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## STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Final report (last part) submitted by the Special Rapporteur,  
Mr. José R. Martínez Cobo

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XX. EQUALITY IN THE ADMINISTRATION OF JUSTICE AND LEGAL ASSISTANCE

A. International provisions

1. The International Bill of Human Rights includes a number of provisions concerning equality in the administration of justice and related stipulations.

(a) The Universal Declaration of Human Rights contains several provisions dealing with aspects of equality in the administration of justice which should all be read together:

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

These provisions are to be read together with the following:

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

...

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

(b) The International Covenant on Civil and Political Rights contains the following relevant provisions:

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

#### Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

...

#### Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. The International Convention on the Elimination of All Forms of Racial Discrimination contains the following provisions in article 5 (a) and (b), which have to be read together with those of articles 6 and 7:

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals, just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

These provisions have to be read together with those in article 2:

"Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

Article 1 of the Covenant defines racial discrimination and paragraph 4 of that article contains the following provision:

"4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

B. Administration of Justice

1. Introductory remarks

3. The topics covered by this heading are very broad in scope. Their fundamental aspects have already been studied by special rapporteurs of the Sub-Commission. Mr. Mohammed Ahmed Abu Rannat prepared a substantial study of equality in the administration of justice. 1/ Mr. L.M. Singhvi has submitted a document (E/CN.4/Sub.2/1983/16) containing a progress report on the study the Sub-Commission has commissioned him to prepare on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers.

4. The aim of the present chapter is much more modest. It presents a summary review - in so far as the available data, which are few and fragmentary, permit - of some of the main elements of these topics, concentrating on the basic aspects of the special problems that indigenous people face in courts of law and in obtaining legal assistance that will afford them effective counsel, at least comparable to that received by other segments of the population of the countries in which they now live.

5. As regards equality to access to the courts and in the administration of justice, it must be pointed out that these matters are in some ways closely related to problems of adequate legal assistance. And, vice versa, effective legal assistance is essential to the proper administration of justice, having regard to its bearing on equal access to justice and the possibility of making use of the organs of administration of justice in comparable conditions.

6. Although it is impossible to quote in full or make a comparative analysis of the constitutional and legal provisions which would far exceed the scope of this chapter, it may be of value to cite the relevant statements of Governments and non-governmental organizations included in the information on these matters available for the study, since they give an indication of what the Governments and organizations consider particularly important.

7. Opinions and judgements on these matters will be expressed as the study proceeds. First, the various topics will be discussed in general terms. Attention will then be given to the available information referring specifically to indigenous populations, followed by such comments as seem pertinent.

8. In all systems there are provisions in the Constitution or other fundamental laws designed to establish and protect the right of access to the courts of law with a view to enforcing the effectiveness of essential rights and freedoms that may have been affected or may be under threat of imminent violation by action taken by the public authorities or private individuals or groups. It is indispensable to have access to the competent tribunals and to the necessary judicial or administrative proceedings for the determination of the existence and scope of the rights and freedoms that may have been denied, abused or wrongly implemented in practice. Thus, in all countries on which there is information on these aspects, there are provisions stipulating - often in similar terms - that access to the courts in accordance with the laws shall not be denied to any person wishing to avail him- or herself of the existing procedures and recourses.

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1/ United Nations publication, Sales No. E.71.XIV.3.

9. A majority of systems also expressly provide for the possibility of challenging the legality of acts of authority as they affect the human rights and fundamental freedoms of persons subject to their jurisdiction. The information available for the present study in connection with these matters presents a wide variety of provisions to guarantee the effectiveness of these rights and freedoms. The Special Rapporteur is also very much aware of the fact that, in all systems and countries, the effectiveness of these provisions and guarantees is always apt to be relative and imperfect in everyday life. There are wide differences in the manner in which such principles are applied in different situations, as well as in the ways in which they are violated.

10. In most systems, in addition, there are provisions for the right to counsel and for the opportunity of the accused in criminal proceedings to defend himself if he so desires. In many countries there is mandatory assistance by counsel in cases of the most serious criminal offences. Counsel is also of marked importance in the determination of the rights of persons in civil, commercial and administrative proceedings. Provisions also exist everywhere for the prompt and expeditious administration of justice in the form of a speedy and impartial trial for all.

11. It would clearly fall beyond the scope of the present chapter even to attempt to examine in detail any group of these rights and freedoms. The purpose of this chapter, as already stated above, is merely to point out some of the main problems encountered by indigenous litigants or accused persons in court, because of their peculiar situation in the society of the countries where they live today, particularly those based on linguistic and cultural difficulties that affect their enjoyment of judicial guarantees and opportunities as well as problems arising from fixed ideas and discriminatory practices meted out to indigenous persons when they have to appear in court.

12. One essential aspect is that of the non-recognition or the non-application of the indigenous systems of customary law, and the imposition on indigenous persons of a "national" system which is alien to them and which they have never accepted as applicable to them.

## 2. Equal treatment before tribunals and all other organs administering justice

### (a) Access to the courts without distinctions

#### (i) Introductory remarks

13. The information available on certain countries contains governmental or non-governmental statements on the existence of certain rules (the text of which is sometimes included) which appear to guarantee equal access to the courts. <sup>2/</sup> While for some countries there is no indication whatsoever of the de facto situation

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<sup>2/</sup> E.g. in Australia, Canada, Costa Rica, Norway, Paraguay, the Philippines, Sri Lanka and Sweden.

regarding implementation of those rules, 3/ for others reference is made to some of the practical problems encountered by indigenous populations in the country 4/ or in certain parts of it. 5/

(ii) Presentation of the information available

14. The Swedish Government has simply stated that:

"In Sweden a foreigner and a person belonging to an ethnic, linguistic and religious minority have the same rights and the same possibilities as other inhabitants to plead in a court of law."

15. According to the Norwegian Government:

"Norwegian legislation contains no specific regulations concerning equality before the law without distinction as to race or origin. It follows in consequence of general legislative principles, however, that discrimination by public authorities on such grounds is illegal as long as no legislative measures are in existence which directly give grounds for discriminatory treatment because of race, colour, or national or ethnic origin. No such legislative measures exist in Norway. Any such discriminatory treatment would therefore be illegal. This applies both to the rights of individuals under existing legislation and to decisions made by the public authorities ..."

16. The Government has added that several rights fall under these provisions, including the right of equal treatment before the tribunals and all other organs administering justice.

17. The Government of Canada states:

"No specific measures have been enacted by legislative authorities in these areas, since the entire intent of the Bill of Rights and Human Rights Acts is to ensure equal treatment in such matters as court appearances ..."

"The Bill of Rights and the Human Rights Acts state that no other laws shall abrogate, abridge or infringe on their provisions. The Bill of Rights expressly prohibits any law of Canada being so applied that it ... deprives a person of 'a fair hearing in accordance with the principles of fundamental justice; the right to the assistance of an interpreter in any proceedings in which he is involved'."

18. In the Philippines, according to a writer: 6/ 7/

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3/ E.g. in Canada, Finland, Norway, the Philippines, Sri Lanka and Sweden.

4/ E.g. in Costa Rica and Paraguay.

5/ E.g. in Australia, regarding the State of Queensland.

6/ Fernando, E.M., Outlines of Constitutional Law (Manila, P.C.F. Publications, 1949), p. 76.

7/ The text of the old constitution has been used as the text of the new Constitution was not available to the Special Rapporteur.

"Section I of article III of the Constitution provides that no person shall ... be denied equal protection of the law.

"The guarantee of equal protection requires that all persons shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the stabilities imposed. It prohibits undue favour or special privilege for any person or class or hostile discrimination against any party.

"The right to equal protection, like the right to due process, is a restraint on the three departments of the national government as well as on subordinate instrumentalities or subdivisions thereof. It is a pledge for protection under equal laws. It is more than a mere abstract right; it is a command which the State must respect and the benefit of which every person may demand. It applies to all persons within the territorial jurisdiction without regard to differences of race and includes aliens ..."

19. According to a source: 8/

"Certain safeguards have been included in the Constitution to ensure fairness in criminal proceedings. There are provisions designed to ensure an independent judiciary, such as security of tenure of judges and fixed compensation. The Constitution also provides that access to courts shall not be denied to any person by reason of poverty."

20. The Government of Finland states:

"According to the Constitution, all Finnish citizens shall be equal before the law and all human rights and fundamental freedoms enumerated by the Constitution, ... shall be guaranteed to all without any discrimination. These principles are implemented by other legislation".

21. On the right to equal treatment before the tribunals and all other organs administering justice, article 13 of the Constitution provides that: "a Finnish citizen shall be tried by no other court than that which has jurisdiction over him by law".

22. The information available on Sri Lanka does not contain any references at all to the indigenous populations of the country, and, according to a writer:

"The administration of justice is based on the application of legal rules, codified and customary, which have evolved from the Roman-Dutch law, the English common law, and the three distinct customary codes observed, respectively, by the Sinhalese of the interior, the Tamils, and the Muslims ... In the Central, North Central, Uva, and Sabaragamuwa provinces of the interior highlands, the traditional Kandyan customary laws, now partly codified, are applied to the Sinhalese in respect to inheritance, matrimony, and donations. In the Jaffna district of the north, Thesavalamai, a customary code originating in southern India, is enforced among the Tamil inhabitants in respect to persons and property. The Muslims are governed by their own personal and religious laws."

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8/ Conference Room Paper No. 51, concerning the Philippines, prepared in connection with the Special Study of Racial Discrimination in the Political, Economic, Social and Cultural Spheres, paras. 8-9.

23. The Constitution provides for the use of Sinhalese and Tamil languages in the courts, in accordance with a number of circumstances warranting the choice of either language with interpretation or translation into the other of these languages (Section 11, several paragraphs). Section 11 further provides:

"(4) Every party, applicant, judge, jurymen or member of a tribunal not conversant with the language used in a court, tribunal or other institution referred to in subsection (1) or subsection (2) of this section, shall have the right to interpretation, and to translation into Sinhala or Tamil, provided by the State to enable him to understand and participate in the proceedings before the court, tribunal or other institution referred to in subsection (1) or subsection (2) of this section.

"Such person shall also have the right to obtain, in Sinhala or Tamil, any such part of the record as he may be entitled to obtain according to law."

24. The information concerning some countries (Australia, Costa Rica, New Zealand, Paraguay and the United States of America) contains some indications of the de facto situation in this regard.

25. The Government of New Zealand has stated that:

"No distinction is made in New Zealand law between citizens of different races in relation to treatment before tribunals and other organs administering justice.

"There has recently however been a good deal of public discussion in New Zealand relating to the proportion of Maori persons appearing in court without being represented by counsel ...". 9/

26. The Citizens' Association for Racial Equality states that the rights concerning equality in the administration of justice:

"are observed though there is some evidence to the effect that the judicial system, based as it is exclusively on British precedents and practices, does not result in Maoris getting equal treatment". 10/

27. According to information concerning Costa Rica and Paraguay, indigenous people face certain problems which are not confined to any particular region. In both cases the problems arise because some indigenous groups or persons fail to satisfy certain requirements. In Costa Rica the problem is one of identification, which can fairly easily be dealt with, but in Paraguay the situation is much more serious since more fundamental requirements are involved.

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9/ For a fuller text of this statement, see para. 216 below.

10/ Information furnished orally during the Special Rapporteur's visit to New Zealand and later confirmed in writing, in July 1973.

28. The Government of Costa Rica states, with regard to the right to equality of treatment before the tribunals and all other organs administering justice, that:

"In accordance with the Political Constitution, all citizens are equal before the law in Costa Rica.

"In the courts of law an Indian who possesses an identity card has no problems, but in practice most of our indigenous people are not in possession of identity cards and are at a disadvantage when claiming their rights and may be unable to do so. This is aggravated by their use of the vernacular and inability in many cases to understand the official language. Efforts are being made to see that all Indians obtain identity cards".

29. In 1979 the Government added:

"Linguistic and cultural difficulties have to some extent made it difficult for indigenous people to learn of the services provided by State and private agencies or to make use of them.

"In an attempt to deal with this problem, CONAI is trying to provide these services to Indians directly or indirectly through traditional organizations, using interpreters, especially in critical cases".

30. With regard to the operation of the provisions relating to equality before the law and equal access to the tribunals and to the administration of justice in Paraguay, the Anti-slavery Society reports:

"Unless they have full citizenship (which is the case only for a minority among them), indigenous people cannot bring charges, plead or testify in court. This hinders the punishment of crimes against indigenous people. It has been mentioned that no such crime has ever been punished in Paraguay.

"In 1975, the legal adviser of Marandú brought charges against persons who committed crimes (such as murder) against Indians. One murder case was taken as an example and widely publicized. These charges have not yet led to a trial.

"In 1975, invited by the Marandú project, the Director of the Indigenous Affairs Department and the President of the Asociación Indigenista made speeches in non-indigenous villages around the indigenous settlement of Yalve Sanga, warning the non-indigenous inhabitants not to steal any more cattle from the Indians. The cattle already stolen until then were not however restored."

31. The information relating to Australia contains some indications concerning the State of Queensland and the special provisions applying in that State to Aborigines and Torres Strait Islanders which are at variance with the law and the practice in other parts of the country.

32. The Australian Government has stated that:

"Aborigines are Australian citizens by virtue of the Nationality and Citizenship Act, and are entitled to equality before the law, and to enjoy the same fundamental freedoms as other citizens.

"All Australians are considered equal before the law. An Act to implement the International Covenant on Civil and Political Rights has specifically included a provision guaranteeing entitlement to the equal protection of the law.

"The provisions of the Racial Discrimination Act also seek to guarantee equality before the law ... Special measures in relation to Aboriginals and Islanders in Queensland included in the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Bill introduced in 1974 are designed to ensure equality before the law to these people."

33. It has been reported, however, that Professor Nettheim of the University of New South Wales stated in connection with the law applying to Aboriginals and Torres Strait Islanders in Queensland:

"When the Aboriginal comes before the court it is the same police officer who, as district officer, can examine and cross-examine witnesses and even address the court.

"The accepted standards of justice are not, it would seem, applicable to the Aboriginal ..."

"The authoritarian nature of the Act is compounded by the fact that many people under it can neither read nor write. They have, he says, 'therefore no hope of interpreting it to their own advantage'.

"Furthermore, third parties (e.g. concerned citizens) are unable to meet with them and State department officers if there is any question of procedures".

34. The Government of the United States of America states that "Indigenous individuals have the same security of person as any other citizen." 11/

35. Also respecting the rights here discussed, it has been written:

"each State constitution includes a bill of rights, on the basis of which minorities can usually claim protection. The procedure is to file suit in court against persons who violate civil rights.

"...

"Two things help minorities to attain equal justice: the first is that the basic law of the land, the Constitution, is written and is explicit. The second is that decisions of the Supreme Court are accepted as binding. This has enabled minorities, through their defense organizations, to fight up to the Supreme Court and so control the discrimination in, and violation of, the law.

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11/ See also the reference, in the information from the Government, to justice in tribal courts, in para. 38, below.

"One major problem the United States has not overcome is the average citizen's disrespect for law and his propensity to take the law into his own hands. This has especially harmful effects on minorities, since they are the groups that benefit most from vigorous and equitable application of the laws." 12/

36. The same source contains information to the effect:

"that, theory to the contrary, the law is not administered equally throughout the United States. Poor people in general have difficulty obtaining equal justice. The police are more likely to arrest them. They frequently cannot afford to hire lawyers or raise bail. They must more often serve jail sentences because they cannot pay the alternative fine. In so far as minorities belong to the poorer groups, they suffer these inequalities.

"Another differential in the administration of justice is geographical. In general the North has better law enforcement, better prisons and jails, and better-trained policemen than the South. There are also differences among cities, some of which are well administered, others are corrupt and graft-ridden. Minorities may suffer along with others if they are concentrated in the South or in corrupt urban areas.

"The most immediate contact minority group members have with the law is the policemen. In many cases this has not been a happy one.

"... the theory of American law is one thing, the practice another ...

"The lower courts, too, frequently fail to give equal justice to minority group members. Lower-court judges and justices of the peace are frequently not men of high legal standing. The dockets are crowded, poor people have no lawyers, cases are run through quickly, and often the prejudice or ignorance of the judge operates against the minority group member. Rarely is there protest or appeal. There is neither time, money, nor knowledge of how to go about appeal on the part of the victim.

"... The whole atmosphere of the courts is undignified and informal compared with our usual picture of the gravity and dignity of law courts." 13/

37. Further, it has been written that the government law enforcement agencies have remained inactive in the face of serious events:

"In the two years since Wounded Knee, [almost two dozen] Indians have been killed on the Pine Ridge Reservation in South Dakota. Yet the Government has almost uniformly refused to investigate these killings or other charges of brutality." 14/

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12/ Arnold and Caroline Rose, America Divided, New York, 1948, pp. 118 and 130.

13/ Ibid., pp. 108, 123 and 136.

14/ Vine Deloria, Jr., "Who knows what violence we can expect?", Akwesasne Notes, vol. 7, No. 4, 1975, p. 19. See chapter XVIII, para. 219 for a fuller quotation.

38. Referring to tribal court justice, the Government states:

"The rights of the individual Indian as viewed from the non-Indian community are not adequately protected in many Indian court processes on reservations where the judicial system is a tribal one. Both American Indian leadership and the Bureau of Indian Affairs are making efforts to improve this situation."

39. It has been observed, however, that:

"The United States, in its zeal to discredit tribal government, contrasts the ideal in the United States with an allegation of actual practice under the tribal jurisdiction. No Indian denies that tribal justice needs improvement. But Indians are 25 times more likely to be arrested than the average citizen in the United States yet all authorities agree that there is, if anything, less non-alcohol-related criminality among Indians than among the general population."<sup>15/</sup>

40. Regarding law enforcement on Indian reservations an official report contains the following:

"Four law enforcement agencies have jurisdiction on Indian reservations: the FBI investigates, and the United States Attorney prosecutes violations of federal law that are designated to be major crimes (murder, kidnapping, rape and 11 other serious crimes); BIA police and tribal police are responsible for policing, investigating minor crimes, and maintaining law and order on a day-to-day basis; and, State police have authority in situations when both the offender and the victim are non-Indians.

"The degree of confidence Indians have in the criminal justice system varies from reservation to reservation and from State to State. Indians complain that some United States Attorneys have not established effective prosecutorial guidelines for major crimes offences, causing delays in processing cases. BIA police, tribal police and federal investigators often duplicate investigative work. On some reservations, law enforcement and court facilities are inadequate and tribal police and tribal judges are insufficiently trained. Some of the non-Indian law enforcement and prosecutorial personnel that operate on reservations are not sensitive to Indian customs and needs.

"The United States Government is aware that these factors tend to shake Indian confidence in the criminal justice system, and is working to increase the effectiveness of police and prosecutors in Indian country. Much work remains to be done, however."<sup>16/</sup>

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<sup>15/</sup> American Indian Law Newsletter, vol. 7, No. 11, Special Issue containing "the American Indian response to the response of the United States of America", p. 23.

<sup>16/</sup> Report prepared by the United States Commission on the Conference on Security and Co-operation in Europe for the European Review Conference in Madrid (November 1980), pp. 152-153.

41. It has been stated in the same official report that:

"Over the years, mutual resentments have built up between Indians and various governmental authorities. As Indian people have become more assertive, and sometimes militant, in demanding their rights, these resentments have increased. Racist statements and actions of some authorities have caused many Indian people to allege that they cannot receive fair trials and that certain Indian activists are now in prison not because of the crimes they have committed but because of their political activism.

"Domestic groups have charged that law enforcement officials have engaged in systematic harassment, surveillance and other extra-legal activity against Indian activists. These critics further assert that leaders of the American Indian Movement (AIM), such as Russell Means, Dennis Banks and Leonard Peltier, are examples of activists who have ended up as political prisoners. (Further information on Means and certain other activists is contained in the section on Alleged Political Prisoners). Critics charge that police and prosecutors increased their alleged harassment of AIM leaders and other activist Indians following the widely-publicized 1973 armed takeover of Wounded Knee, South Dakota, by Indian militants. The occupation of Wounded Knee produced a complicated situation involving several law enforcement agencies, including tribal police from Pine Ridge Reservation. When such controversial confrontations occur, the potential for conflict and misunderstanding is considerably heightened." 17/

42. An official report contains the following information regarding four Indian leaders:

"- Russell Means, National Director of the American Indian Movement, was paroled on 27 July 1979. He began serving a four-year sentence in November of 1977 for 'rioting to obstruct justice'. The statute under which he was convicted was repealed one year later but was not effective retroactively.

"Amnesty International did not give the Commission their specific reasons for considering this case. Means has gained national and international attention because of his leadership in the American Indian Movement (AIM) and the 1973 siege of Wounded Knee, South Dakota. The charges against him for his participation in the siege were dismissed on 16 September 1974, in large part because of inadequate handling of the case by the prosecution. United States v. Means, 383 F.Supp. 389 (W.D. So.Dak. 1974). His recent conviction stemmed from a riot which occurred during the Wounded Knee trials.

"When queried about possible civil rights violations in this case, including allegations that Means was threatened by guards while in prison, the Justice Department informed the Commission: 'The latest incident was an assault on Means by another inmate, which we have no authority to prosecute. No evidence has been brought to our attention indicating inaction by local authorities ... Russell Means was imprisoned in July of 1978 after having exhausted all legal remedies'. He served one year of his four year term and was involved in a work release programme from November of 1978 until his release.

"- Richard Mohawk and Paul Skyhorse were acquitted of murder charges by a California court on 25 May 1978. Amnesty was involved in this case as a result of claims that these men were prosecuted because of their membership in the American Indian Movement (AIM) and were mistreated and denied adequate medical assistance by Ventura County officials while awaiting trial. Amnesty dropped the case as soon as Skyhorse and Mohawk were acquitted, but others continued to point out the fact that the defendants spent more time in pre-trial detention than any accused in California's history. The Civil Rights Division of the Justice Department informed the Commission that no complaints were ever brought to its attention by the defendants or their attorneys. However, the Indian Rights Section of this Division did respond to letters from persons and organizations supporting the defendants' cause.

"The Commission learned that during the time Skyhorse and Mohawk were incarcerated, the Constitutional Rights Section of the Los Angeles Office of the State Attorney General was conducting an independent investigation of general abuses in the administration of justice in Ventura County. The defendants were transferred to Los Angeles County jail when a change of venue motion was granted by the court. When asked about the length of time Skyhorse and Mohawk spent in pre-trial detention, a Ventura County Assistant Attorney General explained that the defendants had caused the delay: 'In California, defendants have an absolute right to be tried within 60 days or have the charges against them dismissed. The trial date was postponed approximately five times and on each occasion the defendants had asked for a continuance, and on each occasion the prosecution opposed the continuance.' 14/

"- Leonard Peltier, a member of the American Indian Movement, was serving two consecutive life sentences for the murder of two FBI agents at Pine Ridge Indian Reservation in South Dakota prior to his escape from federal prison on 21 July 1979. Peltier has been listed by Amnesty's New York Office as a possible prisoner of conscience.

"The only allegation of miscarriage of justice brought to the Commission's attention involves the FBI's misuse of affidavits in securing Peltier's extradition from Canada. The Eighth Circuit Court of Appeals addressed this issue and concluded: 'Peltier does not claim that he was extradited solely on the basis of Myrtle Poor Bear's affidavits or that the other evidence presented to the Canadian tribunal was insufficient to warrant extradition. It is clear from a review of the trial transcript that other substantial evidence of Peltier's involvement in the murders was presented in the extradition hearings ...'. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978).

"Peltier was convicted by a jury in the United States District Court of South Dakota on 25 June 1975, for the murders and in 1978 appealed this conviction to the Eighth Circuit Court of Appeals. As indicated above, the court affirmed his conviction on 14 September 1978, and denied a motion for rehearing on 27 October 1978. The United States Supreme Court denied Peltier's petition for review of his case on 5 March 1979.

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"14/ Correspondence dated 13 September 1977, between Congressman Robert Lagomarsino (R.-Calif.) and Assistant Attorney General Michael Bradbury.

"- Dennis Banks, also a leader in the American Indian Movement, is free in California today. Amnesty dropped investigation of the case in 1976 when Banks fled to California while released on bail. The Supreme Court of California held in March of 1978 that Governor Edmund G. Brown's refusal to extradite Banks to South Dakota was constitutional. South Dakota v. Brown, 20 Cal 3d 765, 576 P.2d 473 (1978). Banks was convicted in South Dakota courts in 1975 on arson, riot and assault charges stemming from a 1973 incident in Custer, South Dakota.

"In its International Report: 1975-1976, Amnesty suggested that Banks had been prosecuted because of his involvement in AIM. Charges against Banks brought by the State of Oregon were dismissed before trial by the federal judge hearing the case. The only other prosecution of which the Commission is aware resulted from Banks' participation in the siege of Wounded Knee, South Dakota. The federal district judge hearing the case against Banks and Russell Means dismissed the charges because of mishandling of the prosecution by the government attorneys. United States v. Means, 383 F.Supp. 389 (W.D.So.Dak. 1974). 18/

43. In this connection, however, a source contains the following information:

"... [Irregularities 19/] ... are common elements of United States Government criminal trials involving Indian people. The records of the trial of Indian leaders Russell Means, Dennis Banks, and many others, document this sordid story.

"...

"The United States Government and local governments continue to arrest and harass Indian people exercising treaty rights such as the right to hunt and fish.

"...

"The United States Government has filled its jails with Indian people. It has reserved for special treatment Indian warriors who struggle for the sovereignty of Indian nations. The list of victims is long." 20/

44. It seems that in the latter months of 1983 as many as 50 members of Congress have become convinced that irregularities indeed intervened in the Leonard Peltier trial for 1975 events and that they are serious enough to warrant a new trial. In a recent report, the following is stated in this regard:

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18/ Ibid., pp. 66-67.

19/ The actual words used in the text are: "trickery, dishonesty, perjury and deceit".

20/ International Indian Treaty Council, The Second International Indian Treaty Conference, Yankton, Lakota (Sioux) Country, South Dakota, 13-20 June 1976. p. 5.

"Fifty Congressmen have asked that Leonard Peltier, a leader of the American Indian Movement (AIM), be retried in a United States court on the charge of murdering two FBI agents at Pine Ridge, South Dakota, in 1975.

"Acting as friends of the court, the Congressmen cited new evidence, discovered as a result of the Freedom of Information Act, which reveals more irregularities on the part of the FBI than were known to the Court during the trial.

"The application by the 50 Congressmen states that the government deliberately misled the Court and the jury by presenting evidence which it knew to be false.

"The lawyers acting for Peltier, at present serving two consecutive life sentences in a federal prison, assert that the ballistic evidence produced in Court was entirely circumstantial. They believe the prosecutors suppressed a ballistic test of the gunhammer, which shows that the gun claimed to be Peltier's could not have fired the bullet found near the body of the FBI agent.

"The original trial raises serious problems of Government policy, according to Don Edwards (D-CA), a member of Congress and Chairman of the Congressional Sub-Committee on Constitutional and Civil Rights. He thought it in the interest of all Americans that the case should be retried.

"Oral submissions were heard by the Eighth Circuit Court of Appeals at St. Louis on 13 September 1983. The law firm of Ashbill and Jenkins of St. Louis, submitted a motion on behalf of the Congressmen.

"Henry Ashbill, a member of the firm, said that the group of Congressmen considered that the case was sufficiently important to make known their opinion that the judicial process in the Peltier case had resulted in findings contrary to the intentions of Congress and to the public interest.

"Many of the Congressmen who signed the motion are members of committees or sub-committees on judicial affairs, criminal law, human rights and freedoms and Indian affairs. As firm believers in justice, they call for a just and equitable settlement of the case and ask that the matter be sent back to a federal court for a new hearing.

"From his cell in a federal prison at Marion, Illinois, Peltier stated that in the seven years since he was gaoled, everything he had learnt about the FBI and those who administer the judicial system in the United States led him to the conclusion that their main concern during his trial had been public relations - to keep the image of the FBI clean, to keep the image of the legal system clean and to keep the image of the United States clean - to avoid trouble at any price, no matter what the cost to individuals. The only thing which seemed important to those guilty of that conspiracy was to hide the fact that he was a political prisoner and a prisoner of war: they could not and would not admit that truth.

"They would not admit to the rest of the world that such a situation - the political oppression of the Indian people - really existed in the United States. In order to hide that truth the FBI was playing the same part as the police of some dictatorships. They were becoming extremists and terrorists themselves, plotting, committing perjury by using duress and physical violence against prisoners to force them to testify, threatening and even committing murder.

"They violated the rights of men and the citizen on the pretext of securing respect for the United States Constitution. And yet the government prosecuting team had accused him and his defence attorney of being 'frivolous' (one of their favourite words), of sticking blindly to a predetermined point of view in the face of all the evidence. The Government's accusation against him was itself a fanciful interpretation of invented testimonies which had been sold to the jury at Fargo, North Dakota". 21/

45. According to another source:

"In March 1975, more than 20 American Indian Movement supporters were ... arrested, many Indian people were beaten and harassed and several were killed in a United States Government attempt to discredit AIM.

"In protest and desperation a group of Sioux women, many of them mothers of small children, occupied a floor of the United States Federal Building in Rapid City, South Dakota.

"The following is the statement they made while inside the building:

"We the Indian women and proud members of the American Indian Movement demand an end to the discriminatory practices of the judicial system - federal, State and local - against traditional Indian people and the American Indian Movement.

"We make the following demands:

"1. An immediate meeting with Trimbach and the FBI, one with Trimble and the BIA and one with Eastman and the BIA police.

"2. A complete and impartial investigation of all cases previously filed with the FBI, and immediate prosecutions following the investigations.

"We shall remain here until these demands are met. We stand on our treaty rights." 22/

46. It has been written in another publication:

"Our police cannot arrest a white man for killing an Indian and put him in our jail and try him by our tribal juries - but whites can arrest and judge our people. Our police can enforce only white laws.

"...

"There is no justice in the American Government, because there is no law although there is order. Law in the pure sense recognizes equality at all levels, and that does not apply to the American State. Rules, however,

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21/ "Etats-Unis: La défense de Leonard Peltier se consolide", Amérique Indienne (Paris), Bulletin No. 36, February 1984, p. 12.

22/ Native American Women, published by The American Indian Treaty Council Information Centre as a special project in connection with the World Conference of the International Women's Year, New York 1975, p. 46.

only have to be obeyed by those without the power to enforce them. The rules do not respond to justice. Power does not recognize rules. The order that exists is in the legislative and judicial branches of the American State - they maintain order with the law. Look at the racism that exists in the rules of this government: the rules of this State were founded on the inclusion of whites only, permitting race slavery and genocide against Indians." 23/

47. As regards law and legislation on reservations, it has been written:

"On reservations where State laws apply, police activities are administered by the State in the same manner as elsewhere. On reservations where State laws do not apply, tribal laws or Department of the Interior regulations are administered by personnel employed by the Bureau of Indian Affairs, or by personnel employed by the tribe, or by a combination of both.

"Today, for those areas of Indian country not under State jurisdiction, nearly 900 people, mostly Indians, are engaged in law enforcement activities. More than half are employed and paid by tribes.

"Indian offenders against State or Federal laws are tried in State or Federal courts. Indian offenders against tribal laws or Department of the Interior law and order regulations are tried in Indian courts. Generally speaking, these Indian courts have many of the aspects of lower State courts.

"Although the judges of the Indian courts may be Bureau of Indian Affairs employees, they function independently of Bureau control and are not subject to Bureau supervision in their administration of justice under either tribal laws or Departmental regulations." 24/

48. According to a publication, the judicial powers of the Indian Government include the power to: "(1) Punish its members for offences against each other and foreigners; (2) Punish its members for public offences against the peace and dignity of the government; (3) Punish foreigners within its territory who violate its laws and customs." Unless the United States Congress has passed an act which restricts a tribe's judicial powers, an Indian government may exercise complete authority over all criminal and civil matters occurring within its jurisdiction. "The judicial decisions of Indian governments with functioning court systems have the same dignity and legal force as decisions of federal and State courts." 25/

49. On the question of the judicial authority of Indian governments see also what has been said above in paragraph 40.

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23/ "The effects of colonialism on Indian life", Akwesasne Notes, vol. 6, No. 4, 1974, pp. 41-42.

24/ The American Indians. Answers to 101 Questions (Washington, D.C. United States Department of the Interior, Bureau of Indian Affairs, 1974), p. 27.

25/ Curtis Berkey, Indian Sovereignty, (Washington, D.C., Institute for the Development of Indian Law, Inc. 1976), pp. 43-44.

50. It has been observed:

"When we turn to civil law, we find similar inequities [between rich and poor] at work. Consider the man who is injured in an automobile accident and enters a tort claim. Dockets are often congested and litigation takes time. Meanwhile the plaintiff may be unable to work and earn his salary, and may be saddled with heavy medical expenses in addition. If he is poor he may be unable to hold out financially through prolonged litigation - and thus he is under pressure to settle his claim promptly whether or not the terms of settlement are just." 26/

51. According to a source:

"... The administration of justice, particularly in border towns surrounding the reservations, is of very poor quality and often enforced discriminatorily with respect to Indians. The Federal Bureau of Investigation has a very bad reputation in investigating crimes committed against Indians on the reservation as well as civil rights violations against Indians off the reservation. This agency has historically had a bad reputation with respect to the protection and the hiring of minorities, and in the case of Indians particularly this reputation is well deserved.

"...

"... The lawyers, while well meaning, have little understanding of the values that are important to the Indian. This is especially true when the issue is individual rights versus tribal rights. The natural inclination of the lawyer is to side immediately with the individual since the lawyer has little appreciation or knowledge of tribal rights." 27/

(iii) Some observations in this regard

52. In this connection, it should be noted that, although the doors of the courts are not physically closed to indigenous people in any country, there are everywhere circumstances which make the right of access to the courts, formally recognized in the constitutions and laws inoperative. Among these circumstances, are:

(a) geographical distribution; (b) problems arising from lack of knowledge of the language spoken in the courts, which is not the language of the indigenous populations and which they have not been properly taught; (c) problems of differences in culture, socio-cultural organization and legal system, those prevailing in the courts and applied by them being foreign to the indigenous populations; (d) problems with police officers and officials administering the law; and (e) difficulty of communicating with lawyers in preparing and presenting cases.

53. The subsequent paragraphs of this section deal with these matters in the light of the available information, which is far from being complete or sufficient to permit a comparative analysis.

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26/ Conference Room Paper No. 44 concerning the United States of America, prepared in connection with United Nations Study of Equality in the Administration of Justice, p. 35.

27/ American Indian Law Newsletter, vol. 7, No. 11, pp. 21 and 57.

(b) Linguistic difficulties

(i) Introductory remarks

54. The constitutions and laws of many countries make no specific reference to the language problems that some persons encounter when appearing in court or to provisions for overcoming such difficulties through access to the courts.

55. Persons who do not have sufficient knowledge of the language or languages of the court, however, do suffer difficulties in judicial proceedings unless proper provisions are made on their behalf. This problem is particularly acute, therefore, in countries where numerous local languages and/or dialects exist.

56. Problems of language in court may affect not only accused persons or other parties to judicial proceedings, but also witnesses and experts.

57. The right of everyone, in the determination of any criminal charges against him, "to be informed ... in a language which he understands of the nature and cause of the charge against him" is laid down in article 14, paragraph 3 (a), of the International Covenant on Civil and Political Rights.

58. The right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court" is added in paragraph 3 (f) of that article.

(ii) Presentation of the information available

59. All legal systems attempt to provide for interpretation, free or otherwise, for persons without a sufficient knowledge of the language of the court. However, that is not an invariable rule outside criminal proceedings. In several countries <sup>28/</sup> a litigant in non-criminal proceedings must make his own arrangements for interpretation, although the cost in some instances may be covered by legal aid or paid by the defeated party.

60. Linguistic problems arise not only in the court room in connection with oral interpretation but also out of court where, for instance, the translation of relevant documents is required. Furthermore, a person who is preparing to go to court may need to address his counsel through an interpreter while preparing his case.

61. If a lawyer requires the services of an interpreter to communicate with his client, in prison or elsewhere, he must engage a private accredited interpreter, at his own expense. The lawyer may also need translations of all the relevant documents in the police or court records which are written in a language he does not command. Such translations must be done by a translator of his own choice at his own expense.

62. In criminal proceedings, free interpretation for accused persons without sufficient knowledge of the language of the court is provided in the great majority of countries.

63. In numerous countries free interpretation is guaranteed to accused persons either by the Constitution or by statute. Interpreters are appointed by the court and the

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<sup>28/</sup> Including Australia, Canada, Denmark, India and Pakistan.

costs are borne by the State, whether or not this is a constitutional requirement. 29/ Even if no legal requirement exists, the courts nearly always make ad hoc arrangements in criminal proceedings. 30/

64. In some countries, however, if the defendant is convicted he may be charged the costs incurred. 31/ In certain countries the accused never bears the cost of interpretation when he is entitled to free legal aid. 32/

65. Official provision of interpretation in return for payment by the person aided also exists and, although not ideal, it goes some way towards reducing discrimination on linguistic grounds in judicial proceedings. Some of the relevant provisions require persons officially aided by interpretation to pay for it under certain circumstances. Some constitutions and many laws or rules of court 33/ provide for or lay down the right to the official provision of interpretation in various types of proceedings but do not specifically state that these arrangements are to be provided free.

66. Some of the provisions just mentioned apply to criminal proceedings. Thus, in several countries, the judges rules, 34/ which govern the admissibility as evidence in criminal proceedings of statements made during police interrogations, provide that, if a foreigner makes a statement in his native language, the interpreter should take down the statement in the language in which it is made and give it to the person making the statement to approve and sign, and that an official translation into the court language should be made in due course, and be provided as an exhibit with the original statement.

67. Few statutory provisions dealing with these questions were available in full. Two such provisions are cited in the next paragraphs as examples of the type of stipulations made in this regard.

68. The Criminal Code of Argentina provides:

"Art. 252. If the person being interrogated does not understand the national language, he shall be examined through an interpreter, who shall take an oath to conduct himself properly and honestly in the performance of his duties.

"The interpreter shall be appointed from among the qualified interpreters at the place where the statement is being taken. If there are none, an expert in the language concerned shall be appointed." 35/

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29/ Including Australia (most states), Chile, Denmark, Ecuador, Finland, Guatemala, India, New Zealand, Philippines, Sri Lanka and Sweden.

30/ Generally through a power granted by statute or by using their discretionary powers.

31/ As in Denmark and France.

32/ As in Venezuela.

33/ As in Brazil, Canada, Japan and Malaysia.

34/ Countries with common law systems, including New Zealand.

35/ There are similar provisions in Chile, Colombia, Ecuador, El Salvador, Mexico, Nicaragua, Paraguay and Venezuela.

69. The Guatemalan Code of Penal Procedure provides:

"Reading of statement

"Article 420 - The defendant may read his statement himself, when so directed by the court.

"If he does not do so, the judge or the investigating official shall do so slowly, clearly and distinctly. At the end of the reading, clarifications, amplifications and requests may be entered. The accused shall sign each of the pages of the statement or shall mark them with his finger print.

"Statement through an interpreter

"Article 421 - If the person questioned does not understand Spanish, he shall be examined through an interpreter who shall be appointed, in order, from among qualified interpreters, language teachers or professors or any other person knowing the language.

"In parts of the country where the foregoing is impossible, the accused shall be taken to the capital or to a place where a person speaking his language can be found, together with letters rogatory, letters requisitorial or an official communication in which shall be set out the questions to be answered.

"Where necessary, the courts may apply to the embassy or consulate concerned through the office of the head of the judiciary. In the commission the judge commissioned may be authorized to designate the interpreter.

"...

"Counsel

"Article 423 - The accused shall be given information regarding arrangement for defence before the completion of the inquiry.

"Witness without knowledge of Spanish

"Article 452 - If the witness is unable to speak or write Spanish, he may, in addition to making his statement in the form prescribed in this Code, write it in his own language or get his interpreter to do so. The document shall be annexed to the file of the proceedings."

70. In civil cases, in the great majority of countries studied, the authorities provide a litigant without knowledge of the language of the court with interpretation. The cost is often borne, however, either by the assisted party or by the unsuccessful party or by the party required by the court to meet the expense.

71. As an example of provisions applying to witnesses in civil proceedings who do not command the court language see for instance the following provision taken from the Code of Civil and Commercial Procedure which stipulates:

"Article 163 - If the witness does not know the Spanish language, he shall make his statement through an interpreter, who shall be nominated by the judge, an accredited interpreter being chosen for preference.

"If the witness so requests, in addition to his statement being taken down in Spanish, it may be written in his own language by the witness or by the interpreter."

72. No provision was found to stipulate who, besides the party concerned, would pay for the services of the interpreter in the absence of legal assistance provisions granting free litigation to the litigant for whom the witness came to court.

73. Arrangements are also made or may be made free of charge for parties in non-criminal proceedings in some countries, provided certain conditions are fulfilled.

74. The free provision of interpretation in civil proceedings is, however, less frequent than in criminal proceedings. In some countries, the cost of interpretation is paid from public funds. <sup>36/</sup> In other countries, the remuneration of interpreters called in by the court in civil cases to assist parties who do not command the language of the court is paid out of public funds. In certain cases, such remuneration is reimbursed by the losing party except when that party has been granted free litigation. <sup>37/</sup>

75. In administrative proceedings, an interpreter, if needed, is furnished free of charge. <sup>38/</sup>

76. In Norway, if the accused does not know Norwegian, the court may (in addition to furnishing interpretation), if necessitated by the importance of the case, decide that the court record shall be written in the foreign language in question.

(iii) Some observations in this regard

77. One of the first linguistic difficulties facing indigenous people in matters concerned with the administration of justice is the problem of communication between indigenous clients and non-indigenous lawyers, many of whom have no command of the language used by their clients. In such cases interpreters have to be used. Apart from the problem of obtaining interpreters, there is, as has been mentioned, the problem of translating any documents that may be needed. These difficulties extend to the courts of law and to quasi-judicial bodies dealing with contentious matters since very often judges, examining magistrates and arbitrators - and the other parties to arbitration - do not speak any of the indigenous languages required.

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<sup>36/</sup> As in Australia (some states), Finland and Philippines.

<sup>37/</sup> As in Denmark, Norway and Sweden.

<sup>38/</sup> As in Ecuador and the United States.

78. Another point is that when indigenous languages have to be interpreted or translated, interpreters knowing and working in indigenous languages are rarely considered as important as those working in internationally used languages other than the official language, i.e. in languages that are foreign in the country in question. People who speak internationally used languages are in a privileged position in the courts since they always enjoy the services of capable, qualified interpreters and translators. In the more important towns, foreigners can make use of consular officials or interpreter-translators. In many cases the consular officials or interpreter-translators are either lawyers or have legal training or at least have rudiments of legal knowledge acquired in the course of their training as translators.

79. It should be noted also that interpreters of indigenous languages normally have no professional training in the language. In many cases they have only practical knowledge of the language and have not been trained as professional translators or interpreters. As a general rule, few if any institutes of higher education offer courses of study in indigenous languages, and there are even fewer schools for training translators and interpreters in those languages.

80. On the one hand there is a lack of training in translation and interpretation as such and on the other interpreter-translators of indigenous languages are less likely than translators of other languages to be lawyers. This leads to problems because the people working as interpreters of indigenous languages have very little understanding of the legal systems and institutions involved in the relationship between counsel and client and between the litigant and the court. As a result they are unable to provide adequate translations of what is being said in the other languages because of the disparities between the legal systems in question. This is serious because the interpreter is not dealing with related languages or with similar legal systems derived from common sources. A thorough understanding of the institutions through the language being used is necessary and could only be obtained through solid legal training.

81. In the case of the court interpreter, this training should at least cover the two systems that must be considered, the system adopted and imposed by the State as the national or State system, and the indigenous legal system. It should be noted at this point that contrary to what appears to be assumed by States in these matters, the indigenous languages are neither dead nor primitive. On the contrary, they incorporate and express indigenous cultural and legal systems and these systems are full of life and in daily use in areas, some of them extensive, of the territory of the State. They have the close ethico-philosophical and cultural support of the indigenous people, who regard them as their own legal system in accordance with whose rules they live their daily lives.

(c) Socio-cultural and juridical difficulties

(i) Introductory remarks

82. Differences between indigenous and non-indigenous socio-cultural and juridical systems create numerous problems for indigenous persons who become involved in the administration of justice, as well as for those responsible for administering justice. This is general to many branches of law but is particularly serious as regards criminal law and procedure.

83. Cultural differences in the concept of crime, guilt and due process of the law mean that many indigenous people accused of having committed an offence are sentenced under conditions that differ from those of the non-indigenous persons who share the socio-cultural and juridical criteria being applied.

84. All these circumstances, compounded further by the lack of communication and mutual respect between the (usually) non-indigenous police and other law enforcement officials and the indigenous populations in almost all countries under whose jurisdiction they live, have frequently led to victimization of indigenous people.

85. As a result, in all countries where indigenous populations live today, there are proportionately more indigenous than non-indigenous people in penal institutions, which has begun to worry experts and Governments everywhere.

86. Finally, indigenous populations also suffer everywhere from marked ignorance of the law being applied to them and scarcity of qualified indigenous lawyers and non-indigenous lawyers with enough understanding of their difficulties.

87. This situation is worsened by the non-existence, failure to use or ignorance of legal assistance services and is further compounded by the language barriers which make it extremely difficult for indigenous people to communicate with the lawyer, prosecutor and judge.

88. Some of the linguistic problems confronting indigenous people in the administration of justice have been discussed above. Problems of legal assistance and preparation of indigenous people as lawyers will be discussed below. The present section will be devoted to discussing some of the main socio-cultural and juridical problems as they are reflected in the information available in these respects.

(ii) Presentation of the information available

89. Reference must first be made to the observed fact that in all countries where there are indigenous populations the number of indigenous people in penal establishments is very large. The number of indigenous prisoners is disproportionately large and represents a higher percentage of the total indigenous population than does the corresponding figure for the non-indigenous population. This is partly the result of discrimination and unequal treatment, as well as of the disparities between the juridical systems concerned, which work to the disadvantage of the indigenous populations.

90. Reference was made to this phenomenon in a background paper prepared recently with a very brief account of basic information on Australian Aboriginal problems today. Among the fundamental points made in this paper, there is one listing the negative aspects of the Australian Government's relations with Aboriginal people:

"6. Disregard for Aboriginal Australians' territorial security and right of self-determination are at the root of a wide range of contemporary human rights problems, including:

"...

"(iii) a disproportionate rate of criminal convictions and incarcerations - in Western Australia, Aboriginal people are twenty times more likely to be imprisoned than whites". 39/

91. During his official visits to countries in connection with the present study, the Special Rapporteur was invariably informed that, in their involvement in court proceedings of various types, indigenous groups and persons became the victims of a process they did not understand. Indigenous defendants, almost invariably withdrew, pleaded guilty, took the consequences stoically ... often for something they did not do, that was not an offence at all, or, at least, was not a serious offence.

92. This accounts for the high incidence of involvement with the law-enforcement services and the high imprisonment rates of indigenous populations. Society at large has finally begun to take notice of this unfair situation.

93. According to information furnished by the Government of Canada:

"In the northern areas and in prairie communities a disproportionate number of court appearances involve native people, usually on charges of assault, disorderly conduct or prostitution. It is claimed by Indian groups that the courts and police officers exercise discrimination in law enforcement.

"...

"The disproportionate number of Indian offenders and the belief on the part of Indians that the police and courts work in a manner prejudicial to them, can be alleviated only when social and economic conditions improve materially for the native people. It is on this assumption that policy-makers and administrators are proceeding with the implementation of expanded economic opportunity and self-government proposals in Canada." 40/

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39/ Background paper, prepared by the Organization of Aboriginal Unity, the National Aboriginal Conference, the National Aboriginal and Islander Legal Service, the National Aboriginal and Islander Health Organization, the National Aboriginal and Islander Childrens Service and the Federation of Land Councils. Undated, mimeographed. A copy was received in March 1984.

40/ See a fuller text of the quotation in para. 229 below.

94. The Government also states that: "the court worker program is seen as an important means of overcoming these attitudes and of encouraging fair exercise of the law." 41/
95. As already indicated, one of the factors contributing to the disproportionate number of indigenous people in penal institutions lies in the differences in culturally based perceptions of guilt, due process, crime and gaol.
96. The indigenous notion of crime, guilt, and due process differs considerably from the meanings assigned to these terms by non-indigenous persons in the courts. For example, a characteristic sense of shame leads indigenous persons to plead guilty when accused of a crime even though they are not in fact guilty. Systems of justice administered in the relevant countries everywhere are not yet sufficiently developed to take account of these subtle differences.
97. Consequently, a large number of indigenous persons are sentenced to imprisonment, during which they are maltreated by wardens and other inmates and have little opportunity, if any at all, to take advantage of any rehabilitation schemes. On the contrary, they are exposed to all kinds of discriminatory and annoying treatment that cannot but have negative effects.
98. In this connection it should be mentioned that, during the Special Rapporteur's official visit to New Zealand (June 1973), it was learned that the Nga Tamatoa, a Maori Organization, had established a Legal Defence Office in Wellington. Members of this organization assist Maoris who come to court by advising them what information they ought to give and how to plead. They also try to obtain help, advice and legal aid for Maoris who are taken to gaol.
99. The Government has commented as follows in this respect:
- "It is correct, as stated by the Special Rapporteur, that a Maori organization of young people known as Nga Tamatoa gives some assistance to Maoris coming before the court in Wellington. This organization has received some financial assistance from Government sources to help meet the rent of an office they occupy. The Maori Affairs Department also has a Maori social worker with the special duty of assisting young Maoris who are charged with offences in the courts in Wellington. The Department also provides similar services in other large centres."
100. The official behaviour of the police and other law-enforcement officers is very important. There is often a very bad relationship between the indigenous population and non-indigenous police and law-enforcement officers who find it hard to understand indigenous people and sometimes have preconceived ideas and prejudices about them. In such circumstances, the relationships are difficult and conflict-ridden, and friction and confrontations are frequent occurrences.
101. A further result is that even persons of good will who wish to be helpful cannot do as much as they would like, partly because of linguistic and cultural differences. The view has been expressed that the problems might be eliminated or at least reduced if there were more indigenous police and law enforcement officers.

102. This is the situation where, as is the case in some indigenous reservations in various countries, all or most of the police are now indigenous. In cases where non-indigenous police are still dealing with the problems of the indigenous population, the advantages of recruiting indigenous officers should be considered.

103. Because of these considerations, the recruitment of indigenous people has been advocated in some countries in which all or most police and law-enforcement officers are non-indigenous. Young indigenous people are being encouraged to join the police force and other law enforcement agencies with a view to increasing indigenous representation. This might result initially in better understanding between indigenous and non-indigenous officers and subsequently lead to a better attitude on the part of the integrated force to indigenous segments of the population. Information is available concerning efforts along these lines, although there is no confirmation of how they have worked out in practice.

104. Canada and the United States of America have begun to tackle this very important problem.

105. Among the different projects and programmes now in operation or planned for the near future, mention should be made here of the following:

(a) Indigenous Court Workers

In accordance with this programme, indigenous persons are engaged to assist indigenous defendants in criminal proceedings. In many provinces (Canada) and states (United States), court workers programmes are currently reported to be in operation. It is further reported that similar programmes will be established shortly in others. It seems that one of the immediate results of these programmes has been a significant reduction of incarceration of indigenous persons.

(b) Indigenous police officers, penitentiary personnel and parole and probation officers

Arrangements are being made to make the posts of police officer, penitentiary personnel and parole and probation officer more accessible to qualified indigenous persons. These projects consist of liberalizing the relevant legal requirements and of placing indigenous persons on parole boards.

(c) Indigenous lawyers

Programmes and schemes to encourage indigenous students to enter the legal profession, some of which are already in operation, seek to provide funds for scholarships coupled with pre-legal training programmes, so that indigenous students have the necessary elements of knowledge to take advantage, effectively of the legal training they will be receiving. An excellent example of this type of activity is the above mentioned programme conducted at the Legal Center that is part of the New Mexico University Law School. Another on-going programme is operating in the Canadian Province of Saskatchewan, as part of the activities of the Law School of the University of that province.

106. All these programmes are based on the realization that indigenous people require more assistance than is now available to them in this field. All current programmes and plans are, however, basically aimed at helping the native person after he or she is in conflict with the law.

107. The need is felt to institute programmes, projects and plans to take the necessary steps before this happens. Preventive action is now considered very important.

108. Legal information programmes. Since it has become increasingly clear that the basic misunderstanding of the legal processes is at the root of many cases of indigenous peoples' conflicts with the law, law information programmes are being planned, basically endeavouring to bring information on the law to indigenous persons before they have had any conflicts with the law enforcement system.

109. Among the programmes included in legal information projects the following should be mentioned:

Meetings between members of the judiciary and the police and indigenous people. Gatherings of different kinds are being envisaged between law enforcement personnel and members of the judiciary and indigenous people to discuss problems of common concern. Seminars with the active participation of indigenous leaders are now being planned. Obviously the aim here is to close the cultural gap between indigenous and non-indigenous peoples and systems.

Legal education component. Initiatives have been taken to include legal education components specifically designed for school children in formal education schemes. Corresponding efforts will be made with regard to youth as well as adults through all effective means. The aim of this type of programme is to have well-informed people who, on the basis of this information, will avoid unnecessary entanglements with the law.

Paralegal personnel to be kept up to date on legal reforms and developments. Seminars would be organized in which paralegal personnel would receive intensive courses periodically to keep them up to date with law reform and developments in the legal field so that they will be better equipped to transmit this information to indigenous peoples and assist them in preventive efforts. Pilot projects were said to be currently almost operative.

110. When rendering court decisions, efforts are also being made to create conditions under which the mores of the native people are duly taken into account, so that sentencing makes more sense to indigenous people and society at large.

111. See also the information provided by the Government of Canada and other sources in relation to Native Court Workers in Canada in paragraph 229, below.

(iii) Some observations in this regard

112. It is evident that consultation with and participation of indigenous communities is essential in any successful approach to these complicated and complex matters.

113. Indigenous presence in the police, in other law enforcement agencies and in the legal profession seems essential in all countries, in order to incorporate socio-cultural and juridical traditions and institutions in these important activities of the State.

114. More and more would need to be done in this area in order to bring about at least a real and discernible improvement on present day conditions which are far from ideal.

3. Equal protection from arbitrary arrest, detention and exile, as well as from cruel and inhuman treatment

(a) Introductory remarks

115. In all legislative systems there are provisions in the Constitution or other fundamental laws designed to protect essential rights and freedoms that may be affected by the absence of the necessary judicial proceedings or because these principles and rules have been abused or wrongly implemented in practice in the courts. Thus, in all countries on which there is information on these aspects, there are provisions stipulating in very similar terms that no person shall be deprived of life, liberty or security, except in accordance with the laws. Other provisions contain an explicit recognition of the right to freedom from arbitrary arrest, detention and exile and of the principle of nullum crimen, nulla poena sine lege penale. The right to be considered innocent until proven guilty establishes the burden of the proof on the part of the prosecution.

116. Most systems also establish in express terms the prohibition of cruel and inhuman treatment and torture, especially during detention or imprisonment, and sanction the guilty officials in a particularly strict manner.

(b) Presentation of the information available

117. The information available on certain countries contains governmental or non-governmental statements on the existence of certain constitutional or legal provisions (the texts of some of which are included) according to which the right to security of person and protection by the State against any violence or bodily harm, whether inflicted by government officials or by any individual group or institution, is guaranteed. <sup>42/</sup> In some of this information there are indications of problems which have arisen in the implementation of these provisions. <sup>43/</sup>

118. The statements concerning some countries contain no explicit reference to the indigenous populations and are quoted in the following paragraphs.

119. The Government of Bangladesh refers to provisions in the Bangladesh Constitution which stipulate that all citizens are equal before the law and are entitled to equal protection of law (art. 27); that, to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law (art. 31) and that no person shall be deprived of life or personal liberty save in accordance with law (art. 32). According to information received from the Government, constitutional provisions in this respect are strictly adhered to and no discrimination is practised against any group or individual.

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<sup>42/</sup> E.g., Australia, Bangladesh, Canada, Norway, Paraguay, the Philippines and Sweden.

<sup>43/</sup> As in Paraguay.

120. The Government of Sweden has stated that in that country, a foreigner and a person belonging to an ethnic, linguistic and religious minority have the same protection of their person and property and in all essential respects the same rights and freedoms as other inhabitants.

121. The Government of the Philippines has stated that:

"The Constitution also deals with the question of security of person (art.III, sec.1 (19)) by prohibiting cruel and unusual punishment."

122. As already stated in paragraph 15, the Norwegian Government has reported that: "Norwegian legislation contains no specific regulations concerning equality before the law without distinction as to race or origin."

123. The Government has added that several rights fall under these provisions, the right to security of person and protection by the State against violence or bodily harm, whether inflicted by Government officials or by any individual, group or institution.

124. As stated in paragraph 17, the Government of Canada reports that no specific measures have been enacted by legislative authorities in these areas, since the entire intent of the Bill of Rights and Human Rights Acts is to ensure equal treatment in such matters as ... security of person. The Government adds that:

"The Bill of Rights expressly prohibits any law of Canada being so applied that it imposes 'arbitrary detention, imprisonment or exile' or 'cruel or unusual treatment or punishment'."

125. The Government of Australia has stated:

"The Racial Discrimination Act provides for the right to equality before the law. In addition, the Human Rights Act gives effect in Australia to the International Covenant on Civil and Political Rights, has provisions relating to speedy trial, presumption of innocence, public trial, fair trial and post trial procedures. Everyone is entitled to those procedures without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or racial origin, property, birth or other status ...".

126. The Government has further stated:

"All the Australian States and Territories have offences in their criminal legislation relating to assault and battery. Those provisions apply to all persons, without distinctions based on race or colour. Furthermore, the prerogative writ known as habeas corpus, applies in Australia. This writ commands that the person holding another in custody is required to produce or 'have the body' of that person before the Court. In addition to these protections of the criminal law, there is the civil action of trespass, including assault, battery and false imprisonment. A person who can establish trespass is entitled to recover damages from the defendant".

127. The information concerning Paraguay includes a reference to instructions by the Minister of the Interior setting standards of conduct for persons dealing with the Guayakí Indians, with regard in particular to respect for their life and persons. An author cites the text of the instructions as follows:

"13.VI 57: Order No. 301 of the Ministry of the Interior, containing instructions to the authorities to prevent the killing, maltreatment or abduction of the Guayakí." 44/

128. The Anti-Slavery Society reports:

"Two ethnic groups, the Ayoreo in the Chaco close to Bolivia and the Aché in Eastern Paraguay, seem to be in a specially precarious situation with regard to their fundamental rights to security and protection:

"AYOREO: In 1972 ... there were Paraguayan press reports about white settlers going out with their arms to 'take revenge' on the Ayoreo. On 29 June 1972, Bishop Maricevich of the Roman Catholic Episcopal Conference condemned the 'real persecution' directed against the Ayoreo and cited one recent example, when more than ten were killed and others captured. In May 1975, in a book edited by the Marandú project, 'the systematic genocide by the skin hunters of the Chaco against the Ayoreo Indians' is condemned, and it is added that the Indigenous Affairs Department has done nothing against it. Mr. John Renshaw, who stayed in Paraguay from July to September 1975, writes of 'killings committed by Paraguayans'.

"ACHÉ: The acts of violence committed against this ethnic group are documented in the publications: 'The Aché Indians - Genocide in Paraguay', IWGIA, Document No. 11, Copenhagen, 1973; 'The Aché - genocide continues in Paraguay', IWGIA Doc. No. 17, Copenhagen, 1974. These documentations cover the period until May 1974.

From 5 to 7 August 1974, a group of perhaps 80 Aché is said to have been transported by force and against their will from Arroyo Guasú (40 km north-west of Curuguaty) to the reservation Colonia Nacional Guayakí, on a military truck. Some of them fled back to their old place in September. This was confirmed to me by letters from Paraguay written by Mr. Anastasius Kohmann, 9 September 1974, and by Mr. Miguel Chase Sardí, 31 October 1974. These are recent proofs of violation of human rights. In the same letter, Mr. Kohmann states that Mr. Pereira, a well known manhunter, "has organized new captures ... It is not impossible that Pereira has 180 or more Aché".

"The British reporter Mr. Norman Lewis describes in the Latin American review Visión of 28 February 1975, how he interviewed a Protestant missionary living at the Aché reservation Colonia Nacional Guayakí, who told him that people of the reservation 'had recently hunted for Indians ... Later on, we found further evidence that the manhunting continues with all force: a woman injured by a bullet when she was brought to the camp, and at her side a terrified child'. The photograph of this scene was published by the Sunday Times of London, 26 January 1975. Other ethnic groups are

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44/ Ramón César Bejarano, "Solucionemos el problema indígena: protección de sus derechos", Diario ABC colour magazine, 26 May 1974.

also victims of infringements against their basic human rights, although the available information is but sparse and usually only arrives after a certain delay. According to the anthropologist Chase Sardi, 1972, the Tomarxa in the Chaco are defending themselves against 'wrongs committed by the hunters', referring to attacks and killings. As for the Eenthlit (also called Lengua), Chase Sardi relates: 'The great majority of cattle ranchers do not allow Indians even to cross their lands, threatening to kill them if they do. We have seen scars of bullet wounds in many (Eenthlit) men who had followed game onto forbidden land without realizing it ... To kill an Indian is not considered a crime ... And when the armed guard expeditions pass through the zone ..., they (the Eenthlit) must give their women to the soldiers if they do not want to lose their own and their families' lives'.

"There are many hints of a very widespread individual violence against Indians. One example is confirmed by Mr. Albert Rieger, a German who visited the religious mission of San Leonardo at Laguna Escalante in the Chaco region: A Nivaklé Indian who had imbibed liquor, protested in a loud voice, against the Indian situation, 20 May 1974. He was therefore violently beaten by a missionary, and finally bound to a pole. When Mr. Rieger protested against this medieval treatment, a collaborator of the mission answered him by letter: 'If here in Escalante a noisy drunkard is fettered to a pole, this is certainly much more agreeable for the person in question, given the healthy and fresh air we have here, than to be sitting in a badly smelling prison cell'. I cite this common case as an example of the everyday atmosphere in relations with the indigenous population.

"Another example, which took place in 1968, but never published, is the forced displacement of some 550 Emok (also called Toba). Accused of being cattle thieves (it turned out later that this was true only of a few isolated individuals), they were put on cattle lorries belonging to the Army, by order of the Indigenous Affairs Department, to be moved more than 300 km to the east, into a region completely alien to them. The forced transport was stopped by a missionary who convinced the military that they should let the Indians free, but the latter have never been allowed to return to their ancestral areas." 45/

129. As an example of unfortunate events that have happened in many parts of the world at different times, and without the intention of singling out the country concerned, the following quotations relating to Colombia in the 1950s will be clear and explicit:

"The spread of [Indian] massacres is justified by the killers on grounds of the 'irrationality' of the Indians and the need to 'put a stop to what we regard as a plague'. This criterion allows them to admit - as happened over the massacre of Cuivas in 1968 - to the murder of as many as 40 'irrational' human beings in order to prevent or to punish actual or possible damage to private property, which is guaranteed by the National Constitution". 46/

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45/ Information provided on 3 September 1976.

46/ World Council of Churches, The Situation of the Indian in South America (Geneva, World Council of Churches, 1972), pp. 61-65.

"There is, unfortunately, no easy way of preventing ... [massacres] from occurring unless there is someone working with the Indians in the field. When it is oil or Government officials who are doing the shooting then effective action can usually be taken with adverse publicity; but when it is the local 'colonos' who use guns and knives in the frequent bar brawls, then publicity can have little effect. Its only use is to force the authorities into bringing the criminals to trial, finding them guilty and giving them some punishment - this is no solution, but it may make the whites think twice before they start shooting again.

"We assume and hope that the Colombian authorities are taking the necessary steps to bring the culprits to trial." 47/

"Last year the Comité de Defensa del Indio in Bogota published En Defensa de mi Raza by Manuel Quintín Lame. Quintín Lame, who was born in the Cauca valley in 1883 of a fairly rich indigenous family with a long and noble lineage, devoted much of his life to political action among the indigenous peoples from the moment in 1910 when he was elected (on his own evidence) 'Chief', Representative and General Defender of the indigenous councils of Pitayo, Jambalo, Toribio, Purace, Poblazon, Cajibío and Pandiguando. He died in 1967 and his book, written in self-taught Spanish, is clear indication of the sense of racial pride still in the indigenous peoples of the Colombian Andes. Quintín Lame suffered more than three years in prison as a result of his agitation but was able to sustain a racial pride that had survived several centuries of foreign domination.

"His labours, combined with those of Bonilla, Reichel-Dolmatoff and others, succeeded in changing the climate of opinion in Colombia in favour of more humane attitudes towards the Indians, so that in 1972 - for the first time in Colombian history - a group of white farmers at Villavicencio were put on trial for the murder of a number of aborigines. They were acquitted, on the grounds that they did not know they were doing wrong because they thought Indians were not human. But a retrial has been ordered." 48/

(Paras. 47, 48 and 49 of the Summary relating to Colombia, prepared in connection with the support of the present study.)

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47/ News from Survival International, London, October 1974, No. 8, p.42.

48/ H. O'Shaughnessy. What Future for the Amerindians of South America? (London Minority Rights Group, 1973), p.3.

130. Again as an example and without the intention of singling out the country concerned, it may be mentioned here that in Guatemala several killings of indigenous people have been reported, for example in Panzós (1978), in the Spanish Embassy (1979) and insistent reports in recent times concerning the north-western part of the country, in the context of the counter-insurgency operations of the armed forces (see paras. 29-30 of the Summary of information relating to Guatemala, prepared in connection with and support of the present study, as well as reports of the Working Group on Indigenous Populations on its first and second sessions contained in documents E/CN.4/Sub.2/1982/33 and E/CN.4/Sub.2/AC.4/1982/R.1 and E/CN.4/Sub.2/1983/22, respectively).

(c) Some observations in this regard

131. It is evident that these are very important rights and freedoms, that should be fully guaranteed to indigenous populations in the same manner as to other segments of the population.

132. In several parts of this study 49/ mention has been made of instances in which these rights and freedoms have not been observed in their entirety and isolated cases or situations in which no respect has been shown for them at all. 50/

133. The courts of law have, unfortunately not always been beyond reproach. 51/ However, the best guarantees in domestic jurisdiction lie in an independent and impartial judiciary bent on applying the law without distinctions to different sectors of society irrespective of whether the opinions and lawful activities of persons or groups are liked or disliked by the other branches of government. All legal recourse procedures should be mobilized and used to guarantee to indigenous communities, organizations and persons, as well as to other sectors of society, the genuine effectiveness of these important rights and freedoms.

134. Of course, the activities developed by the indigenous populations themselves in defence of their rights and freedoms are most important. To that end, indigenous communities, organizations and persons need the assistance of experts in the law and its enforcement. Clear knowledge of the law and the fullest use of the legal assistance facilities and services available are essential. Appearing in court is costly and expensive. Legal assistance should be available to indigenous populations for these and other lawful purposes, in accordance with their needs. The next section of this chapter deals with the information available on legal assistance schemes and programmes and their availability in practice to indigenous populations.

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49/ See paras. 42-46 and 128-130 above.

50/ See paras. 128-130 above.

51/ See para. 129 above.

## C. Legal Assistance

### 1. Introductory remarks

135. There is increasing recognition in all systems of the necessity of providing legal assistance for people charged with offences, as well as those who have contentious civil or commercial issues to bring before the courts, who wish to challenge acts and decisions of the administrative authority or other public authorities or officials. This need is underlined by the multiplicity of actions, procedures and remedies which are theoretically available.

136. Large sectors of the population are affected in various ways, but the impact is particularly serious in the case of indigenous communities, organizations and individuals. One very real problem is ignorance of the law, despite the legal fiction that laws that have been duly promulgated and published are known to the public. Another problem is lack of economic and financial resources to pay the costs of legal action. The State has reserved the jurisdictional function to itself and issues involving opposing interests must be taken to the State-established courts since the dispute can only be settled by a judicial decision, except in cases where there is recourse to arbitration.

137. One problem principally of concern to indigenous people is that there are few if any lawyers whose language and culture are those of the indigenous population and who are thus able, as explained earlier, fully to understand indigenous clients. Indigenous people must therefore make use of the lawyers who are available. These lawyers' professional services have to be paid for and in very many cases indigenous people do not have enough money to do so. Low-income members of the non-indigenous population are similarly affected in the market economies prevailing almost everywhere in the modern world, but they are not usually burdened by the additional disadvantages of language and cultural differences suffered by indigenous people. In the circumstances, ways and means will have to be found of making the necessary legal services available to everyone since persons without the means to pay will otherwise be unable to obtain proper legal counsel.

138. In recognition of these facts, schemes for free or inexpensive legal aid have been introduced throughout the world and States reduce or grant exemptions from judicial fees and other costs incidental to legal proceedings.

139. Before considering the legal aid services actually available to indigenous people, it may be useful and indeed necessary to offer a brief account of the efforts being made to solve these problems by means of programmes and schemes for the population in general. This general information will focus attention on the specific problems of concern to this study which are examined later. It should be noted that the object is now to examine legal aid per se, but to consider some important aspects in the light of the information available for this study.

### 2. Recognition of the need for legal assistance

140. It should be pointed out from the outset that the importance of having adequate legal assistance regardless of the expense involved has been recognized in explicit terms by the General Assembly of the United Nations.

141. Indeed, during its twenty-third session, the General Assembly adopted resolution 2449 (XXIII) on legal aid on 19 December 1968. In the fourth preambular paragraph of the resolution, the General Assembly expressed its belief "that there are cases where the individual's recourse to competent tribunals to which he has a right of access is denied or hindered because of the lack of financial resources to bear the expenses involved". In paragraph 1 of the resolution the General Assembly:

"Recommends Member States:

(a) To guarantee the progressive development of comprehensive systems of legal aid to those who need it in order to protect their human rights and fundamental freedoms;

(b) To devise standards for granting, in appropriate cases, legal or professional assistance;

(c) To consider ways and means of defraying the expenses involved in providing such comprehensive legal aid systems;

(d) To consider taking all possible steps to simplify legal procedures so as to reduce the burdens on the financial and other resources of individuals who seek legal redress;

(e) To encourage co-operation among appropriate bodies making available competent legal assistance to those who need it".

142. It will be noted that although the General Assembly was aware of the "expenses involved in providing such comprehensive legal aid systems" it considered action necessary in all parts of the world and recommended "a progressive development" of such systems.

3. Scope and content of legal assistance

(a) Introductory remarks

143. It is a well-known fact that in all countries, there are today schemes of one sort or another for legal assistance which are oriented towards servicing those who need such assistance. It is impossible, however, to say anything in concrete terms about several of the countries covered by the present study, since there is either no information at all or it is only very fragmentary and insufficient on the application of legal aid schemes to indigenous people.

144. There is no information whatsoever on any aspect of legal assistance as it applies to indigenous populations in several countries. 52/

145. For several other countries there is no information on any legal assistance programmes which may have been set up to serve indigenous populations in particular but only on general legal assistance schemes for all the population alike. 53/ Regarding some of these countries reference is only made to the relevant legal provisions concerning free legal assistance and the absence of judicial costs for persons not present in court or indigent litigants in civil proceedings and for accused persons in criminal proceedings. 54/

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52/ Colombia, Denmark (Greenland), France (Guyane), Guyana, Indonesia, Japan, Lao People's Democratic Republic, Malaysia, Pakistan, Panama and Venezuela.

53/ Argentina, Bangladesh, Bolivia, Costa Rica, El Salvador, Honduras, India, Nicaragua, Norway, Paraguay, Peru, Sweden and the United States of America.

54/ For example, in Argentina, Bolivia and Paraguay.

146. In an effort to solve some of the problems created by the need to pay the lawyer's fees, court charges and the cost of other legal formalities, provisions have been introduced in many countries exempting (partially, temporarily or completely) accused persons or persons involved in civil actions who can prove insufficiency of financial means from court charges. In virtually all countries, arrangements of some sort are made to provide counsel for persons involved in judicial (especially criminal) proceedings, who cannot afford to pay for counsel themselves or who cannot pay the full fees charged.

(b) Court charges and other costs and exemption therefrom

(i) Court charges and other costs

147. Court charges and formalities entailing expenditure are usually involved in bringing a civil action, in appealing against the judgement of a court in a civil case and in enforcing constitutional guarantees concerning a fair hearing. Charges for civil actions or appeals often increase with the value of the claim in dispute,<sup>55/</sup> and the charges for civil appeals may be higher than those charged at first instance. <sup>56/</sup> In some countries of Latin America, there are no court charges as such, but litigants in civil actions must, in taking certain steps, use stamped paper, the cost of which increases in proportion to the value of the matter in dispute. In several of the countries where the use of stamped paper is compulsory in civil actions, court charges also apply. Some of the requirements and expenses in question are to be met before embarking on proceedings.

148. In some systems, a private person may initiate prosecution in certain specified cases. In order to initiate prosecution this private person may have to incur certain expenses.

149. According to Finnish law, a private person may initiate criminal proceedings. If the crime in question is of such a nature that only the person whose right has been violated has the initiating power, there is a similar stamp tax and fee as in civil cases. <sup>57/</sup> This is also the procedure in other criminal cases of a special character if the public prosecutor has not exercised his power to initiate the proceedings or has not intervened therein.

(ii) Exemption from court charges in criminal proceedings

150. In criminal cases, there are in general no court charges, but such charges may be levied when a convicted person appeals or when a private person initiates criminal proceedings. In many countries, however, no charges arise in the case of an appeal. <sup>58/</sup> They may be waived in criminal proceedings if the private initiator proves he cannot afford them. <sup>59/</sup> In some countries he must submit to the court a certificate signed by a justice of the peace attesting to his inability to pay the expenses entailed, and in Finland he must show that he cannot pay the costs of proceedings without relinquishing funds necessary for his own maintenance or for his maintenance liabilities. In many other countries, the individual filing a complaint pays no charge if the public authorities undertake the prosecution.

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<sup>55/</sup> As in Denmark, India, Norway and Pakistan.

<sup>56/</sup> As in France.

<sup>57/</sup> The same is true in Chile, Nicaragua and Venezuela.

<sup>58/</sup> As in Malaysia, Philippines, United States.

<sup>59/</sup> As in Finland, France and Sweden.

(iii) Exemption from court charges in civil proceedings

151. In civil cases (including appeals), parties may in most countries be exempt from court fees, partially completely, or temporarily, if they can prove insufficiency of means; there is often a further requirement of evidence that the party has a reasonable prospect of success in litigation, or that the latter is of significance. Thus, in Sweden, any person who lacks the means to cover the costs of legal proceedings before a court or who, after having paid these costs, would lack the necessary means for his own support or for the fulfilment of his maintenance obligations, is - upon application - granted free litigation by the court. If the court finds that it would be of little importance for the applicant to have his case tried, he will, however, not be granted free litigation.

152. In Norway no court fees are chargeable in the case of disputes between landlord and lessee concerning rented houses, flats, or premises, paternity cases or actions brought by an employee against his employer, provided the case has a connection with the employment relationship.

(iv) Exemption from court charges in administrative and other proceedings

153. It would appear that the same rules discussed for civil proceedings would apply, mutatis mutandis, to administrative and other proceedings.

(c) Lawyer's fees and exemption therefrom

(i) Lawyer's fees

154. The need to pay lawyer's fees, prevents many persons or communities from protecting their rights before the civil courts or administrative tribunals and prevents many accused persons from defending themselves properly. Constitutional and other provisions which contain guarantees concerning a fair hearing lose effectiveness if an individual is prevented by financial factors from going to court to avail himself of those guarantees.

155. Where no statutory or other limitation has been established on the fees which may be charged for various types of legal services, these problems are aggravated. This may force certain litigants to settle for the advice and services of counsel of a lesser competence or even put litigation beyond their reach entirely. Uncertainty as to whether they will be able to meet the eventual cost of a legal action often prevents poor persons from enforcing their rights or compels them to accept a compromise which may not be just.

156. It has been stated that the excessive fees sometimes charged by lawyers is one of the main defects of certain systems where lawyers' fees are not regulated by the Government, except in cases that come before the Supreme Court. 60/

157. Another aspect that aggravates these difficulties and problems is a system prevailing in a few countries whereby one category of lawyers has a monopoly of advocacy before the higher courts and their professional services may be engaged by the individual only through a second category of lawyers.

158. Thus, if a case is to be heard in the higher courts this may call for the payment of fees to lawyers of both types. When a case has already been conducted in the lower courts by a lawyer of the first category in order to conduct an appeal the cost may become particularly high. For example in most civil cases, a barrister must be instructed by a solicitor and may not deal directly with the client, while solicitors may not appear in the high court. 61/

159. Cases involving money in quantities exceeding a certain amount must go to the high court, unless both parties agree to resort to the county court (in which a solicitor could plead).

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60/ Statement by the participant from India at the 1959 United Nations Seminar on judicial and other remedies against the illegal exercise or abuse of administrative authority, Peradeniya (Kandy), Sri Lanka, Report of the Seminar (ST/TAO/HR/4), p.45.

61/ As for instance in New Zealand.

(ii) Regulation of lawyers' fees and other arrangements relating to such fees

160. The very uncertainty of the cost of a legal action often prevents poor persons from enforcing their rights. Apart from any question of exemption from court charges of indigent persons, the court charges for the various types of civil action are in general fixed by law. The greatest cause of uncertainty regarding the cost of bringing an action is the need to pay lawyers' fees. This is aggravated where the lawyers' fees are not regulated by the Government 62/ or where the possibility exists that a client might have to pay barristers and solicitors in a given case. 63/

161. In some countries, certain rules regulate the determination of the lawyer's fees, even if only in the absence of an agreement between lawyer and client.

162. In one country, lawyers' fees for professional services rendered are basically to be freely agreed upon between client and lawyer. In the absence of an agreement or in case of dispute, the fees are to be determined by the courts in conformity with the statutory official tariffs of lawyers' fees. The Bar Association may be called upon by the interested parties to make a fair estimate of the fees to be paid in specific cases. 64/

163. Although not legal in some countries, in others lawyers may accept cases on a contingency basis; this system operates to assist persons who might otherwise not be able to litigate. The fee paid depends on the result of the case. 65/

(iii) Legal assistance in criminal proceedings

164. Apart from the non-existence or possible waiver of court charges in connection with criminal proceedings, many countries provide the accused with counsel free of charge. The manner in which such legal aid is given and its scope vary considerably from country to country.

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62/ See para. 154, above.

63/ See paras. 155-157, above.

64/ Guatemala. A similar system exists in Denmark.

65/ As in the United States.

165. Arrangements made for legal aid in criminal cases fall into three main types. 66/ 67/ more than one of which often appear in the same country:

166. First type of arrangement. Designation by the court of specific lawyers, who are not in the Government service, to act in specific cases. Criminal courts may grant free legal assistance to an accused person appearing before it, if it appears to the court that his means are insufficient to enable him to obtain the services of counsel at his own expense, and it is desirable in the interests of justice that he should have free legal aid to prepare and conduct his defence. 68/

167. The accused may choose a lawyer from the panel of those willing to act in legally aided cases. Where free legal aid has been granted, the fees of counsel and other costs incurred in the conduct of the defence, are paid out of public funds. An accused person whether in custody or not may apply for legal aid by letter. The accused may also apply to the magistrate on being brought before him.

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66/ The three groups here discussed were established in Mr. M.A. Abu Rannat's Study of Equality in the Administration of Justice, (United Nations Publication Sales No. E.71.XIV.3), p. 146.

67/ The methods of furnishing counsel provided by the State have been described as follows by a scholar:

"Counsel may be selected: (a) by the court, with the selection at its discretion, and the appointment often going to a lawyer who happens to be in the courtroom when the need arises; or (b) by the court, from a list of attorneys who may be volunteers or from a list which includes all members of the local bar who are then selected in turn or from a list compiled by the courts in consultation with the President of the Bar Association or from a panel established independently by a professional organization; or (c) the selection of counsel may be delegated to a professional body such as a bar association; or (d) the defence may be entrusted to a State-maintained judicial assistance service or a 'public defender' who serves as a full-time elected or appointed State-paid defence counsel; or (e) the defence may be provided by an organization which is politically independent of the State and supported by private contributions or charities. Counsel appointed by the court under paragraphs (a) or (b) above may or may not be paid by the State for their work." Working Paper E prepared by Mr. Caleb Foote for the United Nations Seminar on the Protection of Human Rights in Criminal Law and Procedure, Manila, February-March, 1958, p.30.

68/ Designation of counsel by the court is also applied in, for instance: Brazil, Canada, Chile, Colombia, Denmark (fees are fixed by the tribunal and paid by the State), Ecuador, El Salvador, Finland (fees are paid from public funds), Guatemala, India (in capital cases), Japan, the Lao People's Democratic Republic, Malaysia (limited to capital offences), New Zealand, Nicaragua, Pakistan (capital offences only), the Philippines, Sweden (fee is paid from public funds), the United States and Venezuela.

168. The magistrate or judge may also offer the accused legal aid without application. The preference of the accused as to choice of lawyer is followed where possible. 69/

169. In France, the presence of a counsel for the defence is mandatory once the accused has requested it. The official appointment of a lawyer is made by the Bâtonnier of the Order of Avocats or by the President of the Court. The lawyer so appointed to serve in the case is not entitled to payment from his client.

170. Second type of arrangement. Services provided by bar associations, law societies, legal aid societies, trade unions, or other bodies, with or without financial aid by the Government and without any designation by the courts or the Government of specific lawyers to serve in specific cases. 70/

171. In Chile, there are Consultorios jurídicos gratuitos para pobres (Free legal advice bureaux for the poor), established and maintained throughout the country by the Bar Association. Qualified lawyers are employed on a full time basis by the Bar Association for these Consultorios and law students who have completed their studies in law school are required by statute to serve a term of several months in one of these Consultorios before they can receive their degrees.

172. In Guatemala, the law schools of the University of San Carlos de Guatemala maintain, under the name of Bufete Popular, offices which are established to provide free legal assistance to persons of insufficient means who ask for it, and to provide training to law students. In order to determine which cases to accept, the Bufete Popular has the assistance of the Advanced School of Social Service. Law students who have completed their courses on civil and criminal procedure are required by statute, and as a scholastic requirement, to serve without pay in the offices of the Bufete Popular and to complete a certain number of assigned tasks involving representation in court. Students render their services free of charge and under the direction of certain professors and of qualified lawyers with extensive and successful trial experience who are employed by the law schools for the Bufete Popular. Upon completion of their assignments students are given a certificate of fulfilment which together with other certificates enables them to take the corresponding tests in trial procedure courses.

173. Third type of arrangement. Provision of services by lawyers employed by the Government for the purpose. Offices of public defenders are found in many parts of the United States. The public defender is appointed by State or local authorities and is a full-time salaried lawyer. Generally, he employs additional salaried lawyers on a full-time or part-time basis.

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69/ Ibid.

70/ In addition to the examples that follow, these services appear in, for instance: Canada, India, Norway, Pakistan, and the United States of America.

174. In areas where this system is in operation, if a defendant in a criminal prosecution cannot afford to retain a lawyer, the public defender will be assigned by the court to defend him. The staff of public defender offices may be selected through civil service procedures, appointed by the judiciary or the appropriate local officials, or elected.

175. Public defender systems are financed by public funds. In some instances, they are treated in the same manner as other government institutions and submit a yearly budget to the proper appropriating body. Others operate on a fixed retainer basis, the public defender being paid a yearly salary or fee for his services and being expected to finance his office expenses from his compensation. 71/ 72/

176. In Mexico, statutory provisions require the High Court to appoint defence lawyers to represent persons accused of criminal offences.

177. In a few countries legal aid in criminal cases is available without proof of financial need. In France, any person appearing before a court is entitled to the assistance of an avocat. He may choose his own defence counsel or ask the court to appoint counsel officially, in which case he incurs no expense and is not required to prove that his financial means are insufficient for the purpose. In Sweden, in criminal matters, the court takes into account only the applicant's need of legal assistance against the background of the charges preferred against him. The financial position of the applicant is not taken into account; persons in good circumstances may thus also obtain a public defence counsel. 73/

178. In most countries, however, the accused must show that he is unable to pay a lawyer's fee, in order to receive free legal aid, and in some countries, 74/ there may be the further requirement of showing that the provision of aid is in the interests of justice.

179. Provisions making counsel mandatory in certain criminal cases 75/ may run counter to the accused's right to defend himself in person, but for those accused who would prefer to be defended by counsel such provisions help since the court

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71/ Similar offices are those of the Public Curator in Queensland, Australia, of the Public Solicitor in Victoria, Australia, and of the Public Defender in New South Wales, Australia.

72/ The Government also employs lawyers for the free defence of the poor in criminal cases in Argentina, Chile, Colombia, Ecuador, El Salvador, Guatemala, Mexico, Paraguay and Venezuela.

73/ The situation is similar in Denmark.

74/ For instance, Australia.

75/ In Italy representation by counsel is compulsory in all but the most minor civil, criminal and administrative cases; it has been said that the reason for this is that the lack of objectivity of the layman involved would prejudice his success.

appoints a lawyer if the accused does not or cannot. Such provisions apply most commonly when the allegations are of serious, especially capital, offences; 76/ and when the accused is a minor, deaf or mute, or mentally unsound. 77/

(iv) Legal assistance in civil proceedings

180. In civil cases, various procedures exist to furnish counsel free of charge to litigants who are unable to pay counsel's fees. They fall into four main categories, more than one of which may appear in the same country: (a) provision of aid by bar associations, law societies, legal aid societies, trade unions, associations and other bodies, with or without aid from the Government and without any designation by the courts or the Government of specific lawyers to serve in the specific cases, 78/ (b) designation by the courts of specific lawyers (not in government service) to act in specific cases; 79/ (c) provision of services by lawyers employed by the Government for the purpose; 80/ (d) designation of a lawyer by a professional organ (or officer thereof) at the request of the court or Government. 81/

181. Examples of the first type of arrangement are to be found in Chile, the Consultorios jurídicos gratuitos, and in Guatemala, the offices of the Bufete Popular, which render free legal assistance in civil matters equivalent to that described in relation to criminal matters in paragraphs 168-170. In Ecuador, a Consultorio Jurídico Gratuito grants legal assistance free of charge to persons of insufficient means in civil and administrative matters. The Consultorio Jurídico Gratuito is a dependency of the law school of the Central University of Quito; it operates in accordance with guidelines given by the University Council and under rules established by the law school. The Director of the Consultorio, a university professor, is in charge of the organization and

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76/ As in France, Japan and Sri Lanka.

77/ As in France.

78/ As in Australia, Canada and the United States.

79/ As in Australia, Brazil, Chile, Colombia, Ecuador, El Salvador, Finland (fees are paid from public funds), Guatemala, New Zealand, Nicaragua, Sweden, the United States and Venezuela.

80/ As in Argentina, Chile, Ecuador, El Salvador, Guatemala, Mexico, Paraguay and the United States.

81/ As in France.

co-ordination of its activities. Four qualified lawyers head the Consultorio, which provides students and new graduates who need the practice with an opportunity to work under proper guidance.

182. The second type of arrangement is always applied when exemption from court charges has been allowed.

183. Under the third type of arrangement, lawyers employed by the legal aid bureaux receive a salary from the State. Legal assistance is made available by application made in person to the legal aid bureau in the applicant's district, accompanied by a certificate from the social welfare office in the applicant's district, giving details of the property, means (if any) and dependants of the applicant. An applicant is required to show that he has reasonable grounds for bringing or defending the proceedings and that his cause of action or defence has a reasonable chance of success. A lawyer is assigned to represent an assisted person by the legal aid bureaux on a rotation system.

184. Certain provisions existing in Costa Rica and in Mexico would fall under the third type of arrangement. In these countries there is no organized plan enabling persons of limited resources to obtain either free or reduced-cost legal advice or legal aid in civil proceedings. In Costa Rica, legal advice and legal aid are available to such persons in proceedings concerning family law and to minors and mentally deficient persons in all civil proceedings through a Government financed organization known as the "atrnato Nacional de la Infancia". In Mexico there are statutory provisions requiring the High Court to nominate special defenders of the poor in each district whose function is to advise and represent poor people in civil proceedings.

185. An example of the fourth type of arrangement is to be found in France, where legal aid is a public service, but costs the State nothing because the officiers ministériels and the avocats give their services free of charge without any remuneration whatsoever. Two conditions must be satisfied: firstly, the applicant must have insufficient means, except in cases of military pension claims and compensation claims resulting from industrial accidents, when legal assistance is granted as of right; secondly, he must be making proper use of a legal right; only responsible and reasonable applications are granted. In general, legal assistance is granted liberally and the field of application is very broad: bringing of an action or defence against an action before any court whatsoever - civil, criminal or administrative - at whatever level: court of first instance, appeals court, or Court of Cassation. Legal assistance may be granted, in any case, to all persons who are prevented by lack of means from exercising their rights in legal proceedings either as plaintiffs or as defendants. Eligibility for legal aid is determined by a board attached to the courts of main instance, and for the appeals courts and the Court of Cassation by a board set up at the seat of the court. Persons seeking legal aid submit an application to that effect to the Procureur de la République.

of their local court, who forwards it to the appropriate board. If aid is granted, the decision is conveyed by the Procureur de la République to the president of the court concerned, who then asks the Bâtonnier of the Order of Avocats, the President of the Chambre des Avoués and the Syndic des Huissiers to appoint the avocat, the avoué and the huissier.

186. In some countries, 82/ public defender offices provide free legal aid in labour matters. In Paraguay, there is a General Defender of Minors, who acts before all courts of law.

187. In France, in certain kinds of civil proceedings, the court is required by law to appoint an avocat. 83/ In most countries, however, assistance is granted on proof of financial need; there may also be a further requirement of proof that the applicant has reasonable grounds for asserting or disputing the claim in question. 84/

188. Certain types of civil action are sometimes excluded from the coverage of legal aid, including actions for defamation, divorce and breach of promise of marriage. 85/ The object of these exclusions, as well as those of certain procedures for debt collection, is "to avoid a large number of unmerited claims over trivial matters". A scheme in operation in Victoria, Australia, normally excludes divorce actions on the ground that they involve not legal rights but voluntary changes in status.

189. In some countries, assistance by counsel is made mandatory and provided free in certain civil cases, as in Denmark, in matrimonial cases where the defendant is unrepresented, in paternity cases and in cases concerning the deprivation of liberty by administrative decree, and in France, in litigation relating to pensions and accidents at work.

(v) Legal assistance in administrative and other proceedings

190. In some countries, legal aid is available in administrative and other proceedings, 86/ usually on a basis similar to that applying to civil proceedings.

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82/ Including El Salvador and Mexico.

83/ See para. 185 above.

84/ As in France.

85/ Various of these are excluded from schemes operative in Australia and in Malaysia.

86/ As in Ecuador, El Salvador, France, Norway, the Philippines, Sweden, and the United States of America.

(d) Application of legal assistance schemes and programmes

(i) Introductory remarks

191. In all of the countries covered in the present study there is some form of legal assistance or aid programme or scheme with the avowed purpose of giving legal advice and legal aid to those who need it. Although there are few differences in the formal definition of those who need legal assistance, the practical implementation of these programmes leaves much to be desired as far as the most vulnerable and destitute sectors of society are concerned. This, compounded by inefficient or unsuitable interpretation and translation systems in connection with court proceedings, poses serious problems to indigenous populations and other needy groups, as will be discussed below.

192. It is considered useful to transcribe some of the statements made by Governments or non-governmental organizations regarding the systems of legal aid prevailing in many countries for which information is available in these respects. It should be pointed out that the essential aspects of most systems, schemes and programmes of legal assistance have been described in a publication containing data arranged according to established categories and classes of legal assistance in the different judicial proceedings existing in these countries. 87/

(ii) General undifferentiated schemes and programmes

193. Provisions for legal assistance are generally made in statutory law. There are, however, a few countries 88/ in which provisions for legal assistance have been included in the Constitution.

194. Thus, in Brazil, the Federal Constitution provides:

"Art. 153:

"....

"Paragraph 32. Judicial assistance shall be granted to the needy in such form as prescribed by law."

195. In accordance with article 153 paragraph 15 of the Constitution "the law shall assure accused persons of full defence, with the recourses inherent therein. There shall be no privileges at law and no exceptional courts".

196. Paragraph 30 of the same article also includes the following provision:

"Every person shall be assured the right to make representation to and to petition the public powers in the defence of rights or against abuses of authority".

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87/ Directory of legal aid and advice facilities available throughout the world, published by the International Legal Aid Association (London-New York, 1966), loose-leaf.

88/ For example, Brazil, India and Suriname.

197. According to article 37 of the Constitution of India, the "Directive Principles of State Policy" included in the Constitution are "fundamental in the governance of the country" and it is "the duty of the State to apply these principles in making laws". The Directive Principles include:

"39A. Equal justice and free legal aid - The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

198. Article 11 of the Constitution of Suriname provides:

"1. Everyone may obtain assistance in legal proceedings.

"2. Rules concerning the grant of legal assistance to those less able to pay shall be laid down by statute."

199. Several Governments 89/ have furnished general information concerning legal assistance schemes and programmes existing within their countries. In all these countries legal assistance programmes and schemes are the same for all. 90/ Some of them 91/ state explicitly that there are no special schemes for indigenous populations.

200. The Government of Bangladesh states:

"The provisions for legal assistance, the right to request it and the conditions under which it is granted or made available, are the same for all citizens of the country. In Bangladesh, all citizens are equal before the law and are entitled to equal protection of law."

201. The Canadian Government states:

"Programmes of legal assistance (Legal Aid) are applied equally to the indigenous and non-indigenous segments of the population.

"A programme of Legal Aid in Canada is conducted under provincial auspices except in the Yukon and Northwest Territories where a Federal Legal Aid Programme is in operation. The programmes are all designed to assist low-income persons, but not specifically those of native, white or ethnic origin. They provide the services of a lawyer in

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89/ Bangladesh, Canada, Finland and Sweden.

90/ Canada states this in explicit terms. See, however, the reference to native court workers and other arrangements devised to give legal assistance to indigenous people, in paragraphs 229-231, below.

91/ Finland and Sweden.

counselling a client, preparing a case and presenting it in court. There is a scale of fees according to ability to pay in some instances; much of the service is provided free to the client. Limitations on the availability of Legal Aid are due to the restricted number of lawyers working under this scheme through the Bar Associations: where distinctions have to be made, they are on the basis of the seriousness of the offence; serious criminal cases will receive the assistance of a lawyer's services regardless of ability of pay. Some civil offences may also receive assistance."

202. The Government of Sweden states:

"Legal assistance is obtainable free of charge through public legal aid offices after a means test.

"The right to obtain public legal assistance at public expense has been provided for in respect of cases concerning the application of the Aliens Act. In such cases Counsel may also be appointed ex officio. Compulsory assistance has not been prescribed in any administrative matters.

"Any person who lacks the means to cover the costs of the legal proceedings before a court or who, after having paid these costs, would lack the necessary means for his own support or for the fulfilment of his maintenance obligations is - upon application - granted free litigation by the court. If the court finds that it would be of little importance for the applicant to have his case tried, he will, however, not be granted free litigation. The rules governing free litigation are applicable both in civil and criminal cases as well as in connection with, for instance, preliminary investigations in criminal cases.

"A party who has been granted free litigation is also exempt from such fees to the public as may otherwise be charged in the proceedings; all his own necessary outlays are, moreover, paid from public funds.

"If the party cannot himself or with the aid of someone else properly take care of his own interests during the proceedings, the court may, upon application, appoint someone to assist him; the remuneration for such assistance is paid from public funds. In criminal cases counsel has the position of a public defence counsel."

The Government continues:

"The formalities required are not very burdensome and depend mainly on what the application documents contain. No one is compelled to have recourse to legal assistance, but most people do so for obvious reasons. For anyone who has been granted the benefit of free legal proceedings the court as a rule recommends legal assistance. There shall be appointed for this purpose a barrister or other person who has passed a ... test prescribed for ... the office of a judge and is found to be qualified for the assignment. The costs for such legal assistance are met out of public funds. It should also be mentioned that a court's chancery staff assists the public with advice and information, inter alia, regarding the drawing up of applications to be sent to the court. For obvious reasons, however, such assistance is confined to supplying forms to be filled in, also to technical advice and suggestions as to how to word a formal application."

203. The Government has further stated that:

"No programmes of legal assistance have been set up specifically for the Lapps and the Finnish-speaking population in northern Sweden, but they are entitled to legal assistance under the same conditions as other Swedish citizens."

204. The Finnish Government states that "programmes of legal assistance apply to all equally without any discrimination...".

205. Regarding legal assistance in the administration of justice, the Government states:

"A trial free of charge can be granted to anyone, including a Lapp, if he cannot pay the costs of the proceedings without relinquishing funds necessary for his own maintenance or for fulfilling his maintenance liabilities. The court may also, at the request of such a person and, if possible, following his choice, order a practising lawyer to assist him at the proceedings. The lawyer's fee shall then be paid from State funds. More detailed provisions on this system are embodied in the Act on Trial without Costs of 6 May 1955 No. 212".

206. The Government has further stated that:

"There are no programmes of legal assistance set up to serve solely the Lapps. Since Lappish is not an official language of the country, interpretation at the State's expense is arranged before the courts and administrative authorities when needed".

207. The Special Rapporteur did not have specific information on the availability and adequacy of existing schemes and programmes of legal aid in the northern part of the country as compared to the rest of the country. It should be noted, though, that according to Act No. 88 of 2 February 1973 "all communes are to offer legal aid services to their inhabitants".

208. In some countries <sup>92/</sup> legal assistance schemes are the same for all throughout the respective territories. Some special attention seems, however, to have begun to be paid to the problems confronted by indigenous peoples (in Costa Rica and New Zealand) or the legal aid provided particularly in tribal districts (in India).

209. According to the Government of India

"Free legal aid is provided particularly in tribal districts and tribal areas through public prosecutors and through lawyers appointed specifically for the purpose. In fact, a panel of lawyers is appointed in a tribal district so that they can follow the cases. Financial provision is made in the budget for the free legal aid. Though the free legal aid principle would apply to both tribal and non-tribal segments of society, in point of fact more care is being taken to ensure

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<sup>92/</sup> As for example in Costa Rica, India and New Zealand.

its applicability to the scheduled tribes. On the planning and development side, funds are being earmarked separately from the Central and State Plans; similarly, funds are separately earmarked for free legal aid to the scheduled tribes. Thus, there is 'protective discrimination' in favour of the scheduled tribe people." 93/

210. In Costa Rica the arrangements for the provision of legal aid apply to the whole population on a basis of equality without explicit discrimination of any kind to the disadvantage of the indigenous populations. The Government states:

"There are no legal aid schemes specifically for the benefit of the indigenous populations. Provision of this kind is to be made in 1978 through CONAI."

211. In 1976 it was reported that in dealing with the principal problem affecting the indigenous communities, the loss of their lands:

"... the assistance of the College of Lawyers is already available for the purpose of submitting the claims of indigenous people throughout the country to the courts. To assist in solving these problems, the National Indigenous Affairs Commission will have a central office to deal with these matters." 94/

212. In reply to the Special Rapporteur's request for information whether legal aid is provided free or at a reduced cost, whether the lawyers concerned have special knowledge of indigenous affairs and whether such professional services have been placed on a formal and systematic footing, the Government stated in 1979 that:

"In answer to these questions it can be stated that: Since 1978 CONAI has engaged a lawyer specializing in indigenous law (on a part-time basis), who provides legal advice for the protection of indigenous rights specified in the laws in force. The indigenous people visit the central offices of CONAI to explain their case and the lawyer provides advice and drafts petitions and applications to preserve their rights, in particular rights connected with the defence of their land. The professional services are paid for by CONAI from its own budget".

213. The Government added, also in 1979, that:

"There are no indigenous lawyers, but there are a few non-indigenous attorneys who take an interest in the cause of the aboriginal peoples and are ready to provide their specialist knowledge for the defence of their rights".

214. In New Zealand, the legal aid system is applicable to all and no special schemes have been provided for Maori litigants or defendants. The system does not appear to afford, in practice, the same protection to Maoris and to non-Maoris.

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93/ Information provided on 30 May 1983.

94/ "Noticiero Indigenista", América Indígena, vol. XXXVI, No. 1, pp. 188-189.

215. The Citizen's Association for Racial Equality states:

"In theory free legal aid available to Europeans is equally available to Maoris, though the latter often fail to make use of it through ignorance of their rights, or shyness. No special programmes of legal assistance have been set up, though recently Maori Welfare Officers have been taking a watching brief in some Magistrates' Courts." 95/

216. The Government has stated:

"No distinction is made in New Zealand law between citizens of different races in relation to treatment before tribunals and other organs administering justice.

"There has recently however been a good deal of public discussion in New Zealand relating to the proportion of Maori persons appearing in court without being represented by counsel.

"For a number of years the Maori and Island Affairs Department administered a fund with which arrangements could be made for any Maori accused person to have his legal fees paid. These costs were refundable where the accused person was able to meet them, but were written off if this was not possible.

"The above scheme was abandoned after the passing of the Legal Aid Act 1969. This Act applies to all citizens and provides that any person appearing before any court or other judicial tribunal may apply for legal aid in presenting his case, whether in civil or criminal proceedings, in all courts, including courts of appeal and the Maori Land Court.

"...

"A study of the situation in the last two years has revealed that in practice, although legal aid is available, an undue proportion of Maoris appearing before the courts do not avail themselves of the opportunity to apply for legal aid. This is particularly so in the case of young offenders. Last year the Government referred the question to an interdepartmental committee, with Maori representation, to recommend ways of improving the provision of legal aid. The recommendations of that committee are now being examined by the Government, which is considering improvements in the form either of duty solicitors paid by the State or of public defenders. Whatever form is adopted will certainly be of benefit to all Maori persons needing assistance of this kind."

217. Reference has been made above 96/ to the fact that the Maori Affairs Department provides the services of Maori social workers in large urban centres.

218. The services provided by the Legal Defence Office maintained in Wellington by the Nga Tamatoa, a Maori organization, with some financial help from the New Zealand Government, have also been mentioned. 97/

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95/ Information provided orally during the Special Rapporteur's official visit to New Zealand in 1973, and later confirmed in writing.

96/ See para. 98.

97/ See paras. 98 and 99, above.

(iii) Special schemes for indigenous populations

219. In Brazil the Statute of the Indian, Act No. 6001 provides:

"Art. 37. The tribal groups or native-communities are legitimate parties for the defence of their rights in justice, and in this case they are entitled to assistance from the Federal Public Prosecutor or from the Indian Protection Agency."

220. This is to be read in conjunction with article 1 of Act No. 6001 which establishes in its sole paragraph that "the protection of the laws of the country is extended to the Indians and native communities in the same terms as it applies to other Brazilians, safeguarding national usages, customs and traditions, as well as the particular conditions recognized in this law."

221. In the Philippines, Republic Act No. 1888 stipulates:

"SECTION 4. The Commission shall have the following powers, functions, and duties:

" ...

"To authorize trial lawyers of the Commission to assist indigent members of the cultural communities accused in criminal cases involving their landholdings."

222. According to a source, <sup>98/</sup> in 1973 the Commission on National Integration furnished the following legal assistance in accordance with the provision quoted in the preceding paragraph:

"The legal arm took charge and completed a total of 1,279 actions, 46 of which were criminal and civil court cases, 25 per cent were review and approval of private conveyances, encumbrances real property, and 99 led to the certification of pasture land applications. Countless cases of legal advice and counselling help to the ignorant, illiterates and indigents.

- Handling of civil, criminal, and administrative cases.
- Sending of communications to private individuals, government agencies, field offices and other divisions/sections.
- Approval of conveyances and encumbrances.
- Certification of pasture application."

223. In the case of some countries (Chile and Mexico), government information is only available regarding the special services organized for the indigenous populations and it has been impossible to obtain information regarding the way the schemes work in practice.

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<sup>98/</sup> Report of the Commission on National Integration 1973, Quezon City, 1973, pp. 17-18.

224. The Government of Chile stated (1975) that:

"Each year the Institute prepares a legal aid programme for the 2,121 undivided indigenous communities in the provinces of Arauco, Bío Bío, Malleco, Cautín, Valdivia and Osorno, in which there are 24 departmental courts. This assistance is provided as follows:

"(a) The legal or judicial aid programmes are applicable in all the regions mentioned in which there are indigenous populations or indigenous community members, who in general have rights of co-ownership of community land;

"(b) The services available and used by them are oral consultations and written reports with a view to the resolution of legal or judicial questions; the authorization of contracts for the alienation of claims and rights belonging to co-owners in indigenous lands; the authorization of contracts for leasing the ownership rights of co-owners, and share cropping contracts; the authorization of gifts of land for educational, religious, social or sports purposes; the authorization of forestry contracts; the institution of proceedings against individuals improperly occupying indigenous community land to obtain its restitution; handling of administrative procedures of indigenous communities at the request of the majority of the community members; the preparation of cases in the courts of law in which indigenous people are parties, in matters relating to the administration, use and enjoyment of indigenous lands.

"In preparing cases the lawyer must take the testimony of witnesses and where necessary obtain a plan prepared by a surveyor employed by the Service and a socio-economic report and assemble all the material required to enable the judge to come to a decision.

"Similarly in dealing with contracts for the alienation of the rights of co-owners of indigenous lands, a surveyor is sent to measure the land in respect of which rights and shares exist, and it is ascertained whether the buyer lives and works in the community. A contract of sale bearing the authorization of the INI is drawn up and sent to the office of the notary for signature by the parties. A notarized copy is made and included in the file of the community.

"(c) The Service employs seven lawyers, all full-time, to assist members of indigenous communities, based in the various offices maintained by the Service. Members of indigenous communities are free to choose lawyers outside the Service, but this does not happen in practice. Members of the communities do not make use of the services of the College of Lawyers which are also provided free. They all avail themselves of the Service's lawyers;

"(d) ...

"(e) The Executive Director, the regional supervisors and the lawyers themselves;

"(f) All assistance given by the Institute is free".

225. With regard to legal assistance services especially provided for indigenous people, the Government of Mexico reported:

There are special programmes in this field:

"The legal aid programmes of the Instituto Nacional Indigenista are specifically intended for indigenous people and include the defence of their individual, social and property rights in the municipal, State and federal courts.

"(a) ... the programmes are mainly concerned with agrarian matters, criminal cases involving indigenous people and administrative cases.

"The general and specific legal assistance schemes for indigenous people are described in the document, 'Bases for action 1977-1982', which currently governs the work of the Institute. Some of them have been mentioned in other replies.

"(b) ... many services are provided for indigenous people and communities for purposes related to the programmes mentioned earlier. Some of them are as follows:

"1. Provision of advice, orally and by correspondence;

"2. Drafting of written administrative requests for submission to municipal, State and federal authorities;

"3. Assistance in personal matters by Institute lawyers;

"4. Formulation of petitions to judicial authorities;

"5. Participation and representation in judicial proceedings, chiefly criminal, labour and civil;

"6. Assistance to the representatives of communities in agrarian matters in the conduct of their business;

"7. Provision of opinions in proceedings concerning recognition and establishment of title to community property.

"(c) ... the services are provided by lawyers working for the Instituto Nacional Indigenista and 'indigenous attorneys', who are law graduates or legal practitioners working under the General Directorate of Educational Services for Disadvantaged Regions and Marginal Groups of the Ministry of Public Education.

"As a general rule if the defendant in a criminal case has no defence lawyer he is given a list from which to choose a lawyer or lawyers and, if he names no-one, the judge designates a court-appointed lawyer. (Constitution, article 20 (IX)).

"The lawyers are paid by the State governments in ordinary criminal cases and by the federation in the case of federal crimes.

"(d) As far as the Institute is concerned, no requirement must be satisfied. It is sufficient that legal assistance should be requested, that it should be needed and that it should be possible to provide it.

"(e) ... the court-appointed counsel in criminal proceedings are designated by the judge in charge of the case.

"... In the case of the Institute's lawyers and the 'indigenous attorneys' the decision to provide the service is made by the director of the indigenous co-ordinating centre to which they are attached.

"(f) ... the services provided by court-appointed counsel in criminal proceedings and by the Institute's lawyers are free.

"As regards the other matters raised, there are no special provisions for indigenous people and groups".

226. The Special Rapporteur requested information about the employment status of the Institute's lawyers, viz. whether they were members of the Institute staff or served in some other capacity. He also asked whether they were paid for the services performed in each case or for being available to the Institute and whether they had other functions in addition to assisting indigenous people and if so, what those functions were (e.g. provision of legal advice to the Institute itself, etc.). He also asked how much time was given to the various functions. Finally he asked whether the court-appointed counsel in criminal cases were satisfactory to defendants and how many court-appointed lawyers had the knowledge of indigenous languages and institutions required for the satisfactory performance of their duties.

227. The Government stated (1980):

"The Institute's lawyers are members of the Institute staff. Their remuneration for services rendered depends on the salary provided for in their contracts. They work full-time. As part of their functions they furnish advice to the Institute.

"Court-appointed counsel in most cases are not satisfactory to defendants, indigenous and non-indigenous alike. Most court-appointed lawyers have no knowledge of indigenous languages. However, ... efforts are being made to promote a wider knowledge of those languages."

228. In Guatemala, legal aid offices have been set up in places with a large indigenous population to deal specifically with indigenous people needing legal assistance. The following report from the Prensa libre of Guatemala, dated 31 August 1976 provides an example:

"People living in the department of Chimaltenango, particularly low-income members of the indigenous population, will enjoy the benefits of free legal assistance with the establishment of the legal aid service attached to the faculty of law of the University of San Carlos.

"Faculty authorities, representatives of the central legal aid office and members of the board of the Chimaltenango office met in the departmental hall on Saturday to co-ordinate final arrangements for opening the premises and starting operations.

"The Chimaltenango office proposes to develop a programme of information about the rights of citizens, particularly as regards legal defence, since it has been found that many people, most of them indigenous, are tried without a lawyer for their defence."

229. In addition to the information quoted in paragraph 197, above, the Government of Canada has stated that:

"Court workers are regarded as an important means of assisting native people, particularly on minor charges of drunkenness, assault or disorderly conduct. Native court workers have been engaged for this purpose in many parts of Canada in some cases through the (voluntary) John Howard Society but principally through governments and the government-funded Friendship Centres. Late in 1972 a Sub-Committee on Native People and the Law was established at the federal level, co-ordinating the efforts of the Departments of Justice, the Solicitor-General, the Secretary of State, Indian Affairs and Northern Development, and National Health and Welfare. Its main programme will be the provision of court workers to assist native people, whether registered Indians or other natives, who become involved with the law, and to institute services to provide information to native people on the law and their rights under the law.

"In the northern areas and in prairie communities a disproportionate number of court appearances involve native people, usually on charges of assault, disorderly conduct or prostitution. It is claimed by Indian groups that the courts and police officers exercise discrimination in law enforcement. The court worker programme is seen as an important means of overcoming these attitudes and of encouraging fair exercise of the law.

"Native police have been recruited in some of the provinces and in the Territories. Some attempts are also being made, notably in Saskatchewan, to assist the work of native offender organizations working in prisons and on release.

"The disproportionate number of Indian offenders and the belief on the part of Indians that the police and courts work in a manner prejudicial to them, can be alleviated only when social and economic conditions improve materially for the native people. It is on this assumption that policy-makers and administrators are proceeding with the implementation of expanded economic opportunity and self-government proposals in Canada.

230. According to a source:

"In order to encourage the development of court-worker services to assist Canada's native people in understanding their legal rights and obtaining legal assistance, the Department of Justice has established a native court-worker programme. The criteria for eligibility for funding under the programme are as follows:

"1. the programme must serve status and non-status native people alike;

"2. the programme must be administered by an independent service organization which has the support of both status and non-status native people;

"3. any contribution by the Department of Justice must be limited to providing court-worker services (i.e., it cannot be used to finance half-way houses, or alcohol or drug abuse programmes);

"4. at least 50 per cent of the cost of the court-worker programme must be borne by the province involved;

"5. the province involved must be willing to monitor the operation of the programme in order to assure that the service provided maintains certain minimum standards of quality." 99/

231. Another source explains:

"The main function of the native court-worker is to bridge the communication barrier that exists between the native accused and those who administer the criminal justice system. His basic function is to provide legal information rather than legal advice. Agreements have been concluded with a number of provinces for the cost sharing of such programmes.

"The federal government provides limited funding for experimental purposes to some 20 legal services organizations under its Community Legal Services and Telephone Legal Services programmes. The combined countrywide budget for these programmes is \$450,000. Funds are generally provided to organizations operating independently of established provincial programmes and the defined objectives are to encourage experimentation with new delivery techniques and research projects and activities having as their end objectives methods of ensuring that comprehensive relevant and effective information legal services are made available to the economically disadvantaged. Specific service projects promoted under these programmes include, preventive, education and counselling projects, the training and utilization of paraprofessionals, delivery of services to the institutionalized poor, the rural poor, native and ethnic groups, and law reform programmes." 100/

232. The Government of the United States of America states:

"Legal aid programmes have been instituted on American Indian reservations, in order that individual indigenous people can have responsible help in pursuing their goals. Increasingly Indian people are taking legal training which should lead to better legal resources for indigenous people and their causes. At least two private groups have been formed to look into legal matters for Indians as a whole. These are the Native American Rights Fund and the Institute for the Development of American Indian Law. Both have received money from non-indigenous foundations to continue in their work. An Indian tribe may hire its own attorney, but contracts between Indian tribes and lawyers involving the use of tribal funds are subject to the approval of the Secretary of the Interior."

233. According to a publication, in the United States of America:

"Legal aid programmes are applied equally to the indigenous and non-indigenous poor. The American legal system is structured so that the poor - the vast majority of Indians are poor - are virtually unrepresented. The programmes of legal services that the Government speaks so proudly of costs approximately \$70 million or 32 cents for each American citizen per year.

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99/ Programmes Offered. Department of Justice 1976, p.9

100/ Legal Aid in Canada - 1975, pp.3-4.

"The number of Indians taking legal training has increased but the need is so great that Indians need an exponential increase to be really represented.

"...

"The approval of tribal attorney contracts by the Secretary of the Interior raises some substantial ethical problems, in that the more zealous an attorney is against the BIA or the Secretary of the Interior the more he may jeopardize future approval of the contract. In essence the one being litigated against has a degree of control over the opposing counsel.

"Another aspect of ... legal services for Indians is the cultural gap which exists between white, middle-class liberal lawyers and Indians. The lawyers, while well-meaning, have little understanding of the values that are important to the Indian. This is especially true when the issue is individual rights versus tribal rights. The natural inclination of the lawyer is to side immediately with the individual since the lawyer has little appreciation or knowledge of tribal rights..." 101/

234. According to Government information:

"... The United States Attorney and the Federal Courts are available to ... [federally recognized Indians] for defending themselves against non-Indians and for cases concerning certain major crimes - murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, carnal knowledge, assault with intent to commit rape and assault resulting in serious bodily injury."

235. In contrast, it has been stated that:

"The United States also suggests that United States Attorneys are available to represent Indian tribes and individuals for their protection. There is, of course, a famous statute in the United States Code, 25 USC 175, which does, in fact state in mandatory language that the United States Attorney shall represent Indians in court. This mandatory statute, however, has been interpreted to be discretionary. The United States Attorney rarely represents Indians in court in cases involving trust responsibility and there is even a tremendous backlog of such cases upon which the United States Attorneys have failed to act. If they are not represented by the United States Attorney, then the United States should not claim before the world community that they are. President Nixon has said as much in his 1970 message and in his package of proposed Indian legislation which includes the Indian Trust Counsel Authority bill. He has recognized the serious conflict of interest between the Government's duties towards the Indians and its public responsibilities. It is puzzling that the United States now tells the world that this conflict does not exist." 102/

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101/ American Indian Law Newsletter, vol. 7, No. 11 pp. 59-60.

102/ Ibid. pp. 15-16.

236. Commenting on an official statement by the United States Government regarding availability of legal aid services to indigenous populations in that country, a writer has stated:

"Most Indian tribes have legal counsel of their own choice, subject to the approval of the Secretary of the Interior".

"This is completely true ..., but it deserves careful study. An Indian tribe cannot employ a lawyer without the assent of the BIA (Bureau of Indian Affairs). The BIA can reject the counsel chosen by the tribe, refuse to pay his fees and, since January 1983, reject certain cases. This is to discourage legal protection of Indian rights. The BIA can see to it that activist lawyers are never asked for or, if they are, that they are not paid. The BIA also controls what judgments are given and in which cases. In these circumstances, it is rarely true that the Indian tribes enjoy independent and impartial legal representation.

"In its comments at the United Nations, the United States did not mention the most pernicious aspect of its Indian policy: the legal principle of 'absolute power'. According to this doctrine, Indian rights 'only exist as a concession on the part of Congress'.

"This means that the Indians enjoy only those few rights that Congress has not yet seen fit to take away from them.

"If the United States wishes to secure international approval for its limited recognition of the social and political rights of the Indians, it must be ready to accept that it does not possess the power to suppress these limited rights." 103/

237. The Australian Government has stated that:

"Every state has established a legal aid service which is available to all members of the community, including Aborigines, in need of such assistance. In the Australian Capital Territory, legal assistance is made available by statute to the community at large, including Aborigines, and a similar scheme is to be introduced in the Northern Territory. Legal services provided under these schemes are either free of charge, or at a reduced fee, depending on the nature of the case. The payment of legal services generally includes all reasonable expenses that would be incurred in the defence of an accused person, the costs being met from Government funds."

238. The Government of Australia has stated:

"Many Aborigines, because of their depressed socio-economic circumstances or their traditional orientation, are ignorant of their basic rights and of the legal services available. Special legal aid societies for Aborigines have therefore been established in most states by voluntary organizations with Government support."

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103/ Russell L. Barsh, "Le gouvernement américain défend sa politique indienne", Amérique Indienne, Bulletin No. 36, pp. 7-10.

239. On 24 April 1974, in a letter addressed to the Committee on the Elimination of Racial Discrimination, the Aboriginal Legal Service of Western Australia stated:

"Within the past year the Australian Government financed independent organizations to enable them to establish legal services for Aboriginal people. Until that time Aboriginal people suffered a definite disadvantage in that they were usually unable to obtain legal aid through established sources because those sources did not extend to giving legal assistance in magistrates' courts. Most Aborigines are charged with petty offences in those courts.

"These services are looking into all aspects of legal assistance for Aborigines, and developing an expertise in this field. A question often occurring is one concerning racial discrimination against Aborigines. At the moment, discrimination on the ground of race is not an offence, but the Commonwealth Government has introduced legislation to provide for penalties for such discrimination, and is establishing a Race Relations Board to resolve such questions by conciliation rather than litigation."

240. Regarding a new scheme of legal assistance the Government gives in its additional information an outline about the major steps that it has taken in this field.

"On 25 July 1973 the Attorney-General announced the establishment of the Australian Legal Aid Office incorporating the Legal Service Bureaux. Establishment of the Office is the major step the Government has taken to make sure that legal aid is readily and equally available to all persons in need - particularly disadvantaged persons - throughout Australia ...

"The programme for 1974/1975 is to complete the establishment of new offices in capital cities and a basic framework of 62 regional offices throughout Australia that are intended to bring the law to persons in need.

"Regional offices will be small 'shop-front' legal offices - usually staffed by two lawyers - that will rely to a large extent upon local private practitioners to whom a substantial volume of work will be referred. They will operate in conjunction with local community and welfare organizations. Offices will be opened in the suburbs of cities and in towns and regional centres throughout Australia. Special provision will be made to serve sparsely settled areas of Australia. Mobile legal offices will be used in some areas.

"The role of the Australian Legal Aid Office will be to provide a community legal service of advice and assistance, including assistance in litigation, in co-operation with community organizations, referral services, existing legal aid schemes and the private legal profession. Its decentralized offices will provide administrative support for community advice centres and legal or welfare advice groups generally.

"The Office will provide a general problem solving service of legal advice, including continuing advice, for all persons in need. It is intended to solve the majority of problems that affect the ordinary citizen. Eligibility will be determined on interview without a formal means test....

"The Australian Government grant of \$2 million was made available to supplement existing legal aid schemes during 1973/1974. The grant was made available on a per capita basis as an interim measure with a view to effecting a quick improvement in the availability of legal aid. \$1.3 million has been provided in 1974/1975 to assist existing legal aid services."

241. In addition to the Legal Aid Office, there is also an Aboriginal Legal Service Programme in Australia.

"The Service is available to Aborigines. 'Aboriginal' means a person who ... is a member or descendant of the Aboriginal race [and is in need of legal assistance]. It includes Torres Strait Islanders and, where it is in the interests of justice in the circumstances of a particular case, includes a person who lives in a domestic relationship with an Aboriginal."

"Under the Programme, legal assistance is being provided in each state and the Northern Territory by Aboriginal Legal Services, funded by the Department of Aboriginal Affairs and in the Australian Capital Territory by the Attorney-General's Department under delegations from the Minister for Aboriginal Affairs."

"Funds are being provided by the Australian Government through the Department of Aboriginal Affairs and made available to each Service on the condition that the funds be applied in accordance with the conditions laid down in the Programme. Each Service is required to submit annual budget proposals for approval by the Department of Aboriginal Affairs."

"The service operates through an Aboriginal Legal Service in each state and territory in Australia on Government grants given on these terms:

"1. Each Service is responsible for the provision of the facility in its state or territory but may make arrangements with Services in other places to avoid problems arising from geographical boundaries."

"2. Each Service has flexibility in its development, to meet the needs of Aborigines who stand in need of legal assistance. The facilities include, as funds permit, arrangements with legal practitioners in private practice for representing applicants in individual cases, with legal practitioners on a retainer basis where the usual arrangements for individual cases cannot readily be made, the direct employment of legal practitioners, field workers, social workers and administrative staff. In the latter three cases preference will be given to Aborigines or to those persons who show an affinity with Aborigines. Research assistance into the special legal problems of Aborigines and the provision of publicity and relevant educational activities directed to Aborigines and persons or groups who deal with Aborigines is also envisaged."

"Each service may reimburse existing facilities for the provision of Legal Aid to Aborigines at the rate of the cost to that facility of assisting the Aboriginal in a particular matter, plus an amount equal to the estimated cost of administration by the facility of that matter not exceeding 5 per cent of the legal account."

"Legal assistance to Aborigines is available for:

"(a) representation in courts and tribunals throughout Australia where the Aboriginal has grounds for such representation;

"(b) advice on matters in which the Aboriginal has or is likely to have a direct interest, whether personally or as a member of a group;

"(c) assistance in non-contentious matters where this is likely to be of direct benefit to the Aboriginal.

Restrictions -

"(a) Legal assistance, other than to ascertain if the Aboriginal has reasonable prospects of success, will not be granted in respect of proceedings by way of appeal if in the view of the Service no good purpose would be served by prosecuting or taking part in the appeal;

"(b) Actions to be taken on behalf of an Aboriginal community or a substantial Aboriginal group will be considered on an individual basis by the Australian Government following an approach by a Service.

"An Aboriginal who is reasonably able to make a contribution towards the expense of his legal assistance may be required to do so." 104/

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104/ Letter from the Aboriginal Legal Service of Western Australia, op.cit.  
(See para. 239, above).