native population lives."

13. Chile's administrative arrangements focus upon development. The Indigenous Development Institute, a dependency of the Ministry of Agriculture, deals mainly with the authorization of transactions related to Indian lands but is also involved to a lesser degree in such diverse activities as loans, school construction and legal and medical assistance. 12/ The Ministry of Agriculture includes another dependency - the Agriculture and Livestock Development Institute - which, according to government sources clears title to indigenous lands by granting individual deeds and furnishes credit and technical assistance to individual property owners. 13/ The Department of Indigenous Affairs, which operates under the Ministry of Lands and Colonization, provides technical expertise for the division of communal property. 14/

14. Founded in 1960, Colombia's Division of Indigenous Affairs (División de Asuntos Indígenas-DAI) has functioned within the Ministry of Government. As a result of the internal organization of that Ministry in 1968, DAI became a part of the Community Integration and Development Authority and was assigned the following duties:

"To carry out special integration and development programmes for the indigenous population, aimed at incorporating them into the national community.

To support, encourage and advise the indigenous population in the task of organizing itself properly and participating with proper awareness in the national integration and development process.

To ensure the individual and collective integrity of the indigenous people and direct the changes aimed at their integration and development.

To co-ordinate the participation of the public and private sectors in integration and development programmes for the indigenous communities, on a regional and local scale.

At regional and local level, to supervise the fulfilment of legal and statutory provisions relating to the indigenous population of Colombia. 15/"


13/ Ibid.

14/ Ibid.

15. These powers were widened by Decree 1741, 30 August 1973, which gave DAI authority to formulate educational policy in indigenous communities and to oversee associations that work with indigenous groups. In the course of its labours, DAI has developed programmes emphasizing legal aid, social assistance, health and sanitation, agricultural development and credit, the training of Indian leaders and the construction or improvement of public works related to the infrastructure. These programmes are carried out at the regional level through a number of Commissions for Indian Welfare and Protection (Comisiones de Asistencia y Protección Indígena), which are located in areas with a high tribal population density. At least seven major Training Centres (Centros de Capacitación) have been established, but training and other forms of assistance are administered at the local level by Indian Affairs Committees (Comisiones de Asuntos Indígenas). Other administrative arrangements include an inspection service for indigenous populations, and a National Council on Indigenous Policy, which advises the Ministry of Government.

16. The Special Rapporteur has been informed that a bill relative to the indigenous peoples of the Department of Guyane was presented to the National Assembly of France in 1971-72. According to the draft, a Bureau of Tribal Populations — under the authority of the Assistant Prefect of Saint Laurent du Maroni — was to be established to carry out policies concerning the indigenous population. No further information with regard to this proposal has been received.

17. Guatemala's National Indigenous Affairs Institute (IIN) is attached to the Ministry of Education, as is also the Rural Socio-Educational Development Authority (Dirección General de Desarrollo Socio-Educativo Rural) which deals with bilingual education under programmes of "castellanización" (teaching the Spanish language). According to the Institute's regulations, approved (2 October 1945), its functions are the following:

- "Research: to initiate, direct, co-ordinate and undertake scientific research and surveys applicable to the solution of indigenous problems or contributing to a better knowledge of them, even though the research may have no immediate practical application.

- Consultation: to hold consultations with government departments on indigenous topics.

- Promotion: to propose to the Government ways and means of integrating the Indian into the general culture of the country.

- Liaison: to co-operate with the Instituto Indigenista Interamericano, scientific institutes and foundations in the co-ordination, development and administration of research projects related to the indigenous population."

18. Although IIN has produced a series of monographs and has participated in some advisory activities and promotional work, many critics note a lack of governmental concern for the work and objectives of the Institute and agree that it has not played a very significant role. This assessment finds some support in the Institute's budgetary problems, which are discussed under part D of this chapter.

16/ Ibid., 7.
17/ Created by Decree No. 062, 16 January 1976, as cited by Swepston, loc. cit., p.727
19/ See paras. 82-84, below.
19. In this regard, one observer, discussing the scarcity of funds available to governmental entities dealing with indigenous affairs in different countries, has discerned a trend towards the reduction of the funds available to the entities, to what is barely enough to cover the salaries of the staff and a limited amount of practical work. In the case of Guatemala's Institute, the over-all total of its budget allocated for staff and its operations have even been reduced. 20/ It should also be noted, however, that the same observer has stressed that the staff of the Institute make efforts to carry out useful research or social promotion projects, despite the very restrictive conditions under which they work. 21/

20. Since 1953, Guatemala has had another administrative entity - the Service for the Promotion of the Indigenous Economy (Servicio de Fomento de la Economía Indígena). Attached to the National Institute for Promoting Production (Instituto Nacional de Fomento de la Producción - INFOP), its purpose has been stated as to raise the standard of living of the indigenous people by strengthening the economy in order to integrate them into the mainstream of national life. As of 1957, it enjoys technical and administrative autonomy within the structure of INFOP, and carries out its programmes on the basis of the following policy guidelines:

"(a) Respect for the dignity of the indigenous person and his communities, in an effort to raise economic, social and cultural levels without causing conflicts resulting in resistance to the proposed changes, the necessary adjustments in personal and communal life to be made on the basis of trust, understanding and appropriateness.

(b) Encouragement of action from within the community through the use of indigenous staff, combined with co-operation from local officials.

(c) A horizontal geographical approach, reaching all the ethnic groups in the country, beginning with a few strategic points and slowly and gradually extending to all communities. The vertical approach (model villages or regions) is inappropriate because: (a) it is unfair in itself; (b) it exaggerates differences with the surrounding milieu; (c) it does not take account of the variability of the indigenous inhabitants, and (d) it precipitates too rapid and complete a cultural change which may not be understood or desired by the indigenous population and which, if it is achieved, may lack foundation.

(d) Use of controlled credit, in keeping with local cultural conditions and granted in kind, in a series of amounts calculated to meet successive needs and composed of a complete range of elements.

(e) Technical advice furnished at the level of traditional knowledge and designed to steer the local economy towards better standards in keeping with natural and human conditions.

(f) Support for handicraft specialities in agrarian communities in order to reduce to some extent their extreme dependence on a single means of livelihood."

20/ See paras. 82, 83, below.
21/ See para. 84, below.
21. Article 338 of the Constitution of India provides for a Special Officer for Scheduled Classes and Scheduled Tribes who is appointed by the President. It is his duty to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes and to report to the President on the working of those safeguards at such intervals as the President may elect. In 1967, the Office of Commissioner for Scheduled Castes and Scheduled Tribes (provided for in Art. 340 of the Constitution) was re-organized and set up under a Director-General for Backward Classes Welfare who is responsible for formulating schemes for the welfare of backward classes, watching over their implementation and maintaining liaison with the States. State governments and Union Territory Administrations have separate departments to look after the welfare of the scheduled castes and scheduled tribes and other backward classes, but administrative organization varies from state to state. In some states, separate Ministers have been appointed to look after tribal welfare as provided for in their respective Constitutions. In addition, there are some 11 Tribal Research Institutes whose activities are co-ordinated by a Central Research Advisory Council.

22. Malaysia's Department of Orang Asli Affairs, within the portfolio of the Ministry of Home Affairs, is responsible for the administration, development and welfare of all Orang Asli in West Malaysia. The Department has its federal headquarters at Kuala Lumpur and branch offices at regional, state, district and village levels. Its internal structure reflects its six major areas of activity: general administration, education, medical and health services, social and economic development, research and planning, and communications and operations.

23. In 1971, the Government of Indonesia established the Directorate for Development of Isolated Ethnic Tribes (Presidential Decree No. 45 of 1974) as a dependency of the Department of Social Affairs. Hierarchically, it is under the Directorate General for Social Development which maintains liaison with the National Planning Council (BAPPENAS). A non-governmental organization has asserted that the Directorate for Development of Isolated Ethnic Tribes "stresses the importance of the village as a way of organizing and controlling the activities of the group who would usually be scattered over a large area of forest." "What is not stressed," that report continues, "is the commitment renouncing any enforcement in the establishment of such villages and the principle that any such 'development' must proceed at a much slower pace . . . pace ..." In the opinion of this organization, the result is that "over-all the Indonesian government policy, when articulated, is in no way committed to a policy of ethnic pluralism when such ethnicity comes into conflict with the 'normal' economic development programme."

24. In 1943, the Nicaraguan Indigenous Affairs Institute was founded in Nicaragua as an affiliate of the Inter-American Indian Institute. The Special Rapporteur did not have access to any recent information as to whether it continues in existence. He notes, however, reports of the founding of an indigenous mass organization – MISURASATA – by the Government of National Revolution of Nicaragua. This organization represents the interests of various Indian groups and occupies a seat on the Council of State, which is the supreme legislative body.

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24/ Information furnished on 3 September 1976 and 24 April 1977 by the Anti-Slavery Society in connection with the present study.
25/ Ibid.
26/ Ibid.
25. Recently again, the Government of National Revolution has created the Atlantic Coast Institute (Instituto de la costa atlántica), which, in the words of one of the members of the Governing junta of National Reconstruction responds to the following ideas:

"... THE FACT THAT IN OUR COUNTRY THERE IS NO RACIAL DISCRIMINATION OR APARTHEID OR DISCRIMINATION ON GROUNDS OF RELIGION OR NATIONAL ORIGIN, OR FOR POLITICAL OR REGIONAL REASONS, DOES NOT MEAN, FIRST, THAT WE ARE TRYING TO INTEGRATE THE MINORITIES (SUMOS, MISKITOS, RAMAS AND CREOLES) INTO OUR CULTURE. OUR STRUGGLE IN RESPECT OF THESE ETHNIC GROUPS IS NOT A STRUGGLE TO BRIDGE A GAP, SINCE THERE IS NONE IN NICARAGUA IN THE RACIAL AND CULTURAL SPHERES. OUR STRUGGLE AS FAR AS ETHNIC PEOPLES ARE CONCERNED IS SIMPLY AND SOLELY TO INTEGRATE THEM INTO THE NICARAGUAN NATIONAL ENTITY THROUGH THE REVOLUTIONARY CULTURE.

IN ORDER TO DO THIS, WE HAVE SET UP THE INSTITUTO NICARAGÜENSE DE LA COSTA ATLANTICA, WHICH IS TRYING TO DEVELOP, MAINTAIN AND GIVE SHAPE TO THE CULTURE OF OUR ATLANTIC ZONE, TO INCREASE PRODUCTION IN THE FISHING, FORESTRY AND MINING INDUSTRIES OF THAT ZONE, AND, FINALLY, TO REMEDY THE LOW ECONOMIC AND SOCIAL STATUS OF THE ETHNIC GROUPS."

26. The Government of Norway has communicated that the co-ordinating body for Lapp questions is the Ministry of Agriculture's Reindeer-Breeding Division which is also responsible for policy toward the Lapps in matters relating to reindeer husbandry. This Division "directs the Central government administration at the local level, which consists of six Commissioners for Lapp Affairs, each of whom administers his own country ..., the Counsellor for Reindeer-Breeding, who is in charge of the advisory service, and the State Reindeer research. The Government also noted that the Education Department and the Church had appointed a committee to deal with economic and social questions concerning the Lapps.

27. Another example of subministerial agencies concerned with development among indigenous populations is Pakistan's Planning and Development Department of the North West Frontier Territories. This Department, which functions under the department of Government of the North West Frontier Territories, co-ordinates the development activities of all the provincial governments and prepares an annual development programme for the Federally Administered Tribal Areas, under the supervision of the Development Commissioner. Pakistan has also created a Federally Administered Areas Development Corporation which has promoted the development of power, agriculture, animal husbandry, forestry, public health, housing, industry and communications.

28. In the United States of America the principal policy-making body is the Bureau of Indian Affairs within the Department of Interior; however, additional specialized offices or divisions have been established within other Departments, as described in the following official report:

"The Federal Government's trust responsibilities and special relationship extends to Indian nations, tribes and individuals. The major federal departments with programmes relating to Indians are Interior; Health, Education and Welfare; Agriculture; Housing and Urban Development; and Commerce. The Departments of Labor, Transportation, Treasury, State and Defense also have programmes important to Indians. The Department of Justice handles most of the legal problems affecting Indian rights. Other agencies such as the U.S. Commission on Civil Rights and the Equal Employment Opportunity Commission have functions of consequence to Indians.

28/ Rafael Córdova Rivas. Statement made on 14 December 1981 at the Inaugural Meeting of the United Nations Seminar on Recourse Procedures and Other Forms of Protection Available to Victims of Racial Discrimination and Activities to be Undertaken at the National and Regional Level.
The Interior Department is the agency which has the greatest impact on Indian affairs. Interior is explicitly charged with the task of protecting Indian lands and resources and has specific statutory responsibility for ensuring the continued well-being of Indian tribes and people. The Bureau of Indian Affairs (BIA) is the main agency within the Interior Department that deals with Indian affairs.

The dual role of the BIA as an advocate of Indian interests and principle agent of the trustee (the United States) has given rise to a large measure of Indian mistrust. The BIA has been accused of paternalism and mismanagement in the past. The present BIA administration has acknowledged past problems and has taken steps to resolve them, recognizing that it has often implemented negative policies too vigorously, while positive policies have been carried out less vigorously. The BIA is now improving its management structure and system, and it is moving to facilitate greater co-ordination and co-operation with the other agencies on programme and policy matters.

Role of the Justice Department

The Department of Justice has the responsibility to litigate Indian interests in the courts. Two sections of the Justice Department fulfil these functions: the Office of Indian Rights of the Civil Rights Division and the Indian Resources Section of the Lands Division.

The Office of Indian Rights was established in 1974 to enforce all federal civil rights provisions as they apply to Native Americans as well as the provisions of the Indian Civil Rights Act of 1968. This office was created as a result of a study of the Civil Rights Division which found that racial discrimination was a significant contributing factor to the social and economic problems faced by American Indians. Since its establishment, the Office of Indian Rights has engaged in litigation involving voting rights cases, discrimination cases concerning access to state and local services, and improvement of conditions in detention facilities with predominantly Indian inmates.

The Indian Resources Section of the Lands Division is responsible for Indian-related, non-civil rights litigation such as lands, natural resources, tribal government and treaty rights issues. 29/

29. Venezuela’s principal organ for indigenous affairs is a dependency of the Ministry of Education. Between 1977 and 1980, it had existed within the Ministry of Justice as the Ministerial Office for Indigenous and Frontier Affairs (Oficina Ministerial de Asuntos Fronteros e Indígenas - OMAFI). In 1980, as a result of an administrative re-organization it was renamed Indigenous Affairs Authority (Dirección de Asuntos Indígenas - DAI) and placed under the Ministry of Education. 30/ With an annual budget of Bs. 18 million and 240 employees, 31/ the DAI is involved not only in education, but in such diverse programmes as the provision of medical equipment, agricultural and stock-raising endeavours, and the construction of roads, sidewalks and streets. 32/ An official report has declared that the Ministry of Education will continue to assume all responsibility with regard to the integral development of the indigenous populations until such time as other administrative arrangements may be developed. 33/


31/ Ibid.

32/ Ibid., p. 122.

33/ Ibid.
30. In countries where responsibility for indigenous affairs is divided among several departments or ministries, some Governments have found it necessary or convenient to establish special bodies to co-ordinate those efforts. Though their announced purpose is co-ordination, some of these entities are more advisory in nature, others have authority to make policy decisions and even to carry out specific programmes. In some cases all of these functions have been combined in a single co-ordinating body.

31. In Costa Rica an autonomous body, the National Indigenous Affairs Commission (Comisión Nacional de Asuntos Indígenas - CONAI) co-ordinates official and private efforts on behalf of the indigenous population. It is composed of representatives from the following governmental offices and local organizations active in indigenous communities: The Office of the President of the Republic, the University of Costa Rica, the National University, the Ministries of Government, Culture, Health, Agriculture and Stockraising; and Public Security; the Mixed Institute of Social Assistance, the Institute of Land and Colonization, the National Service of Sewerage and Drinking Water, the National Housing and Urban Institute, the National Institute of Apprenticeship, and the National Service of Electricity; a representative from selected municipal councils; a delegate from each community development association; a member from each of the legally recognized Pro-Indigenous Associations.

32. The objectives of CONAI are established as follows in article 4 of Law 5251:

(a) To promote the social, economic and cultural improvement of the indigenous population with a view to raising its living standards and integrating the aboriginal communities into the development process;

(b) To serve as a means of co-ordination between the different public institutions responsible for works projects and services for the benefit of the indigenous communities;

(c) To promote scientific research into the life style of the indigenous groups, with the aim of achieving a thorough knowledge of them, and thus to lay the groundwork for conducting programmes designed for their welfare, with a view to an objective appraisal of our native cultural traditions;

(d) To promote publicity on indigenous affairs so as to create an awareness of them and thus to stimulate interest in the study of Indian culture, especially with reference to indigenous languages, the use and study of which will be actively promoted;


35/ Taken from the text of art. 2 as amended by Law No. 5671, 14 April 1975.
(e) To ensure that the rights of the indigenous minorities are respected by stimulating State action to guarantee the Indian individual and collective ownership of his land, the timely use of credit, appropriate marketing of what he produces, and efficient technical assistance;

(f) To ensure the fulfilment of any current or future legal provisions for the protection of the cultural heritage of the indigenous population by co-operating with the institutions entrusted with these matters;

(g) To direct, stimulate and co-ordinate the co-operation of private enterprise in projects for the social, economic and cultural improvement of the aboriginal population;

(h) Through the development of training, to improve the qualifications of those practising professions or occupying posts in the areas inhabited by indigenous people;

(i) To organize agrarian co-operatives in the different indigenous communities, providing them with agricultural instruction, technical aid and appropriate financing;

(j) To establish health centres with well-trained personnel, and to try to train individuals in the different areas inhabited by indigenous peoples to carry out the relevant functions in the future;

(k) To establish local administrative boards to solve in principle the many problems of the indigenous communities; and

(l) To serve as an official liaison organ with the Inter-American Indian Institute (Instituto Indigenista Interamericano) and the other international agencies working in this field. 36/

33. Planning of indigenous policy and taking of decisions in that area are the exclusive province of CONAI and are carried out through its General Assembly, Directive Board, Special Committees and the local committees of indigenous communities. 37/

34. The Government of Finland has established a Commission on Lapp Affairs (Saamelaisasiain neuvottelukunta) for the co-ordination of measures aimed at the safeguard of the interests of the Lapps. This Commission consists of the Governor of the Lapp county, as chairman, and six members appointed by the Council of State. Three members represent the Council of State, the Ministry of Education, and the Ministry of Agriculture, respectively, and the three others represent the various Lapp organizations. The Government has described its functions as follows:

"In particular, the Commission is to prepare and to make proposals to the Council of State concerning measures to be taken in order to promote the culture of the Lapps and to improve their condition of life. Furthermore,

36/ Law No. 5251. Text supplied by the Government. For more specific information on the functions of CONAI, see also Ley Indígena (Indigenous Law) No. 6172, 29 November 1977 and the Reglamento de la Ley Indígena (Regulations governing Indigenous Law) No. 6172, Decree No. 8487-C, 26 April 1978.

37/ Information supplied by the Government.
the Commission shall follow the development of the economic conditions of the Lapps and the satisfaction of their cultural needs and make proposals concerning these matters to the appropriate Ministries. Finally, the Commission is to give opinions to the Council of State, to the Ministries and to the county Government of the Lapp County on matters concerning the Lapps."

35. The Commission on Lapp Affairs, which was formerly under the Ministry of Justice, has functioned under the Council of State since December 1970.

36. Mexico's Co-ordinating Board of the National Plan for Depressed Zones and Marginal Groups (Coordinación General del Plan Nacional de Zonas Deprimidas y Grupos Marginados - COPLAMAR) is the principal co-ordinating body for indigenous policy. Created in 1977 as a dependency of the Office of the President of the Republic, it carries out specific studies and advises the Executive in matters concerning policy and co-ordination. This administrative reorganization placed the following bodies under COPLAMAR's authority: Instituto Nacional Indigenista (INI), Comisión Nacional de Zonas Aridas (CONAZA), Patrimonio Indígena del Valle del Mezquital, La Forestal FCL, Fideicomiso del Fondo Candelillero, Fideicomiso para obras sociales a campeños caneros de escasos recursos (FIOCSERA), Productos Forestales de la Tarahumara (PROFOTARAH), Fidepal, Ltd. (non-profit making), Patronato del Maguey (now Promotora del Maguey y del Nopal), Fondo Nacional para el Fomento de las Artesanías (FONART) and Compañía Forestal la Lacandona (COFOLASA). All government agencies that have any impact on indigenous populations or marginal groups are obliged to co-ordinate their activities. For this purpose a System of Programmatic Co-operation for Depressed Zones and Marginal Groups was established based on the following three elements:

1. Conclusion of programme agreements between the bodies belonging to the Co-ordinating Board and the rest of the departments and agencies of the federal government administration.

2. Territorial integration of projects through planning, execution and evaluation carried out in each zone by the different government institutions of the regional units of COPLAMAR working together, with the participation of the community, and with the supervision of the Committee to Promote Socioeconomic Development (Comité Promotores del Desarrollo Socioeconómico - COPROSE) under the chairmanship of the State Governors.

3. Announcement of non-transferable budgetary action designed to fulfil the agreed programmes."

37. The National Indigenous Affairs Institute which is included within the broad umbrella of COPLAMAR's authority, also has important co-ordinating functions and is more specifically concerned with the indigenous population. Established by law in 1949, its functions and administrative structure are defined as follows:

Article 1. The National Indigenous Affairs Institute, with its own legal personality, is hereby established as a division of the Inter American Indian Institute, with headquarters in the capital of the Republic.


Article 2. The National Institute shall perform the following functions:

I. Investigation of problems related to indigenous groups in the country;

II. Study of improvements needed by those indigenous groups;

III. Representations with the Federal Executive with a view to the approval and implementation of these measures;

IV. Active support in carrying out the measures once approved, and co-ordination and direction, as appropriate, of action by competent government agencies;

V. Action as a consultative body for official and private institutions on matters which in accordance with the present Law are within its competence;

VI. Publication, as and when it is deemed appropriate and through the proper media, of the results of its investigations, studies and promotion efforts; and

VII. Execution of such works projects for the improvement of the indigenous communities as are entrusted to it by the Executive, in co-ordination with the Directorate-General of Indigenous Affairs.

Article 5. The Institute shall consist of the Director and a Board, and such technical and administrative staff as its activities require.

Article 6. The Director of the Institute shall be appointed by the President of the Republic from among those persons who have distinguished themselves in any of the technical activities related to the Institute's functions; he will be its legal representative and the executing agent for the agreements of the Board.

Article 7. The Board shall be presided over by the Director and shall be composed of representatives of the Departments of Public Education (Directorate of Indigenous Affairs), Health, the Interior, Agriculture, Water Resources, Communications and Public Works and Agriculture, and representatives appointed by the Common Lands Credit Bank (Banco de Crédito Ejidal), the National Institute of Anthropology and History, the National Autonomous University of Mexico and the National Polytechnic Institute, one representative appointed by the scientific associations concerned mainly with anthropological studies, and representatives of the largest indigenous groups who shall be appointed and participate in the manner and under the terms indicated by the rules laid down by the present Law.

Article 12. The government secretariats and departments shall give the National Indigenous Affairs Institute the co-operation necessary for achieving the plan of work approved by the Board.
38. Many of IIN's activities are implemented through regional "Indigenous Co-ordinating Centres" which have their own specialized personnel, including teachers and bilingual workers. According to the Government's 1976 Report to the ILO, these regional centres provided contact with two thirds of the Indian population 40/.

39. In Panama the Local Government and Indigenous Policy Section of the Ministry of Government and Justice co-ordinates programmes concerning the indigenous populations of the country 41/.

40. In Paraguay the National Indigenous Affairs Institute (INDI) has been created for the purpose of co-ordinating all governmental and private endeavours related to the indigenous population. The principal organ of INDI is its National Council, which is presided over by the Minister of National Defence, and includes the Ministers of the Interior, Public Health, Justice and Labour, Education and Religion, as well as the Director of the Rural Welfare Institute and a representative of the Armed Forces. 42/ The scope of INDI's authority is described as follows in the respective implementing legislation:

THE PRESIDENT OF THE REPUBLIC OF PARAGUAY

DECREES

Article 1. The National Indigenous Affairs Institute (INDI) is empowered to control, direct and co-ordinate all projects and efforts promoted by official and religious bodies, and private individuals and entities, national or foreign, for the benefit of indigenous communities; to review the projects and operations in progress, with authority not to allow them to continue to introduce such corrective measures as it deems necessary, or to allow them to continue.

Article 2. All projects or operations to be carried out in the future shall without exception require the relevant authorization of the Institute. 43/

41. One author has pointed to INDI as an example of a "basic pattern of administration ... where central bodies supervise and co-ordinate activities relating to the indigenous populations but undertake few operational activities themselves." 44/

41/ Swepston, loc. cit., p. 727.
44/ Swepston, loc. cit., p. 726.
42. During his visit to Peru in 1974, the Special Rapporteur established contact with an autonomous organ called the National System of Support for Social Mobilization (Sistema Nacional de Apoyo a la Movilización Social – SINAMOS). SINAMOS is a co-ordinating, planning and executive body which assumed the functions of a number of organs such as the National Community Development Office (Oficina Nacional de Desarrollo de la Comunidad – ONDC), the Peasant Communities Authority (Dirección de Comunidades Campesinas) and the Rural Organizations Authority (Dirección de Organizaciones Rurales) of the Ministry of Agriculture. It undertakes development activities and is empowered to approve any educational or assistance programmes undertaken by private organizations or individuals with regard to indigenous populations. According to article 6 of Decree-Law 19352, its objectives are the following:

"(a) Encouragement of the people's creative abilities so that they may expend their energy and potential on action for their own development, with government support.

(b) Promotion of organization of the population into dynamic functional and territorial units of a communal, co-operative or other similar nature.

(c) Encouragement and stimulation of a dialogue between the Government and the population of the country, designed to guide the conscious participation of the people in making basic national decisions, in the light of the practical situation of the country and the people's interests and common goals.

(d) Incentives for activities involving popular contribution to better rural and urban development.

(e) Encouragement of systematic linkage between government activities and services, co-ordinated among themselves, and those of the organized population.

(f) Co-ordination of support for social mobilization with reference to participation by the people in public and private sectoral action, at national and regional, zone-wide and local levels, subject to the organizational rules of the State and national planning; and

(g) Assistance in making the public administration an instrument of service to the national community, fostering a change of attitude and behaviour on the part of the public services in view of the new role encumbent upon them and calling for a mystique, training and identification with the interests and aspirations of the people."

4. Official Advisory Bodies

43. Some of the governmental systems covered in the present study have also established special advisory bodies as part of the administrative process. In most cases they are provided for by statute and give official recognition to certain non-governmental organizations whose representatives, along with independent experts and representatives of indigenous populations, are sought for their advice and counsel on matters concerning indigenous affairs. These bodies exist at both the national and local level and serve either in a general advisory capacity or in regard to specific areas such as housing employment, education and discrimination. Though some advisory bodies are entirely independent, others include representatives of the appropriate governmental agencies. Examples of this type of administrative arrangement are given in the following paragraphs.
44. An official publication describes development and structure of the National Aboriginal Conference, which acts as the principal advisory body on aboriginal affairs to the Government of Australia:

"... In November 1973, an election was held by Aboriginals throughout Australia to establish the first National Aboriginal Consultative Committee, a group of forty-one Aboriginals and Torres Strait Islanders elected to advise the Government on Aboriginal needs. At the request of the Committee, the second election, which was scheduled for November 1975, was deferred for nine months. Subsequently, the Government established an independent inquiry into the role of the Committee. As a result of the findings of this Committee of Inquiry, a National Aboriginal Conference (NAC) has been established composed of thirty-five members who are elected for a period of three years. Members meet annually at the national level and at least four times each year in their State or Territory as State or Territory Branches of the NAC.

The executive which meets twice a year is comprised of 10 delegates; half are elected by the members and half are nominated by the Minister. The role of the NAC is to provide a forum in which Aboriginal views can be expressed at State and national level and, in particular, to express Aboriginal views on the long term goals and objectives which the Government should pursue, the programs it should adopt in Aboriginal affairs, and on the need for new programs in Aboriginal affairs. The NAC also participates, through its entitlement to choose five of the ten members, in the work of a new body, the Council for Aboriginal Development. This Council is the body from which the Government seeks formal advice." 45/

45. In Canada according to a 1976 report by the Department of Indian Affairs and Northern Development, a Joint National Indian Brotherhood-Cabinet Committee had been established at the national level as an advisory body on major policy issues of Government-Indian relations. The agenda of the Joint Committee consists of matters proposed by either side and is the subject of detailed consideration by Joint Working Groups. The internal organization of the Joint Committee is described as follows: "To expedite and facilitate the whole process, the Joint Committee has established (a) a Joint Sub-Committee of three Ministers and three Indian leaders; and (b) a Canadian Rights Commission. In addition, there are joint working groups on specific subjects (e.g. housing, economic development) whose work so far has not required the consideration of the Joint Committee. The objective of the Joint Committee process is to enable the Government and Indian leaders to work co-operatively toward the betterment of the Indian people through joint deliberation at the policy level."

46. In 1973, the Government of Finland established an official advisory body, the Lapp Delegation, to watch over the rights of the Lapp population and to promote their economic, social and cultural progress. The functions and organization of the Lapp Delegation are described as follows by an official report:

... it can take initiatives, make proposals and give its opinion to the appropriate authorities on matters concerning:

(a) The protection of environment and the establishment of conservation areas in the Lappish region;

(b) The embarking upon mining enterprises, the establishment of tourist and camping centres, the construction of hydro-electric power plants and regulating reservoirs and the operation of logging and ploughing and draining of swamps and other such measures in the Lappish region;

(c) The use and care of waters, the establishment of areas for fishing as a sport and the arrangement of fishing and hunting conditions in the Lappish region;

(d) The reindeer economy;

(e) The preliminary, fundamental, secondary and adult education of the Lapps;

and in other matters whenever necessary for the achievement of the purposes of this Decree.

The Lapp Delegation consists of twenty members and its term of office is four years. The Council of State appoints as members of the Delegation those twenty persons who in the election arranged among the Lapp populations have received the most votes, however, with such a modification that there shall be at least two members from each one of the four rural communes of the Lappish region. The Lapp Delegation elects from among its members a President and two Vice-Presidents. The Delegation may also appoint a Secretary and, with the permission of the Office of the Council of State, other personnel.

The Lapp Delegation assembles in the Lappish region. The Delegation has a quorum when the President or one of the Vice-Presidents and at least ten members are present. The decisions are made by a majority vote. In the case of an even vote, the President's vote is decisive.

47. In New Zealand there are several types of advisory bodies. The New Zealand Maori Council is an independent statutory body, recognized by the Government as a consultative and advisory body representing Maori opinion. The members
of the Council are representatives of the Maori District Councils, who are named by members of regional tribal executives elected by local committees. According to the Government's report, the Council functions as follows:

"Since the formation of the New Zealand Maori Council, all proposed legislation is submitted to the Council before being debated in Parliament. In addition, the Council has the right, which it exercises from time to time, to appear before the Maori Affairs Select Committee of Parliament (see under VI below) to make its views known on proposed legislation. The Council also has fairly frequent meetings with the Minister of Maori Affairs to discuss matters of policy, including the revision of current laws. Considerable weight is attached to the views of the Council by the Government."

48. Two specialized bodies are the National Advisory Committee on Maori Education and the Maori and Polynesian Health Committee, which advise the Ministry of Education and Ministry of Health, respectively. Appointed by the Minister of Education, the members of the Advisory Committee on Maori Education include the permanent heads of the Departments of Education and Maori and Island Affairs in addition to 14 members nominated by various non-governmental organizations. More than half the members are Maoris. This Committee meets twice a year. The Maori and Polynesian Health Committee includes representatives from the Health Department and the Maori and Island Affairs Department, Maori medical men—a Professor of Social Science, a representative of the University medical schools and of the Maori Women's Welfare League. According to the Government's report, six of the members are Maori and four of them are doctors.

49. The Government of Norway has set up the Norwegian Lapp Council as an advisory body on economic, social and cultural issues concerning the Lapps. The Council is made up of eight members—all Lapps—and it is funded through the budget of the Ministry of Agriculture.

5. Autonomous Entities

50. Preliminary Observations. Strictly speaking, autonomous entities are so defined by statute and are endowed not only with the authority to plan and carry out their own functions, but also with an independent source of income. This type of institution is designed to encourage initiative, particularly in the area of development, while minimizing the deleterious effects associated with bureaucracy and politics. Successful in some cases, this experiment at decentralization has been less effective in others due to the inefficient allocation of resources and lack of co-ordination with national policies. Though a number of the administrative arrangements concerned with indigenous policy function with some autonomy, the information available to the Special Rapporteur is insufficient in most cases to allow a particular institution to be labelled as autonomous in the strict sense. One example of the type of body officially described as autonomous is Venezuela's State Counsel's Office for Indigenous Agriculture (Procuraduría Agraria) which is discussed below.
51. In 1971, as a part of its over-all agrarian reform policy, the Government of Venezuela established the Procuraduría Agraria - an autonomous body which represents and advises indigenous communities and farmers in regard to matters related to their rights under the agrarian laws. 46/ In 1976 it was attached to the Presidency of the Republic. 47/ Its functions are set forth as follows in an official report: 48/

"1. To ensure the fulfilment of the provisions contained in the Law on Agrarian Reform for the protection of the Indian farmers as of right.

2. To ensure the fulfilment of the norms and procedures established by the Organic Law on Agrarian Courts and Procedures, in order to serve effectively the acquired rights of these citizens.

3. To intervene at the request of the country people and the indigenous communities in judicial and non-judicial proceedings when they seek it.

4. To seek the re-scheduling of trials for which no notification has been given, in accordance with the provisions of articles 17 and 29 of the Organic Law on Agrarian Courts and Procedures.

5. To act as representatives, without need for power of attorney or surety, in all trials where the individuals mentioned in article 25 of the Organic Law on Agrarian Courts and Procedures are defendants.

6. To take appropriate action when informed of violations or transgressions injurious to the rights of the individuals referred to in article 25 of the Organic Law on Agrarian Courts and Procedures.

52. In 1979, a Baniba Indian was appointed to the post of Procurador Agrario, and in the following year two Procuradurías Indígenas were established in the Venezuelan State of Zulia and in the Amazon Federal Territory in which areas most of the indigenous population is located. A third Procuraduría Indígena was to be created for the Delta Amacuro Federal Territory and the State of Bolivar in 1981. 49/


47/ Ibid., p. 2.

48/ Ibid., pp. 3-4.

49/ Ibid., p. 4.
6. Parliamentary Committees

53. Though technically not an administrative arrangement, specialized parliamentary or legislative committees or subcommittees may have an important role in the formulation of policy toward the indigenous populations. Examples are found in the legislative assemblies of the United States and India.

In the United States the impact of this type of committee is underlined in the following excerpt from an official report which describes the policy-making function of Congress:

"Federal courts have consistently ruled that Congress has the plenary authority to fix the terms of the United States Government's trust relationship with the Indians. Indians assert, given the historical precedent, that the breadth of this Congressional plenary power to legislate in their regard carries with it the potential danger that such power will be misused to deprive Indians of their rights, since Indians are not as strong in numbers as the non-Indian voting public in the states.

It is not the existence of the power that should be the focus of the discussion but how and when it is exercised. More than one hundred measures expressly affecting American Indian and other Native peoples have been enacted since 1975. The 95th Congress alone created 79 new laws pertaining to Native Americans. While some of these laws affect only one or a few tribes or individual Indians, many Congressional acts during the past four years represent policy statements of major significance affecting Native governments and people in the United States. Two of these acts - one establishing the American Indian Policy Review Commission and the other setting forth an Indian self-determination operating policy - were passed in the first days of 1975. Subsequently, the Congress passed important legislation addressing basic human rights and needs of Indian people in the areas of health, education, child welfare, religious freedom, economic development, land and natural resources and tribal recognition and restoration. Legislation enacted during this period follows a consistent policy line repudiating terminationist and assimilationist policies of the 1930s, removing barriers to Indian self-determination and local level control and enhancing the basic quality of life of Native American peoples.

Balanced against this progress, the House Interior Committee, in January of 1979, voted to abolish its Indian Affairs Subcommittee, which can be credited with drafting and reporting legislation affecting Indian interests in recent Congresses. As a result, Indian legislation will now be one of the many contending areas of legislative responsibility of the full Interior Committee, increasing the likelihood that fewer Members of Congress will be well versed in Indian matters. The Select Committee on Indian Affairs of the Senate, established in the 95th Congress primarily to consider over 200 progressive legislative recommendations made by the American Indian Policy Review Commission, will continue to function in the 96th Congress. These recommendations, however, remain to be considered within this Committee, and the Committee's existence in the 97th Congress is uncertain. 50/

50/ Fulfilling our Promises: The United States and the Helsinki Final Act .... on cit., pp. 150-155.
54. During the period 1968-1973, the Government of India had special parliamentary committees to examine the implementation of constitutional safeguards for the welfare of the scheduled castes and tribes.

7. Countries where no Specialized Arrangements have been found to exist

55. A number of countries have no specialized administrative arrangements for the formulation of indigenous policy but the lack of such arrangements does not necessarily represent an absence of concern for indigenous populations. Some Governments feel, however, that the indigenous population is adequately heard and served by means of regular administrative structures available to them as members of social or economic sectors or as members of the population at large.

56. The Government of Bangladesh, for example, reports that "... no group of individuals are separately treated on the basis of religion, race, caste, sex or place of origin", but that for development purposes, some regions or groups have been identified as 'backward', and "special treatment is given to these groups or regions". Over-all policy in this respect is made and co-ordinated at Government level and implemented through the respective channels of the concerned Ministries under the over-all supervision and co-ordination of Government machinery at Sub-division District and Divisional level ...".

57. The Government of Bangladesh has further stated that:

"Though there is no special law for this population, the Government policy undertaken by the Ministry of Local Government has been conscious about the necessity of laying extra attention for the improvement of social, economic and cultural development of the tribal and Indigenous Population in the country ... According to the first five-year plan, the Government has laid greater stress and importance in extensive development of the conditions of life, work and education of this population. Primary education has been introduced and wherever possible adult education centres on voluntary basis are being established".

58. According to one observer, Argentina has no co-ordinated national programme for indigenous affairs; however, there is an entity known as the National Service for Indigenous Affairs which functions under the Ministry for Social Welfare and acts upon requests by provincial governments for the funding of projects concerning the indigenous population. 51/

59. Neither Bolivia nor Ecuador have any special arrangements, though both have substantial indigenous populations. In the case of Bolivia, one author has written that the indigenous populations "are considered part of the general rural population and activities concerning them are essentially rural development projects carried out by the Ministry of Rural and Agricultural Affairs". 52/ The Government of Ecuador

51/ Swenston, loc.cit., p.727

52/ Ibid., p.729. Bolivia does, however, have a Bolivian Indigenous Affairs Institute and an office of the National Community Development Service, which deals primarily with socio-anthropological studies. Other governmental entities involved with indigenous affairs are the National Council for Agrarian Reform, the Bolivian Institute for Agricultural Technology and the National Colonization Institute. See "the report for National Bolivia", VIII Inter-American Indian Conference, ( Mérida, Yucatán, Mexico), OAS Document No. OEA/Ser.X/XXV.1.8, CII/document 7, 12 November 1980. Original: Spanish.
reported to the ILO in 1977 that "no programmes exist which are exclusively for systematic and co-ordinated action to safeguard the tribal populations", and an independent observer affirmed in 1980 that in Ecuador "there is no body specifically concerned with action in this field ...".

60. Likewise, the Government of Denmark has stated that "the special arrangements which the national authorities have introduced for Greenland apply to all Greenland rather than selected population groups".

61. According to the Government of El Salvador in its report to the VIII Inter-American Indian Conference (1980) a similar situation exists in that country: "It can be said that in the State of El Salvador there is no institution whose task is basically to look after an indigenous population grouping, attending to its needs and solving its particular problems. Rather, any action on behalf of the indigenous population is undertaken through the general social and economic development programmes implemented in the country ...".

62. There is no National Indian Institute in Honduras. The National Institute of Anthropology and History in Comayaguela works in Indian affairs. The Special Rapporteur has no further information with regard to this or any other specialized administrative arrangement in this connection in Honduras.

C. Staff of Governmental Entities

63. The efficacy of the administrative bodies established for the formulation, co-ordination and implementation of policy toward indigenous populations may well depend upon provisions for a capable staff. As a part of the study of administrative arrangements, the Special Rapporteur has attempted to gather information which would allow him to ascertain whether the existing arrangements do tend to guarantee a qualified professional or career staff, and whether governmental policies have promoted or encouraged the hiring of indigenous personnel. Of the few countries for which information is available on these questions most indicated an awareness of the need for qualified staff members and of the desirability of the participation of indigenous personnel.

64. As regards qualifications and requirements for appointment of staff to administrative bodies in Brazil, an official publication states that persons with proven knowledge of indigenous problems will be chosen. However, a private observer maintains that qualified personnel is not always at the disposal of the Government.


54/ Ibid.

55/ Government of Denmark information supplied on 21 May 1981, p.9, for the purposes of the present study.


57/ Ministry of the Interior, FUNAL, op.cit., p.38

58/ Alejandro Marroquin, Balance del Indigenismo, Inter-American Indian Institute, Ediciones Especiales, series no. 62, Mexico City, 1972, p.223.
The basic problem of FUNAI is that it holds practically no dialogue with anthropologists. It has sought to involve the few anthropologists with experience in dealing with the Indians in its work, but it has been unable to obtain their services, first of all, because the salaries offered are too low to tempt highly qualified anthropologists to leave their present posts and join FUNAI, secondly, because they are not in agreement with the approach adopted by FUNAI, and thirdly, because the experience of the Indian Protection Service (SPI) and FUNAI has shown that the officials in charge of indigenous affairs in Brazil do not take the anthropologists' opinions into consideration, but merely give them executive tasks to perform. In SPI, on the initiative of an outstanding anthropologist, many resolutions were taken unanimously; none of them were put into practice, with the exception of short courses for the staff. Today, with the highly centralized structure of FUNAI, an anthropologist would be a mere subordinate administrative officer, and would have to carry out a line of policy he can neither believe in nor justify.

Coelho dos Santos, commenting on the work of the Indigenous Posts, writes: "It cannot be said that the posts in Brazil have carried out or are carrying out today an efficient and rational indigenous policy, in the sense of putting applied anthropology systematically into practice .... In the final analysis, the reason is that the national society has regarded the Indians, individually or collectively as an obstacle to its expansion". Furthermore, seeking the sources of bureaucracy, Coelho points out that because of the poor pay, those appointed as heads of Posts are persons with no technical training, who see the job as a godsend in their desperate economic plight. Frequently the attitude of these officials is one of contempt for the Indians and abject servility towards the landowners and senior government officers; and when the latter commit abuses against the Indians, they do not dare to confront them for fear of losing their jobs, so that they really serve the exploiters of rather than defend the Indians.

An empirical approach to the work of the Posts is easy to find. A chief of Post has the bright idea of making the Indians sow more, since the amount sown strikes him as small. He does not know that the Indians whom he describes as "loafers" are wonderful hunters, and since by cultural tradition the land belongs to the women, the men really have no interest in sowing it. This is what happens when the official proceeding empirically is acting in good faith; but there are cases where officials act with cunning to exploit the Indian. For example, one chief of Post had a plantation adjacent to the land belonging to the Post; his partner was actually the Post agronomist. Together they decided to employ the indigenous workers on the plantation, ostensibly so that they would learn modern cultivation techniques. In fact, they continued sowing in the traditional manner, and all the profits went to the landowners. Examples of this nature are legion, so let us leave it at that".

65. As regards training relevant to the problem of indigenous populations, an official source 59/ states that FUNAI has trained experts in indigenous affairs on the basis of two months' theoretical study and three months' local training in Indian settlements and that so far four courses had been successfully completed by 176 persons.

59/ FUNAI em números, op.cit. p.2.
66. The Government of Burma has established an Academy for Development of National Groups which offers a four-year programme for the training of teenagers for service in their respective areas of ethnic origin. As of October, 1970, it had 425 students, representing 47 ethnic groups.

67. In regard to the staffing of administrative bodies concerned with indigenous affairs the Government of Australia reports that:

"All Commonwealth and State authorities are staffed by permanent public servants. The various public service boards normally require evidence of appropriate qualifications before the appointment, transfer or promotion of any public servant. Most Commonwealth and State authorities also make special provision for the employment of Aboriginal people in Aboriginal affairs areas. Special courses of training are provided for certain key categories of staff in the Northern Territory and some States". The Government has added that "In the expansion of the Office of Aboriginal Affairs into a Department, special attention is being given to arrangements for engaging a higher proportion of Aboriginal staff. (The main difficulty in this is that few Aboriginals have the academic qualifications necessary for entry into the Public Service at the administrative level)."

68. The Government of Canada has provided the following information:

"In the Northwest Territories, direct administration is through the Government of the Northwest Territories with increased authority vested in the elected Council of the Northwest Territories, which includes native representation. Similarly the administration of local matters in the Yukon Territory is under the Yukon Territorial government which is situated in the North and includes an elected Territorial Council. These northern Councils are rapidly assuming control of local administration.

In all of those administrations, there is an accelerating policy of employing native staff people, both in the field and in central administration offices. In the Federal Department of Indian Affairs and Northern Development in Ottawa, a number of sections are now headed by Indian staff officers and in the Native Citizens Programme Group of the Department of the Secretary of State, a number of positions are filled by Indian staff officers. The Public Service Commission has a special Native Employment programme, staffed by native peoples. There is also a policy of recruiting Indian students for summer employment in the administration".

69. The Government of Costa Rica has informed the Special Rapporteur that:

"The CONAI staff are of indigenous origin. They come under the country's labour laws and they have a background of general knowledge of the Indian situation in the country. Depending on the region, they tend to be bilingual in the vernacular language and Spanish, and the qualifications demanded of them depend on the level of the work to be done".

70. The Government of Finland notes that, although there are no special qualifications established by law, the candidate's background and experience is given special consideration as a matter of practice:
"No formal qualifications and requirements for the appointment to various official committees, commissions and working groups are provided for by law. However, it is self-evident that only such persons are appointed who have necessary knowledge and experience in the matter entrusted to the body in question. This is true also as regards official bodies dealing with Lapp affairs. Their membership varies from the Governor of the Lapp Country to a reindeer man. Their tenure depends on the purpose of the bodies which often have an accurately defined task. When the work has been completed, the body is suspended. The responsibility of their members is the same as that of any Government official. As regards unofficial bodies, they are autonomous and, consequently, they elect their members and elect their officers in accordance with their own statutes."

71. Inadequate and unqualified staffing has been blamed for the failure of India's development programmes among indigenous tribes. In this respect, the following factors have been stressed:

1. **Poor Staffing**

The government 'development' workers are non-tribals who regard placement in a tribal area as a punishment, are technically incompetent of dealing with the problems of hilly, low productivity areas, have little knowledge of local values and practices and share the Hindu prejudices against the culturally inferior adivasis .... Not surprisingly they tend to side with the non-tribal landlords, traders and money-lenders - the very people responsible in large measure for tribal underdevelopment.

2. **Paternalism**

Government programmes have almost totally failed to mobilize the people for their own development and in fact because of the kinds of 'developer' officers sent by State Governments have alienated the majority of the tribals. The very use of the term "uplift" demonstrates the Government's philosophy of 'development'. 'Development is something done to tribals by Hindus, not a process which the tribals are actively involved in and control'.

3. **Inflexibility and Insensitivity**

The programmes have been imported unselectively and without modification from the Plains areas and from other tribal areas. There has been little attempt to tailor them to suit the local ecological and cultural conditions. When such plans fail, as they invariably do, blame is placed on "tribal irrationality" or "traditional conservatism", when in fact it is the rationality of the outside planners that should be questioned. 60/

72. According to an official source 61/ approximately 62 per cent of the employees of the United States' Bureau of Indian Affairs in 1972 were of Indian ancestry.

60/ Steve Jones. Report prepared for the Anti-Slavery Society's Joint Committee for Indigenous Peoples and transmitted to the Special Rapporteur by that Society on 31 March 1977 for the purposes of the present study.

In contrast, however, a non-governmental publication states that the federal Government failed to comply with a legislative mandate to give employment preference to Indian people within the Bureau of Indian Affairs in the following terms: 62/

"... According to a report prepared for Congressman Olsen and printed in the Congressional Record December 1970, there are striking differences between the GS level or salary level of Indian and non-Indian employees within the Bureau. On the basis of a data sample collected by the Bureau in each of the eleven area offices on or about 1 June, 1970, the following statistics were compiled:

- 31.8 per cent of the Indians were GS 4's while only 6.33 per cent of the non-Indians fall into this category.

- 9.20 per cent of Indians are employed at the GS 9 level while there are 33.64 per cent non-Indians at this level.

- 14 per cent of the Indians who are wage board employees earn between $5,500 and $5,999 while only two per cent of the non-Indians are in the same earning bracket.

- Only 7.5 per cent of the Indian wage board employees have reached a salary level of more than $10,000 but more than 32 per cent of the non-Indians earn more than $10,000.

Since the issuance of Congressman Olsen's report, the question of Indian preference in employment within the Bureau of Indian Affairs has been adjudicated by the federal courts on at least two separate occasions. Supportive of the inference drawn in Olsen's report that non-Indians are often promoted to supervisory positions when Indians are available, in the case of Freeman vs. Morton (Civil Action No. 327-71) the plaintiff party sought declaratory relief against the defendant party, Secretary of the Interior and others with responsibility for administering the BIA. The plaintiffs request asked the court to make a determination of whether or not she was entitled to preference in respect to promotion, reassignments to vacant positions within the BIA and assignments to available training programmes by virtue of her status as an Indian employee of BIA. Despite a decision favouring the plaintiffs position in regard to promotions and reassignments to vacant positions within the Bureau, the issue was raised again in the case of Mancari vs. Morton. Suing on behalf of herself and all other Bureau of Indian Affairs employees who are less than 25 per cent Indian blood and therefore do not satisfy the Bureau's definition of a member of the Indian race, Mancari contended that the expanded policy of Indian preference established under the Freeman case was violative of their rights under the Civil Rights Acts of 1964 and 1972. It was the holding of the circuit court in this later case that the preference statutes must give way to the Civil Rights Acts. On appeal to the Supreme Court the Indian preference was upheld on both statutory and constitutional grounds .".

D. Funding of Governmental Entities

73. The success of any administrative entity depends to an important degree upon whether its funding is sufficient to allow it to carry out its functions in an effective manner. Within the limitations of the information furnished to him, the Special Rapporteur has examined the sources and control of funds at the disposal of administrative entities concerned with indigenous affairs, as well as the nature and quality of those resources. In the case of governmental or officially recognized bodies, the principal source of funds is the general budget, though in some cases a particular source of revenue has been earmarked for those purposes, and often provision has been made for the acceptance of private contributions. Programmes of the necessary complexity and required variety cannot, however, be sustained on the basis of private contributions alone, and rarely does a particular source of revenue provide for a stable programme or permit the steady growth of the programmes.

74. Most of the administrative arrangements examined in the course of this study were found to be organized under a particular government department or ministry and, as dependencies of those bodies, to be subject to the normal administrative and budgetary controls. Even where relatively recent figures are available, however, the quality of those funds is extremely difficult to judge. An increase in funding, for example, may be insufficient to cover the loss due to inflation: an apparent decrease in the amount made available to programmes affecting indigenous populations may be due to the completion of a seeding project included in the preceding budget. On the other hand, a steady increase in funding over a period of years would most likely reflect that Government's continuing or sustained interest in its indigenous populations, but the over-all amount says nothing about how effectively the funds are being utilized or whether those funds are being expended in the real interests of the indigenous population.

75. In some cases, non-governmental sources have complained of insufficient funding for projects they consider important or have criticized the employment of these funds. However, the Special Rapporteur has been able only to take note of such cases in view of the paucity of data at his disposal.

76. In the paragraphs that follow, the Special Rapporteur presents the information relevant to this portion of the study.

77. In several countries the funds assigned to the governmental entities dealing with indigenous affairs have never been sufficient, if account is taken of the magnitude of the work to be done.

78. Without wishing to imply in any way that this type of problem is limited to the examples given or to the countries mentioned below, the examples serve as useful indicators of the difficulties which exist.

79. In some cases the effective reduction in the Budget due to inflation and other factors have never been made up. In other cases, the adjustments that have been made have been utterly inadequate. The following paragraphs written by an author discussing these aspects of indigenous affairs in Peru are illustrative of this type of difficulty.

80. The writer says that the budget of the Peruvian Indigenous Affairs Institute is 10 million soles, which "is ostensibly the same as in previous years, but with the currency devaluation and the rise in the cost of living, the 10 million soles today are barely equivalent to 40 per cent of what they used to be worth." 63/

63/ A.D. Marroquín, op. cit.
81. In other cases, the global amount of budgetary allocations and other funds available to the entities dealing with indigenous affairs have not been increased in time in due proportion and may have even been further reduced or limited, thus reducing even further the possibility of meeting the cost of salaries and the minimal number of essential projects.

82. In this respect, what an author has written regarding the budget of the National Indian Institute of Guatemala seems to illustrate this type of situation. He reproduces the following chart, which is indicative of the Institute's budgetary problems: 64/

<table>
<thead>
<tr>
<th>Year</th>
<th>Total amount</th>
<th>Salaries and wages</th>
<th>Percentage of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965</td>
<td>91,090.00</td>
<td>32,160.00</td>
<td>35.30</td>
</tr>
<tr>
<td>1966</td>
<td>86,410.00</td>
<td>30,480.00</td>
<td>34.09</td>
</tr>
<tr>
<td>1967</td>
<td>83,128.00</td>
<td>34,480.00</td>
<td>36.66</td>
</tr>
<tr>
<td>1968</td>
<td>55,480.00</td>
<td>30,480.00</td>
<td>54.93</td>
</tr>
<tr>
<td>1969</td>
<td>55,128.00</td>
<td>32,290.00</td>
<td>55.71</td>
</tr>
<tr>
<td>1970</td>
<td>56,495.00</td>
<td>32,400.00</td>
<td>57.35</td>
</tr>
</tbody>
</table>

83. In this regard, the same writer has discerned the following trends: 65/

"The finances of the Institute have not only been very scanty, but also subject to constant ups and downs. In the early budgets, posts were eliminated, others were created and the salaries and wages of the entire staff were reduced; in the more recent budgets, an over-all spending limit is set, and then reduced by more than 20 per cent.

"These data are quite revealing; for an indigenous population of at least 2 million persons, the State assigns the ridiculously low sum of about $60,000. In addition, between 1965 and the present year, the budget has been reduced by 38 per cent. Currently, all the State does is keep up staff salaries and leave a mere 25,000 quetzales for office costs and so-called "practical tasks". Little, very little, can be done with such limited funds."

84. This writer adds on the same subject: 66/

"The NII budget is incredibly limited. But what is more serious is that NII does not have the security of knowing that the funds assigned to it at the beginning of a fiscal year will be maintained over the rest of the year. This situation calls for immediate change.

"If NII does not have sufficient funds to carry on a modicum of activities, it is inevitable that mere routine work and, along with it a bureaucratic attitude will emerge; nevertheless, it is gratifying to note that despite so many adverse factors the staff, who have not received a single salary increase for many years, make an effort to carry out a few useful activities, either research or social work."

64/ Ibid., p. 134.
65/ Ibid.
85. In other countries, the bulk of the funds destined to financing the operation of the activities of the entities dealing with indigenous affairs comes from indigenous lands and other property, as administered for those purposes— in some cases— by the very same entity. The case of Brazil's FUNAI is considered to be illustrative of this type of arrangement.

86. In addition to the typical sources of income, such as government allocations, grants and donations, Brazil's FUNAI has a unique source known as the "renda indígena" which is explained and commented upon by an outside observer as follows: 67/

"... Article 42 places the administration of the Indigenous Patrimony in the hands of FUNAI, and article 43 gives FUNAI control over the application of the "renda indígena", the product of the economic exploitation of the indigenous patrimony referred to in article 24 above. Article 43, paragraph 1, reads:

'the "renda indígena" will preferably be reapplied in lucrative activities or in programmes of assistance to the Indian'.

"Into the obscure pot of the "renda indígena" go also the proceeds of the sale of Indian artefacts and handicrafts, sold by FUNAI through their network of shops in the Brazilian capitals and on the larger airports.

"Thus the product of the wealth of their own lands and labour is effectively removed from the control of the Indians, and there is no mechanism established in the law to put into practice the provisions of the "exclusive usufruct" and "full exercise of direct possession" referred to in articles 22 and 18 above. The "lucrative-activities" of article 43 may be defined freely by FUNAI.

"Furthermore, article 45 gives the Minister of the Interior the rights to the subsoil in indigenous territories, including the powers to allow third parties to research in the areas and exploit the wealth therein. Provisions in this article for compensation to the Indians is left vague, but it is stipulated that such compensation will go into the "renda indígena".

"the participation in the result of the exploitation, the compensation and the product resulting from the occupation of the land will revert to the benefit of the Indians and will form part of the renda indígena."

(emphasis mine).

"The internal contradictions of FUNAI on the structural level reflect the basic ambiguities in official government indigenous policy as revealed by the Indian Statute. In the first place, FUNAI has generated an enormous bureaucracy which is based in Brasilia and absorbs 80 per cent of its budget, leaving only 20 per cent for its 11 regional delegacies and es.175 local Indigenous Posts, the administration of its parks and reserves and work which would be of real importance to the Indian, such as in the field of preventive medicine— principally vaccination against introduced infectious diseases— relevant education— according to the particular level of acculturation of the group, socio-cultural rehabilitation in the case of groups which have been dispersed and decharacterized by "white" encroachment, and of course its primary responsibility of preventing the invasion of Indian Lands through the demarcation and the subsequent protection of those territories.

"In the second place, this bureaucracy includes organs or entities which act in ways antagonistic to the Indians' interests and to the over-all objectives of FUNAI which are supposed to protect and to promote those interests. Some, like the DGPI (Departamento General do Patrimônio Indigena) and PRODEC (Programa de Raciocínio de Desenvolvimento de Comunidades) are funded by FUNAI's budget, while others, such as ASPLAN (Assessoria de l'Departamento de l'UNAI) and COAMA (Coordenação de Amazónia) referred to by Padre Lazi as the Trojan Horse sent into FUNAI, operate with funds from PIN. All of these bodies are concerned exclusively with economic development in Indian territories, in which the participation of the Indian is restricted to the utilization of his labour in his own land, and which are based on national economic development criteria which as we have seen are antagonistic to the well-being of the Indian and indeed to his very survival."

87. Another observer provides further details with regard to FUNAI's income and the use to which some of it is put:

"The Brazilian Government considers that the Indians are not yet capable of managing the lands they live on. In the meantime, this function is carried out by FUNAI, which runs stock-raising and farming undertakings in these areas, with the Indians as labourers. The income produced from such activities and from other uses of these lands is administered by the Programme for Financing Community Development (PRODEC), which reinvests it in development projects in these areas.

"PRODEC also administers income resulting from the use of these lands by non-Indians, which indicates that the right of exclusive possession by the indigenous populations may be limited. Lands within the formal limits of reserved areas are under lease to non-Indians for stock-raising, although the Indian Statute states that 'native land cannot be the object of leasing or renting or any juridical act or negotiation that restricts the full exercise of direct possession by the native community or the forest-dwellers'. However, the Statute does allow such leases as are already in operation to continue to run 'for a reasonable time' at FUNAI's discretion. In its 1976 report, the Government stated that all such cases were under review.

"Lands reserved for Indians may also be leased by non-Indians for mining and extractive processes, though the Government has reported that only prospecting has been authorized so far and no extractive permits have yet been granted. Prospecting and mining may be licensed, but only if the cultural level attained by the Indians in the area concerned makes it permissible." 68/

88. In other countries the funds available come from a variety of sources. For example, in Costa Rica the Government reports that CONAI's funds are subject to the control of the Controller-General, the judicial system and the Law on Financial Administration. The sources of those funds are described in article 8 of Law No. 525:

"The patrimony of the National Commission on Indigenous Affairs shall consist of:

(a) The subsidy which was regularly given to the former Board for the Protection of the Aboriginal Races of Costa Rica under the Law of the Regular Budget of the Republic;

(b) Special contributions granted by the State and autonomous and semi-autonomous institutions of the Republic;"
(c) The assets of the former Board for the Protection of the Aboriginal Races of Costa Rica;

(d) Donations by individuals, foreign States, international agencies and foundations, and any other bodies;

(e) Indigenous names, symbols and designs;

(f) Proceeds from the tax on the rights granted for the commercial use of the indigenous names, symbols and designs.

89. The funds for Mexico's National Indigenous Affairs Institute come primarily from budgetary allocations of the central Government, with some income from productive or commercial activities engaged in by the INI and resources provided by international organs. During the period 1962-1970, INI's share of the budget averaged approximately 2 million dollars per year with little change from one year to the next. 69/ According to one estimate, if the total amount of 26,275,000 pesos or of $2,102,000 had been spent for the benefit of the Indian population in 1966, the expenditure per Indian would have been approximately 13.76 pesos or $1.10. 70/ In 1970, some 51 per cent of the Institute's income was utilized for salaries. 71/ The table and graph below, however, show a considerable and steady increase of budget for the period 1972-1980. 72/

Total budgetary resources spent during the period 1972-1980.

<table>
<thead>
<tr>
<th>Year</th>
<th>Budget (in millions of pesos)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1972</td>
<td>85.7</td>
</tr>
<tr>
<td>1973</td>
<td>147.7</td>
</tr>
<tr>
<td>1974</td>
<td>198.2</td>
</tr>
<tr>
<td>1975</td>
<td>367.6</td>
</tr>
<tr>
<td>1976</td>
<td>466</td>
</tr>
<tr>
<td>1977</td>
<td>755.3</td>
</tr>
<tr>
<td>1978</td>
<td>1,265.0</td>
</tr>
<tr>
<td>1979</td>
<td>1,902.6</td>
</tr>
<tr>
<td>1980</td>
<td>2,046.4</td>
</tr>
</tbody>
</table>

Source: Programming and Budget Unit.

* Authorized in millions of pesos.

Graph showing the increase in NII budgetary resources 73/

69/ Alejandro Marroquín, op.cit., pp. 103-105.
70/ Ibid.
71/ Ibid.
72/ National Report for Mexico, VIII Inter-American Indian Conference, op.cit., p. 51.
73/ Ibid., p. 53.
90. The Commonwealth Government of Australia has adopted a novel system for the sustained funding of State projects in aboriginal affairs. Its Aboriginal Advancement Trust Account, as well as normal sources of funds, are described as follows:

"Shortly after the referendum in 1967 the Commonwealth Government established an Aboriginal Advancement Trust Account, comprising initially $10 million. Funds are appropriated to the trust Account annually through the national Budget. Each year a States Grants (Aboriginal Advancement) Act provides for the disbursal of funds from the Trust Account to the various States in support of their Aboriginal affairs activities.

"In addition, the Commonwealth has developed its own programmes in various fields, funding these either through the Aboriginal Advancement Trust Account or through the votes of the appropriate Commonwealth Departments. This financial year the budget appropriated some $22.5 million to the Aboriginal Advancement Trust Account, of which $14.5 million was disbursed to the States by the States Grants (Aboriginal Advancement) Act, 1972. On 10 January 1973 the new Government authorized the appropriation of an additional $10.85 million to the Trust Account, increasing the total funds provided this financial year to some $33.4 million.

"... $24.5 million was provided in the 1973 financial year for expenditure on Aboriginal affairs in the Northern Territory, $0.305 million (in the votes of the Department of Labour) for special employment programmes for Aboriginals (see Section VIII, 6, Employment), $3.005 million (in the votes of the Department of Education) for Aboriginal Secondary and Study Grants and for special projects in the Northern Territory (see Section VIII, 3, Education); and $0.15 million (in the votes of the Department of Health) for similar special projects in the Northern Territory. The total proposed Commonwealth provision in respect of Aboriginal affairs for 1972/73 was thus $55.3 million, which the new Government has increased to $66.150 million.

"... the various States provide funds towards their Aboriginal affairs programmes from their own resources. It is expected that in this financial year the States will provide some $12 million of their own funds."

91. The Government of the United States has stated that the budget of the Bureau of Indian Affairs is "about $550 million annually, the largest portion of these funds support educational programmes for indigenous children with 25 per cent or more indigenous blood." These programmes range from kindergarten through grants for college training, including post-graduate levels. They also include funding for dormitory operations for a large number of Indian children whose circumstances make it impossible to go to a local school. The Bureau of Indian Affairs administers programmes involving trust land and funds, welfare services (other than that provided by Federal and State social insurance programmes), vocational training and placement, housing credit, and services to improve the land resource, such as technical advice and services concerning roads, forests, range, irrigation, mines, and so on".

92. An official publication noted that in the 1974 fiscal year, of the total budget of $310.9 billion, $583,585,000 was appropriated for the Bureau of Indian Affairs. 74/ The Government has noted that this is not the total amount available, however, for

74/ United States Department of Interior, Bureau of Indian Affairs, op. cit., p. 11.
the Indian community. The Departments of Health, Education and Welfare, Commerce, Housing and Urban Development, as well as agencies such as the Farmers Home Administration, Office of Minority Business Enterprise and Small Business Administration have programmes specially directed towards the indigenous population.

E. Mixed Entities and their Functions

93. Within some systems there are administrative arrangements which may be described as "mixed entities", meaning that they include independent experts or members of the indigenous community as well as representatives of the Government. Some mixed entities whose function is primarily advisory, were referred to previously in this chapter under the subheading "Official Advisory Bodies". It is useful to note, however, that other mixed entities of an executive nature have been charged with the administration of trust funds or specialized programmes. The nature of these entities ensures that indigenous concerns will be heard at the policy-making level and institutionalizes indigenous participation in decisions which have a direct impact upon indigenous communities.

94. Six examples of this type of entity are the Board of Maori Affairs, the Maori Purposes Fund Board, the Maori Education Foundation, the New Zealand Maori Arts and Crafts Institute, the National Advisory Committee on Maori Education and the Maori and Polynesian Health Committee, which are described by the Government as follows:

"The Board of Maori Affairs

This is a statutory body which is responsible for laying down policy to be followed by the Department of Maori and Island Affairs in relation to Maori land development, Maori housing and other aspects of the work of the Department. The Board comprises both official and private members. The Chairman is the Minister of Maori Affairs and the official members are the Secretary of Maori and Island Affairs, the Director-General of Agriculture, the Director-General of Lands and the Valuer-General. There are three private Maori members who are appointed on the nomination of the Minister and one Maori member appointed on the nomination of the New Zealand Maori Council. This Board is an important decision-making body which at present has five Maori members (including the present Minister) and four official members.

"The Maori Purposes Fund Board

This is a statutory body which administers a fund set aside for the promotion of Maori arts, literature and social advancement. The Chairman is the Minister of Maori Affairs. The ex officio members are the four Maori Members of Parliament, the Secretary of Maori and Island Affairs, the Director-General of Education, the Director-General of Health and five appointed members who are experts in the Maori social and cultural field. At present, four of these are Maori, making a total Maori membership of eight out of twelve.

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"Maori Education Foundation"

The Maori Education Foundation was set up by statute in 1961. The funds of the Foundation were subscribed by the public with an equal contribution by the Government. In addition, all income of the Foundation receives a dollar for dollar subsidy from the Government each year. The present capital is about $2.5 million. This fund is administered by a Board of Trustees comprising a Chairman appointed by the Government, the Director-General of Education, the Secretary of Maori and Island Affairs, the Officer in Charge of Maori Education in the Education Department and four other trustees comprising:

(i) A Maori Member of Parliament nominated by the other Maori Members;

(ii) A nominee of the New Zealand Maori Council;

(iii) A nominee of the Maori Women's Welfare League;

(iv) One other nominated by the Minister of Maori Affairs.

All these nominated trustees are Maoris. The Foundation and fund came into being because of a disparity in the achievement of Maori school children and because, until recently, a disproportionate number of Maori children were, mainly for economic reasons, leaving school at the end of the compulsory period of education (which is uniform for all children throughout the country). The fund is used therefore to overcome this problem and to encourage bright Maori children to proceed further in the education field. There has been a striking improvement since the Foundation began to make financial grants to enable Maori students to continue. The fund is also used to promote pre-school education and research. Its operations will be referred to later.

"New Zealand Maori Arts and Crafts Institute"

This body was established by statute in 1963. The city of Rotorua in the North Island of New Zealand contains one of the world's outstanding thermal areas which is visited by up to 200,000 tourists every year. This area, comprising about 54 hectares, was owned by the Government. Under the statute of 1963 the whole area was vested, without payment, in a newly constituted Maori Arts and Crafts Institute. The income derived from the tourist industry is used by the Institute to maintain the thermal area and to operate an Arts and Crafts Institute in Rotorua where Maori youths are given a three-year course of instruction in traditional Maori woodcarving, and shorter courses of instruction are provided for women in weaving and textile arts. The Institute also proposes to establish a school of Maori music and dancing in the near future. The Board of Trustees who administer the
Institute comprise the General Manager of the Government Tourist and Publicity Department, the Secretary of Maori and Island Affairs, a nominee of the New Zealand Maori Council, a nominee of the local Maori community, a nominee of the Rotorua City Council (at present the Deputy Mayor, who is a Maori) and two others nominated by the Institute. At present there are four Maoris and three non-Maoris on the Board. The Director and the entire staff of the Institute are Maoris. Further comments on the work of the Institute are at pp. 39-40 below.

"National Advisory Committee on Maori Education"

This Committee was established about 10 years ago by the Minister of Education to consider the shortcomings which were then found to exist in Maori education, and to advise the Government on the best means of improving the situation. The members are appointed by the Minister of Education and comprise the permanent heads of the Departments of Education and Maori and Island Affairs plus 14 other members nominated by various bodies concerned with the education of Maori children, such as the New Zealand Maori Council, the Maori Women's Welfare League, education boards and teachers' organizations. More than half of the members are Maori. The Committee meets at least twice a year and from time to time sets up ad hoc sub-committees to deal with specific aspects of Maori education. The only costs of the Committee are travelling allowances and accommodation expenses. These are met by the Government.

"The section on Education later in this paper gives some measure of the extent of improvement in education now brought about as a result of the work of the Committee and other causes."

"Maori and Polynesian Health Committee"

This was set up by the Minister of Health some years ago to advise the Government on any health problems of particular relevance to and importance amongst the Maori and any resident Polynesian people in New Zealand. The Committee includes representatives of the Health Department and the Maori and Island Affairs Department, as well as Maori medical men, a Professor of Social Science, a representative of the University medical schools and a representative of the Maori Women's Welfare League. Six of the members are Maori; four of them are medical men.

"Co-ordination of the activities of the mixed governmental and non-governmental bodies described above is achieved by the fact that they are all responsible to the Minister of Maori Affairs, and that the Secretary of Maori and Island Affairs is an ex officio member of all of them."
F. Non-Governmental Entities and their Functions

1. Introductory Remarks

95. In most of the countries under study, non-governmental organizations (NGOs) participate to some degree in the policy-making or implementation processes. Though some have been incorporated into the formal structure by means of officially-recognized advisory or consultative bodies, others exert an influence on official policy by lobbying with governmental bodies, by shaping public opinion, or by assuming responsibility for concrete programmes, particularly those which the Government is either unwilling or unable to undertake. Some Governments have encouraged the development of these organizations by contributing to their funding on a regular basis. At the same time, it is generally accepted that the independence of these organizations must be assured if they are to be genuinely engaged in fulfilling their important role as spokesmen for indigenous concerns and as representatives of indigenous views, particularly when they are constituted on the basis of an indigenous membership.

96. These non-governmental organizations may be classified on the basis of their membership or the level at which they operate and of the scope of their activities or ultimate objectives. In the past, such organizations were usually composed of non-indigenous citizens who acted in what they considered to be the best interests of the indigenous population. In recent years, the most significant trend has been the emergence of non-governmental organizations which are entirely indigenous in their membership and which conceive their functions as the representation and promotion of indigenous views, interests and preferences. Although there are some organizations of mixed membership, it is now possible to speak of indigenous and non-indigenous NGOs.

97. Some are active only locally, but often such organizations are represented at the national and the international levels as well. The most recent development has been the representation of indigenous NGOs at the international level.

98. Some NGOs are involved in the full spectrum of indigenous affairs; others are formed for the attainment of a specific objective such as the preservation of an indigenous culture or the establishment of an educational fund. And finally, some organizations — particularly those of predominantly non-indigenous membership — may be distinguished on the basis of an underlying objective such as religious or political proselytization, humanitarian goals, or academic interests which may not reflect the concerns or the interests of the indigenous populations themselves.

99. It goes without saying that no effort has been made to identify or enumerate the thousands of different organizations active in the different countries, a task that would be beyond the scope of the present study. This part has been drafted to reflect as much information as the limitations of the data available to the Special Rapporteur would permit, and with the limited purpose of conveying an idea of the main types of entities and activities existing today.

100. Since the information at the disposal of the Special Rapporteur is incomplete, only some examples of non-governmental organizations and their participation in the relevant processes are set forth in the paragraphs below.

101. Two broad subdivisions have been made grouping together what have been called "secular entities" in order to differentiate them from organizations of an avowed religious character which have been grouped together under the heading "religious entities". The classification of the entities into groups has no special significance and serves the sole purpose of presenting the relevant material in an orderly fashion.
102. Attention will be focused first on secular entities, classified into two groups: those active inside a country only, which will be called "domestic organizations" and those active in several countries and having an international character on account of their organization and their activities, which will be called "international organizations".

103. The very scanty material on "religious entities" will be presented under three subgroups: "religious organizations active among society at large", those formalized into a "mission system" and the "Summer Institute of Linguistics". These groups are, again, ad hoc groupings made only for the purpose of the presentation of the relevant material.

2. Secular Entities

(a) Domestic Organizations. Some Examples

104. The Government of Canada has provided the following information with regard to three non-governmental organizations of indigenous membership which are active in native affairs in that country:

"By 1970, the National Indian Brotherhood was formed, uniting organizations of status Indians in the provinces and territories. The National Indian Brotherhood pursues an aggressive policy in pursuit of its aims to 'co-ordinate the efforts of the provisional and territorial organizations' and to 'provide a framework through which the Indian people of Canada may forcibly present their views on important subjects or issues such as Indian Treaties, aboriginal and other rights and seek solutions to common problems'.

"The Métis and non-status Indians pursued a policy of organizing ... [Indians] outside the Indian Act. Organizations were formed in most of the provinces and in the two Northern territories. In 1971 representatives of these groups formed the Native Council of Canada. According to its stated aims, 'the Council works with federal government agencies and departments, parliamentarians, the National Indian Brotherhood, Inuit Tapirisat of Canada (Eskimos) and all other organizations to achieve the goal of full native participation in the mainstream of Canada's social, cultural and economic life'.

"The Eskimos began organizing largely through help received from the (non-Indian) Indian-Eskimo Association, and has now formed Inuit Tapirisat with representation from across the northern region. It was incorporated in November 1971, and the membership is composed of individuals of the Eskimo race, including individuals of mixed Eskimo and white parentage. In addition, membership is extended to representatives of affiliated native associations. Its stated aims are to unite the Eskimo people, and its twofold objective is stated as follows:

To help preserve Inuit (Eskimo) culture and language and promote dignity and pride in Inuit heritage; and

to assist the Inuit in their right to full participation in the sense of belonging to Canadian society and to promote public awareness of those rights.

All three organizations are funded by the Department of the Secretary of State, but the impetus has come from vigorous leadership among the native groups themselves. In the fiscal year 1971-1972 total government appropriations provided $1,354,000 for these associations."
105. An example of a non-governmental organization dedicated to economic and educational objectives and composed exclusively of members of the indigenous population is the National Association of Indigenous People of El Salvador (ANIS), founded in El Salvador in 1978:

"According to field data, the Association comprises approximately 12,000 persons from the different zones of the country, West, Centre and East. The only requirement is that a person applying for membership should come from one of the population groups regarded as indigenous or be from 'indigenous' stock.

"One of the economic objectives of ANIS in 1978 was to obtain State financing for the purchase and cultivation of 512 manzanas of land, to be worked in the form of a co-operative. It also planned to foster skilled handicrafts through the work of production and marketing co-operatives, and to found a school where literacy programmes and teaching would be carried on in Nahuat.

"Towards the end of 1978 (30 October), ANIS found that a credit had been approved by the Banco de Fomento Agropecuario for the purchase and financing of 86 manzanas of land. The bank lent it 290,000.00 colones. This loan is expected to be reimbursed in 18 years, at the rate of 57,070.00 colones a year. ANIS has gathered together 120 persons for this economic scheme, officially called the 'Sensonate Agriculture and Animal Husbandry Production Co-operative, Ltd.'.

"The lands are now beginning to be worked. The co-operative receives technical assistance and advice from INSACOOP (Salvadorian Institute for Co-operative Promotion), BINECO, and above all, the Banco de Fomento Agropecuario.

"The handicrafts and Nahuat school schemes have not yet materialized."

106. Regarding private bodies active in Lapp affairs, the Government of Finland has reported that after registration they are recognized as juridical persons and have the possibility of receiving a State subsidy, as do all organizations having a public significance. As examples of non-governmental organizations, the Government notes the following:

"The oldest unofficial organization, the Cultural Association of Lapland was established in 1932 to promote the preservation of the Lappish language and culture. In order to improve the economic, social and cultural conditions of the Lapps, the Federation of the Lapps was established in 1945. Another economic organization for those Lapps who carry on reindeer breeding was established in 1970.

"... every three years since 1953, the Lapps residing in the Nordic countries have had common conferences to deal with their problems. In 1955 they established a special body, the Nordic Lappish Council, which is convened at regular intervals to promote their common interests in all these countries. The Lapps themselves in each of these countries elect their representatives to the meetings of the Council."
107. A specialized non-governmental organization, of indigenous composition, is The Maori Women's Welfare League, Inc., whose functions are described as follows by the Government of New Zealand:

"This is a Maori women's organization with branches throughout the country. It is an incorporated society completely independent of Government control, but receives some Government financial assistance towards administration costs. The organization is purely voluntary and is concerned with matters affecting Maori women and children and the general social welfare of the Maori people. The League is recognized by the Government as a body speaking for Maori women and is often consulted by the Government. The League also initiates discussions with the Minister of Maori Affairs on topics within its field."

108. The principal body active in Lapp affairs in Sweden is the Svenska Samermas Riksforbund (S.S.R. or National Union of Swedish Lapps). The members of the S.S.R. are Lapp villages and societies which elect their representatives to a National Congress. Its basic objectives are to promote and safeguard the economic, social, administrative and cultural interests of Swedish Lapps, with special regard to the continued existence and sound development of reindeer husbandry. The Government has stated that the S.S.R. has no official status:

"It is an association formed by the Lapps themselves. It is for the members ... to decide on the conditions for appointments for posts [within the organization], on responsibilities and training. Rules may be laid down in the internal rules of the [organization]. There is no state control ..."

"The National Union of Swedish Lapps is partly financed from members' fees, but in addition to this, the Union receives financial support from the Government. During the last fiscal year, the State subsidy amounted to 400,000 Swedish crowns. The amount is taken from the Lapp fund, which is a special fund set up to promote the interests of the Lapps."

109. In the United States, non-governmental organizations of a specialized type include tribal interest law firms such as the Native American Rights Fund (NARF) founded in 1970:

"These organizations supplement the work of the Justice Department, which Indians assert has inadequately enforced and protected their rights. Furthermore, Indians assert that conflicts of interest arise within various departments with divergent agencies perspectives on Indian interests. For example, disputes over land and resources in Indian country sometimes bring into play the BIA, the Bureau of Land Management, and the Fish and Wildlife Service of the Interior Department. Moreover, in cases where there are no direct conflicts of interest, Indians assert that political factors and the personal biases of Justice Department functionaries against taking the Indian side in disputes hinder the enforcement of Indian rights."

110. In response to a request by the Special Rapporteur and under the title "Information about National Indian Organizations", the Government of the United States sent a list of non-profit organizations that (1) serve a pan-Indian purpose or profession, (2) do not restrict services or membership to just part of the United States, and (3) consist of at least several different tribes. This list is reproduced below:

76/ Fulfilling our Promises: The United States and the Helsinki Final Act, op. cit., pp. 151-152.
The American Indian Historical Society works to preserve the philosophy, human values, and languages of Indians and to promote their culture, education and general welfare. As the only Indian publishing house in the United States, it disseminates publications on the history and culture of American Indians.

The American Indian Lawyers Training Program, Inc. is an Indian founded and administered non-profit corporation. Since its inception in 1973 AILTP has designed and implemented programmes to promote tribal sovereignty and self-determination through provision of training resources to Indian attorneys, law students, and advocates committed to serving the legal exigencies of Indian people.

The American Indian Movement is an activist, grassroots organization for Native American people whose purpose is the survival of tradition, unity, and justice for everyone.

The American Indian and Alaskan Native Nurses Association's purposes are: (1) to promote optimum health among Indian people; (2) to encourage a more equitable number of American Indians within the nursing profession through recruitment and development in nursing education; (3) to educate both the Indian and non-Indian population about the specific health needs of Indian people; and (4) to recommend proper solutions to the health needs of Indian people.

The Americans for Indian Opportunity is a national Indian advocacy organization that assists tribes and individuals in areas such as natural resources development, justice, and education. It also acts as a liaison between tribes and government agencies, private industry, universities and the media.

Arrow, Inc., Foundation is a non-profit charitable and welfare organization dedicated to direct aid, training, and research for American Indians.

Association of American Indian Physicians facilitates an exchange of ideas and information about American Indian health matters and strives to preserve Indian culture and foster Native American medical practices. Their major emphasis is on health and medical careers recruiting.

The Coalition of Indian Controlled School Boards assists Indian groups that want to play a stronger role in the education of their children.

The Council of Energy Resources Tribes seeks to promote the general welfare of Indian people through protection, conservation, control, and prudent management of Indian-owned energy resources. CERT functions as a forum for 26 member tribes for sharing ideas and experiences as a mechanism for tribes to speak collectively on energy-related matters. It is a source of technical assistance to member tribes on energy-related matters.

The Indian Rights Association helps American Indians to secure the rights guaranteed to them by the United States Constitution, treaties, and statutes, and supports their right of self-determination.

The Institute for the Development of Indian Law is an Indian legal research and educational organization for all American Indians.

The National American Indian Court Judges Association seeks to improve and upgrade the American Indian court system throughout the United States through legislation, professional advancement, and continuing education.
The National Congress of American Indians is the oldest and largest Indian organization representing Indian tribes and the only one which can lobby Congress for Indian legislation.

The National Indian Council on Aging is a national advocacy organization for Indians that provides training and technical assistance to older Indians through tribal programmes.

The National Indian Education Association is an Indian education advocacy organization that focuses on technical assistance and information dissemination to the Indian population.

The National Indian Youth Council is involved in civil rights activities, operating education and employment programmes, and action research.

The National Tribal Chairman's Association is an association that represents 190 federally recognized Indian tribes on matters relating to the Congress and the United States Government and Federal agencies.

The Native American Rights Fund is a national Indian legal programme serving Indian tribes, groups, and individuals in cases of major significance. Emphasis is placed on cases involving tribal sovereignty, tribal natural resources, and treaty rights.

The North American Indian Women's Association is a non-profit educational association and is organized to promote among North American Indians: (1) improved home and family life and community; (2) improved health and education; (3) inter-tribal communications; (4) awareness of Indian culture; and (5) fellowship among all people.

The United Indian Planners Association is a non-profit professional organization for individuals employed as socio-economic development planners by American Indian tribes and organizations. Their aim is to locate and overcome problem areas in planning that deter development among Native Americans.

Paraguay provides examples of several types of non-governmental organizations which are active in indigenous affairs. The Association of Indigenous Groups (Asociación de Parcialidades Indígenas - A.P.I.), of exclusively Indian membership, was founded to bring about greater unity among the indigenous populations of the country and to work for the protection of Indian rights as well as for socio-economic progress. Among its functions it is empowered to make proposals to the Government with regard to indigenous policy and to co-operate in the definition of that policy. 77/ Another private organization, controlled by non-Indians, but open to anyone who wishes to participate, is the Indigenous Association of Paraguay (Asociación Indigenista del Paraguay - A.I.P.), which is styled as a philanthropic entity for the purpose of promoting research and practical programmes for the benefit of the indigenous populations. Its Statute authorizes it to propose laws and programmes for the protection of indigenous tribes. 78/ The Anti-Slavery Society

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78/ Ibid., pp. 18-19.
reported in 1976 that "By governmental decree, the association owns 333 hectares of land occupied by some 500 Maka Indians near Asunción, and exercises administrative control and supervision of economic activities of the village". 79/ A third type of non-governmental organization is the Indian-Ixionote Co-operation Service (Asociación de Servicio de Cooperación Indígena Xionote - ASCIM) which includes both Ixionote and indigenous leaders in its Administrative Council. According to its Statute, the general objectives of ASCIM are to promote the settlement of Indians into stable communities and to assist them in their social and economic development. 80/

(b) International Organizations. Some Examples

112. Emphasis will be placed on international non-governmental organizations having consultative status with the Economic and Social Council of the United Nations among which there are many that have concerned themselves with the plight of indigenous populations and have made statements in that connection to several United Nations bodies dealing with human rights questions, mainly before the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Some examples would include: the Anti-Slavery Society for the Protection of Human Rights, the Minority Rights Group, the International Commission of Jurists, the Women's International League for Peace and Freedom, to name only some of the most active in this respect.

113. Very important in this context are the international NGOs directly representing the concerns, interests, views and preferences of the indigenous peoples of different countries in the different areas of human rights that have been under discussion in those bodies. Three such NGOs constituted exclusively on the basis of an indigenous membership having consultative status with ECOSOC are: the International Indian Treaty Council, 8l/ the World Council of Indigenous Peoples 82/ and the Indian Law Resource Center 83/. All three organizations have been very active at the international level and have represented the views of their constituent organizations and communities before different United Nations bodies dealing with human rights questions. They have actively participated in the two International NGOs Conferences dealing with indigenous populations in 1977 84/ and in 1981. 85/

3. Religious Entities

(a) Introductory Remarks

114. In many of the countries included in this study, Catholic and Protestant missionaries are actively involved with the indigenous population either as individuals or as organizations, or as a part of a formalized system also involving civil administrative functions delegated by the State. It is important to distinguish between the missionary activities of religious groups or ministers who work among society at large and those who are part of a mission system.

79/ Anti-Slavery Society. Information provided on 3 September 1976 in connection with the present Study.


81/ See chap. IV, para. 50 and foot-note 12 there to.

82/ Ibid., paras. 60 - 62 and 127 - 130.

83/ An organization founded in 1979, now having consultative status, included in the Roster.

84/ See chap. IV, paras. 31 - 113.

85/ Ibid., paras. 131-134. The Final Statement and the Four Commission Reports will be included in a further annex to chapter IV in the printed version of the present study.
115. This section will be divided into three subsections dealing, respectively, with religious organizations and activities among society at large, the mission system and the Summer Institute of Linguistics.

(b) Religious organizations and activities among society at large

116. Although their principal objective is religious proselytization, religious groups who work among society at large often engage in varied activities which may range from the preparation of linguistic studies to the creation of programmes designed to promote health, education or socio-economic progress. As a general rule, their activities are subject to governmental authorization and are usually spelled out in a written agreement between the representatives of the missionary group concerned and the Government. Despite this formality, no civil functions are formally delegated by the State to these entities which are merely authorized to carry out specified activities under at least nominal State inspection and supervision.

117. Whether these arrangements serve the best interests of the indigenous community will vary from case to case, but again the critical factor would lie in whether such arrangements constitute an imposition upon the indigenous population. There is a large variety of examples of such groups and activities. The following organization has been chosen to show how they may come to approximate a kind of administrative arrangement in view of the nature of their non-religious activities and the need for governmental authorization.

118. The Maryknoll Fathers in Guatemala are one example of those religious groups who work in society at large. The following report on their activities shows how a broad approach to proselytization may have an economic and social impact in indigenous communities:

They have been carrying on their work for more than 27 years in the Department of Huehuetenango, where approximately 70 per cent of the population is indigenous. In this area they have 18 radio schools, 28 credit co-operatives, three farm co-operatives and two co-operatives for miscellaneous products. The work done with the Indians by the Maryknoll Fathers is somewhat different from the indigenous development work we have called official. Its basic objective, a logical one from the priestly point of view, is catechization and the saving of souls. Specifically with respect to the indigenous person, they try to kindle an awareness in him, in other words to make him feel he is a human being and that, therefore, he has certain rights and should fight to achieve them. The methodological approach in this case is educational. The Fathers maintain bilingual schools attended by Indian and Ladino children. In this they differ from many State schools, which prefer the Ladino-child because he has no Spanish language problems. They have also arranged boarding facilities for children, both Ladinos and Indians, who have to cover long distances, for upwards of five hours. Ladino parents hesitated at first to send their children, not wanting them to share sleeping quarters with Indian children; but because of the insistence of the Maryknoll Fathers, they had to agree to allow the two ethnic groups to live together. There are in addition two experimental schools where only the indigenous language is spoken.

The co-operatives appear to have been successful, earning a good deal of money which they do not know how to invest. In actual fact, the success would appear to be due predominantly to sound advice and management, which are not

86/ Alejandro Marroquín, op. cit., pp. 140-141.
handled by Indians. However, since economic promotion and, in general, indigenous development work are not based on an anthropological knowledge and are conducted on the basis of an empirical knowledge of the area where the Fathers operate, the entire scheme has an air of superficiality and failure to tackle the most important social problems of the indigenous population."

(c) The Mission System

119. Under this system, a religious group is not only formally authorized by the State to proselytize among a particular indigenous population usually in an isolated area but is also given some degree of civil responsibility for that population. In some cases, Governments have delegated authority to missionaries, who have assumed certain lower level functions of government. It is this combination of civil and religious authority which gives this system its administrative character, in the sense discussed in this chapter.

120. Since the sixteenth century Catholic missionaries have been very active among indigenous populations in the Americas. With nationhood, those activities were continued in many countries, particularly in isolated areas by means of Concordats between the Holy See and the host Government.

121. These agreements provided for the co-operation of the Church with the State, which delegated certain important functions to Mission authorities in the Mission territory, without any consultation being undertaken at any time with the indigenous populations which inhabited that territory and thus would be affected by these arrangements.

122. Without entering into the complexities of the matter, which is worthy of special analysis which cannot be undertaken in the present study, it should be pointed out here that this type of arrangement may function and has indeed functioned in the past in such a manner as to impose a particular religious, cultural and socio-political orientation upon indigenous populations which have not requested it or agreed to it in any way.

123. It should be noted, however, that this system has been largely discontinued. Where it still exists, Governments have often been called upon to increase their supervision of the system in order to ensure co-ordination with governmental programmes and objectives. The questions of the basic freedom of indigenous populations to control their own lives and the lack of consultation with these populations, which are directly affected, remain open.

124. The denunciation of the historical failure of the missionary task as well as the analysis and the resulting characterization of the mission system made by the First Barbados Conference (Bridgetown, Barbados, 25–30 January 1971) must be borne in mind. 87/ The recommendation made by this Conference for the discontinuation of this system and the support of, and contribution to, the cause of indigenous

The relevant statements of the First Barbados Conference in this regard will be found in chapter IX dealing with fundamental policy towards indigenous populations.

Account must also be taken of the resolution of the XLII Congress of Americanists (Paris, 2-9 September 1976) concerning a new definition by the Churches of their position in relation to the indigenous communities and rejection by the latter of intervention of a missionary nature, "that is, paternalistic, catechizing and becoming involved in the life of the indigenous communities", the disappearance of the concept and word "mission" and the proselytizing, catechizing or expansionist schemes of the non-indigenous society (resolution 20, items 1 and 2).

The following historical summary of the arrangements between the Church and the Government of Colombia exemplifies the nature of those agreements and underlines some of the problems of recent years:

"In Colombia, the relevant statute provides that 'the general legislation of the Republic shall not apply to savages who are being brought to civilised life by the Missions. In consequence, the Government, in agreement with the ecclesiastical authority, shall determine the manner in which these developing societies shall be governed.' Section 2 provides that indigenous communities which are already civilised, but live on reservation lands, are also excluded from the scope of general legislation and are to be governed according to special laws. Under a second act, the Government delegated its civil, penal and judicial authority to the Catholic Church in regard to areas containing non-integrated forest-dwelling Indians. A decision of the Supreme Court of Justice on May 14, 1967, held this provision unconstitutional, ruling that the Government could not thus surrender complete authority over a segment of its citizens, but confirmed that there was no legislation which did apply to the populations excluded under the 1890 Act. The legal status of the Indians is also affected by the successive 'mission agreements' which have been concluded between the Government and the Vatican since 1888 to regulate the manner in which the Church deals with the indigenous populations under its control. Earlier agreements had confirmed the delegation of authority to the Catholic Church, and had put what became known as the 'mission territories' exclusively under the educational, political and religious control of the missions. This had obvious implications for the opportunity of the indigenous peoples of these areas to enjoy fully the civil and political rights accorded to the rest of the country's citizens. The most recent agreement (the Concordat approved by the Congress in 1974) has somewhat modified the absolute control exercised by the missions, and the ILO Committee of Experts has asked the Government to clarify the legal and practical situation of these populations."

88/ See chapter IV, paras. 140, i and x, and the corresponding note 26.
127. The following is another example in point. The Venezuelan Government promulgated a law in 1915 to regulate the functioning of religious missions among the indigenous population. The objective and development of this system in Venezuela have been described as follows: 90/

"The Venezuelan government appeared to be moving towards acceptance of responsibility in regard to the problem of the Indians when it promulgated the Ley de Misiones in 1915. In virtue of this law the Venezuelan nation delegated to the missionaries the task of 'converting and drawing into civil life the native tribes and groups which still exist in different regions of the Republic ...'. The rules for the implementation of this statute appeared in 1921. Successive additions to them gradually endowed the missions with even greater concessions regarding the control of native tribes and their territories and also regarding the course to be mapped out for them in order eventually to incorporate them in the national life. The missions were organized in vicariates to suit the regions of the country with Indian inhabitants, and the vicariates assumed direct responsibility to the national government. In 1922 the first contract under this law was concluded with the Caroni Mission. This comprises a large part of Eduardo Bolivar State and the Delta Aimauro Federal Territory. On 20 April 1937 the second of these agreements was signed with the Fia Sociedad Salesiana, whose mission-centres cover the Amazonas Federal Territory. On 17 March 1944 the third agreement was signed with the Capuchin Franciscans for the regions of Perti and Goajira, in the State of Zulia.

"The delegation of protection and education of the Indians to the missions was the first concrete and practical step taken by the State during the whole period of the Republic's existence. Nevertheless very little control was effectively possessed by the missionaries over the vast Indian zone entrusted with its lands and inhabitants to their protection. In the first 38 years of the present century, for example, Amazonas Federal Territory suffered periodical invasions commanded by Creole leaders who captured Indians, reduced them to submission and took them to Creole villages as unpaid labour."

128. In this connection account should be taken of the resolution of the XII Congress of Americanists (Mexico City, 2-8 September 1974), concerning the derogation from Venezuela's Missions Law (Ley de Misiones) (resolution III, item 5). 91/

(d) The Summer Institute of Linguistics (SIL)

129. The Summer Institute of Linguistics (SIL), a Protestant group connected with the Wycliffe Bible Translators, Inc., has worked with the indigenous populations of a number of the countries considered in this study. Its immediate objective is to translate the Bible into indigenous languages; its trained linguists establish contact with isolated tribes, study their language, develop a written alphabet, and translate the Bible into that language as a basis for further proselytization. As a result of its work, the SIL has entered into contractual relationships with some Governments to produce bilingual teaching materials. 92/ In at least two


91/ See chapter IV, para. 140, h and i.

92/ Swepston, loc. cit., pp. 741-742. The author cites as examples the Governments of Panama, Brazil and Bolivia.
countries, Bolivia and Peru, it has been given a more important role in the education of forest-dwelling Indians, becoming involved in teacher training in Bolivia and in the administration of the System of Bilingual Education for Indians in the forest regions of Peru. 23/ On the other hand, the Government of Panama terminated its relationship with SIL according to an official 1976 report because its work did not correspond to the Government's concepts of bilingual education needs. In 1977, a similar programme undertaken with FUNAI in Brazil terminated with SIL's expulsion from the Indian areas. 24/ At the same time, this organization has come under attack from some Indian groups. The report of Forum I of the VIII Inter-American Indian Conference asserted that the SIL functions characterized it as an imperialist instrument for penetration, espionage and repression of indigenous populations, which prepares the way for capitalist exploitation of natural resources. 25/

130. In this connection it should be noted that the XLIII Congress of Americanists (Paris, 2-9 September 1976), accepted in a resolution the indigenous community's charge that some missionary groups and other supposedly scientific groups of various kinds devoted to religious activities or research, are agents seeking to infiltrate, ideologically influence and destroy the culture of the native peoples of the Americas (resolution 22, para. 5). 96/

23/ Ibid., pp. 745-746.
24/ Ibid., p. 743.
96/ See chapter IV, para. 140, i and x, and in particular, the corresponding note 28.
STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS
Final report (last part) submitted by the Special Rapporteur, Mr. José R. Martínez Corte

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XI. HEALTH, MEDICAL CARE AND SOCIAL SERVICES

A. The right to health services, medical care and other related social services

1. Preliminary remarks

(a) The recognition of those rights

1. The right to an adequate standard of health and medical care as well as the right to social security have received international recognition in several international instruments on human rights adopted by the General Assembly of the United Nations or by United Nations specialized agencies.

2. Regarding the right to an adequate standard of health, the Universal Declaration of Human Rights provides:

"Article 25"

"1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

"2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection."

The International Covenant on Social, Economic and Cultural Rights stipulates:

"Article 12"

"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

"2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

"(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

"(b) The improvement of all aspects of environmental and industrial hygiene;

"(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

"(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness." 1/"

1/ In article 7, States parties to the Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work "which ensure, in particular: ... (b) safe and healthy working conditions".
3. As far as the right to social security is concerned, the Universal Declaration of Human Rights declares:

"Article 22

"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

The International Covenant on Social, Economic and Cultural Rights provides:

"Article 9

"The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance."

4. In addition to attributing these rights explicitly to "everyone", both texts interdict "distinction" (Declaration) or "discrimination" (Covenant) of any kind based on criteria such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". These interdictions are contained in the respective article 2 of both texts.

5. The International Convention on the Elimination of All Forms of Racial Discrimination includes "the right to public health, medical care, social security and social services" among the economic and cultural rights in regard to which States parties to the Convention have undertaken to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law (articles 2 and 5 (e) (iv)).

6. ILO Convention No. 107, concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Indigenous and Tribal Populations Convention, 1957) provides, as regards the right to health:

"Article 20

"1. Governments shall assume the responsibility for providing adequate health services for the populations concerned.

"2. The organisation of such services shall be based on systematic studies of the social, economic and cultural conditions of the populations concerned.

"3. The development of such services shall be co-ordinated with general measures of social, economic and cultural development."

Concerning the right to social security, it states:

"Article 19

"Existing social security schemes shall be extended progressively, where practicable, to cover:

"(a) wage earners belonging to the populations concerned;

"(b) other persons belonging to these populations."
7. It may be noted in closing this aspect that the Convention on the Prevention and Punishment of the Crime of Genocide declares in article II, which defines genocide, that:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such;"

"...

"(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;"

"...

8. The right to an adequate standard of health, medical care and social security services is also recognized at the national level. Thus, in some countries the constitution stipulates that ensuring and protecting the health and welfare of citizens or of all inhabitants are functions and obligations of the State. Those provisions have to be read in conjunction with other constitutional provisions prohibiting discrimination on the ground of race, colour, language, religion, national or other origin or other status, inter alia. It is clear then that those services are to be made available on a non-discriminatory basis.

9. In all countries covered, there are important statutory and regulatory provisions governing health and medical services and associated social services, generally within social security schemes for workers.

(b) Problems of implementation

10. Despite international and national recognition of the right to adequate health and medical care on a non-discriminatory basis, in most countries indigenous peoples, in so far as they form part of the rural population and have special health problems, do not have equal access to facilities and services. While both private and public services are available in urban areas (although, it is true, in most instances, only to those who can afford them) those same services are often not readily available or are unavailable at any price in the rural areas where most indigenous people live. Many arguments have been advanced to explain this imbalance. For economic as well as political reasons, Governments tend to give priority to health and other services in urban areas. Urban forces are more likely to command attention.

11. It is politically less essential and economically more costly to provide the same level of care in sparsely populated areas. Similarly, private institutions are not particularly attracted to rural areas because of the limited returns on their investment. Medical personnel are further discouraged from practising in rural areas because of the lack of facilities for their families, the lack of opportunity to maintain contact with professional developments and the absence of proper equipment and appropriate support staff for professional work. The unavoidable changes in cultural environment are not infrequently invoked as an additional deterrent.

12. Rural inhabitants who have come to live in urban centres tend to find space only in the shanty towns encircling these centres and swell the numbers of unqualified personnel in public and private employment, if they are lucky enough to find any gainful employment. It is even more difficult for rural inhabitants to move exclusively so as to receive medical attention in the urban centres.

For example Bangladesh, Brazil, El Salvador, Ecuador, Guatemala, Honduras, India, Pakistan and Venezuela.
13. The constitutional and statutory mandate calling for non-discriminatory health and medical services has been implemented through plans for the transfer of urban services and personnel, without changes in organization and training, to areas outside the urban centres. The result has been that the effectiveness of the health and medical services that reach rural and indigenous populations in the countryside is seriously reduced.

14. In the cities, such personnel and services are naturally geared to deal with the needs of the urban dweller within his socio-cultural and physical environment. Urban services and personnel are therefore not attuned to the different situation and needs of the rural recipient of the services concerned. These services must therefore be tailored and personnel trained to adjust and adapt to the different socio-cultural and physical environment prevailing in the rural areas. The mere transfer of urban services and personnel to rural areas, even if unrestricted, is therefore inadequate.

15. It has been stated above, however, that many health and medical personnel are not attracted by practice in the rural areas, because of the shortage of necessary facilities and equipment and appropriate support staff. Those who do go to rural areas are inappropriately trained and ill prepared and existing schemes are not adapted to the rural situation and needs, with the result that inferior health and medical services are made available to rural and indigenous populations. In order to adapt these services, plans and personnel to indigenous populations, programmes and schemes must be suitably oriented, personnel must be appropriately trained and prepared and equipment must be suited to the different conditions existing in the area. Unless these changes are incorporated in the system it will not serve its purpose. What is appropriate and effective for some people is not necessarily appropriate and effective for others with different needs and in a different environment.

16. Mortality and morbidity rates and life expectancy figures are among the most accurate criteria for assessing the suitability of health and medical services.

17. It is an established fact, that in all countries the mortality rates, and particularly the infant mortality rates, are higher and that life expectancy is lower for rural and indigenous populations than for urban inhabitants in general. This indicates that health services and personnel for rural populations groups are inadequate.

18. Thus a pattern of conduct amounting to a failure to provide adequate health and medical services for rural populations emerges which, if continued, could become de facto discrimination. Only specially devised positive government programmes can correct this imbalance, which is further accentuated by the dearth or outright absence of private initiative in rural areas which have been neglected to a greater or lesser degree for far too long.

19. The present chapter attempts to deal with these matters in the light of very fragmentary and incomplete information which, in the case of some countries, was almost non-existent. The information on social security matters did not give rise to any cogent discussion and is only presented here in the few instances in which an explicit reference was made to it in the information supplied for the purposes of the present study.

2. The failure to provide equal access to health services for indigenous populations

20. Although the reasons may vary and the situation is not necessarily the desired result of a deliberate course of action, it may be said that most nations in which indigenous populations live today have failed to provide them with health services
that are equal to those available to the rest of the population. This is true, even in States which have allocated more funds to this area and in which indigenous populations may, in effect, enjoy better health services than their counterparts in other countries. The information from governmental and non-governmental sources contained in the following paragraphs shows that these circumstances are generally recognized and provide examples of the type of inadequacy which may exist in the provision of this kind of service.

21. The failure to provide adequate health and medical services to rural and indigenous populations in particular is recognized everywhere.

22. In general, the three main reasons for this situation are the isolation or sparsity of indigenous settlements, imbalance in the distribution of medical personnel and services between urban and rural areas and the conditions of poverty in which indigenous populations are incorporated into a market economy which means that they lack the economic power for adequate services. It must be noted, though, that these circumstances frequently coincide in different degrees of intensity.

23. Several Governments and non-governmental services refer in particular to the relative isolation or sparsity of indigenous settlements. Thus, the Government of Canada, recognizing the shortcomings of health and other services among native communities, has stated:

"The isolation of most native communities poses a severe obstacle to health care. Public health care is often inadequate and little has been done in the field of mental health or family planning programs. Few programs exist which successfully surmount the cultural and language barriers in remote regions."

24. The relative isolation of the indigenous population of Costa Rica is also cited by the Government as the principal reason why Indians do not enjoy equal access to public and private health facilities or other social services. It notes, however, that Indians now inhabit isolated and rather unproductive areas because they have been displaced, despite the existence of laws which should protect Indian lands.

25. The Government of Panama reports that "geographical remoteness, defective methodology and lack of material resources are major obstacles to the conduct of health programmes."

26. Similarly, according to the Government of Denmark, it endeavours to provide the population of Greenland with treatment of the same standard as that received in Denmark, but "the simple fact that Greenland is sparsely populated makes it difficult fully to live up to this target."

27. Despite the existence of various government health services which are open to all citizens, the Government of Australia reports that aboriginal health remains a major problem:

... Many Aboriginals display a stoic endurance of poor health rather than positive concern for good health, particularly the good health of children. Aboriginals are often reluctant to attend clinics and hospitals, and are deterred by the administrative requirements of schemes such as the Subsidised Health Benefits Plan. Poor nutrition, ignorance, apathy, and all the concomitants of the depressed socio-economic circumstances in which many Aboriginals live tend to lower their resistance and encourage the spread of disease. In addition, many Aboriginals live in rural or remote areas where it is difficult to provide normal community health services. In such areas serious illness necessitates evacuation to a hospital, and this is often resisted or resented by the Aboriginal community."

28. According to an official source, there is no adequate medical coverage for the majority of the population of Bangladesh, and in rural areas, medical care is available to no more than 25 per cent of the inhabitants.

29. In the information concerning other countries more emphasis is placed on the unequal distribution of medical personnel and services which are concentrated in urban centres.

30. Thus, according to one source, about half of Burma's doctors practice in Rangoon and Mandalay, and most of the remainder are in the larger towns. Few physicians are available in rural areas and villagers have to travel to urban centres for modern medical care or depend on medical assistants at rural health centres or traditional practitioners. The situation with regard to dentists is more serious: in 1971, there were believed to be only 26 dentists in the entire country. 4/

31. A similar maldistribution of medical personnel is reported to exist in Indonesia, where in the early 1970s one-fourth of all practising doctors were concentrated in Djakarta, and most of the rest were located in other major urban areas, so that effective ratios ranged approximately from one doctor per 5,000 Djakarta to one doctor per 200,000 in Bali. In some rural regions, moreover, there were no doctors at all, and medical care of all kinds was left exclusively in the hands of about 50,000 traditional dukuns. 5/

32. One source maintains that health care and other social services are not readily available in rural areas of Paraguay:

"Public health, sanitation, and welfare programs made some progress during the 1960s, but in 1971 their principal impact had not yet reached beyond Asuncion and a few of the larger towns. There were practical difficulties to be met in bringing the benefits of these programs to the scattered rural majority of the population. In addition, country people


were distrustful of those medical and dental services available to them, and participation in the national social insurance program was mandatory only for the predominantly urban wage-earning sector of the labor force."

"..."

"The fragmentary statistics available indicate that during the 1960s at least three-fourths of the doctors, dentists, and graduate nurses were located in Asunción. Most of the laboratory personnel worked in the capital city, and social service personnel were assigned only in Asunción and in a few of the health centers in the larger towns. There were pharmacists in most of the interior, where they provided the permanent staffs of the health posts and units." 6/

33. The Anti-Slavery Society has reported that in Paraguay the geographical distribution of medical and hospital facilities is unfavourable to the regions inhabited by the majority of the indigenous populations and that "the health situation is ... obviously worse for the Indians than for the rest of the population ..."

34. In its opinion, the health situation of the Indian is more the result of inferior housing, nutrition and labour conditions than the lack of medical services. However, it asserts that the extremely bad health situation of the Ñehé Ñiandu Indians living in the Colonia Nacional Guayaki is partly due to deliberate withholding of medical care.

35. Available figures for Guatemala show that physicians are concentrated primarily in the capital and that the central Government's per capita expenditures on health services are much higher in Guatemala City than in rural areas:

"The ratio of physicians to population is one to 5,000. This figure, however, is highly misleading since 82% of the MDs practise in Guatemala City. Thus the ratio for rural Guatemala is one MD per 17,000 people, though rural MDs generally practice in the town centers and are not readily available to the majority of the rural population. It is estimated by some that, "... a minimum of three million persons in the rural areas have no ready access to a MD.""

"The [central] government's per capita expenditure in the health sector varies from one department to the next with the per capita expenditures for Guatemala City being at least six times higher than for the various Highland departments. There are efforts to overcome this maldistribution and to get physicians out to the rural areas as a three month obligatory service by last year medical students as well as an attempt to establish a six month rural obligatory service for interns. Though these are commendable efforts, they do not really begin to meet the real health needs of the people in the Highlands. It must also be

mentioned that a number of rural government centers and 

*uestos de salud* - though staffed by physicians and nurses - often do not have medicines necessary for treatment and in many towns where there are government health posts there are no pharmacies."

36. Official estimates show that some 96.5 per cent of the indigenous people in Mexico who live in small rural towns or in marginal neighbourhoods do not have basic sanitary services such as potable water, sewerage and sufficient living space. Running water, gas and other urban services are practically unknown among the indigenous population. Most Indians are not covered by social security since they are either independent or temporary workers. Therefore, they depend on the medical posts established by the Secretaria de Salubridad y Asistencia and Instituto Nacional Indigenista. The Government has stated, however, that its medical services have never reached all of the indigenous population and that some 53 per cent of that population (as of 1977) had more inhabitants per doctor and higher general mortality rates than the rest of the population. 

37. In its report to the VIII Congreso Indigenista Interamericano, the Government of Bolivia recognized that health care for the indigenous population was still in the initial stage since there were insufficient funds to provide care in rural areas. Though in some areas medical posts have been established in recent years, there are not enough doctors or paramedical personnel to man the rural health centres. The Government has attempted to remedy this situation by requiring that each doctor spend a year in rural service before receiving his degree, but this and other measures have not been successfully enforced. 

38. This lack of qualified medical personnel often seems to be compounded by the lack of qualified pharmacists in rural areas. Further, the circumstances under which drugs are distributed in the rural areas of many countries constitute a health hazard. As an example of the global situation, it may be useful to quote here what has been stated about Bolivia:

"In the Altiplano towns, and occasionally in the cities as well, the pharmacy may represent a hazard as well as a cure. Most drugs are available without prescription, and the druggist may also


be a traditional practitioner. In the La Paz press a regularly carried advertisement concerns a product guaranteed to restore male virility. In the towns, sophisticated but little-tested European drugs are available and the prescribed doses are given in languages certainly meaningless to the druggist as well as to the purchaser who, as often as not, is illiterate. The druggist has often received some training, however, and the products sold are frequently of value. Hazardous as they sometimes are, the village store products probably save many more lives than they destroy. 10/

39. Other services such as potable water, sewerage and refuse collection are in general also seriously inadequate in rural areas. To illustrate this situation, the following statement relating to Bolivia is quoted but it should be emphasized that a similar situation prevails in many other countries:

"In the early 1970s the water and sewerage systems were seriously deficient. Virtually all of the rural and most of the urban populations had direct access to neither, and OAS had estimated that 15 per cent of the country's disease could be attributed to unsafe water. According to official data, in 1969 about 34 per cent of the urban population was served by water systems, and about 21 per cent had sewerage outlets. In rural areas, service in both was virtually nil.

"...

"Water, sewerage, and refuse collection are conveniences available only in the larger urban communities. Only a small proportion of the farm population has provided itself with latrines, and few public facilities are available in cities and towns.

"The best sewerage is provided in Santa Cruz, where a model system was installed in 1970 with IDB assistance. There are no sewerage mains other than those in La Paz and the department capitals, and the manual for public health doctors noted that in the late 1960s no more than 4 per cent of the rural population had any installations for the disposal of human wastes.

"Refuse collection in the larger urban localities is generally satisfactory, although it is in some part accomplished by private contractors. In towns and villages much of the refuse is simply thrown into the street, where it is devoured by dogs and pigs. In general, economic imperatives are such that very little trash and garbage are generated. Empty tins, bottles, and cartons find ready use, and animal excrement is used for fuel or fertilizer." 11/

40. The lack of sufficient resources to pay for adequate medical services is underlined in other countries. Thus, in the United States, although the Government has noted that the Indian Health Service provides free medical preventive and curative services and has asserted that "few other citizens of the United States have similar opportunities", it has been affirmed that the statement is misleading and that Indians actually have inferior health services.

41. In fact, a publication contains the following statements:

"It is a distortion to say that few other citizens of the United States have similar opportunities for health services. Although there are many problems in the health delivery system, most Americans can afford minimal health services and virtually all employed Americans have some form of health insurance. The Indian unemployment rate is high; physical conditions of living are bad, and disease is rampant. Many Indian Health Service hospitals are antiquated and inadequate.

"Most Indian Health Services hospitals are understaffed having neither enough doctors nor nurses to provide adequate coverage. The shortage of nurses sometimes approaches dangerous levels. The statement that 'indigenous personnel living in non-reservation areas avail themselves of existing medical and health facilities in the same manner as other citizens' is also exceedingly misleading. A very high percentage of these 'personnel' are poor and cannot afford private medical care. Almost without exception public medical care in the cities of the United States is extremely substandard compared to the rest of the world.

"It is also worth noting that many of these people living in poverty in the cities are there because they are induced to move there by the Federal Government". 12/

11/ Ibid.
3. The impact of de facto discrimination on indigenous health

(a) Preliminary remarks

42. The effects of de facto discrimination or inequalities in the provision of services or facilities can be more devastating in the area of health than in any other. The lack of adequate health and medical care and related social services is reflected in life expectancy figures, infant mortality rates and other demographic information. In general terms, life expectancy is lower and infant mortality higher outside the urban areas. This is generally due to the fact that health and sanitary conditions are worse in the rural areas. In most countries, the unfavourable situation is further accentuated among the indigenous populations, because health and sanitary conditions in the areas they inhabit are even worse than elsewhere.

43. Governments are generally aware of the gravity of health problems in rural areas and particularly among indigenous populations, even without the aid of fully dependable statistics. Reliable official statistics on indigenous populations or, in general, on rural inhabitants were totally unavailable or explicitly not very reliable for many of the countries included in the study. The difficulty in gathering statistical data on scattered and sometimes mobile populations, as well as the paucity of funds generally devoted to that purpose, explain in part the non-existence or lack of reliability of such information. In any case, whenever information was available in the form of mortality and morbidity rates and on the incidence of nutritional deficiencies in indigenous peoples, it was impossible to compare the data from country to country and even, within countries, from region to region, either because of the different approach taken in gathering the data or because of the differences in the periods covered. In consequence, statistical data have been included only in the few cases where they seemed to be beyond serious dispute. No attempt has been made to draw any conclusions of a comparative scope. It is clear though, that mortality and morbidity rates are higher and that life expectancy is lower for indigenous populations than for the other population groups in all countries covered by the study, even as compared with other rural (non-indigenous) population groups.

44. In the paragraphs below, governmental and non-governmental sources are cited as evidence of the effects on the indigenous population of unequal or inadequate provision of health and medical facilities and related services.

(b) Information available

45. According to a non-governmental organization, the morbidity rates of isolated communities in Indonesia are higher than those of society as a whole, but the same report remarks that isolated groups living as nomadic farmers (with hunting and gathering activities supplementing their protein intake) often have a better balanced diet, and consequently better health, than non-tribal peasants in the same area. 13/

13/ Information furnished on 23 September 1976 and 24 April 1977 by the Anti-Slavery Society.
46. Noting the difficulty in providing statistical data, the Government of Costa Rica points to high mortality rates and serious deficiencies in health measures and nutrition among the indigenous population:

"It is difficult to provide statistical data on health, dietary and nutritional patterns, but we are aware that there are serious difficulties in these areas: poor food, lack or misuse of latrines, nutritional deficiency.

The morbidity and mortality rates of the indigenous segments of the population are the highest in the country, since they are a marginal group compared with the non-indigenous inhabitants, and their coverage by the national health programmes is therefore envisaged. These problem areas are affected by lack of communication through the indigenous languages, inaccessibility of the regions they inhabit and other factors. It should be noted that there is no specific census for the indigenous segments of the population."

47. According to an official statement, the infant mortality rate among the Amazon Indians of Brazil was reduced from 183 to 87 per thousand in the period 1973-1977. The latter figure would place the Amazon Indian in a situation comparable to that of the inhabitants of the predominately rural and impoverished north-eastern region of Brazil. Both regions compare unfavourably, though, with other areas. 14/

48. On the basis of official data, one writer has found that "Indians in Guatemala had a life expectancy about 11 years shorter than did Ladinos [non-indigenous population] at birth (38.34 and 49.66 respectively) as well as about 9 years shorter at age five (46.84 and 56.04 respectively)". These differences were attributed to the standard of living as well as the fragmentary nature of the data. 15/ Another author comments on some of the factors which contribute to higher mortality rates among the indigenous population of Guatemala:

"As in most developing countries 'morbidity and mortality' are associated with enteritis and other diarrhetic illnesses, respiratory infections, pneumonia and infectious diseases of early childhood such as measles and whooping cough, a great number of which can be easily recognized and treated by people with far less training than a physician.

"The basic underlying contributory factor is 'malnutrition'. The Nutritional Institute of Central America and Panama (INCAP) [has stated] that more than 70 per cent of all Guatemalan children under five years old were malnourished. The death rate of children under five is one of the highest in all Latin America totaling approximately 50 per cent of all deaths.


"Only 43 per cent of the urban and 0.6 per cent of the rural population has piped water and thus it is evident that lack of public sanitary facilities as well as malnourishment are underlying causes of the high rates, and the types of morbidity and mortality.

"These statistics are much more drastic when considering just the Highland rural areas. The infant mortality rate, for example, is even higher in the rural areas than the large number officially recorded since in a great number of Highland communities the birth of a child is not recorded until it is at least 15 days old and should it die before that time no record is made either of the birth or of the death. The infant mortality rate is 50 per cent or more in many communities." 16/

49. "Mortality and death rates are higher among the indigenous than among non-indigenous segments of the population of Bolivia, particularly because of the prevalence of diseases such as whooping cough and measles among infants. The Government has recognized that maternal and infant care and other health services have not reached the indigenous population and that traditional medicine predominates in the rural environment. 17/ Another official report has stated that the social security system does not cover the rural worker, but that such coverage is contemplated. Malnutrition is another major problem among the rural population:

"In urging the public health authorities to expand their studies in nutrition, a La Paz newspaper in 1971 attributed many of the country's social and economic problems to quantitative and qualitative food deficiency and estimated that two-thirds of the population suffered from some degree of malnutrition. The proportion seems excessive, but malnutrition is known to be widespread, particularly among children. A 1965-68 Government survey found that 38 per cent of the rural children under the age of 15 suffered malnutrition of the first grade (10 to 25 per cent under normal weight), 17 per cent suffered second grade malnutrition (25 to 40 per cent under weight), and 4 per cent suffered malnutrition of the third grade (40 per cent or more under normal weight)." 18/

50. Peru, which has a large indigenous population, has a high infant mortality rate owing to preventable disease, malnutrition, the lack of proper sanitation measures and medical attention:

"The country is still in the stage where preventable diseases represent an important health problem. Malnutrition, another standard index of poor health conditions, is widespread. A high potential rate of natural increase - the birth rate is close to 4 per cent - is countered by the great number of deaths among infants and young children. Figures on the average lifespan are not available, but presumably the life expectancy

16/ K. Heggenhongen, op. cit., p. 305.
17/ Informe Nacional de Bolivia, op. cit., p. 38
18/ Weil and others, Area Handbook for Bolivia, op. cit., p. 166.
is comparatively low, especially in the Sierra. In general, information is incomplete, as reporting facilities are not well developed in many areas, in itself an indication of conditions. According to official estimates, medical certificates are issued for only 33 per cent of the births and 44 per cent of the deaths.

"During the last decade the death rate has been estimated at between 11 and 12 per 1,000 inhabitants. Although deaths among those over 50 years of age account for 25 per cent of the total, those among children under 5 account for 52 per cent. Infant deaths alone amount to approximately one-third. The national infant mortality rate is close to 100 per 1,000, but variation from region to region is considerable. In Lima the rate is approximately 67 per 1,000, but in some rural areas it goes as high as 200 per 1,000. The nature of the care given to mother and child is a key factor.

"Outside the Lima and Arequipa areas, most women continue to have their babies at home, and a medical doctor is in attendance in only a small minority of home births. Midwives are called in the majority of cases, but rather frequently women give birth completely unattended. In these instances, programmes of parental care are seldom practiced and delivery techniques are unsanitary. After birth many infants, especially in rural areas, are constantly exposed to an unhealthy physical environment. The maintenance of personal hygiene is often casual. The available water supply may be contaminated. After weaning, milk is more often than not absent from a diet which differs very little from that of adults." 19/

51. The Anti-Slavery Society has reported alarming infant mortality rates among various Indian groups in Paraguay:

"Infant mortality: Pañ-Quarani 50 per cent before the age of 2 years; Puerto Casado (zone of about 1,500 Indians in the Chaco): Over 50 per cent; Ayoreo of El Faro Moro: 21 per cent until the age of 5 years (not counting babies who died shortly after birth). These figures, from groups who are not in extreme situations, must be compared with the infant mortality rate of the non-indigenous population of Paraguay, which is 21 per thousand." 20/

52. The same organization cites tuberculosis as one of the major health problems among Paraguayan Indians:

"TB: One of the greatest health hazards in indigenous groups, usually explained by poor housing, lack of nourishment, and perhaps also alcoholism. There are few exact statistics, but observers agree that TB is more widespread among Indians than among non-Indians. Among the indigenous inhabitants of the Mennonite zones in the Chaco, PPD tests had positive results for 50 per cent - compared with only 10 per cent among the white Mennonites of the same zones." 21/

19/ Erickson and others, Area Handbook for Peru, the American University, Washington D.C., p. 51.
20/ Information furnished on 3 September 1976.
21/ Ibid.
53. Serious nutritional deficiencies among Paraguayan Indians are directly related to high infant mortality and tuberculosis. A detailed nutrition study exists on the indigenous population of Misión Santa Teresita and Filadelfia of the Western Guaraní and Nivaklé ethnic groups, which can be considered to be an unusually well situated section of the Indian population. The study was written in 1965, but the comparison between indigenous and non-indigenous nutrition still appears to be relevant today.

<table>
<thead>
<tr>
<th>Daily intake for the indigenous population</th>
<th>Daily intake for the non-indigenous population in the same zone (excluding Mennonites)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Calories: less than 1,700</td>
<td>2,350</td>
</tr>
<tr>
<td>Calcium: 176 mg.</td>
<td>516 mg.</td>
</tr>
<tr>
<td>Phosphorous: 722 mg.</td>
<td>1,026 mg.</td>
</tr>
<tr>
<td>Proteins: 59.3 g.</td>
<td>63.4 g.</td>
</tr>
<tr>
<td>Oils and fats: 58.9 g.</td>
<td>54.3 g.</td>
</tr>
<tr>
<td>Vitamin A: 132 mg.</td>
<td>810 mg.</td>
</tr>
<tr>
<td>Vitamin C: 25 mg.</td>
<td>366 mg.</td>
</tr>
<tr>
<td>Thiamine: 0.72 mg.</td>
<td>1.39 mg.</td>
</tr>
<tr>
<td>Riboflavin: 0.82 mg.</td>
<td>1.28 mg.</td>
</tr>
</tbody>
</table>

The comparison shows remarkably better nutrition for the non-indigenous population. It must be noted that the Indians in question are no longer very dependent on their traditional economic activities, but are mainly labourers working for the non-indigenous population. This example, the best documented to hand, is not the only one: Mr. John Renshaw notes "some nutritional deficiencies, anaemia, and possibly protein shortages" among the Ayoreo of Marfa Auxiliadora in the Chaco in 1975. It must be noted that this deficiency is not due to traditional eating habits of the Ayoreo, as these provided a well-balanced diet. About the Indians of Puerto Casaco, Mr. Renshaw writes: "All the population appears undernourished, even the young and the elderly who are fed by the mission.". As for the Pai, Proyecto Pai-Tavyterá stated in 1975 that the high percentage of pulmonary TB among the Pai-Tavyterá is closely linked to intense deterioration of the nutritional system... The most frequent diseases of nutritional origin are malnutrition and avitaminosis. 22/

54. Although no separate statistics are kept on the Lapps, the Government of Finland has reported that their health, dietary and nutritional patterns "differ to some extent from those of the other population due to the fact that they are still, more than others, living on the basis of natural economy". The Government has also declared that the mortality rate of the Lapps is "somewhat higher than that of the other population".

22/ Ibid.
55. In the United States, one study shows important dietary deficiencies among Indian children and a higher infant mortality rate than among non-Indians:

"Poverty spawns squalid living conditions and a multitude of manifestations of ill health. Nowhere is this more tragic in America than among Indian children from conception to school age. Studies in South Dakota and Arizona specify some of the consequences of poverty on the health of Indian children. Of 190 Pine Ridge children who were born in 1964 and tested, 40.5 per cent had hemoglobin determinations below 10 grams, and 15.8 per cent had determinations below 8 grams before the age of two. In Arizona, at Tuba City Hospital, of 676 Indian children below the age of 4 discharged during the 10-month period in 1967, 44 suffered from malnutrition, 38 had iron deficiency anemia, 13 under 1 year manifested marasmus and 8 had incurred kwashiorkor. Of 1,591 Indian children 5 years or older who were discharged, 44 suffered from anemia and 2 from malnutrition. Of 4,335 Indian admissions in a 5-year study, 616 suffered from malnutrition, 44 had incurred kwashiorkor or marasmus, and 572 were small for their age. And at Window Rock, Arizona, 20 per cent of the Indian children hospitalized evidenced malnutrition and 10 per cent of those under 4 suffered iron deficiency anemia. Ten per cent of the Window Rock women tested had iron deficiency anemia, portending the continuation of the cycle.

"The death rate for Indian children under 14 is almost two and one-half times that for all American children under 14, and in every category of medical illness studied for the White House Conference on Children in 1970, Indians (grouped with Alaskan natives) had a higher death rate. As for Indian survival generally, a larger percentage die in their teens, twenties, thirties and forties than is true for the rest of the population, and Indian life expectancy over-all is 44 years. But although the Indian must contend with earlier death and more diseases, he has little or no life or health insurance and in most cases is in debt for medical services already rendered." 23/

56. Although there is a stable Indian population growth rate in Canada, a non-governmental organization has declared that Indian mortality figures are significantly higher than those of the remainder of the population:

"This population increase has taken place in spite of mortality figures which are higher than for the rest of Canada according to figures provided by the Department of Indian Affairs Statistics Division and Statistics Canada. Based on mortality figures for registered Indians available from six provinces and the two territories, their mortality rate was 0.32 per 1,000 in 1973, compared to 7.42 per 1,000 for other Canadians. Infant mortality was four times higher among Indians, 62.12 per 1,000, compared with 15.3 for all infants in Canada. There was a higher incidence of violent deaths among Indians than among non-Indians in 1973, these occurring 3 to 6 times more often among people in the 20-39 age group. Deaths by homicide, suicide and accidents of all kinds occurred on an average of about 2.3 cases per 1,000, as compared to .74 per 1,000 for other Canadians." 24/


57. The Government of Canada has also recognized the relationship between poor health conditions and high mortality rates among Indians:

"The situation remains that health conditions among native people are generally poorer than among the white population. Thus the infant mortality rate in 1968 was 21 per 1,000 live births for all Canadians, 49 per 1,000 for Indians and 89 per 1,000 among Eskimos. However, the mortality rate had declined over the previous decade: for Indians it had declined from three times the national average to just over twice the rate. There is also a higher than average mortality rate in the 20-23 years age group and a much higher incidence of death and injuries from accidents associated with violence or severe climatic conditions."

58. In Canada, despite increased and improved medical and health services rendered to indigenous populations on reserves, the situation in 1981 was still far from satisfactory, since according to an official publication: 25/

"In 1961, life expectancy for Indians under one year was approximately 10 years less than that of the national population, although for Indians surviving to middle age, additional life expectancy was only slightly below the national. By 1971, both Indian and national populations had increased their life expectancies, although the gap between the two populations remained the same Indians surviving to 80 years had a greater additional life expectancy than the national population, suggesting that:

- health conditions are improving for Indians but are still significantly below national levels
- high infant and youth mortality appear to be the major reasons for lower Indian life expectancy.

Death rates for Indians, despite improvements over the past 10 to 20 years, remain well above the national average. For all age groups (except those over 65, where the Indian rate is only slightly higher than the national), Indian death rates range from 2 to 4 times the national average.

The leading causes of perinatal (foetal deaths of 28 or more weeks' gestation plus infant deaths under 7 days of age) and neonatal mortality (deaths under 28 days of age) for both Indian and national populations are complications at birth and congenital anomalies, accounting for more than 75 per cent of perinatal and neonatal deaths.

A larger proportion of post-neonatal mortality (deaths from 1 month to 1 year) in the Indian population is attributed to respiratory ailments and infectious or parasitic diseases, reflecting poor housing, lack of sewage disposal and potable water, as well as poorer access to medical facilities.

25/ Department of Indian and Northern Affairs Canada. Indian conditions. A survey. Published under the authority of the Minister of Indian Affairs and Northern Development, Ottawa, 1980, pp. 15-20.
Lowered perinatal and neonatal mortality has kept pace with national improvements, although the Indian rate is currently approximately 60 per cent higher than the national.

Post-neonatal mortality nonetheless has shown great improvements for Indians, plummeting from 6 times the national rate in 1963 to approximately twice the national rate in 1977.

Accidents, violence and poisonings account for over one-third of all deaths among Indians compared with 9 per cent in Canada as a whole.

Respiratory and digestive system diseases have decreased significantly as causes of death and, in the Indian population, are now comparable to the national rates.

Indian rates of death from cancer and circulatory diseases are less than half the national rate.

The number of Indian deaths due to suicide per 100,000 population is almost 3 times the national rate. Suicides account for 35 per cent of accidental deaths in the 15-24 age group and 21 per cent in the 25-34 age group.

The overall rate of violent deaths for Indians is more than 3 times the national average. These deaths may be comparable in non-Indian rural and remote populations where there is:

- greater use of firearms for hunting
- substandard housing and heating systems
- inadequate fire-fighting equipment
- poor access to medical assistance.

Violent deaths among Indians are higher than in the national population at all age levels. With the exception of those over 65, violent deaths among Indians range from a low of 3 times the national rate in the 5-14 age group to a high of between 4 and 5 times the national rate in the 15-44 age group.

For Indians 1-14 years, burns, drowning and motor vehicles accounted for 69 per cent of accidental deaths.

For Indians 15 years and older, the leading causes were motor vehicle accidents (29 per cent), drowning (10 per cent) and firearms (9 per cent).
Indians use hospitals about 2 to 2.5 times more than the national population, but on the average stay less time (7.3 days compared to 9.1).

The high incidence of respiratory ailments, infectious and parasitic diseases and digestive disease may reflect poor or unsanitary housing and living conditions.

The high incidence of childbirth complications may indicate malnutrition and lack of prenatal care.

The high accident rate may reflect the hazards of a rural and remote lifestyle, which includes high use of firearms for hunting, higher fire risk and poorer access to medical facilities.

59. There is very little information on off-reserve health conditions and services. Among the data appearing in the same publication some refer to the implications of life off-reserve and others to hospitalization rates in British Columbia as follows:

"OFF-RESERVE: IMPLICATIONS"

"A significant proportion (almost one-third) and an increasing number (almost 80,000) of Indians fall outside the program jurisdiction of Indian Affairs by virtue of living off reserves.

"Migration off reserves, in particular among young entrants into the labour force, will likely continue at high levels as long as employment opportunities on reserves remain poor.

"Improvements in the employability of Indians, such as better education and better skills in English or French in the absence of other on-reserve improvements (e.g. employment opportunities on reserve, effective band government, urban access), will encourage further off-reserve migration.

"Since conditions for Indians off reserves in terms of education, employment, income and housing appear to be only modestly better than for Indians on reserve, poor on-reserve conditions appear to be the major factor in migration off reserves.

"The contrast between Indian and non-Indian living conditions is sharper and more apparent in urban centres."
"HOSPITALIZATION

B.C. Off-Reserve Indians Compared to Provincial Rate

1971

"INDIAN RATE (PROVINCIAL RATE = 1)"

<table>
<thead>
<tr>
<th>AGE (Years)</th>
<th>MEN</th>
<th>WOMEN</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>15-24</td>
<td>3.64</td>
<td>2.45</td>
<td>2.82</td>
</tr>
<tr>
<td>25-44</td>
<td>5.19</td>
<td>3.96</td>
<td>4.30</td>
</tr>
<tr>
<td>45-59</td>
<td>4.78</td>
<td>2.94</td>
<td>3.86</td>
</tr>
<tr>
<td>15-59</td>
<td>3.97</td>
<td>3.21</td>
<td>3.48</td>
</tr>
</tbody>
</table>


"In Stanbury's sample, one-third indicated they had, in their own perception, been ill in the previous 12 months. More women (42 per cent) reported illness than men (27 per cent).

"The healthiest off-reserve Indians in B.C. were those living in prisons. Only 12 per cent of this population indicated they had been ill in the previous 12 months.

"Indian women off reserves visited doctors an average of 6.14 times a year compared with 3.34 times for the men in the Stanbury sample, with higher rates for the elderly, the lower educated, and those living in smaller centres.

"Medical insurance was held by 82.7 per cent of the B.C. sample of off-reserve Indians. Those without insurance averaged 2.74 visits to a doctor per year, while those with insurance had an average of 5.02 visits per year." 26/

26/ Ibid., pp. 144 and 147.
4. De jure discrimination related to health, medical and social services

(a) Preliminary remarks

60. In a number of countries considered in the present study, there are laws in the area of health and social services which specifically provide for unequal treatment of indigenous people as compared with the non-indigenous population, or of some indigenous groups as compared with other segments of the indigenous population. These laws may, of course, not be qualified as discriminatory unless they create clearly unfavourable distinctions which are arbitrary, invidious or unjustified with regard to the groups concerned. Special measures designed to protect or aid disadvantaged groups, it must be borne in mind, would not be classified as discriminatory so long as they do not continue in effect longer than necessary.

61. The following subsections consider two types of laws which affect indigenous populations in several countries and which have been called discriminatory. They deal with legal provisions explicitly establishing restrictions, limitations or prohibitions for indigenous people that do not apply to non-indigenous people and with the explicit restriction of health, medical and social services to certain segments of the indigenous population while other segments of those populations are ignored.

(b) Restrictions on the sale or the consumption of alcoholic beverages

62. A few countries report that legal provisions on the sale or consumption of intoxicating beverages and other toxic substances apply equally to all segments of the population, whether they are indigenous or non-indigenous.

63. While in Bangladesh there is a general prohibition in this respect since, according to information provided by the Government, in that country, "intoxicating beverages, use of drugs and narcotics, etc., are prohibited by law and the prohibition is applicable to all citizens alike", the Government of Finland has stated that in that country "there are no special restrictions on the possession or consumption of intoxicating beverages and other toxic substances that would be imposed only on the Lapps". Similarly, the Government of Mexico has indicated that there are no prohibitions or restrictions on the possession or consumption of intoxicating beverages or drugs that do not apply to the population as a whole. 27/

64. In those countries where special restrictions, limitations or prohibitions do apply, they appear to be based on special areas, 28/ special population groups, 29/ special persons, groups or areas, 30/ or special persons, gatherings or places under given circumstances. 31/

27/ It would seem that a very similar situation prevails in Argentina, Bolivia, Chile, Colombia, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru and Venezuela.

28/ As in Australia, Costa Rica and Denmark.

29/ As in Brazil.

30/ As in Malaysia.

31/ As in New Zealand.
65. With regard to those countries in which the restrictions, limitations or prohibitions apply in specified areas, the Australian Government has stated that "Western Australian legislation restricting the supply of liquor to Aborigines on reserves, namely section 130 of the Liquor Act 1970, was repealed by section 32 of Act No. 76 of 1972 of Western Australia." It noted that restrictions on the consumption of liquor on reserves still existed in the mid-1970s in the Northern Territory and the States of Queensland and South Australia.

66. During his official visit to Australia (June 1973) the Special Rapporteur was told in Maningrida (Northern Territory), by members of the local Aboriginal Council, that control of alcoholic beverages was used by the police as a pretext to search Aboriginal persons' baggage whenever they returned to Maningrida from a visit to other localities. Non-Aboriginals, they said, were not subjected to this search. They communicated their desire to have this practice discontinued, as, in their words, they rejected the idea of being "second class citizens".

67. In this respect the Government states (1975):

"The practice of police searching Aboriginals' baggage for liquor was commenced at the request of the Maningrida Aboriginal Council, and could be revoked by the Council. Some people at Maningrida, including some members of the Council, did not approve of the Council's decision. Some other communities have considered attempting to control the importation of liquor in this way, but the practice is not widespread."

68. In order to prevent alcoholism and the exploitation of Indian communities by outsiders who promote the sale of alcoholic beverages, the Government of Costa Rica has prohibited the sale of alcoholic beverages in Indian reservations by Decree 5904-D as modified by Executive Decree 6036-C:

"Article 6 - No person or institution may establish, de facto or de jure, bars, or sell alcoholic beverages, within indigenous reservations. This law cancels the existing possession or concession of licences for domestic and foreign liquors and the transfer of liquor licences within the reservations."

69. According to the Government of Denmark, the sale and serving of alcoholic beverages in Greenland is limited by a system of rationing which went into effect on 1 August 1979 and was amended in October 1979. Authorizations for the purchase of alcoholic beverages are allocated on the basis of age or conviction for certain criminal offences, rather than membership of an indigenous group. However, on the recommendations of some municipal councils rationing is more rigorously applied in certain areas.

70. An example of application to specific population groups only is to be found in Brazil which, in its special protective legislation, distinguishes between "tribal groups" or "non-integrated Indians" and those who are considered "integrated" into society. Article 53 (III) of Act No. 6001 provides the following:

"The following constitute crimes against the Indians and native culture:

"..."

"III. To foster by any means the use and spread of alcoholic drinks in tribal groups or among non-integrated Indians. Penalty: Six months' to two years' imprisonment."
71. A wider range of possibilities including persons, communities or areas is provided by the Aboriginal Peoples Ordinance of Malaysia which gives the appropriate Minister broad regulatory powers to prohibit or restrict the sale of alcoholic beverages or an indigenous person, community, area or reserve, as follows:

"The Minister may make regulations for carrying into effect the purpose of this Ordinance and in particular for the following purposes:

"...

"(m) prohibiting either absolutely or conditionally the sale or gift of any intoxicating liquor as defined in any written law relating to excise for the time being in force in the States of Malaya or any part thereof to any specified aborigine or aboriginal community or within any aboriginal area, aboriginal reserve or aboriginal inhabited place;"

72. According to the Government of New Zealand, the general prohibition of the sale of liquor to Maoris no longer exists, but there are still certain legal restrictions under the Maori Welfare Act of 1962 which are intended to control excessive drinking. These restrictions apply to individuals, certain kinds of gatherings or licensed premises under certain circumstances.

"... the Maori Welfare Act 1962 made provision for the appointment of Maori wardens with certain powers to control drinking by Maoris. The Act and its amendments provide that the Maori wardens must be Maoris. They are appointed by the Minister on the nomination of a District Maori Council and are responsible to that Council. Maori wardens are authorised to enter licensed premises (i.e. licensed to sell liquor) and to warn the licensee or any of his servants to abstain from selling or supplying liquor to any Maori who, in the opinion of the warden, is in a state of intoxication or is violent or quarrelsome or disorderly, or is likely to become so. It is an offence to disobey a warden. The warden may also order a Maori to leave licensed premises if he appears to be intoxicated, violent, quarrelsome or disorderly. If the Maori refuses to leave the premises he commits an offence against the Act and the warden may request a member of the Police Force to expel him. The Act also provides that drinking or having possession of liquor at a Maori gathering is an offence unless a Maori Committee appointed under the Act has issued a permit for liquor to be consumed at the gathering. But only the Maori Committees are empowered to lay charges under the Act, and before dealing with an offender a Committee must give him the option of having a penalty imposed by the Committee after a hearing and the giving of his defence, or having the matter dealt with in the Magistrate's Court. If a penalty is imposed by the Committee the Act provides for that penalty to be enforced by the Magistrate's Court in the event of non-compliance by the offender. The Act provides that no person shall be punished for the same offence by both a Maori Committee and a Magistrate's Court. Penalties imposed by Committees are limited to a fine not exceeding $40.
"The general effect of this legislation is to provide a more preventive system in relation to drunkenness or likely drunkenness than exists under the general law (such as the provisions in the Police Offences Act regarding intoxication) applicable to all persons." 33/

73. The Government adds that in the early 1970s, during a review of legislation affecting Maoris,

"the Government proposed to repeal these provisions in the Maori Welfare Act and to do away with the powers of Maori wardens and Maori Committees, having regard to the fact that the legislation could be considered discriminatory. There was, however, an immediate reaction from Maori organisations throughout the country. The organisations argued that the legal provisions should remain in force, on the grounds that the excessive use of alcohol was a social problem amongst their people and that, although the situation was improving, they felt that it was not yet time to remove the special provisions. They pointed out also that although the legislation applied only to Maoris, the powers accorded by the Act are in the hands of Maoris. They considered that it was better that this problem should continue for the meantime to be handled by the people themselves. The legislation remains in force, but the provisions referred to are to be reviewed from time to time with a view to repeal when they are no longer necessary."

74. Although this legislation apparently represents the wishes of the Maori community for protective legislation in this area, the system has been criticized on the ground that criminal liability depends in some cases upon the race of the defendant and some objection has been made to the existence of a special tribunal and enforcement agency.

75. The Government has replied to these objections as follows:

"... While it is realised that this legislation could possibly be described as discriminatory, it should be noted that it was originally passed at the request of Maori leaders who felt that the Maori people as such have some modest form of control over their own communities. At that time, most Maoris actually lived in Maori villages and the legislation played quite an important part in social control. ... [Some] years ago the then Minister of Maori Affairs suggested that the time had come when the legislation should be repealed, especially in view of the fact that so many Maoris now live in urban areas. However, there was a strong objection from the Maori people to this proposal. They felt that the misuse of alcohol was still a problem amongst their people and they wanted to continue at least for the present some form of internal control. The jurisdiction of the Maori committees to hear offences is being reconsidered at the present time and will be discussed with the Maori organisations."

33/ The Government states that "before the arrival of Europeans in New Zealand the Maoris had no form of alcohol or drugs. However, in some sections of the Maori community the excessive drinking of alcohol later became and, to a lessening degree, still remains a social problem." It was to meet this situation the Government states, that the Maori Welfare Act 1962 made provisions for the appointment of Maori wardens with certain powers to control drinking by Maoris that are described by the Government in its information.
(c) Restriction of services to recognized or registered members of indigenous groups

76. Another type of de jure discrimination is the legal or administrative distinction which denies eligibility for special governmental services to members of indigenous groups who do not live on reservations or reside in isolated areas. The question is whether such distinctions have a rational purpose which outweighs the right of an indigenous citizen to live off the reservation or in an urban area.

77. The Government of Canada recognizes that under the present system many Indians are ineligible for various health and social services:

"The most serious gap in health service relates to eligibility under the Medical Services Branch, which is designed to cover mainly Eskimos and registered Indians living on reserves or in isolated areas who cannot provide for themselves. This excludes Indians with adequate income, enfranchised Indians, Métis and Indians living off the reserve. The Métis and non-status groups suffer from this arrangement in that some provincial authorities still regard them as Indians, a federal responsibility - most live like the poorest group of registered Indians and are left without services. Similarly the off-reserve Indians are expected to qualify for the common social services of the community after one year's residence, but since many live in squatters' fringe areas and are not absorbed into the community their needs tend to be ignored and neglected."

78. Eligibility for federal health services for indigenous people in the United States depends on whether a person is classified as a federally recognized Indian, as explained in the following statement made at a non-governmental conference:

"...federally recognized Indians are entitled to comprehensive health benefits (medical and dental care); this program is administered by the Indian Health Service, located in the United States Department of Health, Education and Welfare (HEW). Prior to the establishment of HEW in 1955 the Bureau of Indian Affairs administered the Indian Health Service. Non-federally recognized Indians constitute the majority of the United States Indian population; they include those in urban and rural areas and those who had signed treaties with the state governments. State governments are responsible for providing health services for these Indians, and in many instances health benefits are inadequate." 34/

79. Other Indians in the United States, particularly those who live off the reservations and in urban areas, have been excluded from federal health services by administrative decisions or regulations, as described in the following excerpt from an indigenous publication:

"The shortage of funds, facilities, and personnel has caused HEW to refuse services to certain groups of people who believe they are entitled to services - especially the group known as 'urban Indians'. Removal from the health facilities on the reservation, poor as they may be, and unable to pay the costs of medical care in the cities, urban Indians often find themselves in chronically poor health in the city environment."

"To remedy the discrimination against them by IHS's master agency, the Department of Health, Education and Welfare (HEW), the National Indian Youth Council has instigated two class-action suits against the department in Albuquerque, New Mexico on behalf of the 440,000 urban Indians in the U.S.

"One suit, a civil suit entitled Lewis v. Weinberger, seeks to compel the defendants to treat Indians eligible to receive medical services in line with the Snyder Act of 1921, and 'to give all such Indians equal considerations for services provided through the expenditure of contract health care funds.' Other suits are designed to force IHS to rewrite its regulations to remove current limitations. The cases are expected to be heard by District Judge Howard C. Bratton this June.

"The IHS now provides services via 51 hospitals, 86 health centers (including 26 in schools) and several hundred other 'health stations' across the U.S. Only persons 'residing on or near reservations' are deemed eligible for treatment." 35/

35/ "Newly passed Indian Health Act could signal better programmes", in Akwesasne Notes, vol. 7, No. 2, 1975, p. 37.
B. Special considerations in providing health services to indigenous populations

1. Preliminary remarks

80. In the provision of health, medical and other social services, Governments must give special consideration to the particular socio-cultural and physical environment of indigenous populations. Like other segments of the population of certain countries, indigenous peoples have special health care needs and problems which reflect their basic concepts and way of life. The fact that distinct health problems exist has been well stated by the Secretary for Health in the Northern Territory Government of Australia: "... our country is a land of contrast, on the one hand the affluent world of non-Aboriginals with near perfect environmental conditions strives for immortality while beset by new enemies such as alcohol and drug abuse, the internal combustion engine, pace diseases like hypertension, coronary occlusion, and mental breakdown, while on the other hand the Aboriginal world represents very much a nineteenth century picture where many of the early health battles still remain to be fought." 36/ The first step towards the establishment of effective health and medical services among indigenous peoples is the realization that a distinct battle is being fought. Such programmes will be successful only to the extent that they are responsive to special health problems in the context of the physical environment and the socio-cultural needs of the population concerned.

81. Practical considerations aside, a policy which consistently ignores the special health care needs of the indigenous population might well be defined as discriminatory. Furthermore, practice has shown that the imposition of the health service concepts and methods of another segment of society which show no regard for those of the indigenous population provokes resistance and misunderstanding and may well violate international norms for the safeguarding of cultural rights.

82. Subsection B considers the relevance and need to take account of socio-cultural factors such as traditional medicine and other beliefs and customs which have a bearing upon health care. It also discusses available information on special problems such as alcoholism and dietary deficiencies. The relationship of the physical environment to special health problems among indigenous peoples is treated in subsection C below.

2. The importance of the socio-cultural factors

(a) Traditional practices and beliefs

83. The existence of traditional health practices and beliefs among indigenous populations is an important factor which must be taken into account. The imposition of modern practices and wholesale rejection of traditional medicine has been one of the most serious shortcomings of governmental health and medical care programmes and reflects a bias against indigenous culture. In order to be responsive to indigenous health and medical needs, modern practices must be acceptable to those populations. It is clear that traditional practices which are found to be effective must be supported and encouraged. It is also clear that in many instances modern medical practices will enhance some aspects of traditional medical care. Modern practices are at times found to be lagging behind traditional practices and require renewed impetus and orientation to become more effective.

36/ Cited by Elizabeth Adler and others in Justice for Aboriginal Australians, report of the World Council of Churches team visit to the Aborigines, 1981, p. 36.
84. The importance of traditional practitioners is evident in the fact that still today 90 per cent of the childbirths in the world are assisted by traditional medical or paramedical practitioners. Many of the modern medicines (quinine compounds, curare, penicillin, etc.) were derived from substances that have been applied in curative and preventive practices for centuries up to centuries by indigenous people or were developed on the basis of such substances.

85. Obviously practices that are found to be harmful in themselves or in the specific socio-cultural context, be they traditional or modern, should be abandoned or de-emphasized. Positive and useful aspects of both medical practices must be emphasized and fully applied.

86. In their endeavours to bring the same primary and basic health and medical care to indigenous peoples as to other segments of the country's population, the appropriate elements of traditional indigenous medical practices and those of modern scientific medicine must be combined and harmonized in such a way as to achieve the utmost effectiveness.

87. A study prepared under the auspices of the World Health Organization underlines this problem and recommends a greater focus upon traditional medicine:

"There are those who take a hostile attitude towards traditional medicine, and those who, without reservation, accept all things handed down by tradition. Both of these attitudes are indeed wrong. The more realistic tendency which is emerging is discriminating and discards the crude and harmful practices while retaining the refined and useful methods for further development and application. The same applies to the clinical approach to modern scientific medicine, particularly in the developing countries, where not infrequently technical bias makes it incomplete and indeed potentially harmful because it pays little or no heed to socio-cultural factors, and focuses mainly on laboratory diagnosis.

"The belief that illness arises from supernatural causes and indicates the displeasure of the ancestral gods and evil spirits, or is the effect of black magic is still held by many communities in Africa, Asia and the developing world, and, to some extent, this is true also of the industrialized countries. It is therefore wrong to attribute magical, irrational and superstitious ideas to any group of countries or level of industrial or educational development. The evidence is that the two approaches to health care are complementary, and that with the swing of the pendulum greater attention should be paid to the traditional practices which bring comfort to very large numbers of people everywhere."

88. By its very nature, medical treatment is difficult to apply. The co-operation of the patient in the healing processes used is essential. Accordingly modern health and medical practices must be seen to be compatible with indigenous culture. Some aspects of this problem have been recognized in a study focusing upon Mexico but which would apply, mutatis mutandis, in all countries:

"Acceptance of modern medical practices depends to some extent on their ability to be incorporated into Indian theories of illness. Many patented and commercial medicines and some modern treatments by physicians have been interpreted as being within the hot-cold conception of disease and the maintenance of equilibrium within the body and incorporated into folk medicine. Other practices have been rejected because they conflict with prevailing beliefs. Indians who believe that disease is caused by supernatural forces or violations of the hot-cold principle cannot accept the modern belief that disease is caused by germs.

"Folk medicine is practised especially in rural areas. From an Indian and mestizo viewpoint, physicians are ignorant of many of the diseases, such as bewitchment and evil eye, which threaten the health of the individual. When physicians find nothing wrong with individuals who believe themselves to be suffering from these maladies, some rural dwellers question the powers of modern medicine. On the other hand, if traditional medicine fails to cure an illness, the aid of a physician will often be sought. However, the greater expense of modern health care usually limits its use to the most serious illnesses." 38/

89. Closely related to the failure to consider traditional practices and beliefs is the lack of attention to more general cultural differences which may create psychological barriers to the acceptance of governmental services. This type of culture shock experienced by Australian Aborigines is described by a Mission of the World Council of Churches:

"Aborigines do not find existing health care relevant to their needs. Before the Federal Department of Aboriginal Affairs (DAA) was established in 1968 little recognition was given by the State Governments to the special health needs of Aborigines. But since then, large sums have been provided by DAA for Aboriginal health care. Aware that these programmes are now in operation we asked Aboriginal communities what the problems were with the kind of health services provided. The answers were:

- "Aboriginal people feel insecure in clinics and hospitals where they are taken care of by all white staff. They would rather not receive any treatment than go to such places and are also afraid of interference in their personal lives (e.g. by family planning). Some told stories of nurses taking away their children;

- "The approach to health care for Aboriginal people has generally been a technical one - enlarging health care facilities, building bigger and more specialized hospitals in predominantly white cities and towns. The atmosphere in such institutions is impersonal. Aboriginal patients are put in an alien environment, often far away from their families and communities. Diseases and sickness are treated but there is little consideration of the economic, political and cultural situation in which the Aboriginal victims live;

- "What is resented by Aborigines is the de facto application of the concept of assimilation. They are expected to get used to the health facilities of white Australians." 39/

39/ Adler, and other, op. cit., pp. 36-37.
90. In this connection it might be relevant to mention here that in the hospital at Comback near Kuala Lumpur in Malaysia, devoted to care for Orang Asli patients, provision is made for extra beds, so that patients may be accompanied by those close relatives accepted by the hospital to keep them company and comfort them during their stay in the hospital. This seems to go at least part of the way towards offsetting reluctance to accept hospitalization because of separation from family and community. The relatives stay in the hospital with the patient and can cook, and engage in other permitted activities to keep themselves while there, as long as they do not interfere with the required treatment and usual hospital routine.

91. Other factors can hamper progress in the areas of health and sanitation. In Brazil, for example, in small villages where privies had been installed, Indians complained of their smell, of the mosquitoes attracted to them, or that children could fall into them. Public health authorities must consider these reactions in their planning. In smaller villages the traditional way of defecating at the edge of the jungle may be more practicable. Another example is the difficulty sometimes encountered in the use of a new potable water supply. Though wells were sunk in some Brazilian villages, the inhabitants continued for some time to bring water from their traditional source - a nearby river, which was heavily polluted and the cause of dysentery. 40/

92. Going to the river may have important socio-cultural functions which could be maintained by the establishment of a public fountain or well in larger villages, which would provide an opportunity for fulfilment of the needs and functions not specifically concerned with the consumption of water.

93. Another related problem is the unhealthy situation to which people have grown accustomed and to which they must be sensitized before public health programmes will be successful. A Canadian author reflects upon whether appropriate perception of many health problems exists:

"... To what extent, for example, are the Indians trained to identify a health problem? We must remember that these people live in situations of extreme privation. Diseases such as impetigo and lice are so prevalent and so much a part of daily life that they might not be perceived as requiring special attention. Obviously, the provision of publicly paid medical treatment is of little value to people who are not sufficiently sensitive to the circumstances when they could request such treatment." 41/

(b) Alcoholism

94. In some countries, alcoholism is recognized as a major problem among the population at large, including the indigenous peoples. It has been pointed out, however, that different socio-cultural factors should be taken into account in responding to this problem among different population groups. In Canada, for example,

"Most Indians drink. As do most Canadians. Drinking is an acceptable social custom and a majority of the adult population drinks - about 70 per cent in both cases.

40/ International Committee of the Red Cross, Draft Programme of Red Cross Medical Assistance to the Indian Population of the Brazilian Amazon River (Geneva, May 1972), p. 40.

"Among Indian people there appears to be less social control to inhibit excessive drinking with proportionately less ostracism from the group as a result of arrest, conviction and detention for liquor infractions. While the use of alcohol serves to provide an escape mechanism from present problems and circumstances, there is also some evidence that in terms of social acceptance it enhances the offender in the eyes of his colleagues.

"While intoxicated, the behaviour of Indian people is basically the same as that found in other groups of the population. Whatever differences do occur appear to be the result of sociological factors and not racial ones.

"Lone drinkers are rather rare, and individual addicted drinkers may be less common among Indian people than among other groups. In some Indian groups, drinkers seem to have formed a social solidarity in the presence of white society.

"There is some evidence that there may be two groups of drinkers in the Indian population - 'anxiety drinkers' and 'recreational drinkers'. The first tends to be younger, better educated and suffering from the tensions of severe problems of adjusting to white society. The second group tends to be older, less well educated, less involved in contemporary industrial society, and not particularly affected by acculturation problems.

"In short, drinking is an accepted social custom among Indian people. They are not different from whites in most respects. Those differences which are apparent seem to be the result of social factors, not racial factors.

"In this part we will summarize five theories about social factors which appear to be associated with alcoholism and violence, and point out the implications of these theories for action programmes.

Acculturation

"One theory holds that Indian people are experiencing a great deal of difficulty in adjusting to the larger society. They are caught between two life styles, one their own traditional way of life and the other a more technological and urban life style. The traditional way of life is downgraded: the technological-urban life style is out of reach.

"It is theorized that this problem of adjustment is at the root of many of the problems facing Indian people - family disorganization, lack of attainment in education, violence, suicide and alcoholism.

"To the extent that this theory is useful it means that a major challenge is to ease or buffer the transition from one lifestyle or culture to another. This in turn means that: (1) traditional culture must not be downgraded, but rather be a source of pride and identification; and (2) Indian people must obtain the skills to survive and compete in a technological-urban society.

Abbreviation

"Another theory suggests that the lives of many Indian people are without meaning - it is a frustrating and purposeless existence for many. They do not have jobs; they have little that is within reach; they are estranged from the larger society; they do not like what they see in their own way of life.
"To the extent that this theory holds, it means that the active participation and involvement of Indian people in every aspect of life of the larger society must be encouraged. It also means that Indian communities should be enriched and diversified to enhance opportunities within their own society.

Discrimination

"A third theory is that white attitudes towards Indians are discriminatory, and that these prejudices and biases become self-fulfilling prophecies. Whites expect Indians to drink, treat them as if they do, and encourage them to do so.

"White attitudes can also be part of a vicious circle. The white won't hire an Indian because he drinks, and that is why he drinks. He wants to work, but he can't get a job; he is ashamed of being on welfare, being unable to provide support for his family, etc. All of this makes the Indian loathe himself and eventually turn to alcohol.

"To the extent that this theory is true, much can be done to alleviate the present situation by changing white attitudes and practices. Whites must come to understand Indian people, think of them positively and come to value their contribution to Canadian society.

Inadequate community structures

"A fourth theory is that Indian communities are more loosely controlled than white communities, that an Indian person will not intervene in the affairs of another Indian person, and that Indian communities are more tolerant of deviant behaviour. Community control is weak and there is little enforcement in Indian communities.

"To the extent that this theory is true, the early identification and development of Indian community leaders is crucial. Attention must also be given to other aspects of social control and law enforcement in Indian communities.

Inadequate social services

"A final theory holds that adequate social services are unavailable to Indians. The social services that do exist tend to alienate or close out Indian people, thus leaving them without basic services or emergency care. There are few social institutions to which the Indian person can turn for help when he needs it.

"To the extent that this theory holds true we must improve services to Indian peoples. Not only are more services needed, but they must develop an open and healthy relationship with Indian people. It is no use having more services if Indian people do not know about them, do not want to use them, or are afraid to do so. More attention must also be given to preventative services of all kinds.

Concluding comment

"In this part we have sketched the outlines of some of the theories which have been used to explain violence and alcoholism amongst Indian people. The
problems experienced by Indian people have many aspects - any attempts to deal with them must also be multifaceted and a whole range of programmes and changes must be instituted simultaneously." 42/

(c) Nutrition

95. In many instances the nutritional habits of indigenous populations before intercultural contacts have been found to be much more balanced than those practised after such contacts. Today, however, as with non-indigenous groups, socio-cultural factors must also be considered in seeking an answer to nutritional deficiencies among indigenous populations. Malnutrition is not only the result of poverty. Eating habits, religious beliefs and taboos, the use of certain drugs, as well as the replacement of more healthy, traditional food sources with modern processed foods, all have an impact. Likewise, modification of the physical environment may, and often does, affect traditional food supplies and produce nutritional deficiencies. Some of these problems are illustrated in the following paragraphs.

96. It has been written that in Burma nutritional defects stem more from dietary practices than from a shortage of food:

"... The highly polished rice that is preferred and is a mainstay of the daily fare loses most of its vitamin and mineral content in the milling process. Although most curries contain some meat, fish, or eggs, the individual portion does not supply adequate quantities, and there is a marked deficiency in protein intake of most people. Much of this lack has a monetary basis, but much is caused also by the Buddhist aversion to taking life of any kind. This is reflected in the unpopularity of beef and mutton. Seafood is an essential ingredient of ngapi, but professional fishermen are usually non-Buddhists and are looked down upon because they destroy life. Fresh fruits and vegetables are important dietary elements, but they cannot make up for other deficiencies. The few analyses of the diet that have been made indicate that a large proportion of the people are undernourished, the major nutritional problems relating to deficiencies in iron, iodine, thiamine, and riboflavin." 43/

97. A nutritional survey among the Eskimos of Canada has found processed foods to be an unacceptable substitute for the traditional diet:

"... On 13 February 1972 an overdue study of nutrition in the North was begun by an eight-man team led by André Beaulieu of St. Romuald, Quebec, under the auspices of Nutrition Canada. The nutrition problem in the North is due largely to the introduction of southern foodstuffs into the diet of native peoples. The dangers of industrial techniques of food preservation - techniques which systematically rob natural foods of their organic vitamin and mineral content - is pointed to by many nutritionists.

"Refined sugar and bleached flour, staples of the northern diet, have little nutritional value. The results are disastrous. Bryan Pearson says: 'Many youngsters in Frobisher Bay live exclusively on a diet of potato chips and pop ... The hospital is full of kids with respiratory disease'."

43/ Henderson and others, op. cit., p. 89.
"In 1965, pneumonia accounted for 31 per cent of the infant deaths in the Northwest Territories. In 1947 the Inuit death rate from tuberculosis was 700 per 100,000 population.

The danger in imported foodstuffs is shown in a scientific study of the energy budget of a hunting village on southern Baffin Island by William B. Kemp. The study is important because it shows that if native peoples can pursue an economy based partly on wage-earning and partly on hunting, they can maintain themselves at a level considerably above subsistence. In the study, Kemp examines the nutritional input of the people in detail and makes these observations:

'The data on food input support the general finding from other areas that show the Eskimo diet to be high in protein. At least in this Eskimo group, even though imported carbohydrates were readily available and there was money enough to buy imports almost ad libitum, the balance was in favour of protein.

'Over the 13-month period the villagers acquired 44 per cent of their calories in the form of protein, 33 per cent in the form of carbohydrate and 23 per cent in fat. Almost all the protein (93 per cent) came from game; 96 per cent of the carbohydrate was store food. The figures suggest how nutritional problems can arise when hunting declines. As store food calories take the place of calories from the hunt, the change frequently involves increased flour consumption and consequently a greater intake of carbohydrate'.

The Government of Costa Rica has reported that nutritional deficiencies result in the indigenous diet when basic vegetables are replaced by processed foods. Another example given by the Government is the substitution of new alcoholic beverages for the traditional Indian chicha:

"For thousands of years one of the festive beverages par excellence among the aborigines has been chicha, usually made from fermented maize. It is nutritious, of high caloric value and rich in vitamins. Apart from its nutritional value, its preparation is imbued with traditions of deep telluric significance and its distillation involves a process of community and spiritual association.

"It is harmless, even when drunk in large quantities; it causes a kind of seasickness but not drunkenness. Now, however, the traditional chicha has been replaced by ruinous alcohol, rum, whisky, guaro, etc., resulting in the loss of an ancient tradition, of a source of income, of spiritual togetherness, of many nutritional elements, and, on the other hand, in acquisition of the alcohol habit, which most often leads to chronic alcoholism, break-up of the family, extreme poverty, etc. Paradoxically, the law encourages the sale of alcohol and forbids the preparation of chicha."

The Government of Denmark has noted that in Greenland traditional food items forming part of the indigenous diet are being replaced by "Substandard" European foodstuffs. The state of nutrition in some types of Greenlandic communities was
investigated in 1974. Part of the indigenous population lives, to a great extent, on traditional food items, i.e., fish, marine mammals, such as seals and whales, and sea birds, and there is an increasing tendency for smaller communities to rely more on the traditional food. Since such food is healthy and cheap compared to imported European foodstuffs, it must be considered convenient and appropriate in every respect to live on such food. There is, however, hardly any doubt that some people living at a lower social level are eating substandard European food with a large carbohydrate content, and that this is detrimental to their health, and in particular to their teeth; there is no indication, however, that such developments depend on race. 45/

100. The Government of Colombia has pointed to the use of drugs, either as a stimulant or as a religious practice, as one of the causes of malnutrition among the indigenous population:

"The indigenous person, lacking economic resources, influenced by daily contact with civilization and consuming a diet of limited nutritional value, is a prey to disease and ages prematurely, despite ingenious and sometimes effective therapeutic practices. In this process of physical disintegration, an important factor is the consumption of hallucinogenic and narcotic substances which are harmful to bodily health but at the same time maintain physical strength without a feeling of exhaustion. The use of coca, yopo and other such substances has functions associated with religious practices, but it also enables the Indian to consume little food while working for long and exhausting periods. The increasingly alarming result of this situation is the general under-nourishment of indigenous groups."

101. According to the Government of Malaysia, food taboos affect the diet of the Orang Asli:

"(2) One factor of considerable importance among Orang Asli groups is that of food taboos. These are complex and widespread. In respect of the Orang Asli affected by them, the following generalization can be made:

"A. Adult men and women past normal childbearing age — Hardly affected

"B. Children below puberty — Significantly affected

"C. Pregnant and nursing mothers — Considerably affected.

"(3) It has been observed that the incidence of taboos in regard to food and the degree to which these are faithfully observed has decreased over the past 15 years or so and will no doubt do so further in the future. It is interesting to note that over the past 15 years the Orang Asli have come into contact with many new types of foods which, apart from fish and meat, in general do not come under any taboos. This in itself will probably lead to a further weakening of the food taboo system."

102. Religious and social ideas may influence dietary practices, as one author has noted in Sri Lanka:

"Although vitamin and protein-rich foods are plentiful, tradition dominates the average family's choice of diet, and malnutrition, caused by a

45/ Information furnished on 21 May 1981.
deficiency of iron and protein in the diet of many segments of the population, is fairly widespread. Many families who could supplement their diet by fish do not do so because fishing is commonly associated with low caste occupations or because their religion prohibits the consumption of fish or meat.

103. Where indigenous peoples depend upon their environment for a significant portion of their food supply, changes provoked by industrial development, hydro-electric or even certain conservation projects may lead to nutritional deficiencies. The Government of Canada has stated that mercury poisoning of fish from industrial wastes was causing serious concern in Manitoba and north-western Ontario where fish is essential to the native diet.

104. It has been reported that indigenous communities in the United States have also been affected by mercury poisoning of plants and fish.

105. Information gathered during the Special Rapporteur’s visit in 1976 to Canada and the United States of America showed that in both countries industrial waste is dumped into rivers and absorbed by plants, eaten by fish, and passed on to humans who eat them in turn. Waste containing mercury which is dumped in waterways is extremely dangerous. The mercury becomes more concentrated as it is passed up the food chain to man. Indigenous communities that make their living by fishing are the newest victims in Canada and the United States.

106. Symptoms of the Minimata disease are being found among the indigenous people of Canada and the United States in several areas of both countries. Research has shown that the disease could be spreading to many other parts of the country. Indigenous organizations demanded action by federal and local governments but all that was accomplished was the posting of signs warning "natives" not to fish. In this regard, it must be noted, that they cannot simply stop fishing, as it is their traditional occupation and the only means of livelihood for themselves and their families. Strong action by federal and local authorities is needed to stop these very dangerous practices.

107. It has been written that the massive flooding required by the James Bay Hydroelectric Project in northern Quebec would upset the ecological balance of the land, seriously impairing the livelihood of some 8,000 Indians who depend on hunting and fishing. In Paraguay the creation of new pasture land has led to the clearing of extensive areas of tropical forest on which the Aché Indians, who are hunters and gatherers, depend for their subsistence. Conservation measures may have a similar impact. According to the Government of Canada, Indians have protested against interference with their traditional hunting and fishing rights through control procedures under the Migratory Birds Convention Act, maintaining that fish and game are necessary for their food supply whereas the law is meant to ensure the pleasure of sportsmen. Likewise, the Indians of Manitoba have protested the prohibition of Seneca root gathering in the Riding Mountain National Park.

In the 1950s over 10,000 people in Minimata, Japan, were maimed, blinded and killed by mercury poisoning. The Japanese island gave its name to this dread disease, Minimata, which attacks the central nervous system and is passed on from generation to generation. There is no known cure.

See also resolution 77-17 of the First Inuit Circumpolar Conference, Barrow, Alaska, 13-17 June 1977 (E/CN.4/Sub.2/476/Add.5), annex I, p. 10.
3. The relevance of the physical environment

108. The concentration of indigenous peoples in rural, and sometimes isolated areas, gives rise to additional factors associated with the environment which must be considered in planning health and medical services. Perhaps the most unique situation is that of groups or communities so isolated from the rest of society that they have developed no immunity to a number of diseases that are relatively common in the world at large. As history has shown, the introduction of new diseases by mere contact, but particularly by the influx of immigration may have a particularly severe effect on indigenous populations to the point of devastating entire communities.

109. The statements made by a Mission of the International Commission of the Red Cross with regard to indigenous populations in the Amazon basin in Brazil are equally applicable to isolated populations elsewhere:

"The rapid decline of Indian populations already contacted is due to disease: this is by no means surprising. Any isolated group would have a low resistance to infection agents which are normally absent in its natural habitat.

"Even diseases that are regarded as relatively mild in Western countries can cause an incredibly large number of deaths. Poor health, due to malnutrition, for example, would also favour the fatal outcome of a disease. For all the reasons mentioned, we are convinced that it is only after having carried out an initial immunization campaign that any kind of long-term assistance in other fields can be given with any chance of success ..."

110. All sources available for the study agree that, broadly speaking, indigenous peoples are particularly affected by certain types of health problems, such as parasitic, respiratory and deficiency diseases. All of these are related, in turn, to the physical environment - inadequate housing and clothing, poor drinking water and sanitary conditions, lack of land or loss of traditional food supplies, etc. The problem of health is closely linked to the general problem of the conditions of poverty in which indigenous populations live in most societies and their limited access to the services made available to them. This demands a holistic approach in the search for solutions.

111. As previously stated, the lack of sanitation programmes and facilities in rural areas is a cause of many of the health problems faced by indigenous peoples. The following excerpt shows how poor sanitation in a small community in Canada has affected the water supply and health of the indigenous population. It is given as an illustration of conditions that are common everywhere:

"Poor sanitation is also a contributing cause of disease in the North. As the wage-welfare system forces native peoples into settlements, and off their familiar land, sanitation becomes a problem. When the people lived nomadic life following the game, human wastes did not concentrate in dangerous levels at any one spot. In today's circumstances, sanitation became a particularly knotty problem in the North.

"As extractive industries bring a temporary influx of people and as the natural increase of native populations in the new settlements continues, the problems will increase. An object lesson of the gargantuan proportions which could result can be seen in the example of settlements a little further south in the middle-North."
Blanc-Sablon is a town on the Quebec-Newfoundland border with a population of 250, on half of whom are Indian. Each year, the run-off from the spring thaw and autumn rains overflows cesspools into the drinking water. In 1973, 55 per cent of the town's population was treated for gastro-enteritis. In April, three infants died.

While Blanc-Sablon has no revenue to build proper sewers or water treatment facilities, the provincial government 'has no authority' to deal with what is a municipal matter.

Similarly, at Ironside, Quebec, the entire underground water table has been contaminated. Dr. Victor Goldbloom, Quebec Minister of the Environment, suggested that the only way to get non-polluted drinking water for the several hundred residents of this community may be to move them out.

A 1969 Quebec Department of Health survey classed 49 of 164 communities as having 'bad quality' drinking water and 57 with a supply considered doubtful.

112. Clothing and housing form part of the physical environment which has a direct impact on health. Many indigenous peoples suffer from sickness and disease associated with inadequate clothing and housing, combined with or exacerbated by inadequate hygiene and health practices. The following comments with respect to the indigenous population in the United States of America are relevant today and are applicable, broadly speaking, to most of the rural indigenous populations throughout the world.

"... The Aboriginal dwelling is almost always damp, insufficiently ventilated, overcrowded and devoid of the most rudimentary sanitary facilities, all of which factors strongly favour the spread of respiratory and digestive diseases, malaria, etc. Clothing is usually inadequate both for protection against the severity of the climate and from the point of view of personal hygiene. This latter factor, combined with unhealthy housing, encourages the spread of skin and parasitic diseases.

It would be fair to say that as a rule the Indians' clothing is insufficient to meet the needs of physical protection and insufficient also with regard to the demands of hygiene. The Indian has seldom more than two garments in the year, and generally they are shabby and full of patches.

113. In rural areas with insufficient medical and veterinary services, contact with animals may be a major source of contagious diseases. The Mission of the International Commission of the Red Cross noted, for example, the role of the dog as a carrier of disease in indigenous villages in Brazil:

"Many Indian villages are full of dogs, and this is no doubt an important factor in the spread of a number of diseases. Not only rabies, but also dracunculiasis, larva migrans, leishmaniasis, both cutaneous and visceral, leptospirosis, paragonimiasis, salmonellosis, strongyloidiasis, toxoplasmosis and American trypanosomiasis (Chaga's disease) can all be transmitted through dogs, and possibly, also tuberculosis in areas of high infection prevalence."

48/ Robert Davis and Marl Zannis, op. cit., p. 118.
50/ Ibid., p. 144.
C. Special measures taken by Governments

1. Preliminary remarks

114. The two basic shortcomings in the provision of health and other services to indigenous peoples are accessibility and adaptability. Health services normally available to other sectors of the population are inaccessible to indigenous peoples either for economic reasons or because they are too remote as explained above. When those facilities are accessible, the personnel is often not equipped, either culturally, psychologically or professionally, to deal with the special health problems related to the socio-cultural and physical environment of the indigenous population.

115. Some governments have become more attuned to these problems in recent years. Special budgetary allocations are being made for programmes that are intended to provide health and medical services for the rural and indigenous populations. Regional or local hospitals and health centres have been established in rural areas; health outposts, or dispensaries have been set up in isolated areas and medical missions are visiting those regions on a more regular basis. Measures have been taken to provide special training for indigenous medical and health workers and to involve the community in health programmes. Health education is receiving renewed emphasis, as are sanitation and immunization campaigns, including the vaccination of animals. Examples of special measures adopted by some governments are given in the following paragraphs. Other measures related to training, alcoholism and nutrition are discussed briefly in separate subsections.

2. Available information on measures adopted

116. There are countries for which no information is available at all, while for other countries only limited information on specific action taken or contemplated was provided for the purposes of the study. More substantial data were available only for a few countries, and it is this information that is outlined in the following paragraphs.

According to a publication, the Government of Peru has taken steps to lower the cost and improve the distribution of pharmaceuticals in rural areas:

"Some activity is also being carried out in the distribution of medicines. Through a series of legal depositions, nationally produced pharmaceuticals have been reduced in retail price by 20 per cent, and foreign-produced pharmaceuticals, by from 10 to 70 per cent. Popular pharmacies (boticas populares), where medicines can be obtained at still lower prices are maintained by the ministry in areas where commercial pharmacies are limited or non-existent." 51/

51/ Erickson, and others, op. cit., p. 162.
117. The Government of Paraguay has announced that it is planning to establish a department of Indian health to carry out studies and provide direct medical services to the indigenous population. 52/ 

118. According to non-governmental sources, Burma had more than 600 rural health centres in operation by 1966. Each centre was responsible for medical services within approximately 15 village tracts, covering a population ranging from 15,000 to 40,000. These centres were headed by either a doctor or a public health assistant with quasi-medical training. As time permitted, the health assistant also visited the countryside. Medical missions have been set up among the forest-dwelling tribes of the Kachin and Kayah states. In the former, there are three dispensaries and a hospital staffed by aborigines. In indigenous villages, the services of aboriginal medicine men and midwives are employed. In Kayah state and the Chin Hills, dispensaries are run by religious missions, and maternity and child welfare societies, located at the edges of the forests, are staffed by qualified health visitors and midwives. Karen nurses and midwives are found in nearly all government hospitals in Burma. 53/ 

119. According to an official report, the Government of Chile extends medical and health care to the indigenous population in rural areas by means of rural health centres provided for in the budgets of regional development programmes. These centres have special services for mothers and infants, including the distribution of foodstuffs and milk. By 1973, 70 such centres had been inaugurated in the region with the largest indigenous populations and were functioning as a part of the Department of Rural Health of the Ministry of Health. 54/ 

120. The Government of Colombia sends health brigades to Indian communities to provide medical services and vaccinations and to work in nutrition and sanitation. At the same time, first aid stations are set up with State funds or funds made available by the community itself. These stations are run by an indigenous person who has been trained for the purpose. 55/ 

121. The Government of Norway has drawn attention to the special schemes for Lapps: 

"Attention is drawn to the special schemes for Lapp wishing to study medicine applicable in respect of those admitted to the medical faculty in Bergen or Tromsø. In recruitment to the School of Nursing in Hammerfest, it is always sought to include some Lapp speaking pupils in each group, although this has not always proved feasible. 

"Otherwise it cannot be said that any special measures have been put into effect."


122. It has been reported that the following measures have been taken on behalf of the rural and indigenous population in Bangladesh:

"The creation in the country of an integrated system of medical institutions and services is one of the most important public health problems. The rural medical complex is to become the basic unit in the system of medical institutions. Each such complex is to comprise a rural health centre with a 25-50 bed hospital and associated union sub-centres. Health centres are being established in every rural region (Tkhana), and each one is expected to provide medical care for up to 50,000 rural inhabitants. The sub-centres are being established in areas within the jurisdiction of the lower local councils and are called upon to provide services to several villages with up to 12,500 inhabitants.

"The national programme for the development of public health services calls for the organization in the country of 356 regional medical complexes, which would combine 3,698 rural sub-centres. According to data for 1973, there were 150 rural sub-centres in Bangladesh. It is proposed to establish a further 206 centres during the first five-year plan, i.e. by July 1978. The programme for the development of rural sub-centres is to extend over a period of 15 years.

"The Government of Bangladesh is seeking to place the entire system of medical services, including the birth control programme and the campaign against epidemic diseases, under unified administrative control. It will be necessary to combine all three branches of the public health service at the rural health centre level. It is also considered that, at this stage in the development of the medical services, the main concern of public health bodies should be the family and the rural community, rather than individual patients."

The Government has reported that, although it has not yet managed to work out a single integrated social security scheme for the entire population or for any sector of it, sectional security measures exist for the indigenous and tribal population. The employed population, mostly indigenous, is covered by statutory old age protection, and by the Workmen's Compensation Act against industrial injuries. Legal provisions for health, sanitation and children's education exist in some areas. Maternity benefits with post-natal and pre-natal care are also available at the cost of the employer.

123. In Canada, governmental health care programmes for indigenous peoples are characterized by their flexibility. The Government employs a system of direct services and grants as well as arranging for care on a fee-for-service basis with independent practitioners and medical care insurance plans. The Government of Canada has provided the following description of its medical care services for indigenous peoples:

"The Medical Services Branch of the Department of National Health and Welfare undertakes to see that health care is provided for Indians and Eskimos. It arranges where possible to have provincial and local services extended to Indians and Eskimos, through the payment of grants, and it provides direct service where no other is available. The annual
appropriation for 1973-74 from Parliament is approximately $35,000,000. In 1970-71 Medical Services operated 13 hospitals, 24 clinics, 57 nursing stations and 91 health centres, chiefly in the northern part of the provinces and in the territories. It directly employed 920 nurses, 30 dentists, 200 doctors and a number of public health personnel. In addition, the majority of professional medical services were provided by medical personnel working on a fee-for-service basis, i.e. although there are only 30 dental officers employed by the Medical Services in the field, there are approximately 700 dentists who work on a fee-for-service basis. The indigenous people are strongly urged and assisted financially to enrol under provincial medical care insurance plans. Where they cannot individually afford such insurance, the Medical Services Branch pays on their behalf. In some cases bands have contributed toward hiring physicians' services from their own communal funds. The International Grenfell Association provides needed health and social services in Northern Labrador.

"Getting specialist services for the remoter areas poses particular problems. Medical Services attempts to meet this by arranging with specialists' associations for visiting services and some, notably the pediatricians and ophthalmologists, have responded generously. Some provincial departments make the services of their peripatetic specialists available on a routine basis. Efforts have also been made to interest university schools of medicine in federal work in remoter areas as a part of medical training and experience. Federal financial assistance to participate in such programs has been extended to 11 major universities.

"However a system of regular free transportation to treatment centres by air is in operation, and along the north-eastern coast the Eastern Arctic Patrol carries out regular medical mission services. Also in the North a broad immunization and TB X-Ray program has brought good results. Tuberculosis is now ranked ninth instead of first as cause of death among northern residents."

124. The Government of Canada has stated that general social security benefits and other related services are available to indigenous peoples:

"All Indians and Eskimos are eligible to receive Canadian social security benefits: these include Family Allowances and Old Age Security pensions which are administered and financed by the federal government, and, where applicable, supplementary Old Age Assistance, Blind Persons' Allowances and Disabled Persons' Allowances which are financed jointly by federal and provincial governments and administered by the provinces.

"Such provincial programs as the Ontario Mothers' Allowances and Assistance to Widows and Unmarried Women, and the Quebec Needy Mothers' Allowance are payable to Indian women as well as whites.

"Rehabilitation and protection services include provisions for the maintenance of Indian children who are in the care of public or private child welfare agencies. Where the services of a child welfare agency are not available, Indian Affairs personnel place such children and arrange for foster home payments. In some provinces, maintenance is also paid on behalf of children committed by courts to training schools or correctional institutions."
"Adults who need institutional care because of senility or chronic illness receive such care and maintenance. In addition, public assistance under the nation-wide Canada Assistance Plan is provided to native people who for physical or social reasons cannot meet their basic minimum needs for food, shelter and clothing. Regrettably, the lack of employment and training has led to many native communities existing almost entirely on this public assistance, creating an unhealthy dependence at a subsistence level.

125. The Government of New Zealand has stated that it has a very comprehensive social security system which covers all its citizens:

"New Zealand has long enjoyed one of the most complete social security systems in the world. A great deal of material could be supplied about the New Zealand system, but in brief it may suffice to say that all social security benefits are available to all citizens regardless of race, and that these benefits include medical benefits, and the right to free treatment in public hospitals and to free medicine supplied on the prescription of a medical practitioner. So far as medical benefits are concerned, the system provides for prescribed fees, part of which are payable by the patient and the balance by the State. By far the greatest proportion of hospital beds in New Zealand is in public hospitals; these are situated in all the main cities and in some of the more isolated rural areas. Free ambulance services are available in almost every part of New Zealand. There are medical practitioners within reasonably easy reach of practically the whole population. In addition, the Health Department stations public health nurses in the more isolated districts. These nurses provide a free service and pay particular attention to the needs of isolated Maori families. All parts of the country have maternity hospitals within a reasonable distance. An active and wide-spread voluntary organization supported by the Government – the Plunket Society – makes a special point of assistance to young mothers and its services are much used throughout the country."

126. The Government of Australia reports that it has been concerned for many years with aboriginal health. Though services provided by the State department of health are available to Aborigines, special measures are taken by Commonwealth and State officials who meet annually to co-ordinate their programmes and policies. An annual budget is made available for aboriginal health, and the Commonwealth provides grants to the states for special aboriginal health programmes. According to the Government, these programmes have contributed to the improvement of rural health services in areas with high aboriginal populations by allowing for the establishment of hospitals, dental clinics, nursing homes, rural health centres, the training of community health nurses and the provision of supplementary food assistance for children and expectant mothers.

127. The Government further reports that, through direct grants, the Commonwealth Government also supports voluntary organizations engaged in aboriginal health work. Special encouragement has been given to the Aboriginal Medical Service, an aboriginal organization which began in an inner-city area of Sydney in 1971. According to the Government, it now retains a full-time medical officer, plans to employ a second, and is extending into nutritional and health education programmes in New South Wales."
128. In 1975, the Government began to provide funds to the Aboriginal Medical Service in Redfern to reimburse pharmacies for the prescription costs of needy patients; a grant has also been provided for the purchase of the premises of that organization. Similar aboriginal medical services have been set up in Melbourne and East Gippsland (Victoria) in Perth (Western Australia), Brisbane and Townsville (Queensland). The Commonwealth also supports the Institute for Aboriginal Development in Alice Springs, which works on health education in aboriginal communities, and other groups dealing with family planning and nutrition.

129. The Government has undertaken a campaign to improve aboriginal health, including an offensive to eliminate leprosy, hookworm, and tuberculosis, and to reduce infant mortality. In addition, proposals are under consideration for the establishment of a national advisory body on aboriginal health, and an Aboriginal Health Section within the Commonwealth Department of Health. Also under discussion are the means of strengthening the services available in rural areas and the training of aboriginal health workers. Other measures taken by the Government include nutritional surveys, dietary supplement programmes, health education, immunization programmes, the provision of basic sanitary services, special measures to control leprosy and prevent malaria, and general programmes to prevent and control animal diseases.

130. A Mission from the World Council of Churches reports that 19 health centres exist in Australia. According to the Mission, they provide an alternative health service "appropriate to the needs of the Aborigines" for the following reasons:

"they are designed and controlled by Aboriginal people themselves;

"they create the atmosphere in which the Aborigines can feel at ease, where they meet their own people, find doctors in whom they can trust because they know the traditional culture and personal predicaments;

"they serve the Aboriginal communities and their problems rather than just the individual patient. They help to strengthen confidence, self-respect and have become centres of social and cultural significance to the Aboriginal community;

"they work along the lines of health services which the World Health Organization regards as effective in Third World countries. They spend less money and serve more patients than state institutions: $10.00 to $15.00 per patient compared with $40.00 to $50.00 per patient in a State run hospital." 56/

131. The Government of Denmark has described as follows the health and social services available to the indigenous population of Greenland:

"The Health Service in Greenland is operated by the public authorities exclusively, and any and all services, including ... medicines, bandages and other facilities are free of charge for all permanent residents. Everybody - indigenous and non-indigenous - thus has equal possibilities of obtaining assistance from the Health Service.

"[Efforts are made] to furnish the Greenland population with treatment of the same standard as in Denmark; but the simple fact that Greenland is extremely sparsely populated makes it difficult fully to live up to this target.

"In all towns in Greenland [there is] a hospital with one or more medical officers, depending on the number of inhabitants within the area concerned.

"These hospitals [provide both out-patient services] (general practitioners) and hospital services as such.

"In settlements the population has regular access to doctors [who travel] regularly within their respective districts.

"In addition, in settlements with less than ... 70 inhabitants, a drug-store-keeper is employed [who] can hand out medicines, following a telephone contact with the doctor - if appropriate.

"In large settlements a Greenlandic health-service assistant is employed, who is in a position to undertake independent treatment of minor cases, and who will consult the doctor on any more important problem.

"Patients who cannot be treated in the settlements are taken to the hospital in town, at the expense of the Health Service, most frequently by ship, in urgent cases a helicopter is used however." 57/

132. Brazil has developed a system of health outposts ("postos") to provide medical care for indigenous peoples in isolated jungle areas. According to one author who has described this programme as it operates in the Xingi National Park, the assistance includes disease and epidemic control, as well as measures to increase food resources and enrich the Indians' diet. Indigenous people normally go to the outpost for care, but the medical team from the post will go into the village in the case of an epidemic or a patient who is too ill to be moved. If specialized care is needed, patients are sent to regional hospitals or to São Paulo. The post also engages in health education programmes, and as part of its preventive measures, controls the entry of non-indigenous people into the area.

133. In a recent report, the Brazilian Government published the following statistics which describe the health services provided to indigenous populations:

57/ Information furnished on 21 May 1981.
In addition to its arrangements with various bodies, FUNAI furnished direct help to indigenous communities, using 17 mobile health teams, 11 'Indian homes', 78 infirmaries established in indigenous stations, the Indian Hospital on Bananal Island, the Chácara-Ambulatorio (a health station at Guaiâ), 781 beds, and 259 personnel (17 doctors, 12 dentists, 13 nurses, 185 infirmary assistants and 32 other specialists). Altogether, there were about 371,000 medical, dental or nursing consultations.

Through this system, epidemiological control of contagious diseases was effected, in part with the co-operation of the various interested bodies with which there were arrangements.

In the campaign against malaria and chagas' disease, 27,765 houses in the North, North-East and Central-East regions were fumigated.

By the end of 1978, some 109,000 doses of vaccine against tuberculosis (hypodermic BCG) had been administered, as well as 223,000 doses of vaccines against diphtheria, tetanus, whooping-cough, measles, yellow fever, meningitis, and infantile paralysis, thus immunising about 80,000 indigenous people.

Under an agreement with the National Food and Nutrition Institute (INAN), about 19,000 Indians benefited from food supplements for children under 6 years of age, pregnant women and wet-nurses.

Through FUNHURAL, Indians were given medical care or were hospitalized in 173 hospitals throughout Brazil, and some 1,135 Indians over 60 years of age were given pensions.

GENE, the pharmaceutical plant, provided FUNAI and religious missions with more than 2 million medicinal units from its production line.

As regards basic sanitation, various communities were helped by the digging of wells and earth latrines and by health-education talks, resulting in a decrease in gastro-intestinal and parasitic diseases...

With the aim of preserving the indigenous groups and harmonizing their contact with the advancing elements of national expansion, between 1974 and 1978 FUNAI carried out attraction activities with the following indigenous groups:

AMAZONAS: Waimiri/Atroari, Marubo, Meyuruna, Kanamari and Yanoama;

PARÁ: Parakaí, Araras, Assurimi and Araweté;

MARANHÃO: Guajá;

T.F. RONDONIA: Karipanas, Zoró, Surui and Rru-Eu-Wau-Wau;

ACRE: Machineri;

T.F. ROBANOA: Yanoama;

MATO GROSSO: Massacá and Krenakarares;

GOLÁS: Avá-Canoeiro.
In the period in question there was a perceptible decrease in general and mother and child mortality, thanks to the work carried out in collaboration with various public and private bodies."

Federal health care services for Indians in the United States are administered primarily through the Indian Health Service, which is described in the following excerpt from an official report:

"The Indian Health Service (IHS) of the Department of Health, Education, and Welfare is the primary federal health resource for approximately 760,000 Indians and Alaska Native people living on or near Federal Indian reservations or in traditional Indian country such as Oklahoma and Alaska. It provides a comprehensive program of preventive, curative, rehabilitative and environmental services. The Service also provides limited assistance to approximately 274,000 of the 507,000 urban Indians to enable them to gain access to those community health resources available to them in areas where they reside.

"Indian health advisory boards have played an important role in developing IHS policy and allocating resources. Tribes also have been actively involved in program implementation. As a result of new laws enacted in the last five years, the number of tribes managing health services has increased. The scope of tribally managed activities is broad, ranging from the provision of outreach services in the community to the planning, construction, staffing and operation of health care facilities.

"The Indian Health Care Improvement Act, which authorizes higher resource levels for a seven-year period, beginning in Fiscal Year 1978, seeks to increase the number of Indian health professionals for Indian communities. It also authorizes IHS to set up programs with Indian urban organizations to improve Indians' access to health services.

Indian Health Developments

"The health of Indian people has improved significantly. This gain is due, in part, to the over-all expansion of health service and the construction of better health care and sanitation facilities. Since 1955, hospital admissions have more than doubled; outpatient visits increased seven-fold and dental services six times. Partly as a result of the increased use of hospitals, the infant mortality rate has been reduced by 74 per cent and the maternal death rate by 91 per cent. During the same period, the death rate for influenza and pneumonia dropped 65 per cent; certain diseases of early infancy, 72 per cent. Tuberculosis, once the great scourge of the Indians, in 1955 struck eight out of every 1,000; now it strikes fewer than one. An Indian child born today has a life expectancy of 65.1 years, an increase of 5.1 years over a child born in 1950. Progress and improvements do not mean that the United States has succeeded in raising the health status of Indians to the high level that it seeks. Further efforts will be required."


135. Indigenous people are covered under the general Social Security Act of the United States and some special social services are available to them through the Bureau of Indian Affairs:

"The major participation by the States in this function was precipitated by the passage of the Social Security Act in 1935.

"The categorical aid programs under Social Security (Old Age Assistance, Aid to Blind, Aid to Families with Dependent Children, and Aid to Permanently and Totally Disabled) are administered through the States for all of their citizens including their Indian citizens both on and off Federal reservations. Over 81,000 (17 per cent of the reservation total of 488,083) Indians living on reservations as of June 1971 were receiving categorical aid assistance.

"Many Indian families are in need of assistance who do not qualify for one of the categorical aids. Assistance provided to this group by the BIA is called General Assistance. States and localities also provide general assistance to needy persons not eligible for the categorical aids.

"The BIA provides foster home care for Indian children on reservations in 12 States: Alaska, Arizona, Iowa, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Carolina, North Dakota, South Dakota and Wyoming. In other states foster home care is provided by state welfare departments to Indian children needing such care, including those living on reservations, on the same basis as for non-Indian children.

"It is the general position of the Bureau that insofar as possible Indians should have the same relationship to public welfare agencies as non-Indians, and that public welfare agencies should have the same responsibility for providing services and assistance as they have for non-Indians in similar circumstances." 60/

136. Mexico has increased the availability of health and medical services in indigenous communities by giving elementary medical training to health workers recruited from their own communities. These locally trained persons staff some 567 medical posts, with the backing of doctors who are stationed in co-ordinating centres. Attention given at the posts includes minor surgery, dental work, laboratory tests, treatment for parasites, diagnoses, pre- and post-natal care for mothers and children, and first aid. 61/

137. Preventive measures are taken. Immunization campaigns against polio, tuberculosis, diphtheria, measles, tetanus and other diseases have been undertaken by the Secretaría de Salubridad y Asistencia and the Instituto Mexicano del Seguro Social. The health workers at the medical posts played a particularly important role in educating the indigenous population with regard to these campaigns. 62/


62/ Ibid., p. 32.
138. In 1979, eight Mobile Health Units entered into action in several Mexican states with a high concentration of indigenous peoples. Each unit has a general surgeon and a dental surgeon with their assistants and the driver. They visit communities along established routes, providing medical assistance and encouraging preventive measures in sanitation and education. 63/

139. Between 1979 and 1980, the Instituto Mexicano de Seguro Social and COPLAMAR established 2,105 rural medical units and 54 rural hospitals which provide free medical services. Those communities where such units are established, however, are requested to undertake work projects which benefit the community as a whole. 64/

140. In parallel action, the appropriate offices of the Co-ordinating Centres have made significant progress in sanitation. Potable water supplies have been increased and protected; washing places, baths, showers and toilets have been supplied; septic tanks and drains have been built. Improvements in housing have been encouraged, particularly the provision of latrines and windows. A special programme for the improvement of rural dwellings is designed to contribute to better sanitary conditions. It will include about 250 villages within the areas of the medical units. State agencies will provide technical advice and materials; the interested communities will supply the labour. 65/

141. The Instituto Indigenista Mexicano is also active in the area of health and medical services. During 1977, its medical centres provided the following services:

<table>
<thead>
<tr>
<th>Service</th>
<th>Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>General medical care</td>
<td>385 220</td>
</tr>
<tr>
<td>General consultations including those for children</td>
<td>320 936</td>
</tr>
<tr>
<td>Minor surgery</td>
<td>5 584</td>
</tr>
<tr>
<td>Dental care</td>
<td>5 016</td>
</tr>
<tr>
<td>Laboratory tests</td>
<td>4 318</td>
</tr>
<tr>
<td>Antiparasitic treatment</td>
<td>44 933</td>
</tr>
<tr>
<td>Forensic medicine and hospitalization</td>
<td>4 433</td>
</tr>
</tbody>
</table>

63/ Ibid.
64/ Ibid., p. 33.
65/ Ibid., p. 33-34.
"Mother and child care

<table>
<thead>
<tr>
<th>Service</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total cases</td>
<td>16,409</td>
</tr>
<tr>
<td>Pre-natal examinations</td>
<td>9,759</td>
</tr>
<tr>
<td>Post-natal examinations</td>
<td>4,997</td>
</tr>
<tr>
<td>Childbirths</td>
<td>1,653</td>
</tr>
</tbody>
</table>

"Infirmary activities

<table>
<thead>
<tr>
<th>Service</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total cases</td>
<td>248,520</td>
</tr>
<tr>
<td>Injections</td>
<td>197,662</td>
</tr>
<tr>
<td>Cures</td>
<td>42,923</td>
</tr>
<tr>
<td>Venoclyses</td>
<td>7,935</td>
</tr>
</tbody>
</table>

142. The Instituto Nacional Indigenista participates in campaigns to vaccinate cattle and other animals in indigenous communities and advises other governmental bodies on measures to maintain ecological balance in interethnic zones.

143. The Government reports that the Instituto Nacional de la Nutrición has been carrying out studies for 20 years in rural and urban areas of the country and a number of governmental offices (Secretaría de Salubridad y Asistencia, Desarrollo Integral de la Familia, Compañía Nacional de Subsistencias Populares, Instituto Mexicano del Seguro Social, Instituto Nacional Indigenista) have undertaken programmes related to nutritional education.

144. In Malaysia, the Department of Orang Asli Affairs has primary responsibility for implementing medical and health services among the Orang Asli. Some of its programmes are noted in an official source:

"(a) A 450 bed hospital at Gombak 12 miles from Kuala Lumpur providing medical treatment for Orang Asli. This hospital contains 13 wards, maternity, x-ray, laboratory, dispensary, out-patient, dental and paediatric facilities, in fact all normal hospital facilities except those for surgery cases which are referred to Kuala Lumpur General Hospital or the University Hospital forming part of the University of Malaya. The hospital is also a recognized training school for Assistant Nurses.

66/ Ibid.
"(b) A system of 140 deep jungle medical posts providing out-patient treatment for deep jungle Orang Asli.

"(c) A comprehensive paramedical service enabling all Orang Asli locations to be visited regularly by departmental medical staff.

"(d) A dental service for Orang Asli which places emphasis on preventive dental care for Orang Asli school children.

"(e) A TB Eradication Campaign which carries out a continuous x-ray programme in all Orang Asli areas by means of mobile miniature mass x-ray machines. These machines are sent by road, boat, and helicopter to cover even the most inaccessible areas. Treatment for TB patients is carried out at Gombak Hospital.

"(f) A Malaria Eradication Campaign carried out in conjunction with the National Malaria Eradication Programme for all deep jungle Orang Asli.

"(g) A 'Flying Doctor Service' and a Medical Evacuation Service to cater for deep jungle Orang Asli areas inaccessible by road or boat and only accessible by air. The Royal Malaysian Air Force provides helicopters for seven days flying per month to take departmental Medical Officers, Dental Officers and Nurses to visit deep jungle locations. Seriously ill Orang Asli are lifted by helicopter from deep jungle locations to Gombak Hospital. In 1972, 343 seriously ill patients were [treated in this way]."

During his official visit to West Malaysia in June 1973 the Special Rapporteur was able to appreciate first hand the excellent health and medical facilities and services established for the Orang Asli. He personally toured the hospital at Gombak and the medical and paramedical clinics and laboratories at the different Orang Asli posts visited. He was assured that these facilities and services were constantly being improved upon in an unrelenting effort to maintain their standards at the highest level possible in each locality. He understood that medicines were available free of charge at all posts.
3. The importance of training programmes

(a) Preliminary remarks

146. The difficulty of attracting adequate numbers of qualified medical personnel to rural areas presupposes an approach to health and medical services which, while creating conditions that would make indigenous programmes and areas more attractive to medical personnel, would also take maximum advantage of local human resources. In some cases quicker, and, in the long run, better results may be obtained by providing the necessary training in basic medical and health services to those already active in that area in rural communities, such as indigenous practitioners and midwives. A strong argument for the incorporation of local healers is made in the following excerpt from a study prepared under the auspices of the World Health Organization:

"National health planning is defective in many countries and the small number of professional groups, relatively ineffective in the rural areas where their services are most needed, are in the main unwilling to delegate responsibility and to allow non-professional health workers to take over parts of their professional roles. In some communities, non-professionals are accepted unwillingly, the health services not utilized, and health personnel responsible for primary health care are inadequately trained for the work which needs to be done. The end result is that the return for the resources and human effort is poor and well below expectation, but it must be remembered that the professional health worker has invariably been trained in a scientifically oriented medical school, but works in communities that are essentially rural, traditional in outlook and with very different cultural backgrounds.

"Traditional medicine is an established part of culture, though in some countries the systems of care and prevention may not be as well developed as in China and other Asian countries. Some countries have retrained indigenous traditional healers for work in the general health systems and have established departments for traditional medicine in the ministries of health and the universities.

"...

"Many public health administrators now concede the fact that traditional healers have a role to play in formal health services, and certain countries now consider the concept of integration a reality that could be achieved in the foreseeable future. In China and India, traditional systems of medicine have already been recognized, legalized and well developed as separate systems in their own rights." 67/

67/ Bannerman, op.cit., p.2.
147. Simultaneously with the training of those already involved, programmes should be initiated to attract members of indigenous communities to careers in medical and health services at all levels, from doctor to health assistant. Professionals of local origin are more likely to be successful in introducing modern methods and technology in a way compatible with the socio-cultural environment. Recruitment and training of indigenous medical and health professionals is, however, not a simple task. Participants in an international conference have identified several problems in this area which are applicable to the situation in many countries:

"First, young Indians have little incentive to choose a medical career because of the lack of role models. There are few Indian doctors. Second, Indians attending college are not counselled to take the science courses required for admission to medical schools. As a consequence many potential medical doctors are not recruited. Third, Indians fear that professional training in medicine (also in law) causes the Indian to lose his or her cultural identity. Fourth, a related concern is that an Indian with a medical degree will prefer to practice in areas where earnings will be higher, rather than return to the Indian community. Fifth, Indians are concerned that standards of the non-Indian dominated medical profession are not entirely applicable in the cultural context of the Indian. Definitions of Indian health and illness must be developed and distinguished from those applied to persons in non-Indian communities. For example, the application of the non-Indian standard of mental retardation to the Indian would be inappropriate. Although many Indians work as doctor's assistants, orderlies, nurses and volunteers in hospitals and health centers, participants generally agreed that additional paramedical personnel must be trained." 68/

(b) Examination of available information

148. It seems that in most countries covered by the study there are arrangements for training indigenous people as medical or paramedical personnel or instructing indigenous or non-indigenous people specifically for work among the indigenous populations.

149. The Government of Finland has explicitly stated, however, that no arrangements have been made with regard to the special training of indigenous or non-Indian medical or health personnel to work among the Lapps.

150. The Government of Denmark has provided the following information on the participation of Greenlanders in local health services, which it describes as of increasing importance:

The Greenlanders' participation in the health service in Greenland is, also in respect of personnel, of ever increasing importance. Although to date only a few Greenlandic doctors have been trained, the function of midwife has for many years been fulfilled to a very large extent by indigenous midwives; indeed almost all midwife posts in Greenland are

now occupied by fully trained indigenous midwives. There are also special jobs for "Fødselsjælpersker" (childbirth helpers, midwife assistants) (an old specifically Greenlandic class of training) and health service assistants (now training in Greenland), designed, inter alia, to concentrate on health service work in the small and often relatively isolated settlements in Greenland. In cases of a more complex character they will often cooperate over the telephone with the district medical officer. In this connection, it is considered appropriate to mention that the Ministry has started a special Greenlandic education and training course for clinical secretaries and assistants, and a special training and education course for X-ray assistants, as a supplementary training for health service assistants. Moreover, a special Greenlandic course for dental care assistants has been established, with a view to attaining a much needed promotion of dental prophylactic work for the Greenlandic population.

151. In Burma, Karen nurses and midwives are found in nearly all government hospitals. In Kachin State, a hospital and three dispensaries are staffed by Aborigines. In indigenous villages the services of aboriginal medicine men and midwives are employed.

152. The Government of Brazil states that members of the indigenous communities served by the medical post system are trained as auxiliaries to paramedical personnel and the teachers who work in health education.

153. According to the Government of Costa Rica, the training of Indians as paramedical personnel and health workers began a few years ago with a small number of individuals. Recently it has been carried out more systematically with the support and direction of the Comisión Nacional Indigenista (CONAI).

154. Bilingual teachers and health workers have made an important contribution to isolated areas of Peru. The health workers and teachers with special training teach the basic elements of personal hygiene, treatment of the most common tropical diseases and sanitation measures such as boiling drinking water, the use of latrines, the disposal of wastes and cleanliness in the home. Some communities have established their own health posts.

155. Since the establishment of the Instituto Nacional Indigenista, the Government of Mexico has carried out training programmes for local paramedical personnel including midwives and practitioners of traditional medicine. Other training programmes for local health workers are maintained by the Secretaría de Salubridad y Asistencia and the Instituto Mexicano del Seguro Social. Additional plans have been made for programmes which will combine traditional indigenous medicine and Western medicine and to train medical personnel for their work among indigenous cultures.

69/ Information provided on 21 May 1981.
70/ See para. 118, above.
156. The efforts of the Government of Indonesia to utilize the services of local midwives and folk practitioners are described by an independent author:

"Assistance in childbirth traditionally has been given by a dukun, who might be a specialist or, more commonly, one who combines general folk medicine with midwifery. In the person and practice of these dukuns, modern medical practices probably collide with the traditional more significantly than in any other aspect of medical care. As highly respected members of the local community and, in the absence of doctors, they are in a unique position to impede or to further the expansion of national health programmes. Accordingly, the government has attempted to enlist their co-operation by giving them status through official recognition and licensing and by providing considerable amounts of training in modern medical practice." 72/

"With the assistance of UNICEF, another programme has been established to increase the competence of dukuns and to co-ordinate their efforts with the national health improvement campaign. Trained rural nurse-midwives of the Public Health Service are required to set aside one day a week to conduct classes for all dukuns in their areas. When these trainees have attained certain minimal levels of understanding and proficiency, they are presented with a UNICEF midwifery kit and other essential equipment.

"The beneficial effects of this programme extend far beyond the simple one of improving the quality of services performed by the dukun in local communities." 73/

157. The Government of Malaysia has taken special measures to train Orang Asli as health workers and medical personnel. The Department for Orang Asli Affairs established an Assistant Nurses Training Centre for this purpose at the departmental hospital. According to the Government's report, some 250 Orang Asli medical staff had been trained by 1974. Additionally, members of the Field Medical Staff who enter the medical division of the Department are specially trained to work in rural and jungle areas. Hospital and jungle medical posts are rotated every 3 to 4 months, and health workers as well as medical personnel participate in training programmes in rural health.

158. The Government of Canada reports that native workers are being trained with good results in the fields of preventive medicine and public health. Some serve as community health workers under the Medical Services Branch and others as liaison officers with Indian bands. In-training programmes for native workers are sponsored at some of the larger hospitals in the North, and more Indians are being employed as welfare administrators. At the same time, an increasing number of bands are administering public assistance programmes among their members, thus eliminating some of the problems in communication caused by cultural factors.

72/ John W. Henderson and others op.cit., p.179.
73/ Ibid., p.180.
159. Nurses who attend the New Zealand Post Graduate Nursing School and plan to work in public health are given a series of lectures on Maori society and attitudes to assist them in their treatment of patients. The Government of New Zealand reports that many Maoris are doctors, dentists and nurses. To ensure a steady supply of Maori and Polynesian doctors, at least four places per year are reserved at the Otago Medical School for Maoris and other Polynesians.

160. With regard to the training of indigenous medical personnel and health workers the Government of the United States of America has declared that:

"More than half of the employees of the Indian Health Service of the U.S. Public Health Service are of Indian descent and they include physicians, dentists, professional nurses, engineers, and health educators. Many others have been trained by the Public Health Service as practical nurses, sanitary aides, laboratory and dental technicians and dental assistants, and community health aides. In addition, many tribes supply funds for medical care and other health services for their people. Tribal health Committees work actively with Indian health staff in planning health services."

161. It has been commented, however, that the above estimate does not represent a true picture:

"The statement that 'more than half of the employees of the Indian Health Service of the United States Public Health Service are of Indian descent and they include physicians, dentists, professional nurses, engineers and health educators' is a gross and deliberate distortion. The Federal Trade Commission would immediately bring sanctions against a private company using such misleading innuendo in its advertising. In fact, almost all of the more than half are employed at the lower grades of the pay scale, not the higher grades as the statement implies. The 'physicians' just barely justifies the plural, there being in actual fact only two. There are no Indian dentists employed in the Indian Health Service." 74/

4. Programmes to combat alcoholism

162. It would seem that in most countries the general programmes to control and combat the incidence of alcoholism apply unchanged to all segments of the population, regardless of their different socio-cultural backgrounds and whether or not they are indigenous.

163. Any effective health programme must be tailored to respond to the needs and problems of the group for which it is designed. The fact that alcoholism might have socio-cultural roots, as discussed above, 75/ would suggest that programmes to combat alcoholism in society at large may not be fully relevant in the context of groups with special cultural backgrounds. This is considered to be the case of

74/ American Indian Law Newsletter, op.cit., p.25
75/ See para. 94, above.
indigenous populations in culturally conflictive societies. The failure to recognize that a different approach is needed explains why it has been said that government-styled programmes in the United States cannot help Indian alcohol abusers effectively, and that tribal medicine and traditional spiritual activity are of greater value. Others have complained that government programmes only treat symptoms and not causes.

164. According to information furnished by the Government of the United States, the Bureau of Indian Affairs, the Indian Health Service and various tribal governments have programmes to combat alcoholism. Another source 76/ has stated that the United States Government has set up a special native desk within its National Institute of Alcohol Abuse and Alcoholism. Some 7 million dollars are expended annually and 140 projects serve both urban and reservation Indians. The one at the University of Utah trains personnel for 114 community programmes in 25 western states and involves 165 persons who alternate between classwork and filed assignments. Three-fourths of the participants are rural or reservation Indians who are taking classes leading to certification. Still another source 77/ is critical of the lack of funding and general efficacy of some of these programmes: "Although the problem of alcohol among American Indians is legend in western culture, few alcoholism programs have been funded and the ones in existence are in danger of dying unless new legislation is passed. Such programs are of very recent origin; they have in general been sparingly funded, and though it is true that they combat alcoholism, evidence is so far lacking that they are in any cases winning the battle."

165. The Government of Mexico has stated that it is carrying out a pilot research programme into rural alcoholism in the area of San Felipe del Progreso, in the State of Mexico. Sponsored by the Instituto Nacional Indigenista and the Centro Mexicano de Estudios de Farmacodependencia, the programme will involve not only anthropological and medical research, but preventive, educational and rehabilitative measures.

166. Reference has been made above, regarding New Zealand, to the Maori Welfare Act 1962 and its amendments which provide for the appointment of Maori wardens with certain powers to control drinking by Maoris. The Maori wardens must be Maoris, are appointed by the Minister on the nomination of a District Maori Council and are responsible to that Council. Maori wardens are authorized to enter licensed premises (i.e. licensed to sell liquor) and to warn the licensee or any of his servants to abstain from selling or supplying liquor to any Maori who, in the opinion of the warden, is in a state of intoxication or is violent, quarrelsome or disorderly, or is likely to become so. It is an offence to disobey a warden. The warden may also order a Maori to leave licensed premises if he appears to be intoxicated, violent, quarrelsome or disorderly. If the Maori refuses to leave the premises he commits an offence against the Act and the warden may request a member of the Police Force to expel him. The Act also provides that drinking or having possession of liquor at a Maori gathering is an offence unless a Maori Committee appointed under the Act has issued a permit for liquor to be consumed at the gathering. 78/

76/ Alcoholism under attack, Akwossaene Notes, vol.6, No. 1, 1974, p.29.
78/ See para. 72 above.
167. It has also been indicated above that the New Zealand Government has stated that this legislation established for Maoris is a systematic way of responding to drunkenness that is more preventive than the one existing under general law provisions applicable to all persons (Maoris and non-Maoris), such as the provisions in the Police Offences Act regarding intoxication. 79/

5. Special measures to combat dietary deficiencies

168. Some efforts to prevent dietary deficiencies through health education, food supplements for mothers and infants, school lunch programmes and environmental protection have been mentioned in previous sections. In some countries additional measures have been taken or are proposed and they deserve consideration here. Most are related to the development of alternative sources or supplies. The report of the ICRC Medical Mission to Brazil, for example, stated that in order to run a valid nutritional programme for Indians with any reasonable hopes for results, it should be combined with an agricultural scheme. It has been explained that this suggestion would entail the entire gamut of agricultural development projects, but in particular, the introduction of new crops, hybrids, or special fertilizers which would help to correct identifiable nutritional deficiencies among any indigenous community.

169. In Malaysia, the Department for Orang Asli Affairs provides funds for the construction of fish ponds, provision of cattle, goats and poultry, distribution of improved seed for traditional crops and the introduction of new crops among the Orang Asli. The Government of Malaysia has stated its belief that the problems of health, education, and social and economic development must be dealt with simultaneously.

170. On the other hand, the provision of new food sources may simply require the modification of certain conservation laws or the opening of new areas to exploitation by indigenous peoples. In Canada, where commercial fishing had ended in certain lakes, a "Fish for Food" programme was initiated. Some traditional sources need nothing more than revitalization. According to information furnished by the Government the Indians of the Grassy Narrows Reservation in Canada have asked the Government for aid in reviving winter trapping as a food source. The same Indians also requested government funds for the establishment of a grocery co-operative which would purchase in bulk from wholesalers and pass on the savings to Indian co-op members.

171. One approach has been the introduction of specially enriched foods such as Incaparina, a high vitamin and protein meal developed by the Institute of Nutrition of Central America and Panama (INCAP) in the 1960s. Incaparina can be produced commercially from locally available products anywhere in the world, modified to suit differing tastes, and sold at very low cost.

79/ Ibid.
172. Government price subsidies for certain basic foodstuffs may be another answer. According to one source, the National Production Council of Costa Rica has subsidized the price of fish in order to encourage people to take advantage of this important source of protein. Although fish consumption reportedly increased as a result, it was noted that traditional beliefs about easy fish spoilage deterred wider consumption. In addition to providing price subsidies, some countries sell and distribute basic foodstuffs in order to prevent speculation and to ensure adequate distribution in isolated areas.

173. The importance of research into the nutritional deficiencies of particular groups is often overlooked. The Government of New Zealand reports that nutritional surveys of the Maori population are carried out from time to time, and a study of the dietary deficiencies of Maori mothers is being conducted under government sponsorship at the National Women's Hospital in Auckland.