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STUDY OF THE PROBLEM OF DISCRIMINATION
AGAINST INDIGENOUS POPULATIONS

Final Report (Supplementary Part) submitted by the
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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 I 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 Aboriginals 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 sincretism, 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": Raffles'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 Semi 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 Pichugui, 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 Shinto, 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 Mikir 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.

78. 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 1830s 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/ Bhoron 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.

83. 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 18 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".

84. 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.

85. 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/

86. 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/

87. 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.

88. 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, spiritis 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. 135, 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/ Herri 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. 467 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, UNESCO 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 B) of penal codes. Whenever 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/

118. 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 290), Malaysia (Section 293), Pakistan (Section 290).

41/ Ibid.

42/ Ibid.

43/ For example, in Nicaragua (articles 207 and 208, Penal Code).

44/ See, in particular, parcs. 63, 69 and 77 to 95, 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 56 (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 51a, 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 51, 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 DHEW 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.

e. In connection with interment 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;

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 Guaymi 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 encesstral 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

i. 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 Hoodonnitz 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.