

***STUDY OF THE PROBLEM OF
DISCRIMINATION AGAINST
INDIGENOUS POPULATIONS***

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Special Rapporteur of the Sub-Commission
on Prevention of Discrimination
and Protection of Minorities*

VOLUME IV



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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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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CHAPTER XVII

LAND

A. Right of ownership with particular reference to land

1. Introductory remarks

1. According to the information made available for the purposes of the present study, there is no system that would explicitly exclude indigenous populations from enjoying the right of ownership. In general it could be stated that, in law, the same basic rules apply in all cases as far as the right to own property is concerned, regardless of whether a person, group or community is or is not indigenous. There are no de jure denials, limitations or restrictions of access to property on such grounds. De facto, it is mainly economic factors which govern access to property. This fact alone would already call for some discussion as to the reasons for the limited economic capacity in certain population groups. Of course, sometimes action taken by the public authorities in practice affects the right to property of certain groups, including indigenous populations. This happens particularly when authorization is given to economically powerful concerns to undertake activities which, it is known will affect the property and the property rights of indigenous peoples. However, the study cannot deal with such involved questions, nor is it pertinent for it to deal with property in general. This chapter will merely focus on the right to own land under the de jure and de facto circumstances prevailing in the countries covered by the study, and on the different factors affecting the effective enjoyment by indigenous populations of the right to own and benefit from their land.

2. Recognition and protection of the right of persons, groups and communities to own property individually or collectively. De jure and de facto denials or restrictions

2. The right to own property has been recognized both in the international instruments on human rights and in the internal legislation of countries.

3. Some relevant provisions from international instruments are reproduced below:

(a) The Universal Declaration of Human Rights, adopted by the General Assembly in resolution 217 A (III) of 10 December 1948, provides:

"Article 17

"1. Everyone has the right to own property alone as well as in association with others.

"2. No one shall be arbitrarily deprived of his property."

(b) The Indigenous and Tribal Populations Convention 1957 (No. 107), adopted by the International Labour Conference at its fortieth session at Geneva on 26 June 1957, provides:

"PART II. LAND

"Article 11

"The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized.

"Article 12

"1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

"2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

"3. Persons thus removed shall be fully compensated for any resulting loss or injury.

"Article 13

"1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.

"2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

"Article 14

"National agrarian programmes shall secure to the populations concerned treatment equivalent to that accorded to other sections of the national community with regard to:

"(a) the provision of more land for these populations when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;

"(b) the provision of the means required to promote the development of the lands which these populations already possess."

(c) The Indigenous and Tribal Populations Recommendation 1957 (No. 104), adopted by the International Labour Conference at its fortieth session at Geneva on 26 June 1957, provides:

"II. LAND

"2. Legislative or administrative measures should be adopted for the regulation of the conditions, de facto or de jure, in which the populations concerned use the land.

"3. (1) The populations concerned should be assured of a land reserve adequate for the needs of shifting cultivation so long as no better system of cultivation can be introduced.

"(2) Pending the attainment of the objectives of a settlement policy for semi-nomadic groups, zones should be established within which the livestock of such groups can graze without hindrance.

"4. Members of the populations concerned should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preference rights in the development of such wealth.

"5. (1) Save in exceptional circumstances defined by law the direct or indirect lease of lands owned by members of the populations concerned to persons or bodies not belonging to these populations should be restricted.

"(2) In cases in which such lease is allowed, arrangements should be made to ensure that the owners will be paid equitable rents. Rents paid in respect of collectively owned land should be used, under appropriate regulations, for the benefit of the group which owns it.

"6. The mortgaging of land owned by members of the populations concerned to a person or body not belonging to these populations should be restricted.

"7. Appropriate measures should be taken for the elimination of indebtedness among farmers belonging to the populations concerned. Co-operative systems of credit should be organized, and low-interest loans, technical aid and, where appropriate, subsidies, should be extended to these farmers to enable them to develop their lands.

"8. Where appropriate, modern methods of co-operative production; supply and marketing should be adapted to the traditional forms of communal ownership and use of land and production implements among the populations concerned and to their traditional systems of community service and mutual aid.

4. The information available includes provisions from the constitutions and fundamental laws of a number of countries concerning recognition of the right of ownership of everyone - the inhabitants, nationals or citizens of a country. In view of its social function, this right is subject to taxes, limitations, restrictions and obligations laid down with a view to the public good or in the general interest. Under supplementary provisions, no one may be deprived of his property except by court order. Expropriation is, however, allowed on the ground of public good, the general interest or the interest of society, as defined by the law, which also provides for fair compensation, sometimes stipulating that the latter shall be payable in advance. 1/

5. All the countries covered by the study have similar provisions which apply to indigenous populations. Some legal systems also provide for a special regime which is applicable only to indigenous lands and stipulates that there shall be certain limitations or restrictions on the rights of alienation, division, encumbrance, attachment or change by way of security in respect of obligations incurred by their owners even in cases where such land has been acquired under the individual private ownership scheme. These latter cases benefit from a protective regime only in certain circumstances and for specific periods laid down in limiting terms by law. These provisions are considered in the next section of this chapter.

6. The Governments of several of the countries on which information is available in this regard 2/ state that there are no de jure or de facto denials, impediments, limitations or restrictions that affect the rights of indigenous persons, groups and communities to own property individually or collectively. They add that, for this reason, no measures of protection are required in this regard. 3/

7. Invariably, however, the de facto situation reveals deficiencies in the effectiveness of such provisions where appropriate protection measures have not been taken. It is these provisions and measures that will be considered in this chapter in so far as possible on the basis of the information available to the Special Rapporteur.

8. Turning now to the examination of the information available on these matters, there are data on legal provisions and statements made by Governments and by non-governmental sources regarding the de jure and de facto situations obtaining in the countries concerned.

9. Statements made by Governments vary in scope from simple claims that denials or limitations of the right do not exist to more comprehensive statements. Information available from non-governmental sources is very varied.

1/ See, for example, the information relating to Argentina, Brazil, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, India, Malaysia, Pakistan, Paraguay, Suriname and Venezuela.

2/ No information is available in this regard on Japan and Sri Lanka.

3/ For instance, Australia, Bangladesh, Costa Rica, Finland, Mexico, Norway, New Zealand, Panama, United States.

10. The Finnish Government states that there are no de jure or de facto denials of, or restrictions on the right of persons, groups or communities to own property individually or collectively. The Norwegian Government makes exactly the same statement.

11. The Government of Guyana states in a similar manner that:

"There are no de jure or de facto denials of or restrictions on the rights of persons, groups and communities to own property, individually or collectively save that Companies incorporated outside of the British Commonwealth may hold lands in Guyana from time to time authorized by licence of the President."

12. In Austria according to information received from the Government, there are no legal barriers to Aborigines owning or leasing land in the same ways as other citizens. In addition, a number of special measures are being taken to increase the areas of land held by or for Aborigines. Likewise there are no barriers to Aborigines holding property of other kinds. However, under the legislation affecting Aboriginal and Torres Strait Islanders in Queensland, at present there are provisions for control by officials of the property of certain persons whose property was controlled under previous legislation, not necessarily with their consent. 4/

13. On the situation prevailing in New Zealand the Citizens' Association for Racial Equality states:

"There is no de jure restriction on Maori ownership of land. Maoris can own land under customary title, though very little land is held now under this title; or on titles recognized by the Maori Land Court and registered in individual Maori ownership. They can also acquire Crown land - as has happened with many of the urban sections on which houses have been built for Maoris - and purchase land on freehold or leasehold title. The area of land acquired from the Crown or private (European) owners is not known; but it is not thought to be very large."

14. As concerns land under customary title, discussed at the beginning of the preceding paragraph, the Government has stated that:

"The term 'Maori customary land' is a legal definition, and simply means land which has never at any time had a registered title. As practically the whole of the Maori land in New Zealand now has properly registered titles, the only customary land remaining is a few tiny pieces of land where an error in survey or contiguous blocks has left a fragment of land intervening. There are also one or two rocky islets off the coast of New Zealand which have never had a title. In both cases Maoris have the right to apply to the Maori Land Court to investigate the titles to those lands and find the persons entitled to them. It is quite common and becoming increasingly so for Maoris to purchase non-Maori freehold land, not only house sites, but also farmlands. It has already been mentioned in other comments that Government finance is available in proper cases to help Maoris purchase farms."

4/ Information specifically relating to problems of aboriginal land tenure is presented in subsequent sections of this chapter.

15. The Government adds that:

"Except in regard to 'Maori land' there are no denials of or restrictions on the rights of any New Zealand citizens, Maori or non-Maori, to own property individually or collectively.

"A Maori can purchase, own and deal as freely with non-Maori land as any other citizen. A special system, however, regulates all his dealings with Maori land, and the dealings of non-Maoris who would wish to acquire Maori land.

"Put in rough general terms, Maori land consists of the remaining areas of land which have belonged to the Maori people since before European settlement, or which were subsequently restored to them. 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 required special provisions. Secondly, the Maori Land Law includes legislative provisions to safeguard the rights of Maoris to their ancestral lands."

16. As regards the de jure situation in Costa Rica, the Government states that:

"There are no de jure or de facto denials of or restrictions on the right of persons, groups and communities to own property, individually or collectively. Act No. 5251 and the Executive Decrees were adopted precisely as a result of the need to legislate in favour of indigenous land tenure".

17. The de facto situation which made these legal measures necessary is reflected elsewhere in the information provided by the Government, in the following terms:

"Owing to causes generally unconnected with them, we note that the most serious factors affecting indigenous development include the migration and displacement of the various settlements. We shall therefore draw attention to the factors that have a bearing on such migration and its consequences. For example, we can quote the case of China Kichá, 100 per cent of whose population was displaced from its settlement; similarly, of the rest of the total indigenous population, 40 per cent was completely displaced and the other 60 per cent is in the process of being displaced. There is also the question of the reduction of geographical area, as in the case of the Boruca Indians, who had a reservation of 32,000 hectares in 1960 and now have only 3,200 hectares; in 15 years, they have thus lost 90 per cent of their land; or in the terrible case of the land lost by the Guatuso Indians, who have at present lost 99 per cent of their land and who will be completely wiped out in a few years' time.

"In the border region, we can mention the case of the immigration of the Guaymi Indians, who originally settled in Panama and emigrated to the Pacific south, Coto Brus, Costa Rica.

"At present indigenous persons are facing their greatest problems as a result of the invasion of lands which they traditionally regarded as their own.

"Unlike their other compatriots, indigenous persons use the 'shifting cultivation' method, with the result that, in the eyes of those compatriots, they own a great deal of land, whereas, in fact, most of the land they farm by that method is already overworked.

"In many cases, moreover, they feel harassed and at a disadvantage in the presence of 'non-indigenous' persons; this causes them so many problems that they migrate to other, more remote areas which they continue to regard as areas of refuge, but which, in point of fact, are ceasing to be so owing to the rapid development the country is undergoing. This applies to China-Kichá, which until a few years ago was a Cabecar settlement in the Pacific south and which, as a result of the invasion by 'non-indigenous' persons, now has only a few of its original inhabitants. The rest have emigrated to places in Talamanca, leaving behind their lands and crops; this has obviously led to losses and has aggravated existing problems.

"In view of this situation, agencies such as our National Indigenous Affairs Commission, the Commission for Indigenous Affairs of the Legislative Assembly and other Government agencies are endeavouring, in so far as possible and within the narrow limits of their means and budgets, to provide conditions that will make it possible to deal positively with similar circumstances. However, owing to the lack of financial resources, the results obtained to date almost never meet needs.

"With regard to education, it is true that the Ministry of Public Education has established schools in almost all of the 54 existing indigenous communities, but curricula do not meet existing needs and the results have not been very effective.

"On the basis of the foregoing, it may be concluded that, in a few years' time, the above-mentioned places of refuge will have ceased to exist altogether. This makes it urgently necessary to draw up and implement plans and programmes with a view to preparing indigenous persons to cope with this situation and to integrate, with as little effort as possible, into Costa Rican society, thereby preventing emigration from rural to urban areas, with the ensuing problems of social impoverishment, the destruction of agricultural reservations and the weakening of agricultural production capacity, which is the main source of national wealth."

18. The Government of Mexico states that:

"In our country, as repeatedly stated, there are no limitations on the right of indigenous persons, groups or communities to access to the various forms of land ownership, such as agricultural production units (ejidos), communal land and small holdings. Nor, strictly speaking, are there any de facto denials or restrictions. There is, however, an ongoing social and legal struggle for the land in which the inhabitants of rural areas, including indigenous persons, are engaged".

19. The Federal Constitution stipulates:

"Article 27. The ownership of the lands and waters situated within the borders of the national territory is vested originally in the nation, which had and continues to have the right to transfer property therein to individuals, thereby constituting private property.

"Expropriations may be made only on the ground of public utility and against compensation.

"The nation shall at all times have the right to make such arrangements in respect of private property as the public interest may demand and also to regulate the use of natural resources that are liable to be appropriated with a view to the equitable distribution of public wealth and to ensuring its conservation. To that end, the necessary measures shall be taken to divide up the latifundia, to develop agricultural small holdings that are being farmed, to create new agricultural communities with the necessary land and water, to encourage agriculture and to prevent the destruction of natural resources and any damage which property may suffer to the detriment of society. Population settlements which do not have land and water or which do not have them in sufficient quantity for the needs of their inhabitants shall be entitled to an endowment thereof which shall be taken from adjacent property, with due respect at all times for agricultural smallholdings that are being farmed."

20. Article 27, paragraph I, of the Federal Constitution provides that:

"Only Mexicans by birth or by naturalization and Mexican companies shall have the right to become owners of lands, waters and accessions thereto or to obtain concessions to exploit mines, waters or mineral fuels in the Republic of Mexico."

21. Article 27, paragraph VII, stipulates, with regard to population settlements which retain communal status, that:

"Population settlements which retain communal status de facto or de jure shall have capacity to enjoy in common the lands, forests and waters which belong to them or have been or may be restored to them.

"All issues which, on account of communal land boundaries, whatever the origin thereof, are pending or which may arise between two or more population settlements shall come under federal jurisdiction. The Federal Executive shall take up such issues and shall propose a final settlement thereof to the parties concerned. If the latter are in agreement, the proposal of the Executive shall have the force of a final decision and shall be irrevocable; in the contrary case, the party or parties not in agreement may appeal to the Supreme Court of Justice in Mexico without prejudice to the immediate enforcement of the presidential proposal.

"The summary procedure for dealing with the aforementioned disputes shall be prescribed by law."

22. With regard to forms of land tenure in Mexico, the following has been written:

"Land holdings in Mexico are characterized by the coexistence of two systems of tenure and two parallel organizational principles. Holdings may be privately owned or communally held and they may be consumption or market oriented. The small size, work-intensive farm units prevail, whether private or communal, and are especially characteristic of the center and south. The extensive, multi-personnel, market oriented holdings are more prevalent in the north.

"Ejididos (production units organized on a co-operative and communal basis) may be as large as the most extensive private holdings, but the holding of the average ejidatario (individual worker of the communal lands) is often smaller than that of the average private farmer. Only in the large northern ejidos is specialization of skill apparent. In the larger operations, common problems - such as irrigation, fertilization, types of crops produced, processing, marketing and transportation - are handled for the entire co-operative.

"The agricultural division of the country between extensive and intensive forms (north and south respectively) is both historical and administrative. In the south, traditional Indian intensive production units of small size survived the Spanish Conquest and the colonial period intact. In the north, where the density of Indian population was always much lower, the hacienda (large estate) became dominant, with its semi-feudal organization and its division of labor according to occupational skill. The hacienda was much more easily adaptable to the growing market economy of the 20th century than were the small Indian plots of the south.

"The ejidos have historical antecedents in the communal organization of land holdings that characterized many Indian groups before the Spanish conquest. During the colonial period and the 19th century, communal holdings were almost entirely replaced by private holdings which evolved from the encomienda system, in which the Spanish crown granted large tracts of land - and the Indians to work the land - to private individuals (see ch. 3, Historical Setting). With agrarian reform as one of the goals of the Revolution, the ejidos have been restored to prominence. As of 1967, of a total of 163.2 million acres covered by the agrarian reform program of 1915, 147.7 million or slightly over a fourth of Mexico's national territory, had been distributed to 2.6 million ejidatarios.

"The Constitution of 1917 and the Agrarian Code of 1934 provided for the restitution of land to communal villages and set forth limits and provisions to which persons holding these lands must conform. Land limits per ejidatario are 24.71 acres (or 10 hectares) of irrigated land or 49.42 acres in dry land. Those entitled to ejidal parcels but for whom no land is available receive certificates of agrarian rights (derechos agrarios a salvo) and must await the next distribution of land by the government. Estimates of the number of persons with such certificates range from 500,000 to 1,000,000 but all estimates agree that the number is increasing.

"Most often, tillable land granted to an ejido is divided into plots or parcels farmed by the individual ejidatarios: in a few cases, the cropland is held in common. The pasture and woodland areas are held for communal use by the ejido. The ejidatario may dispose of the produce of his cropland as he wishes; however, to continue his holding, he must cultivate it. If the land is abandoned for 2 years, it reverts to the ejido for reassignment. By law, ejidal parcels cannot be transferred from the one person to whom they were originally assigned. The ejidatario may augment the size of his holdings and hence their yield by renting additional land from others, and indeed not only is there considerable renting to other ejidatarios but occasionally to persons outside the ejido.

"The maximum amount of land that can be held as private property depends on the use to which the land is put. The limit is generally 247 acres (100 hectares) of irrigated land or the equivalent thereof. Equivalents of one acre of irrigated land are generally 4.94 acres of nonirrigated land, 9.88 acres of good dry-land pasture, or 19.77 acres of poor quality dry-land pasture. Higher limits on private land are established for the production of certain specified crops. The limit is 370 acres of irrigated land for production of cotton and 741 acres for bananas, sugarcane, coffee, henequen, rubber, coconuts, grapes, olives, vanilla, cocoa and fruits. Enough land may be used permanently to support 500 head of cattle, or the equivalent in smaller animals.

"Unlike ejidal property, private property can be transferred by sale from one person to another. Titles to land are registered in each municipio (municipality). If the owner dies intestate, the land passes to his next of kin. Owners of private property may increase their holdings, as may ejidatarios, by renting pieces of land from larger holders, or, unlike ejidatarios, by taking additional land in the names of members of the family.

"The distribution of land between private and ejidal holdings changed markedly between 1930 and 1940 but has since stabilized so that by 1960 approximately 43 per cent of the croplands were in ejidal holdings (see table 24). The average size of both private and ejidal holdings in all regions of the country has increased since 1930, with the exception of the Center zone, where population pressure is the greatest. According to the 1960 census, the average size of private holdings was highest in the Northern Pacific and Southern Pacific zones, while ejidal holdings were largest in the Northern Pacific zone (see table 25). The number of farms holding 12.35 acres or less varied from 44 per cent in the Center zone to 10 per cent in the North and Northern Pacific zones; their share in aggregate cropland varied from almost 10 per cent in the former to less than 2 per cent in the latter two zones (see table 26).

"Average size, of course, does not reflect the distribution of land in individual holdings nor the amount of arable land within a holding. In an intercensal estimate made in 1964, 9 per cent of the private farms had no arable land; presumably they were ranching or forestry enterprises. Private farms with 12.35 acres or less of arable land constituted 75 per cent of the total; 12 per cent of the farms had between 12.35 and 61.77 acres; only 1 per cent had more than 61.77 acres of arable land.

Although there are some very large farms, particularly in the north, much of the land of large farms is too mountainous or too arid to be useful. In the north, 6 per cent of the land was reported tillable and 4 per cent was actually in crops. In the central region, 28 per cent was tillable and 19 per cent was in crops." 5/

23. As to the situation of Araucanian indigenous persons with regard to ownership of land and possibilities of making proper use of it, a publication reports that, in Chile, according to a statement made by the Ministry of Labour in May 1950:

"... the average extent of an Araucanian's individual holding is only $2\frac{1}{2}$ hectares. The problem is said to have grown more serious because original calculations for the distribution of land were based on an Araucanian population of 80,000 persons whereas the number is now considerably higher, with an average of eight persons to each family. The Fourth National Congress of the Araucanian United Front, held in Temuco in May 1940, declared that the Indians were 'in a distressing situation owing to the shortage of land'. In some areas the average yield per holding is reported to be only 80 kilograms of wheat per year." 5/

24. In 1974, the Government provided the following interpretation of the situation and the motivations of Araucanian indigenous persons:

"Land in the reservations is scanty for those who occupy it and the 'benefits' to which we were referring are very limited. To this must be added the fact that very often the occupiers have to pay rent to landowners who have gone away from the community, all of which means that the land does not produce enough to provide adequate support for families. Furthermore, since the land belongs to the community and not to the person who derives the benefit therefrom, the latter has no great interest in making any significant improvements in the property, fencing it in, fertilizing the soil properly, building a better dwelling, sheds and/or cellars, corrals, etc. This is why such land appears to be semi-abandoned, the buildings terribly dilapidated and the people sunk in poverty. However, a closer look reveals that indigenous persons invest their savings in animals, which are livestock property and constitute capital that can be readily liquidated at any time. The results of a census carried out in certain indigenous communities in the departments of La Unión and Río Bueno serve to illustrate the foregoing and show that the stereotyped view of the lazy, irresponsible indigenous person has no basis in fact. His way and manner of life are not, in the final analysis, the result of the system of undivided communities: the indigenous person who lives there is not under an obligation to assume the responsibility which any private property involves. This is so true that when the indigenous person has his own land,

5/ Morris Ryan, John and others, Area Handbook for Mexico, Foreign Area Studies, The American University, Washington, D.C., pp. 307-309.

6/ ILO, Indigenous Peoples, Studies and Documents, New Series No. 35, Geneva, 1953, p. 35.

under his exclusive ownership, and its size allows for moderately reasonable exploitation, his output and work are admirable. A few kilometers to the south of Temuco, near the north/south highway, there are two such individual plots of land which are veritable models of farming and whose owners plough in terrace form. Both owners have achieved a good standard of living and have acquired agricultural machinery, fertilizers and even their own means of transport."

25. On the apparent origin of the location and the amount of land currently occupied by the Araucanians, the following paragraphs may be quoted from information provided by the Government in 1974:

"In order, on the one hand, to facilitate the task of the Settlements Commission and, on the other, to determine exactly how much public land was available, various laws were passed which prohibited the purchase and sale of real property in specified provinces where no individual title deeds to such property had been entered, prior to those laws, in the Land Register of the Real Estate Custodian. As the work of the Commission progressed, these prohibitions were extended to other provinces. The latest prohibition, prohibition No. 1, relates to the provinces of Valdivia and Llanquihue (the province of Osorno did not exist at the time) and came into force on 11 January 1891.

"These legal prohibitions did not succeed in halting the swift advance of civilization, which time and again made a mockery of them on the most varied of pretexts, all of very doubtful legality. At a time when people from all parts of the country and from abroad were flowing into the pacified territory, the National Treasury was auctioning off public lands, establishing settlements, founding towns (Temuco was founded in 1881 as a fortress under the shadow of which there grew up a small settlement that was constantly under attack from the Araucanians; in 1890, it received a sharp impetus with the approval of a plan for the distribution of sites among its inhabitants), opening up roads, building railways, barracks, schools and hospitals and paving the way for the civilizing activities of individuals.

"Forests were cleared by cutting and burning and, for the second time, the plough conquered the soil, although not always as peacefully and honourably as might have been desired. The result of all this was a wide variety of superimposed title deeds which inevitably affected the indigenous reservations as well, though on a small scale (approximately 15 per cent of the area in joint ownership), countless lawsuits and veritable legal chaos, for the most part insoluble owing to the lack of any definite boundaries.

"Then came Act No. 4.169 of 29 August 1927 and, together with the amendments thereto, it was recast as Supreme Decree No. 4.111 of 12 June 1931 concerning the division of indigenous communities; Act No. 4.802 of 24 January 1932, which established the Indian courts; and, shortly thereafter, the Southern Property Acts, which were recast as Supreme Decree No. 1600 and Law-ranking Decree No. 260 of 1931.

"Only very few divisions were actually made; the files filled up with paper. On the other hand, it did prove possible to draw a line between private and public property, the large majority of cases pending between individuals being settled by virtue of the special short limitation period provided for under Law-ranking Decree No. 260. There were many cases in which the National Treasury recognized the validity of title deeds to indigenous lands. The situation of the reservations did not, however, change significantly. 7/

"With a view to expediting division and speeding up the integration of the Araucanias into the life of the nation, the Directorate for Indigenous Affairs, which was responsible to the Ministry of Lands and Settlement, was set up in 1953 (by Law-ranking Decree No. 56 of 25 April 1953). It was also in charge of duly organizing existing communities or those to be established in future; determining the legal status of indigenous families and their rights of succession; supervising the rational economic exploitation of agricultural land owned by indigenous communities and of subdivided land when the indigenous owners so requested; to that end, it could form co-operative, companies or associations of an economic character in which connection it exercised the powers laid down in each case.

"Act No. 14.511 was adopted in 1961. It combined all indigenous legislation (Law-ranking Decree No. 4.111 and the amendments thereto) in a single legal code, making the Indian courts far more operative by defining their territorial jurisdiction, procedures, etc. Under its authority, significant progress was made in the matter of restitutions (which have almost come to an end) and in the division of indigenous communities. At present, there are 2,138 undivided communities."

26. The Government also added, in connection with Act No. 17.729 of 26 September 1972, that:

"Until its enactment, the principle of the division of indigenous communities prevailed, introducing individual ownership of the soil for them on a permanent basis and thereby obliging them to assume the responsibilities which that imposes on their owner, all with a view to obtaining by that means, inter alia, the gradual integration of indigenous persons into society as a whole.

"Act No. 17.729 replaced that system, although not in express terms, and was designed to keep the communities undivided with a view to making them a useful tool in the socialization of the Chilean agrarian structure. So far, this Act has not really come into effect, since the regulations to which it refers have not been enacted. If the Act is to be retained, such regulations should be enacted; otherwise, the Act should be repealed and a new Indigenous Act should be adopted to implement the policy introduced by the new Government in this regard."

7/ The Special Rapporteur requested, but did not receive information on whether such recognition of the validity of title deeds to indigenous land operated in favour of the indigenous people themselves or whether, as this information seems to suggest, recognition was in favour of non-indigenous persons.

27. In 1974, the Government also stated that the problems of indigenous persons differ from area to area, but always include insufficient or poor-quality land:

"... when the size of individual plots is too small, indigenous persons realize that their efforts are pointless, as anyone else would. They are unable to raise the money they need to purchase tools: they lack ploughs, harrows, fertilizers, harvesters, seeds and, in particular, fences, which are very expensive. The consequence is inevitable: the soil begins to erode and looks virtually abandoned. Problems arise between adjacent property owners and result in the most unlikely lawsuits. All this then sets the stage for poverty, like the poverty that affects Chileans with smallholdings whose plots of land have also proved to be too small.

"The economic problems of rural indigenous persons vary considerably from area to area; the problems of those who live in the central valley are different from the problems of those who have settled in the middle of the coastal mountain range or on the lower slopes of the Andes, on farmland or woodland. In the latter case, the areas of land available appear to be larger; the indigenous person lives on a small portion of land which has been cleared and where he has his house and vegetable garden and, perhaps, some land for sheep-grazing and sowing; but, basically, he supports himself by felling trees in the woods held in common and sawing them up as sleepers or planks or just firewood, which he transports in flat carts or lorries to the nearest timber markets, usually with the help of his sons or one or more chance associates. Such jobs are just 'make-work' activities in the forests of the reservation, which are being depleted. There is no reforestation.

"The economic situation of such indigenous persons who live on woodland reservations on the lower slopes of the Andes (their land is very poor and extremely uneven) is one of extreme poverty. The same applies to most of the indigenous persons who have land in the coastal mountains."

28. The information which the Government provided in 1973 in connection with this study contains the following views on how to solve these problems, which were apparently brought to its attention, and these have been submitted apparently with its approval:

"In order to solve or alleviate the economic problems of the indigenous populations, it will be necessary to proceed by area or region and examine the special features of each one. We consider it essential to do away with undivided communities and then to develop the area in question by providing the persons to whom land has been awarded, either by the Agricultural Development Institute or other public agencies, with the necessary means to acquire wire and stakes for fences, tools, fertilizer, seed, breeding animals, etc. In view of population growth, fishing or agricultural industries should be set up as soon as possible in each region with a view to providing remunerative work for future generations.

"..."

29. Paragraphs 77 to 84, 168 to 175, 204 to 206, 239 to 256, 281 to 282, 298 to 300 and 330 infra contain information on recent changes and on the current situation in Chile.

30. In addition to the general provisions relating to the right of ownership some constitutions contain principles relating to the social regime applicable to indigenous land as, for example, in Brazil and in India.

31. The Constitution of Brazil provides:

"Article 4. The patrimony of the Union includes:

"...

"IV. The lands occupied by forest-dwelling aborigines;

"Article 153. The Constitution ensures to Brazilians and to foreigners residing in the country the inviolability of rights concerning life, liberty, security and property, in the following terms:

"...

"Paragraph 22. The right to own property shall be guaranteed, except in case of expropriation for public necessity or utility or social interest, with previous and fair compensation in money, except as provided in Article 161, and the person whose property is expropriated shall have the choice of accepting payment in public debt securities, with a clause of exact monetary adjustment. In case of imminent public danger, the competent authorities may use private property, with assurance of subsequent compensation to the owner.

"...

"Paragraph 34. The law shall make provisions concerning the purchase of land by a Brazilian and by a foreigner residing in the country, as well as by a natural or juridical person, establishing conditions, restrictions, limitations, and further requirements, for the protection of the integrity of the territory, the security of the state, and the fair distribution of property.

"...

"Article 198. 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."

32. According to a source:

"Land is what civilizadas want from Indians, and what FUNAI has to ensure for Indians when they are pacified. General Bandeira de Mello told us that hunting tribes were assured of 100' to 150 hectares per head, acculturated ones, 50 hectares. This measure seems equitable until one inquires into the kind of land given to Indians. That at Marechal Rondon is so poor that the Indians have their plantations 10 km away from the village at the Post; at Canela the only good soil is several leagues away - 'quite close'. One Indian remarked, 'it hardly takes a man an hour to run there!'"

33. A source states:

"Assuming that official policy in Brazil aims, as we believe, at the integration of the Indian population, this, in most instances, can only be achieved if the Indians are given assurances that the land they live on will be their own and for their use in a foreseeable future. Any transfers to new areas must be acceptable to the tribes concerned, and their members should be brought to understand the necessity for the transfer. In order to safeguard the Indian population, land purchases or long-term leases will have to be arranged."

34. The Constitution of India declares:

"17. Protection of certain rights regarding freedom of speech, etc. - (1) All citizens shall have the right ..

"...

"(f) to acquire, hold and dispose of property: ...

"...

"(5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

35. The Anti-Slavery Society has stated:

"... In the case of industrial developments it is not just the land that is taken for the factory or mine development that is important but the extra pressures on adivasi land resulting from the immigration of non-tribal traders and workers. Birsa Seva Dal (BSD) (an adivasi labour organization in Chotanagpur) report a large number of cases of government - bureaucrat - police collusion to illegally alienate tribal land that is close to, but

not part of, government industrial projects (...) but perhaps the most graphic description is provided by Srivastava 1972 for the vicinity of the Bailadila Iron Ore Mine in Bastar District, Madhya Pradesh, that was developed for export to Japan:-

"After the establishment of the project, businessmen, contractors, labourers and technicians started coming to the area ... Vast areas - both barren and fertile attracted the outsiders and they established themselves on both sides of the road passing through the village Bade-bacheli ... allied industries and market centres were also set up ... a bania (non-tribal) sells commodities to meet the day to day needs to the tribals and acts as a money-lender ... any tribal who is not in a position to repay his debt loses his land to the money-lender ... the land around the road is no longer in the possession of the tribals. The outsiders are further encroaching on the land situated a little bit in the interior both for cultivation and habitation ... in Bade-bacheli village 2027 acres of land belonging to five tribal cultivators have been officially permitted to be sold to non-tribals ... but legal alienation of tribal land is not equal to even one tenth of the rate of illegal alienation ... The thatched huts of the tribals are gradually being replaced by the pucca, (brick) tiled houses of the outsiders" (1972:71-75).

36. According to the Government of the United States:

"The right of the Indians to own land collectively is protected by the trust relationship - in which the land is owned by an Indian tribe but the deed is in the hands of the Secretary of the Interior. Individual ownership of land is possible and any inequities felt by the indigenous person in regard to his right to buy a certain piece of land can be litigated by virtue of Civil Rights legislation."

37. It has been written that the Indian nations:

"were driven from their lands on to reservations. Even on the reservations, the populations which depended upon subsistence were denied control of their lands, that control being vested in the Interior Department ...

... aided later by their subsidiary elective councils. Thus do we find Indian reservations flooded by dams to provide water, flood control, and hydro-electricity to the cities. Mines open the earth for coal to provide electricity for the cities. On Indian reservations, white ranchers raise food to be packaged and sent to the cities - while the native people who are entitled to the land go hungry." 8/

38. According to another source:

"In blatant disregard of solemn agreements with the Indian people the United States Government has encouraged and permitted the settlement of non-Indians upon Indian lands and with increasing frequency has recognized this new fait accompli by judicial decrees declaring that such lands are no longer Indian lands.

8/ John Mohawk, "The sovereignty which is sought can be real", Akwasasne Notes, vol. 7, No. 4, 1975, p. 34.

"In an effort to force the division of Indian lands in violation of treaty agreements, the United States Government has subjected the Indian people to duress, fraud, trickery, deceit, and, when all else fails, to the imprisonment of Indian leaders who oppose division of Indian lands, without charges or trial.

"The United States has set up claims procedures to attempt to legalize the past theft of Indian lands. These procedures violate fundamental international law and fundamental fairness. They accept petitions for claims from the colonial puppet government establishment and deny the legitimacy of the traditional Indian governments. These claim procedures issue awards which are minute fractions of the value of the property stolen. For example, \$17.1 million was awarded for the entire Black Hills of South Dakota stolen from the Oglala people. One small 10-acre section of the Black Hills produced \$1.2 billion of gold. Furthermore, claims are denied on technical and procedural grounds whenever possible. Finally, the United States Government, after decreeing that it will not return land it admittedly stole; after deciding unilaterally how much it will pay out of its bounty for stolen goods; after presuming to be the sole authority on the question of to whom and how these claims will be paid, adopts plans and procedures that virtually assure that monies for such claims, when paid, are soon stolen from the Indian people by the agents of the same Government which stole the land for which the money was paid." 9/

39. It has been stated in another publication 10/ that:

"When natural resources have been discovered on Indian land the United States has proceeded to exploit them completely. In the case of the Black Hills the United States stole the lands and extracted the gold. Presently, on Cheyenne and Crow reservations in Montana, the collusion of the BIA and major coal producers Peakbody Coal, AMEX, Standard Oil, Shell Oil, Gulf Oil; etc. resulted in contracts in which the Indians would receive only one third of the market price for their resources. Indians are not free to contract for themselves or to hire a lawyer without BIA (US) approval so they are unable to achieve restitution."

40. As regards the land in the reservation of the Navajo nation, it has been written:

"The reservation has valuable energy resources in oil, natural gas, coal, and uranium. Strip mining is now conducted under leases that failed to mention the method of coal extraction or to guarantee adequate restoration of the land to natural contours. The tribe is concerned about the fairness of future mineral exploitation leases, in view of the relatively small size of its reserves." 11/

9/ International Indian Treaty Council, The Second International Indian Treaty Conference, Yankton, Lakota (Sioux) Country, South Dakota, 13-20 June 1976, p. 4.

10/ The colonial case of American Indians in the United States of America, published by the International Indian Treaty Council, New York, pp. 4-5.

11/ The Navajo nation: An American colony, A report of the United States Commission on Civil Rights, Washington, September 1975, p. 122.

41. It has been reported that:

"A dozen American Indian tribes, controlling at least 55 per cent of United States uranium and 30 per cent of its coal, met twice recently with members of Arab nations to learn bargaining techniques of the Organization of Petroleum Exporting Countries.

MacDonald, Navajo chairman and a member of the Council of Energy Resource Tribes (stated)

"We believe they (CPEC) have a certain amount of information and technology that would be most valuable to us.

"We've found how energy companies have dealt with them in the past - bad leases and one-sided operations. We wanted to see if they could give us some technical assistance we can't get from the United States Government." 12/

42. In Peru, an official publication on agricultural policy matters contains the following paragraphs, which were taken from a statement by the Minister of Agriculture and which are considered relevant here:

"The Peruvian revolution, which the armed forces have the historic task and responsibility of leading and implementing, accords top priority to the far-reaching, rapid and large-scale transformation of agrarian structures.

"In the light of the criteria referred to, we are carrying out agrarian reform in Peru as an integral part of a process of over-all change in national structures. The goals achieved in less than three years are already among the most meaningful on the continent. We can state that the latifundio in its various forms no longer exists in wide and densely populated areas of the country. In place of the anachronistic and unjust structure of land tenure, use and labour, a new agrarian order is being established as rapidly as available resources allow and the principle that ownership of the land should be vested solely in the person who farms it is being jealously observed.

"The king-pin of the new structure is rural self-management enterprises based on three forms of social ownership: agricultural production co-operatives, agricultural companies of special benefit to society and restructured rural communities. The State does not interfere in such enterprises in any way other than what is established for any economic activity, apart from regulations of a temporary nature that are applied in certain cases solely for the purpose of guaranteeing the irreversibility of the revolutionary process. The new structure also includes small rural properties that existed already or are the result of awards of family plots, as well as medium-sized properties, which may belong to natural persons or partnerships. Condominiums and companies with share capital have been

12/ International Herald Tribune, 11 July 1977, p. 4.

abolished. In the case of individually-owned medium-sized estates, regular workers are entitled to share in profits; in the case of partnerships, the law confers on such workers the capacity of partners ex officio and, accordingly, the right to share both in profits and in management. At all times, the owner is required on a permanent basis to comply with the obligation to exploit the land directly and efficiently.

"The General Water Act, which is a fundamental part of the agrarian legislation enacted by the Revolutionary Government of the Armed Forces, has reinstated Government ownership of waters, whatever their source. Government ownership of water is inalienable and use thereof is granted in the light of the requirements that rationally derive from the kind of soils and the kind of crops sown; so-called 'acquired rights' have been abolished, along with any other form of privilege. Control over irrigation water, formerly a reflection of the power of the latifundia owners in our arid coastal region, is today one of the main tools available to users' councils for the planning, under State supervision, of agricultural activities.

"The extent to, and speed with, which changes are being made in our agrarian structures do not stem from any departure from the peaceful nature of the Revolution. At the same time, it must be noted that, unlike what happened under other agrarian reforms comparable in scope to that in Peru, not only has agricultural production not declined, but, on the contrary, significant increases have been recorded in various sectors". 13/

43. According to a source on Sweden:

"Ake Holmbäck considers that the Lapps claimed legal acceptance of this sort of transfer (viz. taxed mountain and taxed land) on account of Lappish hereditary rights in this field differing from the Swedish law; for this reason, inheritants had a special need for some other title to the land than the one they received through inheritance. To me, this explanation of the situation seems a little odd; it is hardly probable that the Lapps would have discussed the different Swedish and Lappish conception of hereditary rights to real estate. They have scarcely formed any opinion, either, about the necessity of having a title to the estate.

"It is more natural to explain circumstances thus: that Lapps, originally, had to have the consent of the sii'da to take over the 'land' and that they therefore, after the introduction of Swedish administration and jurisdiction, turned to Swedish court instead. Among the Skolt Lapps, the situation has till recently been that norraz (the village council) had the conclusive right to decide about the distribution of land.

"If this conception of the situation is correct, it means that the right of single Lapps or Lapp families to the land, was only a right of use, which was even dependent on the consent of the sii'da. It was thus the sii'da which in the last resort had the right of decision over sii'da.

13/ Public Relations Department of the Ministry of Agriculture, Política Agraria, statements by the Minister of Agriculture, Gen. Enrique Valdez Angulo, Lima, March 1972, pp. 12-14.

territory. From this view of the nature of the right, the statement from the seventeenth century that the 'land' had not been divided is quite explicable. According to the Lappish conception, the right to the 'land' has been interpreted in quite another way than just common property right to a knife or a cap. The individual Lapp only had a right to use the land and even that right was to be decided on by the Sii'da Norraz (council).

"In reality there only existed a right of use which depended on the sanction of the sii'da community.

"In the Swedish committee report of 1883 there are (pp. 71 et seq.) similar statements, in essential parts correct, about Lappish justice and the Lappish village.

"The Altevatn decision affirms the ancient Lappish village area. The right to this territory has been in the possession of the Lappish village from time immemorial. Quoting the cadastration of the Lappish village in the 10th century is of considerable importance in this matter.

"The reviewing of the decision of the Møyesterett implies that the right of Lapps to land and water does not derive from the Crown nor from the Reindeer Pasture Acts.

"The Reindeer Pasture Acts appear in the light of the Altevatn decision clearly as regulators which do not affect the rights of the Lapps under private law. The provisions about the funding of compensation payments are such regulators.

"...

"Above all things, the Lapps have a fear of what in the Parliament has been called 'artichoke policy' being applied against them, which means that their land and their rights are taken from them, piece by piece, without any collective estimation ever being made of the basis needed in the country to secure reindeer husbandry and therewith the continuance of Lappish culture. It is to be observed that there are abandoned farms in the country but not one single abandoned reindeer-breeding district. Reindeer husbandry is not a receding industry. Its prospects are good and through co-operation with the meat-marketing organization, the farmers co-operation etc., profitability may be improved considerably. The Lapps consider that only as an association can they withstand the considerable pressure exercised upon them and their land mainly in connection with Crown exploitation and tourism." 14/

14/ Statement by Erik Solem in Lappiske Rettstudier (Oslo, 1933, p.85) as cited in "The policy program of the Swedish Lapps" International Journal of Arctic and Nordic Studies, pp. 284, 285 and 287.

44. According to the same source: 15/

"The reindeer pasture laws are grazing regulation laws, in many respects chiefly to be compared to drill-books. The idea of presenting a civil-law definition in the reindeer pasture laws of the rights of the Lapps to land and water was relinquished in the light of the Norwegian example. As it has been pointed out before, these laws may be characterized as regulatives which do not infringe upon the civil-law character of the actual rights. These regulatives give the State authorities all power, after the Lapps having been 'heard' - in accordance with very incomplete legal instructions. Through the extensive Crown exploitation in Lappish areas the Lapps must in self-defence look on the Crown as their adversary. The system applicable to the Lapps may consequently be characterized thus: All power to the adversary, freedom for the Lapps to drill according to regulations.

"It has been the central task of the Lappish popular movement ever since its initial stages to bring about a correction of such conditions that are quite alien to the Swedish social order as it is usually conceived. This matter has been regarded as common to all the Lapps of the country, reindeer breeding and non-reindeer Lapps. The popular movement has aimed its criticism at the Lapps being the weak, poor, defeated, humiliated ones, who have not come into their right. A long list could be made of racial anti-Lappish statements in the preparatory legislative work since Johan Graan's memorandum of 1673 which lead to the first Lappmark Edict.

"...

"The rights of the Lapps appear to be founded on five different legal facts:

- "1. The original right of ownership of the Lapps;
- "2. Possession by right of immemorial usage;
- "3. Hereditary right of possession accepted by Swedish authorities;
- "4. The land survey;
- "5. The Reindeer Pasture Laws."

45. A writer states:

"The Reindeer Breeding Act of 1971, while failing to satisfy the demands of the more militant Lapps who demand full ownership of the reindeer grazing areas, has been generally hailed as an important piece of legislation which goes a long way toward giving this minority group more responsibility in conducting its own affairs. Under the new act, for instance, questions relating to reindeer breeding will be handled by the

15/ Ibid., pp. 289 and 290.

Provincial Agricultural Board, where the Lapps have their own representatives, instead of the Lapp Administration (now-abolished), from which they were excluded. Compensation for the loss of grazing rights will be shared equally between the Lapp districts affected and the general Lapp Fund where for the first time they will be strongly represented. The new act also provides for the reorganization of Lapp districts into independent economic associations which will undertake reindeer breeding on a collective basis. This transition from private to collective reindeer breeding will undoubtedly have economic advantages - but it will involve radical adjustments and a sharp break with long-standing Lapp traditions." 16/

46. On Indonesia, the Anti-Slavery Society has stated that:

"Over something as important as land, it is unfortunate that the law is not completely clear. By article 33 of the 1945 Constitution section 2 states 'branches of production which are important to the State and which affect the life of most people, shall be controlled by the State', and section 3 states 'Land and water and the natural riches therein shall be controlled by the State and shall be exploited for the greatest welfare of the people'. As a constitutional statement this could be interpreted strictly as meaning that the control necessary for the successful exploitation of the land for the greatest benefit implies that citizens can be turned off the land by arbitrary decree. At its weakest it could only be stating the accepted principle of the assumption of imperium by the sovereign power."

47. The Anti-Slavery Society states that, in Paraguay, problems arise because "the majority of the indigenous population has no full citizenship and therefore cannot exercise any ownership rights legally". This non-governmental organization also states that problems arise, in particular, in relation to cattle and land belonging to indigenous persons:

"One of the major problems is that of indigenous cattle ownership. Many Indians or Indian communities raise cattle, but their rights to own it are often not respected. Government representatives warned non-indigenous settlers not to continue to steal cattle, but they did not then return to the Indians the cattle already stolen. The problem is described by German missionaries of the Chaco in a report to the German Episcopal Conference of 17 December 1969:

'Not infrequently, the aborigines are robbed of the few cattle they possess. This is not directed especially against them, but rather a symptom of the general insecurity and illegality of the frontier regions of the Chaco. However, the aborigines suffer most from this situation, because they have no rights or means of legal defence.'

"Another major problem is that of land ..."

16/ Edward Maze, in Sweden NOW, No. 1/1972, vol. 6 (Stockholm, 1972), pp. 46-47.

48. During his visit to Paraguay in June 1974, the Special Rapporteur was informed that, in Paraguay, emphasis is apparently being placed on increasing efforts to find effective ways for the protection of land tenure by indigenous communities in view of past abuses in that area.

49. In the information provided in 1974 in connection with this study, the Government of Colombia described the present de facto situation of indigenous persons in this regard in the following terms:

"Today as yesterday, indigenous persons are being exploited. The forms of exploitation have varied as little as the customs, habits and beliefs of the indigenous persons. Nonetheless, something is changing: their land. Under pressure from settlers, who quite often had the support of the Church and the Army, the Indians have had to flee from their hard-won land to new frontiers. At present, possession of the Indians' land and its fruits benefits the settlers, who buy it at derisory prices or steal it openly. Others have taken refuge in far-flung forests or deserts where the land has little or no value, with the long-term prospect of the arrival of settlers or traders and of being robbed once again of scant wealth wretchedly come by until now. Those who, because of special traits, do not give up their land to the settlers or their wealth to the traders are assimilated under a process that is no less cruel: their chiefs become their exploiters and themselves occupy the position which the white exploiter occupies elsewhere.

B. Legislative, executive, administrative and judicial measures adopted to protect the lawful property rights of indigenous persons, groups or communities

1. Introductory remarks

50. Before considering the measures adopted in the various countries, a few brief remarks should be made on the significance and importance which the land has for indigenous populations. It must be stressed that there is a fundamental difference between the relationship which indigenous peoples have with the land and the relationship which other sectors of the population of the countries covered by this study have. It will then be easier to understand why all indigenous peoples throughout the world place so much emphasis on the land and land tenure, to place the problems of land and land tenure in their proper perspective and to have some idea of what indigenous peoples think and feel when land - their land - is at issue.

51. It must be noted at the outset that all indigenous communities have, and uphold, a complete code of rules of various kinds which are applicable to the tenure and conservation of land as an important factor in the production process, the foundation of family life and the territorial basis for the existence of their people as such. The whole range of emotional, cultural, spiritual and religious considerations is present where the relationship with the land is concerned. The oral tradition and customary law - not written, but alive in the hearts of indigenous peoples have lived, live and will go on living so long as they survive. The land forms part of their existence.

52. In examining the legal rules which are in force in the countries covered by this study and about which information is available, we find that there are some countries where no special legislation has been enacted to deal with indigenous ownership of land, the matter being governed solely by general rules. However, there are countries where laws have been enacted to provide, in particular, for indigenous ownership of land which is regarded as "indigenous land" or "land subject to a communal regime".

53. Where there are no written legal provisions that apply specifically to the land of indigenous populations, the legislation of the countries in question refers to the rights which "every person", "the inhabitants" or "the citizens" have with regard to the use of land. Such rights therefore apply to indigenous and non-indigenous populations alike. It must, however, be stressed that they have a body of systematic rights which have been adopted in unwritten form and which govern man's entire relationship with the soil. These rights relate to farming, hunting, fishing, harvesting, herding and other socio-economic activities by which they earn a living, including the utilization of the produce of the land, co-operation in many of the activities in question, participation by family members in such activities and by more complex social groups in the daily life of the community and participation of such groups, families and persons in the magic and religious ceremonies and beliefs that are common to them.

54. Land tenure has its origins in the ancestral settlement of indigenous peoples in areas of what now constitutes the physical territory of modern-day nations. Some of the very important factors that determine the basic characteristics of land tenure are: (1) the physical and chemical composition of the soil; (2) the topography and altitude of the area in question; (3) vegetation and animal life; (4) climatic variations; (5) kind of activities for which the land

is used (type of crops, herds, game, fish, fruit, roots and tubers gathered seasonally in each part of the habitat, etc.); (6) the various economic systems currently in use; (7) the rules governing the occupation of and succession to plots whose use and usufruct can be granted; (8) the particular kind of social and political organization adopted; and (9) the major importance of relationships with the super-natural and magic and of religious beliefs and practices.

55. The discoverers, conquerors and settlers who invaded erstwhile purely indigenous territory generally came from a world where the concept of absolute ownership prevailed, on the basis either of the rules of Roman law or of those of common law, with their distinctive characteristics in other respects. That concept imprinted upon the possession of land marked secularizing and individualistic characteristics, with the result that land was regarded as one more possession or commodity. The landowner had the right to make use of his possession and to enjoy it as he thought best, to plant on it such crops or trees as he pleased, to build there what he fancied, to leave it unused for such time as he saw fit and, basically, to sell it, lease it, mortgage it or abandon it. Nor was there any limit on the use or usufruct of his possession. He could freely dispose of it in accordance with the three elements inherent in that concept of ownership: jus utendi, jus fruendi and jus abutendi.

56. For indigenous peoples, the concept of land tenure had a very different meaning. It belonged to the community; it was sacred; it could not be sold, leased or left unused indefinitely. Between man and the land there was a relationship of a profoundly spiritual and even religious nature. They spoke of Mother Earth and its worship. For all those reasons it was in no way possible to regard it as a mere possession or still less as a commodity. Under the machinery for succession from generation to generation, communities, families and persons did not acquire a right of property in the plot of which they had possession even if it came down to them in a direct line from a remote ancestor. The only rights that were available, and could be granted to them by tradition and legal custom were usufruct and priority of use of the ancestral plot, with the consequent obligation to make use of it in the manner required by ecology and custom and not to leave it unused indefinitely.

57. Marked emphasis has usually been placed on the "communal", "socialist" and even "communist" way in which indigenous peoples managed the land in the days before the cultural contact that led to subjection, dispossession and colonization. The picture conjured up by these terms does not, however, really do justice to the complexities that form part of all this. Ownership of the land was held in common by the community as a whole and each group or sub-group or family unit received only the usufruct of a plot. They had what is usually called an "individual right of occupancy", whereas only a "communal right of alienation" existed.

58. In indigenous territory, however, "priority" rights of various kinds were often recognized over certain areas, such as residential sites for certain segments of the community (tribe, sub-tribe, clan) which had been occupied by their respective ancestors since the land was first occupied; areas that had always been cultivated by specific groups and their ancestors; places for fishing; areas for hunting, capturing or setting traps; part of a wood, a clump of trees or individual trees.

59. Only groups holding such special priority rights in these sites or areas had a right of decision over them. Not even tribal leaders or chiefs could take decisions which affected such sites and areas without the knowledge of the holders.

60. There also used to be certain lands that were always regarded as common to everybody and in respect of which any individualized form of takeover by any person, whether by way of use or of usufruct, was expressly and categorically ruled out.

61. In the lives which these peoples led as separate entities with an awareness of their existence as self-governing peoples or nations, land was an element of paramount importance, forming as it did a territorial base. It was the area throughout which collective authority was exercised exclusively by the people, who regarded it as their territory. Within it, all the ancestral and traditional forms of internal organization that had grown up historically were fully valid. All social, cultural and political institutions derived from the body of tradition inherited and built up by each people and were accordingly defended as part of their territory; they resisted any overstepping of boundaries by neighbouring peoples and communities and, of course, invasions from other parts of the world.

62. Out of sentiments of "territoriality", every tribe, clan, people or nation used resolutely to resist any invasion of its land and, in particular, certain areas of it that formed the nucleus of its special way of life and its most sacred spiritual refuge. It took military defeat to strip them of those most precious lands.

63. The situation that now exists in this regard shows that the basic concepts - the Western one of individual private property and the indigenous one of co-operative communal property - are very much alive in the minds, and in the close emotional attachment, of the relevant population sectors in modern-day nations. The direct and indirect conflict between these two basic concepts of land ownership and its tenure and of the fundamental relationship between man and the land therefore persists.

64. Apart from certain, infrequent cases in which the right of indigenous persons to organize their land tenure according to their own ideas has been recognized in a climate of social, political and cultural pluralism, the process of aggression and of the imposition of the basic ideas and notions of the dominant sectors on indigenous communities goes on despite the obvious and persistent efforts of those communities to remain faithful and to give practical effect, to their own ideas about land tenure within the context of cultural and religious considerations that give pride of place to land as something to be respected and venerated as Mother Earth.

65. It might also be noted that, precisely because of this attitude of respect and veneration and because of the technology developed on an ad hoc basis, the approach by indigenous populations to the development of their land and its effective use involves attitudes to the exploitation of the land and its natural resources which are, in ecological terms, more rational and sound than those to be found among the non-indigenous sectors of the population of the countries covered by this study.

66. As happened long ago in the case of agriculture and cattle breeding and, later on, in the case of mining, indigenous land continues to be attractive to and coveted by other sectors of the population for similar reasons. Formerly, entire communities and countless indigenous population groups were displaced so that the occupied land could be turned over to agriculture, cattle breeding and mining in the forms that were then prevalent. Later on, indigenous populations were evicted from less utilizable and productive areas to which they had been chased 50 years or more beforehand, so that new, and hitherto unused mineral and oil deposits could be exploited. Nowadays, new ways of exploiting the land and the new materials to be extracted from it have been discovered.

67. The invasion by the new inhabitants of land that was more accessible and better suited to agriculture or cattle breeding and of land considered suitable for mining compelled indigenous populations, from the time of the initial dispossession or later on as other areas were taken over, to withdraw to less desirable and less productive land. This was accompanied by certain changes in the ancestral forms of tenure, which were dismantled in part, reorganized after being re-interpreted in the light of their own native cultural patterns and adapted to the new circumstances that prevailed. Moreover, the colonial system allowed two types of ownership - private (Western) and communal (indigenous) - to exist in a delicate balance which remained more or less stable while colonial subjugation lasted.

68. This precarious balance eventually suffered the onslaught of the triumphant liberalism that strengthened Westernizing, individualistic and secularizing tendencies as the various countries relevant to this study entered upon the period of independence. In Latin America, the laws of disentailment of property known as "mortmain" applied not only to monasteries, convents and other ecclesiastical corporations, but also, in express terms, to indigenous communities, although their main purpose was to separate civilian and religious powers by breaking up the colonial church's system of land ownership. Similar phenomena occurred in other parts of the world.

69. The attack on indigenous communal tenure enabled individual title to community land to be recognized on the basis of concepts of private ownership in areas directly subject to the control of the authorities and such title assumed more pronounced features in the areas affected by it as the social and political institutions of the new States were strengthened. The indigenous land which was broken up in this way and which became a commodity very soon fell into foreign hands, particularly those of the large non-indigenous landowners, who thus divested the indigenous communities of their territorial base.

70. It is worth repeating that not all communities suffered from this attack in the same way and with the same intensity. Those that were fairly isolated managed to retain their communal land and to give the impression of dividing it up to the satisfaction of the authorities while internally keeping the ancestral forms of tenure virtually intact.

71. For indigenous populations, land, today as yesterday, is a constant and insistent reminder of their ancestors, of their heroic deeds and of the feats of the tribe, clan, people or nation. Oral, ritual and ceremonial chronicles have perpetuated a whole set of traditions that are associated with each and every part of their land. The names of distinctive natural features are linked to tribal exploits, their struggles and their victories, sacred places and ancestral burial grounds. This is why not just "any land" is accepted. There

is a special attachment to a certain ancestral area that involves a combination of aesthetic appreciation, socio-cultural sympathy and deep-seated spiritual and religious feeling.

72. The religion of indigenous peoples, their culture, self-esteem and respect are today also based largely on a continuing and sacred relationship with ancestral land, certain specific areas of which must remain undisturbed. The sacred plants they use in their religious rites and ceremonies and the curative plants they apply in their medicinal practices grow on that land and have to be picked carefully at given times.

73. These factors help to explain why, today as yesterday, the attachment of indigenous peoples to their land knows no bounds and is very different from the concept of land as a commodity in terms of the real or potential benefits it may yield. Today as yesterday, land is part of the existence, as indigenous persons, of these populations and serves as the basis for their entire physical and spiritual environment. It is land that defines the group (clan, tribe, people or nation), its culture, its way of life, its life style, its cultural and religious ceremonies, its problems of survival and its relationships of all kinds within the community and with other groups and, above all, its own identity. Land is synonymous with the very life of indigenous populations.

74. The preservation of this cultural and spiritual relationship with the land and the recovery of sacred land which has been lost and is in the possession of others is of deep spiritual significance. The expropriation, erosion, pillage, improper use and abuse of, and the damage inflicted on, indigenous land are tantamount to destroying the cultural and spiritual legacy of indigenous populations. Forcing them to hand over such land is tantamount to allowing them to be exterminated. In a word, it is ethnocide. This is why, today as always, indigenous land cannot and must not be regarded in purely economic and financial terms with its importance based on the capacity it has to yield mineral, oil and other resources in marketable quantities and forms. For indigenous populations, it must be said once again, the relationship with the land is still, over and above all else, a profoundly emotional and spiritual relationship of deep significance.

75. In the light of all this, it is now necessary to examine the information available on measures and action to foster and promote respect for indigenous customs regarding the attribution of the use of land and to prevent the abuse of these rules by non-indigenous peoples from adversely affecting the effective access of indigenous peoples to their land and its resources.

2. Steps taken to: (1) guarantee respect for and protection of the procedures established by indigenous custom for the transmission by members of the indigenous communities of the right of land use;
(2) prevent advantage being taken of such customs or of lack of understanding of non-indigenous laws and regulations to obtain the ownership of, or other rights to the use of, lands belonging to the indigenous populations or lawfully used by them.

76. The information available presents few data on measures of general application. There are, however, enactments referring to specific land areas and specific indigenous communities in several countries. In some cases there are enactments or measures that have been intended for use as a kind of model to be adjusted to fit other similar circumstances.

77. The Government of Chile has outlined the development of official policies in this respect giving information on previously existing situations and on the provisions currently applicable in this matter. Other sources, including information provided by Mapuche organizations, interpret the meaning and effects of the same provisions differently.

78. It should be noted that the provisions enacted over the years reveal an apparent general trend towards the division of communal land and the granting of individual title deeds to the members of indigenous communities. The exception is Act No. 17.729 of 26 September 1972, which, according to the Government, was designed to "keep the indigenous communities undivided".

79. The Government also states that Act No. 17.729 (1972) incorporates "some interesting innovations, such as the basic principle of allocating land solely to members of the community who both live and work on the reservation, to the exclusion of the rest, who are classified as absent. A declaration of "absence" is made by the Institute and involves the cancellation of the community rights of any persons who leave the reservation and live or work outside it.

"The Act dispensed with the Departmental Indian Courts, transferring any cases that arose between them or between indigenous persons and other persons, to the ordinary courts of law for hearing and settlement; the latter have the task of receiving claims and simply transfer the case to the Indigenous Development Institute, which then receives the evidence, establishes the facts on the spot and briefs the court that is to rule in the matter."

80. The Government states that the Directorate for Indigenous Affairs (DASIN) was set up by Law-ranking Decree No. 56 of 16 March 1953, under the Ministry of Lands and Settlement, with a view to promoting the division of the communities, the liquidation of debts and the settlement of indigenous persons in accordance with Supreme Decree No. 4.111 of 1931; to organizing indigenous communities; to determining the legal status of indigenous families and their rights of succession; to supervising the farming of reservations and small-holdings resulting from the division of communities; and to fostering and co-ordinating the activities of various State bodies and private individuals also concerned with this part of the nation.

"The early years were spent in organizing its functions and revising leasehold agreements, particularly those relating to forestry; approving or disallowing divisions of communities decided by the Indian courts; securing the establishment of schools in indigenous areas; and making loans available through the State Bank and medical and health care through the relevant Ministries.

"The second phase began with Act No. 14.511, which revised all existing legislation on indigenous persons and in general, was modelled on a Supreme Decree No. 4.111 of 1931, except that it simplified and streamlined procedures. Five Indian courts sat in Victoria, Temuco, Imperial, Pitruiquén and La Unión and managed to solve many of the problems involved in the restitution of indigenous lands.

"Article 60 of Act No. 14.511 provided that, when a restitution order had been made, an occupier who lost his case could apply through the relevant Departmental Indian Court for the expropriation of any land which he had been ordered to return within a period of 30 days from the date of execution, provided, of course, that he had made substantial repairs or improvements on the land which was the subject of the restitution (articles 73 and 74). In virtually all cases, the losing parties invoked this right, which was conferred by article 68.

"Such expropriations had to be reported on by the Directorate for Indigenous Affairs (DASIN), which was thus able to mitigate some of the harshness so as to help those who had actually worked the land and made the improvements referred to in article 74 of the Act. Unfortunately, this also cancelled out many of the results achieved by means of restitution orders, although, in all fairness, it must be added that such expropriations always involved very small areas of land.

"Under DASIN's supervision, the lawyers acting on behalf of indigenous persons worked efficiently and were subject to strict control; they were required to submit quarterly reports on both their contested and uncontested cases, on reports prepared, contracts drafted, etc. The fact that they were allowed to exercise their profession freely (article 6) meant that there were efficient professional people, qualified to deal with the various situations that arose between indigenous persons and other indigenous persons or private individuals and before the ordinary courts of law.

"Particular attention should be drawn to the work carried out by the surveyors of the Directorate for Indigenous Affairs who were appointed by the Departmental Indian Courts and who, in 10 years, succeeded in establishing a large number of plots with titles of ownership where communal land had been unlawfully occupied by private individuals. There was thus a large number of court-ordered restitutions, despite the expropriations pronounced in favour of occupiers who had lost their cases.

"The work carried out by the Departmental Indian Courts, the defence lawyers and the surveyors made it possible to reduce to a minimum the amount of land to be returned to the communities; what were usually involved were very small plots (between one-quarter of a hectare and 10 hectares, approximately)."

81. The Government reports on subsequent events and assesses the work of the previous Government in the following terms:

"The last phase of DASIN's work began with the advent of the Government of Popular Unity, which completely politicized DASIN. A large number of new employees were hired solely on the basis of their political affiliations and without regard to their knowledge and efficiency. The Directorate's watchword was the recovery of land for indigenous peoples by any means. The so-called 'Commissions for the Restitution of Indigenous Lands' were set up and, more often than not, entrusted with the task of justifying 'takeovers' staged by political officials and of forcing the expropriation of land on the pretext of solving the social problems thus occasioned. The expropriations

which took place through the Commissions did not, however, transfer the land to indigenous peoples legally; and, even when attempts were made to include many of them in the settlements, the system was not very successful. Indigenous persons wanted to own land individually or on behalf of their indigenous communities, a wish that it was not possible to meet.

"The result of all this was a more or less chaotic legal situation that will take time and work to disentangle. At present, lands that were 'taken over' are being returned and the notorious 'fence removals' are being exposed.

"One of the goals pursued at the time was the political organization of indigenous communities as societies or federations, which were encouraged to make all kinds of claims and used as a spearhead against the established order with a view to making accusations against officials who were regarded as 'reactionaries'.

"Meanwhile, the judicial institutions became immobilized, as did the liquidation of undivided communities. Meetings of officials followed one upon the other, with a resultant sharp drop in work output. Only in the case of the granting of fellowships, the establishment of student hostels and educational allowances was there any significant increase."

The Government states, with regard to the content of Act No. 17.729 and the aims of the previous Government by which it was issued:

"It was promulgated and published on 26 September 1972. Its prime objective was to integrate indigenous persons into society as a whole by assuring them broad participation in discussion and decision-making, but it proved so unwieldy that it has been virtually impossible to implement; furthermore, it makes constant reference to its regulations, which have not been enacted.

"In general, it maintains the prohibitions on encumbering and alienating indigenous lands provided for in earlier laws. The division of indigenous communities is likewise permitted, but only when an absolute majority of the members of the community who live and work on the reservation so request or when the Indigenous Development Institute gives its approval. This and the cumbersome procedure to which divisions are subject, made them impossible in practice. What the previous Government really wanted was to keep these communities undivided so it could use them as a tool in the socialization of Chilean farming.

82. As to measures for guaranteeing respect for and the protection of the procedures established by indigenous custom for the transfer of the right of members of the community to use the land, the Government stated (1975) that the legislation pertaining to land tenure and indigenous property has protected the ownership, use and usufruct of such land by the indigenous populations which occupied it ever since title was granted to them and even earlier.

"Act No. 17.729 Act No. 14.511 and earlier Acts prohibited the sale and alienation of the lands of indigenous communities. The same Acts stipulated that the use and usufruct of such lands should belong to the owners, i.e., the indigenous populations.

"It should also be noted that each family in the community group lives on a particular plot of land and works it for its own benefit, to the exclusion of the use and usufruct to which any other member of the community may lay claim.

"Accordingly, once the usufruct of a piece of community land by the head of a family has been more or less established, two situations may arise. The first is that the head of the family proceeds during his lifetime to divide the right of usufruct among his children. Moreover, it is traditional for children, when they marry, to ask their parent for plots of land which they may use to support themselves and their own family. This is seen as an obligation which, in most cases, the father accepts.

"The second situation that arises is that, upon the father's death, the family's right of usufruct so far as land is concerned can be divided only among those children who personally occupy and live on the land. If there are none, the right of usufruct of the land devolves upon the community. In this way, the existing de facto situation as regards the family's right of usufruct, as wanted and desired by the head of family, is perpetuated after he has gone.

"It may therefore be said that the Act sought to legalize this de facto situation, which is perpetuated by the custom of indigenous populations. In all the background material which the Indigenous Development Institute has to provide the courts in order to settle matters which arise between them and which concern indigenous land, the existing de facto situation with regard to rights of usufruct, the extent and scope thereof, kinship and the origin of the occupation of indigenous land, etc., is of fundamental importance.

In short, all this means that the Act gives positive endorsement to indigenous custom where transfer of the right to use the land is concerned and regularizes the de facto situation as desired and wanted by the holder of the right of usufruct with absolute respect for his wishes."

83. There are several legally recognized means of preventing non-indigenous persons from obtaining the use, usufruct and ownership of indigenous lands or lands belonging to indigenous populations.

"It has already been stated that non-indigenous persons cannot acquire such land. Act No. 17.729 prevents indigenous persons from selling their land. It also prevents the use of indigenous lands and their usufruct by non-indigenous persons.

"In any event, Act No. 17.729 stipulates that all questions involving the administration, exploitation, use and usufruct of indigenous lands shall be settled by the ordinary courts on the basis of a report from the Indigenous Development Institute. This protectionist approach for the benefit of indigenous populations rules out the possibility that other non-indigenous persons may be able to take advantage of customs or lack of understanding of the laws and regulations to obtain ownership of and other rights over indigenous lands.

"The Act also provides, to the same end, that all acts, contracts or measures entered into by indigenous persons with regard to their lands must be authorized by the Indigenous Development Institute.

84. See paragraph 29 supra.

85. The Government of Finland states that there are no special provisions to be applied solely to the Lapps in respect of measures to protect their lawful property, to guarantee respect for and protection of Lappish customs and means for the transfer of their rights to land use. The Government adds that "the services of central and local authorities are available to the Lapp population for the prevention of any abuses against them. A general legal aid service is available to all, including the Lapps."

86. The Government of Denmark states that the Danish Folketing (Parliament), in its 1978-1979 session, passed two acts of importance to the rights of the resident Greenlandic population in regard to non-renewable resources, viz., firstly the Greenland Home Rule Act, No. 577 of 29 November 1978, and secondly, the Mineral Raw Materials in Greenland Act No. 585 of 29 November 1978.

"The Greenland Home Rule Act, in section 8, provides as follows:

(1) The resident population of Greenland has basic rights to the natural resources of Greenland.

(2) With a view to ensuring protection of the rights of the resident population in regard to non-renewable resources, and to ensuring protection of the joint national interests it shall be laid down legislatively that any initial search, and any exploration and exploitation of the said resources shall be subject to an agreement between the Government and the Home Rule Administration.

(3) Prior to any agreement in pursuance of subsection (2) above being concluded, any member of the Landsstyre may demand that the matter be referred to the Landsting (Parliament), which may decide that the Landsstyre shall not co-operate in regard to the conclusion of an agreement of the tenor concerned."

The provision in subsection (1) has the character of a political declaration of principles.

The basis for the provision is a recognition that the resident population of Greenland has basic rights in regard to natural resources, which leads to a formulation of certain political and moral claims which should be respected. These claims originate, in particular, from a sentiment of the interdependence of the population and the land in which it has been living for centuries. This interdependence naturally leads to claims for certain rights which are not covered by the traditional legal linguistic usage, and which, consequently, are not absolute in a legal sense.

The rights to be taken into regard, as far as non-renewable resources (raw materials) are concerned, are the following:-

(1) the right of decisive influence in regard to raw materials, and particularly on the contents of raw material policies, and on the rate of development.

(2) the right to ensure that any detrimental effects on the physical and social environment are countered, in such a manner that Greenland's traditional trades, culture and way of life are protected.

(3) the right to make a profit from any raw material extraction, with a view to creating a financial basis for improvement of the conditions of life, also on a long-term basis.

These rights should, moreover, be seen in relation to the constitutional arrangement desired for the realm as such and for the population, which is accepted by both Denmark and Greenland.

87. According to the Government, to protect these rights and to protect the joint national interests of the realm, the rules relating to raw materials are based on the following principles:

that Greenland and Denmark shall rank equal in regard to laying down the guidelines for developments in regard to raw materials in Greenland, and to adoption of concrete decisions that are decisive for the course of events (the principle of equal status).

that in consequence of the principle of equal status, a joint decision-making competence should be established for the Central Authorities and the Home Rule Administration in regard to the essential decisions concerning raw materials, in such a manner that the Central Authorities as well as the Home Rule Administration shall have the possibility of opposing any course of action or any concrete decision which might be considered unacceptable by the party concerned (mutual right of veto);

that practical co-operation should be established between the political authorities and the administrative and technical capacity, as required for the purposes of control by the public authorities in the field of raw materials; and that the Home Rule Administration shall be ensured access to the expert advisers in the decision-making process to the same extent as the Central Authorities.

The principle of equal status and the joint decision-making competence are set out in subsection (2) which provides for legislation to the effect that any initial search, and any exploration and exploitation of natural non-renewable resources shall be subject to an agreement between the Government and the Home Rule Administration. The other principles of the rules relating to raw materials, like the details of the joint decision-making competence, and rules relating to the distribution of public income from the raw materials of mineral origin, are laid down in the Mineral Raw Materials in Greenland Act. Corresponding principles will also have to be included in legislation, if any, concerning other non-renewable resources.

The provision in subsection (3) implies that the question of the use, or otherwise, of the right of veto on the part of Greenland, is subject to decision by the Landsting, if only one member of the Landsstyre might so desire.

68. In connection with the legislative measures adopted in Brazil to protect the lawful property rights of indigenous persons, groups or communities, the Indian Statute, Act No. 6001 contains several provisions regarding the land rights of the native populations of Brazil. They are contained particularly in articles 17 to 35, 39 to 45 and 60 to 65. In general, Act No. 6001 provides:

"Art. 2. It is the duty of the Union, the states and the municipalities, (municípios), 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:

"...

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

"...

"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."

"...

"Art. 25. Recognition of the right of the Indians and tribal groups to permanent possession of the land they inhabit, in the terms of article 198 of the Federal Constitution shall be independent of the delimitation thereof and shall be assured by the federal agency of assistance to forest-dwellers, taking into account the current situation and the historic consensus of opinion on the length of time they have been occupied, without detriment to the appropriate measures that the Powers of the Republic may take in the case of omission or error of the said agency."

89. Further to the provisions contained in articles 4 (IV) and 198 of the Federal Constitution, quoted in paragraph 35 above, Act No. 6001 declares:

(1) On recognition of rights:

"article 22.

"Sole paragraph. Land occupied by Indians in the terms of this article is the inalienable property of the Union. (Articles 4, Item IV, and 198 of the Federal Constitution).

(ii) On the possibility of intervention:

"Art. 20. Exceptionally and for any of the motives hereinafter enumerated, the Union can intervene if there is no alternative solution, in a native area, said measure to be determined by decree of the President of the Republic.

"§ 1. Intervention may be decreed:

"(a) To put an end to fighting between tribal groups.

"(b) To combat serious outbreaks of epidemics that may lead to extermination of the native community or any disease that may endanger the integrity of the forest-dwellers or tribal group.

"(c) For the sake of national security.

"(d) To carry out public works of interest to national development.

"(e) To repress widespread disorder or pillaging.

"(f) To work valuable subsoil deposits of outstanding interest for national security and development.

"§ 2. Intervention shall be effected in the conditions stipulated in the decree and always by persuasive methods and, therefrom, according to the gravity of the situation, one or more of the following measures may result:

"(a) Restraint of hostilities, avoiding the use of force against the Indians.

"(b) Temporary transfer of tribal groups from one area to another.

"(c) Removal of tribal groups from one area to another.

"§ 3. The removal of a tribal group shall only be resorted to when it is quite impossible or inadvisable to allow it to remain in the area under intervention, in which case the native community, on removal, shall be assigned an area equivalent to the former one, ecological conditions included.

"§ 4. The native community so removed shall be integrally compensated for any loss or damage arising from the removal.

"§ 5. The act of intervention shall be supported by direct assistance from the federal agency entrusted with tutelage of the Indian."

90. Act No. 6001 contains several provisions intended for the defence of native land:

"Art. 34. The federal agency of assistance to the Indian can call on the Armed and Auxiliary Forces and on the Federal Police to co-operate in assuming the protection of the land occupied by the Indians and by the native communities.

"Art. 36. Without affecting the provisions of the preceding article, it is the duty of the Union to take suitable administrative measures or propose, by the intermediary of the Federal Police Prosecutor, adequate judicial measures to protect the forest-dwellers' possession of the land they live on.

"Sole paragraph. When the judicial measures provided in this article are proposed by the federal assistance agency, or against it, the Union shall be an active or passive party to the suit.

"Art. 38. Native land is not liable to take-over (squatters' rights) and cannot be expropriated except as provided in Article 20."

91. Several forms of attribution of land (e.g. "occupied land", "reserved areas" and "land of native ownership") have been foreseen in article 17 of Act No. 6001, which reads:

"Native land is held to be:

"I. The land occupied or inhabited by the forest-dwellers referred to in Articles 4, Item IV, and 198 of the Constitution.

"II. The reserved areas dealt with in Chapter III of this Title.

"III. The land belonging to native or forest-dweller communities."

92. As regards occupied land, Act No. 6001 provides:

"Art. 17. Native land is held to be:

"I. The land occupied or inhabited by the forest-dwellers referred to in Articles 4, Item IV, and 198 of the Constitution.

"Art. 22. Indians and forest-dwellers are fully entitled to permanent possession of the land they live on and to exclusive usufruct of the natural wealth and all the utilities existing on that land.

"Sole paragraph. Land occupied by Indians in the terms of this article is the inalienable property of the Union (Articles 4, Item IV, and 198 of the Federal Constitution).

"Art. 23. Possession by the Indian or forest-dweller is held to mean effective occupation of the land he holds in accordance with tribal usages, customs and traditions and on which he lives or carries on an activity that is indispensable for subsistence or economically useful.

"Art. 24. The usufruct assured to Indians or forest-dwellers comprises the right to possess, use and receive the natural wealth and all the utilities existing on land occupied by them, and likewise the product of economic exploitation of said natural wealth and utilities.

"§ 1. Usufruct which covers accessories and additions thereto, includes the use of the springs and waters comprised in the stretches of inland waterways within the boundaries of occupied land.

"§ 2. The Indian is guaranteed the right to hunt and fish in the areas occupied by him, any police measures that may possibly have to be applied being carried out persuasively.

93. As concerns "reserved areas", Act No. 6001 provides:

"Art. 17. Native land is held to be:

"...

"II. The reserved areas dealt with in Chapter III of this Title.

"...

"Art. 26. The Union may establish, in any part of the national territory, areas set aside for possession and occupation by the Indians, where they can live and obtain means of subsistence, with a right to the usufruct of the natural wealth and goods existing therein, and due respect for the legal restrictions applicable.

"Sole paragraph. The areas reserved as prescribed in this article are not to be confused with those in immemorial possession of the native tribes, and may be organized in one of the following forms:

- "(a) Indian reserve.
- "(b) Indian park.
- "(c) Indian farming settlement.
- "(d) Indian federal territory.

"Art. 27. An Indian reserve is an area intended to serve as the habitat of a native group, with sufficient means for the subsistence thereof.

"Art. 28. An Indian park is an area contained within land in the possession of Indians, whose degree of integration is sufficient to allow of economic, educational and sanitary assistance being supplied to them by the agencies of the Union, wherein the flora, fauna and natural scenery of the region are to be preserved.

"§ 1. In the administration of the parks, the freedom, usages, customs and traditions of the Indians shall be respected.

"§ 2. The police measures necessary to keep order and preserve the existing natural wealth in the area of the park must be taken with the use of persuasive means and in accordance with the interests of the Indians living there.

"§ 3. The subdivision of land in the Indian parks shall comply with the tribal regime of property, usages and customs, and likewise with the national norms of administration, which must be adapted to the interests of the native communities.

"Art. 29. An Indian farming settlement is an area intended for crop and livestock farming, administered by the Indian assistance agency, where acculturated tribes and members of the national community live together.

"Art. 30. An Indian federal territory is an administrative unit subordinated to the Union, instituted in a region where at least one third of the population is made up of Indians.

"Art. 31. The provisions of this Chapter shall be applied, wherever fit, to the areas in which possession arises from application of Article 198 of the Federal Constitution."

94. As to "land of native ownership", Act No. 6001 provides

"Art. 17. Native land is held to be:

"...

"III. The land belonging to native or forest-dweller communities.

"Art. 32. The Indian or the native community, as the case may be, shall have full ownership of land obtained by any of the means of acquiring property in the terms of civil legislation.

"Art. 33. The Indian, whether integrated or not, who occupies a plot of land of less than 50 hectares (123.6 acres) as his own for 10 consecutive years shall acquire full ownership thereof.

"Sole paragraph. The provisions of this article do not apply to land of Union domain occupied by tribal groups, the reserved area referred to in this Law, or land which is the collective property of the tribal group."

95. Commenting on what are seen as internal contradictions in FUNAI's action and in the Indian Statute regarding the indigenous peoples' control over their land, it has been written:

"The initial and fundamental contradiction is that FUNAI is an organization within the Ministry of the Interior and thus dependent on the Ministry for its budget and subordinate to its policy decisions. As the interests of the large private and government economic groups currently conducting the activity known as development are protected by the Ministry and clash with the interests of the Indians whose territories fall within the ambit of this development, it is clear that the interests of the Indians have no real representative. At best FUNAI could try to influence the Ministry's policy in the Indians' favour, and at worst it promotes the Ministry's policy for the Indians' detriment. At present, FUNAI seems to be running a middle course, complying with the development offensive, and attempting to mop up the mess afterwards.

"The second contradiction is found within the Statute of the Indian itself. Articles 2 (v), 17 and 22, which refer to articles 4, iv and 198 of the Brazilian Constitution, guarantee to the Indians the 'permanent possession of the lands they inhabit', and article 25 states:

'The recognition of the right of the Indians and tribal groups to the permanent possession of the lands they inhabit, under the provisions of article 198 of the Federal Constitution, will be independent of their demarcation, and will be assured by the federal organ of assistance to the Indian, according to the contemporary situation and historical consensus with respect to the antiquity of the occupation ...'

"But, in the preceding article 20, we find provision made for the complete violation of these rights: under any one of six stipulated conditions, Indians or tribal groups can be removed, temporarily, or transferred permanently, to any other area.

"The six conditions are:

- (a) To terminate warring between tribal groups.
- (b) To combat serious epidemics, which could lead to the extermination of the indigenous community, or any evil which threatens the integrity of the Indian or tribal group.
- (c) To impose national security.
- (d) To realise public works which are of interest to national development.
- (e) To repress disorder on a large scale.
- (f) To exploit the riches of the subsoil of relevant interest to national security and development.

"The third contradiction has to do with the use of natural resources on the Indians' 'inviolable' territory. Article 2 (ix) and article 22 guarantee the Indian permanent possession and 'exclusive usufruct of the natural riches and all the utilities' in the territories they inhabit. Article 18 prohibits leasing of Indian land and of any 'juridical negotiation which restricts the full exercise of direct possession by the indigenous community or the Indians' of that land. Article 28, paragraph 1, prohibits to anyone alien to the indigenous community 'the practice of hunting, fishing or collection of fruits, similarly any agricultural or ranching activity or extractivist activity'. Finally, article 24 states:

'The usufruct assured to the Indians comprehends the right to the possession, use and perception of the natural resources and all the utilities existent in the lands occupied, and also to the product of the economic exploitation of those natural resources and utilities.'

"However, these provisions too are completely undermined by several articles in Title IV concerning the Indigenous Patrimony, which consists of the tribal lands and their natural resources and utilities referred to above. Article 42 places the administration of the Indigenous Patrimony in the hands of FUNAI, and article 45 gives FUNAI control over the application of the renda indigena, the product of the economic exploitation of the indigenous patrimony referred to in article 24 above.

"The DGPI in particular is guilty of illegally leasing the Indian reserve lands as in the cases of the Karajá in the Ilha de Bananal and the Kadieu in Mato Grosso, of large-scale exploitation of wood, especially in the Kaingang reserves in the south, and of the disgraceful furnishing of 'negative certificates' to economic groups enabling them to invade and exploit Indian lands such as in the cases of the Nambikwara land in the Guapore Valley, and the Kúlina land in the Territory of Acre - to name but a few. The findings of the CPI of the Indian (cited several times in this paper) report some 36 agricultural projects established in Indigenous areas, and run with funds from PIN or PRODEC, which was created in 1976 within FUNAI in order to 'regulate the application of funds from the renda indigena for the utilization of the natural resources existent in the reserves'.

"Apart from exploiting the riches of Indians' lands for ends which have never been adequately clarified, FUNAI also imposes a foreign economic system on Indigenous groups:

'These projects referred to in fact constitute a replica of a typical capitalist model of economic exploitation which is being imposed on those societies. This, in that they involve only the remuneration of the factors of production - land and work - ceded by the community as titular to the Indigenous Patrimony. These practices interfere in every way with the specific socio-economic system of the groups, involving disastrous alterations principally in the system of traditional division of labour, the necessary time and rhythm of work, forms of the distribution and the circulation

of goods, preventing, in fact, that the indigenous economy function, and develop according to the internal regulations and concepts governing land use.' (CPI of the Indian. 1977:32)." 17/

96. In a conference on Indian policy in Brazil held at the Brookings Institution, Washington D.C. on 8 November 1974, it was stated:

"... we believe that several articles in the new Brazilian Indian Statute, which was passed into law on 19 December 1973, provide for the erosion, rather than protection of, Indian land and territorial rights. We would draw specific attention to the following sections of the Indian Statute:

"(a) Title III, Article 22, which states that lands held and occupied by Indians belong to the Union and are not considered as the real property owned by the tribe.

"(b) Title III, Article 20, which gives the Union the right to intervene on Indian lands and to relocate Indian tribes for purposes of 'national security' and development.

"(c) Title IV (in general), which gives the Union powers to administer and develop Indian resources, rather than leaving full control of these resources in the hands of the tribes.

"(d) The veto of Title III, Article 18, section 2, which would have prohibited third parties from contracting with the tribes for purposes of agricultural, fishing or extractive activities.

"As concerns Title III, Article 20 (point (b) above) of the Indian Statute, no recognition is given to article 12, paragraph 1, of Convention No. 107 of the International Labour Organisation, of which Brazil is a signatory, which states that tribal populations will not be displaced from their territories 'without their free consent', or paragraph 2, which provides that when such displacement does occur under exceptional circumstances, the tribal population will receive 'lands of quality at least equal to' those which they previously occupied. In addition, the Indian Statute provides no territorial compensation to many tribes who, before the enactment of this law, were either dispossessed or relocated from their aboriginal lands." 18/

17/ Anna Presland, "Reconquest, an account of the contemporary fight for survival of the Amerindian peoples of Brazil", Survival International Review, Spring of 1979, vol. 4, No. 1 (25), pp. 28 and 29.

18/ "Proposed alternative changes in Brazil's Indian policy", from Indigena, News from Indian America, Berkeley, California, United States of America, 8 November 1974, p. 3.

97. As regards steps taken to guarantee respect for and protection of the procedures established by indigenous custom for transmission of rights of land use by members of the indigenous communities, Act No. 6001 provides:

(i) In general

"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 deeds 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 in so far as they are less favourable to the former with due exception of the provisions of this law."

(ii) As regards "occupied land":

"Art. 23. Possession by the Indian or forest-dweller is held to mean effective occupation of the land he holds in accordance with tribal usages, customs and traditions and on which he lives or carries on an activity that is indispensable for subsistence or economically useful."

(iii) As concerns "Indian parks":

"Art. 28. ...

"§ 1. In the administration of the parks, the freedom, usages, customs and traditions of the Indians shall be respected.

"...

"§ 3. The subdivision of land in the Indian parks shall comply with the tribal regime of property, usages and customs and likewise with the national norms of administration, which must be adapted to the interests of the native communities."

98. As to steps taken to prevent advantage being taken of indigenous customs or the lack of understanding of non-indigenous laws and regulations to obtain the ownership of, or other rights to the use of, lands belonging to the indigenous populations or lawfully used by them, Act No. 6001 provides:

"Art. 62. The juridical effects of acts of any kind whose object it is to secure ownership, possession or occupation of the land inhabited by the Indians or native communities are hereby declared null and void.

"§ 1. The provisions of this article apply to land that has been vacated by the Indians or by native communities by virtue of an illegal act of the authorities or of private persons.

"§ 2. None shall have a right to legal action or indemnity against the Union, the Indian assistance agency or the forest-dwellers, on the grounds of the nullification and voidance with which this article is concerned, or the economic consequences thereof.

"§ 3. Exceptionally and at the exclusive discretion of the director of the Indian assistance agency, the effects of contracts of hire or tenancy in force on the date of issue of this Law shall be allowed to continue for a reasonable length of time, should extinction thereof bring about serious social consequences.

"Art. 63. No preliminary judicial measures shall be granted in cases involving the interests of the forest-dwellers or the Indian Estate, without prior consultation of the Union and the Indian protection agency."

99. The Government of Guyana states:

"Article 8 (1) of the Constitution provides that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except by or under the authority of a written law and where provision applying to that acquisition or taking of possession is made by a written law

(a) requiring the prompt payment of adequate compensation; and

(b) giving to any persons claiming such compensation a right of access either directly or by law of appeal for the determination of his interest in or right over the property and the amount of compensation, to the High Court.

"Subject to the provisions of paragraph (5) of this Article nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the preceding paragraph -

(a) ...

(b) to the extent that the law in question makes provision for the taking of possession or acquisition of -

(1) Property of Amerindians of Guyana for the care, protection and management.

"[There is a] law empowering the Commissioner of the Interior to take possession or retain, sell or dispose of property of Amerindians where it is necessary for the preservation of the property."

100. Concerning certain aspects of the British Guiana Independence Conference (1965) an official source contains the following information:

"... Annex C of the report of the British Guiana Independence Conference, 1965 settled the question of Amerindian land rights once and for all by declaring that Amerindians would be granted legal ownership or rights of occupancy over all lands traditionally occupied by them.

"A main provision of the blueprint was the setting up by law of an Amerindian Lands Commission charged with the job of implementing the over-all decision to give Amerindians title to their lands.

"The Commission, the establishment and functions of which are enshrined in Article 17 of the Guyana Independence Ordinance, had the following terms of reference:

(a) to determine the areas of Guyana where any tribe or community of Amerindians was ordinarily resident or settled on the relevant date, 26 May 1966, including, in the case of Amerindian Districts, Areas or Villages, within the meaning of the Amerindian Ordinance (Chapter 58), the part, if any, of such District, Area or Village where any tribe or community of Amerindians was ordinarily resident or settled on the relevant date, and to identify every such tribe or community with as much particularity as is practicable;

(b) to recommend, with respect to each such tribe or community of Amerindians, whether persons belonging to that tribe or community shall be given rights of tenure with respect to the areas of residence or settlement determined under paragraph (a) above or with respect to such other areas as the Commission may specify, being areas in relation to which such rights of tenure would be no less favourable to such persons than similar rights held in relation to areas determined as aforesaid;

(c) to recommend with respect to each such tribe or community of Amerindians the nature of the rights of tenure to be conferred in accordance with any recommendation under paragraph (b) above;

(d) to recommend, with respect to each such tribe or community of Amerindians, the person or persons in whom such rights of tenure shall be vested; and where the Commission recommends that the legal and beneficial interest in such rights shall be differently held to recommend the terms and conditions under which such legal rights shall vest and such beneficial rights shall be conferred;

(e) to determine, with respect to each such tribe or community of Amerindians, what freedoms or permissions, if any, other than to reside or settle, were by tradition or custom enjoyed on the relevant date by persons belonging to that tribe or community in relation to any area of Guyana, including areas other than those in which such persons were ordinarily resident or settled on that date;

(f) to recommend, with respect to each such tribe or community of Amerindians what rights, whether by way of easements, servitudes or otherwise, most nearly correspond to any freedoms or permissions determined under paragraph (e) above, and the person or persons to whom such rights shall be granted in substitution for the freedoms and permission aforesaid;

(g) to make such recommendations in relation to all or any of the matters aforesaid as may to the commission seem appropriate;

(h) to report to the Minister with respect to the matters set out in paragraphs (a) to (g) above.

"The Commission was appointed and its report submitted to Government in 1969. Its recommendations as accepted by Government are to be implemented." ^{19/}

101. The Government further states:

"The Amerindian Ordinance, Chapter 58, provides as follows:

The Minister may by order -

(a) declare any portion of Guyana to be an Amerindian District, Area or Village;

(b) declare that any such District, Area or Village shall cease to be a District, Area or Village; or

(c) vary the boundaries of any such District, Area or Village.

"Part V of the Ordinance provides that the Minister may in his discretion, by order, establish a District Council or an Area Council for any District or Area as the case may be. The Minister may similarly establish a Village Council for any village. These councils shall include Amerindian captains and such other persons as the Commissioner with the approval of the Minister may appoint, and in appointing Amerindians to be members the Commissioner shall have due regard to the wishes of the inhabitants of the District, Area or Village. One of the powers of these Councils is to regulate and prescribe the manner in which lands under the control of the Council may be used.

"Under the Ordinance, nine Districts have been declared Amerindian Districts, one area an Amerindian Area, and eleven Villages as Amerindian Villages. One District Council and one Area Council have been established. The lands comprised in the Districts, Areas and Villages are in the nature of reserves.

"Section 4 of the Ordinance provides:

'No person other than an Amerindian shall enter or remain within any District, Area or Village or any Amerindian Settlement or encampment without lawful excuse or without the permission in writing of the Commissioner of the Interior.'

"Section 6 provides:

'Any person who enters any District, Area, Village, Settlement or encampment as aforesaid otherwise than in accordance with the permission in writing of the Commissioner and without lawful excuse shall be liable on summary conviction to a penalty of fifty dollars.'

"The State Land Ordinance, Chapter 175, which regulates Grants, Leases and Licences of State Lands provides as follows:

"S.41. Nothing in this Ordinance shall be construed to prejudice, alter, or affect any right or privilege heretofore legally possessed, exercised, or enjoyed by any Amerindian in Guyana.

^{19/} A brief outline of the progress of integration in Guyana, published by the Ministry of Information and Culture of Guyana, January 1970, pp. 37-39 and 63.

"Provided that the Minister may, from time to time, by publication in the Gazette, make any regulations to him seeming meet defining the privileges and rights to be enjoyed by Amerindians, in relation to State Lands and forests and the rivers and creeks of Guyana.

"Under Regulation 39(11) of the State Lands Regulations, Chap. 175, 'Amerindians shall have the right at all times to enter upon an unenclosed or enclosed but otherwise unimproved part of the land leased to anyone for the purpose of seeking their subsistence therefrom in their accustomed manner without molestation but shall not have the right to disturb the leaseholder in the peaceable occupation and enjoyment of the land comprised in the lease.' The lands referred to are State lands leased for grazing areas on the pasture lands of the Coast lands. Similar provisions apply under 3.40(11) to grazing areas on the pasture lands of the Interior.

"Under Section 41 permission for grazing areas on the pasture lands of the Interior shall ordinarily be issued on the following terms and conditions:

- (1) The holder of the permission shall not erect or permit to be erected any corral or cattle pen on land held under the permission within a radius of three miles of any Amerindian Village or Settlement.
- (2) The holder of the permission will be responsible for and shall make good all damage done to any Amerindian cultivation, village or settlement by any cattle grazing on land within the area held under the permission.
- (3) If at any time after the granting of the permission an Amerindian reserve be created in the district any portion of the area comprised in the permission may be resumed for the purposes of the reserve.

"Section 13 of the Amerindian Ordinance, Chap. 58, provides as follows:

13.(1) The Commissioner, a district commissioner or any member of the police force may lay an information or complaint in his own name on behalf of any Amerindian against any person in the magistrate's court having jurisdiction to hear and determine the offence or other matter alleged against the person.

(2) The information or complaint and all proceedings arising out of the same, may be prosecuted or conducted before such court on behalf of the Amerindian by the person who laid the information or complaint in pursuance of the preceding subsection, or by the Commissioner, the district Commissioner or any officer authorized in that behalf in writing by the Commissioner.

(3) The Commissioner, the district Commissioner or an officer may if necessary appeal to any court having jurisdiction to hear an appeal against any decision arising out of proceedings instituted under this section, and may for that purpose retain the services of counsel, and in all respects take such steps on behalf of the Amerindian as he may think fit.

"Section 36 of the Forest Ordinance provides:

"Nothing in this Ordinance shall be construed to prejudice, alter or affect any right or privilege heretofore legally possessed, exercised, or enjoyed by any Amerindian

"Section 207 of the Mining Regulations provide as follows:

"All lands occupied or used by the Amerindians and all land necessary for the quiet enjoyment by the Amerindians of any Amerindian Settlement, shall be deemed to be lawfully occupied by them."

102. With reference to the Amerindian Lands Commission a publication contains the following information:

"The Amerindian Lands Commission was duly set up and reported to the Government of Forbes Burnham, the Prime Minister in 1969. Among its recommendations for legal entitlement to land for all the Amerindian communities were those for the Akawaio of the Upper Mazaruni district. ^{20/} Although lip-service has been paid to this report, its terms have never been given legislative force because of the need for 'extensive surveying work.' This has placed the Amerindians in the position of land squatters without legal tenure.

"In his study The Akawaio of Guyana: a problem of land tenure, Mr. Gordon Bennett, International legal adviser to Survival International, says: 'Clearly there are substantial grounds for contending that, as a matter of Guyanese law, Amerindians enjoy property rights of which they cannot be properly deprived without special, expropriatory legislation and certainly not without adequate and prompt compensation.

'But the Government of Mr. Forbes Burnham has shown, by its statement of policy and by its casual treatment of the Indians whose ancestral lands are at peril, a scant regard for the strict legalities of the situation. If this attitude persists, some form of international intervention may afford the Akawaios their only hope of equitable treatment.' ^{21/}

103. The Constitution of India provides:

"Art. 244

Administration of Scheduled Areas and Tribal Areas - (1) The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam and Meghalaya.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the States of Assam and Meghalaya and the Union territory of Mizoram.

^{20/} For information on the Upper Mazaruni Hydro Power Project, see paragraphs 349-364 below.

^{21/} Guardian Extra, 21 March 1975, p. 14.

"Art. 244-A

Formation of an autonomous State comprising certain tribal areas in Assam and creation of local Legislature or Council of Ministers or both therefor. - (1) Notwithstanding anything in this Constitution, Parliament may, by law, form within the State of Assam an autonomous State comprising (whether wholly or in part) all or any of the tribal areas specified in Part 1 of the table appended to paragraph 20 of the Sixth Schedule and create therefor -

(a) a body, whether elected or partly nominated and partly elected, to function as a Legislature for the autonomous State, or

(b) a Council of Ministers,

or both with such constitution, powers and functions in each case, as may be specified in the law.

(2) Any such law as is referred to in clause (1) may, in particular -

(a) specify the matters enumerated in the State List or the Concurrent List with respect to which the Legislature of the autonomous State shall have power to make laws for the whole or any part thereof, whether to the exclusion of the Legislature of the State of Assam or otherwise;

(b) define the matters with respect to which the executive power of the autonomous State shall extend;

(c) provide that any tax levied by the State of Assam shall be assigned to the autonomous State in so far as the proceeds thereof are attributable to the autonomous State;

(d) provide that any reference to a State in any article of this Constitution shall be construed as including a reference to the autonomous State; and

(e) make such supplemental, incidental and consequential provisions as may be deemed necessary.

(3) An amendment of any such law as aforesaid in so far as such amendment relates to any of the matters specified in sub-clause (a) or sub-clause (b) of clause (2) shall have no effect unless the amendment is passed in each House of Parliament by not less than two thirds of the members present and voting.

(4) Any such law as is referred to in this article shall not be deemed to be an amendment of this Constitution for the purposes of article 368 notwithstanding that it contains any provision which amends or has the effect of amending this Constitution.

104. The Anti-Slavery Society transmitted the following summary of the Fifth Schedule, parts 5 and 6:

Sch 5 (6) Scheduled Areas

(1) In this constitution, the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas.

(2) The President may at any time by order direct changes in the list of Scheduled Areas.

Sch 5 (5) Law Applicable to Scheduled Areas

(1) Notwithstanding anything in this constitution, the Governor, may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State ... [such directions may] ... have retrospective effect.

(2) The Governor may make regulations for the ... good government of any ... Scheduled Area. In particular ... [he] ... may -

(a) prohibit or restrict the transfer of land by or among members of Scheduled Tribes in such an area;

(b) regulate the allotment of land to members of the Scheduled Tribes in such an area;

(c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such an area.

(3) In making any such regulation ... the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made ... shall be submitted to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made ... unless the Governor ... has ... where there is a Tribes Advisory Council for the State, consulted such Council.

105. The Anti-Slavery Society states that it was:

"... in newly independent India that the most severe restrictions were placed on what were tribals' traditional rights to forests. The 1952 New Forest Policy converted the remaining 'rights' the tribals enjoyed under the British - the grazing of cattle, the collection of firewood, the right to cultivate limited areas - into 'concessions' to be controlled by the State forest departments. This combined with the avowed aim of increasing Indian forested area from an estimated 25 per cent to 33 per cent of land area spelled the virtual end of adivasi enjoyment of any but the most limited access to forests.

"In the words of Bardham (1975), after 1952:

'... the one-time "lord of the forest" was reduced to the status of a subject and placed under the tutelage of the forest department. He became a "wage slave" at the disposal of the forest department and forest contractor'.

"The results of these restrictions on customary use were twofold:

"(1) 'Forest Villages' (referred to in Forest Department (f.d.) records as 'labour camps' which illustrates the f.d.'s attitude to the half-million tribals who lived in them) were established for some of those tribals whose traditional areas were designated 'reserve forests'. In order to gain as 'concessions' their traditional 'rights', like collecting minor forest produce and cultivation of food crops, tribals were (and are) effectively forced to live in forest villages, in exchange for which privilege they have to agree to work for the f.d. whenever it requires them to (even if it conflicts with crucial periods in the production cycle) at very low wages. They are not allowed to take other paid work without the permission of the f.d. and they have no tenancy rights in the villages and are thus subject to summary eviction if they fail to comply with the f.d.'s demands.

"(2) Tribals living close to what were designated reserve forests having only limited 'concessions' to use such areas at the discretion of the f.d. are thereby 'encouraged' either to work for non-tribal forest contractors or forest officers at extremely low wages. Reports of violations of basic human rights by both are common as are those of collusion between non-tribal contractors and forest officers to exploit the adivasis and prevent any attempt by them to gain control over their 'traditional' resources. In AP for instance one of the few flourishing tribal forest co-operatives in the country - The Koida Co-op Society - was crushed by the forest department which suddenly and contrary to previous agreement demanded Rs 4,800 in rent. Because the Co-op could not pay it was evicted and the tribals became labourers again for the non-tribal contractor who picked up the lease for only half what the tribals were asked (Shilu Ao 1969).

"The rationale for excluding the tribals from the forested areas is to develop them commercially, tribal forms of land use like shifting cultivation and the grazing of livestock being incompatible with maximum productivity of the forest and in the extreme environmentally hazardous."

106. According to the Anti-Slavery Society again, in Indonesia:

"The Fundamental Stipulations on Agrarian Law - [Law No. 5 of 1860] lay down the principle that the agrarian law, prevailing over the land and water and air space is the adat law, as far as it is not contrary to the interests of the nation and State, which are based on national unity, together with Indonesian socialism and the stipulation formulated in this law and in other legislation with due regard to the elements based on religious law. (Chapter 1, Article 5) The Government states that 'isolated communities of autochthonous peoples have a legal title to the land they need for their living. The right of ownership over land that prevails in these communities is recognized and legalized by the Government of the Republic of Indonesia, but its implementation should take place in such a way as is in accordance with national and state interests'.

"The crux of the problem is whether the traditional right over land required for economic viability can be displaced unilaterally by an executive decision that it is not in accordance with national or State interests. By Article 2, paragraph 4, of the same law 'the right of power of the State as mentioned above, can in its implementation, be delegated to the autonomous localities and society-custom law, in so far as that is not contrary to national interests, based on legislation'. Although difficult to construe, this seems to allow a measure of delegation to local government but it is not clear what exact power is being delegated, whether it is the right to acquire such land on behalf of the central government or merely to fix the requirements of national and State interests. In the Government reply, the former is suggested when it answers concerning the transfer of their land to people outside their own community, that in general it adheres to the regulations of the local government as long as it feels that they have not been taken advantage of. In some societies, restrictions in this respect have been established based on socio-cultural reasons of their own. What the reply does not reveal is what occurs when such a society, for its own socio-cultural reasons, refuses to transfer land to outsiders and the outsider is a local government interest.

"In other words, in the absence of a legal status to land, those holding land according to adat law will invariably fail to receive compensation, because negotiations will be conducted by officials outside the community. Also, the bigger the project, and therefore the larger the amount of money concerned, the more likely it is that more and more distant local authority officials will be involved lengthening the chain of [possible abuses] and leaving nothing for those whose rights have been extinguished."

107. The Government of Costa Rica refers to Act No. 5251 and to Executive Decrees 5904-G, 6036-G, 6037-G and 6688-G.

108. The Government also states that: "Measures have been taken to guarantee respect for these customs and to prevent advantage being taken of ignorance of non-indigenous laws and regulations on land ownership. It is noted that the Executive Decrees were enacted only in order to establish legal measures and that legislation is being enacted to give effect to all the acts and decrees that have been adopted".

109. In this connection, it is pointed out that indigenous reservations have been characterized as "inalienable, non-transferable and for the exclusive use of the indigenous communities inhabiting them". It has also been declared that "indigenous reservations shall be administered by indigenous persons within their traditional or modern community structures, subject to co-ordination by and consultation with CONAI".

110. With regard to the "co-ordination and consultation" functions referred to in the preceding paragraph, the Government reported in 1979 that: "The co-ordination and consultation referred to in that paragraph were initiated by the National Indigenous Affairs Commission to encourage the organization of communities and undertakings which will act as administrative and governing bodies in each reservation. To that end, 14 community development associations and one farming and multiservice co-operative have been set up in indigenous areas and others are in the process of being established".

111. With regard to the unsuccessful establishment of indigenous reservations in the past, without the necessary guarantees, and the adoption of the new measures, which are regarded as more appropriate, mention may be made of the following statements by the Government in the preambular paragraphs of Executive Decrees 5904-G, 6036-G and 6037-G:

(a) As to the poor results achieved:

"The development of the Pacific south had the disastrous result of practically totally dispossessing the indigenous populations because of the lack of appropriate legislation and measures. The same thing is now happening in the indigenous areas of the Atlantic and Coto Brus, where there is also no legislation in this respect (preambular paragraph of Executive Decree 5904-G).

"The life of the indigenous populations of Costa Rica is being seriously threatened by constant and arbitrary plundering of their lands; this phenomenon has increased alarmingly in recent years, even to the point where acts of violence have been committed (first preambular paragraph of Executive Decree 5904-G)."

(b) The reasons are indicated in the following preambular paragraphs of Executive Decree 5904-G:

"2. Plundering was made possible by the fact that indigenous persons have no legal basis for the ownership of the land they have been occupying since time immemorial;

3. Indigenous persons have shown that they are unable on their own to prevent their land from being invaded;

4. For the above-mentioned reasons, indigenous persons have, for a long time, been calling for the establishment or legalization of inalienable reservations and the recognition of their right to guaranteed ownership of the land;

5. Since there are still territories inhabited exclusively by indigenous persons, it is possible to delimit such reservations."

(c) For these reasons and taking account of the fact:

"10. That it is the duty of the State to guarantee the security of its citizens and prevent injustice and ill-treatment, particularly in the case of isolated indigenous minorities (tenth preambular paragraph of Executive Decree 5904-G)."

(d) It has been deemed necessary to adopt, inter alia, the following measures to solve these problems:

(1) The establishment of reservations that are now regarded as necessary by the operative part of Executive Decree 5904-G (and, where appropriate, the provisions of earlier Acts) (articles 1 and 4);

- (ii) The application of the relevant protective measures to other territories by means of the operative part of Executive Decree 6036-G (articles 7, 8, 9 and 10), on the basis of the reasons stated in the preambular paragraphs of Executive Decree 6036-G:

"1. Decree No. 5904-G of 14 March 1976, published in Appendix No. 60 to La Gaceta No. 70 of 10 April 1976, did not include in the reservations established therein large indigenous population settlements in areas inhabited exclusively by them;

"2. Such indigenous populations would like to benefit from the same land ownership guarantees as their neighbours, to be incorporated in the reservations and to enjoy the other guarantees provided for in Decree No. 5904-G."

- (iii) The application to other indigenous reservations, which were established many years ago and have now nearly all disappeared, of the relevant protective measures provided for in the operative part of Executive Decree 6037-G, on the basis of the reasons stated in the preambular paragraphs of that Executive Decree:

"1. Decree No. 5904-G refers only to the establishment of new indigenous reservations, but does not take account of the situation in the old Pacific south reservations established by Decree No. 45 of 3 December 1945;

"2. Such reservations have been heavily invaded by non-indigenous persons, thereby creating more complex problems than those in the Atlantic region, to which a solution must also be found."

The following provisions are intended to solve the problems created by the invasion of such old reservations:

Article 1. The provisions of articles 5, 6, 7, 11, 12, 13, 14 and 15 of Decree No. 5904-G of 14 March 1976, published in Appendix No. 60 to La Gaceta No. 70 of 10 April 1976, shall apply to the Boruca and Ujarrás-Salitre-Cabagra indigenous reservations.

Article 2. The Institute for Lands and Settlement (ITCO) shall, in co-operation with CONAI, carry out a study of land tenure in the three indigenous reservations of China Kichá, Boruca-Térraba and Ujarrás-Salitre-Canagra, with a view to finding the most appropriate means of settling land disputes involving the indigenous and non-indigenous persons who live in those territories and to making a recommendation on the possibility of changes in the boundaries of such reservations.

Article 3. CONAI shall, as soon as possible, undertake studies on the current situation in the China Kichá reservation in order to make a recommendation on the possibility of eliminating that reservation and on the feasibility of relocating the remaining indigenous inhabitants in other reservations in the country."

(iv) The establishment by Executive Decree 6866-G (articles 1, 2 and 3) of appropriate procedures for the more effective registration of the reservations now being established for the indigenous communities concerned.

(e) Consequently (Executive Decree 6037-G):

"The solution to the indigenous problem must be sought at the national level and planned in a comprehensive and general manner to cover all the indigenous communities in the country, account being taken of their particular features" (third preambular paragraph).

112. Despite these texts, indigenous property rights continue to be violated, as shown by the following information, which dates from the period between 1973 and 1976 and indicates that these problems are still unsolved. It continues to be of the utmost importance to find ways of effectively guaranteeing land tenure.

113. In 1973, indigenous persons in Ujarrás, Puntarenas, who were suffering and feared that their land would be taken away, requested the competent authorities to conduct an investigation to put a stop to the abuses and schemes of the exploiters of the region. They established the Ujarrás Indigenous Union as the only means of protecting and defending their property rights. 22/

114. The Legislative Committee which investigated the problem of indigenous persons in Costa Rica in 1975 visited the Boruca, Paso Real, Curré, Lagarto, Puerto Nuevo, Salitre and Ujarrás indigenous population settlements and concluded that "the charges made by the Indians in the newspaper La República are well-founded". It was decided that the Legislative Assembly would continue to summon the main witnesses in connection with complaints about the neglect and takeover of the land of 8,000 indigenous persons by outsiders. Three deputies were of the opinion that the problem of the invasion of land in the indigenous reservations should be solved by implementing legislation that would prohibit transfers of such land. The problem of land invasion had already been raised in the Legislative Assembly and there had been a motion to request the Institute for Lands and Settlement (ITCO) to take action to prevent takeovers of land in Talamanca, Zent, Chirripo and Guápiles. 23/

115. In 1975, several indigenous communities attempted to solve the problem of the invasion of their land in the indigenous reservations by placing landmarks on the reservations. To this end, they prepared a legal statute on the land tenure system in the indigenous reservations and submitted it to the head of the Institute for Lands and Settlement. The representatives of the indigenous communities in Salitre, Platanares, Ujarías de Buenos Aires, Pozo Azul and Corina de Talamanca who visited the Institute expressed the hope that the statute would provide a solution to the serious problems they faced. 24/

22/ "Noticiero Indigenista", América Indígena, vol. XXXIII, No. 4, p. 1223.

23/ Ibid., vol. XXXV, No. 3, pp. 651 and 652.

24/ Ibid., No. 2, p. 426.

116. In 1975, emphasis was placed on the urgent need "to legalize ownership of the land occupied by the Indians. If this step is not taken rapidly, the Indians will continue to be robbed of their land and there will not be even one piece left which they can use to earn a living".

117. In 1976, broad sectors of public opinion regarded it as urgently necessary to guarantee indigenous land tenure. It was held that this is one of the main problems that should be brought to the attention of the Government authorities. 25/

118. In 1976, the National Indigenous Affairs Commission (CONAI) reported that the Institute for Lands and Settlement (ITCO) had sold property belonging to the Boruca reservation and leased it to non-indigenous persons. This confirms the reports made by a newspaper in its campaign in favour of Costa Rican indigenous populations and reflects the serious problems they face. The directors of CONAI held an interview with the President of the Institute for Lands and Settlement, to whom they described the serious irregularities taking place in that reservation. 26/

119. In 1976, the Watsi Indians in Rancho Grande, Talamanca, reported that their land was being invaded "by whites seeking to use it as grazing land for livestock and to use the forests for intensive forestry operations". The report stated that the same thing had happened 15 years previously in indigenous communities on the Pacific, where the best land had fallen into the hands of non-indigenous persons. 27/

120. The above-mentioned Act No. 5251 establishing CONAI contains the following transitional provision, which was amended by Act No. 5651 of 13 December 1974 and states that certain indigenous reservations are inalienable:

"Transitional provision. The indigenous reservations registered in the name of the Institute for Lands and Settlement (ITCO) are hereby declared inalienable and shall be intended solely for the settlement of indigenous communities, for essential public services and for the use, occupation and usufruct of indigenous persons who do not own land, whether registered or not, outside these reservations, where the Institute may grant leases to such indigenous persons; such leases shall be for a limited time and may not be transferred, except to other indigenous persons who are in similar circumstances." 28/

121. According to article 6 of Executive Decree 5904-G, as amended, indigenous reservations are inalienable, non-transferable and for the exclusive use of the indigenous communities inhabiting them. This article reads:

"Indigenous reservations shall be inalienable, non-transferable and for the exclusive use of the indigenous communities inhabiting them. Non-indigenous persons may not rent, lease, purchase or in any other manner acquire land or property situated in such reservations. Indigenous persons may engage in transactions to buy or sell land only with other indigenous persons. Any transaction between indigenous and non-indigenous persons shall be null and void, with the resulting legal consequences."

25/ Ibid.; vol. XXXVI, No. 1, p. 187.

26/ Ibid., pp. 187-188.

27/ Ibid., p. 188.

28/ Paragraph 118 above contains information to the effect that, in 1976, the Institute sold property belonging to the Boruca reservation.

The only non-indigenous persons who may live in the reservations are those who are obliged to do so because of the nature of their work, i.e. as missionaries, nurses, teachers, etc.

In any event, such persons shall meet the following requirements:

- (a) They shall be recognized as necessary;
- (b) They shall have the prior consent of the local indigenous administrative officials or of CONAI;
- (c) They may not use more land than is strictly necessary for their subsistence;
- (d) They may remain in the reservations only as long as required by their work."

122. Article 3 of the Indigenous Act states that:

"Indigenous reservations may not be alienated, prescribed or transferred; they are for the exclusive use of the indigenous communities inhabiting them. Non-indigenous persons may not rent, lease, purchase or in any other manner acquire land or property situated in such reservations. Indigenous persons may engage in transactions to buy or sell land only with other indigenous persons. Any transfer, purchase or sale of land or improvement of such land in the indigenous reservations between indigenous and non-indigenous persons shall be null and void, with the resulting legal consequences. The land, improvements to it and produce of the indigenous reservations shall be exempt from all types of present or future local or national taxes."

123. The Regulations contain the following provisions with regard to article 3 of the Act:

"Article 10. In order to safeguard the rights provided for in articles 3 and 5 of the Act, the President of the Integral Development Association shall appear either in person or through his representative or deputy as soon as possible after the commission of the offence and shall produce evidence of the registration of the reservation in order to initiate, before the competent official, the necessary legal action,

Article 11. For the purposes of the preceding provision, the Presidents of the Integral Development Associations shall renew their certificates of legal personality every three months and shall, as circumstances require, issue credentials for their representation, in accordance with the relevant legal formalities."

124. With a view to the exclusive use of the reservations by the indigenous communities inhabiting them, Executive Decree 5904-G also provides:

"Article 8. Where non-indigenous persons have acquired, legally own or lease property or land situated in the reservations, they shall, upon the entry into force of the present Decree, be expropriated and compensated in accordance with the procedures provided for in Act No. 2825 of 14 October 1961 and the amendments thereto.

In the event of any subsequent invasion of the reservations by non-indigenous persons, the competent authorities shall evict them immediately without payment of any compensation.

Article 11. Land belonging to the Institute for Lands and Settlement and situated within the boundaries of the indigenous reservations shall be ceded by the Institute and used for the rural settlement of indigenous communities."

125. The Indigenous Act and the Regulations thereto provide:

(a) The Act:

Article 5. Non-indigenous persons who are bona fide owners of land in indigenous reservations shall be relocated by the Institute for Lands and Settlement to other similar land, if they so wish; if they cannot or do not agree to be relocated, the Institute shall expropriate and compensate them in accordance with the procedures provided for in Act No. 2825 of 11 October 1961 and the amendments thereto. Studies and procedures relating to expropriation and compensation shall be carried out by the Institute in co-operation with CONAI.

In the event of any subsequent invasion of the reservations by non-indigenous persons, the competent authorities shall evict them immediately without payment of any compensation.

Expropriations and compensation shall be financed in the amount of 100 million colones, which shall be obtained from four annual appropriations of 25 million colones each, starting in 1979; such appropriations shall be included in the general budget of the Republic for 1979, 1980, 1981 and 1982. The fund shall be administered by CONAI under the supervision of the Office of the Controller General of the Republic.

Article 9. Land belonging to the Institute and situated within the boundaries of the indigenous reservations and the Boruca-Térraba and Ujarrás-Salitre-Cabagra reservations shall be ceded by the Institute to the indigenous communities."

(b) The Regulations:

Article 10. In order to safeguard the rights provided for in articles 3 and 5 of the Act, the President of the Integral Development Association shall appear either in person or through his representative or deputy as soon as possible after the commission of the offence and shall produce evidence of the registration of the reservation in order to initiate, before the competent official, the necessary legal action.

Article 11. For the purposes of the preceding provision, the Presidents of the Integral Development Associations shall renew their certificates of legal personality every three months and shall, as circumstances require, issue credentials for their representation, in accordance with the relevant legal formalities."

126. Executive Decree 6036-G refers as follows to what are regarded as "improvements" of expropriated property under article 8 of Executive Decree 5904-G:

"Article 13. When land situated in the reservations (article 8 of Decree 5904-G) is expropriated, only repairs and investments which were genuinely necessary and which represent some permanent economic activity shall be recognized as 'improvements'. In the case of irrational deforestation causing soil erosion or of land that has been taken over or abandoned for more than three years at the time the present Decree enters into force, no compensation shall be paid."

127. The Australian Government mentions the following Statutes:

"Aboriginal Reserves: Substantial areas have been set aside as Aboriginal reserves. The total area of such land is now about 127,000,000 acres. In most states and in the Northern Territory, legislative action has been taken to give Aboriginals special rights in these reserved lands:

In South Australia, the Aboriginal Lands Trust Act, 1966-68, established an all-Aboriginal Trust in which the ownership of Aboriginal reserves is progressively being vested. The Trust holds the freehold title in these lands and may lease, sell or otherwise use or dispose of the land subject to certain safeguards.

In Victoria the Aboriginal Lands Act, 1970 vested the two small reserves in that State in corporations formed by the Aboriginal residents of the reserves.

In Western Australia recent legislation (1972) provides for the establishment of an Aboriginal Lands Trust to hold reserve and other lands for the Aboriginal citizens of the State and the New South Wales Government has recently announced its intention to legislate to provide similarly for an Aboriginal Lands Trust to hold title in reserves.

In the Northern Territory existing legislation allows major areas of Aboriginal reserves to be leased only by Aboriginal individuals or groups."

128. The Government writes (1975):

"The New South Wales legislation to provide an Aboriginal Lands Trust was enacted in 1973. (The Aborigines (Amendment) Act 1973)."

129. The Government regards the arrangements in the Northern Territory, and in some other parts of Australia, as inadequate recognition of Aboriginal rights to land. The Prime Minister has said that:

"We shall legislate to give Aboriginals land rights - not just because their case is beyond argument, but because all of us as Australians are diminished while the Aboriginals are denied their rightful place in this nation."

130. The Government has committed itself to vest reserve and other Aboriginal land in the Aboriginal or Islander people as appropriate, and has indicated that Aboriginal land rights will carry with them full rights to minerals in those lands. An Aboriginal Land Rights Commission has been appointed to recommend ways and means of giving effect to its policy. Although this Commission is confined to the Northern Territory its findings will be relevant throughout Australia. The Commissioner, Mr. Justice E.A. Woodward, is expected to report before the end of the year.

131. According to the Government, it is the policy of the Commonwealth, with regard to the acquisition of additional lands for Aboriginals, to assist Aboriginal communities outside reserves to purchase land. To this end the then Prime Minister announced in a statement on Aboriginal policy in January 1972 that the Government had appropriated a sum of \$5 million and would contemplate a further \$2 million each year for the ensuing four years. The Government has established an Aboriginal Land Fund to purchase or acquire land off reserves for Aboriginal communities, and has undertaken to appropriate \$5 million per annum to the Fund for the next 10 years. To date three large pastoral properties have been bought for Aboriginal groups.

132. In 1972, one source reported: 29/

"In a far-reaching reversal of the previous Government's policy, Prime Minister Gough Whitlam has moved to turn over ownership of tribal lands to the indigenous people who have used them for centuries.

"Mr. Whitlam appointed Justice Albert E. Woodward of Melbourne yesterday to head a commission to go into the many problems associated with the land transfers.

"Mr. Whitlam said the action was a historic one, 'demanded by the conscience of the Australian people'.

"The move goes beyond the previous Government's plan to grant the tribes long-term leases. It is a step toward meeting Aboriginal demands for outright ownership of lands that the tribes had used for hunting and for their shifting habitations from time immemorial, but lost to white ranchers and mineral developers.

"The settlement and development of Australia has been achieved at the expense of long established rights of Aboriginal clans and other groups to title in the land with which they and their ancestors have been traditionally associated', Mr. Whitlam said in appointing Justice Woodward.

"The Whitlam Government plans to give the Aboriginal groups community titles not only to the lands but also to the mineral and timber rights. Far-reaching economic effects are expected.

"Last week the Government halted applications for land leases in the federally administered Northern Territory, a vast area with a heavy tribal population where tracts have been turned over to private interests."

133. It seems, however, that these good intentions were not entirely carried into effect. On the contrary, it appears that in at least three areas of Australia there are problems for Aboriginal property rights on land.

134. A team of the World Council of Churches which visited Australia in 1981 (15 June to 3 July), reported on special acts on Aboriginal ownership of land and their effects in the Northern Territory, Queensland and Western Australia:

"Northern Territory. The Aboriginal Land Rights (Northern Territory) Act 1976 passed by the Federal Government in response to the Woodward Land Rights Commission of 1972-74, is the first instance of any legal attempt to recognize prior Aboriginal ownership of land.

The Act provides for a system of the lodging, hearing and granting of land claims but the granting of land to Aboriginal people in the N.T. has not been as straight forward as it may seem. In its 1979/80 Annual Report, the Department of Aboriginal Affairs stated:

Title deeds to former Aboriginal reserves and other land, presented to Aboriginal Land Trusts in September 1978, were not registered by the Northern Territory Registrar-General because of objections to the terms of the titles in relation to the exclusion from the titles of roads over which the public has a right of way and the way in which mineral rights were reserved to the Crown.

Following negotiations between the Commonwealth and Northern Territory Governments and the Aboriginal Land Councils, the Aboriginal Land Rights (Northern Territory) Act 1976 was amended in the Autumn session of Parliament, to overcome the objections. At the same time the Northern Territory Legislative Assembly passed complementary amendments to its Aboriginal Land Act. Amended title deeds presented to a number of Aboriginal Land Trusts by the Minister in June 1980 were subsequently registered by the Registrar-General. Amended deeds were to be handed over to the other Land Trusts as soon as practicable.

Whilst the 1976 Act was intended to serve as a model for the states to follow, it presents problems for Aborigines in other states because:

- (i) it allows only unalienated crown land to be claimed;
- (ii) it places the onus on Aboriginal people to prove their traditional affiliation to lands, and in doing so are often forced to publicly reveal before the court ancient tribal secrets;
- (iii) it does not provide for claims on the basis of need or compensation.

Aborigines in the N.T. expressed concern about continuing attempts by the N.T. Assembly to weaken the provisions of the Act. In respect to mining, it would appear that Aborigines only have a right to say 'yes', not to say 'no'. Any refusal puts them under constant pressure to give in.

Similarly the Central Land Council in Alice Springs is concerned to make the Act stronger rather than weaker by:

- (i) making sure that the Northern Territory Government promises not to alienate land under claims are kept;
- (ii) making sure that sacred sites, Aboriginal communities and boundaries are protected in case of mining interests granted before the Land Rights Act was passed;
- (iii) giving Aboriginal communities on pastoral leases the chance to obtain some land.

The Queensland and Western Australian Governments have consistently acted to prevent Aborigines from gaining land or any measure of self-determination. These Governments appear hostage to the mining, tourist and pastoral interests and show blatant disregard for the human rights of Aborigines as well as Federal Government legislation regarding Aborigines.

In Queensland, Aborigines have no right to land and the Premier, Mr. Bjelke-Petersen, has announced that the notoriously racist Aborigines Act of 1971 will be repealed this year. Despite the fact that this legislation and its regulations, the administration of the Act and the conditions in which it places Aborigines, amount to the most racist situation for Aboriginal people in Australia, the repeal of the Act will mean the further dispossession of Aboriginal people in Queensland of 7½ million hectares. Mr. Bjelke-Petersen has announced that no freehold title will be given to Aboriginal people nor will they be allowed any special leasing provisions.

The Aboriginal people of Queensland are deeply concerned about their future.

An extensive survey of Aboriginal opinion in Queensland in 1978 revealed that an overwhelming majority of Aborigines on reserves (73.1 per cent) wanted the Commonwealth Government to replace the State Government as the body responsible for making laws. Eighty-five per cent of Aborigines on reserves wanted the ownership of the reserve land to be in their hands. The survey revealed the widespread desire for 'self-determination'.

Now that the Queensland Acts are to be repealed the Aborigines want corporate freehold title to the land. The proposed 50-year lease is unacceptable. Aboriginal religion, culture and self-esteem are based on a continuing sacred relationship with undisturbed land which outweighs any potential economic benefits. Freehold title would secure land against the whim of any future government and guarantee security for their children. Freedom to practise religion and culture is absolutely dependent on uninterrupted access to land.

The Queensland Government has a history of using legislation to stop the advancement of Aborigines. When the people of Aurukun and Mornington Island communities rejected a proposed state government takeover and voted to remain under the administration of the Uniting Church,

the Government introduced Local Governments (Aboriginal Lands) Act 1978 thus turning the reserves into local government areas and removing the Uniting Church administrators. These communities now fear the large-scale intrusion of bauxite mining companies.

The federal Aboriginal Land Fund Commission acquired four properties for Aboriginal groups in Queensland for economic and social purposes. Subsequently the Queensland Government altered regulations to prevent the registration of titles to further proposed purchases, to prevent Aboriginal ownership of land in Queensland.

In Western Australia, the expropriation of Aboriginal land through massacres and the poisoning of water holes and food continued into this century. Today, the Crown still retains title to the remaining reserve land but under Premier, Sir Charles Court, the W.A. Government has consistently refused Aboriginal requests for land and overridden Aboriginal opposition to the rush of mining activities. The most recent example was the paramilitary style action at Noonkanbah, which saw a massive police operation mounted to escort a convoy of mining equipment to drill on land of sacred significance to Aborigines.

The W.A. Government does not permit Aboriginal groups to own land thus undermining federal efforts to purchase properties for Aboriginal communities. At the Warringari Community outside Fitzroy Crossing, we met Aborigines who have been waiting since 1977 for the W.A. Government to grant them 50 hectares out of a cattle station of 380,000 hectares. The cattle station owners are willing to give the land but the W.A. Government refuses to act, leaving the Aborigines struggling to survive, because the fact that they do not own the land means they are not eligible for Federal Government assistance." 30/

135. The Government of Mexico reports that, in order to confirm indigenous rights and curb abuses, the following measures have been adopted:

Legislative measures

Communal property: In view of demands by indigenous peoples, communal property is governed by a special legal regime established in article 27, sections VI, VII and VIII, of the Constitution and in chapter 2, section II, of the Federal Agrarian Reform Act.

Ordinary legal procedures guarantee Mexicans the right to own private property (articles 14 and 16 of the Constitution).

Executive measures

Executive measures include the procedures for the recognition and registration of communal property and for the restitution of land, waters and forests which are dealt with by the Office of the Secretary for Agrarian Reform, a dependency of the Federal Executive Power. Decisions in such matters are taken by the President of the Republic, in accordance with article 8 of the Federal Agrarian Reform Act.

30/ Elizabeth Adler and others, Justice for Aboriginal Australians, Programme to Combat Racism, World Council of Churches, Geneva, 1981, pp. 15-18.

Statistical data

The National Indigenous Affairs Institute acts as a consultative body in procedures relating to the recognition and registration of communal property and to boundary disputes, in accordance with articles 360 and 374 of the Federal Agrarian Reform Act. For the purpose of such procedures, the Institute has repeatedly requested:

1. The recognition, confirmation and registration of land which rightfully belongs to indigenous communities or of land which they own de facto;
2. The restitution of land which has unlawfully been taken away from them; and
3. The right of indigenous populations which have no land to be granted land in accordance with their needs."

Administrative measures

Administrative measures include all the steps and measures taken by the National Indigenous Affairs Institute to defend the property rights of indigenous communities before the municipal, State and federal authorities.

Indigenous populations in the country have a tradition of communal land use which enables all members of the indigenous settlement to take part in its improvement and exploitation. The lawmakers understood this situation and recognized and took it into account in article 27, section III, of the Constitution, which provides that "Population settlements which retain communal status de facto or de jure shall have capacity to enjoy in common the land, forests and waters which belong to them or have been or may be restored to them".

In addition, the agrarian legislation in force entitles the members of indigenous communities, meeting in a general assembly, to decide on the award of plots to individuals, with the result that general rules are being established. It should also be noted that communal property rights may not be alienated, prescribed, encumbered or transferred (articles 22, 23, 47, section X, 52 and 53 of the Federal Agrarian Reform Act).

136. Among the principles of the official policy in Malaysia regarding the Orang Asli populations, there is one concerning land, which reads as follows:

"(d) The special position of Aborigines in respect of land usage and land rights shall be recognized. That is, every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically into line with other communities in this country. Aborigines will not be moved from their traditional areas without their full consent."

137. Areas predominantly or exclusively inhabited by Orang Asli may be declared to be Aboriginal Areas, whether or not divided into "cantons", or to be Aboriginal Reserves. The conditions under which such declarations may be made by the Ruler in Council or the corresponding Governor in Council, and the effects of these declarations are stipulated in the Aboriginal Peoples Ordinance, as follows:

"6. (1) The Ruler in Council or the Governor in Council may, by notification in the Gazette, declare any area predominantly or exclusively inhabited by Aborigines, which has not been declared an Aboriginal reserve under section 7, to be an Aboriginal area and may declare such area to be divided into one or more Aboriginal cantons:

"Provided that where there is more than one Aboriginal ethnic group there shall be as many cantons as there are Aboriginal ethnic groups.

"(2) Within an Aboriginal area -

"(i) no land shall be declared a Malay Reservation in accordance with the provisions of any written law relating to Malay Reservations for the time being in force in the Federation or any part thereof;

"(ii) no land shall be declared a sanctuary or reserve in accordance with the provisions of any written law relating to the protection of wild animals and birds for the time being in force in the Federation or any part thereof;

"(iii) no land shall be alienated, granted, leased or otherwise disposed of to persons not being Aborigines normally resident in that Aboriginal area or to any commercial undertaking without consulting the Commissioner;

"(iv) no licences for the collection of forest produce in accordance with the provisions of any written law relating to forests for the time being in force in the Federation or any part thereof shall be issued to persons not being Aborigines normally resident in that Aboriginal Area or to any commercial undertaking without consulting the Commissioner and in granting any such licence it may be ordered that a specified proportion of Aboriginal labour be employed.

"(3) The Ruler in Council may in like manner revoke wholly or in part or vary any declaration of an Aboriginal area made under sub-section (1).

"7. (1) The Ruler in Council or the Governor in Council may, by notification in the Gazette, declare any area exclusively inhabited by Aborigines to be an Aboriginal reserve;

"Provided that when it appears unlikely that the Aborigines will remain permanently in such place it shall not be declared an Aboriginal reserve but shall form part of an Aboriginal area;

"Provided further that an Aboriginal reserve may be constituted within an Aboriginal area.

"(2) Within an Aboriginal reserve:

"(i) no land shall be declared a Malay Reservation in accordance with the provisions of any written law relating to Malay Reservations currently in force in the Federation or any part thereof;

- "(ii) no land shall be declared a sanctuary or reserve in accordance with the provisions of any written law relating to the protection of wild animals and birds currently in force in the Federation or any part thereof;
- "(iii) no land shall be declared a reserve forest in accordance with the provisions of any written law relating to forests currently in force in the Federation or any part thereof;
- "(iv) no land shall be alienated, granted, leased or otherwise disposed of, except to Aborigines of the Aboriginal communities normally resident within the reserve;
- "(v) no temporary occupation of any land shall be permitted under any written law relating to land currently in force in the Federation or any part thereof;

"(3) The Ruler in Council or the Governor in Council may in like manner revoke wholly or in part or vary any declaration of an Aboriginal reserve made under sub-section (1)."

138. The Ordinance contemplates the compulsory acquisition of land for Aboriginal areas or reserves, whenever necessary, in accordance with the following provision:

"13. When it is necessary to acquire any immovable property, not being State land, in order to declare the same to be an Aboriginal area or an Aboriginal reserve, such property may be acquired in accordance with the provisions of any written law relating to the acquisition of land currently in force in the State in which such property is situated and any declaration required by any such written law that such property is so needed shall have effect as if it were a declaration that such property is needed for a public purpose in accordance with such written law."

139. Rights of occupancy within Aboriginal areas or reserves are granted in accordance with the Ordinance, as follows:

"8. (1) The Ruler in Council or the Governor in Council may grant rights of occupancy of any land not being alienated land or land leased for any purpose within any Aboriginal area or Aboriginal reserve.

"(2) Such rights may be granted to:

"(a) any individual Aborigine; or

"(b) members of any family of Aborigines; or

"(c) members of any Aboriginal community.

"(3) Such rights may be granted free of rent or subject to such rents as may be imposed in the grant.

"(4) Such rights may be granted subject to such conditions as may be imposed by the grant.

"(5) Such rights shall be deemed not to confer on any person any better title than that of a tenant at will...

"(6) Nothing in this section shall preclude the alienation or grant or lease of any land to any Aborigine."

140. Aboriginal communities are not obliged to leave areas declared to be a Malay Reservation, a reserved forest or a game reserve. The Aboriginal Peoples Ordinance provides:

"10. (1) An Aboriginal community resident in any area declared to be a Malay Reservation, a reserved forest or a game reserve in accordance with the provisions of any written law currently in force in the Federation or any part thereof, may, notwithstanding anything to the contrary contained in such written law, continue to reside therein upon such conditions as the Ruler in Council or the Governor in Council may by rules prescribe.

"(2) Any rules made under this section may expressly provide that all or any of the provisions of such written law shall not have effect in respect of such Aboriginal community or that any such provisions shall be modified in their application to such Aboriginal community in such manner as shall be specified.

"(3) The Ruler in Council or the Governor in Council may by order require any such Aboriginal community to leave and remain out of any such area and may in such order make such consequential provisions, including the payment of compensation as may be necessary.

"(4) Any compensation paid in accordance with the provisions of sub-section (3) may be paid in accordance with the provisions of section 12."

141. Compensation should be paid for alienation of State land upon which fruit or rubber trees claimed by Aborigines are growing. The Aboriginal Peoples Ordinance provides:

"11. (1) Where an Aboriginal community establishes a claim to fruit or rubber trees on any state land which is alienated, granted, leased for any purpose, occupied temporarily under licence or otherwise disposed of, then such compensation shall be paid to such Aboriginal community as shall appear to the Ruler in Council or the Governor in Council to be just.

"(2) Any compensation paid in accordance with the provisions of sub-section (1) may be paid in accordance with the provisions of section 12.

"12. If any land is excised from any Aboriginal area or Aboriginal reserve or if any land in any Aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any Aboriginal area or Aboriginal reserve granted to any Aborigine or Aboriginal community is revoked wholly or in part, the Ruler in Council or the Governor in Council may grant compensation therefor and may pay such compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Commissioner to be held by him as a common fund for such persons or for such Aboriginal community as shall be directed, and to be administered in such manner as may be prescribed."

142. In New Zealand, according to information provided by the Government:

"The present law relating to Maori land is contained in the Maori Affairs Act 1953. This Act provides for the recording of titles to Maori land, the succession to shares in it, its alienation and mortgaging, and the setting up of what are known as Maori incorporations. Under this Act, as under its predecessors, a Maori Land Court (originally established in 1862) has special functions relevant to such matters."

143. The Citizens' Association for Racial Equality reports:

"Few special measures have been taken in the past to protect Maori land since the whole emphasis of land policy from the foundation of the colony has been on providing ways to facilitate the acquisition of Maori land by European colonists. It is true that from time to time legislation was passed to prevent Maoris, ignorant of European commercial practices, from being fraudulently deprived of their land; but these were not vigorously enforced and much of the Maori land that was alienated in the later nineteenth century went to pay off debts incurred in attending the Maori Land Court or in other ways."

144. With regard to Peru, an official publication states that: "Pursuant to the provisions of Decree-Law No. 17716 and in accordance with article 212 of the Constitution providing for the restructuring of peasant communities and the establishment of regulations governing their organization and functioning and with the provisions of the National Development Plan, the former Directorate of Communities, in order to provide guidelines for that restructuring, drafted a Special Statute for Peruvian Peasant Communities, which was approved by Supreme Decree No. 37-30 A of 17 February 1970 and refers to the basic aspects of their social, economic and cultural organization with a view to their transformation in accordance with the general principles of agrarian reform, as part of the integrated development policy of the State.

The Special Statute restructures such communities by introducing far-reaching changes in their system of Government and their economic regime and defining their rights and obligations as legal persons under private law, together with the rights and obligations of their members, in accordance with traditional indigenous values and the principles of social justice which govern the domestic policy of the State.

Its aim is to reorganize the communities along new lines, the first step being restructuring, in which membership of the community and land ownership have an important role to play. The first is governed by part IV of the Statute (implemented by Supreme Decree No. 395-70-AG) and the second by part VII, section III, which reaffirms that the right of peasant communities to own and use land is subject to the regime established by the National Constitution, by Decree-Law No. 17716, by the ... Statute and by the other provisions in force."

145. The law relating to indigenous communities and agricultural development in the jungle and jungle border areas provides:

"Article 9. The State shall protect the indigenous communities' title to land, conduct the appropriate surveys and issue title deeds to the communities.

In marking the boundaries of their territories, it shall consider:

- (a) When a community is settled, the area that it occupies;
- (b) When a community makes seasonal migrations, the total area over which it usually moves;
- (c) Where a community does not possess sufficient land, the State shall allocate to it the area it requires to satisfy its members' needs."

"Article 10. Land which is situated within the boundaries of the communities' territory as delimited in accordance with the provisions of the preceding article, and which was allocated by the State to private individuals subsequent to the National Constitution promulgated on 18 January 1920 shall be incorporated into the area owned by the indigenous communities. The private individuals concerned shall be compensated for any useful or essential improvements they may have made. In the event of disagreement as to the value of the improvements, such value shall be determined by the Agrarian Code.

The Agricultural Development Bank shall grant the community concerned any loans it may require to comply with this provision and shall determine payment periods according to the nature of the improvements made."

"Article 11. The title to an indigenous community's land may not be alienated, prescribed or attached."

"Article 12. The National System of Support for Social Mobilization shall enter the indigenous communities in the National Indigenous Communities Register, which it shall establish for that purpose."

146. The Government of the Philippines has transmitted the texts of certain enactments dealing with aspects of land settlement, allocation and development as well as with the conditions for, and power of, approval of encumbrances and conveyances by members of non-Christian communities. The Government has also transmitted the "explanatory notes" attached to the drafts and which contain an explanation of the reasons and purposes of these provisions. The following are the texts and explanations.

Republic Act 3985

(Explanatory Note)

Reports of the field representatives of the Commission on National Integration, confirmed by the findings of the survey conducted in 1962 by the Senate Committee on National Minorities in Mindanao, Palawan, Mindoro, Nueva Ecija, Nueva Vizcaya, Cagayan, Isabela and Mountain Province, disclosed cases of land grabbing where invariably the victims are the poor and illiterate members of the national cultural minorities. In many of these cases thousands are being ejected from their ancestral dwelling and from their farm lots which they and their predecessors-in-interest have been occupying openly, peacefully, continuously and exclusively in the concept of an owner since time immemorial.

The immediate cause of all these unfortunate incidents is the harshness and inequity of our present pasture laws, particularly Section 3 of Commonwealth Act No. 452, which render possible the deprivation of these national cultural minorities of their ancestral homes and landholdings through the grant of pasture permits or leases to important and influential persons both in and outside of the Government.

In the grant of pasture leases or permits the Pasture Land Act does not contain any provision for safeguarding the prior right by occupation or settlement of any person over the area that is the subject of the pasture lease or permit.

To amend this law, approval of the attached bill is earnestly recommended.

Republic Act 3985

[Approved 18 June 1964] 31/

"Section 1. Section three of Commonwealth Act Numbered Four Hundred and Fifty-Two is amended to read as follows:

"Section 3. The Bureau of Forestry shall have jurisdiction and authority over the administration, protection, and management of pasture lands and over the granting of leases or permits for pasture purposes to any citizen of lawful age of the Philippines and any corporation or association of which at least sixty per cent of the capital belongs wholly to citizens of the Philippines and which is organized and constituted under the laws of the Philippines, for an area of not more than two thousand hectares in accordance with the provisions of this Act. Such leases shall run for a period of not more than twenty-five years, but may be renewed once for another period not to exceed twenty-five years, in case lessee shall have made important improvements, which, in the discretion of the Secretary of Agriculture and (Commerce) Natural Resources, justify a renewal.

"However, no pasture permit or lease shall be granted in provinces which, according to the latest official population census, are inhabited by members of the cultural minorities without a prior inspection conducted jointly by representatives of the Bureau of Forestry and of the Commission on National Integration and a certification by said representatives that no members of the national cultural minorities actually occupy any portion of the area applied for under pasture permit or lease."

"Section 2. Section eleven of the same Act, as amended, is further amended to read as follows:

"Section 11. Any corporation, or association or person who occupies or uses any part of the public domain for grazing purposes without lease or permit in violation of the provisions of this Act, or who, having obtained such lease or

31/ This Act is called: "An Act to amend sections three and eleven of Commonwealth Act numbered four hundred and fifty-two, otherwise known as 'The Pasture Land Act' and for other purposes (re conditions for the grant of pasture permit or lease)."

permit uses said part of the public domain for agricultural purposes, shall be punished by a fine of not less than one thousand pesos nor more than two thousand pesos and/or by imprisonment of not more than six months at the discretion of the court. In cases of a corporation or association, the president, managing director or manager thereof shall be held criminally liable. Any lease or permit herein granted shall be automatically cancelled upon violation of any of the provisions of this Act or of any rules or regulations promulgated thereunder.

"Any person responsible for the issuance of pasture permit or lease in violation of the provisions of the second paragraph of section three of this Act shall be liable for the penalties herein imposed.

"However, no member of the national cultural minorities who has occupied any forest zone in good faith for more than five years prior to the approval of this Act shall be subject to the penalty prescribed herein, should the area so occupied be found more suitable for agricultural than for timber purposes, the same shall be disposed of in favour of the actual occupants under the provisions of Commonwealth Act numbered one hundred and forty-one, subject to Republic Act numbered one thousand eight hundred eighty-eight, as amended."

"Section 3. Any or all Acts, rules and regulations and executive orders contrary to or inconsistent with the foregoing provisions of law are hereby repealed."

Republic Act No. 3872

(Explanatory Note)

"Because of the aggressiveness of our more enterprising Christian brothers in Mindanao, Mountain Province, and other places inhabited by members of the national cultural minorities, there has been an exodus of the poor and less fortunate non-Christians from their ancestral homes during the last ten years to the fastnesses of agricultural lands, unfortunately, in most cases within the forest zones. But this is not the end of the tragedy of the national cultural minorities. Because of the grant of pasture leases or permits to the more aggressive Christians, the national cultural minorities who have settled in the forest zones for the last ten years have been harassed and jailed or threatened with harassment and imprisonment.

"The thesis behind the additional paragraph to Section 14 of the Public Land Act is to give the national cultural minorities a fair chance to acquire lands of the public domain. Republic Act No. 782 passed on 21 June 1962 grants the occupants of agricultural public lands the right to own those lands if they have been there since 4 July 1945, or earlier. Evidently, under the prevailing circumstances, a great number of cultural minorities occupying lands of the public domain would fail to come under the provisions of this law, because since 1945, most of them have been driven from their original ancestral abodes. For this reason, this bill, in proposing an additional paragraph which would change the date to 4 July 1955 or 10 years later, attempts to rescue these cultural minorities from a position of disadvantage, not of their own making, and give them a fair chance and equal opportunity with their Christian brothers in the acquisition of public lands. (underscoring added)

"The reason for proposing the additional paragraph (c) of Section 48 is to improve on the preceding paragraph (b) concerning agricultural lands of the public domain. The provisions of paragraph (e) as proposed in this Act cover all kinds of land of the public domain found suitable for agricultural purposes, whether disposable or not, under the bona fide claim of acquisition or ownership. Under these provisions the national cultural minorities are given an advantage in the acquisition of lands of the public domain because their claim to possession or ownership covers both disposable and non-disposable portions of the lands of the public domain as long as they are found suitable for agriculture.

"The amendment to Section 120 of the Public Land Act by inserting a new provision therein is to protect the literate non-Christian cultural minorities who may know how to read and write but may not be in a position fully to comprehend the legal significance or implication of transactions of this nature considering the verbose legal phrases usually employed in instruments covering realty transactions.

"Hence the approval of said amendment is earnestly recommended."

Republic Act 3872

[18 June 1964]

"Section 1. A new paragraph is hereby added to Section 44 of Commonwealth Act Numbered One Hundred Forty-One to read as follows:

"Section 44. Any natural-born citizen of the Philippines who is not the owner of more than twenty-four hectares and who since July fourth, nineteen hundred and twenty-six or prior thereto, has continuously occupied and cultivated, either by himself or through his predecessors-in-interest, a tract or tracts of agricultural public land subject to disposition or who shall have paid the real estate tax thereon while the same has not been occupied by any person, shall be entitled, under the provisions of this chapter, to have a free patent issued to him for such tract or tracts of such land not to exceed twenty-four hectares.

"A member of the national cultural minorities who has continuously occupied and cultivated, either by himself or through his predecessor-in-interest, a tract or tracts of land, whether disposable or not since 4 July 1955, shall be entitled to the right granted in the preceding paragraph of this section: Provided, that at the time he files his free patent application, he is not the owner of any real property secured or disposable under this provision of the Public Land Law."

"Section 2. A new subsection (c) is hereby added to Section 48 of the same Act to read as follows:

"Section 48. The citizens of the Philippines described below, who are occupying lands of the public domain or claim to own any such lands or an interest therein, but whose titles have not been perfected or completed, may apply to the Court of First Instance of the province where the land is located for confirmation of their claims and the issuance of a certificate of title therefor, under the Land Registration Act, to wit:

"(a) Those who prior to the transfer of sovereignty from Spain to the United States have applied for the purchase, composition or other form of grant of lands of the public domain under the laws and royal decrees then in force, and have instituted and prosecuted the proceedings in connection therewith, but have, with or without default upon their part, or for any other cause, not received title therefor, if such application grantees and their heirs have occupied and cultivated said lands continuously since the filing of their applications (sic).

"(b) Those who by themselves or through their predecessors-in-interest have been in continuous, exclusive, and notorious possession and occupation of agricultural lands of the public domain, under a bona fide claim of acquisition or ownership, for at least thirty years immediately preceding the filing of the application for confirmation of title, except, when prevented by war or force majeure. Those shall be conclusively presumed to have performed all the conditions essential to a government grant and shall be entitled to a certificate of title under the provisions of this chapter.

"An act to amend sections forty-four, forty-eight and one hundred twenty of Commonwealth Act numbered one hundred forty-one as amended, otherwise known as the 'Public Land Act' and for other purposes

"(c) Members of the national cultural minorities who by themselves or through their predecessors-in-interest have been in open, continuous, exclusive and notorious possession and occupation of lands of the public domain suitable to agriculture, whether disposable or not, under a bona fide claim of ownership for at least 30 years shall be entitled to the rights granted in subsection (b) hereof."

"Section 3. Section 120 of the same Act is hereby amended to read as follows:

"Section 120. Conveyances and encumbrances made by persons belonging to the so-called 'non-Christian Filipinos' or national cultural minorities, when proper, shall be valid if the person making the conveyance or encumbrance is able to read and can understand the language in which the instrument of conveyance or encumbrance is written. Conveyances and encumbrances made by illiterate non-Christians or literate non-Christians where the instrument of conveyance or encumbrance is in a language not understood by the said literate non-Christian shall not be valid unless duly approved by the Chairman of the Commission on National Integration."

"Section 4. Any Act, law, rule and regulation or executive order contrary hereto is hereby amended and/or repealed accordingly."

Provincial Circular (Unnumbered)

[23 September 1964] 32/

(Conveyance and Encumbrances Approval)

"With the amendment of Section 120 of Commonwealth Act No. 141, as amended, otherwise known as the Public Land Act, by Section 3 of Republic Act No. 3872, which reads:

32/ This Circular was directed to all Provincial Governors of Mindanao and Sulu, Mountain Province, Nueva Vizcaya, Occidental Mindoro, Oriental Mindoro and Palawan.

"Conveyances and encumbrances made by persons belonging to the so-called 'non-Christian Filipinos' or national cultural minorities, when proper, shall be valid if the person making the conveyance or encumbrance is able to read and can understand the language in which the instrument of conveyance or encumbrance is written. Conveyances and encumbrances made by illiterate non-Christians or literate non-Christians where the instrument of conveyance or encumbrance is in a language not understood by the said literate non-Christians shall not be valid unless duly approved by the Chairman of the Commission on National Integration."

The approval of this Office of conveyances and encumbrances executed by persons belonging to the so-called non-Christian Filipinos or national cultural minorities heretofore required under its Provincial Circular (Unnumbered) dated 26 July 1956, is no longer necessary. Henceforth, and to avoid delay, all papers relative to said conveyances and encumbrances requiring approval should be forwarded directly to the Chairman of the Commission on National Integration for appropriate action.

147. The Swedish Government did not transmit separate information on these points. In response to a request for information thereon, the Government simply stated that "the Lapps as well as other minority groups are subject to the same laws as all other Swedes. There are no special rules concerning the sale of real property etc., which apply only to members of minority groups".

148. As regards the legislative measures adopted in Sweden to protect the lawful property rights of the Lapps, a publication states:

"The Reindeer Husbandry Law also contains provisions designed to safeguard the interests of reindeer breeders. For example, reindeer breeding is a privilege reserved for Lapps and may be carried out in certain regions. The law does, however, give the Cabinet the power to initiate moves to close off certain areas to reindeer breeding if they are needed for 'purposes of essential importance to the general welfare'. The Crown also reserves the power to transfer such rights as hunting and fishing.

"As can be seen, questions connected with reindeer breeding, especially those concerning land and water rights, have been the subject of conflicting legal interpretations. It has become increasingly necessary to clarify legal relationships and arrive at a better definition of both the nature and extent of Lapp rights. For this purpose, most of the Lapp villages in Sweden have been involved since 1966 in a suit against the Swedish Government in order to establish in principle that their right to the reindeer grazing fells of Jämtland County supersedes that of the Swedish Crown. In connection with preparatory work for the new Reindeer Husbandry Law, the National Union of Swedish Lapps (which represents the bargaining interests of the Lapp villages and associations) insisted that the Lapps have more extensive legal rights to the reindeer grazing areas than previous reindeer grazing laws have admitted. These rights can be characterized as joint ownership or permanent right of possession based on an ancient prescriptive claim. The rights of hunting and fishing in these areas should thus, in the opinion of the Union, be recognized as properly belonging to the Lapp villages.

"Legal controversies, involving the thorny problem of guaranteeing the Lapps a voice in deciding their future relationship with the non-Lapp population,

are kept in the limelight by the continued encroachments being made on reindeer breeding areas. Increased highway traffic, extensive water-control projects, heavy tourism, intensive forest utilization, legal protection of certain predatory animals, etc., all place increasing demands on reindeer-breeding Lapps to adjust to new conditions." 33/

149. According to information furnished by the Government of the United States an Indian reservation is an area of land reserved for Indian use. The name comes from the early days of Indian-white relationships when Indians relinquished land through treaty, "reserving" a portion for their own use. Reservations have been created by treaties, Congressional acts, Executive Orders and Agreements.

In order to have the trust relationship over Indian land (reservations) removed, Congress must hold hearings and vote that the land can be given to Indian people in fee patent - or to be held as the non-indigenous population holds land. The hearings are a safeguard to prevent the deed going to the Indians without considerable thought being given to the matter. However, in at least one case the land did go to the Indian tribe in fee patent and the tribe is now petitioning the Congress to have it put back into trust. The trust relationship includes freedom from real property taxes, and in the case of the latter tribe, taxes were too heavy a burden for the tribe to maintain. The tribe was forced to sell some of its land - which it could do since the land was no longer in trust - and felt that private ownership did not compensate for the loss of land.

150. In Colombia, the measures taken with regard to indigenous property and, in particular, land have been described in the following way:

"Act No. 89 provides that any parcialidad (settled indigenous community) whether or not its members follow the traditional community way of life, shall be governed not by general legislation, but by a cabildo or council appointed by the Indians themselves in accordance with their traditional customs. In all matters relating to the financial administration of the community, the cabildo has all the powers conferred on it by its particular statutes and by tradition. The cabildo may take steps to annul or cancel any sale which constitutes an infringement of existing legislation and apply for the invalidation of contracts mortgaging community land and of any other transaction which may be prejudicial to the community as a whole. Disputes between Indians over community affairs must be submitted to arbitration and dealt with by ordinary law.

Act No. 19 provides that the land of a community (resguardo) must be divided up by special commissions appointed by the provincial governments; all expenditure relating to these commissions is to be defrayed by the State. The land may be allocated to individual persons or to families and the commissions are empowered to determine the number of hectares to be allotted to each person or family. When a resguardo has been divided up, its members are placed on the same footing as Colombian citizens with respect both to their persons and their property (article 29). When a resguardo is being divided up, suitable areas must be set aside for schools, welfare purposes, market grounds and other public services." 34/

33/ The Lapps in Sweden, Fact Sheets on Sweden, published by the Swedish Institute (FS 59 Mcs), Sweden, 1972.

34/ ILO, op. cit. pp. 516-517.

3. Special provisions concerning the investigation, establishment and registration of titles to land and resources acquired by consuetudinary legal procedures and the registration of all land and all resources to which indigenous populations hold title, or the right of ownership or possession or in which they have shares

151. In the procedure for establishing the rights on land it is important to determine first whether the given piece of land has been claimed by any person or group and, if so, on what grounds. It is obvious that before the coming of the invaders from abroad the indigenous peoples occupied vast areas of the territories on which they had developed their existence as peoples and nations and claimed them as their territory.

152. The notions of "original occupation" or of "aboriginal title" have been propounded to give relevance to the claim of prior physical and economic occupation by indigenous peoples of large areas of the territories of present-day States. In some countries this notion was at the basis of initial agreements or treaties. Recognition of this title was one of the major considerations which enabled indigenous populations to enter into such accords. The recognition and protection of land rights is the basis of all indigenous movements and claims today in the face of the continuous encroachment on their land.

153. Milenary or immemorial possession should suffice to establish indigenous title to land. Such title should receive official recognition and subsequent registration. In the absence of specifically applicable legislative or executive measures explicitly extinguishing aboriginal rights, indigenous claims to their lands should be enough for the recognition of their right based on possession. The pre-existing rights and customs regarding possession and use of land must be recognized by the legal systems of the present States as a matter of course. The idea that these systems create the rights by attributing them through official recognition is erroneous. The arguments of "discovery", "conquest" or "dominion" as applied to the establishment of title to land previously occupied by indigenous populations create no clear rights that supersede those of the earlier possessors.

154. Recognition here is just the acknowledgement of a de facto situation that provides a basis for the existence of a right. Official recognition and subsequent registration should follow as a matter of routine, once possession and economic occupation is proved. In this sense, the rule expressed in article 11 of ILO Convention No. 107 (1957) is nothing more than a simple statement of this universal principle since the right is linked to indigenous traditional occupation of lands: "The right of ownership, collective or individual, of the members of the indigenous populations concerned over the lands which these populations traditionally occupy shall be recognized."

155. The present study cannot enter into the discussion of such fine juridical points as "original occupation", "aboriginal rights", "discovery", "conquest" or "dominion", as they apply to the establishment of title to land. They are the subject of special studies being prepared by scholars in many countries. Some of these concepts have been and are at the basis of indigenous claims to land. This section merely deals with existing rules for the establishment and recognition of indigenous rights to land as described in the information available in this respect for the purposes of the present study.

156. There is no information on several countries in this regard. 35/

157. The Government of Finland simply states that "The services of the central authorities are available to the Lapp populations for the prevention of any abuses against them. General legal aid is available to all, including the Lapps."

158. In general, this may be assumed to be the case in all countries on which there is no information indicating the existence of special measures. It is indeed the case in Norway where, as indicated in the information received from the Government, there are no provisions concerning the investigation, establishment and registration of titles to land or to water resources acquired by consuetudinary legal procedures.

159. The Anti-Slavery Society states that in India:

"There has been a marked increase in the number of landless labourers and detailed case studies in all parts of the Central Tribal Belt show it to be a very serious and continuing problem. In Shahada Taluka, Dhulia District, for example it has been estimated that 10,000 acres of tribal land passed into the hands of non-tribals between 1960 and 1972 (Kulkarni, 1975) which if one assumes that only 50 per cent of the Taluka is cultivable (a reasonable assumption in a heavily deforested, hilly area) means that over this period 7 per cent of the total cultivable area was taken over by non-tribals and that approximately 2,000 tribal families either had to migrate in search of work or become labourers for non-tribal landlords on what used to be their own land.

"The major loopholes in the laws which enable alienation to continue are the following:

"(1) Collusion of the Collector with powerful non-tribal interests. Srivastava (1972) for instance points out that in Bastar District, MP, in 1972 24 per cent of the cases were decided on the spot the same day and another 13 per cent within one week of application - hardly long enough to ensure that the deal is in the tribal's interest - and that the price paid by the non-tribal was often less than the prevailing market price.

"(2) The tribal who wants or has to sell his land sells it to another tribal who is already landless and to some extent dependent on the non-tribal landlord (e.g. debt-bounded labourer or share-cropper). The land remains nominally owned by the tribal but de facto control is in the hands of the non-tribal. As one would expect, this method is particularly common with large landlords at or near the ceiling for ownership (of the Land Ceiling Acts).

"(3) The non-tribal falsifies records held by the village Revenue Officer (talati or patwari) to show that he has been cultivating the land for the period required under 'land to the tiller' laws for him to become the legal owner.

35/ Argentina, Australia, Bangladesh, Bolivia, Burma, Colombia, Ecuador, El Salvador, Denmark (Greenland), France (Guiana), Guatemala, Guyana, Honduras, Japan, Malaysia, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka, Suriname, Sweden and Venezuela.

"(4) The tribal mortgages his land to a bank or other institution against a loan for agricultural improvements but defaults on his repayments and the land is therefore taken and auctioned - often passing into the hands of rich non-tribals. In Ranchi District for instance in the period 1974-1975 one medium sized bank - the United Commercial - filed 38 cases for default against tribals.

"Recognizing these loopholes, some State governments have modified their laws to try and close them. For instance, Andhra Pradesh and Bihar have introduced laws that allow tribals to mortgage their land only with a tribal co-operative (therefore it is hoped precluding the possibility of land alienation to non-tribals) in the case of foreclosure on the loan, and other States (e.g. Maharashtra and Andhra Pradesh) have introduced laws that make it possible for illegally alienated land to be restored to its previous tribal owner.

"However, while fine on paper, neither of these provisions works in practice. Prohibiting a tribal from using commercial banks given the small number of effective tribal co-operatives means that he is forced to turn to money-lenders who generally charge usurious rates of interest and therefore speed up rather than delay the process of the tribal losing his land; and where retrospective laws have been introduced they still depend on the Collector to implement them and become null and void if the original illegal purchaser has resold the land."

160. The Anti-Slavery Society further states:

"All government reports and writings on rural India remark on the fact that it is the money-lender - often one and the same person as the big landlord and trader - who controls the local economy and siphons off the poor peasant's or agricultural labourer's surplus, leaving their families at barely subsistence level. This is particularly true in tribal areas where the money-lender is invariably a non-tribal.

"The poor need the money-lender for productive credit to pay for agricultural improvements, for non-productive domestic and social needs such as the celebration of a marriage or funeral, and to get over a bad year when the harvest has failed, but once in debt at what are usually usurious rates of interest (25 per cent per annum is common, 50 per cent and above by no means unknown) it is impossible to pay off the debt and the poor peasant ends up a landless labourer (having lost his land ...) ... or a share-cropper giving a large proportion of his annual crop to the money-lender to pay the interest (but hardly ever making a contribution towards the capital) on the loan.

161. A writer states that:

"The forest policy followed by the British Government is now being modified to some extent and tribals are being allowed to collect minor forest produce and to have free timber for the construction of their houses. A kind of co-operative movement of the forest labourers has been started in progressive States like Bombay, where the tribals themselves are given

contracts for the exploitation of forests in place of the contractors. These co-operative societies, which are under the strict management of government officers and receive financial help are showing remarkable results and are contributing to the solution of the economic problems of the tribals." 36/

162. With regard to Indonesia, the Anti-Slavery Society has stated that:

"As far as the internal regulations of such communities are concerned, the Government follows colonial practice in that they remain valid unless superseded by, or contradictory to, prevailing national laws. This must be qualified by the additional requirement that the authorities must first become involved and, in the majority of communities, few individuals are anxious to call in representatives of the local administration. What is important is not the internal transfer, possession or distribution of lands but the land claimed by the community in its dealings with outsiders. It is not clear what criteria are used to decide the scope of community land holdings especially when any economic activity is a combination of hunting and collecting in the forest and shifting cultivation over secondary forest areas."

163. On the investigation, establishment and registration of title to Maori land the New Zealand Government states:

"As a matter of the first importance, in order to safeguard the rights of Maoris to their ancestral lands, the titles to all Maori land were investigated by the Maori Land Court many years ago; legal titles consequently exist in all cases and are recorded in the registers of the various offices of that Court. As a protective measure designed to prevent exploitation of Maori land owners and to ensure that transactions affecting this land - which is mostly multiple-owned - are properly scrutinized, the law provides that the owners of pieces of Maori land with five or more owners cannot legally sell, mortgage or otherwise alienate it until the transaction has been approved by the Maori Land Court. Part of the rationale of this system is that where a piece of land is owned by perhaps hundreds of people, the opportunity for groups of owners to be manipulated is a factor which does not enter into ordinary land dealings, and must be guarded against."

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

"Provision for the investigation and registration of Maori titles to land has existed since the Maori Land Court was created in 1865 but since the legislation which established the Court also provided for the European purchase of land so registered, the net effect of the Court's proceedings was for the most part to ensure the transfer of land from Maoris to Europeans. In this century the Court has been empowered to place restrictions on the alienation of land where this was not in the interests of Maori owners, and the Court has often done so, but by this time the greater part of Maori land had already been transferred to European ownership." 37/

36/ L.M. Shrikant, "The integration of the aboriginal population of India", International Labour Review, vol. LXXIII, No. 3, March 1956, p. 250.

37/ The Government added (1974) that "The quotation given hardly takes sufficient account of the fact that for many, many years it has been the duty of the Maori Land Court to scrutinize every sale or lease of Maori land in order to ensure that the transaction is in the interests of the owners. Any sale or lease of Maori land without confirmation of the Maori Land Court is illegal and void."

165. The Government of Costa Rica states that general, but not specific legislation has been enacted on this subject. The following provisions may nevertheless be cited:

(a) Article 4 of Executive Decree 5904-G provides, in fine, that: "The Attorney General of the Republic shall have these reservations entered in the Public Register."

(b) Executive Decree 6866-G, supplementing that provision, stipulates that:

Article 1. The indigenous reservations established under the aforementioned Executive Decrees shall be entered in the Public Register without encumbrance and on behalf of the State.

Article 2. The State shall, in the same legal document, transfer the ownership of the reservations to indigenous communities which have acquired legal personality through their representatives.

When the remaining indigenous communities which have not yet done so acquire legal personality, such ownership shall be transferred to them in the same way.

Article 3. Transfers shall be free of charge, shall not be subject to registration fees and shall be exempt from any other type of tax, in accordance with the provisions of the CONAI Act."

166. The Institute for Lands and Settlement has been entrusted with important functions relating to the territorial demarcation of indigenous reservations:

(a) By Executive Decree 5904-G:

Article 3. The Institute for Lands and Settlement shall be responsible for co-ordinating and carrying out territorial demarcation in accordance with article 1 of this Decree. Two months after the publication of this Decree, the Institute shall begin demarcation work. Any public or private institution that wishes to assist in the task of carrying out the said territorial demarcation may co-operate with the Institute."

(b) By Executive Decree 6036-G:

Article 11. The Institute shall, in co-operation with CONAI, carry out the territorial delimitation of the reservations established under articles 9 and 10 of this Decree. The reservations so delimited shall enjoy the same status as those established under Decree No. 5904-G; all the provisions of the said Decree shall apply where relevant."

167. The Government of Mexico draws attention to the following specific rules:

Article 356. The Land Court shall, on its own initiative or at the request of one of the parties, initiate proceedings for the recognition or granting of title deeds to communal property, provided that there are no boundary disputes and the lands in question are located within its jurisdiction.

When such lands are located within the boundaries of two or more jurisdictions, the Department of Agrarian Affairs and Settlement shall indicate in which of the two Courts the proceedings are to be conducted. In either case, the Department may take over the matter directly.

Article 357. Having received a request or taken the initiative of instituting proceedings, the competent agrarian authority shall, within 10 days, publish the request or the initiating order in the Diario Oficial of the Federation and in the official newspaper of the jurisdiction where the lands claimed by the communities are located. To fulfil that obligation, the judges who have initiated the proceedings shall immediately send a copy of the request or of the order to the Department of Agrarian Affairs and Settlement.

Article 358. Once the proceedings have been initiated, the community concerned shall elect by a majority vote two representatives, one an owner and the other an alternate, who shall take part in the handling of the case, furnishing the community's title deeds and any evidence they may deem pertinent.

Article 359. The agrarian authority shall perform the following tasks, which must be completed within 90 days:

- (a) Locate the communal property over which rights of ownership are alleged to be held, with or without title, and draw up the relevant plans;
- (b) Conduct a general census of the population of the community; and
- (c) Make an on-the-spot verification of data providing proof of ownership and of any ownership functions performed within the areas being claimed or for which title is being sought.

Article 360. Once the publication has been made in the Diario Oficial and the tasks referred to in the preceding article have been completed, the file shall be made available for inspection by the interested parties for a period of 30 days, to enable them to safeguard their interests. During the same period, the views of the National Indigenous Institute shall be sought.

Article 361. Should the President of the Land Court be responsible for the work involved, he shall, as a matter of course, send the file, with a summary of the case and with his opinion, to the Department of Agrarian Affairs and Settlement, for further action.

Article 362. The Department of Agrarian Affairs and Settlement shall rule on the authenticity of the titles presented and, on the basis of that opinion and the other evidence in the case, shall draw up, within a period of 30 days, a draft agreement of recognition and title, which shall be submitted to the President of the Republic for decision.

Article 363. The presidential decision shall be entered in the Public Land Register of the jurisdiction or jurisdictions concerned."

168. With regard to information on the rules concerning the investigation, establishment and registration of titles to land and water resources, the Government of Chile reported in 1975 that: 38/

"From the last century onwards, it has been Government policy to determine and settle ownership of indigenous lands, as well as to identify and determine the holders of title deeds to such lands.

Going back to the past, article 3 of an act of 10 June 1832 stated that 'What is at present owned, in accordance with the law, by indigenous persons is declared to be owned by them in perpetuity and security.' Article 1 of another act of 14 March 1853 provided that all purchases of land from indigenous persons or of lands situated in indigenous territory must be monitored by the Araucanian Intendant to ensure that the indigenous person selling land freely consented to do so, that the land he was selling actually belonged to him and that he had been paid or had been assured of the agreed price. An act of 1874 subsequently prohibited the purchase of indigenous land and, as a matter of curiosity, it may be noted that Act No. 1 of the Republic, promulgated on 11 January 1893, extended the time-limit for the prohibition on the purchase or acquisition of indigenous land.

The act which created the Indigenous Persons Settlement Commission was adopted on 20 January 1883 and is considered as the predecessor of the Commission established in 1966. The function of the Indigenous Persons Settlement Commission was to delimit the land belonging to indigenous persons, to record the results in a book kept for the purpose, to issue to the landowning indigenous person or persons a joint title of ownership on behalf of the Republic and to record such title in another book serving as the Indigenous Property Conservation Register.

The Settlement Commission functioned from the date of its establishment until 1930. It granted approximately 2,975 joint titles of ownership, which covered approximately 526,285 hectares, to a total of about 83,170 indigenous persons.

The Indian courts were set up in 1930, when the Settlement Commission was dissolved, and were entrusted, inter alia, with the task of continuing to recognize the ownership of indigenous persons of the lands they held.

The above-mentioned legal provisions serve as the basis for the organization of indigenous ownership that continues to be fully valid to this day; the joint title of ownership prevails over any other title, regardless of the origin of the latter.

Consequently, the lands belonging to indigenous communities are protected by a joint title of ownership granted on behalf of the State. This title is noted in a minute book and recorded in the special register known as the Indigenous Property Conservation Register. All records, books, files and

38/ See paragraph 169 below for the information the Government submitted to CERD in 1979 and 1982 in this respect.

registers of the Settlement Commission and files of the Indian courts, which have now been dissolved, are kept in the General Archives for Indigenous Affairs, an office which is responsible to the Indigenous Development Institute.

To this day, the title deeds of indigenous communities continue to be kept by the above-mentioned office. All communities that have been divided in accordance with law and whose lands have been awarded to community members in individual plots are nevertheless part of the ordinary real estate regime in Chile; such individual plots or strips are entered in the ordinary Property Register as corporations solely for the benefit of the persons to whom they have been awarded.

As a result of such a division, the joint title of ownership is removed from the Special Indigenous Property Register; the exercise of rights in property is altered to a considerable extent and, with few exceptions, such individual lands are subject to ordinary law.

As the first consequence of such liquidation and division under Act No. 17,729, the lands cease to be indigenous and are governed by ordinary law in so far as their use, usufruct, administration and disposal are concerned. The persons to whom these plots have been awarded nevertheless continue to be indigenous in accordance with article 1 of Act No. 17,729; such a division is not enough to cause anyone who is covered or affected by it to lose his status as an indigenous person.

Special legislation dealing with water resources does not exist; matters relating to water rights are governed by ordinary law."

169. More recently, on 27 March 1979 and 22 October 1982, the Chilean Government submitted two reports to the Committee on the Elimination of Racial Discrimination which relate to the content and objectives of new Decree-Law No. 2568 and indicate that:

(a) CERD/C/18/Add.5

"1. The principal object is to facilitate for the Mapuche access to the individual ownership of land. At present they have only what is termed the usufruct - which does not give them legal title of ownership - of the so-called community reservations.

2. In practice, the members of the Mapuche communities have divided the land among themselves, without any legal title for the reason stated. In the absence of title to the land, they are unable to obtain credit and technical assistance, with the consequence that they are in a position of inferiority as compared with the other small landowners in the rest of the country.

3. The new law puts an end to this patently discriminatory situation. It provides machinery for obtaining individual titles of ownership, free of charge and on a voluntary basis for the persons concerned. Should a single community member object the reservation in question would retain its present status.

4. The serious problem of the irregular taking of Mapuche lands will disappear.

5. In cases where the community in question opts for the division of the land, each parcel of land must correspond to the usufruct of the present holder.
 6. For this purpose a simple and expeditious procedure is envisaged which will make provision for legal aid for the persons concerned as well as for the grant of title free of charge.
 7. The parcels of land awarded under the new procedure will be indivisible, even in the case of succession mortis causa. In addition, they may not be sold for a period of 20 years, except by permission of the Director of the Agricultural Development Institute, which will be granted only in the following cases:
 - (a) if the purchaser is a Mapuche;
 - (b) if the transaction involves an exchange of lands; and
 - (c) if the sale is made for social or educational purposes for the benefit of the persons concerned.
 8. After the stage of regularization of titles has been completed, compensation will be paid to those community members who, while possessing legal rights in the reservation, have not received such parcels of land owing to the fact that they do not at present live or work on those lands.
 9. The Government will grant to the beneficiaries - the descendants of the ancient Mapuche - the utmost cultural, educational, technical and financial support. Under the new legislation, such cultural, educational and socio-economic assistance is to be consistent with the strictest respect of the traditions, mode of life, beliefs and customs of the Mapuche.
 10. It is estimated that under this Decree title deeds will be granted this year to persons living in 300 reservations and that the ownership of the Mapuche lands will be regularized within five years. The initiative for this process of regularization should come from the people concerned themselves. Accordingly, communities which prefer to remain undivided and without individual titles of ownership may retain the status quo without any State intervention.
 11. As will be appreciated, this legislation implies full respect both for the wishes and for the ethnical and cultural unity of the Mapuche."
- (b) CERD/C/90/Add.4

"The Radicación, or process of recognizing indigenous ownership, was undertaken roughly between the years 1880 and 1925. It fixed the boundaries for each group of Mapuche holdings and established for them a joint title of ownership in the name of all the occupants, though each of them, then as now, used to exploit only his own strip or portion.

Between 1884 and 1929 the Indigenous Persons Settlement Commission granted slightly less than 3,000 joint titles of ownership (100 per cent) to 75,000 persons.

Of the total number of titles granted by this Commission, 850 (28.33 per cent) were - at the request of the persons concerned - transformed into about 20,000 individual titles between 1931 and 1979 by the enactment of certain laws such as Law-ranking Decree No. 4,111 and Act No. 14,511.

Since no one's holding was legally recognized as his individual property, there was no incentive to invest or introduce improvements. No one could dispose of his land; and, if he left it, he could thereafter claim only some notional rights over the whole reservation.

Thus, when a father died, none of his heirs wished to leave the land, which was divided up between them; and with each division the holdings of individual farmers in each reservation became smaller and smaller. Hence, the desire of the Mapuches to obtain individual titles of ownership.

Between 1930 and 1965 a number of laws were enacted to introduce legal recognition of individual ownership of holdings which earlier had accidentally been included under a joint title of ownership. Inevitably, this complicated and difficult process was a slow one. Hence, more recent legislation on the transformation of Mapuche titles of ownership is designed to produce a radical and final solution to the problem of legalizing individual ownership of Mapuche holdings, by giving legal recognition to a de facto situation which had existed already in the indigenous reserves protected by the former joint titles.

The procedure which has been set in motion by the new legislation consists of surveying each plot or holding over the total area of the reservation and then requesting the courts to award to each occupant his 'holding' as individual property. Thus, the single title for each indigenous reservation is divided up into an appropriate number of individual titles of ownership of de facto holdings; and, finally, the joint title is cancelled. There is therefore no change or disturbance of the situation which had previously existed de facto in the occupation and exploitation of the reservations, a situation which had in ancient times been established by the Mapuches themselves and in which the State is not interfering.

This procedure for dividing joint titles into individual titles, as briefly described above, was adopted after consultations with the Food and Agriculture Organization of the United Nations (FAO) which on 31 December 1980 published a report on this subject signed by Mr. Cristóbal Unterrichter Heidler. According to this report, the division of land between the heirs of a deceased person, which had been practised de facto by the Mapuches within their reservations, had led to such extremes of saturation that, without an appropriate legal regularization of the situation, it would in future be impossible to apply any of the technical solutions which were still feasible in 1980.

The new law concerning land occupied by indigenous persons has set in motion the legal procedures for granting individual titles of ownership for the separate holdings in each reservation which was formerly the subject of a joint title.

These provisions have up to now made it possible to regularize about 1,150 joint titles (indigenous reservations) (38.34 per cent), which have been replaced by about 12,000 individual titles or holdings.

The purpose of the new law is, primarily, to bring to a conclusion the process of granting individual titles of ownership within indigenous reservations, so that the individual holdings of Mapuches which have de facto existed from time immemorial can now be legally recognized as their property.

The procedure for attaining this objective is voluntary, rapid and free. In essence, it consists of granting titles of ownership to the occupants of reservations, with the State assuming responsibility for providing financial compensation to heirs who have left the indigenous reservations in search of employment elsewhere.

The transformation of the above-mentioned indigenous reservations has been effected in response to written applications which the farmers concerned have submitted voluntarily by mutual agreements and it has not involved any expense for them.

In the Eighth, Ninth and Tenth Regions, there are now about 1,000 indigenous reservations (33.33 per cent) remaining to be regularized. In many of them, the process of transformation has already been initiated at the express and voluntary request of the occupants.

The present legislation is pragmatic. It provides a solution to the age-old irregularity of individual holdings within the indigenous reservations, but does not affect the cultural values or institutions which the Mapuches wish to maintain (ceremonial games, religious rites, ceremonies performed to beseech the divinity to bring rain or fair weather, ceremonies performed to heal the sick, co-operative work). The choice of a chief within the group is determined by the wishes of the local community; and the election of the chief does not affect the usufruct of a holding, since a person who is designated as chief will continue to own it.

When indigenous populations elect local chiefs, the Government does not interfere in the least with this arrangement. On the contrary, it makes use of this local authority, as it does in other rural communities, to represent the area, to take charge of local labour, or to organize social, religious and cultural events."

170. It is important to reflect the views formally expressed by Mapuche organizations with regard to the provisions of Decree-Law No. 2568 and the statement by the Government contained in document CERD/C/18/Add.5 and reproduced in the preceding paragraph. Paragraphs 348, 349, 350 and 351 of the report of the Special Rapporteur on the situation of human rights in Chile are therefore reproduced below:

"When they learnt about the new Decree-Law, Mapuche organizations pointed out, (Statement by the Chilean Mapuche Cultural Centres in Regions VIII, IX and X, Solidaridad No. 67, April 1979), that the Mapuche people had not been informed or consulted about it beforehand. They also pointed out that the tenor and purpose of the law constituted an attack on Mapuche cultural integrity,

which 'by splitting up the indigenous community by force, in the guise of a solution to our problems and camouflaged as a protectionist measure, condemns us, in actual fact, to extermination'. They also said that the Decree-Law 'does not modify but eliminates the mechanisms of participation, development and progress contained in previous legislation and, by stripping the Mapuche of their lands and forcibly assimilating them into the national community, is destroying our specificity, our values, our cultural heritage and consequently our own district and legitimate social identity - the basis on which Chilean society was built up and enriched - and disregards the State's responsibility to protect and promote the development of all indigenous and component groups of Chilean society' ".

The most criticized provisions of Decree-Law No. 2,568 are the following:

(a) Proceedings for the division of reserves, which may be initiated before the Departmental Civil Court by the Defending Counsel for Indigenous Persons at the request of a single occupant of the land (although President Pinochet stated the opposite in his speech in Villarrica, as quoted above). According to the Law previously in force (Law No. 17,729, of 26 September 1972) the application had to be supported by half the number of communal landowners plus one before proceedings for division of the land could be initiated.

The possibilities of objecting to an application for division submitted by a single communal owner are very limited, being restricted to the following cases: the existence of pending actions for recovery (provided that the objection is recorded against the registration of the title deed and that 10 per cent of the fiscal valuation of the reserve is deposited), which is not a true cause for objection but a remedy for which money is required; the fact that the reserve has already been divided up under an executory court judgement, in which case an order will be given for implementation of the division with the aid of the police (this is merely a formal cause for objection since in practice the division is carried out more rapidly); the existence of a covenant of common ownership between the current occupiers (which may not be entered into for more than five years). The latter is the only true cause for objection as it falls within the maximum period of time authorized in the Civil Code for indivisibility of land.

In actual fact, only one of the communal owners needs to submit an application for division for this to take place. Consequently, division would not be voluntary, as the Government claims, but it would be sufficient for one of the communal owners, Mapuche or otherwise, to submit an application for division for it to be imposed on the majority.

(b) The provision which states that persons who, "whether or not they possess the rights" indicated in the legislation, exploit a parcel of a reserve independently and for their own benefit and account, shall be considered to be the occupiers (art. 3). Tenants of one or more parcels of land belonging to communal owners who are grantees of land in the reformed agricultural area are also considered occupiers (art. 10).

This provision is criticized for recognizing the rights to Mapuche lands of persons who do not belong to this ethnic minority. A statement issued by the Temuco Indigenous Institute on 26 March 1979 refers to this provision as follows:

"The foregoing means that a tenant, on being considered by this law as an OCCUPIER, will become the owner of Mapuche land, WHETHER HE IS MAPUCHE OR NOT, and makes this legal provision the first obvious attempt to dispossess the Mapuche landowner of his land, since a tenant can perfectly well be non-Mapuche. Both the tenor and the purpose of this law are clear.

"The law does not stop there though. In addition to enabling a non-Mapuche tenant to acquire ownership of the land, it states that IT IS PRESUMED DE JURE (and hence cannot be disproved) that all the occupiers of a reserve are common owners of it, AND HAVE THE STATUS OF INDIGENOUS PERSONS."

The statement adds that the fact of recognizing the entitlement to Mapuche lands of persons not belonging to the community legalizes any unjust occupation of land which occurred before 1977. The Temuco Centre for Mapuche Culture made a statement in which it declared:

"The usurper of Mapuche lands is granted legal title to them and, what is more, anyone who has taken over our land by force through illegal manoeuvres acquired the status of an indigenous person" (La Tercera de la Hora, 18 May 1979).

(c) The fact that there is no limitation on the amount of land a person can appropriate individually and for his own benefit has also been criticized (art. 19).

(d) A further negative aspect of this enactment is the possibility of attachment of Mapuche lands in payment of loans obtained from a financial institution. The previous legislation (both Law No. 14,511 of 3 January 1961 and Law No. 17,729 of September 1972) had established that there should be no attachment, not only of Mapuche lands but of the shares and entitlements of members of this community, their dwellings, installations and all the tools of their trade, except in the case of bonds held in the State Bank or other State institutions. Under the new enactment, the Mapuches lose this protection and are in much greater danger of losing their property as a result of debts owed to private profit-making institutions.

(e) There is the possibility of alienating Mapuche lands, which under the previous legislation could not be mortgaged or sold to persons who are not Mapuche. Article 26 of Decree-Law No. 2,568 establishes that the portions of land resulting from division may not be transferred during the first 20 years, but adds that they can be sold in certain cases authorized by the Regional Director of the Farming Development Institute (INDAP); for example, if the transferee is the owner of another portion resulting from a division of land under this same law. As has been seen above, the new owner need not be Mapuche, as non-indigenous occupiers are also entitled to be allotted parcels of land. Consequently, the information submitted by the Government of Chile, and quoted in paragraph 169 (a) does not reflect the true content of Decree-Law No. 2,568 when it says that the parcels of land resulting from division may be sold only to Mapuches for 20 years. Land may also be encumbered or mortgaged in favour of a State body, or of private financial, credit or banking institutions, upon authorization by INDAP. The possibility of encumbering or

mortgaging land has been represented by the Government as a means of facilitating the procurement of credit for the exploitation of Mapuche lands. This places the land in the reserves on a similar footing to other land, but in view of the lack of assistance from the State, (as is explained later, the provisions on State assistance to the Mapuche people in regard to technical assistance, services and education have disappeared from the new legislation) and the dire poverty to which the Mapuche people have been reduced, it can be foreseen that this land will soon fall into the hands of purchasers or financial and credit institutions, with the result that Mapuche territories will no longer be one of the bases of the Mapuche community, and a unifying force in it.

(f) The dissolution of the Indigenous Development Institute, and the repeal of the legislation establishing mechanisms and measures for the social, educational and cultural promotion of the Mapuche community, and providing technical, legal, economic and general assistance for the development of this indigenous people have also been criticized. Decree-Law No. 2,658 makes no provision in this respect. All the statements and comments which have been transmitted to the Special Rapporteur on this legislation are critical of the change in it in this respect.

(g) It was also pointed out that Laws Nos. 14,511 and 17,729 established procedures for the recovery, extension and protection of indigenous lands through the total or partial restitution of land that had been occupied by non-indigenous persons without title to it or whose title was null or illegal. Moreover, INDAP had been authorized to purchase land in order to assign it to indigenous persons and to receive land transferred to it by CORA for the same purpose. No provisions of this kind are in Decree-Law No. 2,568.

When commenting on the new enactment some authors have emphasized the terms of article 23 which states "... the Judge shall order the portions resulting from the division to be handed over, always with the aid of the police". Authorization of police intervention seems to indicate that the legislator foresaw that the indigenous people would have difficulty in accepting the legislation. (Vives, Cristian, "Mapuches: un pueblo amenazado", Mensaje No. 278, May 1979).

Decree-Law No. 2,750 modified Decree-Law No. 2,568 in some aspects, which have not been mentioned before. It gave new powers to the Carabineros by authorizing them to obtain on-the-spot information about the portions of land assigned to each grantee. The Minister for Agriculture explained this measure as follows: "It is thereby intended to give the authority which is normally required to deal with rural problems in the first instance the minimum means to resolve everyday conflicts between occupiers from the present indigenous communities". (El Mercurio, 12 July 1979). Thus the police force may participate directly, and prior to any conflict, all matters relating to the allotment of lands within its jurisdiction, and is consequently entitled to intervene without an express court order in any problems which arise. This provision would seem to extend the powers of the Carabineros beyond its ordinary competence and place the Mapuches under the direct supervision of a security force."

171. As to the situation prevailing in the 1980s, in his report to the General Assembly at its thirty-fourth session, the Special Rapporteur on the situation of human rights in Chile observed that the new provisions had been enacted without the persons concerned having been consulted or having participated in their elaboration, and without the Mapuché people's historical traditions, specific

temperament, forms of ownership and work, and even less its needs and cultural development, being taken into account. On the contrary, he said Decree-Law No. 2568:

"concerns itself with incorporating the Mapuche community into the social and economic structures established throughout the country in recent years and deprives it of any form of protection or safeguard for its identity and integrity, and of assistance in its development. The extreme poverty to which these autochthonous communities have been reduced and the obligation to incorporate themselves into an alien social, economic and cultural system, on the unilateral decision of the Government, are seriously threatening their existence as an ethnic group. The Special Rapporteur notes particularly that, in this respect, the Government of Chile has followed the tendency criticized in previous reports of the Ad Hoc Group and, by repealing the legislation in force in favour of a new Decree-Law, has aggravated the situation of the Mapuche people". 39/

172. In November 1979 the Canadian Inter-Church Committee on Human Rights in Latin America appointed an Ad Hoc Commission to visit Chile in order to study the situation of the Mapuche communities living in the country.

In analysing the above-mentioned Decree-Law No. 2568, this group referred in its report to some of the objections listed above (see para. 170), affirming that the Decree Law had abrogated the provisions previously in force which established procedures enabling the indigenous communities either to recover lands which had belonged to them and which they had lost through usurpation, sale or transfer, or to obtain other land in compensation. The report also mentions the pressure brought to bear on the Mapuches by the Chilean authorities to induce them to apply for the division of reserve lands, officials being sent to the communities for this purpose to convince them that if they did apply they would obtain loans and better living conditions. According to the report, other means of pressure are also used: the Mapuches are subjected to threats to their freedom or physical integrity by officials or by local landowners who warn them that if they do not agree to the division of their lands all loans for the purchase of seed and fertilizer will be cut off. It is true that the lifting of the ban imposed by previous legislation on the attachment of land, shares and other entitlements, dwellings, installations and tools belonging to the Mapuches in the event of non-payment by their owners of loans obtained from institutions (except the State Bank or other State institutions) 40/ opens up new possibilities of private loans to the Mapuches. But, as the report states, the poverty in which the majority of the Mapuches live jeopardizes any possibility they have of keeping these lands, which represent the only security on loans they can give financial institutions, and which they risk losing if they fail to meet their commitments. Consequently, any attempt to integrate the Mapuche communities into a system of free competition is tantamount to depriving them of the protection which previously enabled them to preserve the common ownership of their goods, which is the basis of their existence as a separate ethnic community with its own cultural, social and economic characteristics.

39/ See A/34/583, paragraph 552.

40/ Ibid., paragraph 349.

173. The identity and integrity of the Chilean indigenous communities are seriously jeopardized by poverty, illness, high mortality rates and, above all, the need to look for employment elsewhere in order to survive individually. This migratory phenomenon has been apparent for a long time, but under the present regime it has worsened as a result of the deterioration in living conditions and the persecution and oppression of which the indigenous inhabitants have been victims, particularly during the years immediately after the armed forces seized power. In actual fact, the aim of the legislation enacted in 1979 is to improve the productivity of Mapuche land by including it in the system of private ownership. Owing, however, to their poverty and their ignorance of the rules of the system in which it is hoped to integrate them, the Mapuches can only be at a disadvantage vis-à-vis much more powerful individuals and enterprises. Their dispossession will turn them into cheap labour for the new owners of their lands and will force them to leave, at the risk of seeing their culture disintegrate and their identity disappear, in violation of their rights as an ethnic minority.

174. The division of Mapuche lands is proceeding rapidly. The Minister of Agriculture, at present responsible for all matters concerning the indigenous communities, has announced that he hopes to have allocated 10,000 plots of land to private owners before the end of 1980. ^{41/} To promote this division of Mapuche community land, the Government has promulgated Decree-Law No. 3256 of 27 February 1980, which exempts from land tax those to whom plots of land have been allocated in application of the system established by Decree-Law No. 2568 and those applying for division before 1 November 1981. Communities remaining undivided, however, will not be exempted from taxes but will be liable to pay a sum representing 25 per cent of the fiscal value of the land in question, in accordance with a provision issued by the Military Junta in 1974 (whereas Act No. 17,729 of 26 September 1972, previously in force, granted these communities total exemption from real estate taxes). ^{42/} Nor is exemption granted, either, to Mapuches owning in their own name plots allocated as a result of divisions effected under previous provisions. The Mapuches had submitted to the authorities an application for such exemption, but Decree-Law No. 3256, by granting it only in part, merely encourages the breakdown, desired by the Government, of community-ownership bonds. If exemption was granted to all Mapuches, it would be a real measure of support for the indigenous communities living and working in such precarious conditions.

175. The land division process provided for in Decree-Law No. 2568 begins with topographical studies carried out by INDAP. If an occupant is in favour of division he appears before the competent magistrate, who sets a date for a hearing, which is announced in a local newspaper at the same time as the application for division. The persons concerned do not have to be informed of the hearing individually, and consequently the Mapuches are afraid that hearings might take place without their knowledge, as newspapers are not received in the reserves regularly. That is why the Catholic Church, a number of whose bishops have met with General Pinochet to inform him of their objections to Decree-Law No. 2568 (see A/34/583, para. 347), has supported the establishment of Mapuche cultural centres to help these communities faced with disintegration to organize their defence and initiate a development process taking the true needs and characteristics of these ethnic minorities into account.

^{41/} El Mercurio, 3 February 1980.

^{42/} El Mercurio, 15 March 1980.

176. In Brazil, concerning the investigation, establishment and registration of titles to land and to water resources acquired by consuetudinary legal procedures, Act No. 6001 provides:

"Art. 25. Recognition of the right of the Indians and tribal groups to permanent possession of the land they inhabit, in the terms of Article 198 of the Federal Constitution, shall be independent of the delimitation thereof, and shall be assured by the Federal agency of assistance to the forest-dwellers, taking into account the current situation and the historic consensus of opinion on the length of time they have been occupied, without detriment to the appropriate measures that the Powers of the Republic may take in the case of omission or error of the said agency."

177. On the delimitation referred to in Art. 25 transcribed in the preceding paragraph Act. No. 6001 provides further:

"Art. 19. All native land, by initiative or under guidance of the Federal agency of assistance to the Indian, shall be delimited administratively. In accordance with the process established by decree of the Executive Power.

"1. The delimitation promoted in the terms of this article, homologated by the President of the Republic, shall be registered in a special book kept for the purpose by the Service of the Estate of the Union (Serviço do Patrimônio da União - SPU) and in the real estate register of the judicial district in which the land is located.

"2. Against the delimitation carried out in the terms of this article, there can be no grant of possessory interdiction, the interested parties having the right to resort to petitionary or delimitative action.

...

"Art. 65. Within the limit of five years, the Executive Power shall effect the delimitation of all Indian land not yet delimited."

178. In an assembly of indigenous chiefs held at Xavante Village, San Marcos, Mato Grosso, Brazil, (15-19 May 1978), the following statements are attributed to Xavante, Bororo, Karaja, Pareci and other indigenous leaders:

"1978 is a year of especial significance for Indian affairs, as the end of the year marks the deadline established by Brazilian law five years ago for the demarcation of all Indian lands by FUNAI, the National Indian Foundation and Government body responsible for Indian affairs. This is far from being realized due to FUNAI's inefficiency and pressure from Government and other economic interests which are still trying to wrest the last of the Indians' land from them.

"...

"And a Pareci Indian declared:

"At this juncture we wish with all the Indians, and not only the Indians, but all those who in good faith desire the well-being of the Indians to demand

that the promise made by FUNAI five years ago to demarcate all the Indians' lands within the term of five years be kept. Failure to accomplish this - the promised term expires this year - will be the greatest crime against the indigenous societies that the official indigenous agency could inflict." 43/

179. Declarations and demands were formulated in an Assembly of Native Leaders held at Goiás on 19 December 1978, including the following:

"What calls most urgently for attention and has been the subject of arguments and complaints within the various organizations with a Brazilian national field of action is the following. 'The Executive Authority will carry out, within the period of five years, the demarcation of the Native Territories which have not yet been demarcated.' (Article 65).

"...

"Mr. President, the period for the demarcation of the native areas having expired, we wish to inform Your Excellency that the Native Communities believe that they have every right to defend and rid their zones of interlopers should the competent body, the FUNAI, not complete the demarcation of the native zones. As we conclude that it is on this date that the period for the demarcation of the native areas expires, we demand that what you have ordered should be carried out and that the proposed law for emancipation, for which the Minister, Rangel Reis, is responsible, should be scrapped." 44/

180. Under the title "The lands of the Indians in Brazil" a publication contains inter alia the following:

"On the 19th of December, 1973, the President of the Republic signed Law No. 6001 - the Statutes respecting the Indian. Article 65 of this Law states that, in five years, the Government would demarcate all the native lands in Brazil.

"This period of five years came to an end on the 19th of December this year and the Government has not complied with, neither has it the time to comply with, the law. This means that the Government ratified the law which laid down the period for demarcation, and did not fulfil it, i.e., it showed disregard for the Law.

"The Native Peoples and the friends of the Indians who trusted the Government, now do not trust its 'goodwill' in defending the natives. Instead of fulfilling the law which call for the demarcation of the native zones, the Government is trying to create a law called 'Emancipation', for the precise purpose of taking away their land from the Indians.

43/ "An Assembly of Indigenous Chiefs", Akwesasne Notas, Autumn 1978, p. 23.

44/ Anna Presland, loc. cit., pp. 35 and 36.

"The situation of the native lands in Brazil today provides ample proof of the ill will of the Government and of the interests which are behind the Government and which are ready to eat up the lands of the Indians. From the Kaingang of Inhaçors on the Rio Grande do Sol, to the Ingariko of Roraima Peak, from the Potiguara from Paraíba to the Mafubo and Mainina, from the far west of Amazonia, the position of the native lands in our country is, to say the least, tragic! The following schedule can leave no doubts as to this ..." 45/

131. A writer has stated that: 46/

"On December 19th, 1978, FUNAI released a document (...), listing the Indians' land demarcated or delimited or in the process of delimitation, and those to be demarcated. The 19th of December was the final day of the five-year term, laid down by Law No. 6001 of the 19th December 1973, which created the Statute of the Indian, given to FUNAI to demarcate all the Indigenous Territories in Brazil. Less than one-third of these territories are demarcated, and many of them were in fact completed during the time of the SPI, before FUNAI came into existence.

"FUNAI lists 66 areas demarcated (these do not represent Indigenous groups, as one tribe may have several scattered areas), ranging in size from the 2,300,000 ha. of the Xingu Park, whose demarcation has not yet been completed and which is invaded by ranches and was cut in half by the BR-080 highway, and the 1,238,322 ha. of the Apuana Park, entirely occupied by mineral companies, INCRA colonists and large fazendas to the small and inadequate Kaingang reserves of Carrateiro (601 ha.) and Kato (245 ha.). Eleven areas are in the process of being demarcated and 11 are to be demarcated. Fifty three areas have been delimited and 16 are yet to be officially delimited."

182. The same author has stated: 47/

"According to a document brought out by CIMI in November 1978 (...), no measures have been taken whatsoever to protect the lands of some 35 Indigenous groups. In the Territory of Roraima, whose population of 25,000 Indians represents about one-third of its total population and 12.5 per cent of Brazil's indigenous population, FUNAI has taken absolutely no steps at all to protect the Indians' land, although Roraima is an area of constant Indian/non-Indian land conflict. The only existing reserve is one decreed by Rondon himself, today taken over by INCRA and cattle ranches."

183. It has been stated in this regard that in Canada:

"In October 1971, the Manitoba Indian Brotherhood presented a proposal to the Government entitled Wahbung: Our Tomorrows. It stressed the belief

45/ Ibid., p. 36.

46/ Ibid., p. 27.

47/ Ibid.

that, 'The Indian people enjoy "special status" conferred by recognition of our historic title that cannot be impaired, altered or compromised by federal-provincial collusion or consent. We regard this relationship as sacred and inviolate.' The following year, the Grand Council of Treaty No. 3, in presenting the Minister with its brief on economic and social development, stressed in addition that:

"Our Treaty must speak to our people in the present if it is to have any meaning at all to us ... The value of the lands ceded by the Indians to Her Majesty has increased many times. We Indians recognize this and accept the terms of our Treaty. It is in this spirit of recognizing that our treaty was not frozen in time but was signed to affect the future of the descendants of the two signing parties that we now ask you to examine with us how the two economic clauses must speak to our people today."

Later, the Federation of Saskatchewan Indians presented a report to the Commissioner on Indian Claims which emphasized the specific content and interrelation of treaty rights. It said that:

"... the Saskatchewan treaties, when placed in their proper historical context and interpreted in relation to the severe problems facing plains tribes, emerge as comprehensive plans for the economic and social survival of the Saskatchewan Bands. To regard the treaties as 'mixed bags' of disparate and unrelated 'rights' and 'benefits' - though these rights and benefits have undeniable reality - is too simplistic an analysis and fails to acknowledge their full scope and intent.

"The reaction on the part of treaty Indians to the Government's White Paper has served as notice of the types of treaty claims that will eventually be brought forward. These Indians have been quite reluctant to advance their claims piecemeal. Indications are that their general claims may be ready for presentation within a year or two. In the meantime, there is some interest in preliminary discussions on pressing treaty issues such as education, and hunting and fishing rights. Eventually, other matters such as economic development, taxation, health services, and the central grievance concerning the erosion of tribal government and community fabric, will come to the fore.

"While the Government has received and studied the various papers submitted by Treaty Indian Associations, these papers have not been seen as official claims, and there has been no significant response except for the continuing assurance that the Government will honour all lawful obligations, and the indication in the August 1973 policy statement that the spirit and terms of the treaties will be upheld. Outside the Northwest Territories, provincial involvement remains a problem, since agreements on a number of the issues might require provincial co-operation.

"Consideration of treaty claims will need to be closely tied to efforts at revising the Indian Act. Treaty Indians in Alberta and Saskatchewan, at least, see the revision to the Act as a vehicle for consolidating recognition of their treaty rights. It would seem that any fundamental changes in the Act must await resolution of the basic issues in both treaty and non-treaty areas.

"In April 1975, at a meeting between the National Indian Brotherhood and a committee of federal Cabinet Ministers, a proposal for claims processes that had been developed through consultation between Prairie Indians and the Indian Claims Commissioner was put forward and accepted in principle by the Ministers.

"The primary procedure for dealing with claims would allow basic issues to be brought up through provincial and territorial Indian associations and presented directly to Cabinet Ministers. The issues would be discussed in this forum to determine whether there was a basis for agreement. Through this process, general principles and parameters for settlement mechanisms might be established. Such agreements would allow detailed treatment of the issues to be delegated. In some cases, this might require negotiations at a secondary level. In others, administrative machinery might be appropriate, while in further instances, it might be desirable to refer matters to the courts or specially created arbitration tribunals. In this way, the settlement processes would be tailored to the issues and based on fundamental agreements in principle. To facilitate such negotiations, a new impartial commission is proposed.

"The agreement contemplates a totally original and innovative institution for dealing with claims issues. Its implementation should create a new negotiation-centred era of activity towards claims resolution." 48/

184. According to a writer, in Canada:

"The British practice of recognizing the title of original inhabitants to their ancestral lands was generally adopted by the Canadian Government. However, the term 'title' had no common definition, mutually understood by all concerned. Land ownership in the European sense was a concept foreign to Indian culture. While Indians recognized the private ownership of personal goods, they did not apply it to land. For the Indian, title was the right to use the land and its riches, to range freely through the country. This concept persists today in Indian thinking.

"The treaties, adhesions to treaties, and land surrenders which were negotiated throughout Canada after 1781 were attempts at mutual agreement between white settlers and Indian people. Most treaties and land surrenders were signed after the Indians had lost control of their territory. Their only choice was to lose their land with a treaty, or to lose it without one. Usually they were guaranteed official use of a 'reserve', which was held in trust by the Crown. This was a measure to protect the Indians from further encroachments, and to offer them security against the aggressiveness of their white neighbours. Other treaty gifts: free education, free medical care, cash annuities, groceries, etc., also helped to win the Indian people's goodwill. Protecting the Indian was not the main reason for treaties, however. Overriding all other considerations was the land: the Indians owned it and the white people wanted it. Even when the Indians posed no threat, treaties were still signed, as a moral or ethical gesture: a gentleman's way to take

48/ Indian claims in Canada: an essay and bibliography, (Research Resource Centre, Indian Claims Commission 1975), pp. 32-34.

without grabbing. Indian treaties stand unique in political and judicial chronicles. Between 1781 and 1902, four hundred and eighty three treaties, adhesions and land surrenders were signed in Canada. Treaties signed after 1867 have been called the 'numbered treaties', ranging from One to Eleven. Treaty No. 163, signed in 1877 is better known as Treaty 7; Treaty No. 428, signed in 1899, is Treaty 8.

"Many words of the treaty text, their meaning and their consequences, were beyond the comprehension of the northern Indian. Even if the terms had been correctly translated and presented by the interpreters, the Indian was not prepared, culturally, economically or politically, to understand the complex economics and politics underlying the Government's solicitation of his signature. The Indian people did know that they could not stop the white people from moving into their territory, and in their minds the treaties primarily guaranteed their freedom to continue their traditional life style, and to exchange mutual assistance and friendship with the newcomers. By Treaties 8 and 11, the Canadian Government intended to extinguish the Indian title to the immense Athabasca-Mackenzie District. The Indian people intended to sign friendship treaties.

"The Indians were at a great disadvantage. They spent most of their time in the bush, without the opportunity to become familiar with the changes taking place around them. They were unable to react to these in any cohesive manner, leaving themselves vulnerable for exploitation and abuse. Many efforts were made to alert the Canadian public to the injustices which were being done to the northern Indians. But none of these efforts could halt the advance of prospectors and miners who were rolling back the northern frontier to the Arctic coast. Oil at Norman Wells, uranium at Port Radium, and gold at Yellowknife occupied the attention of government and business." 49/

185. On a closely related problem, it has been written:

"... With the establishment of the reserves in the last half of the nineteenth century, done for the purpose of protection of the Indian against encroaching white settlement, the instrument of protection soon became the means of oppression. Through the colonial-like legal framework created by the Indian Act for the administration of the reserve, the Indian communities were locked into a structure completely outside the mainstream of Canadian society. The Indian became the serf-like recipient of an all-powerful alien White bureaucracy which, playing the role of benevolent dictator, mercilessly, if unintentionally, debased and destroyed the rightful heritage of a proud and fine people.

"The paternalistic, rigid trusteeship system created by the Indian Act perpetuates a complete unilateral dependence on the part of the Indian ward. For 100 years, through four generations, Indians have not, in any meaningful sense, controlled their lands, monies, business transactions, social, community and local government activities. The government, in the form of the Cabinet,

49/ René Fumoleau, Omi, As long as this land shall last (McClelland and Steward Limited, 1973), pp. 17 et. seq.

Minister of Northern Affairs, Indian Affairs Branch, or Superintendent on the reserve, interposes itself in the individual's and community's decision-making process at every level of activity. Even such personal things as being able to make a testamentary disposition of one's property is ineffectual without government approval. There is even a special, demeaning, class of citizenship for Canada's first citizens. To gain enfranchisement, that is, to become an 'ordinary' Canadian citizen, an Indian must not simply become twenty-one; he must also, in the opinion of the Minister, be 'capable of assuming the duties and responsibilities of citizenship' ..."^{50/}

186. According to another source:

"As recently as 10 years ago, the Eskimo, or the Inuit, as they prefer to be called, lived at one with the land. They signed no treaties with the Crown and lived and moved about freely on their aboriginally held lands.

"With the recent exploration and development of national resources in the North, the question of ownership and management of land has become one that now affects and concerns all Inuit. They find themselves in the position of having no legal claim to land they have always used.

"Aboriginal title has been recognized in statutory enactments of the British Government before Confederation and in Canada after that time. Over a period of 200 years, it was recognized in treaties with Indians in other parts of Canada. In view of the past recognition of aboriginal title, it is surprising that the present Government of Canada denies the recognition of aboriginal rights.

"Thus decisions which significantly affect the lives of the Inuit are being made without their knowledge or consent, and, more importantly, without their involvement in the decision-making process. Having lived in the Arctic since time immemorial, and having traditionally regarded the land they occupied as for their use, the Inuit view the invasion of this land with dismay and apprehension.

"The Inuit people, through their spokesmen in the Inuit Tapirisat of Canada, have asked the assistance of the Government of Canada to enable them to do a Land Claims Study. The Inuit are not asking absolute freedom of use of the land as they once had, but through their Land Claims Study, wish to consult with their people and present to the Government of Canada, suggestions for settlement that would be understood and acceptable to all concerned.

"The Canadian Friends strongly support this request and are pleased that the Government of Canada provided a substantial grant to enable the Inuit Tapirisat of Canada to undertake the Land Claims Study and hope that the Government will provide any other assistance that will facilitate the successful completion of this programme."^{51/}

^{50/} Peter A. Cumming, Associate Professor of Law, Osgoode Hall Law School of York University, "Indian rights - a century of oppression", reproduced by the Indian-Eskimo Association of Canada, Toronto, Ontario. (This paper is in substance a reprint of an article by the author which appeared in The Globe and Mail, 24 February 1969), pp. 5 and 6.

^{51/} Canadian Friends Service Committee: Statement to the Government of Canada, 1972.

187. The overriding importance of the issue of effective recognition of the aboriginal rights of the native peoples of Canada has been described as follows:

"Aboriginal rights is more than a legal issue: it has important moral, emotional and symbolic value for Native people. Although aboriginal rights were long recognized by French, British and North American law, there are differing concepts about its meaning. Chief among these is that aboriginal occupancy - which gave Indians a right to their land - could be extinguished by a just war, a treaty or an act of a legitimate legislative body. This view has gradually given way to government acceptance of aboriginal rights as a basis for negotiations.

"The Supreme Court's split decision on the Nishga case in BC in January 1973, which involved aboriginal rights, may have contributed to the Federal government's about-face position. Having originally refused to recognize these rights, the government is now proceeding on negotiations on this basis in the Yukon, the far North, the Northwest Territories and shortly in British Columbia.

"The James Bay final agreement, signed in November 1975 after nearly two years of negotiations between the Grand Council of the Crees, the Northern Quebec Inuit Association, the Federal and Quebec governments, and public and private organizations involved in the James Bay hydro-electric development, is the first agreement in Canada to recognize aboriginal rights. The Cree and Inuit people had used and occupied northern Quebec; their interest in the land had never been extinguished by treaty or superceded by law. The agreement is a complex one and is by no means as binding as it appears: yet in recognizing aboriginal rights, it represents a landmark.

"The issue of aboriginal rights is uniting Native people. Native groups in the Maritimes, for example, representing status, non-status and Metis, are co-ordinating research efforts to present a unified claim on behalf of the Micmac tribes. The Micmac way of life - their political, social, educational and economic systems - were all based on use and occupancy of the land." 52/

188. According to the same source, aboriginal rights are a focal point in a great variety of projects being discussed between native groups and government authorities. The evolving solutions seem increasingly to take into account, in some measure, the basic conceptions regarding land sharing and environmental and ecological conservation aspects insisted upon by native groups:

"The homeland of 10,000 Cree and Inuit people on the Quebec Shore of James Bay has been a centre of controversy since early 1971 when Premier Bourassa of Quebec announced a multi-billion dollar hydro-electric development which would disrupt their lands and lives. The signing of the James Bay final agreement has not resolved the controversy: it has moved it to other areas. The settlement which was eventually reached covers two-thirds of the area of Quebec. While it provided lands and hunting, fishing and

52/ Canadian Association in Support of the Native Peoples. And What About Canada's Native Peoples? Ottawa, 1976, p. 18.

trapping territories, in cash terms, it was worth \$225 million to the Native people, or 2 per cent of the total value of the project. There is a pronounced fear among other Native groups that the federal government will use this settlement as a pattern for all future settlements without taking into consideration the many differences present in other claims.

"The Mackenzie Valley is under extreme pressure for northern oil and gas development. The most immediate push is for construction of a \$7 billion natural gas pipeline. Treaties No.8 and No.11 made with Natives in this area are considered fraudulent by Native people and legal experts alike on the basis that the Indians' understanding of treaty implications was very different from the written terms. And even if they were binding, land settlement provisions were never carried out. A caveat-filed by Native organizations was declared valid by the Territorial Supreme Court but that decision was overturned by the NWT Supreme Court of Appeals on a technicality.

"The Indian and Metis people of the Mackenzie Valley - known as the Dene - are negotiating with the federal government for a joint land settlement. Their unique proposal emphasizes the recognition of aboriginal title by legislation rather than the extinguishment of rights in exchange for monetary compensation. North of the treeline, the Inuit are negotiating a separate claim based on similar principles.

"The federal government is willing to negotiate with the Inuit on the basis of unextinguished aboriginal title but maintains that Indian title was extinguished by the treaties. The impasse must be resolved before legislation in the treaty areas can proceed.

"In March 1974, Mr. Justice Thomas Berger was appointed by the government to conduct an inquiry into the social, economic and environmental impacts of a natural gas pipeline in the Mackenzie Valley and to make recommendations on what conditions should be attached to pipeline construction. Hearings in every community in the valley have given the Native people a chance to make their views known to government. Almost without exception, they have stated that no decision on a pipeline or other development should be made until land claims are settled.

"The Inuit people of the North are presenting a comprehensive land settlement proposal. The Inuit who did not sign treaties or otherwise surrender their claim to the land and water which comprise all the Northwest Territories north of the treeline, have realized that they must act together to preserve and protect their territory, their culture and their identity. The proposal calls for a land sharing arrangement which will ensure that Inuit people benefit from its use and resources. The proposal will represent a great improvement over the Alaska or James Bay settlements which involved large cash payments.

"The Indians of British Columbia in 1975 refused federal funds in an attempt to force the government to begin negotiating their long-standing claims. Over most of BC the Indians have never signed a treaty surrendering aboriginal rights to the land but despite federal pressure, the Government of BC, until very recently has adamantly refused to negotiate, claiming that

Indians are a federal responsibility. Willing to enter negotiations concerning over 36,000 acres of land cut off for more than a century to existing reserves, the provincial government has not yet been willing to negotiate aboriginal claims. In BC, unlike the Yukon and Northwest Territories, Crown land has been turned over to the province, hence negotiations could not proceed without their participation. Hopefully, the settlement will be a combination of cash, mineral royalties, exclusive rights to certain lands, and social programmes to be run by Native people themselves.

"The Indian Association of Alberta has begun legal action on behalf of the 20,000 status Indians of Alberta to acquire what they consider a fair and equitable share of opportunities offered by Alberta development. In laying claim to about 25,000 square miles of the province, including the Athabaska Oil Sands, what they want is a share in the jobs and revenue which will spring from sands development. They would use the money to finance their own economic and social development in their own way, independent of government 'handouts' and management by the Department of Indian Affairs. It should be noted that in the act incorporating Alberta as a province, the obligation of the provincial government to provide land for the purpose of settling Indian claims was made explicit.

"These are some but not all of the major claims being advanced at the present time. (Canadian Association in Support of the Native Peoples. And What About Canada's Native Peoples?, Ottawa, 1976, pp. 19-21).

"Of all the projects in the short history of Inuit Tapirisat, by far the most significant is the Inuit land claims proposal for the Northwest Territories.

"It is probably the most comprehensive proposal of its kind ever presented in North America, the product of three years of intensive research and field work covering the legal aspects, renewable and non-renewable resources, and the documentation of actual land use and occupancy over the centuries.

"The land use and occupancy study, directed by Dr. Milton Freeman of McMaster University, shows that from prehistoric times the Inuit have used and occupied virtually all of the 750,000 square miles of land generally north of the treeline, and an estimated 800,000 square miles of northern ocean.

"This research, along with an exhaustive study of renewable resources directed by Dr. Gordon Nelson of the University of Waterloo, and a survey of non-renewable resources by geological consultant Pedro Van Meurs of Ottawa, went into the preparation of a proposed agreement in principle drawn up by ITC's legal consultant, Prof. Peter Cumming of York University.

"But lest there be any misunderstanding, ITC's land claims proposal is not another example of white men in the south deciding what is best for Inuit in the north. At successive annual meetings of Inuit Tapirisat, delegates from all regions of the Arctic gave their organization's board of directors a strong mandate to proceed with the land claims project. And while the consultants were preparing their studies, ITC field workers were actively seeking the views of the people in the communities, talking to them about the issues and collecting their suggestions.

"All of this hard work and effort culminated in an historic meeting of Inuit held at Pond Inlet, NWT from Oct. 28 to Nov. 2, 1975. More than one hundred voting delegates from 32 Arctic communities attended. Resolutions passed by their community councils empowered them to vote on behalf of their people.

"For six days and some long nights, the delegates plodded through the lengthy land claims document clause by clause, questioning some of the points, voting to make amendments to some of the important sections, and finally passing a resolution authorizing ITC to begin negotiations with the federal government.

"What the delegates did in effect was declare that the Inuit are willing to share the land which they have never surrendered by treaty or otherwise.

"Because they are neither greedy nor unreasonable, the Inuit are not asking for outright ownership of their entire 750,000 square miles of traditional lands. In fact, ownership of land as southern Canadians understand it is a concept that had always been foreign to the Inuit. The land had always been there for the people to use and occupy.

"However, the people realize now that if their native environment is to be preserved for future generations, they must have a piece of paper establishing ownership under Canadian law of enough land to ensure their survival.

"So they are asking for ownership of 250,000 square miles of land, which will be selected in such a way that each Arctic community has at least 2,500 square miles.

"The remaining 500,000 square miles north of the treeline would be surrendered, but with certain conditions attached. Among those conditions, the Inuit would retain exclusive hunting, fishing and trapping rights. And the Inuit want a share of the revenue from development of natural resources. A royalty of three per cent has been suggested.

"The Inuit want to be self-sufficient. One really unique feature of their land settlement proposal is that it won't cost the taxpayers of Canada anything. They are not asking for a cash settlement, because the Inuit land is not for sale. In fact they are offering to pay back, with interest, the money provided by the federal government (more than \$2,000,000) to finance their land settlement research.

"The revenue from resources would go toward financing a comprehensive social and economic development programme, and operations of the new Inuit Development Corporation. The whole philosophy behind ITC's proposal is to permit the Inuit to gain some control of their social, cultural and economic destiny.

"To that end, they are also suggesting a first step toward self-government, by the creation of a new territory to be known as Nunavut, which means 'Our Land.' Nunavut would comprise all 750,000 square miles of the traditional Inuit lands, and its system of government would be similar to that of the existing Northwest Territories, with an appointed commissioner and an elected council. Since the majority of electors would be Inuit, native people would assume a degree of control over industrial development and such things as environmental protection and wildlife conservation.

"And then eventually, perhaps there will be a Province of Nunavut. The Inuit are not separatists. They are Canadians. But they don't want to be colonial subjects. They want to be partners in Confederation.

"When you consider the unbelievably barren nature of the Arctic terrain and the effects of a climate that is harsh and cruel by southern standards, 250,000 square miles is really not very much.

"Look at it this way.

"In the fertile agricultural areas of Ontario, according to Statistics Canada, the average farm earning 51 per cent or more of its revenue from livestock covers an area of 209.1 acres.

"In Alberta, where the grazing land is not quite as lush and the climate somewhat more severe, the average livestock operation requires 1,025.5 acres.

"In the Arctic, it takes up to tens of square miles of land to support one caribou.

"That is why it is so unreasonable to think in terms of five square miles per family, as has been suggested for native land settlements in other parts of the North.

"In an exhaustive study of Arctic renewable resources carried out for Inuit Tapirisat, Dr. Gordon Nelson of the University of Waterloo says that 'Inuit hunters range over hundreds or thousands of square miles, so land settlement must be thought of on an entirely different scale than elsewhere in Canada.'

"There are lessons to be learned from history when it comes to negotiating a land agreement with the Inuit. In the nineteenth century when the arid plains of western Canada were being settled, homesteaders were allowed 160 to 320 acres for farming. This size was based on the experience of raising crops on the moist lands of eastern Canada, but was totally unrealistic for the dry land of the west.

"It took decades of trial and error, countless farm failures and untold human misery before farms of 1,000 acres or more - large enough to support a family - could be established by those lucky enough to emerge as winners in the long struggle against other settlers and the environment.

"Dr. Nelson concludes in his report that the same principle applies in the Far North. 'Much land must be placed in control of the Inuit and conservation agencies of government if wildlife and environment are to be protected and traditional hunting and fishing as well as modern commercial renewable resource-based enterprises are to have a sound opportunity to grow in the Arctic.'

"There are good, solid reasons why the people of Canada through their elected government should reach a land sharing agreement with the Inuit of the Northwest Territories.

"Old-fashioned fair play is one of them. It can be argued that Canada owes a large debt to the Inuit, after so many years of intruding into their land, uninvited, imposing changes in their way of life, exploiting the natural resources of the Arctic without consulting the original inhabitants.

"The Government of Canada has adopted an enlightened and generous policy of assistance and support for the emerging countries of the Third World. In fairness, can Canadians be any less generous with the first citizens of their own country?

"But if apathy and indifference should rule out fairness as an argument, how about enlightened self-interest?

"The politicians churn out hundreds of thousands of inspired words about maintaining sovereignty over that vast and magnificent land that stretches north beyond the treeline, through the Arctic Islands, almost to the North Pole.

"But to have sovereignty, you must have occupancy.

"The Inuit are the occupants. They are the only occupants who want to, or indeed are able to live in the extreme environment of Canada north of the treeline. They are happy to live there, and struggling desperately to preserve what is left of their unique way of life.

"In fact, until the whiteman came and imported the southern comforts of home, the Inuit were the only ones who knew even how to survive in the north.

"Recently, southern Canada has been showing a great interest in the Arctic. But this has not been reflected in any eagerness among large numbers of southern Canadians to actually live in the Arctic. They are interested in the north for what they can take out of it.

"Canadians are on the threshold of one of the most significant decisions since Confederation. They can help the Inuit achieve self-sufficiency - socially, culturally, and economically.

"The alternative is continued colonial rule at ever-increasing cost to the Canadian taxpayer, coupled with destruction of the Inuit culture and the consignment of a proud and independent people to a marginal existence on poor wages and government handouts.

"For the Inuit, it is still not too late to avoid the mistakes which have blighted the history of white society's relationships with native people." (Inuit Tapirisat of Canada. An introduction to the Eskimo People of Canada and their National Organization, Ottawa, no date, pp. 6-11).

189. On negotiation and the settlement processes, the Government of Canada stated in 1982 that:

"The 1973 policy statement expressed the government's preference for negotiated settlements of comprehensive and specific claims where negotiations are successfully concluded, final agreements are signed between the claimant group and the federal government and the claim is considered settled. The significance of final settlement is that negotiations on the same claim cannot be reopened at some time in the future.

"Specific claims have been identified in most provinces. Claimant groups include Indian bands, groups of bands, or Indian associations acting on behalf of their member bands. In some cases claims are against provincial as well as the federal government. The present review process is administrative in nature and the role of government acting as judge in its own cause has been the subject of some criticism. A number of review processes are being developed with the Indian claimants to ensure open and fair review. The most prominent example is a tripartite review process involving Canada, the Province of Ontario, and the Indian Chiefs of Ontario where the Indian Commission of Ontario, headed by a provincial Supreme Court Justice, facilitates the review of the claims. Once a lawful obligation has been identified and accepted by the Minister for resolution, negotiations begin with the claimant band. The process of settling is often a complex one, depending on the nature of the claim and the type of compensation being sought. The negotiating process, however, provides the kind of flexibility needed to determine which remedies would most adequately compensate for the grievance in question, whether these be in the form of land, cash, goods, services or other benefits. As a result, specific claim settlements can vary, depending on what is being claimed. The criteria for calculating compensation may also vary from claim to claim according to the particular issues raised in the claims.

"After agreement has been reached between the government and the claimant group on the terms of settlement, a final agreement is signed, compensation is provided and the claim is considered closed.

"In terms of comprehensive claims, the negotiation process provides the opportunity to translate the loosely defined concept of 'aboriginal interest' into concrete and lasting benefits in the context of contemporary society. Such benefits can be many and varied: lands; hunting, fishing and trapping rights; resource management; financial compensation; taxation; native participation in government structures; and native administration of the implementation of the settlement itself. The final settlement of a comprehensive claim confirms these benefits in legislation, in order to give them the stability and binding force of law.

"Another major advantage of the negotiation process, in terms of both specific and comprehensive claims, is the opportunity it provides for taking into account the interests of non-claimant groups in the area that may be affected by a claim settlement, as well as the particular concerns of the provincial or territorial governments involved. Settlement of the claim, be it specific or comprehensive, must accommodate these interests, else settlement will merely give rise to another set of grievances. In the case of a claim arising in the provinces, active provincial participation is particularly necessary because lands and resources that may form part of a settlement are under provincial jurisdiction.

"In the territories, lands and resources fall under federal jurisdiction. However, because of the effect northern claims settlements will have on northern residents, because the territorial governments will be involved in the claims implementation process, and because many of the settlement provisions will fall within areas of territorial jurisdiction, the representation of the territorial governments as active participants on the federal negotiating teams of the northern claims is viewed as essential."

The Office of Native Claims

The Office of Native Claims was established within the Department of Indian and Northern Affairs in 1974 to deal with the increasing number of claims being presented to the federal government. It represents the minister and the federal government as the focal point for specific and comprehensive claim negotiations with native groups across the country.

In addition to negotiating native claims, the Office of Native Claims also reviews claims that have been presented to the government, in order to identify and analyse the legal, historical and factual elements relating to the claims. In carrying out its responsibilities in these two areas, the Office of Native Claims works closely with other programme areas of the department and with other departments, agencies and levels of government that may be involved.

Funding for Native Claims

In 1969, the Federal Government began funding Native Groups and Associations to enable them to conduct research into Treaties and Indian Rights. The Department of Indian and Northern Affairs assumed funding programme responsibility in 1972 with a four-year (1972-76), \$7½ million Indian Rights and Treaties Research Funding Programme.

Following the 1973 Nishga court case and the announcement of the Federal Government's Policy on Claims of Indian and Inuit people, the funding programme was broadened to also provide financial support to Native Claimant Groups for research, development and negotiation of native claims.

Since 1976, funds have been provided in the form of accountable contributions and loans:

- Contributions are made to native groups to enable them to research, develop and present claims to the Federal Government.
- Loans are made in cases where the claim has been accepted for negotiation by the Minister of Indian Affairs, to enable the claimant to further develop the claim, prepare a negotiating position and to participate in the negotiation of the claim. Loans are repayable from the proceeds of a claim settlement. The vast majority of these loans are provided interest-free.

Between 1970 - March 1981, the Federal Government has provided approximately \$21.6 million in grants and contributions, and \$36.7 million in loans to Native Groups to enable them to conduct research into Treaties and Aboriginal Rights, and to research, develop and negotiate their claims.

190. On the question of titles to water resources, the Government of the United States writes that:

"The rights of Indian tribes to the water that is on or close to their reservations is a matter of considerable controversy at the present time. There is one landmark case involving a lake in the State of Nevada which has been the focal point of Indian life but also a source of water for a nearby non-indigenous community."

191. Concerning the Indian Claims Commission the Government communicates that:

"The Indian Claims Commission, an independent agency of the Federal Government, is a special tribunal established under a Congressional Act of August 13, 1946 to consider claims of Indian tribes, bands, or other identifiable groups for monetary judgments - usually based on past land transactions between the groups and the United States Government - against the United States."

At the time when the information was furnished, the Government stated that it had awarded nearly \$431 million to Indian groups by the end of the fiscal year.

192. Speaking of the Indian Claims Commission, it has been written:

"By its very concept, this commission was an insult, for it forced the Indians to sue the government to receive payment for damages, rather than relying on the 371 sacred treaties. Thus it seemed to deny the duplicity of the past even as it sought to rectify it. Since 1946, the Indian Claims Commission has paid various tribes about \$100 million. This sounds like a lot until one considers the amount of land taken from the Indian. Based on the contemporary Indian population (purely by way of an example, since payments are made to individual tribes) it would mean that every Indian would receive about \$225.

"Indian lands, once considered 'free' are still treated in this manner by the ranchers and other whites who reside on reservations. While the ranchers exploit Indian lands for profit, local governing bodies trespass for reasons of convenience, building roads, setting up high-tension wires, and committing other 'improvements' without consulting the Indian landowners." ^{53/}

193. The Government states that:

"Two tribes of Indians have been awarded sizeable pieces of land by the Federal Government ... [in the early 1970s]. These have been landmark cases, since the policy had been to compensate Indian tribes for lands taken unfairly or without adequate compensation in times past in money rather than in kind.

^{53/} Burnette and Koster, The Road to Wounded Knee, Bantam Books, New York, 1974, p. 121.

"The Taos Pueblo was awarded 48,000 acres of land that had been a part of Carson National Forest, New Mexico on December 15, 1970, when [the] President ... [of the United States] signed into law HR 471 (PL 91-550). The United States Government took these lands without compensation thus laying the groundwork for legislative actions."

194. According to information furnished by the Government, Public Law 91-550 provides that:

"The United States holds title, in trust for the Pueblo de Taos, to the described area and that the lands will become part of the Pueblo de Taos Reservation to be administered by the Secretary of the Interior under the laws and regulations applicable to other Indian trust lands. The law provides that the Indians shall use the land for traditional purposes only, such as religious ceremonies, hunting and fishing, as a source of water, forage for livestock, wool, timber and other natural resources for their personal use, subject to the necessary conservation practices prescribed by the Secretary. Except for these practices, the land will remain forever wild and will be administered as a wilderness under the Wilderness Act of 1964.

"Other provisions of PL 91-550 include permission for non-members of the Tribe to enter the lands for purposes compatible with wilderness preservation upon consent of the Tribe. The law does not alter the rights of present holders of Federal leases or permits covering the land, but authorizes the Pueblo, with tribal funds, to obtain the relinquishment of such leases or permits.

"Finally, the law directs the Indian Claims Commission to determine to what extent the value of land conveyed in this legislation should be set off against any claims the Taos Pueblo may have against the United States."

195. In connection with the present study, the Government has transmitted the text of an Executive Order signed by the President of the United States on 20 May 1972 restoring 21,000 acres of land in the State of Washington to the Yakima tribe of Indians. This Decree reads:

"EXECUTIVE ORDER 11670

"PROVIDING FOR THE RETURN OF CERTAIN LANDS TO THE YAKIMA
INDIAN RESERVATION

"In 1855, the United States entered into a treaty with the Yakima Tribe of Indians. The treaty created a reservation, generally described by natural landmarks, for the exclusive use and benefit of the Tribe. Over the years, there have been continuing disputes regarding the true location of the reservation boundary.

"In 1897, President Cleveland created by proclamation the Mount Rainier Forest Reserve in an area near the western boundary of the Yakima Reservation. In 1908, President Theodore Roosevelt extended the boundary of that Forest to include a tract of some 21,000 acres, then mistakenly thought to be public land. The tract is included within a larger area now called the Gifford Pinchot National Forest. In 1942, a portion of the tract was designated the Mount Adams Wild Area, and this portion has been administered since 1964 for the public benefit under the Wilderness Act.

"In 1966, the Indian Claims Commission found that this tract had originally been intended for inclusion in the Yakima Reservation. However, the Commission does not have authority to return specific property to a claimant; it may only grant money damages. Accordingly, the Tribe sought Executive action for return of its land.

"The Attorney General has at my request reviewed the specific history and background of this particular case, including the principles which govern the taking of land by the United States and the question of whether this particular land was so taken. In a recent opinion, the Attorney General has advised me that, in these exceptional and unique circumstances, the land was not taken by the United States within the meaning of the Fifth Amendment and that possession of this particular tract can be restored to the Tribe by Executive action.

"Now, therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, particularly 16 USC 473, it is ordered as follows:

"Section 1. A portion of the eastern boundary of the Gifford Pinchot National Forest is modified as follows:

" 'Beginning at the point on the main ridge of the Cascade Mountain, where the Yakima Indian Reservation boundary as located by the 1926 Pecore survey, from Goat Butte intersects said main ridge; thence southwesterly along the main ridge of the Cascade Mountains to the summit or the pinnacle of Mount Adams, as shown on the diagram of the Ranier National Forest attached to the Presidential proclamation of October 23, 1911, 37 Stat. 1718; thence southerly along a divide between the watersheds of the Klickitat and White Salmon Rivers as shown on the 1932 Calvin Reconnaissance Survey Map (Petitioner's Exhibit No. 4, Docket No. 47, Indian Claims Commission) to its intersection with the north line of Section 34, Township 7 North, Range 11 East, Willamette Meridian.'

"Section 2. The Secretary of the Interior is directed to assume jurisdiction over the tract of land heretofore administered as a portion of the Gifford Pinchot National Forest and excluded from the Forest by Section 1 of this order, and to administer it for the use and benefit of the Yakima Tribe of Indians as a portion of the reservation created by the Treaty of 1855, 12 Stat. 951.

"Section 3. Any prior order or proclamation relating to the tract of land affected by this order, to the extent that it is inconsistent with this order, is hereby superseded." 54/

54/ The Executive Order was signed by President Richard Nixon at the White House on 20 May 1972, and was filed with the Office of the Federal Register on 22 May 1972, at 11.10 a.m.

4. Special provisions concerning the sale, mortgaging or otherwise encumbering, rental, attachment, etc., of lands belonging to indigenous persons, groups or communities, to, or for the benefit of, non-indigenous persons, groups or organizations, including - in certain cases - the requirement of prior authorization or subsequent approval by communal bodies or by the competent administrative or judicial authorities

196. The regime under which lands held in common by indigenous persons may not be alienated or attached and which consists of special measures requiring prior authorization or subsequent approval of the disposal or encumbrance of indigenous lands was instituted to protect indigenous populations. It is important to determine the will of the majority with regard to any alienation or attachment, which must be authorized by the community itself and which may form the subject of a ruling by a specialized and independent outside authority or court to the effect that, in the circumstances of the case, the disposal or encumbrance is beneficial or justified.

197. Indigenous persons who engage in subsistence farming and are surrounded by a market economy are in an unfavourable position that makes them dependent on financial and other forms of assistance for the fulfilment of their obligations. The above-mentioned limitations and restrictions, which deprive creditors of the right to attach indigenous land, make it impossible for indigenous persons to use such land as security to obtain financing. If such assistance does not exist, is withheld or is rigged, debtors can easily fall behind in their payments or find it impossible to meet their obligations. For this reason, it has been suggested that consideration should be given to the special procedures for financial assistance to indigenous populations and other sectors that are covered by this protective regime. In such procedures, security is based not on the possibility of attaching land in the event of unpaid debts, but on industriousness, integrity, reliability in the fulfilment of obligations, productivity and permanent residence in the district, which are well-known characteristics of indigenous persons.

198. It is, of course, understood that the possession of property and even of land that is not indigenous land or protected community land is subject to the normal legal regime, without limitation or restriction. There are two entirely different regimes, one for indigenous or protected community land and the other for land which it is not considered necessary to protect by this special statute.

199. The present section examines the information on this subject that is available for the purposes of the present study.

200. There is no information regarding several countries. ^{55/}

^{55/} Argentina, Australia, Bangladesh, Bolivia, Burma, Colombia, Denmark (Greenland), Ecuador, El Salvador, Finland, France (Guiana), Guatemala, Guyana, Honduras, Japan, Pakistan, Panama, Paraguay, Peru, Sri Lanka, Suriname, Sweden and Venezuela.

201. The Anti-Slavery Society states that in Indonesia: "The only conclusion that can be drawn from the combination of the agrarian law and adat law, both imprecise as to the specific rights and duties of opposing interests, is that the right to traditional lands must remain dependent on the political relationship between the local government, village representatives and outside third parties and concession holders".

202. The Anti-Slavery Society has also reported the following on India:

"Illegal alienation" of tribal land in the Chotanagpur urban industrial area

"The following examples of recent illegal alienation of adivasi land close to large public projects come from a report by Birsa Seva Dal, an adivasi labour organization in Chotanagpur, and their veracity must therefore be suspect. However, since similar examples are mentioned in government reports for earlier periods it would seem safe to assume that they are true. They are included here to demonstrate the collusion between police-government and powerful non-tribal interests but are exceptional because BSD was able in these cases to resist the non-tribal's power. In most areas tribals are nowhere near so well organized.

"Case 1: The Battle of Tata in 1968

"In 1968 there was a virtual battle close to the steelworks of the TATA company (one of India's biggest industrial companies) in Jamshedpur, Singhbhum District, Bihar. Many thousands of adivasis lived in Nildih and Bāridih villages as legal tenants on dispersed plots scattered over the hilly terrain. The TATA company decided it wanted the land for expansion of its activities (which dominate the steel city of Jamshedpur so much that it is usually referred to as Tata) and sent in paid thugs to evict the tribals by beatings and burning of their houses. Birsa Seva Dal informed the Government about the adivasis legal tenure of the land but the Government did nothing. Eventually with only 20 families remaining on the 1,800 acre site, Birsa Seva Dal mobilized hundreds of adivasis in the area and retook the area. Now a town of 3,000 adivasi families called Birsanagar (Birsa Town - after the famous nineteenth century tribal leader) is on the site. In this case, because Birsa Seva Dal is particularly strong in Jamshedpur, and because the injustice was so obvious, the adivasis rights were protected.

"Case 2: The Heavy Engineering Corporation in Ranchi District .

"The Government alienated thousands of acres of tribal land to set up HEC in Ranchi District, but since HEC did not need all the land that was taken for the plant it tried to use the land for a housing co-operative for its employees. As this was not the original purpose for which the adivasi land was taken, Birsa Seva Dal refused to allow construction to start. Adivasis who once owned the spare land have come from neighbouring villages to which they had been displaced to cultivate it but have been beaten and their crops destroyed. Meanwhile most of the unused land is cultivated by immigrating north Biharis working in the 'modern sector'. The conflict is continuing, however, and in June 1975 a non-tribal who was trying to bulldoze down tribal crops on the land was pulled from his machine and beaten to death.

"Case 3: The TELCO case - Government versus the Tribals

"In November 1975 the TELCO company tried to evict adivasis from 7½ acres of land they were cultivating and paying rent for within the TELCO compound in order to give the land over to its non-tribal employees (the adivasis as is usual not being employed by the company). The adivasis produced complete documents to show their legal right to cultivate the land, but when the Government visited the magistrate threatened the tribals with prosecution under Criminal Code 107 (Breach of the peace) and 144 (Unlawful assembly). Fortunately Birsa Seva Dal is taking the case to the high court, though this is an extremely expensive process and will take at least a year. The result is not yet known.

"Case 4: Kudru Township, Ranchi

"During the 1960s and 1970s a great deal of land was alienated by illegal methods (physical coercion, thumbprints on transfer documents while under the influence of the land agents' liquor) in order to build housing estates such as Kudru, Harmu, Argoya and Bairyat) for Government workers and businessmen. The tribals did not want to sell this land - certainly not at the extremely meagre prices offered - and now BSD is making a stand against the non-tribal agents' attempts to take another 45 acres in Kudru.

"It should be stressed that these are the lucky ones because BSD was present and able to fight the cases. In most of tribal India (e.g. near Bailadila Iron Ore Mine) the indigenous peoples are totally unorganized and unaware of their rights and how to fight for them."

203. It should be borne in mind that tribals can only sell land to non-tribals with the permission of the District Collector. In some states this applies to all Scheduled Areas, in others it has been given different degrees of more general applicability, while in still others the scope of these provisions has been widened to cover all Scheduled Tribes.

The Anti-Slavery Society adds:

"[The following points will demonstrate] the way in which successive governments ... have treated tribal India as an internal colony to be exploited for its raw materials and labour:

- "(1) The value of the resources extracted from tribal areas greatly exceeds the funds employed by Union and state governments for tribal welfare and development.
- "(2) The government-sponsored exploitation of the adivasis' traditional environment has involved heavy social costs for the tribals who have been forced to give up considerable amounts of land and whose customary rights to forests have been severely restricted. Few if any of the benefits of such developments have accrued to the tribals who more often than not have been forced to become landless labourers either locally for the forest department or a non-tribal landlord or in some distant brickworks, plantation or area of high agricultural potential.

"(3) In order to facilitate this colonial exploitation the tribals are prevented from acquiring any real political muscle. The large tribal population of the CTB has been split up between eight predominantly non-tribal states so that adivasis never form more than a small minority, and local tribal movements directed against non-tribal exploiters are ruthlessly crushed with the help of the Government."

204. In Chile, according to information provided by the Government, Act No. 17.729 (1972) "maintains the prohibition on the attachment or alienation of indigenous lands provided for in earlier legislation. It allows the land owned by indigenous communities to be divided up, but only when such division is requested by the absolute majority of the members of the community who live or work in the reservation and when it is approved by the Indigenous Development Institute. This Act abolishes the Indian courts and assigns jurisdiction in such matters to the ordinary law courts".

205. This legal regime was changed by the Decree-Law of 21 March 1979. Shortly after its enactment, the Government explained that plots awarded under the new procedure would be indivisible, even in the case of succession. In addition, they could not be sold for a period of 20 years, except by permission of the Director of the Agricultural Development Institute, which would be granted only in the following cases: (a) if the purchaser was a Mapuche; (b) if the transaction involved an exchange of lands; and (c) if the sale was made for social or educational purposes for the benefit of the persons concerned.

206. The following two aspects of Decree-Law No. 2568 and of the information contained in the preceding paragraph have been criticized (see paragraph 170 above):

"(d) A further negative aspect of this enactment is the possibility of attachment of Mapuche lands in payment of loans obtained from a financial institution. The previous legislation (both Act No. 14,511 of 3 January 1961 and Act No. 17,729 of September 1972) had established that there should be no attachment, not only of Mapuche lands, but of the shares and entitlements of members of this community, their dwellings, installations and all the tools of their trade, except in the case of bonds held in the State Bank or other State institutions. Under the new enactment, the Mapuches lose this protection and are in much greater danger of losing their property as a result of debts owed to private profit-making institutions.

(e) There is the possibility of alienating Mapuche lands, which under the previous legislation could not be mortgaged or sold to persons who are not Mapuche. Article 26 of Decree-Law No. 2,568 establishes that the plots of land resulting from division may not be transferred during the first 20 years, but adds that they can be sold in certain cases authorized by the Regional Director of the Agricultural Development Institute (INDAP); for example, if the transferee is the owner of another plot resulting from a division of land under this same law. As has been seen above, the new owner need not be Mapuche, as non-indigenous occupiers are also entitled to be allotted plots of land.

Consequently, the information submitted by the Government of Chile and quoted in paragraph 170, 56/ does not reflect the true content of Decree-Law No. 2,568 when it says that the plots of land resulting from division may be sold only to Mapuches for 20 years. Land may also be encumbered or mortgaged in favour of a State body, or of private financial, credit or banking institutions, upon authorization by INDAP. The possibility of encumbering or mortgaging land has been represented by the Government as a means of facilitating the procurement of credit for the exploitation of Mapuche lands. This places the land in the reservations on a similar footing to other land, but in view of the lack of assistance from the State 56/ and the dire poverty to which the Mapuche people have been reduced, it can be foreseen that this land will soon fall into the hands of purchasers or financial and credit institutions, with the result that Mapuche territories will no longer be one of the basis of the Mapuche community, and a unifying force in it."

207. In Norway land in certain areas cannot be sold if it is considered to be of use to the Lapps or for reindeer pasturage. The Government states that there are no provisions regarding the sale of property belonging to Lapps. In Finnmark most of the non-cultivated land is State-owned. There is a special statute concerning the use of State-owned land in Finnmark (Act of 12 March 1965). Pursuant to this Act, no land may be sold if:

- (a) the public authorities consider it necessary to reserve it for reindeer pasturage;
- (b) it is used, or is expected to be used, as a right of way for the regular migration of the mountain Lapps.

208. In accordance with information provided by the Government of the United States, trust land cannot be sold or mortgaged. However, in some cases tribes have leased trust land for long periods to non-indigenous peoples or concerns:

209. It has been held that multiple ownership plus trust status is one of the major causes of Indian poverty, because it prevents efficient use of the land by the owners. It is pointed out that because land in trust status is held in the name of the United States on behalf of the Indian owner, just as tribal land is held in trust, the Indian owner cannot do anything with his land without the permission of the BIA superintendent, who acts on behalf of the United States Government. The same source further states:

"Today, the various tribes are still hindered in free operation of their lands, but not nearly as severely as the individual Indian. Federal laws are strangling the individual Indian owner in red tape (which Indians call white tape) entangling anyone who wishes to make the simplest changes in the status of his own property in a mesh of confusing and degrading legal technicalities." 57/

56/ As is explained later, the provisions on State assistance to the Mapuche people in regard to technical assistance, services and education have disappeared from the new legislation.

57/ Burnetts and Koster, op.cit., pp. 118-119.

210. On the Alaska land settlement of 1972, it has been stated, however, that:

"Alaskan natives are struggling with the problems arising out of the Alaska Native Land Claims Settlement Act which cleared the way for the Alaskan petroleum pipeline, still uncertain whether the huge settlement is boon or doom.

"In 1972, Congress voted to award the native people of Alaska 40 million acres of their own land, in compensation for their giving up the other 440 million acres forever. They also were awarded a billion dollars, perhaps to replace all services and rights guaranteed through the trust responsibilities of the Bureau of Indian Affairs.

"Under the legislation, the settlement is to be made over a 20-year period, and in order to receive it, the aboriginal people are required to organize business corporations, with their entire population as voting stockholders.

"Many view this as the most successful treaty ever negotiated by natives. Their holdings will equal roughly 2 per cent of the total land of the United States. Considered as a business entity, the Alaskan natives will qualify among the ten largest corporations in the United States.

"But the contract is less than golden. Ultimately, they fear, it could bring them defeat by acculturation - something they have deftly managed to avoid for three centuries." 58/

211. Another article contains the information that:

"While the oil boom has already made millionaires out of some businessmen in Alaska, most ordinary folk are dismayed at the rising prices, crime and disorder.

"...

"The pipeline has caused severe housing shortages, overcrowded schools and roads, saturated public utilities, increased pollution, 'Alyeska Go Home' bumper stickers say on some vehicles.

"Tensions between two groups - workers from Texas and Oklahoma still wearing cowboy boots in the northern cold, and native people of Alaska - often erupt into fights.

"As it was during the California Gold Rush, perhaps the saddest stories are those of native women who turn to prostitution in exchange for survival when rampant development ruins the natural economy, and rampant inflation makes store-bought goods prohibitive.

"The crime and decline didn't just drift in. A former United States Attorney and an Alaskan politician were among nine persons indicted in July in an alleged scheme to set up gambling and prostitution operations near the pipeline terminal at Valdez.

58/ "Alaska land settlement: boom and doom", Akwesasne Notes, vol. 6, No. 1, 1974, p. 22.

"Social dissolution also hits the white Alaskans in whom the land had developed a life-style of friendliness, interdependence, and tolerance. That too is eroding as development by their countrymen from the South takes over - small children are being abandoned in shabby hovels in sub-zero weather, for instance, and the statistics of social breakdown are building up.

"For many native people, it has been impossible to keep that cake and eat it too. The departure of people from the villages to jobs on the pipeline has led to increased crime, broken marriages, child neglect, and a decline in the natural way of living. Even as far north as Barrow on the North Slope, the tiny town of 2,300 - all but 100 of whom are Inuit - is becoming a miniature Los Angeles. People are abandoning traditional dwellings to move into small boxy homes costing \$45,000 in a subdivision.

"As the swath cut for the pipeline finds more and more gravel roads cut towards it, native people are struggling to keep hordes of hunters and tourists off their lands.

"... The loss of the animals by increased hunting will drive even more Inuit into the cities" 59/

212. In Mexico, the legal regime regarding the disposal of land differs according to whether the land in question is community or ejidal land, on the one hand, or privately owned land, on the other:

"In so far as an indigenous person owns land under the regime applicable to private property, there are no special regulations and he does not require any kind of authorization to perform such operations. If the person concerned is the holder of agricultural rights over such land under a community or ejidal regime, the general principle that such rights may not be alienated, prescribed, attached or transferred is applicable and hence they may in no circumstance or in any manner be alienated, conveyed, transferred, leased, mortgaged or attached, either wholly or in part. Operations, acts or contracts which have been or may be performed in contravention of this principle are null and void.

"Titles to arable land, which may, in accordance with law, be awarded to individual members of the ejido, remain at all times vested in the ejidal community. The individual use of land, where it exists, terminates when it is determined by law that the land should be farmed collectively for the benefit of all the members of the ejido; it may be resumed when collective farming ceases.

"Individual parcels and plots which belong to ejidatarios and fall into disuse because there is no legal heir or successor remain at the disposal of the ejidal community concerned."

59/ "Alaska", Akwesasne Notes, vol. 8, No. 3, 1976, p. 28.

213. In some countries, indigenous land as such is legally inalienable. In fact, it is taken over and alienated in violation of clear legal provisions concerning inalienability.

214. Thus, as indicated in paragraph 122 above, the Costa Rican Indigenous Act states:

"Article 3: Indigenous reservations may not be alienated, prescribed or transferred; they are for the exclusive use of the indigenous communities inhabiting them. Non-indigenous persons may not rent, lease, purchase or in any other manner acquire land or property situated in such reservations. Indigenous persons may engage in transactions to buy or sell land only with other indigenous persons. Any transfer or purchase or sale of land or improvement of such land in the indigenous reservations between indigenous and non-indigenous persons shall be null and void, with the resulting legal consequences. The land, improvements to it and produce of the indigenous reservations shall be exempt from all types of present or future local or national taxes".

215. In Malaysia, the Aboriginal Peoples Ordinance requires the prior consent of the Commissioners for all dealings in land by aborigines, as follows:

"9. No aborigine shall transfer, lease, charge, sell, convey, assign, mortgage or otherwise dispose of any land except with the consent of the Commissioner and any such transaction effected without such consent shall be void and of no effect."

216. According to the Canadian Government the alienation of reserve land:

"from Indian Bands by sale, mortgage or other process is prohibited under the Indian Act. Within the reserve, the common ownership of the land is in accordance with Indian tradition, which does not regard land as a commodity to be owned but as a universal element to be freely enjoyed. Thus there were no territorial boundaries between Indian tribes or nations in the wilderness of Canada before white occupation and Indians still assert that land ownership is a foreign concept which they accept reluctantly to protect their group interests.

"The Lands Division of the Department of Indian Affairs and Northern Development has revised the records of land holdings to establish an accurate Reserve Land Register, employing research into federal and provincial archives covering a three-century period. The Land Register is maintained by the Government and a microfilm service has been introduced to supply information to Band Offices. An 'Indian Lands Manual' containing detailed information on land administration was drafted for the use of Band Councils and departmental officers.

"The leasing, surrender, and other land agreements under this Division of Government are increasingly conducted with the active participation of Band Councils. On the job training in land administration has been provided for members of Band Councils."

217. The Canadian Government adds that:

"Restrictions on individual rights of ownership under the Indian system are in accordance with the present desire of the Indians who do not wish to see the reserve system destroyed."

218. In Brazil, in accordance with article 198 of the Federal Constitution, lands inhabited by forest dwelling aborigines are inalienable under the terms of federal law. Any legal action whose purpose is to effect ownership, possession or occupation of lands inhabited by forest dwelling aborigines is declared null and void, and the non-indigenous occupants are given no remedy against or indemnity from the Union or the National Indian Foundation. The provisions of article 62 of Act No. 6001 quoted in paragraph 98 above, quod vide, are correlative to those constitutional provisions.

219. Furthermore, no leasing or renting, hunting, fishing or fruit gathering or agricultural, pastoral or extractive activities by outsiders are legal on native land and no legal effects attach to efforts to acquire such rights on native land. Native land is tax exempt and enjoys Public Treasury privileges, Act No. 6001 provides:

"Art. 15 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.

"1. In these areas, any person foreign to the tribal groups or native communities is prohibited from hunting, fishing or fruit gathering, and to engaging in any agricultural, pastoral or extractive activity.

"...

"Art. 38 Native land is not liable to usurpation (squatters' rights) and cannot be expropriated, except as provided in Article 20.

"...

"Art. 60 The assets and income of the Indian Estate enjoy full exemption from taxation.

"Art. 61 The privileges of the Public Treasury as regards the prohibition against pledging of goods, income and services, special actions, procedural time limits, interest and costs, extend to the interests of the Indian Estate."

220. Land spontaneously and definitively abandoned by native communities reverts to the possession and full ownership of the Union, without any remaining indigenous rights, under the following provision of Act. No. 6001:

"Art. 21 Land spontaneously and definitively abandoned by a native community or tribal group shall revert, by proposal of the Federal agency of assistance to the Indian and declaratory act of the Executive Power, to the possession and full ownership of the Union."

221. The following statements are included in the text issued by the participants in the Assembly of Native Leaders held at Goiás on 19 December 1978:

"Another Article in the Indian Statute states the following:
'Native lands may not be subject to leasing or any legal deed or transaction which might restrict the full exercise of immediate tenure by the Native Community or by the forest-dwelling aboriginals'.
(Article 18).

"Mr. President, we are well aware of the grave problem which confronts the Native Communities which have had their lands leased out by FUNAI itself and now find themselves unable to move intruders which FUNAI has allowed into our zones. Other lands are encroached upon in a peaceful manner, although without the opportune support of the Post Chiefs or the regional representatives of the Organization for the protection of the Indian. A concrete case is that of Roraima, where the representative of FUNAI permitted interlopers to encroach upon the native areas, according to the statements of the Native Leaders who met in the Assembly of Surumu.

"But the most serious case was the one in which an act of coercion was suffered by a Native Community which now has no prospect of seeing its lands returned, as happened to the Kadiweu of Mato Grosso do Sul which had its land snatched from it with the permission of the competent body (FUNAI), by means of leasing. These same interlopers now form the Association of the Lessees of the Kadiweu Reserve, which has powerful regional influence." 60/

222. On FUNAI's limited effectiveness in the defence of indigenous land rights, an author writes:

"... Indian territory is still regarded as 'fair game' whether declared reserved land or not according to a report in the Estado de São Paulo, 12.11.1978, there are about 100,000 settlers in the demarcated Indian reserves and parks - in other words, there are more non-Indians than Indians in the Indian reserved lands! All of this confirms what the President of FUNAI, General Ismarth de Oliveira, has said many times in public, and which he said yet again to 24 Indian representatives of tribes from all over Brazil, who went to Brasília to protest against the land situation and the proposed alteration of the Indian Statute, on the 19th of December, to the effect that the demarcation of the land is not a guarantee that it will not be invaded, and it is up to the Indian to defend his own land.

60/ Anna Presland, loc.cit., p. 36.

"This ... assertion makes nonsense of the concept of State protection of the Indian, and points out the complete futility of the existence of FUNAI. It encourages the Indians to desperate, hopeless and ultimately fruitless warfare in their own defence, against enormous odds. The few victories there have been have not involved very significant interests. In the main, the Indian is absolutely powerless in the face of numerous, ruthlessly greedy, and very well armed economic groups. If indeed this is the attitude of FUNAI, it is illegal and unconstitutional, for State protection of the Indian, and his exclusive right to occupy and exploit the resources of his own traditional territory permanently are written into the Brazilian Constitution." 61/

223. As explained earlier (see paragraphs 13-15 and 163-164, above) in New Zealand land may fall into one of three general categories: "Maori customary land", other "Maori land" and "non-Maori land".

224. As also explained above, a Maori can purchase, own and deal as freely with non-Maori land as any other citizen. A special system, however, regulates all his dealings with Maori land, and the dealings of non-Maoris who would wish to acquire Maori land. Except in regard to "Maori land" there are no denials of or restrictions on the rights of any New Zealand citizens, Maori or non-Maori, to own property individually or collectively. With regard to "Maori land", in this century, the Maori Land Court has been empowered to place restrictions on the alienation of land where this was not in the interests of Maori owners, and the Court has often done so. It has been reported that for many years it has been the duty of the Maori Land Court to scrutinize every sale or lease of Maori land in order to ensure that the transaction is in the interests of the owners. Any sale or lease of Maori land without confirmation of the Maori Land Court is illegal and void. This protective measure was designed to prevent exploitation of Maori land owners and to ensure that transactions affecting this land - which is mostly multiple-owned - are properly scrutinized. The law provides that the owners of pieces of Maori land with five or more owners cannot legally sell, mortgage or otherwise alienate it until the transaction has been approved by the Maori Land Court. Part of the rationale of this system is that where a piece of land is owned by perhaps hundreds of people, the opportunity for groups of owners to be manipulated is a factor which does not enter into ordinary land dealings, and must be guarded against.

225. The Citizens' Association for Racial Equality states in this regard, however, that "by this time the greater part of Maori land had already been transferred to European ownership" (para. 164 above).

61/ Ibid., p. 27.

C. Recognition of the authorities within the indigenous communities which control the distribution of land among their members, and support of such authorities

226. As has been stated earlier in the present study, the forms of internal organization of indigenous communities are an important part of their cultural and legal heritage. They are an essential element for achieving enduring forms of cohesion and solidarity among the constituent parts of the communities and are vital to the maintenance of socio-cultural traditions.

227. In the context of land tenure and attribution of the use of land to groups, families or individuals, such organization affects the most fundamental elements of the existence of indigenous communities as such. The wisdom with which the traditions and customs handed down from generation to generation are put into operation in changing circumstances is indispensable for the maintenance and safeguarding of the patterns that shape the cultural heritage of such groups: an evolving system of criteria that has the required flexibility and adaptability to face any situation. Any arrangements must take that fact into account within the framework of endogenous processes of discussion and decision. No outside imposition should intervene.

228. If new elements are to be incorporated, they have to be appraised and interpreted by the community from within and adapted, shaped and adjusted, to be useful and constructive. External manipulation would only bring about bastardization and imposition of alien methods which, in the long run, will prove to be negative and destructive. Land is the most important element in the existence of any indigenous community as it constitutes its territorial base as well as an element in the productive processes which ensure the community's survival and well-being. Any interference will have profound effects with unforeseeable consequences. It bears repeating that, when there is no proven valid alternative to indigenous ways, they should not be tampered with as nothing good will come from it.

229. The information at the disposal of the Special Rapporteur in this regard shows that no data are available for several countries covered by the study. 62/

230. The countries on which data are available fall into four groups.

231. First, the Norwegian Government has stated that "there are no authorities within the Lapp communities which control the distribution of land."

232. The information available on certain countries simply makes reference to the fact that indigenous communities are recognized as "legal entities" (as in Sweden) or that they take part in local administration (as in Finland).

233. Thus, the Finnish Government stated in 1974 that:

"The Lapp communities form part of the respective rural communes where the Lapps, together with other populations, can participate in local administration through the Communal Councils and other bodies."

62/ Argentina, Australia, Bangladesh, Burma, Canada, Denmark (Greenland), Ecuador, El Salvador, France (Guiana), Guatemala, Guyana, Honduras, India, Indonesia, Japan, Lao People's Democratic Republic, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka, Suriname and Venezuela.

234. Similarly, the Government of Sweden has stated that according to the 1971 Reindeer Breeding Act, the Lapp village is given special recognition as a legal entity.

235. In a similar manner, the Government of India reported in June 1983 that "In the north-east, village councils which control land have been statutorily recognized in the Village Courts Act."

236. Legislation in Bolivia states somewhat more clearly that indigenous communities are composed of peasant families who are known as "originarios" or "agregados" and who own an area legally recognized as an "indigenous community" under titles granted by colonial or republican governments or as a result of traditional occupation. Such communities are self-governing as far as internal affairs are concerned (Agrarian Reform Act, article 123 (c)).

237. In some countries it seems that distribution of land within communities or groups is governed internally, but there is an external authority which has to acquiesce in cases of disposition of land, either authorizing this action beforehand or approving it subsequently. This may be an institute and the courts (as in Chile) or a special court (as in New Zealand).

238. In Colombia, the commissions established to divide the land belonging to indigenous communities (resguardos) under the decree governing the Institute for the division settlement and preservation of forest areas are supervised and monitored by the Institute (article 27).

239. With regard to the recognition of the governing bodies of indigenous communities in matters relating to the division of community land among the members, it bears repeating that, in 1975, the Government of Chile stated that "community land is divided up among the various heads of household and legislation has merely endorsed indigenous customs relating to the division of land among members of the community. The law also provides for the necessary safeguards to ensure compliance with the wishes of the members of the community by limiting action by the law courts to cases of disputes among them. Even in such cases, the Institute must, in providing information to the law courts, take account of any agreements, sales, gifts, exchanges and kinship that may have occurred or that exist among the indigenous persons who are parties to the dispute".

240. Decree-Law No. 2568 permits no opposition to the division of lands, which may be applied for by a single occupant, even if not a Mapuche (see A/34/583, para. 349(a)). In practice, there has been no division in communities where the majority displayed staunch opposition when officers of the Farming Development Institute (INDAP) came to take measurements for division. This has been the case in a number of well-organized Mapuche communities. Most of the communities, however, for lack of information and organization, did not oppose the division of their land.

241. A report received by the Special Rapporteur on the human rights situation in Chile, brings out the contradiction between the promises of the authorities, who gave assurances that the only reservations that would be divided into individual plots were those where all the members agreed to submit a request to that

effect, 63/ and article 10 of Decree-Law No. 2568, which provides that the process of dividing the reservation's lands shall be initiated by the Defending Counsel for Indigenous Persons at the written request of any occupant. 64/ In addition, the report received mentions the large-scale official propaganda campaign to convince the Mapuches that the division of their lands has many advantages for them and then analyses the situation as it appears in practice when the three parties involved in the process of division combine efforts to that end. The three parties are: (a) the officials of the Agricultural Development Institute (INDAP) who present the request to the court, determine the area of land to which it applies, carry out the socio-economic inquiry into the families in the community, draw up the plan or scheme of division, propose the public bailiff (Ministro de Fe) (an INDAP official) and the allocation of plots, institute the public announcements and notifications required by the law and convey the property titles; (b) the Mapuches, who sign a request form, appear before the judge and receive a property title for the plot which they occupied in the community lands; and (c) the judge, who validates INDAP's actions by approving them.

242. The author of the study in question points out that, in order to understand the kind of relationship which is established between the three parties, account must be taken of the lack of intercultural communication between the Mapuches, on the one hand, and the INDAP officials and the judges, on the other, since the way of thinking is profoundly different in the two cultures. In practice, according to the author, the INDAP officials explain the content of the law superficially, putting the emphasis on the advantages which the members of the communities will gain by accepting the division of their lands. Sometimes they offer "gifts" (zinc, barbed wire for fencing) in exchange for the signing of a document in which the Mapuches submit a request for land division or for short-term credit. Respect for authority being a characteristic of the Mapuches, they do not refuse to agree to the request made of them.

243. This is how the process of division is initiated. The interested parties are invited to appear before the judge by a notice published in the newspapers. By law, 20 days must elapse after publication, but the study in question mentions a case in which that time-limit was not respected. 65/ In court, the brief - which contains information about the area and location of the land and about the plan and scheme of division - can be consulted by the Mapuches, who are members of the communities, and they can raise objections. In practice, the Mapuches do not always appear before the court and the judge merely notes their absence and declares the case settled. When the Mapuches do appear, no account is taken of their objections.

63/ These words were spoken by General Pinochet in the speech which he delivered at Villarica on 22 March 1979, during a ceremony held on the occasion of the signature of Decree-Law No. 2568.

64/ See paragraph 170 (a) above.

65/ The report mentions case No. 16 tried by the Court at Cañete. The brief was presented on 18 November 1980 and the judgement sanctioning the division is dated 14 December 1980.

244. At the time of the second Day of Mapuche Cultural Centres, organized at Temuco at the end of 1980, the activities of INDAP officials who encourage the division of Mapuche lands were violently criticized. In a public statement, the Mapuche leaders of Panguipulli, Atanasio Huenún and Sixto Rain declared:

"INDAP officials take no account of the opinion of the majority of the members of the communities, threaten to call in the armed forces to frighten the Mapuches, subject the peasants to violent intimidation and spread false rumours, for example, that anyone who does not accept the division will be excluded from the community". 66/

It appears from a report drawn up at the request of Mgr. Sergio Contreras, Bishop of Temuco, that 56 cases were submitted to the courts during the second half of 1979, as against 182 during the same period in 1980, not including a large part of November and the whole of December. The figures show clearly that "government officials are unanimously and firmly resolved to apply Decree-Law No. 2568 without delay to every community without exception".

245. The leaders of the Federation of Mapuche Cultural Centres are also concerned by the subsequent stages of the division procedure, which does not permit members of the communities to object to the documents accompanying requests for division, a step for which they are allowed only three days. There is also concern about the absence of members of the communities from the court or during the appearance, because that is when injured parties could raise objections. The report says that "unfortunately that scarcely ever happens in practice, since not all the interested parties attend the court session and the law does not allow people to object freely".

246. Mr Mario Gurihuentro, President of the Cultural Centres, added that "the court's attitude to objections by members of the communities is particularly serious" for example, in case No. 24 taken by the court at Cañete, 24 out of 26 members of the community expressly opposed during their court appearance the division planned by INDAP "since it was contrary to their interests". The court nevertheless confined itself to finding that this opposition was not legally admissible and "ruled in favour of the division without any other kind of proceedings". 67/

247. A representative of the Mapuche Cultural Centres affirmed that 250 Mapuche communities have already been divided up without the current owners of the individual plots being fully aware of the consequences of the division. That situation has caused disputes between members of the Mapuche families, who blamed one another for their misfortunes and quarrelled over strips of land, something that never happened before since the Mapuches work as a community. Some quarrels between fathers, sons and brothers have gone as far as murder. The representative of the Cultural Centres also pointed out that once the communal lands have been divided, a part becomes State property, for example, the cemeteries and the sacred land set aside for religious ceremonies. This is simply a continuation of the plundering from which the Mapuches have suffered throughout Chile's history. The representative of the Cultural Centres explained that what matters for his people is the land they possess

66/ Hoy, No. 180, 31 December 1980-6 January 1981.

67/ El Mercurio, 31 March 1981.

and that the Mapuches do not think like other Chileans. The Government now offers goods to those who accept land division: some cows and a Western-style house (rather than a traditional Mapuche one), but it makes them sign documents in which they undertake to pay ever-increasing interest (this interest is calculated in "development units"). The Mapuches, who do have no business instinct and live in a subsistence economy, will never be able to amass the sums necessary to pay this interest, so they will contract debts which could later cause them to lose their lands.

248. In this connection, the report previously cited comments as follows:

"Sight should not be lost of the fact that the Mapuche peasant lives his own cultural life, characterized primarily by a subsistence economy. It is obvious that monetary concepts are alien to him and that consequently, since he is unable to understand that he will have to make a payment when the contract matures, one of his main problems will be permanent indebtedness, which will get worse in the near future. It is true that Decree-Law 2568, article 26, prohibits the sale of plots for a period of 20 years, but this situation may well be modified and enterprises may resort to seizure if payments are not made."

249. The word "Mapuche" means "man of the land" and thus bears witness to the importance which land has for the Mapuches. At the time of the second Assembly of the Cultural Centres, the Mapuches voiced their concern at the economic situation they find themselves facing for want of land to cultivate. While their numbers have tripled in a century (they now number 1 million), their arable lands have shrunk. They added that the Araucanian (Mapuche) people "are not in a position to compete with those who have enough land and modern technology, and cannot flourish in an economy based on free enterprise". 68/

250. The witness who talked to the Special Rapporteur said that he was deeply concerned at the risk that the Mapuche people itself might disappear. He said that, following division of the land, some Mapuches had received barely 0.7 hectares as individual plots, and that these lay 80, 90 or 100 kilometres away from the urban centres. Separated from the rest of the community, these indigenous people and their families will not be able to survive on the produce of their land. They will be forced to migrate to the urban centres to serve as cheap labour.

251. Another indigenous community also risks losing the land which it has occupied for 150 years. This is the 93 families of the Huilichl community, living in the Yoldad Incopulli reservation in the Quellón district, 120 kilometres from the town of Castro. According to the head of the community, Estanislao Chignay Raimapo, who submitted documents in support of his statements, the reservation's land covers 10,000 hectares and was part of the public domain in 1938. According to the documents, each family had at its disposal 300 to 500 hectares on which it grew potatoes and wheat and raised livestock.

68/ Hoy, No. 180, 31 December 1980-6 January 1981.

252. Sociedad Forestal Chiloe Limitada (Chiloe Forestry Company), which bought this land from the State, recently applied for legal recognition of its title and the judge of the First Court of Castro recognized the company's title as valid. At a festival organized by the present Government in which they took part, the indigenous people addressed a letter to President Pinochet asking him "to order the competent authority to examine the basis for the injustice which people are seeking to commit against our community". The indigenous people met responsible officials of the Ministries of Agriculture and of Lands and Settlement and an offer was made to grant them one hectare per family. Their comment on that offer was that: "We cannot do anything with one hectare at Chiloe". 69/

253. The representative of the Mapuche Cultural Centres who talked to the Special Rapporteur on the human rights situation in Chile said that the communities which he represented were asking for recognition of their right to programme their own development, taking their culture into account. This attitude does not mean that they will not obey the Chilean Government and respect the laws of the majority; it means that they want those laws to recognize their existence as an indigenous people. The Mapuches have their own system of working the land, which is a communal system, and by living on their lands, they could develop without giving up their ethnic characteristics or losing their cultural values. But when tied to a commercial system in which they are forced to get into debt to purchase goods, while being denied the right to education and health either for lack of schools and medical care or, when these services exist, because their cost is prohibitive, the Mapuches are put into a position where they will not be able to survive as an ethnic group and where, as individuals, they will be forced to emigrate to meet their needs.

254. The witness also stated that, when the system of reservations was introduced in 1884, the lands allotted to the Mapuches were clearly less extensive than those which they possessed previously, namely, a total area of slightly under 500,000 hectares, of which only half remained today, the large landowners having gradually appropriated the other half. Today, those landowners would like to use the Mapuche lands for reforestation or to build hotels and other tourist facilities, for they are situated in beautiful regions of lakes and islands. According to the witness, the law is designed to dispossess the Mapuche of his lands, which will be devoted to money-making activities by those who have the necessary sums for investment.

255. Ideas similar to those of the witness have been advanced at various international meetings. At the thirty-fourth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the representative of the International Indian Treaty Council said: "After constant violations of the rights of the Mapuches, the Chilean Government has adopted a law under which their lands are divided into small, transferable plots, thus destroying the communal character of Mapuche society and even threatening its right to own those lands". 70/

69/ The witness pointed out that the scholarships awarded to Mapuche students, which have been mentioned as government gifts to these indigenous people, amount to 1,800 Chilean pesos per year - more or less the price of a pair of shoes.

70/ See E/CN.4/Sub.2/SR.905

256. The situation of the indigenous people in Chile, far from having improved since previous reports, is continuing to deteriorate. In view of the vital importance which land has for the indigenous population as the foundation and pillar of their ethnic identity, it is to be feared that the Mapuches may find themselves dispossessed of their property, either by being urged, or even forced, to divide it up and adapt to methods of work and economic relationships which are alien to them, or by being deprived of their lands by real estate operations which take account of neither their presence nor their rights, which they have acquired by centuries-old occupation and by being the first and native occupants of these territories.

257. The New Zealand Government states that recognition of the authorities within the indigenous communities which control the distribution of land among their members and support of such authorities "presuppose a state of affairs which does not exist amongst the Maori people. The question of which area of family land is to be occupied by a particular member of the family is a matter for decision by all of the owners who decide in each case what is to be done with the land. However, if the owners decide to lease or sell interests in family land to one of their number, this is a transaction which requires confirmation by the Maori Land Court."

258. The available information on some countries indicates that the local authorities of indigenous communities are to some extent recognized as being competent in matters relating to the distribution of indigenous land ownership.

259. For example, the Government of Costa Rica states that "no regulations have been enacted in this regard", but it has taken a step in this direction in declaring that "indigenous reservations shall be administered by indigenous peoples within their traditional or modern community structures", although it stipulates that this will be done "subject to co-ordination by and consultation with CONAI" (article 5 of Executive Decree 5904-G).

260. The Special Rapporteur repeatedly requested information on what had been done in this connection, but he did not receive any additional information of any kind.

261. The Mexican Government states that:

"The general assemblies of the communities, which are the highest local authority, are empowered to conclude agreements on the way in which community property is to be used; the members of the indigenous communities themselves thus decide on the procedures for land distribution (articles 22, 23 and 47 of the Agrarian Act)".

262. The Government of the United States has reported that "Tribal Governments in some cases assign reservation land to members of the tribe, and this decision is left to the tribal government."

263. In Malaysia the Aboriginal Peoples Ordinance, section 4, provides that "Aboriginal headmen have the right to exercise their authority in matters of aboriginal custom and belief in aboriginal communities and aboriginal ethnic groups."

264. In Brazil, the legal situation is even clearer. Article 2 of Act No. 6001 provides that the Federal Government, the states and the municipalities, as well as the organs of the relevant indirect administrations, have within the limits of their competence, specific obligations with regard to the protection of indigenous communities and the preservation of their rights. Such obligations include that of ensuring respect for the unity of indigenous communities and for their cultural values and traditional customs as part of the process of integrating Indians into national society (paragraph VI).

265. Act No: 6001 also contains a more specific provision relating to land distribution, but it refers solely to Indian parks. Article 28 thus states, inter alia, that "the subdivision of land in the Indian parks shall comply with the tribal regime of property, usages and customs and likewise with the national norms of administration, which must be adapted to the interests of the native communities" (paragraph 3).

D. Provisions to strengthen and further develop successful and appropriate co-operative procedures applied by the indigenous populations in connection with systems of production, supply, marketing and credit with respect to land use and other related factors

266. The only defense that economically weak groups have in a market economy is to associate with a view to improving the production, supply, marketing of and demand for essential commodities from the land. In this context, co-operative organization is very close to traditional methods and actually duplicates ancestral organizational patterns in certain areas. Traditionally indigenous peoples and nations organized themselves in welfare communities with sophisticated economic systems where every member of society participated in the different sectors of production and everyone received a fair portion of the product. Everyone had a function to perform and performed it fully. No one received less nor took more than he deserved, given the communal nature of production. In this over-all co-operation for production and consumption there was a system that the present day indigenous societies are revitalizing.

267. It is, then, natural for indigenous populations to adopt co-operative forms of organization in all that they undertake. For these reasons, co-operativism and co-operative association have always been very successful, provided that it is co-operativism as they understand it, not alien or superimposed forms of "modern" co-operativism that lead to penetration and rejection of indigenous ways.

268. Non-indigenous co-operative patterns have not been successful when imposed on indigenous communities in place of their own co-operative patterns. Authentic indigenous co-operative systems of production, supply, marketing and credit with respect to land use and other related factors have been an unqualified success in many cases and countries. They should be strengthened and assisted in their further development.

269. This section is devoted to a discussion of the information available on appropriate co-operative procedures.

270. No information was available on several countries in this regard. 71/

271. According to information furnished by the Norwegian Government there are no provisions in Norway to strengthen and further develop successful and appropriate co-operative procedures applied by the indigenous populations.

272. In some countries, 72/ there are no special provisions relating to indigenous co-operatives. The provisions on co-operatives do not, however, appear to rule out indigenous co-operatives. In Ecuador, for example, article 46 of the Constitution stipulates in general terms that Ecuador's economy is composed of four basic sectors; paragraph 3 states that the community or self-managing sector is made up of communal or similar co-operative undertakings whose property and management are

71/ Argentina, Australia, Bangladesh, Brazil, Burma, Canada, El Salvador, France (Guiana), Guatemala, Guyana, Honduras, Indonesia, Japan, Malaysia, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka, Suriname and Venezuela.

72/ For example, in Bolivia, Ecuador and Paraguay.

the responsibility of the community of individuals who permanently work therein and that the State will enact legislation to regulate and develop this sector. Article 51, paragraph 3, provides that community and co-operative production will be encouraged.

273. Bolivia also has no specific provisions, but the Agrarian Reform Act deals with "agricultural co-operatives" in articles 133, 134 and 135, which recognize the social benefit of agricultural and livestock co-operatives and provide that their detailed organization will be dealt with in a special law, but since this law was not available to him the Special Rapporteur does not know whether it exists. According to the provisions of the Agrarian Reform Act, however, these co-operatives include settlers and small and medium-sized landowners, but no further details are given. It is thus not clear whether the Act deals with indigenous co-operatives as such. It was considered relevant to mention this Act because it does not exclude co-operatives which are indigenous co-operatives in the strict sense.

274. In Paraguay, the law simply states that any community to which land is granted, with ownership being attributed to the community and not to the individuals composing it, must set up a production co-operative (Rural Welfare Institute, paragraph 4 of Order No. 677 of 24 March 1974).

275. In some countries, however, there are specific provisions for indigenous populations. Thus, for instance, the States of Andhra Pradesh and Bihar, in India, endeavouring to preclude the continuing land alienation to non-tribals through executions of unpaid debts, have promulgated laws allowing tribals to mortgage their land only to tribal co-operatives. In practice, these measures are reported to have produced little effect. (See also paras. 159 and 161 above).

276. A publication contains the following regarding Sweden:

"The new law ... grants the reindeer-breeding Lapps a greater measure of self-determination than older laws gave them. The Lapp village will become a kind of co-operative society, responsible for reindeer breeding within the grazing area of the village. It will plan, construct and maintain common facilities as well as distribute the costs among its members. The power of jurisdiction over individual Lapp matters possessed by regular public authorities under the old Reindeer Grazing Law of 1928 and subsequent village by-laws has now been removed. The former special system of Lapp authorities, with its hierarchy of bailiffs, supervisors and Lapp executive officers has been abolished. Administrative matters which in the future must be decided on a county level will be handled by the ordinary county authorities, such as the County Agricultural Boards. On the national level, the Swedish Board of Agriculture will be given chief responsibility for future development of reindeer husbandry. The Lapps themselves will, none the less, continue to influence decisions on these matters both on a regional and national level. On the Cabinet level, matters of reindeer husbandry fall under the jurisdiction of the Minister of Agriculture," 73/

277. The Government of Finland states that:

"In order to facilitate reindeer breeding, it was provided by the Reindeer Breeding Act of 4 June 1948 No. 444 that, subject to certain restrictions, reindeer breeding is permitted, in those regions where it is the main means of

livelihood, irrespective of the ownership of land. In particular land owned by the State can be used for this purpose. For the administration of this system those who are engaged in reindeer breeding in a certain region are required to found particular associations which are collectively responsible for possible damage caused by reindeers to private property as well as for a fee to be paid to the State. However, such an association may, for economic reasons, be exempted from the obligation to pay the fee".

278. The Government adds that:

"The same Reindeer Breeding Act lays down general rules in this field. Their implementation is entrusted to the appropriate administrative authorities. This Act is mainly applied to the vast areas in Lapland owned by the State. The restrictions concern the organization of reindeer-herding units which shall, as far as possible, have natural boundaries. No reindeer owner may participate in more than one unit. Without the permission of the unit, a reindeer owner may not participate in a unit outside his own commune. The reindeer-herding units together form an association, the purpose of which is to link the units, to develop reindeer breeding, to carry out experiments and improvement of the reindeer stock, etc. The Act also contains detailed provisions on precautionary measures to be taken by the reindeer-herding units for prevention of damage, on the evaluation of damage brought about by reindeer, and on the compensation of damage".

279. On Maori co-operative procedures in New Zealand, the Citizens Association for Racial Equality states that some Maori co-operative procedures have been utilized in land developments, notably in the system of incorporations inspired largely by Ngata.

280. Maori incorporations have been described as follows by the Government:

"In recent years, the device of the 'Maori incorporation' has become a very important method of managing tribal land, and this has become the principal form of co-operative farm production for Maoris. The method of establishment and of administration of such incorporations is provided in the statute law. By a simple and inexpensive process, the owners of the land may be incorporated by an order of the Maori Land Court. A committee of management is elected by the owners at an annual general meeting. This committee appoints managers and staff to farm the land or to engage in other business activities related to the land.

"This has proved to be a most satisfactory way of dealing with land which has large numbers of owners, in circumstances where the owners are mostly living elsewhere. Indeed several of the largest and wealthiest farming enterprises in New Zealand are Maori incorporations.

"Capital for development and improvement of the assets of Maori incorporations is available on favourable terms from a sum of money allocated annually by the Government for this purpose and administered by the Maori and Island Affairs Department, but incorporations are not restricted to this source and may obtain capital elsewhere".

281. In Chile, in his 1947 message, the President of the Republic submitted to the National Parliament a bill to set up an Indigenous Affairs Corporation whose headquarters would be in the city of Temuco and whose principal functions would be to "develop, organize, monitor and promote indigenous agricultural and livestock production" and "to extend to the indigenous populations, indigenous communities and the agricultural co-operatives formed by them the necessary credits for and means of production". In addition, "the Indian Court at Temuco has arranged for the Land Credit Bank to open its doors to small Araucanian farmers and has undertaken to keep a special register of the credits allotted. In 1940, the Araucanian National Congress urged the Government to establish a Development Corporation which would extend long-term agricultural credit to the Indians at low rates of interest; it also urged that a representative of the Araucanian United Front should be included as adviser on the Board of the Land Bank. The Act respecting small farmers' co-operatives may be applied to reservation Indians, but no co-operatives comprising Indians of this class have so far been established". 74/

282. In 1974, the Government reported that: "Although loans by the State Bank to indigenous persons increased substantially, they were not enough because the amounts of money involved did not meet requirements in terms of machinery, tools, animals, fertilizers, seeds, etc.

These efforts required the adoption of rules and regulations to which the activities of the DASIN officials had to be adapted so as to ensure some measure of uniformity, equity and justice in the granting of financial assistance and fellowships."

283. The information provided by the Government of Colombia makes the following reference to a supervised credit system for the development of indigenous agriculture, small-scale industry and handicrafts: "Through the establishment of the fund for the development of indigenous agriculture and the fund for the development of indigenous small and medium-scale industry and handicrafts, it has been possible to extend the credit service to the regions where the 12 Indigenous Affairs Commissions operate.

The funds, which have to date distributed about 3 million pesos, are managed by the Land Credit Bank under agreements concluded by the Ministry of the Interior and the Bank. In August, the funds will be increased by a further 2 million pesos.

This programme has made it possible to develop basic industries in the indigenous economy, including fishing in Guajira, handicrafts in Vaupés, Amazonas and Arauca and farming in Cauca, Narino, Putumayo, Meta and Risaralda."

284. According to the Mexican Government, the State has endeavoured not only to restore land to peoples and communities and to confirm its ownership but has also encouraged them to organize to make better use of their resources, to obtain credits and to market their products. The National Indigenous Institute has, in co-operation with other Government agencies, worked to ensure that organizational procedures take account of traditional indigenous forms of co-operation and mutual assistance.

74/ ILO, op.cit. p.393.

In general, various types of associations have been established, depending on the kind of activity in question and the provisions of Mexican legislation. For example, forest ejidos have set up ejidal forestry undertakings, which have, in turn, formed unions; producers, such as coffee growers and others, have also set up associations and mutual benefit groups.

Fishermen have established co-operatives, as have other indigenous persons who have acquired means of transport; they have also received assistance and advice from the Institute and other Government agencies.

285. As indicated in paragraph 110 above, the Government of Costa Rica reported in 1979 that: "Co-ordination by and consultation with the National Indigenous Affairs Commission are in their early stages and are designed to encourage the organization of communities and undertakings which will act as administrative and governing bodies in each reservation. To this end, 14 community development associations and one farming and multiservice co-operative have been set up in indigenous areas and others are in the process of being established."

286. The Government of the United States has informed the Special Rapporteur that:

"Technical assistance is available to Indian groups on the harvesting of timber, establishment of industrial and tourism operations, and the leasing of indigenous mineral resources. Money to finance such operations is also available up to the limit of a revolving Bureau of Indian Affairs credit fund to finance Indian economic activities. In addition, money is available from other federal government units such as the Department of Commerce and the Small Business Administration."

287. Regarding economic development efforts, legislative actions relevant to land and resources, federal involvement in land and resources, water policy and fishing disputes, an official report contains the following information:

"Economic Development Efforts

"Many reservation lands are rich in natural resources, which can be used by the tribes to lift themselves out of poverty. Some tribes are actively pursuing economic self-reliance through the development of their oil, gas, coal, uranium and other energy resources. Other tribes have not made final decisions regarding development of their resources and still others have decided against development at this time. If there is to be development, it is a function of the Federal Government to assure that the best and most economically and environmentally sound arrangements are made. In addition, the government is to provide technical and financial assistance to ensure that the tribal decisions will be based on an expert and experienced evaluation of the technical and factual data.

"Help has been provided from the White House or federal agencies when tribes have requested it. In 1977, five federal agencies gave the member-tribes of the Council of Energy Resource Tribes more than two million dollars for this endeavour. Two agencies, the Community Services Administration and the Administration for Native Americans, have ear-marked their funding for a human needs assessment of the impact of energy development on the affected Indian people. And, the Department of the Interior has an ongoing responsibility to assert the Indian interest in resource protection and development of related policies.

"Legislative Actions"

"During 1977 and 1978, Congress passed about 50 bills which expressly benefit tribes and individual Indians. The most hotly debated Indian issues in the Congress during 1977 and 1978 were Indian water rights in the Southwest, Indian fishing rights in the Northwest and Indian land rights in the East. Despite controversy, the 95th Congress passed mutual-consent agreements achieving settlement of a water rights case in Arizona and the first of the Eastern Indian land claims cases in Rhode Island. By an Act of July 1978, the Ak-Chin Indian Community's longstanding water claims were settled, enabling the tribe to continue its profitable tribal agriculture programmes, thus avoiding years of economic hardship in litigation.

"Similarly, the Rhode Island Indian Claims Settlement Act of September 1978, sponsored and vigorously supported by CSCE Commission Co-chairman Claiborne Pell, ratified a negotiated settlement of the case brought by the Narragansett Indians under the Indian Non-Intercourse Act of 1790. The Act cleared title to acreage in the state authorizing federal funds to reimburse the tribe for lands lost and to purchase lands. On 20 August 1979, the Administration and the Cayuga Nation of New York arrived at a land claim settlement that will involve the establishment of a trust development fund for the tribe. The settlement will soon be sent to Congress for ratification.

"Federal Involvement in Land and Resources"

"Tribal Land Acquisition Acts"

"Recognizing that the futures of Indian tribal governments and tribal economies are largely dependent on a sufficient land base to support their populations, it is a continuing United States policy to assist tribes with land acquisitions and land consolidation programmes. During the years from 1975 to 1978, Congressional legislation has authorized acquisition by tribal groups of about 400,000 additional acres of land, assisting some 30 tribes to expand their land base.

"Eastern Land Claims"

"The issue of land claims brought by Indians against states, municipalities and private landowners in federal courts in the eastern United States has received national attention. The claims are against states, cities and individuals, rather than against the Federal Government; they are based on the allegation that the Federal Government did not approve transfer of these lands by Indians to non-Indians, which is required by a statute first enacted in 1790 as the Indian Trade and Intercourse Act. Following the ratification of a mutual consent agreement by the 95th Congress, the first Indian land claims court settlement was reached between the state of Rhode Island and the Narragansett tribe. In May of 1979, the state returned 1,800 acres to the tribe. A similar approach will facilitate the settlement of the claims of some 3,000 Indians comprising the Passamaquoddy and Penobscot tribes in Maine to a land in that state.

"Now that the Narragansett/Rhode Island settlement is concluded (and a major step toward resolution of the Maine case has been taken) other Indian land claims may be examined in an atmosphere conducive to fruitful negotiation.

"Water Policy

"Conflicts over water rights in the Southwest constitute some of the most intense disputes between the states and Indians. Many are the subject of ongoing litigation in both state and federal court. For years, the states pursued a policy of homesteading on arid western lands, while the Federal Government was designing and constructing water projects with little regard to the needs of Indian communities or to the potential negative impact such projects could have on the ecological condition of reservation lands. The United States Supreme Court acknowledged Indian water rights early in this century in a decision known as the Winters Doctrine.

"In his water policy message on 17 June 1978, President Carter announced a new water policy. Implementation of the policy is to be conducted in consultation with the Indian tribes. The Presidential directive calls for negotiations whenever possible to resolve conflicting water claims. Should negotiations fail, litigation in federal, as opposed to state, courts is favoured.

"Fishing Disputes

"Over the past five years, Indian fishing has been the subject of serious public and political controversy. The Federal Government - despite tremendous opposition from non-Indian communities - has used its authority to assert the full range of fishing rights reserved to the tribes when the reservations were created. The government also recognizes the need to protect the resource. The government recognizes the right of these tribes to fish for commercial, as well as for ceremonial and subsistence purposes.

"The United States Government has actively sought to protect Indian fisheries from environmental degradation, from the potential negative consequences of non-Indian diversion of waterways for agricultural and industrial purposes, from excessive non-Indian commercial and sport fishing, and from other dangers to the resource. For example, in the State of California, the government is addressing these problems as it attempts to put the Hoopa and Yurok tribes' fishery resource in good order for their future use and self-management. As yet, the United States has avoided going to court to determine the extent of the tribal fishery right. The California Department of Natural Resources is taking a similarly positive approach, working with the federal agencies and the Indians to improve the fish stock and to lay a basis for co-ordinated tribal/state/federal management of the resource in the future.

"However, when litigation cannot be avoided, the Federal Government often assumes trustee responsibility for the defense of Indian treaty rights in the courts. The Federal Government's commitment to protect Indian rights - even if this would mean confrontation with a state - is exemplified by an emotionally charged fishing rights dispute in Washington State.

"In 1974, a landmark court decision (U.S. v. Washington) was announced, affirming the treaty fishing rights of 19 Northwest Indian tribes. The decision declared these tribes entitled to catch up to half the harvestable fish and to participate jointly with the State of Washington in the management of their fishery resources. State officials, institutions, courts and non-Indian fishers refused to accept and abide by the decision and court orders.

"Finally, in the middle of the 1977 fishing season, the federal courts, at the recommendation of the Administration, were forced to take over management of the fishery. Rising to the challenge in the face of massive illegal fishing by non-Indians, strong public emotion and legal obstacles in the State, the federal agencies pooled their resources to aid the federal court in managing the fishery. On 2 July 1979, the Supreme Court ruled that Indian tribes in the Northwest are entitled by treaty to halve the harvestable catch, warning State authorities to comply." 75/

75/ Report prepared by the United States Commission on the Conference on Security and Co-operation in Europe for the European Review Conference in Madrid (November 1980), pp. 159-162.

E. Special measures to protect indigenous land and its resources

1. Special measures to prevent and combat harmful practices with respect to mineral or other resources of the subsoil of land belonging to indigenous persons, groups or communities, applied at the time when such resources are discovered or thereafter

288. Land has been the single possession of the indigenous populations that non-indigenous people have most coveted and manoeuvred to control. This happened in the past not only because they need land on which to settle but also because it was useful to develop agricultural or cattle raising activities, which, at the time of conquest or settlement, were the most important activities. Soon thereafter, another consideration was added, that of the mineral deposits contained in the soil and subsoil of indigenous lands. This new consideration became as or more important than the others, in some areas, leading to friction and ultimately armed conflict with the ensuing defeat of the indigenous population. Indigenous communities were systematically pushed or brought by force to other lands which the non-indigenous sectors did not consider desirable for one reason or another.

289. Later, other minerals and oil gave rise to a new wave of ousting and dispossession. The areas to which the indigenous populations were pushed this time were poorer and unproductive, as all attractive and productive land had been grabbed from them already in many areas. At present yet another wave of land grabbing has been unleashed on indigenous communities, with the use of excessive force and abuse. New minerals and other substances have been found to exist on and in indigenous lands, which not long previously looked unattractive and were not as productive as others, precisely in part because of what lay underneath them.

290. Radioactive materials have been extracted from indigenous land while the indigenous population was still living there. Atomic testing has been carried out on indigenous land or in indigenous areas over the protests and complaints of indigenous peoples, who feel that this time they have nowhere to go and that they must stay where they are, on their lands, and who demand respect for the ecological balance and healthy environment they had before mercury poisoned their rivers and radioactive uranium waste was dumped on their land, causing disease and sterility.

291. At the International NGO Conference on Indigenous Peoples and the Land, held at the Palais des Nations, Geneva, from 15 to 18 September 1981, Commission III looked into the question of "Transnational corporations and their effect on the resources and the land of the indigenous peoples". Among other things this Commission found that today, the transnational corporations of the world are using government, military and parliamentary procedures as their enforcement troops. Numerous studies have documented the merger of major raw material, extraction, refinement, and production companies with financial institutions to form "parent companies" which have subsidiaries in numerous countries and industries throughout the world. The world is now entering an era where "parent companies" are eating their "children" to form the most powerful monopolies the world has ever known. The transnational corporation companies have created a "global supermarket" and "clubs". With their interlocking directorates, these clubs plan the structure and direction of the global economy, act as advisers to government, and determine the destiny of millions of people throughout the world.

292. On mining, forest exploitation, hydro-electric and other projects, the Commission stated: Past and present mining projects have destroyed the land and people of many areas. For example in Canada the government has given permits to transnational mining companies to dump toxic wastes into the river systems from which the Haida, the Nishka and other indigenous peoples of the North West Coast obtain their livelihood.

The theft and wanton exploitation of gold resources of the Lakota in North America, the Ibaloi of the Philippines and other equates indigenous death with their wealth. The Cero Colorado project and the Guaymi of Panama are similar cases affecting the Maori of New Zealand and Aboriginal Australians.

A universal side effect of energy development is cancer and related diseases.

Indigenous peoples' lands are seized from the traditional owners to be put into the service of transnational corporations. Fruit companies, particularly United Branch, were named for seizing and holding, by force and political manipulation, lands in Nicaragua, Panama and the Philippines. Del Monte and Castle Cooke have grabbed vast tracts of fertile lands from which they preserve and export the fruits leaving poverty and hunger behind.

Tribal peoples are to agri-business operations less than cattle. In Paraguay, Brazil, Colombia, Peru, Australia, Ecuador and Bolivia indigenous peoples have been denied access to lands in order to make way for cattle ranching.

Logging companies are devastating the environment of forest-dwelling peoples and damaging the world environment. Forest losses of 170,000 hectares a year in the Philippines are seen. Past losses of valuable wood from Nicaraguan forests looted by English and Dutch companies are only now beginning to be restored under the new government. Forest lands of indigenous peoples in the Philippines, Brazil, United States, Canada, Ecuador, Peru, Colombia and other countries are looted by transnationals with the co-operation of governments who sell these resources with total disregard for the rights and needs of indigenous owners.

Vast amounts of coal, oil, uranium, natural gas, undeveloped hydro and geothermal potential, as well as other energy resources, exist on the lands of indigenous peoples. In the accelerated exploitation of these resources by transnational corporations the commission found the following cases particularly alarming:

- Uranium exploitation in Dene, Lakota, Anishnabe, Saskatchewan Metis and Non-Status Indians, Dine, Pueblo, Namibia and Australian Aboriginal ancestral lands;
- Coal strip-mining on Australian Aboriginal, Dine, Crow, Northern Cheyenne and Azanian Native lands;
- Oil extraction in the North Sea, the North Slope of Alaska, Guatemala, Mexico, Amazon Basin of South Africa and Australia, affecting indigenous people from the Islands and North America;
- Hydro-electric power and dams which will drown native homelands in Cherokee and James Bay Cree country in North America. Guayami in Panama, Kalinga Bontoc in the Philippines, Sami lands in Scandinavia, Akawaio in Guyana, Kaingang and Guarani in Southern Brazil, Parakana and Waimiri-Atroari in Northern Brazil.

The companies involved in these projects include among others Rio Tinto Zinc, Union Carbide, Kerr-McGee, Exxon, Peabody Coal and Amax.

These companies have made indigenous lands unfit for human habitation. They have destroyed the environment, polluted the water and air, brought disease to Indian people, and invaded the sacred space and landscape on which indigenous culture and religion depend. In the wake of these projects, non-Indian boomtowns have sprung up bringing with them prostitution, crime and alcoholism.

293. The responsibility of financial institutions is assessed as follows: International financial institutions play a central role in backing the operations of transnational corporations on lands of indigenous peoples. These projects include the financing of mining, forestry and hydro-electric schemes. These so-called "development" projects are implemented through huge infusions of capital by financial institutions which are interested in obtaining gigantic returns. The actual control of many regional resource schemes, such as Northern Frontier Development in Canada and the Amazon Development project in South America is in the hands of these financial institutions with their immense power.

In the Philippines, the ambitious energy programme to build 40 major hydro-electric dams on tribal lands was advised and financed by the World Bank, Asian Development Bank and the United States Agency for International Development. In Bolivia, the World Bank and European banks are funding so-called "integrated projects" and in Panama, the World Bank is providing funds for mining and hydro-electric projects.

These projects far from supporting the "poorest of the poor" are actually supportive of transnational corporations, international contractors and the local elite. The indigenous peoples always end up as the most impoverished. 76/

294. On the impact of the nuclear arms build-up on the land and life of indigenous peoples, the Conference:

(a) Considered:

"the present reckless nuclear arms race to be one of the most crucial and relevant issues of our time. After a careful analysis and examination of the critically affected situations around the world, the Commission dealing with that topic was even more persuaded that ultimately, the struggle of the indigenous peoples for disarmament, land rights and self-determination contributes to the welfare not only of the indigenous peoples themselves but also for the whole human family. By the same token the Commission underlined that all world-wide efforts against the nuclear arms build-up will benefit the struggles of the indigenous movements. As an example of this interrelationship it was pointed out that the promotion for the right to self-determination and land rights of indigenous peoples would involve struggles against nuclear development and the operations of the transnational corporations."

(b) and stated that:

"The proposal for a nuclear free zone in both the Pacific Ocean and the Indian Ocean cannot be achieved without the elimination of nuclear testing, weapons delivery systems, passage of nuclear warships and submarines, transport and dumping of nuclear waste, establishment of military bases and communication systems, and the militarization of societies.

"...

"The self-determination of all indigenous peoples is a prerequisite for the successful struggle for disarmament and is necessary in order for them to control their own land resources.

"There has not been nor ever will be adequate compensation for the land taken by governments and transnational corporations as weapons storage facilities, and this illegal usurpation of indigenous land has among other things led to the death and displacement of indigenous populations.

"...

"There is a serious lack of legal protection and of legal recourse whether national or international, for indigenous peoples against nuclear development and the disposal of nuclear waste. This raises fundamental questions regarding the ethical basis upon which legislations are enacted."

295. There is no information in this regard in connection with several countries. 77/

296. In general there is little or no discussion of the de facto situation in the data available on several countries which state that the same general rules apply in these matters to indigenous and non-indigenous lands as well as the resources that may be found to exist there.

297. The information available on Australia does, however, contain some insights into the de facto situation when it discusses essentially legal texts and their effects.

In the top end of the Northern Territory and in the Kimberley region of Western Australia, Aboriginal communities are living in fear of the impact the massive mining developments will have on their life styles, their freedom, their culture, and their land and sacred sites.

In Arnhem Land, one old Aboriginal man told the team "All the mining company can see is money; money means nothing to me. Money is white man's business". To which an elderly Aboriginal woman added, "We don't have Government to protect our land. Why is the Government pushing us? We want our land to stay as it is".

The Aborigines of Arnhem Land are powerless to stop the destruction and exploitation of their land. When the Aborigines have used legal means to prevent or limit the encroachment of mining companies onto their land, the Government has resorted to changing the law.

Examples of retrospective legislation to thwart efforts by Aborigines to use legal processes to achieve justice were given by the people of Oenpelli. The Oenpelli people took two actions in the courts: (i) an injunction to stop the commencement of mining at Ranger because not all Aboriginal elders were in agreement with mining proceedings, and (ii) an injunction to prevent a mining company from using a particular road which ran close to an Aboriginal settlement.

In response, the Federal Government amended Section 23 (iii) of the Land Rights Act enabling Land Councils to sign mining agreements on behalf of local Aboriginal communities without first gaining consent from all the local Aboriginal communities.

77/ Argentina, Australia, Bangladesh, Bolivia, Burma, Colombia, Ecuador, El Salvador, France (Guiana), Guatemala, Guyana, Honduras, Indonesia, Japan, Malaysia, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka, Suriname and Venezuela.

As an Aborigine explained: "When things get difficult for government they simply bring in a new law" and in the case of the agreement to mine at Naborlek, the government introduced a new law and made it retrospective to prevent the Aborigines from taking legal action.

It is thus not surprising to hear an Aborigine say that "law is white man's method of manipulation".

Aborigines in Arnhem Land are deeply concerned about the expiration of the freeze in June this year on the granting of mining exploration licences in Arnhem Land.

The Aborigines fear a new influx of mining exploration companies will further erode their land rights and add to the pressure on their socially fragile communities, still recovering from the invasion of the pastoralists.

In the uranium province of the Northern Territory, the team was told that 15 Aborigines have died since mining development commenced as a result of excessive alcohol drinking and other stress related problems.

Whilst promises have been made by the N.T. Government to exert control over the activities of miners and their families in the uranium province and other mining areas of the N.T., the Aborigines reported that already whites are traversing sacred sites and other areas of importance to them. Unless mining is to mean the gradual destruction of Aboriginal culture and people, the N.T. Government must ensure that whites living in Aboriginal areas do not traverse Aboriginal land without necessary permits.

In a report on the social impact of uranium mining on Aborigines in the Northern Territory to the Minister for Aboriginal Affairs in September, 1979, the Australian Institute for Aboriginal Studies (AIAS) identified the following matters of concern:

- that lack of information, inadequate communication and misinformation had led to some serious misapprehensions in the minds of Aboriginal communities;
- that there was considerable disquiet among people in the proximity of Oenpelli/Naborlek on the question of roads and their use;
- that there was a serious lack of structures to enable Aborigines to handle money arising from the Ranger and Queensland Mines Ltd. agreements;
- that there was little action on Aboriginal employment and training in mining operations.

A subsequent report from AIAS in March 1980 recommended that "no new developments should proceed in the Alligator Rivers region until the Aboriginal people of the region have had time to adjust to the enormous innovations to which they have recently been subjected - and of which mining is but one".

Yet whilst consecutive reports from AIAS indicate Aboriginal concern about developments in the region, there is no indication that either the Federal Government or the N.T. Assembly have taken any action to address these problems.

In the Kimberley region of Western Australia, mining development is becoming a direct confrontation between the growth economy and the human rights of the people. The West Australian Government in its actions in support of or on behalf of the mining companies is showing a callous disregard for the people. Community development programmes for Aborigines are apparently being stopped in order to prevent any hindrance to mining development.

The mining developments in W.A. should benefit primarily the people on whose land it is occurring and who are being affected by the developments and secondly, benefit the people of Australia. The high level of foreign investment in Australian mining ventures means that such developments are not only failing to benefit the Aborigines but also failing to benefit the Australian people.

The State Government in Western Australia has not required any environmental impact study examining the effects on the Aboriginal people of the area of any proposed resource development. Greater consideration must be given to the people who will be primarily affected by the mining developments i.e. the Aboriginal people.

The West Australian Government to date has not ensured that royalties flow to Aboriginal people for mining on or damage to their traditional or sacred land or their sacred sites. We affirm that Aborigines have a right to such royalties and that these royalties could provide the economic base for the communities that they lost when dispossessed of the land. The failure of the West Australian Government to pay due concern to the rights of Aborigines led to the conflict between the United States based corporation AMAX and the Aborigines of Noonkanbah station in 1980. In such situations of conflict, the role of the Kimberley Land Council is invaluable and the West Australian Government would be well advised to adequately fund the Kimberley Land Council to ensure that Aboriginal concerns are adequately taken into account and that such conflicts as that at Noonkanbah do not arise in the future.

It is in the interests of the Aborigines, the Government (who wants to see development proceed) and the mining companies (for whom delays mean money) to ensure that there are adequate and efficient procedures for Aboriginal communities likely to be affected by mining to voice their opinion and to have it heard fairly and seriously in a genuine process of negotiation. The role of the Land Councils in the Northern Territory have assisted this process and there is much to commend the West Australian Government ensuring a similar role for Land Councils in Western Australia.

These arguments regarding the role of Aboriginal Land Councils in Western Australia apply equally validly for Queensland, where the Government sees the activities of the Land Councils as a hindrance rather than a help. Inasmuch as the Land Councils present a democratically representative view of a large number of Aboriginal communities in the area they cover, their effective operation is an appropriate means of ensuring that Aboriginal views are taken into account in the negotiation process. 78/

78/ Adler and others, op.cit., pp. 22-25.

298. The Government of Chile states:

"Measures to prevent and combat harmful practices with regard to the exercise of mining rights and the exploitation of the mineral or other resources of the subsoil of land belonging to indigenous persons or communities are provided for in article 90 of the Mining Code.

This article states that, in order to have right of way and other rights to use surface land, compensation must first be paid for any damage which may be caused either directly or indirectly to the owners of such land or to any other persons. This provision is enforced throughout the territory of Chile and, if indigenous lands or lands owned by indigenous persons are used for mining, those indigenous persons must be compensated in accordance with that provision, provided that they own their land and hold titles to it and that it is registered in their name in the Indigenous Property Register kept by the General Archives for Indigenous Affairs."

299. Referring to the above-mentioned legal regime, the Government reported in 1975 that regulations governing the procedure for obtaining such compensation are contained in Indigenous Act No. 17,729. Article 53 of that Act provides that matters arising out of the administration, exploitation, use and possession of indigenous lands and acts and contracts which relate to or affect such matters and to which indigenous persons are parties or in which indigenous interests are involved shall be settled by the departmental court of sole instance in the department where the land is situated.

This provision states that the court shall request the Indigenous Development Institute to prepare a report containing all the necessary background information to settle the dispute. After surveying the land and determining what damage may be caused, the Institute shall then set the amount of compensation to be paid to the indigenous persons. As has been said, such compensation must be paid prior to mining operations or to the establishment of rights to the surface land in question.

Subsequently, in the exercise of those rights to which the mine owner is entitled, any problem or dispute which he may have with the owners or occupiers of the surface areas of indigenous land must in all cases be settled by the law courts following the submission of a report by the Indigenous Development Institute.

300. Since the present Chilean Government has enacted so much new legislation, the Special Rapporteur has no information on the current regulations on the subject.

301. The Government of Mexico states that there are no special measures for indigenous persons or communities and that, consequently, the following general rules are applicable:

"Article 27 of the Constitution provides that the Nation has direct ownership of all the natural resources of the continental shelf and insular sills; of all minerals or substances which, in veins lodes masses or beds, constitute deposits the nature of which may be distinct from the components of the soil."

The Government also states that, in such cases, "the ownership of the Mexican nation may not be alienated or prescribed; individuals or companies constituted in conformity with Mexican law may not undertake the exploitation, use or development of the resources in question except under concessions granted by the Federal Executive

in accordance with the rules and conditions established by law. One important rule established by the enabling law on mining relating to article 27 of the Constitution is that the submission of a request for a prospecting concession on unoccupied land will be given preference over subsequent requests".

302. The Swedish Government has stated:

"Exploitation of mineral or other resources is subject to the conditions laid down in the 1974 Mining Act, the 1886 Act on coal deposits, etc. These Acts provide for compensation to be paid to land-owners, whose interests are affected as a result of the exploitation of such natural resources. There is no special legislation applicable to the Lapps only."

303. According to a writer, the construction of power stations on Lapp land has caused harm:

"High on the list of grievances have been the many hydroelectric power stations that have been built in northern Sweden 'on Lapp land' ... The dams created huge lakes which inundated valleys rich in grass and lichen, the reindeer's principal source of food. The first Judge who ruled on the dam building didn't consider the Lapps at all ..." 79/

304. The New Zealand Government states:

"Under New Zealand law all gold, silver, coal, uranium or petroleum found on or under any land in New Zealand, whether Maori or otherwise, is the property of the State, but the owners of land have a statutory right to compensation for injurious effects to the land caused by mining of such minerals. In the case of other minerals, mining can only be carried out with the agreement of the owners. The Mining Act 1971 empowers the Minister of Mines to lay down conditions under which the mining of minerals may take place. He may impose restrictions on the amount and type of damage that may be done to the surface of the land and he has the power to fix the rate of royalties to be paid by the miner to the owners of the land. The Minister may also review the rate of royalty at ten yearly intervals in the event of long-term mining being undertaken. The Mining Act also provides that any agreement by the owners of Maori land to the mining of their property shall be deemed to be an alienation requiring confirmation by the Maori Land Court."

305. The Citizens' Association for Racial Equality states:

"Maori rights to minerals and other sub-soil resources are on a par with European rights."

306. On prevention of harm to the natural environment of the Lapps, the Government of Finland states:

"Certain measures, such as the construction of hydroelectric power stations, logging and lumbering, as well as growing tourism have turned out to be harmful to the natural environment of the Lapps in view of their traditional means of livelihood. This harm has been compensated to some extent by certain administrative measures and grants."

307. As an example of special measures, mention may be made of Act No. 556 of 13 December 1963 on the settling of those who have surrendered their landed property because of the regulation of the Kemijoki basin. According to this Act, any person who by voluntary agreement has surrendered landed property to the owner of a power plant in order to enable the use of the water power of the Kemijoki basin or the

regulation of the said basin or other construction for that purpose may be granted, in compensation, other landed property or credit and other benefits in accordance with the legislation concerning the use of land, even if such a person would not otherwise fulfil the requirements laid down by this legislation. If the person is engaged in reindeer breeding, a so-called dwelling farm may be established for him provided that he is able to make his living primarily through the yield of such farm and reindeer breeding.

There are no statistics indicating how many of those who have benefited by this and other administrative arrangements belong to the Lapp populations.

308. Regarding the situation in Greenland, the Government of Denmark has furnished information on proposed legal measures which have subsequently been adopted.

309. The report of the Commission on Home Rule in Greenland stated, in connection with rights to mineral resources and their exploitation:

"The Home Rule System recommended by the Commission also comprises legislation on mineral resources, sunlight, air, water, etc., as the Commission, in accordance with the desire expressed by the all-Greenlandic Committee, has submitted a proposal for revised legislation within this field. In its work in this latter respect, the Commission has recognized that the resident population of Greenland has certain fundamental rights when it comes to such natural resources, resulting especially in the formulation of certain moral political demands, which should be respected in the wording of the legislation on mineral resources, etc. The Commission has, moreover, applied the principle that in the wording of legislation on mineral resources, etc., as well as of the Home Rule Act, due respect must be paid to national unity and thus also to the interests of the whole nation.

"In its recommendation for legislation on mineral resources, etc., the Commission has applied the principle of equality, in accordance with which Greenland and Denmark shall have equal rights when it comes to laying down the lines for the development policy and for adoption of important concrete resolutions". 80/

310. The Danish Government provided further information in 1981, stating that:

"Through the passing of the Mineral Raw Materials in Greenland Act, No. 585 of November 29, 1978, which came into force on July 1, 1979, a joint decision-making competence was established for the Central Authorities and the Home Rule Administration concerning the essential dispositions relating to mineral raw materials, see section 2 of the Act, whereby the Minister for Greenland can only commence any initial search, and any exploration and exploitation of mineral raw materials in Greenland, or grant permission for initial search for and concessions with exclusive rights of exploration and exploitation of such raw materials subject to an agreement to such effect having been made between the Government and the Home Rule Administration.

80/ See also Editorial Note, IWGIA Newsletter, No. 22, Copenhagen, June 1979 pp.8, 9, and 10.

Prior to such agreement being made, any member of the Landsstyre may demand that the matter be referred to the Landsting (Parliament), which may decide that the Landsstyre shall not cooperate in regard to the conclusion of an agreement of the tenor concerned.

"The establishment of a joint decision-making competence thus implies that an agreement will have to be made between the Government and the Home Rule Administration in each specific case, and it thus implies, in turn, a right of veto on the part of the Government and of the Home Rule Administration, respectively, in regard to such decisions.

"In the Mineral Raw Materials Act it is provided moreover, in section 3, that a joint Danish-Greenlandic board shall be nominated, entitled: 'Faellesrådet vedrørende minerálske råstoffer i Grønland' (The Joint Board of Mineral Raw Materials in Greenland). This Joint Board is entrusted with the supervision of developments in the field of raw materials in Greenland, and it shall have a complete insight into the matters dealt with by 'Råstofforvaltningen for Grønland' (The Greenland Raw Materials Administration), which is a separate administration established by the Minister for Greenland as of 1 July 1979, which is entrusted with the central, practical administration of the decisions made by the Government and the Home Rule Administration within the scope of the joint decision-making competence. The Minister for Greenland is the top responsible Head of the Raw Materials Administration.

"The Joint Board is moreover entitled to submit recommendations in regard to the Government's and the Landsting's exercise of the joint decision-making competence. Irrespective of the manner in which such recommendations are submitted, they are based on full insight into prior as well as pending applications and plans which are being dealt with by the Raw Materials Administration, and on equal access to such expert knowledge as is available to the Raw Materials Administration.

"The Joint Board consists of a Chairman and 6-10 other members. The Chairman is nominated for a term of 4 years, upon joint recommendation by the Government and the Home Rule Administration, the two parties moreover appoint one half of the board members each, for their respective terms of office. The President of the Greenland Landsting is currently Chairman of the Joint Board, and in addition there are 10 ordinary members. The Joint Board, since its nomination in the summer of 1979, has held 3 meetings: 2 in Greenland and 1 in Denmark; efforts are made to hold the meetings in Greenland and in Denmark alternately.

"On the basis of the short period of time that has elapsed since the establishment of the Raw Materials Administration, in 1979, it is not possible to state definitely the extent to which it can be assumed to have satisfied the intentions and proposals of the Home Rule Commission, which resulted in a new raw materials arrangement for Greenland. The Joint Board of Mineral Raw Materials in Greenland, which in many respects must be considered the most essential innovation of the raw materials arrangement, apparently functions in accordance with the political basis for the raw materials arrangement."

311. In Brazil there are special rules governing mineral extraction in indigenous lands. There is also information on the de jure and the de facto situation from

governmental and non-governmental sources. As regards special measures to prevent and control harmful practices with respect to the mineral or other resources, of the subsoil of land belonging to indigenous persons, groups or communities, Act No. 6001 provides:

"Art.44. Surface wealth in the native areas can only be exploited by the forest-dwellers, who have the exclusive right to practice placer mining, panning and screening for nuggets, precious and semiprecious stones in the areas in question.

"Art. 45. Exploitation of subsoil wealth in the areas belonging to the Indians, or to the domain of the Union, but in the possession of Indian communities, shall be effected in the terms of the legislation in force, with due observation of the provisions of this Law.

"1. The Ministry of the Interior, through the competent agency of assistance to the Indians, shall represent the interests of the Union, as owner of the soil, but the share in the results of exploitation, indemnities and royalties for the occupation of the land, shall revert to the benefit of the Indians and constitute a source of native income.

"2. In order to safeguard the interests of the Indian Estate and the well-being of the forest dwellers, the grant of authorization to third parties for prospecting or mining on tribal possessions shall be subject to prior understandings with the Indian assistance agency."

312. Provision for Government participation in the exploitation of the subsoil is made in section III, article 20, paragraph 1 (f) of Act No. 6001, which states that:

"exceptionally and for any of the motives hereinafter enumerated the Union can intervene, if there is no alternative solution, in a native area ... to work valuable soil deposits of outstanding interest for national security and development".

313. Concerning this section, an author writes:

"Section III departs from the heretofore prevailing Indian law of Brazil in several crucial aspects, which are fraught with extreme danger to the cultural integrity and physical survival of the indigenous populations of the country. It ... vests all ownership and sub-soil mineral rights in such lands in the national government. It then states five legal grounds for removal of indigenous populations from their native lands by the national government, by force of necessary ... Following so closely upon the revelation of the atrocities and massacres of Indians perpetrated by private interests in collaboration with the old Indian Protection Service, which led to a world outcry and a major reform of the Indian Service by the Brazilian Government, this new law provides official legal sanctions for some of the worst abuses of the old system." ^{81/}

^{81/} T. Turner, "Brazilian Statute of the Indian: Resolution 8 III", Newsletter of the American Anthropological Association, 12 (1), (Washington 1971), p.10.

314. Another author adds:

"In spite of several presidential decrees, but with the approval of FUNAI, and in compliance with an Indian Statute which serves the cause of those who passed it better than that of the natives, these reserves were recently crossed by highways. While for the Xingu Park its loss of territory in the north was compensated by an extension to the south, that of the Aripuanã was reduced by half on the pretence that many of the Indians were living outside the territory.

"...

"In our opinion, however, the reduction in 1973 was due to the Brazilian Government's desire to reach the large tin mines by the BR-172, a highway linking them with the Trans-Amazonian proper; and which would have crossed the Aripuanã Park. Be that as it may, already in 1969 the reserve began to be invaded by numerous prospecting firms and the Indians began to be contaminated with all kinds of epidemics.

"... At that time, it was not known that the firms had received authorization from FUNAI, and that the responsible agency, as well as the indigenist in charge had been somehow rewarded by them ...

"One cannot but see a contradiction in the fact that FUNAI is supposed both to defend and guarantee the interests of the Indians, and at the same time promote mineral prospecting on their territory. The conflicts deriving from this situation have been well publicized: conflicts not only between representatives of FUNAI and prospectors, but also between the latter and Indians. One needs only to recall the 'bombing' of a Cinta-Larga village, which brought the situation here to the attention of the public. Those atrocities led to the disarming and expulsion of the prospectors from native territory, which was not accomplished without difficulty. Interests were at stake as cassiterite had been discovered, and the prospectors saw this resource slipping out of their hands.

"In June 1969, a new decree established the Aripuanã Indigenous Park within the previously mentioned boundaries, but without mentioning the presence of the Surui. The decree also stipulated that the area was to be reduced within the following two years, as soon as it turned out to be more than the Indians needed. Furthermore, it established that prospecting for minerals, in which the territory is said to be rich, is to be under the control of FUNAI. Thus under the cover of protecting the native population, the prospectors were disarmed and expelled and a reservation was created outside the area of conflict, while maintaining the ambiguity of the term Cinta-Larga for all the Indians of the area. Thus legal existence was denied the Surui, as well as the protection due to them. In spite of the insistence of a group of prospectors of Rondonia, who reported this to Meirelles, affirming that there were both Surui and Cinta-Larga Indians in the area, while the FUNAI representative claimed that there were only Cintas-Largas, whose main communities were east of the Rio Roosevelt. This stubbornness, and the pressure of various economic and political interests, resulted in the 'protection' of the Cinta-Larga proper only, whereas the Surui Indians were sacrificed.

"How can one speak of its protective role, when in addition to the difficulty involved in promoting respect for native land, FUNAI does not even try to protect the latter, but rather to promote its invasion; and when all legal measures have been taken to tolerate this invasion.

"This illusion of protection is even more striking, since a control system already exists. This is the FUNAI outposts, which are dependent on FUNAI's regional delegate and the Park director, both established in Pôrto Velho. They receive their orders as well as their budget from Brasilia, and are supposed to control the various outposts, each consisting of a responsible chief and a dozen workers.

"I have noted that for the majority of these Indians there is no territorial protection, since the Aripuanã Indigenous Park was established east of the area inhabited by the Suruí and the Mojur. Furthermore, large concentrations of settlers are installed on the very boundary of the native territory (3,000 settlers at Cacoal), or even within it, such as the GLEBA at Espingno d'Oeste (1,500 to 2,000 settlers). All these agglomerations are developing their plantations and their prospecting in native territory. Numerous landing strips have been constructed in this area." 82/

315. Still another author reproduces, among other tables, the following dealing with "The Invasion of Indian Territory" by the mining sector:

THE INVASION OF INDIAN TERRITORY (II)

II. The Mining Sector

Mineral and Area of extraction	Indigenous Territory invaded	International Finance and Technical Assistance	Multinational Corporations
Iron ore: Serra dos Carajás Pará	Kicrin-Kayapo: NE of Xingu park	US geological survey 21 projects of minerological and geological survey with colaberation of DNPM and CRPM supported by USAID and Brazilian Government	Amazonas Mineracao: association of CVRD (state-owned) and US Steel) Note: since sold its share (1977)
Manganese: Serra do Navio, Amapá	South of Karipuna, Galibi, Palikur, Marwornio	Export-Import Bank: loan of \$US 5.5 m. to ICOMI for mangan. alloy factory	ICOMI: Industria and Comercio de Minérios. Assoc. of CAEMI of A.T. Antunes and Bethlehem Steel
Bauxite: Trombetas River, Pará	Pianokoto-Tirio, Warikyana, Arikena, Parukoto-Xaruma	Overseas Private Investment corp. (USA): insurance for investments of ALCOA, W.R. Grace, Hanna Mining	ALCOA (Canadian branch of ALCAN), Nippon Steel, Kaiser-alumin. National Bulk Carriers Pechiney, Alusuisse, Rio Tinto Zinc, Hanna Mining

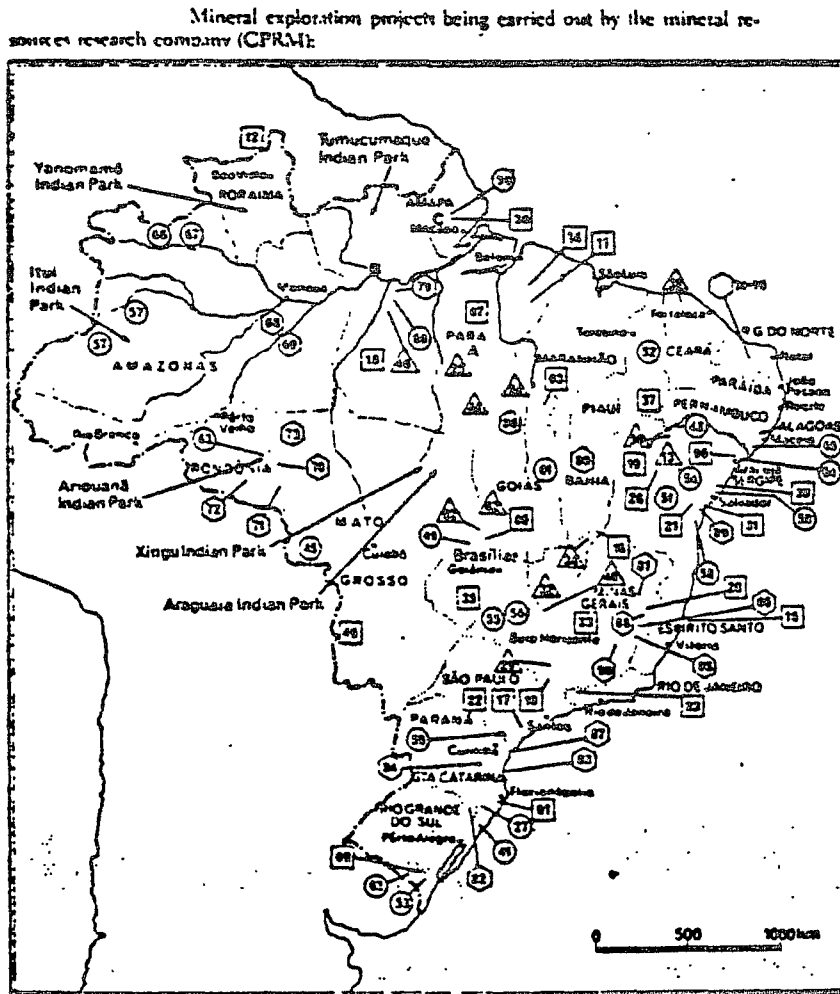
Mineral and Area of extraction	Indigenous Territory invaded	International Finance and Technical Assistance	Multinational Corporations
Cassiterite or tin: territory of Rondonia	Aripuana Park: Surui, Cinta-Larga	Earth Satellite corp: research through Project RADAM for Brazilian Government and private companies	FERUSA (Mineracao Ferro Uniao)/Biliton International Metals/Royal Dutch Shell; CESBRA (Cia Estanifera do Brasil) COFREMMI/Patino; W.R. Grace, Molybdenum corp (US), Cia Brasileira de Metalurgia/Rockerfeller/Moreira; Salles/Molyb. Mineracao Aracazeiro: Itau/National Lead Ind./Portland Cement.

Note: Subsequent to this opinion report, large deposits of Cassiterite and Uranium have been found in Yanomamo territory, Surucucu, Roraima, with concessions given to a company called Alem-Ecuador (Davis 1977:105) and the State owned CVRD - Co. Vale do Rio Doce.

In the upper Rio Negro basin, at Tapuruquera and Uapes, large deposits of Titanium have been found in the territory of the Tucanoan-speaking tribes. 83/

83/ Anna Presland, loc.cit., p.22 (The data contained in this table are presented as taken from the newspaper Opinião of 18 April 1975.

316. The following information about mineral exploitation in Brazil has been made available in connection with the study:



^H Indians and the Amazon mining frontier
Source: *Engineering and Mining Journal* (November 1975), pp. 170-1.

Key: Multinational mining projects in the Amazon Basin:

- A Amazonia Mineração (iron ore, Serra dos Carajás): \$3 billion (American) project of U.S. Steel Corporation and Companhia Vale do Rio Doce to begin in 1980.
- B Mineração Rio do Norte (bauxite, Trombetas River): \$260 million project of Alcan Aluminum Company and Companhia Vale do Rio Doce to begin in 1977.
- C Indústria e Comércio de Minérios (manganese, Serra do Navio): large manganese mining and processing project of Bethlehem Steel Corporation and Cia. Auxiliar de Empresa Mineração began in 1957.

□ Finished projects	34	Januaria-Itacarambi (Vanadium, silver, lead)	69	Concisa—Construção Civil e Industrial Ltda. (Cassiterite)
1 Morro da Fumaça (Fluorite)	36	Curuçá (Copper)	70	Progresso da Rondônia Mineração (Cassiterite)
3 Serra da Gangalha (Diamonds)	38	Aprazível (Copper)	71	Tin Brasil Mineração Ltda. (Cassiterite)
7 Transamazônica	40	Itamaguari (Gypsum)	72	Mineração Aracazeiros Ltda. (Cassiterite)
5 Santa Fé (Nickel)	42	Canadá (Copper)	73	Mineração Rio das Garças Ltda. (Cassiterite)
6 Carmópolis (Potassium, rock salt)	44	Gradas (Iron)	74	Mineração Amaranite (Scheelite)
9 Bage (Copper)	48	Patos de Minas (Phosphate)	75	Mineração Tijuca Ltda. (Scheelite)
10 Poços de Caldas (Molybdenum)	○ Projects awaiting a decision from DNP/		76	Mineração Acquarius (Scheelite)
11 Paragominas (Bauxite)	27	Orleães (Coal)	77	Zangarellias Mineração Ltda. (Scheelite)
12 Serra do Mel (Molybdenum)	41	Aratanga (Coal)	78	Mineração Nordeste do Brasil Ltda. (Scheelite)
14 Rio Capim (Kaolin)	43	Tombador (Syenite)	79	Camita SA (Rock salt)
15 Plat. Continental (Rock salt, potassium, sulphur)	45	Santa Barbara (Copper, chrome)	80	Serrasa—Serra do Ramalho Mineração Ltda. (Fluorite)
16 Montalvânia (Silver, zinc, lead, fluoite)	49	Bom Jardim (Lead, zinc)	81	Operadora de Equipamentos SA (Chromite)
17 Morro do Serrote (Phosphate)	50	Ita (Silver)	82	Emp. Min. Imarui e Salomão Mineração Ltda. (Fluorite)
18 Rio Jamarym (Silver, zinc, copper, lead)	51	Ipirá (Chrome)	83	Leprevost e Cia. (Gold)
19 Nique Nique (Lead)	52	Pimenteiras (Phosphate)	84	Mineração Morretes (Gold)
21 Brasília (Copper)	53	Candiota (Coal)	85	Minas Del Rei D. Pedro SA (Gold)
22 Cerra Azul (Niobium)	54	Couto (Copper)	86	Mineração Morro Velho SA (Gold)
23 Morro Redondo (Bauxite)	55	Três Ranchos (Niobium)	87	Enecl (Nickel)
26 Saculba (Chrome)	56	Ouvidor (Niobium)	88	C. R. Almeida SA (Ilmenite)
28 Aimores (Titanium)	57	Rio Jutai (Lignite, peat, saprolite)	89	Somicol SA (Manganese)
30 Rio Falsa (Copper)	58	Ilheus (Phosphate)	90	Cia. Bozano Simonsen (Iron)
31 Itapanica (Limestone)	59	Barra do Mendes (Nickel)		
33 Alterosa (Limestone, beryllium)	60	Aveiro (Limestone)		
35 Parana (Phosphate)	61	Dianópolis (Zinc)		
37 Massape (Vermiculite)	62	Iru-Butia (Lignite)		
46 Corumbá (Iron)	63	Presidente Hermes (Iron)		
39 Araçás (Coal)	64	São Cristovão (Phosphate, limestone, gypsum)		
△ Projects under way	65	Propriá (Phosphate)		
2 Morro do Engenho (Nickel)	66	Uaupés (Titanium)		
13 Anjoniha (Chrome)	67	Tapuruquara (Titanium)		
24 Arapnema (Nickel, copper)	○ 1975 projects financed through CPRM			
25 São Felix do Xingu (Lead)	68	Mineração Angelim SA (Cassiterite)		
29 Catalão (Chrome)				
32 Chaminés Alcalinas (Phosphate, diamonds, titanium, niobium)				

84/

84/ Shelton H. Davis, Victims of the Miracle, Development and the Indians of Brazil, Cambridge University Press, Cambridge.

317. The Special Rapporteur requested but did not receive information on how these different projects affect indigenous populations in the various parts of the country concerned, or on the adoption of special measures to prevent and combat harmful practices with respect to mineral or other resources of the subsoil of land belonging to indigenous persons, groups or communities.

318. The information relating to some countries contains data on intended or proposed new rules on these matters. There is only de jure information on these countries. Thus the Norwegian Government states that in recent years, especially in Inner Finnmark and in Lapp areas, it has been held that the local population should be deemed the owner of the common land in its rural settlement and thus be entitled to the economic returns deriving from it. Up to now the greater part of the uncultivated land in Finnmark has been deemed to be State-owned property. A committee has been appointed on a Nordic basis to clarify the legal rights of the Lapps in respect of natural resources.

319. The Government of Costa Rica reports that

"consideration is being given to special measures to prevent and combat possible harmful practices with respect to mineral or other resources of the subsoil of land belonging to indigenous communities".

320. According to information furnished by the Government of Canada:

"The mineral resources of Indian lands are explored and developed by oil companies and mining companies under policy established in regulations and in the Indian Act. The minerals section of the Lands Division Branch is responsible for assisting Indian Bands to manage these resources for the purpose of providing revenue, employment and involvement for the Indian people. The program is carried out by mineral resource specialists from offices in Ottawa and Calgary. Oil and gas rights are offered for public tender and are granted for the highest cash bonuses to oil companies. Band representatives are encouraged to attend oil and gas sales and to participate in reviewing tenders. Revenues annually are in the nature of \$5,000,000 from oil and gas development in the provinces of Alberta and Sashatchewan."

321. The Anti-Slavery Society states that in India:

"Urban industrial developments associated with the rich mineral deposits of tribal areas and large HEP/irrigation dams ... are leading to the wide-spread alienation of adivasi land. Perhaps one could argue that this would be acceptable if the adivasis were given employment in the new enterprises, if they were able to share in some of the benefits of the modern schemes. However, the question does not arise since they are not.

"Leaving aside the fact that only 10% of Indian forests are commercially harvested at all at the moment (Avard, 1975) and that therefore there should be vast areas over which adivasi methods of production could be practised within ecologically sound limits at no economic cost, both the qualitative and quantitative data indicate an element of hypocrisy in the government position. Patil (1974), among many others, has pointed out how the most serious environmental damage caused by recent over rapid deforestation, is due not to tribal land use methods but to indiscriminate logging by forest

contractors (presumably with the concurrence of the f.d.); and Table 12 [at the end of this paragraph] shows clearly that many States - of which MP is the worst - seem to be 'mining' their forests - ripping them down as quickly as possible for short-term profit (maybe to invest in lowland areas of high agricultural potential or in urban-industrial areas) not reinvesting for long-term renewable gains.

"Several state governments would seem to be causing a great deal of potential ecological and economic damage by the policies they are pursuing and one might conjecture that the real reason the tribals are being excluded from the forests is not to protect the forest but to dislocate the tribal economy so badly that the adivasis are forced to harvest the forests of their traditional environments for the benefit of the non-tribal contractors and plains-dwellers.

"... One of the major problems of development in any indigenous society like the adivasis is to decide what rights the society should have to the resources of their traditional environment, and what role they should play in the exploitation of those resources. There are several possibilities:

- "(1) A situation of autonomy in which the indigenous people have a large measure of control over the exploitation of the resources in their area and benefit accordingly;
- (2) Situations of 'internal colonialism' where the indigenous society is exploited by the national and international 'centres', has little control over and derives few benefits from resource exploitation in its area; or
- (3) The extreme types of colonial policy - ethnocide when the indigenous culture is destroyed and genocide when the individuals of the society are killed ...

"The situation in tribal India is neither ethnocidal nor genocidal but quite clearly tribal India is an internal colony exploited by Hindu India. The resource development decisions taken by distant bureaucrats in the state capitals, in Delhi and in the boardrooms of the MNCs in the West provide that even the renewable (forest) resources of tribal India should be 'mined' to provide investment capital for the further development of the non-tribal plains and the developed world. The tribals receive few benefits from these developments and given the environmentally dangerous rate at which some states are deforesting and the predictions of D.D. Guru (1974) concerning the depletion of many mineral resources in the S.E. Resources 'triangle' by the turn of the Century, it seems likely that the resources of tribal areas will become largely exhausted without bringing any benefits to their original 'owners'.

"TABLE 12

"EXPENDITURE ON AND REVENUE FROM FORESTS UNDER THE CONTROL
OF STATE FOREST DEPARTMENTS (1969-1970):

	TOTAL EXPENDITURE (Rs millions)	FOREST REVENUE (Rs millions)	% EXPENDITURE TO REVENUE
<u>Central Tribal Belt Forest</u>			
<u>"Miners"</u>			
Madhya Pradesh	76.6	258.6	29
Orissa	39.1	65.8	48
Gujarat	21.7	44.2	49
Andhra Pradesh	31.0	60.2	52
Bihar	25.3	37.9	68
<u>Forest "Developers"</u>			
Rajasthan	15.6	10.0	155
Maharashtra	89.1	86.0	103
W. Bengal	22.7	24.5	93
<u>Other States Forest</u>			
<u>"Developers" par excellance</u>			
Haryana	8.0	3.4	231
Punjab	12.5	6.4	193

Note:

"These figures show how most states in the Central Tribal Belt are failing to reinvest in their forests, instead they are "mining" their forest resources and using the revenues provided on welfare, education and infrastructure often outside the tribal areas. The small amount reinvested in states like MP is probably only enough to offset the worst environmental degradation caused by rapid and widespread logging. Such short-term policies totally ignore the forest as:

1. A potential resource for employment;
2. A source of subsistence and of the generation of surplus products for industrial use;
3. A source of nutrient and crop flows into crop agriculture.

"Source: Forest Statistics Bulletin No. 12 (Central Forestry Commission Ministry of Agriculture)."

322. The Government of the United States has stated that:

"Technical advice on mineral exploitation and on soil conservation is available to Indian tribes from the Bureau of Indian Affairs. The Bureau of Mines of the United States Department of the Interior and the Department of Agriculture also is available for advice to the Indian tribes. Mineral leases must be authorized by the Secretary of the Interior before they are binding. All surface leases and user permits issued for Indian holdings contain provisions to assure compliance with applicable air and water standards, minimize or correct hazards to the public health and safety, and provide for conservation protection of the environment. Lessees are required to provide adequate measures to avoid, control, minimize, or correct erosion, contamination or other abuses and damages within or surrounding the leased premises that may result from operations conducted under the lease. Prudent management practices, as well as application of recognized good farming and grazing techniques are stipulated in leases for farming and grazing operations."

323. Regarding the development of the natural resources located on Indian lands, it has been written:

"... issues of long-range economic development are brought ... sharply into focus with the increased pressure to develop energy resources located on Indian lands. With the lack of Indian people trained in managerial and administrative skills and in mining technology, tribal groups such as the Northern Cheyenne are unable to assume direct and immediate control of the rich coal resources located on their lands. With increased pressure from the public sector of new sources of energy the question arises whether or not such tribes will be disadvantaged in the policy-making process in favour of mining concerns and the public interest. The Northern Cheyennes submitted a petition to the Department of the Interior in January, 1974, requesting revocation of coal leases on their lands. Their petition charged over thirty violations of federal leasing regulations. The Department of the Interior in responding to the petitioner granted only a few of the tribe's requests, holding the others in abeyance for 'further study'.

"Thus, indices of how the government will deal with energy issues regarding Indian owned resources appear to balance in favour of the business and public sector rather than in favour of the tribes. For example, while small grants are to be made to the Northern Cheyenne to initiate community development and coal research training, the importance of these grants is offset by legislative measures introduced into Congress. In December 1973, Congressman Manuel Lujan introduced H.R. 11,748 which attempted to place certain Indian leasing lands under the control of the state governments rather than the Secretary of the Interior. Even more indicative of future policy is the resistance with which HR 11,500, a strip mining regulation bill, has met with in Congress. A piece of legislation which would stringently regulate coal mining operations (both surface and subsurface), and would provide funding and technical assistance for Indian tribes to develop and administer a mining control program for reservation and other tribal lands, it has consistently met with strong Congressional opposition. It has been said that it is 'as ridiculous as trying to grow bananas on Pike's Peak', there has also been pressure on the House side of the Congress to delete the section pertaining to Indian lands and mining control programs." 85/

85/ 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.50-51.

324. An author has written that the western tribes of Indians:

"hold massive deposits of coal and own a great deal of water on major rivers. Pressures have built up for rapid, total development of Indian resources, and the federal government, which is supposed to protect Indian resources from unfair exploitation leads the groups seeking to force the development of tribal assets. While there is a great deal of resistance on the part of young activists against the further ruination of tribal lands, the elected tribal leaders themselves seem unable to understand that the government is not their friend. Too often, they fail to protect tribal assets because they are led astray by government officials who appear to be looking out for their interests. It is a sad commentary on contemporary life that although the foremost enemy of the Indians is their federal trustee, tribal leaders still believe in the Bureau of Indian Affairs." 86/

325. The tribal council of the Hopi people, although unrecognized, made several lucrative deals with industrial plants which led to destruction of the traditional life of the Hopi.

86/ Vine Deloria, Jr., "Religion and the Modern American Indian", Current History, December 1974, p.253.

2. Special measures to protect isolated indigenous populations and their fauna and flora against expanding non-indigenous settlements or enterprises

326. One of the greatest threats to isolated indigenous populations and the fauna and the flora on which their existence is based is the approaching non-indigenous groups or enterprises and their activities. This aspect is closely connected with the preceding item on the exploitation of the resources in indigenous areas which, in principle, should be left to the indigenous peoples themselves. It is their land and the resources found in and on it that these persons, groups or enterprises wish to have under their control. What becomes of those resources should be subject to the final decision by the indigenous groups concerned in all matters affecting their development.

327. Persons, groups or enterprises from the outside are not deterred by that fact that they may cause hardship for the indigenous groups concerned and damage to their physical environment, nor even by the obvious ethnocidal and ecocidal consequences of their action. Special measures must be taken by the responsible authorities if there is to be any effective control. The protection of the physical environment, including plant and animal life, on which their spiritual and physical existence is based, is primarily a responsibility of the State, whose authorities should take adequate measures for its effective protection. The present section discusses available information concerning these aspects.

328. No information was available in this regard on several countries. 87/

329. The Government of Norway states that no special measures are taken in order to protect isolated Lapp populations and their fauna and flora against expanding non-indigenous settlements or enterprises.

330. The Government of Chile states that:

"There are no special measures to protect isolated indigenous populations because such populations do not exist. Fauna is protected throughout the country under legislation which covers both indigenous and non-indigenous land. Close seasons are specified for all types of fauna and the killing of some species whose survival is threatened is prohibited at all times".

331. The Government of New Zealand states:

"... as all Maori land has legal titles, and transactions affecting it come before the Maori Land Court, it is not possible for expanding non-indigenous settlements to spread over Maori land without the consent of the owners and without a valid sale or lease being confirmed by the Maori Land Court. The granting of rights to take minerals from Maori land is also subject to confirmation by the Maori Land Court.

87/ Argentina, Australia, Bangladesh, Bolivia, Burma, Colombia, Denmark (Greenland), Ecuador, El Salvador, France (Guiana), Guatemala, Guyana, Honduras, India, Indonesia, Japan, Lao People's Democratic Republic, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Sri Lanka, Suriname and Venezuela.

"In the case of Maori land owned by four people, or fewer, there are no restrictions on its alienation."

332. In some countries this type of measure consists in the interdiction or restriction of persons or groups having access to indigenous areas or in declaring null and void all actions and provisions that would affect the fauna and flora in indigenous areas.

333. For example, in Mexico, according to information provided by the Government:

"The protection of indigenous populations in the situations under consideration is based on article 52 of the Federal Agrarian Reform Act and on the provisions of article 53, which reads: 'Any acts by individuals and any orders, decrees, agreements, laws or other acts by municipal state or federal authorities, or by the federal or ordinary courts which have had or may have the effect of depriving isolated communities of all or part of their agricultural rights, in contravention of the provisions of the present Act, shall be null and void.'"

334. In Costa Rica, according to information provided by the Government:

"There are no special measures, only the general legislation of the country. Failure to observe this legislation is causing serious damage to flora and fauna."

In the seventh preambular paragraph of Executive Decree 5904-G, it is recognized:

"That the farming methods used by indigenous persons are less destructive of forests than those used by non-indigenous persons, thus providing better protection for river basins, particularly in hilly regions; and that it is the duty of the State to ensure that tree cover in forestry lands is always maintained.

"The irrational exploitation of forest resources by non-indigenous elements completely upsets the ecological balance and makes the land partially sterile; as a result of indiscriminate felling, for example, arable land does not attract sufficient rainfall or, if it does rain, the soil, having no natural cohesion, becomes heavily eroded, with a consequent loss of nutrients. Indigenous persons, who use the 'shifting cultivation' method, then have to move in search of better land since they do not know about modern methods involving the use of fertilizers, manure, improved seeds, etc. We see once again that, since they have no opportunity for education, they emigrate. In this connection, attention is drawn to the irrational exploitation of the rubber forests on the Guatomo plain or of the forests in Corima de Limón, the Boruca area and other areas."

According to article 12 of the Indigenous Act:

"Forestry lands in reservations shall be maintained as such in order to preserve the hydrological balance of river basins and protect wildlife in such areas.

"Natural resources shall be rationally exploited so that they are constantly renewed. Forestry programmes may be implemented only by State institutions, which shall guarantee the constant renewal of forests.

"Wardens chosen from among indigenous populations shall be responsible for guarding and protecting forests."

Article 12 of the Regulations provides that:

"Land which belongs to the Sixaola Agricultural and Forestry Company and is situated within the boundaries of the indigenous reservations shall be expropriated in order to serve as 'forestry lands', as described in article 12 of Executive Decree 5904-G."

335. The Finnish Government has stated that:

"In order to avoid harmful and dangerous construction in the future, Government sponsored environment planning comprising the whole Lapp County has been initiated. Work has also begun on the evaluation of damage to local populations in the Lapp County caused by tourism."

336. According to information furnished in June 1983 by the Government of India:

"A new national forest policy is on the anvil. It is considered necessary for sustaining and promoting a tribal economy which is based on forest resources. A vital need spelt out in the policy is that of meeting the requirements of rural and tribal populations for small timber, minor forest produce, fuel wood and grazing. It is also considered vital to preserve the natural heritage of the country, its vast and unequalled variety of fauna and flora which is also the repository of wide genetic diversity. Though these ideas are being included for the first time in the new national forest policy, this marks the culmination of sustained thinking and some action already taken in the country in this regard."

337. The protection of isolated aboriginal populations and their fauna and flora seems to be the purpose of the following provisions of the Aboriginal Peoples Ordinance of Malaysia:

"14. (1). The Minister may, if he is satisfied that having regard to the proper administration of the welfare of the aborigines in any aboriginal area or aboriginal reserve or aboriginal inhabited place, it is desirable that any person or class of persons should be prohibited from entering or remaining in any such area, reserve or place, make an order to that effect in the form prescribed in the schedule to this Ordinance."

"(2) (a) Such order when addressed to an individual person, may be served on the person named therein by a police officer or by any person whom the Minister may direct to serve the same.

"(b) The order shall if practicable be served personally on the person named therein by showing him the original order and by tendering or delivering to him a copy thereof signed by the Minister.

"(c) If service cannot conveniently be effected as aforesaid the serving officer shall affix a copy of the order to some conspicuous part of the house or other place where the person named in the order ordinarily resides and thereupon the order shall be deemed to have been duly served.

"(d) A certificate signed by the Minister that an order has been duly served on the person named therein shall be admissible in evidence in any judicial proceeding and on the production of such certificate the Court shall presume until the contrary is proved that such order was duly served.

"(3) Such order, when addressed to a class of persons, shall be published in the Gazette.

"(4) Any person on whom an order has been served in accordance with the provisions of this section who is found within any aboriginal area mentioned in such order or within any aboriginal reserve mentioned in such order or within any aboriginal inhabited place mentioned in such order and any person who is a member of any class of persons which has been prohibited from entering or remaining in any aboriginal place who is found within such area, reserve or place shall be liable to a fine of one thousand dollars.

"(5) Any person found committing an offence under sub-section (4) may be arrested without warrant by the Commissioner or any police officer.

"15. (1) The Commissioner and any police officer may detain any person found in any aboriginal area, aboriginal reserve or aboriginal inhabited place whose activities he has reason to believe are detrimental to the welfare of any aborigine or any aboriginal community and shall remove any such person from such area, reserve or place within seven days from the date of detaining him.

"(2) The Commissioner or any police officer who detains or removes any person in accordance with the provisions of sub-section (1) shall as soon as possible report all the circumstances in writing to the Minister."

338. According to a source, in Canada:

"An example of provincial legislation possibly affecting [the] people and the land is 'Bill 50 - The James Bay Region Development Act', adopted by the Quebec National Assembly in July, 1971. As stated in Aboriginal people of Canada and their environment:

'(The object of this legislation is) to place the control of the entire exploitation and development of the territory in the hands of a newly constituted corporation called the James Bay Development Corporation. This Corporation was given wide powers to develop the area and particularly has been vested with extensive authority to expropriate holdings in the territory.

'However, the Corporation is obliged by legislation to see to the protection of the natural environment and prevent pollution in the territory. Moreover, the statute incorporating the James Bay Development Corporation is not supposed to affect rights of Indian communities in the territory. The Cree Indians and the Inuit have argued before the Courts that this statute is unconstitutional.'

"The threat posed by hydro-electric projects includes older dams such as the Caribou Dam in Ontario which forced the relocation of the Ojibway people; and new dams on the North Saskatchewan River in Alberta which are wiping out the hunting grounds of the Stoney people; and dams yet to be built on the Churchill and Nelson Rivers in Saskatchewan and Manitoba which will adversely affect the Indian people of those areas, and in the north of the Great Bear River which will seriously affect the Hope and Slavery people in the Northwest Territories.

"Besides causing great social and environmental damage, these projects share other features as well.

"The compensation the Indian people received, bears absolutely no relation to the total social, environmental, cultural and economic costs imposed on the people by dam construction. Compare the unequal treatment the Tall Grass people received when flooded out by the Bennett Dam to the assistance given to the people forced to relocate by the St. Lawrence Seaway. The Tall Grass people received no comparable compensation or consideration." 88/

339. According to the same source:

"The tragedy of our people today is the needless clash between renewable and non-renewable resource exploitation. Mr. Jean Chrétien, Minister of Indian Affairs and Northern Development, acknowledged this problem in a report to the Standing Committee of the House of Commons on Indian Affairs and Northern Development in March of this year with respect to the development of the North. The Minister stated:

'At this critical stage in the development of the North, competing and sometimes conflicting land use demands do inevitably arise and must be resolved. Confrontations have arisen in this area and will continue to do so if we do not design a pattern of consultation.'

"The conflict continues and despite reassuring words from the Minister, non-renewable resource development throughout Canada and particularly in the North is accelerating. This can be seen from his own report which contains statements such as:

'There has been a general increase of mining activity in both territories.'

'The pace of oil and gas exploration and development has increased as indicated by a rise in exploration expenditures from \$175 million in 1972 (17 per cent) ...'

'A number of potential hydro power sites in both the Yukon and the Northwest Territories were investigated.'

"Native people are a minority in Canada. A minority with not only special rights but unique attitudes and life-styles based upon the land.

88/ Indians: Lands and Resources, a brief presented by the National Indian Brotherhood to the Man and Resources Conference, November 1975, pp. 4, 5, 17 and 18.

"This potential and alarming destruction of the traditional way of life of the Indians has been lightly regarded by the planners of the James Bay project, and has even been represented as a benefit of the project. The aboriginal people of the area, however, have never been consulted by the Province about the project and its enormous threat to an entire way of life.

"That such a project could have such disastrous consequences is by no means unusual. The James Bay Project would not be the only one causing such wholesale disruption of Indian people and the environment. The sad litany of projects causing such disruption is seemingly without end. They include dams in the east on the Manicouagan River in Quebec which seriously altered the trapping economy of the Montagnais peoples, in the west on the Peace River which forced the relocation of the Tall Grass people in British Columbia, and in the south on the Saint John River in New Brunswick which virtually eliminated the fishing and gathering economies of the Malecite people.

"But most important, Indian people were not consulted in any fashion on any aspect of these developments. This happened even though Indian people frequently constituted a majority of the population in the affected areas and still had a legal claim to the land. They would be the ones to suffer the disastrous environmental and social effects, while the project benefited city dwellers hundreds of miles away." 89/

340. On the variety of approaches to this question it has been written:

"In the unsettled areas of northern Canada where the traditional pursuits of hunting, fishing and trapping persist, the Indian and Inuit proposals for claims settlement are more heavily oriented towards achieving the affirmation of aboriginal rights in the belief that cultural integrity and development can best be maintained through active participation in the control of the development and use of northern lands. The President of the Indian Brotherhood of the Northwest Territories recently explained that his people

'... see a land settlement as the means by which to define the native community of interest in the north, and not to obscure it. This is why we stress ... that formalization of our rights is our essential goal, rather than the extinguishment of those rights ...

'... Now we seek, through a land settlement, a resource base under our own control, which ensures our autonomy and our participation as equals in those decisions which affect our lives.'

"In contrast, in the southern, more populated areas of Canada where the land has become densely settled, aboriginal title claims place more emphasis on compensation for the extinguishment of the title, and the restitution of rights such as hunting and fishing, and exemption from taxation. In all of these areas, the native peoples view a possible settlement as a means by which they may develop and achieve control of their lives and communities.

89/ Ibid., pp. 18, 20 and 22.

"Claims have been presented to the federal government for past reserve land losses. Within this category, several main types of claims are emerging. A large number contest the legality or status of surrenders of reserve lands. These include submissions on surrenders processed without proper Indian consent, uncompleted sales of surrendered land, sale of lands prior to their being surrendered, lack of letters patent for completed sales, and forged Indian signatures or identifying marks on surrenders. In Nova Scotia, a general claim has also been presented contesting the legality of all land surrenders between 1867 and 1960. This is based on the argument that the Miemac Indians of that province constituted one band and that under the Indian Acts of the period surrenders could only be obtained at a meeting of a majority of all band members of the requisite sex and age." 90/

341. According to the Government of the United States:

"The trust relationship governing Indian reservation land is a protection against erosion of the Indian landbase to neighbouring interests. Indian tribal governments generally control hunting and fishing on the reservations they govern, and establish regulations that reflect the wishes of indigenous tribal members."

342. In Brazil there is a provision in Act No. 6001 merely stating:

"Art. 46. The felling of timber in the native forests considered to be under the regime of permanent preservation, in accordance with item g and paragraph 2 of Article 3 of the Forestry Code, is subject to the existence of programs or projects for developing the respective land by crop and stock farming, industry or reforestation."

343. In connection with the deprivation of the Keapor and Tembe Indian nations of their own land a publication states: 91/

"Although the Director of King Ranch has been quoted as saying: 'But there are no Indians in the region', the World Council of Churches in a 1972 Memo showed this to be totally untrue.

"This is the tribal land of Keapor (Urubu) and Tembe Indian nations and was set aside as a reserve for them. King Ranch and Deltec was able to obtain some of their land as a cattle station after the Brazilian Minister for the Interior over ruled the half-hearted objectors of FUNAI and abolished the Indian Reserve (FUNAI is the National Foundation for Assistance to the Indian - the equivalent to the Department of Aboriginal Affairs in Australia).

90/ Indian claims in Canada: an essay and bibliography, (Research Resource Centre, Indian Claims Commission 1975), pp. 8 and 15.

91/ King Ranch is a United States based enterprise.

"Vast areas are now to be cleared of their Indian inhabitants, their tribes broken up and replaced by cattle and giant barren bauxite pits.

"One of the main tribes to be affected is the Tembe. This is what some Brazilian anthropologists had to say:

'The Tembe live on the banks of the Gurupi River, along the border between Para and Maranhao. For several years they were protected against land invasions by a title deed provided by the government of Para. Nevertheless, in the late 1960s, FUNAI began to negotiate with King Ranch, a United States-based enterprise, for the transference of the Tembe lands.

'In order to receive financial incentives from the government agency charged with the development of the Amazon region (SUDAM), the King Ranch needed a certificate demonstrating that no Indians occupied these lands. FUNAI provided them with the certificate. Then the King Ranch, together with the government, began proceedings for the voiding of Indian title, and the Tembe were dispossessed of their lands.

'The invasion of the Tembe Reserve is typical of what is happening to Indian lands all along the Trans-Amazonic Highway. By the end of 1973, almost all of the region was occupied by agricultural enterprises, colonization projects, or mining firms. Of eleven reserves created by government decree to receive tribes found along the highway, not one has been concretely planned or protected against outside invasions.' 92/

344. Furthermore, the same publication states that:

"In a confrontation which has pitted bows and arrows against helicopters and Caterpillar tractors, the Waimiri-Atroari Indians have put a halt to one section of Brazil's massive road-building program in the northwest Amazon region of South America.

"The Indians' land has been invaded by the Brazilian government's agents and huge work crews, using heavy machinery to tear up the trees and land. Since 1973, the Brazilian government has attempted to put a 600 kilometer road through Waimiri-Atroari territory in order to connect the city of Manaus with the town of Caracarai along the Venezuelan border. They claim that this segment, BR-174, would provide a vital link with the highly-publicized Trans-Amazon Highway to the south." 93/

92/ The Mapoon - Book three. The Cape York Aluminum Companies and the Native Peoples (COMALCO, RTZ, KAISER, CRA, ALCAN, BILLITON, PECHINEY, TIPPERA), p. 58.

93/ Ibid., p. 66.

345. In the same context an author writes the following about one of the National Parks:

"Incredible though it may seem, it is just this Xingu Park which, against the will of the Villas Boas brothers, but with the approval of FUNAI and of the entire government, was crossed in 1971 by a road linking Brasilia with Manaus - a road which was originally planned to pass north of the reservation. It is true that the part thus cut off, inhabited by several hundred Kayapo Indians, has been compensated by an extension of the southern part of the park, but this extension is of no more interest to the indigenous population than to the settlers. This is an extremely disquieting development in a country which for 150 years has considered itself as the champion of "humane and Christian" action to serve as an example to the ILO Convention of 1957 concerning the protection and integration of aboriginals (No. 107).

"Judging from a document recently published by the Ministry of Transportation, Xingu National Park will not even get off this easy, but will be the object of yet another road violation. Linking Salvador with Cuiaba, BR 242 will cross the reservation at an even more critical point than BR 080: it will cut off the bottom of an already seriously mutilated body. Finally, in addition to all this the impending withdrawal of the Villas Boas brothers and their replacement by FUNAI personnel leaves little hope as to even the physical survival of a population relatively isolated from civilized people, and thus unprepared for being integrated with them.

"We could extend the example of Xingu National Park to other territories apparently reserved for Indians, but this example suffices to illustrate Brazilian natives policy at present and to indicate the difficulty, indeed the impossibility, of solving the problem of the final remaining indigenous population of this country.

"Until very recently the constant struggle of the Park's authorities for the preservation of the integrity of Indian territory was successful. During the first months of 1971, however, this territory was cut through by highway BR-080. In spite of the countless protests in the press and from national and international anthropological associations, the road was built through the Park.

"So as not to mark the invasion into Indian territory too clearly, the limits of the Park were modified, the land north of the road being expropriated 'so that the Park would not be cut through by the road' (O Estado de São Paulo, 13/7/1971) and a piece of land being added to the south of the Park in compensation." 94/

94/ Carmen Junqueira, The Brazilian Indigenous Problem and Policy: The example of the Xingu National Park, Amazon, IWGIA document, Copenhagen, Geneva, 1973., p. 4.

346. Another source stated in connection with the building of new roads through the Xingu National Park:

"The colonization projects that will accompany the building of new roads indicate that what is intended is possession of the land ... privately appropriated, that is expected to be government financed. They will specialize in agricultural and cattle-raising enterprises, and in some extractive industries also, since an effort will be made to interest large firms in the mining industry. As far as we know, there are no mineral ores in the Upper Xingu, but agriculture and cattle-raising will be carried on along the highways.

"Since the Park territory is protected by law, the presence of those economic fronts on its periphery are a disturbing factor, probably kept within bounds by an intelligent local policy, as long as the Park boundaries are respected by the roads and the frontier settlements. The original plan for the Xavantina Cachimbo Highway (a section of the Brasilia-Manaus-highway) followed the dividing line of the Liberdade and the Suiá-Missu rivers, from north to south and to the east of the reservation, curving toward the west at the von Martius water-falls, already at the northern limits of the Park. However, there is talk of a change in that plan, which would take the highway from the southeast to the northeast directly across the Xingu National Park crossing the river close to the Diaurum Post. The consequences are evident: any attempt to control inter-ethnic social relations will be ineffective and competition for the land could become irresistible to the point of driving the two sides apart. And this is likely to occur before it will have been possible to pass on to the native population the know-how of social and economic interaction, which would help them to confront with a measure of success the process of integration into the life of the nation.

"Therefore, the new highway plan is a mistake which could ruin work that has taken many years to accomplish, which until now has been brilliant and effective and which will be destroyed if that error is not corrected - and corrected in good time.

"Still to be considered is the question of tribal finances when the Indians begin to produce for the market. The dominant outlook in official circles considers indigenous production as belonging not only to the producer, but to the whole Indian population of Brazil. This might be justified if the income were high, but in practice it means that the Indian only sees the result of his work in reinvestments of collective interest, but never in terms of his individual participation in it. This destroys all motive to produce, completely understandable from the point of view of the Indian who sees himself reduced to the condition of being a hired man on land that is rightly his. Furthermore, we must acknowledge that the system allows the Indian to take no decisions concerning his own destiny and interests.

"Closely related to this attitude is the idea that FUNAI should function along directive and self-sufficient lines or, in the final analysis, that the Indian ought to pay for the social services he receives, whether by direct payment or by the exploitation of the natural resources of his territory. This fails to recognize that social assistance to the native territories and peoples is the duty and responsibility of a developing society, whether it wishes it or not.

"We do not oppose that expansion, especially since it is irreversible. But, in realizing it, one must always bear in mind the debt owed to those who previously occupied the land, without means of resisting the development or becoming integrated in it. The task of our society is to help them in that step, and the financial burden must be ours and not that of the protected. It is for this reason that we feel it is not advisable to establish for the future a managerial system in the Xingu: what is needed is to anticipate the situations before they arise and to organize scientifically the necessary stages so that one day those Indians will be able to assume the direction of their own lives and society, something they will only learn by doing. A cooperative solution, effectively directed, that would permit the Indian to participate in the administration of his possessions and to adapt his methods of production would perhaps by the ideal objective. It remains to be seen whether in the present structure and state of affairs, and with the prevailing developmental and pragmatic mentality, a lucid decision will be found that will lead to that objective." 95/

347. On the "Invasion of Indian Territory" by the "Transamazonica Highway System" and by the "Agri-business Sector", the following data are given by an author:

THE INVASION OF INDIAN TERRITORY (I) 96/

1. The Transamazonica Highway System:

Principal Roads of Transam. system	Indigenous Territory Invaded	International Finance and Tech.Assistance	Multinational Corporations
Transamazonica highway: 4,960 Km linking the North-east to Peruvian border	Juruna, Arara, Parakana, Asurini, Kararao	The World Bank: Loan of US\$ 400 million to DNER: largest road-building loan in Bank's history	Earth Satellite Corp. Litton Industries/Westinghouse Corp. contracts for Proj. RADAM for aerophotometric studies, value US\$ 7,000,000
Belem-Brasilia highway: north to south from the west bank of the Amazon	Gaviao, Kraho, Apinaye, Xavante, Xerente	Export-Import Bank: loan of US\$ 3,898,350 to Camargo Correa, Brazil's major construction co., for equipment purchase	Caterpillar Brazil: sale of 770 pieces of machinery to value US\$ 47,000,000 to army engineering corp and 7 private cos., building roads in Amazonia

95/ World Council of Churches, The situation of the Indians in South America, Ethnological Institute of the University of Bern, Geneva, 1972, p. 274.

96/ Anna Presland, loc.cit., pp. 21 and 25. (Data presented as taken from the newspaper Opinião of 18 April 1975).

Santarém-Cuiabá highway: north to south through centro-west: inc. BR-080	Xingu National Park: Kren- Akreore	USAID: donation of US\$ 8.4 million for training in data use in Earth Resources Observation centre, Sioux Falls, S. Dakota	Komatsu (Japan). Fiat (Italy), General Motor, J.I. Case, Clark Equipment, Eaton Corp., Wabco. Huber-Warco (USA) and other foreign companies with tractor equipment worth US\$ 125,000,000
Northern Perimeter Highway: 4 000 Km along the borders of Brazil with Guyana, Surinam, Venezuela, Peru, Columbia	Tucumaque Park, Waimiri- Atroari, Yanomami. Atalaia Park (?)		
Porto Velho- Cuiabá highway: principal road across Mato Grosso and Rondonia	Aripuana Indian Park: Cinta-Larga, Surui Munxor	(From: Davis 1977: 81:) US\$ 1,000,000 from US Army to BEC for heavy construction equipment, USAID: loan of US\$ 2.6 million for construction of 14 permanent bridges on road.	

THE INVASION OF INDIAN TERRITORY (III) 97/

III. The Agri-business Sector

Agribusiness Corporation	Indigenous Territory Invaded	Area of Agri- project	International Finance and Tech. Assistance
Jari Forestry and Agri-pecuary: Daniel Ludwig, National Bulk Carriers	9 villages of Apalai or Aparai	60,000 ha (?) in ranching and farmland, along Jari and Para rivers. (Note: this is incorrect: the Jari total area is said to be 1,500,000 Ha. (Bourne 1978:57) and disputed in Brazil to be more)	World Bank: US\$ 60,000,000 for cattle ranching industry (1974); 2 anterior loans for meat production of US\$ 76,000,000 (1967-1972)
Swift-Armour King Ranch: recent fusions with Deltec International Packers and Brascan	Tembe/Urubu- Kaapor	Cattle ranch of 72,000 Ha. in Paragominas, Para. and Maranhao	As above

Volkswagen of Brazil	Caiapo	22,400 Ha. in Ataguaia, Pará	USAID: loan of US\$ 11.9 million to Institute of Regional Development of Amapá(?) for research in agriculture and cattle ranching
Suiá-Missu ranch Liquigas, Italy	Xingu Park, north, Xavante	560,000 Ha in cattle ranch, parallel to Suia-missu river Mato Grosso	USAID: loan of US\$ 32 million for study of rice production in Amazonia, through International Inst. of Research
66 companies of ranching and land owned in Sao Paulo: area of large rural properties of Stanley Amos Selling - North American land negotiator	Tapirape, Araquaia Park, 5 Xavante reserves	Municipalities of Barra do Garcas and Luciara, Mato Grosso	

348. In a document of 14 July 1971 signed by more than 80 Brazilian ethnologists anthropologists, historians and sociologists it is stated that:

"The radical transformation of the Amazon owing to the projects of development now in progress should be welcomed by the Indian agencies as an exceptional opportunity to integrate or to 'acculturate' the Indian. The profound changes in the natural conditions of flora and fauna, the expansion of colonization through the pioneer superhighways in the most distant regions, and various other economic, social and cultural factors of change, all these events will necessarily produce a contact and a dependency which is each time more intimate and ineluctable between the indigenous groups and the national society. Meanwhile, all development projects which are currently being formulated for the Amazon exclude the indigenous communities or, which is more serious and paradoxical, refer to the same only to suggest a policy of neutralization ('pacification') and of forced transference of entire groups to other areas not as close to the new centres of development. The marginalization and compulsory removal of indigenous groups from the areas of pioneer occupation was always a constant in the history of the colonization of the country. In remaining faithful to this tradition as one of the most important elements of its practical action in the Amazon, FUNAI not only contradicts its specific function which is to protect the Indians and create conditions for their close association with the national society, but also deliberately destroys the bases of its policy of 'acculturation' by removing the Indians from permanent contact with the expanding pioneering nuclei.

"It has been said in the press that the various indigenous groups, in being transferred from the basins of the Tocantins, Xingu, and Taparjós Rivers, will be concentrated in the Xingu Indian Park. Recently we were informed that the area of the Park would be enlarged to shelter these various groups. Apart from the consideration of the problems of adaptation and coexistence of these various groups concentrated in the same region, and the implicit negation of their essential rights of possession of their areas of occupation since time immemorial, there are other elements which cannot be avoided relating to this project. At the same time that FUNAI chooses the Xingu Indian Park as an area for the relocation of indigenous groups removed from their traditional territories, the Park itself is concretely and indirectly threatened as a 'reserve' or area of refuge by a pioneering superhighway (BR-808), which cuts through it diagonally. This signifies that the Indians are removed from their regions by the pressure of progress brought about by SUDAM and the Transamazon Superhighway and are transferred to another area which is simultaneously submitted to the same pressures. It is worth stressing that the defence of BR-808 as an instrument of acculturation, which is energetically supported by FUNAI, should for necessary consistency, be extended to the indigenous areas in existence today in the path of the Transamazon highway. The only possible alternative to this hypothesis does not do justice to FUNAI, SUDAM, SUDECO and the other administrative and planning agencies: it is that which embodies the old Brazilian axiom, with colonial roots, according to which the Indians are basically incapable of progress or of being useful and have no recognized rights.

"The signatories, in the same manner as their illustrious ancestors who in 1908 signed the document of the National Museum, are convinced that it is possible, in spite of and beyond any future and momentary interests or preconceptions, to inform the most responsible sectors of national society, in order to impose on the Indian problem a more just and humane solution." 98/

349. It has been written that some groups of Amerindians in Guyana are facing the peril of forced removal from their ancestral lands:

"The Akawaio Indians of Guyana have lived in the forests and savannahs of the Upper Mazaruni Basin near Conan Doyle's Lost World since long before the conquest of South America. They are skilled hunters who have turned their hand successfully to cultivating the fragile soil of the region. In their trances, the shamans are said to enter the spirit world by a ladder, represented by a string tufted with razor grass which is inserted into a nostril and drawn painfully through the mouth, inch by inch. They have no ladder to escape the disaster which now threatens to overwhelm them.

"The Akawaio are confronted by a spectre which haunts indigenous groups in the world's tropical rain forests. For countless millenia the rain-forests have been storehouses of untapped genetic wealth ...

98/ World Council of Churches, op.cit., p. 341.

"In the Akawaio's case, it is to be death by drowning. The Guyanese Government is committed to the Upper Mazaruni as the site for a £100 million dam and power station, equivalent in output to the Aswan Dam, to provide power for an aluminium smelter near the bauxite mines on the River Demerera, about 160 miles away. The dam's flood waters would inundate an area of approximately 1,000 square miles, covering nearly all the tribe's lands. One community to be spared has already been largely taken over by the Government as an agricultural settlement and prospective National Service centre. The 4,000 Akawaio have nowhere to go." 99/

350. Describing the Hydro-electric Power Project in the basin of the Upper Mazaruni river, the following has been written:

"Sometime during 1975, the Government took the momentous decision to begin implementation of a Hydro-electric Power Project in the basin of the Upper Mazaruni River.

"Its estimated cost is around \$1,000 M(G) and when completed sometime in 1982, it will produce 1,000 megawatts of electrical power or about 10 times the power that is presently generated in Guyana.

"...

"It is significant that the lion's share of this expenditure on preparatory works is being borne by the Government though it is expected that later, as is usual in such cases, international financing of some parts of the Project will be obtained.

"...

"Since July 1975, a Swedish Consulting Engineering Firm SWECO, A.B., has been responsible for carrying out the final engineering studies for the Project. Previous studies of the Upper Mazaruni had been carried out by the Yugoslav firm Energo-Project.

"In addition, the Montreal Engineering Company has also carried out a study of a number of sites for the production of hydro-electricity.

"Sites investigated by the Montreal Engineering Company include the Amalia Falls in the Mazaruni River and the Kaitour Falls. These are considered by the Government of Guyana to be less profitable (in terms of cost - time - output) than the present Upper Mazaruni Site." 100/

99/ The Guardian Extra, London, Friday, 21 March 1975, p. 14.

100/ "Upper Mazaruni Hydro Power Project", Hydro Progress, a monthly Bulletin of the Upper Mazaruni Development Authority, Georgetown, Guyana, No. 1, March 1976, pp. 1 and 3.

351. According to the same official publication, some of the main indigenous groups affected by this project have been identified as follows:

"With the construction of the Upper Mazaruni Hydro-electric Works, a number of indigenous inhabitants in the area will be affected. They can be divided into two main groups consisting of the Amerindians and the Pork-knockers along with a scattering of settlers from Guyana's coastal belt and from islands in the Caribbean.

"There are about 4,500 Amerindians living at Kamarang, Waramadong, Jawalla, Pipillippai, Kako, Imbaimadai, Chinowieng and Kaikan. These are mainly members of the Akawaio tribe among whom are a few Caribs and Arawaks. Another tribe, the Arecunas live at Paruima. However, not all of them will be affected since some of the villages will be out of reach of the Project's reservoir waters.

"Among the second group - the settlers are 1,200 Pork-knockers a hardy and largely nomadic breed of people based mainly at Kurupung and Imbaimadai when not in the backdam. The additional 300 islander settlers work as farmers, small businessmen and Government employees.

"The Hydro-electric Project will have an effect on the life-styles of all of these people. For many of them it means new wealth, social status and security and a change of career. For others it will be undoubtedly a ~~painful, emotional experience since it will be necessary for them to break their ties with the land on which their settlements now stand.~~ Fortunately, only a few will be affected in this way." 101/

352. It has been written:

"... many square miles of land will be flooded, creating a vast artificial lake beneath which Kamarang, Jawalla and a number of villages and settlements will be completely and permanently submerged ...

"Unhappily, the scheme will create much hardship for the Amerindians who have inhabited this area from time immemorial and necessitate the uprooting and removal of hundreds of people from their homes and holdings. For this reason serious doubts about the morality of this undertaking have been expressed in many quarters and it is admitted that it can be justified only on the grounds that it will be of real advantage to the Nation as a whole, and hopefully will ultimately bring material benefits to future generations of the displaced Amerindian people themselves." 102/

101/ "Challenge of Resettlement", Hydro Progress, a monthly Bulletin of the Upper Mazaruni Development Authority, Georgetown, Guyana, No. 1, March 1976, p. 6.

102/ The Archbishop's Letter, Austin House, Georgetown, Guyana, South America 25 February 1976: Information furnished on 3 September 1976 by the Anti-Slavery Society.

353. Another source contains the information that:

"The Akawaio Indians ... are now being plundered for timber and minerals with the encouragement of industrialized nations hungry for resources and high investment returns. The forest dwellers who stand in the path of the bulldozers and chainsaw gangs are under orders to make way for progress, and integrate with societies deeply divided by race and religion. The record of the Americas shows that 'integration' invariably spells extinction or cultural death." 103/

354. Commenting on the different reports that have been issued on the project, it has been written:

"The plan to submerge 1,000 square miles of Akawaio land by damming the Mazaruni River, revealed in the Guardian Extra last year, has been viewed by overseas observers with some scepticism. It was felt that Guyana, a country the size of Britain with a population of fewer than 1 million, had little need for such a lavish scheme which will flood nearly one-eightieth of the country's land mass to provide cheap power far in excess of the country's requirements.

"The original scheme was submitted by Energoprojekt, the Yugoslav state construction company. Early last year, the Guyanese Government called in Sweco, a Swedish firm of consulting engineers which had worked with Energoprojekt on the Kafue hydro-electric project in Zambia. The two schemes have almost identical features in that they both make use of a large river bend to obtain the necessary head of water.

"The Swedish firm immediately pointed out the impracticality of some of the Yugoslav proposals. The initial size of the reservoir was so vast that the cost of clearing the forest in the first stage would almost equal the entire expense of the hydro-electric installation. Anticipating that neither the funds nor the time would be available for this clearance work, Sweco said the lake would turn into 'a veritable marshland with dead forest surfacing above the water level over some 85 per cent of the lake at high water and over practically the entire area at low water'.

"Sweco then put forward a modified plan for raising the water level in three stages. The first stage would be in operation by 1982, the second in 1992, and the third was unspecified. This would allow for the gradual exploitation of the forest and a measured rise in power output more suitable to the nation's requirement." 104/

355. Some of the basic views of the affected indigenous groups have been reported upon as follows:

"An appeal by the Akawaio tribe against the flooding of their homeland in the remote Upper Mazaruni area of Guyana, where the government of Forbes Burnham is expected shortly to announce detailed plans for a huge £500 million

103/ The Guardian Extra, London, 21 March 1975.

104/ The Guardian, 3 July 1976.

hydro-electric project, has recently been passed to the Guardian. Tapa-recorded by a visitor to the area, it is a moving statement of despair which echoes the former plight of North American Indian tribes facing similar encroachments on their land.

"When British Guiana became independent 10 years ago, the Akawaio were promised a legal title to their land. Referring to this, the Akawaio spokesman says: 'After having rejoiced because they told us. 'Be contented, live and stay in this, your land', we are now sad and unhappy, and we turn to this side and to that for we do not wish that this our land should be flooded. ... Our former head, that former government that went away and ended, would have explained all these things properly and would have put them right.'" 105/

356. The appeal continues:

"We do not wish the water to be stopped up, we do not want the dam to be made for with it the excrements and urine will go to our gardens to our crops of manioc, of sugar cane and potatoes ... We do not want anyone now to go to our gardens in the same way as they go into the bush: and how much worse will it be when all go to the gardens because the water will have no outlet. All of us who live in the Cotinga are thinking this and are distressed.

"...

"... We hear it said that they will close off the Mazaruni, the Kako, the Kukul, the Membaro, the Kamarang and the Paruma: and anxious-stricken we ask: what are we going to do? And we do not hear anyone who can explain how it is going to be good, this damming of the river in order to put in a turbine for generating electric light.

"Here we are growing sad and thinking: where shall we go? Shall we go to the lands of other people to molest them or anger them as when others come to us and the land is insufficient. They love their lands; we ourselves, we love this land in which we live ... We have heard it said - previously they spoke to us thus: stay peacefully in your land, work your gardens; with the fruits of the gardens you can feed yourselves and also sell some to get a little money. And now?

"... can we, who are not mountain-top birds like Amuchima, ascend the mountains to make gardens? There some birds can live, but not the Indians. And also the birds of the savanna, when they are flooded out with water they become sad because they do not know how to live in the forest." 106/

105/ Before the Flood, loc.cit., p. 2.

106/ Ibid., and information furnished on 3 September 1976 by the Anti-Slavery Society.

357. This project was specifically mentioned among other "non-approved development cases" that were rejected by the International NGO Conference on Discrimination against Indigenous Populations in the Americas (1977). In the report of the Economic Commission of this Conference it was stated that:

"To accommodate the increasing demand for materials and resources and the inherent profit quest, the multinational corporations have accelerated development and exploitation of native peoples and resources ...

"The development and exploitation of these reserves is being initiated and accelerated at an alarming rate ...

"... Plans are now implemented without native consultation and input on the lands surrounding native areas and in the areas themselves. Specific cases of unapproved development include ...

... the Hydro-electric Project in Guyana which would flood the whole of the Akawaio territory." 107/

358. Hydro Progress, a monthly bulletin of the Upper Mazaruni Development Authority, which publishes the views of the Government of Guyana, contains the following information:

"... the Hydro-electric project for which [the] Minister [of Energy and Natural Resources] is responsible is administered by the Upper Mazaruni Development Authority and involves not only the construction of the installations but also the resettlement of the Amerindians and other settlers from the area to be flooded and the development of the lands alongside the access road ...

"The resettlement of the Amerindians and other settlers involves the Ministry of Energy and Natural Resources, the Ministry of Health, Ministry of Agriculture, Ministry of Co-operatives and National Mobilisation, the Ministry of Works and Housing, the Guyana Council of Churches and the Guyana Water Authority.

107/ Report of the International NGO Conference on Discrimination against Indigenous Populations in the Americas - 1977, 20-23 September 1977, Palais des Nations, Geneva. Report of the Economic Commission, "I. Multinational Corporations", p.7. The same report contains the following statements on the utilization of non-renewable resources and some of its consequences for indigenous populations in different areas of the Americas:

"Effects of development are the utilization and selling of non-renewable resources, especially water. Water is used as a primary energy source in transportation of energy resources, and in industrial development ...

"Where water continues to be used by corporations as a component of agri-business, native populations are threatened by more immediate exploitation. Agri-business is dependent on an inexpensive, readily available labor supply, which is found in the rural native populations ..." (p.7).

"Both the Ministry of Agriculture and the Ministry of Energy and Natural Resources together with the Ministry of Health and Ministry of Works and Housing (surveys) are further co-operating on the necessary ecological investigations relevant to the Project.

"The Ministry of Information and Culture is giving assistance in relation to publicity." 108/

"A representative of the indigenous Alleluja religion of the Akawaio tribe is to be nominated shortly to sit on the Committee after the necessary consultations with the Allelujah group, have been completed.

"The Committee, which will have powers to co-opt additional members, is to submit monthly reports to the Cde. Minister of Energy and Natural Resources." 109/

359. In his inaugural address to the first meeting of the Resettlement Committee on 30 January 1976, the Minister of Energy and Natural Resources stated:

"... that presently in the remote Mazaruni region people still live in primitive conditions ... it is Government's belief that in the national interest it is better for the people themselves as well as the entire Guyanese population that arrangements be made for their orderly removal to another place so that they too can share in the benefit of the upsurge in economic activity which would attend the establishment of a Hydro-electric Station." 110/

360. On the benefits of having a Resettlement Committee it has been written:

"The establishment of a Resettlement Committee is a move which is meant to ensure that there is in fact as much benefit as possible to the Amerindians and others who will be affected ...

"Since this Committee also includes members from the Amerindian tribes in the areas, it exposes them to a wide cross section of opinions, help and advice to which they have perhaps never before been introduced. In addition, because of the composition of the Committee, every aspect of Resettlement including means of developing further the moral, cultural and traditional patterns of Amerindian life are discussed." 111/

361. The Special Rapporteur requested but did not receive information on the decisions and activities of the Resettlement Committee, as well as on the present representation of the Amerindian groups concerned; with an indication of their rights as committee members and of the numerical importance of their votes within

108/ Hydro Progress, No. 1, March 1978, pp. 3 and 10.

109/ Ibid., pp. 2 and 3.

110/ Ibid., p. 2.

111/ Ibid., p. 11.

the total membership of the Committee. The Special Rapporteur also requested but did not receive information on topography, flora and fauna of the resettlement lands, whether or not it resembles the traditional habitat of the groups concerned closely, information on the location of these lands vis-à-vis the project (whether close or far from it), work opportunities that may have been created by the project for members of those communities, as well as the conditions of that employment.

362. The terms of reference of an Upper Mazaruni Hydro-electric Resettlement Committee and its composition have been described as follows:

- "(1) The identification of settlements and areas to be flooded both in the Upper Mazaruni and in the Kurupung River areas.
- "(2) The identification of the areas for resettlement of those Amerindians as well as others who would be affected.
- "(3) Consideration of whether in the new Amerindian settlements, the existing pattern of small and separate villages, and settlements based largely on tribal, and/or religious consideration should be maintained or whether some degree of amalgamation is feasible.
- "(4) Consideration of the question of compensation, or recompense.
- "(5) The examination of the question of the standard and type of physical planning, lay out, buildings and other facilities.
- "(6) The formulation of proposals for the smooth, orderly and timely transition from the old settlements to the new, including the nature and scope of development in the old and new settlements respectively during the transition period.
- "(7) The formulation of information and communication programmes designed to explain the rationale and the main features of the Hydro Power Project to the Amerindians and others who would be most affected.
- "(8) Generally, to make recommendations with respect to the foregoing.

...

"The Committee consists of:-

- "(1) The Manager, U.M.D.A. (Chairman).
- "(2) The Asst. Manager (Resource Development) U.M.D.A.
- "(3) The P.S. Ministry of Regional Development.
- "(4) The Chief Interior Development Officer.
- "(5) The Regional Development Officer (Mazaruni/Potaro).
- "(6) Representative of the Guyana Council of Churches.
- "(7) Representative of the Seventh Day Adventist Church in Guyana.
- "(8) Representative of the Pilgrim Holiness Church in Guyana.

- "(9) Two representatives (of the Amerindian Communities) of the Upper Mazaruni Subregional Council.
- "(10) Cde. P. Peters (of Imbaimadai).
- "(11) Cde. L.R. Ferguson (of Kurunpung)
- "(12) Cde. Dr. L.P. Cummings (U.G.)
- "(13) Cde. Dr. L. Phillips (G.N.S.)
- "(14) Cdc. Dr. Leslie Mootoo.
- "(15) Cde. Dennis Williams.

363. One publication contains the following information on an alternative to the Upper Mazaruni Hydro Power Project:

"The choice of the Upper Mazaruni site assumes new proportions in view of the fact that it lies in the heart of disputed territory, and is the subject of a moratorium signed by Guyana, Venezuela and Britain in 1970. The protocol stipulates that the boundary dispute can be solved only by mutual co-operation, and that neither Guyana nor Venezuela may take unilateral action to strengthen or assert its claims in the zone.

"Since the Upper Mazaruni scheme would be in breach of the treaty, it is difficult to resist the conclusion that the Government is determined to press ahead and consolidate its hold over the area with massive infusions of men and machines before the agreement expires in 1982.

"Organizations concerned with the fate of the Akawaio feel that Britain, as a signatory to the treaty and former ruler, should take steps to remind the Guyanese of their obligations.

"Perhaps for this reason, the World Bank has so far steered clear of the Upper Mazaruni scheme, and it is doubtful whether it or the United Nations wishes to provide finance for the operation. However, a Canadian firm has carried out a feasibility study of another promising site on behalf of the United Nations and funded by the World Bank. This study, completed in 1969, was of the Tiboku area of the lower Mazaruni. It concluded that it was technically and economically feasible to site a dam and power station at Tiboku to meet the anticipated growth of Guyana in 1975-83, together with a superimposed metallurgical load of 130 MW. The cost was estimated at £47.5 million.

"The Tiboku scheme would not seriously displace Amerindians, would do less damage ecologically and would cost less than half the Upper Mazaruni scheme (now estimated at £130 million). Other feasibility studies have been made at Tiger Hill, sited on the Demerera River conveniently close to the bauxite mines, the Berbere River, the Cuyuni River and the Essequibo River at Monkey Jump. However, the suspicion is growing that the Government is privately committed to the Upper Mazaruni dam, and is merely going through the formalities of conducting other feasibility studies to give democratic gloss to a fait accompli. The attempted eviction of the Akawaio substantiates this theory." 112/

364. The Special Rapporteur requested but did not receive information on all efforts that may have been made to ascertain in an authentic and accurate manner the attitudes, desires and preferences of the indigenous groups concerned regarding the evolving characteristics of the project and its alternatives, expressed under conditions reasonably free from any constraints, intimidation or pressure. He stated that he would particularly appreciate information on aspects of the establishment of the project itself; its modalities; implications for the groups concerned; the resettlement areas for groups to be transferred elsewhere and the suitability of those lands in the groups' estimation, as well as the work possibilities the project may bring to them.

365. In resolution 77-06 concerning environment policy, the Inuit Circumpolar Conference has stated the following:

"WHEREAS, the regions of the Inuit homeland are made up of numerous fragile ecosystems and environments; and

"WHEREAS, the nations within the circumpolar region presently lack adequate environmental policies and legislation to protect these regions; and

"WHEREAS, the Inuit have not been permitted full participation in the various decision-making processes, both in the private and public sectors, affecting these regions;

"NOW, THEREFORE, BE IT RESOLVED that each nation in which the Inuit lives is vigorously urged to adopt by convention a common set of rules with respect to offshore and onshore Arctic resource development, and that the Inuit community has a right to participate in this rule-making.

"BE IT FURTHER RESOLVED that the rules for Arctic resource development will specifically provide for an Inuit-controlled technology assessment program; and

"BE IT FURTHER RESOLVED that the rules of Arctic resource development will specifically provide for the determination of safe technology; an Arctic population policy; locally-controlled wildlife management and Arctic military-use policy; conservation of traditional use values; access to government information concerning the Inuit homeland; the development of an international Arctic coastal zone management program and a co-operative environmental impact assessment protocol detailing participation of the Inuit."

366. In resolution 77-11 concerning peaceful and safe uses of the Arctic Circumpolar Zone the Inuit Conference stated that:

"WHEREAS, we Inupiat recognize that it is in the best interests of all circumpolar people that the Arctic shall forever be used for peaceful and environmentally safe purposes; and

"WHEREAS, we Inupiat are equally interested in the continuation of our homeland free of human conflict and discord; and

"WHEREAS, we Inupiat acknowledge the emphatic contributions to scientific knowledge resulting from a co-operative spirit in scientific investigations of the Arctic;

"NOW, THEREFORE, BE IT RESOLVED THAT:

"1. The Arctic shall be used for peaceful and environmentally safe purposes only;

"2. There shall be prohibited any measure of a military nature such as the establishment of military bases and fortifications, the carrying out of military manoeuvres and the testing of any type of weapon and/or the disposition of any type of chemical, biological or nuclear waste;

"3. A moratorium be called on implacement of nuclear weapons; and

"4. All steps be taken to promote the objectives in the above mentioned."

367. The Inuit Circumpolar Conference in its resolution 77-15 has called upon the International Whaling Commission to defend Inuit rights to hunt the whale:

"WHEREAS, the Inuit have hunted the Whale for thousands of years, and the relationship between the Inuit and the Whale has become a necessary part of the Arctic ecological system; and

"WHEREAS, there are those who do not understand the relationship between the Inuit and the whale, and are working to stop Inuit whaling as a means of preserving whale species being destroyed by commercial whaling; and

"WHEREAS, Inuit whaling is subsistence whaling and not commercial whaling; and

"WHEREAS, whaling is a necessary part of Inuit cultural identity and social organization, and is in no way similar to commercial whaling;

"NOW, THEREFORE, BE IT RESOLVED that the delegates assembled at the first Inuit Circumpolar Conference call upon the United States and Canadian delegates to attend the forthcoming meeting of the International Whaling Commission in Australia to defend the Inuits' aboriginal right to hunt the whale in the Arctic."

368. The Inuit Circumpolar Conference also adopted resolution 77-16, urging the wise and full use of subsistence resources:

"WHEREAS, subsistence hunting is the foundation of Inuit survival in the Arctic and constitutes an important aboriginal right of the Inuit; and

"WHEREAS, game stocks upon which the Inuit depend for their physical and cultural survival are limited, and are under heavy pressure wherever Arctic natural resources are being developed; and

"WHEREAS, these pressures will result in attempts to limit or eliminate subsistence hunting in the Arctic unless special care is taken; and

"WHEREAS, it is traditional behaviour for game biologists and others to justify hunting limitations by pointing to wasteful hunting practices through modern hunting equipment and transportation; and

"WHEREAS, stories of waste of game and other poor hunting practices make the political defense of subsistence more difficult by reducing public confidence in the ability of the Inuit to manage fish and game;

"NOW, THEREFORE, BE IT RESOLVED that the delegates assembled at the first Inuit Circumpolar Conference call upon all Inuit to behave as hunters and in no way that will create scandal and endanger our subsistence hunting rights, and to conserve our game as we would conserve our homeland, and protect the future generations of our people."

F. Attribution of Land

369. Separate attention will be given to the two aspects of this question that are relevant for indigenous populations.

1. Due consideration for the satisfaction of the needs of the indigenous populations with respect to land and the means to exploit it successfully

370. There is considerable information on agrarian reform schemes in several countries. This study is, however, only interested in ascertaining in what manner, if any, these schemes and programmes could benefit the indigenous populations of these countries, and not in entering into a detailed description of plans, schemes and programmes that, in practical terms, may bear little relevance for indigenous communities. Unfortunately, most of the information available in these respects did not show clearly how such schemes were applied for the benefit of indigenous populations. The data concerning certain countries did, however, contain some information directly relevant for the purposes of the present study and will be presented in a succinct manner.

371. It must be pointed out, though, that not infrequently, far from benefiting the indigenous populations, the schemes are carried out at the expense of land which has traditionally been considered indigenous land by communities and peoples whose ancestors have occupied it - physically and economically - for many centuries and even for millenia. Many of the indigenous ancestral lands are considered as res nullius for agrarian reform purposes or as "fiscal land", as they have never been registered in the name of their possessors and usufruct holders in the public registry of real estate and are, according to the criteria on which those programmes are based, "unoccupied" or "not occupied".

372. This has happened in the past in connection with the nomadic or semi-nomadic populations of a hunter-gatherer economy who occupy a vast area of land on which they and their ancestors have migrated seasonally for hundreds or thousands of years. As the official criteria for occupation include sedentarism and a considerable amount of agricultural labour on the land, the land is classed as "attributable" in agrarian reform schemes. This lack of recognition of millenary physical and economic occupation has led to the attribution of indigenous ancestral land to others, who presumably fulfil the criteria ruling these aspects, depriving indigenous communities of land rather than attributing or giving land to them. As has been pointed out, the criteria for valid occupation often call for intensive use of land and its integration in a market economy organization of land development with high productivity. Thus those groups that practise subsistence economy are not considered as really occupying their land even if they are sedentary and devoted to agricultural activities.

373. Another problem that has arisen in this connection is that of attempts at the overnight conversion of populations which have been traditionally, and are today pastoralists or hunter-gatherers, of a nomadic or semi-nomadic life-style, to sedentary agriculturalist communities. This has been attempted in many areas and at different periods. Under these measures, indigenous communities have been assigned land for agriculture and brought to a site selected with little participation by the community concerned in order to make them abandon their "primitive" ways and adopt methods more susceptible of "civilized settlement" and "integration" into the national society through their incorporation into the market economy at the bottom of the ladder.

374. It is always questionable whether the communities affected have really been consulted and taken part in a decision. It is also generally questionable whether this "conversion" is necessary or even desirable within a broader perspective. It is hopeless to try to attain such radical changes in life-style in a short period of time and without the free and informed will of those concerned. Should such changes indeed be required or desirable in the long run, all factors considered and with the interests of the indigenous communities concerned clearly in mind as a main consideration, this cannot possibly be attained in a short time.

375. Appropriate and efficient agrarian reform programmes must take into account the existing occupation of land by indigenous populations on the basis of criteria that indicate the real situation before land is classed in any way as alienable by agrarian reforms. The needs of the indigenous communities for additional land must be realistically and fairly assessed and taken into account in those plans.

376. If it is found necessary to move some communities from their ancestral lands to other areas (and any such decision must in any case be abundantly well founded and confirmed after careful consideration), the new areas must be freely chosen by the communities affected, from among areas with identical or very similar fauna, flora and topographical features to the ancestral land that they will be forced to abandon, whenever the reason for abandonment, is not an unavoidable natural disaster (e.g. destruction by earthquake) permanent arrangements have to be made to compensate the indigenous communities for the disruption of their normal life-style and to help them to return to their ancestral land once the circumstances forcing their resettlement have passed. These communities should be granted at least the same facilities and services they enjoyed before removal from lands.

377. The information available on these aspects shows that several types of situation exist in the countries covered by the study. Sometimes, even within given countries, situations may vary from region to region.

378. The information on this subject may be classified as follows: countries on which there is no information; countries where little attention has been paid to the needs in question; and countries where such attention exists primarily in legal texts, but rarely in fact.

379. There is no specific information on a number of countries. 113/

380. It should be noted that, in countries where these matters have received very little attention, only information of a general nature is available.

381. Following the adoption of the Agrarian Reform Act in Bolivia, a serious indictment was made of the development of indigenous communities: "A second major objective, development of the indigenous comunidades, autonomous traditional communities, has received almost no attention". 114/

113/ Argentina, Australia, Bangladesh, Burma, Costa Rica, Denmark (Greenland), Ecuador, El Salvador, Finland, France (Gufana), Guatemala, Guyana, Honduras, Indonesia, Japan, Pakistan, Panama, Peru, Philippines, Sri Lanka, Suriname and Venezuela.

114/ Dwight B. Heath and others, Land Reform and Social Revolution in Bolivia, Foreign Area Studies, The American University, Washington, D.C. p. 375.

382. With regard to the countries where legislation has been adopted on this subject, but has frequently not been implemented in practical terms, it should be noted that the available information varies and includes legal provisions and different types of information from governmental and non-governmental sources on their practical application.

383. In Brazil article 2 (v) of Act No. 6001 guarantees the Indians the right to remain in their habitat permanently if they so wish, and to be provided with resources for their development and progress.

384. In connection with the establishment of reserves for the Yanomami (Yanoama) it has been written:

"In an immense area in the northeast of the State of Amazonas and the west of the Territory of Roraima, their lands have been invaded by the Northern Perimeter Highway BR-210, INCRA colonization, cattle ranching and mineral prospectors and mining companies.

"The Yanomami (also referred to as Yanomamö, Yanoama or Waiká for the group as a whole, Sanuma, Ninam, Yanomam in terms of sub-linguistic groups, and Guaharibo, Xirixana, Xiriana by Brazilians locally) have, in a few years of intensified contact, suffered casualties similar to those suffered by the Parakana: disintegration of the group and cultural collapse, decimation through disease, begging and prostitution have all been results of contact with roadworkers during the construction of the BR-210, the presence of prospectors, and the slow encroachment of settlers.

"The Yanomami number about 20,000 in Venezuela and Brazil, and, with a population of eight and a half thousand, are the most numerous group in Brazil still to have remained largely isolated and thus retained a high degree of cultural and physical integrity. They are widely scattered over an area of some 6 million hectares in Amazonas and Roraima and are at present seriously threatened by the three principal offensives of Brazilian development - the roads, the exploitation of mineral wealth, and the development of agribusiness.

"While contact with Yanomami Indians goes back to the last century, it is only since the 1940s and 1950s that permanent contact was initiated with certain groups with the establishment of missions, both Catholic and Protestant (North American) in nine separate areas in Amazonas and Roraima. Since this time, various infectious diseases of "white" origin most notably tuberculosis and onchocerciasis have appeared and spread widely amongst the Yanomami, one of whose characteristics is perambulation over large areas and frequent inter-group visiting.

"In the late 1950s, the Xirixana of the Mucajaí sought contact with settlers on the river shortly before a mission station was established amongst them, and have maintained this contact ever since. The smaller Waiká groups further downriver, on the Mucajaís affluent, the Apiaú, had long suffered the abuses of pelt hunters, loggers and settlers, and finally with the advent of INCRA colonists fled this year to join the Xirixana, bringing with them however the TB with which they are badly affected, and which had in fact already spread from them to the Xirixana in the early 1970s, where it still, in spite of missionary health care, accounts for deaths in the tribe.

"White farmers from downriver frequently come up to the Mucajaí to recruit Indians for labour: at first only the men went, but recently women and families have been going down. They stay for several weeks, returning angry at the poor pay they have received, infected with colds and 'flu, covered with ragged clothing. The missionaries told me that after every trip the whole tribe has to be treated for VD.

"Although no official information is available, the Xirixana have reported that in September 1978 a party of INCRA topographers, who began marking out land on the river bank between some of the malocas, cutting tractor-wide swaths through the forest. Two years ago and then stopped, came up the river again, setting cement markers along the bank all the way up beyond the last Xirixama maloca. A young military cadet who accompanied the INCRA team said that they had marked out lots of up to 5,000 ha. as far up as just below the area of Surucucu. This flagrant invasion of the Indians' territory has yet to be investigated.

"In 1969 and 1970 influenza and dysentery and subsequently TB in waves of epidemics decimated Yanomami in the region of the Maiá river in Amazonas, and at least 100 are known to have died at that time. In June 1978, according to reports from CIMI, the Prelacy of the Rio Negro and the FUNAI agent Mario Craveiro, almost another 100 died in the same region, victims of malaria and TB. Missionaries now fear that partial treatment of TB victims may be creating drug-resistant bacillae, and that owing to the network of contacts amongst Yanomami groups, the disease may reach drastic and lethal proportions, which only a huge and well-organized health programme could even hope to control.

"Onchocerciasis (African River Blindness) has also been spreading through the Yanomami from Venezuela: its Brazilian focus is in the region of Tototobi and Surucucu, where 100 infection has been found, but as the blackfly vector is found all over Yanomami territory, and a few cases have already been identified in the Mucajaí and the Catrimani regions, the potential for further spreading is very high.

"In late 1974 the construction of the BR-210 began to be halted due to unfeasibly high costs (Cr \$1,000,000 per km) in 1976. During this period infectious diseases brought in by the construction teams, principally 'flu and its complications and measles, killed approximately 30 Yanomami. In 1977 a further outbreak of measles which spread to isolated groups killed another 68 Indians - 40 per cent of each of the three groups worst hit. Skin diseases transmitted by infected secondhand clothing given to the Indians, venereal disease and alcohol have taken their terrible toll of several groups in this region of the upper Catrimani, crossed by the road only 3 km from one of the Yanomami villages, and the Catrimani mission. Two FUNAI posts supposedly protect the area (it was to this region that Amancio was sent after the Wamuri-Atroasi scandal, and accusations of his running a punishment camp on the BR-210 led to his removal from the area), and the post at Km 211 has re-housed the Opikteri, one group which succumbed to begging and prostitution at the roadside, abandoning their village: now they work for FUNAI on the post.

"The road is expected to be recommenced in 1979.

"The region of Surucucu in Roraima, with one of the largest concentrations of Yanomami, numbering some 2,000 Indians, is being threatened by a road linking it with the Catrimani. INCRA colonization and the discovery of large mineral deposits, particularly uranium. By 1974 150 technicians from the CRRM (Government mineral research co.), Projeto RADAM (Radam Amazonia) and Nucleobras (the Government nuclear energy co.) were working in Surucucu. Between 1974 and 1976 when all prospectors were expelled from the area after constant conflicts and the deaths of two prospectors and one Indian, there were up to 500 men living in camps, prospecting for gold, cassiterite and manganese. There is now a FUNAI post in Surucucu, the missionaries having moved out, and the real mining invasion is, of course, yet to begin.

"Since 1968, projects have been sent to FUNAI by missionaries and anthropologists for the demarcation of the Yanomami's land in the form of a Park, and in 1974 the "Projeto Yanoama" designed by two anthropologists from the University of Brasilia to provide social and health control of Indian/White relations along the road construction front was approved by FUNAI. A political move against foreign anthropologists caused the project to be dropped in 1976 before it got under way, and this year FUNAI announced the delimitation of 21 small separate areas for local Yanomami groups in Amazonas and Roraima.

"A counter proposal to this measure is to be presented by a group connected with the Catrimani mission to the Brazilian Congress and to FUNAI, as it is universally recognized that FUNAI's proposal would be fatal to the Yanomami, who have already proven fragile in contacts with white society, in that they would find themselves on tiny islands in a sea of representatives of a powerful and aggressive society who, basically, are only after all the land and the wealth they can grab. To these four case histories could be added dozens of others, many of them far more gruesome and dramatic, where contact has been more ruthless and more violent: some of these will be referred to briefly below. But the process, the international and internal colonialist reconquest of Brazil, has the same effect on all Indian groups. Of the 155 tribal groups listed by CIMI in their latest survey of August 1978, hardly a single group, whether their territory is officially demarcated or not, is free from the interference of large economic groups, individual settlers or the income-generating departments of FUNAI itself." 115/

385. A journalist writes: "One strategic road, the Northern Perimeter Highway, already runs through 220 kilometres of their territory. Mere contact with the workers who built the road was enough for several dozen Indians to catch diseases to which they had no resistance and which were therefore fatal to them. Quite without meaning to, white missionaries themselves transmitted measles to some other Yanomami and it, too, was fatal. Perhaps the greatest peril that now lies in wait for the Yanomami is the fact that traces of uranium have been discovered in their region and this is likely to start a 'nuclear gold' rush. The havoc that such invasions of 'prospectors' usually create among indigenous tribes is

115/ Anna Presland, loc. cit., p. 26.

only too well-known. In addition, the Brazilian National Settlement Institute has begun to set aside two areas for the intensive breeding of zebus. This is just one more problem for the Yanomami. The Brazilian Government has not remained entirely indifferent to the problems faced by this Indian tribe. Through FUNAI (the National Indian Foundation), it has proposed to split up the Yanomami in 21 small reservations, which would be protected little islands. However, this solution cannot be regarded as satisfactory. For one thing, it would mean that entire villages would have to be uprooted. For another, it would place unacceptable restrictions on the Yanomamis' living space by putting them 'in cages'. On 23 June, a counter-proposal was submitted to the Brazilian Government by a number of Indian defence and protection organizations which are united under the banner of the London-based Survival International Movement. These organizations include Amazind, a documentation and information centre for Amazonian Indians which operates under the able guidance of the ethnologist, Rene Fürst, and has its headquarters in Geneva. What is this counter-proposal?" 116/

386. As to India, the Anti-Slavery Society has stated:

"The development of the most underdeveloped community in India has depended so far on relatively paltry sums that would be insufficient in well served Plains areas and are totally inadequate in the hilly tribal districts where there is almost no infrastructure. If one adds to this the fact that in India the major financial resources come not from plan allocations but from banks and open market borrowing which ... are not open to STs, one gets an even more staggering picture of the cumulative disadvantages they suffer in comparison to non-tribals. However, damning as the small quantum of resources allocated to tribal development is, particularly in view of Government rhetoric about "uplifting" the tribals, the indictment against the Government of India is not just that the funds it spends in tribal areas are insufficient, but also that the funds it spends are considerably less than the value of the minerals and timber extracted from these areas.

"Some imbalance of course is to be expected - the job of a government is to allocate national and State resources to those sectors and regions that will make the greatest contribution to over-all national welfare, and therefore investment in 'green revolution' areas, such as Punjab and Naryana, may, under certain definitions of welfare, be preferable to investing in tribal areas.

"There can be no doubt ... that the value of the resources extracted from tribal areas greatly outweighs the funds employed by Union and State governments for tribal welfare and development confirming the assertion made earlier that tribal India can best be seen as an internal colony within an exploitative non-tribal country.

"... it is not just that the tribals are not benefiting financially from the exploitation of their traditional environments. Account must also be taken of the deleterious effects that the huge forestry, mining, urban-industrial and HEP/irrigation dam schemes are having on the adivasis'

116/ Jean-Paul de Sury in the Tribune de Genève, 16 July 1979.

ability to continue their traditional methods of production. Tribals are being forced by a combination of land alienation for dams and industrial developments, prohibitions on the use of forest resources, ... lack of investment in tribal agriculture and land alienation by encroaching Hindus, to give up their largely autonomous, self-sufficient methods of production to become badly paid, landless labourers, either harvesting their traditional forests and working in mines for the benefit of the non-tribal areas, or migrating seasonally or permanently to distant brickfields, plantations and areas of high agricultural potential in search of work."

The government sponsored spread of the capitalist mode of production into peripheral adivasi areas is destroying the tribals' pre-capitalist modes of production. The adivasis are paying for the development of Hindu India with economic insecurity, poor wages, social disorganization and cultural shock.

387. Section 13 of the Aboriginal People's Ordinance of Malaysia provides for the compulsory acquisition of land for aboriginal areas or reserves.

388. There are, however, certain problems in connection with the nomadic or semi-nomadic groups of Orang Asli. Such groups necessarily claim vast extensions of land in the area where they obtain their means of livelihood. Efforts to settle these groups in determined areas are coupled with a necessary restriction of such extensions of land. This is not always welcomed by the Orang Asli groups, as the Special Rapporteur was told during his official visit to Malaysia in June 1973.

389. In this connection, the statement of policy regarding the Aboriginal population contains the following criteria concerning agriculture and forest policy (section (iii) (b)):

"As regards cultivation it should be the ultimate objective to replace the present system of shifting cultivation with some system of permanent agriculture. It is accepted that the reason why these groups of aborigines practice shifting cultivation is also because of the nature of the terrain in which they live. At the same time it is also accepted that any inducement to these groups to adopt a more permanent form of agriculture should avoid disrupting their traditional way of life too suddenly, and that the process may take a considerable length of time. The basic requirements for settled agriculture are a sufficiency of food crops and a dependable cash crop, probably rubber, which is the least demanding of crops. This required a degree of permanency of occupation, an advance in agricultural technique and the choice of suitable sites. Definite plans should therefore be formulated to provide the necessary land for this in places where the aborigines are willing to settle. Further, although traditions should be observed and enforced settling avoided at all costs, no encouragement should be given to the perpetuation of their present nomadic way of life. In pursuance of the above it will be necessary either to include trained agricultural personnel in the Department of Aborigines, or to provide training for in-service officers. It will also be necessary to train aborigines to work as agricultural extension personnel. The Ministry of Agriculture and Co-operatives should however help with the provision of advice and such essentials as planting materials and better types of seeds." 117/

117/ Ministry of the Interior, Statement of policy regarding the administration of the aborigine peoples of the Federation of Malaysia, Kuala Lumpur, November 1961, pp. 5-6.

390. With regard to arrangements to satisfy the needs of the indigenous populations with respect to land and the means to exploit it, the Anti-Slavery Society has furnished the following information on Paraguay:

"... The Commission established to seek a legal formula for granting land titles in favour of the indigenous communities, in its conclusions of 11 December 1973, proposed that land titles be granted not to individuals, but to whole communities. This seems to be in accordance with the traditions of most Paraguayan Indians and corresponds to a tradition of co-operative land ownership in Paraguay. From these conclusions, and from the resolution No. 677 of 24 March 1974, of the Instituto de Bienestar Rural, the following method for obtaining land titles can be devised:

1. The Indians in question must be inscribed in the Birth Register and thus obtain full citizenship so that they can exercise ownership rights.
2. The group in question must attend literacy courses.
3. It must be trained in co-operativism.
4. It must constitute a production co-operative.
5. In the meantime, the Instituto de Bienestar Rural (IBR) must have reserved land for the group in question.
6. The land is transferred to the Asociación Indigenista del Paraguay.
7. The Asociación Indigenista transfers the land to the indigenous co-operative'.

"Up to now, this process has only been carried out once in the case of the Paí Indians. There are, however, difficulties:

1. The process is long, thus allowing the time for land speculators and non-indigenous settlers to act. For instance, with the process still under way, white settlers could occupy the land in question and thus gain a certain right to be there, which would guarantee de facto their staying there even after the land was officially granted to the Indians.
2. The process of land transfer cannot be fulfilled without benevolent non-indigenous intermediaries. These must act so that IBR reserves land for the Indians, as the latter, at that time usually do not yet have full citizenship and therefore cannot claim their land for themselves. Experience shows that IBR will not reserve land on its own initiative, so that the intervention of the benevolent intermediary - a missionary, a well meaning farmer, an anthropologist - is necessary to file the claim for the Indians. Later on, the land must pass through the hands of the Asociación Indigenista del Paraguay, again a body composed not of Indians, but of non-indigenous Paraguayans ...'

"Most of the land inhabited by Indians is in the hands of non-indigenous persons. De jure, such land may be expropriated in favour of Indian settlers who have been residing there for more than 20 years, on the condition that they guarantee exploitation of the land 'in a rational and productive manner' (Law No. 622 of 19 August 1960, and Law No. 854 of 22 March 1963), but de facto this condition will usually be quoted in order to prove that the land cannot be given to the Indians. The Marandú Project informs us about the difficulties it encountered when, for the first time in Paraguay, it carried out a land survey with the aim of reserving land for the Indians:

'Such surveying can only be done in areas of State lands and for communities wishing to establish settlements in such areas. As for those communities settled on private (non-indigenous) land, even if

this property were illegally obtained in infraction of the valid legal provisions concerned de facto occupation, in each case a solution must be found, if the proprietors refuse to give in: expropriation with compensation, exchange or purchase of the land. But all these solutions are costly and the aborigines cannot meet those costs themselves'.

"In many cases, the fact that the Indians settle on lands which are not their own property makes them very dependent on the legal proprietors. This is the base of much of the power exerted over the Indians by local institutions and persons. One concrete, typical example is the Mennonite zone: after the 1962 indigenous revolt, many Indian settlers received land of which they had usufruct, 5 hectares per family. The distribution is controlled by the Mennonite Office for Indian Settlement, which at the same time, has the task of evangelizing the Indians. As a result, the Indians usually receive land only on the condition that they profess the Mennonite version of Christian faith.

"The problem of occupation of indigenous land by settlers is acute, especially in East Paraguay. Thus, for instance, the Chiripá Indians lost some 900 hectares of the lands reserved for them at Colonia Chiripá-Fortuna (of a total of some 1,600 hectares) and about 500 of the 1,000 hectares reserved at Paso Cadena, through the invasion of non-indigenous settlers in 1973. A similar phenomenon has been observed since 1973 in the Aché reservation, Colonia Nacional Guayakí. These examples show that even the concession of land titles to Indian communities, in itself already very difficult, does not resolve all the problems, as invasions are possible even into reserved Indian properties."

391. The Government of Costa Rica explains that: "Appropriate measures are being adopted, as shown by Executive Decrees 5904-G, 5905-G, 6036-G, 6037-G and 6866-G."

392. In Mexico, the Government states only that article 27, section X, of the Constitution contains the following provisions with regard to the needs of indigenous populations in respect of land: "The population settlements that lack ejidos or cannot obtain their restitution through lack of title, by reason of the impossibility of identifying said titles or because they may have been alienated legally, shall be granted lands, forests and waters sufficient to constitute ejidos in proportion to the needs of their population; in no case may the required area be denied and, to that end, sufficient land for the purpose shall be expropriated by the Federal Government, taking the same from the lands nearest the towns concerned. The area or individual unit of apportionment shall not in the future be less than 10 hectares of artificially or naturally watered land or, in default of these, of their equivalents in other kinds of land, according to the terms of section XV, paragraph 3, of this article."

393. According to a source, in certain parts of Canada, "treaties were entered into to deal with some of the rights of the Indian tribes ... In the treaties the Government undertook certain obligations and guaranteed certain rights (such as the right to hunt and fish which the Indian people had exercised from time immemorial).

"The use of the land must be preserved or restored or the Indian rights otherwise dealt with to the satisfaction of the Indian people involved."

"Recognition by the Federal Government of aboriginal title means: (a) recognition of the obligation to deal with Indian claims in non-treaty areas of the country. In the areas where Indian people have lost or are gradually losing the use of the land either the full use of the land must be protected or restored or the claim based on Indian title must be dealt with to the satisfaction of the Indian people involved. (b) If treaties meet adequate standards of fairness, [it should be based on] recognition of treaty promises as they were understood by the Indian people. If the treaties fail to meet adequate standards of fairness this failure must be acknowledged and fair and adequate arrangements made to the satisfaction of the Indian people involved." 118/

394. However according to another source:

"While 44 per cent of Indian reserve land is forested, 35 per cent of reserve land, (2,108,400 acres) has agricultural potential. Perhaps, even more than forestry, agriculture holds an enormous potential for development. The Agricultural Institute of Canada has published a study which states that agriculture could support 4,675 Indian families, fully 30 per cent of the total Indian population now resident on reserves with agricultural potential. This is particularly significant when one realizes there are currently fewer than 600 full-time Indian farmers.

"Roughly, one-third of the land with agricultural potential is currently being farmed by Indians, and one-third is leased under "contractual" arrangement to non-Indians with indications ... of low or inadequate returns to the people of the reserves as compared to the land's potential", according to the Department of Indian Affairs, which arranged for these leases in the first place.

"Clearly, the potential for agricultural development exists. If it is to be developed it requires tangible assistance programmes and the full involvement of Indian people. It would also require that the Indian people maintain full control over this development. Agriculture is yet another [way] of allowing Indian people to maintain contact with the land, so necessary to us, while building a viable and self-supporting economy." 119/

395. As regards the competence of the Lapp village, in Sweden reference is made to the fact sheet "The Lapps in Sweden". The grazing areas of the village are used jointly by those Lapps who belong to the village.

396. See paragraph 411 below for information regarding the United States of America.

397. With regard to Colombia, a publication contains the following information:

. 118/ Aboriginal title, op.cit., pp. 3, 4 and 5.

119/ Indians: Lands and Resources, a brief presented by the National Brotherhood to the Man and Resources Conference, November 1973, pp. 11 and 12.

"The Colombian Petroleum Company and the government participated jointly in the effort to establish peaceful relations with the Mutilones and in securing land for a reservation. In 1965 a law created the Mutilone reservation in Norte de Santander, and troop patrols were sent to enforce its boundaries, keeping out non-Indian settlers. The Colombian Institute of Agrarian Reform (Instituto Colombiano de Reforma Agraria - INCORA) has also discouraged homesteaders from settling near the Mutilones by refusing loans for land purchases in that area." 120/

398. As already stated, the Government of Norway has reported that the Act concerning Reindeer Husbandry gives the Lapps the exclusive right to reindeer husbandry in the reindeer pasture areas. Finmark is an exception, since all permanent residents there are entitled to practise reindeer husbandry.

399. The Government of New Zealand states:

"Mention must also be made of the Maori land development programme administered by the Maori and Island Affairs Department under which, with the consent of the owners, the Department can provide the whole of the finance necessary to bring Maori land to a fully productive stage. Very large areas of Maori land are continually being developed by the Department of Maori Affairs on behalf of the owners with the funds so provided. When the land is developed and stocked, the Department farms the land for a period to recover the cost of development. When the debt is reduced to a reasonable proportion the normal practice nowadays is for the Maori owners to form an incorporation of the kind described, and to assume the management of the farming enterprise. (In other cases they might decide to divide the land into single farms.) Last year the total area of Maori land being developed under the Maori land development programme was over 300,000 acres (approximately 121,500 hectares).

"In addition to the various forms of assistance shown above, the Department of Maori and Island Affairs provides finance for Maoris on single farms of Maori land, and also provides supervision to help improve the standard of farming. Maori farmers or Maori incorporations are also able to get finance from the State Advances Corporation, a Government corporation which provides loan finance for farming purposes."

120/ Thomas E. Weil and others, Area Handbook for Colombia, Washington D.C., Government Printing Office, 1970, p. 92.

2. The major pertinent aspects of any agrarian reform programmes designed to obtain land for the indigenous populations and to distribute to them means for working both the land which they already own and land which they are to receive under such programmes

400. Four groups can be established in this connection: countries for which there is no information; those for which there is information only on general measures, without any special measures on indigenous populations; those in which some attention is given to the needs of indigenous populations within the framework of general measures and, finally, those in which special measures designed particularly for indigenous populations are contemplated or taken.

401. There is no information in relation to several countries. 121/

402. The available information on Ecuador, Guatemala and Peru, for example, refers in general to broad measures which would apply to indigenous populations, but which do not specifically mention such population settlements. This appears to be the case in many countries about which specific information on this subject is not available. It also seems to be the case in Sweden, where, according to information furnished by the Government: "There are no special agrarian reform programmes designed for the Lapps".

403. In a number of countries, the needs of indigenous populations in respect of land receive attention within the framework of general provisions relating to agrarian reform. Colombia and Finland are in this group.

404. The Government of Finland states that "there are no agrarian reform programmes designed particularly for the benefit of the Lapps", it has added that:

"The agrarian reform programmes implemented so far have concerned the whole country. The circumstances in Lapland have been taken into consideration in their implementation in view of the fact that the means of livelihood in Lapland, particularly in the Lappish region, differ from those in other parts of the country".

405. With regard to Colombia, attention is drawn to article 94 of Act No. 135 of 13 December 1961 relating to agrarian reform, which provides that:

"The Institute shall, in co-operation with the indigenous affairs sections of the Departments, examine the situation with regard to arable land in the indigenous communities and take part in the land redistribution schemes provided for in article 3 (g) of Act No. 81 of 1958. If it is found that this measure cannot solve the problems of communities with too little land, the Institute shall take the necessary steps to provide such communities with additional land or to help resettle the surplus population. The Institute shall also co-operate with the indigenous affairs sections in performing the duties and carrying out the activities referred to in article 3 (h), (i), (j), (l), (ll), (m), (p) and (q) of the above-mentioned Act and shall monitor contributions to the Development Fund." 122/

121/ Australia, Bangladesh, Brazil, Burma, Canada, Denmark (Greenland), El Salvador, France (Guiana), Guyana, Honduras, Indonesia, Japan, Nicaragua, Pakistan, Panama, Philippines, Sri Lanka, Suriname and Venezuela...

122/ Diario Oficial, Bogota, 20 December 1961.

406. The last group is composed of countries about which there is information relating to specific measures. With regard to Argentina, it was reported that:

"As regards the Indian population as a whole, the first Five-Year Plan made provision for a settlement programme using 500,000 hectares of Government land reserved for Indians, to be divided up in three different stages, namely: the reservation; the reducción; and the colonia. When it is clear that the Indian has been assimilated, he is transferred from his reservation to the nearest reducción. This is a training centre where the adult Indian spends five years, at the end of which he is given a piece of land in a colonia; this land he must pay for in instalments varying with the volume of the crop.

The settlement scheme included the following projects: (a) 7,500 hectares of the former Nahuel Pan reserve in the national territory of Chubut to be divided up into small farms for the members of the Nahuel Pan tribe, whose land was to be returned to them by virtue of Decree No. 13806 of 1943; (b) 50,000 hectares of land in the Chaco and 30,000 in Formosa to be surveyed, divided up and marked off to create the first reservations; (c) a reducción of roughly 8,700 hectares to be established in the Lanín National Park in the territory of Neuquén; (d) the institution of a rotating credit fund to develop stock-raising among Indians; and (g) the organization of agricultural co-operatives in Indian colonias (financed by means of contributions from the Indians themselves and from the State) for the purchase of expensive agricultural machinery and the introduction of a social security system to enable the Indians to procure the necessities of life even if the harvest is bad.

Some forest-dwelling Indian tribes in the north of Argentina have already been settled in colonias established by the Government." 123/

407. According to the Government of Mexico:

"Agrarian reform in Mexico was established in the Constitution which has been in force since 1917 and was immediately preceded by the Mexican Revolution that broke out as a reaction by the people against a dictatorial regime which had lasted over 30 years and had kept the majority of the Mexican people, particularly workers and peasants, in circumstances of extreme poverty and insecurity.

This explains why the most important revolutionary schemes are always based on agrarian and labour grievances.

Article 27 of the Constitution and the Federal Agrarian Reform Act establish the following guidelines for agrarian reform:

1. Population settlements which retain communal status de facto or de jure may own real estate (article 27, section VI, of the Constitution).
2. Population settlements which retain communal status de facto or de jure shall have capacity to enjoy in common the land, forests and waters which belong to them or may have been or may be restored to them (section VII).

3. Communal property shall be governed by a special legal regime designed to protect such property (articles 52 and 53 of the Federal Agrarian Reform Act).

4. For the benefit of such communities, a comprehensive system shall be established specifying that the legal acts which deprived them of their property are declared null and void (section VIII).

5. Population settlements which lack land shall be entitled to be granted such land in accordance with the needs of their population (section X).

6. Provisions concerning the economic organization of ejidos are contained in chapter I, section 3, of the Federal Agrarian Reform Act."

408. In this connection, the Government of Chile reported (1975), in the information it provided for the purposes of the present study, that:

"In general, it may be said that indigenous populations do not have enough land to meet their basic needs. It is estimated that each family group owns between 3 and 6 hectares per person, depending on location and quality. They have only rudimentary tools and few farming skills. This factor has considerable bearing on the economically depressed conditions in which most communities live.

The arrangements being made to solve these problems include the training of "trail blazers" from indigenous communities: indigenous leaders receive instruction in farming, handicrafts, etc., with a view to replacing subsistence farming by the intensive production of certain items."

409. In the information it provided to CERD in 1982, the Government of Chile stated that:

"Additional land: The Government has transferred to Mapuche groups a total of more than 100,000 hectares of non-indigenous land (i.e. land not covered by the former joint titles). Some of this land had been the subject of former claims by indigenous persons and some was transferred to meet the basic needs of dispossessed indigenous groups. As a result of these transfers and of earlier transfers of land to indigenous persons in the course of the agrarian reform undertaken by the Alessandri Government (1958-1964), the total area of land owned by indigenous persons will be considerably larger than the area they owned at the time of the pacification of the frontier (CERD/C/90/Add.4)."

410. The Norwegian Government has put forward a plan of action for the Lapp settlement areas (Report No. 13 to the Storting). With regard to agriculture, it aims to provide financial assistance to the Lapp agricultural areas, over and above the aid schemes in force today. According to this report to the Storting, the expansion of these farms is desirable since they are currently too small and ineffective. In addition, it is stated that efforts will primarily be directed towards increased milk production, and the obvious course in future will be to prepare plans aimed at combined farms with subsidiary sources of income such as inland fishing, berry-harvesting and tourism. Emphasis will be placed on raising the level of expertise through the initiation of courses.

411. On certain aspects of a possible agrarian reform programme in the United States of America, one author writes:

"There are 10.7 million acres of individually owned Indian land in trust with the Federal Government. Original allotments of the land were in the name of one individual. However, upon the death of the original owners, and the death of subsequent heirs, the ownership of this land has become so fractionated that many owners cannot effectively use the land. The result is that much of it is not used or is leased by the BIA on behalf of the owners and the income divided in accordance with percentage of ownership. It is hard to do anything with land in multiple ownership because of difficulty in contacting all owners and obtaining their agreement to a proposed sale, lease, or other use. Fractional shares of individual ownership in a piece of land may be such grotesque figures as 837/4,515,840. Payments to many owners from lease income or sale may be 10 cents or less. The administrative costs to the Government are great.

"Solutions have been proposed from time to time.

"One of the main proposals was Senator Frank Church's bill in 1961: In 1963 this bill was passed by the senate but not acted upon by the House.

"Provisions of this bill were: Where there were up to ten owners, any one or more owning a 50 per cent or larger interest may request the Secretary of the Interior to sell or partition the land. In tracts with 11 or more owners, the requirement is reduced to one or more owning at least 25 per cent of the land. There were provisions to protect the tribe in the event the land constituted a key tract. Where land was in part owned by individuals with unrestricted interests the above provisions would apply only upon agreement of the non-trust owners. If non-trust owners do not agree, the Secretary, upon percentage request indicated above, can consent to a judicial partition for purchase at appraised value or to meet the high bid. The tribe also had the right to meet the high bid. Trust interests in minerals was also authorized to make loans for the purchase of such lands. Authorization was provided for land consolidation sales or exchanges between tribes and individuals. Indian testimony on the various proposals has made clear that any solution must include the following:

1. retention of land title, to the maximum extent, in Indian ownership; and
2. recognition of the equity of Indian owners.

In addition to the above, the executive and the Congress have indicated that the solution must: (1) not place large demands on the Federal Treasury for its accomplishment; and (2) provide a means for substantially eliminating the problem." 124/

124/ Theodore W. Taylor, The States and their Indian Citizens, United States Department of the Interior, Bureau of Indian Affairs, Washington, D.C., 1972, pp. 118-119.

412. In India according to one source:

"In view of the excessively high proportion of landless peasants in the active population of the Scheduled Castes and Tribes, it is clear that any programme for their economic development should invariably envisage a plan to provide them with land for cultivation.

"The three sources of available land are: virgin or vacant land, land freed in pursuance of provisions fixing maximum farming areas, and land given to the Bhoodan and Gramdan movements. Some of the states have issued laws or regulations granting preferential treatment for agricultural workers from the Scheduled Castes and Tribes in the redistribution of available land.

"TABLE VI ALLOTMENT OF LAND TO SCHEDULED CASTES

State or Territory	Form of reservation	Share allotted 1965-66 (as % of all land distributed)
Bihar	Preferential right	30.1
Gujarat	Preferential right	68.1
Kerala	25 per cent (Castes and Tribes)	11.2
Madhya Pradesh	Preferential right	18.3
Maharashtra	None	39.2
Mysore	50 per cent (Castes and Tribes)	28.6
Rajasthan	25 per cent (Castes and Tribes)	2.8
Uttar Pradesh	Preferential right	38.0
Assam		20.5
Himachal Pradesh	Preferential right	65.9
Tripura	Preferential right	8.6
Madras	None	37.0

"Table VI indicates the provisions in this respect and the actual allotment of land to Scheduled Castes in twelve states or territories in 1965-66.

"Rather paradoxically, in the two states where no action has been undertaken to establish preferential treatment (Maharashtra and Madras), the share allotted to Scheduled Castes has been among the highest.

"The reasons why the populations fail to exercise their rights include the poor quality of the land available, the absence of loans or facilities enabling them to work it, the complexity of the procedure involved, the fact that the land allotted has to be paid for (sometimes by auction, as in the state of Uttar Pradesh), and probably in many cases ignorance of the existing provisions. The way these measures have worked in practice provides clear evidence that it is not enough just to establish preferential treatment: the proper conditions enabling the beneficiaries to take full advantage of it must also be created." 125/

125/ J-P. Arles, "The Economic and Social Promotion of the Scheduled Castes and Tribes in India", International Labour Review, vol. 103, No. 1, January 1971, pp. 45-48.

413. The Government of Costa Rica reports that the Executive Decrees mentioned earlier in this chapter "show that appropriate measures are being taken".

414. One author reports that, in Paraguay, measures have been taken at various times to bring about agrarian reform in the country, to divide rural properties of more than a certain size and to reserve land for the settlement of indigenous groups and persons. Article 2 of Act No. 852 of 22 March 1963 setting up the Rural Welfare Institute states that:

"The Institute's aim is to change the agricultural structure of Paraguay and to integrate the rural population into the economic and social development of the nation through legislation that will make it possible gradually to eliminate large estates and smallholdings and to replace them by a just system of land ownership, occupation and exploitation. Such legislation will promote the equitable distribution of land and the effective organization of loans, production and marketing, thereby helping rural producers to achieve economic stability, the guarantee of their freedom and social well-being".

Article 1 of Act No. 662 of 27 August 1960 on the proportional allotment of large land holdings reads: "Properties with 10,000 hectares or more of land that is suitable for agriculture shall be subject to the system of proportional allotment established under this Act".

On 13 December 1972, Dr. Juan Manuel Frutos, the Chairman of the Board of the Rural Welfare Institute, stated, in his note A.No.28-4 containing a copy of Decision No. 1573 and addressed to the Chairman of the Indigenous Association, that:

"In this connection, we wish to inform the Association that the Institute has duly taken account of the problems of indigenous persons, who, like all other inhabitants of the Republic, have the right to protection by the State of their lives, physical integrity, liberty, security, property, honour and reputation, in accordance with article 50 of the National Constitution. To that end, many parcels of land have been set aside throughout the national territory for the settlement of indigenous groups and many national settlements have been established with a view to integrating their members into civilized society as useful citizens of their country." 126/

415. On the allocation of land to "indigenous settlements", the following information was provided in an official document: "... the Rural Welfare Institute has set aside for indigenous settlement 100,000 hectares of land in various parts of the Republic. The indigenous settlements will develop according to their own social and political characteristics in co-operation with technical teams from agencies in the public and private sectors. These technical teams will work together with the indigenous authorities in the communities to help them find solutions which will be based on their present cultural position and will lead to integration into national society.

126/ Ram3n C3sar Bejarano, "Solucionemos el Problema Ind3gena (Protecci3n de sus Derechos)", ABC Color, 24 December 1972.

It should be noted that the measures are being taken in Government land areas and for communities which wish to settle in such areas. To date, there has not been a single case in which indigenous populations have been moved. In every case, they have been settled in the areas where they already lived." 127/

416. During the International NGO Conference on Discrimination Against Indigenous Populations in the Americas, 1977 (Palais des Nations, Geneva, Switzerland, 20 and 23 September 1977), it was reported that, in recent editions of European newspapers, land in Paraguay was being offered to potential buyers (immigrants to the country). It was stated that, at least in some particular cases, the prices published in the newspapers were lower than those being charged to Paraguayan indigenous persons seeking land.

417. The Special Rapporteur had before him an advertisement published in a newspaper of the Federal Republic of Germany, the Frankfurter Allgemeine Zeitung, dated Friday, 29 April 1977 (No. 99), page 31, offering land at \$US 120 per hectare. According to reports, the asking price in Paraguay at the time was \$US 140 to 150 per hectare. It was also reported that the argument in support of the price difference was that the aim was to attract immigrants to the country with the inducement of being able to purchase land cheaply.

418. The New Zealand Government states:

"Finally, under the Maori land development programme finance is available to buy non-Maori land for the settlement of Maori farmers, or to increase the holdings they already have. Some fairly substantial areas of Government-owned land are also being developed by the Maori and Island Affairs Department for the eventual settlement of Maori farmers. The area of Government land being developed for this purpose at present is over 7,000 hectares.

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

"In general insufficient Maori land has been preserved to enable more than about one quarter of the present Maori population to derive a living from it. Agrarian reform programmes - confined mainly to those of Ngata in the 1920s and the labour government of the 1930s - have been entirely restricted to land still in Maori ownership: very little land has been bought back."

420. During the Special Rapporteur's official visit to New Zealand several persons stated that:

"the unavailability of land for agricultural application by Maori persons or groups was one of the major causes of the influx of the Maoris to the cities. The insufficient amount of Maori land available is a result of a past official policy of legal and illegal acquisition of Maori land by Pakehas."

127/ Report submitted in 1973 by the Government of Paraguay under article 22 of the ILO Constitution relating to the application of the Convention on Indigenous and Tribal Populations, 1957 (No. 107), page 1.

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SUB-COMMISSION ON PREVENTION OF
DISCRIMINATION AND PROTECTION
OF MINORITIES

Thirty-seventh session
Item 10 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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XVIII. POLITICAL RIGHTS

A. International provisions

1. The international Bill of Human Rights includes a number of provisions concerning political rights and related stipulations.

(a) The Universal Declaration of Human Rights contains specific provisions in article 21, as follows:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right to equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

This article should be read together with the following stipulations:

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

(b) The International Covenant on Civil and Political Rights contains specific provisions on political rights in article 25, as follows:

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

This article should be read together with the following stipulations:

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or public order (ordre public), or of public health or morals.

Article 20

1.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

2. The International Convention on the Elimination of All Forms of Racial Discrimination provides inter alia for political rights in article 5 (c), which should be read together with paragraph (d), subparagraphs (viii) and (ix), of the same article and with articles 2, 6 and 7 of the Convention, as follows:

"Article 5

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to 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, notably in the enjoyment of the following rights:

"...

"(c) Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

"(d) Other civil rights, in particular:

"...

"(viii) The right to freedom of opinion and expression;

"(ix) The right to freedom of peaceful assembly and association;..."

These provisions have to be read together with those in articles 2, 6 and 7 as follows:

"Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

Article 6

States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

Article 1 of the Convention defines "racial discrimination" and paragraph 4 of that article contains the following provision.

"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

B. Initial remarks

3. The real significance for indigenous populations of the provisions quoted in paragraphs 1 and 2 above depends on many circumstances which may vary from country to country and even from region to region within the same country.

4. It must be pointed out that, as is well known, the effective exercise of the rights set out in these provisions is affected everywhere by a number of factors, particularly those of an economic and social character. In the case of indigenous populations, the effective exercise of political rights is affected by a long list of complex circumstances which transcend any formal and abstract recognition embodied in the constitutions and other fundamental laws of the countries where such populations are to be found. Although not entirely absent, explicit de jure discrimination is infrequent. Generally speaking, the factors responsible for preventing indigenous populations from effectively exercising those rights which are formally granted to the population as a whole, or from participating in the electoral or consultative processes otherwise than within the strict confines of the area they inhabit, are to be found in the de facto situation. Their economic, social and cultural way of life sets them substantially apart in this regard. Their prevailing concern with local affairs has tended to confine their action almost entirely to the region in which they live. This tendency is exaggerated in the case of isolated populations, such as certain groups of forest-dwellers and mountain-dwellers who, by virtue of their complete physical isolation, have absolute control over their own affairs, but, at the same time, lead strictly separate lives from the rest of the population of the country. A similar sort of situation may prevail in the case of nomadic and semi-nomadic populations whose isolation is relative. The presence of indigenous populations in these areas of refuge is often the direct result of the expansionist tendencies of the dominant population during the colonial period or even during the independent life of the country.

5. There is a whole complex of pressures which have continued to impinge on these groups, keeping them, whether deliberately or not, in a state of physical and institutional isolation. It is this process of pressure and defensive action which can be held responsible in not a few cases for the ignorance of the official language and the illiteracy which in practice prevent greater participation by these groups in the consultative and voting processes or election or appointment to public office outside their own communities. The same process is responsible for eliminating from books and other publications and from the institutions and practices imposed by the dominant groups any information concerning, or consideration or recognition of, the political institutions, practices and sensibilities of the indigenous populations. Furthermore, whenever indigenous populations live in contact with other non-indigenous population groups which have assumed a predominant position, they have suffered varying degrees of interference in their internal organization and methods of control and this has seriously affected their own socio-political processes inside their communities.

6. The range of factors relevant to the situation of indigenous populations in the various countries in which they live could have been made clear only if the information available had been based on a close and systematic scrutiny of that situation. However, this is not the case. The information available in connection with the present study is mainly of a fragmentary nature and relates only to a few situations.

C. Discrimination and the elimination thereof

1. Introductory remarks

7. The information available in this regard reveals no clear-cut cases of specific de jure exclusion of indigenous inhabitants from the right to vote or to be elected or appointed to public office. Nor is there any information concerning systematic denial, limitation or restriction in law in connection with their rights of peaceful and unarmed assembly or of association for political purposes and their freedom of expression for these ends.

8. In practice, however, even without such legal provisions there can be serious limitations in this regard. Although, for the purposes of the present study, the formal recognition of these rights is of lesser interest than the possibilities open to indigenous populations for the effective exercise of any rights that other segments of the population can in fact exercise fully, mention should be made of the basic provisions in force as they emerge from the information gathered. Because this information does not provide a basis for comparative analysis, the account that follows will deal mainly with certain specific cases in each country. Only in a few instances was it possible to present any kind of comparative analysis.

9. In the countries for which information is available, the law makes provision for all citizens, without distinction as to race, colour, or national or ethnic origin, to enjoy equality with respect to political rights, in particular the rights to participate in elections, to vote and to stand for election and to take part in the government as well as in the conduct of public affairs. In most cases, these rights are enshrined in the Constitution. Usually the Constitution sets out the qualifications and disqualifications for persons entitled to vote in an election of members to a national Parliament or legislative assembly and to be elected as members of such bodies, the basic criteria of the electoral system to be followed at such elections, and the intervals at which these elections shall be held. It also establishes machinery such as elections commissions or tribunals for the purpose of ensuring impartiality and compliance with the provision of the law in the registration of electors and the conduct of elections.

10. It must be stated, however, that even though the law may accord to all persons within a country the right to vote and to stand for election, there are a number of circumstances which may prevent the exercise of that right by all persons on an equal footing. In some cases, the failure of members of a non-dominant group to take full advantage of the right in question may be due to historical factors, economic opposition, educational opportunities or some form of existing de facto discrimination. For example, despite the fact that no individual or group may today be excluded by law from suffrage, the members of certain non-dominant groups appear to face a number of obstacles in achieving full and free participation in electoral and political processes. Indigenous voter registration and political participation have been slow to take effect or actually made difficult in some areas.

11. Despite significant progress in many areas, indigenous candidates and voters are reported to have experienced hostility on the part of non-indigenous persons and many forms of discrimination by State and local governmental officials and bodies, political parties, and public and party officials. False information, fraud and outright intimidation are apparently still used in some countries to

block, weaken or neutralize the indigenous vote. Measures have been taken to change the boundaries of constituencies where indigenous voters are in the majority, so as to reduce their voting strength and consolidate predominantly non-indigenous districts. Measures adopted to prevent indigenous persons from becoming candidates include: abolishing elective offices, extending the terms of incumbent officials, substituting appointment for election, increasing filing fees, delaying or refusing registration.

12. Nevertheless, there is evidence of increasing participation of indigenous people in the electoral processes of all the countries surveyed in recent years.

2. Consideration of the information available

(a) General statements

13. Before entering upon the examination of concrete statements and provisions dealing with more specific aspects of political rights, some general statements received from Governments which cover a wide range of subjects will be quoted.

14. The Government of Denmark has stated in respect of Greenland, that:

"The provisions laid down by the Central Governmental Authorities relating to the rights referred to under outline item 71 do not refer to any specific groups of the population; they refer either to the population of the realm in its entirety (the provisions of the Danish Constitution concerning the right to vote, and eligibility for the Folketing, and concerning freedom of association, of assembly, and of speech and expression) or to the entire population of Greenland (the provisions concerning the right to vote, and eligibility for the Greenlandic Landsting, and for the Greenlandic municipal councils)."

15. The Government of Bangladesh has stated that "in Bangladesh, every citizen enjoys the same political rights and privileges, irrespective of his religion, race, caste, sex or place of birth or origin."

16. The Government of New Zealand has transmitted the following general statement in addition to the specific information it has also provided on several aspects of political rights. The Government writes:

"Both in national elections and in local elections all citizens aged 21 or over who have the necessary residential qualifications are entitled to vote or to stand as candidates for election."

17. The Finnish Government has stated that

"there are no denials or restrictions affecting the right of the Lapp population to participate in elections or other popular consultations; their right of access to elective or non-elective public office, their right of peaceful assembly and association for political purposes, or their right to form or join political parties, or their freedom of expression to those effects."

18. The Australian Government, on its part, has reported that:

"Aboriginals share full political rights with other Australians. They may enrol, vote and stand for election at all levels of government. Aboriginals are however excused from compulsory enrolment under the Commonwealth Electoral Act although they may, of course, enrol voluntarily. Aboriginals also share with all other Australians the same rights of peaceful assembly and demonstration, association for political purposes, and formation of and membership in political parties."

19. Some Governments have included in their information data on past restrictions that have now disappeared or have referred to difficulties now confronting indigenous populations in the effective exercise of their political rights.

20. Thus, the Government of Canada, referring to past restrictions, stated:

"In 1950 Eskimos were granted the right to vote in federal elections, and in 1960 restrictions against voting by registered Indians were removed. There is now no discrimination against [Eskimos with regard to] voting, holding political office or participating in the electoral process in federal, provincial or territorial elections."

21. The Government of Australia has added to its information quoted above (para. 18) some data with reference to the exercise of political rights by Aborigines and states:

"It is likely that educational, economic, cultural and linguistic factors hinder many Aboriginals from effectively exercising their political rights, but Aboriginals have in recent years become increasingly politically aware and urban Aboriginals are generally able effectively to exercise their political rights. Special educational programs are carried out by the Australian Electoral Office. The National Aboriginal Consultative Committee, too, provides a training ground for Aboriginals wishing to acquire wider political influence."

22. The Norwegian Government has included some references to the fact that the timing of certain elections sometimes poses difficulties for Sami voters, although there are no restrictions whatsoever on their political activities. The Government also states that there are some language difficulties:

"... There are no de jure or de facto obstacles to participation in political activities. At elections the language problem may prove difficult. At times when elections are being held, the nomadic Lapps are heavily occupied so that it may be desirable to enable them to vote by post. The Lapp organizations have now taken up this question."

23. The Government of the United States of America, in addition to other information supplied in connection with political rights, has stated in general terms that:

"... representation of American Indians and Alaska Natives in the governmental structure has been, largely, a matter of happenstance. The indigenous person has won an election by virtue of his ability to get votes from a constituency that he then represents."

24. On this question, in general, it has been written that

"... the heart of the question ... is ... Do Indians or can Indians participate not only in elections of their tribal government but in all other levels of government, county, State, and federal? The answer is unfortunately: 'not, unless the individual is willing to expend great effort'.

"The poor representation of American Indians and Alaskan Natives in the governmental structure has not been the result of happenstance. Instead the reason can be pointed out exactly, the systematic exclusion of Native Americans from the elective and governmental process. The treaties referred to in the United States answer provided that Congress must approve; this approval was the condition that was not met." 1/

25. It has been added:

"Although Indians finally received the legal franchise in all States in 1948, 24 years after Congress granted it, Indians have been systematically denied registration, the process by which one can be eligible to vote. This is done by not making a register available, not providing bilingual explanations or simply refusing to register people. Another major method by which Indian franchise becomes meaningless is through gerrymandering, the drawing of district lines to dilute the strength of a group or area. This is done by either including all the Indians in all districts making their vote worth less than a less popular non-Indian district or splitting up the Indian population so that they are outnumbered in every district." 2/

26. It has been stated in an official report that in the United States of America:

"Indians constitute less than one half of 1 per cent of the population of the United States and are widely dispersed throughout the country. Hence, they are not a particularly effective political force. Therefore, historically Indians have depended greatly on their unique legal status to protect them from the erosion of their rights by non-Indian private interests and State and local government." 3/

27. The Government of Australia reports:

"Since Aborigines comprise less than 1 per cent of the total population, are predominantly rural and scattered throughout Australia, and were by tradition organized effectively only into small local units, their failure to become a political force is not surprising. Political awareness amongst Aborigines is, however, increasing rapidly."

1/ American Indian Law Newsletter, vol. 7, No. 11, Special issue containing "the American Indian response to the response of the United States of America", p. 53. See also government information quoted in paragraph 128, below.

2/ American Indian Law Newsletter, vol. 7, No. 11, p. 53.

3/ Report prepared by the United States Commission on the Conference on Security and Co-operation in Europe for the European Review Conference in Madrid (November 1980), p. 150.

28. Turning to the more specific information which refers to concrete aspects of the question, it should be stated from the outset that, in general, there is only information on basic de jure aspects, with no significant discussion of the actual application or enforcement of the relevant provisions. All the data available in connection with the present study will, nevertheless, be discussed in as concrete terms as possible. Aspects of the right to vote and to be elected, as well as that of access under conditions of equality to non-elective public office will be dealt with. The rights of assembly, of association, including formation of and admittance to political parties, will then be discussed, together with whatever data are available on the right to freedom of speech and expression of political opinions and views. It should be borne in mind that this chapter is not intended to be an exhaustive analysis of political rights per se. It focuses on elements in the information available for the study which would indicate any differences in the way in which such rights are implemented with regard to the indigenous populations, particularly differences which may be prejudicial to them.

(b) The right to vote

29. Generally speaking, in all countries surveyed, the requirements for voting are: nationality of the State in question, 4/ attainment of a given age (usually 18 or 21) and freedom from civil interdiction (for example, civil incapacity, insanity, moral turpitude) and from disqualification from the exercise of political rights (for example, conviction of a serious crime).

30. In some countries, certain legal provisions would exclude some citizens from the right to vote like other citizens because they do not fulfil specified literacy or other educational requirements or do not have other skills referred to in the law in general terms which leave a wide margin for interpretation.

31. The Brazilian Constitution excludes illiterate persons from the right to register as voters. The Constitution provides:

"Article 147. Brazilians over eighteen years of age registered as prescribed by law shall be voters.

"...

Paragraph 3. The following may not register as voters:

- "a. Illiterate persons;
- "b. Those who do not know how to express themselves in the national language;
- "c. Those who are deprived, temporarily or permanently, of political rights."

4/ In three of the countries surveyed, however, aliens may vote in municipal elections, provided they satisfy certain conditions such as residence (Bolivia, Constitution art. 220; Paraguay, Constitution art. 312 and Venezuela, Constitution art. 111).

32. Act No. 6001 provides:

"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."

33. Further, concerning the enjoyment of the general rights of citizenship without discrimination, the Special Rapporteur notes that, although under article 147 of the Federal Constitution Brazilians over 18 years of age have the right to vote, under section 9 of Act No. 6001 "an Indian may not be emancipated from tutelage and therefore acquires the right of citizenship until he is 21 years of age and only if he has 'the necessary skill to perform a useful activity' ..."

34. The Philippine Constitution provides that "it shall be the obligation of every citizen qualified to vote to register and cast his vote" (article V, section 4). Other provisions seem, however, to disqualify certain indigenous persons from voting like other citizens, but grant them the right to elect their own representatives to certain public bodies. It has been written, in fact, that:

"... Illiterate Aborigines do not have voting rights, but those who fulfil certain conditions regarding education may elect their own representatives to the various government bodies." 5/

35. Provisions making literacy a prerequisite for the right to vote have now disappeared from constitutional or statutory texts in several other countries. 6/ Elsewhere, a distinction has been drawn making the vote obligatory for those who know how to read and write and optional for those who do not. Most of these provisions have now also disappeared from constitutional and statutory law. One country, however, makes that difference in its Constitution adopted in 1977 and presently in force. 7/

36. The fact that citizenship was only "conferred" on American Indians in the United States of America in 1924 and that some had not asked for it or wanted it, and all received legal franchise in all states in 1948 has been discussed earlier. 8/ The statement of the Canadian Government that Inuits were granted the right to vote in federal elections only in 1950 and restrictions against voting by registered Indians were removed only in 1960, has also been quoted before. 9/

5/ International Labour Organisation, Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries, Studies and Reports, New Series, No. 35 (Geneva, International Labour Office, 1953), p. 550.

6/ For example, in Chile (1925 Constitution, art. 7), Ecuador (1946 Constitution, art. 17) and Peru (1933 Constitution, art. 86).

7/ Ecuador, Constitution of 1977, article 33, which reads: "Voting is universal, direct and secret, obligatory for those who know how to read and write, and optional for illiterate persons."

8/ See paras. 24 and 25 above and paras. 55-59 of chapter VII on basic principles (E/CN.4/Sub.2/476/Add.2).

9/ See para. 20 above.

37. There are, however, other countries in which full citizenship is still granted only to some indigenous peoples and not to all. Thus political rights are exercised only by those who have full citizenship. This appears to be the case in Paraguay, since, according to information supplied by the Anti-Slavery Society, political rights have in fact been "granted to the minority among the Indians, who have full citizenship, ... but not to the others". 10/

38. Even where all enjoy full citizenship in law, some difficulties may remain which restrict the exercise of voting rights in practice.

39. Thus, the Government of Costa Rica states:

"Ninety per cent of the indigenous population do not participate in elections or other consultations of the people because they do not have an identity card, which for various reasons - schooling, culture - they have not been able to obtain or keep valid. There are no legal limitations, once an identity card is obtained."

40. In the United States of America, certain difficulties encountered by American Indians in registering as voters have been mentioned above. 11/

41. At the local level, the indigenous inhabitants have been having a more satisfactory record of participation and have been taking an active part in many activities and civic affairs of political importance in the immediate locality in which they live and in local government in the rural areas in which they are concentrated. In recent times, there have been instances of participation by these populations in similar activities in urban centres.

(c) The right to stand for election and to be elected

42. In all countries covered by the study, a candidate for elective public office must meet the requirements for exercising the right to vote and, in addition, he must possess the necessary abilities and qualifications to carry out the relevant functions satisfactorily. The conditions, abilities and qualifications for access to non-elective public posts usually follow a similar pattern in the different countries.

43. A specified age, higher than that required for voting is often required for standing for election to higher posts, such as senators, or representatives in national assemblies. 12/

10/ Information furnished on 3 September 1976.

11/ In paras. 24 and 25.

12/ This happens in all countries surveyed. For example, an age limit of 30 years is set in Pakistan for election to the Senate (Constitution, art. 62(c)) and in Norway for election as a representative (Constitution, art. 51). The minimum age in Brazil for election to the Federal Senate is 35 (Constitution, art. 41). In India the minimum age is 25 for election to the House of the People in Parliament and 30 for election to the Council of States in the same Parliament (Federal Constitution, art. 34 (b)).

44. In Ecuador, candidates for elective office must be affiliated to a political party as a necessary requirement. 13/ Similarly, in Sweden, the seats in the Riksdag are distributed among parties in accordance with a system of representation which is proportional to the votes obtained in the election. 14/
45. In certain countries the law prevents indigenous people from standing for election and being elected to public office.
46. This is the case in Brazil where "persons who may not be registered may not be elected to office" (Federal Constitution, art. 150). Since, as has been discussed above, 15/ illiterate persons may not register as voters, it follows that indigenous people who are illiterate, may not stand for election.
47. In Paraguay many indigenous persons may not stand for election to public office since not all of them have been granted full citizenship. This has meant that indigenous people tend not to be represented in public office. 16/ The Anti-Slavery Society which has submitted this information adds, as an example, that there is no Indian deputy in the National Assembly. 17/
48. In other countries, there is no de jure restriction on indigenous people standing for election and being elected to public office, but de facto there are obstacles which ultimately curtail their participation in political activities, including that of being elected. This is the case, for example, in Costa Rica, where according to information furnished by the Government up to 90 per cent of the indigenous population does not take part in elections or other popular consultations because they have no knowledge of the identity card needed to do so. Once they have obtained the card, there are no legal limitations on their participation in electoral and political processes. 18/
49. According to information quoted above, 19/ in the United States of America the electoral roll is not open to all indigenous people, some are simply refused registration or the necessary explanations in a language they can understand in order to register and thus become eligible to vote as well as to stand for election.
50. Other practices include "gerrymandering" or other dilution tactics, through which the relative numerical strength of the indigenous vote is diminished or neutralized so that they are outnumbered where they could otherwise be very important groups or even constitute a majority.

13/ Constitution of 1977, article 37, which reads: "Only legally recognized political parties may present candidates in a public election. In addition to the other requirements imposed by the Constitution, to run as a candidate in any public election a person must be affiliated to a political party."

14/ Constitution, article 14.

15/ See paras. 31-33, above.

16/ See para. 35, above.

17/ Information submitted on 3 September 1976.

18/ See para. 37, above.

19/ See para. 25, above.

51. Similar practices are used in the Central Tribal Belt in India according to information quoted below 20/ in the context of a discussion of questions pertaining to the autonomy of tribal populations in the areas they inhabit and their recognition as local or regional politico-administrative entities.

52. In several of the countries for which information is available, the indigenous population has representatives at various levels in national Government. They participate, for example, in the national and State legislative bodies.

53. Thus in 1975, according to information furnished by the Government of Australia, three Aborigines had been elected to Australian parliaments under universal franchise. In late 1974 Mr. Hyacinth Tungutalum of Bathurst Island was elected to the Northern Territory Legislative Assembly, and in the 1974 Queensland State elections, Mr. Eric Deeral, of Hops Vale and Cairns, North Queensland, was elected to the Legislative Assembly. Senator Nevills Bonner of Queensland retains his seat in the Australian Senate.

54. The Government of Canada has stated that:

"The first Indian, Frank Calder, a Nishga chief, was elected to the British Columbia legislature in 1949.

"... two native people sit in the federal House of Commons, having been elected in the federal election of October 1972: Len Marchand, M.P. for Kamloops-Caribou, and Wally Firth, M.P. for the Northwest Territories ...

"Several native people have been elected to the Territorial Councils of the Northwest Territories and the Yukon."

55. The statements of the Government of the United States of America to the effect that indigenous persons have won an election by virtue of their ability to get votes from a constituency that they then represent, as well as the assertion by the Government that "representation of American Indians and Alaska Natives in the Governmental Structure has been a matter of happenstance" have been referred to above. 21/

56. The Government has further stated in this connection, that:

"Indian tribes are governed, generally speaking, through a constitution that has been ratified by the Secretary of the Interior and that spells out how a tribal government is elected, how long it serves the tribe, and who is entitled to vote in tribal elections. The rights of peaceful assembly are guaranteed indigenous people by the United States Constitution as are the rights of peaceful assembly of all other citizens.

"Denial of rights of an indigenous person by his or her tribal government generally are redressed at election time. However, at least one protest on an Indian reservation - the protest at Wounded Knee on the Pine Ridge (Oglala Sioux) Reservation - came about, in part, because a dissident group of Oglala Sioux tribal members did not agree that the tribal government represented their point of view."

20/ See paras. 168 and 169, below.

21/ See para. 23, above.

57. In this connection it has been written:

"It is ironic that the United States chose only to respond by citing the existence of tribal governments and an isolated incident on the Pine Ridge Reservation in South Dakota while at the same time Navajo People in Arizona are being denied their franchise through illegal and immoral means.

"Indians have the right of peaceful assembly and freedom of speech but without a meaningful franchise these rights are void. Rights in a vacuum are not rights.

"While it is true that the major problem [is one] of determining eligibility, assuming eligibility in a recognized tribe is [based on] ancestry, the tragedy of this process is that people with little or no tribal blood are included on some rolls while people with the requisite amount or more are excluded. This procedure is particularly prevalent in areas where mineral wealth is present and per capita payments will be made.

"The United States has also failed to provide adequate help for similar tribes that have been ignored in making a correct updated roll. Of course proving ancestry is to no avail if the tribe to which one belongs is no longer recognized." 22/

58. It has been indicated that one of the most dramatic problems which led to activities of the American Indian Movement was corruption in the Bureau of Indian Affairs and within federally controlled "elective systems" of government on Indian reservations. 23/

59. It has also been pointed out that the Wounded Knee siege was caused in part by the fact that the Oglala Sioux were not allowed to elect their own officials themselves but had to accept persons imposed by the Bureau of Indian Affairs. 24/

60. As to indigenous representation in local government it has been pointed out that in Finland there is mixed Lapp and non-Lapp representation in the Communal Councils of the provinces where the Lapps reside, as other groups of population also reside there. The municipal and rural communes constitute local administrative entities which have been granted, by law, a far-reaching right to local self-government.

61. In New Zealand as a result of the local elections in 1971, 13 of the 21 cities elected from one to four Maori councillors, thus bringing to 22 the total number of Maoris elected to the municipal councils.

62. In any event, the indigenous populations and some non-governmental bodies complain that, in spite of the growing non-indigenous vote for indigenous candidates, the latter have so far achieved a merely symbolic representation which does not give them an effective say in the decisions of the multirepresentational assemblies to which they belong.

22/ American Indian Law Newsletter, pp. 53-54.

23/ John Mohawk, "The sovereignty which is sought can be real", Akwesasne Notes, vol. 7, No. 4, 1975, pp. 34-35.

24/ "Facts on file", Weekly World News Digest, 1973 (New York), p. 166.

63. Thus, for example, in New Zealand - a country in which the participation of the indigenous population in local government is most apparent - the Government rightly notes as important that:

"There is a long tradition of Maori participation in local government in rural areas and, in the last 15 years, they have been playing an increasingly prominent part in urban areas. The last local body elections were held in 1971. There are 21 cities in New Zealand and in the 1971 elections 13 cities elected from one to four Maori councillors. Altogether, 22 Maoris were elected to city authorities. Bearing in mind the fact that there are some cities with only a handful of Maori residents, it is clear that the residents of most cities have no prejudice against Maoris in their controlling authorities. There is not one city where the Maori proportion of the population is sufficient to elect one of their number without substantial support from non-Maori citizens. Maoris were also elected in many boroughs and counties. On a number of occasions Maoris have been elected as mayors of boroughs and chairmen of county councils. In the last elections two cities elected Maori Deputy Mayors."

64. On the other hand, the Citizens' Association for Racial Equality, a domestic non-governmental organization that is working towards more effective equality of the various population groups in the country pointed out, in its statement to the Special Rapporteur during his official visit to that country in June 1973, that:

"A great network of local bodies and ad hoc organizations exists in New Zealand, and Maoris are invariably eligible for election or appointment to these. But their minority status means that they are seldom able to exercise effective control over them, let alone an effective voice within; their representation, at best, is usually of a token nature. The result is that Maoris are invariably left out of the decision-making process - and often from decisions that vitally affect them (or their children)." 25/

65. The separate Maori and non-Maori representation in Parliament is discussed below in section D,2. In the case of local body elections, the situation is different. All citizens resident in a local authority area vote on a common roll. Cities are governed by city councils, smaller towns by borough councils and the rural areas by county councils.

66. In this connection, reference should be made to the provisions in force in some countries, whereby certain seats in the local and national assemblies are reserved for certain disadvantaged population groups, including indigenous populations.

67. In New Zealand, there is separate Maori representation in Parliament and in the Cabinet. Separate Maori representation was provided for by the Maori Representation Act, 1867. Today, the statute law on elections and the life of Parliament is contained in the Electoral Act, 1956. The House of Representatives now consists of 80 members, four of whom are Maori (see paras. 141-147 below).

68. In India, the Scheduled Tribes, which have been included by the Indian Government among those it describes as the "weaker" sections of the population, are entitled to proportionate representation in state assemblies and the National Parliament. These arrangements are described in more detail in paragraphs 138 to 140, below.

69. In Pakistan, by Order No. 13 of 1970, seats have been allocated to the centrally administered tribal area in the National Assembly (see para. 137, below).

25/ Information furnished orally to the Special Rapporteur in Auckland during his official visit to New Zealand in June 1973 and later confirmed in writing.

(d) The right to equal access to public service

70. In all the countries for which information is available, the law imposes no restriction on the eligibility of nationals to access to the public service on the ground of race, colour, national or ethnic origin. The right to take part in the Government, as well as in the conduct of public affairs at any level, and to have equal access to public office is based only on personal competence and merit with no restrictions other than those established by law. In many countries, the right to hold public office is restricted to citizens and certain of the highest administrative and political offices must be held by citizens by birth and not by naturalized persons.

71. Initial appointments to career posts in the administration are in most cases made on the basis of competitive examinations as a general rule.

72. In one country (Guatemala) a fundamental law provides that "in filling public posts, there shall be no discrimination based on race, sex, civil status, religion, birth, social or economic position or political opinion". According to the same law any discrimination on political, social, religious, racial or sex grounds which harms or favours public servants or persons aspiring to enter the Civil Service shall make the public officials responsible liable to fines, suspension or in grave cases, dismissal following a hearing before the National Civil Service Board.

73. In many countries indigenous people are markedly underrepresented in appointed governmental posts. The fact that they occupy so few important public posts, or none at all, is largely the result of linguistic, cultural and educational differences, the bulk of indigenous populations often being illiterate in many countries.

74. There are, however, clear cases where there are other reasons, whether in addition to the former causes or independently, for preventing, limiting or restricting access to appointive public office which seriously affect any criteria for bringing about conditions of equal access to such office.

75. For example, the Anti-Slavery Society states that in Paraguay indigenous people rarely occupy appointive public office and never "on any but ... the lowest administrative level". This is communicated together with indications that only some of the indigenous populations in Paraguay have been granted "full citizenship". 26/

76. In several countries, the indigenous inhabitants hold non-elective office in the national Government, including some important posts, since according to the information available, there is nothing to prevent them from holding any office, provided that they have the abilities and qualifications required by law. This, however, as is pointed out, is the stumbling-block for the indigenous populations in these countries. since, until very recently, very few indigenous inhabitants possessed the education and experience required for many of the important posts. For example, New Zealand explains the fact that only one Maori judge sits in its courts by the absence of candidates with the requisite qualifications: namely, being a lawyer and having practised law for a specified

26/ See paras.37 and 47, above.

number of years. A similar situation is to be found in other countries. In all of them, however, it is reported that more and more indigenous inhabitants are pursuing university and professional studies and submitting applications for public posts.

77. The Government of Canada has stated that one Indian Senator has held office in the Canadian Senate, an appointed body.

78. In Guyana, according to an official publication:

"Earnest of things to come in so far as Amerindian development and integration with the rest of the community are concerned is seen in the fact that even now, when far-reaching long-term plans for Amerindian integration are just beginning to be implemented, Amerindian citizens of Guyana are already becoming far more visible than before among the coastal citizenry. Thus the past few years have seen a much greater intake of Amerindians into the army and the police force, the nursing profession, teaching, business, and Government and other offices.

"In 1969, Parliamentary Secretary for Amerindian Affairs, Mr. Philip Duncan, became the first Amerindian citizen to represent Guyana at the United Nations. Mr. Duncan, who was one of the Guyana's team of delegates attending the twenty-eighth United Nations General Assembly, thereby set the pattern for the future participation of Amerindians in the external affairs of the country ..." 27/

79. In Australia the Office of Aboriginal Affairs carries out the directions of the Minister-in-Charge. In the State of Victoria, there is an Aboriginal Affairs Advisory Council created by the Aboriginal Affairs Act, 1967; this Council includes aboriginal members. There is also a Minister for Aboriginal Affairs in this State. Arrangements for a statutory advisory council are being made in the State of New South Wales.

80. In connection with access to non-elective office, the Government of the United States of America reports that:

"... the Bureau of Indian Affairs has had ... Indians as Commissioner[s] ... and, ... [like] various other units of government concerned with Indian matters, has a high proportion of Indian employees that presumably inject Indian thinking into the executive branch of government ..."

81. Reference has been made above in chapter X, Administrative arrangements, paragraph 72, to statutory preference to be granted to American Indians in posts available in the Bureau of Indian Affairs. The low representation existing in these posts despite legislative mandate and judicial adjudication has also been pointed out.

82. What has been called "the failure to comply with a legislative mandate to give employment preference to Indian people within the Bureau of Indian Affairs" 28/

27/ Guyana, Ministry of Information and Culture, "A brief outline of the progress of integration in Guyana", January 1970, pp.33, 61-62.

28/ American Indian Law Newsletter, loc.cit., pp.47-49.

was reflected in Congressman Olsen's report (1970) which stated, inter alia, that most positions occupied by Indians in the Bureau were of a low category and salary and that non-Indians were often promoted to supervisory positions when Indians were available. The cases of Freeman vs. Morton and Mancari vs. Morton have been mentioned as upholding the right of Indians to preferential employment in the Bureau of Indian Affairs. 29/ It was also shown that the number of American Indians employed by the Federal Government in agencies and departments where the Indian preference statutes are not in effect were even lower. The low figures given were said to represent an increase of 0.1 to 1.0 per cent in various levels. 30/

83. The Special Rapporteur has received information from the Government on the more recent situation of Indian employment within the Bureau of Indian Affairs and in agencies and departments of the Federal Government which had shown some improvement. The Special Rapporteur did not receive data on Indian employment in State and local Government agencies and departments.

84. The New Zealand Government has stated:

"In the case of non-elective public offices, the same opportunities are open to Maoris as to non-Maoris. In the ... Cabinet of 20 Ministers there were two Maoris and one part-Maori holding office [in 1973]. In the judiciary there ... [was in 1973] only one Maori magistrate. To qualify for judiciary positions a person must have practised as a barrister for at least seven years. In the past only a few Maoris have qualified in law, which meant that there was little opportunity for a Maori to be appointed to the judiciary. In the last few years, however, the number of Maori lawyers has substantially increased and it may be expected that more will be appointed to the judiciary in future years. In the armed services and the police force there are large numbers of Maoris holding responsible positions. In the public service Maoris are able to apply for any position for which they are qualified and there are in fact Maoris holding positions of responsibility in a wide range of Government departments. In recent years two Maoris have held the position of permanent head of a Government department. With the numbers of Maoris now moving through the upper grades of the public service, there is every prospect of an increasing number reaching top positions."

85. The Citizens' Association for Racial Equality, a non-governmental organization mentioned above (see para.64), has transmitted information to the effect that Maoris

"are underrepresented in the civil service, even in the Department of Maori Affairs where all the important posts are held by Europeans. Civil service procedures for appointments and promotions take little or no account of the different cultural background and patterns of social behaviour of Maoris - and thus it is not surprising that they are underrepresented in positions of responsibility."

29/ Ibid.

30/ Ibid., p.49.

86. The Government pointed out in 1974 that the comments quoted in the preceding paragraph

"do not seem to take proper account of the part which is in fact being played by Maoris in local Government in New Zealand.

"It has already been mentioned, in other material supplied, that important decisions on Maori land development, Maori housing and investments by the Maori Trustee are made by the Board of Maori Affairs which has a Maori majority. Legislation just introduced into Parliament provides for an increase in the number of private Maori members of this Board from four to seven. As the present Minister, who is Chairman, is a Maori, the new Board will comprise eight Maoris and four officials. In addition, District Maori Advisory Committees are being set up throughout the country to exercise delegated powers from the Board. These delegated powers will include the powers to make decisions on many aspects of Government lending to Maoris. So far as the social welfare division of the Department of Maori Affairs is concerned, this is almost entirely staffed by Maoris (and a few Pacific Island Polynesians) from the Executive Director downwards. Persons applying for positions in this service are expected to speak Maori and to have a good knowledge of Maori society and culture."

87. Some countries reserve a certain percentage of positions in the public services and provide special training facilities to candidates belonging to indigenous groups to enable them to compete for higher posts in the administrative and allied services. In some countries the qualifications and standards required have been lowered in order to give indigenous candidates a chance of occupying some of those posts. (See paras.88, 89, 92, 130, 135 and 138 below.)

88. According to information provided by the Government of Pakistan, it has relaxed the age limit by up to three years for minority communities and tribal candidates in certain districts in order to facilitate their access to the public service of Pakistan. (See para.135, below.)

89. According to information from the Government of Chile:

"As to the possibility of being named to public office, whether elective or not, ... they [indigenous people] are subject to the provisions both of the Constitution and of the Administrative Statute. As regards access to public service in areas of indigenous concentration, however, there is a system of assigning them special points in the competitive examinations for such posts in accordance with regulations to be issued by the President of the Republic (Law 17, 729. art.67).

"Apart from this, in the Araucanía area for example, there is a large number of civil servants, especially teachers, who are Mapuches or of Mapuche descent."

90. In other countries, the indigenous populations have been granted special representation in appointive bodies, mainly in the executive branch. 31/

31/ For example in Australia, India, Pakistan and the Philippines. Not so in Malaysia, however, where the Government appoints a person to represent Orang Asli interests in Parliament and this person sits in the Senate. See para.134, below.

91. Thus, according to information provided by the Philippine Government, the President normally includes a qualified member of national cultural minorities as head of one Cabinet-level agency or department. 32/

92. In Pakistan the Constitution provides that for a period not exceeding 10 years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan (section 27 (1)). People of different areas or classes should be enabled - through education, training, industrial development and other methods - to participate fully in all forms of national activities, including their employment in the service of Pakistan. (See para.135, below.)

93. In India, a certain proportion of posts in the public services has been set aside for members of the Scheduled Tribes, and the Government provides special tutoring facilities in order to accelerate advancement to senior posts in the federal civil services. While the provision regarding reservation of seats in the Parliament and State Assembly expires 20 years after the entry into force of the Constitution, those Constitutional provisions concerning reservation of posts in public service are entrenched.

(e) The right of assembly; the right of association; the right to form and join political parties; freedom to express political views and opinions

94. The information available in connection with these matters does not contain any references to provisions applying specifically to indigenous populations. It refers in general to provisions applicable to all persons and does not include any indications as to how these provisions may have been enforced with regard to indigenous populations. The data available are incomplete and fragmentary. It may, however, be useful to indicate briefly the de jure situation as reflected by these provisions, the texts of which are available in connection with the study, pointing out the few references to the de facto situation as it affects indigenous populations.

95. In all countries for which there is information on these matters 33/ provision is made in the Constitution, in other fundamental texts and/or in statutory law for citizens 34/ or the inhabitants of the country 35/ to enjoy - on an equal footing - the right of assembly, the right to participate in public meetings and demonstrations or processions in public places - provided that these

32/ See para.131 below.

33/ No information whatsoever was available on Argentina, Australia, Burma, Chile, El Salvador, Guyana, Indonesia, Laos, Malaysia, New Zealand, Nicaragua, Norway, Panama, the Philippines, Sweden or Venezuela. This, of course, does not imply that these rights are not recognized or regulated in those countries.

34/ As, for example, in Bangladesh, Denmark (Greenland), India, Pakistan and Sri Lanka. Whether this right is attributed only to citizens or to all the inhabitants of the country is not specified in the information relating to Canada, for example.

35/ As, for example, in Bolivia, Brazil, Costa Rica, Ecuador, Guatemala, Honduras, Japan, Mexico, Pakistan, Paraguay, Peru and Sri Lanka.

rights are exercised peacefully and that those participating in such activities are unarmed 36/ - and the right to associate with others for any legal purpose. 37/ In all systems the exercise of these rights is subject to regulation to safeguard, inter alia, public order, public morality and public decency. 38/

96. In some countries provisions also exist establishing the right of citizens to form associations in order to participate in political affairs. 39/

97. Regarding some concrete examples of the formation of their own political parties by the Maoris in New Zealand, the Government has stated that:

"Generally speaking, Maoris tend to support one or other of the main political parties, but it is normal at each general election for small political parties to be formed by Maoris. There is no restriction on their right to do so or against any peaceful assembly and association for political purposes. These freedoms are preserved by the common and statute law for all persons, subject to laws of general application as to public safety, slander, etc."

98. As to Paraguay, it has been stated that:

"There is no special political association of Indians in Paraguay (the Asociación Indigenista being a body of non-Indians). 40/

36/ E.g. Bolivia, Brazil, Costa Rica, Ecuador, Denmark (Greenland), Guatemala, Honduras, Japan, India, Mexico, Pakistan, Peru, Sri Lanka and Venezuela.

37/ E.g. Bolivia, Brazil, Costa Rica, Ecuador, Denmark (Greenland), Guatemala, Honduras, Japan, Mexico, Pakistan, Paraguay and Peru.

38/ See foot-notes 34 to 37 immediately above.

39/ Information is available concerning only a few countries, i.e. Bolivia, Ecuador, El Salvador, Guatemala (which, however, prohibits "the formation or functioning of political parties that advocate the communist ideology or, by their doctrinaire approach, methods of action or international connections, act against the sovereignty of the State or the foundations of the democratic organization" of the country; it is also provided that not less than 20 per cent of those affiliated to a political party must know how to read and write, whereas the percentage of illiteracy among the indigenous population is high - see in this connection Chapter XIII, Education (E/CN.4/Sub.2/1983/21/Add.2, paras.76-85)), Honduras, Mexico, Pakistan and Paraguay (in which, however, "neither the formation nor functioning will be allowed of any political party whose purpose is to destroy the republican and representative democratic system of government or the multiparty system. The subordination of Paraguayan political parties to, or their alliance with, similar organizations in other countries is prohibited. Nor may subsidies or directives be received from abroad.").

40/ Information submitted by the Anti-Slavery Society on 3 September 1976.

"... The Consejo Indígena ... tends to consider itself an informal representative of the Indian community, but its prestige depends on its being supported by Paraguayans, of the Marandú Project." 41/

99. As regards political parties in Suriname, it has been reported that "political parties are racial, but the Government is a coalition of these parties ...". 42/

100. In Guyana an official source provides the following information:

"Although Amerindians have been electing their own village leaders since 1955, Amerindians as a group had no political voice before 1962, when a body calling itself the Amerindian Association was formed. This Association, founded by a group of educated Amerindians, but open to 'all persons genuinely interested in the welfare of Amerindians' numbered 5,000 members in 1969 and had branches in 20 Amerindian villages.

"In keeping with its stated aims and objectives ('... to promote and represent the interests and welfare of Amerindians in Guyana, and to make representation, and to take appropriate actions in these respects'), the Association early became very vocal about the question of Amerindian land rights urging as one of its main planks of existence the granting to Guyana's Amerindians of firm title to all lands occupied by them.

"So successful was this call that by 1965, when the conference for settling Guyana's independence was held in London, special consideration was given by the Guyana representatives at the conference to the question of giving Amerindians titles to their ancestral lands." 43/

101. On political parties in Greenland, Denmark, an author writes:

"There are currently four political parties in Greenland. Two of them still have not established themselves formally as political parties, and are called movements, but are equivalent to parties. They act on the basis of their political programmes, they take part in elections and so on." 44/

41/ The Consejo Indígena is an informal body composed of respected indigenous leaders from various Paraguayan groups. It is closely related to the private Marandú Project whose collaborators selected the first members of the Consejo Indígena. The Consejo gradually gained independence and became a spokesman for indigenous claims, and came to be recognized unofficially by State bodies, namely the Indigenous Affairs Department, as an informal representative of the indigenous population. Ibid.

42/ V.S. Naipaul, The Middle Passage (André Deutsch Limited, London), 1962, p.164.

43/ Guyana, Ministry of Information and Culture, op.cit., p.37.

44/ Helge Kleivan, "Kalaallit Nunaat - The land of the Greenlanders", IWGIA Newsletter, No.22, Copenhagen, June 1979, p.15.

102. These four parties are described as follows by the author:

"'Siumut' [In the early 1970s] a group of young politicians who later formed a moderate socialist party Siumut (i.e. 'Forward'), formulated their strong criticism of the post-war development process. They launched severe attacks on the concentration of the population in a few towns, which was one of the main features of the notorious 'G-60' scheme initiated in 1964. This policy effected the abandonment of many of the outlying settlements, as part of the effort to direct labour to the industrial plants in the towns of West Greenland. The remaining settlements stagnated due to a pronounced concentration of investments in the larger population centres only."

"'Atassut' (i.e. 'the connecting link') is a movement that has been established in opposition to Siumut. It stresses the importance of the best possible relationship between Greenland and Denmark, hence the name of the movement. Atassut is in favour of home rule, but its representatives in the Commission on Home Rule were much more willing to compromise with the Danish politicians when the Siumut representatives were fighting most courageously to retain undivided ownership and control for the resident population of Greenland over non-renewable resources."

"'Inuit Ataqatigiit' (i.e. 'the brotherhood of the Inuit people'; also meaning 'human brotherhood') is the only movement strongly opposed to home rule. It is a socialist group fighting for independence, and maintaining that the compromise in the Commission on Home Rule over non-renewable resources was a sell-out. Like the Siumut party it is most definitely against Greenland's membership of the EEC, and like Siumut it has a clearly anti-centralist attitude."

"'Sulissartut Partiat' (i.e. 'the Labour Party') is closely related to SIK, the labour union of Greenland. This party is very close to Siumut on all the main issues." 45/

103. Freedom of expression, including that of political views, is also provided for in all systems for which information is available. 46/

45/ Ibid., p.19.

46/ The data relating to Bangladesh, Burma, Chile, Costa Rica, Denmark (Greenland), Guatemala, Guyana, India, Japan, Pakistan and Suriname contained the texts of provisions dealing with this right. The information relating to Canada, Finland, Sweden and the United States of America contains statements of a general character concerning freedom of speech. Since none of these provisions or statements carried any specific references to the use of this right for political purposes or to its use by indigenous populations for the stated purposes, no meaningful discussion of these matters could be developed.

104. As regards some aspects of the rights to freedom of expression and of assembly and association for political and related purposes, in the United States of America it has been argued by many individuals, groups and organizations that being a leader, or even a member of some associations - particularly the American Indian Movement - and engaging in activities on behalf of Indian rights, has given rise to harassment and persecution.

105. Furthermore, it has been alleged that certain associations seem to have been placed under surveillance and to have been singled out for harassment and disruption.

106. A publication contains information that would tend to indicate that there is a campaign against the American Indian Movement which is said to have been "tagged for disruption and surveillance":

"As part of that programme, the CIA developed illegal relationships with local police departments, which included training programmes in intelligence work, routing payment of 'gratuities', the lending of CIA agents and equipment for police work, and the use of police officers during CIA break-ins. The CIA also had a long-time agreement with the Justice Department which exempted any CIA agent from criminal investigation or prosecution. These practices were exposed in the recent Rockefeller Commission on CIA Activities.

"...

"The combinations of arrests, court actions and harassments point more and more to a state-federal-local conspiracy to deal expediently, efficiently, and thoroughly with native activists.

"...

"The legal campaign against the American Indian Movement has continued for almost three years now, waged by an army of civil servants and police and prosecutors who never have to worry about where their rent money or supper for their children is coming from. These salaried officials are backed up by millions of dollars of travel money, investigators, secretaries, and all the technology and information the United States can command." 47/

47/ Akwasasne Notes, vol.7, No.5, 1975, pp.8, 14.

D. Special measures

1. Introductory remarks

107. The mere elimination of the adverse distinctions made against indigenous populations is not sufficient. Further measures must be taken to ensure that indigenous populations are truly on an equal footing with other population groups which enjoy their rights and freedoms in a fuller sense, as individuals and as peoples. After centuries of suppression and exploitation positive measures have to be taken to achieve conditions of real opportunity for these groups, which are now disadvantaged and vulnerable.

108. One such measure is the reservation of elective or appointive posts for candidates from underprivileged or disadvantaged groups in the general context of society as a whole. Among these "marginal" groups are the indigenous populations who after centuries of deprivation, persecution and exploitation, are in extremely depressed situation from which they must emerge as full participants in the common effort and add their voices and views to the collective approach to problems and their solution. Their approach is recognized as valid and useful and they should have the opportunity to contribute their ideas thus enriching and broadening the content of any action taken in the many areas in which they are particularly competent.

109. Their own forms of organization and internal control have to be fully implemented so that they may find in their own roots the best ways of acting in accordance with their inherited life-styles and values. To this end, a necessary measure of autonomy or self-determination has to be granted them in executive, administrative, legislative and judicial matters as well as in cultural, linguistic and educational approaches, including areas concerning matters of health and medicine, traditional occupations and forms of land tenure and development of natural resources.

110. The concentration of the indigenous populations in certain areas or regions of countries where their own ancestral traditions and inherited institutions prevail can then be recognized and treated as local or regional socio-political entities for administrative and political purposes.

111. The following paragraphs will be devoted to the examination of such solutions as are referred to in the information available in connection with the study concerning ways in which a more just and equitable solution may be found for these populations to organize and function in the broader context of the State in which they find themselves today.

2. Separate representation of indigenous populations

112. In the outline used for the collection of information in connection with the study, the following text was included under item 73:

"Information as to whether separate representation of the indigenous and non-indigenous populations has been established at any level and, if so, details as to the special conditions governing the separate electorates and separate access to elective and non-elective positions, whether legislative, executive, administrative or judicial, and an indication as to whether such conditions work to the advantage or disadvantage of the indigenous populations of the country."

113. Few Governments and no non-governmental organizations responded to this question. Some information was gathered from other sources, such as domestic non-governmental organizations contacted during the Special Rapporteur's visit to several countries and scholarly publications. Whatever information is available as a result of these efforts is presented here.

114. No information whatsoever was available for many countries in this regard. 48/

115. Information is available on some countries to the effect that there is no separate representation for indigenous populations in those countries. 49/

116. The Government of Brazil states that: 50/ "there is no separate representation for the various ethnic, religious and similar groups. The representation of small ideological groups is assured by the existence of various political parties".

117. The Canadian Government has also stated that:

"No separate representation in provincial or federal governments has been introduced, nor has it been sought by the native people. Indians, Eskimos and Métis have participated in all three major political parties in Canada. Extraordinary steps have been taken in the North to provide for balloting in remote communities with the flying in of official polling materials."

118. In somewhat similar terms, the Finnish Government has submitted the following information:

"There is no separate representation for the Lapps at any level. As they have the same political rights as other people, there are Lapp Members of Parliament and members of the local communal councils which are representative bodies for local self-government."

119. In response to a request for information on certain aspects of political rights, the Government simply stated:

"There is no discrimination against the Lapps in regard to these rights. The same legal rules apply to all Swedish citizens, including the Lapps. There is no separate political representation of the Lappish population."

48/ Argentina, Bangladesh, Bolivia, Colombia, Denmark (Greenland), Ecuador, El Salvador, Guatemala, Guyana, France (Guyana), Honduras, Indonesia, Japan, Laos, Panamá, Paraguay, Perú, Sri Lanka, Suriname and Venezuela.

49/ For example, Brazil, Canada, Costa Rica, Finland, México and Sweden.

50/ Study of Discrimination in the Matter of Political Rights, Conference Room Paper No. 77, para. 51.

120. An expert who has been active for a long time in Sami affairs in Sweden has stated in this regard, that:

"The Lapps have no representatives in the Swedish Parliament In 1971 a new reindeer farming statute was presented in a Government proposition and by lobbying and forming a group consisting of several political parties we succeeded in getting several ameliorations in the text of the law. It has been possible, in the current Parliament situation, to get a union of several parties for such ameliorations, but things can change very much from election to election It is impossible for the Lapps to rely on just one political party; it would be dangerous to do so." 51/

121. On this question, the Government of Mexico states:

"By virtue of the principle that all persons are equal before the law, enshrined in article 10 of the Constitution, there is no separate representation in our country of indigenous and non-indigenous populations."

122. With reference to separate representation of indigenous and non-indigenous populations in elective and non-elective collective bodies, the Government of Costa Rica answers simply "Question does not apply".

123. The information concerning three countries contains elements which would indicate the theoretical possibility of separate representation (Chile), the intention of the federal Government to establish such separate representation in a federal territory (Australia) and the existence at recent elections of separate indigenous lists of candidates which did not however gain separate representation (Norway).

124. The Government of Chile states (1975):

"There is no possibility in Chile, on the basis of legal texts, of achieving mandatory separate representation of indigenous populations that would mean also separate access to elective and non-elective positions, whether legislative, executive, judicial, etc.

"At certain times in the past some political scientists have favoured abandoning the idea of bringing about a certain degree of political parallelism between indigenous people and their non-indigenous co-nationals

"The aim of achieving an integration of indigenous people that does not absorb the customs, religion, etc. inherent in their special way of life largely conflicts with the objective of those who support political and ideological parallelism. Convincing evidence that indigenous people do not seek and have not sought to separate themselves from the country's political context by forming an ideological grouping of their own that would represent solely and exclusively the interests and aspirations of their race is to be seen, for example, in the high number of Mapuches who invariably present themselves as candidates, covering the entire range of existing political ideologies, in the country's elections of representatives.

"Such a statement of the situation rules out the possibility of any desired separate representation that indigenous people could have or seek at any level.

51/ Speech by Tomas Cramér, Sami ombudsman, at the Federal Union of European Nationalities meeting, 9 May 1972. Joruplunds Folkhögskola in South Slesvig, West Germany.

"Now, if we may reflect on the matter for a moment, we can say that separate representation of indigenous people would be perfectly possible in fact and would be perfectly valid from the legal point of view. We make that statement on the basis of actual existence of human and geographical conditions that would make it possible. Such conditions would be: they inhabit well-defined areas of the country, forming genuine zones of concentration, e.g. the Mapuches from Bio Bio to Llanquihue, the Aymaras in the Northern Zone, etc.; they have uniform customs, needs and problems as regards their social situation and standard of living; they possess organizations which represent them and have mass support, such as the Araucan Societies; they are deeply devoted to their ancestral customs and venerate their forebears, an aspect often exploited by politicians; they account for a significant part of the electorate in their areas; lastly, those and other situations would make possible, or would pave the way for, achievement of separate political representation.

"However, in spite of all the above, apparently the non-political nature of their organizations and the great diversity of ideologies found among the members, which is augmented by their extreme political instability, have prevented the formation of a single Mapuche or indigenous party of the kind propagandized by some politically motivated sectors.

"All the above is to be understood as being without prejudice to the right of every citizen of the Nation to be guided by and to adhere to any of the country's political ideologies."

125. The Government of Norway has stated that there has never been separate representation for the Lapps. In the last two elections, there was a separate Lapp list of candidates, but at the last general election it did not receive enough votes to gain representation.

126. The Government of Australia communicates:

"To date, special protective or supplementary measures [for the separate representation of Aborigines] have not been considered necessary. The ... [federal] Government has indicated however that it would provide for special representation for Aboriginal members in the Legislative Council of the Northern Territory, and has undertaken to investigate whether Aboriginal representation could be provided in State and Federal parliaments."

127. In some countries, provision has been made in different contexts for the separate representation of indigenous populations either in elective posts (United States of America) or in appointive posts (the Philippines), but either information has also been made available on the non-implementation of these provisions (United States) or the Special Rapporteur has no information on implementation thereof (the Philippines), as will be discussed in the following paragraphs.

128. The Government of the United States of America has reported that

"Although at least one treaty signed by the United States Government and an Indian tribe specifies a representation in the Congress under certain conditions, this has never come about and representation of American Indians and Alaska Natives in the governmental structure has been, largely, a matter of happenstance The indigenous person has won an election by virtue of his ability to get votes from a constituency that he then represents."

129. In chapter X on administrative arrangements (see E/CN.4/Sub.2/1982/2/Add.4) reference is made to the statutory preference to be granted to American Indians in posts available in the Bureau of Indian Affairs. The low representation existing in these posts despite legislative mandate and judicial adjudication has also been pointed out.

130. Information provided by the Government of the Philippines would indicate that under certain circumstances the examination requirements for employment in the civil service may be waived in the case of members of the national cultural communities, and has transmitted the following legal text:

"Republic Act 2260 (Civil Service Law): ... Sect. 23. Requirement and Selection of Employees - Opportunity for government employment shall be open to all qualified citizens and positive efforts shall be exerted to attract the best qualified to enter the service.

"Employees shall be selected on the basis of their fitness to perform the duties and assume the responsibilities of the position whether in the competitive or unclassified service

"Qualification in an appropriate examination shall be required for appointment to positions in the competitive or classified service in accordance with the civil services laws except otherwise provided for in this Act: Provided, ... and provided, finally, that for the period of ten years from the approval of this Act and in line with the policy of Congress to accelerate the integration of the cultural minorities, wherever the appointment of persons belonging to said cultural minorities is called for in the interest of the service as determined by the appointing authority, with the concurrence of the Commissioner of Civil Service, the examination requirement provided in this Act, when not practicable, may be dispensed with in appointments within their respective provinces if such persons meet the educational and other qualifications in an appropriate examination which may be required if the appointing official so directs."

131. The Government has also stated: "The President normally includes a qualified member of national cultural communities (minority) as a member of the Presidential Cabinet, as head of one Cabinet level agency or department".

132. Despite efforts made to obtain further information on these aspects, the Special Rapporteur was unable to ascertain any degree of implementation in practice of these provisions.

133. In several countries, the indigenous populations have been granted special separate representation in elective or appointive bodies. 52/

134. In Malaysia, according to information provided by the Government, it appoints a person "to represent Orang Asli interests in Parliament" and this person sits in the Senate.

135. Among the entrenched provisions of the Pakistan Constitution is one that provides that steps should be taken to bring on terms of equality with other persons the

52/ Although this generally occurs in the legislative or the executive branches of government, there are special courts having exclusive jurisdiction in cases involving indigenous land rights. The information available in this respect does not, however, indicate whether indigenous membership in these courts is prescribed by law. A case in point would be the special Land Courts existing in New Zealand, Maori Land Court and Maori Appellate Court.

members of "under-privileged castes, races, tribes and groups" and, to this end, such groups should be identified by the Government and entered in a schedule of under-privileged classes. The Constitution also provides that "for a period not exceeding ten years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan". Moreover, the Constitution states that the people of different areas and classes, through education, training, industrial development and other methods, should be enabled to participate fully in all forms of national activities, including employment in the service of Pakistan. The Government reports that this representation has not been neglected in the higher cadres of administration. The Government has waived the age limit by up to three years for minority communities and tribal candidates in certain districts, including aboriginals of some of them.

136. The Government of Pakistan has stated that:

"In article 36, the Constitution has safeguarded the legitimate rights and interest of minorities including their due representation in the Federal and Provincial Services."

137. For the purpose of electing members to the seats allocated to the Centrally Administered Tribal Areas in the National Assembly, the President put Order No. 13 of 1970 into effect. 53/

138. In India, special measures have taken the form of enactments designed to ensure the participation of disadvantaged groups in the political processes. The Scheduled Castes (the so-called "untouchables") and the Scheduled Tribes, which have been described by the Indian Government as the "weaker" sections of the population, are entitled to proportionate representation in State Assemblies and the National Parliament. One of the consequences of this arrangement is, according to the Government, the fact that the legislative bodies are constantly "alive" to their needs. A certain proportion of posts in the public services has been set aside for members of the Scheduled Castes and Tribes, and the Government provides special tutoring facilities in order to accelerate advancement to senior posts in the federal civil services. While the provision regarding reservation of seats in the Parliament and State Assembly expires in 20 years after the commencement of the Constitution, those Constitutional provisions concerning reservation of posts in public service are entrenched.

139. Regarding the separate representation of Scheduled Castes and Scheduled Tribes in certain pluripersonal bodies and their claims to certain posts and services, the Constitution of India provides:

"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;

53/ The Gazette of Pakistan, Islamabad, 18 July 1970. The Special Rapporteur requested the Government of Pakistan to provide the text of Order No. 13 of 1970 or information on its content, but received neither.

- (i) In the Tribal areas of Assam;
 - (ii) In Nagaland;
 - (iii) In Meghalaya;
 - (iv) In Arunachal Pradesh; and
 - (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 at 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 the State 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 30 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 States; and

(b) The representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination, shall cease to have effect on the expiration of a period of 30 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."

140. The Anti-Slavery Society states: 54/

"In view of the fact that the one protective piece of legislation assiduously implemented by the Government of India is that of reserving seats for the Adivasis in State and Union legislatures, it may seem contradictory to assert that the Adivasis are actively prevented from acquiring real political power in India. However, reservations policy of the Government of India is little more than a sham since there is no hope of the Adivasis acquiring real political muscle in this way ..."

141. In New Zealand, as stated before (see paras. 67 and 84 above), there is separate Maori representation in Parliament and in the Cabinet. Separate Maori representation was provided for by the Maori Representation Act, 1867. The Electoral Amendment Act 1937 introduced a secret ballot for Maori voters who enjoy the same electoral privileges as non-Maoris in electing the representatives of the four Maori electorates. Today, the statute law on elections and the life of Parliament is contained in the Electoral Act, 1956. The House of Representatives now consists of 80 members, four of whom are Maori. The Maoris are usually represented in the Cabinet. 55/

54/ Information furnished on 31 March 1977 in connection with the present study.

55/ In 1973 there were three Maori ministers in a Cabinet of 20 ministers.
See para. 84 above.

142. New Zealand has had arrangements for the separate representation of the indigenous population for over a century. On the historical background of this question it has been stated that:

"Within a few years of the establishment of self-government in New Zealand, it became apparent that very few Maoris qualified, under the law existing at the time, to take part in Parliamentary elections, either as voters or as candidates. The reason for this was that persons could register as electors only if they owned freehold land of a prescribed value. As all Maori land was held at that time under Maori customary tenure, very few Maoris were qualified.

"In 1867 the Maori Representation Act was passed to overcome this difficulty and to ensure that Maoris were represented in Parliament. The Act provided for the establishment of four Maori electorates together covering the whole country, and all male Maoris aged 21 years or more were given the right to vote or to be a candidate in one of those four electorates.

"It is an interesting comment that the Maoris received universal manhood suffrage sometime before the rest of the community. This was extended to the rest of the population in 1882 and in 1893 the vote was extended to all adult women, Maori or non-Maori. New Zealand was thus the first country in the world to have full adult suffrage, and the Maori people shared in this distinction."

143. The arrangements now in force have been described in the following terms:

"The present electoral law provides that persons who are half-Maori or more must enrol in one of the four Maori electorates. Each electorate can elect one member of Parliament who need not be a Maori; but in practice so far Maori members have invariably been elected by Maori electorates. Persons who are less than half-Maori must enrol in a non-Maori electorate and persons who are half-Maori may choose whether to enrol in a Maori or non-Maori electorate. In practice, as already remarked in this paper, persons of Maori descent are not required, when enrolling, to produce any evidence of their ancestry and there is a growing number of Maoris who would have some difficulty in stating just how much Maori ancestry they have. As already indicated, people have a certain freedom of choice as to whether they enrol in one type of electorate or the other.

"There has been a good deal of discussion during ... [recent] years about the future of Maori representation in Parliament. Both of the leading political parties have made it public that they will not change the present situation until there is a clear indication from the Maori people that they consider it time to abolish the separate Maori seats. In 1967 the electoral law was amended to make it possible for a person registered as a Maori elector to stand for Parliament in any electorate whether Maori or non-Maori. Similarly, a person who is not legally a Maori may stand for a Maori seat.

"Since the 1967 Act the major political parties have nominated Maoris as candidates for non-Maori seats on a number of occasions. None of these Maori candidates have succeeded in being elected, although several have come reasonably close to it. They have at least demonstrated that a substantial number of non-Maori electors are prepared to vote for a Maori candidate. There is a widespread feeling amongst the Maoris that they will be prepared to do away with separate Maori seats when they see a reasonable number of Maoris being elected to Parliament in non-Maori seats.

"... [Since the beginning of the 1970s] there has been a movement amongst the Maori people for an increase in the number of Maori seats in Parliament on the grounds that the increase in the Maori population now justifies more than four seats. There is some justification in this view that the Maoris are under-represented, and the Government has indicated in a policy statement that this matter will be attended to. For many years the Maori population was in fact overrepresented relative to its proportion of the population, but the recent increases in population have changed the situation. But taking into account the substantial number of Maoris who undoubtedly are enrolled on the non-Maori rolls, the under-representation is probably somewhat less than would appear from the ratio between the present four Maori seats and the total Maori population as shown in the census."

144. During his official visit to New Zealand, the Special Rapporteur heard many people criticize the fact that Polynesians, who are eligible to take part in housing and other Maori schemes, are not entitled to vote as Maoris and in fact vote as "Europeans", which for some people means "swelling the ranks of the opposite side".

145. The Government has stated, commenting on the above information, that

"The Special Rapporteur was told that Polynesians who are entitled to take part in housing and other Maori schemes are not entitled to vote as Maoris. This is correct. The special representation of Maoris in Parliament was instituted to ensure that the original inhabitants of the country should have a guaranteed voice in Parliament. It is considered that there could be very little justification in extending this to Polynesians who have migrated to New Zealand from other parts of the Pacific any more than there should be separate representation of other immigrant communities, such as Indians, Chinese, Dutch, Greek and so forth. The Government has recently announced that the whole question of Maori representation is being examined to ensure that Maoris are represented in Parliament in proper proportion to the population. The Government intends to amend the law to provide for this."

146. A further aspect was brought to the Special Rapporteur's attention during his official visit to New Zealand. In fact, several persons also complained that in addition to the under-representation discussed in the preceding paragraph, there were certain difficulties with the geographical distribution of Maori ballot boxes, some of which were not easily accessible to Maori voters, who had to travel rather long distances to vote. All concurred, however, in the view that separate Maori representation, even with its difficulties, should be kept until something better was found.

147. The Government has reported on changes introduced subsequently into the electoral law, stating that:

"... So far as the distribution of ballot boxes for Maori voters is concerned, the electoral law was amended prior to the last election to enable Maori voters to vote in any polling booth in the country instead of voting only in separate booths as had previously been the case. It is now thought that there should be no special difficulties for Maori voters in this respect. The Government does not propose to abolish separate Maori representation until the Maori people are satisfied that this should be done."

3. Indigenous communities as politico-administrative entities having autonomy or self-determination

(a) Introductory remarks

148. There is constant reference by indigenous communities and organizations to the concept of self-determination, which they consider the only form that would enable them to take over the reins of their destiny and which they claim as an inalienable right to determine for themselves the future course of their existence. The content of this right to self-determination is not the same in the claims put forward by various populations. In their reaction, governments often confuse any claim for autonomy or self-determination with a demand for absolute and immediate freedom, independence and sovereignty. If, however, one examines the claims of indigenous peoples more closely, one soon sees how they differ in content. Some call for forms of autonomy limited to certain specific spheres, in which dictates coming from outside, far from being helpful, only complicate everything. Others aspire to and demand more complete self-determination as a people which, it is true, in certain cases goes as far as the right to organize itself as a nation-State with full independence and full enjoyment of the freedom and sovereignty it entails. In the latter cases, this often goes back to treaties concluded with the colonial government or with the government of the independent successor State in which the indigenous population sees recognition of its separate existence as an independent nation-State. It is pointed out that subsequently that recognition was unilaterally modified by the non-indigenous State, which claims, as its own, the territory in which the indigenous community concerned lives, and disregards undertakings solemnly entered into in treaties concluded with what was then recognized as an independent nation.

149. At the third 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 levels, held at Managua, Nicaragua, from 14 to 22 December 1981, in connection with the Decade for Action to Combat Racism and Racial Discrimination, the summary of the discussion concerning these questions included the following:

"Self-determination in its many forms was the basic pre-condition to the possibility for indigenous populations to enjoy their fundamental rights and to determine their future and preserve, develop and transmit to future generations their ethnic specificity". 56/

150. Part of the discussion at the seminar was described as follows:

Reference was made to the fact that the right of self-determination was expressed at several levels and included economic, social and cultural, as well as political factors that must be studied in each case. As contemplated in United Nations language, that right in the largest sense of its "external" manifestations, meant the right of Statehood, also including the right to choose various forms of association with other political communities.

56/ Report of the seminar (ST/HR/SER.A/11), para. 58 (m).

It was also mentioned that the right of self-determination, however, also arose on an internal level of national society, where a people or group having a defined territory might be autonomous in the sense of having a separate and distinct administrative structure and judicial system determined by and internal to themselves. One participant stated that concepts of historical importance, like "self-determination" and "colonialism", should not be used out of their precise context. To apply the concept of self-determination in the sense of preservation of cultural identity did not seem to be appropriate. In any case, it was difficult to imagine that any country would accept to detach parts of its territory in order to form autonomous national entities. That would not be in the best interests of indigenous groups.

It was also stated that the right to self-determination was also a right of individuals in that each individual had the right to free expression and to realize his or her full human potential as defined by each of them. In that sense, reference was made to the right to be different that was both an individual and a group right as recognized in the declaration on race and racial prejudices adopted by UNESCO in 1978.

With respect to that right as it applied to indigenous nations and peoples, it was mentioned, in particular, that the essence of the right was the right of free choice and, therefore, in a large measure the indigenous peoples themselves must create the content of this principle. Their differing aspirations and goals must be respected in each case ... 57/

151. The participants in the seminar thus clearly established the diverse nature of the claims of different populations and communities. In recognition of the complexity of the subject, it was formally suggested that perhaps another study on the right to self-determination should be prepared from the point of view of the existence of indigenous populations with different claims.

152. In addition, at the International NGO Conference on Indigenous Peoples and the Land, held at the Palais des Nations, Geneva, from 15 to 18 December 1981, a proposal was submitted in Commission 1 (legal commission), which it accepted and included in its report to the plenary Conference. The Conference in turn included this point in its Final Declaration, in the following terms:

"The Conference requests the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a special rapporteur to further study the right to self-determination, focusing in particular on this right as it refers to indigenous nations and peoples".

153. Another aspect of supreme importance for the orderly and harmonious existence of indigenous communities is that of autonomy in the forms of their internal organization. Any interference in such matters has disastrous consequences, which disorganize and destabilize indigenous communities by preventing them from functioning normally as such.

57/ Ibid., paras. 54-57..

154. The importance of this aspect was recognized at 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 San José (La Catalina, Santa Bárbara de Heredia), Costa Rica, from 6 to 12 December 1981. As a result of its work, the Conference adopted by acclamation, on 11 December 1981, the San José Declaration, which states the following with regard to this particular aspect:

"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.

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." 58/

155. On this subject, the discussion at the seminar mentioned in paragraph 149 above was summarized as follows:

"Interference in the organizational and cultural traditions of Indian nations and peoples, whether by State authorities, representatives and organizations of the predominant groups or transnational organizations, always had a devastating effect on indigenous communities which were thus destabilized. It was immaterial for the victims whether the destructive force came from within or from without the country in which they lived.

58/ See the text of the Declaration in document E/CN.4/Sub.2/1982/2/Add.1, annex VI (Chapter II, Measures taken by the specialized agencies).

When those forms of interference, exploitation and alienation that had been termed internal colonialization by some reached extremes of offensiveness, they would constitute what had been termed ethnocide or cultural genocide. The San José Declaration had been adopted on 11 December 1981 at a recent UNESCO/FLACSO meeting of Experts. In it ethnocide was declared to be a crime under international law as was genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide."

"Respect and support for the indigenous peoples' own internal organization and their cultural manifestations was a sine qua non for any arrangements conducive to the appropriate participation of indigenous communities in all matters that would affect their destiny.

Indigenous participation in decision-making processes on all matters affecting them was essential for the elimination of discriminatory and exploitative conditions."

"Some participants stressed that profound structural changes in the present organization of the global societies in which indigenous peoples and nations lived were necessary before such favourable aspects of equality could be realized. Otherwise formal equality would be either meaningless or even harmful."

"Drastic economic, social, cultural and political structural changes were necessary to bring about the elimination of discrimination against, and exploitation of, indigenous peoples." 59/

156. Consequently, de facto or de jure recognition of the existence of indigenous communities as local or regional politico-administrative entities means little or nothing if interference in basic forms of internal organization is such as to produce disequilibrium and destabilization in their midst.

157. This is one of the defects pointed out in the United States Indian Reorganization Act of 1934, which, while according recognition of important aspects of initiative and responsibility to the indigenous communities, peoples and nations of that country, imposed upon them, as has been mentioned, foreign ways of consulting the will of their members and of determining when and how decisions are reached which are binding for those members.

59/ ST/HR/SER.A/11, para. 58 (e), (f), (i), (j), (g) and (n).

(b) Examination of the information available

(i) Initial remarks

158. Indigenous communities or organizations may have been recognized in law or in fact as local or regional politico-administrative entities. They may have been granted a measure of autonomy or self-determination in legislative or administrative matters or in the establishment of their own courts, or in all these spheres.

159. In the outline prepared for the collection of information for the study, which was sent out to Governments, regional inter-governmental organizations, specialized agencies and non-governmental organizations, items 74 and 75 deal with these questions. The response was very unsatisfactory. However, some information became available to the Special Rapporteur from other non-governmental sources in which the two subjects were inextricably intertwined, thus making it very difficult to differentiate between them for the purposes of this study.

160. In some cases, indigenous populations may have been given the power of self-government but subject to limitations, restrictions or interferences that may have disrupted their internal organization, altered their internal control patterns or imposed on them an alien manner of choosing the indigenous authorities, measures which ultimately deny them, in practice, the self-determination that has ostensibly been granted them.

161. In the following paragraphs, whatever information is available in connection with these aspects will be discussed.

(ii) Indigenous communities as local or regional politico-administrative entities

162. There is no information from several countries in this respect. 60/

163. For certain countries only governmental information was available, indicating simply that indigenous communities do not have the character or the status of local or regional politico-administrative entities. 61/

164. In response to a request for information in this regard, the Government of Sweden has stated that "Lappish organizations and communities do not have the status of political entities".

165. The Finnish Government has transmitted information to the effect that apart from their participation in the communities where they reside together with non-Lappish populations in the mixed communal councils, Sami communities have no special politico-administrative character. The Government points out in this respect that:

"The municipal and rural communes constitute local administrative entities which have been granted by law a far-reaching right to local self-government. ... rural communes ... in which the Lapps in Finland are mainly residing, are also inhabited by other people. Consequently, there is a mixed representation in their communal councils."

60/ Argentina, Bangladesh, Bolivia, Brazil, Burma, Colombia, Denmark (Greenland), Ecuador, El Salvador, France (Guyana), Indonesia, Lao People's Democratic Republic, Panama, Paraguay, Peru, Philippines, Sri Lanka, Suriname and Venezuela.

61/ E.g., in Finland, Norway and Sweden.

166. The Government of Norway has stated:

"The Lapp organizations are not regarded as party political, but express their views on questions relating to Lapp policy. In their work they follow a broad general policy line in an effort to influence public opinion."

167. In some countries, although the traditional form of leadership continues to exist and to have socio-cultural functions in indigenous communities, these communities and groups of communities are not allowed to assume the character or the status that they could well have, on the basis of numerical strength and organization, as politico-administrative entities of a local or regional character. 62/ In one way or another this is prevented, 63/ obstructed, undermined 64/ or simply utilized and manipulated for purposes alien to the communities' own goals and ends. 65/

168. According to information provided by the Anti-Slavery Society, 66/ the Tribals in the Central Tribal Belt in India are split up between eight states; so that everywhere they form politically insignificant minorities in predominantly Hindu states. They are thus deprived of the numerical strength on the basis of which they could have obtained the character and status of political entities of a local or regional character. The Society states:

"There are 32.4 million Scheduled Tribals in the Central Tribal Belt split up between eight States in such a way that nowhere do tribals comprise more than 23 per cent of the total population of the state ... despite the fact that there are two heavy concentrations of tribals that could easily form the basis of new states containing a large proportion of the total tribal population of the Central Tribal Belt and giving them a far greater say over their own affairs. Again it could be argued that if the Government of India were truly concerned with tribal development, it would have encouraged some move towards greater tribal autonomy in these areas, but bearing in mind the fact that these regions include almost all of India's mineral deposits and a large part of her forests, one can see why the Government prefers to have them split up between different states.

The two areas are:

1. The 'Jharkhand' region comprising nine districts on the borders of eastern Madhya Pradesh, Southern Bihar and Northern Orissa, with a population of 14.9 million, 55 per cent of which are tribals.
2. The Bastar (Southern Madhya Pradesh) Boraput (Southern Orissa) area including the agency areas of Northern Andhra Pradesh with a population of 8.1 million, 57 per cent of which are tribals. These areas could form perfectly viable states either separately, or together in a large state, with a population of about 28 million over 50 per cent of whom would be

62/ E.g., in Guyana, India and Japan.

63/ As in India.

64/ As in Guyana.

65/ As in Japan.

66/ Information submitted on 31 March 1977.

tribals and which would include about 45 per cent of all the tribals in the Central Tribal Belt. Singly the states would compare numerically with Punjab (11 million), Haryana (10 million) and of course Nagaland (0.5 million); fused as one unit the tribal state would be more populous than Orissa (22 million), Gujarat (27 million) or Rajasthan (26 million)."

169. The Anti-Slavery Society further states on this matter: "

"The state boundaries in India were redrawn by the States Reorganizing Committee in 1956, but, despite the fact that the Jharkhand party which was calling for a tribal state comprising Southern Bihar and nine districts in other states was the major opposition party in Bihar at the time, its request was dismissed on the grounds that it would leave Bihar an 'unbalanced' state and that people outside Southern Bihar were against it. No consideration was paid to the benefits that would accrue to a large part of the tribal population as a result of their having effective political representation for the first time and a larger measure of control over the development of their area. Similarly, in other parts of India state boundaries were aligned according to whether the inhabitants of the peripheral boundary areas spoke relatively more or less of the non-tribal regional languages such as Hindi and Bengali, Oriya and Telegu. No account was taken of the fact that the boundaries split culturally and economically homogeneous tribal areas between different states leaving the Adivasis powerless and dependent.

"However, despite, or perhaps because of, the tribals' powerlessness within the national and state political system, there have been a large number of political uprisings by Adivasis in many different parts of India.

"... The tribal revolts have all been ruthlessly smashed by rich non-tribal landlords, Congress politicians and the police. As with the revolts of the nineteenth century, the reactions of the non-tribals to tribal agitation has been violent suppression.

"... By a combination of gerrymandering and violent suppression of popular movements, the State in India has successfully prevented the tribals from acquiring any real political strength thus assuring the continued exploitation of the tribal areas and tribal labour by Government-supported forestry, mining and other developments, and by the non-tribal landlords, money-lenders and traders who are the political stalwarts of Congress and other major centre-right parties in tribal areas. It is highly unlikely that the Government will cede any real political power of its own free will and therefore it would seem that the future for the tribals must lie in organizing both among themselves, and with other segments of the rural poor, in order to transform themselves into a real political force to be reckoned with." 67/

170. In Guyana according to an official source: 68/

"... the traditional Amerindian local government unit is the tribe, the headman or Teuchau of each local community being generally responsible for orienting the affairs of his 'constituents', with whom he maintains close and constant consultation.

67/ Ibid.

68/ Guyana, Ministry of Information and Culture, op. cit., pp. 61-62.

"In the stricter sense of the term local government, however, the administration of the interior has for many years been in the hands of an Interior Department headed by a Commissioner of the Interior and responsible from 1961 to 1966 to the Ministry of Home Affairs and then to the Ministry of Local Government until 1969."

171. The information that immediately follows that quoted in the preceding paragraph gives clear indications of official attitudes towards these autonomous communities which have functioned as local political and administrative entities and the lack of official recognition of their traditional leadership. It also shows that official efforts are being made to change the internal organization of these communities - which in passing is said to be "just as effective" for the populations involved - into the organizational forms officially promoted by the State:

"Naturally, the prime plank of the department's policy has been the encouragement among Amerindian communities of the development of a sophisticated local government set-up such as that obtaining on the coast, where village administration is carried out by a number of elected nominated local authorities guided by a Government-appointed Local Government Board.

"To wean the Amerindian away from his simpler (and to him just as effective) traditional method of running his village affairs is not an easy task, however, and the problems of effecting the desired change-over have been many.

"Nevertheless, the weaning has gone on quietly and unobtrusively over the years, and today every Amerindian settlement of any size has an elected captain serving for four years and an elected village council serving for two years. All elections are by secret ballot, and adult suffrage is universal."

172. It has been written that in Japan:

"A few old Ainu villages governed by chieftains and elders still exist and the Government has set up some new ones as tourist attractions. Many Ainu, however, live in hovels scattered among the Japanese in the towns and villages." ^{69/}

173. In Chile, some communities appear to have certain elements of the status of a local or regional politico-administrative entity. In the words of the Government:

"... the indigenous organizations, those which can be considered as such (this excludes Peasants' Committees, Communal Councils, etc., which were the product of party political interests and represented a certain ideological trend) are and have been non-political, so that in that sense the question of their recognition does not arise. It is necessary to explain that the organizations we are discussing operate in areas where indigenous populations are concentrated, in a manner independent of the community or communities which form them, and to be a member of the organization, it is enough to be indigenous.

^{69/} George L. Harris and others, Area Handbook for Japan, prepared by the Foreign Area Studies Division, The American University, Washington D.C., 1964, pp. 74-75.

"What is more, the term 'community' relates to a legal concept which originally was much like the civil quasi-contract of the same name and which time and legal regulations have been shifting to and changing into a sui generis organization. This institution was originally based on a chieftainship or lonco, which generally spares the indigenous inhabitant heading it the problems of establishing himself but does not by any means recognize privileges within the member families and even less a political or religious structure.

"The existence of these chiefs of the Otrora community, who are highly respected, proceeds without outside interference, almost automatically and, as stated, generally on the basis of direct-line kinship with the established chief.

"We consider that this chieftainship is nowadays of relatively less significance, being limited to what we might call the administrative sphere of the reserve, with importance in the direction and organization of religious and festive ceremonies and, in some more remote regions, with an incipient mission of family equity similar to the right of correction and guidance which the civil law accords to a father over his children.

"Indigenous communities, as very sui generis legal entities formed not always of kin but also of separate family groups, have absolute independence in appointing their loncos, and the members of these communities are also independent in being personally responsible for their lawful and unlawful actions, being subject in that respect to the jurisdiction of the ordinary courts of law, to which they have recourse on a footing of absolute equality with the other inhabitants of the Republic.

"In short, the chiefs and representatives of these communities originate in a system of self-administration but they have neither political nor correctional ascendancy over those they represent."

174. In another country, Guatemala, municipal organization in indigenous communities or populations is a compromise between the internal social organization of the local indigenous inhabitants and the wider political system of the State in which they live. Basically, this means a formal coating of the indigenous civil and religious hierarchy with formal elements similar to those governing the country's other municipalities. They are politico-administrative entities in which the local communities and supra-local institutions in which the indigenous hierarchy operates as the agent of order and organization of local society are linked to the network of social relations covering the nation. One writer puts it as follows:

"In the four centuries during which Guatemala had no national State but a plurality of cultures, the various stages of its history obliged the indigenous inhabitants to behave in a particular manner and, at the same time, produced various degrees of attraction resulting in the desertion of the local societies by some indigenous inhabitants ...

"However, in addition to the political structure constituting the nation-State, Guatemala's political apparatus must, in order to govern its indigenous population, be extended to the local societies, which in population and size alone account for more than half of the inhabitants of the national territory. Technically, the indigenous municipalities are governed by organizations similar to those governing any municipality; in practice, the

municipal organization is a compromise between the internal social organization of the local indigenous inhabitants and the wider political system in which they live. From the point of view of the National Government, the municipal administrations in the indigenous communities link the local society to the nation. For the indigenous person, that is only part of its functions. From his point of view, the municipal organization is considered a different structure.

"For indigenous communities, the main feature of political life is one kind or other of a civil and religious hierarchy ...

"Typically, the indigenous inhabitants organize their local communal life around a number of offices forming two series: one consisting of religious posts and the other, of civil posts. The two series, however, are connected by common symbols, by virtue of the fact that persons in authority alternate between posts in each of the series. The indigenous inhabitants tend to think of them as one system, and the term 'civil religious hierarchy' recognizes this fact of interrelationship.

"The ordinary functioning of the civil and religious hierarchies determines the limits and the number of members of the local society. A person is a Panajacheleño, Chimalteco, Cantelense or Maxeño only if he has the right to participate in the hierarchy. In any community, persons of mixed Spanish-Indian descent can regularly reach the highest posts of the hierarchy but do so for a salary and are outside the system. Forest Indians, born in another municipality, who do not know the customs of the local society and are not under the protection of its patron saint, are not part of the system. A secretary of mixed descent, normally a very powerful individual locally, is a familiar part of the hierarchy, but more necessary as a scribe than as a participant. The hierarchy constitutes virtually the entire social structure of an indigenous municipality ...

"The hierarchy is the link between the local community and the super-local institutions with which the members of the society must deal. It is the intermediary between the society and the nation on the one hand and between a vision of the world, religion, and the Catholic Church on the other. From its beginnings, the hierarchy has acted as the agent of order and organization of the local society within a network of nation-wide social relations.

"High-ranking indigenous employees often have a thankless and unrewarding role. But the hierarchy serves the community as a defence organization. It not only unites the community to the nation but at the same time protects the members of the community from direct contact with national representatives and institutions. A familiar scene of the past was that of a delegation of indigenous notables in a government office explaining why government demands were unreasonable or could not be satisfied.

"In the political role of the hierarchy, two important social conditions are necessary: (1) the officials of the hierarchy act on behalf of the community and maintain themselves as passive agents of the nation; and (2) the nation does not sidestep the hierarchy and appeal to the individual indigenous person directly. These conditions have long been characteristic of Guatemala. It is this combination - the indigenous community both as a local corporate body and as a defensive organization within a nation - which finds it

advantageous or convenient to limit the political nucleus and deal with the Indians indirectly; and it is this that has helped the hierarchy to survive on its local social base." 70/

175. In one group of countries there is de jure recognition of indigenous communities as local or regional politico-administrative entities. 71/

176. According to a publication in Colombia:

"Act No. 89 states that any parcialidad shall be governed not by the normal system prevailing throughout the country but by a cabildo or council appointed by the Indians themselves in accordance with their traditional customs. In all matters relating to the financial administration of the community the cabildo has all the powers conferred upon it by its particular statutes and by tradition. The cabildo may take steps to annul or cancel any sale which constitutes an infringement of existing legislation and apply for the invalidation of contracts mortgaging community land and of any other transaction which may be prejudicial to the community as a whole. Disputes between Indians over community affairs must be submitted to arbitration and dealt with by ordinary law." 72/

177. The Government of Canada has stated that:

"On the local level, an evolving system of Band management is increasing the autonomy of Indians on reserves. The Band Council system was introduced in 1871, and the procedure for democratic election is contained in the Indian Act. It is anticipated that the local autonomy of the Band Councils on reserves will become roughly equivalent to that of municipal councils in other communities in Canada.

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

"Indian tribes are encouraged to have a constitution that is ratified by the Secretary of the Interior. The Government thus officially formed by such a constitution is then recognized as a local and regional political entity in that it establishes courts of law, policing or policing authority on the Indian reservation, and passes ordinances that are the reservation law."

179. The self-determination of indigenous populations in the United States of America has gone through a complex process of evolution from the 1770s to the present time. There was a treaty-making period, with recognition of self-determination and treaty-making power, up to 1871 when an Act was passed indicating that thereafter "no Indian Nation or Tribe within the territory of the United State shall be acknowledged or recognized as an independent nation, tribe (or power) with whom the United States may contract by treaty." 73/ A period of reduction of the relevant powers of indigenous peoples followed and continued into the 1920s when United States citizenship was conferred on indigenous people (1924, as discussed above, see para. 25). In 1928 the publication of the Meriam report marked a reversal of this trend and a beginning of the reinstatement of certain powers,

70/ Manning Nash, "Relaciones Políticas", Integración Social en Guatemala, Publicación No. 3 del Seminario de integración social guatemalteca, Guatemala, C.A. Tipografía Nacional, 1956, pp. 140-142.

71/ E.g. in Canada, Colombia and the United States of America.

72/ International Labour Organisation, op. cit., p. 432.

73/ Indian Appropriation Act of 3 March 1871 (16 Stat. 544, 25 US C.71).

although with interference in internal organizational aspects. This period culminated in the early 1950s with a very negative attitude towards jurisdictional powers on reservations and the announcement of a terminationist approach in policies towards indigenous populations.

180. The following has been written concerning two measures which have had a profound effect on the jurisdictional powers in the Indian reservations and implied the denunciation of the treaties and the termination of the special relationship established therein between the indigenous populations and the Federal Government:

"Two measures adopted by Congress in the summer of 1953 prepared the way for almost a decade of turmoil that paralysed community action, destroyed two major tribes, and both frightened and angered Indians throughout the nation.

"The first was an act (Public Law 280) transferring jurisdiction over criminal and civil law to certain specified states and authorizing all other states in which Indian reservations were located to assume similar jurisdiction, without reference to the views of the Indians.

"Prior to enactment, state law did not apply within an Indian reservation, and except for certain major crimes, Indian tribes exercised police powers within reservation boundaries. State jurisdiction had been requested in good faith by tribes lacking the resources to maintain law enforcement agencies among their own people, but the Congress, without seeking the views of tribes, not parties to the request, replied with legislation of general application. The Indians protested, since they saw the action as a threat to one of the remaining areas in which they exercised local autonomy, and beyond that lay the possibility that the states would want to tax Indian lands, a power the states had sought for some time. The protest brought no relief.

"The second measure produced even greater alarm. This was a policy statement (Concurrent Resolution 108 of the Eighty-third Congress) declaring it to be 'the sense of Congress that, at the earliest possible time', Indians should be freed from federal supervision and control. Going still further, the Resolution directed the Secretary of the Interior to review existing laws and treaties and recommend what amendments or nullifications were needed to release the United States.

"A suggestion that their treaties might be denounced brought consternation to the Indians, for the treaties, like the land base itself, had acquired a symbolic value with which the tribes could associate their continuing existence. The treaties made them a distinctive people, and their abrogation would cut them off from their own past. Even the threat of such action was enough to create anxiety throughout the Indian population." 74/

181. In the 1960s the presidential election platform contained measures to reverse the policy of termination and presidential messages to Congress in the late 1960s and early 1970s promised that the new policies would encourage self-determination without threats of termination and reverse the policy of erosion of jurisdictional powers of indigenous peoples on reservations. An American Indian Policy Review Commission was established in the mid-1970s and recommended self-determination policies with a clearer intent. Presidential messages to Congress in the early

74/ McNickle D'Arcy, Native American Tribalism (New York, Oxford University Press, 1973), pp. 105-106.

1980s have ratified the intention of following a policy of self-determination. However, indigenous communities and their representatives have repeatedly stated that the authorities invoke these statements as policy-guiding "intentions" which, according to indigenous people, are not subsequently carried into effect in the form of concrete measures of actual implementation, for instance regarding several aspects of the American Indian Religious Freedom Act.

182. Basic issues today appear to include the interpretation of treaty provisions on many issues, the continued existence and legal enforcement of bilateral treaties despite their unilateral abrogation, the treaty-making power of indigenous nations today, the affirmation of the existing indigenous land-base, the protection of sacred lands from encroachment, abuse and dispossession, the restoration to indigenous communities of lands of which they have been illegally divested, control over the resources contained in indigenous lands and jurisdictional and self-government powers on indigenous reservations, as well as several aspects of self-determination in concrete spheres of action. Also see paragraphs 215 and 216 below.

183. On the problems which have to be solved, a writer states:

"There must be a concerted effort to define a new status for Indian lands today, and it must come as a generation of new legal and social concepts.

"... One of the most needed things today is a definition of the jurisdictional question. At the present time, it is a jungle of conflicting claims and counter-claims which produces a great deal of heat but hardly any light.

"There is a very simple solution to this problem and it follows the line of reasoning we are using in the treaty defence of the Wounded Knee trials. Unless a state or the Federal Government can show a specific grant of jurisdictional powers from the Indian tribe concerned to that government, there is no state or federal jurisdiction that can be exercised against the Indian tribe. Perhaps the best way that we could bring this issue to the fore would be to push for the creation of a special Indian court, and all suits involving an Indian tribe would have to be filed in this court. The Court would have its own staff of experts or consultants who would prepare exhaustive materials on the background of an issue prior to the court attempting to resolve the issue. At the least, such a court would eliminate the constant harassment suits which states are using to plague tribal governments.

"Such a court was originally visualized by John Collier in his original draft of the Indian Reorganization Act, but when the tribes in different areas demanded so many changes in the bill and Collier had to compromise, the idea of the court was lost. One of the major weaknesses of the operation of the present IRA statute has been that its enforcement is incomplete without the presence of such a court to guarantee tribal governments relatively hassle-proof protection from state and federal encroachments.

"The final reformation that must be made is the complete overhaul of the Indian Claims Commission. The ICC has become an arena in which tribal rights are daily compromised because of the pressing necessity of finishing the large caseload quickly, and because the Indians of too many tribes have lost hope of receiving a just deal from the Government, and are willing to take whatever dollars the Government dangles in front of them to avoid a prolonged conflict within the tribe." ^{75/}

^{75/} Vine Deloria, Jr., "The future of Indians", Akwesasne Notes, vol. 7, No. 5, 1975, p. 37.

184. Numerous allegations are contained in various parts of the summary of information relating to the United States of America, its appendices and annexes to the effect that election of officials (tribal councils) under the principles embodied in the Indian Reorganization Act of 1934 means the introduction in Indian nations of new authorities that come to have a parallel existence to that of the traditional authorities despite the small percentage of voters that have elected them. The rejection of these procedures is expressed through the systematic and consistent boycotting of these elections by traditional people. This abstentionism is then interpreted by the non-Indian authorities as acceptance and legitimation of the new authorities. It is reported that despite the fact that such spurious officials are considered by the vast majority of the members of these nations as having been imposed from the outside by an alien power and in direct opposition to the traditional procedures and officials, they are recognized by the Government and ultimately replace the traditional authorities in these nations' relations and dealings with the Federal Government.

185. In response to a request, contained in the above-mentioned summary, for information on those allegations, the Government furnished the following statement:

"There are a vast number of books, articles, studies and surveys which deal with the Indian Reorganization Act (I.R.A.) of 1934. Their treatment of the Act and conclusions drawn cover the entire spectrum of the Act's desirability and probably are reflective of the authors' philosophical leanings. However, all would agree that the I.R.A. was one of the most significant pieces of legislation to its time and to the present. It constituted a major reversal of government policy and approach toward Indian affairs and with the passage of the legislation in the 1970s forms the basis for the current self-determinationist approach to Indian affairs.

"During the period in which votes were taken on whether the Indian Reorganization Act should apply to the reservations, which extended from 1934 to 1936, 258 elections were held. The Oklahoma and Alaska Indians were not concerned in these elections as they were automatically brought under the law. In this balloting, 181 tribes (representing 129,750 Indians) voted to accept the law and 77 tribes (86,365 Indians) rejected it. About half of the latter were members of the Navajo Tribe (45,000) which rejected the Act by a close vote.

"Today, in only a few of the modern tribal entities is there considered to be a parallel existence of traditional authorities. In most instances the traditional form of government has ceased to function. That is not to say however that traditional viewpoints are not considered for, in all probability, the elected tribal leadership possesses the knowledge of traditional ways which are taken into account in every decision which is made.

"To say that the boycotting of tribal elections by traditional people constitutes a rejection of the legitimacy of tribal government and therefore the entire system is faulty is not to recognize reality. It is agreed that the ideal system would be one in which there is 100 per cent participation in the democratic processes of electing a leadership or in decision-making. However, this is never the case when the vagaries of the individual inclination or disinclination to participate are considered, for people choose not to participate whether or not they are traditional. And, in most cases traditionalists do participate. The spuriousness of the officials elected under the present system then becomes a matter of personal viewpoint." 76/

76/ Information provided in January 1982.

(iii) Autonomy, self-government and self-determination of indigenous populations

186. The information available in this regard is incomplete and fragmentary and allows for only a very limited comparative analysis, if any.

187. No information was available in this respect in connection with many countries. 77/

188. The data relating to the countries on which some information is available, falls into three main groups. The first group would consist of countries on which there is information to the effect that no autonomy or special autonomy is enjoyed by the indigenous populations. 78/ Those countries on which only de jure information is available would form the second group. 79/ The third group would comprise countries on which there is de jure information, with some insight into what the legal provisions actually mean de facto. 80/ Other countries are special cases. 81/

189. There is strictly negative information regarding certain countries. Thus, the Government of Norway has stated that the Lapp municipalities (i.e. those where Lapps constitute the majority) are not accorded more autonomy than other municipalities.

190. The Government of Costa Rica simply answers "Does not apply", to the question on this subject.

191. In some cases this negative information nevertheless contains positive aspects concerning certain specified activities. Thus the Government of Sweden has stated that "there is no autonomy or self-government for the Lapps except as regards the prerogatives of the Lapp villages in regard to reindeer breeding".

192. The information available on other countries stresses in particular the de jure aspects of this question, whether in plans for the future or in provisions that have already been incorporated into constitutional or statutory law.

193. An example of this group, where enactments are planned is Australia, since the Federal Government has stated its intention of promulgating legislation to enable Aboriginal communities to exercise a measure of self-government that would be equal to that of general Australian local authorities.

77/ Argentina, Bangladesh, Bolivia, Brazil, Colombia, Denmark (Greenland), Ecuador, El Salvador, France (Guyanne), Guyana, Honduras, Indonesia, Japan, Lao People's Democratic Republic, Panama, Paraguay, Peru, the Philippines, Sri Lanka and Venezuela.

78/ E.g. Australia, Costa Rica, Norway and Sweden.

79/ E.g. Suriname and India.

80/ E.g. Finland, Malaysia, Mexico and New Zealand.

81/ E.g. Canada, Pakistan and The United States of America.

194. In certain other countries in this group legal provisions enable some communities to be established on the basis of a certain measure of self-government with specified powers. The Special Rapporteur had at his disposal the texts of those provisions only and was unable to obtain information on their actual implementation.

195. India and Suriname are examples of this approach in law. The Constitution of Suriname provides:

"Article 150. The division into administrative districts shall be effected by statute. Administration within such districts shall be regulated by or pursuant to statute.

"Article 151. Self-governing communities may be established and dissolved by statute".

"Article 152.

1. The organization of self-governing communities and the composition, duties, powers and obligations of their governing bodies shall be regulated by statute.

2. The supervision of such governing bodies shall be regulated by statute. Their Ordinances and other decisions may be suspended or rescinded, in a manner to be prescribed by statute, if they conflict with higher statutory regulations or with the general interest.

"Article 153. Where representative bodies are established by statute for self-governing communities, the suffrage and the responsibility of the executive governing bodies to the representative bodies shall be regulated by statute."

196. The Government of India has communicated the following:

"In so far as the indigenous organizations and communities are concerned, they function in their own traditional spheres. For example, in the tribal areas village councils continue to exercise their own conventional authority particularly in the social sphere. In some areas the traditional Nyaya Panchayats or local people's courts function. There has been no interference in the working of the traditional bodies". 82/

197. According to information furnished by the Anti-Slavery Society, the scheduling of tribals is manipulated to reduce the number of reservations for tribals in some state legislatures. The Society reports that:

"In states where the tribal population forms a large percentage of the total it is obviously in the interests of the powerful non-tribals who control the state to reduce the number of reserved tribal seats in the state legislature, thereby reducing the potential political power of the Adivasis. This has been achieved by reducing the number of tribals who are officially scheduled and therefore to be taken into account in deciding the size of the tribal quota. For example, prior to the reorganization of states in 1956 in what was later to become Madhya Pradesh, the political power of the Adivasis was reduced by not scheduling over 600,000 in the Vidarbha region ... " 83/

82/ Information provided on 30 May 1983, in connection with the study.

83/ Information provided on 31 March 1977, in connection with the present study.

198. It has been contended that scheduled tribal populations could well have obtained a large measure of autonomy within the federal structure of India with the creation of a tribal state comprising Southern Bihar and nine other districts in adjoining states. In the 1950s the Jharkhand party called for the creation of such a state but contrary interests prevailed, particularly those concerning the possible exploitation of the mineral deposits and forestry resources which abound in the region. 84/

199. The Constitution of India contains, among the directive principles of state policy, the following provision on local autonomous or self-governing entities:

"40. Organization of village panchayats - The State shall take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government".

200. Responding to a request by the Special Rapporteur, the Government of India has forwarded the following information:

"The Special Rapporteur desires information as to how the provision for organization of village panchayats has been developed and implemented. Statutory panchayats have been constituted by the state Governments. Though the statutes vary from state to state, by and large, wards of panchayats return members to the gram panchayat which is usually composed of one large revenue village or a number of revenue villages. Thus, a ward may be a part of a village or one revenue village. Several gram panchayats have been aggregated to form a Panchayat Samiti for a development block normally covering about 100 or 150 villages. The Panchayat Samiti is an advisory body for execution of development work through the development block. At the district levels, Zilla Parishads have been constituted. The scheduled tribes have been involved in the ward membership, gram panchayat, Panchayat Samiti and Zilla Parishads. These local elective bodies function in some spheres as deliberative and decision-making bodies and in some other spheres as advisory bodies.

"There is no distinction between local and regional entities apart from the aforesaid bodies. The indigenous communities enjoy the same measure of autonomy or self-government in these bodies as a non-tribal in a non-tribal area of the country. In other words, there is no distinction in the matter between the two sections". 85/

201. In some countries a limited measure of autonomy is actually being exercised by indigenous communities and leaders. In this connection reference should be made to Finland, Malaysia, Mexico and New Zealand.

202. The Finnish Government has stated:

"In order to bring about a separate administration for the Lapps in matters concerning their interests, a Government Committee arranged an experimental election for a particular Lappish Parliament designed for this purpose. The experiment succeeded so well that the Committee will make a

84/ See paras. 168 and 169, above.

85/ Information furnished on 30 May 1983, in connection with the present study.

proposal on the legalization of such an institution. The task of a separate Lappish administration would be to control and to promote the interests of the Lapps in legal, economic, social and cultural spheres, to take care of the common affairs of the Lapps and to participate in Nordic co-operations. This administration would also support research work and draw up a programme with specific objectives. Moreover, it would make proposals and give opinions on matters concerning the establishment of mines, hydro-electric power stations, tourist centres and the like, and on measures relating to forestry, fishing and hunting, and education. Later on, the Lappish administration would be authorized to make final decisions and to take action accordingly".

203. Subsequently the Government stated that:

"The plans for a separate administration have now been implemented by Decree No. 824 on the Lapp Delegation of 9 November 1973."

204. In Malaysia, according to the Aboriginal Peoples Ordinance, section 4, second paragraph, "nothing in this section shall preclude any headman from exercising his authority in matters of aboriginal custom and belief in any aboriginal community or any aboriginal ethnic group".

205. The Aboriginal Peoples Ordinance provides for the recognition of hereditary headmen of aboriginal communities and for the confirmation of headmen selected in aboriginal communities in which they are not hereditary. However, the Ordinance also empowers the Minister to remove any headman from his office as well as to make regulations providing for the appointment of headmen and prescribing the qualifications and methods for their appointment as follows:

"16. (1) The hereditary headman of an aboriginal community shall be the headman thereof, or in the case of an aboriginal community in which the office of headman is not hereditary, a person selected to be headman thereof, subject in each case to confirmation by the Minister.

"(2) The Minister may remove any headman from his office.

" ...

"19. The Minister may make regulations for carrying into effect the purposes of this Ordinance and in particular for the following purposes -

" ...

" (c) providing for the appointment of, and prescribing the qualifications of and the method of appointing, any headman;

" ... "

206. In this connection it has been stated that "it should be noted that there is no tribal government/administration in the sense of the Orang Asli ruling themselves". 86/

86/ J. B. Idris, A brief note on the Orang Asli of West Malaysia and their administration, (Kuala Lumpur, Department of Orang Asli Affairs, Ministry of National and Rural Development, March 1972), p.8

207. According to the same writer, 87/ headmen of the different groups have no political power and exercise restricted authority in social matters. In this connection he states, however, that the major ethno-linguistic groups exercise a certain measure of autonomy:

Negrito

"The six tribal sub-divisions are territorial and linguistic units. Each sub-division is practically autonomous. Each group shows egalitarian tendencies with the leader having: (i) no real power; (ii) no material gain; (iii) no emblem of office; (iv) no executive power; (v) the ability to rule through his own personality.

Senoi

"Traditionally the Senois are ruled by a group of elders, and the society has strict taboos on violence, with sanctions by verbal persuasion (verbal ability equals intelligence). The criterion of leadership is therefore neither economic power nor a generous distribution of wealth.

"Nowadays each group needs a 'spokesman' for its contacts with the outside world, hence the 'Headman'.

Proto Malays

"The Social Organization of the Proto-Malays differs from that of the Senoi. The Temuan, for example, recognize no less than seven degrees of leadership. Each tribe is generally endogamous and descent is bilateral, with the exception of the Temuans in Negeri Sembilan who have characteristics of matriarchy and matriliney".

208. In New Zealand, the Government points out that:

"The New Zealand Maori Council and its constituent District Maori Councils and Maori committees have statutory recognition. The constitutional functions of these bodies are set out in the Maori Welfare Act 1962. They have certain powers to regulate the conduct of Maori people within their districts. For example, they have power to impose fines for unruly behaviour at Maori gatherings and to appoint wardens to control the abuse of alcohol by members of their community. It must be borne in mind that the overwhelming majority of Maori people nowadays live scattered through the whole community and that it is not very practical to have two sets of rules operating within one area". 88/

87/ Ibid., pp. 3-6.

88/ Information furnished during the Special Rapporteur's visit to New Zealand in 1973. See para. 64 and footnote 25/ above.

209. The Citizen's Committee for Racial Equality states, in this connection:

"Apart from the exceptions of Maori councils mentioned above, Maoris have not been granted any form of local autonomy, despite the pleas of the King and Kotahitanga movements for this. Likewise no special courts have been permitted, except the very limited warden's courts permitted recently".

210. The Government of Mexico states with reference to this particular aspect:

"... it must be pointed out that articles 39, 40 and 41 of the Constitution clearly indicate the form of government which the people of Mexico decided to adopt.

"Moreover, under article 115 of the Constitution, the states shall adopt, for their internal regime, a republican form of government, which shall be representative and of the people, having free municipalities as the basis of their territorial division and political and administrative organization, in accordance with the basis specified in the same article.

"Consequently, for the purposes of the present document, account should be taken of situations which have made it possible to reconcile the constitutional political order with the customary rules of the populations, as is the case of the mentioned indigenous municipalities in southern Mexico".

211. In Pakistan, the autonomy granted to certain community leaders is said to be gradually diminishing. A writer has stated that "the tribal leaders in some of the sensitive West Pakistan frontier regions are given a measure of autonomy, though gradually diminishing, in return for their co-operation in the maintenance of civil order". ^{89/}

212. The measure of autonomy assumed by indigenous communities, i.e. "Indian Bands", in Canada, seems on the contrary, to be on the increase. In this respect the Government has stated that:

"At present the Band Management Division of the Department of Indian Affairs and Northern Development continues to supervise the administration of local affairs on many reserves, but the number of those which have assumed local responsibility in fund-raising and administration is increasing to about half the total number of Bands. Councils have been assisted in acquiring administrative offices, and training courses in local administration are provided".

213. Reference has been made above (see paras 178-185) in very general terms to the evolution of the treaty-making powers; the jurisdictional powers and the self-determination policies and claims in the United States of America.

214. Since it has often been stated that indigenous populations are all seeking recognition as independent nation-states in the world of today, it should be indicated here that although some indigenous nations and peoples are indeed claiming maintenance of their sovereign powers and recognition as sovereign nations, not all have exactly the same broad approach to this important question. To illustrate the variety of approaches in this respect, a recognized indigenous writer may be quoted as follows:

^{89/} Richard F. Myrop and others, Area Handbook for Pakistan, (Washington DC, Foreign Affairs Series, The American University, 1971) pp. 270-271.

"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.

"The assumption of many non-Indians is that independence of a nation implies that it stands in the same position as does the United States toward the rest of the nations of the world. People visualize a standing army, a massive import-export business, tariffs, gigantic administrative bureaucracies, international intrigue, and the ability to wage wars on distant nations with relative impunity. Such indeed are the characteristics of a superpower, but not of the average nation which has recognition as a self-governing community with inherent rights to its own existence.

" ...

"The oldest independent states ... are the mini-states of Europe; Monaco, Andorra, Liechtenstein, San Marino and the Vatican City. Each exists in substantial sovereign independence, yet each has also negotiated certain agreements, understandings, and treaties with its larger neighbours. These larger countries have been willing to fully recognize the small states as sovereign entities and contract with them on specific issues, an example the United States might well examine when deciding how to deal with the Indian demand for sovereignty". 90/

215. As has already been indicated, as a result of the United States emphasis on the "dependent character" of the "domestic-nation" status of the Indian nations and tribes, they only exercise a minimum of self-determination, if any. As has also been stressed, this situation is not compatible with express provisions of treaties entered into with the United States.

216. According to the information contained in numerous paragraphs of this study; some of the basic American Indian concerns have revolved around existing treaties and their interpretation, self-determination, the treaty-making powers of the Indian Nations and the restoration and/or protection of the Indian land-base and of Indian control over their land and the resources to be found therein. Treaties and self-determination in particular have been very prominent among the aims of the Trail of Broken Treaties demonstration, as contained in points 1-3 and 13B, inter alia, of the 20 Points position paper. These were also central issues in the events of Wounded Knee in 1973 (See paras. 217-219, below), as well as the situation of the Hopi Nation discussed below in paras. 220-224. They are basic issues, also, in the cases on which information is contained in annexes I, II, III and IV to the summary of information relating to the United States of America.

90/ Vine Deloria, Jr., Behind the Trail of Broken Treaties, (New York, Dell Publishing Co., Inc., 1974), pp. 162-163, 176.

217. With reference to the events of Wounded Knee, an author concludes that:

"... the Wounded Knee siege dwelt on the provisions of self-government and undisturbed use of the Sioux lands and not specifically the restoration of lands already taken. While the people at Wounded Knee wanted a total restoration of lands in western South Dakota, they based their contentions on the political recognition of the Sioux Nation as contained in the treaty and not upon any clause of the treaty which gave them the power to reclaim lands. It is therefore the history and meaning of treaties that has become important to Indians today, the manner in which the treaties limited exercise of self-government or eroded the power of the tribe to deal with other nations and not particularly the redefinition of tribal land titles.

" ...

"The contemporary demand of American Indians for a restoration of the treaty relationship must be seen in this historical setting. Few tribes would have signed treaties with the United States had they felt that the United States would violate them. The promises of self-government found in a multitude of treaties, the promises of protection by the United States from wrongs committed by its citizens, the promises that the tribes would be respected as nations on whose behalf the United States acted as a trustee before the eyes of the world, were all vital parts of the treaty rights which Indians believe they have received from the United States.

" ...

"The Indian treaty ... according to the courts of the United States, did not establish the wardship relationship with it. The only valid interpretation of tribal political status which this decision leaves is that of dissenting Justice Thompson, that the Cherokees, and by extension the other Indian tribes, remain in a very real sense foreign nations with respect to the United States. It is this tradition that the current Indian movement seeks to support. And if the wardship status was not established in the treaties, the only documents in which the Indian tribes contracted with the United States government on a legal basis, then the international basis of Indian existence must still be good legal doctrine". 91/

218. According to another writer:

"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. Central to the demands made in the 20 point paper was the insistence that the United States reopen treaty negotiations with Indian nations. The leaders of the Caravan pointed out that

91/ Ibid., pp. 114, 136, 138.

there was no valid reason why Indian nations could not make treaties or reach agreements with the United States Government today. Treaty making could start again if Congress repealed the 1871 Act. And Congress has never specifically prohibited the making of "agreements" with Indian governments. Both the United States Government and Indian governments today have the legal capacity to reach new agreements which would clarify or redefine their relationship to each other. New treaties or renegotiated old treaties would form the basis for a legal relationship in which Indian sovereignty would be preserved.

" ...

"Congress and federal agencies have prevented Indian governments from exercising all their powers. To overcome this, many Indians have argued that, since Indian tribes are nations, relations with the United States should be governed by principles of international law. Under international law, Indian governments would be accorded a higher political and legal status than they now have. The right to nationhood would be recognized and protected by other nations of the world. New treaties or agreements could guarantee continued economic assistance without federal dominance. More federal monies would go directly to Indians rather than to bureaucratic agencies. And the United States Government would fulfil its trust responsibility by providing the resources necessary for strengthening Indian sovereignty". 92/

219.. In 1975, it was written that:

"In the two years since Wounded Knee, [almost two dozen] Indians have been killed on the Pine Ridge Reservation in South Dakota. Yet the Government has almost uniformly refused to investigate these killings or other charges of brutality. The usual statement is that federal agencies do not have any evidence available which would enable them to do anything about the oppression at Pine Ridge. When two FBI agents were killed recently, however, the reservation was flooded with agents. Armed helicopters are still seen swarming over the land and screams of law and order are heard."

"Throughout America, Indians continue to slip behind the rest of the population in nearly every category of social progress. The Federal Government responds by issuing reorganizational plans for the Bureau of Indian Affairs every time the outcries of Indians become annoying. Indian programmes have become primarily public relations operations, existing mainly in press releases without any visible changes occurring in local Indian communities.

"Exploitation of minerals on Indian reservations from Arizona to Montana continues unabated and the Bureau of Indian Affairs refuses categorically to assist the tribes with these very complex problems. Its contention is that since it is a federal agency, it therefore has a conflict of interest if it attempts to assist Indians whose lands contain minerals which figure prominently in governmental energy policies". 93/

92/ Curtis Berkey, Indian Sovereignty (Washington D.C., Institute for the Development of Indian Law, 1976), pp. 23, 102.

93/ Vine Deloria, Jr., "Who knows what violence we can expect", Akwesasne Notes, vol. 7, No. 4., 1975, p. 19.

220. It has been reported that the Hopi tribal council, although unrecognized for about 75 per cent of the 8,000 Hopi people 94/ continue the traditional way of life 95/, has made several lucrative deals with industrial plants 96/ which lead to destruction of the traditional life of the Hopi. 97/

221. According to a source:

"In the 1971-72 period, the Four Corners Power plants and the strip-mining of Black Mesa were major environmental issues. The traditional peoples of both nations [Hopi and Navajos] were totally opposed to strip-mining, particularly of sacred areas, for coal worth as much as a hundred billion dollars. In addition, signs of oil, natural gas and uranium are evident. The progressive Hopis, as well as the corporations and legal interests allied with them, would profit greatly through partitioning.

"Still another faction objected - but for far different reasons. They had no objection to the development itself, but they said the native people should have a bigger cut of the pie, or should run the strip-mining themselves.

" ...

"The media has characterized the dispute as being simply Hopis vs. Navajos. However, both peoples are divided into factions, the "traditionals" vs. the "progressives". Both groups of traditional peoples say this is a dispute among the progressives over wealth, and that the traditional people, left alone, would be able to peacefully resolve this problem among themselves instead of giving in to United States forced settlement. The progressives tend to be Christian, tend to regard themselves as United States citizens, and while they give some honour to the traditions of their people, according to the traditional viewpoint they do not live by the traditional values.

"The traditionals ... say they have a responsibility to protect the land and the lives of the unborn generations, and they follow the system of government given to them. Especially among the Hopi, they do not believe in voting, which acknowledges the right of a majority over a minority.

"Instead they decide by consensus, the way of natural peoples."

"While the Hopi Tribal Council has been pressuring for partitioning. Hopi and Navajo traditionals have worked for reconciliation". 98/

94/ "Doomsday ... " TECHQUA IKACHI, No. 9, November/December 1976.

95/ Elizabeth Dunbar, BLACK MESA: the effect of development, Pasadena American Friends Service Committee, Pacific Southwest Regional Office, 1974, p.5.

96/ Ibid., p.6; "Traditional Hopi Meeting - October 10, 1976", TECHQUA IKACHI, No. 9, November-December 1976; "Navajo-Hopi Dispute", Akwasasne Notes, vol. 8, No. 4, 1976.

97/ "Hotevilla village commemorates founding", and "Cutting the Hopi lifeline" TECHQUA IKACHI, No. 8, August/September 1976.

98/ "Navajo-Hopi Dispute", loc. cit.

222. Another publication contains information to the effect that:

"With the signing of the Treaty of Guadalupe Hidalgo in 1848, the United States acquired from Mexico vast portions of land that now comprise much of the American Southwest, including the ancient tribal lands of the Hopi. The treaty stipulated that the United States would "Honour forever the Indian reservation boundaries (previously) established by the "Government of Mexico" . Since that time, a series of Executive orders and other governmental actions have reduced the Hopi reservation to less than 1,000 square miles, one sixth of its size in 1882". 99/

223. An author writes:

"The Hopi have never signed a treaty with the Government of the United States. They are still a sovereign nation and wish to continue as such. Yet despite the truthfulness of the Hopi's independence, they have never been free from the federal government's continual imposition. Despite their protests to the Government that if left alone they could live a full and prosperous life, the United States Government refuses to withdraw its influence.

" ...

"The Indian Reorganization Act of 1934 provided each tribe with its own government and constitution, modelled on the "successful" Anglo way. Each tribe was asked to vote for the adoption or rejection of this new form of government. When the Hopi were approached with the idea, only 755 Hopis out of about 4,500 cast ballots. Even when the votes were counted, many of them were found to be in the names of deceased Hopi and Hopi who no longer lived on the reservation. Nonetheless, the Council and its constitution became incorporated into the Hopis' lives". 100/

224. According to another publication:

"The Hopi Tribal Council and 229 Hopis voted on 30 October 1976 to accept a \$5,000,000 land settlement (Indian Claims Commission Docket 196) which involves the aboriginal land rights of 8,000 Hopis. The Indian Claims Commission (a non-Indian Commission) has accepted this as being 'in accordance with the law'; and now Indian Claims Commission Docket 196 goes before the House Committee on Appropriations to pay the Tribe off for nearly 2 million acres; henceforth, the Hopi Tribe shall have no further claims, demands or counterclaims on the United States Government in relation to lands stipulated in Docket 196.

"The Hopi traditional leaders have opposed this land settlement and are seeking support in having it halted.

99/ "Hopi Tribal Council", Akwesasne Notes, vol. 4, No. 2, 1972.

100/ Elizabeth Dunbar, op. cit., p. 5.

" ...
" ... on 30 October 1976 the Tribal Council held a vote during a religious ceremony. Out of approximately 8,000 Hopis only some 250 voted on this land settlement - 229 for and 19 against. On that same day some 2,500 Hopis attended the Lacon Ceremony. Again the Tribal Council was in violation of its own Constitution: "Article VI, Section 1, (c) was violated by the action of the Hopi Indian agent, the Hopi tribal council has only a negative authority on land, to wit: "to prevent the sale, disposition, lease or encumbrance of tribal lands, or other tribal property. It has no authority to make affirmative decisions on land because that authority belongs to the Kikmongwis of the Hopi sovereign villages".

" ...
"Since the Tribal Council Chairman and BIA Superintendent refused to meet with the traditional leaders, the Kikmongwis (Traditional heads of the sovereign villages) replied with a letter stating their position and intention. Following is one of the six statements made in the letter sent to the Tribal Council Chairman and BIA Superintendent:

"It is your responsibility as servants to the Hopi People to do what Hopi People want and not what you want. Since you both have refused to face our people face to face on this vital issue we will now take action to have both of you resign or removed from your positions. You have failed to fully inform the Hopi people on things that concern the very land, way of life and religion of our people. Instead of obtaining the aboriginal land of our people, the Tribal Council and Bureau of Indian Affairs went along with Attorney John S. Boyden to make our land-base smaller and smaller. Both the Hopi Tribal Council and John S. Boyden are getting rich while the Hopi people are becoming very poor moneywise. This must stop NOW!

"We demand that you both inform all Hopi People everywhere that there will be no voting on this proposed settlement on 30 October 1976. This is our decision and the decision of our One-Horn and Two-Horn Religious Society Leaders".

"A memo dated 5 November 1976 recounting violations of the Constitution was presented to the Tribal Council on behalf of the Traditional people. Evidently the Tribal Council ignored the memo for on or about 11 November an eight-member Hopi delegation sent by the Tribal Council travelled to Washington, D.C. to attend the hearing on the land settlement, Docket 196 before the Indian Claims Commissioners. Testimony was given to the effect that the Hopi Tribal Council explained and publicized the "Land Settlement" to the Hopi people. It was further stated that a vote was held in accordance with the Law.

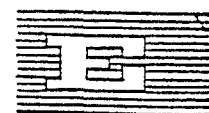
"The Hopi Tribal Council has funds allocated for travel, per diem, etc, while the traditional people do not. Consequently the traditional people had to rely on a telegram to make their statement known. The telegram was sent on behalf of all Hopi traditional Kikmongwis, religious society Mongwis and all the Hopi people who follow the old traditional Hopi way. They expressed their disapproval of the proposed settlement in Docket 196, and stated they did not accept the authority of the Hopi Tribal Council and had never authorized the contract of Mr. John S. Boyden. They also stated that the publicity given for only one week and the hearing held regarding the

proposed settlement inadequate to inform all the Hopi people or to allow them to express their opinions, and that many of the Hopi people were deeply involved in a religious ceremony which conflicted with the hearing on the land settlement at the Tribal Council's headquarters. They stated that the vote of some 250 Hopis out of a Tribe of 8,000 is not truly representative of the opinions of the majority of the Hopi people. They further stated that their religious traditions and prophecies prohibited the Hopi people from giving up any claim to their ancestral lands for mere monetary considerations, and that letters and petitions from hundreds of Hopi people who opposed the proposed settlement and supported their message would follow shortly.

"The Indian Claims Commission, when asked, stated it had heard the Tribal Council's testimony, and had also received the telegram from the traditional people and that it was all a matter of record. The Indian Claims Commission, nevertheless, accepted the Land Settlement, Docket 196, and made the decision official on 2 December 1976 and discussed how the money would be handled. The Claims Commission did this in view of the fact that only the traditional leaders have the authority to relinquish their land". 101/

101/ "Hopi tribal council accepts \$5 million land settlement, Hopi traditional reject land settlement", News Release, American Friends Service Committee, Pasadena 1976, pp. 1 and 3-5.

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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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Chapter XIX

RELIGIOUS RIGHTS AND PRACTICES

A. The right of indigenous populations to profess and practise their religion or belief

1. The International Bill of Human Rights contains provisions on the right of everyone to freedom of thought, conscience and religion; freedom to manifest religion or belief in teaching, practice, worship and observance, without coercion which would impair his freedom to have or to adopt a religion or belief of his choice and with no other limitations than those prescribed by law as necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others; and including the liberty of parents, or guardians where applicable, to ensure the religious and moral education of their children in conformity with their own convictions. These provisions contained in article 18 (in connection with articles 2, 7, 19, 20, 26 (3), 29 and 30) of the Universal Declaration of Human Rights; article 18 (in connection with articles 2, 5, 20, 21, 22, 26 and 27) of the International Covenant on Civil and Political Rights and article 13 (3) and (4) (in connection with articles 2, 4 and 5) of the International Covenant on Economic, Social and Cultural Rights, would seem to be comprehensive enough to provide a legal basis for an adequate protection of these rights.

2. By resolution 36/55 adopted without a vote at its thirty-sixth session on 25 November 1981, the General Assembly of the United Nations proclaimed the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The text of the Declaration which is annexed to the resolution had been elaborated by the Commission on Human Rights ^{1/} and consists of 10 preambular paragraphs and eight operative provisions.

3. Without claiming to enter into an analysis of any kind of this Declaration, its provisions will be arranged for the purposes of the present chapter into four groups, as follows: (a) provisions contemplating aspects of the right of everyone to freedom of thought, conscience and religion, comprising articles 1 and 6; (b) provisions contemplating aspects of the rights of a child as regards freedom of thought, conscience and religion, article 5; (c) provisions to prevent any restrictive or derogatory effects of the Declaration in regard to any right defined in the International Bill of Human Rights, article 5; and (d) provisions on equality in the enjoyment of rights and the elimination of discrimination relating thereto, comprising articles 2, 3, 4 and 7.

4. It is deemed useful to quote here the provisions of the Declaration, dealing with the right to freedom of thought, conscience and religion for all:

"Article 1

"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

^{1/} Commission on Human Rights resolution 20 (XXXVII), annex.

"2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice."

"3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

"Article 6

"In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

"(a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;

"(b) To establish and maintain appropriate charitable or humanitarian institutions;

"(c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

"(d) To write, issue and disseminate relevant publications in these areas;

"(e) To teach a religion or belief in places suitable for these purposes;

"(f) To solicit and receive voluntary financial and other contributions from individuals and institutions;

"(g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

"(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

"(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels."

5. Similarly, the legal systems of countries for which there is information appear to have provisions which, despite their widely varying scope, would seem to guarantee all "citizens", "nationals" or "inhabitants", most important aspects of the rights to freedom of thought, religion or belief, and to the exercise, practice and observance of their religion or belief.

6. This seems to be the case regardless of whether there is separation of Church and State and, therefore, no State, official or established religion or church, or one religion or church has been recognized as the "church of the State", as the "religion of the State", as "the faith professed by the great majority of the

citizens of the union", or the duty to give a religion "the foremost place and accordingly to protect and foster... [it]" has been imposed on the State or the Federal Government has been charged with the duty to "maintain" a particular religion.

7. These provisions are generally coupled with others assuring or guaranteeing other religions or churches the rights granted under the constitution or the fundamental laws of the land so that they can function unhampered. In some countries there are "recognized religions" which are identified through administrative procedures or are proclaimed as such by the fundamental laws. These generally would include some or most of the "Major Religions of the World" (e.g., Buddhism, Christianity, Islam, Hinduism, Judaism), and all the corresponding sects active in the country and which have fulfilled the prescribed formalities or have otherwise gained legal recognition.

8. Most of these systems include provisions guaranteeing the free manifestation, exercise and observance of religion or belief in accordance with laws of general application as to public peace, public order, public safety, public health, public morals, morality, good customs, decency, solidarity, democracy, unity, the evolution of the country, and provided that it not be prejudicial to the beliefs or the rights and freedoms of others or cause a public nuisance, etc.

B. The right of indigenous populations not to be compelled to participate in the activities of any religion or belief

9. An indispensable corollary to the recognition of the freedom of all persons to profess and practise their own religion is the recognition of the right not to be compelled to participate in the activities of any religion, particularly those of religions other than the one professed by these persons.

10. This principle is recognized in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief in article 1, paragraph 2, (see para. 4 above) which reads: "No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice."

11. The same principle is also recognized in many legal systems in different ways. In Sweden, for example, the law provides that "No one shall be compelled to belong to a religious denomination. Any agreement contrary to this provision shall be null and void." (Act No. 680 of 1951, article 4). The Penal Codes of several countries contain provisions whereby the use of threats, violence or other forms of coercion to compel or prevent participation in the ceremonies of any religion are punishable as attacks against freedom of religion. For instance, in the case of Honduras, penalties are imposed for the use of such means to "force a person to perform religious acts or participate in the ceremonies of any religion" (Penal Code, article 208) or to "prevent a person, by the same means, from practising the religion which he professes or from participating in its ceremonies" (Penal Code, article 209).

12. According to the information available for the purposes of the present study, however, two particular aspects of this corollary have been given special attention in the constitutions or in the laws of several countries covered by the study.

These aspects are the right of all persons not to be compelled to pay any taxes the proceeds of which are allocated in whole or in part for the support of any religion other than their own, 2/ and the right not to receive religious instruction or to take part in or to attend any religious ceremony or worship against their wishes or, in the case of children, against the wishes of their parents or legal guardians. 3/

C. The right not to be discriminated against on the ground of indigenous religion or belief

1. Normative aspect. De jure situation

13. Another important requirement for the exercise of full religious rights and practices is that no discrimination should be allowed to exist in these respects.
14. It is deemed useful to quote articles 2, 3, 4, 7 and 8 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, which contains provisions relevant to non-discrimination in these areas.
15. Article 3 of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief declares that:

"Discrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations."

16. Article 2 of the same Declaration defines intolerance and discrimination for the purposes of declaring that no one should be subject to any acts of intolerance or discrimination, as follows:

"1. No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis."

2/ For example, in India, Malaysia and the United States of America.

3/ For example, in Bangladesh, Burma, Finland, Guatemala, Malaysia, New Zealand, Pakistan, Sweden and the United States of America. Religious instruction of children attending school is discussed in paras. 96-112 below.

17. Articles 4 and 7, accordingly, impose duties on States in the following terms:

"1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter." (article 4)

"The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice." (article 7)

18. Article 8 adds provisions to the effect that:

"Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights."

19. As regards existing provisions on the matter in the countries covered by the study, it should be noted that in several legal systems discrimination on grounds of religion or belief has been prohibited, declared illegal or illegal and punishable, under constitutional and legal provisions whose purpose is to establish formal equality and eliminate unjustifiable differences.

20. In this respect, it should be recalled that equality before the law is explicitly recognized for all the inhabitants of the country 4/ or its nationals 5/ and the right to equal protection by the law for all inhabitants 6/ or for its nationals. 7/

21. It should also be borne in mind that "religion", "beliefs", "creed" and "religious convictions" appear among the grounds explicitly mentioned in the provisions prohibiting discrimination in the constitutions of several States. Following the ascending order of magnitude of the relevant provisions employed in chapter VIII concerning general measures for the prohibition, prevention and elimination of discrimination, 8/ mention should be made for example of Denmark (religious beliefs), French Guiana, France (religion), Burma (religion), El Salvador (religion), Venezuela (creed), Malaysia (religion), Suriname (beliefs), Japan (beliefs), Guyana (beliefs), Panama (religion), Brazil (religious beliefs), Bangladesh (religion), Pakistan (religion), India (religion), Guatemala (religion), Bolivia (religion) and Ecuador (religion).

4/ For example, in Argentina, Brazil, Canada, Ecuador, El Salvador, Guatemala, Honduras, India, Paraguay and Suriname. See chapter VIII, paragraph 5 and relevant foot-note 1.

5/ For example, in Bangladesh, Burma, Finland, Indonesia, Laos, Malaysia, Norway, Pakistan, Panama, Sri Lanka and the United States of America. See chapter VIII, paragraph 5 and relevant foot-note 2.

6/ For example, in Canada, Guatemala and India. See chapter VIII, paragraph 5 and relevant foot-note 3.

7/ For example, in Bangladesh, Brazil, Laos, Malaysia, Norway, Pakistan, the Philippines, Sri Lanka and the United States of America. See chapter VIII, paragraph 5 and relevant foot-note 4.

8/ See chapter VIII, paragraph 26.

2. Special problems of indigenous populations. De facto situation

22. Provided that they are properly and fully enforced, these provisions would seem to be more or less adequate when indigenous populations have embraced one or another of the "recognized" religions or belong to one of the "major" religions.

23. There are, however, special problems for indigenous populations in this regard, when they do not profess, manifest, practise and observe one of these major religions (Buddhism, Christianity, Hinduism, Islam, Judaism).

24. To give an example of how ordinarily "good provisions" may be a source of problems for the indigenous populations who keep their traditional religious beliefs; it is useful to cite some basic relevant provisions of the constitution of one country.

25. The Indonesian Constitution contains the following provisions on the matter of freedom of religion, conscience and thought:

"Article 2. The State shall guarantee the freedom of the people to profess and to exercise their own religion.

"...

"Article 18. Everyone is entitled to freedom of religion, conscience and thought.

"Article 19. Everyone has the right to freedom of opinion and expression.

"...

"Article 43. 1. The State is founded on the belief in the Omnipotence.

2. The State guarantees the freedom of every resident to profess his own religion and to worship according to his religion and belief. 3. The authorities give equal protection to all recognized religious denominations and organizations. Aid in any form given by the authorities to ministers of religion and to religious denominations or organizations, shall be rendered on the basis of equality. 4. The authorities shall see to it that all religious denominations and organizations obey the law - common law included."

26. Given the fact that in Indonesia many isolated communities and their members have kept their animistic beliefs and corresponding practices, these provisions have been interpreted as carrying with them certain limitations to the national motto "unity in diversity", as the concept of diversity, in the context of religious rights and practices:

"... means that the Indonesian State, according to article 29, section 1 of the Constitution 'shall be based upon belief in the One, Supreme God' and by section 2 'the State shall guarantee the freedom of the people to profess and exercise their own religion'. In a country that has substantial numbers of followers of all the major world religions this article provided some difficulty in the drafting. Eventually this format was agreed on and provides an official example of the liberality of the Constitution, guaranteeing as it does freedom of worship. The main drawback is that by referring to one, Supreme God, it has been decided that freedom of religion does not extend to those who practise any form of animism. Consequently the guarantee of freedom of religion is a mirage to many tribal communities who become subject to strong official campaigns to convert. That is one example of how far official policy is prepared to recognize genuine ... diversity."

27. Most Governments in their information submitted in connection with the present study only mention freedom of religion or belief and of religious practices in general terms. ^{9/} A few countries, however, refer in particular to the traditional indigenous beliefs and practices in their general statements.

28. For example, the Government of Chile states in connection with article 10, paragraph 2, of the Constitution that: "As is stated in the constitutional provision quoted, full freedom exists for indigenous persons, as inhabitants of the country, to hold or not to hold religious beliefs, and to profess them". ^{10/}

29. The Government of Mexico also reports that: "In the situations mentioned there have as yet been no specific cases of coercion or persecution of the indigenous population to make them profess or practise religious beliefs. Nor are there any legal obstacles in the way of following religious practices."

30. The Government of Guatemala is rather more explicit and states that: "There are no limitations or restrictions preventing indigenous persons from professing their traditional religion with all its rites and customs; however, they are subject to various social pressures to make them adopt Christianity (Catholicism or Protestantism). These pressures may on occasion give rise to a conflict situation, as in the case of the Confraternities, which Western religious sects are endeavouring by all means to dissolve."

31. The Constitution of Panama states in article 34 that all religions may be freely professed, and all religious practices freely observed, with no restriction other than respect for Christian morals and public order.

32. It appears that these provisions should be understood as applying directly to traditional indigenous religions and forms of worship, since the Government refers in its report to the fact that article 85 of the 1972 Constitution provides that "the State recognizes and respects the ethnic identity of national indigenous communities", and that it "shall carry out programmes to develop the ... spiritual values of each of their cultures" and shall establish an institute for their study, preservation and promotion.

33. According to information furnished by the Government of New Zealand apart from the ordinary laws of general application as to public safety, decency, etc., no denials, limitations or restrictions are imposed in law or in practice on the right of the Maori population to profess, express, and practise, or not to profess, express or practise, any creed or religion; to worship in accordance with their beliefs and customs; to comply in practice and observance with the tenets of their religion or creed and to refrain from performing acts incompatible with it; to disseminate their religion or creed; and to give instruction and training in it.

34. According to information furnished by the Australian Government, no specific limitations or restrictions are imposed in law or in practice on the right of Aborigines or other Australians to profess, express, and practise, or not to profess,

^{9/} The Government of Canada, for example, has stated that "there is no discrimination in Canada today in regard to religious observance".

^{10/} See also paragraph 83 *infra*.

express or practise, any creed or religion; to worship in accordance with their beliefs and customs; to comply in practice and observance with the tenets of their religion or creed and to refrain from performing acts incompatible with it; to disseminate their religion or creed, and to give instruction and training in it. In some matters, however, the application of the general law would limit Aboriginal freedom to carry out traditional practices. For example, there are general laws relating to the burial of the dead which, if enforced, would interfere with some Aboriginal customs. In some areas concessions are made in matters of this kind.

35. While there has been and is no legislative or administrative restriction on the form of Aboriginal marriage, in the past polygamy has been discouraged by some missionaries. While the form of Aboriginal marriage has not been officially restricted, neither has it been officially recognized. In relation to certain Social Service benefits, customary marriages are fully recognized, but this administrative practice has not been extended to recognition of the entitlement in relation to all wives of polygamous unions. The Government adds that "This matter is under review".

36. The Government of the United States of America states that the right of American Indians and Alaska Natives to practise whatever religion they wish to practise is guaranteed by the United States Constitution as it is for all other American citizens. Recognition of the rights of the indigenous population to its own religious practices is particularly evident in that the use of peyote - denied to others - is given to American Indians who belong to the Native American Church.

37. The courts are the avenue whereby all American citizens protest infringement of their constitutional rights. In addition, the United States Civil Rights Commission takes an active interest, as does the Office of Indian Rights of the Department of Justice, a unit within that part of the Executive Branch of the Federal Government.

38. The Bureau of Indian Affairs does not concern itself with the religious activities of Indians except to try to assure that the basic American right of freedom of religion - to which they are entitled as are all other citizens - is not denied them.

39. One source contains information to the effect that: 11/

"A preference is generally given to Christian Indians and Christian institutions in the administration of government programs. For example, Indian children in boarding schools are 'encouraged' to attend Christian church services, and in day schools are given 'released time' to attend Christian religious instruction. No comparable deference is paid to Indian religions, and of course text books and teachers tend to downgrade the importance and liability of Indian religions."

11/ 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. 41-42.

40. Discussing the situation in the early 1970s, one source contains information to the effect that: 12/

"While the Constitution of the United States guarantees religious freedom, it has and is being stifled in a number of ways. These methods have ranged from direct or indirect legislative prohibitions, to the destruction of culture and ridicule of beliefs.

"Religion in most tribes is an integral and fundamental foundation of the tribal structure.

"While the practice of Indian religion has not specifically been outlawed since the 19th century, the passage of certain laws has indirectly imposed penalties for certain practices and paraphernalia.

"For example, the Civil Rights Act of 1968 imposed extreme hardships on the tribes which are theocracies. The imposition of the Anglo-American legal tradition on tribal governments prevents certain tribes from exercising their constitutional rights. The restrictions against owning feathers of certain types of birds for conservation purposes, is used to arrest Indians who use the feathers in their religious ceremonies. It is interesting to note the government's response mentions the use of peyote as a privilege that Indians have. This permitted use of a drug, which is essential for certain tribes' religious beliefs, occurred only after extensive litigation and is still not universally permitted.

"But one can effectively prohibit a religion by destroying the underlying cultural foundation. The use of Indian boarding schools whereby Indian children were separated from their parents and forced to speak English is an example of this. Indian children were made to feel ashamed of their language and culture. This negative attitude is re-enforced by the media. Indian religions are made fun of and shown as a few sloppy pantheistic phaseabout worship to earth and trees or as frantic savages dancing for rain. This is the intellectual equivalent of showing Christianity as Easter egg hunts.

"The United States if it truly cared about the free exercise of religion, it must conscientiously remove the barriers that exist both real and cultural and recognize Indian beliefs as legitimate exercises of freedom."

41. The 20-points position paper representing the culmination of the Caravan Workshop was prepared in October 1972 prior to the formation of the Trail of Broken Treaties and was presented to the White House in November 1972 upon arrival of the Trail in Washington D.C. Point 18 of this paper dealt with the protection of Indian religious freedom and cultural identity. It contained the following proposals: 13/

12/ Ibid., pp. 60-61.

13/ The 20-Point Position Paper, Legislative Review, vol. 2, No. 1, pp. 63-64.

"The Congress should proclaim its insistence that the religious freedom and cultural integrity of Indian people shall be respected and protected throughout the United States, and provide that Indian religion and culture, even in regenerating or renaissance or developing stages or when manifested in the personal character and treatment of one's own body, shall not be interfered with, disrespected or denied. (No Indian should be forced to cut their hair by an institution or public agency or official, including military authority or prison regulation, for example). It should be an insistence by Congress that imposes strict penalty for its violation."

42. The American Indian Religious Freedom Act was signed into law in August 1978. The Act proclaims that it is the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise their traditional religions, including, but not limited to, access to sites, use and possession of sacred objects and the freedom to worship through ceremonies and traditional rites.

43. Section 2 of the American Indian Religious Freedom Act of 1978 (Public Law 95-341) required a report to Congress, one year after the approval of the Act, containing the results of an evaluation, undertaken in consultation with native traditional religious leaders and concerning administrative changes considered necessary for the protection and preservation of the religious cultural rights and practices for the American Indian, Eskimo, Aleut and Native Hawaiians.

44. This report was published in August 1979 and contains inter alia information on categorical actions undertaken under the Act, consultations carried out with native traditional religious leaders. Several sections are organized so as to cover a statement of issues, identification of problems, statutory authorities for administrative action, task force recommendations for uniform administrative procedures and recommendations for congressional administration.

45. On the basis of action reported in this respect it would appear that the way is open in the United States to increasingly significant consultation processes and substantial improvement in the effectiveness in the exercise of indigenous religious rights and practices. Several aspects of relevant information contained in the report are discussed below. 14/

46. It appears clear then that it is important to see how general provisions may in fact apply to indigenous populations in the context of their traditional beliefs.

47. This is precisely where the present study should concentrate, as it is not engaged in a study of religious freedom in general nor is it to study the rights of religious minorities which may belong to one or more of these "major" religions. Although not overlooking problems which indigenous groups might have together with the other members of a religious minority belonging to one or another of these major religions in a country where another of these religions may prevail, this study should concentrate on the problems confronted by indigenous populations who have kept and still adhere to and practise and observe their ancestral religions and beliefs. These problems should be examined in a historical perspective, as many aspects of their present difficulties have deep roots in the history of the countries concerned.

14/ United States Department of the Interior American Indian Religious Freedom Act Report (P.L. 95-341). A report by the Federal Agencies Task Force, Chairman, Cecil D. Andrus, Secretary of the Interior, Washington D.C., August 1979.

48. Since the very first contacts between the "new-comers" and the "natives", some of their respective religious beliefs and practices came to be expressed by each one of them and perceived by the other. Soon after, with renewed contacts, efforts were set in motion by the "new-comers" to convert the natives to their belief. By the time colonial rule was established there was usually an ongoing religious struggle. The "colonizers", who generally brought with them what they believed to be the only true religion, considered the religious beliefs and practices of the "natives" as "pagan", "gentile", "heathen", "idolatrous" and soon showed contempt for an intolerance of these beliefs. In most cases this haughty attitude contrasted with the "natives'" religious syncretism, which meant tolerance, if not acceptance of the other beliefs or religion by the "natives". Often where there was a religious imperative to catechize and convert the "pagan" to the newly arrived "true religion", further problems ensued often resulting in legal or social pressures amounting to the interdiction of the practice of the indigenous religion and the desecration or destruction of sacred symbols, objects and places, in the name of religion and civilization. A reaction by the "natives" to reaffirm their own beliefs and religion, particularly in the light of this and other not very civilized or exemplary behaviour by the "colonizer", was not long in coming.

49. And so, a continuing confrontation has been the history of religious contact between the dominant and non-dominant groups with repeated "encounters" in which the dominant religious authorities and groups have by "erosion" or by "alluvion" managed to get at least nominal conversion of important portions of the indigenous population to their religious confession.

50. Even after centuries have passed, indigenous populations who do not belong to those "established religions" are still today regarded as "pagans" and with that label goes a motley of preconceived ideas which are far from complimentary to them.

51. Perhaps a new horizon will be open in this regard if the beliefs of indigenous populations which form that part of their spiritual life which for other groups of population are considered "religion" were recognized as performing essentially the same function and serving the same fundamental purposes, regardless of any "substantive" differences.

52. As the beliefs of many indigenous groups in different parts of the world have been described as "animistic beliefs" or as "animism", the provisions of the Federal Constitution of Burma, including "animism" among other religions listed, appears to be a step in the right direction. The relevant provisions read as follows:

"21. (1) The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union.

(2) The State also recognizes Islam, Christianity, Hinduism and Animism as some of the religions existing in the Union at the date of the coming into operation of this Constitution.

"...".

53. It is known that many groups of population now constituting the indigenous populations of several countries had a highly developed and sophisticated religion based on ethical principles and geared towards the essential fellowship of human beings, when the onslaught of other, intolerant and exclusivist religions, although they were essentially based on very similar principles and functions, came to deny their very right of existence.

54. Many forms of intolerance of what are dubbed "inferior forms of religion" are, unfortunately, still with us. Usage and customs, social pressures, or even law on occasion have created an atmosphere wherein effective interdiction and intolerance of indigenous religions and beliefs is imposed.

55. Many instances of religious intolerance are present when arrangements are made to charge religious missions with the implementation of programmes and schemes devised for the indigenous populations of some countries. 15/

56. Although scarce, cases of "favoured" or even "obligatory" efforts at conversion into a particular religion are still present in the legal systems of some countries.

57. Thus, in the Constitution of Argentina, the Federal Congress is charged with the duty of "... promoting their [the Indians] conversion to Catholicism".

58. Supplementary rules have sought to eliminate the activities of Protestant groups in regions populated by the indigenous populations. Thus a Decree of 31 May 1946 provided: 16/

"Considering: ...that the said [non-Catholic] religions in some cases preach and proselytize in regions populated by the Indians and that, in this connection, the national Constitution, in article 67, paragraph 15, provides for the conversion of the Indians to Catholicism and Act 3727 concerning the organization of the National Ministries, in article 9, paragraph 15, recommends to the Department of Foreign Affairs and Worship the establishment of missions among the Indians...

"Article 6. As from the date of this decree, no new religious missions, temples or denomination organizations belonging to faiths other than the Roman Catholic Apostolic faith shall be established in national territory for purposes of proselytism among the Indians."

59. Measures of this sort have been supported in the past in similar cases with arguments maintaining that the religious homogeneity of indigenous populations is conducive to an easier "assimilation" or "integration" of these groups into the national community. It is, however, uncertain whether the homogeneity sought by sincere and well-intentioned religious persons and bodies in converting them

15/ See paras. 68, 69 and 83 below.

16/ Decree No. 344. See Boletín del Ministerio de Relaciones Exteriores y Culto de la Nación Argentina. Año 1, No. 5. Buenos Aires (May 1946), p. 15.

to one or another of the major religions will necessarily work to the advantage of the indigenous groups and even whether it will come about at all. 17/

60. Be that as it may, and whether it be deemed desirable that indigenous populations should embrace one of the world's major religions or not and no matter how sincere the intentions of the religious bodies may be in their efforts to convert them, it should not be forgotten that it is up to the indigenous populations themselves to decide whether or not they need a new religion in place of the spiritual-religious beliefs to which they now adhere. Perhaps it is time to re-examine and revise ideas claiming that the conversion of these populations to a particular "major religion" will help to integrate the various segments of a country's populations. Past experience warns us that rather than the sought homogeneity, further heterogeneity may result. Apart from their unavoidable alienation from their former brethren and concomitant socio-cultural adaptations, their conversion to one of the "major religions" does not necessarily bring with it the absolute acceptance of the new converts by the other members of that religion. The latter may, and often do, suspect the new converts of keeping some of their former beliefs and practices, be it only in a covert or even in a surreptitious manner. This, then, will not automatically result in the integration of the various segments of the country's population. As past experience also shows, moreover, the result may in fact be further heterogeneity and not better attained homogeneity.

61. Although in an atmosphere of religious freedom, with a proliferation of religious sects actively seeking the conversion of the indigenous groups to their particular religion, this would, unavoidably, result in even further fragmentation of the population, the alternative of granting exclusive rights to one or another of these cannot guarantee bringing them closer to each other, and would run counter to all notions of religious freedom.

62. As a result of the continuing campaign of religious conversion directed at the indigenous groups, which was carried out through all kinds of violent and non-violent means during colonial times, and which was continued during the countries' independent life, indigenous beliefs, religions and churches would seem to have practically disappeared in some areas. This seems to be the case in several countries, for which there is information.

17/ A writer's view of the effects of conversion of Orang Asli groups to different "major religions" is provided below:

"Though it may seem desirable to some people that the Orang Asli embrace one of the world religions they should also realize that their 'soul saving' efforts may have some unfortunate secular effect within that society of people whose souls they are after. It is evident that those Orang Asli groups who have embraced Islam or Christianity are usually quite isolated socially from their 'animist' brethren. The situation can be aggravated if there are pockets of different religious groups and denominations. This socio-religious fission within a largely 'animist' society has taken place in East Malaysia, and in many other parts of the world. It is to be hoped that this sociological phenomenon will not become widespread in West Malaysia because as it is the Orang Asli are already a diverse people with different languages, and degrees of development, and to introduce more elements of diversity would only create more problems for them. Having considered briefly the consequence and conversion of the Orang Asli from within their society we should also consider the consequence from without, i.e. the relationship of the converted Orang Asli and their non-Orang Asli brethren. If they become Muslims they will be accepted as full members in the Malay community. It is perhaps not usually realized that a number of Malays, especially those in the southern states of West Malaysia, are descendants of Orang Asli (Proto-Malays) who had been absorbed into the general Malay community. It is however difficult to say whether the situation would be similar for Christian Orang Asli among their generally urbanized and economically well-off and 'sophisticated' Christian brethren": Raffie'i, B.H.b., op.cit., pp. 5-6.

3. Present religious affiliation of indigenous populations in the different countries covered by the present study

63. Thus, on the religious affiliation of the Sani population in Finland, the Government has stated that:

"The Lapps do not constitute any separate religious communities but belong to the same religious parishes as other population residing in the same regions".

64. It has further been written in this regard, that "Skolt Lapps of Finland (and perhaps also the Russian Lapps) belong to the Russian Orthodox faith; all others are Lutheran. Missionaries visited Lapps, and gained proselytes, as early as the 13th century, but in most areas Christianity had no secure roots before the 18th or 19th century. The shaman was important in non-Christian Lappish society. There is, at least in most of the Northern Lappish communities, a strong evangelical congregationalism (Laestadianism) with insistences upon personal asceticism and open confession of sins. Confessions are sometimes accompanied by ecstasy. Local congregations are virtually autonomous".

65. In Guyana, apart from the self-declared Hindus and Muslims, plus the members of the Anglican Church and of different Protestant denominations, the other major religious affiliation is Roman Catholicism, of which the Portuguese and the Amerindian populations continue to be the two primary strongholds.

66. As to the religious affiliation of the Pakistani population, it has been reported that all tribal groups with the exception of the small Kafir populations of the extreme north profess Islam, the religion of the great majority of the main community, and that the fact that Pakistan is an Islamic State gives a degree of symbolic, if not substantive, importance to the community of religious leaders. The tribal leaders in some of the sensitive Pakistan frontier regions are given a measure of autonomy, though this is gradually diminishing, in return for their co-operation in the maintenance of law and order."

67. On the religious affiliation of the inhabitants of Paraguay it has been stated that "the vast majority of the people are Roman Catholic. The number of Protestants does not exceed 1 per cent of the population, and there is a smaller number of Jews. Indigenous Indian religions had, in effect, disappeared from the national scene".

68. On the other hand, from information furnished by the Anti-Slavery Society it seems that some indigenous religious beliefs and practices do survive, since it reports on certain acts of the military or missionary authorities seeking to induce their abandonment through different means, some of which seem oppressive:

"In spite of a general disdain for the 'pagan' beliefs of the Indians, most Paraguayan civil and military authorities do not seem to be too much concerned about Indian religion. A kind of indifferent religious tolerance is the consequence, except towards 'repugnant' customs like anthropophagy. The oppression of the Aché religion ... as long as their reservation was administered by a military functionary, seems to be more an exception than the rule".

Different, of course, is the attitude of religious missionaries. Here, much depends on the individual aims and opinions of each missionary, and it is difficult to generalize, but in most cases the temptation is very great for the missionary to exert his power over the Indians in the sense of forcing them to turn to Christianity.

69. According to the same source,

"this is extended often even to indigenous manifestations which have only a faint religious touch. For instance, among the Maká near Asunción, the Protestant missionaries tried to destroy a monument to a Paraguayan general who had been a benefactor of the Maká. They had discovered that the Indians deposited flowers at the monument, and were afraid this could be the beginning of 'a cult towards an image' severely rejected by this Protestant sect. Among the Aché of Colonia Nacional Guayakí, the traditional songs were forbidden, although they are far from being exclusively religious and sometimes contain just mockeries of a neighbour. The atmosphere of oppression is well described by Mr. Renshaw who visited the Roman Catholic Mission of María Auxiliadora to the Ayoreo Indians:

'When we arrived at the scene of the (traditional religious) ceremony we were told not to come any closer, but were later admitted when we promised not to take any photos, tape recordings, or tell the missionaries what we had seen. The Ayoreo are afraid of the missionaries, because they rely on them for protection against other groups and Paraguayans.'

"About the Aché reservation Colonia Nacional Guayakí, Mr. Lewis points out in his article of 28 February 1975 that:

'As Mr. Stolz, the missionary administrator, admitted himself, all the indigenous attributes like for instance the ornament which the men carry in one of their lips had been drastically suppressed. Although the Guayakí (= Aché) love music, there was no musical instrument of any kind in Cecilio Báez (= another name for Colonia Nacional Guayakí). Stolz did not permit the celebration of ceremonies ... The aborigine names - the Guayakí receive names of totemic animals - were forbidden.'

"Münzel has explained in his publications the horrible psychological consequences of this oppression.

"Another typical case is described by Chase Sardi in his report to the Minister of Defence of 16 January 1974 on behalf of the Anthropological Studies Center of the Catholic University of Asunción, after a visit to the Aché zone:

'The priest, Father Jorge Romero, of Cecilio Báez (a place close to the reservation) took with him (from the reservation) a boy called Cleto-í. He is about 10 years of age and his indigenous name is Takuangi. His mother, Elena, whose indigenous name is Pichuguí, weeps continuously because her son is absent. But the priest refuses to return him, on the pretext that he is giving him a Christian education.'

"In cases where the Indians have the possibility to do so, they often try to escape from the missionary pressures thus exerted upon them. For instance, several Paí Indian families left behind their land which had recently been reserved for them by legal titles, in order to escape the religious pressure exercised upon them by the Norwegian Pentecostal Mission. This example shows how much the Indians dislike this religious pressure, to the point of even leaving their lands which had been legally acquired under many difficulties."

70. In others, although indigenous religions may have ostensibly disappeared since indigenous persons or groups have nominally been converted into one or another of the major religions, indigenous beliefs and religions do survive in secret rites and ceremonies. In some instances the conversion of indigenous populations was attained through the creation - under the protection of one of the major churches - of what have been called "indigenous churches", some of which have kept some of the indigenous beliefs and rites.

71. This has happened, for instance, in New Zealand, where there are two such indigenous churches, of which one is said to have kept some indigenous practices. It has been stated that:

"Through the influence of Christianity, traditional Maori religious beliefs and practices have been largely eliminated, though some Maori Christian sects like Ringatu have managed to retain some Maori practices. Ringatu and Rotana (the main Maori Church ...) are registered and recognized as churches ...".

72. The Government has stated in this regard:

"There are two Christian denominations which were founded by Maoris and have an almost exclusively Maori membership. There are the Rotana Church comprising about 13 per cent of the Maori population and the Ringatu Church comprising 2½-3 per cent of the Maori population".

73. Finally, there are cases in which the indigenous populations, or large portions of them, have kept their ancestral beliefs, rites, and ceremonies, and practise them openly or secretly in addition to, or merging them into, the prevailing major religions.

74. Thus, for example, the Government of Japan states that some Ainu continue to cling to their own religion and that the animistic Ainu religion resembles primitive Shintó, but is closer to the supernaturalism of nearby North Asian tribes.

75. The information available in relation to a number of countries, in addition to mentioning the retention of their ancestral beliefs and practices by the indigenous populations, makes reference to concerted efforts made in the past - though sometimes even continuing into our days - for their conversion to other religions.

76. As regards India, it has been stated that the tribes of the hills and also those of the plains are of Mongoloid stock, and that many of the hill tribes have been converted to Christianity by missionaries, but the majority still observe the customs and festivals of their traditional religion, which is based on animism and has a close affinity to the ancient form of Hindu worship. The Mikirs and Kacharis of the Mikir and North Cachar Hills are mostly Hindus.

77. The Government of Canada states that proselytizing by various Christian churches has taken place over the centuries, but in some instances purely native religious forms, such as the Iroquois "longhouse" tradition, the sundance on the prairies, and the totem pole raising ceremonies on the West Coast are still observed.

73. The Government of Costa Rica states that "in this respect, religion or religions have changed and have been trying to change the particular beliefs of indigenous persons so as to induce them to embrace alien religions, which in a way is an encroachment on the culture of the indigenous populations. The Indian has been subjected to all these practices, sometimes against his will. It is difficult to supplant the deep-rooted beliefs of the indigenous populations", who "outwardly accept an alien religion although inwardly they continue to respect their own values".

79. As concerns the religious affiliation of the Orang Asli of Malaysia one source states that: 18/

"... Although comparatively little research has been done on the various facets of Orang Asli life some data on their spiritual beliefs are now available which give us some indications of the nature of that part of their life which for ourselves we regard as 'religion'. The Orang Asli generally believe in 'Nature Spirits' for example the spirit of the padi, some trees etc. These beliefs have often been referred to as 'Animism' and various forms of it are found in extensive parts of Asia, Africa and South America.

"With objective enquiry into the Orang Asli life in general we should find comprehensive systems of beliefs which have successfully catered for their 'spiritual' or 'religious' needs. To that extent I think we cannot simply dismiss them as mere 'pagans' and ungodly 'primitives' with no 'religion' whose souls must necessarily be saved.

"There has been a considerable amount of effort from various religious quarters to 'persuade' the Orang Asli to forsake their beliefs and embrace such world-religions as Islam and Christianity. There are pockets of Orang Asli who have embraced Islam and Christianity. Whereas conversion to Christianity seems to have been more the direct result of missionary, hence, organized activities, conversion to Islam, on the other hand seems to be more the result of the day-to-day relationship of the Orang Asli and the Malays, the somewhat diffused process of 'becoming' Malays, or 'masuk Melayu'. The impact of such religions as Islam, Christianity and others has been comparatively small; the main bulk of the Orang Asli population are still 'animists'."

80. On the religious affiliation of the indigenous population of the United States, a writer has stated:

"Christianity has made gigantic inroads into many tribes because of the nearly 60 years, from the 1880s to the 1910s, when the native religions were prohibited by the government.

"The Five Civilized Tribes of Oklahoma - the Cherokee, Creek, Choctaw, Seminole and Chickasaw - adopted Christianity very early (in comparison to other tribes), and they have a very strong membership in the Baptist and Methodist denominations". 19/

18/ Bharon Azhar b. Raffie'i, (Deputy Commissioner for Orang Asli Affairs) The New World of the Orang Asli, Kuala Lumpur, August 1967, pp. 4-5.

19/ Vine Deloria, Jr., "Religion and the Modern American Indian", loc.cit., p. 250.

81. The same author has added, however, that:

"... The Five Civilized Tribes are not wholly Christian, however, and medicine men and women still perform their healings and ceremonies in the traditional communities. Considering the national rate of Indian acculturation, one might suggest that the Five Civilized Tribes have reached a proportion of traditional versus Christian religious beliefs that all other tribes will eventually approximate: 80 per cent Christian, and 20 per cent traditional".

"... The recent efforts of Indian activists to reclaim tribal ceremonies have highlighted the dilemma of today's religious Indian. A traditional Indian finds himself still experiencing the generalized presence of spiritual forces; at the same time he finds himself bound by the modern technology of communications and transportation, which speed his world far beyond its original boundaries". 20/

82. And he states further that:

"Of modern Indian tribes that maintain a traditional religious life the Pueblos stand out as the most consistent and persistent of the nation's Indian groups in continuing their old ways. Pueblo life still revolves about the ceremonial year, and although most Pueblos are employed in modern jobs that require a thorough knowledge of the white man's world, they cling to the religious ways that have served them for countless generations. The Pueblos block off all roads leading to their towns and villages at ceremonial time. Although they apparently allow non-tribal members to observe their festivals, in reality they allow outsiders - both white and Indian - to view only those aspects of the Pueblo religion that can be known by people outside the Pueblo.

"Tradition is also strong among the Navajo, particularly with respect to healing ceremonials. The Navajo religion is deeply philosophical and ceremonially complex, and the Navajo medicine men still practice the ancient rites of healing for a surprising number of the tribe. The first reaction of the United States Public Health people to the Navajo medicine men was rejection and was based on cultural prejudices rather than on any profound knowledge of the Navajo religion. In recent years, this prejudice has broken down as whites have learned about the Navajo religion and customs; a programme to train medicine men now forms an important part of the health programme on the reservation. Medicine men and white doctors often work together successfully to heal Indians who have complex health problems.

"The Apache groups of Arizona and New Mexico also adhere rigorously to their traditions.

...
"The Iroquois of New York state and Canada also maintain a very strong sense of tribal solidarity.

...
"The tribes of the northern plains have reinstated their traditional Sun Dance after many decades of its prohibition by the government". 21/

20/ Ibid.

21/ Ibid., pp. 250-251.

33. The Government of Chile refers in particular to the activities of the Franciscans, Jesuits and Capuchins and their efforts to convert the indigenous populations in Chile, making special mention of baptismal registers and then going on to refer to the survival of certain indigenous ceremonies and the existence of indigenous cemeteries. The Government states that:

"Historically, the Franciscans, Jesuits and Capuchins were the first to perceive the need to convert the indigenous population, and they based their activities on the two fundamental concepts of education and evangelizing. As a result, large numbers of schools with churches alongside them can be seen throughout the territory occupied by the Mapuche Indians.

This work of christianization has been of considerable importance as far as the establishment of family relationships is concerned, since the names of ancestors entered in baptismal registers, for example, have been used to prove rights derived from kindred, filiation, etc. In this connection, special mention should be made of the complete freedom and respect enjoyed by the indigenous populations in religious matters, enabling them to preserve their religious practices and ceremonies which, despite evangelizing crusades, have remained intact. The best known among the latter is the 'nguillatun', a collective prayer ceremony (not solely on behalf of the indigenous populations) designed to obtain a good harvest, health and prosperity, and to give thanks for favours received.

A ceremony or ritual for the celebration of marriage is almost non-existent owing to the progress of civilization; in many cases, a de facto union occurs between an indigenous man and woman outside the civil law, but its effects are similar to those of a legal relationship, following the recognition given by the law to this practice over the course of time (article 13 of Act No. 14,511, and article 3 of Act No. 17,729).

It reaffirms the principle of absolute freedom of religion and respect for religious ceremonies and practices and the existence of indigenous cemeteries separate from those of the non-indigenous population, administered by an indigenous member of the community where the cemetery is located, and under the supervision of the National Health Service. This is a further indication of the State's respect for the customs and practices of the indigenous population.

In another context, a comparison of the tenets of the indigenous religion with the basic principles and tenets of the dominant religions of the country leads to the conclusion that there is no conflict or incompatibility between them (without taking account of course of their religious ceremonies and individual features). The result is that most of the indigenous population profess jointly their aboriginal religion and one or other of the prevailing faiths. For this reason there would be no point in having legal or administrative provisions limiting or restricting the practices of the indigenous religion in favour of a particular doctrinal system.

Furthermore, their religious ceremonies are handed down through spontaneous acts of a simple family nature for which the participants do not require indoctrination, assemblies, myths, or dissemination of propaganda, apart from what is directly handed down from parents to their children without the intervention of religious leaders".

34. In the information relating to several other countries emphasis is placed on the fact that the religion practised today by many indigenous groups is a mixture of ancestral beliefs and rituals and beliefs and rituals acquired through religious instruction and conversion. Some examples follow of information supplied in which these aspects are brought out more clearly. It seemed preferable to quote literally the views of authors working in this field in order to preserve the terminology, with which the Special Rapporteur may not necessarily agree.

35. In the case of Peru it has been stated that:

"The Inca religion, having identified itself with the social and political system, could not survive the Inca State. Its tenets were temporal rather than spiritual, being more concerned with the kingdom of this earth than with the kingdom of heaven. Its rule of life placed emphasis on the social aspect rather than the individual. The same mortal blow struck both theocracy and theogony. What has subsisted of this religion in the Indian soul is concerned not with metaphysical concepts but with agrarian rituals, magic practices and pantheistic sentiments.

From the various accounts we have concerning Inca myths and ceremonies it is evident that the Quechua religion was during the empire much more than the State religion (in the sense that such a religion has in our age). The church had the character of a social and political institution; it was the State itself. Religion was subordinated to the social and political interests of the empire". 22/

36. The same author continues:

"The externals and ornamentation of Catholicism easily seduced the Indians. Evangelization and religious teaching were never successful in the deepest sense because of this same lack of indigenous resistance. For a people which had not differentiated the spiritual from the temporal, the political domain included the ecclesiastical. The missionaries did not impose the Gospel; they imposed religious ceremonies, the liturgy, wisely adapting them to indigenous customs. Aboriginal paganism continued to exist under the Catholic religion". 23/

37. The following is another statement on the subject:

"The Indian population is, for the most part, almost totally ignorant of Roman Catholic dogma. Although most are considered to be nominally Catholic, one authority describes their religious practice as a mixture of paganism and the superstition of folk Catholicism. The Indian religious system is, in fact, a syncretism between pre-Hispanic religious beliefs and certain concepts and practices borrowed from or imposed by the Spaniards during the colonial period". 24/

22/ Mariátegui, José Carlos, op. cit., p. 121.

23/ Ibid., pp. 127 and 128.

24/ Erickson, et al., op. cit., p. 251.

86. Furthermore, it is pointed out that:

"Although most fiestas are tied to the Christian calendar and commemorate saints, this is the only connection between native religion and Roman Catholic concepts and doctrine. Often, the commemorative day of the most popular saints in a village occurs simultaneously with some important event in the annual cycle, such as planting or harvest. Invariably, the saint will assume the role of fertility guardian or spirit of the bountiful harvest. It is not unusual for the time of celebration to coincide with that set aside in pre-Hispanic times for the worship of a local deity". 25/

89. It has been stated that some pure forms of indigenous religion still exist in the Sierra and the mountainous region of Peru:

"Unmixed elements of religion still survive in the Sierra among nominally Christian Indians. Such elements of belief and practice usually exist alongside, rather than in place of, the Christian religion. Those who practice the native religion find no incongruity in this and usually consider themselves to be Catholics. They merely find the traditional system more efficacious for certain purposes. For example, in many areas the patron saint of animals introduced by the Spaniards is believed to have little power over the llama or the alpaca. In this case it is deemed advisable to call upon a purely native spirit in a native ritual method. This is somewhat different from the usual syncretic religious system with its strong Catholic overtones.

"In many parts of the Montaña there survives a more purely preconquest native religious tradition. The specific forms it takes varies from group to group. For some there exists a supreme god and a number of subordinate spirits; others endow all natural objects - stones, rivers and trees - with spirits. Belief in life after death is equally varied and often vague. Many believe that the souls of the dead return to haunt the living and that the dead must be respected, avoided and placated; for some the dead are of little consequence, and the bodies of the deceased are dumped unceremoniously into the river.

"Often the political power and religious power are embodied in the same person, the village leader, who is often also the head of the extended family. It is he who performs all the necessary rituals, be it for ensuring success in warfare, planting or curing of illnesses". 26/

90. As regards religious affiliation and practices in Mexico it has been reported that:

"Mexican Catholicism has social and regional variations in ritual and sacrament observance. Upper classes adhere to formal Catholic doctrines and look with disdain on lower class pious practices which are often a fusion of Christian and pagan elements held over tenaciously from pre-Conquest Aztec and Maya religions. Generally, Christian features prevail in the northern states and in major urban areas, while Indian beliefs and practices are prevalent in the Yucatán Peninsula and in peripheral population regions.

25/ Ibid., p. 252.

26/ Ibid., p. 254.

"It is interesting to note that the strongest Catholic areas today are generally those in which the main thrust of 16th century missionary activity occurred while the weaker Catholic regions correspond to the areas of least intensive missionary work. Many of the anti-clerical personnel of the Mexican Revolution came from the weaker regions while the opposition was usually strongest elsewhere". 27/

91. In the case of Bolivia, certain differences between the Aymara and Quechua communities have been pointed out, as follows:

"Indian beliefs today are an intricate blend of Roman Catholicism and pre-Hispanic religion. Necessary adaptations were made with ease by the Indian. The Inca had introduced new gods that were incorporated into the local pantheon so that, when the Spaniards came, the Indians were easily able to graft foreign beliefs and practices onto the existing religious culture. The Indian, however, does not divide his religious beliefs into Spanish and indigenous elements, nor does he concede greater or lesser power to the supernaturals on the basis of origin. The basic lack of system in the synthesis is partly a result of the absence of a priestly cult dedicated to the study and formulation of a theology. Although this lack leads to confusions and incongruities, it is not a source of concern for the Indian.

"The older religious beliefs have tended to persist more strongly among the Aymara than among the Quechua, but the two groups are generally characterized more by their similarities than by their differences. The Aymara world is densely populated with spiritis that are constantly influencing everyday events. They are related to and explain his economic state (in agriculture), his health, his personal relations with other members of his community, and the fearful unknown. Most commonly, spirits are place spirits, living in the air, in or around a natural phenomenon, or wandering with no fixed dwelling. The association of the spiritis with place reveals the Aymara's preoccupation with his natural environment, which plays such an important role in his life, and also explains the variations in objects of veneration from town to town or area to area". 28/

92. In Guatemala, in addition to the more isolated groups which preserve their ancestral religious beliefs and practices without major external influences, the majority have mixed them with other beliefs, practices and ceremonies. The situation has been described as follows:

"There are three general features which characterize religion in Indian Guatemala. First, the religion of the Indian consists of a combination of Christianity and paganism blended together so thoroughly that it is difficult to separate one element from the other. Second, religion displays an extremely local character. Indeed, it may be said that in western and north central Guatemala, there are almost as many variations in religion as there are

27/ Morris Ryan, et al., op. cit., pp. 200 and 201.

28/ Thomas E. Weil and others, Area Handbook for Bolivia, Foreign Areas Studies, The American University, Washington, D.C., pp. 133, 134 and 135.

municipios. Each municipio has its own local adaptations, its own set of supernaturals, prayers, myths, legends, and special formulae for appeasing the gods. Third, religion permeates all aspects of everyday life, so that it cannot be divorced from political, economic, social or personal affairs. Such matters as health practices and the curing and prevention of disease are intimately connected with religious beliefs and practices, as are the ordinary techniques of making a living". 29/

93. The following has been written about the blending of ancestral religions with Christianity in some communities:

"Indians of pure Maya-Quiché stock retain much of their ancient pre-Hispanic culture and combine the worship of both the Christian God and their pagan deities in a unique fashion. On market days the plaza, or main square, is a melody of colour and aromatic incense. Sounds are muted as the Indians from some 60 surrounding districts assemble to trade, gossip, and perform their religious devotions in a placid and happy atmosphere.

"In their devotions at the beautiful Spanish colonial Church of Santo Tomás, the Indians stop on the lower steps of the church to make offerings of copal incense to their ancestral gods, then climb the steps swinging their censers as the smoke wafts their prayers skyward. As Catholics, they pray before the Crucifix and the altars of the saints and burn candles on the floor of the church, after scattering offerings of rose petals or pine needles. At the two greatest festivals of the year, those of Holy Week and Saint Thomas, the Indians of 'Chichi' still celebrate with ancient ceremonial dances and the palo volador (flying pole), in addition to the procession of the saints and their traditional rituals". 30/

94. In many countries there are some groups that mainly because of their isolation from other groups have had little contact with the prevailing religions and who are now undergoing the processes that others lived through in past centuries or decades. This is the case of certain groups in some of the countries for which there is information in this regard. In these countries some isolated nomadic or semi-nomadic groups are now being located and brought within programmes formulated for their gradual integration into the community at large.

95. It has been stated that in Australia the strict application of general law would limit aboriginal freedom to carry out traditional practices (e.g. the general law relating to burial) and that, therefore, concessions are made in matters of this kind. It has been added that, while there is no legislative or administrative restrictions on the form of aboriginal marriage (which has not been officially restricted or recognized), in the past, polygamy has been discouraged by some missionaries. In relation to certain social service benefits, customary marriages are fully recognized, but this administrative practice has not been extended to recognition of entitlement in relation to all wives of polygamous unions. The Government adds that "this matter is now under review".

29/ Nathan L. Whetten: Guatemala, The Land and the People, New Yale University Press, 1961, p. 286.

30/ Merri Holway, Guatemala, American Nations Series Section of General Publications, Pan American Union, Washington D.C., p. 15.

D. The right of indigenous populations not to be compelled to receive instruction in a religion or belief contrary to their convictions or to the wishes of indigenous parents or legal guardians

96. Some of the data available on religious rights and practices touch upon the question of the religious instruction of pupils as one facet of this matter.

97. This is an important aspect of the principle according to which "no one shall be compelled to receive instruction in a religion or belief contrary to his convictions or, in the case of children, contrary to the wishes of their parents or legal guardians". A principle drafted precisely in those terms had been included among those proposed by the Sub-Commission in the draft Declaration on the elimination of all forms of religious intolerance prepared by it. 31/

98. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981 mentioned above 32/ provides in this respect:

"Article 5

"1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.

"2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

"3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

"4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.

"5. Practices of a religion or beliefs in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration".

31/ See A/8330, annex I.

32/ See paras. 2 and 3 above.

99. This provision is to be co-ordinated with that of article 6 (e) establishing the freedom "to teach a religion or belief in places suitable for these purposes" in connection with the provisions of article 1 of the Declaration and subject to the provisions of paragraph 3 of that article on "such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".

100. The information available on these matters shows that in a number of the countries surveyed, including those having a State religion, this right has been established in the constitution or in the law. These provisions are in line with notions of the absence of religious intolerance and discrimination.

101. In Burma the Constitution provides that 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 compulsorily imposed on it (Sec. 22).

102. In Malaysia, where the Federal Constitution provides for the protection of a particular religion, it is further provided that "State law may control or restrict the propagation of any religious doctrine or belief among persons professing the Muslim religion" (section 11, (4)). The same Constitution contains provisions of a much wider scope:

"Section 12

" ...

"(2) Every religious group has the right to establish and maintain institutions for the education of children and provide therein instruction in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but federal law or State law may provide for special financial aid for the establishment or maintenance of Muslim institutions or the instruction in the Muslim religion of persons professing that religion.

"(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

"(4) For the purposes of clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian".

103. As regards indigenous populations in particular, the Aboriginal Peoples Ordinance of 1954, as amended in 1967, provides:

"17. (1) ...

"(2) No aboriginal child attending any school shall be obliged to attend any religious instruction unless the prior consent of his father or of his mother if his father is dead, or of his guardian should both parents be dead, is notified to the Commissioner, and is transmitted by the Commissioner in writing to the headmaster of the school concerned.

"(3) Any person who acts in contravention of this section shall be liable to a fine of five hundred dollars".

104. In Guatemala the Constitution provides in article 93 that: "religious instruction in official establishments is optional. Both in these and in private establishments it may be given during regular hours. Civic, moral and religious education is declared to be in the national interest. The State may contribute to the support of the latter without discrimination of any kind".

105. The Constitution of Bangladesh provides in Section 41 (2) that no person attending any educational institution shall be required to receive religious instruction or to take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own.

106. In other countries this is not contained in the constitution itself but in statutory provisions which have the same purpose.

107. Thus, in Finland, as regards religious instruction to be given in public schools, detailed provisions are incorporated in the Act No. 247 on Elementary (Folk) School of 1 July 1957 and in Act No. 457 on the Principles of School System of 26 July 1960. According to these Acts, no one is compelled to receive instruction in a religion to which he does not adhere. Nevertheless, when five or more pupils belong to the same religious denomination, instruction in their own religion shall be given to them if so required by their parents or guardians.

108. According to Section 927 of the Revised Administrative Code of the Philippines no teacher or other person engaged in any public school, whose salaries are paid out of national, provincial or municipal funds, shall teach or criticize the doctrines of any church, religious sect, or denomination, or shall attempt to influence the pupils for or against any church or religious sect. If any teacher shall intentionally violate this section he or she shall, after due hearing, be dismissed from the public service.

109. The Government states that there are lay schools which offer religious instruction, but outside the normal curricula and school hours. These are primarily voluntary on the part of teachers and students and undertaken only upon the petition of parents and/or guardians of the students. No one is compelled or required to be present for religious instruction of any kind at any time.

110. The Swedish Government states that the attitude of the authorities is that in principle the general Swedish compulsory school shall be responsible for the education of all children in the country. Consequently national or religious schools founded on private initiative do not receive State subsidies (with a few exceptions).

111. Pupils attending schools run by public authorities may be exempt from lessons in religion, provided that they belong to a religious community that has been given permission by the Government to teach religion in lieu of the schools. These pupils must be taught religion to a corresponding extent arranged for by their parents and they must be able to produce a certificate thereof. On 17 April 1953 such permission was granted the Catholic Church in Sweden and the Mosaic communities in Stockholm, Gothenburg and Halmö.

112. Sweden has made a reservation against the article in the Additional Protocol to the European Convention on Human Rights which concerns the rights of parents to choose religious education for their children. 33/

E. Special measures

1. Preliminary remarks

113. In the Outline for the Collection of Information for use in preparing the study, 34/ point 70 was included for the purpose of gathering information concerning special provisions and measures of protection, administrative, civil and penal, to prevent and combat any interference with acts of worship and religious practices and observances of the indigenous populations and to protect all altars, chapels and other sacred places and objects and ancestral burial grounds.

114. No specific information was available on these points in relation to several countries. 35/ Nevertheless, certain general provisions in those countries that affect the religious rights and practices of indigenous populations in aspects relevant to this heading will be discussed in connection with special measures.

115. Further, data that were available specifically on these matters were, however, either general statements by Governments or very scanty materials usually referring to penal provisions in connection with certain aspects of this question as they would apply in general to populations of countries as a whole. Little of the data referred in particular to the special problems confronting indigenous traditional religious beliefs and their present-day practitioners.

116. In one country, there had been a recent comprehensive effort to solve some of these specific problems. The comments under particular aspects will consider the most important aspects of this special effort in this matter.

2. General provisions

117. Focusing first on the general provisions available in this connection, it can be stated that among the countries for which there is information in this regard, most legal systems provide - usually in their penal codes 36/ - for the

33/ Information provided by the Government of Sweden.

34/ The outline appeared as an annex to document E/CN.4/Sub.2/L.566 and was sent to all States Members of the United Nations, to FAO, ILO, UNESCC and WHO, to the Regional Intergovernmental Organizations and the NGOs in consultative status and having an interest in the subject matter, with requests for information.

35/ Argentina, Bangladesh, Bolivia, Ecuador, El Salvador, French Guiana, Honduras, India, Indonesia, Japan, Laos, Malaysia, Mexico, Nicaragua, Norway, Pakistan, Panama, Peru, Philippines, Sri Lanka, Suriname, Sweden and Venezuela.

36/ The data given in parentheses after the names of countries in the following paragraphs and foot-notes refer to articles (indicated as A) or sections (indicated as S) of penal codes. Wherever the provisions mentioned come from other texts, those texts will be explicitly mentioned.

punishment of persons responsible for acts such as (a) incitement to persecution of persons or population groups in the country for religious reasons; 37/ (b) meetings or demonstrations in which religious associations 38/ or the religious feelings of the inhabitants 39/ are directly insulted; (c) wounding the religious feelings of persons or groups of persons, including by spoken or written words, by visible representations, insults or attempts to insult the religious feelings of any person; 40/ by any sound in the hearing of that person or by gestures in the sight of that person; 41/ by placing any object in the sight of that person. 42/

113. Criminal law provisions exist which penalize as religious intolerance actions designed to make another person change religious belief or religion, using for this purpose material means of compulsion, threats, pressure or other measures liable to disturb such a person. 43/

119. Excepting perhaps some geographically isolated groups, indigenous populations are among those human groups that have been subjected to systematic "religious conversion" with the results that have been so fragmentarily reflected in this chapter. 44/ Together with the subjection of indigenous populations to the religious mission system in several countries, this conversion, which was not always attempted through peaceful means, should be fully studied. It was felt, however, that this fell outside the scope of the present study. Here attention should be focused, rather, on the current obstacles and difficulties affecting those groups and persons who have kept the traditional religions or beliefs of their ancestors in the normal practice of those religions or beliefs.

120. As a result of deeply imbedded attitudes, deriving from policies of outright repression of indigenous religious leaders and practitioners in respect of their beliefs and practices, which had developed early in the colonial context, policies and practices not dealing directly with religious matters were strongly biased against indigenous beliefs and practices even long after the colonial situation had finally ended. This bias lingered on even after the repressive policies were formally abandoned - which unfortunately by the way is still not the case in several areas - since no comprehensive review of existing policies and practices was ever undertaken to weed out the remaining undesirable attitudes, at least as far as public policies and practices are concerned. Thus, by inattention, inadvertence or indifference, many limitations, restrictions or obstacles continue to operate to the detriment of the free and full exercise of religious rights or continue to hinder indigenous religious practitioners and leaders in their observances and practices.

37/ For example, in Argentina (Police decree, Federal Capital, 2 March 1945).

38/ Ibid.

39/ Ibid.

40/ For example, in Burma (Section 298), Malaysia (Section 293), Pakistan (Section 298).

41/ Ibid.

42/ Ibid.

43/ For example, in Nicaragua (articles 207 and 208, Penal Code).

44/ See, in particular, paras. 63, 69 and 77 to 93, supra.

3. Prevention and punishment of interference with indigenous rights and ceremonies

(a) General penal provisions

121. Available penal provisions of general application refer to interference with the worship or ceremonies of any religion by deliberate acts consisting of
(a) disturbance of any assembly engaged in religious worship or religious ceremonies 45/;
(b) prevention, interruption, delay or disturbance of personal or collective celebration of religious ceremonies, rites or manifestations of any religion 46/; and
(c) preventing by means of violence or threats the practice of a religion permitted in the country. 47/

122. These provisions are of course useful, as they contemplate the punishment of such deliberate acts. They are, however, not enough in particular for practitioners of indigenous religions, whose ceremonies and rites need protective measures that were not contemplated in these provisions which centred on types of direct religious attacks and not so much on indirect and "consequential" denials, limitations, restrictions or obstacles also affecting traditional indigenous rites and ceremonies in many places.

(b) Importance of indigenous rites and ceremonies

123. It is a well-established fact that participation in ceremonies and traditional rites is an intrinsic part of the free exercise of all indigenous religions. Ceremonies and rites exist in great variety seeking to ensure the maintenance or the renewal of contact or steady relationship with certain specific spiritual beings, the observance of seasonal, generative or other changes affecting particular religious objects, the celebration of name-giving practices, initiation ceremonies and rites for the perpetuation of certain spiritual societies, preparation ceremonies for the celebration of specific rites, the preparation for the arrival of certain periodical phenomena, as well as for the birth or the death of persons. Ceremonies and rites may also be performed for disease-healing purposes, or with the aim of influencing certain natural phenomena.

124. Information concerning ceremonies and traditional rites is very fragmentary and scanty, in great part because of the reticence affecting communications in that regard on the part of the indigenous traditional leaders and practitioners based on a historical background and past experience of unfavourable consequences after revelations to catechists, priests or other interested persons. There is an ever-present and underlying suspicion that any information given would become the basis for further probing into indigenous religious history and would ultimately lead to excavations of traditional ceremonial sites by a variety of people and institutions. In this connection, it is recalled that, in the past, these persons or entities have shown little concern or respect for the present-day practitioners or even less for the communities affected by such probings.

45/ For example, in Burma (S.296), Malaysia (S.296) and Pakistan (S.296).

46/ For example in Honduras (preventing, disrupting or delaying, A.211), Nicaragua (disturbing another person...by any means so as to interrupt his devotions, bother him or distract his attention, A.207(2)).

47/ For example, in Chile (A.138).

125. Religious obligations in connection with rites and ceremonies are embodied in specific rules of indigenous customary law which may prescribe, for instance, the site where certain ceremonies and rites should be held; the manner of holding them; attendance and participation in ceremonies and rites as well as concrete causes for the exclusion or modification of such attendance or participation; the information it is permissible or not permissible to transmit to non-practitioners; the period and the manner of preparation before the ceremony or rite, as well as observance of certain norms of conduct immediately thereafter; the manner and modalities of arrival at and of departure from ceremonial and ritual sites, or the actual manner of holding the ceremonies and rites and the proper conduct to be observed before and after, and so on.

126. Failure to observe these laws may carry with it severe consequences for the individual practitioner or for his community or group as a whole. These consequences may last for extended periods or until a certain ceremony or rite is performed in the appropriate manner to offset the effects of the original non-compliance.

(c) Problems and difficulties

i. Introductory remarks

127. According to Government sources, in some countries no need has been felt to take measures to prevent interference with indigenous rituals and ceremonies. In certain cases, reference has been made to a general trend to abide by the law. No information was available, however, on the actual situation in this respect. Thus, for example, in Australia no specific provisions in legislation have been considered necessary to prevent interference with the performance of the rituals of Aborigines. Government officials and missionaries in contact with Aboriginal communities are aware that any interference would be contrary to policy, which is to encourage the maintenance and development of the traditional culture.

128. In other countries, special provisions existing in the statute books contemplate in particular certain measures intended specifically for application in connection with indigenous religious rites and ceremonies. In Brazil, for example, Act No. 6001 makes it a crime "against the Indians and native culture", punished with imprisonment "to jeer at native cultural ceremonies, rites and customs or traditions, or to revile or disturb in any way the practice thereof" (article 58 (1)). No information was available, though, on the actual implementation of these provisions or as regards the actual situation in this respect.

129. Problems and difficulties arise in connection with rites and ceremonies in many ways. Apart from practices and acts of interference, disturbance, banning or prohibition of religious rites, practices and ceremonies, there are many other instances of indirect or incidental or even non-voluntary interference.

ii. Problems and difficulties arising from specific circumstances

a. In connection with official holidays

130. As concerns official holidays, for example, it is a well-known fact that all religions attach great importance to the observance of their religious holidays. In this connection, it is then important to determine whether the State takes into account the holidays that are important to the different groups and allows them to observe their religious days of rest as official holidays so that they may celebrate the corresponding rites and ceremonies.

131. It is to be recalled that the draft declaration on the elimination of all forms of religious intolerance proposed by the Sub-Commission contained a provision stating that "due account shall be taken of the prescriptions of each religion or belief relating to days of rest and all discrimination in this regard between persons of different religions or beliefs shall be prohibited".

132. It should also be borne in mind that the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief includes among its provisions in article 6 (h) in connection with article 1, paragraph 3, the freedom to "observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief".

133. Provisions of this nature have been made in several countries. Concrete information in this regard is available, for the purposes of the present study, only in connection with few countries, such as Sri Lanka, Malaysia and Pakistan, in the form of Government statements.

134. In Sri Lanka, the religious festivals of the four major religions professed in the country are celebrated as national holidays. In Malaysia, the schedule to the Holiday Ordinance lists 11 public holidays, which are said to include the religious celebrations of the main ethnic and religious groups of the country. Eighteen holidays are officially observed in Pakistan, of which four are national, eight Moslem, four Hindu and two Christian. In addition, provision is made for 16 "optional holidays", of which two are national, four Moslem, three Hindu, two Christian, two Parsee and three Sikh.

135. These few data show, however, that in these countries, as happens in most other countries covered in the present study, national, official or public holidays and days of rest that have been formally established tend, in principle, not to take account of the main ceremonies and rites to be observed by the indigenous religious practitioners which would require the provision of a holiday or day of rest for their performance.

136. It must be recognized, though, that in countries where a great number of different religions exist, the proclamation of all the relevant dates for all those religions as official holidays would bring about inordinately extended periods of inaction to the detriment of the normal conduct of the necessary public activities and the ensuing serious consequences for the general public. It nevertheless remains true that while numerous holidays may have been established, not a single relevant indigenous date considered necessary for the celebration of even the most important indigenous ceremonies and rites has been designated to be a national, official or public holiday and, therefore, the observance and celebration of the corresponding ceremonies and rites are made difficult if not impossible for religious practitioners, unless they are ready to face serious consequences in their employment conditions.

137. Further, the fact that the law does not include these dates among those of recognized holidays or days of rest brings with it the consequence that they cannot be included among its provisions for the purpose of establishing exemptions consisting of granting free time that may be necessary for those persons who are working on those days to attend religious services, or engage in ceremonies and rites, as the case may be. Indigenous pupils adhering to indigenous traditional religions who are attending State schools are not exempted from classes in order to make it possible for them to observe the holidays prescribed by their religions.

138. Problems arise in connection with employment regulations and practices that are centred on non-indigenous conceptions of time and have holiday schedules based on other religions which end up being imposed on indigenous employees to the detriment of their needs and obligations under indigenous religions. These problems manifest themselves, inter alia, as obstacles to the observance of ceremonial events at the proper time and for the prescribed periods.

139. In the United States of America, for instance, it has been stated in connection with the review of the effects of the American Indian Religious Freedom Act, 1978, that: certain of the conflicts between federal employment practices and Native religious obligations were discussed during the consultation period. Unique problems arise where federal agencies are located upon the premises of an Indian Pueblo. A common occurrence is the closing of the Pueblo for religious ceremonies; often, there is no advance notice of the ceremony, the Pueblo people are required to remain at home, non-Pueblos are forbidden to observe and anyone working at the Pueblo must stay away.

140. This affects primarily the staffs of the Bureau of Indian Affairs (BIA) and Indian Health Services (IHS). The Task Force was advised by the BIA school superintendent at San Felipe Pueblo that federal employment procedures do not provide for staff disposition when religious ceremonies prohibit non-Pueblo staff from going to work. Thus, both Pueblo and non-Pueblo staff are forced to take annual leave.

141. The major governmental employers of Native Americans, the BIA and the IHS, are examining their employment practices as they affect the religious obligations of some tribes. The IHS is discussing the problem with its Indian Health Board. The Interior Assistant Secretary for Indian Affairs has directed the BIA to develop a plan that seeks to accommodate employees' religious practices requiring time away from work, and to examine the problem as it affects student time away from school.

142. This plan is to be developed in consultation with the affected employees and tribal and traditional religious leaders. It is authorized under the Federal Employees Flexible and Compressed Work Schedules Act of 1978, as amended, which requires the Office of Personnel Management to prescribe regulations to permit federal employees to engage in compensatory work for time lost while meeting religious requirements.

b. For children in non-indigenous foster or adoptive homes

143. Difficulties also arise for some indigenous children that have been separated from their parents or communities and cultural heritage and placed in non-indigenous foster homes or adopted by non-indigenous persons. These children may be denied access to the cultural and religious life of their communities or groups and therefore be faced with the impossibility or the extreme difficulty of attending or taking part in indigenous rites and ceremonies.

144. The Government of the United States of America has transmitted a report in which it is stated that the Indian Child Welfare Act of 1978, Public Law 95-608, establishes standards for the placement of Indian children and serves to prevent the breakup of Indian families, recognizing that Indian children have been separated from their parents and raised outside their homes at a shockingly higher rate than non-Indian children. The Act is now being implemented by the affected federal agencies and state and tribal courts, but its reversal effects will not be felt for a generation. Thus, this problem area will continue to be identified as a Native religious freedom impediment in relation to many of those children removed from their homes prior to 1978.

c. For children in non-indigenous boarding educational institutions

145. Problems of essentially the same nature affect indigenous children who are interned in educational institutions away from their indigenous community or group.

146. In the United States of America, an official report forwarded by the Government states in this regard that problems regarding federal educational institutions are being resolved through the contracting of those schools to tribes and the revision of BIA educational policies to ensure that the freedom of religion of students is not abridged. Increasing emphasis on the cultural content of federally-funded Indian education programmes will necessarily increase the students' awareness of Native American religious beliefs.

147. In the newly published BIA regulations under the Education Amendments of 1978 (25 USC 2010, 2013), the religious freedom rights of Indian students are specifically noted in 25 CFR Part 31a, as the BIA policy to: "promote and respect the right to cultural practices, consistent with the provisions of the American Indian Religious Freedom Act".

148. In 25 CFR Part 31, the following are recognized: 1) the right to freedom of religion, and the right to be free from religious proselytization; 2) the right to cultural self-determination based upon tribal thought and philosophy; 3) the right to freedom of speech and expression, including choice of dress, and length of hair; 4) the basic right to an education requiring a staff which recognizes, respects and accepts the students' cultural heritage, its values, beliefs and differences; and 5) the right to a meaningful education which shall be designed to insure that tribal elders and members having a practicing knowledge of tribal customs, traditions, values and beliefs are utilized in the development and implementation of cultural programmes.

d. In connection with internment in health-care institutions

149. Similar problems affect indigenous persons who are interned in health-care or in penal institutions who experience problems and difficulties in having access to or taking part in the necessary indigenous ceremonies and rites.

150. As to health-care institutions, in the United States, according to an official report forwarded by the Government, the official policy of the Indian Health Service (IHS) provides for the consideration of the religious needs of patients and for accommodations for Native religious ceremonies and practices. During the Task Force consultations, abuses of this policy were specifically mentioned and decried by DEEW and IHS representatives.

151. The Rehabilitation Services Administration considers Native American religions in its counselling of Native Americans. Recent amendments to the Rehabilitation Act permitting tribal operation of rehabilitation programmes will facilitate the use of Native American religious beliefs and ceremonies in the rehabilitation of disabled Native Americans.

152. The new Public Health Service facility at Laguna Pueblo includes space specifically designed for Native religious use.

a. In connection with internment in penal institutions.

153. As regards penal institutions in the same country, ^{48/} the same report states that many Native American prisoners experience substantial difficulty in the practice of ceremonies and traditional rites, possession of sacred objects and access to spiritual leaders.

154. In federal prisons, where inmates' religious beliefs are recognized as important to the rehabilitative process, Native American religious needs are being administratively accommodated within existing statutory authorities and policy presently applied to the practice of other religions.

155. The Task Force heard the views of traditional peyote religion and Native American Church leaders on this subject, who maintained that the peyote ceremonies could aid in rehabilitation and that Native American prisoners should have access to peyote roadmen, or ceremonial leaders. However, they took the position that peyote itself should not be brought into the prisons.

156. The Bureau of Prisons has established a special liaison team to work with the Office of Chaplaincy Services as a clearing-house for Native concerns; modified prisoner placement and transfer criteria regarding the religious and cultural needs of Native prisoners; and permitted on a test-case basis sweat lodges, yuwipi ceremonies and possession of some items necessary to the practice of Native traditional religions.

iii. Problems and difficulties arising from border crossings to attend or take part in indigenous religious ceremonies

157. Border-crossing difficulties also affect the appropriate observance and participation in or attendance at ceremonies and rites when the territory of indigenous communities has been divided by the borders drawn between existing nation States, but the common cultural and religious traditions continue on both sides of the border. The members of these indigenous nations, communities or groups, whose national, communal or group identity ties remain undisturbed as a strong link between them, have insisted that their territorial boundaries were established many centuries before the present-day international borders ever existed and that their free movement across those borders for ceremonial or ritual purposes should not be disturbed. This is particularly clear in cases where the communal or group ties have been reflected in formal agreements concerning travel for purposes of ceremonies and rites. Special arrangements are being contemplated in several countries on problems affecting border-split indigenous nations, communities or groups.

^{48/} In this regard it should be noted that in the United States of America Native Americans have a disproportionately high arrest and incarceration rate - the highest of any identifiable group in the country. Native people incarcerated in federal prisons and federally-funded state institutions are subject to the policies of the Bureau of Prisons and the Law Enforcement Assistance Administration.

158. At the eighth Inter-American Indian Congress, the Fourth Commission dealt with the topic "Indigenous groups in border areas". The following were among the views and recommendations of this Commission: 49/

"GENERAL CONSIDERATIONS

"Whereas

The frontiers between States members of the Inter-American Indian Institute create a number of problems affecting indigenous groups in border areas;

The cultural, political and social unity of ethnic groups is affected by those frontiers;

The maintenance of ethnic integrity and unity is indispensable for the survival of indigenous groups;

...

It is recommended:

1. That countries with problems of indigenous populations in border areas should carry out surveys leading to bilateral agreements for a satisfactory and effective solution of such problems;

2. That, when formulating such agreements, international instruments concerning human rights should be taken into account.

SPECIAL CONSIDERATIONS

Whereas:

Indigenous groups with problems in border areas are nowadays confronted with difficulties relating to national identity, land holding, freedom of movement in the border area, education, social and health services, military service, religion and free passage for goods and articles of prime necessity, with the result that particular ethnic groups receive different and inequitable treatment,

It is recommended:

1. That in bilateral agreements consideration should be given to the need to prepare registers of indigenous populations in border areas in order to determine for the persons concerned the national identity corresponding to each of them;

2. That on the basis of such population registers agreement should be reached on an identity card enabling the ethnic group divided between the two countries to move freely in the area;

49/ Recommendations of the Fourth Commission on "Indigenous Groups in Border Areas", adopted by the Programme and Co-ordinating Commission.
Document OEA/Ser.K/XXV.1.8.CXI/doc.49, 20 November 1980. Original: Spanish.

3. That the territorial area for each indigenous frontier population of the two countries should be clearly defined, and that the occupancy of the territorial area should be legalized and guaranteed so that the indigenous group may maintain its rights;

...

6. That both countries should respect the cultural, artistic and religious manifestations which maintain the unity of the ethnic frontier group;

...

8. That in the bilateral agreement between the two countries the free movement of goods and articles of prime necessity should be authorized within the border area mentioned in recommendation 3;

9. That the facilities required as a result of recommendations 6 and 8 should be introduced by both countries simultaneously and in co-ordination, in order to maintain a balanced development of the indigenous border area of the two countries."

159. In paragraph 13 of its report the Fourth Commission took note of the matters raised by participating countries having difficulties with their indigenous border groups and formulated the following recommendations relating to some of the specific problems mentioned:

(a) That Costa Rica and Panama should carry out a survey and conclude an agreement on the Guaymí Indians;

(b) That Venezuela and Colombia should carry out a survey and conclude an agreement on the Guajiro Indians;

(c) That Venezuela and Brazil should carry out a survey and conclude an agreement on the following indigenous groups:

Yanomami,
Yaruros,
Pemon,
Baniwa,
Sanema,
Jabibi,
Waiwai;

(d) That Mexico and the United States should carry out a survey and conclude an agreement on the Papago, Cucapá and Kikapu Indians;

(e) That Mexico and Guatemala should carry out a survey and conclude an agreement on the Mame and Cakchiquele Indians;

(f) That Brazil and Peru should carry out a survey and conclude an agreement on the Marubo and Mairuna Indians;

(g) That Paraguay and Bolivia should carry out a survey and conclude an agreement on the Ayoreo Indians;

(h) That Nicaragua and Honduras should carry out a survey and conclude an agreement on the Misquito and Sumo Indians;

(i) That Colombia and Panama should carry out a survey and conclude an agreement on the Choco and Cuna Indians."

160. Paragraph 14 contains the following general recommendation: "That, when requested to do so by the countries concerned, the Inter-American Indian Institute should act as adviser in solving problems of indigenous groups in border areas".

161. In the United States of America, the tribes whose people reside on both sides of the border find it ironic that they are subject to immigration laws at all, as their territorial residence predates the national divisions by many centuries. However, through the Customs Committee on Indian Affairs, these tribes are working with the appropriate agencies, as well as their Canadian and Mexican counterparts, on particular problems as they arise. Immigration restrictions on the Canadian border have been removed, and present laws regarding entry into the country are sufficiently broad to permit entry of members of related groups for Native American religious ceremonies.

162. It is reported that the Kickapoo Indians of this country and Mexico have a long-standing border-crossing agreement which does not impede their travels in fulfilment of ceremonial obligations. Their procedural arrangement with the appropriate local officials allows for early resolution of specific difficulties encountered. (Cross-border problems relative to the transportation of sacred objects are detailed in Section III, D.) The Yaqui Tribe of Arizona has experienced difficulty with the entry into the United States of Yaqui people from Mexico, whose participation is essential to certain ceremonies.

iv. Funeral ceremonies

163. Information available on penal provisions of general application deals with interference with funeral ceremonies by disturbing any persons assembled for the performance of funeral ceremonies. 50/

164. According to available information some indigenous funeral and burial ceremonies have survived into the present time with full force.

165. In several countries the general laws relating to the burial of the dead have not been strictly enforced in order to accommodate indigenous traditional practices and customs in that regard, which are "tolerated" or for which "concessions" are made since they would not conform to the provisions of those laws.

166. Thus, for example, in New Zealand it is reported that some Maori social practices like the tangi (for the burial of the dead) have survived in a modified form and are tolerated as such.

167. The Government of Australia states that in some matters the application of the general law would limit Aboriginal freedom to carry out traditional practices. For example, there are general laws relating to the burial of the dead which, if enforced, would interfere with some Aboriginal customs. In some areas concessions are made in matters of this kind.

50/ As for example in Burma (S.297), Malaysia (S.297) and Pakistan (S.297).

4. Access to and protection of sacred places

(a) General penal provisions

168. Available information on penal legislation of general application contains provisions on places of worship and religious ceremonies and on places of burial and funeral ceremonies, cemeteries and human remains.

169. Among the relevant provisions concerning places of worship and religious ceremonies the following should be noted among those contained in the information available on these subjects.

170. Acts offending the religious feelings of persons in a place devoted to religious worship or during the celebration of any religious ceremony, inter alia, by: (i) performing acts notoriously offensive to the feelings of the faithful; 51/ (ii) committing in a place of worship acts which, although not covered by other criminal offences, nevertheless offend the religious feelings of persons attending that place. 52/

171. More directly concerned with the places themselves are acts consisting of: (i) committing trespasses in places of worship; 53/ (ii) destroying, damaging or defiling any place of worship with the intention of insulting the religion of the faithful. 54/

(b) Importance of holy lands and sacred places for indigenous religions

172. The attachment of all indigenous peoples to their land is a fact well noted in history. In treaties, agreements and special statutes, Governments have made provisions regarding a land base for indigenous communities and their members, at their insistent demand.

173. It is also a well-established fact that indigenous peoples all over the world hold certain areas of their encephal land as holy. These lands may be sacred, for example, because they are the dwelling place or embodiment of spiritual beings, because they surround or contain burial grounds, because of religious events which occurred there, because they contain specific natural products or features, because in them the indigenous forefathers have made arrangements of stones, erected architectural works, placed sculptural works, left engravings or paintings or found rocks or other natural features of religious significance.

51/ As for example in the Philippines (Act 133).

52/ As for example in Honduras (Art. 212).

53/ As for example in Burma (S.297), Malaysia (S.297) and Pakistan (S.297).

54/ As for example in Burma (S.295), Malaysia (S.295) and Pakistan (S.295).

174. There are specific religious beliefs regarding each type of sacred site which form the basis for religious laws governing the sites. These laws may prescribe, for example, who may or may not go to the site; when, how and for what purposes the site may or must be visited; what ceremonies or rituals may or must take place at the site; what manner of conduct must or must not be observed at the site; the consequences to the individual, group or community if those laws are not observed.

(c) Physical access to and preservation of the natural character of sacred lands and places

175. Indigenous religious use of land has, in general, not been explicitly excluded, but neither has it been specifically included in the purposes for which the land is held by public agencies, nor has it been recognized as a use of such land.

176. General limitations, restrictions or controls do affect this use, though, since physical access to lands has been denied to people because of necessary military considerations. Some public lands have controlled access because of the purposes for which the land is held, such as primitive and wildlife management areas. Access is also limited by fire-control regulations.

177. Further, gathering of substances and ceremonial uses of public lands are limited by laws, regulations and practices, including certain procedures deferring to restrictive local or special laws or practices, particularly in the hunting, fishing and gathering areas.

178. This limited, restricted or controlled access has severely limited indigenous religious use, or has placed such use outside the protection of the law. Access to natural products or substances on some public land may allow for waiver of fees and exceptions for personal use, but these have rarely been operative for indigenous religious gathering.

179. The leasing of some public lands effectively prevents indigenous religious use of these lands, and especially affects the gathering of natural products, which are often destroyed or damaged by the lessee's use of the land. The gathering of a specific plant or animal may be forbidden or limited by conservation statutes.

180. In some cases indigenous religious use of public lands has repeatedly been accommodated in an uneven, arbitrary or ad hoc manner, invariably involving long struggles - often through arduous litigation - and not infrequently necessitating special legislation.

181. Gaining access to these lands does, however, not solve all problems.

182. Physical access to the revered land and its natural products is essential, but the preservation of the natural conditions must also be included since, without this, mere access would be meaningless. The suitability and efficacy of the natural products and the spiritual force of the sacred sites depend upon the preservation of natural physical conditions. Changing the physical conditions not only damages the spiritual nature of the land, but may also endanger the well-being of the indigenous religious practitioners in their roles and religious obligations as guardians and preservers of the natural character of specific land areas.

(d) Problems and difficulties

1. Introductory remarks

183. Such preservation is often made unnecessarily difficult through management practices such as the extermination or removal of original species; reckless introduction of imported species that endanger indigenous ones; failure to prevent overgrazing, particularly during dry periods; excessive, uncontrolled or unreasonable hunting, fishing or trapping practices; or the serious alteration of the terrain through uncontrolled sources of water, land or air pollution or extensive river channelization. The most serious of these practices are, of course, dams and other similar projects which alter altogether an area with extensive damage to the natural environment and preclude access to the underlying land.

184. All these practices endanger the natural supply of the substances required by indigenous religions, and may damage the character of land areas which are extremely sensitive to the actions and consequences of prevailing ways of life.

185. Restrictions designed to ensure the preservation of the natural character of the land and the performance and observance of rituals and ceremonies without disturbance or interruption and in accordance with religious laws are rendered imperative by many practices.

186. Inadequate control of tourism threatens the offerings left at sacred sites and gathering areas. It also has a negative impact upon sacred sites and the privacy of indigenous religious practitioners.

187. Rituals which require differing forms of privacy have been covertly or even overtly observed, interrupted and affected through the presence and activities of unauthorized persons. The privacy needed for rituals varies from community to community, ranging from the exclusion of certain members of the group from plant-gathering and other rites, to the exclusion of all non-participants for the duration of the ceremony.

188. It is therefore necessary to adopt adequate measures to protect access to and privacy in sacred lands and places.

ii. Access to sacred lands and places

189. The reservation system used in some countries could, to a certain degree, have accomplished the intended purpose, provided that the reserved areas at least roughly coincide with the ancestral lands of the communities concerned. This, unfortunately, has rarely been the case. Further, the rigid application of the system has ended up effectively denying access to off-reservation areas necessary for the gathering of natural products used for healing and ceremonial purposes, and access to areas containing sacred sites or holy places revered in indigenous tradition.

190. In other countries, where this system does not apply, indigenous ancestral lands have been taken over or eroded away throughout the years despite the resistance of indigenous communities to these losses and regardless of their concerted efforts for recovering lost ancestral land, sacred sites and holy places.

191. Many of these places are now held by the Government for a variety of purposes but, while most would not be incompatible with indigenous religious use, no action has been taken to make religious use possible in practice. The accommodation of traditional indigenous uses within land management programmes must take into account the requirement that these lands should remain in their natural state.

iii. Gathering of natural substances

192. The indigenous natural substances of the land are an integral part of the indigenous traditional religions. The proper ways and rhythm of gathering the natural products are essential to ensure their efficacy in traditional use. The gathering may be carried out immediately or it may take place over a long period, depending on the amount needed and the religious instructions governing sources and the method of gathering. The amount gathered varies according to the purpose of the gathering (for certain ceremonies, for example, determined animals in specified limited quantities per period, a small collection of first shoots of a particular plant, a determined number of feathers, teeth or claws would suffice).

193. The place and the time determined for the gathering, as well as the preparation of the persons entrusted with it, are also important.

194. The time chosen for the gathering may be determined by the immediacy of the need for a particular substance; by the problems of arranging travel to distant places for a specific natural product, as well as by communal tradition or by the individual's particular belief, which may require a certain period of gathering, often based on the seasons of the year, recurring cycles or other natural events, with the time of day or night being similarly prescribed.

195. The place of the gathering may be determined by tradition, as well as known availability and accessibility of the natural product; a ritual search may also be involved.

196. The persons who are to engage in the gathering may be subject to specific religious laws regarding their behaviour immediately before, and may have to undergo preparatory rituals. The presence of others is often controlled because of beliefs that the substance itself may be affected by the proximity, behaviour or condition of all persons. Those who are to gather the substance are often required to achieve a proper state of mind or purity through self-discipline and sexual abstinence prior to entering the physical presence of the natural product to be gathered or establishing physical contact with it.

197. The ceremonies may also require preparatory rituals, purification rites or stages of preparation. Both active participants and observers may need to be readied. Natural substances may need to be gathered. Those who are unprepared or whose behaviour or condition may alter the ceremony are often not permitted to attend. The proper spiritual atmosphere must be observed. Structures may need to be built for the ceremony or its preparation. The ceremony itself may be brief or it may extend through many days. The number of participants may range from one individual to a large group.

198. In Australia:

"... Places sacred to Aborigines who still practice their traditional religion may include particular natural features (pools, rocks, caves, etc.), arrangements of stones, paintings or engravings on rock surfaces. The latter are of general archaeological and anthropological interest also. In the Northern Territory and more recently in the States, legislation has been enacted to make it an offence to interfere with sites such as Aboriginal paintings, burial and ceremonial grounds and to make it possible to set aside areas where Aboriginal sites occur and provide special protective measures for these sites. The Federal Government is providing funds for an accelerated program of surveys to identify Aboriginal sites so that protective measures can be taken."

199. In New Zealand, a few pa (fortifications) sites on public reserves and even on privately owned land have been preserved; many more have been, however, bulldozed away or otherwise desecrated.

200. In the United States of America during the period of consultation, many problems encountered in indigenous religious use of federal lands were called to the attention of the Task Force.

201. Dialogue and the search for the settlement of several of the problems identified are under way in each problem and policy area with the aim of solving them.

202. Many of these problems are in litigation or before the Congress at present. According to the official evaluation report transmitted by the Government 55/ as part of the continuing evaluation process, some of these problem areas may be examined in light of the policy commitment to the religious freedom of Native Americans. It is important to note here that certain problems result from adverse policies of the distant past and may defy resolution, particularly where irrevocable physical change has rendered the subject lands inaccessible.

203. The report also states that several specific problems have been resolved by mutual agreement between the affected agency and Indian tribe or Native group; several general problems affecting more than one tribe or Native group have been the subject of policy determinations within an agency.

204. The Coso Hot Springs figure prominently in the Indian religious history of this area as a sacred place for spiritual and physical renewal and curing.

205. The Department of Navy acquired the Coso Hot Springs and surrounding lands following the Second World War, whereupon the China Lake Naval Weapons Center was established. Because of its use as ammunition storage site, certain security restrictions were placed on its public use and access, including a prohibition against overnight and extended visits, bathing in the springs and entry without an escort.

55/ See para. 139 above.

206. Following a year-long dialogue regarding national security needs and tribal religious needs, the Department of Navy agreed to lift certain prohibitions on the duration of visits and authorized activities to allow for the tribal religious use of Coso Hot Springs.

207. The Department of the Navy has entered into an access agreement with the Owens Valley Paiute and Shoshone Band of Indians, providing for the Indian religious use of the medicinal muds and waters of the area.

208. In a Memorandum of Understanding, the parties agreed that: the week-end and other visits will not interfere with the Navy mission; the scheduled visits are reserved exclusively for members of the Owens Valley Paiute-Shoshone Band of Indians and/or the Kern Valley Indian Community, with other requests for visits determined on a case by case basis; and medicine men who are visiting these tribes are also covered by the agreement. The Prayer Site, Coso Hot Springs, the old resort of the same name and a designated overnight camping area constitute the agreement area.

209. The agreement may be reviewed at the request of either party following the submission of the President's evaluation to the Congress. All parties agree to scrupulously adhere to the Historic Preservation Act and to diligently pursue a preservation and management plan for the Coso Hot Springs National Register of Historic Places site. The tribal people agree that the springs and pond must not be permanently disturbed, and that they assume all risks associated with the hot springs area. Finally, the Navy will provide an escort who, upon request during any ceremony, shall withdraw to a discrete distance and shall not intrude on traditional rites.

210. Allocation of Buffalo on Federal Lands - The problem of the lack of access to buffalo on federal lands was prominently mentioned throughout the consultation period by traditional Indian people whose religions are based on or involve the American bison. These Indian tribes and people utilize every part of the buffalo, although the significance and need for a particular part of the animal varies from tribe to tribe and religion to religion. Certain Indian religions need buffalo meat for ceremonial feasts, while some ceremonies require the presence of a live buffalo among the participants. In other religions, certain ceremonies cannot begin until the participants have eaten buffalo tongue, and some cannot continue unless a buffalo skull is available. Tribal religious elders also spoke of the "spiritual sickness" which occurs when their people are unable to see and live near buffalo.

211. It is reported that under federal conservation programmes, the American bison has made so spectacular a recovery from its previously diminished state that the herds on National Wildlife Refuge lands are thinned periodically and the excess buffalo sold under the lottery system. The Fish and Wildlife Service, in response to the Indian religious need, is developing a policy by which at the fall round-up each year a percentage of the excess buffalo will be made available for Indian religious purposes.

212. This allocation policy, including provisions for methods of taking, will be developed and implemented in continuing consultation with Indian traditional religious leaders.

213. The California Desert Conservation Plan (CDCP) established by the Federal Land Policy and Management Act is designed to protect the California Desert environment - including lands in Arizona and Nevada - and its cultural, archaeological and historical resources and sites.

214. In implementing this Plan, the Desert Planning Staff of the Bureau of Land Management (BLM) has initiated an inventory of Native American areas of concern. Their findings indicate that more than 20 tribes and Indian groups have sacred sites located in the CDCP area. In ascertaining the locations and significance of these sites, the Staff ethnologist has worked closely with tribal elders, religious leaders and councils. In many instances, sites of significance were revealed only after the Indians were informed of the protectionist intent of the project and assured that no site-specific public disclosure would be made. Under BLM staff policy, only those areas previously known to the public can be identified publicly. These include Pilot Knob, Intaglio, Coachilla Valley, Saline Valley and Panamint Mountains, which are village sites and burial grounds presently threatened by urban encroachment. Other protected areas include those used for the gathering of plants and herbs used for nutritional, spiritual and medicinal purposes.

215. After an evaluation of the multidisciplinary study, the BLM hopes to develop an innovative approach to the management and protection of these designated areas, involving arrangements for the affected tribes and BLM to share the responsibility in achieving their mutual goal of preserving these sacred areas. Actively seeking the co-operation of Indian tribes in ascertaining what areas are of socio-cultural and religious significance to them, and the BLM efforts to preserve and protect those sites for Indian use, is without precedent.

216. The lifestyle and heritage of the Native American groups in the area demonstrates a relationship with the desert of tremendous time and depth, and these lands and resources are a necessary part of an ongoing traditional lifestyle. This initial step by the BLM towards identifying Native American values and concerns in the California Desert will ensure their participation in the long-range management of the area.

217. The evaluation report 56/ calls it "an excellent example of a federal agency working in close consultation with American Indians to achieve a mutually desirable goal."

218. It should be pointed out, however, that not all cases have been satisfactorily solved in the United States of America or elsewhere. For example, in many cases indigenous people in the United States have unsuccessfully demanded - often in Court - the return of several areas or places sacred to them and/or that public authorities and private individuals should be enjoined from actions that would desecrate these areas and places. It is deemed useful to illustrate these cases with a few words on the Black Hills, including Bear Butte, which are sacred to both the Lakota, Sioux and Cheyenne nations. 57/

56/ See para. 139 above.

57/ Paper issued by the Grand Council of the Mimaq Nation on 21 May 1982, which was submitted to the Special Rapporteur for the purposes of the present study.

(a) Congress confiscated the Black Hills, including Bear Butte, in 1877, but federal laws barred the tribes from challenging the seizure at that time. Finally, in 1946, Congress made it possible for tribes to sue for money compensation for stolen lands, but the Oglala Lakota maintained that freedom of religion cannot be sold and insisted on the return of the land itself. They sued for ownership of the Black Hills in 1980, but United States courts ruled that Congress has power to force them to accept money for the loss of their religion - a dangerous precedent subversive of all civil liberties.

(b) Bear Butte is one of the ancient shrines in the Black Hills sacred to both the Lakota and Tsistsistas peoples. By tradition it is the place where these peoples received their first instructions from the Creator, and as such remains their most powerful site for ceremonies and visions. As the Sacred Pipe and Sacred Arrows are, in a sense, the cross of the Lakota and Tsistsistas peoples, Bear Butte has always been their principal church and altar.

(c) For several years, the South Dakota State Department of Game, Fish and Parks has been building access roads and bridges into Bear Butte to encourage tourism. Lakota and Tsistsistas religious leaders have decried these intrusions as desecrations of Bear Butte's natural landscape, and as an invitation for outsiders to intrude upon and interrupt religious activities.

(d) In April 1982, the State announced a one-month closure of Bear Butte to permit extensive new road and parking-lot constructions. The State also advised Lakota and Tsistsistas religious leaders that they would, in the future, only be allowed to use Bear Butte for five days at a time, and only when permitted in writing by State officials.

(e) In response to this, on 21 May 1982 seven traditional religious leaders of the Lakota, Sioux and Tsistsistas Nations filed suit in the federal district court at Rapid City, South Dakota, challenging State officials' efforts to limit ceremonial use of Bear Butte and to build roads and parking-lots in ceremonial areas, and challenging the State's actions as violations of freedom of religion under the First Amendment, the American Indian Religious Freedom Act of 1978, and the International Covenants on Human Rights signed by President Carter in 1977.

(f) Joined in the complaint are the Keeper of the Sacred Pipe, the Oglala Lakota traditional head chief, and three Arrow Priests of the Tsistsistas Hoodonnistz or Sacred Arrow Ceremony.

(g) The suit asks that State officials be ordered to remove tourist facilities from Bear Butte, and not to interfere in any way with the natural features of the area, or with its religious use by Lakota and Tsistsistas peoples. It also asks for \$1 million in damages for violations of the two peoples' civil rights under federal law.

(h) On Friday, 18 June, the Judge ordered South Dakota authorities to stop all road constructions till the trial is over. The trial will start in August 1982. 58/

219. In a presentation dated 17 June 1982 transmitted to the Special Rapporteur, the National Aboriginal Conference of Australia reported that: 59/

58/ Paper by the Svensk - Indiansk Förbundet of Stockholm, as submitted to the Special Rapporteur in connection with the present study.

59/ Paper by the National Aboriginal Conference approved by Executive Resolution dated 17 June 1982 and submitted to the Special Rapporteur for the purposes of the present study.

(a) In Australia, domestic legislations have vested powers of control of cultural heritage in State and Territory Ministers, thereby removing the right to cultural heritage from traditional custodians. The only form of input provided for is in the form of participation in Advisory Committees which, as the name indicates, act only in an advisory capacity. Provision for compulsory Aboriginal membership in even those Advisory Committees is either not made at all or guarantees only a minority representation.

(b) Seven of the State or Territory legislations are framed as Relics Preservation Acts, of which only one has incorporated the question of Aboriginal heritage as the primary factor for legislation. The Australian Capital Territory has no legislation specifically dealing with Aboriginal cultural heritage and is therefore considered as negligent in this regard by its Aboriginal constituents.

(c) Federal legislation has failed to acknowledge Aboriginal inherent rights by virtue of the enactment of the Australian Heritage Commission Act 1975 by not referring explicitly to Aboriginal cultural heritage and containing what are considered to be inadequate provisions.

(d) The National Aboriginal Conference has charged that the various heritage legislations deny rights of heritage, cultural continuity and freedom of cultural expression. It has also charged that the Australian Government itself is in contravention of the International Convention Concerning the Protection of the World Culture and Natural Heritage.

(e) Some inadequacies present in State legislations have been highlighted as follows:

- (i) The Queensland Aboriginal Relics Preservation Act 1967 does not allow for declaration and thereby protection of unmodified sites of significance to Aboriginal people. There is documented evidence of sites being destroyed as a result of inadequate legislation and incompetent administration.
- (ii) When the Noonkanbah situation arose, the Western Australia Aboriginal Heritage Act (1972-1980) was amended, thereby giving the Minister additional powers to override Aboriginal claims for protection of sites. To quote:

"Where any person is aggrieved by the declaration of an Aboriginal site as a protected area he may make representations in writing to the Minister setting out the grounds upon which he is aggrieved and the Minister may, if he is satisfied that the complainant has shown reasonable cause why his interest in the matter should be taken into consideration, direct the Trustees to consider the representations and report to him on them, and if upon considering the representations, the report of the Trustees, and any further information that the Minister may require the complainant or the Trustees to provide, it appears to the Minister that it is in the general interest of the community to do so, he may recommend to the Governor that the declaration of the protected area be varied or revoked."

(e) Access to, and care and protection of, traditional burial areas.
Problems and difficulties

220. Information available on penal provisions of general application deals mainly with interference with burial places and human remains, by (a) inflicting any indignity on a human corpse or human remains, 60/ (b) desecrating, insulting or concealing a human corpse or human remains, 61/ (c) committing trespass in any place of burial, or places set apart for the performance of funeral rites or as a depository for the remains of the dead, 62/ and (d) violating or vilifying a place where a human corpse or human remains are buried. 63/

221. In relation to the provisions of article 207, paragraph 2, of the Penal Code of Costa Rica, as referred to in sections ii and iv, the Government states that these provisions have not proved effective in respect of the "huaqueros" - the name given in Costa Rica to exhumers of indigenous cemeteries. The national legislature has accordingly ordered, in the Indigenous Act of 20 December 1977, the prohibition on an administrative basis of this type of excavation, having regard more to damage to the archaeological heritage than to a "desire to excavate tombs". Consequently, no real punitive legislation may be considered to exist on this point.

222. These few available data, however, point indirectly to some of the problems caused by the lack of respect for indigenous burial places and cemeteries, as well as to the continued use of some burial places and to the survival of indigenous burial customs and ceremonies.

223. As most other religions, traditional indigenous religions have devised standards for the care and treatment of human remains, burial sites and cemeteries.

224. Thus, on the one hand, their customary law, deeply grounded in indigenous religious beliefs, has generally included standards of conduct for the treatment of the dead and for their burial as well as for the care of cemeteries or burial sites encountered and human remains uncovered, as well as for the care and treatment of the bodies of their ancestors. These laws may, for example, require the performance of certain types of rituals as well as determine the burial site, specify who may visit the site or prescribe the proper disposition of burial offerings. Most indigenous religious beliefs dictate that burial sites once established are not to be disturbed or displaced, except by natural phenomena.

60/ As for example in Burma (S.297), Malaysia (S.297) and Pakistan (S.297).

61/ As for example in Costa Rica (Art. 207 (2)).

62/ As for example in Burma (S.297), Malaysia (S.297) and Pakistan (S.297).

63/ As for example in Costa Rica (Art. 207 (1)).

225. On the other hand, the prevalent view in the over-all society in which indigenous populations find themselves living today is that ancient burials and human remains, which are almost invariably indigenous human remains, are public property and artefacts of study and display and may even become an investment, particularly upon acquisition by private individuals or owners.

226. It is readily understandable that this view is not shared by those indigenous people whose ancestors and near relatives are so considered and that this view would conflict with indigenous customary law.

227. Access to burial sites on public land is necessary for practitioners of those indigenous religions which require the performance of ceremonies at those burial sites and to continue the use of the site as burial ground. The rules governing this access to land of religious significance have been discussed above 64/ as well as those governing religious ceremonies and rites. 65/

228. The disturbance of indigenous burial sites on public lands may be deliberate as in cases of acts executed as development activities under authorized archaeological and educational use of the site, as well as through unauthorized or illegal use of the site, pillage and vandalism, or as a result of the construction of roads, dams or other projects. Inadvertent displacements usually occur when public authorities proceed with works in the absence of adequate site surveys and without consulting the indigenous people concerned.

229. Most existing protection is contained or to be provided for, therefore, in administrative operating regulations and policies.

230. As has been discussed, 66/ the Government of Australia has stated that in the Northern Territory and in some States, legislation has been enacted inter alia to make it an offence to interfere with Aboriginal burial grounds as well as to make it possible to set aside areas where Aboriginal sites occur and provide special protective measures for these sites. The Federal Government is providing funds for an accelerated programme of surveys to identify Aboriginal sites so that protective measures can be taken.

231. In New Zealand a large number of Maori burial grounds are no longer under Maori ownership. Maori burial grounds and sacred places have usually been taken over when the land they were on was sold or lost and no special measures have been introduced to protect them.

64/ See paras. 175-182 and 189-191.

65/ See paras. 123-125.

66/ See paras. 167 and 198 above.

232. The Government has stated that in the vast majority of cases this is simply due to the fact that the Maori owners did not trouble to have them reserved when they sold the land. It must be remembered that there are countless numbers of Maori burial grounds scattered throughout the country, many of which are very small and large numbers are unknown to the present-day Maori.

233. In the same country, in order to preserve ancestral burying grounds - and to provide for new grounds in Maori land, since Maoris prefer to be buried in such land - the Maori Affairs Act provides that Maori burial grounds should be set apart and reserved, and vested in trustees, by the Maori Land Court.

234. In recent years there has been a strong move towards the preservation of sites which are of historical or other special significance to the Maori people; and legislation now being considered by Parliament would extend the power of the Maori Land Court to declare such places to be Maori reservations, even when situated on Crown land or privately owned land.

235. In the United States, although the Antiquities Act of 1906 protects and preserves the cultural property of the country, these laws are said to "carry only minor penalties" and to "have been successfully challenged in litigation". It is added that "severe limitations" have been "placed on their enforcement".

236. Also in the United States, it is the policy of the Interagency Archaeological Services to require field officers to consult with relatives or tribal governments, in those cases where remains can be identified. A similar policy is said to be now enforced by some Army Corps of Engineers offices, the Bureau of Land Management and the Tennessee Valley Authority.

237. In accordance with draft procedures for processing and evaluating permit applications, before an application for research excavation on Bureau of Land Management (BLM) administered land can be evaluated an Environmental Analysis Record (EAR) must be conducted in order to ascertain the effect of the action on all values and resources in the area of work. Included in the analysis is a consideration of socio-cultural impacts on "Native American religious values".

238. In addition to providing Native American input during the EAR process, the Board of Land Management (BLM) is encouraging Antiquity Act permit applicants to consult with local Native American religious/tribal/group leaders prior to submittal of an application for archaeological research. In this way, Native American concerns can be identified early in the process of determining whether to grant an application.

239. Included in the BLM draft Antiquity Permit procedures is a stipulation concerning human burials which would be attached to any permit issued for archaeological investigations on BLM-administered land. If human burials are encountered during excavation, all work must stop in the immediate area and the responsible BLM officer must be notified. Appropriate parties must be contacted and consulted, including local Native Americans, the State Historic Preservation Officer, and the county coroner. Recommendations as to how best to proceed would be based on this consultation process.

5. Availability, possession, care and protection of sacred objects

(a) Introductory remarks

240. Available information on penal provisions of general application concerning sacred objects deals with the punishment of deliberate acts of destroying, damaging or defiling any object held sacred by any class of persons with the intention of insulting their religion or with the knowledge that their religion will thereby be insulted. 67/

241. Apart from these acts of deliberate desecration or destruction of sacred objects, problems arise for indigenous populations in this connection, however, in ensuring continued access or a continuing availability of some sacred objects and in the preservation and protection of the sacred character of certain objects when crossing borders, or when these objects are in the possession of public or private museums. In this latter case also, access to these objects and their availability and ultimate return to indigenous communities can pose problems when this availability and/or this return are/is desired.

242. This section will be organized as follows: description, availability, preservation, protection; protection and preservation of the sacred character of objects when crossing borders; protection and preservation of the sacred character of objects in museums and the possibility of returning sacred objects to the indigenous communities concerned.

(b) Description, availability, preservation and protection of sacred objects

243. As has been said above 68/ traditional indigenous religions are based on the natural environment. For their religious observances, practitioners rely on natural substances which are considered sacred and fundamental to their religious and ceremonial life.

244. Many sacred objects exist and the proper care, treatment and disposition of each object is provided for in the indigenous customary laws which contain elaborate concepts of ownership, property and custody in this regard.

245. Often what in indigenous customary law would be the equivalent of legal ownership is reserved in the community or group as a whole and the individual "owner" or keeper has only what resembles physical custody. This is particularly clear in the case of those sacred objects used in ceremonies in which the community or group as a whole participates. It would also be clear regarding those sacred objects used as an integral component of ceremonial cycles.

246. Sacred objects and their proper care and treatment vary with the community or group. Classification of sacred objects by type is, consequently, best done according to the particular distinctions made by each community or group, a task that would clearly fall outside of the present study.

67/ As for example in Burma (S.295), Malaysia (S.295) and Pakistan (S.295).

68/ See paras.172-174, 182-185 and 192 above.

247. It is deemed useful, however, to say in very general terms that sacred objects would include natural creatures such as fish, animals, plants or parts thereof, as well as special or distinctly shaped rocks and diverse minerals. According to religious customary law, they may be consumed, buried, held, worn, carried, observed or merely present and are commonly used for such purposes as healing, purification or visions.

248. Also used are objects made by man from natural materials. Such objects would usually include inter alia drums, masks, prayer feathers, pipes, totems or carefully prepared medicine bundles or other wrapped bundles or sculpted or engraved objects or ceremonial attire. They are either used, worn or merely present.

249. The care of the sacred object may involve, for example, a simple ritual before or after its use, periodic offerings (e.g. of tobacco, cedar or indigenous incense (like copal)). Intricate provisions may exist for those actions that are either allowed or forbidden in the physical presence of the object.

250. In most cases, the separation of these objects from the community or group was never envisaged. The consequences to the community or group of the absence or mistreatment of a particular object are such that the free exercise of the indigenous religion may be severely restricted.

251. In recent times many animals, plants and minerals have become increasingly scarce for use in traditional indigenous religions. Non-indigenous settlement of countries as well as the introduction into them of non-indigenous plant or animal species has led to a great reduction of the natural animal and plant species, including some with traditional religious significance. Large construction projects greatly affect wildlife habitats, render inaccessible many deposits of mineral substances and have come to accentuate these trends, to the detriment of traditional indigenous practitioners.

252. Ever since early contact between natives and "newcomers" and as a result of war or Government action, many indigenous communities have been removed to areas away from their ancestral homelands, often far from their traditional fishing, hunting and gathering grounds.

253. Neither the passage of time nor the distances separating these communities from these places have, however, diminished the need of many indigenous religious practitioners and leaders to return periodically to their ancestral homelands.

254. Further, not all indigenous traditional religions and geographical situations would allow the use of comparable materials instead: in fact, most do not. Thus, despite the great difficulty involved in these journeys, many indigenous traditional religious leaders and practitioners continue to travel to their ancestral areas to gather materials necessary for religious purposes.

255. Once the journey is made, however, some are unable to gather the needed materials because of regulatory provisions, administrative procedures or other actions of the public authorities or of private individuals.

256. The continued practice of their deeply held religious beliefs thus becomes almost an impossibility for those indigenous practitioners who are precluded from gaining access to the relevant areas or from gathering, possessing, preserving and protecting the necessary materials.

257. Conservation laws have been promulgated in many countries in efforts to preserve the natural species of the different areas. Often, however, these restrictive provisions have not been strictly observed or have been challenged in court, with varying results, thus weakening their impact. Furthermore, indigenous religious use of these species has not always been taken into account in these laws. The effects of these statutes, that were passed to take account of situations or to correct abuses which were not brought about by indigenous groups, have ended up limiting the specific use of these species through provisions that often belatedly call for a non-dangerous diminution of their numbers. In general these laws have, consequently, not remedied the problems encountered by indigenous groups in obtaining these species for their traditional religious use, or done so in a very limited way.

258. In the United States of America, for instance, there is a Bald Eagle Protection Act to which objections have been raised. The relevant procedures are now being revised by the Fish and Wildlife Service, in consultation with indigenous religious and tribal leaders. Some groups need a certain number of squirrels (e.g. the Nuscogee traditional practitioners) or of deer (e.g. the Kikapoo traditional practitioners) for ceremonial feasts throughout the year. It is now recognized that State regulations developed prior to the enactment of the American Indian Religious Freedom Act may not have taken these unique needs into account at the time of promulgation and that they may not meet these expressed needs at present.

259. Although fee waivers and use permits may be obtained under present statutory and regulatory provisions for purposes of gathering of animals, plants and mineral substances, information on these provisions is not widely known among indigenous people and efforts are being made and planned to disseminate information on the existence of these favourable provisions.

260. The use of certain products which are considered to be "controlled substances" poses particular problems. It must be said from the outset that use by traditional religious practitioners of these substances is completely different from the applications of the same substances by other people. This clear distinction notwithstanding, the use of these substances had been banned systematically for all users, regardless of the religious or other nature of this use. It is only in recent years that these strict and universal prohibitions have begun to be lifted in recognition of the importance of these substances for indigenous religious traditional practitioners. This is the case of, among others, peyote, hallucinogenic mushrooms and other plants in many countries.

261. In the United States of America the use of peyote is allowed under the statutory authority of the Administrator of the Drug Enforcement Administration, but the distribution system seems to be unduly complicated in certain States of the Union. In Texas, for instance, it seems that although only American Indians are permitted to use peyote for religious purposes, only non-Indians are the authorized distributors. Further, the forms used for processing the applications are ill-suited to the needs of many of those who use peyote in religious ceremonies. It has been suggested that allowing traditional Indians to harvest peyote on federal lands in the South West and allowing the importation of peyote from Mexico for Native religious use may perhaps administratively relieve increasing difficulties in obtaining peyote for religious use.

(c) Protection and preservation of the sacred character of objects when crossing borders

262. When the boundaries of the present countries were drawn up, they ran through the territories of many indigenous nations, communities or groups. Much of the previous indigenous trade was curtailed, thus affecting inter alia the free flow of many items used solely for religious purposes and the steady trade in items purely for religious use, including medicinal and sacred herbs from each area, sometimes situated at enormous distances from each other. With the existence of the boundaries, border crossings were restricted, the borders were surveyed and customs service facilities were established. As a result, sacred objects are sometimes searched, resulting in the impairment of their spiritual qualities. Misunderstandings about duties on the part of the indigenous people, together with the lack of knowledge about indigenous religious practices on the part of the border officials, have often led to confiscations of sacred objects, plants, feathers and animal parts, or even to the, in general, unintentional desecration of other sacred objects.

263. In this connection, the Government of the United States has transmitted information to the effect that on 15 September 1978 the United States Commissioner of Customs issued a policy statement entitled "Policy to Protect and Preserve American Indian Religious Freedom" in which the Commissioner instructed Customs officials "to institute measures to assure sensitive treatment in the course of Customs examinations of the articles used by American Indians in the exercise of their religious and cultural beliefs."

264. Before the approval of the American Indian Religious Freedom Act, the Commissioner of Customs established a Committee on Indian Affairs composed of district directors from each of the geographic areas where border problems were known to exist. This committee has held several regional meetings with Native Americans to discuss specific problems so that they might be resolved at the local level. The communication links established through these meetings have resulted in a continuing dialogue to bring specific problems to the attention of appropriate officials.

265. The Customs Service Indian Affairs Committee has met with tribal representatives in various parts of the country, in an effort to determine specific problem areas where, perhaps due to a lack of knowledge or unawareness of Native American beliefs or customs, Customs officers may be handling sacred objects in an insensitive manner. At one of these meetings, a representative of the Yaqui Tribe identified a problem arising in connection with the importation from Mexico of sacred masks and other paraphernalia, which could be mistaken for commercial importations and thus handled in a manner which would not be proper for sacred objects.

266. In order to assist Customs officers in identifying the sacred Yaqui objects, the Tribe permitted Customs to photograph the sacred objects and the ceremonies in which they were used. The photographs were then reviewed by tribal elders and selected ones were assembled into a booklet with explanatory material. This booklet will be distributed to Customs officers at the appropriate ports of entry to assist them in identifying the sacred objects, so that they might be treated by Customs officers with due respect and sensitivity.

267. An additional problem in this area of border crossings of sacred objects is the theft or illicit acquisition of indigenous sacred objects resulting in or undertaken for the purposes of selling them abroad. As is known, many sacred

objects are owned by an indigenous community or group, with physical custody of the objects being transferred to members of the community or group, who are chosen in a specified manner for successive custody in accordance with the traditional beliefs. Actions by the community, group or custodian to recover the sacred objects should be entertained in a way that makes the established procedures easily and readily accessible to these communities, groups or individuals upon the production of evidence of their right to recover the objects in question.

- (d) Protection and preservation of the sacred character of objects in museums.
The possibility of returning sacred objects to the indigenous communities concerned

268. In order to have a better understanding of the problems experienced by indigenous people in the use and possession of sacred objects which are controlled by public and private museums, the relevant situations should be examined in the context of the means and methods used to acquire them and of related laws and regulations.

269. In the past some sacred objects left their original owners during military confrontations and were included in the spoils of war and eventually came under museum control.

270. Also in the past, sacred objects were lost to indigenous owners or custodians as a result of less violent but equally effective pressures exercised by missionaries, corrupt officials or employees or commercial or other agents.

271. Museum records often show that sacred objects were bought from the original indigenous owner or custodian. In many instances, however, the chain of title does not lead to those original owners or custodians nor to any voluntary and legally valid act on their part disposing of these objects in any way.

272. Most sacred objects were stolen from their original indigenous owners or custodians. In many other cases, sacred religious objects were sold or otherwise disposed of by indigenous people who did not have ownership of or title to the sacred objects involved.

273. Many sacred objects were taken from indigenous graves located on indigenous or public lands and donated to museums.

274. In many parts of the world it is today common for "pot hunters" or "huaqueros" to enter indigenous and public lands for the purpose of illegally expropriating sacred objects. As a result, trafficking in, and the export of, such property flourish, with some of these sacred objects eventually entering into the possession of museums.

275. It would seem probable, however, that under most systems the vast majority of items in museums are not of current significance in the practice of the indigenous religion.

276. Objects of religious significance to be found now in museums may vary widely but will most probably include: (a) Sacred objects which were meant to serve a continuing religious function (for example, objects the presence of which serves as a guard or protection for land); (b) Sacred objects which have suffered a disturbance in their proper disposition according to indigenous customary law (for example, certain offerings, which are properly supposed to be allowed to disintegrate naturally); (c) Sacred objects which under indigenous customary law rules were not to be transferred outside the family, group or community (e.g., ceremonial attire, sacred rocks or bundles).

277. Many of the problems arising from museum possession of indigenous sacred objects would be definitively solved, as far as the communities and/or religious groups and leaders are concerned, by the return of these objects to them.

278. As an interim measure while museum control continues, or as an alternative solution in some cases, these problems would be overcome by bringing the manner of displaying, handling, treating or caring for these objects into line with traditional customary law rules on those matters.

279. Thus, while many of the religious communities and/or religious groups and leaders wish to obtain and are working toward the return to them of the sacred objects now under museum control, others may wish only to find and establish ways to work with the museums concerned to obtain proper treatment and care of the pertinent objects and make sure that no desecration of these objects will result from their continued control by those museums.

280. Each case presented by practitioners of indigenous religions seeking proper treatment or return of sacred objects must be considered with proper understanding and circumspection, since the problem posed by the presence of indigenous sacred objects in museums will be resolved only through careful determinations of what constitutes essential fairness in these conflicts between culturally distinct systems.

281. In the United States of America, as part of the activities connected with the enactment of the American Indian Religious Freedom Act and the evaluation of action under it carried out during the year following its enactment, very important measures seem to have been taken, as reported in the evaluation report. 69/

282. According to this report, the Task Force has developed legislative recommendations concerning theft or other unauthorized removal from indigenous lands of objects of current religious significance to occupants of those lands; the export of important items of the indigenous patrimony, sacred and other; the interstate transport or receipt of stolen indigenous religious items; and the appropriation, theft, sale and possession of sacred objects belonging to indigenous people not presently protected. Those recommendations are currently being reviewed within the Administration.

283. The Administration has recommended enactment of proposals entitled, "Archaeological Resources Protection Act of 1979", with the amendments offered in the Administration's reports on these bills.

284. The museums of the Departments of the Army, Navy and Air Force are presently reviewing their holdings for any object that may be of religious significance to practitioners of Native American traditional religions. Should any such objects be identified, the appropriate Native religious leaders will be notified and invited to discuss its return, long-term loan and/or care and handling.

285. The Institute of Museum Services of the Department of Health, Education and Welfare (IMS-DHEW), which funds private museums and institutions, has suggested that a survey be conducted to determine the extent of museum holdings nationwide that would be claimed by Native American religious leaders. IMS proposes that the

69/ See para.139 above.

assessment should be conducted in light of the following issues: legality of claim to specific artefacts; method of resolving conflicting claims; and the consequences of establishing a precedent of returning a part of museum collections to the original owners.

286. An example of federal/tribal/institutional co-operation on the removal and disposition of tribal heritage material can be found in the Ozette Archaeological Project. When an important archaeological site was discovered on the Makah Indian Reservation on the Washington coast, the Makah people were divided on the issue of permitting excavation. Tribal members were eager to learn more about their tribal history but feared the religious implications of the disturbance of this ancient site.

287. The Makah Tribal Council and Washington State University professors worked out an agreement to ensure that the sanctity of the site would be protected, that the participation of the Tribe in decisions regarding the project would be guaranteed and that the artefacts and other materials would remain in the possession of the Tribe.

288. To honour the agreement's final provision, the Tribe and University worked together to solicit funds for a major museum on the Makah Reservation. The museum building was funded by the Environmental Protection Agency. The National Endowment for the Arts and the Crown Zellerbach Foundation contributed funds for the displays, and the National Endowment for the Humanities funded a language programme which is run through the museum.

289. The project was conducted with respect for the Makah traditional beliefs and needs, to the benefit of all participants. The Makah Museum, which opened on 2 June 1979, provides housing for the artefacts and jobs for the people. The Makah people have learned more about their past from this unique site and have the tangible evidence of their rich heritage.

290. The National Aboriginal Conference of Australia has stated that: 70/

"In South Australia there has been a call by traditional custodians of sacred material, now located in the Strehlow Collection in Adelaide, to be returned to the rightful custodians. A challenge is being prepared and will suggest that there has been a dereliction of duty and that despite powers within the legislation, Aboriginal inheritance rights are being denied."

The 1974 Report of the Committee of Inquiry into the National Estate stated that:

"One area in which there is lack of agreement among the States concerns the ownership, sale, extra-State transfer, and custody of portable objects from sites. While one State permits the sale of artefacts, it is extremely difficult for any State to control trafficking in relics. Uniformity is urgently needed." (para.5.39)

70/ Presentation dated 17 June 1982, cited above. See para.218 and foot-note 59 above.

6. Protection of places and objects of archaeological interest

291. Burial grounds and sacred land, places and objects have usually been taken over when the original indigenous land base was eroded away or taken over outright as a result of war or expanding settlement by non-indigenous populations. Lands, places and objects have also been lost to indigenous populations through other acts of divestment by land grabbers and object traffickers or through the machinations of corrupt public officials and employees as well as of commercial and other agents having an interest in such lands, places or objects. Until very recently no special measures had been introduced to protect those lands, places or objects in any significant way.

292. Some places and objects that have been identified as of general archaeological or historical interest have been protected, but mostly in recent times and not always in a way as to recognize the possible religious significance and importance some of them might have for indigenous populations.

293. As a result, many objects have been taken from these sites and appropriated as collection pieces, a portion of them ultimately reaching private or public museums. No question ever arose in the minds of the people so proceeding, that some of these objects might be sacred to indigenous people, or that handling these objects and displaying them in certain ways would offend the religious feelings of the indigenous traditional believers and desecrate many of those sacred objects.

294. They had no inkling of the fact that by proclaiming an area that is sacred for indigenous peoples as an archaeologically interesting site, and proceeding in certain given ways to restoration work and ultimately opening these areas to the public, they were desecrating them or making their desecration more likely. No consultation has been conducted with the traditional and religious leaders of the indigenous populations concerned either on the possible religious significance of sites and objects or on how to avoid their desecration while still doing what was indispensable for the preservation and even possible restoration, without violating relevant indigenous customary law rules governing these lands and objects.

295. There is, unfortunately, an international market for archaeological pieces and artefacts, and this has brought an increased number of looters to these sites with the consequent desecration of sacred places and objects as well as burial places and the corresponding loss to the scientific world of important and irreplaceable objects. The attacks on all sites, whether strictly archaeological or places and objects with artistic and archaeological value that are in current use, have been mounting in areas where these abuses can be perpetrated without appropriate protective or punitive action.

296. For these reasons, although the present study is not particularly concerned with archaeological places or objects, it is deemed necessary to deal briefly with some provisions on their protection as they are mentioned in some of the information available in connection with the study, and would generally constitute an indirect aspect of this question.

297. In New Zealand, having regard to increased world-wide interest in archaeology and archaeological objects, the Government is at present preparing legislation to protect Maori burial grounds from interference, particularly by unauthorized persons seeking ancient artefacts. Legislation is also being prepared to give a greater measure of protection to archaeological sites of interest to the Maori people, and to prevent any desecration of Maori burial grounds.

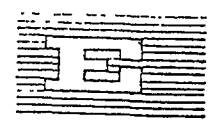
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COMMISSION ON HUMAN RIGHTS
SUB-COMMISSION ON PREVENTION OF
DISCRIMINATION AND PROTECTION
OF MINORITIES

Thirty-seventh session
Item 10 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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XX. EQUALITY IN THE ADMINISTRATION OF JUSTICE AND LEGAL ASSISTANCE

A. International provisions

1. The International Bill of Human Rights includes a number of provisions concerning equality in the administration of justice and related stipulations.

(a) The Universal Declaration of Human Rights contains several provisions dealing with aspects of equality in the administration of justice which should all be read together:

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

These provisions are to be read together with the following:

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

...

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

(b) The International Covenant on Civil and Political Rights contains the following relevant provisions:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

...

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1. The International Convention on the Elimination of All Forms of Racial Discrimination contains the following provisions in article 5 (a) and (b), which have to be read together with those of articles 6 and 7:

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to 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, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals, just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

These provisions have to be read together with those in article 2:

"Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

Article 1 of the Covenant defines racial discrimination and paragraph 4 of that article contains the following provision:

"4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

B. Administration of Justice

1. Introductory remarks

3. The topics covered by this heading are very broad in scope. Their fundamental aspects have already been studied by special rapporteurs of the Sub-Commission. Mr. Mohammed Ahmed Abu Ramat prepared a substantial study of equality in the administration of justice. ^{1/} Mr. L.M. Singhvi has submitted a document (E/CN.4/Sub.2/1983/16) containing a progress report on the study the Sub-Commission has commissioned him to prepare on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers.

4. The aim of the present chapter is much more modest. It presents a summary review - in so far as the available data, which are few and fragmentary, permit - of some of the main elements of these topics, concentrating on the basic aspects of the special problems that indigenous people face in courts of law and in obtaining legal assistance that will afford them effective counsel, at least comparable to that received by other segments of the population of the countries in which they now live

5. As regards equality to access to the courts and in the administration of justice, it must be pointed out that these matters are in some ways closely related to problems of adequate legal assistance. And, vice versa, effective legal assistance is essential to the proper administration of justice, having regard to its bearing on equal access to justice and the possibility of making use of the organs of administration of justice in comparable conditions.

6. Although it is impossible to quote in full or make a comparative analysis of the constitutional and legal provisions which would far exceed the scope of this chapter, it may be of value to cite the relevant statements of Governments and non-governmental organizations included in the information on these matters available for the study, since they give an indication of what the Governments and organizations consider particularly important.

7. Opinions and judgements on these matters will be expressed as the study proceeds. First, the various topics will be discussed in general terms. Attention will then be given to the available information referring specifically to indigenous populations, followed by such comments as seem pertinent.

8. In all systems there are provisions in the Constitution or other fundamental laws designed to establish and protect the right of access to the courts of law with a view to enforcing the effectiveness of essential rights and freedoms that may have been affected or may be under threat of imminent violation by action taken by the public authorities or private individuals or groups. It is indispensable to have access to the competent tribunals and to the necessary judicial or administrative proceedings for the determination of the existence and scope of the rights and freedoms that may have been denied, abused or wrongly implemented in practice. Thus, in all countries on which there is information on these aspects, there are provisions stipulating - often in similar terms - that access to the courts in accordance with the laws shall not be denied to any person wishing to avail him- or herself of the existing procedures and recourses.

^{1/} United Nations publication, Sales No. E.71.XIV.3.

9. A majority of systems also expressly provide for the possibility of challenging the legality of acts of authority as they affect the human rights and fundamental freedoms of persons subject to their jurisdiction. The information available for the present study in connection with these matters presents a wide variety of provisions to guarantee the effectiveness of these rights and freedoms. The Special Rapporteur is also very much aware of the fact that, in all systems and countries, the effectiveness of these provisions and guarantees is always apt to be relative and imperfect in everyday life. There are wide differences in the manner in which such principles are applied in different situations, as well as in the ways in which they are violated.

10. In most systems, in addition, there are provisions for the right to counsel and for the opportunity of the accused in criminal proceedings to defend himself if he so desires. In many countries there is mandatory assistance by counsel in cases of the most serious criminal offences. Counsel is also of marked importance in the determination of the rights of persons in civil, commercial and administrative proceedings. Provisions also exist everywhere for the prompt and expeditious administration of justice in the form of a speedy and impartial trial for all.

11. It would clearly fall beyond the scope of the present chapter even to attempt to examine in detail any group of these rights and freedoms. The purpose of this chapter, as already stated above, is merely to point out some of the main problems encountered by indigenous litigants or accused persons in court, because of their peculiar situation in the society of the countries where they live today, particularly those based on linguistic and cultural difficulties that affect their enjoyment of judicial guarantees and opportunities as well as problems arising from fixed ideas and discriminatory practices meted out to indigenous persons when they have to appear in court.

12. One essential aspect is that of the non-recognition or the non-application of the indigenous systems of customary law, and the imposition on indigenous persons of a "national" system which is alien to them and which they have never accepted as applicable to them.

2. Equal treatment before tribunals and all other organs administering justice

(a) Access to the courts without distinctions:

(i) Introductory remarks

13. The information available on certain countries contains governmental or non-governmental statements on the existence of certain rules (the text of which is sometimes included) which appear to guarantee equal access to the courts. ^{2/} While for some countries there is no indication whatsoever of the de facto situation

^{2/} E.g. in Australia, Canada, Costa Rica, Norway, Paraguay, the Philippines, Sri Lanka and Sweden.

regarding implementation of those rules, 3/ for others reference is made to some of the practical problems encountered by indigenous populations in the country 4/ or in certain parts of it. 5/

(ii) Presentation of the information available

14. The Swedish Government has simply stated that:

"In Sweden a foreigner and a person belonging to an ethnic, linguistic and religious minority have the same rights and the same possibilities as other inhabitants to plead in a court of law."

15. According to the Norwegian Government:

"Norwegian legislation contains no specific regulations concerning equality before the law without distinction as to race or origin. It follows in consequence of general legislative principles, however, that discrimination by public authorities on such grounds is illegal as long as no legislative measures are in existence which directly give grounds for discriminatory treatment because of race, colour, or national or ethnic origin. No such legislative measures exist in Norway. Any such discriminatory treatment would therefore be illegal. This applies both to the rights of individuals under existing legislation and to decisions made by the public authorities ...".

16. The Government has added that several rights fall under these provisions, including the right of equal treatment before the tribunals and all other organs administering justice.

17. The Government of Canada states:

"No specific measures have been enacted by legislative authorities in these areas, since the entire intent of the Bill of Rights and Human Rights Acts is to ensure equal treatment in such matters as court appearances ..."

"The Bill of Rights and the Human Rights Acts state that no other laws shall abrogate, abridge or infringe on their provisions. The Bill of Rights expressly prohibits any law of Canada being so applied that it ... deprives a person of 'a fair hearing in accordance with the principles of fundamental justice; the right to the assistance of an interpreter in any proceedings in which he is involved'."

18. In the Philippines, according to a writer: 6/ 7/

3/ E.g. in Canada, Finland, Norway, the Philippines, Sri Lanka and Sweden.

4/ E.g. in Costa Rica and Paraguay.

5/ E.g. in Australia, regarding the State of Queensland.

6/ Fernando, F.M., Outlines of Constitutional Law (Manila, P.C.F. Publications, 1949), p. 76.

7/ The text of the old constitution has been used as the text of the new Constitution was not available to the Special Rapporteur.

"Section I of article III of the Constitution provides that no person shall ... be denied equal protection of the law.

"The guarantee of equal protection requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the stabilities imposed. It prohibits undue favour or special privilege for any person or class or hostile discrimination against any party.

"The right to equal protection, like the right to due process, is a restraint on the three departments of the national government as well as on subordinate instrumentalities or subdivisions thereof. It is a pledge for protection under equal laws. It is more than a mere abstract right; it is a command which the State must respect and the benefit of which every person may demand. It applies to all persons within the territorial jurisdiction without regard to differences of race and includes aliens ..."

19. According to a source: 8/

"Certain safeguards have been included in the Constitution to ensure fairness in criminal proceedings. There are provisions designed to ensure an independent judiciary, such as security of tenure of judges and fixed compensation. The Constitution also provides that access to courts shall not be denied to any person by reason of poverty."

20. The Government of Finland states:

"According to the Constitution, all Finnish citizens shall be equal before the law and all human rights and fundamental freedoms enumerated by the Constitution, ... shall be guaranteed to all without any discrimination. These principles are implemented by other legislation".

21. On the right to equal treatment before the tribunals and all other organs administering justice, article 13 of the Constitution provides that: "a Finnish citizen shall be tried by no other court than that which has jurisdiction over him by law".

22. The information available on Sri Lanka does not contain any references at all to the indigenous populations of the country, and, according to a writer:

"The administration of justice is based on the application of legal rules, codified and customary, which have evolved from the Roman-Dutch law, the English common law, and the three distinct customary codes observed, respectively, by the Sinhalese of the interior, the Tamils, and the Muslims ... In the Central, North Central, Uva, and Sabaragamuwa provinces of the interior highlands, the traditional Kandyan customary laws, now partly codified, are applied to the Sinhalese in respect to inheritance, matrimony, and donations. In the Jaffna district of the north, Thesavalamai, a customary code originating in southern India, is enforced among the Tamil inhabitants in respect to persons and property. The Muslims are governed by their own personal and religious laws."

8/ Conference Room Paper No. 51, concerning the Philippines, prepared in connection with the Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres, paras. 8-9.

23. The Constitution provides for the use of Sinhalese and Tamil languages in the courts, in accordance with a number of circumstances warranting the choice of either language with interpretation or translation into the other of these languages (Section 11, several paragraphs). Section 11 further provides:

"(4) Every party, applicant, judge, jurymen or member of a tribunal not conversant with the language used in a court, tribunal or other institution referred to in subsection (1) or subsection (2) of this section, shall have the right to interpretation, and to translation into Sinhala or Tamil, provided by the State to enable him to understand and participate in the proceedings before the court, tribunal or other institution referred to in subsection (1) or subsection (2) of this section.

"Such person shall also have the right to obtain, in Sinhala or Tamil, any such part of the record as he may be entitled to obtain according to law."

24. The information concerning some countries (Australia, Costa Rica, New Zealand, Paraguay and the United States of America) contains some indications of the de facto situation in this regard.

25. The Government of New Zealand has stated that:

"No distinction is made in New Zealand law between citizens of different races in relation to treatment before tribunals and other organs administering justice.

"There has recently however been a good deal of public discussion in New Zealand relating to the proportion of Maori persons appearing in court without being represented by counsel ...". 9/

26. The Citizens' Association for Racial Equality states that the rights concerning equality in the administration of justice:

"are observed though there is some evidence to the effect that the judicial system, based as it is exclusively on British precedents and practices, does not result in Maoris getting equal treatment". 10/

27. According to information concerning Costa Rica and Paraguay, indigenous people face certain problems which are not confined to any particular region. In both cases the problems arise because some indigenous groups or persons fail to satisfy certain requirements. In Costa Rica the problem is one of identification, which can fairly easily be dealt with, but in Paraguay the situation is much more serious since more fundamental requirements are involved.

9/ For a fuller text of this statement, see para. 216 below.

10/ Information furnished orally during the Special Rapporteur's visit to New Zealand and later confirmed in writing, in July 1973.

28. The Government of Costa Rica states, with regard to the right to equality of treatment before the tribunals and all other organs administering justice, that:

"In accordance with the Political Constitution, all citizens are equal before the law in Costa Rica.

"In the courts of law an Indian who possesses an identity card has no problems, but in practice most of our indigenous people are not in possession of identity cards and are at a disadvantage when claiming their rights and may be unable to do so. This is aggravated by their use of the vernacular and inability in many cases to understand the official language. Efforts are being made to see that all Indians obtain identity cards".

29. In 1979 the Government added:

"Linguistic and cultural difficulties have to some extent made it difficult for indigenous people to learn of the services provided by State and private agencies or to make use of them.

"In an attempt to deal with this problem, CONAI is trying to provide these services to Indians directly or indirectly through traditional organizations, using interpreters, especially in critical cases".

30. With regard to the operation of the provisions relating to equality before the law and equal access to the tribunals and to the administration of justice in Paraguay, the Anti-slavery Society reports:

"Unless they have full citizenship (which is the case only for a minority among them), indigenous people cannot bring charges, plead or testify in court. This hinders the punishment of crimes against indigenous people. It has been mentioned that no such crime has ever been punished in Paraguay.

"In 1975, the legal adviser of Marandí brought charges against persons who committed crimes (such as murder) against Indians. One murder case was taken as an example and widely publicized. These charges have not yet led to a trial.

"In 1975, invited by the Marandí project, the Director of the Indigenous Affairs Department and the President of the Asociación Indigenista made speeches in non-indigenous villages around the indigenous settlement of Yalve Sanga, warning the non-indigenous inhabitants not to steal any more cattle from the Indians. The cattle already stolen until then were not however restored."

31. The information relating to Australia contains some indications concerning the State of Queensland and the special provisions applying in that State to Aborigines and Torres Strait Islanders which are at variance with the law and the practice in other parts of the country.

32. The Australian Government has stated that:

"Aboriginals are Australian citizens by virtue of the Nationality and Citizenship Act, and are entitled to equality before the law, and to enjoy the same fundamental freedoms as other citizens.

"All Australians are considered equal before the law. An Act to implement the International Covenant on Civil and Political Rights has specifically included a provision guaranteeing entitlement to the equal protection of the law.

"The provisions of the Racial Discrimination Act also seek to guarantee equality before the law ... Special measures in relation to Aboriginals and Islanders in Queensland included in the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill introduced in 1974 are designed to ensure equality before the law to these people."

33. It has been reported, however, that Professor Nettheim of the University of New South Wales stated in connection with the law applying to Aboriginals and Torres Strait Islanders in Queensland:

"When the Aboriginal comes before the court it is the same police officer who, as district officer, can examine and cross-examine witnesses and even address the court.

"The accepted standards of justice are not, it would seem, applicable to the Aboriginal ..."

"The authoritarian nature of the Act is compounded by the fact that many people under it can neither read nor write. They have, he says, 'therefore no hope of interpreting it to their own advantage'.

"Furthermore, third parties (e.g. concerned citizens) are unable to meet with them and State department officers if there is any question of procedures".

34. The Government of the United States of America states that: "Indigenous individuals have the same security of person as any other citizen." 11/

35. Also respecting the rights here discussed, it has been written:

"each State constitution includes a bill of rights, on the basis of which minorities can usually claim protection. The procedure is to file suit in Court against persons who violate civil rights.

"..."

"Two things help minorities to attain equal justice: the first is that the basic law of the land, the Constitution, is written and is explicit. The second is that decisions of the Supreme Court are accepted as binding. This has enabled minorities, through their defense organizations, to fight up to the Supreme Court and so control the discrimination in, and violation of, the law.

11/ See also the reference, in the information from the Government, to justice in tribal courts, in para. 38, below.

"One major problem the United States has not overcome is the average citizen's disrespect for law and his propensity to take the law into his own hands. This has especially harmful effects on minorities, since they are the groups that benefit most from vigorous and equitable application of the laws." 12/

36. The same source contains information to the effect:

"that, theory to the contrary, the law is not administered equally throughout the United States. Poor people in general have difficulty obtaining equal justice. The police are more likely to arrest them. They frequently cannot afford to hire lawyers or raise bail. They must more often serve jail sentences because they cannot pay the alternative fine. In so far as minorities belong to the poorer groups, they suffer these inequalities.

"Another differential in the administration of justice is geographical. In general the North has better law enforcement, better prisons and jails, and better-trained policemen than the South. There are also differences among cities, some of which are well administered, others are corrupt and graft-ridden. Minorities may suffer along with others if they are concentrated in the South or in corrupt urban areas.

"The most immediate contact minority group members have with the law is the policemen. In many cases this has not been a happy one.

".. the theory of American law is one thing, the practice another ...

"The lower courts, too, frequently fail to give equal justice to minority group members. Lower-court judges and justices of the peace are frequently not men of high legal standing. The dockets are crowded, poor people have no lawyers, cases are run through quickly, and often the prejudice or ignorance of the judge operates against the minority group member. Rarely is there protest or appeal. There is neither time, money, nor knowledge of how to go about appeal on the part of the victim.

"... The whole atmosphere of the courts is undignified and informal compared with our usual picture of the gravity and dignity of law courts." 13/

37. Further, it has been written that the government law enforcement agencies have remained inactive in the face of serious events:

"In the two years since Wounded Knee, [almost two dozen] Indians have been killed on the Pine Ridge Reservation in South Dakota. Yet the Government has almost uniformly refused to investigate these killings or other charges of brutality." 14/

12/ Arnold and Caroline Rose, America Divided, New York, 1948, pp. 118 and 130.

13/ Ibid., pp. 108, 123 and 136.

14/ Vine Deloria, Jr., "Who knows what violence we can expect?", Akwesasne Notes, vol. 7, No. 4, 1975, p. 19. See chapter XVIII, para. 219 for a fuller quotation.

38. Referring to tribal court justice, the Government states:

"The rights of the individual Indian as viewed from the non-Indian community are not adequately protected in many Indian court processes on reservations where the judicial system is a tribal one. Both American Indian leadership and the Bureau of Indian Affairs are making efforts to improve this situation."

39. It has been observed, however, that:

"The United States, in its zeal to discredit tribal government, 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." 15/

40. Regarding law enforcement on Indian reservations an official report contains the following:

"Four law enforcement agencies have jurisdiction on Indian reservations: the FBI investigates, and the United States Attorney prosecutes violations of federal law that are designated to be major crimes (murder, kidnapping, rape and 11 other serious crimes); BIA police and tribal police are responsible for policing, investigating minor crimes, and maintaining law and order on a day-to-day basis; and, State police have authority in situations when both the offender and the victim are non-Indians.

"The degree of confidence Indians have in the criminal justice system varies from reservation to reservation and from State to State. Indians complain that some United States Attorneys have not established effective prosecutorial guidelines for major crimes offences, causing delays in processing cases. BIA police, tribal police and federal investigators often duplicate investigative work. On some reservations, law enforcement and court facilities are inadequate and tribal police and tribal judges are insufficiently trained. Some of the non-Indian law enforcement and prosecutorial personnel that operate on reservations are not sensitive to Indian customs and needs.

"The United States Government is aware that these factors tend to shake Indian confidence in the criminal justice system, and is working to increase the effectiveness of police and prosecutors in Indian country. Much work remains to be done, however." 16/

15/ American Indian Law Newsletter, vol. 7, No. 11, Special Issue containing "the American Indian response to the response of the United States of America", p. 23.

16/ Report prepared by the United States Commission on the Conference on Security and Co-operation in Europe for the European Review Conference in Madrid (November 1980), pp. 152-153.

41. It has been stated in the same official report that:

"Over the years, mutual resentments have built up between Indians and various governmental authorities. As Indian people have become more assertive, and sometimes militant, in demanding their rights, these resentments have increased. Racist statements and actions of some authorities have caused many Indian people to allege that they cannot receive fair trials and that certain Indian activists are now in prison not because of the crimes they have committed but because of their political activism.

"Domestic groups have charged that law enforcement officials have engaged in systematic harassment, surveillance and other extra-legal activity against Indian activists. These critics further assert that leaders of the American Indian Movement (AIM), such as Russell Means, Dennis Banks and Leonard Peltier, are examples of activists who have ended up as political prisoners. (Further information on Means and certain other activists is contained in the section on Alleged Political Prisoners). Critics charge that police and prosecutors increased their alleged harassment of AIM leaders and other activist Indians following the widely-publicized 1973 armed takeover of Wounded Knee, South Dakota, by Indian militants. The occupation of Wounded Knee produced a complicated situation involving several law enforcement agencies, including tribal police from Pine Ridge Reservation. When such controversial confrontations occur, the potential for conflict and misunderstanding is considerably heightened." 17/

42. An official report contains the following information regarding four Indian leaders:

"- Russell Means, National Director of the American Indian Movement, was paroled on 27 July 1979. He began serving a four-year sentence in November of 1977 for 'rioting to obstruct justice'. The statute under which he was convicted was repealed one year later but was not effective retroactively.

"Amnesty International did not give the Commission their specific reasons for considering this case. Means has gained national and international attention because of his leadership in the American Indian Movement (AIM) and the 1973 siege of Wounded Knee, South Dakota. The charges against him for his participation in the siege were dismissed on 16 September 1974, in large part because of inadequate handling of the case by the prosecution. United States v. Means, 383 F.Supp. 389 (W.D. So.Dak. 1974). His recent conviction stemmed from a riot which occurred during the Wounded Knee trials.

"When queried about possible civil rights violations in this case, including allegations that Means was threatened by guards while in prison, the Justice Department informed the Commission: 'The latest incident was an assault on Means by another inmate, which we have no authority to prosecute. No evidence has been brought to our attention indicating inaction by local authorities Russell Means was imprisoned in July of 1978 after having exhausted all legal remedies'. He served one year of his four year term and was involved in a work release programme from November of 1978 until his release.

17/ Ibid.

"- Richard Mohawk and Paul Skyhorse were acquitted of murder charges by a California court on 25 May 1978. Amnesty was involved in this case as a result of claims that these men were prosecuted because of their membership in the American Indian Movement (AIM) and were mistreated and denied adequate medical assistance by Ventura County officials while awaiting trial. Amnesty dropped the case as soon as Skyhorse and Mohawk were acquitted, but others continued to point out the fact that the defendants spent more time in pre-trial detention than any accused in California's history. The Civil Rights Division of the Justice Department informed the Commission that no complaints were ever brought to its attention by the defendants or their attorneys. However, the Indian Rights Section of this Division did respond to letters from persons and organizations supporting the defendants' cause.

"The Commission learned that during the time Skyhorse and Mohawk were incarcerated, the Constitutional Rights Section of the Los Angeles Office of the State Attorney General was conducting an independent investigation of general abuses in the administration of justice in Ventura County. The defendants were transferred to Los Angeles County jail when a change of venue motion was granted by the court. When asked about the length of time Skyhorse and Mohawk spent in pre-trial detention, a Ventura County Assistant Attorney General explained that the defendants had caused the delay: 'In California, defendants have an absolute right to be tried within 60 days or have the charges against them dismissed.' The trial date was postponed approximately five times and on each occasion the defendants had asked for a continuance, and on each occasion the prosecution opposed the continuance.' 14/

"- Leonard Peltier, a member of the American Indian Movement, was serving two consecutive life sentences for the murder of two FBI agents at Pine Ridge Indian Reservation in South Dakota prior to his escape from federal prison on 21 July 1979. Peltier has been listed by Amnesty's New York Office as a possible prisoner of conscience.

"The only allegation of miscarriage of justice brought to the Commission's attention involves the FBI's misuse of affidavits in securing Peltier's extradition from Canada. The Eighth Circuit Court of Appeals addressed this issue and concluded: 'Peltier does not claim that he was extradited solely on the basis of Myrtle Poor Bear's affidavits or that the other evidence presented to the Canadian tribunal was insufficient to warrant extradition. It is clear from a review of the trial transcript that other substantial evidence of Peltier's involvement in the murders was presented in the extradition hearings ...'. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978).

"Peltier was convicted by a jury in the United States District Court of South Dakota on 25 June 1975, for the murders and in 1978 appealed this conviction to the Eighth Circuit Court of Appeals. As indicated above, the court affirmed his conviction on 14 September 1978, and denied a motion for rehearing on 27 October 1978. The United States Supreme Court denied Peltier's petition for review of his case on 5 March 1979.

14/ Correspondence dated 13 September 1977, between Congressman Robert Lagomarsino (R.-Calif.) and Assistant Attorney General Michael Bradbury.

"- Dennis Banks, also a leader in the American Indian Movement, is free in California today. Amnesty dropped investigation of the case in 1976 when Banks fled to California while released on bail. The Supreme Court of California held in March of 1978 that Governor Edmund G. Brown's refusal to extradite Banks to South Dakota was constitutional. South Dakota v. Brown, 20 Cal 3d 765, 576 P.2d 473 (1978). Banks was convicted in South Dakota courts in 1975 on arson, riot and assault charges stemming from a 1973 incident in Custer, South Dakota.

"In its International Report: 1975-1976, Amnesty suggested that Banks had been prosecuted because of his involvement in AIM. Charges against Banks brought by the State of Oregon were dismissed before trial by the federal judge hearing the case. The only other prosecution of which the Commission is aware resulted from Banks' participation in the siege of Wounded Knee, South Dakota. The federal district judge hearing the case against Banks and Russell Means dismissed the charges because of mishandling of the prosecution by the government attorneys. United States v. Means, 383 F.Supp. 389 (W.D.So.Dak. 1974). 18/

43. In this connection, however, a source contains the following information:

"... [Irregularities 19/] ... are common elements of United States Government criminal trials involving Indian people. The records of the trial of Indian leaders Russell Means, Dennis Banks, and many others, document this sordid story.

"...

"The United States Government and local governments continue to arrest and harass Indian people exercising treaty rights such as the right to hunt and fish.

"...

"The United States Government has filled its jails with Indian people. It has reserved for special treatment Indian warriors who struggle for the sovereignty of Indian nations. The list of victims is long." 20/

44. It seems that in the latter months of 1983 as many as 50 members of Congress have become convinced that irregularities indeed intervened in the Leonard Peltier trial for 1975 events and that they are serious enough to warrant a new trial. In a recent report, the following is stated in this regard:

18/ Ibid., pp. 66-67.

19/ The actual words used in the text are: "trickery, dishonesty, perjury and deceit".

20/ International Indian Treaty Council, The Second International Indian Treaty Conference, Yankton, Lakota (Sioux) Country, South Dakota, 13-20 June 1976. p. 5.

"Fifty Congressmen have asked that Leonard Peltier, a leader of the American Indian Movement (AIM), be retried in a United States court on the charge of murdering two FBI agents at Pine Ridge, South Dakota, in 1975.

"Acting as friends of the court, the Congressmen cited new evidence, discovered as a result of the Freedom of Information Act, which reveals more irregularities on the part of the FBI than were known to the Court during the trial.

"The application by the 50 Congressmen states that the government deliberately misled the Court and the jury by presenting evidence which it knew to be false.

"The lawyers acting for Peltier, at present serving two consecutive life sentences in a federal prison, assert that the ballistic evidence produced in Court was entirely circumstantial. They believe the prosecutors suppressed a ballistic test of the gunhammer, which shows that the gun claimed to be Peltier's could not have fired the bullet found near the body of the FBI agent.

"The original trial raises serious problems of Government policy, according to Don Edwards (D-CA), a member of Congress and Chairman of the Congressional Sub-Committee on Constitutional and Civil Rights. He thought it in the interest of all Americans that the case should be retried.

"Oral submissions were heard by the Eighth Circuit Court of Appeals at St. Louis on 13 September 1983. The law firm of Asbill and Jenkins of St. Louis, submitted a motion on behalf of the Congressmen.

"Henry Asbill, a member of the firm, said that the group of Congressmen considered that the case was sufficiently important to make known their opinion that the judicial process in the Peltier case had resulted in findings contrary to the intentions of Congress and to the public interest.

"Many of the Congressmen who signed the motion are members of committees or sub-committees on judicial affairs, criminal law, human rights and freedoms and Indian affairs. As firm believers in justice, they call for a just and equitable settlement of the case and ask that the matter be sent back to a federal court for a new hearing.

"From his cell in a federal prison at Marion, Illinois, Peltier stated that in the seven years since he was gaoled, everything he had learnt about the FBI and those who administer the judicial system in the United States led him to the conclusion that their main concern during his trial had been public relations - to keep the image of the FBI clean, to keep the image of the legal system clean and to keep the image of the United States clean - to avoid trouble at any price, no matter what the cost to individuals. The only thing which seemed important to those guilty of that conspiracy was to hide the fact that he was a political prisoner and a prisoner of war: they could not and would not admit that truth.

"They would not admit to the rest of the world that such a situation - the political oppression of the Indian people - really existed in the United States. In order to hide that truth the FBI was playing the same part as the police of some dictatorships. They were becoming extremists and terrorists themselves, plotting, committing perjury by using duress and physical violence against prisoners to force them to testify, threatening and even committing murder.

"They violated the rights of men and the citizen on the pretext of securing respect for the United States Constitution. And yet the government prosecuting team had accused him and his defence attorney of being 'frivolous' (one of their favourite words), of sticking blindly to a predetermined point of view in the face of all the evidence. The Government's accusation against him was itself a fanciful interpretation of invented testimonies which had been sold to the jury at Fargo, North Dakota". 21/

45. According to another source:

"In March 1975, more than 20 American Indian Movement supporters were ... arrested, many Indian people were beaten and harassed and several were killed in a United States Government attempt to discredit AIM.

"In protest and desperation a group of Sioux women, many of them mothers of small children, occupied a floor of the United States Federal Building in Rapid City, South Dakota.

"The following is the statement they made while inside the building:

"We the Indian women and proud members of the American Indian Movement demand an end to the discriminatory practices of the judicial system - federal, State and local - against traditional Indian people and the American Indian Movement.

"We make the following demands:

"1. An immediate meeting with Trimbach and the FBI, one with Trimble and the BIA and one with Eastman and the BIA police.

"2. A complete and impartial investigation of all cases previously filed with the FBI, and immediate prosecutions following the investigations.

"We shall remain here until these demands are met. We stand on our treaty rights." 22/

46. It has been written in another publication:

"Our police cannot arrest a white man for killing an Indian and put him in our jail and try him by our tribal juries - but whites can arrest and judge our people. Our police can enforce only white laws.

"...

"There is no justice in the American Government, because there is no law although there is order. Law in the pure sense recognizes equality at all levels, and that does not apply to the American State. Rules, however,

21/ "Etats-Unis: La défense de Leonard Peltier se consolide", Amérique Indienne (Paris), Bulletin No. 36, February 1984, p. 12.

22/ Native American Women, published by The American Indian Treaty Council Information Centre as a special project in connection with the World Conference of the International Women's Year, New York 1975, p. 46.

only have to be obeyed by those without the power to enforce them. The rules do not respond to justice. Power does not recognize rules. The order that exists is in the legislative and judicial branches of the American State - they maintain order with the law. Look at the racism that exists in the rules of this government: the rules of this State were founded on the inclusion of whites only, permitting race slavery and genocide against Indians." 23/

47. As regards law and legislation on reservations, it has been written:

"On reservations where State laws apply, police activities are administered by the State in the same manner as elsewhere. On reservations where State laws do not apply, tribal laws or Department of the Interior regulations are administered by personnel employed by the Bureau of Indian Affairs, or by personnel employed by the tribe, or by a combination of both.

"Today, for those areas of Indian country not under State jurisdiction, nearly 900 people, mostly Indians, are engaged in law enforcement activities. More than half are employed and paid by tribes.

"Indian offenders against State or Federal laws are tried in State or Federal courts. Indian offenders against tribal laws or Department of the Interior law and order regulations are tried in Indian courts. Generally speaking, these Indian courts have many of the aspects of lower State courts.

"Although the judges of the Indian courts may be Bureau of Indian Affairs employees, they function independently of Bureau control and are not subject to Bureau supervision in their administration of justice under either tribal laws or Departmental regulations." 24/

48. According to a publication, the judicial powers of the Indian Government include the power to: "(1) Punish its members for offences against each other and foreigners; (2) Punish its members for public offences against the peace and dignity of the government; (3) Punish foreigners within its territory who violate its laws and customs." Unless the United States Congress has passed an act which restricts a tribe's judicial powers, an Indian government may exercise complete authority over all criminal and civil matters occurring within its jurisdiction. "The judicial decisions of Indian governments with functioning court systems have the same dignity and legal force as decisions of federal and State courts." 25/

49. On the question of the judicial authority of Indian governments see also what has been said above in paragraph 40.

23/ "The effects of colonialism on Indian life", Akwesasne Notes, vol. 6, No. 4, 1974, pp. 41-42.

24/ The American Indians, Answers to 101 Questions (Washington, D.C. United States Department of the Interior, Bureau of Indian Affairs, 1974), p. 27.

25/ Curtis Berkey, Indian Sovereignty, (Washington, D.C., Institute for the Development of Indian Law, Inc. 1976), pp. 43-44.

50. It has been observed:

"When we turn to civil law, we find similar inequities [between rich and poor] at work. Consider the man who is injured in an automobile accident and enters a tort claim. Dockets are often congested and litigation takes time. Meanwhile the plaintiff may be unable to work and earn his salary, and may be saddled with heavy medical expenses in addition. If he is poor he may be unable to hold out financially through prolonged litigation - and thus he is under pressure to settle his claim promptly whether or not the terms of settlement are just." 26/

51. According to a source:

"... 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.

"...

"... The lawyers, while well-meaning, have little understanding of the values that are important to the Indian. This is especially true when the issue is individual rights versus tribal rights. The natural inclination of the lawyer is to side immediately with the individual since the lawyer has little appreciation or knowledge of tribal rights." 27/

(iii) Some observations in this regard

52. In this connection, it should be noted that, although the doors of the courts are not physically closed to indigenous people in any country, there are everywhere circumstances which make the right of access to the courts, formally recognized in the constitutions and laws inoperative. Among these circumstances, are: (a) geographical distribution; (b) problems arising from lack of knowledge of the language spoken in the courts, which is not the language of the indigenous populations and which they have not been properly taught; (c) problems of differences in culture, socio-cultural organization and legal system, those prevailing in the courts and applied by them being foreign to the indigenous populations; (d) problems with police officers and officials administering the law; and (e) difficulty of communicating with lawyers in preparing and presenting cases.

53. The subsequent paragraphs of this section deal with these matters in the light of the available information, which is far from being complete or sufficient to permit a comparative analysis.

26/ Conference Room Paper No. 44 concerning the United States of America, prepared in connection with United Nations Study of Equality in the Administration of Justice, p. 35.

27/ American Indian Law Newsletter, vol. 7, No. 11, pp. 21 and 57.

(b) Linguistic difficulties

(i) Introductory remarks

54. The constitutions and laws of many countries make no specific reference to the language problems that some persons encounter when appearing in court or to provisions for overcoming such difficulties through access to the courts.

55. Persons who do not have sufficient knowledge of the language or languages of the court, however, do suffer difficulties in judicial proceedings unless proper provisions are made on their behalf. This problem is particularly acute, therefore, in countries where numerous local languages and/or dialects exist.

56. Problems of language in court may affect not only accused persons or other parties to judicial proceedings, but also witnesses and experts.

57. The right of everyone, in the determination of any criminal charges against him, "to be informed ... in a language which he understands of the nature and cause of the charge against him" is laid down in article 14, paragraph 3 (a), of the International Covenant on Civil and Political Rights.

58. The right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court" is added in paragraph 3 (f) of that article.

(ii) Presentation of the information available

59. All legal systems attempt to provide for interpretation, free or otherwise, for persons without a sufficient knowledge of the language of the court. However, that is not an invariable rule outside criminal proceedings. In several countries ^{28/} a litigant in non-criminal proceedings must make his own arrangements for interpretation, although the cost in some instances may be covered by legal aid or paid by the defeated party.

60. Linguistic problems arise not only in the court room in connection with oral interpretation but also out of court where, for instance, the translation of relevant documents is required. Furthermore, a person who is preparing to go to court may need to address his counsel through an interpreter while preparing his case.

61. If a lawyer requires the services of an interpreter to communicate with his client, in prison or elsewhere, he must engage a private accredited interpreter, at his own expense. The lawyer may also need translations of all the relevant documents in the police or court records which are written in a language he does not command. Such translations must be done by a translator of his own choice at his own expense.

62. In criminal proceedings, free interpretation for accused persons without sufficient knowledge of the language of the court is provided in the great majority of countries.

63. In numerous countries free interpretation is guaranteed to accused persons either by the Constitution or by statute. Interpreters are appointed by the court and the

^{28/} Including Australia, Canada, Denmark, India and Pakistan.

costs are borne by the State, whether or not this is a constitutional requirement. 29/ Even if no legal requirement exists, the courts nearly always make ad hoc arrangements in criminal proceedings. 30/

64. In some countries, however, if the defendant is convicted he may be charged the costs incurred. 31/ In certain countries the accused never bears the cost of interpretation when he is entitled to free legal aid. 32/

65. Official provision of interpretation in return for payment by the person aided also exists and, although not ideal, it goes some way towards reducing discrimination on linguistic grounds in judicial proceedings. Some of the relevant provisions require persons officially aided by interpretation to pay for it under certain circumstances. Some constitutions and many laws or rules of court 33/ provide for or lay down the right to the official provision of interpretation in various types of proceedings but do not specifically state that these arrangements are to be provided free.

66. Some of the provisions just mentioned apply to criminal proceedings. Thus, in several countries, the judges rules, 34/ which govern the admissibility as evidence in criminal proceedings of statements made during police interrogations, provide that, if a foreigner makes a statement in his native language, the interpreter should take down the statement in the language in which it is made and give it to the person making the statement to approve and sign, and that an official translation into the court language should be made in due course, and be provided as an exhibit with the original statement.

67. Few statutory provisions dealing with these questions were available in full. Two such provisions are cited in the next paragraphs as examples of the type of stipulations made in this regard.

68. The Criminal Code of Argentina provides:

"Art. 252. If the person being interrogated does not understand the national language, he shall be examined through an interpreter, who shall take an oath to conduct himself properly and honestly in the performance of his duties.

"The interpreter shall be appointed from among the qualified interpreters at the place where the statement is being taken. If there are none, an expert in the language concerned shall be appointed." 35/

29/ Including Australia (most states), Chile, Denmark, Ecuador, Finland, Guatemala, India, New Zealand, Philippines, Sri Lanka and Sweden.

30/ Generally through a power granted by statute or by using their discretionary powers.

31/ As in Denmark and France.

32/ As in Venezuela.

33/ As in Brazil, Canada, Japan and Malaysia.

34/ Countries with common law systems, including New Zealand.

35/ There are similar provisions in Chile, Colombia, Ecuador, El Salvador, Mexico, Nicaragua, Paraguay and Venezuela.

69. The Guatemalan Code of Penal Procedure provides:

"Reading of statement

"Article 420 - The defendant may read his statement himself, when so directed by the court.

"If he does not do so, the judge or the investigating official shall do so slowly, clearly and distinctly. At the end of the reading, clarifications, amplifications and requests may be entered. The accused shall sign each of the pages of the statement or shall mark them with his finger print.

"Statement through an interpreter

"Article 421 - If the person questioned does not understand Spanish, he shall be examined through an interpreter who shall be appointed, in order, from among qualified interpreters, language teachers or professors or any other person knowing the language.

"In parts of the country where the foregoing is impossible, the accused shall be taken to the capital or to a place where a person speaking his language can be found, together with letters rogatory, letters requisitorial or an official communication in which shall be set out the questions to be answered.

"Where necessary, the courts may apply to the embassy or consulate concerned through the office of the head of the judiciary. In the commission the judge commissioned may be authorized to designate the interpreter.

"...

"Counsel

"Article 423 - The accused shall be given information regarding arrangement for defence before the completion of the inquiry.

"Witness without knowledge of Spanish

"Article 459 - If the witness is unable to speak or write Spanish, he may, in addition to making his statement in the form prescribed in this Code, write it in his own language or get his interpreter to do so. The document shall be annexed to the file of the proceedings."

70. In civil cases, in the great majority of countries studied, the authorities provide a litigant without knowledge of the language of the court with interpretation. The cost is often borne, however, either by the assisted party or by the unsuccessful party or by the party required by the court to meet the expense.

71. As an example of provisions applying to witnesses in civil proceedings who do not command the court language see for instance the following provision taken from the Code of Civil and Commercial Procedure which stipulates:

"Article 163 - If the witness does not know the Spanish language, he shall make his statement through an interpreter, who shall be nominated by the judge, an accredited interpreter being chosen for preference.

"If the witness so requests, in addition to his statement being taken down in Spanish, it may be written in his own language by the witness or by the interpreter."

72. No provision was found to stipulate who, besides the party concerned, would pay for the services of the interpreter in the absence of legal assistance provisions granting free litigation to the litigant for whom the witness came to court.

73. Arrangements are also made or may be made free of charge for parties in non-criminal proceedings in some countries, provided certain conditions are fulfilled.

74. The free provision of interpretation in civil proceedings is, however, less frequent than in criminal proceedings. In some countries, the cost of interpretation is paid from public funds. 36/ In other countries, the remuneration of interpreters called in by the court in civil cases to assist parties who do not command the language of the court is paid out of public funds. In certain cases, such remuneration is reimbursed by the losing party except when that party has been granted free litigation. 37/

75. In administrative proceedings, an interpreter, if needed, is furnished free of charge. 38/

76. In Norway, if the accused does not know Norwegian, the court may (in addition to furnishing interpretation), if necessitated by the importance of the case, decide that the court record shall be written in the foreign language in question.

(iii) Some observations in this regard

77. One of the first linguistic difficulties facing indigenous people in matters concerned with the administration of justice is the problem of communication between indigenous clients and non-indigenous lawyers, many of whom have no command of the language used by their clients. In such cases interpreters have to be used. Apart from the problem of obtaining interpreters, there is, as has been mentioned, the problem of translating any documents that may be needed. These difficulties extend to the courts of law and to quasi-judicial bodies dealing with contentious matters since very often judges, examining magistrates and arbitrators - and the other parties to arbitration - do not speak any of the indigenous languages required.

36/ As in Australia (some states), Finland and Philippines.

37/ As in Denmark, Norway and Sweden.

38/ As in Ecuador and the United States.

78. Another point is that when indigenous languages have to be interpreted or translated, interpreters knowing and working in indigenous languages are rarely considered as important as those working in internationally used languages other than the official language, i.e. in languages that are foreign in the country in question. People who speak internationally used languages are in a privileged position in the courts since they always enjoy the services of capable, qualified interpreters and translators. In the more important towns, foreigners can make use of consular officials or interpreter-translators. In many cases the consular officials or interpreter-translators are either lawyers or have legal training or at least have rudiments of legal knowledge acquired in the course of their training as translators.

79. It should be noted also that interpreters of indigenous languages normally have no professional training in the language. In many cases they have only practical knowledge of the language and have not been trained as professional translators or interpreters. As a general rule, few if any institutes of higher education offer courses of study in indigenous languages, and there are even fewer schools for training translators and interpreters in those languages.

80. On the one hand there is a lack of training in translation and interpretation as such and on the other interpreter-translators of indigenous languages are less likely than translators of other languages to be lawyers. This leads to problems because the people working as interpreters of indigenous languages have very little understanding of the legal systems and institutions involved in the relationship between counsel and client and between the litigant and the court. As a result they are unable to provide adequate translations of what is being said in the other languages because of the disparities between the legal systems in question. This is serious because the interpreter is not dealing with related languages or with similar legal systems derived from common sources. A thorough understanding of the institutions through the language being used is necessary and could only be obtained through solid legal training.

81. In the case of the court interpreter, this training should at least cover the two systems that must be considered, the system adopted and imposed by the State as the national or State system, and the indigenous legal system. It should be noted at this point that contrary to what appears to be assumed by States in these matters, the indigenous languages are neither dead nor primitive. On the contrary, they incorporate and express indigenous cultural and legal systems and these systems are full of life and in daily use in areas, some of them extensive, of the territory of the State. They have the close ethico-philosophical and cultural support of the indigenous people, who regard them as their own legal system in accordance with whose rules they live their daily lives.

(c) Socio-cultural and juridical difficulties

(i) Introductory remarks

82. Differences between indigenous and non-indigenous socio-cultural and juridical systems create numerous problems for indigenous persons who become involved in the administration of justice, as well as for those responsible for administering justice. This is general to many branches of law but is particularly serious as regards criminal law and procedure.

83. Cultural differences in the concept of crime, guilt and due process of the law mean that many indigenous people accused of having committed an offence are sentenced under conditions that differ from those of the non-indigenous persons who share the socio-cultural and juridical criteria being applied.

84. All these circumstances, compounded further by the lack of communication and mutual respect between the (usually) non-indigenous police and other law enforcement officials and the indigenous populations in almost all countries under whose jurisdiction they live, have frequently led to victimization of indigenous people.

85. As a result, in all countries where indigenous populations live today, there are proportionately more indigenous than non-indigenous people in penal institutions, which has begun to worry experts and Governments everywhere.

86. Finally, indigenous populations also suffer everywhere from marked ignorance of the law being applied to them and scarcity of qualified indigenous lawyers and non-indigenous lawyers with enough understanding of their difficulties.

87. This situation is worsened by the non-existence, failure to use or ignorance of legal assistance services and is further compounded by the language barriers which make it extremely difficult for indigenous people to communicate with the lawyer, prosecutor and judge.

88. Some of the linguistic problems confronting indigenous people in the administration of justice have been discussed above. Problems of legal assistance and preparation of indigenous people as lawyers will be discussed below. The present section will be devoted to discussing some of the main socio-cultural and juridical problems as they are reflected in the information available in these respects.

(ii) Presentation of the information available

89. Reference must first be made to the observed fact that in all countries where there are indigenous populations the number of indigenous people in penal establishments is very large. The number of indigenous prisoners is disproportionately large and represents a higher percentage of the total indigenous population than does the corresponding figure for the non-indigenous population. This is partly the result of discrimination and unequal treatment, as well as of the disparities between the juridical systems concerned, which work to the disadvantage of the indigenous populations.

90. Reference was made to this phenomenon in a background paper prepared recently with a very brief account of basic information on Australian Aboriginal problems today. Among the fundamental points made in this paper, there is one listing the negative aspects of the Australian Government's relations with Aboriginal people:

"6. Disregard for Aboriginal Australians' territorial security and right of self-determination are at the root of a wide range of contemporary human rights problems, including:

"...

"(iii) a disproportionate rate of criminal convictions and incarcerations - in Western Australia, Aboriginal people are twenty times more likely to be imprisoned than whites". 39/

91. During his official visits to countries in connection with the present study, the Special Rapporteur was invariably informed that, in their involvement in court proceedings of various types, indigenous groups and persons became the victims of a process they did not understand. Indigenous defendants, almost invariably withdrew, pleaded guilty, took the consequences stoically ... often for something they did not do, that was not an offence at all, or, at least, was not a serious offence.

92. This accounts for the high incidence of involvement with the law-enforcement services and the high imprisonment rates of indigenous populations. Society at large has finally begun to take notice of this unfair situation.

93. According to information furnished by the Government of Canada:

"In the northern areas and in prairie communities a disproportionate number of court appearances involve native people, usually on charges of assault, disorderly conduct or prostitution. It is claimed by Indian groups that the courts and police officers exercise discrimination in law enforcement.

"...

"The disproportionate number of Indian offenders and the belief on the part of Indians that the police and courts work in a manner prejudicial to them, can be alleviated only when social and economic conditions improve materially for the native people. It is on this assumption that policy-makers and administrators are proceeding with the implementation of expanded economic opportunity and self-government proposals in Canada." 40/

39/ Background paper, prepared by the Organization of Aboriginal Unity, the National Aboriginal Conference, the National Aboriginal and Islander Legal Service, the National Aboriginal and Islander Health Organization, the National Aboriginal and Islander Childrens Service and the Federation of Land Councils: Undated, mimeographed. A copy was received in March 1984.

40/ See a fuller text of the quotation in para. 229 below.

94. The Government also states that: "the court worker program is seen as an important means of overcoming these attitudes and of encouraging fair exercise of the law." 41/

95. As already indicated, one of the factors contributing to the disproportionate number of indigenous people in penal institutions lies in the differences in culturally based perceptions of guilt, due process, crime and gaol.

96. The indigenous notion of crime, guilt, and due process differs considerably from the meanings assigned to these terms by non-indigenous persons in the courts. For example, a characteristic sense of shame leads indigenous persons to plead guilty when accused of a crime even though they are not in fact guilty. Systems of justice administered in the relevant countries everywhere are not yet sufficiently developed to take account of these subtle differences.

97. Consequently, a large number of indigenous persons are sentenced to imprisonment, during which they are maltreated by wardens and other inmates and have little opportunity, if any at all, to take advantage of any rehabilitation schemes. On the contrary, they are exposed to all kinds of discriminatory and annoying treatment that cannot but have negative effects.

98. In this connection it should be mentioned that, during the Special Rapporteur's official visit to New Zealand (June 1973), it was learned that the Nga Tamatoa, a Maori Organization, had established a Legal Defence Office in Wellington. Members of this organization assist Maoris who come to court by advising them what information they ought to give and how to plead. They also try to obtain help, advice and legal aid for Maoris who are taken to gaol.

99. The Government has commented as follows in this respect:

"It is correct, as stated by the Special Rapporteur, that a Maori organization of young people known as Nga Tamatoa gives some assistance to Maoris coming before the court in Wellington. This organization has received some financial assistance from Government sources to help meet the rent of an office they occupy. The Maori Affairs Department also has a Maori social worker with the special duty of assisting young Maoris who are charged with offences in the courts in Wellington. The Department also provides similar services in other large centres."

100. The official behaviour of the police and other law-enforcement officers is very important. There is often a very bad relationship between the indigenous population and non-indigenous police and law-enforcement officers who find it hard to understand indigenous people and sometimes have preconceived ideas and prejudices about them. In such circumstances, the relationships are difficult and conflict-ridden, and friction and confrontations are frequent occurrences.

101. A further result is that even persons of good will who wish to be helpful cannot do as much as they would like, partly because of linguistic and cultural differences. The view has been expressed that the problems might be eliminated or at least reduced if there were more indigenous police and law enforcement officers.

102. This is the situation where, as is the case in some indigenous reservations in various countries, all or most of the police are now indigenous. In cases where non-indigenous police are still dealing with the problems of the indigenous population, the advantages of recruiting indigenous officers should be considered.

103. Because of these considerations, the recruitment of indigenous people has been advocated in some countries in which all or most police and law-enforcement officers are non-indigenous. Young indigenous people are being encouraged to join the police force and other law enforcement agencies with a view to increasing indigenous representation. This might result initially in better understanding between indigenous and non-indigenous officers and subsequently lead to a better attitude on the part of the integrated force to indigenous segments of the population. Information is available concerning efforts along these lines, although there is no confirmation of how they have worked out in practice.

104. Canada and the United States of America have begun to tackle this very important problem.

105. Among the different projects and programmes now in operation or planned for the near future, mention should be made here of the following:

(a) Indigenous Court Workers

In accordance with this programme, indigenous persons are engaged to assist indigenous defendants in criminal proceedings. In many provinces (Canada) and states (United States), court workers programmes are currently reported to be in operation. It is further reported that similar programmes will be established shortly in others. It seems that one of the immediate results of these programmes has been a significant reduction of incarceration of indigenous persons.

(b) Indigenous police officers, penitentiary personnel and parole and probation officers

Arrangements are being made to make the posts of police officer, penitentiary personnel and parole and probation officer more accessible to qualified indigenous persons. These projects consist of liberalizing the relevant legal requirements and of placing indigenous persons on parole boards.

(c) Indigenous lawyers

Programmes and schemes to encourage indigenous students to enter the legal profession, some of which are already in operation, seek to provide funds for scholarships coupled with pre-legal training programmes, so that indigenous students have the necessary elements of knowledge to take advantage, effectively of the legal training they will be receiving. An excellent example of this type of activity is the above mentioned programme conducted at the Legal Center that is part of the New Mexico University Law School. Another on-going programme is operating in the Canadian Province of Saskatchewan, as part of the activities of the Law School of the University of that province.

106. All these programmes are based on the realization that indigenous people require more assistance than is now available to them in this field. All current programmes and plans are, however, basically aimed at helping the native person after he or she is in conflict with the law.

107. The need is felt to institute programmes, projects and plans to take the necessary steps before this happens. Preventive action is now considered very important.

108. Legal information programmes. Since it has become increasingly clear that the basic misunderstanding of the legal processes is at the root of many cases of indigenous peoples' conflicts with the law, law information programmes are being planned, basically endeavouring to bring information on the law to indigenous persons before they have had any conflicts with the law enforcement system.

109. Among the programmes included in legal information projects the following should be mentioned:

Meetings between members of the judiciary and the police and indigenous people. Gatherings of different kinds are being envisaged between law enforcement personnel and members of the judiciary and indigenous people to discuss problems of common concern. Seminars with the active participation of indigenous leaders are now being planned. Obviously the aim here is to close the cultural gap between indigenous and non-indigenous peoples and systems.

Legal education component. Initiatives have been taken to include legal education components specifically designed for school children in formal education schemes. Corresponding efforts will be made with regard to youth as well as adults through all effective means. The aim of this type of programme is to have well informed people who, on the basis of this information, will avoid unnecessary entanglements with the law.

Paralegal personnel to be kept up to date on legal reforms and developments. Seminars would be organized in which paralegal personnel would receive intensive courses periodically to keep them up to date with law reform and developments in the legal field so that they will be better equipped to transmit this information to indigenous peoples and assist them in preventive efforts. Pilot projects were said to be currently almost operative.

110. When rendering court decisions, efforts are also being made to create conditions under which the mores of the native people are duly taken into account, so that sentencing makes more sense to indigenous people and society at large.

111. See also the information provided by the Government of Canada and other sources in relation to Native Court Workers in Canada in paragraph 229, below.

(iii) Some observations in this regard

112. It is evident that consultation with and participation of indigenous communities is essential in any successful approach to these complicated and complex matters.

113. Indigenous presence in the police, in other law enforcement agencies and in the legal profession seems essential in all countries, in order to incorporate socio-cultural and juridical traditions and institutions in these important activities of the State.

114. More and more would need to be done in this area in order to bring about at least a real and discernible improvement on present day conditions which are far from ideal.

3. Equal protection from arbitrary arrest, detention and exile, as well as from cruel and inhuman treatment

(a) Introductory remarks

115. In all legislative systems there are provisions in the Constitution or other fundamental laws designed to protect essential rights and freedoms that may be affected by the absence of the necessary judicial proceedings or because these principles and rules have been abused or wrongly implemented in practice in the courts. Thus, in all countries on which there is information on these aspects, there are provisions stipulating in very similar terms that no person shall be deprived of life, liberty or security, except in accordance with the laws. Other provisions contain an explicit recognition of the right to freedom from arbitrary arrest, detention and exile and of the principle of nullum crimen, nulla poena sine lege penale. The right to be considered innocent until proven guilty establishes the burden of the proof on the part of the prosecution.

116. Most systems also establish in express terms the prohibition of cruel and inhuman treatment and torture, especially during detention or imprisonment, and sanction the guilty officials in a particularly strict manner.

(b) Presentation of the information available

117. The information available on certain countries contains governmental or non-governmental statements on the existence of certain constitutional or legal provisions (the texts of some of which are included) according to which the right to security of person and protection by the State against any violence or bodily harm, whether inflicted by government officials or by any individual group or institution, is guaranteed. ^{42/} In some of this information there are indications of problems which have arisen in the implementation of these provisions. ^{43/}

118. The statements concerning some countries contain no explicit reference to the indigenous populations and are quoted in the following paragraphs.

119. The Government of Bangladesh refers to provisions in the Bangladesh Constitution which stipulate that all citizens are equal before the law and are entitled to equal protection of law (art. 27); that, to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law (art. 31) and that no person shall be deprived of life or personal liberty save in accordance with law (art. 32). According to information received from the Government, constitutional provisions in this respect are strictly adhered to and no discrimination is practised against any group or individual.

^{42/} E.g., Australia, Bangladesh, Canada, Norway, Paraguay, the Philippines and Sweden.

^{43/} As in Paraguay.

120. The Government of Sweden has stated that in that country, a foreigner and a person belonging to an ethnic, linguistic and religious minority have the same protection of their person and property and in all essential respects the same rights and freedoms as other inhabitants.

121. The Government of the Philippines has stated that:

"The Constitution also deals with the question of security of person (art.III, sec.1 (19)) by prohibiting cruel and unusual punishment."

122. As already stated in paragraph 15, the Norwegian Government has reported that: "Norwegian legislation contains no specific regulations concerning equality before the law without distinction as to race or origin."

123. The Government has added that several rights fall under these provisions, the right to security of person and protection by the State against violence or bodily harm, whether inflicted by Government officials or by any individual, group or institution.

124. As stated in paragraph 17, the Government of Canada reports that no specific measures have been enacted by legislative authorities in these areas, since the entire intent of the Bill of Rights and Human Rights Acts is to ensure equal treatment in such matters as ... security of person. The Government adds that:

"The Bill of Rights expressly prohibits any law of Canada being so applied that it imposes 'arbitrary detention, imprisonment or exile' or 'cruel or unusual treatment or punishment'."

125. The Government of Australia has stated:

"The Racial Discrimination Act provides for the right to equality before the law. In addition, the Human Rights Act gives effect in Australia to the International Covenant on Civil and Political Rights, has provisions relating to speedy trial, presumption of innocence, public trial, fair trial and post trial procedures. Everyone is entitled to those procedures without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or racial origin, property, birth or other status ...".

126. The Government has further stated:

"All the Australian States and Territories have offences in their criminal legislation relating to assault and battery. Those provisions apply to all persons, without distinctions based on race or colour. Furthermore, the prerogative writ known as habeas corpus, applies in Australia: This writ commands that the person holding another in custody is required to produce or 'have the body' of that person before the Court. In addition to these protections of the criminal law, there is the civil action of trespass, including assault, battery and false imprisonment. A person who can establish trespass is entitled to recover damages from the defendant".

127. The information concerning Paraguay includes a reference to instructions by the Minister of the Interior setting standards of conduct for persons dealing with the Guayakí Indians, with regard in particular to respect for their life and persons. An author cites the text of the instructions as follows:

"13.VI 57: Order No. 301 of the Ministry of the Interior, containing instructions to the authorities to prevent the killing, maltreatment or abduction of the Guayakí." 44/

128. The Anti-Slavery Society reports:

"Two ethnic groups, the Ayoreo in the Chaco close to Bolivia and the Aché in Eastern Paraguay, seem to be in a specially precarious situation with regard to their fundamental rights to security and protection:

"AYOREO: In 1972 ... there were Paraguayan press reports about white settlers going out with their arms to 'take revenge' on the Ayoreo. On 29 June 1972, Bishop Maricevich of the Roman Catholic Episcopal Conference condemned the 'real persecution' directed against the Ayoreo and cited one recent example, when more than ten were killed and others captured. In May 1975, in a book edited by the Marandú project, 'the systematic genocide by the skin hunters of the Chaco against the Ayoreo Indians' is condemned, and it is added that the Indigenous Affairs Department has done nothing against it. Mr. John Renshaw, who stayed in Paraguay from July to September 1975, writes of 'killings committed by Paraguayans'.

"ACHÉ: The acts of violence committed against this ethnic group are documented in the publications: 'The Aché Indians - Genocide in Paraguay' IWGIA, Document No. 11, Copenhagen, 1973; 'The Aché - genocide continues in Paraguay', IWGIA Doc. No. 17, Copenhagen, 1974. These documentations cover the period until May 1974.

From 5 to 7 August 1974, a group of perhaps 80 Aché is said to have been transported by force and against their will from Arroyo Guasú (40 km north-west of Curuguaty) to the reservation Colonia Nacional Guayakí, on a military truck. Some of them fled back to their old place in September. This was confirmed to me by letters from Paraguay written by Mr. Anastasius Kohmann, 9 September 1974, and by Mr. Miguel Chase Sardi, 31 October 1974. These are recent proofs of violation of human rights. In the same letter, Mr. Kohmann states that Mr. Pereira, a well known manhunter, "has organized new captures ... It is not impossible that Pereira has 180 or more Aché".

"The British reporter Mr. Norman Lewis describes in the Latin American review Visión of 28 February 1975, how he interviewed a Protestant missionary living at the Aché reservation Colonia Nacional Guayakí, who told him that people of the reservation had recently hunted for Indians ... Later on, we found further evidence that the manhunting continues with all force: a woman injured by a bullet when she was brought to the camp, and at her side a terrified child'. The photograph of this scene was published by the Sunday Times of London, 26 January 1975. Other ethnic groups are

44/ Ramón César Bejarano, "Solucionemos el problema indígena: protección de sus derechos", Diario ABC colour magazine, 26 May 1974.

also victims of infringements against their basic human rights, although the available information is but sparse and usually only arrives after a certain delay. According to the anthropologist Chase Sardi, 1972, the Tomarxa in the Chaco are defending themselves against 'wrongs committed by the hunters', referring to attacks and killings. As for the Eenthlit (also called Lengua), Chase Sardi relates: 'The great majority of cattle ranchers do not allow Indians even to cross their lands, threatening to kill them if they do. We have seen scars of bullet wounds in many (Eenthlit) men who had followed game onto forbidden land without realizing it ... To kill an Indian is not considered a crime ... And when the armed guard expeditions pass through the zone .., they (the Eenthlit) must give their women to the soldiers if they do not want to lose their own and their families' lives'.

"There are many hints of a very widespread individual violence against Indians. One example is confirmed by Mr. Albert Rieger, a German who visited the religious mission of San Leonardo at Laguna Escalante in the Chaco region: A Nivaklé Indian who had imbibed liquor, protested in a loud voice, against the Indian situation, 20 May 1974. He was therefore violently beaten by a missionary, and finally bound to a pole. When Mr. Rieger protested against this medieval treatment, a collaborator of the mission answered him by letter: 'If here in Escalante a noisy drunkard is fettered to a pole, this is certainly much more agreeable for the person in question, given the healthy and fresh air we have here, than to be sitting in a badly smelling prison cell'. I cite this common case as an example of the everyday atmosphere in relations with the indigenous population.

"Another example, which took place in 1968, but never published, is the forced displacement of some 550 Emok (also called Toba). Accused of being cattle thieves (it turned out later that this was true only of a few isolated individuals), they were put on cattle lorries belonging to the Army, by order of the Indigenous Affairs Department, to be moved more than 300 km to the east, into a region completely alien to them. The forced transport was stopped by a missionary who convinced the military that they should let the Indians free, but the latter have never been allowed to return to their ancestral areas." 45/

129. As an example of unfortunate events that have happened in many parts of the world at different times, and without the intention of singling out the country concerned, the following quotations relating to Colombia in the 1950s will be clear and explicit:

"The spread of [Indian] massacres is justified by the killers on grounds of the 'irrationality' of the Indians and the need to 'put a stop to what we regard as a plague'. This criterion allows them to admit - as happened over the massacre of Cuivas in 1968 - to the murder of as many as 40 'irrational' human beings in order to prevent or to punish actual or possible damage to private property, which is guaranteed by the National Constitution". 45/

45/ Information provided on 3 September 1976.

46/ World Council of Churches, The Situation of the Indian in South America (Geneva, World Council of Churches, 1972), pp. 61-65.

"There is, unfortunately, no easy way of preventing ... [massacres] from occurring unless there is someone working with the Indians in the field. When it is oil or Government officials who are doing the shooting then effective action can usually be taken with adverse publicity; but when it is the local 'colonos' who use guns and knives in the frequent bar brawls, then publicity can have little effect. Its only use is to force the authorities into bringing the criminals to trial, finding them guilty and giving them some punishment - this is no solution, but it may make the whites think twice before they start shooting again.

"We assume and hope that the Colombian authorities are taking the necessary steps to bring the culprits to trial." 47/

"Last year the Comité de Defensa del Indio in Bogota published En Defensa de mi Raza by Manuel Quintín Lame. Quintín Lame, who was born in the Cauca valley in 1883 of a fairly rich indigenous family with a long and noble lineage, devoted much of his life to political action among the indigenous peoples from the moment in 1910 when he was elected (on his own evidence) 'Chief', Representative and General Defender of the indigenous councils of Pitayo, Jambalo, Toribio, Purace, Poblazon, Cajibío and Pandiguando. He died in 1967 and his book, written in self-taught Spanish, is clear indication of the sense of racial pride still in the indigenous peoples of the Colombian Andes. Quintín Lame suffered more than three years in prison as a result of his agitation but was able to sustain a racial pride that had survived several centuries of foreign domination.

"His labours, combined with those of Bonilla, Reichel-Dolmatoff and others, succeeded in changing the climate of opinion in Colombia in favour of more humane attitudes towards the Indians, so that in 1972 - for the first time in Colombian history - a group of white farmers at Villavicencio were put on trial for the murder of a number of aborigines. They were acquitted, on the grounds that they did not know they were doing wrong because they thought Indians were not human. But a retrial has been ordered." 48/

(Paras. 47, 48 and 49 of the Summary relating to Colombia, prepared in connection with the support of the present study.)

47/ News from Survival International, London, October 1974, No. 3, p.42.

48/ H. O'Shaughnessy. What Future for the Amerindians of South America? (London Minority Rights Group, 1973), p.3.

130. Again as an example and without the intention of singling out the country concerned, it may be mentioned here that in Guatemala several killings of indigenous people have been reported, for example in Panzós (1978), in the Spanish Embassy (1979) and insistent reports in recent times concerning the north-western part of the country, in the context of the counter-insurgency operations of the armed forces (see paras. 29-30 of the Summary of information relating to Guatemala, prepared in connection with and support of the present study, as well as reports of the Working Group on Indigenous Populations on its first and second sessions contained in documents E/CN.4/Sub.2/1982/33 and E/CN.4/Sub.2/AC.4/1982/R.1 and E/CN.4/Sub.2/1983/22, respectively).

(c) Some observations in this regard

131. It is evident that these are very important rights and freedoms, that should be fully guaranteed to indigenous populations in the same manner as to other segments of the population.

132. In several parts of this study 49/ mention has been made of instances in which these rights and freedoms have not been observed in their entirety and isolated cases or situations in which no respect has been shown for them at all. 50/

133. The courts of law have, unfortunately not always been beyond reproach. 51/ However, the best guarantees in domestic jurisdiction lie in an independent and impartial judiciary bent on applying the law without distinctions to different sectors of society, irrespective of whether the opinions and lawful activities of persons or groups are liked or disliked by the other branches of government. All legal recourse procedures should be mobilized and used to guarantee to indigenous communities, organizations and persons, as well as to other sectors of society, the genuine effectiveness of these important rights and freedoms.

134. Of course, the activities developed by the indigenous populations themselves in defence of their rights and freedoms are most important. To that end, indigenous communities, organizations and persons need the assistance of experts in the law and its enforcement. Clear knowledge of the law and the fullest use of the legal assistance facilities and services available are essential. Appearing in court is costly and expensive. Legal assistance should be available to indigenous populations for these and other lawful purposes, in accordance with their needs. The next section of this chapter deals with the information available on legal assistance schemes and programmes and their availability in practice to indigenous populations.

49/ See paras. 42-46 and 128-130 above.

50/ See paras. 128-130 above.

51/ See para. 129 above.

C. Legal Assistance

1. Introductory remarks

135. There is increasing recognition in all systems of the necessity of providing legal assistance for people charged with offences, as well as those who have contentious civil or commercial issues to bring before the courts, who wish to challenge acts and decisions of the administrative authority or other public authorities or officials. This need is underlined by the multiplicity of actions, procedures and remedies which are theoretically available.

136. Large sectors of the population are affected in various ways, but the impact is particularly serious in the case of indigenous communities, organizations and individuals. One very real problem is ignorance of the law, despite the legal fiction that laws that have been duly promulgated and published are known to the public. Another problem is lack of economic and financial resources to pay the costs of legal action. The State has reserved the jurisdictional function to itself and issues involving opposing interests must be taken to the State-established courts since the dispute can only be settled by a judicial decision, except in cases where there is recourse to arbitration.

137. One problem principally of concern to indigenous people is that there are few if any lawyers whose language and culture are those of the indigenous population and who are thus able, as explained earlier, fully to understand indigenous clients. Indigenous people must therefore make use of the lawyers who are available. These lawyers' professional services have to be paid for and in very many cases indigenous people do not have enough money to do so. Low-income members of the non-indigenous population are similarly affected in the market economies prevailing almost everywhere in the modern world, but they are not usually burdened by the additional disadvantages of language and cultural differences suffered by indigenous people. In the circumstances, ways and means will have to be found of making the necessary legal services available to everyone since persons without the means to pay will otherwise be unable to obtain proper legal counsel.

138. In recognition of these facts, schemes for free or inexpensive legal aid have been introduced throughout the world and States reduce or grant exemptions from judicial fees and other costs incidental to legal proceedings.

139. Before considering the legal aid services actually available to indigenous people, it may be useful and indeed necessary to offer a brief account of the efforts being made to solve these problems by means of programmes and schemes for the population in general. This general information will focus attention on the specific problems of concern to this study which are examined later. It should be noted that the object is now to examine legal aid per se, but to consider some important aspects in the light of the information available for this study.

2. Recognition of the need for legal assistance

140. It should be pointed out from the outset that the importance of having adequate legal assistance regardless of the expense involved has been recognized in explicit terms by the General Assembly of the United Nations.

141. Indeed, during its twenty-third session, the General Assembly adopted resolution 2449 (XXIII) on legal aid on 19 December 1968. In the fourth preambular paragraph of the resolution, the General Assembly expressed its belief "that there are cases where the individual's recourse to competent tribunals to which he has a right of access is denied or hindered because of the lack of financial resources to bear the expenses involved". In paragraph 1 of the resolution the General Assembly:

"Recommends Member States:

- (a) To guarantee the progressive development of comprehensive systems of legal aid to those who need it in order to protect their human rights and fundamental freedoms;
- (b) To devise standards for granting, in appropriate cases, legal or professional assistance;
- (c) To consider ways and means of defraying the expenses involved in providing such comprehensive legal aid systems;
- (d) To consider taking all possible steps to simplify legal procedures so as to reduce the burdens on the financial and other resources of individuals who seek legal redress;
- (e) To encourage co-operation among appropriate bodies making available competent legal assistance to those who need it".

142. It will be noted that although the General Assembly was aware of the "expenses involved in providing such comprehensive legal aid systems" it considered action necessary in all parts of the world and recommended "a progressive development" of such systems.

3. Scope and content of legal assistance

(a) Introductory remarks

143. It is a well-known fact that in all countries, there are today schemes of one sort or another for legal assistance which are oriented towards servicing those who need such assistance. It is impossible, however, to say anything in concrete terms about several of the countries covered by the present study, since there is either no information at all or it is only very fragmentary and insufficient on the application of legal aid schemes to indigenous people.

144. There is no information whatsoever on any aspect of legal assistance as it applies to indigenous populations in several countries. 52/

145. For several other countries there is no information on any legal assistance programmes which may have been set up to serve indigenous populations in particular but only on general legal assistance schemes for all the population alike. 53/ Regarding some of these countries reference is only made to the relevant legal provisions concerning free legal assistance and the absence of judicial costs for persons not present in court or indigent litigants in civil proceedings and for accused persons in criminal proceedings. 54/

52/ Colombia, Denmark (Greenland), France (Guyane), Guyana, Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Pakistan, Panama and Venezuela.

53/ Argentina, Bangladesh, Bolivia, Costa Rica, El Salvador, Honduras, India, Nicaragua, Norway, Paraguay, Peru, Sweden and the United States of America.

54/ For example, in Argentina, Bolivia and Paraguay.

146. In an effort to solve some of the problems created by the need to pay the lawyer's fees, court charges and the cost of other legal formalities, provisions have been introduced in many countries exempting (partially, temporarily or completely) accused persons or persons involved in civil actions who can prove insufficiency of financial means from court charges. In virtually all countries, arrangements of some sort are made to provide counsel for persons involved in judicial (especially criminal) proceedings, who cannot afford to pay for counsel themselves or who cannot pay the full fees charged.

(b) Court charges and other costs and exemption therefrom

(i) Court charges and other costs

147. Court charges and formalities entailing expenditure are usually involved in bringing a civil action, in appealing against the judgement of a court in a civil case and in enforcing constitutional guarantees concerning a fair hearing. Charges for civil actions or appeals often increase with the value of the claim in dispute,^{55/} and the charges for civil appeals may be higher than those charged at first instance.^{56/} In some countries of Latin America, there are no court charges as such, but litigants in civil actions must, in taking certain steps, use stamped paper, the cost of which increases in proportion to the value of the matter in dispute. In several of the countries where the use of stamped paper is compulsory in civil actions, court charges also apply. Some of the requirements and expenses in question are to be met before embarking on proceedings.

148. In some systems, a private person may initiate prosecution in certain specified cases. In order to initiate prosecution this private person may have to incur certain expenses.

149. According to Finnish law, a private person may initiate criminal proceedings. If the crime in question is of such a nature that only the person whose right has been violated has the initiating power, there is a similar stamp tax and fee as in civil cases.^{57/} This is also the procedure in other criminal cases of a special character if the public prosecutor has not exercised his power to initiate the proceedings or has not intervened therein.

(ii) Exemption from court charges in criminal proceedings

150. In criminal cases, there are in general no court charges, but such charges may be levied when a convicted person appeals or when a private person initiates criminal proceedings. In many countries, however, no charges arise in the case of an appeal.^{58/} They may be waived in criminal proceedings if the private initiator proves he cannot afford them.^{59/} In some countries he must submit to the court a certificate signed by a justice of the peace attesting to his inability to pay the expenses entailed, and in Finland he must show that he cannot pay the costs of proceedings without relinquishing funds necessary for his own maintenance or for his maintenance liabilities. In many other countries, the individual filing a complaint pays no charge if the public authorities undertake the prosecution.

^{55/} As in Denmark, India, Norway and Pakistan.

^{56/} As in France.

^{57/} The same is true in Chile, Nicaragua and Venezuela.

^{58/} As in Malaysia, Philippines, United States.

^{59/} As in Finland, France and Sweden.

(iii) Exemption from court charges in civil proceedings

151. In civil cases (including appeals), parties may in most countries be exempt from court fees, partially completely, or temporarily, if they can prove insufficiency of means; there is often a further requirement of evidence that the party has a reasonable prospect of success in litigation, or that the latter is of significance. Thus, in Sweden, any person who lacks the means to cover the costs of legal proceedings before a court or who, after having paid these costs, would lack the necessary means for his own support or for the fulfilment of his maintenance obligations, is - upon application - granted free litigation by the court. If the court finds that it would be of little importance for the applicant to have his case tried, he will, however, not be granted free litigation.

152. In Norway no court fees are chargeable in the case of disputes between landlord and lessee concerning rented houses, flats, or premises, paternity cases or actions brought by an employee against his employer, provided the case has a connection with the employment relationship.

(iv) Exemption from court charges in administrative and other proceedings

153. It would appear that the same rules discussed for civil proceedings would apply, mutatis mutandis, to administrative and other proceedings.

(c) Lawyer's fees and exemption therefrom

(i) Lawyer's fees

154. The need to pay lawyer's fees, prevents many persons or communities from protecting their rights before the civil courts or administrative tribunals and prevents many accused persons from defending themselves properly. Constitutional and other provisions which contain guarantees concerning a fair hearing lose effectiveness if an individual is prevented by financial factors from going to court to avail himself of those guarantees.

155. Where no statutory or other limitation has been established on the fees which may be charged for various types of legal services, these problems are aggravated. This may force certain litigants to settle for the advice and services of counsel of a lesser competence or even put litigation beyond their reach entirely. Uncertainty as to whether they will be able to meet the eventual cost of a legal action often prevents poor persons from enforcing their rights or compels them to accept a compromise which may not be just.

156. It has been stated that the excessive fees sometimes charged by lawyers is one of the main defects of certain systems where lawyers' fees are not regulated by the Government, except in cases that come before the Supreme Court. 60/

157. Another aspect that aggravates these difficulties and problems is a system prevailing in a few countries whereby one category of lawyers has a monopoly of advocacy before the higher courts and their professional services may be engaged by the individual only through a second category of lawyers.

158. Thus, if a case is to be heard in the higher courts this may call for the payment of fees to lawyers of both types. When a case has already been conducted in the lower courts by a lawyer of the first category in order to conduct an appeal the cost may become particularly high. For example in most civil cases, a barrister must be instructed by a solicitor and may not deal directly with the client, while solicitors may not appear in the high court. 61/

159. Cases involving money in quantities exceeding a certain amount must go to the high court, unless both parties agree to resort to the county court (in which a solicitor could plead).

60/ Statement by the participant from India at the 1959 United Nations Seminar on judicial and other remedies against the illegal exercise or abuse of administrative authority, Peradeniya (Kandy), Sri Lanka, Report of the Seminar (ST/TAO/HR/4), p.45.

61/ As for instance in New Zealand.

(ii) Regulation of lawyers' fees and other arrangements relating to such fees

160. The very uncertainty of the cost of a legal action often prevents poor persons from enforcing their rights. Apart from any question of exemption from court charges of indigent persons, the court charges for the various types of civil action are in general fixed by law. The greatest cause of uncertainty regarding the cost of bringing an action is the need to pay lawyers' fees. This is aggravated where the lawyers' fees are not regulated by the Government 62/ or where the possibility exists that a client might have to pay barristers and solicitors in a given case. 63/

161. In some countries, certain rules regulate the determination of the lawyer's fees, even if only in the absence of an agreement between lawyer and client.

162. In one country, lawyers' fees for professional services rendered are basically to be freely agreed upon between client and lawyer. In the absence of an agreement or in case of dispute, the fees are to be determined by the courts in conformity with the statutory official tariffs of lawyers' fees. The Bar Association may be called upon by the interested parties to make a fair estimate of the fees to be paid in specific cases. 64/

163. Although not legal in some countries, in others lawyers may accept cases on a contingency basis; this system operates to assist persons who might otherwise not be able to litigate. The fee paid depends on the result of the case. 65/

(iii) Legal assistance in criminal proceedings

164. Apart from the non-existence or possible waiver of court charges in connection with criminal proceedings, many countries provide the accused with counsel free of charge. The manner in which such legal aid is given and its scope vary considerably from country to country.

62/. See para. 154, above.

63/ See paras. 155-157, above.

64/ Guatemala. A similar system exists in Denmark.

65/ As in the United States.

165. Arrangements made for legal aid in criminal cases fall into three main types. 66/ 67/ more than one of which often appear in the same country:

166. First type of arrangement. Designation by the court of specific lawyers, who are not in the Government service, to act in specific cases. Criminal courts may grant free legal assistance to an accused person appearing before it, if it appears to the court that his means are insufficient to enable him to obtain the services of counsel at his own expense, and it is desirable in the interests of justice that he should have free legal aid to prepare and conduct his defence. 68/

167. The accused may choose a lawyer from the panel of those willing to act in legally aided cases. Where free legal aid has been granted, the fees of counsel and other costs incurred in the conduct of the defence, are paid out of public funds. An accused person whether in custody or not may apply for legal aid by letter. The accused may also apply to the magistrate on being brought before him.

66/ The three groups here discussed were established in Mr. M.A. Abu Rannat's Study of Equality in the Administration of Justice, (United Nations Publication Sales No. E.71.XIV.3), p. 146.

67/ The methods of furnishing counsel provided by the State have been described as follows by a scholar:

"Counsel may be selected: (a) by the court, with the selection at its discretion, and the appointment often going to a lawyer who happens to be in the courtroom when the need arises; or (b) by the court, from a list of attorneys who may be volunteers or from a list which includes all members of the local bar who are then selected in turn or from a list compiled by the courts in consultation with the President of the Bar Association or from a panel established independently by a professional organization; or (c) the selection of counsel may be delegated to a professional body such as a bar association; or (d) the defence may be entrusted to a State-maintained judicial assistance service or a 'public defender' who serves as a full-time elected or appointed State-paid defence counsel; or (e) the defence may be provided by an organization which is politically independent of the State and supported by private contributions or charities. Counsel appointed by the court under paragraphs (a) or (b) above may or may not be paid by the State for their work." Working Paper E prepared by Mr. Caleb Foote for the United Nations Seminar on the Protection of Human Rights in Criminal Law and Procedure, Manila, February-March, 1958, p.80.

68/ Designation of counsel by the court is also applied in, for instance: Brazil, Canada, Chile, Colombia, Denmark (fees are fixed by the tribunal and paid by the State), Ecuador, El Salvador, Finland (fees are paid from public funds), Guatemala, India (in capital cases), Japan, the Lao People's Democratic Republic, Malaysia (limited to capital offences), New Zealand, Nicaragua, Pakistan (capital offences only), the Philippines, Sweden (fee is paid from public funds), the United States and Venezuela.

168. The magistrate or judge may also offer the accused legal aid without application. The preference of the accused as to choice of lawyer is followed where possible. 69/

169. In France, the presence of a counsel for the defence is mandatory once the accused has requested it. The official appointment of a lawyer is made by the Bâtonnier of the Order of Avocats or by the President of the Court. The lawyer so appointed to serve in the case is not entitled to payment from his client.

170. Second type of arrangement. Services provided by bar associations, law societies, legal aid societies, trade unions, or other bodies, with or without financial aid by the Government and without any designation by the courts or the Government of specific lawyers to serve in specific cases. 70/

171. In Chile, there are Consultorios jurídicos gratuitos para pobres (Free legal advice bureaux for the poor), established and maintained throughout the country by the Bar Association. Qualified lawyers are employed on a full time basis by the Bar Association for these Consultorios and law students who have completed their studies in law school are required by statute to serve a term of several months in one of these Consultorios before they can receive their degrees.

172. In Guatemala, the law schools of the University of San Carlos de Guatemala maintain, under the name of Bufete Popular, offices which are established to provide free legal assistance to persons of insufficient means who ask for it, and to provide training to law students. In order to determine which cases to accept, the Bufete Popular has the assistance of the Advanced School of Social Service. Law students who have completed their courses on civil and criminal procedure are required by statute, and as a scholastic requirement, to serve without pay in the offices of the Bufete Popular and to complete a certain number of assigned tasks involving representation in court. Students render their services free of charge and under the direction of certain professors and of qualified lawyers with extensive and successful trial experience who are employed by the law schools for the Bufete Popular. Upon completion of their assignments students are given a certificate of fulfilment which together with other certificates enables them to take the corresponding tests in trial procedure courses.

173. Third type of arrangement. Provision of services by lawyers employed by the Government for the purpose. Offices of public defenders are found in many parts of the United States. The public defender is appointed by State or local authorities and is a full-time salaried lawyer. Generally, he employs additional salaried lawyers on a full-time or part-time basis.

69/ Ibid.

70/ In addition to the examples that follow, these services appear in, for instance: Canada, India, Norway, Pakistan, and the United States of America.

174. In areas where this system is in operation, if a defendant in a criminal prosecution cannot afford to retain a lawyer, the public defender will be assigned by the court to defend him. The staff of public defender offices may be selected through civil service procedures, appointed by the judiciary or the appropriate local officials, or elected.

175. Public defender systems are financed by public funds. In some instances, they are treated in the same manner as other government institutions and submit a yearly budget to the proper appropriating body. Others operate on a fixed retainer basis, the public defender being paid a yearly salary or fee for his services and being expected to finance his office expenses from his compensation. 71/ 72/

176. In Mexico, statutory provisions require the High Court to appoint defence lawyers to represent persons accused of criminal offences.

177. In a few countries legal aid in criminal cases is available without proof of financial need. In France, any person appearing before a court is entitled to the assistance of an avocat. He may choose his own defence counsel or ask the court to appoint counsel officially, in which case he incurs no expense and is not required to prove that his financial means are insufficient for the purpose. In Sweden, in criminal matters, the court takes into account only the applicant's need of legal assistance against the background of the charges preferred against him. The financial position of the applicant is not taken into account; persons in good circumstances may thus also obtain a public defence counsel. 73/

178. In most countries, however, the accused must show that he is unable to pay a lawyer's fee, in order to receive free legal aid, and in some countries, 74/ there may be the further requirement of showing that the provision of aid is in the interests of justice.

179. Provisions making counsel mandatory in certain criminal cases 75/ may run counter to the accused's right to defend himself in person, but for those accused who would prefer to be defended by counsel such provisions help since the court

71/ Similar offices are those of the Public Curator in Queensland, Australia, of the Public Solicitor in Victoria, Australia, and of the Public Defender in New South Wales, Australia.

72/ The Government also employs lawyers for the free defence of the poor in criminal cases in Argentina, Chile, Colombia, Ecuador, El Salvador, Guatemala, Mexico, Paraguay and Venezuela.

73/ The situation is similar in Denmark.

74/ For instance, Australia.

75/ In Italy representation by counsel is compulsory in all but the most minor civil, criminal and administrative cases; it has been said that the reason for this is that the lack of objectivity of the layman involved would prejudice his success.

appoints a lawyer if the accused does not or cannot. Such provisions apply most commonly when the allegations are of serious, especially capital, offences; 76/ and when the accused is a minor, deaf or mute, or mentally unsound. 77/

(iv) Legal assistance in civil proceedings

130. In civil cases, various procedures exist to furnish counsel free of charge to litigants who are unable to pay counsel's fees. They fall into four main categories, more than one of which may appear in the same country: (a) provision of aid by bar associations, law societies, legal aid societies, trade unions, associations and other bodies, with or without aid from the Government and without any designation by the courts or the Government of specific lawyers to serve in the specific cases, 78/ (b) designation by the courts of specific lawyers (not in government service) to act in specific cases; 79/ (c) provision of services by lawyers employed by the Government for the purpose; 80/ (d) designation of a lawyer by a professional organ (or officer thereof) at the request of the court or Government. 81/

131. Examples of the first type of arrangement are to be found in Chile, the Consultorios jurídicos gratuitos, and in Guatemala, the offices of the Bufete Popular, which render free legal assistance in civil matters equivalent to that described in relation to criminal matters in paragraphs 163-170. In Ecuador, a Consultorio Jurídico Gratuito grants legal assistance free of charge to persons of insufficient means in civil and administrative matters. The Consultorio Jurídico Gratuito is a dependency of the law school of the Central University of Quito; it operates in accordance with guidelines given by the University Council and under rules established by the law school. The Director of the Consultorio, a university professor, is in charge of the organization and

76/ As in France, Japan and Sri Lanka.

77/ As in France.

78/ As in Australia, Canada and the United States.

79/ As in Australia, Brazil, Chile, Colombia, Ecuador, El Salvador, Finland (fees are paid from public funds), Guatemala, New Zealand, Nicaragua, Sweden, the United States and Venezuela.

80/ As in Argentina, Chile, Ecuador, El Salvador, Guatemala, Mexico, Paraguay and the United States.

81/ As in France.

co-ordination of its activities. Four qualified lawyers head the Consultorio, which provides students and new graduates who need the practice with an opportunity to work under proper guidance.

182. The second type of arrangement is always applied when exemption from court charges has been allowed.

183. Under the third type of arrangement, lawyers employed by the legal aid bureaux receive a salary from the State. Legal assistance is made available by application made in person to the legal aid bureau in the applicant's district, accompanied by a certificate from the social welfare office in the applicant's district, giving details of the property, means (if any) and dependants of the applicant. An applicant is required to show that he has reasonable grounds for bringing or defending the proceedings and that his cause of action or defence has a reasonable chance of success. A lawyer is assigned to represent an assisted person by the legal aid bureaux on a rotation system.

184. Certain provisions existing in Costa Rica and in Mexico would fall under the third type of arrangement. In these countries there is no organized plan enabling persons of limited resources to obtain either free or reduced-cost legal advice or legal aid in civil proceedings. In Costa Rica, legal advice and legal aid are available to such persons in proceedings concerning family law and to minors and mentally deficient persons in all civil proceedings through a Government financed organization known as the "atrorato Nacional de la Infancia". In Mexico there are statutory provisions requiring the High Court to nominate special defenders of the poor in each district whose function is to advise and represent poor people in civil proceedings.

185. An example of the fourth type of arrangement is to be found in France, where legal aid is a public service, but costs the State nothing because the officiers ministériels and the avocats give their services free of charge without any remuneration whatsoever. Two conditions must be satisfied: firstly, the applicant must have insufficient means, except in cases of military pension claims and compensation claims resulting from industrial accidents, when legal assistance is granted as of right; secondly, he must be making proper use of a legal right; only responsible and reasonable applications are granted. In general, legal assistance is granted liberally and the field of application is very broad: bringing of an action or defence against an action before any court whatsoever - civil, criminal or administrative - at whatever level: court of first instance, appeals court, or Court of Cassation. Legal assistance may be granted, in any case, to all persons who are prevented by lack of means from exercising their rights in legal proceedings either as plaintiffs or as defendants. Eligibility for legal aid is determined by a board attached to the courts of main instance, and for the appeals courts and the Court of Cassation by a board set up at the seat of the court. Persons seeking legal aid submit an application to that effect to the Procureur de la République

of their local court, who forwards it to the appropriate board. If aid is granted, the decision is conveyed by the Procureur de la République to the president of the court concerned, who then asks the Bâtonnier of the Order of Avocats, the President of the Chambre des Avoués and the Syndic des Huissiers to appoint the avocat, the avoué and the huissier.

186. In some countries, 82/ public defender offices provide free legal aid in labour matters. In Paraguay, there is a General Defender of Minors, who acts before all courts of law.

187. In France, in certain kinds of civil proceedings, the court is required by law to appoint an avocat. 83/ In most countries, however, assistance is granted on proof of financial need; there may also be a further requirement of proof that the applicant has reasonable grounds for asserting or disputing the claim in question. 84/

188. Certain types of civil action are sometimes excluded from the coverage of legal aid, including actions for defamation, divorce and breach of promise of marriage. 85/ The object of these exclusions, as well as those of certain procedures for debt collection, is "to avoid a large number of unmerited claims over trivial matters". A scheme in operation in Victoria, Australia, normally excludes divorce actions on the ground that they involve not legal rights but voluntary changes in status.

189. In some countries, assistance by counsel is made mandatory and provided free in certain civil cases, as in Denmark, in matrimonial cases where the defendant is unrepresented, in paternity cases and in cases concerning the deprivation of liberty by administrative decree, and in France, in litigation relating to pensions and accidents at work.

(v) Legal assistance in administrative and other proceedings

190. In some countries, legal aid is available in administrative and other proceedings, 86/ usually on a basis similar to that applying to civil proceedings.

82/ Including El Salvador and Mexico.

83/ See para. 185 above.

84/ As in France.

85/ Various of these are excluded from schemes operative in Australia and in Malaysia.

86/ As in Ecuador, El Salvador, France, Norway, the Philippines, Sweden, and the United States of America.

(d) Application of legal assistance schemes and programmes

(i) Introductory remarks

191. In all of the countries covered in the present study there is some form of legal assistance or aid programme or scheme with the avowed purpose of giving legal advice and legal aid to those who need it. Although there are few differences in the formal definition of those who need legal assistance, the practical implementation of these programmes leaves much to be desired as far as the most vulnerable and destitute sectors of society are concerned. This, compounded by inefficient or unsuitable interpretation and translation systems in connection with court proceedings, poses serious problems to indigenous populations and other needy groups, as will be discussed below.

192. It is considered useful to transcribe some of the statements made by Governments or non-governmental organizations regarding the systems of legal aid prevailing in many countries for which information is available in these respects. It should be pointed out that the essential aspects of most systems, schemes and programmes of legal assistance have been described in a publication containing data arranged according to established categories and classes of legal assistance in the different judicial proceedings existing in these countries. 87/

(ii) General undifferentiated schemes and programmes

193. Provisions for legal assistance are generally made in statutory law. There are, however, a few countries 88/ in which provisions for legal assistance have been included in the Constitution.

194. Thus, in Brazil, the Federal Constitution provides:

"Art. 153:

"....

"Paragraph 32. Judicial assistance shall be granted to the needy in such form as prescribed by law."

195. In accordance with article 153 paragraph 15 of the Constitution "the law shall assure accused persons of full defence, with the recourses inherent therein. There shall be no privileges at law and no exceptional courts".

196. Paragraph 30 of the same article also includes the following provision:

"Every person shall be assured the right to make representation to and to petition the public powers in the defence of rights or against abuses of authority".

87/ Directory of legal aid and advice facilities available throughout the world, published by the International Legal Aid Association (London-New York, 1966), loose-leaf.

88/ For example, Brazil, India and Germany.

197. According to article 37 of the Constitution of India, the "Directive Principles of State Policy" included in the Constitution are "fundamental in the governance of the country" and it is "the duty of the State to apply these principles in making laws". The Directive Principles include:

"39A. Equal justice and free legal aid - The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

198. Article 11 of the Constitution of Suriname provides:

"1. Everyone may obtain assistance in legal proceedings.

"2. Rules concerning the grant of legal assistance to those less able to pay shall be laid down by statute."

199. Several Governments 89/ have furnished general information concerning legal assistance schemes and programmes existing within their countries. In all these countries legal assistance programmes and schemes are the same for all. 90/ Some of them 91/ state explicitly that there are no special schemes for indigenous populations.

200. The Government of Bangladesh states:

"The provisions for legal assistance, the right to request it and the conditions under which it is granted or made available, are the same for all citizens of the country. In Bangladesh, all citizens are equal before the law and are entitled to equal protection of law."

201. The Canadian Government states:

"Programmes of legal assistance (Legal Aid) are applied equally to the indigenous and non-indigenous segments of the population.

"A programme of Legal Aid in Canada is conducted under provincial auspices except in the Yukon and Northwest Territories where a Federal Legal Aid Programme is in operation. The programmes are all designed to assist low-income persons, but not specifically those of native, white or ethnic origin. They provide the services of a lawyer in

89/ Bangladesh, Canada, Finland and Sweden.

90/ Canada states this in explicit terms. See, however, the reference to native court workers and other arrangements devised to give legal assistance to indigenous people, in paragraphs 229-231, below.

91/ Finland and Sweden.

counselling a client, preparing a case and presenting it in court. There is a scale of fees according to ability to pay in some instances; much of the service is provided free to the client. Limitations on the availability of Legal Aid are due to the restricted number of lawyers working under this scheme through the Bar Associations: where distinctions have to be made, they are on the basis of the seriousness of the offence; serious criminal cases will receive the assistance of a lawyer's services regardless of ability of pay. Some civil offences may also receive assistance."

202. The Government of Sweden states:

"Legal assistance is obtainable free of charge through public legal aid offices after a means test.

"The right to obtain public legal assistance at public expense has been provided for in respect of cases concerning the application of the Aliens Act. In such cases Counsel may also be appointed ex officio. Compulsory assistance has not been prescribed in any administrative matters.

"Any person who lacks the means to cover the costs of the legal proceedings before a court or who, after having paid these costs, would lack the necessary means for his own support or for the fulfilment of his maintenance obligations is - upon application - granted free litigation by the court. If the court finds that it would be of little importance for the applicant to have his case tried, he will, however, not be granted free litigation. The rules governing free litigation are applicable both in civil and criminal cases as well as in connection with, for instance, preliminary investigations in criminal cases.

"A party who has been granted free litigation is also exempt from such fees to the public as may otherwise be charged in the proceedings; all his own necessary outlays are, moreover, paid from public funds.

"If the party cannot himself or with the aid of someone else properly take care of his own interests during the proceedings, the court may, upon application, appoint someone to assist him; the remuneration for such assistance is paid from public funds. In criminal cases counsel has the position of a public defence counsel.".. *

The Government continues:

"The formalities required are not very burdensome and depend mainly on what the application documents contain. No one is compelled to have recourse to legal assistance, but most people do so for obvious reasons. For anyone who has been granted the benefit of free legal proceedings the court as a rule recommends legal assistance. There shall be appointed for this purpose a barrister or other person who has passed a ... test prescribed for ... the office of a judge and is found to be qualified for the assignment. The costs for such legal assistance are met out of public funds. It should also be mentioned that a court's chancery staff assists the public with advice and information, inter alia, regarding the drawing up of applications to be sent to the court. For obvious reasons, however, such assistance is confined to supplying forms to be filled in, also to technical advice and suggestions as to how to word a formal application."

203. The Government has further stated that:

"No programmes of legal assistance have been set up specifically for the Lapps and the Finnish-speaking population in northern Sweden, but they are entitled to legal assistance under the same conditions as other Swedish citizens."

204. The Finnish Government states that "programmes of legal assistance apply to all equally without any discrimination ...".

205. Regarding legal assistance in the administration of justice, the Government states:

"A trial free of charge can be granted to anyone, including a Lapp, if he cannot pay the costs of the proceedings without relinquishing funds necessary for his own maintenance or for fulfilling his maintenance liabilities. The court may also, at the request of such a person and, if possible, following his choice, order a practising lawyer to assist him at the proceedings. The lawyer's fee shall then be paid from State funds. More detailed provisions on this system are embodied in the Act on Trial without Costs of 6 May 1955 No. 212".

206. The Government has further stated that:

"There are no programmes of legal assistance set up to serve solely the Lapps. Since Lappish is not an official language of the country, interpretation at the State's expense is arranged before the courts and administrative authorities when needed".

207. The Special Rapporteur did not have specific information on the availability and adequacy of existing schemes and programmes of legal aid in the northern part of the country as compared to the rest of the country. It should be noted, though, that according to Act No. 88 of 2 February 1973 "all communes are to offer legal aid services to their inhabitants".

208. In some countries ^{92/} legal assistance schemes are the same for all throughout the respective territories. Some special attention seems, however, to have begun to be paid to the problems confronted by indigenous peoples (in Costa Rica and New Zealand) or the legal aid provided particularly in tribal districts (in India).

209. According to the Government of India

"Free legal aid is provided particularly in tribal districts and tribal areas through public prosecutors and through lawyers appointed specifically for the purpose. In fact, a panel of lawyers is appointed in a tribal district so that they can follow the cases. Financial provision is made in the budget for the free legal aid. Though the free legal aid principle would apply to both tribal and non-tribal segments of society, in point of fact more care is being taken to ensure

^{92/} As for example in Costa Rica, India and New Zealand.

its applicability to the scheduled tribes. On the planning and development side, funds are being earmarked separately from the Central and State Plans; similarly, funds are separately earmarked for free legal aid to the scheduled tribes. Thus, there is 'protective discrimination' in favour of the scheduled tribe people." 93/

210. In Costa Rica the arrangements for the provision of legal aid apply to the whole population on a basis of equality without explicit discrimination of any kind to the disadvantage of the indigenous populations. The Government states:

"There are no legal aid schemes specifically for the benefit of the indigenous populations. Provision of this kind is to be made in 1978 through CONAI."

211. In 1976 it was reported that in dealing with the principal problem affecting the indigenous communities, the loss of their lands:

"... the assistance of the College of Lawyers is already available for the purpose of submitting the claims of indigenous people throughout the country to the courts. To assist in solving these problems, the National Indigenous Affairs Commission will have a central office to deal with these matters." 94/

212. In reply to the Special Rapporteur's request for information whether legal aid is provided free or at a reduced cost, whether the lawyers concerned have special knowledge of indigenous affairs and whether such professional services have been placed on a formal and systematic footing, the Government stated in 1979 that:

"In answer to these questions it can be stated that: Since 1978 CONAI has engaged a lawyer specializing in indigenous law (on a part-time basis), who provides legal advice for the protection of indigenous rights specified in the laws in force. The indigenous people visit the central offices of CONAI to explain their case and the lawyer provides advice and drafts petitions and applications to preserve their rights, in particular rights connected with the defence of their land." The professional services are paid for by CONAI from its own budget."

213. The Government added, also in 1979, that:

"There are no indigenous lawyers, but there are a few non-indigenous attorneys who take an interest in the cause of the aboriginal peoples and are ready to provide their specialist knowledge for the defence of their rights".

214. In New Zealand, the legal aid system is applicable to all and no special schemes have been provided for Maori litigants or defendants. The system does not appear to afford, in practice, the same protection to Maoris and to non-Maoris.

93/ Information provided on 30 May 1983.

94/ "Noticiero Indigenista", América Indígena, vol. XXXVI, No. 1, pp. 188-189.

215. The Citizen's Association for Racial Equality states:

"In theory free legal aid available to Europeans is equally available to Maoris, though the latter often fail to make use of it through ignorance of their rights, or shyness. No special programmes of legal assistance have been set up, though recently Maori Welfare Officers have been taking a watching brief in some Magistrates' Courts." 95/

216. The Government has stated:

"No distinction is made in New Zealand law between citizens of different races in relation to treatment before tribunals and other organs administering justice.

"There has recently however been a good deal of public discussion in New Zealand relating to the proportion of Maori persons appearing in court without being represented by counsel.

"For a number of years the Maori and Island Affairs Department administered a fund with which arrangements could be made for any Maori accused person to have his legal fees paid. These costs were refundable where the accused person was able to meet them, but were written off if this was not possible.

"The above scheme was abandoned after the passing of the Legal Aid Act 1969. This Act applies to all citizens and provides that any person appearing before any court or other judicial tribunal may apply for legal aid in presenting his case, whether in civil or criminal proceedings, in all courts, including courts of appeal and the Maori Land Court.

"...

"A study of the situation in the last two years has revealed that in practice, although legal aid is available, an undue proportion of Maoris appearing before the courts do not avail themselves of the opportunity to apply for legal aid. This is particularly so in the case of young offenders. Last year the Government referred the question to an interdepartmental committee, with Maori representation, to recommend ways of improving the provision of legal aid. The recommendations of that committee are now being examined by the Government, which is considering improvements in the form either of duty solicitors paid by the State or of public defenders. Whatever form is adopted will certainly be of benefit to all Maori persons needing assistance of this kind."

217. Reference has been made above 96/ to the fact that the Maori Affairs Department provides the services of Maori social workers in large urban centres.

218. The services provided by the Legal Defence Office maintained in Wellington by the Nga Tamatoa, a Maori organization, with some financial help from the New Zealand Government, have also been mentioned. 97/

95/ Information provided orally during the Special Rapporteur's official visit to New Zealand in 1973, and later confirmed in writing.

96/ See para. 93.

97/ See paras. 98 and 99, above.

(iii) Special schemes for indigenous populations

219. In Brazil the Statute of the Indian, Act No. 6001 provides:

"Art. 37. The tribal groups or native-communities are legitimate parties for the defence of their rights in justice, and in this case they are entitled to assistance from the Federal Public Prosecutor or from the Indian Protection Agency."

220. This is to be read in conjunction with article 1 of Act No. 6001 which establishes in its sole paragraph that "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 national usages, customs and traditions, as well as the particular conditions recognized in this law."

221. In the Philippines, Republic Act No. 1888 stipulates:

"SECTION 4. The Commission shall have the following powers, functions, and duties:

" ...

"To authorize trial lawyers of the Commission to assist indigent members of the cultural communities accused in criminal cases involving their landholdings."

222. According to a source, ^{98/} in 1973 the Commission on National Integration furnished the following legal assistance in accordance with the provision quoted in the preceding paragraph:

"The legal arm took charge and completed a total of 1,279 actions, 46 of which were criminal and civil court cases, 25 per cent were review and approval of private conveyances, encumbrances real property, and 99 led to the certification of pasture land applications. Countless cases of legal advice and counselling help to the ignorant, illiterates and indigents.

- Handling of civil, criminal, and administrative cases.
- Sending of communications to private individuals, government agencies, field offices and other divisions/sections.
- Approval of conveyances and encumbrances.
- Certification of pasture application."

223. In the case of some countries (Chile and Mexico), government information is only available regarding the special services organized for the indigenous populations and it has been impossible to obtain information regarding the way the schemes work in practice.

^{98/} Report of the Commission on National Integration 1973, Quezon City, 1973. pp. 17-18.

224. The Government of Chile stated (1975) that:

"Each year the Institute prepares a legal aid programme for the 2,121 undivided indigenous communities in the provinces of Arauco, Bío Bío, Malleco, Cautín, Valdivia and Osorno, in which there are 24 departmental courts. This assistance is provided as follows:

"(a) The legal or judicial aid programmes are applicable in all the regions mentioned in which there are indigenous populations or indigenous community members, who in general have rights of co-ownership of community land;

"(b) The services available and used by them are oral consultations and written reports with a view to the resolution of legal or judicial questions; the authorization of contracts for the alienation of claims and rights belonging to co-owners in indigenous lands; the authorization of contracts for leasing the ownership rights of co-owners, and share cropping contracts; the authorization of gifts of land for educational, religious, social or sports purposes; the authorization of forestry contracts; the institution of proceedings against individuals improperly occupying indigenous community land to obtain its restitution; handling of administrative procedures of indigenous communities at the request of the majority of the community members; the preparation of cases in the courts of law in which indigenous people are parties, in matters relating to the administration, use and enjoyment of indigenous lands.

"In preparing cases the lawyer must take the testimony of witnesses and where necessary obtain a plan prepared by a surveyor employed by the Service and a socio-economic report and assemble all the material required to enable the judge to come to a decision.

"Similarly in dealing with contracts for the alienation of the rights of co-owners of indigenous lands, a surveyor is sent to measure the land in respect of which rights and shares exist, and it is ascertained whether the buyer lives and works in the community. A contract of sale bearing the authorization of the INI is drawn up and sent to the office of the notary for signature by the parties. A notarized copy is made and included in the file of the community.

"(c) The Service employs seven lawyers, all full-time, to assist members of indigenous communities, based in the various offices maintained by the Service. Members of indigenous communities are free to choose lawyers outside the Service, but this does not happen in practice. Members of the communities do not make use of the services of the College of Lawyers which are also provided free. They all avail themselves of the Service's lawyers;

"(d) ...

"(e) The Executive Director, the regional supervisors and the lawyers themselves;

"(f) All assistance given by the Institute is free".

225. With regard to legal assistance services especially provided for indigenous people, the Government of Mexico reported:

There are special programmes in this field:

"The legal aid programmes of the Instituto Nacional Indigenista are specifically intended for indigenous people and include the defence of their individual, social and property rights in the municipal, State and federal courts.

"(a) ... the programmes are mainly concerned with agrarian matters, criminal cases involving indigenous people and administrative cases.

"The general and specific legal assistance schemes for indigenous people are described in the document, 'Bases for action 1977-1982', which currently governs the work of the Institute. Some of them have been mentioned in other replies.

"(b) ... many services are provided for indigenous people and communities for purposes related to the programmes mentioned earlier. Some of them are as follows:

- "1. Provision of advice, orally and by correspondence;
- "2. Drafting of written administrative requests for submission to municipal, State and federal authorities;
- "3. Assistance in personal matters by Institute lawyers;
- "4. Formulation of petitions to judicial authorities;
- "5. Participation and representation in judicial proceedings, chiefly criminal, labour and civil;
- "6. Assistance to the representatives of communities in agrarian matters in the conduct of their business;
- "7. Provision of opinions in proceedings concerning recognition and establishment of title to community property.

"(c) ... the services are provided by lawyers working for the Instituto Nacional Indigenista and 'indigenous attorneys', who are law graduates or legal practitioners working under the General Directorate of Educational Services for Disadvantaged Regions and Marginal Groups of the Ministry of Public Education.

"As a general rule if the defendant in a criminal case has no defence lawyer he is given a list from which to choose a lawyer or lawyers and, if he names no-one, the judge designates a court-appointed lawyer. (Constitution, article 20 (IX)).

"The lawyers are paid by the State governments in ordinary criminal cases and by the federation in the case of federal crimes.

"(d) As far as the Institute is concerned, no requirement must be satisfied. It is sufficient that legal assistance should be requested, that it should be needed and that it should be possible to provide it.

"(e) ... the court-appointed counsel in criminal proceedings are designated by the judge in charge of the case.

"... In the case of the Institute's lawyers and the 'indigenous attorneys' the decision to provide the service is made by the director of the indigenous co-ordinating centre to which they are attached.

"(f) ... the services provided by court-appointed counsel in criminal proceedings and by the Institute's lawyers are free.

"As regards the other matters raised, there are no special provisions for indigenous people and groups".

226. The Special Rapporteur requested information about the employment status of the Institute's lawyers, viz. whether they were members of the Institute staff or served in some other capacity. He also asked whether they were paid for the services performed in each case or for being available to the Institute and whether they had other functions in addition to assisting indigenous people and if so, what those functions were (e.g. provision of legal advice to the Institute itself, etc.). He also asked how much time was given to the various functions. Finally he asked whether the court-appointed counsel in criminal cases were satisfactory to defendants and how many court-appointed lawyers had the knowledge of indigenous languages and institutions required for the satisfactory performance of their duties.

227. The Government stated (1980):

"The Institute's lawyers are members of the Institute staff. Their remuneration for services rendered depends on the salary provided for in their contracts. They work full-time. As part of their functions they furnish advice to the Institute.

"Court-appointed counsel in most cases are not satisfactory to defendants, indigenous and non-indigenous alike. Most court-appointed lawyers have no knowledge of indigenous languages. However, ... efforts are being made to promote a wider knowledge of those languages."

228. In Guatemala, legal aid offices have been set up in places with a large indigenous population to deal specifically with indigenous people needing legal assistance. The following report from the Prensa Libre of Guatemala, dated 31 August 1976 provides an example:

"People living in the department of Chimaltenango, particularly low-income members of the indigenous population, will enjoy the benefits of free legal assistance with the establishment of the legal aid service attached to the faculty of law of the University of San Carlos.

"Faculty authorities, representatives of the central legal aid office and members of the board of the Chimaltenango office met in the departmental hall on Saturday to co-ordinate final arrangements for opening the premises and starting operations.

"The Chimaltenango office proposes to develop a programme of information about the rights of citizens, particularly as regards legal defence, since it has been found that many people, most of them indigenous, are tried without a lawyer for their defence."

229. In addition to the information quoted in paragraph 197, above, the Government of Canada has stated that:

"Court workers are regarded as an important means of assisting native people, particularly on minor charges of drunkenness, assault or disorderly conduct. Native court workers have been engaged for this purpose in many parts of Canada in some cases through the (voluntary) John Howard Society but principally through governments and the government-funded Friendship Centres. Late in 1972 a Sub-Committee on Native People and the Law was established at the federal level, co-ordinating the efforts of the Departments of Justice, the Solicitor-General, the Secretary of State, Indian Affairs and Northern Development, and National Health and Welfare. Its main programme will be the provision of court workers to assist native people, whether registered Indians or other natives, who become involved with the law, and to institute services to provide information to native people on the law and their rights under the law.

"In the northern areas and in prairie communities a disproportionate number of court appearances involve native people, usually on charges of assault, disorderly conduct or prostitution. It is claimed by Indian groups that the courts and police officers exercise discrimination in law enforcement. The court worker programme is seen as an important means of overcoming these attitudes and of encouraging fair exercise of the law.

"Native police have been recruited in some of the provinces and in the Territories. Some attempts are also being made, notably in Saskatchewan, to assist the work of native offender organizations working in prisons and on release.

"The disproportionate number of Indian offenders and the belief on the part of Indians that the police and courts work in a manner prejudicial to them, can be alleviated only when social and economic conditions improve materially for the native people. It is on this assumption that policy-makers and administrators are proceeding with the implementation of expanded economic opportunity and self-government proposals in Canada.

230. According to a source:

"In order to encourage the development of court-worker services to assist Canada's native people in understanding their legal rights and obtaining legal assistance, the Department of Justice has established a native court-worker programme. The criteria for eligibility for funding under the programme are as follows:

- "1. the programme must serve status and non-status native people alike;
- "2. the programme must be administered by an independent service organization which has the support of both status and non-status native people;
- "3. any contribution by the Department of Justice must be limited to providing court-worker services (i.e., it cannot be used to finance half-way houses, or alcohol or drug abuse programmes);
- "4. at least 50 per cent of the cost of the court-worker programme must be borne by the province involved;

"5. the province involved must be willing to monitor the operation of the programme in order to assure that the service provided maintains certain minimum standards of quality." 99/

231. Another source explains:

"The main function of the native court-worker is to bridge the communication barrier that exists between the native accused and those who administer the criminal justice system. His basic function is to provide legal information rather than legal advice. Agreements have been concluded with a number of provinces for the cost sharing of such programmes.

"The federal government provides limited funding for experimental purposes to some 20 legal services organizations under its Community Legal Services and Telephone Legal Services programmes. The combined countrywide budget for these programmes is \$450,000. Funds are generally provided to organizations operating independently of established provincial programmes and the defined objectives are to encourage experimentation with new delivery techniques and research projects and activities having as their end objectives methods of ensuring that comprehensive relevant and effective information legal services are made available to the economically disadvantaged. Specific service projects promoted under these programmes include, preventive, education and counselling projects, the training and utilization of paraprofessionals, delivery of services to the institutionalized poor, the rural poor, native and ethnic groups, and law reform programmes." 100/

232. The Government of the United States of America states:

"Legal aid programmes have been instituted on American Indian reservations, in order that individual indigenous people can have responsible help in pursuing their goals. Increasingly Indian people are taking legal training which should lead to better legal resources for indigenous people and their causes. At least two private groups have been formed to look into legal matters for Indians as a whole. These are the Native American Rights Fund and the Institute for the Development of American Indian Law. Both have received money from non-indigenous foundations to continue in their work. An Indian tribe may hire its own attorney, but contracts between Indian tribes and lawyers involving the use of tribal funds are subject to the approval of the Secretary of the Interior."

233. According to a publication, in the United States of America:

"Legal aid programmes are applied equally to the indigenous and non-indigenous poor. The American legal system is structured so that the poor - the vast majority of Indians are poor - are virtually unrepresented. The programmes of legal services that the Government speaks so proudly of costs approximately \$70 million or 32 cents for each American citizen per year.

99/ Programmes Offered. Department of Justice 1976, p.9

100/ Legal Aid in Canada - 1975, pp.3-4.

"The number of Indians taking legal training has increased but the need is so great that Indians need an exponential increase to be really represented.

"...

"The approval of tribal attorney contracts by the Secretary of the Interior raises some substantial ethical problems, in that the more zealous an attorney is against the BIA or the Secretary of the Interior the more he may jeopardize future approval of the contract. In essence the one being litigated against has a degree of control over the opposing counsel.

"Another aspect of ... legal services for Indians is the cultural gap which exists between white, middle-class liberal lawyers and Indians. The lawyers, while well-meaning, have little understanding of the values that are important to the Indian. This is especially true when the issue is individual rights versus tribal rights. The natural inclination of the lawyer is to side immediately with the individual since the lawyer has little appreciation or knowledge of tribal rights..." 101/

234. According to Government information:

"... The United States Attorney and the Federal Courts are available to ... [federally recognized Indians] 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."

235. In contrast, it has been stated that:

"The United States also suggests that United States 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 USC 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 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 represented by the United States Attorney, then the United States 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 towards the Indians and its public responsibilities. It is puzzling that the United States now tells the world that this conflict does not exist." 102/

101/ American Indian Law Newsletter, vol. 7, No. 11 pp. 59-60.

102/ Ibid. pp. 15-16.

236. Commenting on an official statement by the United States Government regarding availability of legal aid services to indigenous populations in that country, a writer has stated:

"Most Indian tribes have legal counsel of their own choice, subject to the approval of the Secretary of the Interior".

"This is completely true ..., but it deserves careful study. An Indian tribe cannot employ a lawyer without the assent of the BIA (Bureau of Indian Affairs). The BIA can reject the counsel chosen by the tribe, refuse to pay his fees and, since January 1983, reject certain cases. This is to discourage legal protection of Indian rights. The BIA can see to it that activist lawyers are never asked for or, if they are, that they are not paid. The BIA also controls what judgments are given and in which cases. In these circumstances, it is rarely true that the Indian tribes enjoy independent and impartial legal representation.

"In its comments at the United Nations, the United States did not mention the most pernicious aspect of its Indian policy: the legal principle of 'absolute power'. According to this doctrine, Indian rights 'only exist as a concession on the part of Congress'.

"This means that the Indians enjoy only those few rights that Congress has not yet seen fit to take away from them.

"If the United States wishes to secure international approval for its limited recognition of the social and political rights of the Indians, it must be ready to accept that it does not possess the power to suppress these limited rights." 103/

237. The Australian Government has stated that:

"Every state has established a legal aid service which is available to all members of the community, including Aborigines, in need of such assistance. In the Australian Capital Territory, legal assistance is made available by statute to the community at large, including Aborigines, and a similar scheme is to be introduced in the Northern Territory. Legal services provided under these schemes are either free of charge, or at a reduced fee, depending on the nature of the case. The payment of legal services generally includes all reasonable expenses that would be incurred in the defence of an accused person, the costs being met from Government funds."

238. The Government of Australia has stated:

"Many Aborigines, because of their depressed socio-economic circumstances or their traditional orientation, are ignorant of their basic rights and of the legal services available. Special legal aid societies for Aborigines have therefore been established in most states by voluntary organizations with Government support."

103/ Russell L. Barsh, "Le gouvernement américain défend sa politique indienne", Amérique Indienne, Bulletin No. 36, pp. 7-10.

239. On 24 April 1974, in a letter addressed to the Committee on the Elimination of Racial Discrimination, the Aboriginal Legal Service of Western Australia stated:

"Within the past year the Australian Government financed independent organizations to enable them to establish legal services for Aboriginal people. Until that time Aboriginal people suffered a definite disadvantage in that they were usually unable to obtain legal aid through established sources because those sources did not extend to giving legal assistance in magistrates' courts. Most Aborigines are charged with petty offences in those courts.

"These services are looking into all aspects of legal assistance for Aborigines, and developing an expertise in this field. A question often occurring is one concerning racial discrimination against Aborigines. At the moment, discrimination on the ground of race is not an offence, but the Commonwealth Government has introduced legislation to provide for penalties for such discrimination, and is establishing a Race Relations Board to resolve such questions by conciliation rather than litigation."

240. Regarding a new scheme of legal assistance the Government gives in its additional information an outline about the major steps that it has taken in this field.

"On 25 July 1973 the Attorney-General announced the establishment of the Australian Legal Aid Office incorporating the Legal Service Bureaux. Establishment of the Office is the major step the Government has taken to make sure that legal aid is readily and equally available to all persons in need - particularly disadvantaged persons - throughout Australia ...

"The programme for 1974/1975 is to complete the establishment of new offices in capital cities and a basic framework of 62 regional offices throughout Australia that are intended to bring the law to persons in need.

"Regional offices will be small 'shop-front' legal offices - usually staffed by two lawyers - that will rely to a large extent upon local private practitioners to whom a substantial volume of work will be referred. They will operate in conjunction with local community and welfare organizations. Offices will be opened in the suburbs of cities and in towns and regional centres throughout Australia. Special provision will be made to serve sparsely settled areas of Australia. Mobile legal offices will be used in some areas.

"The role of the Australian Legal Aid Office will be to provide a community legal service of advice and assistance, including assistance in litigation, in co-operation with community organizations, referral services, existing legal aid schemes and the private legal profession. Its decentralized offices will provide administrative support for community advice centres and legal or welfare advice groups generally.

"The Office will provide a general problem solving service of legal advice, including continuing advice, for all persons in need. It is intended to solve the majority of problems that affect the ordinary citizen. Eligibility will be determined on interview without a formal means test ...

"The Australian Government grant of \$2 million was made available to supplement existing legal aid schemes during 1973/1974. The grant was made available on a per capita basis as an interim measure with a view to effecting a quick improvement in the availability of legal aid. \$1.3 million has been provided in 1974/1975 to assist existing legal aid services."

241. In addition to the Legal Aid Office, there is also an Aboriginal Legal Service Programme in Australia.

"The Service is available to Aboriginals. 'Aboriginal' means a person who ... is a member or descendant of the Aboriginal race [and is in need of legal assistance]. It includes Torres Strait Islanders and, where it is in the interests of justice in the circumstances of a particular case, includes a person who lives in a domestic relationship with an Aboriginal.

"Under the Programme, legal assistance is being provided in each state and the Northern Territory by Aboriginal Legal Services, funded by the Department of Aboriginal Affairs and in the Australian Capital Territory by the Attorney-General's Department under delegations from the Minister for Aboriginal Affairs.

"Funds are being provided by the Australian Government through the Department of Aboriginal Affairs and made available to each Service on the condition that the funds be applied in accordance with the conditions laid down in the Programme. Each Service is required to submit annual budget proposals for approval by the Department of Aboriginal Affairs.

"The service operates through an Aboriginal Legal Service in each state and territory in Australia on Government grants given on these terms:

"1. Each Service is responsible for the provision of the facility in its state or territory but may make arrangements with Services in other places to avoid problems arising from geographical boundaries.

"2. Each Service has flexibility in its development, to meet the needs of Aboriginals who stand in need of legal assistance. The facilities include, as funds permit, arrangements with legal practitioners in private practice for representing applicants in individual cases, with legal practitioners on a retainer basis where the usual arrangements for individual cases cannot readily be made, the direct employment of legal practitioners, field workers, social workers and administrative staff. In the latter three cases preference will be given to Aboriginals or to those persons who show an affinity with Aboriginals. Research assistance into the special legal problems of Aboriginals and the provision of publicity and relevant educational activities directed to Aboriginals and persons or groups who deal with Aboriginals is also envisaged.

"Each service may reimburse existing facilities for the provision of Legal Aid to Aboriginals at the rate of the cost to that facility of assisting the Aboriginal in a particular matter, plus an amount equal to the estimated cost of administration by the facility of that matter not exceeding 5 per cent of the legal account.

"Legal assistance to Aboriginals is available for:

"(a) representation in courts and tribunals throughout Australia where the Aboriginal has grounds for such representation;

"(b) advice on matters in which the Aboriginal has or is likely to have a direct interest, whether personally or as a member of a group;

"(c) assistance in non-contentious matters where this is likely to be of direct benefit to the Aboriginal.

Restrictions -

"(a) Legal assistance, other than to ascertain if the Aboriginal has reasonable prospects of success, will not be granted in respect of proceedings by way of appeal if in the view of the Service no good purpose would be served by prosecuting or taking part in the appeal;

"(b) Actions to be taken on behalf of an Aboriginal community or a substantial Aboriginal group will be considered on an individual basis by the Australian Government following an approach by a Service.

"An Aboriginal who is reasonably able to make a contribution towards the expense of his legal assistance may be required to do so." 104/

104/ Letter from the Aboriginal Legal Service of Western Australia, op.cit.
(See para. 239, above).