

A Guide to
Indigenous Peoples' Rights
in the International Labour Organization

Fergus MacKay
Coordinator, Legal/Human Rights Programme
Forest Peoples Programme

Indigenous peoples throughout the world continue to suffer serious abuses of their human rights. Their lands, in particular, are threatened by logging, mining, roads, conservation activities, dams, agribusiness and colonisation. Although many states have laws which recognise and protect indigenous peoples' rights, these are often violated or simply inconsistent with international human rights law.

The International Labour Organization (ILO), a specialised agency of the United Nations, has developed international agreements and mechanisms designed to address these very real problems.

This report provides guidance on how to file a complaint with the ILO's Governing Body. Illustrations are given of relevant cases and decisions, and concrete examples of how a case can be moved through the system. There is also a summarised review of the specific rights protected under the two ILO Conventions most relevant to indigenous peoples: ILO 107 and ILO 169.

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Also available in paperback from:
Forest Peoples Programme
1c Fosseyway Business Centre
Stratford Road
Moreton-in-Marsh
GL56 9NQ
UK
info@fppwrn.gn.apc.org



Forest Peoples
Programme

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Summary

Indigenous peoples throughout the world continue to suffer serious abuses of their human rights. In particular, they are experiencing heavy pressure on their lands from logging, mining, roads, conservation activities, dams, agribusiness and colonisation. Although many states have laws which recognise and protect indigenous peoples' rights, to varying degrees, these laws are often violated. In other cases, adequate laws are not in place. Also, in many states, national laws are inconsistent with the binding obligations of these same states under international human rights law.

The International Labour Organization, a specialised agency of the United Nations, has developed international agreements and mechanisms designed to address these very real problems. These agreements place **binding** obligations on the states that have ratified them. The ILO has also put in place a procedure to allow indigenous persons to complain if they believe that their state is not fulfilling these obligations. The ILO's Governing Body is competent to receive and review these complaints. It has looked at a number of cases involving indigenous peoples in the past, which have resulted in jurisprudence recognising indigenous rights. This jurisprudence include the rights of indigenous peoples, among others:

- ❑ To lands, territories and resources traditionally occupied and used, and to a healthy environment;
- ❑ To protection of sites of cultural and religious significance;
- ❑ To cultural and physical integrity;
- ❑ To meaningful participation in decisions that affect them;
- ❑ To maintain and use their own cultural, social and political institutions;
- ❑ To be free from discrimination and to equal protection of the law.

This Briefing paper provides guidance on how to file a complaint with the ILO's Governing Body. Summaries of relevant cases and decisions that have already passed through the system are also included*. These cases and decisions show how the system deals with indigenous rights and provide concrete examples of how a case can be moved through the system as a way of illustrating some of the points made in the section on how to submit a petition. It also summarises what rights are protected under the two ILO Conventions most relevant to indigenous peoples.

We hope that this Briefing will provide indigenous peoples with a better understanding of their rights and encourage them to use these international procedures to gain redress. We also hope it will help spur states throughout the world to reform their domestic laws and judicial procedures so that they provide **effective and meaningful** protections for the rights of the indigenous peoples within their jurisdictions.

* Please note that the details given in this guide include an assessment of developments up until mid-2002 and do not take into account events at the ILO since that date.

I Introduction

Indigenous peoples' rights have assumed an important place in international human rights law and a discrete body of law confirming and protecting the individual and collective rights of indigenous peoples has emerged and concretised in the past 20 years. This body of law is still expanding and developing through indigenous advocacy in international fora; through the decisions of international human rights bodies; through recognition and codification of indigenous rights in international instruments presently under consideration by the United Nations and Organization of American States; through incorporation of indigenous rights into conservation, environmental and development-related instruments and policies; through incorporation of these rights into domestic law and practice; and through domestic judicial decisions. Taken together, this evolution of juridical thought and practice has led many to conclude that some indigenous rights have attained the status of customary international law and are therefore generally binding on states.¹

International bodies mandated with protection of human rights have paid particular attention to indigenous rights in recent years. These bodies have contributed to progressive development of indigenous rights by interpreting human rights instruments of general application to account for and protect the collective rights of indigenous peoples.² Even the African Commission on Human and Peoples' Rights, by far the weakest human rights body, has begun to address indigenous peoples' rights by taking the important step of establishing a working group on indigenous peoples in Africa.³ The UN Committee on the Elimination of Racial Discrimination, the UN Human Rights Committee, the International Labour Organization's Committee of Experts and the Inter-American Commission on Human Rights all stand out in this respect.

Despite these advances in international law, violations of indigenous rights are all too common. Much of this abuse is associated with heavy pressure to exploit the natural resources in indigenous peoples' territories. Indigenous peoples in tropical forest areas have suffered especially severely from this intensifying pressure on their lands, which is

¹ See, among others, S.J. Anaya, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (Oxford and New York: OUP, 1996), at 49-58, 107; S. Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harv. Human Rights J.* 57 (1999), at 128; R. Torres, *The Rights of Indigenous Peoples: The Emerging International Norm*, 16 *Yale Journal Int'l Law* 127; and C. Iorns Magallanes, *International Human Rights and their Impact on Indigenous Peoples' Rights in Australia, Canada and New Zealand*. In, P. Havemann (ed.) *INDIGENOUS PEOPLES' RIGHTS IN AUSTRALIA, CANADA AND NEW ZEALAND*. (Auckland: OUP, 1999), at 238, 242; and, S.J. Anaya & R. Williams, *The Protection of Indigenous Peoples' Rights over Land and Natural Resources under the Inter-American Human Rights System*. 14 *Harv. Hum. Rts. J.* 33 (2001).

² Instruments of general application refer to those human rights instruments applying to all persons rather than instruments focused exclusively on the rights of indigenous peoples.

³ African Commission on Human and Peoples' Rights, *Resolution on the Rights of Indigenous People/Communities in Africa*, Cotonou, Benin, 6 November 2000. The mandate of the Working Group is described in the resolution as to: 'examine the concept of indigenous people and communities in Africa; study the implications of the African Charter on Human Rights and well being of indigenous communities especially with regard to: the right to equality (Articles 2 and 3) the right to dignity (Article 5) protection against domination (Article 19) on self-determination (Article 20) and the promotion of cultural development and identity (Article 22); [and to] consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities'.

resulting in rapid deforestation as a result of logging, mining, agricultural expansion, colonisation and infrastructure projects. Environmental conservation initiatives also often do not account for indigenous rights. Further, many of the international developments related to indigenous rights have yet to be translated into concrete changes at the national and local levels. National laws in many countries, for instance, continue to be substantially at odds with international human rights standards.

This *Guide to Indigenous Peoples' Rights in the International Labour Organization*, one of a series produced by the Forest Peoples Programme, aims to provide indigenous peoples and organisations with practical information to support their effective use of the ILO's human rights mechanisms and procedures for the vindication of their rights.⁴ While these procedures are far from perfect and certainly will not remedy all human rights problems, their use by indigenous peoples has led to concrete gains at the national and local level in the past and can be expected to continue to do so in the future. Their use also further reinforces and develops indigenous rights norms at the international level, which provides additional strength to local and national advocacy and reform efforts.

The Guide provides an overview of the institutions and instruments of the ILO, especially ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) (Parts II-V). It then discusses the procedures and requirements for filing complaints with the ILO's Governing Body and summarises the jurisprudence of the Committee (Part VI). Finally, as most of the states parties to ILO 169 are Central and Latin American states, it concludes with a short section on the relationship between the ILO instruments on indigenous peoples and the instruments and bodies of the Inter-American human rights system.

⁴ Guides have also been written on the UN Human Rights Committee, the Inter-American Commission and Court on Human Rights and the African Commission on Human and Peoples' Rights.

II The International Labour Organization

The ILO was founded in 1919 as a specialised agency of the League of Nations, the predecessor of the United Nations. It was the first international organisation devoted to the protection of human rights. Today, the ILO is a specialised agency of the United Nations with headquarters in Geneva and offices throughout the world. It is unique among international organisations in that its Constitution recognises the membership, with attendant voting privileges, of non-state actors – workers’ and employers’ delegations – in addition to states.

The ILO’s tripartite membership structure accords workers’ organisations, or ‘industrial associations’ as they are called by the ILO, a substantial voice in the ILO’s decision-making process. In practice, however, the states’ and employers’ delegations often vote together lessening the impact of the workers’ delegations vote. Nonetheless, the workers’ delegations have exercised some influence in the ILO, in particular acting on behalf of indigenous peoples during the drafting of ILO 169.

The ILO’s institutional structure is also tripartite. Its three organs are: the International Labour Office, the Governing Body and, the General Conference of representatives of member states, or the International Labour Conference as it is usually called.

III The ILO and Indigenous Peoples

Until the 1970s, the ILO was the only member of the UN system to have consistently expressed an interest in indigenous peoples' rights. This was in large part due to widespread exploitation of indigenous labour, that continues to the present day in certain countries. The ILO began to study the condition of indigenous workers as early as 1921; a Committee of Experts on Native Labour was established in 1926; a number of early Conventions addressed the situation of indigenous workers (Convention No. 29 in particular) and; in 1953, the ILO published a comprehensive reference work entitled *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries*.

Most recently, the ILO has implemented a project entitled 'Project to promote ILO policy on Indigenous and Tribal peoples' that seeks to increase awareness of ILO standards related to indigenous peoples and a project known as the 'Inter-regional programme to support self-reliance of Indigenous and Tribal communities through co-operatives and self-help'. The former was conducted primarily in Asia and Africa,⁵ the latter in India, the Philippines, Thailand, Vietnam, West Africa and Central America.

The ILO also adopted the first international instrument to exclusively address indigenous peoples' rights in 1957 – The Indigenous and Tribal Populations Convention (ILO 107). The stated aim of ILO 107 was and remains the integration and assimilation of indigenous peoples into the states in which they live. It attempts to balance its integrationist emphasis with certain protective measures. However, the explicit emphasis on assimilation and integration of indigenous peoples, often taking precedence over the protective measures, generated considerable criticism and outright rejection by many indigenous peoples. Due to this lack of respect for indigenous culture and identity, the Convention became an 'embarrassment' to the ILO, and therefore, in 1986, it was decided that it should be revised according to the principle that indigenous peoples should 'enjoy as much control as possible over their own economic, social and cultural development'.⁶ In 1989, after a two-year revision process, ILO Convention No. 169, Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169) was adopted by the International Labour Conference in Geneva.

⁵ Cambodia, India, Laos, Thailand, Vietnam, Cameroon, Kenya, Namibia, South Africa and Tanzania.

⁶ H.R. Berman, *The ILO and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988*, 41 *Int'l Comm'n of Jurists Rev.* 48, 48-9 (1988).

IV ILO Convention No. 107 ⁷

While ILO 107 has been superseded and replaced by ILO 169, it remains in force for those countries which ratified it but have not ratified ILO 169.⁸ Therefore, for indigenous peoples in those countries, ILO 107 remains a source of rights that the state is obligated to respect. As noted above, the Convention's assimilationist focus also remains a cause for concern in those countries. Consequently, this section will briefly note some of the main elements and guarantees contained in ILO 107.

According to the ILO, 'When Convention No. 107 was adopted, indigenous and tribal peoples were seen as 'backward' and temporary societies. The belief at the time was that, for them to survive, they had to be brought into the national mainstream, and that this should be done through integration and assimilation'.⁹ Integration and assimilation, however, were tempered by provisions aimed at protecting indigenous and tribal peoples during their transition to membership of mainstream society. This general principle is elaborated upon in Articles 2-5 of the Convention. Articles 2 and 3, for instance, read:

Article 2

1. Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.
2. Such action shall include measures for--
 - (a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population;
 - (b) promoting the social, economic and cultural development of these populations and raising their standard of living;
 - (c) creating possibilities of national integration to the exclusion of measures tending towards the artificial assimilation of these populations.
3. The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.
4. Recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded.

Article 3

⁷ The full text of ILO 107 is contained in Annex B.

⁸ The following states have ratified ILO 107, but not ILO 169: Angola, Bangladesh, Belgium, Brazil, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syria and Tunisia.

⁹ *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual*. International Labour Office (Project to Promote ILO Policy on Indigenous and Tribal Peoples), Geneva, 2000, at 4.

1. So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.

2. Care shall be taken to ensure that such special measures of protection--

(a) are not used as a means of creating or prolonging a state of segregation; and

(b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures of protection.

One of ILO 107's most important provisions is Article 11 concerning land rights, which provides that 'The right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized'. In interpreting this article in a complaint involving tribal people in India, the ILO Committee of Experts, the body mandated with oversight of state compliance with ILO Conventions, held that the rights that attach under Article 11 also apply to lands presently occupied irrespective of immemorial possession or occupation. India had unsuccessfully argued that the phrase 'traditionally occupy' limits compensable land rights to groups which can demonstrate immemorial possession. The ILO Committee stated that the fact that the people has some form of relationship with land presently occupied, even if only for a short time was sufficient to form an interest and, therefore, rights to that land and the attendant resources.¹⁰

As with ILO 169, indigenous and tribal peoples living in countries that have ratified ILO 107 may seek enforcement of their rights by approaching the ILO's Governing Body. The same procedures that apply to ILO 169, discussed in Section VI below, also apply to petitions submitted in relation to ILO 107.

¹⁰ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(4A), at 287, International Labour Conference, 75th Session, Geneva (1988).

V ILO Convention No. 169¹¹

A Introduction

This section provides an overview of the main principles and provisions of ILO 169. ILO 107 was formally revised and replaced in 1989 with the adoption of ILO 169 (*Article 36, ILO 169*). As of July 2002, it has been ratified by 16 states: Mexico, Denmark, Ecuador, Fiji, Norway, Venezuela, Argentina, Costa Rica, Colombia, Honduras, Peru, The Netherlands, Guatemala, Bolivia, Dominica and Paraguay. The following states have submitted it to their national legislatures for ratification or are discussing ratification: Brazil, Chile, Philippines, Finland, El Salvador, Panama, and Sri Lanka.

It should be noted at the outset, that ILO 169 has its problems and has been severely criticised by many indigenous peoples, particularly concerning its lack of self-determination language; weak provisions on lands, territories, resources and relocation; lack of a consent standard; and the absence of meaningful indigenous participation in the revision process (see, Box below). Also, ILO 169 should be viewed as an absolute minimum statement of indigenous rights; this is particularly apparent in comparison with the UN Draft Declaration. Nonetheless, a number of indigenous peoples' organisations are promoting the ratification of ILO 169 in those countries where indigenous peoples have expressed a desire to do so.¹² There are a number of reasons for this:

First, and most importantly, for indigenous peoples in certain states ratification of ILO 169 will be a major step forward for the protection of their rights as national laws are presently sub-standard, unenforced or even hostile. At a minimum, ratification of ILO 169 provides international oversight and a measure of transparency to indigenous-state relations, consultations and negotiations that were previously entirely within the jurisdiction of the state and addresses a number of concerns in a relatively positive manner.

Second, and equally importantly, for those states that have not ratified ILO 169, but have ratified ILO 107, the latter remains in force with its disrespect for indigenous culture and identity intact. For those peoples in states with national legislation of a higher standard than ILO 169, ratification will in no way prejudice the enjoyment of those rights over and above ILO 169's standards. This is explicitly stated in Article 35, which says that the application of ILO 169 'shall not adversely affect the rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties or national laws, awards, customs or agreements'.

¹¹ The full text of ILO 169 is in Annex C.

¹² The following international indigenous organizations are actively promoting the ratification of ILO 169: the Inuit Circumpolar Conference, the National Indian Youth Council, the Saami Council and the World Council of Indigenous Peoples. Additionally, many national indigenous organizations are promoting ratification in their respective states: Guyana, Suriname, the Philippines and India, for instance.

Third, ratification of ILO 169 provides access to the ILO's reporting and monitoring procedures, which are among the best available. States-parties to the Convention must report on a regular basis to the ILO Committee of Experts on the Application of Conventions and Recommendations, on steps taken to implement and maintain compliance with its terms. In fact, even member-states of the ILO that have not ratified the Convention must report on the reasons for not doing so.¹³ Additionally, complaints may be submitted to the ILO by interested parties, in certain cases including indigenous peoples, informing the ILO of perceived violations. See Section VI, below, for more detailed information on the ILO reporting and complaints procedures.

Finally, the language of ILO 169 is relatively imprecise, permitting flexible interpretations of its provisions. Therefore, ILO 169 can be either interpreted expansively, increasing the scope of its provisions, or restrictively, having the opposite effect. Consequently, it is important for indigenous peoples to participate in any process that involves the interpretation of the convention, particularly in the Committee of Experts to ensure the most favourable interpretation of the standards contained therein.

The Resolution of the Indigenous Peoples' Preparatory Meeting – Geneva, (1989), severely criticised ILO 169.

The resolution:

1. Calls upon indigenous peoples all over the World to seize every opportunity to condemn the ILO and the revision process.
2. Calls upon states not to ratify the revised Convention.
3. Calls upon indigenous peoples to monitor the ILO and governments in the implementation of the Convention.
4. Calls upon support groups of indigenous peoples to urge states not to ratify the Convention and to publish lists of governments who ratify the revised Convention.
5. Calls upon members of the Working Group and the Sub-commission on the Prevention of Discrimination and Protection of Minorities to condemn the racist revision.
6. Calls upon the Working Group to monitor the implementation of the revised Convention.
7. Calls upon governments and human rights experts involved in the process of drafting of the Declaration on the Rights of Indigenous Peoples not to repeat the mistake of the ILO.
8. Calls upon the Working Group, the Sub-commission and governments to disregard the terms of the revised Convention in the process of achieving a meaningful development on the draft Declaration on the Rights of Indigenous Peoples.

¹³ ILO CONST. Article 19.5.

B The Convention

The primary purpose of ILO 169, as stated during the revision process, is to ‘recognize the principle of respect for the identity and wishes of the [indigenous peoples] concerned and to provide for the increased consultation with, and participation by, these populations in decisions affecting them’. Thus, there is an emphasis on the participation of, and consultation with, indigenous peoples, particularly concerning development-related activities. However, the consent of the indigenous people(s) concerned is not required, rather the goal of consultations is simply to attempt to achieve a good faith agreement between the parties.

ILO 169 is one of the ILO’s procedural conventions. Therefore, the Convention primarily recognises procedural rights rather than substantive rights. In other words, ILO 169 sets forth procedures that the state is required to follow and comply with in relation to indigenous peoples. Consequently, the Committee of Experts is more interested in whether the state has followed the correct procedures (i.e. consultation, participation, environmental impact assessments) than the result of its actions. Exceptions to this include Article 14, which requires that the state recognise and respect the rights of indigenous peoples to own and use their lands traditionally occupied and used. This is a substantive right that requires that the state produce a concrete result.

ILO 169 includes: rights to participate in the formulation of legislation; certain rights to internal autonomy, including economic, social and cultural development; respect for certain aspects of indigenous customs or customary laws; rights to lands and territories, including use rights, traditional economic activities and the use of natural resources; protection from relocation and; broad based cultural rights – religious, linguistic and educational.

1 Interpretation

With regard to interpretation of the Convention, two points should be made. First, the *travaux préparatoires*¹⁴ and the Reports of the Committee of Experts are indispensable guides to the background and content of the various provisions of the Convention.¹⁵ These reports can and should be used to clarify the language of the Convention’s provisions.

Second, many of the provisions of the Convention overlap and inform the content and scope of other provisions. Therefore, when reading a particular provision of the Convention, constant reference should be made to the general principles of participation, consultation and respect for indigenous culture and institutions as well as any other related

¹⁴ The term ‘*travaux préparatoires*’ refers to the all background documents that were used in the negotiation and drafting of an international instrument. The *travaux préparatoires* for ILO 169 are contained in, among others, *Reports of the Committee on Convention No. 107* for the years 1988 and 1989 (Provisional Record 32, International Labour Conference, 75th Session (1988) and, Provisional Record 25, International Labour Conference, 76th Session (1989).

¹⁵ See, for example, *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, International Labour Conference, 82nd Session, 1995, Report III (Part 4A) (International Labour Office, 1995), 398-99 for ILO 169 and 288-91 for ILO 107

articles. These general principles (PART I. GENERAL POLICY and others) can be informative as to the correct reading of the specific principles, particularly if they are being interpreted restrictively. These general principles include:

Article 2(1). Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:

(a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;

(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3(1). Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

Article 4(1). Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely expressed wishes of the peoples concerned. (emphasis added)

Article 5. In applying the provisions of this convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, **with the participation and co-operation of the peoples affected.** (emphasis added)

Article 6(1). In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and **in particular through their representative institutions**, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, **to at least the same extent as other sectors of the population**, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, **in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent** to the proposed measures. (emphasis added) (Article 6)

Article 7(1). **The people concerned shall have the right to decide their own priorities for the process of development** as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, **and to exercise control, to the extent possible, over their own economic, social and cultural development.** (emphasis added)

Article 8(1). In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary law.

2. These peoples shall have the right to retain their own customs and institutions, where these are **not incompatible with fundamental rights defined by the national legal system and internationally recognized human rights.** (emphasis added)

Article 13(1). In applying the provisions of this Part of the Convention [PART II. LAND] governments shall respect the **special importance for the cultures and spiritual values** of the peoples concerned **of their relationships with the lands or territories**, or both as applicable, which they occupy or otherwise use, and in particular **the collective aspects** of this relationship. (emphasis added)

Article 33(1). The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfillment of the functions assigned to them.

2. These programmes shall include:

(a) the planning, co-ordination, execution and evaluation, **in co-operation with the peoples concerned**, of the measures provided for in this Convention

(b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, **in co-operation with the peoples concerned.** (emphasis added)

Two points should be made about Article 6. First, the ILO has read the language 'to at least the same extent as other sectors of the population' (Article 6(b)) to mean that

indigenous peoples are entitled to special means of direct representation not necessarily conferred on other citizens.¹⁶ Second, the language ‘[t]he consultations carried out . . . shall be undertaken in good faith . . . with the objective of achieving agreement or consent’ does not require that agreement or consent be obtained, **only that agreement or consent should be the objective of the consultations.**¹⁷ It required this clarification by the ILO secretariat for this language to be adopted over the objections of certain government representatives who feared that any reference to consent could be construed as a veto power. What can be said of this provision, however, is that it requires consultation and negotiation ‘in good faith’, and ‘in appropriate form’ with indigenous representative institutions before the adoption of legislative and administrative measures. These consultations and negotiations are also subject to ILO oversight where they can be challenged by indigenous peoples as violative either of Article 6 in general or of a specific clause contained therein.

In Article 8(2), the language ‘incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights’ should be interpreted as meaning that indigenous peoples should not deprive individuals of their basic rights as citizens, rather than total compliance with all rights defined under domestic law. We will now briefly look at the some of the specific provisions of ILO 169 – Parts II–VII.

2 Self-government and Autonomy

ILO 169 does not explicitly recognise a right to self-determination, autonomy or self-government for indigenous peoples. In fact, the ILO declared itself incompetent to recognise the right to self-determination, which it felt should be left to a UN body with the requisite authority. Therefore, while the Convention does use the term ‘peoples’, it also includes qualifying language stating that the use of that term ‘shall not be construed as having any implications as regards the rights which may attach to the term under international law’ (Article 1(3)).

The general principle is stated above, but we will repeat it here for emphasis. Again, this principle should be referred to in connection with the specific provisions contained elsewhere in the Convention.

The people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. (Article 7(1))

What does this mean? Basically, this provision recognises that indigenous peoples have the right to some measure of self-government with regard to their institutions and in determining the direction and scope of their economic, social and cultural development.

¹⁶ *Report of the Committee on Convention No. 107*, Provisional Record 32, para. 77, International Labour Conference, 75th Session (1988)

¹⁷ R.L. Barsh, *An Advocates Guide to the Convention on Indigenous and Tribal Peoples*, 15 *Okla. City Univ. L.R.* 209 (1990), at 219.

The precise scope of that internal autonomy is to be determined by reference to, among others: the participation provisions; the provisions on health services (Article 25(1) – ‘adequate health services . . . under their own responsibility and control’); education (Article 27 (2)(3) – ‘[t]he competent authority shall ensure the training of members . . . with a view to the progressive transfer of responsibility for conduct of [educational programmes]’ and ‘the right of these peoples to establish their own educational institutions’); vocational training (Article 22(3) – ‘these peoples shall progressively assume responsibility for the organisation and operation of such special training programs’); and especially to those concerning lands and territories (Articles 13-19) and indigenous institutions (Articles 7(1), 8(2) and 9).

The quality of the relationship between indigenous peoples and governments is also a determining factor in how the autonomy provisions of the Convention are applied in practice. A working, cooperative relationship based upon mutual respect and understanding can only enhance the quality and scope of the autonomy rights. In this regard, it is disappointing to say the least that the ILO chose to use such a weak standard – ‘with the objective of achieving consent’ – rather than free and informed consent or consent as is used in the UN Draft Declaration and elsewhere in ILO 169.

The Convention does not recognise a right to establish autonomous indigenous legal systems. However, should an indigenous community establish its own, autonomous legal system, it would appear that Articles 7(1) and 8(2) would require the state to justify any interference with its existence.¹⁸ The Convention does recognise the right to maintain indigenous customs and institutions, provided that these are not incompatible with national law or recognised human rights standards. It also requires that states must respect indigenous peoples’ customary methods for dealing with ‘offenses committed by their members’ and, that indigenous customs concerning ‘penal matters’ must be taken into consideration by the state’s law enforcement authorities (Article 9(1)(2)). The requirement of conformity with national law is extremely disappointing as it may severely hamper the effective development and operation of indigenous institutions.

3 Lands and Territories

ILO 169’s provisions on lands, territories and resources have justifiably been criticised by indigenous peoples as inadequate. Nevertheless, these provisions do contain a number of important protections over and above those presently found in certain domestic legal systems. These provisions are framed by Article 13(1) which requires that governments recognise and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories and especially ‘the collective aspects of this relationship’.

Article 14 recognises that indigenous peoples’ collective ‘rights of ownership and possession . . . over the lands which they traditionally occupy shall be recognized’ and that states ‘shall take steps as necessary to identify’ these lands and to ‘guarantee effective

¹⁸ *Id.*, at 223.

protection of [indigenous peoples'] rights of ownership and possession'.¹⁹ According to the ILO, the language 'lands which they traditionally occupy' includes 'lands where indigenous and tribal peoples have lived over time, and which they have used and managed according to their traditional practices. These are the lands of their ancestors, and which they hope to pass on to future generations. It might in some cases include lands which have been recently lost'.²⁰

Article 13(2) defines the term 'lands' as used in Articles 15 and 16 as inclusive of 'the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use'. This definition is stated in the present tense – 'occupy' and 'use' – and therefore, does not include historical claims to, or disputes over, lands and territories, although it would encompass lands recently occupied or used that indigenous peoples are not presently occupying or are denied access to. Also, indigenous peoples do not have to prove immemorial occupation of lands and territories, present or recent occupation is sufficient.

Furthermore, the fact that the Convention recognises rights to lands and territories, does not mean that these rights will always be full ownership rights. Rather the nature of the rights recognised is dependent on the circumstances and can be anywhere up to the highest form of land ownership recognised by the domestic legal system. Obviously, this means that recognition of full title to indigenous lands is not always going to be the result of ratification of ILO 169. Indeed, the extent of land rights recognised under the Convention are going to be determined, in large part, by reference to the domestic law of the state.

The Convention does, however, require that the state establish '**adequate procedures** . . . within the national legal system to resolve land claims' (emphasis added) (Article 14(3)).²¹ Additionally, the state is required to protect, 'in appropriate cases' the right of access to lands 'not occupied by [indigenous peoples], but to which they have traditionally had access for their subsistence and traditional activities' (Article 14(1)). Exactly what is meant by 'in appropriate cases' is unclear, although Article 23's protection of, and requirement that subsistence practices be strengthened, and Article 7(1)'s recognition of indigenous control over lands that they 'use' are informative. It is not encouraging that the only requirement placed upon the adjudication of land claims is that they be by 'adequate procedures', particularly given the history of abuse of indigenous land rights and claims

¹⁹ Compare this with the UN Draft Declaration, Article 26, which states that 'Indigenous peoples have the right to own, develop, control and use the lands and territories . . . and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation or encroachment upon these rights'.

²⁰ *ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual*. International Labour Office (Project to Promote ILO Policy on Indigenous and Tribal Peoples), Geneva, 2000, at 31.

²¹ Compare with the Draft Declaration, Article 27, which states that 'Indigenous peoples have the right to the restitution of the lands and territories which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

by domestic courts that claim to have adequate procedures and safeguards for all who come before them. This requirement does, however, provide a means of challenging the validity of land claims procedures in the Committee of Experts.

In accordance with Article 7(1)'s recognition of indigenous peoples' right to control their lands and territories and the provisions relating to respect for indigenous institutions, Article 17 requires that the state respect indigenous 'procedures established . . . for the transmission of land rights', and, consult with the peoples concerned 'whenever consideration is being given to their capacity to alienate or otherwise transmit their rights outside their own community'.

Indigenous peoples have the right to 'participate in the use, management and conservation' of natural resources pertaining to their lands and the right to have these resources 'specially safeguarded' (Article 15(1)). In cases where the state owns mineral or other sub-surface rights pertaining to indigenous lands and wishes to explore for or exploit these resources, it must 'establish or maintain procedures through which [it] shall consult these peoples' to determine the extent to which 'their interests would be prejudiced' prior to engaging in, or allowing these activities.²² The peoples concerned, 'wherever possible', must share in any benefits derived from these activities and receive compensation for any damages incurred. The provisions on, among others, environmental assessment (Article 7(3)), special measures to protect the environment (Article 4(1)) and the protection of natural resources (Article 15(1)) should also be referred to here.

It should be noted here, as with other provisions described above, that the Convention uses the standard 'consult' which is substantially weaker than the standard 'consent' or 'free and informed consent'. However, these 'consultations' must conform to Article 6(2)'s requirement that they be undertaken 'in good faith . . . in a form appropriate to the circumstances, with the objective of achieving agreement or consent'. Also, subject to Article 6(2), the state has the power to be the sole determiner of the phrase 'wherever possible'. This basically means that, subject to good faith consultation, the state can decide when indigenous peoples share in the benefits of the exploitation of their resources on their lands.

This provision is certainly one of the most inadequate and objectionable in the Convention. It completely fails to account for the devastating effects that resource exploitation operations have on many aspects of indigenous peoples' lives and well being. It is not coincidental that many of the petitions brought by indigenous peoples before international human rights complaints mechanisms involve human rights violations directly attributable to so-called development activities on and around their territories. The Convention does little more than place a number of extremely weak procedural hurdles in the way of the continued exploitation and destruction of indigenous lands and territories

²² Compare with the UN Draft Declaration, Article 30, which states that 'Indigenous peoples have the right . . . to require that states obtain their *free and informed consent* prior to approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact' (emphasis added).

by the state and authorised transnational corporations. Also, it is difficult to see how this provision relates to Article 13(1), that requires a recognition of and respect for the special spiritual and cultural relationship that indigenous peoples have with their lands and territories. The same also applies to Article 16, which does not strictly prohibit the relocation of indigenous peoples from their lands and territories.

4 Self-definition and Cross-border Contact

Article 1 of the Convention defines who are the indigenous and tribal peoples to whom the Convention applies. First, and most importantly, Article 1(2) states that '[s]elf-definition as indigenous or tribal shall be regarded as a (but not the) **fundamental criterion**' in determining to whom the Convention applies (emphasis added). The other criteria to be used are historical and socio-cultural: descent from occupants predating colonisation or establishment of state borders, maintenance of distinct cultural, social and political institutions and status as distinct from larger society.

Article 32 requires that states 'facilitate' cross-border contact and cooperation between indigenous and tribal peoples separated by international borders for activities in the 'economic, social, spiritual and environmental fields'. This article obligates the state to take positive steps, 'including international agreements' to provide cross-border access.

5 Conclusion

Although ILO 169 has some substantial deficiencies and inadequacies and is not an ideal instrument from the perspective of all indigenous peoples – indeed it is severely inadequate when measured against the benchmarks of control and consent – a reading of its provisions supports the conclusion that for many indigenous peoples it is a useful instrument. At worst, it provides some protection for rights not previously recognised or respected and some transparency to indigenous-state relations. However, if interpreted and implemented expansively, it provides for a functional, semi-autonomous, self-governing regime in which indigenous peoples can enjoy, albeit to a limited degree, some of the attributes of the right to self-determination – cultural rights, rights to lands, territories and natural resources, some measure of control over self-development and respect for indigenous customs and institutions, to name a few.

Also, at present, it is the only binding instrument on the rights of indigenous peoples that, on its face, departs from the paternalistic and assimilationist policies of the past and addresses a number of issues of concern in a positive way.²³ Furthermore, with ratification comes access to the ILO's relatively effective supervisory and oversight mechanisms in which indigenous peoples can raise concerns about their human rights situations and challenge state actions or policies. This is the subject of the next section.

²³ I say 'on its face', as persuasive arguments have been made that ILO 169 is merely a modified version of ILO 107 and maintains an essentially assimilationist approach. See, S. Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention No. 169*, 2 *WITHOUT PREJUDICE* 59 (1989).

The ILO has produced a manual on ILO 169, entitled *ILO Convention No. 169 on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual* (2000). It is available from ILO Geneva at the following address:

Project to Promote ILO Policy on Indigenous and Tribal Peoples
Equality and Employment Branch
International Labour Standards Department
4, Route des Morillons
CH-1211 Geneva 22
Switzerland

For a more comprehensive treatment of ILO 169, see, *Indigenous Peoples' Rights*, International Labour Organization, Multidisciplinary Team, San Jose, Costa Rica:
<http://www.ilo.org/public/english/region/ampro/mdtsanjose/indigenous/derecho.htm>

VI ILO Complaint and Oversight Mechanisms

A The Committee of Experts

State compliance with obligations assumed under the various ILO Conventions is monitored by two bodies: the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) and the Conference Committee on the Application of Conventions and Recommendations (Conference Committee). The Committee of Experts is composed of 20 independent experts representative of the regions and economic and political systems of the World. It meets annually in Geneva. The Conference Committee's membership is composed of delegations from the ILO's three groupings. It meets annually in Geneva during the session of the International Labour Conference.

As mentioned above, one of the benefits of ratifying ILO 169 is access to the ILO's reporting and monitoring procedure, which is one of the best available. The ILO regularly and systematically monitors the implementation of all of its ratified Conventions. It does this in a number of ways: first, by requiring states to report on steps taken to implement ratified Conventions (every 2–4 years). These reports are reviewed annually in the Committee of Experts. It also requires states to report on the reasons for not ratifying Conventions if they have not done so within one year of adoption by the ILO. Second, by receiving reports from workers' and employers' organisations operating in states that have ratified Conventions, as a supplement to information received from states. Third, and importantly, there is a complaints procedure which can be used to raise and address perceived violations of ratified ILO Conventions.

1 Reports

State reports on compliance with ILO Conventions are examined by the Committee of Experts. The Committee of Experts may respond in two ways when it perceives that states are not meeting their obligations under ratified Conventions. First, 'Direct Requests' are communicated to states, workers' and employers' organisations in the state in question. These Direct Requests ask for additional information and often make recommendations to the state on measures that should be taken to remedy violations of rights. Generally, most states comply with the Committee's recommendations and the matter goes no further. Second, in cases where the state does not comply or if serious and persistent violations are evident, the Committee may issue 'Observations' on the state's conduct, which are distributed to other states and published in the Committee's Report to the International Labour Conference.

The Conference Committee is responsible for examining the report of the Committee of Experts, from which it selects a number of cases for review. These cases generally represent what the Conference Committee considers to be examples of persistent violations or important cases. The Conference Committee then reports to the International

Labour Conference on states' performance. This report, and observations on the Report of the Committee of Experts, are published annually in the Proceedings of the International Labour Conference.

Another method used by the ILO to encourage and facilitate compliance with the obligations assumed under its treaties is 'Direct Contacts'. Direct Contacts essentially entail the provision of technical support from the International Labour Office or individual experts to governments to aid in the implementation of and respect for ILO Conventions. The aim of technical aid, should it be requested by a state or consented to subsequent to initiation by the ILO, is to make recommendations and to find solutions to problems involved with implementing or respecting rights defined in a ratified Convention. For instance, if a state is remiss in implementing or respecting the protections of indigenous lands and territories defined in ILO 169, the ILO may, for example, aid in designing legal reforms or strengthening indigenous land management institutions or a combination thereof. One advantage for states in agreeing to, requesting and complying with Direct Contacts is that they are able to avoid public criticism – a strong incentive.

2 Complaints and Representations

There are four main complaints procedures that can be used in the ILO system: Representations (*ILO CONST., Article 24*); Complaints (*ILO CONST., Article 26*); Freedom of Association complaints and; Special Surveys on Discrimination in Employment. These procedures are subject to relatively few procedural requirements, thereby facilitating easy access and reducing the need for technical support. While all of these procedures may be of some use, Article 24 – Representations, and to a much lesser extent, Article 26 – Complaints, are the most useful for indigenous peoples in those states that have ratified ILO 107 and 169. Consequently, we will discuss only those procedures here.

Under Article 24, any 'industrial association' can submit Representations to the ILO. The definition of an industrial association is flexible, including trades-unions, local, national or international associations. indigenous peoples' organisations, campesinos' unions and cooperative associations that represent farmers, fishers, artisanal workers or other indigenous workers, may also be included in this category. Also, Article 26 – Complaints, can be instituted by a delegate to the International Labour Conference. This most likely would be a representative of a Workers' delegation, who may also be an indigenous person. Therefore, indigenous peoples may have direct access to the ILO to raise issues concerning violations of the rights defined in ILO 169. Furthermore, the organisation submitting the Representation need not have a factual connection with the situation described in the Representation. Thus, the relatively few procedural obstacles and the possibility of direct access or coordination with Workers' organisations, that have been helpful to indigenous peoples in the past, provides an opportunity to have grievances examined in an international forum.

a Article 24 – Representations

Representations may be filed against any member-state of the ILO that has ratified an ILO Convention and is perceived to have failed to meet its obligations as defined under that Convention. If the state concerned is not a member-state of the ILO, the fact that it is bound by a Convention will suffice. The Representation may be submitted by any industrial association of workers or employers. Representations are investigated by the Governing Body of the ILO, whose membership structure is 50% state representatives and 50% workers' and employers' representatives. The procedure governing receipt and examination of Article 24 representations is set out in the Standing Orders of the Governing Body **concerning the procedure for the examination of representations under articles 24 and 25 of the ILO Constitution**. These Standing Orders are repeated in Annex A to this document.

The ILO has very loose admissibility requirements. To be declared admissible a Representation must include the following (*Article 2, Standing Orders*). It must:

- 1 be in writing and in a widely used language;
- 2 be submitted by an industrial or employers' association – some description of the organisation should be included as evidence of its status;
- 3 concern a member-state of the ILO or a state bound by an ILO Convention (if not a member);
- 4 make specific reference to Article 24 of the ILO's Constitution;
- 5 concern an ILO Convention ratified by the state in question and the Convention must be in force for that state;²⁴ and,
- 6 allege that the state has failed to respect the rights defined in a ratified ILO Convention; this should include, although not required, information and documentation to substantiate the claim.

After a Representation has been found admissible, the Governing Body will appoint a special committee from amongst its members to examine the allegations. The special committee will, at this point, request a response from the state concerned and may request further information, if needed, from the submitting organisation. The special committee then forms an opinion and communicates it and any recommendations to the Governing Body.

Based upon the opinions of the special committee and the information received from the parties, the Governing Body will reach a decision as to whether a violation has or has not occurred. If the Governing Body finds that the state has not violated the terms of the Convention, the proceeding is terminated. If it finds against the state, it can publish the

²⁴ Reservations are not permitted to ILO Conventions, therefore, this factor need not be addressed when contemplating submitting an Article 24 Representation.

Representation, along with its opinion and the other supporting documents. It may also decide to establish a Commission of Inquiry to examine the Representation under Article 26's Complaints procedure (see below).

The findings of the Governing Body are followed up by the Committee of Experts and the Conference Committee to oversee state compliance with the decision. This may include use of Direct Contacts, Observations and Direct Requests. As noted above, many states do comply with recommendations developed by the ILO's supervisory machinery.

b Article 26 – Complaints

The requirements for filing a complaint are the same as those for submitting a Representation. The only difference being who is competent to institute the proceeding. Complaints must be filed by either a delegate to the International Labour Conference, any member-state of the ILO or the Governing Body. Complaints are also examined by the Governing Body. To be declared admissible the Complaint must include the following. It must:

- 1 be in written form, in a language that is widely used;
- 2 be filed by either an ILO member-state, the Governing Body or a delegate to the International Labour Conference;
- 3 concern a member-state of the ILO or one bound by an ILO Convention;
- 4 concern a Convention ratified by, and in force for the state in question and;
- 5 allege the failure of the state in question to secure the effective enjoyment of a right or rights defined in the relevant Convention, including, although not required, as much supporting evidence as possible.

After the Complaint is declared admissible, the Governing Body begins its investigation. As with Representations, the state is requested to submit information responding to the allegations contained in the Complaint. At this point a quasi-judicial Commission of Inquiry is usually established to pursue the matter. The Commission requests that the parties (the state and those submitting the Complaint) submit written presentations concerning the allegations, which are then exchanged by the parties so that they may formulate a response and submit additional information if needed. The Commission may also solicit information from other states and NGOs to aid in the investigation. This stage is normally followed by hearings involving the parties or their representatives and any relevant witnesses. Occasionally, at the discretion of the Commission, on-site fact finding missions are also organised.

The decision of the Commission includes a determination of compliance or non-compliance and recommendations, which may be quite detailed, to remedy the situation that gave rise to the Complaint. The decision and any recommendations made are published in the Official Bulletin of the ILO. The decisions of the Commission are

implemented in the same manner as decisions reached under the Representations procedure. However, two additional enforcement options exist with regard to Complaints, neither of which have been used to date. First, the Governing Body can recommend to the International Labour Conference that appropriate actions be taken to enforce the Commission's decision (Article 33, ILO CONST.). Second, a member-state of the ILO may request that another Commission of Inquiry be established to determine if the state found in violation has complied with the original decision (Article 34, ILO CONST.). Whether these options have not been used previously due to a lack of political will on the part of the ILO or because states usually comply with recommendations of the ILO's supervisory machinery thereby forgoing the need to resort to them is unknown.

In conclusion, the reporting and complaints procedures of the ILO offer an opportunity for indigenous peoples to raise their human rights concerns in an international forum. As emphasised in the discussion of ILO 169, the imprecise nature of the language in that Convention will permit flexible interpretations of its provisions. Therefore, it is important for indigenous peoples to actively participate in any ILO procedure that may have some bearing on the elaboration of ILO 169's rights. To date, 11 cases have been filed in connection with ILO 169: eight have been decided (two on Mexico, two on Colombia and one each for Peru, Ecuador, Denmark and Bolivia) and three are pending before the Committee of Experts, all of them against Mexico. These cases, all filed as Representations in accordance with Article 24 of the ILO Constitution, are discussed the following section.

Complaints, representations or other communications should be addressed to:

Director General
International Labour Office
c/o International Labour Standards Department
4 route des Morillons
1211 Geneva 22
Switzerland

The ILO maintains a database of Complaints and Representations received and decided, which can be searched at the following web site:

English: <http://www.ilo.org/ilolex/english/iloquery.htm>

French: <http://www.ilo.org/ilolex/french/iloquery.htm>

Spanish: <http://www.ilo.org/ilolex/spanish/iloquery.htm>

B Cases concerning ILO 169

1 Peru²⁵

In a communication dated 17 July 1997, the General Confederation of Workers of Peru (CGTP) made a representation under Article 24 of the ILO Constitution alleging that the government of Peru had failed to secure the effective enjoyment of rights under ILO 169. The representation concerned the application of a law to coastal indigenous communities, which converted communally held lands into individual titles, allowed individuals to sell communal lands and set up a special arbitration system to resolve land disputes. The ILO Governing Body appointed a Committee of Experts to examine the representation.

Facts: On July 9, 1997, the Peruvian Congress approved Act No. 26845, which regulated the establishment of individual land titles for indigenous communities in the coastal plain. This Act, according to the Peruvian government, simply recognised the existing form of land tenure (individually held and farmed plots) employed by the communities and was intended to promote more efficient and productive agriculture. The CGTP alleged that this Act was: discriminatory in that it treated coastal indigenous communities on a different basis than indigenous communities in the mountain and forest regions; that it compromised the ownership rights, cultural traditions and survival, social organisation and institutions of the affected communities by dividing and allowing individuals to sell communal lands to outsiders; that the community would not receive compensation for lands disposed of by individuals; and that the arbitration system established by the Act was discriminatory and denied the communities access to judicial and other remedies.

The Decision: In its conclusions, the Committee made explicit reference to Article 13 of ILO 169, which refers to, among others, the need for special attention to the collective aspects of indigenous peoples' relationship with their lands and territories. It also made reference to Article 17(2), which requires that indigenous peoples be consulted whenever consideration is being given to alienating their lands outside of their community, noting that no consultation had taken place. It stated that 'The ILO's experience with indigenous and tribal peoples has shown that when communally owned indigenous lands are divided and assigned to individuals or third parties, the exercise of their rights by indigenous communities tends to be weakened and generally end up losing all or most of the lands, resulting in a general reduction of the resources that are available to indigenous peoples when they keep their lands in common'.²⁶

Concerning the allegation that the arbitration system imposed by the Act was discriminatory and denies the communities access to judicial remedies, the Committee noted that Article 2(2) required that measures be taken to ensure that indigenous peoples benefit equally from the rights which national laws grant to other members of society. It

²⁵ *Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP)*. Doc. GB 270/16/4; GB 270/14/4 (1998)

²⁶ *Id.*, at para. 26.

then requested that Peru consider amending that section of the Act which established the exclusive jurisdiction of the arbitration system and requested information about whether the communities could access judicial remedies once the arbitration system had made a final decision.

The Committee stated that it was not proper for it to determine whether individual or collective titles were the most appropriate form of land tenure for indigenous peoples in any given situation. However, it then recalled Article 13 and stated that ‘the loss of communal land often damages the cohesion and viability of the people concerned. This is why, in the preparatory work of [ILO169], many delegates took the position that lands owned by indigenous persons, and especially communal lands, should be inalienable. In a closed session, the Conference Committee decided that Article 17 should continue the line of reasoning pursued in other parts of the Convention, according to which indigenous and tribal peoples shall decide their own priorities for the process of development (Article 7) and that they shall be consulted through their representative institutions whenever consideration is being given to legislative or administrative measures which may affect them directly’.²⁷ In the case at hand, the Committee stated that the government’s decision, without any form of consultation with or participation by the affected communities had violated the Convention.

The Committee recommended to the Governing Body that Peru take the following steps to remedy the violation:

- Submit detailed information on what it had done to implement and give effect to the provisions of ILO 169 discussed in the case, so that the Committee of Experts could follow up on the case;
- Pay special attention to Article 13;
- That it must take legislative or administrative decisions that may affect ‘the landownership’ of indigenous peoples in full consultation with their representative institutions, as provided for by Article 6;
- That under Article 17(2) indigenous peoples must be consulted whenever consideration is given to their capacity to alienate their lands and that Peru inform the Committee of Experts of the measures taken to ensure respect for this right;
- That, in consideration of Article 2(2), Peru consider amending section 16 of the Act, which established the exclusive jurisdiction of the arbitration panel and inform the Committee of Experts on whether access to judicial remedies was possible after arbitration had been exhausted.

²⁷ *Id.*, at para. 30.

2 Mexico²⁸

As with the previous case, the Mexico case, examined by a Committee appointed by the Governing Body, was substantially based upon perceived violations of ILO 169's land rights provisions (Articles 13 and 14, especially). The case, decided in 1998, was filed on 9 July 1996 by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education on behalf of the Union of Huichol Indigenous Communities of Jalisco (UHICJ). The UHICJ was seeking return of and title to a part of their ancestral lands that had been granted to non-indigenous communities and reunification of these lands with the rest of their lands. The case also provides an example of the ILO's approach to domestic remedies issues.

Facts: In 1993, the Huichol community of San Andres Cohamiata petitioned the Mexican government for the return of 22,000 hectares of land and the unification of their community. In that same year, they filed legal action in the Agrarian Tribunal of the State of Nayarit for the return of part of this area presently held by the Tierra Blanca community (1255 hectares). They claimed that in the 1960s the Mexican government had illegally given this land to a number of non-indigenous communities, separating about 2,000 Huichol from San Andres. They cited titles issued to them by the Spanish crown in 1725, a demarcation of their territory in 1809 and documents issued by the Mexican government admitting that they were the owners of the lands in question. The Huichol who lived in the non-indigenous communities were not recognised by the land census and therefore had no rights to their lands under the law and were dependent upon the permission of the non-indigenous land owners to farm and graze their livestock, resulting, among others, in a serious violation of their cultural rights. These lands, upon which the Huichol depended for their economic subsistence and which are integral to their religious and social organisation, were taken over by non-indigenous livestock breeders.

In 1996, the Agrarian Tribunal ruled against the community stating that they had failed to prove their case and that it would be inappropriate to recognise the property rights of the community as this would affect the rights of third parties. At this time, however, the community did manage to get the Agrarian Attorney General to open an investigation of the situation and its relationship to ILO 169 and the possibility of returning the community's lands. The community appealed the decision of the Agrarian Tribunal to the Third Collegial Court of the Twelfth Circuit for protection of their constitutional rights and filed a case through the SNTE with the Committee of Experts under Article 24 of the ILO Convention asserting that Mexico had violated their rights under Articles 13 and 14 of ILO 169.

The complaint alleged that 2,000 Huichol had been illegally integrated into non-indigenous communities thereby losing their rights to their ancestral lands and that the Mexican government had demonstrated that it was unwilling to address the situation. It further alleged that due to non-recognition of their land rights, the Huichol of San Andres

²⁸ *Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education. Doc. GB 270/16/3; GB 272/7/2 (1998).*

have been forced to live in conditions that ‘violate the most elementary individual and collective rights . . .’. The government countered by citing the decision of the Agrarian Tribunal and stated that the case should not be examined by the Committee as the Third Collegial Court had not yet made a decision on the case. It also said that the Secretariat for Labour and Social Welfare had requested information on the study of the Agrarian Attorney General.

The Decision: In its conclusions, the Committee addressed the domestic remedies aspects of the case, finding that its Standing Orders do not require that ‘a decision must be reached in a national procedure before the Governing Body may examine the case or the aspect of the case which is still pending before the national jurisdiction and, in fact, the examination of a representation by the Governing Body sometimes becomes a relevant circumstance in a decision being handed down in a national legal procedure on a specific aspect of the application of a ratified Convention’.²⁹

Concerning the land rights issues, the Committee stated that, while it does not issue opinions about individual land disputes under ILO 169, ‘its essential task is rather to ensure that the appropriate means of resolving these disputes have been applied and that the principles of the Convention have been taken into account . . .’.³⁰ Therefore, according to the Committee, Articles 13 and 14 of ILO 169 must be read in conjunction with Articles 2(1) and 6, which require, respectively, that the state develop, with the participation of the affected indigenous peoples, coordinated and systematic action to respect their rights and guarantee their integrity and; that indigenous peoples must be consulted with and participate in decisions that affect them.

Applying Article 14, the Committee found that although the lands of some of the Huichol had been given to others, ‘they continued to share occupancy of the lands at issue’ and according to Article 14(1) ‘the Government would be obliged to take measures, in appropriate cases, to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, and that this appears to be the situation in this case’.³¹ Concerning Article 14(2), it found that, with the exception of the 1,255 hectares of land held by Tierra Blanca presently under consideration by the courts, Mexico should ‘take the necessary measures to guarantee effective protection of the rights of ownership and possession of the Huicholes, and in particular to protect them from possible intrusion by third parties’.

The Committee noted the allegation that the community is forced to live under conditions that violated basic individual and collective rights and requested that Mexico examine the measures that can be taken to remedy this situation, possibly including the ‘adoption of special measures to safeguard the existence of these peoples as such and their way of life to the extent that they wish to safeguard it, which is one of the primordial objectives of this Convention’.³² Finally, it requested that Mexico re-evaluate the application of its

²⁹ *Id.*, at para. 31.

³⁰ *Id.*, at para 32.

³¹ *Id.*, at para. 40.

³² *Id.*, at para. 42.

agrarian laws in this case in light of Articles 19, 4 and 6 (consultation and participation), noting that Article 4 requires that ‘special measure shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned’.

Consistent with its conclusions, the Committee recommended to the Governing Body that Mexico take the following steps to address the issues raised by the case:

- To take appropriate measures to guarantee the use rights of the Huichol on lands not exclusively occupied by them in accordance with Article 14;
- That the Government inform it of: 1) the decision of the Third Collegial Court; the measures taken to remedy violations of the Huichol’s individual and collective rights caused by non-recognition of their land rights, including any special measures adopted; the measures taken to remedy the situation underlying the representation, ‘taking account of the possibility of assigning additional land to the Huichol people when they do not have the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers as provided in Article 19.

3 Bolivia³³

This case was filed in 1998 by the Bolivian Central of Workers on behalf of the Confederation of Indigenous Peoples of Bolivia (CIDOB) and its affiliates, the Coordinating Body of Ethnic Peoples of Santa Cruz (CPESC), the Central of Indigenous Peoples of Beni (CPIB) and the Indigenous Central of the Amazon Region of Bolivia (CIRABO). It alleged violation of Articles 6 and 14 of ILO 169 in connection with a series of logging concessions some of which overlapped traditional indigenous territories in the Bolivian Amazon.

Facts: In 1996, Bolivia’s new Forestry Act came into force permitting holders of long term forestry contracts to convert their contracts to forestry concessions valid for 40 years and renewable for an additional 40 years. As a result and despite objections by indigenous peoples, in August 1997, 86 new concessions were issued, 27 of which overlapped indigenous territories. This occurred in contravention of a law granting the indigenous territories provisional titles and required that no new concessions were granted until formal title was issued. At the time the concessions were granted formal title had yet to be conveyed.

The complaint filed with the Committee of Experts alleged that

this conversion of forestry exploitation contracts is in direct contradiction with the indigenous territorial claims currently being processed in order to obtain land title. It states that the area of the logging concessions overlapping with indigenous territories amounts to a total of 712,313 hectares. This accounts for 33 per cent of Yaminahua-

³³ *Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB). Doc. GB.272/8/1; GB.274/16/7.*

Machineri territory, 22 per cent of Guarayo territory and 13 per cent of Monte Verde territory, for example. Moreover, the COB points out that the territories in question will be subjected to a process of clearing title which is likely to result in considerable areas being allotted to third parties. The territories will be further reduced by expropriations and concessions for mining and petroleum exploitation.³⁴

It also alleged that there was no genuine consultation with or participation by the affected indigenous peoples in connection with the decision to issue the logging concessions. Their attempts to have the concessions revoked were rejected by the agency responsible for forestry issues. An administrative appeal against this decision had been filed but was undecided at the time the complaint was filed with the Committee of Experts. Finally, the complaint further alleged that the logging concessions constituted ‘a direct threat to the viability of indigenous territories, since the existence of forestry concessions in these territories will have a considerable social and economic impact, affecting the natural resources that need to be protected for future generations’.³⁵

The Decision: The Committee began by noting that this case refers ‘principally to the adoption of administrative decisions by the National Forestry Superintendency, establishing 27 forestry concessions that overlap with six traditional indigenous territories, without prior consultation’. Referring to Article 15 of the Convention, which had not been invoked by the petitioners, it then stated that as the logging concessions and

concessions for mining and petroleum exploitation may directly affect the viability and interests of the indigenous peoples concerned, the Committee recalls that Article 15 of the Convention should be read in conjunction with Articles 6 and 7 of the Convention, and that by ratifying the Convention governments undertake to ensure that the indigenous communities concerned are consulted promptly and adequately on the extent and implications of exploration and exploitation activities, whether these are mining, petroleum or forestry activities.³⁶

In these circumstances, the Committee considers it appropriate to recommend that the Governing Body request the Government to consider the possibility of establishing, in each particular case, especially in the case of large-scale exploitations such as those affecting large tracts of land, environmental, cultural, social and spiritual impact studies, jointly with the peoples concerned, before authorizing exploration and exploitation of natural resources in areas traditionally occupied by indigenous peoples. In addition, the Committee suggests that the Governing Body request the Government to inform the Committee of Experts on the Application of Conventions and Recommendations on the process of clearing title now under way in the community lands of origin and on whether the appropriate consultation procedures that must take place before undertaking any exploration or exploitation of natural resources have been established or maintained, as provided by the Convention.³⁷

With regard to Articles 6 and 15’s provisions requiring consultation, the Committee emphasised that the

³⁴ *Id.*, at para. 12.

³⁵ *Id.*, at para. 17.

³⁶ *Id.*, at para. 38.

³⁷ *Id.*, at para. 39.

principle recognized in Article 6(2) of the Convention, according to which the consultations carried out in application of the Convention shall be undertaken in good faith and in a form that is clear and appropriate to the circumstances, especially when the contracts referred to in this case are of a considerable duration and cover an extensive area. While the Committee understands that the lands with which the forestry concessions overlap have not yet been titled as community lands of origin, it has not received any evidence indicating that such consultations, whether under Article 6(1)(a) or under Article 15(2) of the Convention, have been carried out or whether provision has been made for the peoples concerned to participate wherever possible in the benefits of such activities. The Committee accordingly suggests that the Governing Body request the Government to inform the Committee of Experts on the progress achieved concerning consultations with the peoples concerned, their participation, wherever possible, in the benefits of the concessions, and their receipt of fair compensation for any damages which they may sustain as a result of this exploitation.

One point to note about this statement is the omission of any reference to Article 6(2)'s requirement that consultations 'shall be undertaken . . . with the objective of achieving agreement or consent to the proposed measures'. This omission is disturbing, both given that this language substantially strengthens ILO 169's primary consultation provisions, including that found in Article 15(2), and because it is also apparent in other decisions reached by the Committee.

In conclusion, the Committee's recommendations in this case were as follows:

- That the government provide detailed information to the Committee on the measure taken to give effect to Articles 6, 14 and 15 of ILO 169 in its reports required under Article 22 of the ILO Constitution;
- That the government 'apply fully the provisions of Article 15 of the Convention and to consider engaging in consultations in each particular case, especially when large tracts of land such as those referred to in this representation are affected, as well as environmental, cultural, social and spiritual impact studies, jointly with the peoples concerned, before authorizing the exploration and exploitation of natural resources in areas traditionally occupied by indigenous peoples';³⁸
- That the government provide information 'on the establishment or maintenance of the appropriate consultation procedures that must be carried out before undertaking any programme for the exploration or exploitation of natural resources, as provided by the Convention';³⁹ and,
- That the government provide information 'the progress made in practice with regard to consultations with the peoples concerned, their participation wherever possible in the benefits of the concessions and their receipt of fair compensation for any damages which they may sustain as a result of this exploitation'.⁴⁰

³⁸ *Id.*, at para. 44(b).

³⁹ *Id.*, at para. 44(c).

⁴⁰ *Id.*, at para. 44(d).

4 Mexico⁴¹

This case was filed by the Radical Trade Union of Metal and Associated Workers on behalf of the indigenous Chinantec community of Ojitlán in 1998. It alleged violations of Articles 5, 6, 7, 13 and 16. These alleged violations were caused by construction of a hydroelectric dam, which ‘forcibly relocated Ojitlán’s indigenous Chinantec families from their native lands and sacred sites and entirely disrupted their traditional way of life’, and the failure of Mexico to honour an agreement made in relation to the relocation of the community.⁴²

Facts: This case centres around construction of a hydroelectric dam on the Papaloapan River that forced the relocation of 5,000 Chinantec families pursuant to a series of Presidential Decrees issued between 1972-74. These decrees provided that the Chinantecs would receive 260,000 hectares of land in Uxpanapa Valley in the State of Veracruz as compensation for their lands flooded by the dam as well as a paved road and development projects to improve their living and health conditions at their new location. They received only 90,000 hectares and the road and development projects were not implemented. From 1976 until 1997, the Chinantecs tried to get the government to honour its commitments under the Presidential Decrees without success. In the process, members of their organisation were harassed, intimidated and arrested on dubious charges.

In 1998, the case was filed with the Committee of Experts alleging violations of the following articles of ILO 169:

Article 6: The Government of Mexico failed to consult in good faith, with the objective of achieving agreement or consent, with the indigenous Chinantec peoples with respect to their land claims in Uxpanapa Valley, Veracruz. Instead of consulting in good faith with indigenous Chinantec leaders, the Mexican Government ceased all negotiations and ordered the arbitrary arrest of the Chinantec leader, Juan Zamora González, and his brother, Marcos Zamora González, in May 1997.

Article 7: The Government of Mexico failed to include Chinantec participation in the economic and special development projects affecting them directly in Uxpanapa Valley.

Articles 5 and 13: The Mexican Government failed to respect the special importance of the Chinantec peoples’ spiritual and cultural relationship to their ancestral lands in Ojitlán, Oaxaca.

Article 16: The Mexican Government removed the indigenous Chinantecs from their traditional lands without their free and informed consent. Also, it failed to provide the displaced Chinantecs with new lands of quality and legal status equal to that of the lands they had previously occupied. The Government of Mexico failed to carry out its promise to provide lands for the Chinantecs in Uxpanapa Valley.⁴³

⁴¹ *Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1958 (No. 169), made under article 24 of the ILO Constitution by the Radical Trade Union of Metal and Associated Workers.* Doc. GB.273/15/6; GB.276/16/3.

⁴² *Id.*, at para. 9.

⁴³ *Id.*, at para. 20.

The government's response to the allegations stated that the Chinantecs were compensated; that the relocation took place in accordance with ILO 107, which was in force for Mexico at that time and until 1991 when ILO 169 entered into force for Mexico; that their special relationship to their lands was respected; that the Chinantecs' land was not occupied since time immemorial but was governed by special legislation and; that the Committee could not examine alleged violations of ILO 169, such as the events related to the dam that took place prior to Mexico's ratification of that instrument.

The Decision: The Committee began by observing that Mexico's contention that it was not responsible for events that occurred prior to its ratification of ILO 169 was correct, but added that

This being the case, the Committee considers that the provisions of the Convention may not be applied retroactively, particularly as regards questions of procedure (including the types of consultations which would have been required at the time of taking these decisions if, hypothetically, the Convention had been in force). However, the effects of the decisions that were taken at that time continue to affect the current situation of the indigenous peoples in question, both in relation to their land claims and to the lack of consultations to resolve those claims. The Committee therefore considers that the Convention does currently apply with respect to the consequences of the decisions taken prior to its entry into force.⁴⁴

In other words, *if the 'effects' of an act or decision taken prior to ratification and entry into force of ILO 169 for a particular country 'continue to affect the current situation of the indigenous peoples in question', the Convention does apply in relation to the 'consequences' of that act or decision even though it occurred prior to ratification.* This is consistent with the jurisprudence of other international human rights bodies, such as the United Nations Human Rights Committee and the Inter-American Commission and Court on Human Rights.

With regard to Mexico's statement that the Chinantecs did not occupy the land flooded since time immemorial, the Committee stated that 'the fact that land rights have originated more recently than colonial times is not a determining factor. The Convention was drafted to recognize situations in which there are rights to lands which have been traditionally occupied, but also may cover other situations in which indigenous peoples have rights to lands they occupy or otherwise use under other conditions'.⁴⁵ Thus, as with ILO 107, it is not necessary to demonstrate immemorial occupation in order to prove rights to lands and resources under ILO 169.⁴⁶ The Committee also requested additional information on the alleged violations of Articles 5 and 13, which require that indigenous peoples' special relationship to their lands, territories and resources be respected, as it believed that the information before it was insufficient to reach an informed decision about these articles.

Turning to the consequences of relocation, the Committee stated that

⁴⁴ *Id.*, at para. 36.

⁴⁵ *Id.*, at para. 37.

⁴⁶ For ILO 107, see, *supra* note 10 and attendant text.

according to Article 12(2) of Convention No. 107, which was in force at the time of the relocation, and Article 16(4) of Convention No. 169, when a return to their lands is not possible, indigenous and tribal peoples shall be provided in all possible cases with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. The Committee, in this case in particular and bearing in mind that a number of years have passed since the removal of these indigenous peoples took place, wishes to suggest to the Government that, in the quest for solutions to the problems that still appear to affect the relocated Chinantec communities, it resume a dialogue to enable both parties to seek solutions to the situation facing these peoples in the Uxpanapa Valley.⁴⁷

Concerning the framework for this dialogue, the Committee referred to Article 6 stating that

In the Committee's opinion, consultations constitute an essential element in resolving this type of problem, as well as being one of the Convention's requirements. The Committee recalls that, under Article 6 of the Convention, governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly. It requests the Government to continue providing information concerning developments in this situation, particularly as regards the establishment of new channels of communication with the peoples affected.⁴⁸

Note again the absence of the language requiring that achieving agreement or consent be the objective of the consultations.

5 Denmark⁴⁹

This case was submitted in November 1999 by a Danish trade union on behalf of the members of the former settlement of Uummanaq (Thule District) in north-western Greenland. The representation alleged a violation of Article 14(2) of ILO 169, which requires that 'Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession'.

Facts: As with the previous case concerning Mexico, this case also relates to the consequences of forcible relocation. In May 1953, the entire population of Uummanaq, an indigenous settlement of the Thule people, was relocated to permit expansion of a United States' military base. This took place without consultation and without obtaining the consent of the affected people. According to the representation, the new site for the settlement lacked many of the subsistence resources found at the previous site and it was only the presence of a large number of whales that kept the relocated persons from starvation. In 1954 and 1959, the Thule sought compensation from Danish authorities, but were denied. In December 1996, they filed a case with the High Court in Copenhagen

⁴⁷ *Id.*, at para. 40.

⁴⁸ *Id.*, at para. 41.

⁴⁹ *Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Sulinermik Inuussutissarsiuqartut Kattuffiat (SIK)*. Doc. GB.277/18/3; GB.280/18/5.

seeking compensation and recognition of their land rights in their area from which they were relocated. The Court ruled in their favour and ordered that compensation be paid, but failed to address the land rights issue. The latter was appealed to the Danish Supreme Court and was pending at the time the Thule brought their case to the Committee of Experts.

In response, Denmark argued that:

- the relocation took place in 1953, 44 years prior to its ratification of ILO 169 and therefore, the representation is inadmissible as it cannot be held responsible for acts taking place prior to ratification and entry into force;
- that the dispute was pending before the Supreme Court of Denmark and therefore, the Thule could not assert a failure of Denmark to guarantee their rights under ILO 169 until the Court had issued its ruling;
- that the Thule did not constitute a ‘people’ for the purposes of ILO 169 but were part of the larger Inuit population of Greenland, who made no distinction among themselves, and that the Inuit ‘never recognized the existence of areas reserved for particular population groups’.⁵⁰ In support of this position it referred to its declaration made at the time it ratified ILO 169, which provides, among others, that ‘it has not at any time been possible, for either natural or legal persons, to acquire rights of ownership to lands in Greenland’.

The Decision: The Committee began by dismissing Denmark’s declaration, noted in the previous paragraph, filed when it ratified ILO 169 by stating that ‘no reservations to the ratification of ILO Conventions are admissible and that, consequently, the Government’s Declaration has no binding force’.⁵¹ It also dismissed the state’s argument that the Committee could not examine the case as it was presently under consideration by the Danish Supreme Court – ‘with regard to the litigation pending before the Danish Supreme Court, the Committee notes that neither article 24 of the ILO Constitution or the Standing Orders require that a complainant exhaust national remedies available before the Governing Body may examine a representation involving the same or similar issues’.⁵² It then addressed Denmark’s contention that it could not be held responsible under ILO 169 for events (the 1953 relocation) occurring prior to ratification and entry into force. Consistent with its decision in the Mexico case discussed immediately above, the Committee stated that

The Committee observes that the relocation of the population of the Uummanaq settlement, which forms the basis of this representation, took place in 1953. It also takes note of the fact that the Convention only came into force for Denmark on 22 February 1997. The Committee considers that the provisions of the Convention cannot be applied retroactively, particularly with regard to procedural matters, such as whether the appropriate consultations were held in 1953 with the peoples concerned. However, the

⁵⁰ *Id.*, at para. 25.

⁵¹ *Id.*, at para. 27.

⁵² *Id.*, at para. 30.

Committee notes that the effects of the 1953 relocation continue today, in that the relocated persons cannot return to the Uummannaq settlement and that legal claims to those lands remain outstanding. Accordingly, the Committee considers that the consequences of the relocation that persist following the entry into force of Convention No. 169 still need to be considered with regard to Articles 14(2) and (3), 16(3) and (4) and 17 of the Convention, examined below, despite the fact that the relocation was carried out prior to the entry into force of the Convention. These provisions of the Convention are almost invariably invoked concerning displacements of indigenous and tribal peoples which predated the ratification of the Convention by a member State.⁵³

The Committee also discussed Denmark's position that the Thule cannot be considered a people, separate and distinct from all Inuit in Greenland, for the purposes of ILO 169. It observed that

the parties to this case do not dispute that the Inuit residing in Uummannaq at the time of the relocation are of the same origin as the Inuit in other areas of Greenland, that they speak the same language (Greenlandic), engage in the same traditional hunting, trapping and fishing activities as other inhabitants of Greenland and identify themselves as Greenlanders (Kalaalit). The Committee notes that, prior to 1953, the residents of the Uummannaq community were at times isolated from other settlements in Greenland due to their remote location; however, with the development of modern communications and transportation technology, the Thule District is no longer cut off from other settlements in Greenland. The Committee notes that these persons share the same social, economic, cultural and political conditions as the rest of the inhabitants of Greenland (see Article 1(1) of the Convention), conditions which do not distinguish the people of the Uummannaq community from other Greenlanders, but which do distinguish Greenlanders as a group from the inhabitants of Denmark and the Faroe Islands. *As concerns Article 1(2) of the Convention, while self-identification is a fundamental criterion for defining the groups to which the Convention shall apply, this relates specifically to self-identification as indigenous or tribal, and not necessarily to a feeling that those concerned are a 'people' different from other members of the indigenous or tribal population of the country, which together may form a people.* The Committee considers there to be no basis for considering the inhabitants of the Uummannaq community to be a 'people' separate and apart from other Greenlanders. *This does not necessarily appear relevant to the determination of this representation, however, for there is nothing in the Convention that would indicate that only distinct peoples may make land claims, especially as between different indigenous or tribal groups.*⁵⁴ (emphasis added)

The Committee's treatment of the land rights issues in this case again illustrates the procedural nature of ILO 169. In this regard, the Committee stated that

With regard to the pending claims for compensation for lost hunting and trapping rights and other consequential damages incurred by the resident of the Uummannaq community as a result of the 1953 relocation, the Committee points out that the ILO cannot resolve individual land disputes under the Convention, including with regard to the issues of valuation of compensation. *The Committee considers that its essential task in such cases is not to offer an alternative venue for parties dissatisfied with the outcome of a claim for*

⁵³ *Id.*, at para. 29.

⁵⁴ *Id.*, at para. 33.

*compensation before the national administrative or judicial bodies, but rather to ensure that the appropriate procedures for resolving land disputes have been applied and that the principles of the Convention have been taken into account in dealing with the issues affecting indigenous and tribal peoples.*⁵⁵ (emphasis added)

The Committee's reasoning on the land rights provisions at issue in this case is very instructive about ILO land rights provisions in general and is repeated here at length. Referring to Articles 14 and 17 and finding that Denmark had complied with its obligations under those articles, it observed that:

35. Article 14(2) of the Convention provides that: 'Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession'.

36. The Committee points out that Article 14, paragraph 2, on which the complainant organization bases its allegations, must be interpreted in the light of the general policy set forth in Article 2(1) of the Convention, which requires governments to develop, with the participation of the peoples concerned, 'coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity'.

37. The Committee considers that the land traditionally occupied by the Inuit people has been identified and consists of the entire territory of Greenland. Section 8(1) of the Home Rule Act of 1978 establishes that 'the resident population of Greenland has fundamental rights to the natural resources of Greenland'. Noting that Greenlanders have the collective right to use the territory of Greenland and continue to have access to the land for their subsistence and traditional hunting and fishing activities, the Committee considers that the situation in Greenland is not inconsistent with the principles established in Article 14 of the Convention.

38. The Committee observes that Article 14, paragraph 3, requires governments to establish adequate procedures within the national legal system to resolve land claims by indigenous and tribal peoples. The Committee observes that there are procedures in place to resolve land disputes, that these procedures have in fact been invoked by the peoples concerned and that the land claims have been and are continuing to be examined in depth by the competent national authorities. It therefore concludes that the Government of Denmark has complied in this regard with Article 14(3).

39. The Committee is aware of the difficulties entailed in resolving conflicting land claims, particularly where there are different and opposing viewpoints with respect to the relationship which different communities have to the land, their cultural and spiritual attachment to lands which they traditionally occupy, as well as to the activities that they traditionally carry out on the land, such as hunting, trapping and fishing. The Committee is aware that the former residents of the Uummannaq community were forcibly relocated in 1953 under difficult circumstances, with little or no prior consultation, and that they have not been able to return to their settlement.

40. The Community also notes, however, that the former residents of the Uummannaq community have been awarded compensation for lost hunting and trapping rights, as well as for damages incurred as a result of the relocation. It also notes that, almost 50 years

⁵⁵ *Id.*, at para. 34.

later, the persons concerned, and their children, have now resettled in other sections of Greenland or in Denmark. Under the particular circumstances of this case, the Committee considers that to call for a demarcation of lands within Greenland for the benefit of a specific group of Greenlanders would run counter to the well-established system of collective land rights based on Greenlandic tradition and maintained by the Greenland Home Rule Authorities. This conclusion should be seen in the light of Article 17(1) of the Convention, which provides that ‘procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected’, noting that traditionally no individual land rights are recognized among Greenlanders.⁵⁶

The Committee also found that Denmark’s actions since 1997 were consistent with the Convention with regard to Article 16, which deals with relocation. It did however urge the Thule and Denmark to continue to discuss measures needed to arrive at a mutually satisfactory solution to the dispute. It concluded its consideration of the case by recommending that Denmark provide information in its Article 22 reports on the results of the case before the Supreme Court, any additional measures taken to compensate the Thule, any consultations held about future use of the land around the military base claimed by the Thule and the measures taken ‘to ensure that no Greenlanders are relocated in the future without their free and informed consent or, if this is not possible, only after following appropriate procedures in accordance with Article 16 of the Convention’.⁵⁷

6 Ecuador⁵⁸

This case was submitted in January 2000 by a trade union on behalf of the Independent Federation of the Shuar People of Ecuador (FIPSE), an indigenous organisation representing approximately 5,000 people. The representation alleges that the Government of Ecuador violated articles 2, 4(1), 5, 7, 13(1), 14(1), 15(2) and 17 of the Convention in connection with approval of petroleum exploitation licenses granted to US oil company, Arco. These licenses, which were subsequently transferred to another company, covered much of Shuar territory.

Facts: As with many of the cases submitted about ILO 169, this case deals heavily with the provisions related to consultation – 6(1), 7(1) and 15(2). It mostly concerns an agreement made between Ecuador and Arco in April 1998, concerning rights to exploit petroleum in an area known as Block 24. Block 24 covered around 70 per cent of Shuar territory, the indigenous people affected by the agreement. The Shuar maintained that, while petroleum is owned by the state under the laws of Ecuador, they were neither notified nor consulted about this agreement. A year later, in October 1999, Arco sold its rights to Block 24 to another US company, called Berlington Resources Ecuador Ltd. The Shuar once again complain that they were neither informed nor consulted about the transfer of rights to Block 24.

⁵⁶ *Id.*, at paras. 35-40.

⁵⁷ *Id.*, at para. 44.

⁵⁸ *Report of the Committee of Experts set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL)*. Doc. GB.277/18/4, GB.282/14/2, submitted 2000.

On 13 August 1998, FIPSE held an extraordinary assembly to discuss the situation and, ‘in view of the negative experiences witnessed in oil mining activities in the north of the country’, decided ‘not to allow any negotiations between individual members or any of its centres and associations and the Arco company’ and declared that ‘any attempt by the company in this regard would be considered as a violation of the integrity of the Shuar people and its organizations and as an open infringement of our rights as recognized in the Constitution (of Ecuador) and in Convention No. 169 of the ILO’.⁵⁹ Among others, FIPSE alleged that Arco had attempted to by-pass the Shuar’s legitimate representatives by setting up committees in order to maintain a pretence of consultation with the Shuar and by negotiating directly with FIPSE member organisations, three of which had concluded agreements with Arco, rather than FIPSE itself.⁶⁰ FIPSE also filed a law suit against Arco, in which the judge ruled that Arco could not approach individuals or FIPSE member organisations without prior authorisation from the Court. Arco appealed this decision to the Constitutional Court, which ruled in Arco’s favour reversing the lower court’s order.

In response to the allegations raised in the representation, Ecuador argued that it had delayed implementation of some of the petroleum activities, including an environmental impact assessment, in Block 24 due to the objections of the Shuar; that the agreements with FIPSE member organisations were considered null and void; that the consultation requirements set out in ILO 169 did not apply as the decisions related to Block 24 had been made prior to Ecuador’s ratification of the Convention; and, amazingly, that ‘it does not find the consultation mechanisms appropriate because they would tend to hinder the oil-related consultation processes which are the responsibility of the government institutions. Likewise, the Government notes that the mining of products from the subsurface (including hydrocarbons), unlike that of surface products, is the domain of the Government’.⁶¹

The Decision: The Committee began by stating that, while Ecuador was correct that the Convention could not be applied retroactively (to the signing of the agreement with Arco in 1998 that took place before ratification in 1999), it found that some of the events complained of occurred after the Convention entered into force for Ecuador and that ‘the situation created by the signature of that agreement still prevails. In addition, the obligation to consult the peoples concerned does not only apply to the concluding of agreements but also arises on a general level in connection with the application of the provisions of the Convention (see Article 6 of Convention No. 169)’.⁶² Put another way, the effects of signing the agreement with Arco continued after the Convention entered into force and the Convention’s consultation requirements relate to all subsequent events not just conclusion of the agreement.

⁵⁹ *Id.*, at para. 13.

⁶⁰ The representation filed with the ILO argued that this violated article 17(3) of the Convention. Article 17(3) states that ‘Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them’.

⁶¹ *Id.*, at para. 25.

⁶² *Id.*, at paras. 28 and 30.

Having reached this decision, the Committee then elaborated upon the consultation provisions of the Convention and emphasised that ‘the spirit of consultation and participation constitutes the cornerstone of Convention No. 169 . . .’.⁶³ It added that the requirement of consultation in article 6(1) should further be considered ‘in the light of the fundamental principle of participation, set forth in Article 7(1) and (3), which establish that:

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. (...)

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.⁶⁴

Articles 2(1) and 2(2)(b), also requiring participation were then highlighted as was article 15(2), which directly requires consultation in connection with exploitation of subsurface resources. With regard to exploitation of subsurface resources in general, the Committee

stress[ed] that it is fully aware of the difficulties entailed in the settlement of disputes relating to land rights, including the rights relating to the exploration and exploitation of subsurface products, particularly when differing interests and points of view are at stake such as the economic and development interests represented by the hydrocarbon deposits and the cultural, spiritual, social and economic interests of the indigenous peoples situated in the zones where those deposits are situated. However, the spirit of consultation and participation that constitutes the essence of Convention No. 169 requires that the parties involved seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation.⁶⁵

Discussing how consultations should take place, the Committee then made reference to article 6(2), which provides that ‘The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures’. It elaborated further in the following passage:

38. The Committee considers that the concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord. A simple information meeting cannot be considered as complying with the provisions of the Convention. In addition, Article 6 requires that the consultation should

⁶³ *Id.*, at para. 31

⁶⁴ *Id.*, at para. 34.

⁶⁵ *Id.*, at para. 36.

occur beforehand, which implies that the communities affected should participate as early as possible in the process, including in the preparation of environmental impact studies. Although in this case the project was established before the Convention came into force in Ecuador, when it did come into force so did the obligation to carry out consultations in respect of any activity affecting the application of the Convention.

39. The Committee recalls that in the discussion concerning the adoption of Article 6 of the Convention on prior consultation, a representative of the Secretary-General stated that in drafting the text the Office had not intended to suggest that the consultations referred to would have to result in the obtaining of agreement or consent of those being consulted, but rather to express an objective for the consultations. In the Committee's view, while Article 6 does not require consensus to have been reached in the process of prior consultation, it does stipulate that the peoples involved should have the opportunity to participate freely at all levels in the formulation, implementation and evaluation of measures and programmes that affect them directly, as from the date on which the Convention comes into force in the country. In addition, Articles 2(1), 2(2)(b), 6, 7 and 15(2) imply the obligation to develop a process of prior consultation with the indigenous peoples of the country before taking measures that might affect them directly, such as the signature of an agreement authorizing activities relating to the exploration or exploitation of hydrocarbons on their ancestral territory, or the continuation of activities initiated prior to the entry into force of the Convention. The obligation of prior consultation implies that the peoples concerned should be consulted before finalizing the environmental study and the environmental management plan. It is provided that the Government shall 'establish or maintain procedures through which' it 'shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands'.⁶⁶

This passage is quoted at length because it is very instructive about the Committee's thinking on what the Convention requires concerning consultation and participation. Note especially that agreement is not the required result of consultations, but merely an objective. On the other hand, the consultation process applies to all decision making, including evaluation measures, must be prior consultation and must involve some degree of participation in decision making. As the following passage indicates, consultation must also take place with representative indigenous organisations and institutions:

the Committee wishes to emphasize that by establishing the obligation of consultation, Article 6(1) makes it clear that the peoples concerned should be consulted 'through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly'.

44. The Committee is of the opinion that the principle of representativity is a vital component of the obligation of consultation. The Committee is aware that it could be difficult in many circumstances to determine who represents any given community. However, if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention. In this case, the Committee considers that not only was the appropriate

⁶⁶ *Id.*, at paras. 38-9.

consultation not carried out with an indigenous organization clearly representative of the peoples concerned in the activities of Arco on Block 24 the FIPSE but that the consultations that were carried out excluded it, despite the public statement issued by the FIPSE in which it determined ‘not to allow any negotiation between individual members or any of its centres and associations and the Arco company’. In this context, the Committee recalls that Article 6(1)(c) stipulates that governments shall ‘establish means for the full development of these peoples’ own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose’. This being the case, the Committee considers that any consultation carried out in future in respect of Block 24 should take into account the abovementioned statement by the FIPSE.⁶⁷

Finding that Ecuador had failed to comply with articles 6(1), 7(1) and 15(2), the Committee recommended that Ecuador ‘establish prior consultations in the cases of exploration and exploitation of hydrocarbons that could affect indigenous and tribal communities and to ensure the participation of the peoples concerned in the various stages of the process, as well as in environmental impact studies and environmental management plans;’ contact and maintain dialogue with the Shuar’s representative organisations in order to find solutions for the problems affecting them; and to inform the Committee on:

(1) The measures taken or envisaged to remedy the situations that gave rise to the complaint, taking into account the need to establish an effective mechanism for prior consultation with the indigenous and tribal peoples as provided in Articles 6 and 15, before undertaking or authorizing any programme for the prospecting or exploitation of the resources that exist on their lands;

(2) The measures taken or envisaged to ensure that the required consultations are carried out in compliance with the provisions of Article 6, particularly as regards the representativity of the indigenous institutions or organizations consulted;

(3) The progress achieved in respect of consultations with the peoples situated in the zone of Block 24, including information on the participation of these peoples in the use, administration and conservation of said resources and in the profits from the oil-producing activities, as well as their perception of fair compensation for any damage caused by the exploration and exploitation of the zone.⁶⁸

7 Colombia⁶⁹

This case was submitted in November 1999 by the Central Unitary Workers’ Union (CUT) and the Colombian Medical Trade Union Association (ASMEDAS) on behalf of the Embera Katío people of Alto Sinú who comprise around 2,400 persons occupying an area estimated at 103,517 hectares in the upper reaches of the Sinú river basin. The representation alleges violations of various provisions of the Convention requiring consultation and participation (2(1), 6(1), 7(1), 15) and article 17 (transmission of land

⁶⁷ *Id.*, at paras. 43-4.

⁶⁸ *Id.*, at para. 45(c).

⁶⁹ *Report of the Committee of Experts set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers’ Union (CUT) and the Colombian Medical Trade Union Association.* Doc. GB.277/18/1;GB.282/14/3, submitted 1999.

rights), all in connection with construction and operation of the Urrá hydroelectric dam. The Committee also raised articles 16(5) on relocation and 19 on provision of more lands.

Facts: In 1993, the then Colombian Institute for Natural Resources (INDERENA) – now the Ministry for the Environment – issued permits allowing a state-owned electricity company to construct the Urrá I hydroelectric dam and to alter the course of the Río Sinú. The ancestral lands of the Embera Katío people of Alto Sinú and of the Zenú people of San Andrés de Sotavento were affected by this dam; most of the lands were flooded after the dam was filled in 1999. However, no consultation took place in connection with both construction the dam in 1993 and flooding of the land in 1999.

Prior to construction of the dam, the Embera Katío people's primary means of subsistence came from hunting, fishing, gathering and shifting agriculture. Fish from the Río Sinú provided a major part of their diet. Construction of the dam substantially reduced fish stocks and flooded prime agricultural land as well as sacred sites and cemeteries. It was alleged that the dam also caused 'intense social, cultural, economic and political inter-ethnic conflicts that affected the Embera Katío community . . . altered traditional relations between the Embera Katío people of Alto Sinú and the river . . .' and caused irreparable harm to the Sinú river basin and to the Embera Katío community of Alto Sinú.⁷⁰

In November 1994, the Embera Katío made an agreement with the company and the government concerning future consultation and compensation. Compensation was defined in a plan, known as the Ethno-Development Plan. The Plan contained eight programmes relating to health, education, livestock development and sustainable management of the traditional territory of the Embera Katío people. In October 1996, another agreement was made between the company, the Institute of Agrarian Reform (INCORA), the Ministry for the Environment, the Ministry for Mines and Energy and the Embera Katío people. This agreement provided that the company would comply with the commitments contained the Plan and would finance the Plan until the year 2000. At this time, the Embera Katío also demanded that the forests and aquatic resources be adequately maintained, and that it receive a share in the income from the generation of electricity.

In September 1997, the company sought permission to flood the land by filling the dam; permission was granted in October 1999 and flooding commenced in November 1999. During this period the company attempted to relocate a number of communities and a cemetery. The latter was allegedly done without the consent of the affected people and without the presence of the required spiritual leaders. After a number of attempts to raise concerns with government agencies, the affected communities initiated legal action seeking protection of basic constitutional rights in March 1998. Immediately after the suit was filed, it was alleged that the government and company 'began a process of illegal consultations with a dissident sector of the Embera Katío people which had been influenced by the Government and the enterprise in such a way as to favour its own interests'.⁷¹

⁷⁰ *Id.*, at para. 15.

⁷¹ *Id.*, at para. 22.

In November 1998, the Constitutional Court ruled in favour of the Embera Katío and order that flooding be suspended. The ruling further ordered protection of the fundamental rights of the Embera Katío ‘to survival, to ethnic, cultural, social and economic integrity, to participation and to . . . due process’ as well as compensation in an amount ‘that at least ensures its physical survival;’ that consultation involving the traditional authorities be undertaken prior to flooding and operation of the dam, that financing be provided to ensure continuation and establishment of traditional and other productive practices and that the programmes associated with the Ethno-Development Plan be resumed. It was alleged that, despite the fact that some amount of consultation did take place (with a minority of the Embera Katío only), various environmental and social studies were undertaken and compensation was discussed, the government and company never fully complied with the Court’s ruling. Moreover, it was also alleged that Embera Katío leaders were assassinated and subjected to other forms of intimidation.

The government’s response to the allegations essentially stated that consultation did take place; that any defects in the consultation process were a result of internal conflicts among the Embera Katío; that it fully complied with the Constitutional Court’s ruling and the agreements made in the Ethno-Development Plan; and, that allegations of assassinations were under investigation.⁷²

The Decision: The Committee issued its decision in November 2001, two years after it had received the representation. It began by noting that prior consultation had not taken place, as confirmed by the Colombian Constitutional Court, and found that this constituted a violation of articles 6(1) and 15(2) of the Convention. As it had explained in previous cases, the Committee explained that consultation and participation were fundamental to all of the Convention’s provisions and explicitly linked consultation and participation again to article 2(1) and 7(1). Discussing article 6(1), the Committee stated that ‘while Article 6 does not require consensus to be obtained in the process of prior consultation, it does provide that the peoples concerned should have the possibility to participate freely at all levels in the formulation, implementation and evaluation of measures and programmes that affect them directly’.⁷³

Discussing the government’s attempts to consult with a minority of the Embera Katío, the Committee stated that

While the Committee is fully aware that in some cases it might be difficult to determine who are the legitimate representatives of an indigenous people, in this case it considers that it would have been appropriate to comply with the spirit of the order of the Constitutional Court on the matter of consultation and to support a single consultation process with all the legitimate authorities of the Embera Katío people of Alto Sinú, as well as the establishment of a single agreement, as far as possible, with a view to preserving the ethnic integrity of the people.⁷⁴

⁷² *Id.*, at paras. 30-53.

⁷³ *Id.*, at para. 61.

⁷⁴ *Id.*, at para. 63.

The Committee then made reference to article 16(5), which requires that compensation for all losses or injuries suffered due to relocation. It noted that even though the Constitutional Court had ordered payment of compensation, this order has not been complied with by the time it reached its decision. With regard to the agreements signed by the government, company and the Embera Katío concerning replacement of lost lands, the Committee referred to article 19, which provides that: 'National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to: (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers; (b) the provision of the means required to promote the development of the lands which these peoples already possess'.⁷⁵

In conclusion, the Committee recommended that Colombia: amend a decree governing consultation with indigenous and tribal peoples (Decree No. 1320 of July 1998) so as to bring it into line with the Convention; that it ensure that all representatives of the Embera Katío be consulted about and participate in future efforts to resolve the situation; and, finally, that it provide information on compensation rendered, investigations into assassinations and other forms of intimidation, progress made in implementing the various agreement reached in connection with the dam and, 'all the measures taken or which might be taken to safeguard the cultural, social, economic and political integrity of the Embera Katío people and to prevent acts of intimidation or violence against the members of that people'.⁷⁶

8 Colombia⁷⁷

This case was submitted in November 1999 by the Single Confederation of Workers of Colombia (CUT). The case actually involves three different situations in which CUT alleges that Colombia has failed to comply with the Convention: the first, adoption of Decree No. 1320 of July 1998 on prior consultation; the second, improvements to the Troncal del Café highway, which cuts through the Cristianía Indigenous Reservation, without previously consulting the indigenous community involved; and, the last, issuing a petroleum exploration licence to US oil company, Occidental (Colombia), without conducting the required prior consultations with the U'wa indigenous community. A series of articles were alleged to have been violated in connection with each situation.

The Facts: 1. Decree 1320 On 13 July 1998, the Colombian government issued Decree No. 1320, which was intended to regulate and define the manner by which indigenous and tribal peoples were to be consulted. In determining the nature of the Decree's provisions, the government did not consult with indigenous peoples or even its own ministries and agencies responsible for indigenous affairs. According to the government, the Decree was designed to avoid delays in decision making and project implementation, while at the

⁷⁵ *Id.*, at para. 67.

⁷⁶ *Id.*, at para. 68(c)(ii).

⁷⁷ *Report of the Committee of Experts set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union. (CUT). Doc.GB.276/17/1/GB.282/14/3, submitted 1999.*

same time providing indigenous peoples an opportunity to express their views. According to CUT, ‘the Decree fails to take account of the different ways of thinking and concepts of time and space of the various indigenous peoples living on Colombian territory, and that both the promulgation and content of the Decree violate Articles 2(1), 2(2)(b), 4(1) and (2), 6, 7 and 15(1) of the Convention’.⁷⁸ CUT adds that this same Decree was held to be inconsistent with Colombian law and ILO 169 by the Constitutional Court in the case filed by the Embera Katío (described in the case above).

Colombia responded by stating that Decree No. 1320 was intended to implement article 15(2) of the Convention and used identical language to that article. I also maintained that, in accordance with a decision of the Administrative Court of the First Section of the Council of State, that, as the Decree set forth procedures for prior consultation, the Decree itself need not be subject to prior consultation. Put another way, there was no need to consult about the procedures for consultation.

The Facts: 2. The Troncal del Café highway The second part of the case alleges that the Embera Chamí indigenous community of the Cristianía Indigenous Reserve suffered damages caused by work to upgrade the Troncal del Café highway. In addition to contamination of ground water, the buildings located near the highway, a local mill, a coffee processing plant, a stable and a number of corrals and dwellings were also damaged by construction work on the road. The CUT asserted, because of the manner in which the road works took place, that the government violated the rights of the affected indigenous community, among others: by failing to adopt special measures for protecting its members, institutions, property, labour, culture and environment; by failing to consult the community; by failing to take account of the community’s own development needs or to carry out a study, with community participation, to assess the possible social, spiritual, cultural and environmental impact of the planned measures; and, finally, by failing to take steps to protect and preserve the Cristianía Indigenous Reserve’s natural environment. It also noted that the Colombian state had failed to comply with a number of judicial decisions upholding the rights of the community and ordering suspension of the road works and various mitigation measures. The CUT alleges that the Government’s acts and omissions violated articles 2(1), 4(1), 6, 7, 12, 13 and 16(5) of the Convention.

Colombia responded by stating that the road improvements were initiated prior to ratification and entry into force of the Convention and, therefore, it could not be held responsible for a failure to consult. It added that it began to consult about the road after entry into force and that the community was presently involved in implementation of the road works. Colombia denied that it had failed to comply with the order of the Constitutional Court and added that it had met its domestic and international legal obligations by creating and legalising indigenous reserves in the affected region.

The Facts: 3. Petroleum exploration in U’wa territory The last part of the case involves the granting of an environmental license on 3 February 1995 to a US company, Occidental (Colombia), to conduct petroleum exploration activities in the territory of the U’wa people, in particular at a location known as ‘Gibraltar 1’, an exploratory well. The U’wa number around 5,000 persons. This license covered a zone encompassing an indigenous

⁷⁸ *Id.*, at para. 15.

reserve, an indigenous reservation and traditional U'wa lands and was issued without prior consultation with the U'wa. According to CUT, the license was also granted without coordinated action to protect the rights of the U'wa, without respecting their social and cultural identity, customs, traditions and institutions, thereby, violating Colombia's obligation to adopt measures to safeguard the integrity of the U'wa and, without taking into account the integrity of U'wa territory in general and the wishes expressed by the communities in question. It alleged that these actions violated articles 2(1), 2(2)(b), 4(1) and (2), 6, 7, 13, 14 and 15 of the Convention

Immediately after the license was granted, the Ombudsman, acting on behalf of the U'wa filed legal action challenging the license due to failure to consult with the U'wa. The Court ruled in favour of the U'wa. Occidental appealed to the Supreme Court of Colombia, which overruled the lower court's decision. In August 1995, the Constitutional Court found in favour of the U'wa and declared that prior consultation had not taken place. However, three years later, in October 1998, the Colombian Council of State ruled in favour of Occidental, finding that prior consultation had taken place and permitted exploration activities to begin in U'wa territory. In September 1999, the Ministry of the Interior stated that the Occidental's proposed area of operations and the 'portion of land that has not officially been accorded (protected) status [as an indigenous territory] is neither regularly nor permanently occupied by indigenous communities'. Based on this, the Ministry of Environment issued a permit for exploration at Gibraltar 1 a few days later.

After the representation was filed in 1999, CUT submitted further information alleging that the Colombian military and police units had attacked members of U'wa communities and that the government had failed to acquire lands for the U'wa leaving them with only 61,000 of the 220,000 hectares over which they held legal rights.

The state responded by denying, with reference to an environmental impact statement, that there were any indigenous peoples living in the immediate vicinity of the Gibraltar 1 well site or the larger area surrounding the well site. In doing so, it implicitly admitted that it had not consulted with the U'wa.

The Decision: The Committee first reviewed this representation in March 2001. However, in accordance with articles 4(1)(a) and 5(1) of its Standing Orders, it decided to defer a decision in order to allow the parties to submit additional information. The final decision was reached in November 2001.

1. Decree No. 1320 Noting that the government itself admitted that indigenous peoples were not consulted about the development and adoption of Decree 1320, the Committee referred to article 6(1)(a) and stated that

Article 6, paragraph 1(a), of the Convention states that 'In applying the provisions of this Convention, governments shall ... consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly'. The Committee considers that Decree No. 1320 of 1998, the explicit purpose of which is to regulate 'prior consultation with the indigenous and black communities before any exploitation of resources within their territory', constitutes a

legislative measure that is likely to affect the communities in question directly. Article 6, paragraph 1(a), therefore clearly implies an obligation to consult the country's indigenous peoples before the adoption and promulgation of the Decree in question.⁷⁹

Note that this provision applies to legislation, decrees and other administrative measures and, most likely, also to Constitutional revisions or amendments.

With regard to the content of the Decree itself, the Committee observed that it:

- Provides for 'participation meetings' with indigenous and tribal peoples after the Decree was adopted (Article 21) – found to violate the requirement for prior consultation;
- Provides for only one consultative meeting (Art.12), even though for a given project or activity it may be necessary to consult a number of different indigenous or tribal peoples - found to be inadequate and therefore incompatible with the Convention; and,
- Does not provide for any participation by or consultation with the peoples concerned during the preparation of environmental studies and formulation of environmental management plans (Article 13).

On this last point, after discussing the requirements of articles 6, 7, the Committee stated that 'Articles 2(1), 2(2)(b), 6, 7 and 15(2) require consultation of the peoples concerned before the finalisation of any environmental study and environmental management plan ...' and concluded that

For the reasons given above, the Committee considers that the process of prior consultation, as provided for in Decree No. 1320, is not consistent with Articles 2, 6, 7 and 15 of the Convention. The adoption of rapid decisions should not be to the detriment of effective consultation for which sufficient time must be given to allow the country's indigenous peoples to engage their own decision-making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions. Although the Committee does not claim that these traditions are the only ones that can serve as a basis for consultations in accordance with the Convention, it does consider that if they are not taken into consideration, it will be impossible to meet the fundamental requirements of prior consultation and participation.⁸⁰

2. The Troncal del Café highway The Committee began by stating that, while the Convention could not be applied retroactively, many of the complaints made in the representation concerning the road arose after the Convention entered into force and, therefore, Colombia could be held responsible for the events related to those complaints. Again reinforcing the ILO's position that ILO 169 is a procedural convention, the Committee stated

With regard to the demands for compensation, the Committee wishes to make it clear that it does not presume to express an opinion regarding particular land disputes under

⁷⁹ *Id.*, at para. 72.

⁸⁰ *Id.*, at para. 79.

the Convention, in particular regarding the question of any possible causal link between damages suffered by the community and the highway project. The Committee considers that its fundamental task is rather to ensure that appropriate measures have been applied to resolve such disputes and that the principles of the Convention have been taken into account in dealing with the problems that affect the country's indigenous and tribal peoples.⁸¹

It then stated that it 'considers that the Government had an obligation to consult the community affected by it from the date on which the Convention entered into force onwards, in particular with regard to the provisions of Article 7(1) and (2) of the Convention, in order to allow the community to participate in its own economic, social and cultural development'.⁸²

3. Petroleum exploration in U'wa territory The Committee began by noting that Colombia had conceded that no prior consultation with the U'wa had taken place based upon Colombia's conclusion that the U'wa were not affected by the activities of Occidental, at least at Gibraltar 1. It then stated that

the Government has applied the criterion of the 'regular and permanent presence of indigenous communities' in deciding whether the siting of an exploratory or operational project in a given area will affect the communities in question. In this regard, the Committee recalls that the Convention refers to the concept of 'rights of ownership and possession (of the peoples concerned) over the lands which they traditionally occupy' (Article 14, paragraph 1), a concept that is not necessarily equivalent. Furthermore, the Convention does not cover merely the areas occupied by indigenous peoples, but also 'the process of development as it affects their lives ... and the lands that they occupy or otherwise use' (Article 7, paragraph 1). The existence of an exploratory or operational project immediately adjacent to land that has been officially recognized as a reserve of the peoples concerned clearly falls within the scope of the Convention.⁸³

Deciding that Gibraltar 1 was within the ancestral territory of the U'wa, and in any event only 1.7 kilometres from the boundary of the U'wa reserve, the Committee concluded that the area of operations of the Gibraltar 1 exploratory well project 'would have an impact on the communities in that area, including the U'wa communities. Therefore, under the terms of Article 15(2) of the Convention, the Government was required to consult the U'wa with a view to determining whether their interests would be harmed, before authorizing the exploratory operations'.⁸⁴

Turning to the issue of prior consultation, the Committee concluded that

the concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith, and the sincere desire to reach a consensus. A meeting conducted merely for information purposes cannot be considered as being consistent with the terms of the Convention.

⁸¹ *Id.*, at para. 81.

⁸² *Id.*, at para. 82.

⁸³ *Id.*, at para. 86.

⁸⁴ *Id.*, at para. 87.

Furthermore, according to Article 6, the consultation must be ‘prior’ consultation, which implies that the communities affected are involved as early on as possible in the process, including in environmental impact studies. Lastly, the Committee wishes to emphasize that, as in the present case, meetings or consultations conducted after an environmental licence has been granted do not meet the requirements of Articles 6 and 15(2) of the Convention. For these reasons, the Committee considers that the Government violated the Articles in question by issuing the environmental licences for which Occidental applied in 1995 and 1999 (after the Convention had entered into force in Colombia) without conducting the due process of prior consultation with the peoples affected.⁸⁵

It also noted in connection with article 15(2) that ‘if the Gibraltar 1 exploratory well is situated ... within lands traditionally occupied by the U’wa or at least within a distance of 1.7 km from those lands, the Government must consult the peoples affected in order to determine the applicability of Article 15(2) and ensure that the peoples affected by the exploratory activities can receive compensation for any damages suffered as a result of them, and to determine to what extent those peoples should participate in the benefits of such exploration or exploitation activities’.⁸⁶

Finally, the Committee recommended that Colombia:

- amend Decree 1320 to bring it into compliance with the Convention and that indigenous and tribal peoples be consulted about and participate in amending the Decree;
- apply in full Articles 6 and 15 of the Convention, and ‘consider establishing consultations in every specific case with the indigenous peoples concerned whenever legislative or administrative measures that may affect them directly are considered, or before adopting or authorizing any programme of exploration or exploitation of resources located within their lands;’⁸⁷
- with regard to Occidental’s activities, that it involve the U’wa and maintain a close and constructive dialogue about all future decisions; and,
- provide information on: measures taken to amend Decree 1320 and ‘any measure that has been taken or may be taken to ensure the fullest and freest possible participation of representatives of the peoples concerned in the reform process;’⁸⁸ measures taken to remedy the situation of the Embera Chamí affected by the road works; measures taken to remedy the situation of the U’wa including the provision of additional lands, further impact studies and compensation; other measures taken to remedy the situations described in the representation as well as the steps taken to consult the affected peoples about formulation and implementation of those measures; and, finally, measures taken to investigate alleged attacks on the U’wa by the army and police.

⁸⁵ *Id.*, at para. 90.

⁸⁶ *Id.*, at para. 91.

⁸⁷ *Id.*, at para. 94(b).

⁸⁸ *Id.*, at para. 94(d)(i).

VII ILO 169 and the Inter-American System

The majority of the states that have ratified ILO 169 are located in Central and South America. These same states are also parties to the human rights instruments developed by the Organization of American States, primarily the 1948 American Declaration of the Rights and Duties of Man (Declaration) and the 1969 American Convention on Human Rights (American Convention). This section provides a short overview of the relationship between these instruments and the potential for raising complaints about violations of indigenous peoples' rights under ILO 169 in the Inter-American Commission and Court on Human Rights. The Inter-American Commission on Human Rights (IACHR) is empowered to receive complaints from individuals or groups of individuals concerning perceived violations of their rights under the Declaration and Convention.⁸⁹ It may also submit cases to the Inter-American Court, which has the authority to issue binding judgments in cases.⁹⁰

An important feature of IACHR proceedings is that the IACHR can look to international instruments other than those adopted by the Inter-American system to support its decisions and to determine the obligations of states. This is true both for the Declaration and the Convention. In the case of the Convention, Article 29(b) provides that, 'No provision of this Convention shall be interpreted as: (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party'.⁹¹ For the Declaration, the IACHR has stated that the provisions of the Declaration must be interpreted with regard to 'other international obligations of member states which may be relevant' and with regard to the 'overall framework of the juridical system in force at the time of interpretation'.⁹²

The preceding has allowed the IACHR to look at state obligations under a variety of international instruments to determine if a violation of the American Declaration or Convention has occurred. In cases concerning indigenous peoples, it has made reference, for instance, to the International Covenant on Civil and Political Rights, particularly

⁸⁹ For a detailed description of the inter-American human rights system as it relates to the rights of indigenous peoples, see, *A Guide to the Rights of Indigenous Peoples in the Inter-American Human Rights System* (Forest Peoples Programme, 2001), www.forests-peoples.org/

⁹⁰ The Court may only hear cases filed against states-parties to the American Convention that have accepted the Court's jurisdiction. To date, the following states-parties to ILO 169 have accepted the Court's jurisdiction: Argentina, Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and Venezuela.

⁹¹ See, also, '*Other Treaties*' *Subject to the Consultative Jurisdiction of the Court (Requested by Peru)*, Advisory Opinion No. OC-1/82 of September 24, 1982, Inter-American Court on Human Rights, at para. 12; and, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Inter-American Court of Human Rights, Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, at para. 51, – the American Convention 'must be interpreted in the light of the concepts and provisions of instruments of a universal character'.

⁹² *Report No 109/99 (Case 10.951-United States)*, Inter-American Commission on Human Rights, at para. 40 – '... it would be inconsistent with general principles of law for the Commission to construe and exercise its Charter-based mandate without taking into account other international obligations of member states which may be relevant. '[A]n international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of interpretation.'

Article 27 dealing with minority rights, ILO Conventions Nos. 107 and 169, European human rights law, international humanitarian law codified in the Geneva Conventions, and various treaties, declarations and resolutions adopted by the UN and its specialised agencies.

This is important because the IACHR and the Inter-American Court have both developed jurisprudence that goes beyond the guarantees contained in ILO 169. Therefore, it may be more advantageous for indigenous peoples in an OAS member state to seek enforcement of their rights in the IACHR rather than in the Committee of Experts. In doing so, ILO 169 can also be invoked to demonstrate state obligations. The IACHR's investigative powers are far greater than the Committee of Experts, which permits greater attention to the situation at hand and indigenous peoples themselves may file the complaint in the IACHR rather than having to go through a labour organisation. The IACHR may also seek a negotiated settlement to the dispute through its friendly settlement procedure and/or submit a case to the Court, which will also consider ILO 169 and may issue legally binding judgments.

There are two main differences between the Committee of Experts and the IACHR. First, in the latter, domestic remedies must be exhausted prior to submitting a complaint. This is not required and is one of the main benefits of the procedure in the Committee of Experts. Second, with the exception of the IACHR's friendly settlement procedure, the IACHR process is more confrontational than the Committee of Experts process, both in terms of the actual process and the means by which the recommendations of the two bodies are followed up and given effect. One of the strengths of the Committee of Experts' process is that it is specifically designed to work in cooperation with states to remedy violations of ILO Conventions. This is often cited as one of the main reasons for its success.

Finally, using the IACHR procedure rather than the Committee of Experts' will most likely result in a stronger decision and recommendations. This is largely due to the procedural nature of ILO 169 in comparison to the substantive nature of the American Declaration and Convention. The former mostly requires that states follow the requisite procedures established in ILO 169, whereas the latter require that state comply with the substance of the rights set forth therein and require a result, recognition of and respect for the substance of rights.

VII Annexes

Annex A

Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization **General provision**

Article 1

When a representation is made to the International Labour Office under article 24 of the Constitution of the Organization, the Director-General shall acknowledge its receipt and inform the government against which the representation is made.

Receivability of the representation

Article 2

1. The Director-General shall immediately bring the representation before the Officers of the Governing Body.
2. The receivability of a representation is subject to the following conditions:
 1. it must be communicated to the International Labour Office in writing;
 2. it must emanate from an industrial association of employers or workers;
 3. it must make specific reference to article 24 of the Constitution of the Organization;
 4. it must concern a Member of the Organization;
 5. it must refer to a Convention to which the Member against which it is made is a party; and
 6. it must indicate in what respect it is alleged that the Member against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention.
3. The Officers shall report to the Governing Body on the receivability of the representation.
4. In reaching a decision concerning receivability on the basis of the report of its Officers, the Governing Body shall not enter into a discussion of the substance of the representation.

Reference to a committee

Article 3

1. If the Governing Body decides, on the basis of the report of its Officers, that a representation is receivable, it shall set up a committee for the examination thereof, composed of members of the Governing Body chosen in equal numbers from the Government, Employers' and Workers' groups. No representative or national of the State against which the representation has been made and no person occupying an official position in the association of employers or workers which has made the representation may be a member of this committee.

2. Notwithstanding the provisions of paragraph 1 of this Article, if a representation which the Governing Body decides is receivable relates to a Convention dealing with trade union rights, it may be referred to the Committee on Freedom of Association for examination in accordance with articles 24 and 25 of the Constitution.
3. The meetings of the committee appointed by the Governing Body pursuant to paragraph 1 of this article shall be held in private and all the steps in the procedure before the committee shall be confidential.

Examination of the representation by the Committee

Article 4

1. During its examination of the representation, the committee may:
 - request the association which has made the representation to furnish further information within the time fixed by the committee;
 - communicate the representation to the government against which it is made without inviting that government to make any statement in reply;
 - communicate the representation (including all further information furnished by the association which has made the representation) to the government against which it is made and invite the latter to make a statement on the subject within the time fixed by the committee;
 - upon receipt of a statement from the government concerned, request the latter to furnish further information within the time fixed by the committee;
 - invite a representative of the association which has made the representation to appear before the committee to furnish further information orally.
2. The committee may prolong any time-limit fixed under the provisions of paragraph 1 of the article, in particular at the request of the association or government concerned.

Article 5

1. If the committee invites the government concerned to make a statement on the subject of the representation or to furnish further information, the government may:
 - communicate such statement or information in writing;
 - request the committee to hear a representative of the government;
 - request that a representative of the Director-General visit its country to obtain, through direct contacts with the competent authorities and organizations, information on the subject of the representation, for presentation to the committee.

Article 6

When the committee has completed its examination of the representation as regards substance, it shall present a report to the Governing Body in which it shall describe the steps taken by it to examine the representation, present its conclusions on the issues raised therein and formulate its recommendations as to the decisions to be taken by the Governing Body.

Consideration of the representation by the Governing Body

Article 7

1. When the Governing Body considers the reports of its Officers on the issue of receivability and of the committee on the issues of substance, the government concerned, if not already represented on the Governing Body, shall be invited to send a representative to take part in its proceedings while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government.
2. Such a representative shall have the right to speak under the same conditions as a member of the Governing Body, but shall not have the right to vote.
3. The meetings of the Governing Body at which questions relating to a representation are considered shall be held in private.

Article 8

If the Governing Body decides to publish the representation and the statement, if any, made in reply to it, it shall decide the form and date of publication. Such publication shall close the procedure under articles 24 and 25 of the Constitution.

Article 9

The International Labour Office shall notify the decisions of the Governing Body to the government concerned and to the association which made the representation.

Article 10

When a representation within the meaning of article 24 of the Constitution of the Organization is communicated to the Governing Body, the latter may at any time in accordance with paragraph 4 of article 26 of the Constitution adopt, against the government against which the representation is made and concerning the Convention the effective observance of which is contested, the procedure of complaint provided for in article 26 and the following articles.

Representations against non-members

Article 11

In the case of a representation against a State which is no longer a Member of the Organization, in respect of a Convention to which it remains party, the procedure provided for in these Standing Orders shall apply in virtue of article 1, paragraph 5, of the Constitution.

Annex B

B. Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No. 107) (Entered into force: 02:06:1959; Date of adoption: 26:06:1957)

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Fortieth Session on 5 June 1957, and

Having decided upon the adoption of certain proposals with regard to the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries, which is the sixth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, and

Considering that the Declaration of Philadelphia affirms that all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity, and

Considering that there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population, and

Considering it desirable both for humanitarian reasons and in the interest of the countries concerned to promote continued action to improve the living and working conditions of these populations by simultaneous action in respect of all the factors which have hitherto prevented them from sharing fully in the progress of the national community of which they form part, and

Considering that the adoption of general international standards on the subject will facilitate action to assure the protection of the populations concerned, their progressive integration into their respective national communities, and the improvement of their living and working conditions, and

Noting that these standards have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, at appropriate levels and in their respective fields, and that it is proposed to seek their continuing co-operation in promoting and securing the application of these standards,

adopts the twenty-sixth day of June of the year one thousand nine hundred and fifty-seven, the following Convention, which may be cited as the Indigenous and Tribal Populations Convention, 1957:

Part I. General Policy

Article 1

1. This Convention applies to--

(a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.

2. For the purposes of this Convention, the term *semi-tribal* includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community.

3. The indigenous and other tribal or semi-tribal populations mentioned in paragraphs 1 and 2 of this Article are referred to hereinafter as “the populations concerned”.

Article 2

1. Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.

2. Such action shall include measures for--

(a) enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population;

(b) promoting the social, economic and cultural development of these populations and raising their standard of living;

(c) creating possibilities of national integration to the exclusion of measures tending towards the artificial assimilation of these populations.

3. The primary objective of all such action shall be the fostering of individual dignity, and the advancement of individual usefulness and initiative.

4. Recourse to force or coercion as a means of promoting the integration of these populations into the national community shall be excluded.

Article 3

1. So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations.

2. Care shall be taken to ensure that such special measures of protection--

(a) are not used as a means of creating or prolonging a state of segregation; and

(b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures of protection.

Article 4

In applying the provisions of this Convention relating to the integration of the populations concerned—

(a) due account shall be taken of the cultural and religious values and of the forms of social control existing among these populations, and of the nature of the problems which face them both as groups and as individuals when they undergo social and economic change;

(b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate substitutes which the groups concerned are willing to accept shall be recognised;

(c) policies aimed at mitigating the difficulties experienced by these populations in adjusting themselves to new conditions of life and work shall be adopted.

Article 5

In applying the provisions of this Convention relating to the protection and integration of the populations concerned, governments shall—

(a) seek the collaboration of these populations and of their representatives;

(b) provide these populations with opportunities for the full development of their initiative;

(c) stimulate by all possible means the development among these populations of civil liberties and the establishment of or participation in elective institutions.

Article 6

The improvement of the conditions of life and work and level of education of the populations concerned shall be given high priority in plans for the over-all economic development of areas inhabited by these populations. Special projects for economic development of the areas in question shall also be so designed as to promote such improvement.

Article 7

1. In defining the rights and duties of the populations concerned regard shall be had to their customary laws.
2. These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes.
3. The application of the preceding paragraphs of this Article shall not prevent members of these populations from exercising, according to their individual capacity, the rights granted to all citizens and from assuming the corresponding duties.

Article 8

To the extent consistent with the interests of the national community and with the national legal system—

(a) the methods of social control practised by the populations concerned shall be used as far as possible for dealing with crimes or offences committed by members of these populations;

(b) where use of such methods of social control is not feasible, the customs of these populations in regard to penal matters shall be borne in mind by the authorities and courts dealing with such cases.

Article 9

Except in cases prescribed by law for all citizens the exaction from the members of the populations concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law.

Article 10

1. Persons belonging to the populations concerned shall be specially safeguarded against the improper application of preventive detention and shall be able to take legal proceedings for the effective protection of their fundamental rights.
2. In imposing penalties laid down by general law on members of these populations account shall be taken of the degree of cultural development of the populations concerned.
3. Preference shall be given to methods of rehabilitation rather than confinement in prison.

Part II. Land

Article 11

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

Article 12

1. The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.
2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.
3. Persons thus removed shall be fully compensated for any resulting loss or injury.

Article 13

1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.
2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

Article 14

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

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

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

Part III. Recruitment and Conditions of Employment

Article 15

1. Each Member shall, within the framework of national laws and regulations, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to the populations concerned so long as they are not in a position to enjoy the protection granted by law to workers in general.

2. Each Member shall do everything possible to prevent all discrimination between workers belonging to the populations concerned and other workers, in particular as regards—

(a) admission to employment, including skilled employment;

(b) equal remuneration for work of equal value;

(c) medical and social assistance, the prevention of employment injuries, workmen's compensation, industrial hygiene and housing;

(d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

Part IV. Vocational Training, Handicrafts and Rural Industries

Article 16

Persons belonging to the populations concerned shall enjoy the same opportunities as other citizens in respect of vocational training facilities.

Article 17

1. Whenever programmes of vocational training of general application do not meet the special needs of persons belonging to the populations concerned governments shall provide special training facilities for such persons.

2. These special training facilities shall be based on a careful study of the economic environment, stage of cultural development and practical needs of the various occupational groups among the said populations; they shall, in particular enable the persons concerned to receive the training necessary for occupations for which these populations have traditionally shown aptitude.

3. These special training facilities shall be provided only so long as the stage of cultural development of the populations concerned requires them; with the advance of the process of integration they shall be replaced by the facilities provided for other citizens.

Article 18

1. Handicrafts and rural industries shall be encouraged as factors in the economic development of the populations concerned in a manner which will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing.
2. Handicrafts and rural industries shall be developed in a manner which preserves the cultural heritage of these populations and improves their artistic values and particular modes of cultural expression.

Part V. Social Security and Health

Article 19

Existing social security schemes shall be extended progressively, where practicable, to cover—

- (a) wage earners belonging to the populations concerned;
- (b) other persons belonging to these populations.

Article 20

1. Governments shall assume the responsibility for providing adequate health services for the populations concerned.
2. The organisation of such services shall be based on systematic studies of the social, economic and cultural conditions of the populations concerned.
3. The development of such services shall be co-ordinated with general measures of social, economic and cultural development.

Part VI. Education and Means of Communication

Article 21

Measures shall be taken to ensure that members of the populations concerned have the opportunity to acquire education at all levels on an equal footing with the rest of the national community.

Article 22

1. Education programmes for the populations concerned shall be adapted, as regards methods and techniques, to the stage these populations have reached in the process of social, economic and cultural integration into the national community.
2. The formulation of such programmes shall normally be preceded by ethnological surveys.

Article 23

1. Children belonging to the populations concerned shall be taught to read and write in their mother tongue or, where this is not practicable, in the language most commonly used by the group to which they belong.

2. Provision shall be made for a progressive transition from the mother tongue or the vernacular language to the national language or to one of the official languages of the country.
3. Appropriate measures shall, as far as possible, be taken to preserve the mother tongue or the vernacular language.

Article 24

The imparting of general knowledge and skills that will help children to become integrated into the national community shall be an aim of primary education for the populations concerned.

Article 25

Educational measures shall be taken among other sections of the national community and particularly among those that are in most direct contact with the populations concerned with the object of eliminating prejudices that they may harbour in respect of these populations.

Article 26

1. Governments shall adopt measures, appropriate to the social and cultural characteristics of the populations concerned, to make known to them their rights and duties, especially in regard to labour and social welfare.
2. If necessary this shall be done by means of written translations and through the use of media of mass communication in the languages of these populations.

Part VII. Administration

Article 27

1. The governmental authority responsible for the matters covered in this Convention shall create or develop agencies to administer the programmes involved.
2. These programmes shall include--
 - (a) planning, co-ordination and execution of appropriate measures for the social, economic and cultural development of the populations concerned;
 - (b) proposing of legislative and other measures to the competent authorities; (c) supervision of the application of these measures.

Part VIII. General Provisions

Article 28

The nature and the scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 29

The application of the provisions of this Convention shall not affect benefits conferred on the populations concerned in pursuance of other Conventions and Recommendations.

Article 30

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 31

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications has been registered.

Article 32

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an Act communicated to the Director-General of the International Labour Office for registration. Such denunciation should not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 33

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 34

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 35

At such times as may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 36

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 32 above, if and when the new revising Convention shall have come into force;

b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 37

The English and French versions of the text of this Convention are equally authoritative.

Annex C

Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) (Note: Date of coming into force: 05:09:1991; Date of adoption: 27:06:1989)

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

Recalling the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;

adopts the twenty-seventh day of June of the year one thousand nine hundred and eighty-nine, the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

Part I. General Policy

Article 1

1. This Convention applies to:
 - (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
 - (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
3. The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:
 - (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
 - (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
 - (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.
2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5

In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6

1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.
2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

Part II. Land

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these peoples already possess.

Part III. Recruitment and Conditions of Employment

Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.
2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
 - (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
 - (b) equal remuneration for work of equal value;
 - (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
 - (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.
3. The measures taken shall include measures to ensure:
 - (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in

the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;

(b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;

(c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;

(d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

Part IV. Vocational Training, Handicrafts and Rural Industries

Article 21

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.
2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.
3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

Article 23

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.
2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

Part V. Social Security and Health

Article 24

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

Article 25

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.
2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.
3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.
4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

Part VI. Education and Means of Communication

Article 26

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.
2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.
3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

Article 28

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.
2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.
2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

Part VII. Contacts and Co-operation across Borders

Article 32

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

Part VIII. Administration

Article 33

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.
2. These programmes shall include:
 - (a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
 - (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

Part IX. General Provisions

Article 34

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

PART X. PROVISIONS

Article 36

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 41

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides—
 - (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;
 - (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44

The English and French versions of the text of this Convention are equally authoritative.