UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

Distr.
GENERAL

E/CN.4/Sub.2/1982/2/Add.6
20 June 1982

ENGLISH
Original: ENGLISH/FRENCH/SPANISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of Discrimination and Protection of Minorities
Thirty-fifth session
Item 12 of the provisional agenda

STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS

Final Report (Supplementary Part) submitted by the Special Rapporteur Mr. José R. Martínez Cobo

CONTENTS

CHAPTER V

DEFINITION OF INDIGENOUS POPULATIONS

A. Introduction

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

> "The definition of indigenous populations for the purposes of this study involves the following four tasks:
>
> (a) Establishment of a 'working definition' to be used in the collection of information for the study;
>
> (b) Identification of population groups which should be regarded as indigenous in individual countries; this is a task to be undertaken when the individual country papers relating to the study are drafted;
>
> (c) Comparative study of all the definitions contained in the individual country papers;
>
> (d) Definition of indigenous populations from the international point of view. This definition will be one of the results of the study and will constitute the basis of the proposals which the Special Rapporteur will submit as part of his final report so that the Sub-Commission may formulate recommendations concerning measures to be adopted in this area."

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

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

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

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1/ For example, for Argentina, Burma, El Salvador, Honduras, Nicaragua and Suriname.

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

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

> "346. Identifying a person or group as indigenous may be a complex and difficult proposition, however. In many instances, the first confrontation between 'inhabitants' and 'invadors' took place centuries ago. With the passing of time, life in common broke down the physical and ethnic distinctions between the two groups and brought about varying degrees of biological and cultural hybridism. The resulting social racial and cultural blending makes it very difficult to arrive at a precise definition of who may today be considered to be the 'indigenous' or 'aboriginal' inhabitants in a given country. The only exceptions may be groups which occupied or sought refuge in jungle areas, thick forests or mountains, or other areas of difficult access, where they could maintain their own distinct culture and way of life, and who have remained in relative isolation up to the present date.
>
> "347. Under these circumstances, the problem arises today of determining in each case the criterion to be applied in defining which groups are to be held as 'indigenous'. In this connexion it has been written: 'The notions with reference to which such groups are classified are so flexible and varied that there are often discrepancies in statistical data or estimates within a single country, and useful comparisons between one country and another are impossible. Different and often contradictory criteria tend to be used by administrators, lawyers and sociologists as a basis for their definition, such as the colour of the skin, language, customs, tribal conditions and living standards. Every country has tackled the problem of definition in its own way, according to its own traditions, history, social organization and policies.'"

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

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

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2/ United Nations publication, Sales No.: E.71.XIV.2.

of additional criteria used in some countries. Next, we shall undertake an examination of systems which require a formal declaration that certain communities, groups or persons are indigenous, and also of registration and certification formalities for indigenous persons, and of the rules used by the authorities of certain countries to decide, in doubtful or disputed cases, whether or not persons are to be officially classified as indigenous. Cases of changes of status from "indigenous" to "non-indigenous" and vice versa, in countries where the relevant information is available, will also be briefly examined.

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

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

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

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

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

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

> "The World Council of Indigenous Peoples declares that indigenous peoples are such population groups as we are, who from old-age time have inhabited the lands where we live, who are aware of having a character of our own, with social traditions and means of expression that are linked to the country inherited from our ancestors, with a language of our own, and having certain essential and unique characteristics which confer upon us the strong conviction of belonging to a people, who have an identity in ourselves and should be thus regarded by others." (Res.2 Argentina). 5/

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

> "We the INDIAN PEOPLES are descendants of the first populations of this continent: we have a common history, an ethnic personality of our own, a cosmic conception of life, and as inheritors of a thousand year old culture, after almost 500 years of separation, we are newly united in order to be the vanguard of our total liberation from western colonialism." (Number 2) 6/

3/ See chapter IV (E/CN.4/Sub.2/476/Add.5, p.32 and annex III, p.7).

4/ Ibid., annex VI, p.1.

5/ Ibid., p.32 and annex III, p.5.

6/ Ibid., annex VII, p.1.

13. The sole concern in preparing this chapter has been the determination of the criteria existing in different countries to establish which sectors of the population are relevant to the present study and not the rights and obligations that may derive from this determination, which is reserved for the substantive chapters that follow. The possible effects that the resulting classification might have are, therefore, not specifically examined in this chapter, although, in some cases, general indications that are inseparable from the material relating to definition will be reproduced here. In this connection, exceptionally it is useful to point out here that while in some countries the classification of an individual, group or community as indigenous is said to carry with it a special status, with entitlement to specified services, in most countries covered by the study taxonomic criteria are said to be used merely for statistical purposes, no status consequences deriving from such classification. As examples of the first position outlined above, Registered Indians in Canada and Recognized Indians in the United States are the particular responsibility of the respective federal Government of these countries. Their "registration" or "recognition" are essential for entitlement to "certain beneficial provisions of the Indian Act" (see paras. 291 and 295, Canada) or for being "designated as an Indian eligible for basic Bureau of Indian Affairs services" (see para. 323, United States). As examples of the second position, the Mexican Government has stated inter alia that "these criteria of differentiation do not relate to the equality of individual and social rights" (see para.332, Mexico) and the Government of Denmark in connection with Greenland when it states inter alia: "No formal distinction is made between genuine Greenlanders and others in terms of national, linguistic, cultural or other similar criteria. The legal, economic and other social disparities existing between the Greenland society and that of Denmark proper are more or less alike for all residents in Greenland regardless of origin." (Emphasis added) (see paras. 68, 185, 256 and 336 below).

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

B. Ancestry

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

16. On the other hand, from the information available it is not possible to determine precisely in all cases to what extent the ancestry factor is involved in the formula used. It is clear, however, that it is always present, although the relative importance attached to it varies considerably from case to case. It is evident, as has already been explained, that various countries have arrived at solutions which embrace a wide variety of criteria of differentiation, ranging from factors which are exclusively or almost exclusively "racial" to considerations which are purely social and cultural.

17. In this connection some attention must be given to the word "race", and to the way it is used in this context. It must be stated, first, that popularly held noticns about "race" represent one of the most widespread misconceptions of our time, and a misconception which has the most dangerous and tragic consequences. Scientific evidence has been disregarded; and many people on the contrary seem to take it for granted that science determined many years ago what the word "race" meant, and that it demonstrated the existence of important physical and psychic differences between the so-called races. This not not true. In popular parlance, nevertheless, the word "race" is still used to designate a considerable variety of groups and categories whose members are united by relationships of various kinds which go far beyond inherited physical characteristics. Hence the widespread impression that there is a causal link between physical and cultural characteristics. Daily life affords ample proof that this is not the case. Physical type, culture, language, religion, etc. vary independently of one another, and there is an infinite range of combinations and permutations.

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

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

20. It has been pointed out, however, that even in this sense "races" do not exist as groups which can actually be identified in nature, but that they are rather man-made classifications. Such classifications are indeed based on a certain concentration of hereditary physical characteristics, 7/ but these characteristics are not separate or invariable entities which make it possible to divide mankind into strictly differentiated races. It has been proved, in fact, that these characteristics do not serve to divide human beings into clear-cut and exclusive groups, since the most groups contain persons with marked variations and their members range, for example, from persons with very pale skin and to others with a very dark skin; from persons with long skulls to others with almost round skulls; and from persons with thin noses to others with very broad noses, etc.

7/ Such as the shape of the skull (brachycephalic, i.e. almost round, with a breadth at least four fifths of the length; dolichocephalic, i.e. longheaded, with a breadth less than four fifths of the length); height and bone structure; light or dark skin; shape and colour of the eyes; wide or thin nostrils; flat or high bridge to nose; colour and texture of the hair, etc.

21. It has been observed, furthermore, that such characteristics do not occur in fixed series, but vary with time and circumstances. In fact the characteristics which have been mentioned - and others which might be mentioned as well - change independently of each other so that the dolichocephalic skull may be found with any skin colouration, with any shape of nose, height and bone structure, colour and shape of eyes, colour and texture of hair, etc. Also, these characteristics do not remain unchanged with the passage of time but are constantly varying owing to environmental influences and man-made changes.

22. The Expert Committee on Racial Problems, convened by UNESCO in Paris in December 1949, concluded - in terms which take account of these facts - that the term "race" designates "a group or population characterized by some concentrations, relative as to frequency and distribution, of hereditary particles (genes) or physical characters which appear, fluctuate and often disappear in the course of time by reason of geographic and/or cultural isolation." 8/

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

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

8/ UNESCO "Statement on Race" (UNESCO House, Paris, 18 July 1950), in: Four Statements on the Race Question, Paris, second impression, 1970, pp.30-35.

9/ UNESCO "Statement on the nature of race and race differences" (UNESCO House, Paris, 8 June 1951), in: Four Statements on the Race Question, op.cit., pp.36-43.

10/ UNESCO "Proposals on the biological aspects of race" (Moscow, 18 August 1964) in: Four Statements on the Race Question, op.cit., pp.44-49.

25. The Conference of Experts which in 1967 approved in Paris the "Statement on race and racial prejudice" 11/ expressed the view that "human problems arising from so-called 'race' relations are social in origin rather than biological. A basic problem is racism - namely, antisocial beliefs and acts which are based on the fallacy that discriminatory inter-group relations are justifiable on biological grounds".

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

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

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

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

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

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11/ UNESCO "Statement on race and racial prejudice" (UNESCO House, Paris, 26 September 1967), in: ibid., pp.50-55.

12/ As will be obvious, this is the approach which has been adopted in the present study.

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

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

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

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

34. This system is unsatisfactory from the social and psychological viewpoints and perhaps even more so than other systems which, in regard to ancestry, refer to congeries of supposedly permanent characteristics, and to disadvantages supposedly associated with the concept of "degree" or "percentage". The description of persons of mixed descent as "half-castes" or "half-blood", or a reference to their ancestry in terms of a fraction corresponding to the "degree" of mixture, inevitably creates the impression that such persons are incomplete in some fundamental sense. It leads - even if unintentionally - to the feeling that when "blood is mingled" the blood of one of the persons concerned is "diluted", "contaminated" or "polluted" by that of the other. 13/

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

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13/ In this connection, mention may be made of another of the conclusions reached by the above-mentioned Group of Experts which met in Paris in June 1951. This conclusion reads: "There is no evidence that race mixture produces disadvantageous results from a biological point of view. The social results of race mixture, whether for good or ill, can generally be traced to social factors." ("Statement on the Nature of Race and Race Differences", para.9 (e)).

properly. This would be very difficult and complicated in the case of entire groups of the population. It is almost impossible to classify and record the "race" of men and women contracting formal alliances; but it is still more difficult in the case of informal unions and completely impossible in the case of casual sexual relations which result in the birth of new citizens of "mixed blood". Considerable weight is, ultimately, given to the statements of the parties concerned, and account is taken of other factors.

36. One writer, describing the situation in New Zealand where this system exists, observes that: 14/

.....

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

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

37. It is consequently affirmed that: 15/

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

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

14/ Metge, Joan. The Maoris of New Zealand. Rutledge and Kegan Paul, London, 1967, pp.54-55.

15/ Ibid., p.55.

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

40. For certain countries,16/ no information is available on this subject. In the information available to the Special Rapporteur, ancestry is referred to merely by implication in some countries. 17/ In a number of other countries, however, explicit reference is made to descent, in terms which will now be reviewed.

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

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

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

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

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

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

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

46. There was an oblique reference to Lappish descent in the criterion adopted in 1959 for the study made by the Nordic Lapp Council in Finland. Persons were considered to be Lapps when, in addition to their residence within the Lappish region, at least one of their parents or grandparents had learnt Lappish as his or her first language. In the course of the study it was later required only that the persons themselves had learnt Lappish as their first language.

16/ Argentina, Burma, El Salvador, Honduras, Nicaragua and Suriname.

17/ Colombia, Chile and Laos.

47. The Amerindian Ordinance defines Amerindians in Guyana on a basically ancestral criterion. This is contained in the reference to "Any Indian..." (para. (a)) and explicitly in the addition stating that "Any descendant of an Amerindian of paragraph (a) of this definition to whom in the opinion of the Commissioner of Interior the provisions of the Ordinance would apply." (para. (b)). In operating the definition, the principle has been for mixed Amerindians that they should fulfil other requirements in order to be considered Amerindians.

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

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

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

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

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

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

53. For census purposes, the criterion of ancestry, expressed as "race" seems to be of fundamental importance in the United States of America 18/. This ancestry criterion comes into play in conjunction with objective subjective criteria which vary in accordance with the circumstances. It may thus be present through an act of

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

> "For Census purposes, an Indian, for example, has been identified on a self-declaration basis. If an individual did not declare his race, the enumerator has counted him as an Indian if he appeared to be a full-blooded American Indian or - if of mixed Indian and white blood - was enrolled on an Indian tribal or agency roll or was regarded as an Indian in the community in which he lived. To be designated as an Indian eligible for basic Bureau of Indian Affairs services, an individual must live on or near a reservation or on or near trust or restricted land under the jurisdiction of the Bureau; be a member of a tribe, band, or group of Indians recognized by the Federal Government; and for some purposes, be of one-fourth or more Indian descent."

self-identification or group consciousness on the part of the person 19/ included in the census; or as a result of a lack of declaration on the latter's part, by the application of the subjective estimation of the enumerator, who considers the person for census purposes as a full-blooded Indian; 20/ or by the estimation of the enumerator that the person concerned is partly Indian plus the fact of the person's inclusion in the roll of an Indian tribe or agency 21/ or by the estimation of the enumerator plus the fact that the person was regarded as Indian in the community where he lived. 22/ In addition determination of "the amount of Indian blood" seems to be necessary in varying percentages to "meet membership requirements laid down by a tribe" which varies with the tribe and ranges from "a trace to as much as a half". 23/ For some purposes it is required that a person be of one fourth or more Indian descent in order to be designated as an Indian eligible for basic Bureau of Indian Affairs services. 24/

54. In Canada, ancestry seems to be always an underlying criterion since, in connection with the different groups established in that country among the native people, namely, Status Indians, non-Status Indians, Métis and Inuits, the Government of Canada has stated that Canadian native people are undoubtedly "the existing descendants of the peoples who inhabited the present territory of the country... when persons of another culture or ethnic origin arrived there from other parts of the world." 25/

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

56. In Costa Rica, there is also considered to be an oblique reference to indigenous ancestry, as the legal definition 26/ refers to "ethnic groups which are directly descended from the pre-Columbian civilizations". The Special Rapporteur

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19/ See para.227 below, under "group consciousness".

20/ See paras.228 and 229 dealing with attribution of identity in the United States, below.

21/ See paras.128-131 under "the fact of living under a tribal system" and paras.229 and 230 under attribution of identity, below.

22/ See para.231 dealing with the attribution of identity and para.243 under "acceptance by the indigenous community", below.

23/ See para.243 under "acceptance by the indigenous community", and also para.323 below.

24/ See para.323 below.

25/ See para.90 and footnote 36/, below. Also see, in para.250 below under "residence in certain areas of the country", what concerns the geographical isolation of the Inuits which points, indirectly, at the criterion of ancestry. Also see paras.289 and 305 below.

26/ See para. 280 below.

considered that these words have more than one sense, and has therefore also mentioned them under "culture". 27/

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

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

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

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

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

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

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

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

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

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

27/ See para. 87 below.

28/ Encyclopedia Britannica, 1967, Vol.II, pp.879 and 883-884.

29/ Alejandro D. Marroquín:"Panorama del indigenismo en Ecuador" in Balance del Indigenismo. Ediciones especiales: 62, Instituto indigenista Americana, Mexico City, 1972.

30/ Information furnished on 3 September 1976 in connection with the present study.

31/ Dupont-Gonin, La Guyane française, (Genève-Paris, Droz, 1970), pp.62-63.

67. According to the information available on Venezuela, descent from the pre-Columbian groups of the population is implicit as a requirement for a person to be considered as "indigenous".

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

> "Greenland and its indigenous Eskimo population differ from metropolitan Denmark in so many ways that the relationship between Danes and Greenlanders can never be such as that existing between Zealanders and Jutlanders." (Point 1) Emphasis added.

C. Culture

1. Culture in general

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

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

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

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

73. The cultural elements to be considered 32/ must clearly include both material and technical elements as well as those relating to behaviour and ideology.

32/ It is well-known that from the sociological point of view, the world of culture, as well as each specific culture or individual cultural heritage, comprises a wide variety of elements: language, popular, scientific and philosophical knowledge, religious, moral, political, social and other beliefs, ideas, legends, traditions, symbols, customary forms of behaviour, standards of behaviour (religious, moral, legal, hygienic, social, agricultural, culinary, medical, etc.), quality criteria or maxims, proverbs, forms of social organization, forms of political organization, legal structures or institutions, economic patterns and organizations, writings, drama, poetry, song, statutory, sculpture, painting, architecture, music, dance, manners and clothing, utensils, implements, artefacts, instruments, machines, etc.

Consideration must be given inter alia to the instrumental and technological aspects, the economy and agriculture, as well as beliefs, habits, customs, rites and ancestral symbols, social and family organization, social and legal institutions, dress, religious and mythical concepts, etc. One important point to be borne in mind is that the meaning of all these aspects is coloured by a conception of the world which is peculiar to these communities when compared to the ideas of other population groups living alongside them.

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

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

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

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

78. Cultural borrowings are always present. They increase with contact between communities of different cultures, and increase even more when the groups in question change their habitat.

79. It must therefore be concluded that the culture criterion, although it is very useful, is not enough to classify a person as indigenous or non-indigenous. However, although they do not suffice for that purpose, cultural considerations, like somatic considerations, are important factors which must be taken into account in defining the persons, groups and communities which are to be considered as indigenous.

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

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

82. No information is available for certain countries. 33/ In others, the indigenous culture requirement is not expressly mentioned. 34/ On the other hand, this criterion is included in various other countries, and in the following forms:

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

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

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

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

87. In Costa Rica, outside the legal definition, reference is made to "autochthonous culture" and to the fact of having "retained a clearly defined culture of their own", as well as to the "cultural factor and the feeling of self-awareness and the use of vernacular languages". The legal definition contains the cultural element, as it refers to "persons who form ethnic groups which are directly descended from the pre-Columbian civilizations and retain their own identity". 35/

33/ Argentina, Burma, El Salvador, Honduras, Nicaragua and Suriname.

34/ Australia, Finland, New Zealand, Norway, Paraguay and the United States.

35/ See para. 280 below.

88. In Guatemala, a person's culture and a value system based more on the community than on the individual in addition to the normal use of an indigenous tongue, are the factors which determine whether a person is to be classed as indigenous or non-indigenous in censuses.

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

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

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

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

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

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

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

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

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

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

37/ Gonzalo Rubio Orbe, "Ecuador Indígena" in América Indígena, Vol.XXXIV-3, Mexico City, 3rd quarter,1974, pages 596-587.

38/ See para.274 below.

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

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

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

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

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

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

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

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

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

40/ See para.279 below.

41/ See para.136 below.

2. Particular aspects

(a) Religion

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

107. As stated above, the words "religions which may be 'a mixture of Buddhism and totemism'" are included among the relevant criteria in Bangladesh for some groups. 42/

108. The Canadian Government mentions "religion" in particular, stating that in many cases native people in Canada "maintain their diverse traditional forms of ... religion." 43/

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

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

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

112. Similarly, in the cases People vs. Cayat, (68 Phil. 12), and Porkan, et al vs. Navarro, (73 Phil, 2,O.G., p. 32, 33) it was held that this expression:

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

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

42/ See para. 86 above.

43/ See para. 90 above.

..."... the desire to preserve their own culture, religion or language through the formation of their own communities and the continued practice of their own customs, religion and beliefs, use of their own particular dress and language..." (Emphasis added).

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

(b) The fact of living under a tribal system

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

115. In India this requirement is indicated in the constitutional designation of these communities as "scheduled Tribes". 44/ The specification that a person must be a "member of a tribe, a tribal community, or a part of a tribe or of a tribal community or of a group within a tribe or within a tribal community" in order to be considered as "tribal" seems to give this criterion overriding importance for determining whether a person is or is not indigenous. The absence of any obligation to be "presently endogamous, although originally they might have been so" is to be noted as a taxonomic element in differentiating "scheduled tribes" from "scheduled castes".

116. Similarly in Pakistan this is explicitly present as the guiding criterion in the name given in the Constitution to the areas where these populations live "Tribal areas" 45/ and in the requirement of "belonging to the tribes".

117. In various countries special reference is made to this circumstance. In Bangladesh for example, the relevant groups are said to "consist of small tribal or semi-tribal communities". Allusion is also made to "members of tribal or semi-tribal populations" 46/

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

119. One of the judicial decisions mentioned above 47/ includes, as a factor for determining which persons are indigenous persons, the condition that the natives of the Philippine Islands in question "[be] usually living in tribal relationship apart from settled communities", (Porkan et al vs Navarro and People vs. Cayat, cited above).

44/ See chapter VII, Basic Principles, paras. 84 to 89 E/CN.4/Sub.2/476/Add.2).

45/ Ibid., para. 83.

46/ See para. 138. below.

47/ See para. 112. above.

120. In Panama, "... those inhabitants who live under a tribal system ..." are regarded as indigenous (the criterion adopted by the above mentioned Directorate of Statistics and Census, Office of the Controller-General of the Republic).

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

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

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

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

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

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

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

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

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

127. The Government further stated that

> "The status Indians are members of Bands who hold in common certain reserve lands generally by virtue of written treaties, though treaties were not signed in all cases. Some of these Band members have taken up residence off reserves ...
>
> "Obviously, a person can be "registered" whether or not his band or tribe has signed a treaty, and whether or not he lives on a reserve (though in this latter case, certain beneficial provisions of the Act are lost).

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

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

130. A writer states: 50/

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

50/ Robert L. Faherty, "The American Indian: An Overview", In Current History, December 1974, p. 243.

51/ For census purposes and in the absence of self-identification as an Indian, when a person is of mixed Indian and white ancestry, the ennumerator will count him/her as an Indian if he/she has been entered in the roll of an Indian tribe (see para. 53 above.).

131. Discussing some of the important aspects of definition it has been written: 52/

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

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

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

(c) Membership of an indigenous community

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

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

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

54/ This criterion would also be implied, at least as one of the possible alternatives, in some systems where reference is made to birth in an indigenous community (as in Paraguay) to the relevance of "organizational expressions" (as for the Instituto Nacional Indigenista in México) or to "un sistema de valores más comunal que individual" (as in Guatemala).

133. It has been stated before that in the Philippines "living ... apart from settled communities" 55/ and "the formation of their own communities ..." 56/ are mentioned among the considerations to be taken into account when determining whether or not a person is a member of one of the National Cultural Communities.

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

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

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

137. In Bangladesh the wording is similar "consist of small tribes of semi-tribal communities" cited above 57/ and "members of tribal or semi-tribal populations" 58/

138. In Indonesia the references to these groups as "isolated communities of autocthonous peoples" or as "isolated ethnic tribes" describing them as groups "under a single head of clan" clearly imply this membership. 59/

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

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

55/ See paras. 113 and 119 above.

56/ See para. 101 above.

57/ See para. 117 above.

58/ Ibid

59/ See para. 118 above.

Membership of these bands or communities is required, and this may flow from being born and living as a member in one of these groups or may be acquired by subsequent acceptance in such bands or communities.

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

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

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

144. In 1973 the Canadian Government stated that of the approximately 258,000 status Indians, 166,000 lived on reserves, and about 24,000 on Crown lands. The Government added: "There are about 560 separate Indian communities or bands, which (with the exception of certain nomadic groups occupying the outlying and northern regions) are located on 2,200 reserves, varying in size from a few acres to more than 500 square miles."

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

> "... In 1979 there were 300,000 in 573 bands. Some 30 per cent were living outside Indian reserves.
>
> "Except in the north, Indian bands are located on reserve lands set aside for Indians exclusive use through treaties or other legal arrangements. There are 2,242 separate parcels of reserve land with a total area of 10,021 square miles. This land base has remained relatively the same since 1960.
>
> "The average band size has grown from about 350 in 1960 to about 525 in 1979, when the smallest band was New Westminster, with 2 members, and the largest, Six Nations of the Grand River, numbered 9,950.
>
> "About 65 per cent of the Indian population is located in rural or remote communities, compared to 25 per cent of the national population." 61/

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

61/ Indian Conditions. A Survey. Published under the authority of the Minister of Indian Affairs and Northern Development. Ottawa, 1980, p. 3.

146. Membership of an indigenous community is also suggested in some of the criteria used for determining who is a non-Status Indian in Canada since, according to the Government "Identification of members of the non-status native groups is not fixed in law but includes such factors as ... acceptance by the Indian community, or the following of a traditional manner of living."

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

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

(d) Dress

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

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

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

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

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

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

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

62/ See para. 136 above.

63/ See para. 86 above.

64/ See paras. 101 and 113 above.

65/ See para. 57 and foot-note 28/ above.

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

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

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

(e) Livelihood

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

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

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

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

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

67/ Eighth population census, 26 March 1973, Central Statistical Office, Ministry of the Economy, Guatemala, p. XXX.

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

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

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

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

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

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

> "(a) The members of tribal or semi-tribal populations in this independent country are less advanced than that of other national community. But the Government has given priority to raise the lot of the Tribal population soon.
>
> "(b) The members of tribal or semi-tribal populations are regarded as indigenous on account of their descent from the populations which are settled in specified geographical areas of the country." 68/ 69/

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

69/ See paras. 61 above and 253 below.

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

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

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

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

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

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

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

73/ In this connection, it should be recalled that the Instituto Nacional Indigenista of Mexico and the bulk of government action concerning indigenous populations has been placed under a superior co-ordinating entity called Coordinación General del Plan Nacional de Zonas Depriminidas y Grupos Marginados (COPLAMAR). See para. 36, Chapter X (ECN.4/Sub.2/1982/2/Add.4). It must also be pointed out that "marginality" has not been formalized into a taxonomic criterion.

D. Language

172. The use of a vernacular language by an individual group or community has always been considered one of the criteria for classifying them as indigenous.

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

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

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

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

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

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

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

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

74/ Bolivia (1950 census), Colombia (implicit).

(b) use of the indigenous language as mother tongue; 75/

(c) use of the indigenous language at home as the habitual means of communication within the family, also referred to as the "first language"; 76/

(d) use described as the main, 77/ preferred, 78/ habitual, 79/ general, 80/ or normal 81/ use of the indigenous language, even if the official language is known. 82/

180. These requirements suggest that it is essential that the indigenous language should have been acquired ab initio, or that it should be the habitual vehicle of expression of the individual, group or community, even though they may have acquired other languages and even if they use them frequently. Efforts are therefore made to determine whether the persons, groups or communities in question consider the indigenous language to be "their own language" 83/ and particularly whether the phenomenon "loyalty to the language" arises, based on awareness that the language in question is the vehicle of cultural expression and a fundamental element in the preservation of a culture.

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

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

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

76/ Finland (1960 and 1970).

77/ Bolivia (1950 census), Finland (1962).

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

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

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

81/ Norway.

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

83/ The words "speak a language of their own" are included among the relevant criteria in Bangladesh. In this respect it should be remembered that in Finland the person concerned is asked, in case of doubt, which language group he feels he belongs to.

contract or the instructions on work safety. It is essential to take into account the possible linguistic limitations of an accused person - or of one of the litigants in judicial proceedings - who has insufficient knowledge of the official language, in order to assure him a proper trial or prepare the defence of his rights and interests, etc. etc.

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

184. No information is available for certain countries. 84/ In other countries, the use of an indigenous language is not required as a criterion for considering persons as indigenous. 85/

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

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

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

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

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

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

84/ Argentina, Burma, El Salvador, Honduras, Nicaragua and Suriname.

85/ Australia, Guyana, New Zealand, Paraguay and the United States of America.

190. In Colombia, "in the most remote areas of the country ... the use of an indigenous tongue is considered a major element in the definition of Indian status primarily because these people cannot speak Spanish and, therefore, do not participate in the national society". 86/

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

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

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

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

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

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

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

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

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

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

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

86/ Area Handbook for Colombia, Government Printing Office, Washington, 1970, pp.89-100.

87/ P. Dupont-Gonin, op.cit., p.62. See paras. 60 and 123 above.

88/ See paras. 92 and 116, and foot-note 45/ above.

89/ See para.115 above.

90/ See paras. 56 and 87 above.

91/ Alejandro D. Marroquín, op. cit., p.148.

92/ See para.57 above.

93/ VIII Censo de Población, op. cit., p. xxx.

202. In Mexico, the Government reports that, among the criteria used to decide whether a person, group or community is indigenous, "the national system of statistical information, through population censuses, and the Ministry of Education place more emphasis on the language criterion, while the Instituto Nacional Indigenista includes forms of culture and social organization".

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

204. Speaking the Lappish language - possibly requiring that this be as a mother tongue - is among the criteria used for determining who is and who is not a Lapp in Sweden. 94/

205. Reference has already been made to the fact that in Finland it was required that either one parent or a grandparent spoke Lappish as his or her first language, as an element of the initial definition adopted by the Nordic Lapp Council in its study in 1962. In the course of the study, an addition has been made to the criterion used, to the effect that persons who have learnt Lappish as their first language are also considered as Lapps even if none of their parents or grandparents was of Lappish origin. In official censuses, language has always been the criterion, but it has varied in specific requirements. Thus, from 1900 to 1940, mother tongue was used as the criterion. In the census of 1950, people were asked which language they spoke best. In the censuses of 1960 and 1970, people were asked about their main language. In dubious cases, people have been asked to state their own views as to what language group they considered themselves to belong.

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

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

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

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

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

E. Group consciousness

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

211. In other words, the subjective criterion of the person, group or community in question is taken into consideration. Ideally, when the opinion of the person concerned is sought, his answer will reflect his own true position as closely as possible. In this way, a genuine census is obtained of persons who feel themselves to be "indigenous", and those groups and communities which consider themselves to be indigenous are accurately located. 95/

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

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

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

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

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

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95/ See the quotation in para. 37 above.

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

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

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

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

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

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

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

> "The information concerning various language groups is used only for statistical purposes. No rights or obligations of the people concerned are involved and, consequently, the expressed will of the person in an official census does not produce any effects on his status."

222. When carrying out the 1973 census in Guatemala, use was made of the criteria of self-identification and designation as an indigenous person. In the case of self-identification, if there was any doubt, the respondent was asked whether he was "indigenous", "non-indigenous" or "ladino", and his reply was recorded. In the 1964 census, the replies given by the respondent to questions on use of indigenous dress, use of indigenous language, use or non-use of any type of footwear (shoes or sandals) were used as an additional criterion to assist the enumerator in deciding. All these elements involve forms of self-identification as an indigenous person.

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

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

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

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

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

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

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

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

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

232. Other acts of designation as indigenous may come from the legislator or from the administrator in the United States. Thus, according to the information provided by the Government, "By legislative and administrative action, the Aleuts and Eskimos are eligible for programs of the Bureau of Indian Affairs." Identification as an

Aleut or an Eskimo under these acts, whether self-identification or designation must necessarily precede the decision as to eligibility for entitlement to such programmes and services.

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

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

> "There is no arrangement for a general and formal declaration of identification as Aboriginal or otherwise although a declaration may be required for specific administrative purposes. To qualify for some of the special benefits for Aboriginals such as the Aboriginal Study and Secondary Grants Schemes, for example, applicants are required to sign a declaration that they are of Aboriginal or Islander descent. When the national census is conducted, people are invited to indicate their race and, if of mixed race, to indicate with which racial group they identify.
>
> "For administrative purposes the children of a person who identifies as Aboriginal are deemed to be Aboriginal; where neither parent identifies as Aboriginal, children would not be deemed Aboriginal unless some special case or evidence to the contrary were put. Changes in self-identification would not affect the status of a spouse, who could identify or decline to identify as an Aboriginal in his or her own right."

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

F. The multiple criterion

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

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

238. None of the criteria described above is at present used as the only criterion of differentiation; and none of the experts who have dealt with this subject has advocated the application of any one of the individual criteria on its own. It has been pointed out, however, that when the "multiple criterion" is applied, the size of

the demographic group to be defined decreases as the number of components in the multiple criterion increases, i.e. when all these requirements have to be met simultaneously.

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

G. Acceptance by the indigenous community

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

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

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

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

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

245. In addition to ancestry and self-identification, the definition used for purposes of establishing eligibility of a person as an Aboriginal or Torres Strait Islander for the Australian Government's special programmes in respect of Aboriginal or Islander people, requires that this person be "accepted as such by the community with which he is associated". 96/

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

247. In this connection, it should be pointed out that, almost invariably, indigenous populations are inclusive people and will accept all descendants of any of their group who identify themselves as "indigenous", without any other requirements of any sort. 97/

96/ The Government adds that acceptance would possibly be required, if a person who is not of Aboriginal or Islander descent would assert Aboriginal or Islander identity. See para. 358 below.

97/ This has been expressly asserted of the Maori community. See the New Zealand Government statement quoted in para. 367 below.

H. Residence in certain parts of the country 98/

248. This seems to be one of the requirements established, in certain countries, in the criteria used to define indigenous populations.

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

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

251. In Guyana, for example, in operating the definition contained in the Amerindian Ordinance, the principle has been for mixed Amerindians that they should be "residing in an Amerindian area or community and living the life of an Amerindian". (Emphasis added.) The meaning of "Amerindian area" is not defined in this text. It is not known whether these areas are determined by the administrative authorities and, if so, how. 99/

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

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

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

99/ A request for information in this regard had been included in the summary transmitted to the Government for comments and supplementary data. Unfortunately, no information has been received on these aspects.

254. In Pakistan this criterion is applied with reference to groups that "inhabit the legally defined tribal areas" and, for some communities and groups that have led an "isolated life for a long time".

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

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

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

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

> "In Greenland the term 'indigenous' can be taken to mean 'born in Greenland' only. To a certain degree this criterion is applied in demographic contexts in order to distinguish loosely between genuine Greenlanders and others, mostly persons from Denmark, who will usually be staying in Greenland for a few years only. However, the distinction only represents an approximate national, cultural or linguistic division since the group designated 'born in Greenland' includes a large number of children born of Danish parents.
>
> "In one particular respect a person's affiliation to either the Danish or the Greenland community does carry some legal implication as public sector hiring practice distinguishes between original and non-original persons. Personnel hired as non-original have been recruited outside Greenland - usually in Denmark - by virtue of their background in administration, teaching, health services or because they hold the technical skills necessary in the execution of several public service functions, in all of which fields the Greenland community has a shortage of trained staff. In order to recruit such personnel from outside Greenland it has been necessary to pay salaries largely equivalent to those paid in Denmark whereas salary rates in Greenland as a whole are only 60 to 75 per cent of the salary level in Denmark. In addition, non-originals enjoy several accommodation rights, paid holiday trips to Denmark, etc.
>
> "To obtain non-original status a person must first of all be domiciled outside Greenland at the time of employment. Domicile notwithstanding, a person who was born in Greenland or settled permanently in Greenland before his completed fifth year cannot obtain status as non-original. Exemption from the said rules may, however, be granted in exceptional circumstances."

I. Legal definitions

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

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

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

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

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

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

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

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

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

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

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

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

109/ This seems to be the case in Panama (see para. 279 below).

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

263. In Australia, specific criteria have become institutionalized in certain States 110/ but there is no definition which is generally applied at the Federal level. At this level, working criteria have been adopted; and these have acquired a certain legal significance in cases where statements by the persons concerned are open to doubt.

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

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

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

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

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

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

110/ Particularly in the State of Queensland, as will be seen below.

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

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

269. The Government has further communicated that:

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

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

271. It has been pointed out already that changes in identification by both parents who cease to identify as "Aborigines" would affect their children's identification. 111/ On the other hand, it is not clear whether the change by one parent would be reflected in the children being considered as having ceased to be "Aborigines" also. It may be presumed from the transcribed statement that "the children of a person who identifies as an Aboriginal are deemed to be Aboriginals" (emphasis added), that as long as one of their parents still identifies as an "Aboriginal", the children would qualify as such. It is clear that the spouse of a person who ceases to identify as an Aborigine would only change his or her identification upon his or her free statement in that sense.

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

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

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

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

111/ See the statement on "group consciousness or self-identification", quoted in para. 234 above.

"Art. 4. The Indians are considered:

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

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

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

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

"(1) anyone who invokes a right, directly and immediately derived from a título de merced (formally established communal holding) or a título gratuito de dominio granted in accordance with the Laws of 4 December 1856, 4 August 1874 and 20 January 1883; Law No. 4169 of 8 September 1927; Law No. 4802 of 11 February 1930; Decree No. 4111 of 9 July 1931; Law No. 14,511 of 3 January 1961, and any other legal provisions which may amend or supplement them;

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

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

274. The Government of Guyana states:

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

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

(b) Any descendant of an Amerindian within the meaning of paragraph (a) of this definition to whom in the opinion of the Commissioner of Interior the provisions of the Ordinance would apply.

"The Ordinance also provides for the registration of Amerindians. In operating the definition the principle has been for mixed Amerindians that they should be residing in an Amerindian area or community living the life of an Amerindian.

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

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

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

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

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

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

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

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

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

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

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

(c) the child of any union between an aboriginal female and a male of another race, provided that such child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.

(2) Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practising such religion.

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

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

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

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

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

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

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

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

276. The Government of New Zealand has stated:

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

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

"For census purposes the old definition still applies, but in practice there is no check on the way in which a person describes himself in a census form. For electoral purposes the situation is somewhat similar. A person

who is less than half-Maori must register as a voter in a general electorate. A person who is more than half-Maori must register in a Maori electorate while a person who is half-Maori may choose whether to register in a general electorate or in a Maori electorate. But in practice again, no check is made on the ancestry of a person registering as an elector so that, in fact, there exists and there is commonly exercised, a great and subjective choice in this matter.

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

277. The Government has added:

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

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

279. The Government of Panama states that:

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

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

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

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

112/ La Gaceta, Diario Oficial de la Republica de Costa Rica, 20 December 1977.

281. According to the information gathered in 1976 during the Special Rapporteur's visit to Canada there are three groups of native people in the country: the first may be designated as status, registered or treaty Indians, the second, as Métis and non-status Indians, the third, as Inuits.

282. Status (registered, treaty) Indians, are native people who are members of a band and hold certain rights under the Indian Act of 1876, revised in 1951 and individual treaties.

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

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

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

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

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

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

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

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

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

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

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

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

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

296. The Status Indians are members of bands who hold in common certain reserve lands generally by virtue of written treaties, though treaties were not signed in all cases. Some of these band members have taken up residence off reserves; of the approximately 258,000 Status Indians, 166,000 live on reserves, and about 24,000 on Crown lands.

297. There are about 560 separate Indian communities or bands, which (with the exception of certain nomadic groups occupying the outlying and northern regions) are located on 2,200 reserves, varying in size from a few acres to more than 500 square miles.

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

299. All these Status Indians are listed in an Indian Register maintained by the Federal Government Department of Indian Affairs and Northern Development.

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

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

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

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

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

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

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

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

308. The fact that there is some degree of formal official recognition of this tripartite classification has been shown, for example, in the composition of the Indian Policy Review Commission in which - apart from the Congressional membership, there are three representatives of "recognized Indians", one representative of the "non-recognized Indians" and one of the "urban Indians".

309. There is no general legal (legislative or judicial) definition of an "Indian". For specific purposes there are, however, very numerous legislative or judicial determinations of who is an indigenous person, depending on the particular circumstances. 113/

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

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

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

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

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

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

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

314. Non-Recognized Indians are persons of native ancestry who may belong to a tribe, band or group, 114/ but who do not enjoy federal recognition as such because:

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

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

114/ A non-native person who has been formally adopted by a recognized tribe, band or group does not qualify for federal BIA services. It is not clear whether this person would be considered as a "non-recognized Indian" or as a "non-Indian". This question will be posed in the monograph on the United States requesting clarification.

(b) the tribe, band or group to which they belong has never obtained 115/ recognition by treaty or otherwise from the Federal Government;

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

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

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

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

318. Commenting on the essentially legal or quasi-legal nature of definition as indigenous or as non-indigenous in the United States, a non-governmental publication contains the following statement: 116/

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

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

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

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

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

116/ American Indian Law Newsletter, loc.cit., p.3.

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

321. The same publication contains the following statements: 118/

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

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

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

117/ American Indian Law Newsletter, loc.cit., p.3.

118/ Ibid., pp. 1-3.

322. The Government also stated that:

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

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

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

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

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

119/ Fulfilling our promises: the United States and the Helsinki Final Act. A Status Report. Compiled and edited by the Staff of the Commission on Security and Co-Operation in Europe, Washington, D.C., November 1979, pp. 148-149.

J. Change in status from indigenous to non-indigenous

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

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

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

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

329. The Government of Australia states:

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

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

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

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

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

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

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

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

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

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

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

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

337. In Malaysia the Aboriginal Peoples Ordinance, in Section 3 (1) (b), provides that if an Aborigine continues to follow an aboriginal way of life and aboriginal customs and continues to speak an aboriginal language, he shall not be deemed to have ceased

to be an Aborigine, even if he has been converted to any non-aboriginal religion, or, for any other reason, has ceased to adhere to aboriginal beliefs (Section 3(2)). It follows then, a contrario, that an Aborigine who for any reason ceases to adhere to aboriginal beliefs and ceases to follow aboriginal customs and ways of life, and does not speak an aboriginal language any more, shall be deemed to have ceased to be an Aborigine.

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

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

> "Much confusion has arisen in recent years due to the rather indiscriminate use of the two words, tribe and caste, which are the special features of the social organization of India. These words have been used by many as synonymous and therefore many tribes have been described as castes while a number of castes have received tribal designation.
>
> "The minimum definition of a tribe as suggested by W.J. Perry "is a group speaking a common dialect and inhabiting a common territory". The definition that we find in current literature on the subject is that given in the Imperial Gazette and may be stated thus: a tribe is a collection of families bearing a common name, speaking a common dialect, occupying or professing to occupy a common territory and is not usually endogamous, though originally it might have been so. A caste in its simple sense is also a collection of families bearing a common name, occupying or professing to occupy a common territory and very often speaking the same dialect, though it is always endogamous. When the same caste is found in two geographical areas, speaking different dialects, there is no social relationship between them and no intermarriage takes place, so that the groups may be taken as distinct castes though with the same appellation.
>
> "From very early times, there has been a gradual and insensible change from tribe to caste and many are the processes of conversion from tribe to caste. The lower castes of today, most of them had a tribal origin. Risley describes four processes by which transformation of tribes into castes is effected. The processes may be stated thus: (1) The leading men of an aboriginal tribe, having somehow got on in the world and become independent landed proprietors, manage to enrol themselves in one of the more distinguished castes. They usually set up as Rajputs, their first step being to start a Brahmin priest who invents for them a pedigree hitherto unknown. (2) A number of aborigines embrace the tenets of a Hindu religious sect, losing thereby their tribal name. (3) A whole tribe of aborigines or a large section of a tribe enrol themselves in the ranks of Hinduism, under the style of a new caste which though claiming an origin of remote antiquity is readily distinguishable by its name. (4) A whole tribe of aborigines or a section thereof, become gradually converted to Hinduism without abandoning their tribal designation. To these four processes may be added a fifth in which an individual member of an aboriginal or semi-aboriginal tribe adopts a surname and gotra of a particular caste, manages to enrol himself as a member of that particular caste...". 120/

120/ D.N. Majumdar, Races and Cultures of India. Bombay, Calcutta, New Delhi, Madras. 1958. pp.355-358.

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

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

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

343. The Government has communicated that:

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

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

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

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

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

121/ See the last paragraph of the legal definition quoted in para. 274 above.

122/ See subparagraph (b) in the first paragraph of the legal definition quoted in para. 274 above.

123/ The content of this paragraph has also been quoted in para. 301 above.

348. An Indian woman who marries a person who is not an Indian must give up her Indian status (though white women marrying Indian men are added to the rolls as persons having Indian status). 124/

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

350. A similar case (the Lovelace case) was brought before the Human Rights Committee for its views under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights. The facts of the case (Communication No. R. 6/24) showed "that Sandra Lovelace has been denied the legal right to reside on the Tobique Reserve. On 30 July 1981 the Committee adopted the view that there had been "a breach by Canada of Article 27 of the Covenant". A member of the Committee expressed his individual view that in the case "articles 2 (paragraph 1), 3, 23 (paragraphs 1 and 4) and 26 of the Covenant" had also been breached "for some of the provisions of the Indian Act are discriminatory particularly as between men and women". In the course of the case, statistics furnished by Canada showed that from 1965 to 1978 on an average 510 Indian women married non-Indian men each year. Marriages between Indian women and Indian men of the same band during that period were 590 on the average each year. Between Indian women and Indian men of a different band, 422 on the average each year, and between Indian men and non-Indian women, 448 on the average each year. 125/

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

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

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

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

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

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

125/ Report of the Human Rights Committee on its Eleventh, Twelfth and Thirteenth sessions. Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), Communication No. R.6/24, annex XVIII, pp. 166-167.

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

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

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

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

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

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

126/ American Indian Law Newsletter, loc. cit. pp.3-5

127/ Ibid.

128/ Ibid., pp. 9-10

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

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

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

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

356. The American Indian Law Newsletter has also included the following information:[129]

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

K. Change in status from non-indigenous to indigenous

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

129/ Ibid., page 5.

358. In this respect, the Australian Government has stated:

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

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

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

> "The main problem in defining which persons are descended from members of indigenous groups is whether or not such ancestry makes them eligible for Federal (Central Government) services. Only certain indigenous groups have a treaty or other relationship with the Federal Government which makes their membership eligible for special services. All other descendants of indigenous peoples are eligible for all general Federal programs available to any person in the general population regardless of race and have all their local services provided by the State and locality in which they live".
>
> "Thousands of people in the United States have some degree of Indian blood. Generally, unless an individual has at least one parent who is legally entitled to membership in a Federally-recognized Indian tribe he cannot qualify for membership or for Federal services available solely to Indians, or to share in the assets of an Indian tribe. Sometimes, however, an individual with Indian blood who may be qualified to be an enrolled member of a specific tribe may not have taken the necessary steps to prove this. If and when he or she takes the initiative to prove his or her eligibility for membership and becomes an enrolled member of an American Indian tribe with a Federal relationship, he or she becomes entitled to special services reserved to it".

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

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

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

364. In Canada, as has been stated, white women who marry Indian men are entered on the Indian Register and acquire Indian status.

365. It would appear that in Guyana persons having ceased to be legally considered Amerindians and consequently, as not being entitled to the relevant privileges, may come again to be considered as Amerindians and return to enjoy the corresponding privileges. This would be the case of an Amerindian woman, after the death of her non-Amerindian husband or after having discontinued cohabitation with her de facto husband, etc.

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

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

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

369. From the definition adopted in its 1959 report by the Select Lapp Committee reading "Anyone who possesses Lappish as his mother tongue and/or regards himself as a Lapp is considered to be a Lapp", it may be concluded that in Norway a person who has not previously regarded himself as a Lapp could come to regard himself as a Lapp, and therefore, come to be considered as a Lapp. It is unclear whether a person not having Lappish ancestry could so proceed. It seems that, for certain sectors of social opinion, a person with Lapp ancestry will always be a Lapp, in accordance with the above-mentioned catch phrase "Once a Lapp, always a Lapp". 130/

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

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

372. Thus, according to the information provided in 1979 as a comment on the draft summary of the information relating to Costa Rica, the Government of that country states that "An indigenous person never loses his status in so far as he retains it in his heart of hearts". This may be solely subjective, because of the pressures or circumstances of his environment, for example, "when a person who has considered himself to be indigenous subjectively loses his indigenous status, as in the case of some

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130/ Information furnished by the Government in this respect has been quoted in para. 334 above.

students or [persons engaged] in entrepreneurial activities who do not wish to feel inferior, because of a wrong understanding of the term indigenous in that environment. This change is not always final, because there are cases "of indigenous groups which have become acculturated but who, on becoming aware of the value of their own origins, demand to be considered as indigenous groups, under the rights established in the existing laws, even though previously they preferred to be considered 'non-indigenous'".

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

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

L. Registration and certification

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

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

377. The Government states that:

> "Indigenous status is proved by a certificate issued by the Institute of Indian Development. If the Institute refuses this certificate, the person concerned may then appeal to the competent Indian Court, which will render a short summary judgement, after hearing the views of the Institute.
>
> "Nevertheless, anyone desiring to do so may challenge in a court of law another person's status as indigenous, even though this person may have a certificate from the Institute; and the Court shall rule after hearing the views of the Institute".

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

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

380. The Government states:

> "The determination of membership of an individual in a cultural minority is made by a Government agency known as Commission on National Integration which makes the formal certification to the fact, upon the person's formally expressed will and submission of the required documents. The laws defining minority groups are used as criteria for the issuance of certifications".

381. Registration is very important in Canada, as upon being inscribed on the Indian Register persons acquire Indian status as Status or Registered Indians. This is a key aspect of the legal definition quoted above which requires, either "being registered" as an Indian, or "being entitled to be registered" as an Indian. 131/

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

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

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

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

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

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

131/ See paras. 292 to 295 above.

132/ See paras. 292 to 299 above.

133/ See para. 295 above.

134/ See paras. 294 and 299 above.

135/ See paras. 282-285 above.

136/ See paras. 347-350 above.

137/ See paras. 298 and 302 above.

138/ See paras. 283 and 285 above.

388. Registration may be deemed to be required in India in the sense that, under the conditions specified above 139/, the Schedules Tribes have to be specified by public notification by the President, or, by law, by Parliament, in order to be considered as such.

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

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

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

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

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

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

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

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

139/ See para. 115 and footnote 44/ above, and paras. 84 to 89 in chapter VII.

140/ See para. 83, chap. VII.

141/ See paras. 283 and 299 above.

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

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

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

142/ See paras. 53, 309, 311, 312 and 323 above.

143/ See para. 115 and foot-note 44/ above, as well as paras. 84-89, chap. VII.

144/ See para. 389 above and para. 83, chap. VII.